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ANTITRUST PROVISIONS OF THE ATOMIC ENERGY ACT

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"It is . . . declared to be the policy of the United States that . . . the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise."[1] These are almost the first words of the Atomic Energy Act of 1954 which, in stating the policy of the United States, establish the goals to be sought. As stated, the strengthening of free competition is a goal; it is not the device by which the other goals are to be achieved. Apparently of equal value to the others mentioned, it might be sacrificed in case of a competition between it and another goal, such as increasing the standard of living.

But the vision is that the goals are conjunctive, and many would say: Strengthen free competition in private enterprise, and all else must follow as the night the day. On the other hand, much of the literature in the field of the economics of atomic energy reads as if atomic energy is the absolute power, and Lord Acton has properly predicted what absolute power does.[2] The issues here have been highlighted by the fact that the first foreseeable practical use of the bigness of the power is in the field of generation of electricity, a field where competition's play is rarely felt and where emotions run high. Most of the testimony before congressional committees can be characterized as partisan pro- or anti- public power, and the initial debates concerning the enactment of the 1954 act would have been much shorter, absent the public-private power issue.

The choice between continued government monopoly, as under the McMahon Act, at one extreme, and unbridled catch-as-catch-can, survival of the fittest competition, resulted in a compromise. One result of this compromise is the inclusion of specific antitrust provisions in the basic Atomic Energy Act. In the present state of the art of developing and using atomic energy, a company's engineers and scientists might well welcome an antitrust prosecution as an encomium. At least it would be as ambiguous as the legend on the grave marker of the church janitor who perished in a fire which destroyed the church: "Well done, good and faithful servant."

The antitrust provisions developed from a sincere fear that nuclear

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1. Atomic Energy Act of 1954 § 1, 60 Stat. 755 (1944), as amended, 68 Stat. 921 (1954), 42 U.S.C. § 2011 (Supp. V, 1958).

2. "Power tends to corrupt; absolute power corrupts absolutely." Letter to Bishop Mandell Creighton (1887).

power lends itself to monopolization and restriction, a fear founded on the circumstances that: (1) to date, vast amounts of capital are required for entrance into the field, (2) great risks deter entry, and (3) those companies which are in the field, since the days of the Manhattan Project,[3] have a head start over outsiders.[4]

The likelihood is, however, that the impact of the antitrust provisions of the Atomic Energy Act will be much less significant than the variety of other provisions of the act wherein the federal government has retained control devices. Dean David Cavers has written:

> As the 1954 Act emerges from the clouds of debate, one can still see part of the atomic "island of socialism" in the Federal archipelago—along with the Army, Navy, Air Force and Post Office. And the part of the island that has subsided does not leave clear sailing for private enterprise. An industry to which entry is by government permit, which requires government authority to construct its plants and acquire its raw material and fuel, which can sell its nuclear products only to the government and its radioactive byproducts only to government licensees, which is subject to regulation of the price it may charge for its power output, which must license its main inventions and employ only licensed operators, is a far cry from the world of Adam Smith. It presents a mixed economy, perhaps a mixed-up one. What we have in the 1954 Act is an experiment which was rather hastily designed but which, fortunately, can be tested and restudied without putting major values in jeopardy. I look forward to the Atomic Energy Act Amendments of 1959.[5]

The following colloquy between Senator Pastore and Mr. William Mitchell, speaking as General Counsel of the Atomic Energy Commission, is illustrative.

> Senator Pastore: I have another question which is quite important and I think almost everyone admits, in talking about this big problem of monopoly, to which I am seriously and honestly opposed: Isn't it a fact that no matter what you do, or what combination you have, or what progress you make, all of these companies and all of these combinations are more or less at the mercy of the decisions to be made by the AEC and supported or unsupported by the Congress? In other words, the moment the AEC decided to cut off the fuel supply, these enterprises would come to an immediate stop. Am I right or wrong?

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3. To avoid the rigidities of old line government operations, a flexible contractor system was adopted by the Manhattan Project. *Address of James T. Ramey, Executive Director, Joint Committee on Atomic Energy, Sept. 25, 1956,* CCH ATOMIC ENERGY L. REP. ¶ 1591 (1956); See NEWMAN & MILLER, THE CONTROL OF ATOMIC ENERGY (1948), *passim.*

4. President Eisenhower's message recommending amendments to the Atomic Energy Act of 1946 said: "Until industrial participation in the utilization of atomic energy acquires a broader base, considerations of fairness require some mechanism to assure that the limited number of companies, which as Government contractors now have access to the program, cannot build a patent monopoly which would exclude others desiring to enter the field." 1 LOSEE, LEGISLATIVE HISTORY OF THE ATOMIC ENERGY ACT OF 1954, at 51 (1955).

5. Cavers, *The Atomic Energy Act of 1954,* ATOMIC POWER 127-28 (1955).

Mr. Mitchell: I think that is right, sir.

Senator Pastore: In other words, if you had 15 companies that joined together, the moment the Congress passed an act prohibiting the AEC to give them any more uranium or any more fuel, that would bring that whole activity to a definite stop. Am I right in that?

Mr. Libby:[6] I believe so, yes.

Senator Pastore: It isn't a question of believing. It is so. Unless they have the fuel that is owned by the United States Government, and must be owned by the United States Government under the Atomic Energy Law of 1954, and can only be leased to them under certain conditions, the minute that is withdrawn that whole activity comes to a definite stop, doesn't it? So there has got to be cooperation here at any rate.

Mr. Mitchell: There surely does have to be cooperation, Mr. Chairman. I think we should recognize that probably none of these groups are going to go into a program like this unless they obtain from us a license which will insure the availability of their fuel. Then, of course, if the Commission should arbitrarily revoke the license or the Congress should determine that the license should be terminated, the company probably would have a claim for compensation.

Senator Pastore: I am not suggesting that we do that or that it be held over their heads as a club. I am merely arguing against this big issue that has been raised here of creating monopolies. How can you effectively create a big monopoly when the whole decision of existence depends upon the policies of the Government?

Mr. Mitchell: I think this is true . . . .[7]

Nonetheless, there are specific antitrust provisions of the act to which attention will now be turned. These are sections 105, specifically labelled "Antitrust Provisions," and 158, the texts of which are set forth in the footnote.[8] Clearly rejected is the philosophy of Joseph

6. Dr. Willard F. Libby, Acting Chairman of the Atomic Energy Commission.

7. *Hearings on S. 2643 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce,* 84th Cong., 2d Sess. 139 (1956) (Amendments to Public Utility Holding Company Act, 1935).

8. "SEC. 105. ANTITRUST PROVISIONS.—a. Nothing contained in this Act, including the provisions which vest title to all special nuclear material in the United States, shall relieve any person from the operation of the following Acts, as amended, 'An Act to protect trade and commerce against unlawful restraints and monopolies' approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved August twenty-seven, eighteen hundred and ninety-four; 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes' approved October fifteen, nineteen hundred and fourteen; and 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes' approved September twenty-six, nineteen hundred and fourteen. In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the laws cited above, to have violated any of the provisions of such laws in the conduct of the licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act.

"b. The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of special nuclear

Schumpeter who would find a need for protective restraints on competition to foster new industries like atomic energy.[9]

The first impact of these provisions would seem to arise under section 105(c), and certain questions of interpretation of and procedure under this section seem obvious,[10] turning on the basic inquiry: What precision can be attributed to the phrase "tend to create or maintain a situation inconsistent with the antitrust laws"?[11]

The phrase appears in other statutes,[12] having originated in the Federal Property and Administrative Services Act of 1949,[13] the legislative

material or atomic energy which appears to violate or to tend toward the violation of any of the foregoing Acts, or to restrict free competition in private enterprise.

"c. Whenever the Commission proposes to issue any license to any person under section 103, it shall notify the Attorney General of the proposed license and the proposed terms and conditions thereof, except such classes or types of licenses, as the Commission, with the approval of the Attorney General, may determine would not significantly affect the licensee's activities under the antitrust laws as specified in subsection 105 a. Within a reasonable time, in no event to exceed 90 days after receiving such notification, the Attorney General shall advise the Commission whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws, and such advice shall be published in the Federal Register. Upon the request of the Attorney General, the Commission shall furnish or cause to be furnished such information as the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section."

The antitrust laws referred to are: Sherman Anti-Trust Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1952); Wilson Tariff Act, 28 Stat. 570 (1894), 15 U.S.C. §§ 8-11 (1952); Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27, 44 (1952), 18 U.S.C. § 402 (1952), 29 U.S.C. §§ 52, 53 (1952); and Federal Trade Commission Act, 38 Stat. 717 (1914), 52 Stat. 111 (1938), 66 Stat. 632 (1952), 15 U.S.C. §§ 41-58 (1952).

"SEC. 158. MONOPOLISTIC USE OF PATENTS.—Whenever the owner of any patent hereafter granted for any invention or discovery of primary use in the utilization or production of special nuclear material or atomic energy is found by a court of competent jurisdiction to have intentionally used such patent in a manner so as to violate any of the antitrust laws specified in subsection 105 a., there may be included in the judgment of the court, in its discretion and in addition to any other lawful sanctions, a requirement that such owner license such patent to any other licensee of the Commission who demonstrates a need therefor. Such licensee shall pay a reasonable royalty fee, to be determined in accordance with section 157, to the owner of the patent."

9. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81-106 (3d ed. 1950).

10. The initial impact stems from this section, because commercial licenses are to be tested hereunder before a license issues. For any activity other than a commercial license (Atomic Energy Act of 1954 § 103), the only impact will be a proceeding under the enumerated antitrust laws.

11. 68 Stat. 938 (1954), 42 U.S.C. § 2135(c) (Supp. V, 1958). The words "tend to violate the antitrust laws" or "tend to create or maintain a situation inconsistent with the antitrust laws" become particularly attenuated when applied to the Clayton Act which, in turn, speaks of activities which "tend to create monopoly."

12. Federal Property and Administrative Services Act of 1949, § 207, 72 Stat. 631 (1958). This amendment, approved August 19, 1958, retains the words "tend to create or maintain a situation inconsistent with the antitrust laws," first used in the original act of 1949, 63 Stat. 391 (1949). The Rubber Producing Facilities Disposal Act of 1953 also uses the words "inconsistent with" in referring to antitrust laws. 67 Stat. 412 (1953), 50 U.S.C. APP. §§ 1941a, g (Supp. V, 1958).

13. This section does not apply to disposition of real property the acquisi-

history of an earlier version of which suggests that a course of action may be inconsistent with the antitrust laws without violating them.[14] There is some language in the debates on the present statute to indicate that the phrase encompasses only conduct which if pursued would violate the antitrust laws, or in other words the language is designed to apply to the early stages of a course of conduct which would eventuate in a violation.[15] Certain it is that the Attorney General can recommend against a license grant without finding that the antitrust laws have been or are being violated as of the time the license is awarded, for in another subsection of this section of the act, Congress has used the words "violated any of the provisions"[16] of the antitrust laws, and in controlling the use of patents, Congress refers to an intentional violation of the antitrust laws.[17] Further, in subsection 105(b), Congress uses the words "tend toward the violation" of antitrust acts. There are, then, three possible degrees: actual violation, tending toward violation, and inconsistent with the antitrust laws. Though the words used differ from those used in the 1946 act.[18] the present clause seems to have no less broad meaning than the original.[19]

This reflects an unfolding tendency to entrust solution of a variety of imponderables in the antitrust field to the Attorney General. For ex-

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tion cost of which is less than $1,000,000, or personal property (with some exceptions) with an acquisition cost of less than $3,000,000.

14. Jacobs and Melchior, *Antitrust Aspects of the Atomic Energy Industry,* 25 GEO. WASH. L. REV. 508 (1957).

15. "Mr. Ferguson: If it was inconsistent with those [antitrust] laws, it would be a violation of them, would it not?"

"Mr. Humphrey: Yes." 100 CONG. REC. 11325 (1954).

Somewhat later, Mr. Hickenlooper said: "Well, the Attorney General looks over this application and proposed license and its terms and conditions and says: 'What do these people expect to do? How do they expect to run this business?' Then he leafs through the statutes and holdings and comes up with a decision and says to the Commission: 'If you grant this license under its terms and conditions it will establish and maintain a condition in violation of the antitrust laws.' "

"Mr. Ferguson: I have no objection if that is what the Senator has in mind."

"Mr. Humphrey: That is exactly what we have in mind, *and it is before the fact rather than after the fact.*" 100 CONG. REC. 11325 (1954) (Emphasis added.)

16. § 105 a., 68 Stat. 938 (1954), 42 U.S.C. § 2135 (Supp. V, 1956).

17. § 158, 68 Stat. 947 (1954), 42 U.S.C. § 2188 (Supp. V, 1956).

18. "Where activities under any license might serve to maintain or to foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises in the field, the Commission is authorized and directed to refuse to issue such license or to establish such conditions to prevent these results as the Commission, in consultation with the Attorney General, may determine. The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of fissionable material or atomic energy which appears to have these results." 60 Stat. 764 (1946), 42 U.S.C. § 1807(c) (1952).

19. For one criticism of the antitrust provisions of the 1946 act, see the testimony of Dean E. Blythe Stason, *Hearings on S. 3323 and H.R. 8862 Before the Joint Committee on Atomic Energy,* 83d Cong., 2d Sess. 57, 60 (1954) (Amending the Atomic Energy Act of 1946); 2 LOSEE, LEGISLATIVE HISTORY OF THE ATOMIC ENERGY ACT OF 1954, at 1691, 1695 (1955).

ample, he may be asked to decide whether voluntary agreements under the Defense Production Act of 1950 have "adverse effects . . . on the competitive free enterprise system" which "outweigh the benefits of the agreement or program to the national defense . . . ."[20] Exemption from the antitrust laws at one time came about under the Small Business Act of 1953, if the approving official of the Small Business Administration had a statement in writing "from the Attorney General that he, mindful of the antitrust laws and the public interest, concurs in the finding and approval made . . . ."[21]

None of this language seriously suggests a guide to the conduct of the Attorney General in language that enables a business man to judge conduct or be prescient of the position to be taken in a given case. This language is not precise, and it seems to permit the Attorney General to recommend against a license grant in a case which does not necessarily tend toward a violation of the antitrust laws. The problem may be moot, for who is to say at the onset of a project that on fruition it will or will not violate the antitrust laws. If one cannot foretell that, one cannot be held to block a course of action only by showing an inexorable tendency toward an actual violation, so the only real question is whether the conduct is inconsistent with the antitrust policies now, and that is the question posed by the statute.

But, in discussing a rejected version of the statute, Senator Sterling Cole made this observation:

> I can imagine that our judges will take a very dim view of finding an applicant's position inconsistent with antitrust laws when no violation of antitrust laws has occurred.[22]

This emphasizes the substantive ambiguity in the statute, and suggests a procedural problem: How does the judge get a chance to decide this issue?

A rejected version of section 105[23] would have set forth a specific procedure to be followed in the event a proposed license would tend to create or maintain a situation inconsistent with the antitrust laws. In substance, this would have involved an initial determination by the Attorney General or the Federal Trade Commission, on petition by the applicant, the determination of which hearing was to have bound the Commission, subject to the right of appeal to court from

20. 64 Stat. 818 (1950), 66 Stat. 306 (1952), 69 Stat. 581 (1955), 50 U.S.C. § 2158 (Supp. V, 1958).

21. This language appeared in § 7 of the Small Business Act of 1953, 67 Stat. 235 (1953), 69 Stat. 548 (1955), 15 U.S.C. § 636(a) (Supp. V, 1958). This language was deleted on July 18, 1958 from the Small Business Act by 72 Stat. 387 (1958).

22. 100 CONG. REC. 10902 (1954); 3 LOSEE, LEGISLATIVE HISTORY OF THE ATOMIC ENERGY ACT OF 1954, at 3455 (1955).

23. H.R. REP. No. 9757, 83d Cong., 2d Sess.; 1 LOSEE, LEGISLATIVE HISTORY OF THE ATOMIC ENERGY ACT OF 1954, at 588 (1955).

that ultimate determination. This appeal was permitted to "all parties to the hearings" who were not clearly defined.

Under the statute as adopted, the Attorney General's recommendation becomes part of the record, and thus subject to review by an appropriate court.[24] One may ponder over the significance of the Cole statement as it applies to such a review. At the other extreme, one may ponder whether a court will often second guess an administrative ruling on the facts, the conclusion of which is merely that a course of conduct is inconsistent with the antitrust laws of the United States.[25] Business men are beginning to wonder what course of conduct is not inconsistent therewith.

Suppose, however, the license is granted and thereafter the licensee is thought to be in violation of one of the antitrust laws. What is the effect of the license? A recent decision under the Communications Act of 1934 is significant here. The Federal Communications Commission had licensed an exchange of radio stations, which exchange was attacked about a year later as a violation of the Sherman Act in an action brought by the United States seeking revocation of the license held by one of the parties to the transfer and divestiture of its title. The court held that it had no jurisdiction over the suit, for the sole remedy in this situation is by appeal to the court of appeals of the District of Columbia from the order of the FCC.[26] The court opined that, inasmuch as the FCC had before it all of the facts, it had the duty to decide the issue of the effect of the antitrust laws. To permit the new action is a proscribed form of double jeopardy.

But under the Atomic Energy Act, no agency of the government has decided that the licensee has not violated the antitrust law. The question of violation of those laws is not presented at all, so it is not unreasonable to conclude that subsequent suits under the antitrust laws are not precluded by the grant of a license. Of course, a finding that a situation is inconsistent with the antitrust laws seems broad

24. 100 CONG. REC. 10172 (1954). Of course, the recommendation made by the Attorney General does not bind the Atomic Energy Commission. Conference Report, H.R. REP. No. 2666 on H.R. REP. No. 9757, 82d Cong., 2d Sess. (1952); 1 LOSEE, LEGISLATIVE HISTORY OF THE ATOMIC ENERGY ACT OF 1954, at 1563 (1955).

Any action taken by the Commission is made subject to the Administrative Procedures Act by § 181 of the Atomic Energy Act of 1954. 68 Stat. 953 (1954), 42 U.S.C. § 2231 (Supp. V, 1958). It would seem that the agency referred to is the Atomic Energy Commission and not the Attorney General.

25. In United States v. Aluminum Co. of America, 91 F. Supp. 333, 412 (S.D.N.Y. 1950), the War Assets Administrator acted against the recommendation of the Attorney General under the Surplus Property Act of 1944. The District Court reviewed the facts and ordered the sale to be executed in accordance with the Administrator's determination. Under the statute involved in that case, however, the Attorney General's determination was that the sale violates the antitrust law.

26. United States v. Radio Corp. of America, 158 F. Supp. 333 (E.D. Pa. 1958); noted in 71 HARV. L. REV. 1556 (1958), 44 VA. L. REV. 457 (1958).

enough to include a situation in actual violation of the laws, so the requirements of fair play might mitigate a subsequent proceeding on facts known at the time the license was granted. The legislative history of the act gives very little help, as can be seen from some of the debates set forth in the footnote.[27]

The situation is particularly muddy in a case in which the Attorney General initially recommended against the license, but the Commission on considerations of broader policy awarded it,[28] or where the prosecution stems from the Federal Trade Commission which is not consulted prior to the issuance of the license.[29] About all that is clear is that suits by private litigants are not inhibited,[30] and that conduct of the licensee subsequent to the issue of the license is subject to the antitrust laws. As Attorney General Brownell said:

> Concern with anticompetitive considerations let me emphasize, does not end with issuance of any commercial license. Licenses, once issued, are still subject to the antitrust laws. And licenses may be revoked by the Commission if subsequent information would warrant refusal of a license on an original application.
>
> We interpret this language to include instances where a later investigation reveals anticompetitive factors unknown to this Department at the time the license was issued.[31]

There are many activities in the field of atomic energy development that will not come under the specific language of section 105 (c) which has been discussed. The Attorney General need not be consulted in any license other than a commercial license,[32] or in other arrangements made with the Commission, such as contracts. A prosecution under the antitrust laws may be founded on such activities, for section 105 makes applicable antitrust legislation to all phases of the development and

27. "Mr. Pastore: Will the Senator admit that it is the clear intention of the joint committee that the provision shall in no way constitute a bar to or estop future action on the part of the Attorney General for violation of any antitrust law?"

"Mr. Hickenlooper: Yes, indeed." 100 CONG. REC. 10172 (1954); 3 LOSEE, LEGISLATIVE HISTORY OF THE ATOMIC ENERGY ACT OF 1954, at 3176 (1955).

Later, however, Mr. Hickenlooper stated: "The Attorney General does not rule in advance that the applicant has carte blanche approval to do what he wants to do. All he says is 'Under the present terms of the license, I do not find that it, in and of itself violates the antitrust laws.' That is all he says."

"Mr. Humphrey: And, based upon the existing facts."

"Mr. Hickenlooper: As they exist now. If later the fellow violates the antitrust laws, the Attorney General ought to act." 100 CONG. REC. 11327 (1954), 3 LOSEE, *op. cit. supra* at 3667.

28. See note 24 *supra*.

29. Jacobs and Melchior, *Antitrust Aspects of the Atomic Energy Industry*, 25 GEO. WASH. L. REV. 508, 518 (1957).

30. *Ibid.*

31. Remarks before the Section on Antitrust Law, New York State Bar Association, Jan. 24, 1957, CCH ATOMIC ENERGY L. REP. ¶ 3554 (1957); BNA ATOMIC INDUSTRY REP. 3.38.

32. § 105 c is limited to applications for licenses under § 103 of the act (commercial licenses).

use of nuclear energy. In view of the fact that full consideration does not precede Commission action, there is scarce possibility of an estoppel against such prosecution.

One area where the only control device may be by antitrust prosecutions after a specific violation of the antitrust acts seems to be in the area of supply of component parts of production and utilization facilities. At the present state of the art, where reactors are being used by regulated utility companies, not subject to the antitrust provisions of the act,[33] the only significant monopoly problems may be with the suppliers of the various valves, gauges, pumps, controls and other components.

Section 109 of the act authorizes licenses of any important component part[34] of a production or utilization facility. In testimony before the *202 Hearings* in 1956, the Commission stated:

> The Act authorizes the Commission to define as a production or utilization facility any important component part especially designed for such equipment or device. There appear to be no health, safety or security factors requiring licensing control of component parts. For this reason the regulations do not control component parts . . . .[35]

This would seem to be tantamount to a general license authorized by section 109, even though the wording suggests that the Commission has taken no action at all.

One may imagine a situation in which every applicant for any kind of construction permit or license planned to use a control valve manufactured by a particular company, *X* Company. That valve could be used for experimental reactors under section 104 and for commercial reactors under section 105. The valve might or might not have uses apart from the control of atomic reactors. To what extent do the antitrust provisions apply to *X* Company?

In the first place, so far as section 104 licenses are concerned, there is no statutory mandate for the AEC to consult with the Attorney General.[36] Those licenses can be granted without consideration of antitrust aspects.

In the second place, section 105 (c) contains words that seem to suggest that it is the licensee's position and not the position of any supplier which controls.[37]

In the third place, a consideration of the antitrust aspects of section

33. 100 CONG. REC. 11324 (1954) (remarks of Senator Humphrey); 3 LOSEE, LEGISLATIVE HISTORY OF THE ATOMIC ENERGY ACT OF 1954, at 3664 (1955).
34. 68 Stat. 939 (1954), 42 U.S.C. § 2139 (Supp. V, 1958).
35. BNA ATOMIC INDUSTRY REP. 227.4.
36. Licenses thus far granted have been under § 104, and it seems unlikely that § 103 licenses will be granted in the foreseeable future. See Thomas, *Democratic Control of Atomic Power Development,* 21 LAW & CONTEMP. PROB. 38, 52 (1956).
37. The exception clause in § 105 c applies to licenses which would not

103 licenses without knowledge of the situation respecting other licenses, does not give the Attorney General a sufficiently broad picture in which to judge the proposed conduct.

Finally, when the time arrives for the grant of section 103 licenses, the monopoly position of X Company may be a *fait accompli,* hardly remedied by denial of a license to an applicant whose sole supply source is the monopolist.

The preventive techniques incorporated in section 105 do not promise much, it would seem. The threat of prosecution for violations does mean though, that "the ghost of Senator Sherman sits on the board of directors of every large U.S. corporation."[38]

But before attention is turned to the general effect of those statutes, mention must be made of section 158.[39] Insofar as this section authorizes compulsory licensing with reasonable royalty as a remedy granted where patents are used in violation of law, it is unnecessary.[40] Such licenses are possible under existing law.[41] The section's implied sanction on royalty free licenses has been criticized as an undesirable limitation on the government.[42] The general incorporation of the antitrust laws as appropriate to the new field of atomic energy would seem to have been adequate.

Indeed, a somewhat strange limitation appears in that section of the act which does incorporate the general antitrust statute into the act, section 105. The Commission is authorized to suspend, revoke or take any necessary action with respect to any license where the licensee is found by a court of competent jurisdiction to have violated the mentioned sections of the antitrust laws. Proceedings before the Federal Trade Commission do not constitute court actions, (unless appealed of course), thus the Atomic Energy Commission's authority to revoke

affect the licensee's conduct or activities under the antitrust laws.

Senator Humphrey, in discussing the problem of antitrust, said: "We want to be sure that we do not grant all the licenses to Westinghouse or General Electric, so that no other company may be able to get into the competitive picture." 100 CONG. REC. 11324 (1954).

Mr. J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, Department of Justice said: "An important instrument in creating such an environment is the authority to select licensees for the manufacture, production, transfer, acquisition, and so forth, of any utilization or production facility in the field of atomic energy." *Hearings on S. 3323 and H.R. 8862, op. cit. supra* note 19, at 712.

38. Sigmund Timberg, in FRIEDMANN, ANTI-TRUST LAWS; A COMPARATIVE SYMPOSIUM 440 (1956).

39. 68 Stat. 947 (1954), 42 U.S.C. § 2188 (Supp. V. 1958).

40. Ooms, *Some Suggestions Relating to Patent Provisions in Atomic Energy Legislation to Protect the Public Interest,* 38 J. PAT. OFF. SOC'Y 38, 61 (1956).

41. Frost, Oppenheim and Twomey, *Compulsory Licensing and Patent Dedication Provisions of Antitrust Decrees—A Foundation for Detailed Factual Case Studies,* 1 PATENT, TRADE-MARK & COPYRIGHT JOURNAL OF RESEARCH & EDUCATION 127 (1957).

42. Riesenfeld, *Patent Protection and Atomic Energy Legislation,* 46 CALIF. L. REV. 40, 63-4 (1958).

does not cover conduct found by the Federal Trade Commission to be a violation,[43] and it may not extend to violations handled by consent decrees.[44]

Beyond the problems presented by the technical wording used in the Atomic Energy Act, there seem to be three characteristics of an evolving atomic energy industry which raise broad antitrust problems:

(1) For the present, use of atomic energy reactors requires large investments of money, without promise of immediate return. This circumstance means that only large organizations dare enter the field.[45]

(2) The prognosis is that most effective and efficient use of atomic energy requires incorporation into one operation of all the various stages of the production, use, and purification of special nuclear materials.[46]

(3) A tendency is manifest toward groups of companies undertaking various projects. This tendency justifies itself because of the first characteristic mentioned above, plus the elements of risk involved.

As to size, the rule of thumb has been that the mere size of an operation or corporation is not regarded as proof of monopoly, but "size carries with it an opportunity for abuse that is not to be ignored . . . ."[47] Yet two aspects of size obfuscate the issue: First, relative size at some point equals monopolistic power.[48] Second, size, relative or absolute, brings about results which are not only not bad, they are demonstrably good. The growth of large department stores reflects the consumer's desire for shopping in a place where a variety of goods, competitive and otherwise, are displayed and available. The large manufacturing corporation can acquire the capital for manufacturing or assembling an automobile, while the little fellow could not accomplish it. The assumed responsibility behind the name of the large firm helps its product outsell the smaller competitor, unknown on a national market. A large population needs large institutions to do jobs little fellows cannot accomplish, except perhaps by combinations.

It is not surprising, therefore, that agreement is lacking whether

43. Jacobs and Melchior, *Antitrust Aspects of the Atomic Energy Industry,* 25 GEO. WASH. L. REV. 508, 511 (1957).

44. See the discussion of the effect of "nolo contendere" among Senators Langer, Hickenlooper, Douglas, and Johnson. 100 CONG. REC. 11743 (1954).

45. See Lindseth, *1958: Year of Decision in Atomic Power,* 24 VITAL SPEECHES 316 (1958); Tybout, *The Public Investment in Atomic Power Development,* 21 LAW & CONTEMP. PROB. 60 (1956). It is not to be overlooked, however, that many highly competitive new industries, with small producers, have developed since the advent of atomic energy utilization, such as manufacturers of radiation instruments, measuring devices, detection equipment, and the like. See TEEPLE, ATOMIC ENERGY A CONSTRUCTIVE PROPOSAL 93 (1955).

46. REPORT OF PANEL ON THE IMPACT OF THE PEACEFUL USES OF ATOMIC ENERGY, pt. 2, at 5-6 (McKinney Panel) (1956).

47. United States v. Swift & Co., 286 U.S. 106, 116 (1932).

48. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

we attack size per se, or size abused.[49] The ambivalence of size has yet to be resolved by statistical evidence, so the stop-gap is that announced as the rule of thumb. That rule may be completely false, yet it is as true as any other generalization safely made.[50] The controlling generalities are clear: Our system is paramountly controlled by the market economy—competition. The more competitors the merrier, judged from the consumer's emotional point of view; yet presumably, the larger the size of the competitors, the smaller their number. At some point, this diminution destroys competition. Competition, further, may be made ineffective without being completely abolished. This is the point which industry shall not pass, but the point is not subject to pinpointing.[51]

But the alternatives seem clear: government monopoly or government regulation, neither of which offers much promise of removing the effect of what may be called the human element.[52] Neither offers, therefore, a guaranty of success, and both contain germs of the domination we resist from private sources. The election, therefore, is made to rely on competition, as strong as the circumstances will allow, to direct the economic system. It is, therefore, significant to notice some of the purchasing policies of the Atomic Energy Commission vis-à-vis the question of size. The regulations set forth in the footnote[53] show a remarkable interest in the small businessman, to the extent that the Commission showers as much care on him, an adopted child, as it

49. See HALE & HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT, chs. 2, 3 (1958).

50. "The arsenals of euphemisms and epithets are presently well enough stocked to fill a Bartlett's Familiar Quotations on Antitrust. But there persists a dearth of accepted, double-checked and triple-tested data." Jones, *The Problems of Size in Antitrust Thinking: Theories in Search of Facts*, 3 U.C.L.A. L. REV. 141, 171 (1956).

51. The most enlightened debate vis-à-vis atomic energy and competition is to be found in Adams, *Atomic Energy: the Congressional Abandonment of Competition*, 55 COLUM. L. REV. 158 (1955), and Palfrey, *Atomic Energy: A New Experiment in Government-Industry Relations*, 56 COLUM. L. REV. 367 (1956). Mr. Adams' analysis also appears in ADAMS & GRAY, MONOPOLY IN AMERICA, ch. VII (1955).

The problem of the "insider" is examined in detail in these discussions, and in Note, *Compulsory Licensing of Patents Under the Atomic Energy Act of 1954*, 43 GEO. L. J. 221 (1955).

52. The writer has been informed of a proposed solution to the problem of "influence" in the allocation of limited radio and T. V. frequencies—sell them to the highest bidder. Though this is obviously inappropriate where the public interest involves more than financial responsibility, it does point out the relationship between the market economy and government regulation. Both require integrity.

53. "It is the policy of the Commission to place with small business concerns a fair proportion of the total of supplies and services procured by contract for the Commission. For this purpose a small business concern is any concern which, including its affiliates, employs in the aggregate fewer than 500 persons." 10 C.F.R. § 5.24 (Supp. 1957).

"A fair proportion of required supplies and services shall be procured from small business concerns . . . ." 10 C.F.R. § 5.506 (Supp. 1957).

shows its legitimate offspring and primary responsibility, atomic energy.[54]

One last consideration on the question of size: Whatever may be true of the significance of size in unregulated business, it seems reasonable to suppose that abstract size is less controlling in an area so regulated and circumscribed as that of atomic energy under the present act.[55]

With respect to the vertical integration of the reactor technology, the time has not come to predict what form antitrust measures will take.[56] If the particular integration results from building the various stages in the whole process by a particular company, the only attack would seem to lie under the Sherman Act, where a conspiracy, virtual monopoly, or an intent to monopolize must be shown.[57] If, on the other hand, by acquisition small companies are merged into one large enterprise, section 7 of the Clayton Act[58] applies, and that act may be violated by a legitimate investment by one corporation in another which, long after, proves to tend toward monopoly.[59] The *Du Pont-General Motors* decision may well suggest the ultimate fate of a successful corporate merger in this new atomic era. The success of General Motors was no more in the cards in 1917 and 1919, when Du Pont purchased 23 per cent of its stock, than is the success of a newcomer pioneering some stage of the utilization of atomic energy. But, if half a century from now, it is determined that the effect of such acquisition has been to lessen competition substantially or tend toward monopoly, a Clayton Act violation appears. The then prosecuted company may take heart, however, from the "inarticulate major premise" of the *Du Pont-General Motors* decision that "the Clayton Act does not countenance the purchase by the fourth largest industrial

54. That there are, nonetheless, obstacles in the way of small business, see the testimony of Mr. Zalman M. Shapiro, before the *1958 Hearings Before the Joint Committee on Atomic Energy on Development, Growth and State of the Atomic Energy Industry*, 85th Cong., 1st Sess. 260 (1958).

55. Note, *Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination*, 58 COLUM. L. REV. 673, 682 (1958).

56. The Atomic Energy Commission is rapidly implementing its policy of letting private industry take over additional operations on a commercial basis. See, for example, BNA ATOMIC INDUSTRY REP. 4:306. The differences between business organization in the atomic energy field and elsewhere are pointed out by Messenheimer, *Analysis of Certain Provisions of the Atomic Energy Act of 1954 Pertaining to Problems of Businessmen Attempting to Enter the Nucleonics Field*, 6 AM. U. L. REV. 91 (1957).

57. United States v. Columbia Steel Co., 334 U.S. 495 (1948); United States v. Aluminum Co. of America, *supra* note 48; Alexander Milburn Co. v. Union Carbide Corp., 15 F.2d 678 (4th Cir. 1926); *but see* HANDLER, ANTITRUST IN PERSPECTIVE 53 (1957).

58. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (Supp. V, 1958).

59. See United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957), noted *inter alia* Burns, *Legal, Economic and Political Considerations Involved in Mergers*, 11 VAND. L. REV. 59 (1957); *The Du Pont-General Motors Decision: The Merger Problem in a New Perspective: a Symposium*, 46 GEO. L. J. 561 (1958); 42 MINN. L. REV. 305 (1957); 1957 U. ILL. L. F. 672.

concern of a substantial stock interest in the second largest corporation in America."[60]

In the interval, moreover, policies toward vertical integration may change. Hale and Hale have exhaustively analyzed the various arguments against such integration and have found them unfounded.[61] The real problem is restriction on competition at some horizontal level, in their opinion. An integration may in fact invigorate the competitive process by preserving a company which otherwise would fall by the wayside.[62] For the present, though, mergers present a problem of a different sort from expansion by internal growth, a problem not clearly delineated or documented.[63]

The tendency of companies to form groups to carry on atomic experimentation and activity has been the subject of the greatest practical concern to date.[64] The interest in this phenomenon arises from the possible application of the Public Utility Holding Act of 1935[65] to any group which creates a subsidiary for the generation of electricity or perhaps for the generation of heat to be used in making electricity. The nature of the problem is succinctly stated thus:

> The obligations imposed upon holding companies and subsidiaries, therefore, ranging from necessity for registration with and submission to the jurisdiction of the Commission, security issuance and acquisition approval, prevention of inter company transactions and interlocking directorates, regulation of inter company loans, as well as specialized accounts, records and reports obviously casts a discouraging burden upon those companies, including many non-utilities, who may desire to join together in order to accomplish needed research and development in the field of atomic electric power.[66]

Attempts to clarify the matter by legislation have been of no avail,[67] but the Securities and Exchange Commission has solved the problem on an administrative level in two ways: (1) by granting specific exemptions under section 2(a)(3) of the Holding Company Act,[68] and (2) by changing one of its rules so as to exclude non-profit power

60. HANDLER, ANTITRUST IN PERSPECTIVE 61 (1957).
61. HALE & HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT, ch. 5 (1958).
62. HANDLER, *op. cit. supra* note 60, at 68.
63. See Burns, *Legal, Economic and Political Considerations Involved in Mergers*, 11 VAND. L. REV. 59, 66 (1957).
64. This trend started in 1951 with the beginning of study groups. Northrop, *The Changing Role of the Atomic Energy Commission in Atomic Power Development*, 21 LAW & CONTEMP. PROB. 14 (1956). Obviously, the trend is not limited to atomic energy, or to the United States. See BERTIN, ATOM HARVEST 232 (1955).
65. 49 Stat. 803 (1935), as amended, 15 U.S.C. § 79 (1952).
66. Murphy, *Atomic Energy and the Holding Company Act*, 24 J.B.A.D.C. 20, 28 (1957).
67. See Dunlavy, *Government Regulation of Atomic Industry*, 105 U. PA. L. REV. 295, 372 (1957), and *Hearings on S. 2643*, *supra* note 7.
68. BNA ATOMIC INDUSTRY REP. 3:27.

reactor development from the definition of an electric utility company.[69]

The crux of this matter is the present limitation of exemption to non-profit activities, a limitation not likely to be lifted in the foreseeable future.[70] The assumption seems to be that at the point in time a reactor becomes competitive with conventional power sources, so as to be profitable, the Holding Company Act will apply. The hope is that no needless impediment will stop atomic research, but once the age of atomic power arrives, a device is available to forestall the situation aimed at by the Holding Company Act.

An additional permission for group activities is found in the Small Business Act, section 9.[71] By this act, small, independently owned and operated concerns, not dominant in their field of operation, may form groups to carry on experiments and research. This, coupled with the program of assistance in procuring government contracts, as well as loans, promises valuable assistance for the small businessman, though the precise limits encompassed within the term "small business" may require refinement.[72]

Even without the blessing of a permissive statute, it seems that so long as research is being carried on, the antitrust laws offer no inhibition. One can scarcely imagine a broader dictum than this:

> The development of patents by separate corporations or by cooperating units of an industry through an organized research group is a well known phenomenon. However far advanced over the lone inventor's experimentation this method of seeking improvement in the practices of the arts and sciences may be, there can be no objection, on the score of illegality, either to the mere size of such a group or the thoroughness of its research.[73]

Once the research stage is passed, however, the antitrust laws become a factor. Restrictive agreements by competitors to set prices, divide markets, limit production, for example, are illegal. Agreements designed to so restrict the use of the results of research between competitors will run afoul of the antitrust laws.[74] Beyond these, there is an area where the antitrust laws may be violated by a course of conduct, depending on the actual effect the arrangement has on competition.[75] If the particular group plays a dominant role in the industry, it may be required to license non-members of the industry to use patents resulting from joint research.[76]

69. 17 C.F.R. § 250.7 (b) (Supp. 1957).
70. See *Hearings on S. 2643, supra* note 7, *passim.*
71. 72 Stat. 391 (1958).
72. Baum, *The Small Business Administration: Some Potential Problems,* 27 U. CINC. L. REV. 270 (1958).
73. United States v. Line Material Co., 333 U.S. 287, 310 (1948).
74. LAMB and KITTELLE, TRADE ASSOCIATION LAW AND PRACTICE 115 (1956).
75. *Id.* at 118.
76. United States v. General Instrument Corp., 87 F. Supp. 157 (D.N.J. 1949).

The foreseeable situation does not involve joint ventures by competitors, however. Instead, corporations which have not competed and between which there is little likelihood of competition, are pooling their individual talents and know-how to attack technical problems in a new field. The considerations here are not dissimilar from those involved in vertical integration previously discussed, and the gains from such collaboration may be found to exceed any disadvantages.[77] Joint ventures by non-competitors are not free from the effects of the antitrust laws, however. Where the purpose or effect of the venture is to foreclose competitors from any substantial market, the antitrust laws may be violated.[78] This may mean that once the joint operation becomes commercially successful, it may not be used as the sole supply source or outlet for one or more of its members.[79]

This, then, is the enigma of antitrust in the atomic energy field. The nature of the risks involved, coupled with the expense, require the efforts of large companies, or the combined efforts of small ones. There is a notable social good to be derived from getting the job done, particularly when the international implications of the struggle for usable atomic power are considered. Yet the penalty of success may be an antitrust prosecution, resulting in loss of license and patent rights. Even before that stage is reached, a company may be restricted in its contractual operations with the Atomic Energy Commission because of the policy of spreading the business and helping the small entrepreneur. There is a game called "Monopoly" which may have an unrecognized verisimilitude: Once the game reached the point where one player or even two were successful in putting hotels on the better streets, the players usually broke up the game, divided the money and the property, and started over. There was no fun in playing against overwhelming odds. To prolong the game, one had to exercise care not to reach a point of domination.

77. Hale, *Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws*, 42 VA. L. REV. 927 (1956).

78. United States v. National City Lines, Inc., 186 F.2d 562 (7th Cir. 1951), *cert. denied*, 341 U.S. 916 (1951).

79. Hale, *Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws*, 42 VA. L. REV. 927, 934 (1956).