

8I: *W. Woodhead / B. Bordenick / Harrison / Parler*
Reply 5/4/90

By HAND
4/19/90

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ASSESS. No.
900426 0054

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of:)
Safety Light Corporation)
United States Radium Corporation)
USR Industries, Inc.)
USR Lighting, Inc.)
USR Chemical, Inc.)
USR Metals, Inc.)
U.S. Natural Resources, Inc.)
Lime Ridge Industries, Inc.)
Metreal, Inc.)
(Bloomsburg Site Decontamination))

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Docket Nos. 030-05980
030-05982
030-05981
030-08335
030-08444
(ASLBP No. 89-590-01-0M)
(ALAB No.)

SUPPLEMENT TO MOTION
OF USR INDUSTRIES, INC., USR LIGHTING, INC.,
USR CHEMICAL PRODUCTS, INC., USR METALS, INC.
AND U.S. NATURAL RESOURCES, INC.
TO DISMISS ORDERS ISSUED MARCH 16, 1989
AND AUGUST 21, 1989

I. INTRODUCTION

USR Industries, Inc., USR Lighting, Inc., USR Chemical Products, Inc., USR Metals, Inc. and U.S. Natural Resources, Inc. (collectively "USR Industries") respectfully submit this supplement to its November 20, 1989 motion to dismiss for lack of jurisdiction the two immediately effective Nuclear Regulatory Commission ("NRC") Orders issued March 16, 1989 and August 21, 1989 in the above-captioned action, to the extent that they apply

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to the movants. This supplement is based on documents received from the NRC Staff pursuant to USR Industries' Supplemental Interrogatories on March 18 and April 4, 1990.

II. PROCEDURAL BACKGROUND

On November 20, 1989, USR Industries moved the Atomic Safety and Licensing Board to dismiss for lack of jurisdiction two immediately effective NRC Orders issued March 16, 1989 and August 21, 1989, in the above-captioned action, to the extent that they apply to the movants. On January 29, 1990, the Licensing Board denied that motion to dismiss. On February 7, 1990, USR Industries requested the Appeal Board to direct certification of the January 29, 1990 Order, and specifically, the question of NRC jurisdiction over USR Industries, to the Appeal Board for review pursuant to 10 C.F.R. §§ 2.718 and 2.735. On February 15, 1990, the Appeal Board consolidated for consideration and disposition USR Industries' February 7, 1990 motion for directed certification and USR Industries' February 13, 1990 supplemental motion for directed certification of the January 29, 1990 Order and the Licensing Board's February 8, 1990 Order which reconsidered and modified the previously issued stay pendente lite of the immediate effectiveness orders of March and August 1989. On March 6, 1990 the Appeal Board heard oral argument on the two directed certification motions of USR Industries.

On March 18 and April 4, 1990, USR Industries received the NRC Staff's responses to USR Industries' February 15, 1990 Supplemental Interrogatories.^{1/} The Staff had initially opposed t's request for supplemental interrogatories but by Order dated March 14, 1990, the Licensing Board directed the Staff to respond. The supplemental information contained in the Staff's responses is most significant and instructive and is directly relevant to, and has a crucial bearing on, the jurisdictional issue. Indeed, it forms the basis for this supplement to USR Industries' motion to dismiss the March 16 and August 21, 1989 Orders.

III. DISCUSSION

This supplemental information discloses that, according to the Staff, only three Part 30 licensees have ever requested NRC consent, pursuant to Section 184 of the Atomic Energy Act of 1954, as amended, and/or 10 C.F.R. § 30.34b, to transfers of their licenses where the purported basis for the transfer of control of the Part 30 license was the transfer of stock in a corporation. Staff's response to Supplemental Interrogatory 2. It is instructive to note that two of those three requests for NRC consent took place after the issuance of Information Notice 89-25 on March 7, 1989 -- the first time that the NRC had publicly announced that stock sales could require prior NRC approval --

^{1/} A copy of the Staff's responses, including the documents enclosed therewith, are attached hereto as Exhibit A.

and one of those two requests (Damon Biotech) specifically cited the Information Notice.

Furthermore, in all three instances cited by the Staff NRC consent was given. In fact, according to the NRC Staff, there has never been an instance where the NRC has denied a Part 30 licensee's Section 184 request for consent because of a stock transfer. Staff's response to Supplemental Interrogatory 3. In one of the three instances where NRC consent was given, the explicitly stated basis for the consent was that "no changes in the licensed operation will occur as a result of the purchase." Doctor's Regional Medical Center: License No. 24-16714-01. See Staffs' response to Supplemental Interrogatory 2.

Beyond this, according to the Staff, there have been three instances other than U.S. Radium Corp. in which 100% of the stock of a corporation holding a Part 30 license was transferred and no prior NRC consent thereto was either sought or given. Staff's response to Supplemental Interrogatory 5. Though no prior consent was either sought or given, it would appear, in all three instances, that either a new license or license amendment was issued to reflect the new entity authorized to conduct the licensed activities. The NRC Staff has not indicated (1) that prior consent was legally required or (2) that any NRC enforcement action was taken or even considered. To the contrary, it would appear from the documents furnished by the Staff in

response to the supplemental interrogatories that the Staff's assumption was that no prior consent was legally required.

In summary, from the Staff's responses to USR Industries' supplemental interrogatories, it appears:

1. that prior to March 7, 1989, the date of issuance of Information Notice 89-25, in only one instance did any Part 30 licensee seek prior NRC consent because of a stock transfer;

2. that, in total, there have been only three instances in which prior NRC consent was sought by a Part 30 licensee because of a stock transfer and there has never been a denial of any such request - a major consideration for the consent being that there would be no changes in the licensed operation; and

3. that on three other occasions 100% of the stock of a corporation holding a Part 30 license was transferred and no prior NRC consent was either sought or given.

From the foregoing it is clear that there has been a complete absence of any consistent pattern with regard to NRC's application of section 184 of the Atomic Energy Act and 10 C.F.R. §§ 30.34b. -- except, prior to March 7, 1989, a pattern of not requiring, with one exception, prior consent for any stock transfer. No explanation has been furnished as to why no prior consent was required by the Staff for the three other 100% stock transfers identified in the Staff's response to Supplemental

Interrogatory 5 and yet prior consent is maintained by the Staff to have been required in this matter.

USR Industries' attempt, in Supplemental Interrogatory 7, to obtain a rational explanation for this stark disparity of treatment in the application of Section 184 to Part 30 licensees merely elicited the response that, "The Staff could not anticipate every possible stock transfer and merely indicated that it is prudent to consider each situation on its own terms" and the citation of four AEC/NRC cases "discussing stock ownership and control of license pursuant to § 184 of the Atomic Energy Act." All four cases involved facility licensees under Part 50 and not materials licensees under Part 30, and one of the four cases cited by the Staff did not involve Section 184 at all but Section 104d whose apparent objective is to avert any risk to the national security that might ensue as a result of alien control of a reactor facility. General Electric Company and Southwest Atomic Energy Associates (SEFOR), 3 AEC 99 (1966).

Beyond this, on the basis of the information supplied by the Staff, it is absolutely clear that if, assuming arguendo that prior consent under Section 184 was ever required of, and had been sought by, the movants in this proceeding, it most certainly would have been granted. There was no change in the licensed operation after the 1980 reorganization and the 1982 stock transfer. There was never any NRC contention that the licensed

materials at the Bloomsburg site were not properly handled or secured or that personnel at the site, before and after the 1980 reorganization and the 1982 stock transfer, were not capable, competent and committed. Furthermore, there is no reasonable basis on which the NRC could have consented, as it did, to the three requests for prior consent identified in the Staff's response to Supplemental Interrogatory 2 and yet refused to consent to the "transfers" allegedly involved in the 1980 reorganization and 1982 stock transfer if such consent had indeed been required and in fact been sought.^{2/}

Under the circumstances described above, including an administrative history during which every request by a Part 30 licensee for Section 184 consent, on the basis of a stock transfer, has been granted, it is difficult to imagine what possible justification could have been offered by the NRC for denying a request by the movants for such consent had such consent in fact been sought. Such a denial would have been patently unreasonable and a clear abuse of discretion.

^{2/} 10 C.F.R. § 30.34b cannot be read in isolation; it must be read in the context of the entire part. If prior consent had been sought by USR Industries, the factors that would have been considered by the NRC would be the same as those considered in the evaluation of an application for an initial Part 30 license: essentially, the adequacy of the equipment and the qualifications of the applicant by training and experience in terms of protecting health and minimizing danger to life and property. 10 C.F.R. § 30.33. They do not include any financial qualifications information.

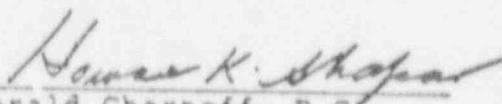
The new information contained in the Staff's responses to the supplemental interrogatories reveals that the Staff's application of Section 184 and 10 C.F.R. § 30.34b vis-a-vis USR Industries has been grossly discriminatory and completely inconsistent with the Staff's treatment of other Part 30 licensees who have effected 100% stock transfers.

Even if prior consent had been required - and it was not, to insist, as does the Staff, that NRC acquired jurisdiction over USR Industries because of its failure to obtain prior consent in the face of an administrative history which shows that consent would unquestionably have been granted had it been sought is both illogical and punitive in the extreme. It is reminiscent of the long past days of common law pleading. To force USR Industries into bankruptcy on such a basis borders on, if it does not transcend, the outrageous. Assuming arguendo that prior consent was ever required of the movants in this proceeding, it should be granted nunc pro tunc.

IV. CONCLUSION

For the reasons stated in USR Industries' November 20, 1989 motion to dismiss the two immediately effective NRC Orders issued March 16, and August 21, 1989, as supplemented by the foregoing, those orders should be dismissed with respect to the movants.

Respectfully submitted,



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APPENDIX "A"

NRC STAFF'S RESPONSES TO
USR INDUSTRIES' SUPPLEMENTAL
INTERROGATORIES