

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SAFETY LIGHT CORPORATION)	Docket Nos. 030-05980-ML/ML-2
UNITED STATES RADIUM)	030-05982-ML/ML-2
CORPORATION)	
USR INDUSTRIES, INC.)	
USR CHEMICAL PRODUCTS, INC.)	(ASLBP Nos. 92-659-01-ML
USR METALS, INC.)	and 92-664-02-ML-2)
USR LIGHTING, INC.)	
U.S. NATURAL RESOURCES, INC.)	
LIME RIDGE INDUSTRIES, INC.)	
METREAL, INC.)	
(Bloomsburg Site Decommissioning)	
and License Renewal Denials))	

NRC STAFF'S MOTION FOR SUMMARY DISPOSITION
AS TO NRC JURISDICTION OVER USR INDUSTRIES, INC.,
USR LIGHTING, INC., USR CHEMICAL PRODUCTS, INC.,
USR METALS, INC., AND U.S. NATURAL RESOURCES, INC.

INTRODUCTION

On February 7, 1992, the Nuclear Regulatory Commission ("NRC" or "Commission") Staff denied renewal applications for License Nos. 37-00030-02 and the 37-00030-08 licenses ("the Licenses") of USR Industries, Inc., USR Lighting, Inc., USR Chemical Products, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc. ("the USR companies"), Safety Light Corporation, Lime Ridge Industries, Inc., and Metreal, Inc. ("Safety Light"), and the United States Radium Corporation (collectively, "the Licensees") and issued an Order to the Licensees setting a schedule and criteria for decommissioning the U.S. Radium site located near Bloomsburg, Pennsylvania ("the

Bloomsburg site").¹ In a separate proceeding (ASLBP Nos. 89-590-01-OM and 90-590-01-OM-2 ("OM proceeding")) involving the Staff's "Order Modifying Licenses (Effective Immediately) and Demand for Information" (March 16, 1989) ("March Order") and the Staff's "Order Modifying Licenses (Effective Immediately)" (August 21, 1989) ("August Order") issued to the Licensees, as well as in the ML proceeding, the USR companies have argued that the NRC does not have jurisdiction over them.²

In the OM proceeding, the Atomic Safety and Licensing Appeal Board determined, in ALAB-931,³ that the Commission had jurisdiction over USR Industries, but ruled that the record before it did not permit a determination of whether the separate

¹ Letter from Robert M. Bernero (Director, Office of Nuclear Material Safety and Safeguards), to Jack Miller (President, Safety Light Corporation), et al., dated February 7, 1992 ("Denial Letter"), and attached "Order Establishing Criteria and Schedule for Decommissioning the Bloomsburg Site" ("February 1992 Order").

² See "Memorandum of Law in Support of the Motion of USR Industries, Inc., USR Lighting, Inc., USR Chemicals, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc., to Dismiss the Orders Issued March 16, 1989, and August 21, 1989" (Nov. 20, 1989) ("USR November 20, 1989 brief"); "Memorandum of Law in Support of the Motion of USR Industries, Inc., USR Lighting, Inc., USR Chemicals, Inc., USR Metals, Inc. and U.S. Natural Resources, Inc. to Stay the Order Issued August 21, 1989," (Nov. 6, 1989) ("USR November 6, 1989 brief"); "Reply of USR Industries, Inc., USR Lighting, Inc., USR Chemical, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc. in Support of the Motion to Dismiss Orders Issued March 16, 1989 and August 21, 1989," (Jan. 3, 1990) ("USR January 3, 1990 brief"); "Supplemental Motion of USR Industries, Inc., USR Lighting, Inc., USR Chemical Products, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc. For Directed Certification," (Feb. 13, 1990) ("USR February 13, 1990 brief").

³ *Safety Light Corporation*, ALAB-931, 31 NRC 350, 362-367 (1990).

corporate status of the other USR companies insulated them from any decontamination liability that might attach to their parent, USR Industries.⁴

The facts also establish that the subsidiaries of USR Industries are also subject to Commission jurisdiction. In addition, through the doctrine of collateral estoppel, the Appeal Board's decision in ALAB-931 precludes USR Industries from challenging the Commission's jurisdiction before this Board. Therefore, in accordance with the Licensing Board's Order of May 15, 1992, the NRC Staff submits this Motion.⁵ In setting the schedule for the filing of this Motion, the Licensing Board directed the Staff to prepare the portion of this Motion not dealing with issue preclusion as if ALAB-931 had not issued. Accordingly, while the Staff believes ALAB-931 precludes relitigation of the issue of the Commission's jurisdiction over USR Industries, this Motion sets forth the facts and discusses the issues as if no previous decision had issued. Only after discussion of the issues relating directly to jurisdiction does the Staff set forth its analysis of the application of the doctrine of collateral estoppel as it relates to ALAB-931's effect

⁴ *Id.* at 368. Discovery on jurisdictional issues has been completed in the OM proceeding, and neither party requires further discovery on these issues. "Response of USR Industries, Inc. and Safety Light Corporation To The April 8, 1992 Atomic Safety and Licensing Board Order" at 3, Response to Board Question 3 (May 4, 1992); "NRC Staff's Reply To Licensees' Response To The Licensing Board's Order of April 8, 1992" at 3 (May 11, 1992).

⁵ At this time, the proceeding concerning the February 1992 Order (ASLBP No. 92-659-01-ML)("ML proceeding") is consolidated with the proceeding on the Denial Letter (ASLBP No. 92-664-02-ML-2)("ML-2 proceeding"). On June 26, 1992, the Staff filed a motion with the Commission for directed certification of the Licensing Board's Order of June 11, 1992, which consolidated these proceedings.

on this proceeding. Because the NRC does have jurisdiction over the USR companies, as explained below, the Licensing Board, pursuant to 10 C.F.R. § 2.749, should grant this Motion.

BACKGROUND

The facts that give rise to the controversy over whether the Commission has jurisdiction over the USR companies in this proceeding include those set forth in the Staff's briefs filed in the OM proceeding dated November 16, 1989,⁶ and December 15, 1989,⁷ on which the Appeal Board relied in making its decision in ALAB-931. While the Staff's November 16, 1989 brief and December 15, 1989 brief described many of the facts that give rise to the NRC's jurisdiction over the USR companies in this proceeding, certain additional facts regarding USR Industries' subsidiaries have become available through discovery. The Staff sets forth all the pertinent facts below, together with a history of the licenses in this case.

⁶ "NRC Staff's Response to Motion Of USR Industries, Inc., USR Lighting, Inc., USR Chemicals, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc., To Stay The Order Issued August 21, 1989" (Nov. 16, 1989)("Staff's November 16, 1989 brief").

⁷ "NRC Staff's Response to Motion Of USR Industries, Inc., USR Lighting, Inc., USR Chemicals, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc., To Dismiss Orders Issued March 16, 1989, and August 21, 1989" (Dec. 15, 1989)("Staff's December 15, 1989 brief").

A. Licensing History

On March 16, 1956, the Atomic Energy Commission ("AEC") issued License Number 37-30-1 to the United States Radium Corporation ("U.S. Radium") "[f]or preparation of sealed sources for experimental use within the laboratory and for resale to AEC licensed users."⁸ On June 20, 1956, the AEC issued License Number 37-30-2 (now License No. 37-00030-02) ("the 02 license") to U.S. Radium for "RESEARCH AND DEVELOPMENT as defined in Section 11(q) Atomic Energy Act of 1954[]" and "PROCESSING FOR REDISTRIBUTION to AEC licensed users."⁹ The 02 license replaced License No. 37-30-1.

The AEC subsequently issued other licenses to U.S. Radium. On May 16, 1962, the AEC issued License No. GL 122 (now License No. 37-00030-10G) to U.S. Radium.¹⁰ On April 16, 1965, the AEC issued License No. 37-30-7 (now License No. 37-00030-07E) to U.S. Radium¹¹ (the NRC terminated the 07E license on October

⁸ License No. 37-30-1, March 16, 1956 (Staff Exh. 1).

⁹ License No. 37-00030-02, June 20, 1956 (Staff Exh. 2).

¹⁰ License No. 37-00030-10G, May 16, 1962 (Staff Exh. 3). The 10G license provided that, "[p]ursuant to Section 30.24(j), 10 CFR 30, the licensee is authorized to manufacture the sealed self-luminous sources listed in Condition 10 below, and when such sources have been manufactured, tested, and labelled in accordance with the provisions of this license and Sections 30.24(j) and 30.25 of 10 CFR 30, to distribute the sources to persons generally licensed pursuant to Section 30.21(d) of 10 CFR 30."

¹¹ License No. 37-00030-07E, April 16, 1965 (Staff Exh. 4). The 07E license authorized "[a]pplication of tritiated luminous paint to timepiece hands and dials for sale or distribution to persons exempt from the requirements for a license pursuant to Section (continued...)

10, 1991). On January 13, 1966, the AEC issued License No. GL 237 (now License No. 37-00030-09G) to U.S. Radium.¹² The 10G, 07E, and 09G licenses originally authorized use, possession, and distribution of products containing hydrogen-3 (tritium). Since 1972, however, none of these licenses have authorized any activity other than distribution of certain products.¹³

On April 25, 1969, U.S. Radium applied to renew License No. 37-00030-02.¹⁴ The license application requested a new license, or in the alternative, amendment of the 02 license to authorize new activities. The application also independently requested the AEC to renew the 02 license. U.S. Radium's proposed renewal of the 02 license would have then authorized possession of byproduct material at the Bloomsburg site for

¹¹(...continued)

30.10(a), Title 10, Code of Federal Regulations, Part 30, 'Licensing of Byproduct Material.'

¹² License No. 37-00030-09G, January 13, 1966 (Staff Exh. 5). License condition 9 specified that "[p]ursuant to Section 32.51, Title 10, Code of Federal Regulations, Part 32, the licensee is authorized to manufacture luminous devices specified in Condition No. 10 of this license subject to the conditions and limitations contained herein and to distribute such devices to persons generally licensed pursuant to Section 31.5, Title 10, Code of Federal Regulations, Part 31, or equivalent provisions of the regulations of any Agreement State."

¹³ See, e.g., License No. 37-00030-09G (Feb. 4, 1972)(included in Staff Exh. 5, *supra*, note 12). Similar licenses or amendments are included in Staff Exh. 3, *supra*, note 10, and Staff Exh. 4, *supra*, note 11, relating to License Nos. 37-00030-10G and 37-00030-07E, respectively.

¹⁴ Application for Byproduct Material License, April 25, 1969. (Staff Exh. 6).

"[d]econtamination, clean-up and disposal of areas previously used for research, development and processing under this license."¹⁵

In response to this application, on August 5, 1969, the AEC issued License No. 37-00030-08 to U.S. Radium for "[p]rocessing for distribution to authorized recipients[]" and "[r]esearch and development as defined in 10 CFR 30.4(q)."¹⁶ The AEC also renewed the 02 license for the purposes requested in the application.¹⁷ On January 25, 1979, the NRC issued amendment number 40 to the 02 license.¹⁸ License conditions 13 and 14 of this license required U.S. Radium to submit a status report of decontamination work for each period beginning on July 1, as specified in applications dated June 7, 1977, and October 23, 1978. Each such report was due on the succeeding July 1. The incorporation of the October 23, 1978, letter into the license required U.S. Radium to take the actions listed on the schedule enclosed with that letter.¹⁹ Accordingly, as of January 1979, U.S. Radium was well aware of its obligation to decontaminate the Bloomsburg site.

¹⁵ *Id.*

¹⁶ License No. 37-00030-08, August 5, 1969 (Staff Exh. 7). The AEC issued this license rather than amending the 02 license at U.S. Radium's request.

¹⁷ License No. 37-00030-02, Amendment No. 36. (Enclosed with Staff Exh. 2).

¹⁸ Amendment number 40 and the materials it incorporates by reference are included in Staff Exh. 2.

¹⁹ See Staff Exh. 2.

B. The 1980 Reorganization of U.S. Radium

Beginning in 1979, U.S. Radium, a publicly held company, engaged in a series of transactions, culminating in 1980, that resulted in U.S. Radium becoming a wholly-owned subsidiary of USR Industries along with USR Lighting, Inc., USR Metals, Inc., USR Chemical Products, Inc., and U.S. Natural Resources. Each of the latter four companies either took over the operation of a single division of U.S. Radium as it was structured before the transactions, or took control of particular assets of U.S. Radium. The plan for this series of transactions is set forth in USR Industries' Form S-14, "Registration Statement Under the Securities Act of 1933" ("S-14"),²⁰ which it filed with the Securities and Exchange Commission on May 16, 1980, and its American Stock Exchange listing application of August 21, 1980 ("ASE Listing Application").²¹ Figure 1, *infra*, shows the overall structure of U.S. Radium before the transactions began in 1979, as well as the end result in 1980.

In brief, Metreal and the USR companies other than USR Industries, namely USR Metals, USR Chemical Products, USR Lighting, and U.S. Natural Resources were incorporated in 1979 and transferred to U.S. Radium. Figure 2, *infra*, represents the

²⁰ "Securities and Exchange Commission Washington, D.C., 20549, Form S-14, Registration Statement Under the Securities Act of 1933, USR Industries, Inc. (Exact name of registrant as specified in its charter.)" (May 16, 1980)(Staff Exh. 8).

²¹ "Listing Application No. 12145, American Stock Exchange, Inc.," (with attachments)(Feb. 11, 1981)(Staff Exh. 9).

corporate structure of U.S. Radium in 1979 after the creation of Metreal.²² The other four subsidiaries of USR Industries, at the time of their incorporation in June of 1979,²³ were nominally capitalized and their incorporators immediately transferred them to U.S. Radium. Figure 3, *infra*, represents the corporate structure of U.S. Radium after the incorporation of the four subsidiaries identified above. As described *infra* at 13-15, U.S. Radium later contributed the stock of these nominally capitalized corporations to USR Industries, making them subsidiaries of USR Industries, and then transferred the assets of its various divisions to those corporations.²⁴

On May 14, 1980, U.S. Radium, a publicly held corporation, created USR Industries, Inc.²⁵ Concurrently, USR Industries created Industries Merger Co., Inc. As the "Agreement and Plan of Merger" ("Merger Plan") dated May 16, 1980,²⁶

²² Metreal was incorporated in January of 1979. S-14, *supra*, note 20, at 21. U.S. Radium then conveyed a portion of the land and contaminated buildings on the Bloomsburg site to Metreal. *Id.* Metreal is a subsidiary of Safety Light today, and there is no issue as to the NRC's jurisdiction over Metreal.

²³ Articles of Incorporation for USR Metals (Staff Exh. 10); Articles of Incorporation for USR Lighting Products (Staff Exh. 11); Articles of Incorporation for USR Chemical Products (Staff Exh. 12); Articles of Incorporation for U.S. Natural Resources (Staff Exh. 13).

²⁴ The facts in this paragraph, as well as those relating to USR Industries' subsidiaries set forth *infra* at 13-15, are additional facts made available through discovery in the OM proceeding.

²⁵ ASE Listing Application, *supra*, note 21, at 1.

²⁶ "Agreement and Plan of Merger," dated May 16, 1980, Exhibit A to United States Radium Corporation Proxy Statement dated July 11, 1980 ("Proxy Statement") (included with the ASE Listing Application, *supra*, note 21).

describes, as of that date U.S. Radium²⁷ (which then owned, possessed, and operated the Bloomsburg Facility) owned all the outstanding stock of USR Industries, Inc.; in turn, USR Industries owned all the outstanding stock of Industries Merger Co., Inc. All three of these corporations were Delaware corporations. Figure 4, *infra*, represents the structure of U.S. Radium as of May 14, 1980. When U.S. Radium created USR Industries and Industries Merger Company on May 14, 1980, the Board of Directors of U.S. Radium was identical to that of USR Industries, and the same individual was Chairman of the Board of all three companies.²⁸ Moreover, neither USR Industries nor Industries Merger Co. owned any assets other than those of U.S. Radium. Both USR Industries and Industries Merger Co. were only nominally capitalized.²⁹

As described in the Merger Plan, on execution of the plan, each share of U.S. Radium (publicly held) would convert to a share of USR Industries. The shares of Industries Merger Co., Inc. (all of which were held by USR Industries) would convert to shares of the "Surviving Corporation," i.e., the entity whose assets comprised all of U.S. Radium's assets prior to May 14, 1980. Finally, all shares of USR Industries outstanding prior to execution of the Merger Plan (held by U.S. Radium) would be

²⁷ The Merger Plan denotes U.S. Radium as "USR," USR Industries as "Industries," and Industries Merger Co., Inc., as "Merger Company."

²⁸ ASE Listing Application, *supra*, note 21, at 4; Proxy Statement, *supra*, note 26, at 4-6; Merger Plan, *supra*, note 26, at A-7.

²⁹ Proxy Statement, *supra*, note 26, at 16.

canceled.³⁰ Figure 5, *infra*, represents the structure of U.S. Radium as reorganized into the USR companies after execution of the Merger Plan. In summary, U.S. Radium created its wholly-owned subsidiary (USR Industries) and USR Industries' wholly-owned subsidiary (Industries Merger Co.) so that, on execution of the Merger Plan, U.S. Radium's ownership of USR Industries would cease and U.S. Radium would become a wholly-owned subsidiary of USR Industries. The Board of Directors of the former U.S. Radium would constitute the Board of Directors of USR Industries after execution of the Merger Plan.³¹

As further described in the Proxy Statement dated July 11, 1980, after the merger, U.S. Radium, as a wholly-owned subsidiary of USR Industries, would transfer its Chemical Products Division, its Lighting Products Division, and its Metals Division, each with its own line of business, and its oil and gas interests, to separate wholly-owned subsidiaries of USR Industries. The Proxy Statement names these subsidiaries as USR Chemical Products, Inc., USR Lighting Products, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc.³² However, U.S. Radium would not transfer but would retain its Nuclear Products Division, which operated its safety lighting business (its only business licensed by the NRC).

³⁰ *Id.*, Article II, at A-3.

³¹ Letter dated July 11, 1980, from Ralph T. McElvenny, Jr., Chairman of the Board and Chief Executive Officer of U.S. Radium to the stockholders of U.S. Radium (accompanying Proxy Statement, *supra*, note 26).

³² Proxy Statement, *supra*, note 26, at 15; S-14, *supra*, note 20, at 22-23.

U.S. Radium's Form S-14 describes the reasons for the restructuring as being to a) decentralize management of the U.S. Radium divisions and b) limit the risks and liabilities associated with each business of U.S. Radium to the assets associated with that business.³³ As set forth in the S-14, these reasons are that:

[c]urrent management believes that [current systems of management and financial control centered in a few individuals] are outmoded and not best applied to the present businesses of [U.S. Radium], and that they should be succeeded by a decentralized structure based upon separate subsidiary corporations. The restructuring will facilitate this change in operations, since line management of each of [USR] Industries' subsidiaries will be directly responsible for imposition of controls over their respective operations, including manufacturing, sales, financial and administrative aspects. [U.S. Radium] believes that this change in management and financial control structure will stimulate more realistic and responsive decision-making.

...

The restructuring is further intended to limit the risks and liabilities associated with each business of [U.S. Radium] to the assets associated with that business. Management believes that each of [U.S. Radium's] businesses should be free-standing to the extent possible; that is, that none of the businesses should have to depend upon the others for support, or be burdened with the risks and liabilities associated with those other businesses. As a related matter, [U.S. Radium] believes that it would be advantageous to conduct those of its businesses which are not licensed and regulated through corporations which are separate and distinct from a corporation whose business is licensed and regulated. [U.S. Radium's] safety lighting products business is the only business of [U.S. Radium] which is licensed and regulated.³⁴

³³ S-14, *supra*, note 20, at 25-26; Proxy Statement, *supra*, note 26, at 16-17.

³⁴ S-14, *supra*, note 20, at 25-6.

The only individual liability identified in the S-14 as being desirable to segregate from U.S. Radium's assets, as stated above, is the liability resting in U.S. Radium's Nuclear Products Division, which was engaged in NRC licensed activities. As clearly stated above, U.S. Radium's responsibilities under its licenses was a concern to U.S. Radium's management, which believed that the obligations of the licenses should be associated only with the assets used in the division operating the licensed activities. U.S. Radium's Nuclear Products Division, however, was not the licensee; rather, U.S. Radium was the licensee. Prior to the August 1980 reorganization, and, as the Staff argues below, still true today, U.S. Radium as a whole was obligated to satisfy its responsibilities under the licenses.

On August 27, 1980, U.S. Radium, USR Industries, and Industries Merger Co. executed the Merger Plan.³⁵ On execution of the Merger Plan, the members of the boards of directors of U.S. Radium and USR Industries did not change. The only assets that USR Industries acquired through execution of the merger were assets of U.S. Radium before the merger.³⁶

Subsequently, on November 24, 1980, U.S. Radium entered into agreements with (1) USR Lighting Products to transfer the assets of the Lighting Products Division of

³⁵ ASE Listing Application, *supra*, note 21, at 3.

³⁶ Letter dated July 11, 1980, *supra*, note 31, at 2.

U.S. Radium to USR Lighting Products;³⁷ (2) USR Metals to transfer the assets of the Metals Division of U.S. Radium to USR Metals;³⁸ and (3) USR Chemical Products to transfer the assets of the Chemical Products Division of U.S. Radium to USR Chemical Products. U.S. Radium completed the reorganization by simultaneously contributing the assets of the various divisions into corporate subsidiaries of USR Industries, as described. In short, the Chemical Products Division became USR Chemical Products, Inc.; the Lighting Products Division became USR Lighting Products, Inc.; the Metals Division became USR Metals, Inc.; and the Nuclear Products Division remained with U.S. Radium.³⁹ Metreal, whose sole assets were portions of the contaminated land and buildings on the Bloomsburg site, and the Nuclear Products Division were the only assets retained by U.S. Radium.

By letter dated December 19, 1980, U.S. Radium informed the Commission that it had changed its name to Safety Light Corporation.⁴⁰ Subsequently, on January 21, 1981, U.S. Radium requested the NRC to change the name on its 02 license to Safety

³⁷ Asset transfer agreement between U.S. Radium and USR Lighting Products (Nov. 24, 1980) (Staff Exh. 14).

³⁸ Asset transfer agreement between U.S. Radium and USR Metals (Nov. 24, 1980) (Staff Exh. 15).

³⁹ Deposition of Ralph T. McElvenny, Jr. ("McElvenny Deposition"), Tr. at 79 (Staff Exh. 16). Staff Exh. 16 contains those pages of the McElvenny Deposition referred to in this Motion.

⁴⁰ Letter from Jack Miller, President, Safety Light Corp., to Paul Guinn, NRC (Dec. 19, 1980) (Staff Exh. 17).

Light.⁴¹ U.S. Radium made this request notwithstanding that it was not until June 22, 1981, that the Board of Directors of U.S. Radium consented to a resolution changing U.S. Radium's name to Safety Light Corporation, to be effective on July 15, 1981.⁴² It was not until June 24, 1981, that USR Industries, Inc., as the sole stockholder of U.S. Radium consented to the adoption of the following resolution:

RESOLVED, that the Certificate of Incorporation of [U.S. Radium] shall be amended effective July 15, 1981 by changing Article First thereof so that, as amended, said Article shall be and read as follows:

"FIRST. The name of the corporation is Safety Light Corporation." ⁴³

This amendment to U.S. Radium's Certificate of Incorporation was filed with the Secretary of State of Delaware on December 21, 1981.⁴⁴ Aside from the January 21, 1981, request, none of the corporations involved in these transactions informed the NRC

⁴¹ Letter from Jack Miller, President, Safety Light Corp., to Paul Guinn, NRC (Jan. 21, 1981) (Staff Exh. 18).

⁴² U.S. Radium Corp. Unanimous Consent of Board of Directors (June 22, 1981)(Staff Exh. 19).

⁴³ U.S. Radium Corp. Action of Sole Stockholder In Lieu of Meeting (June 24, 1981) (Staff Exh. 20).

⁴⁴ Certificate of Amendment to Certificate of Incorporation of United States Radium Corporation (Dec. 21, 1981) (Staff Exh. 21).

of any of the above transactions.⁴⁵ The NRC Staff has never given its written consent to any of the transactions described above.⁴⁶

C. 1982 Sale of Safety Light

On May 24, 1982, USR Industries sold its wholly-owned subsidiary, Safety Light, to Lime Ridge Industries, which was owned by the three individuals who were Safety Light's operating management.⁴⁷ No corporation or individual involved with this transaction requested the NRC's permission or consent to transfer control of the licenses to new owners.⁴⁸ The NRC has never given its written consent to this transfer of control.⁴⁹ On March 7, 1983, in response to Safety Light's January 21, 1981, request, the NRC amended the 02 license to change the name of the licensee stated on the 02 license from U.S. Radium to Safety Light.⁵⁰ When the NRC issued this amendment,

⁴⁵ Affidavit of Francis Costello (June 26, 1992)(Staff Exh. 22)("Costello Affidavit"), at ¶¶ 12, 14, 16, and 18; McElvenny Deposition, Tr. at 181-182.

⁴⁶ Costello Affidavit at ¶¶ 19, 21; McElvenny Deposition, Tr. at 182-183.

⁴⁷ Letter from Jack Miller, President, Safety Light Corporation to U.S. Nuclear Regulatory Commission, Materials Licensing Branch, Division of Fuel Cycle & Materials Safety (Nov. 11, 1983)(Staff Exh. 23); Safety Light Corporation 1982 Sale Documents (Staff Exh. 24).

⁴⁸ Costello Affidavit at ¶¶ 15-7; McElvenny Deposition, Tr. at 204-205; Deposition of John T. Miller ("Miller Deposition"), Tr. at 163 (Staff Exh. 25); Deposition of Charles R. White ("White Deposition"), Tr. at 69 (Staff Exh. 26).

⁴⁹ Costello Affidavit at ¶¶ 19, 21; McElvenny Deposition, Tr. at 206-208; Miller Deposition, Tr. at 164-165; White Deposition, Tr. at 73-74.

⁵⁰ Amendment number 42 to the 02 license, included with Staff Exh. 2.

the only information it had indicated that Safety Light was identical to U.S. Radium before the 1980 restructuring.⁵¹ The NRC then had no knowledge that U.S. Radium was a subsidiary of USR Industries or that substantial assets of U.S. Radium had been transferred to the other USR companies.⁵² Figure 6, *infra*, represents the action the NRC Staff believed it was taking in changing the name on the License from U.S. Radium to Safety Light.⁵³

The NRC Staff first became aware that U.S. Radium had reorganized in some fashion during an inspection of the Bloomsburg site on March 8, 1983, during which the Staff believed it had discovered that U.S. Radium had separated into two corporations, namely, Safety Light and USR Metals.⁵⁴ The report of this inspection, which summarizes the NRC's knowledge of the Licensees' corporate structure, states:

The inspectors learned from discussions with the licensee's management that actual ownership of the Bloomsburg facility had changed on November 24, 1980, when U.S. Radium sold the facility and a portion of the activities previously conducted at the Bloomsburg facility to the current President and Vice President of the Safety Light Corporation. The remainder of the previous activities conducted by U.S. Radium at the Bloomsburg facility were transferred to U.S.R. Metals Corporation. Licensee

⁵¹ Costello Affidavit at ¶ 13.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Inspection Report Nos. 30-5980-83-01, *et al.* (Sept. 20, 1983)(Staff Exh. 27).

representatives agreed to provide full details of the transfer of ownership to NRC's licensing staff.⁵⁵

As a result of the inspection, and in response to the letter transmitting Inspection Report Nos. 30-5980/83-01, *et al.*,⁵⁶ to Safety Light, John T. Miller, the President of Safety Light, wrote a letter (dated November 11, 1983) to the Staff in which Safety Light informed the Staff that:

[a]s previously stated in correspondence of 21 January 1981 and properly incorporated into all our existing licenses, effective 24 November 1980, our Company name was changed from United States Radium Corporation to Safety Light Corporation. There were no organizational changes made due to the name change.

2. On 24 May 1982, USR Industries . . . finalized the sale of the stock of its wholly-owned subsidiary Safety Light Corporation to a group of executive officers of Safety Light Corporation.⁵⁷

Prior to receiving the November 11, 1983, letter, the Staff was not aware that USR Industries existed, nor did the Staff have any information available to it that described USR Industries' corporate structure.⁵⁸ The NRC again inspected the Bloomsburg site on June 19-20 and November 12, 1986, seeking further information

⁵⁵ *Id.* at 4. In view of the facts recited *supra* at 9-16, the NRC Staff clearly had not obtained full information regarding the 1980 and 1982 transactions when it issued this inspection report.

⁵⁶ Cover letter to Inspection Report Nos. 30-5980/83-01, *et al.* (Sept. 22, 1983) (included in Staff Exh. 27).

⁵⁷ Staff Exh. 23, *supra*, note 47.

⁵⁸ Costello Affidavit at ¶¶ 12, 16.

regarding the corporate structure of U.S. Radium.⁵⁹ Safety Light responded to this inspection, in part, by submitting a letter dated February 6, 1987, accompanied by a map that showed the names and locations of the companies currently occupying space at the site.⁶⁰ On April 20, 1988, the NRC transmitted Inspection Report Nos. 30-5980/86-001, *et al.*, to the Licensees.⁶¹ The cover letter transmitting Inspection Report Nos. 30-5980/86-001, *et al.*, and the report itself documented the Staff's concern about the reorganization of U.S. Radium and included a Demand for Information issued to U.S. Radium, USR Industries, Safety Light, and their subsidiaries and successor corporation.⁶² Based on the information obtained through this Demand, the NRC issued the Orders of March 16, 1989, and August 21, 1989, and determined that it had jurisdiction to include the USR companies in the Denial Letter and apply the requirements of the February 1992 Order to them.

With respect to USR Industries, the decision of the Appeal Board in ALAB-931 became final agency action on June 6, 1990, after the Commission declined any

⁵⁹ *Id.* at ¶ 17.

⁶⁰ Letter from Jack Miller, President, Safety Light Corporation, to Dr. J. Piccone, U.S. NRC, Region I (Feb. 6, 1987)(Staff Exh. 28).

⁶¹ Inspection Report Nos. 30-5980/86-001, *et al.* (with cover letter dated April 20, 1988)(March 20, 1988)(Staff Exh. 29).

⁶² *Id.*

review.⁶³ Subsequently, after the Licensing Board issued a "Memorandum and Order," dated December 13, 1991, in which it stated that "there is no law of the case in these proceedings that automatically bars the framing of appropriate issues concerning jurisdictional questions",⁶⁴ the Staff requested Commission review of the Licensing Board's Order.

While the Commission denied the Staff's petition for review, the Commission stated:

In ALAB-931, 31 NRC 350 (1990), the Appeal Board found that USR Industries' sale of Safety Light Corporation in 1982 was transfer of control within the meaning of section 184 of the Atomic Energy Act and that the failure to notify the NRC of the proposed transfer and the failure to have obtained consent were a sufficient foundation for the inclusion of USR Industries in the enforcement orders. 31 NRC at 368. Although this finding may be challenged in a petition for review of the Licensing Board's initial decision at the conclusion of proceedings before the Board, the Appeal Board's finding in ALAB-931 constitutes the "law of the case" at this point which must be followed by the Licensing Board. The Appeal Board left open, however, the question whether certain other matters needed to be resolved which might bear on jurisdiction over USR Industries and its subsidiaries. *See id.* at 367 n.53 & 370 n.60. With respect to these other matters, there appears to

⁶³ Memorandum for Board and Parties, *Safety Light Corporation* (Bloomsburg Site Decontamination), Subject: ALAB-931, From Samuel J. Chilk, Secretary of the Commission (June 13, 1990)(Staff Exh. 30).

⁶⁴ *Safety Light Corporation* (Bloomsburg Site Decontamination), Memorandum and Order at 11 (unpublished)(Dec. 13, 1991).

be no "law of the case" and, thus, further inquiry may be appropriate.⁶⁵

Because the Commission had determined that ALAB-931 is law of the case in the OM proceeding, as set forth herein by doctrine of collateral estoppel, it precludes relitigation of jurisdictional issues relating to USR Industries. As more fully discussed below, ALAB-931 does preclude relitigation of that issue, but even if it does not, the facts warrant a determination by this Board that USR Industries is subject to this Commission's jurisdiction.

DISCUSSION

A. Standards for Summary Disposition

The Commission's Rules of Practice in 10 C.F.R. § 2.749 authorize a presiding officer to consider a party's motion for a decision in that party's favor on any part of the matters involved in the proceeding. Section 2.749(d) provides that:

The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

⁶⁵ *Safety Light* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 160 (1992).

The Commission's summary disposition procedures have been analogized to Rule 56 of the Federal Rules of Civil Procedure.⁶⁶ Decisions arising under the Federal Rules thus may serve as guidelines to licensing boards in applying 10 C.F.R. § 2.749.⁶⁷ Under the Federal Rules, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.⁶⁸ "Factual disputes that are irrelevant or unnecessary will not be counted."⁶⁹ Accordingly, a disputed factual issue in and of itself does not preclude summary disposition.

The NRC Staff has recited the facts material to the Licensing Board's determination of whether the Commission has jurisdiction over the USR companies in the "Background" section, *supra*, and in the separate statement of material facts required to be filed together with this motion by 10 C.F.R. § 2.749(a). These facts are demonstrated by specific reference to documents and affidavits attached to this motion as recited in the Background section, *supra*. None of these facts are in dispute. Where

⁶⁶ See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974).

⁶⁷ *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing ALAB-443, *supra*, at 754.

⁶⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

⁶⁹ *Id.*

there is no genuine issue as to any material fact, summary disposition is appropriate.⁷⁰ An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.⁷¹ There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.⁷² Accordingly, a dispute over a fact material to the decision does not preclude summary judgment in favor of the moving party unless the evidence could support a decision in favor of the non-moving party. In addition, the movant will prevail only if entitled to a decision as a matter of law.⁷³

As explained below, the NRC Staff is entitled to a decision that the Commission has jurisdiction over the USR companies as a matter of law. The NRC has jurisdiction over the USR companies in this proceeding because USR Industries did not properly transfer its ownership and control over the licenses, the transfer was legally invalid, and USR Industries remains responsible for decontaminating the Bloomsburg site under the licenses. As discussed below, USR Industries is precluded from relitigating this issue. Moreover, as set forth below, the Licensing Board may hold all the USR companies

⁷⁰ *Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4)*, ALAB-660, 14 NRC 987, 1003 (1981), citing *Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2)*, ALAB-584, 11 NRC 451, 453 (1980).

⁷¹ *Anderson*, 477 U.S. at 248.

⁷² *Id.* at 249.

⁷³ *Turkey Point*, ALAB-660 at 1003.

responsible for the Bloomsburg site because Congress' intent in enacting the Atomic Energy Act of 1954, as amended ("1954 Act") would be defeated if the corporate form of U.S. Radium, as reorganized in 1980, shielded it from its obligations under the licenses to protect public health and safety.

B. Statutory Requirement of Commission Consent to Transfer of Control of a License

Based on Section 184⁷⁴ of the Atomic Energy Act of 1954, as amended, the Commission's regulations in 10 C.F.R. § 30.34(b) state that:

[n]o license issued or granted pursuant to the regulations in [Part 30] and Parts 31 through 35, and 39 nor any right under a license shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of [the Atomic Energy Act] and shall give its consent in writing. (Emphasis added.)

⁷⁴ 42 U.S.C. § 2234 (1982). Section 184 of the Atomic Energy Act of 1954, as amended, provides that :

"Sec. 184. Inalienability of Licenses.--No license granted hereunder and no right to utilize or produce special nuclear material granted hereby shall be transferred, assigned or in any manner disposed of either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of [the Atomic Energy] Act, and shall give its consent in writing.

Section 30.34(b) implements Section 184 of the Atomic Energy Act as it applies to materials licensees such as the USR companies and Safety Light. Section 30.34(b) also embodies Congress' direction to the Commission that:

Sec. 183. Terms Of Licenses.--Each license shall be in such form and contain such terms and conditions as the Commission may, by rule or regulation, prescribe to effectuate the provisions of [the Atomic Energy Act], including the following provisions:

. . . .
"c. Neither the license nor any right under the license shall be assigned or otherwise transferred in violation of the provisions of [the Atomic Energy Act].⁷⁵

Each of the licenses states that "[t]his license shall be deemed to contain the conditions specified in Section 183 of the Atomic Energy Act of 1954, as amended, and is subject to all applicable rules, regulations and orders of the Nuclear Regulatory Commission now or hereafter in effect. . ."⁷⁶ Sections 183 and 184 of the Atomic Energy Act prohibit the transfer of control of a license unless the Commission 1) secures full information regarding the proposed transfer, 2) finds that the transfer is in accordance with the Atomic Energy Act, and 3) gives its consent to the transfer in writing. Likewise, 10 C.F.R. § 30.34(b), which implements Sections 183 and 184 of the 1954 Act, prohibits transfer of those licenses, unless the Commission obtains complete information, makes the appropriate finding, and approves that transfer in writing. As set forth above, and

⁷⁵ 42 U.S.C. § 2233(c) (1982).

⁷⁶ See, e.g., License No. 37-00030-02, Amendment No. 40 (Jan. 25, 1979) (See Staff Exh. 2). (Every license and amendment issued in this case includes this statement.)

explained further below, the Commission was not given the appropriate information, did not make the required findings, and did not give its consent in writing to any transfer of control over U.S. Radium's licenses. In addition, the statute does not authorize the Commission to allow a transfer in any other fashion, nor does it authorize a licensee to unilaterally transfer its license.⁷⁷ Accordingly, any act purporting to transfer control of a license without the Commission's written consent is legally invalid and void *ab initio* insofar as the Atomic Energy Act and NRC's implementing regulations are concerned.

C. USR Industries' Sale of Safety Light To Lime Ridge Industries

Because USR Industries did not comply with the Atomic Energy Act of 1954 and the Commission's implementing regulations in selling Safety Light in May of 1982, there was no approved transfer of control of the licenses from USR Industries to the Lime Ridge Industries, Inc. which purchased Safety Light, and the transfer was legally invalid.

First, the May 1982 sale was a transfer of control. Before the May 1982 sale, the Board of Directors of Safety Light was identical to the Board of Directors of the USR companies, which then controlled Safety Light's operating management. After the sale, the operating management of Safety Light was a separate corporate entity and was no

⁷⁷ Cf. *U.S. Ecology, Inc.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), LBP-87-5, 25 NRC 98, 106-108, 110-112, *vacated on other grounds*, ALAB-866, 25 NRC 897 (1987)(prohibiting a licensee from unilaterally terminating its license). The Staff notes that sec. 184 states that "no license . . . shall be transferred" without the Commission's written consent, and that this prohibition on its face applies equally to the transferee as well as the transferor. Accordingly, both parties to an unapproved transfer of control of a license violate sec. 184. See also discussion at 29-32, *infra*.

longer responsible to USR Industries. Accordingly, USR Industries' sale of Safety Light was a transfer of control.⁷⁸

In this proceeding it is not necessary to address the question of what percentage of stock must be sold to constitute a transfer control requiring prior Commission approval,⁷⁹ because USR Industries owned 100% of Safety Light's stock prior to the sale and transferred 100% of that stock to Lime Ridge Industries, Inc., which was owned by the three individuals who were Safety Light's operating management. The Board of Directors of Safety Light prior to the sale, which was elected by its sole shareholder, USR Industries, and to whom Safety Light's operating management was responsible for the company's operation, lost its control over Safety Light on execution of the sale. When a person obtains majority stock ownership of a corporation, that person obtains control of the corporation.⁸⁰

⁷⁸ *Safety Light*, ALAB-931 at 365-67.

⁷⁹ The Commission has held that, with respect to the sale of a 12% ownership interest in the Seabrook station, "[a]ny transfer of ownership would require Commission approval." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 22 (1987), fn.ref. omitted; see *Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 199-201 (1978) (citing *Seabrook supra*, and defining possession as ownership).

⁸⁰ See *infra*, note 75. Compare *Pension Benefit Guaranty Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935 (5th Cir. 1983)(in a bankruptcy proceeding, transfer of license subject to approval of applicable agency); *Montana Power Co. v. Federal Power Comm'n*, 185 F.2d 491, 496 (D.C. Cir. 1950)(invalidating transfer of permits by series of foreclosures and mergers).

The NRC precedents cited above establish the general principle that transfer of a controlling interest in stock transfers ownership and control of a license, which requires prior agency approval. The 1982 sale from USR Industries to Lime Ridge Industries was just such a transaction that required the Commission's written approval before becoming effective. The Commission has required prior approval of such transfers.⁸¹

In short, the Board of Directors of Safety Light prior to the sale, which was a single individual, the Chairman of the Board of Directors of USR Industries, controlled Safety Light's operating management prior to the sale. Ultimately, Safety Light was responsible to USR Industries, its sole shareholder. After the sale, the operating management of Safety Light was no longer responsible to USR Industries. Accordingly, USR Industries' sale of Safety Light was a transfer of control that required the Commission's written consent to be effective.⁸²

⁸¹ See, e.g. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, *aff'd*, ALAB-470, 7 NRC 473 (1978). In *Fermi*, intervenors in an NRC license amendment proceeding involving Detroit Edison's sale of a 20% interest in the Fermi Plant to two electric cooperatives had filed suit in Federal District Court alleging that the sale violated the 1954 Act. *Drake v. Detroit Edison Co.*, 443 F.Supp. 833 (W.D. Mich. 1978). The District Court stayed the proceeding before it because the intervenors had filed a petition for enforcement action pursuant to 10 C.F.R. § 2.206. In responding to the petition under § 2.206, the staff found that, based on the details of the contract, there was no transfer of ownership prohibited by sec. 184 of the 1954 Act, but that there was a transfer of utilization facility prohibited by sec. 101 of the 1954 Act. The staff took enforcement action different from that requested and denied the petition. In the amendment proceeding, the Licensing Board denied the petition to intervene.

⁸² The Legislative History of the Atomic Energy Act of 1954, P.L. 83-703, 83rd Cong., 2d Sess. ("Legislative History"), provides ample evidence that Congress intended
(continued...)

As set forth in the Background section above, the NRC Staff did not consent in writing to the 1982 transfer of control before it occurred, nor has it ever consented in writing to that transfer of control.⁸³ Moreover, sec. 184 of the 1954 Act does not merely require prior written consent, but, as set forth above, requires the NRC Staff to "find that the transfer [of control] is in accordance with the provisions [of the 1954 Act.]"⁸⁴ It can do this only after "securing full information."⁸⁵ The NRC Staff

⁸²(...continued)

the Commission's authority and responsibilities in this area to be pervasive. The original versions of the bill (H.R. 8862 and S. 3323) limited Commission review under sec. 184 to only those transfers of licenses that were effectuated through "transfer of control of licensees." Legislative History at 163-64 and 239-40. After holding hearings at which several witnesses testified as to the need to expand the Commission's review under sec. 184 to other types of transfers, particularly other types of "involuntary" transfers (*Id.* at 1699 and 1749), the Joint Committee on Atomic Energy reported out a bill containing a revised sec. 184 which expanded the Commission's authority to cover transfers effectuated through "transfer of control of licenses." With respect to facilities, which the Bloomsburg site is not, this authority explicitly included mortgages, pledges, and liens. *Id.* at 627-28 and 731-32. This latter version was eventually enacted into law. Under the current statute, prior Commission consent to mortgages on facilities is a prerequisite to the enforcement of the rights created by such mortgages by any court. Since mortgages ordinarily do not involve a "transfer of control" to the mortgagee prior to foreclosure (59 C.J.S. Mortgages § 310), then *a fortiori*, prior Commission consent must be required for sales of controlling stock interest. *United States v. Union Pacific Railroad Co.*, 226 U.S. 61, 95-96 (1912); *Christophides v. Porco*, 289 F. Supp. 403 (S.D.N.Y. 1969)(less than a majority of stock ownership can control a corporation).

⁸³ See *supra*, notes 44-49. The Staff does not concede that it has authority to consent to a transfer of control of a license after the transfer has occurred because sec. 184 of the Atomic Energy Act requires the Commission's prior written approval. An after-the-fact determination by the Staff is merely an expression of the Staff's willingness to exercise its discretion to refrain from taking enforcement action against either party to an illegal transfer of control of a license.

⁸⁴ Section 184 of the 1954 Act, *supra*, note 74.

secured what it believes to be full information regarding the 1982 transfer of control (but not regarding the 1980 reorganization) only after Safety Light and the USR companies responded to the Staff's 1988 Demand for Information. The Staff has never made any finding that the 1982 transfer of control was in accordance with the 1954 Act. Accordingly, the 1982 transfer of control was legally invalid, insofar as the 1954 Act and the Commission's requirements are concerned.

The Commission's decision in *Sheffield* provides an analogy concerning the public policy that is served by the Commission's rules which forbid an unauthorized transfer of control of a license.⁸⁶ In *Sheffield*, the licensee, U.S. Ecology, announced that it was terminating its license and abandoning the site.⁸⁷ The Staff found that the licensee had no authority to do so and ordered U.S. Ecology back to the site.⁸⁸ The Commission affirmed the immediate effectiveness of that order, but did not rule on the licensee's

⁸⁵(...continued)

⁸⁵ *Id.*

⁸⁶ *Cf. U.S. Ecology, Inc.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), LBP-87-5, 25 NRC 98, 106-108, 110-102, . *vacated on other grounds*, ALAB-866, 25 NRC 897 (1987)(prohibiting a licensee from unilaterally terminating its license).

⁸⁷ *Id.* at 101.

⁸⁸ *Id.*

authority to abandon the site.⁸⁹ The Commission appointed a Licensing Board to hear the issue, and it decided that U.S. Ecology could not unilaterally terminate its license.⁹⁰

Unlike *Sheffield*, in which the Licensing Board found it necessary to analyze the license and structure of the Commission's regulations in order to conclude that U.S. Ecology could not unilaterally terminate its license and abandon the site, in this case the 1954 Act and the Commission's regulations explicitly forbid unilateral transfer of control of a license.⁹¹ However, the public policy behind the *Sheffield* ruling, that owners of licenses have obligations to discharge before terminating their responsibilities under their licenses, applies equally in this situation.⁹² Whether a licensee wishes to terminate its license or transfer control of its license to a third party, the Commission must assure itself that the licensee has discharged its obligations under the license and that the prospective owner is capable of satisfying its obligations under the license.⁹³

⁸⁹ *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673 (1979).

⁹⁰ *Sheffield*, 25 NRC at 112.

⁹¹ One arguably might view USR's corporate transactions to create and sell Safety Light as an independent licensee, as tantamount to the attempted unilateral termination of a license found unlawful in *Sheffield*.

⁹² *See Safety Light*, ALAB-931 at 364.

⁹³ Likewise, just as an applicant may not possess or use licensed materials nor begin licensed activities until the Commission issues a license, no person may be a transferee of control over a license without the Commission's written consent.

The Atomic Energy Act authorizes the NRC to determine when a license may be terminated or control over it transferred. To allow the owner of a license to transfer control over its license along with the concomitant responsibilities to protect public health and safety without the Commission's informed consent, would allow it to take unilateral action to avoid responsibility to, among other things, decontaminate a site that it could not avoid by terminating its license. In this case, had the USR companies satisfied the Atomic Energy Act's requirement for them to seek Commission approval of the proposed transfer, the NRC could have considered the effect on Safety Light's ability to satisfy its obligations to protect public health and safety under the licenses before approving their transfer to Safety Light's operating management. In view of USR Industries' failure to comply with 10 C.F.R. § 30.34(b), and because no person may take advantage of his own wrong,⁹⁴ this Licensing Board should determine that USR Industries' attempt to transfer ownership and control of the licenses does not relieve it of its obligations and responsibilities to protect public health and safety under those licenses.⁹⁵

In addition, the unauthorized creation of paper entities cannot prevent the Commission from accomplishing its statutory objectives. A transfer of control over a

⁹⁴ *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959). Application of this doctrine in this proceeding would act to preclude the USR companies of taking advantage off the invalid 1980 transfer of control of the licenses, and thus prevent them from obtaining a legally superior position through violation of the 1954 Act with the 1954 Act.

⁹⁵ *Montana Power Co.*, *supra*, note 80; see *Lorain Journal Co. v. Federal Communications Comm'n*, 351 F.2d 824, 828-830 (D.C. Cir. 1965).

license may allow the transfer of substantial assets from a licensee, which can affect its ability to fulfill its obligations under its license. Similar to its ability to preclude a licensee from abandoning a site, as demonstrated in *Sheffield*, the Commission should be able to pierce the corporate veil in order to prevent frustration of its regulatory tasks.⁹⁶

⁹⁶ See *North American Telecommunications Ass'n v. F.C.C.*, 772 F.2d 1282, 1293 (7th Cir. 1985). *North American* involved the Federal Communications Commission's effort to prevent revenues from licensed operations (for which it set rates) from subsidizing unregulated activities (the so-called "separate subsidiary" order). The Federal Communications Act, 47 U.S.C. § 154(i), authorized the FCC to prohibit such subsidies and allowed the FCC to collect information from otherwise unregulated holding companies in order to allow it to determine whether the separate subsidiary order had been violated. The FCC's general authority is very similar to the NRC's: Section 154(i) of the FCA states that "[t]he [FCC] may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." Similarly, sec. 161 states:

"In the performance of its functions the [NRC] is authorized to --

...

"b. establish by rule regulation, or order, such standards and instructions to govern the possession and use of . . . byproduct material as the Commission may deem necessary or desirable to . . . to protect health or to minimize danger to life or property;

...

"i. prescribe such regulations or orders as it may deem necessary . . . to govern any activity authorized pursuant to [the Atomic Energy Act] . . . in order to protect health and to minimize danger to life or property[.]

While the FCC's general authority appears broader, it is limited to those activities that are otherwise spelled out in the Federal Communications Act. The courts have referred to the NRC's authority as very broad. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel*, 435 U.S. 519, 525-26 (1978); *Consolidated Rail Corp. v. Interstate Commerce Comm'n*, 646 F.2d 642, 649 (D.C. Cir. 1981); *Westinghouse Elec. Corp. v. United States*, 598 F.2d 759, 771 (3d Cir. 1979); *New Hampshire v. Atomic Energy Comm'n*, 406 F.2d 170, 173 (1st Cir. 1969); *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778, 780 (D.C. Cir. 1968)(holding the NRC's authority "unique in its breadth").

The courts have consistently recognized that a corporate entity may be disregarded in the interests of public convenience, fairness and equity.⁹⁷ Where the statutory purpose could be easily frustrated through the use of separate corporate entities, a regulatory commission is entitled to look through corporate entities and treat the separate entities as one for purposes of regulation.⁹⁸ In applying these rules, federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law theory for piercing the corporate veil.⁹⁹

⁹⁷ *Capital Telephone Company, Inc., v. F.C.C.*, 498 F.2d 734, 738, (1974) citing *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 322 (1939).

⁹⁸ *Id.* at 738, n. 10; see *infra*, note 100.

⁹⁹ *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981). Even under the stricter federal common law standard, USR Industries is responsible for satisfying U.S. Radium's obligations under the licenses. The three showings under federal common law necessary to establish parent company liability are 1) the parent controls the subsidiary to such a degree that the subsidiary is a mere instrumentality of the parent; 2) wrong by the parent through the subsidiary, e.g., violation of a statute; and 3) unjust loss to the claimant, such as the subsidiary's inability to satisfy its obligations. See *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 160 (7th Cir. 1963). The first test is satisfied here because after the August 1980 reorganization, USR Industries exercised the same degree of control over Safety Light as U.S. Radium did over its Nuclear Products Division before that transaction. Miller Deposition, Tr. at 34-35 (Staff Exh. 25). Accordingly, Safety Light was controlled as if it were merely part of USR Industries. The second test is satisfied by Safety Light's participation in the illegal 1982 transfer of control, as well as U.S. Radium's violation of sec. 184 in 1980 by transferring control over its licenses to USR Industries. The third test is satisfied because Safety Light is incapable of fulfilling its obligations to protect public health and safety as a result of U.S. Radium's transfers of assets to USR Industries' subsidiaries. Accordingly, USR Industries must satisfy U.S. Radium's obligations under the licenses even under the stricter federal common law standards.

The relevant statute in this proceeding, sec. 184 of the Atomic Energy Act, as amended, places little importance on the corporate form. Rather, it *requires* the Commission to approve direct or indirect transfer of control over a license, regardless of the corporate form. Accordingly, USR Industries, as the parent of Safety Light prior to the May 1982 sale, should be responsible just as U.S. Radium prior to the August 1980 reorganization was responsible for the activities conducted by its Nuclear Products Division.¹⁰⁰

The same legal standard that applies to USR Industries applies to USR Industries' subsidiaries other than Safety Light. In general, the equitable doctrine of piercing the corporate veil is not limited to the parent-subsidary relationship. The separate identities of affiliated corporations owned by the same parent may be disregarded under proper

¹⁰⁰ As discussed *supra*, note 99, as a result of the August 1980 reorganization of U.S. Radium, there were no real changes other than the name change that affected the operation at the Bloomsburg site. (Deposition of John T. Miller, Tr. at 35). That is, the relationship of Safety Light at Bloomsburg to USR Industries after the 1980 transaction was identical to the relationship of U.S. Radium's Nuclear Products Division to U.S. Radium prior to the 1980 reorganization. Accordingly, USR Industries should be liable as a licensee. This result is in accord with *P.F. Collier & Son Corp. v. Federal Trade Commission*, 427 F.2d 261 (5th Cir. 1971). In *Collier*, the Fifth Circuit pierced the corporate veil in order to enforce an order the FTC had imposed on a corporation that had attempted to withdraw from the FTC's jurisdiction by dissolving and reforming as a new corporation. *Collier*, 427 F.2d at 271. *Collier* is instructive to show that a regulatory agency cannot be prevented from accomplishing its statutory functions by the creation of paper entities, and that the Commission may look through the form of the transactions to their substance, as recited in *Capital Telephone*, 498 F.2d 734, *supra*. Cf. *Anderson v. Abbott*, 321 U.S. 349 (1944) (holding that a federal statute providing for assessments against certain bank shareholders was not thwarted by Delaware corporate law). The federal statute applicable here is analogous to that interpreted in *Anderson* in that it does not respect corporate forms.

circumstances.¹⁰¹ As stated above, the primary reasons for the 1980 transactions were U.S. Radium's desire for decentralized management of its divisions and limitation of each of its division's risks and liabilities to the assets employed in each division's business. However, John T. Miller, manager of U.S. Radium's Nuclear Products Division in August 1980 was unaware of the transaction when it occurred.¹⁰² More importantly, the August 1980 transaction caused no changes in the management of the Nuclear Products Division.¹⁰³ Accordingly, with respect to the Nuclear Products Division, U.S. Radium did not, in fact, "decentralize" its management. The other reason for the transaction, the isolation of liabilities, especially those of U.S. Radium's regulated business, involved only its NRC-regulated operation. Because U.S. Radium was the licensee, and not its Nuclear Products Division, the liabilities U.S. Radium attempted to isolate in the Nuclear Products Division were its obligations under its NRC license to protect public health and safety. Accordingly, to respect the corporate form would allow U.S. Radium to shield its assets, avoid its responsibilities under its licenses, and frustrate

¹⁰¹See *C M Corp. v. Oberer Development Company*, 631 F.2d 536, 539 (7th Cir. 1980); *Central Nat'l Bank of Mattoon v. Bowen Transports, Inc.*, 551 F.2d 171, 179 (7th Cir. 1977). Both *Oberer* and *Bowen* are cases applying federal common law to the typical instance in which a private litigant attempts to pierce the corporate veil; the reasoning that the doctrine should apply between two subsidiaries as between parent and subsidiary applies equally where a federal agency invokes the doctrine, as in this proceeding.

¹⁰² Miller Deposition, *supra*, note 48, at 33-4.

¹⁰³ See *supra*, notes 99 and 100.

the intent of Congress in requiring Commission consent to transfers of control of licenses.

The reason for considering the subsidiaries of USR Industries as part of the licensee is that they, too, participated in and benefitted from the 1980 unauthorized transfer of control of the licenses. In short, USR Industries' subsidiaries all obtained their assets from U.S. Radium as it existed before the 1980 reorganization at the direction of USR Industries, and not for the benefit of U.S. Radium. Accordingly, this Licensing Board should determine that USR Industries and the other USR companies are responsible for satisfying the obligations of U.S. Radium under the licenses.

D. The 1980 Reorganization of U.S. Radium

Independent of the 1982 transaction, the August 27, 1980, merger of U.S. Radium into Industries Merger Corporation was itself an unauthorized transfer of control over the licenses to USR Industries in violation of sec. 184 of the Atomic Energy Act of 1954 and, therefore, void *ab initio*. Accordingly, the 1980 transaction forms a basis, standing alone, for the Commission's jurisdiction over USR Industries and the other USR companies.

As a preliminary matter, it is clear that the August 1980 transaction was a transfer of control of a license. Prior to the transaction, U.S. Radium, the licensee, was a publicly held company, responsible to its Board of Directors, its many shareholders, and the regulatory agencies with jurisdiction over it, including the NRC. Upon completion of the August 1980 transaction, USR Industries owned 100% of the stock of U.S.

Radium, and U.S. Radium's Board of Directors reported to USR Industries. A new entity, USR Industries, obtained 100% ownership of the stock of U.S. Radium and, through that ownership, obtained direct control over U.S. Radium's licenses.¹⁰⁴ Ralph T. McElvenny, Jr., as Chief Executive Officer and representative of USR Industries, the new entity and the sole shareholder of U.S. Radium, voted all the shares of U.S. Radium to elect U.S. Radium's Board of Directors. Upon USR Industries' acquisition of 100% of U.S. Radium's stock, U.S. Radium was no longer publicly held, and control rested in USR Industries. Accordingly, there was a transfer of control over U.S. Radium's licenses.¹⁰⁵

Because U.S. Radium did not transfer control over its licenses in accordance with the requirements of sec. 184 of the Atomic Energy Act and 10 C.F.R. § 30.34(b), the August 1980 transaction is legally invalid. In short, none of the three prerequisites to a valid transfer, as defined in sec. 184, were satisfied. First, the Commission did not obtain full information regarding the 1980 transfer until 1988, well after the transfer took place.¹⁰⁶ Second, the Commission never found that the 1980 transfer of control was in accordance with the Atomic Energy Act. Finally, the Commission never consented

¹⁰⁴ Section 184 of 1954 Act prohibits transfers of indirect control over licenses, in any event. *See supra*, notes 74, 82, and 100.

¹⁰⁵ *See* Discussion, *supra*, at 36.

¹⁰⁶ *See supra*, notes 47-61 and accompanying text.

in writing to that transfer of control.¹⁰⁷ Accordingly, the 1980 transfer of control of the licenses from U.S. Radium to USR Industries is legally invalid as to the Commission.

In order to remedy U.S. Radium's violation of the Atomic Energy Act through the 1980 transfer, the NRC looks to the substance of the transaction, and holds U.S. Radium, dismembered as it is today, responsible for the obligations it had in 1979 to protect public health and safety.¹⁰⁸ Accordingly, the Licensing Board should find that the NRC has jurisdiction over USR Industries and the other USR companies.

E. Collateral Estoppel Through ALAB-931

On April 23, 1990, the Atomic Safety and Licensing Appeal Board issued an Order in the enforcement (OM) proceeding relating to the decontamination of the Bloomsburg site required by the March and August Orders (*supra*, at 2) and involving the identical licensees, licenses and site as in the instant proceeding.¹⁰⁹ The USR companies had moved for interlocutory review of two orders of the Licensing Board, one of which denied their motion for dismissal. The USR companies based their motion on a claim of lack of jurisdiction by the NRC. The jurisdiction issue was fully briefed, with exhibits, by the USR companies in their applications before the Licensing Board¹¹⁰ and

¹⁰⁷ See *supra*, at 16.

¹⁰⁸ See Discussion, *supra*, at 32-37; see *supra*, note 100.

¹⁰⁹ *Safety Light Corporation, et al.* (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350 (1990).

¹¹⁰ USR November 6, 1989, brief, *supra*, note 2, at 10-14; USR November 20, 1989, brief, *supra*, note 2, at 7-23; USR January 3, 1990 brief, *supra*, note 2, at 4-15.

their motions before the Appeal Board.¹¹¹ The Staff also fully briefed its opposition.¹¹² The Appeal Board affirmed the Licensing Board's denial of the motion to dismiss and held that the 1982 sale of Safety Light by USR Industries to three individuals was a transfer of control over the NRC licenses, under Section 184 of the Atomic Energy Act.¹¹³ USR Industries' failure to notify the Commission of the proposed transfer and to obtain the Commission's consent to the transfer was sufficient foundation for it to be included as a party in the OM proceeding orders.¹¹⁴ The Commission declined to review the Appeal Board decision, and the decision became final agency action on June 6, 1990.¹¹⁵

The Staff submits that the findings and Order of the Appeal Board in ALAB-931 precludes the Licensees from relitigating the issues of jurisdiction as to USR Industries, pursuant to the doctrine of collateral estoppel.

¹¹¹ USR February 13, 1990 brief, *supra*, note 2, at 6-11.

¹¹² Staff's November 16, 1989, brief, *supra*, note 6, at 5-7, 10-17; Staff's December 15, 1989 brief, *supra*, note 7, at 5-20, 28-32; "NRC Staff's Response to Motion and Supplemental Motion of USR Industries, Inc., USR Lighting, Inc., USR Chemical Products, Inc., USR Metals, and U.S. Natural Resources, Inc. For Directed Certification," filed February 28, 1990, at 16-17.

¹¹³ *Safety Light*, ALAB-931 at 362-67.

¹¹⁴ *Id.* at 368.

¹¹⁵ Memorandum For Board and Parties, *Safety Light Corporation* (Bloomsburg Site Decontamination), Subject: ALAB-931, From Samuel J. Chilk, Secretary for the Commission (June 13, 1990) (Staff Exh. 29).

The doctrines of res judicata and collateral estoppel are applicable to Commission proceedings.¹¹⁶ Generally, when there has been a judgment on the merits in a proceeding, the doctrine of res judicata bars a second proceeding, involving the same parties or their privies, based on the same cause of action.¹¹⁷ The doctrine of collateral estoppel applies when the second proceeding is based upon a different cause of action and precludes relitigation of issues actually litigated and necessary to the outcome of the first proceeding.¹¹⁸ As the Appeal Board stated in *Farley*:

For its part, collateral estoppel does not require an identity between the two causes of action, demands or claims. It is enough that the issues of law or fact previously receiving final adjudication are the same as those being now asserted--and that adjudication was by a tribunal empowered to consider and decide those issues. [citations omitted] Unlike res judicata, however, collateral estoppel can serve to conclude only "those mattered in issue or points controverted, upon the determination of which the [earlier] finding or verdict was rendered."¹¹⁹

"Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party

¹¹⁶ See, e.g., *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557 (1977); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant Units 1 and 2), ALAB-182, 7 AEC 210, 214 (1974), *remanded on other grounds*, CLI-74-12, 7 AEC 203 (1974).

¹¹⁷ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

¹¹⁸ *Id.* at 326. See also *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598-99 (1948); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536-7 (1986).

¹¹⁹ *Farley*, ALAB-182 at 213 (citation omitted).

or his privy and of promoting judicial economy by preventing needless litigation."¹²⁰ Collateral estoppel applies to matters which were "actually litigated and determined in the first proceeding."¹²¹

At least four elements must be present for collateral estoppel to be given effect:

(1) the issue sought to be precluded must be the same as that involved in the prior action; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment.¹²²

In addition, the tribunal in the prior proceeding must have had jurisdiction to render the decision, and the party against whom collateral estoppel is asserted must have been a party or in privity with a party to the prior proceeding.¹²³

Each of the criteria for application of the doctrine of collateral estoppel is satisfied here. First, the Appeal Board had jurisdiction to issue the decisions which affirmed the denial of the USR companies' motion. Second, there was a valid final judgment on the merits of the jurisdiction issue. Third, the issue of the NRC's jurisdiction over USR Industries was fully briefed and argued, as described above, and was necessary to the

¹²⁰ *Parklane*, 439 U.S. at 326 (Footnote omitted) (citation omitted).

¹²¹ *Sunnen*, 333 U.S. at 598-99.

¹²² *Houston Lighting and Power Company, et al.* (South Texas Project, Units 1 and 2), *Texas Utilities Generating Company, et al.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), *aff'd* ALAB-575, 11 NRC 14 (1980).

¹²³ *Davis-Besse*, ALAB-378 at 561; *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Unit 1 and 2), LBP-85-11, 21 NRC 609, 620 (1985).

outcome in the prior proceeding. Finally, USR Industries was a party to the prior proceeding. Thus, the criteria of collateral estoppel are met and collateral estoppel bars the relitigation of the NRC's jurisdiction as to USR Industries.

In addition, the parties to the OM proceeding are precisely the same parties as in the instant matter. The issue of the NRC's jurisdiction over the Licensees or certain of the Licensees is identical in both proceedings, as is the Licenses and the site involved. The only difference is the nature of the proceeding: In the OM proceeding - an enforcement matter; in this proceeding - denial of license renewal applications and a decommissioning order. The factual basis for the Licensing Board decisions are identical. In addition, the Staff is aware of no change of circumstances which would cause a change in the prior decision.¹²⁴

When each criterion for the application of collateral estoppel is examined, as explained below, it is clear that they have been met in the instant case, and collateral estoppel should bar the relitigation of the NRC's jurisdiction over USR Industries.

1. The issue sought to be precluded is the same as that involved in ALAB-931. In that proceeding, the USR companies claimed that the NRC had no regulatory jurisdiction over USR Industries, the same claim they have raised in their Answer and Request for Hearing¹²⁵ submitted in response to the Denial Letter and the February

¹²⁴ See *Farley*, ALAB-182 at 211, 213, 216.

¹²⁵ "Answer and Request for Hearing Submitted by USR Industries," filed March 17, 1992, at 1 and 3 ("Request for Hearing").

1992 Decommissioning Order.¹²⁶ The Licensees have indicated that, as to the jurisdiction issue, the discovery obtained in the OM proceedings is sufficient for the instant case.¹²⁷ Therefore, the discovery is identical. In addition, the facts and bases asserted in support of the jurisdiction issue are essentially identical.¹²⁸

2. The issue of jurisdiction over USR Industries was actually litigated in the prior proceeding. The USR companies in the prior proceeding had a full and fair opportunity to present their arguments and factual assertions before the Licensing Board and the Appeal Board in the prior proceeding. They presented their arguments and assertions three times to the Licensing Board and an additional time to the Appeal Board.¹²⁹ (See

¹²⁶ Letter from Robert M. Bernero to Safety Light Corporation and USR Industries, dated February 7, 1992; "Order Establishing Criteria and Schedule for Decommissioning the Bloomsburg Site" (Feb. 7, 1992).

¹²⁷ "Response of USR Industries, Inc. and Safety Light Corporation to the April 8, 1992 Atomic Safety and Licensing Board Order" at 4 (May 4, 1992)("May 4th Response").

¹²⁸ There are some additional facts alleged by the Licensees, which are irrelevant and immaterial, and should have been raised in the prior proceeding. The additional allegations, which are found at 7-9 of the May 4th Response, are not "changes in facts which are essential to the judgment." *Montana v. United States*, 440 U.S. 147, 159 (1978). They are, allegations of facts which, by and large, the Licensees knew, or should have known, at the time of the prior decision, but which they neglected to bring to the attention of the tribunal, although they had a full and fair opportunity to do so. See *Montana*, 440 U.S. at 153-155; *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948); *Klein v. Commissioner of Internal Revenue*, 880 F.2d 260, 262-63 (10th Cir. 1989)(the issues must be "in substance" the same); *Farley*, ALAB-182 at 211-13. In addition, the allegations do not concern matter which would have been essential to the prior decision.

¹²⁹ The statements contained in Licensees' pleadings identified in footnotes 98 and 99, *supra*, may be considered to be judicial admissions by a party, thus withdrawing those facts admitted from issue and deeming them admitted. See *American Title Ins. Co. v. Lacelaw Corp.*, 861 F. 2d 224, 226-27 (9th Cir. 1988); *United States v. Monkey*, 725 F. 2d 1007, 1010-11 (5th Cir. 1984).

footnotes 98 and 99, *supra*). They also presented exhibits in support of their position. In fact, it was their motion that raised the issue of jurisdiction before the Boards.

A full trial on the merits in the prior proceeding is not a prerequisite for collateral estoppel to be given effect in a subsequent proceeding.¹³⁰ The authorities cited in *La Preferida* demonstrate that proceedings other than a full hearing may suffice for purposes of application of collateral estoppel:

Klingman [v. Levinson], 831 F.2d 1292, 1296 (7th Cir. 1987)]. . . (consent judgment given collateral estoppel effect where parties clearly intended the judgment to determine finally the debt owed to plaintiff would not be dischargeable in a bankruptcy proceeding); *Gilldorn Sav. Ass'n v. Commerce Sav. Ass'n*, 804 F.2d 390, 394-95 (7th Cir. 1986) (denial of a motion to dismiss was sufficiently final for collateral estoppel purposes where court in prior action had to have rejected each ground raised in order to deny the motion). See generally 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, § 4443 (1981).¹³¹

The second tribunal may also look beyond the earlier judgment and examine the pleadings and evidence in order to determine upon what facts and law the prior tribunal

¹³⁰ *La Preferida v. Cervceria Modelo, S.A. de C.V.*, 914 F. 2d 900, 906 (7th Cir. 1990).

¹³¹ *La Preferida*, 914 F.2d at 906. See also *John Morrell & Co. v. Local Union 304A*, 913 F. 2d 544, 563-64 (8th Cir. 1990). Of course, in the instant case, the Appeal Board was very clear regarding the grounds it was rejecting and the grounds it was basing its decision upon. *Safety Light*, ALAB-931, *supra*.

based its decision.¹³² In addition, once an issue of law or fact necessary to a judgment is decided, the decision "precludes relitigation of the same issue on a different cause of action between the same parties."¹³³ Therefore, the decision on jurisdiction as to USR Industries which is final as the OM proceeding has preclusive effect in this proceeding.

Finally, a judgment ordering dismissal for lack of jurisdiction under the Federal Rules of Civil Procedure will be preclusive "as to matters actually adjudicated," thus precluding relitigation of the issue which led to the dismissal.¹³⁴ The inverse should also be true: a judgment denying dismissal on jurisdiction grounds, with the reasons specified in the order denying the dismissal, will preclude relitigation of the issue of jurisdiction which led to the denial of dismissal.¹³⁵

3. The jurisdiction issue was determined by a valid and final judgment. There has been no allegation that the decision of the Appeal Board is invalid or that the Appeal Board did not have jurisdiction to decide the USR companies' motion. The Commission declined to review the Appeal Board decision and declared the decision "final agency action." (Staff Exh. 29.) While the decision of the Appeal Board is an interlocutory order, it is final as to the issue of jurisdiction over USR Industries in the OM

¹³² *La Preferida*, 914 F.2d at 907, citing *Gilldorn*, 804 F.2d at 395.

¹³³ *Montana*, 440 U.S. at 153. See also *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466-67 n.6 (1981).

¹³⁴ *GAF Corp. v. United States*, 818 F.2d 901, 912 (D.C.Cir. 1987), and the cases cited therein.

¹³⁵ See *Cutler v. Hayes*, 818 F.2d 879, 888 n.72 (D.C. Cir. 1987).

proceedings. It is a final decision regarding an issue between the parties and is final for purposes of collateral estoppel.¹³⁶

4. The determination that the NRC has jurisdiction over USR Industries was and is essential to the prior judgment. It is abundantly obvious that a decision regarding jurisdiction is essential to any case. Without jurisdiction, a tribunal cannot issue any orders or decisions affecting a party. If the Appeal Board had granted USR Industries' motion to dismiss, the net effect would be that USR Industries would no longer be a party in the OM proceedings and would not be liable for any judgment issued therein.

5. The Appeal Board had jurisdiction to make a determination on its own jurisdiction and render the prior decision on the USR companies' motion to dismiss. This has not been contested by any of the parties.

6. The party against whom collateral estoppel is being asserted, USR Industries, was a party in the prior proceeding.

As set forth above, ALAB-931 is preclusive as to the Commission's jurisdiction over USR Industries. Accordingly, the Commission has jurisdiction over USR Industries and that issue should not be relitigated. The Licensing should grant the Staff's Motion for Summary Disposition with respect to USR Industries on the basis of the preclusive effect of ALAB-931.

¹³⁶ See *Kremer*, 456 U.S. at 466-67, n.6; *Montana*, 440 U.S. at 153; *Turshen v. Chapman*, 823 F.2d 836, 839-40 (4th Cir. 1987).

CONCLUSION

As set forth above, U.S. Radium, as restructured in 1980, is responsible for protecting public health and safety under the existing licenses. Since the 1982 transfers of control of the licenses to Safety Light from USR Industries were invalid, as were the 1980 transfer of control from U.S. Radium to USR Industries, the NRC has jurisdiction over USR Industries and the other USR companies. Accordingly, the Licensing Board should grant the NRC Staff's Motion for Summary Disposition and determine that the Commission has jurisdiction over USR Industries and its subsidiaries.

Respectfully submitted,

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Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of June 1992.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SAFETY LIGHT CORPORATION)	Docket Nos. 030-05980-ML/ML-2
UNITED STATES RADIUM)	030-05982-ML/ML-2
CORPORATION)	
USR INDUSTRIES, INC.)	
USR CHEMICAL PRODUCTS, INC.)	(ASLBP Nos. 92-659-01-ML
USR METALS, INC.)	and 92-664-02-ML-2)
USR LIGHTING, INC.)	
U.S. NATURAL RESOURCES, INC.)	
LIME RIDGE INDUSTRIES, INC.)	
METREAL, INC.)	
(Bloomsburg Site Decommissioning)	
and License Renewal Denials))	

NRC STAFF'S STATEMENT OF UNDISPUTED
MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE REMAINS

1. On March 16, 1956, the Atomic Energy Commission ("AEC") issued License Number 37-30-1 to the United States Radium Corporation ("U.S. Radium") "[f]or preparation of sealed sources for experimental use within the laboratory and for resale to AEC licensed users."¹
2. The activities identified in (1), *supra*, were authorized at a site located at 4150 Old Berwick Road, Bloomsburg, Pennsylvania ("the Bloomsburg site").
3. On June 20, 1956, the AEC issued License Number 37-30-2 (now License No. 37-00030-02) to U.S. Radium for "RESEARCH AND DEVELOPMENT as defined in Section 11(q) Atomic Energy Act of 1954[]" and "PROCESSING FOR REDISTRIBUTION to AEC licensed users."²
4. License No. 37-00030-02 replaced License No. 37-03-1.

¹ License No. 37-30-1, March 16, 1956 (Staff Exh. 1).

² License No. 37-00030-02, June 20, 1956 (Staff Exh. 2).

5. On May 16, 1962, the AEC issued License No. GL 122 (now License No. 37-00030-10G) to U.S. Radium.³
6. On April 16, 1965, the AEC issued License No. 37-30-7 (now License No. 37-00030-07E) to U.S. Radium⁴ (the NRC terminated License No. 37-00030-07E on October 10, 1991).
7. On January 13, 1966, the AEC issued License No. GL 237 (now License No. 37-00030-09G) to U.S. Radium.⁵
8. License Nos. 37-00030-10G, 37-00030-07E, and 37-00030-09G originally authorized use, possession, and distribution of products containing hydrogen-3 (tritium), but since 1972 have not authorized anything other than distribution of certain products.
9. On April 25, 1969, U.S. Radium applied to renew License No. 37-00030-02.⁶

³ License No. 37-00030-10G, May 16, 1962 (Staff Exh. 3). The 10G license provided that, "[p]ursuant to Section 30.24(j), 10 CFR 30, the licensee is authorized to manufacture the sealed self-luminous sources listed in Condition 10 below, and when such sources have been manufactured, tested, and labelled in accordance with the provisions of this license and Sections 30.24(j) and 30.25 of 10 CFR 30, to distribute the sources to persons generally licensed pursuant to Section 30.21(d) of 10 CFR 30."

⁴License No. 37-00030-07E, April 16, 1965 (Staff Exh. 4). The 07E license authorized "[a]pplication of tritiated luminous paint to timepiece hands and dials for sale or distribution to persons exempt from the requirements for a license pursuant to Section 30.10(a), Title 10, Code of Federal Regulations, Part 30, 'Licensing of Byproduct Material.'"

⁵ License No. 37-00030-09G, January 13, 1966 (Staff Exh. 5). License condition 9 specified that "[p]ursuant to Section 32.51, Title 10, Code of Federal Regulations, Part 32, the licensee is authorized to manufacture luminous devices specified in Condition No. 10 of this license subject to the conditions and limitations contained herein and to distribute such devices to persons generally licensed pursuant to Section 31.5, Title 10, Code of Federal Regulations, Part 31, or equivalent provisions of the regulations of any Agreement State."

⁶ Application for Byproduct Material License, April 25, 1969. (Staff Exh. 6).

10. The license application identified in (9), *supra*, requested a new license, or in the alternative, amendment of License No. 37-00030-02 to authorize new activities.
11. The application identified in (9), *supra*, requested the AEC to renew License No. 37-00030-02, independent of the request identified in (10), *supra*.
12. U.S. Radium's renewal of License No. 37-00030-02 proposed in (11), *supra*, would have then authorized possession of byproduct material at the Bloomsburg site for "[d]econtamination, clean-up and disposal of areas previously used for research, development and processing under this license."⁷
13. In response the application identified in (9), *supra*, on August 5, 1969, the AEC issued License No. 37-00030-08 to U.S. Radium for "[p]rocessing for distribution to authorized recipients[]" and "[r]esearch and development as defined in 10 CFR 30.4(q)."⁸
14. In addition to the response identified in (13), *supra*, the AEC renewed License No. 37-00030-02 for the purposes requested in the application.⁹
15. On January 25, 1979, the NRC issued amendment number 40 to License No. 37-00030-02,¹⁰ which included license conditions 13 and 14 requiring U.S. Radium to submit a status report of decontamination work for each period beginning on July 1, as specified in applications dated June 7, 1977, and October 23, 1978.
16. The incorporation of the October 23, 1978, letter into the license required U.S. Radium to take the actions listed on the schedule enclosed with that letter.¹¹

⁷ *Id.*

⁸ License No. 37-00030-08, August 5, 1969 (Staff Exh. 7). The AEC issued this license rather than amending the 02 license at U.S. Radium's request.

⁹ License No. 37-00030-02, Amendment No. 36. (Enclosed with Staff Exh. 2).

¹⁰ Amendment number 40 and the materials it incorporates by reference are included in Staff Exh. 2.

¹¹ See Staff Exh. 2.

17. Beginning in 1979, U.S. Radium, a publicly held company, engaged in a series of transactions, culminating in 1980, that resulted in U.S. Radium becoming a wholly-owned subsidiary of USR Industries along with USR Lighting, Inc., USR Metals, Inc., USR Chemical Products, Inc., and U.S. Natural Resources, Inc.
18. The plan for the series of transactions identified in (17), *supra*, is set forth in USR Industries' Form S-14, "Registration Statement Under the Securities Act of 1933" ("S-14"),¹² which it filed with the Securities and Exchange Commission on May 16, 1980, and its American Stock Exchange listing application of August 21, 1980 ("ASE Listing Application").¹³
19. Metreal, Inc. was incorporated in January of 1979.
20. U.S. Radium conveyed a portion of the land and contaminated buildings on the Bloomsburg site to Metreal upon the latter's incorporation.
21. Metreal is a subsidiary of Safety Light today, and there is no issue as to the NRC's jurisdiction over Metreal.
22. USR Metals, Inc., USR Chemical Products, Inc., USR Lighting, Inc., and U.S. Natural Resources, Inc., were incorporated in June of 1979.¹⁴
23. At the time of their incorporation, the companies identified in (22), *supra*, were nominally capitalized.
24. At the time of the incorporation of the companies identified in (22), *supra*, the incorporators of those companies immediately transferred them to U.S. Radium.

¹² "Securities and Exchange Commission Washington, D.C., 20549, Form S-14, Registration Statement Under the Securities Act of 1933, USR Industries, Inc. (Exact name of registrant as specified in its charter.)" (May 16, 1980)(Staff Exh. 8).

¹³ "Listing Application No. 12145, American Stock Exchange, Inc.," (with attachments)(Feb. 11, 1981)(Staff Exh. 9).

¹⁴ Articles of Incorporation for USR Metals (Staff Exh. 10); Articles of Incorporation for USR Lighting Products (Staff Exh. 11); Articles of Incorporation for USR Chemical Products (Staff Exh. 12); Articles of Incorporation for U.S. Natural Resources (Staff Exh. 13).

25. On May 14, 1980, U.S. Radium, a publicly held corporation, caused the incorporation of USR Industries, Inc.¹⁵
26. Concurrent with the transaction identified in (25), *supra*, USR Industries caused the incorporation of Industries Merger Co., Inc.
27. As of May 16, 1980, U.S. Radium owned, possessed, and operated the business located on the Bloomsburg site.
28. As of May 16, 1980, U.S. Radium owned all the outstanding stock of USR Industries, Inc.
29. As of May 16, 1980, USR Industries, Inc., owned all the outstanding stock of Industries Merger Co., Inc.
30. As of May 16, 1980, U.S. Radium, USR Industries, and Industries Merger Company were Delaware corporations.¹⁶
31. At the time of the incorporation of USR Industries and Industries Merger Company on or about May 14, 1980, the Board of Directors of U.S. Radium was identical to that of USR Industries, Inc.
32. At the time of the incorporation of USR Industries and Industries Merger Company on or about May 14, 1980, the same individual was Chairman of the Board of U.S. Radium, USR Industries, and Industries Merger Company.¹⁷
33. At the time of their incorporation, both USR Industries and Industries Merger Co. were only nominally capitalized.¹⁸

¹⁵ ASE Listing Application, *supra*, note 13, at 1.

¹⁶ *Id.*

¹⁷ ASE Listing Application, *supra*, note 13, at 4; "Agreement and Plan of Merger," at A-7 dated May 16, 1980, Exhibit A to United States Radium Corporation Proxy Statement dated July 11, 1980 ("Proxy Statement") (included with the ASE Listing Application, *supra*, note 13).

¹⁸ Proxy Statement, *supra*, note 24, at 16.

34. The "Agreement and Plan of Merger," dated May 16, 1980, Exhibit A to United States Radium Corporation Proxy Statement dated July 11, 1980 ("Merger Plan"), describes that, on execution of the Merger Plan, each share of U.S. Radium (publicly held) would convert to a share of USR Industries.
35. The Merger Plan identified in (34), *supra*, describes that on implementation of the Merger Plan, the shares of Industries Merger Co., Inc. (held by USR Industries) would convert to shares of the "Surviving Corporation," i.e., the entity whose assets comprised all of U.S. Radium's assets prior to May 14, 1980.
36. The Merger Plan identified in (34), *supra*, describes that on implementation of the Merger Plan, all shares of USR Industries outstanding prior to execution of the Merger Plan (all of which were held by U.S. Radium) would be canceled.¹⁹
37. The Board of Directors of U.S. Radium before implementation of the Merger Plan identified in (34), *supra*, would constitute the Board of Directors of USR Industries after execution of the Merger Plan.²⁰
38. As further described in U.S. Radium's Proxy Statement dated July 11, 1980, after the merger, U.S. Radium, as a wholly-owned subsidiary of USR Industries, would transfer its Chemical Products Division, its Lighting Products Division, and its Metals Division, each with its own line of business, and its oil and gas interests, to separate wholly-owned subsidiaries of USR Industries.
39. The Proxy Statement identified in (38), *supra*, names the separate wholly-owned subsidiaries of USR Industries identified in (38), *supra*, as USR Chemical Products, Inc., USR Lighting Products, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc.²¹
40. The Proxy Statement identified in (38), *supra*, describes that U.S. Radium would not transfer but would retain its Nuclear Products Division, which operated its safety lighting business (its only business licensed by the NRC).

¹⁹ *Id.*, Article II, at A-3.

²⁰ Letter dated July 11, 1980, from Ralph T. McElvenny, Jr., Chairman of the Board and Chief Executive Officer of U.S. Radium to the stockholders of U.S. Radium (accompanying Proxy Statement, *supra*, note 16).

²¹ Proxy Statement, *supra*, note 16, at 15; S-14, *supra*, note 12, at 22-23.

41. On August 27, 1980, U.S. Radium, USR Industries, and Industries Merger Co. executed the Merger Plan identified in (34), *supra*.²²
42. On execution of the Merger Plan identified in (34), *supra*, the members of the boards of directors of U.S. Radium and USR Industries did not change.
43. The only assets that USR Industries acquired through execution of the Merger Plan identified in (34), *supra*, were assets of U.S. Radium before the merger.²³
44. On November 24, 1980, U.S. Radium entered into an agreement with USR Lighting Products to transfer the assets of the Lighting Products Division of U.S. Radium to USR Lighting Products.²⁴
45. On November 24, 1980, U.S. Radium entered into an agreement with USR Metals to transfer the assets of the Metals Division of U.S. Radium to USR Metals.²⁵
46. On November 24, 1980, U.S. Radium entered into an agreement with USR Chemical Products to transfer the assets of the Chemical Products Division of U.S. Radium to USR Chemical Products.
47. U.S. Radium completed the reorganization described in (22)-(46), *supra*, by simultaneously contributing the assets of the various divisions into corporate subsidiaries of USR Industries, as identified in (44)-(46), *supra*.
48. U.S. Radium continued to own and operate the business of the Nuclear Products Division of U.S. Radium as organized before the transaction identified in (41), *supra*.²⁶

²² ASE Listing Application, *supra*, note 13, at 3.

²³ Letter dated July 11, 1980, *supra*, note 21, at 2.

²⁴ Asset transfer agreement between U.S. Radium and USR Lighting Products (Nov. 24, 1980) (Staff Exh. 14).

²⁵ Asset transfer agreement between U.S. Radium and USR Metals (Nov. 24, 1980) (Staff Exh. 15).

²⁶ Deposition of Ralph T. McElvenny, Jr. ("McElvenny Deposition"), Tr. at 79 (Staff Exh. 16).

49. Metreal, Inc., whose sole assets were portions of the contaminated land and buildings on the Bloomsburg site, and the Nuclear Products Division were the only assets retained by U.S. Radium after the transactions identified in (22)-(48), *supra*.
50. By letter dated December 15, 1980, U.S. Radium informed the Commission that it had changed its name to Safety Light Corporation.²⁷
51. By letter dated January 21, 1981, U.S. Radium requested the NRC to change the name on License No. 37-00030-02 to Safety Light.²⁸
52. U.S. Radium made the request identified in (51), *supra*, notwithstanding that it was not until June 22, 1981, that the Board of Directors of U.S. Radium consented to a resolution changing U.S. Radium's name to Safety Light Corporation, to be effective on July 15, 1981.²⁹
53. On June 24, 1981, USR Industries, Inc., as the sole stockholder of U.S. Radium consented to the adoption of the following resolution:

RESOLVED, that the Certificate of Incorporation of [U.S. Radium] shall be amended effective July 15, 1981 by changing Article First thereof so that, as amended, said Article shall be and read as follows:

"FIRST. The name of the corporation is Safety Light Corporation." ³⁰

²⁷ Letter from Jack Miller, President, Safety Light Corp., to Paul Guinn, NRC (Dec. 15, 1980) (Staff Exh. 17).

²⁸ Letter from Jack Miller, President, Safety Light Corp., to Paul Guinn, NRC (Jan. 21, 1981) (Staff Exh. 18).

²⁹ U.S. Radium Corp. Unanimous Consent of Board of Directors (June 22, 1981)(Staff Exh. 19).

³⁰ U.S. Radium Corp. Action of Sole Stockholder In Lieu of Meeting (June 24, 1981) (Staff Exh. 20).

54. The amendment to U.S. Radium's Certificate of Incorporation identified in (53), *supra*, was filed with the Secretary of State of Delaware on December 21, 1981.³¹
55. Prior to the December 15, 1980, letter identified in (50), *supra*, none of the corporations involved in the transactions identified in (22)-(54), *supra*, informed the NRC of any of those transactions.³²
56. Prior to the December 15, 1980, letter identified in (50), *supra*, no individual informed the NRC of any of the transactions identified in (22)-(54), *supra*.³³
57. No corporation involved with the transactions identified in (22)-(48), *supra*, requested the NRC's prior permission or consent to transfer control of U.S. Radium's licenses with regard to those transactions.³⁴
58. The NRC has never made a finding that any transaction identified in (22)-(48), *supra*, was in accordance with the Atomic Energy Act of 1959, as amended.
59. The NRC Staff has never given its written consent to any of the transactions identified in (22)-(48), *supra*.³⁵
60. On May 24, 1982, USR Industries sold its wholly-owned subsidiary, Safety Light Corporation, to Lime Ridge Industries, Inc.³⁶

³¹ Certificate of Amendment to Certificate of Incorporation of United States Radium Corporation (Dec. 21, 1981) (Staff Exh. 21).

³² Affidavit of Francis Costello (June 26, 1992)(Staff Exh. 22)("Costello Affidavit"), at ¶¶ 12, 14, 16, and 18; McElvenny Deposition, Tr. at 181-182.

³³ *Id.*

³⁴ Costello Affidavit at ¶ 12; McElvenny Deposition, Tr. at 204-205; Deposition of John T. Miller ("Miller Deposition"), Tr. at 163 (Staff Exh. 25); Deposition of Charles R. White ("White Deposition"), Tr. at 69 (Staff Exh. 26).

³⁵ Costello Affidavit at ¶¶ 19, 21; McElvenny Deposition, Tr. at 182-183.

³⁶ Letter from Jack Miller, President, Safety Light Corporation to U.S. Nuclear Regulatory Commission, Materials Licensing Branch, Division of Fuel Cycle & Materials (continued...)

61. At the time of the transaction identified in (60), *supra*, three individuals, namely John T. Miller, President of Safety Light, and Charles R. White, Vice-President of Safety Light, and David J. Watts, owned 100% of the stock of Lime Ridge Industries.
62. After the transaction identified in (60), *supra*, Lime Ridge Industries, Inc., merged into Safety Light Corporation, with Safety Light being the surviving corporation.
63. No corporation involved with the transaction identified in (60), *supra*, informed NRC of that transaction prior to May 24, 1982.
64. No individual informed the NRC of the transaction identified in (60), *supra*, prior to May 24, 1982.
65. No corporation involved with the transaction identified in (60), *supra*, requested the NRC's prior permission or consent to transfer control of the licenses with regard to that transaction.³⁷
66. The NRC has never made a finding that the transaction identified in (60), *supra*, was in accordance with the Atomic Energy Act of 1959, as amended.³⁸
67. The NRC has never given its written consent to the transaction identified in (60), *supra*.³⁹

³⁶(...continued)

Safety (Nov. 11, 1983)(Staff Exh. 23); Safety Light Corporation 1982 Sale Documents (Staff Exh. 24).

³⁷ Costello Affidavit at ¶ 15; McElvenny Deposition, Tr. at 204-205; Deposition of John T. Miller ("Miller Deposition"), Tr. at 163 (Staff Exh. 25); Deposition of Charles R. White ("White Deposition"), Tr. at 69 (Staff Exh. 26).

³⁸ Costello Affidavit at ¶ 20.

³⁹ *Id.* at ¶¶ 19, 21.

S T A F F E X H I B I T S

The "Staff Exhibits" to this document (the NRC Staff's Motion for Summary Disposition As To NRC Jurisdiction Over USR Industries, Inc., USR Lighting, Inc., USR Chemical Products, Inc., USR Metals, Inc., and USR Natural Resources, Inc., dated June 30, 1992) are in ADAMS as separate documents. A list of the Exhibits and their corresponding ML numbers is at ML040220785.