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NUCLEAR REGULATORY COMMISSION ISSUANCES

June 1995

U.S. NUCLEAR REGULATORY COMMISSION

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NUREG-0750
Vol. 41, No. 6
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NUCLEAR REGULATORY COMMISSION ISSUANCES

June 1995

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judges (ALJ), the Directors' Decisions (DD), and the Decisions on Petitions for Rulemaking (DPRM).

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or have any independent legal significance.

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
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COMMISSIONERS

Ivan Selin, Chairman
Kenneth C. Rogers
E. Gail de Planque
Shirley A. Jackson

B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel

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COMMISSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
E. Gail de Planque
Shirley A. Jackson

In the Matter of **Docket No. 55-30662-EA**
(IA 94-007)

KENNETH G. PIERCE
(Shorewood, Illinois) **June 1, 1995**

The NRC Staff sought Commission review of the Initial Decision on the ground that the Licensing Board made "clearly erroneous" factual findings. The Commission denied Staff's petition for review.

RULES OF PRACTICE: PETITION FOR REVIEW

Among the factors we consider in exercising our discretion to grant or deny review of a licensing board initial decision is the existence of a substantial question whether a licensing board finding of material fact is "clearly erroneous."

RULES OF PRACTICE: PETITION FOR REVIEW

The Staff's petition does not show that the Board's own view of the evidence was "clearly erroneous" — i.e., that its findings were not even plausible in light of the record viewed in its entirety. This is fatal to a petition for review resting solely on the "clearly erroneous" argument.

MEMORANDUM AND ORDER

Among the factors we consider in exercising our discretion to grant or deny review of a licensing board initial decision is "the existence of a substantial question" whether a licensing board "finding of material fact is clearly erroneous." *See* 10 C.F.R. § 2.786(b)(4)(i). In this enforcement proceeding, the NRC Staff seeks Commission review on the sole ground that the Licensing Board made "clearly erroneous" factual findings.

We deny the petition for review. The Staff's petition, supported by an *amicus curiae* answer filed by the Commonwealth Edison Company, demonstrates only that the record evidence in this case may be understood to support a view sharply different from that of the Board. The Staff's petition does not show that the Board's own view of the evidence was "clearly erroneous" — i.e., that its findings were not even "plausible in light of the record viewed in its entirety." *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985). This is fatal to a petition for review resting solely on the "clearly erroneous" argument.

We grant Commonwealth Edison's Motion for Leave to File *Amicus Curiae* to the extent that it seeks permission to file an answer to the Staff's petition, and we deny it as moot to the extent that it requests permission to file a full brief with the Commission.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of June 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
E. Gail de Planque
Shirley A. Jackson

In the Matter of **Docket No. 70-3070-ML**

LOUISIANA ENERGY SERVICES
(Claiborne Enrichment Center) **June 8, 1995**

The Commission denies a petition filed by Citizens Against Nuclear Trash (CANT) seeking interlocutory Commission review of the Atomic Safety and Licensing Board's March 2, 1995 Memorandum and Order (unpublished). That order denied CANT's petition for waiver of certain regulations contained in 10 C.F.R. Part 61 that pertain to land disposal of waste.

RULES OF PRACTICE: INTERLOCUTORY REVIEW

Interlocutory review of Atomic Safety and Licensing Board decisions is disfavored unless a party can show that the licensing board's decision threatens "irreparable impact" or has a "pervasive or unusual" effect on the proceeding's basic structure.

RULES OF PRACTICE: APPEALABLE ORDERS

Licensing board rulings denying waiver requests pursuant to 10 C.F.R. § 2.758, which are interlocutory, are not considered final for purposes of appeal.

ORDER

The Commission has before it a petition for review filed by an intervenor, Citizens Against Nuclear Trash (CANT). CANT challenges a March 2, 1995 Memorandum and Order (unpublished) of the Atomic Safety and Licensing Board denying a petition for waiver of certain regulations contained in 10 C.F.R. Part 61 that pertain to land disposal of waste. The NRC Staff and the Licensee, Louisiana Energy Services (LES), oppose CANT's petition for review. We deny the petition.

We view the Licensing Board ruling denying the waiver petition as interlocutory. CANT, relying on a 1989 decision in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-920, 30 NRC 121, 124-26 (1989), suggests that the Licensing Board's waiver denial is final for purposes of appeal. We do not find that *Seabrook*, which was issued by the now-defunct Appeal Board, governs this case. The Appeal Board's holding in *Seabrook* was based on the totality of the circumstances of an extremely complicated proceeding and must be read in light of distinctions between the Commission's review in contrast to the Appeal Board's in section 2.758 proceedings. Moreover, treating licensing board waiver denials as final and allowing immediate Commission review would contradict the waiver rule itself, which provides for immediate certification to the Commission *only* when the Board finds a *prima facie* case in *favor* of a waiver. *See* 10 C.F.R. § 2.758.

Interlocutory review of licensing board decisions is disfavored unless a party can show that the licensing board's decision threatens "irreparable impact" or has a "pervasive or unusual" effect on the proceeding's "basic structure." *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319 (1994) (*Vogtle*); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994) (*Rancho Seco*). CANT has not suggested, nor do we see, how its petition meets these interlocutory review standards.

The waste disposal issues in this case are subtle and complex. We would prefer to review waste disposal as a whole, rather than in a piecemeal fashion, after a final licensing board decision resolving the entire case has been issued, unless intervening circumstances demand immediate Commission review. Our reluctance to step into this controversy prematurely is reinforced by a recent licensing board pleading filed by CANT on the effects of the Low-Level Radioactive Waste Policy Act on depleted uranium tails disposal. In that pleading, CANT states that the Board "would have to reopen the waiver proceeding for classification of the tails in order to rule that the tails should not be disposed of by the States as Class A waste pursuant to the LLRWPA." *See*

CANT's Response Memorandum Regarding Effects of Low Level Radioactive Waste Policy Act on Depleted Uranium Tails Disposal at 6 n.2.

We leave unresolved CANT's challenges to the merits of the Licensing Board's ruling.

CONCLUSION

For these reasons, CANT's petition for Commission review of the Licensing Board's March 2, 1995 Memorandum and Order is DENIED.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of June 1995.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
E. Gail de Planque
Shirley A. Jackson

In the Matter of

Docket Nos. 70-00[illegible]
30-02278-MLA
(TRUMP-S Project)
(Byproduct License
No. 24-00513-32; Special
Nuclear Materials License
No. SNM-247)

CURATORS OF THE
UNIVERSITY OF MISSOURI

June 22, 1995

The Commission grants a petition for reconsideration of CLI-95-1, 41 NRC 71 (1995), in which the University of Missouri challenges one of the conditions imposed by the Commission. The Commission also denies a second petition for reconsideration of CLI-95-1, in which the Intervenors challenge a number of technical and legal underpinnings of that order.

ATOMIC ENERGY ACT: SAFETY FINDINGS

NRC: HEALTH AND SAFETY RESPONSIBILITIES; RESPONSIBILITIES UNDER AEA; ADJUDICATORY RESPONSIBILITIES

The fact that the Commission's radiation-protection mission requires it to consider questions of fire safety does not convert the Commission into the direct enforcer of local codes, OSHA regulations, or national standards on fire safety, occupational safety, and building safety.

ATOMIC ENERGY ACT: COMMON DEFENSE AND SECURITY, NON-PROLIFERATION

NUCLEAR PROLIFERATION

RULES OF PRACTICE: ADMISSIBILITY OF AREAS OF CONCERN

Federal restrictions on the University's publication of the methodology and results of the TRUMP-S experiments, including a requirement that it receive security clearance from the Department of Energy if the University wishes to publish such information, constitutes an intervening step outside the control of the NRC and the University that separates the experiments' results from the proliferation feared by the Intervenors.

ATOMIC ENERGY ACT: SAFETY FINDINGS

LICENSE AMENDMENT APPLICATION

MATERIALS LICENSE UNDER PART 30: STANDARDS

MATERIALS LICENSE UNDER PART 70: STANDARDS

NRC: HEALTH AND SAFETY RESPONSIBILITIES; RESPONSIBILITIES UNDER AEA; ADJUDICATORY RESPONSIBILITIES

While the Commission by no means encourages defective applications, it also does not take the position that an application, however minimally flawed, must be rejected altogether, and may not be modified or improved as NRC review goes forward. Such a position would be incompatible with the dynamic licensing process followed in Commission licensing proceedings.

ADJUDICATORY BOARDS: AUTHORITY OVER STAFF ACTION

LICENSING BOARD/PRESIDING OFFICER: REVIEW OF NRC STAFF'S ACTIONS

Although the Commission expects its Staff to consider thoroughly all its licensing decisions, the issue for decision in adjudications is not whether the Staff performed this duty well, but instead whether the license application raises health and safety concerns.

ENVIRONMENTAL REPORTS

The Commission's regulations categorically exclude from NEPA review all amendments for the use of radioactive materials for research and development. The purpose of an environmental report is to inform the Staff's preparation of an Environmental Assessment (EA) and, where appropriate, an Environmental Impact Statement (EIS). Where Staff is categorically excused from preparing an EA or EIS, a licensee need not submit an environmental report.

REGULATORY GUIDES: APPLICATION

When determining issues of public health and safety, the Commission has the discretion to use the best technical guidance available, including any pertinent NUREGs and Regulatory Guides, as long as they are germane to the issues then pending before the Commission. However, the Commission's decision to look to such documents for technical guidance in no way contradicts the Commission's rulings that NUREGs and Regulatory Guides are advisory by nature and do not themselves impose legal requirements on either the Commission or its licensees.

REGULATORY GUIDES: APPLICATION

A licensee is free either to rely on NUREGs and Regulatory Guides or to take alternative approaches to meet its legal requirements (as long as those approaches have the approval of the Commission or NRC Staff).

REGULATORY GUIDES: APPLICATION

The fact that the emergency planning regulations had not yet gone into effect when the University filed its applications did not preclude the Commission from seeking technical guidance from a NUREG that provided the scientific foundation for those regulations.

LICENSE AMENDMENT APPLICATION

MATERIALS LICENSE APPLICATION: NEED TO SUBMIT SAFETY PROCEDURES

The Commission is free to consider a licensee's general emergency procedures when resolving risk issues, regardless of the fact that the Commission's regulations do not require the licensee to submit those emergency procedures as part of an application.

TECHNICAL ISSUES

The following technical issues are discussed: Radiation detection equipment; Evacuation plan; Dose and dispersion calculations; Fire safety issues; Emergency plans; Emergency procedures; Transuranic (TRU) material, storage of; Dispersion; Accident dose estimates; NUREG-1140; Regulatory Guide 1.145.

MEMORANDUM AND ORDER
(Petitions for Reconsideration)

In CLI-95-1, the Commission addressed numerous issues related to the application of the University of Missouri ("University" or "Licensee") to use uranium and certain transuranic elements for research in its "TRUMP-S Project." 41 NRC 71 (1995). Both the University and the Intervenors (three organizations and ten individuals) have filed petitions for reconsideration. The University seeks clarification of a license condition placed upon it by our order, and the Intervenors take issue with our resolution of a host of safety and procedural issues. For the reasons set forth below, we clarify our earlier order as requested by the University, and we deny the Intervenors' request for reconsideration.

I. BACKGROUND

Because CLI-95-1 already sets forth the background of this proceeding in considerable detail, we will provide here only a brief description of the case's history. In 1990, the Commission's Staff ("NRC Staff") issued to the University two license amendments which collectively authorized the Licensee to possess and use certain specified quantities of uranium, neptunium, americium, and plutonium at its Columbia, Missouri campus. The University intended to use the materials in research known as the "TRUMP-S Project," which aims at developing an inexpensive means to reduce the volume of waste requiring high-level radioactive waste disposal facilities. *See* 41 NRC at 88.

Three organizations and ten individuals intervened, objecting to these amendments on the grounds that their issuance would be inconsistent with the public health and safety and would damage the common defense and security of the country. After a lengthy informal hearing, the Presiding Officer issued a Final Initial Decision in which he concluded that the University's possession and use of the radioactive elements at issue were consistent with the public health and safety and did not harm the common defense and security. However, to decrease further the risks associated with such possession and use, the Presiding Officer

imposed certain additional safety conditions on the licensee. LBP-91-31, 34 NRC 29, *clarified*, LBP-91-34, 34 NRC 159 (1991). Both the University and the Intervenors appealed these two decisions.

In CLI-95-1, we affirmed LBP-91-3 and LBP-91-34 with several modifications, and thereby approved the University's license amendment applications, subject to nine conditions. More specifically, we affirmed the Presiding Officer's conclusions regarding all procedural issues raised on appeal as well as his decision to exclude three areas of concern (nuclear proliferation, waste disposal, and decommissioning funding); we concluded that the dose and dispersion risks associated with the release of TRUMP-S radioactive material are acceptably small; and we modified and supplemented the fire safety conditions that the Presiding Officer had imposed upon the University.

Both the University and the Intervenors seek reconsideration of CLI-95-1. The University challenges one of the nine conditions imposed by the Commission, and the Intervenors challenge numerous technical and legal underpinnings of CLI-95-1.

II. DISCUSSION

A. Licensee's Petition for Reconsideration

In CLI-95-1, the Commission imposed a number of requirements on the University as a condition for the grant of its license amendments, including the following:

> b. . . . the University must modify the Emergency Classes and Action Levels in its MURR Facility Emergency Plan[1] in the following . . . respect[]:
>
> * * * *
>
> ii. The classification scheme must clarify that either a "prolonged fire" affecting nuclear materials or a "significant release possibly approaching EPA [Environmental Protection Agency] PAG [Protective Action Guideline] levels" of such materials would constitute a "Site Area Emergency."

41 NRC at 172.

The University questions the wording of this condition. The University agrees with the Commission that a "significant release [of nuclear materials] possibly approaching EPA PAG levels" at the site boundary should be classified as a Site Area Emergency, but argues that a "prolonged fire" affecting nuclear materials in the Alpha Lab would not necessarily cause a "significant release possibly

[1] "Emergency Plan for the University of Missouri Research Reactor Facility," Facility License No. R-103, Docket No. 50-186 (dated Aug. 12, 1989, reprinted Dec. 8, 1989) (hereinafter "Emergency Plan" or "MURR Emergency Plan"), submitted by NRC Staff into the record of this proceeding on August 16, 1990.

approaching EPA PAG levels." The University's proposed remedy for this problem is that the Site Area Emergency classification would apply only to a "prolonged fire" that could cause a "significant release." Licensee's Petition at 2-3.

The University's point is well taken and, in fact, accurately reflects what the Commission intended in imposing this condition. Our order's phrase "'prolonged fire' affecting nuclear materials" was intended to be nothing more than a shorthand version of the following language from the University's own Emergency Plan:

> [p]rolonged fire or explosion within the facility that can result in a release of radioactivity that would cause exposures of the public or Staff approaching 1 rem whole body or 5 rem thyroid

which appeared earlier in the same paragraph of our order. CLI-95-1, 41 NRC at 156 (emphasis omitted), *quoting* MURR Emergency Plan at 25-26, Table 1, "NOUE" action level 5.

To remove any possible confusion, we modify Ordering Paragraph 2.b.ii to read:

> The classification scheme must clarify that either a "prolonged fire or explosion within the facility that can result in a release of radioactivity that would cause exposures of the public or Staff approaching 1 rem whole body" or a "significant release possibly approaching EPA PAG levels" of such materials would constitute a "Site Area Emergency."

The Intervenors oppose this modification, contending initially that the University lacks the equipment necessary to measure accurately any "significant releases" from airborne alpha-emitting transuranics outside the MURR facility. They argue that the MURR Emergency Plan focuses on a reactor accident, which would involve gamma-emitting material detectable by geiger counters, but that geiger counters are useless in detecting alpha emissions. Answer of Intervenors-Appellants, filed May 1, 1995 ("Answer"), at 1-2. The Intervenors are incorrect. The University does have the capacity to detect alpha emitters both directly and indirectly, as indicated by record evidence and discussed in CLI-95-1. *See* 41 NRC at 132. Actual radiation measurements, in any event, normally come after-the-fact. Site area emergencies are declared on the basis of predictive judgments based on site conditions.[2]

The Intervenors next assert that the facility is in a public area, without boundaries to keep the public sufficiently far away from the facility (at least

[2] The Intervenors also argue that the University has no plans to station people at appropriate locations outside the facility to measure doses over time so as to determine the time at which doses exceed PAG levels. Answer at 2. However, the Intervenors point to no record evidence that supports their position that the University will not take appropriate radiation measurements when necessary.

200 meters, according to the Intervenors) to avoid receiving a dose in excess of the PAG.[3] Answer at 2. (The University claims that its site boundary is actually 400 meters from the facility.) The Intervenors' argument ignores record evidence that the University does in fact control the area around the facility. *See* Licensee's Exhibit No. 10, Affidavit of J. Charles McKibben Regarding Adequacy of Site, at 4 ¶12. Given the likely time available between the start of a fire and the radionuclides' escape through the doors of the building (the escape route in the worst-case scenario), the University should easily be able to remove members of the public from an area with only a 150-meter radius.[4] This is because the University currently has in place both "an agency-approved emergency plan that includes an evacuation area considerably larger than the one that would be required for a stand-alone Alpha Lab" (CLI-95-1, 41 NRC at 153) and also procedures and personnel necessary to evacuate buildings or fields within *400* meters of the facility (Licensee's Exhibit No. 10, *suprc*, at 3 ¶8, 4 ¶12).

Finally, the Intervenors argue broadly that the Commission in CLI-95-1 unfairly "massaged" certain numbers in its dose and dispersion calculations, selected the least conservative numbers to use in those calculations (specifically, for χ/Q, release fraction, and the quantity of transuranics involved in a fire), concluded from those calculations that the risks of an offsite dose equivalent exceeding the EPA PAG are insignificant, and thereby sent a "message" to the University that "there is no need for safety." Answer at 2-3. The Commission stands by its technical calculations for the reasons explained in considerable detail in CLI-95-1. *See, e.g.*, 41 NRC at 145-52. We cannot agree with the Intervenors that our decision, which resulted in the imposition of nine safety-related license conditions on the University (in addition to those already imposed by the Presiding Officer), somehow suggests Commission approval of "a lackadaisical attitude toward safety." Answer at 3.

B. Intervenors' Petition for Reconsideration

Intervenors' petition for reconsideration in places resorts to intemperate, even disrespectful, rhetoric in attacking the Commission's decision. *See, e.g.*, Petition at 6 ("kangaroo Commission"), 22 ("giving the words 'arbitrary and capricious'

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[3] The PAG limit set by the EPA is 1- to 5-rem exposure during a 1-hour period. U.S. Environmental Protection Agency, *Manual of Protective Action Guides and Protective Actions for Nuclear Incidents*, at p. 2-6, Table 2-1, EPA 400-R-92-001 (October 1991). The Commission has based its own 1-rem effective dose equivalent standard on the most conservative end of the EPA's 1- to 5-rem spectrum. *See* NUREG-1140, "A Regulatory Analysis on Emergency Preparedness for Fuel Cycle and Other Radioactive Material Licensees," January 1988, at iv.

[4] The Commission in CLI-95-1 found that the PAG levels would not be exceeded outside a radius of about *150* meters — not 200 meters as suggested by the Intervenors. 41 NRC at 152 n.126, 153 (1.02-rem whole-body dose at 150 meters).

a bad name"), 23 ("Arbitrariness elevated to a high art"). While colorful, this style of advocacy does not help elucidate the issues before the Commission. Even so, we have examined carefully each of the Intervenors' arguments for reconsideration, but find them unpersuasive.

1. Fire Safety Issues

The Intervenors assert that the Commission "punted" on fire safety and improperly "ignored" the City of Columbia's fire ordinances, the BOCA Code, a Department of Energy Order, an Office of Personnel Management Circular, National Fire Protection Association ("NFPA") documents (specifically NFPA 801, NFPA N10, and the NFPA Handbook), and regulations promulgated by the Occupational Safety and Health Administration. Petition at 1-2. According to the Intervenors, the Commission was "required" to consider "these authorities as a guide." *Id.*

The Intervenors' position is entirely misconceived. Far from ignoring the various fire-safety documents in the record, the Commission explicitly relied on them where appropriate. *See* 41 NRC at 135-36 n.92, 161 nn.141 & 142, 162 n.145. In addition, the Presiding Officer canvassed these same materials extensively (*see* LBP-91-31, 34 NRC at 50-93), and while the Commission did not go so far as to endorse his finding that a fire was not even "credible," we did find "correct in general" his view "that the chances of a severe fire are very small." CLI-95-1, 41 NRC at 128. We saw no need, however, to go over in detail the same fire-safety ground as the Presiding Officer. This was because we were convinced that, "even in a worst-case scenario (i.e., a fire leading to offsite radiation exposures), . . . the risk to the public from a fire affecting the TRUMP-S materials is still acceptably small." *Id.*

The Intervenors also take issue with our statements that our "responsibility is directed to the hazards associated with nuclear materials rather than to all questions of fire safety at licensed facilities," and that we are "not a general fire safety or occupational health agency." Petition at 2. But these statements merely reiterate the Commission's statutory charter to protect against radiation hazards.[5] It is, of course, true that the Commission's radiation-protection mission requires it to consider questions of fire safety, but this does not convert the Commission into the direct enforcer of local codes, OSHA regulations, or national standards on fire safety, occupational safety, and building safety. Here, the Commission considered questions of fire probability, fire consequences, and fire protection and was able to find adequate protection against radiation hazards from fire. *See* CLI-95-1, 41 NRC at 127-63.

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[5] *See* AEA §§ 57c(2), 84a(1), 182a, 42 U.S.C. §§ 2077(c)(2), 2014(a)(1), 2232(a) (1988). *See also* 10 C.F.R. §§ 30.33(a)(2), 70.23(a)(3).

There is one additional fire-safety matter raised in the Intervenors' petition. They challenge the Commission's decision, when considering the adequacy of the fire-safety conditions imposed by the Presiding Officer, to "derate" 90% of the fire load in the MURR basement. P tition at 25, *citing* CLI-95-1, 41 NRC at 160-61. According to the Intervenors, derating is a "peculiar" concept.

In fact, derating is an accepted practice in rating fire load, as demonstrated in portions of the NFPA's *Fire Protection Handbook* that the Commission cited in its opinion. *See* 41 NRC at 161 n.141. We thus disagree with the Intervenors' fire-safety expert, Fire Chief Wallace, on this issue.

2. *Exclusion of the Issue of Nuclear Weapons Proliferation*

The Intervenors object to the Commission's refusal to consider their claim that the TRUMP-S Project increases the risk of nuclear weapons proliferation and therefore is inimical to the common defense and security. Petition at 3, 25-27. In CLI-95-1, the Commission explained in detail why this issue was not germane to the subject matter of this proceeding. 41 NRC at 165, *quoting* 10 C.F.R. § 2.1205(g). In brief, the Commission ruled that the Intervenors had failed to show that weapons proliferation was reasonably related to, and would arise as a direct result of, the specific license amendments at issue in this proceeding. 41 NRC at 165-66.

In their petition for reconsideration, the Intervenors recast their position in an attempt to establish a direct connection between the TRUMP-S Project and nuclear proliferation. They say that the release of information learned from the TRUMP-S Project would give other nations access to technology enabling them to obtain plutonium in a form usable in bombs, even if the United States itself never adopts the technology. Petition at 26.

It is not a purpose of the TRUMP-S Project, however, to enhance bomb-making capacity or to provide a supply of plutonium for use in bombs. Rather, the research has the benign purpose of developing less-costly means of radioactive waste disposal. *See* CLI-95-1, 41 NRC at 88. The Intervenors' proliferation concern assumes that a side-effect of the TRUMP-S information would be to provide information that foreign powers interested in nuclear weapons might find useful. But, as we said in CLI-95-1, "[w]e are loath to halt basic research in its tracks on the purely speculative ground that its fruits may someday be put to improper use." 41 NRC at 106.

Such improper use is by no means inevitable. The Intervenors' argument, for example, ignores federal restrictions on the University's publication of the methodology and results of the TRUMP-S experiments, including a requirement that it receive security clearance from the Department of Energy if the University

wishes to publish such information.[6] *See* 10 C.F.R. Part 810; AEA § 57b, 42 U.S.C. § 2077(b). More specifically, prior to publishing its methodology and results, the University would need either to ensure that such information constituted a "generally authorized activity" appropriate for public dissemination pursuant to 10 C.F.R. § 810.7, or to obtain from the Department of Energy "specific authorization" for the publication pursuant to 10 C.F.R. § 810.8. This clearance process constitutes an intervening step outside the control of the NRC and the University that separates the experiments' results from the proliferation feared by the Intervenors.

3. *Commission's Alleged Failure to Enforce Its Regulations on Applications*

The Intervenors criticize the Commission for stating that an application must not automatically be rejected whenever Staff or an intervenor finds a flaw in it. According to the Intervenors, the Commission's statement indicates the Commission's unwillingness to enforce its own regulations (particularly 10 C.F.R. § 2.1233(c)). Petition at 7.

The Commission answered this precise argument in CLI-95-1. 41 NRC at 95-96. "We by no means encourage defective applications, but we also do not take the Intervenors' absolutist position that an application, however minimally flawed, must be rejected altogether, and may not be modified or improved as NRC review goes forward. The Intervenors' position is incompatible with the dynamic licensing process followed in Commission licensing proceedings. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 790, *review declined*, CLI-83-32, 18 NRC 1309 (1983).

Throughout their petition, the Intervenors stress alleged shortfalls by the NRC Staff in its review of the TRUMP-S application, as if the adequacy of the Staff review is what the Commission must decide. *See, e.g.*, Petition at 16-17. We expect the Staff, of course, to consider thoroughly all its licensing decisions.

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[6] The Intervenors' error is surprising, given another point they make: that the TRUMP-S contract itself "attempts to prevent" foreign nationals' access to the TRUMP-S results. Petition at 26. This is not really true as a contractual matter — the contract appears to contemplate some foreign (particularly Japanese) access. Support Services Agreement between Rockwell International Corp. and the University of Missouri, dated Aug. 10, 1990, at 7 ¶ 13(b), 10 ¶ 13(d)2.3, and Flysheet #1 ¶ 1, Intervenors' Exhibit No. 19 at 505, 508, and 518. *Cf.* Excerpts on TRUMP-S from the Minutes of the January 10, 1990 Meeting of the Isotope Use Subcommittee of the Reactor Advisory Committee at 1, appended as Attachment 3 to Licensee's Exhibit No. 9, Affidavit of Dr. Susan M. Langhorst Regarding Adequacy of Safety Procedures, Administrative Controls and Licensee's Personnel Qualifications (the results of the TRUMP-S experiments "would be a significant development for . . . countries where waste disposal options are limited (such as Japan, which is funding this project)"). However, the contract does cross-reference the DOE restrictions: "[t]he [University] must comply with the applicable DOE regulations regarding sensitive nuclear technology . . . ." Support Services Agreement between Rockwell International Corp. and the University of Missouri, dated Aug. 10, 1990, at Flysheet #1 ¶ 1, Intervenors' Exhibit No. 19 at 518.

But in adjudications, the issue for decision is not whether the Staff performed well, but whether the license application raises health and safety concerns. *See* CLI-95-1, 41 NRC at 121-22.

4. Environmental Report

The Intervenors offer three objections to the Commission's ruling that the University did not need to submit an environmental report as a part of its applications: (1) the Commission allegedly failed to address the fact that the use of students to perform the TRUMP-S experiments is inherently riskier than the use of professionals to conduct those experiments, and that, under such circumstances, the Commission's regulations required the University to file an environmental report; (2) the TRUMP-S experiment, by its very nature, allegedly increases the risks at MURR, thereby necessitating the submittal of an environmental report; and (3) the Commission allegedly ignored its own requirement that an environmental report be filed for projects involving plutonium processing. Petition at 12-13, *referring to* CLI-95-1, 41 NRC at 103-04.

As noted in our earlier opinion, however, the NRC's rules categorically exclude from NEPA review all amendments, such as the TRUMP-S amendments, for the "use of radioactive materials for research and development." *See* 41 NRC at 124, *discussing* 10 C.F.R. § 51.22(c)(14)(v). The purpose of an environmental report is to inform the Staff's preparation of an Environmental Assessment ("EA") and, where appropriate, an Environmental Impact Statement ("EIS"). *See, e.g.*, 10 C.F.R. § 51.45(c) ("[t]he environmental report should contain sufficient data to aid the Commission in its development of an independent analysis").[7] Where (as here) Staff is categorically excused from preparing an EA or EIS, a licensee need not submit an environmental report. *See National Institutes of Health*, DD-95-5, 41 NRC 227, 235 (1995).[8]

As noted in CLI-95-1, the Intervenors could have sought a waiver of the categorical exclusion here upon a showing that it did "not serve the purposes for which the regulation was adopted." 10 C.F.R. § 2.1239(b), *cited in*

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[7] The Commission imposed the regulatory requirements regarding submittal of "environmental information" (of which an environmental report is one kind) for the express purpose of implementing section 102(2) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2) (which requires the preparation of EAs and/or EISs). *See* 10 C.F.R. § 51.41 ("[t]he Commission may require an applicant . . . to submit such information to the Commission as may be useful in aiding the Commission in complying with section 102(2) of NEPA"). *Cf.* 10 C.F.R. § 51.40 (encouraging applicants to consult with NRC Staff before submitting environmental reports or other environmental information).

[8] Although the above analysis is sufficient to dispose of all three of the Intervenors' arguments regarding the absence of an environmental report from the University's applications, we also note that the Intervenors fail to address either our reasons for concluding that the use of graduate students poses no significantly increased risk to public health and safety (CLI-95-1, 41 NRC at 103) or our lengthy explanation of why we do not consider the Alpha Lab to be a plutonium processing plant (*id.* at 124-27).

CLI-95-1, 41 NRC at 125 n.70. The Intervenors quibble over how CLI-95-1 described the waiver provision, *see* Petition at 18-19 n.3, but fail to explain why our rules prevented them from arguing that the categorical exclusion for research ought not apply to the TRUMP-S project.

5. *Allegedly Inconsistent Treatment of NUREGs and Regulatory Guides*

The Intervenors assert that the Commission relied on its own NUREGs and Regulatory Guides only when they supported the Commission's position, but refused to abide by them when they demonstrated that the licensee failed to meet the standards set forth in those documents. Petition at 7-8.

When determining issues of public health and safety, the Commission has the discretion to use the best technical guidance available, including any pertinent NUREGs and Regulatory Guides, as long as they are germane to the issues then pending before the Commission. However, the Commission's decision to look to such documents for technical guidance in no way contradicts the Commission's rulings (elsewhere in CLI-95-1) that NUREGs and Regulatory Guides are advisory by nature and do not themselves impose legal requirements on either the Commission or its licensees. A licensee is free either to rely on NUREGs and Regulatory Guides or to take alternative approaches to meet legal requirements (as long as those approaches have the approval of the Commission or NRC Staff). *See* CLI-95-1, 41 NRC at 97-98, 100-01.

6. *Allegedly Inconsistent Treatment of New Emergency Planning Regulations and NUREG-1140*

The Intervenors allege that the Commission acted inconsistently in deciding that new emergency planning regulations were inapplicable to this proceeding yet also relying extensively on NUREG-1140, the basis for those regulations, in its examination of the dose and dispersion issues. Petition at 22-24, *referring to* CLI-95-1, 41 NRC at 101-03 and 143-52, respectively.

In fact, no such inconsistency exists. The fact that the emergency planning regulations had not yet gone into effect when the University filed its applications did not preclude the Commission from seeking technical guidance from a document (NUREG-1140) that provided the scientific foundation for those regulations. As noted in the preceding section of this Order, the Commission, in deciding issues of public health and safety, is free to use any NUREGs and

Regulatory Guides as guidance, as long as they are germane to the issues then pending before the Commission.[9]

7. *Allegedly Inconsistent Treatment of the Emergency Plan*

The Intervenors argue that the Commission inconsistently held both that the MURR Emergency Plan applies to the Alpha Laboratory (CLI-95-1, 41 NRC at 129) and that certain parts of the Plan cannot, by their terms, apply to the Alpha Laboratory and must be changed (*id.* at 130). Petition at 19-20. In so arguing, the Intervenors ignore the fact that emergency plans can have different subsections that apply to different portions of a facility. The Commission sees no inconsistency in declaring that the Plan as a general matter applies to all laboratories in the MURR facility (including the Alpha Lab) but requires a few modifications to reflect the addition of the Alpha Lab to the facility. This is analogous to our approving a license application subject to conditions.

8. *Alleged Inconsistent Treatment of Licensee's Emergency Procedures*

The Intervenors criticize the Commission for relying on the Reactor Emergency Procedures to "downplay" the risks associated with the TRUMP-S Project and at the same time ruling that the Intervenors have no right to demand that the license amendment application be accompanied by emergency procedures specifically applicable to the TRUMP-S Project. Petition at 20. Again, the Commission sees no inconsistency here. The Commission is free to consider a licensee's general emergency procedures when resolving risk issues, regardless of the fact that our regulations do not require the licensee to submit specific emergency procedures as part of an application.[10]

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[9] In a related argument, the Intervenors question the meaning of the Commission's statement that NUREG-1140 underwent "the public notice and comment process." Petition at 23 n.4, *citing* CLI-95-1, 41 NRC at 148. The Commission's statement was intended to indicate that the dose calculation methodology set forth in NUREG-1140 was a subject of the notice and comment process which ultimately led to the promulgation of the two new Emergency Planning regulations. *See* Final Rule, "Emergency Preparedness for Fuel Cycle and Other Radioactive Material Licensees," 54 Fed. Reg. 14,051, 14,052 (Apr. 7, 1989) ("The conservative accident scenarios and dose calculations which formed the technical basis for the proposed rule are described in . . . NUREG-1140"); Draft Report for Comment, NUREG-1140, at 1 (June 1985) ("This [draft] regulatory guide evaluates the need for a proposed rule to require additional emergency preparedness for certain . . . material licensees"). Although the above-cited draft of NUREG-1140 was originally published in June 1985, it was reprinted April 1987, contemporaneously with the issuance of Notice of Proposed Rulemaking, 52 Fed. Reg. 12,921 (Apr. 20, 1987), which led to the issuance of the Final Rule cited above.

[10] The Intervenors also question how the Commission can conclude that the procedures are adequate when the Commission has not seen more than the few procedures that the Intervenors submitted into the record. Petition at 20. As we indicated in CLI-95-1, the adequacy of the emergency procedures is not even before us in this proceeding. 41 NRC at 141 n.101.

9. Alleged Need for a TRUMP-S Emergency Plan

The Intervenors argue that the Commission erred in ruling that the existence of the University's Reactor Emergency Plan made it unnecessary for the licensee to submit a plan dealing specifically with emergencies arising from the TRUMP-S Project. Petition at 10-12, *citing* CLI-95-1, 41 NRC at 129-43. Intervenors assert that the Reactor Emergency Plan addresses types of accidents (fuel damage events) quite different from those that could arise from the TRUMP-S Project (a fire resulting in release of extremely fine radioactive particulates into the air). Petition at 11.

The Intervenors also assert that the primary risk from a reactor accident comes from gamma-emitting radionuclides, and thus the primary emergency equipment identified in the Reactor Emergency Plan are gamma-detection devices. They argue that, by contrast, the principal risk from a TRUMP-S accident comes from alpha-emitting materials for which the Reactor Emergency Plan's equipment would be useless, so that there would be no way to measure radioactive contamination after an accident. *Id.* at 11-12. Finally, the Intervenors note that the Reactor Emergency Plan has never been the subject of a contested proceeding in which its adequacy has been tested. *Id.* at 12.

None of this is persuasive, however. First, the Intervenors have failed to rebut or even address the Commission's reasons, stated in CLI-95-1, for believing that it would be unwise as well as unnecessary to have two emergency plans for the MURR facility. *See* 41 NRC at 130. Second, they do not discuss the modifications that CLI-95-1 ordered in the MURR Emergency Plan to take account of the TRUMP-S project. *See* 41 NRC at 130, 154-56, 172. Third, they disregard the MURR Emergency Plan's explicit references to laboratory accidents.[11] Fourth, they fail to address the Commission's explanation, set forth in CLI-95-1, of the University's capacity to detect alpha emitters. *See* 41 NRC at 131-32. Finally, the fact that the MURR Emergency Plan was not the subject of a hearing prior to this proceeding raises no inference that it is inadequate.

10. Amount, Storage, and Disposal of Transuranic Material

In CLI-95-1, the Commission imposed, as a condition on the TRUMP-S license amendments, the requirement that the University use no more than 1 gram of any actinide at any one time in the TRUMP-S experiments. *See* 41 NRC at 148 n.114, 173. Because 1 gram of Am-241 contains 3.43 curies, the

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[11] For instance, the Emergency Plan specifies that "[c]ontainment, *laboratory building* and site boundary airborne radioactivity and radiation levels sha[l] be determined by stack monitor, area radiation monitors and portable monitoring equipment . . . ." Emergency Plan, *supra* note 1, at 14 §§ 5.2.2, 5.3.2 (emphasis added). *See also* Intervenors' Exhibit No. 19 (University document entitled "Emergency Plan for TRUMP-S at MURR") at 420 ("The MURR emergency plan contains a description of the elements of advance planning to cope with emergency situations connected with the operation of MURR, *including experiments conducted within the MURR facility*").

Commission based its dose/dispersion analysis on the assumption that only 1 gram of Am-241, or 3.43 curies, would be involved in a fire. The Intervenors raise three objections to this ruling.

a. Presumption That Licensee Complies with Condition

The Intervenors first object to the Commission's decision to base its dose/dispersion analysis on the 1-gram (or 3.43 curies) license condition, and point to the fact that the license permits possession and use of 10 curies of Am-241. Petition at 21. They ask us to base our findings on the assumption that the University will violate an explicit and unambiguous condition of its license. We see no reason to do so, and the Intervenors have offered no persuasive argument why we should. They point out that license conditions sometimes are violated, which is undoubtedly true, but here it seems unlikely in the extreme that a University violation of the 1-gram restriction would happen to coincide with a fire in the MURR facility. We decline to rest our fire safety analysis on that hypothetical possibility.

b. Consideration of Actinides When in Storage

Second, the Intervenors object to the Commission's decision that a fire analysis need not consider americium and plutonium when they are in storage. They argue that people enter and exit the storage facility frequently and that the storage facility is a place "where various flammable events may occur." Petition at 21.[12]

We disagree. The actinides are placed in storage before and after being used in experiments. Prior to using the actinides in experiments, the University stores the actinide material in the reactor fuel vault, a highly secure facility housed inside the reactor containment building.[13] The Intervenors have referred us to no record evidence (and have provided us with no other reason) that would convince us that this reactor fuel vault is a location "where various flammable events may occur" or where the likelihood of a fire is at all credible. After use, the actinides are placed in the archived storage vault, which, as the record

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[12] The Intervenors offer a similar argument in support of their objection to our affirmance of the prehearing exclusion of their waste disposal issue. Petition at 3. They assert that the current absence of a licensed disposal facility for transuranic or mixed waste means that the wastes from the TRUMP-S Project will remain on the University campus indefinitely, perhaps for decades, and that the waste storage facility is designed neither for handling such wastes nor for safely storing them indefinitely. This is of particular concern to the Intervenors because these wastes allegedly "would be kept with other flammable materials for decades in a setting where a fire is a serious likelihood." *Id.* at 27. For the reasons set forth in CLI-95-1, 41 NRC at 167-68, we reject this argument. *See also* discussion of archived storage vault, *infra*, at pp. 400-01.

[13] Licensee's Exhibit No. 4, Affidavit of Chester B. Edwards, Jr., Regarding the Adequacy of Alpha Laboratory Equipment, Fire-Related Features in the Alpha Laboratory and General Basement Area, and the Storage and Transfer of Actinide and Archived Materials, dated Nov. 13, 1990, at 10 ¶42.

reflects in detail, is a facility in which extensive shielding is provided by lead, steel, concrete, and earth. *See id.* at 13-14 ¶¶61-65. Again, the Intervenors' petition offers no evidence that this facility would fail to provide both secure storage and protection against fire.

From the description and location of the archived storage vault, we find that it is constructed of heavy noncombustible materials and is located so as to minimize the surface area potentially exposed to fire as well as to protect the vault and its contents from any fire-related building hazards. We conclude that a fire affecting the contents of the archived storage vault is not credible.

c. Alleged Storage of Actinides in Waste Facility

Third, the Intervenors assert that at the conclusion of the TRUMP-S Project, the entire TRUMP-S supply of americium and plutonium will no longer be in the storage facility but will instead be located in the waste facility, in forms far more vulnerable to fire and closer to other materials of substantial fire hazard. The Intervenors also call our attention to the flammability of the transuranics and also to the long period (allegedly years or decades) when that waste may have to sit awaiting removal to a federal disposal site. Petition at 21-22. We see no evidence in the record to support this contention. Rather, the record indicates that after the conclusion of the experiments, the University will safely store the actinides in its archived storage vault, just described, until DOE takes possession of the waste.

11. The Commission's Selection of a χ/Q Value

In CLI-95-1, the Commission rejected the Intervenors' argument that we were required to apply Regulatory Guide 1.145, dealing with accidental dispersion from nuclear power plants, to the determination of the χ/Q value for the TRUMP-S Project. The Commission chose to rely instead on the χ/Q value derived in NUREG-1140, dealing with accidental dispersion from materials license facilities. 41 NRC at 149-51. The Intervenors challenge the Commission's conclusion that Regulatory Guide 1.145 was designed to address dispersion from nuclear power plants, rather than materials facilities. They assert that all dispersions must be treated alike, regardless of the type of facility, and that Regulatory Guide 1.145 is binding on the Commission. But that Regulatory Guide's title — "Atmospheric Dispersion Models for Potential Accident Consequence Assessments at Nuclear Power Plants" — plainly indicates its limited application. Moreover, as previously noted, Regulatory Guides do not have the force of law. Thus, this claim is doubly without merit.

The Commission explained in CLI-95-1 its reasons for looking to NUREG-1140 rath.. than Regulatory Guide 1.145 in determining the χ/Q value for the

TRUMP-S project: it is more recent than the Regulatory Guide and, because it rests on a sophisticated analysis targeting materials licensees, it results in more reliable modeling of postulated accidents.[14] *See also* note 9, *supra*. We find no error in our prior analysis on this point.

12. Release Fraction

The Intervenors assert that the Commission, in its dose and dispersion calculations, was confused about the distinction between the entrainment fraction and the release fraction (RF). According to the Intervenors, the Commission cited two scientists, Schwendiman and Mishima, as measuring RFs (*citing* CLI-95-1, 41 NRC at 148-49), yet elsewhere claimed that studies on which the Intervenors' expert relied (which included those of Schwendiman and Mishima) concerned entrainment rather than RFs (*citing* 41 NRC at 148 n.116). Petition at 22-23.

We are well aware of the difference between RF and entrainment. *See* CLI-95-1, 41 NRC at 146 n.110. In concluding otherwise, the Intervenors misread CLI-95-1. On the one hand, we stated that Schwendiman and Mishima, who were cited repeatedly by both the University and the Intervenors, were also cited in NUREG-1140 when the Staff developed RFs for fires. On the other hand, *without* citing Schwendiman and Mishima, we stated that the Intervenors' "TRUMP-S Review Panel derived *much of its data* from experiments on entrainment which, as previously noted, does not equate with RF." 41 NRC at 148 n.116 (emphasis added). The two statements are not contradictory.

The Intervenors also object that the Commission did not review the dispute between them and the University regarding the correct RF value. Petition at 23. Given that the Commission had already engaged in a detailed examination of this issue in a recent rulemaking (*see* note 9, *supra*), and given further that the detailed examination was related directly to the issue at bar in this proceeding (i.e., the appropriate release fraction for a materials license facility), we saw no need to "reinvent the wheel" by examining it again in this proceeding.

13. Other Matters

The Intervenors accuse the Commission of describing the TRUMP-S Project inaccurately. Petition at 6. This argument is inappropriately raised on reconsideration. Petitions for reconsideration are akin to appeals from Initial Decisions

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[14] Contrary to the Intervenors' suggestion, dispersion is not simply dispersion, regardless of the type of facility from which the radionuclides come. Petition at 24 n.5. Accidents at different types of facilities would result in the release of different physical forms of radionuclides and would consequently lead to quite different dispersions. (In fact, the Intervenors make this very point in another section of their Petition, at 11.) Airborne concentrations of particulates (the physical form of *all* plutonium and/or americium that might be released in a TRUMP-S accident) would be less than airborne concentrations of gases (the form of *most* radioactive material released from a reactor accident), due to plume depletion from gravitational settling, turbulent diffusion, impaction with the ground, and scavenging of material during precipitation. NUREG/CR-3657, SAND84-0186, "Preliminary Screening of Fuel Cycle and Byproduct Material Licenses for Emergency Planning" at 36 (March 1985).

— they lie only from unfavorable actions by the Commission, not from *dictum* or factual background sections in an order with which the party disagrees but which have no operative effect. *See* CLI-95-1, 41 NRC at 119 n.63. We therefore need not rule on this argument.[15]

Finally, the Intervenors reiterate other previously raised contentions regarding decommissioning, personnel qualifications, TRUMP-S safety procedures, proper interpretation of the Commission's procedural regulations, the order of evidentiary submissions, the required degree of specification for special nuclear material,[16] the adequacy of Staff's safety review, the need for a licensee to submit a safety analysis, and the need for Staff to prepare a safety evaluation report, an environmental impact statement, and/or an environmental assessment. Petition at 3-4, 5-6, 8-10, 13-19. Because the Commission already has fully considered and rejected all such arguments (CLI-95-1, 41 NRC at 95-96, 98 n.12, 99-101, 104-13, 116-18, 121-28, 168-71), we see no point in revisiting them here.

III. CONCLUSION

The University's petition for reconsideration is ***granted*** to the extent described above, and the Intervenors' petition for reconsideration is ***denied.***

It is so ORDERED.

For the Commission*

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 22d day of June 1995.

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[15] Moreover, as for two of the three alleged inaccuracies, the Intervenors are not asserting that CLI-95-1 contains false information, but only that the Commission did not include certain information that the Intervenors would have preferred to see in the "Background" section of that order. As to the Intervenors' third point (i.e., the Commission misspoke in suggesting that the United States currently has high-level disposal facilities in operation), they are correct, but our mistaken characterization of the current status of TRU waste (it is actually stored on site) is inconsequential to the merits of our decision.

[16] The Intervenors incorrectly suggest that the Commission failed to consider Professor Warf's arguments on this issue. The Commission considered the Intervenors' position on this issue, as set forth in Intervenors' Exhibit No. 20, Declaration of TRUMP-S Review Panel, dated Dec. 24, 1990, at 11-14 — a document that Dr. Warf coauthored. CLI-95-1, 41 NRC at 104 *et seq.* Insofar as Professor Warf's views are incompatible with the conclusions of CLI-95-1, the Commission disagrees with his views.

*Commissioner Jackson did not participate in this decision.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
E. Gail de Planque
Shirley A. Jackson

In the Matter of **Docket Nos. 50-424-OLA-3**
50-425-OLA-3

GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant,
Units 1 and 2) **June 22, 1995**

The Commission denies Georgia Power Company's motion that in effect requests the Commission to stay indefinitely inquiries being conducted by the NRC Office of Investigation.

ADJUDICATORY BOARDS: EFFECT OF OTHER PROCEEDINGS

It is not unusual in our practice for an adjudicatory proceeding and an OI investigation on the same general subject matter to proceed simultaneously, even where issues may overlap.

ENFORCEMENT ACTIONS: STAY OF PROCEEDINGS

Despite this practice, the Commission has been willing to stay a parallel proceeding if a party shows substantial prejudice.

ORDER

A. Introduction

The Georgia Power Company ("GPC") has filed before the Commission a "Motion for Order Preserving the Licensing Board's Jurisdiction" that in effect requests the Commission to stay indefinitely inquiries being conducted by the NRC Office of Investigations ("OI"). The GPC motion asks us to direct OI "not to pursue investigations related to discovery or pleadings" in an ongoing Licensing Board proceeding. GPC Motion at 1. The NRC Staff and the Intervenor, Allen Mosbaugh, oppose the stay. We deny the motion for the reasons stated below.

B. Standard of Review

It is not unusual in our practice for an adjudicatory proceeding and an OI investigation on the same general subject matter to proceed simultaneously, even where issues may overlap. This allows the NRC to use all of its tools for carrying out its broad responsibilities to protect public health and safety. Recognizing this practice, the Commission in 1984 issued a Policy Statement that established guidelines for OI to make *in camera, ex parte* disclosures to the Licensing Board when information gathered during the course of a separate ongoing investigation is potentially relevant to an adjudicatory proceeding. *See* Statement of Policy; Investigation, Inspection, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984).

Despite this practice, the Commission has been willing to stay a parallel proceeding if a party shows substantial prejudice, e.g., where discovery in an adjudicatory proceeding would compromise an OI investigation (the converse of the situation in this case). *See Oncology Services Corp.*, CLI-93-17, 38 NRC 44 (1993). Here, however, GPC's objections do not rise to the level of substantial prejudice required to enjoin an ongoing, customary agency activity.

C. Discussion

Despite GPC's suggestions to the contrary, the Licensing Board and OI appear to be fully aware of their respective roles and are following the Commission's policy statement requiring (in some instances) OI-Board consultations. OI is keeping the Licensing Board informed of its investigations through Board Notifications and through an earlier *in camera, ex parte* Staff briefing. Moreover, to the extent that the OI inquiry does cover matters that could theoretically also be the focus of an inquiry by the Licensing Board into conduct of GPC counsel,

the Licensing Board has not initiated such an inquiry. We see no evidence that it would be hindered in doing so because of the OI investigation.

GPC asserts that the OI investigation will provide an avenue for Mr. Mosbaugh to obtain affidavits that were refused him on privilege grounds during discovery in the adjudicatory proceeding. In support of this assertion, GPC argues that Mr. Mosbaugh will be able to use the OI proceeding to circumvent the Licensing Board's privilege ruling. However, beyond conclusory assertions, GPC has offered no explanation how Mr. Mosbaugh would get these affidavits from OI. Indeed, as we understand it, GPC already has refused to give the affidavits to OI, claiming that they are privileged. We are aware of no direct or obvious route by which the affidavits would pass from GPC to OI to Mr. Mosbaugh. Therefore, the threat of Mr. Mosbaugh obtaining the privileged affidavits through the OI investigation is speculative, to say the least, and does not provide a legitimate reason for staying the OI investigation.

Finally, GPC has failed to demonstrate any other form of prejudice to its interest arising from the parallel OI investigations and the adjudicatory proceeding. GPC claims that the adjudicatory proceeding diverts its employees' and counsel's attention away from the adjudicatory hearing. But this is true in *any* case of parallel proceedings and is insufficient, in and of itself, to halt either one of the proceedings. Here, GPC has offered little to demonstrate that the OI investigation actually has interfered with GPC's ability to make its case in the adjudicatory hearing.

GPC's motion provides only one specific example of interference. GPC asserts that OI requested an interview with a GPC employee who also is a witness in the adjudicatory proceeding. However, according to the Staff, the interview never took place and OI has agreed voluntarily not to interview the employee until after he has testified in the pending hearing. *See* NRC Staff Response to Georgia Power Company's Motion for Order Preserving the Licensing Board's Jurisdiction, at 4 (May 17, 1995).

CONCLUSION

In summary, GPC has failed to meet its heavy burden of showing that continuing the OI investigation would create substantial prejudice to GPC's participation in the proceeding now under way before the Licensing Board. Accordingly,

GPC's Motion for Order Preserving the Licensing Board's Jurisdiction is DENIED.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 22d day of June 1995.

Atomic Safety and Licensing Boards Issuances

LICENSING BOARDS

ATOMIC SAFETY AND LICENSING BOARD PANEL

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James P. Gleason,* *Deputy Chief Administrative Judge (Executive)*
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Dr. George F. Tidey

**Permanent panel members*

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Jerry R. Kline, Special Assistant

In the Matter of **Docket No. 030-30266-ML-Ren**
(ASLBP No. 95-701-01-ML-Ren)
(Byproduct Materials License
No. 30-23697-01E)

INNOVATIVE WEAPONRY, INC.
(Albuquerque, New Mexico) **June 1, 1995**

In a proceeding involving an appeal from the NRC Staff's denial of a requested renewal of a byproduct materials license, in which (based on a transfer of the license to a new entity) the Staff rescinds its prior license renewal denial, the Presiding Officer grants the Staff's unopposed motion to terminate the proceeding.

RULES OF PRACTICE: MOOTNESS

Although the NRC is not strictly bound by the mootness doctrine, its adjudicatory tribunals have generally adhered to the mootness principle.

MEMORANDUM AND ORDER
(Terminating Proceeding)

This proceeding involved an appeal from the NRC's denial of the requested renewal of License No. 30-23967-01E by Innovative Weaponry, Inc. (IWI-New

Mexico), together with a Demand for Information (DFI) directed to Mr. Barry Mowry, IWI-New Mexico's President. Pending resolution of IWI-New Mexico's appeal, the license remained in effect in accordance with 10 C.F.R. § 30.36. On November 15, 1994, the Presiding Officer issued a Notice of Hearing (59 Fed. Reg. 60,025 (Nov. 21, 1994)).

This proceeding is subject to the hearing procedures set forth in 10 C.F.R. Part 2, Subpart L (§ 2.1201 *et seq.*) In accord with 10 C.F.R. § 2.1231, the NRC Staff on December 19, 1994, forwarded the hearing file for the proceeding to the Presiding Officer and the parties.

On December 23, 1994, the NRC Staff moved (without opposition) to hold the proceeding in abeyance until January 31, 1995, pending its consideration of new information (an application to transfer control of the license from IWI-New Mexico to Innovative Weaponry, Inc., of Nevada (IWI-Nevada)). The Presiding Officer granted the Staff's request on January 5, 1995. The Presiding Officer later granted further Staff unopposed requests to hold the proceeding in abeyance (Orders dated February 27, 1995, March 17, 1995, and May 3, 1995).

On May 4, 1995, the Staff filed a Motion to Terminate the Proceeding. It states that on April 3, 1995, the Staff transferred the license from IWI-New Mexico to IWI-Nevada and that on April 4, 1995, it rescinded both the denial of the renewal application and the DFI. Before filing this motion, the Staff sought additional information from IWI-Nevada and Mr. Mowry. The Staff received a response by letter dated April 21, 1995. Based on this information, the Staff concludes that the issue raised by the hearing request — i.e., whether there was an adequate basis for the Staff's denial — is moot because the license has been transferred, the denial has been rescinded, and Mr. Mowry is no longer involved with activities authorized by the transferred license.

Although, as the Staff observes, the NRC is not strictly bound by the mootness doctrine, its adjudicatory tribunals have generally adhered to the mootness principle. *See, e.g., Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 185 (1993). I find no reason not to do so here and to terminate this proceeding on mootness grounds.

Mootness exists when there is no reasonable expectation that the matter will recur and that interim relief or intervening events have eradicated the effects of the allegedly unlawful action. However, even when an agency order no longer has effect, as here, a matter may not be moot if it is "capable of repetition, yet evading review." *Id.* Although the Staff indicates that it may in the future issue a new DFI to Mr. Mowry (Motion at 5 n.5), that possibility does not vitiate the applicability of mootness principles to this proceeding. Mr. Mowry could

assert any legal rights he may have were such a DFI to be issued.[1] Similarly, although the Staff has apparently not yet granted the renewal of the license to IWI-Nevada, that organization would have a right to appeal any such denial. (As set forth earlier, the transferred license remains in effect pending final Staff action on the renewal. 10 C.F.R. § 30.36.) That being so, the mootness principle applies and the exception is not here applicable.

The Staff states that it has not sought to determine whether the other parties to this proceeding might have objection to its termination motion. Because the time for response to the motion has elapsed and we have received no response, I am treating the Staff's motion as unopposed and, for the reasons stated, I am *granting* it. This proceeding is hereby *terminated.*

This Memorandum and Order is effective upon issuance and will constitute the final action of the Commission thirty (30) days after issuance, unless any party petitions the Commission for review pursuant to 10 C.F.R. § 2.786 or the Commission takes review *sua sponte.* Any petition for review must be filed within fifteen (15) days of service of this Memorandum and Order.

IT IS SO ORDERED.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 1, 1995

[1] The Staff claims that hearing rights do not attach to a DFI, and on November 30, 1994, it filed a Motion for Clarification and Reconsideration of my November 15, 1994 Memorandum and Order granting the request of IWI-New Mexico for a hearing, together with the associated Notice of Hearing. The Staff's various deferral motions sought to hold the entire proceeding in abeyance, including my action on its reconsideration motion. By granting the Staff's termination request, I am declining to take any further action on the Staff's reconsideration motion.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Frederick J. Shon
James H. Carpenter

In the Matter of

Docket Nos. 030-05980-ML&ML-2
030-05982-ML&ML-2
(ASLBP Nos. 92-659-01-ML
92-664-02-ML-2)

SAFETY LIGHT CORPORATION,
et al.
(Bloomsburg Site Decommissioning and License Renewal Denials)

June 8, 1995

In this Memorandum the Licensing Board sets forth its reasons for previously granting an NRC Staff motion for summary deposition on the issue of whether the agency has regulatory jurisdiction over USR Industries and its four wholly owned subsidiaries.

RULES OF PRACTICE: LAW OF THE CASE

Although in some circumstances the law of the case doctrine may be a rule of practice, that doctrine only applies to successive stages of the *same* proceeding. *See* 1B *Moore's Federal Practice* ¶0.404[1] (2d ed. 1995).

RULES OF PRACTICE: LAW OF THE CASE

That doctrine provides that once the law of the case is determined on appeal by a superior tribunal in a proceeding, the inferior tribunal lacks the authority to depart from it in that same proceeding. Any change in the law of the case must be made by the superior tribunal itself or by a yet higher authority to which the superior tribunal owes obedience. *See* 1B *Moore's Federal Practice* ¶0.040[1] (2d ed. 1995).

RULES OF PRACTICE: COLLATERAL ESTOPPEL

The doctrine of collateral estoppel long has been held applicable to administrative adjudicatory determinations. *See United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Commissioner v. Sunnen*, 333 U.S. 591 (1948). *See also* 4 K. Davis, *Administrative Law Treatise* § 21:2 (2d ed. 1983). And issue preclusion is a settled principle of NRC adjudicatory proceedings. *See, e.g., Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974).

RULES OF PRACTICE: COLLATERAL ESTOPPEL

As in judicial proceedings, the purpose of the administrative repose doctrine "is to prevent continuing controversy over matters finally determined and to save the parties and boards the burden of relitigating old issues." *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986).

RULES OF PRACTICE: COLLATERAL ESTOPPEL

In contrast to the doctrine of res judicata that is applicable only when a final judgment is rendered, "for purposes of issue preclusion . . . 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Restatement (Second) of Judgments* § 13 (1980).

RULES OF PRACTICE: COLLATERAL ESTOPPEL

For a prior determination of an issue to be sufficiently firm to support issue preclusion, the earlier decision should not be "avowedly tentative." *Restatement (Second) of Judgments* § 13 cmt. g (1980). Additionally, the fact "that the parties were fully heard, that the court supported its decision with a reasoned opinion,

[and] that the decision . . . was in fact reviewed on appeal are factors supporting the conclusion that the decision is final for the purpose of preclusion." *Id.*

RULES OF PRACTICE: COLLATERAL ESTOPPEL

Finally, even when all of the requirements for applying the doctrine of collateral estoppel are met, the doctrine still must be "applied with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factor in the particular case." *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216 (1974).

RULES OF PRACTICE: COLLATERAL ESTOPPEL

"To produce absolution from collateral estoppel on the ground of changed factual circumstances, the changes must be of a character and degree such as might place before the court an issue different in some respect from the one decided in the initial case." 1B *Moore's Federal Practice* ¶0.448, at III.-642 (2d ed. 1995).

RULES OF PRACTICE: COLLATERAL ESTOPPEL

Similarly, "a change or development in the controlling legal principles" or a "change [in] the legal atmosphere" may make issue preclusion inapplicable. *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948).

RULES OF PRACTICE: COLLATERAL ESTOPPEL

Whatever other public policy factors may outweigh the application of the doctrine of collateral estoppel, the correctness of the earlier determination of an issue is not among them. Simply stated, issue preclusion does not depend on the correctness of the prior decision. *United States v. Moser*, 266 U.S. 236, 242 (1924); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1204 (D.C. Cir. 1986). *See* 1B *Moore's Federal Practice* ¶0.441[2], at III.-519 to III.-521 (2d ed. 1995).

RULES OF PRACTICE: SUMMARY DISPOSITION

Because the Commission's summary disposition rules borrow extensively from Rule 56 of the Federal Rules of Civil Procedure, it has long been held that federal court decisions interpreting and applying like provisions of Rule 56 are appropriate precedent for the Commission's rules. *See, e.g., Cleveland Electric*

Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977).

RULES OF PRACTICE: SUMMARY DISPOSITION

Pursuant to Rule 56(c) and by analogy the Commission's summary disposition rule, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

RULES OF PRACTICE: SUMMARY DISPOSITION

Similarly, summary judgment, as well as summary disposition, "will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

RULES OF PRACTICE: SUMMARY DISPOSITION

Stated otherwise, "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. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

ATOMIC ENERGY ACT: INTERPRETATION

The plain language of section 184 of the Atomic Energy Act is exceptionally broad and the reach of the provision is all encompassing. The title of section 184, "Inalienability of Licenses," only reinforces its breadth inasmuch as "inalienable" means "incapable of being alienated, surrendered or transferred." *Webster's Third New International Dictionary* 1140 (1971).

ATOMIC ENERGY ACT: INTERPRETATION

The reach of the statute is manifest from its comprehensive language, and section 184 contains absolutely no limiting provisions. The terms "voluntarily or involuntarily, directly or indirectly" and the phrase "through transfer of control of any license to any person" are words and phrases of inclusion indicating a congressional intent to expand the scope of the section to the maximum extent.

ATOMIC ENERGY ACT: INTERPRETATION

On its face, section 184 not only broadly prohibits all manner of transfers, assignments, and disposals of NRC licenses, but also all manner of actions that have the effect of, in any way, directly or indirectly, transferring actual or potential control over a license without the agency's knowledge and express written consent.

ATOMIC ENERGY ACT: SECTION 184

As a consequence of the merger and the merger agreement, the new parent corporation now possessed the ultimate authority to exercise dominion over the corporate affairs of its wholly owned subsidiary, including the power to direct, manage, and regulate all activities concerning the material license. The very definition of a subsidiary corporation is one that is controlled by another corporation by reason of the latter's ownership of at least a majority of the shares of stock. *Black's Law Dictionary* 1428 (6th ed. 1990). *See* 18 Am. Jur. 2d *Corporations* § 35 (1985).

ATOMIC ENERGY ACT: SECTION 184

If the statutory proscription against the transfer of control of NRC licenses could be avoided by the expedient of a corporate restructuring, complex or otherwise, then section 184 would be a toothless tiger.

ATOMIC ENERGY ACT: SECTION 184

As long as section 184 and any other regulation or license condition is not violated, a material licensee may transfer its assets without notifying and obtaining the agency's permission.

ATOMIC ENERGY ACT: SECTION 184

When the transfer of control of NRC licenses is involved, section 184 requires the agency's express written consent, not just that the agency be notified.

ATOMIC ENERGY ACT: SECTION 184

The language of the Atomic Energy Act itself demonstrates that Congress placed no importance on the corporate form in enacting section 184.

ATOMIC ENERGY ACT: SECTION 184

The inclusion of a "corporation" in the definition of a "person" in section 11s of the Atomic Energy Act and the use of the latter term in the inalienability of licenses provision in section 184 indicates that Congress intended a corporation to be treated in the same manner as all other entities.

ATOMIC ENERGY ACT: SECTION 184

Corporate law principles, which are applicable only to the corporate form of organization, are entitled to no consideration under section 184 and do not thwart NRC regulatory jurisdiction over a corporation for violating that provision.

ATOMIC ENERGY ACT: SECTION 184

Congress, in effect, already has pierced the corporate veil for corporate violators of section 184 by definitionally including corporations in the inalienability of licenses provision. *See Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1093 (1st Cir.), *cert. denied*, 464 U.S. 961 (1983).

ATOMIC ENERGY ACT: SECTION 184

It long has been established that the fiction of corporate separateness of state-chartered corporations will not be permitted to frustrate the policies of a federal statute.

ATOMIC ENERGY ACT: SECTION 184

The statutory frustration principle permits the NRC to disregard the corporate form and impose liability on the parent corporation shareholder for the obligations of its subsidiary. And, this is true whether or not its intent was to avoid the statutory prohibition of section 184 for "intention is not controlling when the fiction of corporate entity defeats a legislative purpose." *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 717 (7th Cir. 1965).

MEMORANDUM

In LBP-94-41, we approved a settlement agreement of the five pending *Safety Light* proceedings and terminated all proceedings.[1] Among those proceedings

[1] 40 NRC 340 (1994).

was the consolidated proceeding involving a challenge to (1) an NRC Staff denial of renewal applications for two byproduct material licenses originally issued to the United States Radium Corporation ("Radium Corporation") and (2) a Staff order setting the criteria and schedule for decommissioning the radioactively contaminated Bloomsburg, Pennsylvania manufacturing site formerly owned by that licensee.[2] In an earlier bare bones order in the consolidated proceeding,[3] we granted the Staff's motion for summary disposition[4] on the question whether the agency has regulatory jurisdiction over USR Industries, Inc., and its four wholly owned subsidiaries, USR Lighting Products, Inc., USR Chemical Products, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc. ("USR Companies"), each of which the Staff named as among the responsible parties in the license renewal denials and decommissioning order.[5] Although the consolidated proceeding was settled along with the other *Safety Light* proceedings, this Memorandum ties up a loose end and sets forth fully our reasons for granting the Staff's summary disposition motion and concluding that the NRC has regulatory jurisdiction over USR Industries and its four wholly owned subsidiaries.

I. ISSUES PRESENTED

Section 184 of the Atomic Energy Act broadly prohibits the direct or indirect transfer, assignment, or disposal of any NRC license through the transfer of control of the license to any person without the Commission's knowledge and written consent.[6] Here, the Staff's summary disposition motion squarely raises the question whether the 1980 transmogrification of the publicly held Radium Corporation into a wholly owned subsidiary of a newly created USR Industries and the subsequent conveyance by that subsidiary (after a corporate name change) of all the nonregulated assets of Safety Light (nee Radium Corporation) to four other freshly formed subsidiaries, followed, in turn, by the conveyance of all the stock in those four subsidiaries to USR Industries, all without the Commission's written consent, contravenes section 184 so that the NRC has jurisdiction over USR Industries and the other USR Companies. In addition, the Staff's motion raises a second narrower question whether the

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[2] The site is located on approximately 10 acres along the north bank of the Susquehanna River about 2.5 miles from Bloomsburg, Pennsylvania.

[3] Order (Aug. 13, 1993) (unpublished).

[4] *See* NRC Staff's Motion for Summary Disposition as to NRC Jurisdiction Over USR Industries, Inc., USR Lighting, Inc. [sic], USR Chemical Products, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc. (June 30, 1992) [hereinafter Staff's Motion].

[5] The agency's regulatory jurisdiction over the current named licensee of the two subject material licenses, Safety Light Corporation, was not contested in the consolidated proceeding.

[6] *See* 42 U.S.C. § 2234. The language of section 184 is repeated in the Commission's regulations, 10 C.F.R. § 30.34(b).

later 1982 sale of Safety Light by its parent (USR Industries) to the subsidiary's operating management, again without the Commission's written consent, runs afoul of section 184 so as to give the agency jurisdiction over USR Industries. USR Industries and the other USR Companies contest the NRC's assertion of jurisdiction over them and oppose the summary disposition motion.[7]

The identical jurisdictional issues involving the same corporate restructuring were also presented in two other separate proceedings that also were before us. Those proceedings involved Staff enforcement orders against, *inter alia*, USR Industries and the other USR Companies as responsible parties for these same byproduct material licenses. Because of the identity of the jurisdictional issues in these separate enforcement proceedings with the consolidated proceeding, we start by briefly outlining the procedural history of all the proceedings. We then set forth the licensing history of the byproduct material licenses at issue. Next, we describe the corporate restructuring of Radium Corporation and the subsequent sale of Safety Light. We treat these matters in detail because the parties' summary disposition filings give only a brief glimpse of these events, while many of the details helpful to a full understanding of the corporate makeover are buried in the stack of documents filed as exhibits. Having unearthed the details of the transactions, we include them in this Memorandum so that in the event these issues arise again, the history of these events will appear in one place. Finally, we turn to the arguments of the parties.

II. PROCEDURAL HISTORY

The instant consolidated proceeding began with the Staff's February 7, 1992 letter denying the long-pending license renewal applications of Safety Light for byproduct material licenses No. 37-00030-02 (the "02" license) and No. 37-00030-08 (the "08 license"). As grounds for its action, the Staff declared that the licensees had failed to comply with the requirements of 10 C.F.R. § 30.35 regarding decommissioning funding for the Bloomsburg facility.[8] On the same date, the Staff issued an order directing the licensees to satisfy the

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[7] *See* Answer of USR Industries, Inc., USR Lighting [sic], Inc., USR Chemical Products, Inc., USR Metals, Inc., U.S. Natural Resources, Inc., and Safety Light Corporation in Opposition to the NRC Staff Motion for Summary Disposition (Aug. 15, 1992); Statement of Disputed Facts; Exhibits to the Statement of Disputed Facts in Support of the Answer of USR Industries, Inc., *et al.*, in Opposition to the NRC Staff Motion for Summary Disposition (Aug. 15, 1992) [hereinafter collectively USR Industries' Answer].

Even though licensee Safety Light does not contest the agency's assertion of jurisdiction over it, Safety Light nevertheless has joined USR Industries and the other USR Companies in opposing the Staff's Motion for Summary Disposition. This seeming incongruity is permitted under the Commission's summary disposition rule, which provides that "*[a]ny other party*s may serve an answer supporting or opposing the motion [for summary disposition]." 10 C.F.R. § 2.749(a) (emphasis supplied).

[8] Letter from Robert M. Bernero, Director, Office of Nuclear Material Safety and Safeguards ("NMSS"), to Safety Light Corporation, et al. (Feb. 7, 1992).

decommissioning requirements of 10 C.F.R. § 30.36 in accordance with certain prescribed criteria and a specified schedule.[9]

In describing the contamination at the site, the order stated:

> Although the Bloomsburg site has not been characterized completely, the record indicates that not only are buildings and equipment contaminated with strontium-90 (Sr-90), cesium-137 (Cs-137), and other radionuclides, but outdoor areas (i.e., soil, groundwater) are also contaminated at levels that render the site unsuitable for unrestricted release. Since 1982, Oak Ridge Associated Universities (ORAU), Chem-Nuclear Systems, Inc. (CNSI), and the Department of Energy's Radiological and Environmental Sciences Laboratory (RESL) have conducted limited studies, analyzed soil and water samples from various locations on the site, or both. Most of the samples exhibit radioactive contamination, and the levels of contamination of many samples are higher than those the NRC considers acceptable for release for unrestricted use. ORAU measured the highest concentrations found in individual samples from the site: ORAU measured 15.4 picocuries Sr-90 per gram of soil, 631 picocuries Cs-137 per gram of soil, and 62,000 picocuries Sr-90 per liter of groundwater, which are approximately 3, 42, and 7760 times the appropriate release criteria, respective [sic]. Despite the limited number of samples and the limited nature of studies conducted to date, the ORAU, CNSI, and RESL data show that there is widespread contamination on site which must be remediated before the site can be released for unrestricted use.[10]

Previewing their arguments now before us, in their joint answer to both Staff actions, USR Industries and the other USR Companies denied that they ever had been NRC licensees or possessed any NRC-regulated materials and that the agency lacked jurisdiction over them.[11] After considerable procedural skirmishing, the proceedings encompassing the license renewal denials and the decommissioning order were consolidated.[12] The Commission reversed that Board determination, but it nevertheless ordered the two proceedings consolidated.[13]

At the time the Staff denied Safety Light's license renewal applications, there were two agency enforcement proceedings already pending against, *inter alia*, Safety Light, USR Industries, and the other USR Companies. Those proceedings involved a number of material licenses, including the 02 and 08 licenses, and were before identically constituted licensing boards that were treating the proceedings together. The first proceeding began with a March 16, 1989 immediately effective Staff order directing the licensees to prepare and implement a plan for characterizing and decontaminating the Bloomsburg

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[9] 57 Fed. Reg. 6136 (1992).

[10] *Id.* at 6136-37 (footnotes omitted).

[11] Answer and Request for Hearing (Feb. 27, 1992) at 3.

[12] LBP-92-13A, 35 NRC 205 (1992). *See also* Memorandum and Order (Granting in Part and Denying in Part NRC Staff's Motion of April 13, 1992) (June 1, 1992); Chief Administrative Judges' Memorandum (Designating Presiding Officer) (June 9, 1992); LBP-92-16A, 36 NRC 18 (1992).

[13] CLI-92-13, 36 NRC 79 (1992). *See also* Commission Order [Granting Interlocutory Review] (July 2, 1992).

site.[14] The second proceeding began with an August 21, 1989 Staff order directing the licensees to establish and fund a $1,000,000 trust to ensure the adequate characterization of the extent and type of radioactive contamination at the Bloomsburg site.[15] In providing that the August 21 order also should be immediately effective, it stated that the licensees'

> failure to provide assurance of adequate funding to complete implementation of a satisfactory site characterization plan, the uncertainty regarding the nature and exent [sic] of contamination at the Bloomsburg facility, and the statements made by the Corporations' principal officers as to the limited financial resources available for site characterization let alone decontamination, demonstrate that additional actions are immediately needed to protect public health and safety. . . .[16]

In the enforcement proceedings, USR Industries and the other USR Companies moved to dismiss the March 16 and August 21 orders on the ground that the NRC lacked regulatory jurisdiction over them. The Licensing Board, as then constituted, denied the licensees' motion holding that the NRC had jurisdiction over USR Industries and the other USR Companies. With respect to the complex 1980 corporate transactions, the Board concluded that

> [t]here was no notice given of the transfers of controlling interest in the stock which could involve transfers of ownership and control of a license, requiring NRC written consent. In short, there was not even an attempt to comply with the mandatory requirements regarding "transfer of control of any license" upon written consent by the NRC after securing full information. The statute requires a full, fair disclosure to be made by licensees of actions involving the transfer or control of licenses, so that the NRC can make an informed judgment whether such actions are in accordance with the Atomic Energy Act. Clearly financial and other considerations related to decontamination of the site of licensed nuclear byproduct activities could and should be reviewed by the NRC in fulfilling its statutory responsibilities. However, the NRC never had an opportunity to review the effect of the significant changes in the licensed corporation because of the nondisclosure of the facts by the parties to this proceeding. As a result of noncompliance with the statutory requirements, the transfers of control of the licenses by corporate restructuring were invalid as to the NRC which is obligated by statute to disregard them.[17]

Similarly with regard to the 1982 sale by USR Industries of its subsidiary Safety Light, the Board determined that

> there was no affirmative disclosure of changes in 100% stock ownership and transfer of control over licenses, and no written consent by the NRC pursuant to the statutory mandate. The prohibitions against unapproved transfers of control of licenses enacted by Congress

[14] 54 Fed. Reg. 12,035 (1989).
[15] 54 Fed. Reg. 36,078 (1989).
[16] *Id.* at 36,079.
[17] LBP-90-7, 31 NRC 116, 128 (1990) (footnotes omitted).

> cannot be ignored or avoided by licensees or by the NRC itself. The attempted transfers of ownership and control by the USR Companies were ineffective to eliminate NRC jurisdiction over the succeeding entities because the transfers were in violation of statutory requirements. The strong public policy established by Congress cannot be defeated or eroded by using corporate forms to shield licensees from their obligations to protect the public health and safety. USR Industries remain[s] responsible for decontaminating the Bloomsburg site under the licenses, and the NRC has jurisdiction over them to compel compliance in this enforcement proceeding.[18]

Upon interlocutory review, the now defunct Atomic Safety and Licensing Appeal Board determined that the 1982 sale of Safety Light by USR Industries contravened section 184 of the Atomic Energy Act and it affirmed the Licensing Board's ruling that the agency had jurisdiction over USR Industries.[19] The Appeal Board specifically left open, however, the question whether the agency had jurisdiction over USR Industries' four wholly owned subsidiaries as a result of the 1980 corporate restructuring.[20]

Immediately after this Licensing Board was established to hear the challenges of Safety Light, USR Industries, and the other USR Companies to the Staff's denials of the license renewal applications for the 02 and 08 licenses and the Staff's decommissioning order, the Licensing Board presiding over the enforcement proceedings was reconstituted so all the proceedings were before identically constituted Boards.[21] Thereafter, we decided to proceed with the consolidated proceeding on the license renewal denials and the decommissioning order and, in effect, hold the proceedings involving the enforcement orders in abeyance. The enforcement proceedings were not consolidated with the proceeding on the license renewal denials and the decommissioning order. We took this step in an effort to hold only one trial instead of three because of the likelihood that the two Staff enforcement orders would become moot in the event we upheld the Staff's denial of the license renewal applications and sustained the Staff's decommissioning order. In turn, this approach minimized the expenditure of the licensees' limited assets on legal fees and litigation expenses in circumstances where those assets were needed for the costly cleanup of the Bloomsburg site.[22] We then provided the Staff with the opportunity to file the motion for summary disposition on the jurisdictional issues.[23]

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[18] *Id.* at 128-29.
[19] ALAB-931, 31 NRC 350 (1990).
[20] *Id.* at 368-69.
[21] 57 Fed. Reg. 11,343 (1992).
[22] *See* LBP-92-16A, 36 NRC at 19-21.
[23] Tr. at 89-90.

III. CHRONICLES

A. Licensing History

Radium Corporation employed naturally occurring radioisotopes in its business long before the enactment of the Atomic Energy Act of 1954. With the advent of the Atomic Energy Commission's (AEC) licensing authority under that act, Radium Corporation received its first license to possess and use byproduct material at its Bloomsburg, Pennsylvania site on March 16, 1956. That license, No. 37-30-1, authorized Radium Corporation to possess and use up to 1 curie of actinium-227 "[f]or preparation of sealed sources for experimental use within the laboratory and for resale to AEC licensed users."[24] Shortly thereafter, on June 20, 1956, the AEC issued the 02 license to Radium Corporation.[25] That license replaced the initial license, which was then canceled. The 02 license entitled Radium Corporation to possess and use at its Bloomsburg site substantial quantities of any byproduct material with an atomic number between 3 and 83 for "RESEARCH AND DEVELOPMENT as defined in [original] Section 11(q) Atomic Energy Act of 1954" and for "PROCESSING FOR REDISTRIBUTION to AEC licensed users."[26] At the top of the first page of the 02 license, as in the case of Radium Corporation's initial license and all subsequent licenses, the license stated, *inter alia*, that "[t]his license shall be deemed to contain the conditions specified in Section 183 of the Atomic Energy Act of 1954, and is subject to all applicable rules, regulations, and orders of the Atomic Energy Commission now or hereafter in effect and to any conditions specified below."[27] In turn, section 183(c) provides that "[n]either the license nor any right under the license shall be assigned or otherwise transferred in violation of the provisions of this Act."[28]

Since its issuance to Radium Corporation, the 02 license has been renewed and amended frequently. In addition, Radium Corporation received a number of other byproduct material licenses for Bloomsburg site activities such as the manufacture of self-luminous sources and the application of tritiated luminous paint to timepiece hands and dials,[29] but none of these licenses is involved in the consolidated proceeding. As pertinent here, Radium Corporation applied again to renew the 02 license on April 25, 1969.[30] That renewal application sought

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[24] Staff's Motion, Exh. 1, License No. 37-30-1 (Mar. 16, 1956).

[25] As originally issued, the 02 license was designated License No. 37-30-2 but in subsequent years the NRC's license numbering system was changed so that the license now carries the number 37-00030-02.

[26] Staff's Motion, Exh. 2, License No. 37-30-2 (June 20, 1956).

[27] *Id. See generally* 10 C.F.R. § 34.34(a).

[28] 42 U.S.C. § 2233(c).

[29] *See, e.g.*, Staff's Motion, Exh. 3, License No. GL-122 (May 16, 1962) (subsequently No. 37-00030-10G); *id.*, Exh. 4, License No. 37-30-7 (Apr. 16, 1965) (subsequently No. 37-00030-07E).

[30] *Id.*, Exh. 6, Application for Byproduct Material License (Apr. 25, 1969).

authorization to possess the byproduct material with atomic numbers between 3 and 83 then at the Bloomsburg site for "[d]econtamination, clean-up and disposal of areas previously used for research, development and processing under this license" and "[d]istribution to authorized recipients of material of value that are [sic] not radioactive scrap."[31] In a letter accompanying the renewal application, Radium Corporation also requested that a new license be issued to authorize the remainder of the activities it wished to continue at the Bloomsburg site that were not already covered by its other licenses, in addition to a short-term renewal of the 02 license "to allow for completion of decontamination and disposal in areas which were used for processing under this license."[32]

In response to this renewal application, the AEC issued amendment 36 to the 02 license on August 5, 1969, renewing it until July 31, 1970. The amendment authorized Radium Corporation to possess any byproduct material in the contaminated facilities and equipment at the Bloomsburg site for the purpose of "[d]econtamination, clean-up and disposal of equipment and facilities previously used for research, development, and processing under this license."[33] On the same date, the AEC also issued the 08 license to Radium Corporation authorizing it to possess and use at the Bloomsburg site substantial quantities of a number of radioisotopes for, *inter alia*, "[p]rocessing for distribution to authorized recipients" and "[r]esearch and development as defined in 10 CFR 30.4(q)."[34] Since 1970, the 08 license has been amended several times, the last time on January 8, 1987.[35] The 08 license has remained in effect past its stated expiration date of December 31, 1987, pursuant to the Commission's regulations allowing license continuation pending agency action on a timely renewal application and a final decision on the challenge to the Staff's February 7, 1992 denial of the renewal applications.[36]

After several additional license renewals, Radium Corporation once again applied to renew the 02 license on June 7, 1977.[37] Just over a year later on June 9, 1978, the Staff wrote to Radium Corporation requesting that "you supplement your application with a detailed report concerning the status of your decontamination efforts."[38] Specifically, the Staff directed that the report

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[31] *Id.* at 1.

[32] *Id.*, Exh. 2, Letter from O. L. Olson, Director, Nuclear Division, United States Radium Corporation, to Robert E. Brinkman, Isotopes Branch, U.S. Atomic Energy Commission (Apr. 24, 1969) (filed as a supplement to Exh. 2 by the Staff on Oct. 23, 1992).

[33] *Id.*, License No. 37-00030-02, Amendment 36 (Aug. 5, 1969).

[34] *Id.*, Exh. 7, License No. 37-00030-08 (Aug. 5, 1969).

[35] USR Industries' Answer, Exh. 16, License No. 37-00030-08, Amendment 10 (Jan. 8, 1987). *See* 57 Fed. Reg. at 6136.

[36] *See* 10 C.F.R. § 30.37(b).

[37] Staff's Motion, Exh. 2, Application for Byproduct Material License (June 7, 1977).

[38] *Id.*, Letter from Frederick Combs, Radioisotopes Licensing Branch, Division of Fuel Cycle and Material Safety, to United States Radium Corporation, Attn: J. David McGraw (June 9, 1978).

"identify those areas which are still contaminated and the types and quantities of contamination in those areas, provide a description of your current program for surveying these areas and surrounding environs, and outline your plan for completing decontamination of this facility."[39] Radium Corporation responded in an October 23, 1978 letter stating "[e]nclosed is the information you requested in your letter of June 9, 1978. Specific operations are scheduled only through June of 1979. At this time, a complete evaluation of survey results collected will be carried out to determine further operations."[40]

The report enclosed with Radium Corporation's October 23, 1978 letter, which was entitled "Decontamination Program[,] U.S. Radium Corporation[,] Bloomsburg Facility," contained two parts. Part I, labeled "Present Status," began with a preface stating that

> [t]he purpose of the plant survey was to identify, to the best of our ability, the status of the entire plant site. The survey was not designed to determine the full extent of any contamination found in a specific area, but rather to determine what areas or buildings did have any significant levels of contamination, and a rough estimate of the work and equipment needed to carry out such decontamination. This type of survey was sorely needed because records of the early history of radioactives [sic] operations on the site (1948-1956) were incomplete.[41]

The report then briefly described the status of twenty-six numbered areas of the Bloomsburg site. For example, with respect to "Area #9 — Silo" the report states that "[t]he silo was used solely for remote storage of certain types of high-level sources. Contamination is basically background; however, a thorough survey has not been conducted."[42] With respect to "Area 11 — Personnel Office" the report states that

> [i]n the basement of the former personnel office is an old well of some sort that was apparently used for waste disposal purposes. No records are available as to what was disposed of in this well — by whom, why or when. It apparently has a concrete cap. Radiation levels over the cap are 0-0.25 mR/hr beta-gamma.[43]

Part II of the report was labeled "Proposed Schedule for Further Study and Decontamination Operations" and began with a brief preface stating that

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[39] *Id.*

[40] *Id.*, Letter from Terry D. Brown, Nuclear Operations Manager, United States Radium Corporation, to Frederick Combs, U.S. Nuclear Regulatory Commission (Oct. 23, 1978).

[41] *Id.*, Decontamination Program, U.S. Radium Corporation, Bloomsburg Facility (undated).

[42] *Id.*

[43] *Id.*

> [b]ased upon the site contamination status contained in Part I of this program, a tentative schedule for the decontamination program has been developed covering the next nine months. It will be modified by considerations such as weather conditions and survey results.
>
> In June of 1979, a schedule for the next twelve months will be developed, based upon new survey results and any other new information available.[44]

The preface was followed by a schedule that detailed the decontamination steps and further surveying Radium Corporation would conduct from October through December 1978 for eight of the areas at the Bloomsburg site and the actions it then would take from January through June 1979 for five other areas at the site.[45]

Following receipt of Radium Corporation's report, the NRC issued amendment 40 on January 25, 1979, renewing the 02 license until February 29, 1984.[46] Like the earlier licenses, amendment 40 authorized Radium Corporation to possess the byproduct material contaminating the facilities and equipment at the Bloomsburg site for the purpose of "[d]econtamination, cleanup, and disposal of equipment and facilities previously used for research and development under this license."[47] In addition, amendment 40 included new license conditions 13 and 14. Condition 13 stated that "[a] report of status and schedule of work for the 12 months [sic] period commencing July 1 shall be submitted no later than July 1."[48] Condition 14 provided that "the licensee shall possess and use [the] licensed material [described in the license] in accordance with statements, representations, and procedures contained in . . . [the] application dated June 7, 1977 as amended October 23, 1978."[49] This was the status of the 02 and 08

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[44] *Id.*

[45] *Id.*

[46] *Id.*, License No. 37-00030-02, Amendment 40 (Jan. 25, 1979).

[47] *Id.*

[48] *Id.* at 1-2.

[49] *Id.* at 2. Any ambiguity that condition 13 of license amendment 40 imposed an *annual* reporting requirement about Radium Corporation's decontamination activities at its Bloomsburg site was clarified the next year by Radium Corporation's July 17, 1980 letter commitment to the NRC. That letter from Jack Miller, Manager, Nuclear Operations, United States Radium Corporation, to John D. Kinneman, Chief, Materials Radiological Protection Section, United States Nuclear Regulatory Commission – Region I, was written in response to an NRC inspection report finding Radium Corporation's failure to file the decontamination status report an item of noncompliance. In pertinent part, Radium Corporation's letter stated:

> Further to your letter dated June 24, 1980, which we received on June 30, 1980, it appears that the single item of noncompliance resulted from an improper interpretation of Condition 13 of the above-captioned license by Mr. Terry D. Brown, former Manager of Nuclear Operations.
>
> As we advised the USNRC by the letter dated February 20, 1980 (copy attached), Mr. Brown is no longer employed by United States Radium Corporation, his former responsibilities having been assumed by the undersigned.
>
> As Manager, Nuclear Operations, I have joined Dr. John G. MacHutchin, Radiation Safety Officer, in establishing an affirmative review procedure designed to insure that proper interpretation of our license requirements is maintained and that *the status report will be submitted to the NRC annually* within the July 1 date specified.

USR Industries' Answer, Exh. 22 (emphasis supplied).

material licenses held by Radium Corporation at the time the licensee underwent major structural surgery in 1980.

B. Corporate Restructuring

By way of background, Radium Corporation was initially incorporated in Delaware in 1917 and maintained corporate offices at 170 East Hanover Avenue, Morristown, New Jersey.[50] Prior to its total restructuring in 1980, Radium Corporation was managed and operated on a highly centralized basis with three divisions: the chemical products division that manufactured luminescent phosphors; the lighting products division that produced instrument panels; and the metal products division that made specialty watch dials.[51] The metal products division was located at the Bloomsburg site and also included Radium Corporation's safety lighting products business that manufactured safety lighting products and tritiated chromatograph foils and accelerator targets — activities requiring byproduct material licenses from the NRC.[52] Before its 1980 metamorphosis, Radium Corporation also owned oil and gas interests and a number of subsidiaries including Unatco Funding Corporation and Metreal Corporation. Unatco, a Panama corporation, was formed in June 1979 to make international venture investments. Metreal, a Pennsylvania corporation, was formed in January 1979 and owned the contaminated land and buildings at the Bloomsburg site previously owned by Radium Corporation, which were leased back to the parent corporation for, *inter alia*, the safety lighting products business.[53] In addition to the Unatco and Metreal subsidiaries, Radium Corporation also owned

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[50] Staff's Motion, Exh. 8, Proxy Statement of United States Radium Corporation (May 28, 1980) and Preliminary Prospectus of USR Industries, Inc. (May 16, 1980) at 1, 21, filed as part of SEC Form S-14 Registration Statement of USR Industries, Inc. (May 16, 1980).

[51] *Id.*, Exh. 9, Proxy Statement of United States Radium Corporation and Prospectus of USR Industries, Inc. (July 11, 1980) at 14 [hereinafter Proxy Statement] filed as part of the American Stock Exchange Listing Application of USR Industries, Inc. (Feb. 11, 1981) [hereinafter AMEX Application]. Staff's Motion Exh. 9 includes, in addition to the Proxy Statement, the following documents as part of the AMEX Application that will be cited as follows: Letter from Ralph T. McElvenny, Jr., Chairman of the Board and Chief Executive Officer, United States Radium Corporation, to Stockholders (July 11, 1980) [hereinafter Stockholder Letter] and Notice of Annual Meeting (July 11, 1980); Exhibit A to Proxy Statement, Agreement and Plan of Merger (May 16, 1980) [hereinafter Merger Agreement]; and Exhibit B to Proxy Statement, Certificate of Incorporation of USR Industries, Inc. (May 14, 1980).

[52] Although Radium Corporation's July 11, 1980 Proxy Statement clearly states that the corporation only had three divisions and that the safety lighting products business was operated together with the metals products division, contemporaneous correspondence suggests that Radium Corporation sometimes indicated that the regulated safety lighting products business was another division. For example, in a July 17, 1980 letter from Radium Corporation to the NRC, the letterhead reads "United States Radium Corporation, Nuclear Products Division." The letter is signed, however, by Jack Miller in his capacity as "Manager, Nuclear Operations." USR Industries' Answer, Exh. 22. *See also id.*, Exh. 24, Letter from Jack Miller, Manager, Nuclear Operations, United States Radium Corporation, Nuclear Products Division, to Paul Guinn, United States Nuclear Regulatory Commission (Sept. 19, 1980). But in an October 14, 1980 letter from Radium Corporation to the NRC, the letterhead does not contain the "Nuclear Products Division" designation even though it is signed by Jack Miller in his capacity as "Manager, Nuclear Operations." *Id.*, Exh. 25.

[53] Staff's Motion, Exh. 9, Proxy Statement at 14.

four other nominally capitalized subsidiaries that it formed in 1979 as part of its restructuring process: USR Chemical Products, Inc., a New Jersey corporation; USR Lighting Products, Inc., a New Jersey corporation; USR Metals, Inc., a Pennsylvania corporation; and U.S. Natural Resources, Inc., a Texas corporation.[54]

Until its 1980 restructuring, Radium Corporation was a publicly held, American Stock Exchange-listed corporation directed by a four-person board of directors.[55] In October 1978, Mr. Ralph T. McElvenny, Jr., became Chairman of the Board and Chief Executive Officer ("CEO"), having been first elected to the Board in August of that same year.[56] Mr. McElvenny also owned the controlling interest in and, since 1977, was Chairman and CEO of Titan Wells, Inc., a company involved in oil and gas exploration and production that owned 26.08% of the shares of Radium Corporation's outstanding common stock.[57] Further, Mr. McElvenny was the sole director of USR Chemical Products, Inc., USR Lighting Products, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc. — the four wholly owned subsidiaries Radium Corporation formed in 1979 as part of its restructuring process.[58]

In 1980, Radium Corporation undertook the remaining steps to complete the corporate makeover that ultimately resulted in it becoming a renamed, wholly owned subsidiary of a new parent corporation. The newly named subsidiary, however, owned only those assets requiring NRC material licenses while Radium Corporation's other assets resided in four sister subsidiary corporations. In describing its restructuring plan in a letter to stockholders accompanying its 1980 proxy statement, Radium Corporation's Chairman, Mr. McElvenny, stated that, "[a]lthough the objectives of the plan are simple, the mechanics may at first seem somewhat complicated."[59] The simple objectives of the plan were then detailed in the 1980 proxy statement as follows:

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[54] *Id.*, Proxy Statement at 15; *id.*, Exhs. 12, 11, 10, 13, Certificates of Incorporation of USR Chemical Products, Inc., USR Lighting Products, Inc., USR Metal, Inc., and U.S. Natural Resources, Inc., respectively.

[55] *Id.*, Exh. 9, AMEX Application at 2; *id.*, Proxy Statement at 4.

[56] *Id.*, Proxy Statement at 7. Two other Radium Corporation directors, Brian P. Burns and Joseph G. Kostrzewa also came on the board of directors in 1978. The fourth board member, Harry J. Dabagian, President and Chief Operating Officer of Radium Corporation since September 1978, became a director in 1977, having previously served as Vice President and General Manager of the Chemical Products Division. Mr. Burns was a senior partner in one of the law firms that rendered legal services to Radium Corporation and Mr. Kostrzewa was Senior Vice President and Treasurer of Traverse Corporation, one of two companies that operated Radium Corporation's oil and gas interests. *Id.* at 5-7, 11.

[57] *Id.* at 3, 6-7.

[58] *Id.*, Exhs. 11, 12, 13, Certificates of Incorporation of USR Lighting Products, Inc., USR Chemical Products, Inc., and U.S. Natural Resources, Inc., respectively. *See also id.*, Exh. 15, Consent of Sole Director (Nov. 24, 1980) (attached to November 24, 1980 Agreement between Radium Corporation and USR Metals, Inc.).

[59] Staff's Motion, Exh. 9, Stockholder Letter.

> The objective of the merger and the transfers described above is to rearrange the business of United States Radium Corporation into a structure better suited to meet the current and future needs of the total enterprise.
>
> . . . .
>
> The restructuring is further intended to limit the risks and liabilities associated with each business of the Corporation to the assets associated with that business. Management believes that each of the Corporation'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, the Corporation 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. The Corporation's safety lighting products business is the only business of the Corporation which is licensed and regulated.[60]

The mechanics of Radium Corporation's restructuring plan — the complicated part — were also outlined in the 1980 proxy statement and an exhibit thereto entitled Agreement and Plan of Merger. First, on May 14, 1980, Radium Corporation formed another nominally capitalized subsidiary, incorporated in Delaware, named USR Industries, Inc.[61] In turn, USR Industries formed an additional nominally capitalized, wholly owned subsidiary, also incorporated in Delaware, dubbed Industries Merger Company, Inc. ("Merger Company").[62]

Thereafter, pursuant to the May 16, 1980 Agreement and Plan of Merger ("Merger Agreement") among Merger Company, USR Industries, and Radium Corporation, Merger Company merged into Radium Corporation effective August 27, 1980.[63] This union left Radium Corporation as the surviving corporation and ended Merger Company's existence. Further, under the Merger Agreement and on the effective date of the merger, each outstanding share of common stock of Radium Corporation automatically converted into a share of common stock of USR Industries, each outstanding share of common stock of Merger Company converted into a new share of common stock of Radium Corporation, and each share of common stock of USR Industries outstanding immediately prior to the merger was canceled.[64] As a consequence of these actions, Radium Corporation (the former publicly held parent corporation of USR Industries) became the wholly owned, privately held subsidiary of USR Industries.[65] In addition, the Merger Agreement called for Radium Corporation to amend its certificate of incorporation to change its name to Safety Light Corporation.[66]

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[60] *Id.*, Proxy Statement at 16-17.
[61] *Id.*, Certificate of Incorporation of USR Industries.
[62] *Id.*, AMEX Application at 3; *id.*, Proxy Statement at 16.
[63] *Id.*, Merger Agreement at A-2; *id.*, AMEX Application at 1.
[64] *Id.*, Merger Agreement at A-3; *id.*, Proxy Statement at 20.
[65] *Id.*, Proxy Statement at 12, 15-16.
[66] *Id.*, Merger Agreement at A-3.

Although the terms of the Merger Agreement changed the corporate form of Radium Corporation from a publicly held corporation to that of a wholly owned subsidiary of a new parent corporation, the merger itself effected few immediate substantive changes. Following the merger, shares of USR Industries' common stock represented the same interest in the same assets as shares of Radium Corporation common stock represented prior to the merger.[67] Similarly, the consolidated financial statements of USR Industries immediately after the merger were substantially the same as the consolidated financial statements of Radium Corporation immediately before the merger.[68] The number of authorized, issued, and outstanding shares of USR Industries common stock after the merger was the same as that of Radium Corporation before the merger.[69] Following the merger, the shareholders who previously owned Radium Corporation common stock owned the same proportion and amount of USR Industries common stock and no exchange of stock certificates was required.[70] Also, after the merger the stock options for shares of Radium Corporation stock held by the Chairman and CEO of Radium Corporation, Mr. McElvenny, and one of the directors, Mr. Burns, only could be exercised for USR Industries common stock.[71] Additionally, on the effective date of the merger, shares of Radium Corporation common stock were to be removed from listing on the American Stock Exchange and shares of USR Industries common stock were to be listed.[72]

The officers and directors of Radium Corporation at the time of the merger remained in their positions following it. In addition, the Chairman and CEO, as well as the other three Directors of Radium Corporation, initially assumed the same positions at USR Industries.[73] The certificate of incorporation and bylaws of Radium Corporation did not change because of the merger, although the Merger Agreement called for Radium Corporation to change its name to Safety Light Corporation.[74] Similarly, USR Industries' certificate of incorporation and bylaws at the time of the merger remained substantially the same as those of Radium Corporation.[75]

In contrast to changes in the corporate form of Radium Corporation that occurred with the implementation of the Merger Agreement, the substantive changes in its corporate existence occurred thereafter. The final steps in its corporate transformation involved a series of asset transfers from Radium

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[67] *Id.*, Proxy Statement at 16.
[68] *Id.* at 12.
[69] *Id.*, Merger Agreement at A-1; *id.*, Proxy Statement at 16.
[70] *Id.*, Proxy Statement at 16, 21.
[71] *Id.* at 20-21.
[72] *Id.* at 20.
[73] *Id.* at 18; *id.*, Merger Agreement at A-4.
[74] *Id.*, Merger Agreement at A-3 to A-4.
[75] *Id.*, Proxy Statement at 20.

Corporation to four of its wholly owned subsidiaries, followed by the transfer of stock in those subsidiaries, plus the stock of an additional subsidiary, to Radium Corporation's new parent, USR Industries. Specifically, in late 1980, Radium Corporation conveyed, without compensation, the entire assets of its lighting products division to its wholly owned USR Lighting Products, Inc., subsidiary. The transfer was accomplished by means of an agreement between Radium Corporation and USR Lighting Products that was executed on behalf of the former by its Chairman and CEO, Mr. McElvenny, and adopted on behalf of the latter by its sole director, Mr. McElvenny.[76] Similarly, with the exception of its NRC-regulated safety lighting products business which it retained, Radium Corporation assigned all the rest of the assets of its metal products division to its wholly owned USR Metals, Inc., subsidiary.[77] According to its proxy statement, Radium Corporation also was to transfer the assets of its chemical products division to its wholly owned USR Chemical Products, Inc., subsidiary and transfer its oil and gas interests to its wholly owned U.S. Natural Resources, Inc., subsidiary.[78]

To complete its corporate restructuring, Radium Corporation then conveyed all the shares of stock of these four subsidiary corporations, plus the shares of its wholly owned Unatco Funding Corporation subsidiary, to its new parent corporation, USR Industries.[79] These asset transfers left Radium Corporation with only its NRC-regulated safety lighting products business (regulated by the 08 license) and its wholly owned Metreal, Inc., subsidiary — the subsidiary from which it leased the contaminated land and buildings at the Bloomsburg, Pennsylvania site (regulated under Radium Corporation's 02 license). All of Radium Corporation's other assets now were the property of USR Lighting Products, USR Chemical Products, USR Metals, U.S. Natural Resources, and Unatco, which, with the stock conveyances from Radium Corporation to its new parent, were now, like Radium Corporation, wholly owned subsidiary corporations of USR Industries.

According to Mr. McElvenny, the Chairman and CEO of both USR Industries and Radium Corporation during the period of the corporate reorganization, no one at either Radium Corporation or USR Industries notified the NRC of the corporate restructuring before it occurred or asked the agency for its approval because they did not believe it was required.[80] Similarly, Mr. McElvenny also

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[76] *Id.*, Exh. 14, Agreement Between Radium Corporation and USR Lighting Products, Inc. (Nov. 24, 1980) and Consent of Sole Director (Nov. 24, 1980); *id.*, Exh. 9, Proxy Statement at 15.

[77] *Id.*, Exh. 15, Agreement Between Radium Corporation and USR Metals, Inc. (Nov. 24, 1980) and Consent of Sole Director (Nov. 24, 1980).

[78] *Id.*, Exh. 9, Proxy Statement at 15. Both of these subsidiary corporations apparently are now inactive corporations.

[79] *Id.*

[80] *Id.*, Exh. 16, Deposition of Ralph T. McElvenny at 181-82.

knew of no explicit written consent approving any of these transactions sent by the NRC to Radium Corporation or USR Industries,[81] and the NRC has never given its explicit written consent to any aspect of the corporate restructuring of Radium Corporation.[82]

Following the completion of Radium Corporation's restructuring in late 1980, Radium Corporation notified the NRC in a December 19, 1980 letter referencing the 08 license that the "United States Radium Corporation, Nuclear Products Division, has recently changed its corporate name to Safety Light Corporation."[83] The letter then stated "[a]s discussed, during one of your last plant visits, we would like to incorporate this change and the resultant operational changes in the renewal of the captioned license. As you suggested, we are re-submitting our entire renewal application in place of the one originally sent to you in 1978."[84] Thereafter, in a January 21, 1981 letter to the NRC referencing the 02 license, Radium Corporation stated that

> This is to advise you officially that, effective 24 November 1980, our Company name was changed from United States Radium Corporation to Safety Light Corporation.
>
> Our facility location is the same as before, with the exception that the mailing address has been modified to specify our actual building, rather than the general plant site. Therefore, in future, kindly address all correspondence to the following:
>
> Safety Light Corporation
> 4150-A Old Berwick Rd.
> Bloomsburg, PA 17815
>
> Our telephone number remains unchanged . . .[85]

Notwithstanding the representations in the December 19, 1980 and January 21, 1981 letters to the NRC, it was not until June 22, 1981, that Radium

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[81] *Id.* at 182-83.

[82] *Id.*, Exh. 22, Affidavit of Francis M. Costello at 7.

[83] *Id.*, Exh. 17, Letter from Jack Miller, President, Safety Light Corporation, to U.S. Nuclear Regulatory Commission (Dec. 19, 1980). This letter also appears as USR Industries' Answer, Exh. 8.

[84] Staff's Motion, Exh. 17. The discussion referenced in the December 19, 1980 letter apparently occurred during an earlier August 14, 1980 meeting between three members of the NRC Staff and four representatives of Radium Corporation when the Staff visited the Bloomsburg facility to discuss Radium Corporation's pending April 12, 1978 license renewal application for the 08 license. A subsequent NRC confirmatory letter indicated that Radium Corporation had agreed to resubmit its license application because "[t]he original application was f'ed April 12, 1978, and is now outdated (*e.g.*, user changes, pending company name change, etc.) . . . [and] [t]he management structure of the organization has changed substantially." USR Industries' Answer, Exh. 7, Letter from Paul R. Gunn, Material Licensing Branch, Division of Fuel Cycle and Material Safety, to United States Radium Corporation (Oct. 3, 1980). *See also id.*, Exh. 5, Memorandum from Myu Campbell, Materials Inspector, MRPS, for John D. Kinneman, Chief, Material Radiological Protection Section, FF&MSB (Aug. 20, 1980) re meeting between U.S. Radium Corporation and NRC Licensing; *id.*, Exh. 6, Memorandum from Michael E. Wangler, Materials Licensing Branch, to Files (undated) re prelicensing visit to U.S. Radium Corporation, License No. 37-00030-08.

[85] Staff's Motion, Exh. 18, Letter from Jack Miller, President, Safety Light Corporation, to U.S. Nuclear Regulatory Commission (Jan. 21, 1981). This letter also appears as USR Industries' Answer, Exh. 9.

Corporation's Board of Directors — now made up of three Directors — adopted a resolution changing its corporate name to Safety Light Corporation.[86] That action was followed on June 24, 1981 by USR Industries' adoption, as the sole shareholder of Radium Corporation, of a resolution consenting to the corporate name change.[87] Six months later, on December 21, 1981, Radium Corporation filed with the Office of the Secretary of State of Delaware a name change certificate of amendment to its articles of incorporation.[88]

C. Sale of Safety Light

After finalizing its subsidiary's corporate name change, USR Industries disposed of Safety Light by selling it to Lime Ridge Industries, Inc. — a Pennsylvania Corporation owned by the President and two Vice Presidents of Safety Light.[89] The sale to Safety Light's operating management was accomplished by means of a May 24, 1982 stock purchase agreement between USR Industries and Lime Ridge whereby USR Industries sold all of the issued, outstanding shares of capital stock of Safety Light to Lime Ridge for $35,000 and a promissory note for $315,000.[90] Under the explicit terms of the stock purchase agreement, no personal liability for payment of the debt attached to the Lime Ridge shareholders and Lime Ridge granted USR Industries a security interest in the shares of Safety Light by pledging the shares pursuant to an escrow agreement.[91] In turn, Safety Light guaranteed Lime Ridge's obligation and secured its guarantee by granting USR Industries a security interest in Safety Light's equipment, inventory, and accounts receivable and Lime Ridge further secured its obligation under the promissory note by granting USR Industries a similar security interest.[92] Finally, Lime Ridge agreed to merge into Safety Light within 90 days, after which the shares pledged by Lime Ridge to USR Industries would be released from escrow.[93] Prior to the execution of the May 24, 1982

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[86] Staff's Motion, Exh. 19, Unanimous Consent of Board of Directors (June 22, 1981).

[87] *Id.*, Exh. 20, Action of Sole Stockholder in Lieu of Meeting (June 24, 1981).

[88] *Id.*, Exh. 21, Certificate of Amendment (Dec. 21, 1981).

[89] *Id.*, Exh. 24, Stock Purchase Agreement (May 24, 1982). This Staff exhibit consists of a stack of 22 documents labeled "Safety Light Corporation 1982 Sale Documents." The Stock Purchase Agreement has six schedules and four exhibits and is followed by the remainder of the documents. Because most of the documents are made up of multiple pages and not all of them carry page numbers, the documents are cited by title and date and a page number has been assigned, if necessary.

[90] *Id.* at 2; *id.*, Exh. A, Promissory Note (May 24, 1982).

[91] *Id.*, Stock Purchase Agreement at 3; *id.*, Exh. B, Pledge and Escrow Agreement (May 24, 1982).

[92] *Id.*, Stock Purchase Agreement at 4; *id.*, Exh. C, Guaranty of Payment (May 24, 1982); *id.*, Exh. D, Security Agreement (May 24, 1982).

[93] *Id.*, Stock Purchase Agreement at 4-5. The agreement for the sale of Safety Light also provided that Safety Light and its subsidiary, Metreal — the lessee and owner, respectively, of the Bloomsburg site — would enter into a lease for a portion of that property with USR Metals, now the wholly owned subsidiary of USR Industries possessing the nonregulated assets of the former metals products division of Radium Corporation. *Id.* at 13, Lease

(Continued)

stock purchase agreement for the sale of all of the stock of Safety Light to its operating management, neither USR Industries nor Safety Light informed the NRC of the intended sale.[94] Similarly, neither USR Industries nor Safety Light sought the written consent of the NRC for any aspect of the transaction, and the NRC has never given its written consent to any aspect of USR Industries' May 24, 1982 sale of Safety Light to the subsidiary's operating management.[95]

Ten months after the sale of Safety Light in 1982 and some 14 months following Safety Light's January 21, 1981 letter notifying the NRC that Radium Corporation had changed its name to Safety Light, the agency responded to that correspondence by issuing amendment 42 to the 02 license.[96] The March 7, 1983 license amendment changed the name on Radium Corporation's 02 material license to Safety Light.[97] Coincidentally, the next day NRC inspectors conducted an unannounced routine inspection of the Bloomsburg site and discovered that ownership of the facility had changed. According to the September 20, 1983 report of the earlier March 8, 1983 inspection,

> [t]he inspectors learned from discussions with the licensee's management that actual ownership of the Bloomsburg facility had changed on November 24, 1980 [sic], 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.[98]

The agency's transmittal letter enclosing the inspection report also instructed Safety Light to provide

> the details of the recent change in ownership of the Safety Light Corporation, including the date of the transaction, a discussion of the reorganization which occurred when the name of

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Agreement (Apr. 1, 1982). The lease was for portions of two buildings and related rights of way, easements, and facilities at the Bloomsburg site where the metals products division of Radium Corporation had carried on its unregulated manufacturing operations. The lease was for an initial 5-year term at $416.67 per month and gave USR Metals four options to renew for successive 5-year terms with a rent increase for each term at 50% of the applicable Consumer Price Index for northeastern Pennsylvania. Lease Agreement at 1.

[94] Staff's Motion, Exh. 16, Deposition of Ralph T. McElvenny at 204-05; *id.*, Exh. 22, Affidavit of Francis M. Costello at 5; *id.*, Exh. 25, Deposition of John T. Miller at 163; *id.*, Exh. 26, Deposition of Charles R. White at 69.

[95] *Id.*, Exh. 16, at 205; *id.* Exh. 22, at 7; *id.*, Exh. 25, at 164; *id.*, Exh. 26, at 73-74.

[96] Earlier, on January 20, 1983 — exactly 2 years after Safety Light's January 21, 1981 letter notifying the agency of the name change — the NRC issued amendments to Radium Corporation's other licenses changing the name of the licensee to Safety Light. USR Industries' Answer, Exh. 10, License No. 37-00030-07E, Amendment 07 (Jan. 20, 1983); License No. 37-00030-09G, Amendment 06 (Jan. 20, 1983); License No. 37-00030-10G, Amendment 04 (Jan. 20, 1983).

[97] Staff's Motion, Exh. 2, License No. 37-00030-02, Amendment 42 (Mar. 7, 1983). This license also appears as USR Industries' Answer, Exh. 10.

[98] *Id.*, Exh. 27, Inspection Report Nos. 30-5980/83-01, 30-5981/83-01, 30-5982/83-01, 30-5335/83-01, 30-8444/83-01 (Sept. 20, 1983) at 4 attached to letter from Thomas T. Martin, Director, Division of Engineering and Technical Programs [Region I, NRC] (original signed by John D. Kinneman for Mr. Martin) to Safety Light Corporation (Sept. 22, 1983) [hereinafter Martin Letter].

the licensee changed from U.S. Radium to Safety Light Corporation on November 24, 1980, a description of the current organization of the Safety Light Corporation and a description of who is financially responsible for the ultimate decontamination of the radioactive materials buried on your property.[99]

In its letter, the NRC also instructed Safety Light to "promptly submit a report of the status and schedule for decontamination activities for the 12-month period commencing on July 1, 1983."[100]

Safety Light responded to the NRC request for information in a November 11, 1983 letter stating, in pertinent part:

1. As 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, Inc., 2203 Timerloch Place, The Woodlands TX; finalized the sale of the stock of its wholly-owned subsidiary Safety Light Corporation to a group of executive officers of Safety Light Corporation.

   The following individuals now own 100% of the stock of Safety Light Corporation: John T. Miller–President, David J. Watts–Vice President, Charles R. White–Vice President

3. Safety Light Corporation is the corporate entity which has full corporate power to carry on its business and is responsible for the properties and assets now owned and operated by it.[101]

Safety Light's November 11, 1983 letter thus clearly revealed to the agency that when Safety Light was sold to its operating management it was a subsidiary of an entity called USR Industries, Inc., a corporation theretofore unknown to the NRC. The agency nonetheless did not pursue its inquiry into the corporate lineage of Safety Light and the availability of adequate resources to decontaminate the Bloomsburg site for some 2½ years. During this prolonged interval, however, the agency did amend another of Safety Light's material licenses

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[99] *Id.*, Exh. 27, Martin Letter at 1-2. This letter also appears as USR Industries' Answer, Exh. 12.

[100] Staff's Motion, Exh. 27 at 2. At the same time that the Regional Office instructed Safety Light to provide it with the details of the sale of the company, the Chief of the Materials Section for Region I, John D. Kinneman, sent a memorandum to NRC Headquarters setting out his current understanding of the events surrounding the sale of Safety Light. The memorandum also questioned whether Safety Light had adequate resources to decontaminate the Bloomsburg site. USR Industries' Answer, Exh. 21, Memorandum from John D. Kinneman for John W. Hickey, Materials Licensing Branch, NMSS (Sept. 22, 1983). In recommending that the 02 material license should contain a schedule for decontamination of the property, Mr. Kinneman stated that "[t]he wording of License Condition No. 13, does not make it clear that the licensee has to submit an annual plan or schedule for decontamination activities." *Id.* at 2. In this regard, it should be noted that Mr. Kinneman was the addressee of Radium Corporation's July 17, 1980 letter responding to the agency's citation of the licensee (also approved by Mr. Kinneman) for failure to file an annual decontamination status report, as required by condition 13 of license amendment 40 in which the licensee committed to filing an annual status report. *See supra* note 49.

[101] Staff's Motion, Exh. 23, Letter from Jack Miller, President, Safety Light Corporation, to U.S. Nuclear Regulatory Commission (Nov. 11, 1983). This letter also appears as USR Industries' Answer, Exh. 13.

authorizing it to distribute luminous signs, although that license is not involved in this proceeding.[102] Then, on June 19-20, 1986, and again on November 12, 1986, the NRC inspected the Bloomsburg site.[103] During these inspections, the agency's inspectors requested that the licensee provide the NRC with a site plan and the location of every company occupying the site and the location and levels of contamination found by the licensee's surveys.[104] In a February 6, 1987 response, Safety Light provided the NRC with a site plan of the Bloomsburg site that detailed the contaminated areas and also showed the elaborate division of the buildings and grounds among Safety Light, its subsidiary Metreal, and their lessee, USR Metals.[105]

Although the agency inspected the Bloomsburg site in June and November 1986, the NRC did not finalize its report of that inspection until March 22, 1988.[106] It then sent the inspection report to USR Industries on April 20, 1988.[107] According to the report of the inspection, the agency found three apparent violations.[108] First, the agency determined that the failure of USR Industries and Safety Light to apprise the NRC of the sale of Safety Light and obtain prior approval of the transfer of the 02 and 08 material licenses constituted an apparent violation of 10 C.F.R. § 30.34(b). Second, the agency concluded that the licensee's failure to file an annual report of the status and schedule of site

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[102] USR Industries' Answer, Exh. 16, License No. 37-00030-09G, Amendment 08 (July 22, 1986). It should be noted that during the lengthy period in which the NRC did not further investigate Safety Light's corporate history, the Materials Licensing Branch of NMSS corresponded with Region I regarding the renewal of Safety Light's 02 material license. In an August 9, 1984 intra-agency memorandum, the Licensing Branch indicated that it had reviewed the status of Safety Light's 02 license that was then under timely renewal and stated that it now was clear that Safety Light had been sold to the current owners without any NRC review or approval. The Licensing Branch, nevertheless, recommended that Region I process Safety Light's January 27, 1984 renewal application and obtain from the licensee a decommissioning schedule. Finally, the Licensing Branch recommended that the regional office send USR Industries a letter it had drafted stating that the NRC had not received prior notice of the sale of Safety Light or approved the sale and that it was reviewing whether USR Industries might be held liable for any decontamination obligation not met by Safety Light. USR Industries' Answer, Exh. 14, Memorandum from John W.N. Hickey, Section Leader, Industrial Section, Material Licensing Branch, FC, NMSS, for John D. Kinneman, Chief, Nuclear Material Section A, Region I (Aug. 9, 1984). The regional office never sent the Licensing Branch's proposed letter, apparently because the Region I staff could not reach a consensus on the approach the agency should take toward USR Industries. USR Industries' Answer, Exh. 3, Deposition of John D. Kinneman at 66-67.

[103] Staff's Motion, Exh. 22, Affidavit of Francis M. Costello at 6; *id.*, Exh. 29, Inspection Report Nos. 030-05982/86-01, 030-05980/86-01 (Mar. 22, 1988) at 1 [hereinafter March 1988 Inspection Report], attached to Letter from William T. Russell, Regional Administrator [Region I, NRC] to USR Industries, Inc. (Apr. 20, 1988) [hereinafter Russell Letter].

[104] *Id.*, Exh. 29, March 1988 Inspection Report at 3-4.

[105] *Id.*, Exh. 28, Legend and Site Plan attached to Letter from Jack Miller, President, Safety Light Corporation to U.S. Nuclear Regulatory Commission (Feb. 6, 1987). Both before and after receiving this Safety Light response, the agency continued to issue license amendments to Safety Light's various material licenses. On January 8, 1987, the NRC issued amendment 10 to the 08 material license and on June 16, 1987, the NRC issued another amendment to Safety Light's material license authorizing distribution of luminous signs. USR Industries' Answer, Exh. 16.

[106] Staff's Motion, Exh. 29, March 1988 Inspection Report.

[107] *Id.*, Exh. 29, Russell Letter.

[108] *Id.*, Exh. 29, March 1988 Inspection Report at 2.

decommissioning work for each 12-month period since July 1, 1979, constituted an apparent violation of condition 13 of the 02 license. Third, the agency found that licensee's failure to complete decontamination of portions of the site in accordance with the schedule contained in licensee's letter of October 23, 1978, constituted an apparent violation of condition 14 of the 02 license.[109] Finally, the agency's transmittal letter included a demand for information pursuant to section 182a of the Atomic Energy Act[110] directing USR Indu: es to provide, within 30 days, sworn, written responses describing all relationships and transactions between USR Industries, United States Radium Corporation, and their successors and subsidiaries affecting the Bloomsburg site. The NRC's information demand also directed USR Industries to provide the agency with a decommissioning plan for the site, including an estimate of the cost of decommissioning, and to propose a method to ensure the availability of sufficient funds to implement the decommissioning plan.[111]

Based upon the information contained in USR Industries' response to the agency's demand for information, the Staff issued the previously described enforcement orders of March 16, 1989, and August 21, 1989, that are not part of the instant proceeding.[112] In each enforcement order the Staff named as responsible entities not only Radium Corporation and Safety Light but also USR Industries, USR Lighting Products, USR Chemical Products, USR Metals, U.S. Natural Resources, Lime Ridge, and Metreal. Subsequently, on February 7, 1992, when the Staff denied Safety Light's license renewal applications for the 02 and 08 licenses and issued the decommissioning order for the Bloomsburg site — the Staff actions before us in this consolidated proceeding — it named all of these same corporations as responsible entities.[113]

IV. PARTIES' ARGUMENTS

A. Collateral Estoppel

In its motion for summary disposition, the Staff argues that the doctrine of collateral estoppel precludes USR Industries from relitigating in the instant consolidated proceeding the issue of the NRC's regulatory jurisdiction over it because that identical jurisdictional issue was previously decided against USR Industries by the Appeal Board in ALAB-931.[114] That decision resolved the interlocutory appeal, by way of directed certification, of USR Industries and

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[109] *See supra* p. 426.
[110] 42 U.S.C. § 2232(a).
[111] Staff's Motion, Exh. 29, Russell Letter, App. B.
[112] *See supra* pp. 420-21.
[113] *See supra* pp. 419-20.
[114] Staff's Motion at 39-47.

its four wholly owned subsidiaries (i.e., USR Lighting Products, USR Chemical Products, USR Metals, and U.S. Natural Resources) from the Licensing Board's denial of the USR Companies' motion to dismiss the Staff's March 16 and August 21, 1989 enforcement orders.[115]

As previously noted, the Licensing Board in LBP-90-7 ruled that the NRC had regulatory jurisdiction over USR Industries and the other USR Companies because both the 1980 corporate restructuring of Radium Corporation and the 1982 sale of Safety Light by USR Industries violated section 184 of the Atomic Energy Act.[116] Upon the interlocutory appeal of USR Industries and the USR Companies, the Appeal Board squarely held that USR Industries' 1982 sale of its Safety Light subsidiary, without the Commission's consent, was a transfer of control of the 02 and 08 material licenses within the meaning of section 184 of the Atomic Energy Act, thereby giving the NRC jurisdiction over USR Industries for purposes of the enforcement order proceedings.[117] The Appeal Board left open, however, the issue of the agency's regulatory jurisdiction over USR Industries' four wholly owned subsidiaries that were created as part of the 1980 corporate restructuring of Radium Corporation.[118]

In its opinion in ALAB-931, the Appeal Board began its analysis with the language of section 184 of the Atomic Energy Act and posed the jurisdictional issue before it as requiring the Board to decide what constitutes "the direct or indirect transfer of a license through a 'transfer of control' of that license."[119] The Appeal Board then addressed each of USR Industries' arguments on that jurisdictional question.

Before the Appeal Board, USR Industries first asserted that the 1982 sale of Safety Light stock to three members of Safety Light's operating management was not a transfer of the license within the meaning of section 184 because of the established tenet of corporate law that the transfer of stock in a corporation does not act to transfer any of the assets of the corporation. Based on the lack of any supporting legislative history of section 184, the Appeal Board rejected this assertion, concluding there was no indication that Congress intended to incorporate that principle or any other tenet of corporate law into the section.

The Appeal Board also examined and rejected USR Industries' argument concerning the significance of the fact that section 184 speaks only to the transfer of a license. According to USR Industries, because section 184 as originally proposed would have encompassed the transfer of a *licensee*, the difference between this language and the enacted language indicated a congressional

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[115] ALAB-931, 31 NRC at 355.
[116] *See supra* pp. 421-22.
[117] ALAB-931, 31 NRC at 365-68.
[118] *Id.* at 368.
[119] *Id.* at 363.

intent not to include transactions like the 1982 sale of Safety Light stock.[120] Similarly, USR Industries argued that such a legislative intent could be found in the difference in language between section 184 and section 310(d) of the Communications Act[121] — an earlier enacted regulatory scheme on which many of the provisions of the Atomic Energy Act generally were based. The latter provision, in prohibiting transfers of Federal Communications Commission station licenses without agency permission specifically speaks of, *inter alia*, transfers of control of corporations holding licenses. In rejecting these USR Industries' arguments, the Appeal Board stated that the legislative history of section 184 of the Atomic Energy Act was silent regarding the reason for casting that section in terms of the transfer of control of the license and it concluded that

> there is no cause to believe that Congress would have desired certain transfers of total ownership of licensed radio stations to require prior agency approval in circumstances where identical transfers of total ownership in corporations holding nuclear licenses would not require such approval. Indeed, given the manifest public health and safety implications of activities under nuclear licenses, it is reasonable to assume that Congress would have been even more interested in clothing this Commission with the authority to pass advance judgment on the acceptability of transactions such as those now in issue.[122]

Having concluded that there was no congressional bar to Commission oversight of the 1982 transaction, the Appeal Board turned its attention to the question of whether that arrangement was a direct or indirect transfer of control of the licenses issued to Radium Corporation. In this regard, the Appeal Board concluded:

> [w]e discern no room for reasonable doubt that a transfer of control took place. In this regard, we find totally irrelevant the fact that, as the USR Companies stress, under corporate law, a transfer of shares of stock does not serve as a transfer of corporate assets. Apart from the absence of anything to indicate that Congress intended that doctrine to govern the application of section 184 of the Atomic Energy Act, our concern here is with the transfer of control over the licenses issued to U.S. Radium. Irrespective of whether the licenses themselves (as a corporate asset) are deemed to have been transferred when USR Industries sold its 100% interest in its Safety Light (nee U.S. Radium) subsidiary to the three individuals, it cannot be seriously maintained that the effect of the sale was not a transfer of control.
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> Before the sale, those who possessed dominion over the full range of the operations of USR Industries had the authority, if they desired to exercise it, to call the tune with respect to Safety Light's activities under the licenses by reason of Safety Light's status as a wholly-owned subsidiary. . . . This is so even though the 1982 purchasers of Safety Light also happened to be its President and two Vice Presidents. Upon consummation of the sale, USR Industries' management necessarily relinquished all right to dictate how the licensed

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[120] *Id.* at 363-64.

[121] 47 U.S.C. § 310(d).

[122] ALAB-931, 31 NRC at 364.

activities should be conducted. Rather, the full right to direct those activities — and thus to control the licenses themselves — became vested in the new owners of Safety Light. . . .[123]

In making this determination, the Appeal Board in ALAB-931 also rejected several additional arguments of USR Industries. According to USR Industries, because the same radiation safety officer and employees under the supervision of the licensee's radioisotope committee had "control" of the license and licensed activity both before and after the 1982 sale there was never a transfer of that control. The Appeal Board found that conditions contained in the 02 license designed to ensure that only qualified employees were involved with licensed activities did not place those employees in control of the license within the meaning of section 184 of the Atomic Energy Act.[124]

Finally, USR Industries argued that the NRC interpreted the concept of control in section 184 of the Atomic Energy Act differently for Part 30 material licenses than for Part 50 reactor licenses. USR Industries claimed that in initial applications for reactor licenses, unlike initial applications for material licenses, the agency requires the names, address, and citizenship of the utility's directors and officers. This difference, USR Industries claimed, was proof that the agency did not believe that control of Part 30 material licenses is vested in corporate directors and officers. In rejecting this argument, the Appeal Board stated:

No doubt, the Commission has its reasons for requiring utilities seeking to construct or to operate massive nuclear power plants to provide information that is not likewise required of a corporate applicant for a byproduct material license, which generally are of much smaller dimensions. There is, however, no cause to suppose that one of those reasons is that the Commission perceives fundamental differences in the concept of control of a Part 50 license, as compared with that of a Part 30 license. Indeed, the Commission's implementing regulations in the two Parts are identical to the extent relevant here.

In sum, although there are obvious differences between Part 30 and Part 50 licenses (and the processes necessary to obtain them), none of those differences is pertinent to the matter of where "control" of the license lies within the meaning of the Atomic Energy Act and the implementing regulations. In the instance of a corporate Part 30 or Part 50 licensee, that control is to be found in the person or persons who, because of ownership or authority explicitly delegated by the owners, possess the power to determine corporate policy and thus the direction of the activities under the license. Here, to repeat, control over the license in question thus was in the hands of USR Industries at the time of the sale of its wholly-owned Safety Light subsidiary and, upon that sale, the control was transferred to the purchasers without the NRC's consent.[125]

In its answer to the Staff's summary disposition motion, USR Industries does not directly respond to the Staff's argument that the doctrine of collateral

[123] *Id.* at 365.
[124] *Id.* at 366.
[125] *Id.* at 367 (footnotes omitted).

estoppel bars it from relitigating here the same jurisdictional issue previously decided against USR Industries by the Appeal Board in ALAB-931. Rather than confront the Staff's argument, USR Industries takes the position that the Appeal Board's jurisdictional ruling in ALAB-931 is only the "law of the case" and, therefore, we should reconsider the question of the agency's jurisdiction over USR Industries in this proceeding. In support of this proposition, USR Industries contends that because the law of the case doctrine is only a rule of practice, we have the necessary authority to reconsider the jurisdictional issue. It then argues, without any elaboration or specification, that we should exercise our discretion to revisit the issue in the instant proceeding because the Staff has submitted new facts and arguments not previously raised and USR Industries should have the opportunity to present additional evidence in response.[126] Finally, in a concluding footnote, USR Industries claims that "[f]or these same reasons, the related doctrines of collateral estoppel and res judicata should not prevent reconsideration of the issue of jurisdiction over USR Industries."[127] Citing the Commission's *Clinch River* decision,[128] USR Industries asserts that these doctrines need not apply to an administrative agency when overriding public policy interests favor relitigation of a matter. It argues that revisiting the jurisdictional issue is appropriate here in order to lay to rest the Staff's assertion that the 1982 sale of Safety Light violated section 184 of the Atomic Energy Act.[129]

USR Industries' reliance on the law of the case doctrine to avoid the preclusive effects of the Appeal Board's jurisdictional ruling in ALAB-931 is misplaced. Although in some circumstances the law of the case doctrine may be a rule of practice as USR Industries suggests, that doctrine only applies to successive stages of the *same* proceeding.[130] The instant consolidated proceeding involves the Staff's February 7, 1992 license renewal denials of the 02 and 08 material licenses and the Staff's decommissioning order of the same date. This consolidated proceeding is a separate and distinct proceeding from the enforcement proceedings in which the Appeal Board handed down ALAB-931. The latter enforcement proceedings have not been consolidated with the license renewal denials and decommissioning proceeding with which we deal here. This being so, the law of the case doctrine simply has no relevance to the current consolidated proceeding and that doctrine cannot be used as the foundation for an argument to avoid the preclusive effects of ALAB-931.

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[126] USR Industries' Answer at 27-29.
[127] *Id.* at 29 n.19.
[128] *United States Department of Energy* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 420 (1982).
[129] USR Industries' Answer at 29 n.19.
[130] *See* 1B James W. Moore et al., *Moore's Federal Practice* ¶0.404[1] (2d ed. 1995) (hereinafter *Moore's Federal Practice*).

Nonetheless, even if we assume that the instant consolidated proceeding is somehow part of the earlier enforcement proceedings in which ALAB-931 was decided, the law of the case doctrine still provides no basis for USR Industries to avoid the preclusive effects of the Appeal Board's ruling. That doctrine provides that once the law of the case is determined on appeal by a superior tribunal in a proceeding, the inferior tribunal lacks the authority to depart from it in that same proceeding. Any change in the law of the case must be made by the superior tribunal itself or by a yet higher authority to which the superior tribunal owes obedience.[131] Thus, in the posited circumstances, we would be required to follow ALAB-931 because it was rendered by a superior tribunal upon an interlocutory appeal at a previous stage of the same proceeding. Consequently, even in this assumed situation, USR Industries' argument evidences a fundamental misapprehension of the law of the case doctrine and its argument does nothing to avoid the preclusive effects of the Appeal Board's earlier ruling that the NRC has regulatory jurisdiction over USR Industries.

Further, the Staff is correct that USR Industries is barred by the doctrine of collateral estoppel from relitigating here the identical jurisdictional issue decided against it by the Appeal Board in ALAB-931. Although variously stated, one familiar formulation of the doctrine of collateral estoppel, or issue preclusion, was provided by the first Justice Harlan:

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.[132]

That doctrine long has been held applicable to administrative adjudicatory determinations[133] and issue preclusion is a settled principle of NRC adjudicatory proceedings.[134] As in judicial proceedings, the purpose of the administrative repose doctrine "is to prevent continuing controversy over matters finally determined and to save the parties and boards the burden of relitigating old issues."[135]

Agency precedents, which track judicial ones, establish that, in order for issue preclusion to apply,

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[131] *Id.*

[132] *Southern Pacific R.R. v. United States*, 168 U.S. 1, 48-49 (1897).

[133] *See United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Commissioner v. Sunnen*, 333 U.S. 591 (1948). *See also* 4 K. Davis, *Administrative Law Treatise* § 21.2 (2d ed. 1983).

[134] *See, e.g., Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974).

[135] *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986).

> the individual or entity against whom the estoppel is asserted must have been a party, or in privity with a party, to the earlier litigation. The issue to be precluded also must be the same as that involved in the prior proceeding and the issue must have been actually raised, litigated, and adjudged [by a tribunal of competent jurisdiction]. Additionally, the issue must have been material and relevant to the disposition of the first action, so that its resolution was necessary to the outcome of the earlier proceeding.[136]

Stated somewhat more succinctly, the application of the doctrine of collateral estoppel requires that we consider the questions of identity of parties, identity of issues, and issue materiality.

In the circumstances presented, the doctrine is fully applicable and USR Industries has submitted no supportable grounds to thwart its impact. Initially, however, we note that USR Industries effectively has abandoned any defense to the applicability of the doctrine with respect to the issue of the NRC's regulatory jurisdiction over USR Industries stemming from the 1982 sale of Safety Light in violation of section 184 of the Atomic Energy Act. In its summary disposition motion, the Staff met its burden as the moving party by fully briefing the issue of the applicability of the doctrine and demonstrating how each requirement of the preclusion doctrine was met. USR Industries' only response has been to ignore the Staff's argument. In such circumstances, we are under no obligation to construct USR Industries' defense for it. Rather, we justifiably may treat the legal issue as conceded by USR Industries.[137]

In any event, all of the elements for the application of issue preclusion on the question of the NRC's regulatory jurisdiction over USR Industries are present here. Turning first to the issue of party identity, USR Industries was named as a responsible party in the Staff's enforcement orders of March 16 and August 21, 1989,[138] and USR Industries requested the hearings[139] that ultimately led, upon its interlocutory appeal, to the Appeal Board's jurisdictional ruling in ALAB-931. Thus, USR Industries clearly was a party to the earlier enforcement proceedings in which the issue of jurisdiction was litigated.

With respect to the matter of identity of issues, we note that the doctrine of collateral estoppel is fully applicable to questions of jurisdiction.[140] In the instant consolidated proceeding, the question of the agency's regulatory jurisdiction over USR Industries is identical in every material respect to the jurisdictional issue that was raised, litigated, and adjudged in the enforcement

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[136] *Id.* at 536-37 (footnote citations omitted).

[137] *Cf. Shearon Harris*, ALAB-837, 23 NRC at 533-34; *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 413 (1976); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473, 476 (1975).

[138] 54 Fed. Reg. 12,035 (1989); 54 Fed. Reg. 36,078 (1989).

[139] Answer and Request for Hearing (Apr. 17, 1989) at 5; Answer and Request for Hearing (Sept. 8, 1989) at 5.

[140] *See, e.g., Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-26 (1931).

proceedings. Specifically, in its answer to the Staff's March 16 and August 21, 1989 enforcement orders, USR Industries denied that the NRC had regulatory jurisdiction over it.[141] USR Industries then affirmatively raised the issue of the agency's jurisdiction over it before the Licensing Board in a motion to dismiss the Staff orders.[142] After the Licensing Board denied its motion to dismiss,[143] USR Industries filed with the Appeal Board a motion for directed certification of the Licensing Board's action.[144] The Appeal Board accepted USR Industries' interlocutory appeal, and, in ALAB-931, affirmed the Licensing Board's ruling with respect to the agency's regulatory jurisdiction over USR Industries.[145] The Appeal Board's ruling in ALAB-931 — like the Licensing Board's initial ruling in LBP-90-7 — leaves no doubt that the issue of the agency's regulatory jurisdiction over USR Industries was raised, argued, and decided in the enforcement proceedings. Nor is there any question that under the Commission's Rules of Practice the Licensing Board and then the Appeal Board had the requisite authority to entertain and dispose of USR Industries' motion to dismiss and the subsequent interlocutory appeal on this issue.[146]

There also is no question that the issue of the NRC's regulatory jurisdiction over USR Industries was relevant and material to the eventual disposition of the enforcement proceedings. Without regulatory jurisdiction over USR Industries, the agency's enforcement orders directed to that corporation would be without force and effect. Thus, the last requisite for applying issue preclusion is fulfilled because resolution of the jurisdictional issue was necessary to the outcome of the enforcement proceedings.

Moreover, even though the Appeal Board's jurisdictional ruling in ALAB-931 was in response to an interlocutory appeal, its decision is sufficiently final to warrant imposition of the doctrine of collateral estoppel and preclude

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[141] Answer and Request for Hearing (Apr. 7, 1989) at 5; Answer and Request for Hearing (Sept. 8, 1989) at 5.

[142] Motion to Dismiss Orders Issued March 16, 1989, and August 21, 1989 (Nov. 20, 1989). *See also* 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); Reply of USR Industries, Inc., USR Lighting, Inc., USR Chemical Products, 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).

[143] LBP-90-7, 31 NRC 116 (1990).

[144] 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. 7, 1990). *See also* 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); NRC Staff's Response to Motion and 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. 28, 1990); Submission of USR Industries, Inc., Comparing Section 310 of the Federal Communication Act of 1934, as amended, to Section 184 of the Atomic Energy Act of 1954 (Mar. 7, 1990); NRC Staff Response to Submission of USR Industries, Inc., Comparing Section 310 of the Federal Communication Act of 1934, as amended, to Section 184 of the Atomic Energy Act of 1954 (Mar. 16, 1990).

[145] ALAB-931, 31 NRC 350 (1990).

[146] *See* 10 C.F.R. §§2.718, 2.721, 2.730(e); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478 (1975).

relitigating the identical issue here. In contrast to the doctrine of res judicata that is applicable only when a final judgment is rendered, "for purposes of issue preclusion . . . 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."[147] For a prior determination of an issue to be sufficiently firm to support issue preclusion, the earlier decision should not be "avowedly tentative."[148] Additionally, the fact "that the parties were fully heard, that the court supported its decision with a reasoned opinion, [and] that the decision . . . was in fact reviewed on appeal are factors supporting the conclusion that the decision is final for the purpose of preclusion."[149]

Precisely because the jurisdictional issue was resolved by the Licensing Board in the enforcement proceedings and then thoroughly tested on appeal before the Appeal Board, it is appropriate to apply the preclusion doctrine here. The Appeal Board's affirmance in ALAB-931 of the Licensing Board's jurisdictional ruling with respect to USR Industries was not tentative or preliminary but was intended as the terminative determination on the question of the agency's regulatory jurisdiction over USR Industries. The type and quality of procedures under which the jurisdictional issue was litigated before the Licensing Board in the enforcement proceedings were identical to those that would be applicable if the issue were again litigated in this consolidated proceeding. Both proceedings are formal adjudicatory proceedings conducted pursuant to Subpart G of the Commission's Rules of Practice, 10 C.F.R. Part 2. Thus, USR Industries already has had a full and fair opportunity to litigate the issue in the enforcement proceedings and there is no valid reason for giving it a second bite of the apple.

Finally, even when, as here, all of the requirements for applying the doctrine of collateral estoppel are met, the doctrine still must be "applied with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factor in the particular case."[150] In the instant case, USR Industries has not shown any changed circumstances or asserted any valid public interest factors sufficient to avoid the imposition of the preclusion doctrine to the issue of the agency's regulatory jurisdiction over it. Nevertheless, we note that USR Industries does make the bald declaration in its misplaced argument on the law of the case doctrine that "the NRC Staff has submitted new facts and arguments not previously raised with respect to jurisdiction" and, therefore, "USR Industries should not be prevented from vigorously presenting additional evidence in response."[151] USR Industries fails

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[147] *Restatement (Second) of Judgments* § 13 (1980).
[148] *Id.* cmt. g.
[149] *Id.*
[150] *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216 (1974), *remanded*, CLI-74-12, 7 AEC 203 (1974).
[151] USR Industries' Answer at 28.

to identify, much less support, what facts and arguments the Staff makes in this consolidated proceeding that were not made previously in the enforcement proceedings. Nor has it identified what new evidence it seeks to offer or explained why such evidence was not presented in support of its motion to dismiss in the enforcement proceedings. Indeed, our comparison of the filings of USR Industries and the Staff before the Licensing Board and the Appeal Board in the enforcement proceedings with the filings of the parties in the instant consolidated proceeding fails to reveal any new material facts or significant arguments that were not fairly made in the enforcement proceedings.[152]

In any event, even if the Staff asserts some new facts or arguments in support of the agency's regulatory jurisdiction in its summary disposition motion, that occurrence, without a great deal more, does not translate into the kind of "supervening, material change in factual or legal circumstances" that is necessary to vitiate imposition of issue preclusion.[153] "To produce absolution from collateral estoppel on the ground of changed factual circumstances, the changes must be of a character and degree such as might place before the court an issue different in some respect from the one decided in the initial case."[154] Similarly, "a change or development in the controlling legal principles" or a "change [in] the legal atmosphere" may make issue preclusion inapplicable.[155] No such factual or legal changes are present here and USR Industries asserts none. Furthermore, the Licensing Board's jurisdictional ruling in the enforcement proceedings was issued in response to USR Industries' motion to dismiss for lack of regulatory jurisdiction over it. By raising the jurisdictional issue in a dismissal motion before it had undertaken any discovery, USR Industries controlled not only the timing of its filing but also the extent of the factual development of the issue, so it should not now be heard to complain about newly asserted, albeit unspecified, facts and arguments by the Staff in the instant proceeding.

Finally, there are no special public interest factors present here to preclude applying the doctrine of collateral estoppel. USR Industries claims that the jurisdictional issue was wrongly decided in the enforcement proceedings and argues in a footnote that there is a "significant public policy interest in correctly determining the issue of jurisdiction."[156] USR Industries' argument is devoid of merit. Whatever other public policy factors may outweigh the application of the doctrine of collateral estoppel,[157] the correctness of the earlier determination of

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[152] *See supra* notes 142 & 144.

[153] *Farley*, ALAB-182, 7 AEC at 213.

[154] 1B *Moore's Federal Practice* ¶0.448, at III-642. *See Montana v. United States*, 440 U.S. 147, 159 (1979) (holding that change in factual setting not sufficient to create a new legal issue).

[155] *Sunnen*, 333 U.S. at 599-600.

[156] USR Industries' Answer at 29 n.19.

[157] *See, e.g., Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661, 669-70 (1944).

an issue is not among them. Simply stated, issue preclusion does not depend on the correctness of the prior decision.[158]

> The premise of preclusion itself is that justice is better served in most cases by perpetuating a possibly mistaken decision than by permitting relitigation. If relitigation were permitted whenever it might result in a more accurate determination, in the name of "justice," the very values served by preclusion would be quickly destroyed. The risks of imposing a wrong decision on later litigation, moreover, are accounted for in many ways by the wide array of limitations [on applying the doctrine].[159]

Nor is USR Industries' argument buttressed by its reliance on the Commission's *Clinch River* decision.[160] That decision involved a request for an exemption pursuant to 10 C.F.R. § 50.12 rather than a formal adjudicatory proceeding required by section 189 of the Atomic Energy Act. Whatever else that case may stand for, it is simply inapposite to the question of the applicability of the doctrine of collateral estoppel to the formal administrative adjudications involved here.

Accordingly, all the requirements for applying the doctrine of collateral estoppel are met and USR Industries is estopped from asserting in the instant consolidated proceeding that the NRC lacks regulatory jurisdiction over it. USR Industries may not relitigate here the same jurisdictional issue decided against it in ALAB-931.

B. Alternative Holding

Alternatively, even if we assume that the doctrine of collateral estoppel is inapplicable to the issue of the NRC's regulatory jurisdiction over USR Industries, we nevertheless would resolve that question precisely as the Appeal Board did in ALAB-931. Because the facts regarding USR Industries' 1982 sale of its Safety Light subsidiary, the jurisdictional issue, and USR Industries' arguments before the Appeal Board in the enforcement proceedings, are all identical to the facts, issue, and arguments here, there is no basis to distinguish ALAB-931 from the instant case. Hence, we must follow that decision as a matter of stare decisis. Equally compelling, however, is the fact that the Appeal Board's reasoning in ALAB-931 rejecting each of USR Industries' various arguments is fully explained and is correct. Thus, we not only follow that decision, but we incorporate it here to avoid repeating that same analysis. We do so notwithstanding the fact that the Appeal Board's jurisdictional ruling was

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[158] *United States v. Moser*, 266 U.S. 236, 242 (1924); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1204 (D.C. Cir. 1986). *See* 1B *Moore's Federal Practice* ¶0.441[2], at III.-519 to III.-521.

[159] 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4426, at 265 (1981).

[160] CLI-82-23, 16 NRC 412 (1982).

rendered on review of the Licensing Board's ruling on a motion to dismiss rather than, as here, on a motion for summary disposition. We are able to make this determination because, contrary to USR Industries' assertion, there are no genuine issues of material fact in dispute that preclude the grant of summary disposition on the jurisdictional issue with respect to USR Industries.

Along with its summary disposition motion, the Staff filed a statement of undisputed material facts as required by 10 C.F.R. § 2.749(a). Among its factual assertions regarding USR Industries' 1982 sale of its Safety Light subsidiary, the Staff's listing includes statements 65, 66, and 67 asserting, respectively, that none of the corporations involved in the 1982 transaction requested the NRC's prior permission or consent to transfer control of the 02 and 08 material licenses; that the NRC has never made a finding that the 1982 transaction was in accordance with section 184 of the Atomic Energy Act; and that the NRC has never given its written consent to the 1982 transaction as required by section 184.[161] The Staff supports statement 65 with the deposition testimonies of the Chairman and Chief Executive Office of USR Industries, and the initial President and Vice President of Safety Light.[162] Although this same deposition testimony also supports factual assertions 66 and 67, the Staff specifically supports these factual statements with the affidavit of the NRC's principal inspector for the Bloomsburg site who served in that capacity from 1980 through 1989.[163]

In both its answer to the Staff's summary disposition motion as well as its statement of disputed facts filed with its answer, USR Industries merely states in a footnote, without more, that it disputes the Staff's statements 65, 66, and 67.[164] Nowhere in either its answer or its statement of disputed facts, however, does USR Industries challenge these Staff statements or provide any evidence directly controverting them. Because USR Industries has neither controverted Staff statements 65, 66, and 67 as required by section 2.749(a) nor provided affidavits or other evidence demonstrating that there is a genuine issue of fact

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[161] NRC Staff's Statement of Undisputed Material Facts as to which no Genuine Issue Remains (undated) at 10.

[162] *Id.* at 10 n.37.

[163] *Id.* at 10 nn.38 & 39. *See supra* pp. 433-34 and notes 94-95.

[164] *See* USR Industries' Answer at 4 n.1; Statement of Disputed Facts (undated) at 2 n.1. In the same manner, USR Industries also disputes Staff statement 21, which asserts that there is no issue as to the NRC's regulatory jurisdiction over Metreal. *See* USR Industries' Answer at 4 n.1, 30 n.20; Statement of Disputed Facts (undated) at 2 n.1. Contrary to USR Industries' assertion, however, Staff statement 21 presents no genuine issue of disputed material fact and USR Industries cannot now for the first time challenge the agency's regulatory jurisdiction over Metreal. In response to the Staff's February 7, 1992 license renewal application denials and decommissioning order that named, *inter alia*, Metreal as a responsible party, Safety Light, USR Industries, and the other USR Companies filed, on February 27, 1992, a joint "Answer and Request for Hearing." *See* 10 C.F.R. § 2.705. The answer denied that the NRC had regulatory jurisdiction over USR Industries and the other USR Companies. The answer did not deny that the agency had jurisdiction over Metreal and the answer was not filed on behalf of Metreal. Further, Metreal did not file a separate answer denying that the NRC had regulatory jurisdiction over it. Accordingly, because no denial by, or on behalf of, Metreal ever has been filed with respect to the agency's regulatory jurisdiction over it and, under the Commissioner's Rules of Practice matters not denied are admitted, USR Industries cannot now challenge the NRC's jurisdiction over Metreal.

about those statements as required by section 2.749(b), Staff statements of material fact 65, 66, and 67 are deemed admitted.[165] Accordingly, there are no genuine issues of material fact to preclude the grant of summary disposition on the jurisdictional issue with respect to USR Industries and there is no bar to our following and adopting the Appeal Board's decision in ALAB-931.

Moreover, nothing raised by USR Industries' counsel during argument on the Staff's summary disposition motion rises to the level of sufficient evidentiary support to controvert the Staff's factual statements and demonstrate a genuine issue of disputed material fact. At oral argument, USR Industries' counsel opined that the 1983 discussion between Safety Light's management and NRC inspectors at the Bloomsburg site, where the inspectors learned of the earlier 1982 sale of Safety Light and the Staff's subsequent correspondence for over 4 years exclusively with Safety Light (and not USR Industries), amounted to an NRC finding of compliance with the requirements of the Atomic Energy Act and NRC consent to the sale of Safety Light.[166] Although this argument is inventive, the matters recited by USR Industries' counsel simply do not controvert the Staff's fully supported statement of undisputed material facts 65, 66, and 67. Even if the events asserted at oral argument are most generously considered, they fall short of the mark. While these events might amount to colorable evidence, under the standards governing summary disposition,[167] they do not constitute sufficient evidence from which a reasonable jury could find for USR

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[165] Section 2.749(a) of 10 C.F.R. provides that "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." In a second similar provision, the Commission's summary disposition rules, like the analogous summary judgment provision of Rule 56(e) of the Federal Rules of Civil Procedure, states that

> [w]hen a motion for summary disposition is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact.

10 C.F.R. § 2.749(b). Finally, and again like the provision of Rule 56(c) of the Federal Rules, the summary disposition rules provide that the Licensing Board

> 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 the 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.

10 C.F.R. § 2.749(d).

[166] Tr. at 235. *See supra* pp. 434-36.

[167] Because the Commission's summary disposition rules borrow extensively from Rule 56 of the Federal Rules, it has long been held that federal court decisions interpreting and applying like provisions of Rule 56 are appropriate precedent for the Commission's rules. *See, e.g., Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977). Thus, pursuant to Rule 56(c) and, by analogy the Commission's summary disposition rule, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Similarly, summary judgment, as well as summary disposition, "will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Stated otherwise, "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. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

Industries on these matters. Consequently, these assertions also do not create a genuine issue of disputed material fact that would preclude a grant of summary disposition in the Staff's favor.

In its answer to the Staff's summary disposition motion, USR Industries further argues that the Staff's actions after discovering the 1982 sale of Safety Light amount to consent to the stock sale. Specifically, USR Industries asserts that, after learning of the sale of Safety Light, the Staff nevertheless communicated only with Safety Light, issued various license amendments only to Safety Light, and sent inspection reports only to Safety Light after conducting inspections at the Bloomsburg site. According to USR Industries, these Staff actions amount to NRC consent to the 1982 sale of Safety Light and such consent now deprives the agency of regulatory jurisdiction over USR Industries.[168]

The operative facts of USR Industries' argument are not in dispute; nonetheless the conclusion it draws from the Staff's actions is incorrect. Section 184 of the Atomic Energy Act requires, *inter alia*, that the agency "shall give its consent in writing" to the transfer of control over any NRC-granted license. This statutory provision is clear and unambiguous. The NRC cannot ignore, waive, or change this statutory mandate. Nothing short of the agency's written permission expressly agreeing to the transfer of the 02 and 08 material licenses from USR Industries to Safety Light will comply with section 184. Contrary to USR Industries' suggestion, letters from the NRC to Safety Light on other subjects or the agency's grant of unrelated license amendments to Safety Light do not meet the consent requirement of the statute. "Implied consent," as USR Industries' counsel candidly referred to its position at one point in oral argument,[169] is insufficient under section 184 — even assuming the Staff actions could somehow be interpreted as amounting to implied consent.[170]

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[168] USR Industries' Answer at 36-38.

[169] Tr. at 235.

[170] Because the agency cannot ignore the command of section 184 that it consent in writing to all license transfers, USR Industries' additional argument that there is no basis for the agency to withhold its consent to the 1982 sale of Safety Light cannot serve as a valid defense to the agency's assertion of *jurisdiction* over USR Industries for violating the statute. Moreover, USR Industries' assertion that NRC approval of the 1982 transaction would be consistent with the agency's own guidelines and practices is based on a selective and inaccurate reading of the applicable agency policy directive and information notice. *See* Policy and Guidance Directive FC 86-2, Processing Material License Applications Involving Change of Ownership (Feb. 11, 1986) at 1, ¶3.b ("[n]ote that if the change of ownership has already occurred without written consent from NRC, it is a violation of NRC regulations"); NRC Information Notice No. 89-25: Unauthorized Transfer of Ownership or Control of Licensed Activities (Mar. 7, 1989) at 3, ¶¶2.h & 2.i ("NRC approvals for change in ownership or control may be delayed or denied if the following information, where relevant, is not included in the submittal: . . . h. [T]he presence or absence of contamination should be documented. If contamination is present, will decontamination occur before transfer? If not, does the successor company agree to assume full liability for the decontamination of the facility or site? i. A description of any decontamination plans, including financial assurance arrangements of the transferee, should be provided. . . . This should include information about how the transferee and transferor propose to divide the transferor's assets, and responsibility for any cleanup needed at the time of transfer.").

C. Agency Jurisdiction Over the USR Companies

In its motion for summary disposition, the Staff also argues that the 1980 corporate makeover of Radium Corporation violated section 184 of the Atomic Energy Act, thereby giving the NRC regulatory jurisdiction over USR Industries as well as its four wholly owned subsidiaries, USR Lighting Products, Inc., USR Chemical Products, Inc., USR Metals Inc., and U.S. Natural Resources, Inc. — the beneficiaries of all of Radium Corporation's former nonregulated assets.[171] As in the case of the Appeal Board's analysis in ALAB-931 of USR Industries' 1982 sale of its Safety Light subsidiary, the starting point for determining whether the 1980 corporate restructuring of Radium Corporation violated section 184 is the statute itself. That provision provides that no NRC 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 this [Act], and shall give its consent in writing.[172]

The plain language of this section is exceptionally broad and the reach of the provision is all encompassing. The title of section 184, "Inalienability of Licenses," only reinforces its breadth inasmuch as "inalienable" means "incapable of being alienated, surrendered, or transferred."[173] The reach of the statute is manifest from its comprehensive language, and section 184 contains absolutely no limiting provisions. The terms "voluntarily or involuntarily, directly or indirectly" and the phrase "through transfer of control of any license to any person" are words and phrases of inclusion indicating a congressional intent to expand the scope of the section to the maximum extent. Indeed, it would be difficult to write a broader or more encompassing provision. Nor is the broad reach of section 184 surprising as a component of an overall regulatory scheme that has been described as "virtually unique in the degree to which broad responsibility is reposed in the administering agency."[174] Thus, on its face, section 184 not only broadly prohibits all manner of transfers, assignments, and disposals of NRC licenses, but also all manner of actions that have the effect of, in any way, directly or indirectly, transferring actual or potential control over a license without the agency's knowledge and express written permission. And when the 1980 corporate restructuring of Radium Corporation is analyzed in this light, we have no trouble concluding that there was a transfer of control

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[171] Staff's Motion at 37-39.
[172] 42 U.S.C. § 2234.
[173] *Webster's Third New International Dictionary* 1140 (1971).
[174] *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).

over the 02 and 08 licenses without the NRC's knowledge and written consent, in violation of section 184.

In Part II.B, above, we spelled out the details of the 1980 corporate transformation of Radium Corporation and we need not repeat all of those particulars here. It suffices to note that before the 1980 restructuring, Radium Corporation was a publicly held corporation governed by a four-person board of directors, which was elected by a majority vote of the shareholders.[175] As such, Radium Corporation possessed the exclusive dominion over all activities with respect to the 02 and 08 material licenses, subject, of course, to the terms and conditions of the license and the agency's regulations.

In contrast, after its 1980 restructuring through a reverse triangular merger and the operation of the Merger Agreement, Radium Corporation no longer was a publicly held corporation that possessed exclusive control over its material licenses. Rather, Radium Corporation was a wholly owned subsidiary of a new parent corporation, USR Industries. As a wholly owned subsidiary, Radium Corporation no longer had independent authority over its corporate affairs and exclusive control over the 02 and 08 material licenses. Its previous exclusive authority independently to direct, manage, and regulate all activities with respect to its material licenses had been transferred by operation of the merger and the effect of the Merger Agreement to its new parent, USR Industries.

As a consequence of the merger and the merger agreement, the new parent, USR Industries, now possessed the ultimate authority to exercise dominion over the corporate affairs of its wholly owned subsidiary, Radium Corporation, including the power to direct, manage, and regulate all activities concerning the material license.[176] The very definition of a subsidiary corporation is one that is controlled by another corporation by reason of the latter's ownership of at least a majority of the shares of stock.[177] Here, of course, USR Industries owned 100% of the shares of stock of Radium Corporation. Similarly, the definition of a parent corporation is one that has control through stock ownership of a subsidiary corporation.[178] Thus, the 1980 corporate restructuring resulted in a transfer of control of the 02 and 08 material licenses from Radium Corporation to

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[175] At the time of the 1980 annual meeting preceding its corporate restructuring, there were 1,164,136 outstanding shares of Radium Corporation common stock and only one stockholder owned beneficially more than 5% of the outstanding shares. Titan Wells, Inc., held 26.08% of the outstanding shares while Radium Corporation's officers and directors collectively owned beneficially 35.97% of the common stock. Staff's Motion, Exh. 9, AMEX Application at 1; *id.*, Proxy Statement at 3-4.

[176] *See* ALAB-931, 31 NRC at 364 n.46, 365.

[177] *Black's Law Dictionary* 1426 (6th ed. 1990). *See* 18 Am. Jur. 2d *Corporations* § 35 (1985).

[178] *Black's Law Dictionary* 1114 (6th ed. 1990). *See* 18 Am. Jur. 2d *Corporations* § 35 (1985).

USR Industries within the meaning of section 184 of the Atomic Energy Act.[179] Because neither Radium Corporation nor USR Industries sought or received the NRC's express written consent for this transfer of control over the 02 and 08 material licenses,[180] the 1980 merger violated section 184, thereby giving the NRC regulatory jurisdiction over USR Industries as the transferee of the ultimate control over its new subsidiary's 02 and 08 material licenses.

Moreover, because the 1980 makeover of Radium Corporation transferred control over the 02 and 08 licenses in violation of the Atomic Energy Act and occurred without complying with the requirements of section 184, the corporate restructuring of the original corporate holder of the 02 and 08 licensees is void ab initio as to the NRC. An important consequence of this nugatory act is that the NRC also has regulatory jurisdiction over all of USR Industries' wholly owned subsidiaries that received the various pieces of Radium Corporation as part of the corporate restructuring.

Specifically, as a publicly held corporation, Radium Corporation was comprised of three divisions — lighting, chemical and metal products — and it owned a number of subsidiaries and other oil and gas interests. Prior to its corporate makeover, all of the assets of Radium Corporation's three divisions, as well as the worth of its wholly owned subsidiaries and its other assets, stood behind its regulatory obligations as the licensee under the 02 and 08 material licenses. Radium Corporation then underwent major surgery that radically altered its corporate form and worth.

In a nutshell, the corporate restructuring began with Radium Corporation forming four nominally capitalized subsidiaries whose names paralleled its operating divisions and its oil and gas interests. These subsidiaries were called USR Lighting Products, USR Chemical Products, USR Metals, and U.S. Natural Resources. Next, Radium Corporation formed another nominally capitalized subsidiary, USR Industries, that, in turn, formed yet another subsidiary called Merger Company. Pursuant to the terms of a Merger Agreement among Radium Corporation, Merger Company, and USR Industries, Merger Company merged into Radium Corporation leaving Radium Corporation the surviving corporation.

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[179] In its answer to the Staff's motion for summary deposition, USR Industries does not argue that there could not be a transfer of control over the 02 and 08 licenses because the same individuals served as directors of Radium Corporation both before and after the 1980 merger and also served as the initial directors of USR Industries. We note, however, that the commonality of directors has no bearing on whether the 1980 corporate restructuring resulted in a "transfer of control of any license to any person" within the meaning of section 184. This is so because section 11s of the Atomic Energy Act, 42 U.S.C. § 2014(s), defines "person" to include a corporation. Therefore, even though Radium Corporation and USR Industries had the same individuals serving on their respective boards, each corporation nevertheless is a separate entity and thus a separate "person" within the meaning of section 184. Moreover, assuming arguendo that the identity of board members somehow was material, the individuals on the Radium Corporation board after the 1980 merger wore different "hats" than those same individuals wore as members of the initial USR Industries board. Under the broad language of section 184, this difference of duties and responsibilities of the members of the respective boards after the merger would establish, at a minimum, an indirect transfer of control over the 02 and 08 material licenses.

[180] *See supra* pp. 431-32.

This merger, in conjunction with the stock conversion provisions of the Merger Agreement, left Radium Corporation as the wholly owned subsidiary of USR Industries. As a wholly owned subsidiary under the control of its new parent, USR Industries, Radium Corporation completed its restructuring through a series of asset transfers.

First, Radium Corporation conveyed, without compensation, the assets of its lighting products division to its USR Lighting Products subsidiary. Next, with the exception of its NRC-regulated safety lighting products business that it retained, Radium Corporation assigned all the other assets of its metal products division to its USR Metals subsidiary. Further, according to its proxy statement, Radium Corporation was to convey the assets of its chemical products division to its USR Chemical Products subsidiary and transfer its oil and gas interests to its U.S. Natural Resources subsidiary. As the final step in its corporate makeover, Radium Corporation transferred all the shares of stock in these four subsidiaries to its new parent thereby making each entity, like itself, a wholly owned subsidiary of USR Industries. Similarly, it conveyed the shares of its wholly owned Unatco subsidiary to USR Industries, leaving Radium Corporation with only its NRC-regulated safety lighting products business and its Metreal subsidiary from which Radium Corporation leased the contaminated land and buildings at the Bloomsburg site.

Thus, at the conclusion of its corporate restructuring, the bulk of Radium Corporation's former assets resided with its sister subsidiary corporations controlled by USR Industries. Because the corporate makeover of Radium Corporation violated section 184 by transferring control of Radium Corporation's 02 and 08 material licenses to USR Industries without the express written consent of the NRC, and the asset transfers to Radium Corporation's sister subsidiaries were an integral part of that corporate restructuring, the NRC's regulatory jurisdiction necessarily extends to the USR Companies that received Radium Corporation's assets. Any other result effectively would be at odds with the purpose and intent of section 184 by rendering the inalienability of licenses provision a nullity. If the statutory proscription against the transfer of control of NRC licenses could be avoided by the expedient of a corporate restructuring, complex or otherwise, then section 184 would be a toothless tiger. Accordingly, in the circumstances presented, the NRC also has regulatory jurisdiction over the USR Companies.

In opposing the NRC Staff's assertion of regulatory jurisdiction over it and the other USR Companies, USR Industries makes a number of arguments. Each of these arguments lacks merit.

First, USR Industries argues that the NRC lacks jurisdiction over them because Radium Corporation and its successor, Safety Light, have been the sole

consecutive licensees at the Bloomsburg site.[181] Contrary to USR Industries' argument, the fact that neither USR Industries nor any of the other USR Companies have been named as licensees on the 02 and 08 material licenses is not determinative of the NRC's regulatory jurisdiction over them. As previously explained, the agency's jurisdiction over USR Industries and the other USR Companies stems from the unapproved restructuring of Radium Corporation in violation of section 184 of the Atomic Energy Act and the role USR Industries and the USR Companies played in that corporate reorganization. Hence, it is the transfer of control of the NRC licenses without agency approval in violation of section 184 that gives the NRC regulatory jurisdiction over USR Industries and the other USR Companies and the fact that they have never been named NRC licensees is irrelevant.

For much the same reason, USR Industries' second argument also is without merit. It initially asserts that there are no regulatory requirements that an NRC material licensee give prior notice, or any notice at all, to the NRC before it spins off non-nuclear-related assets to its stockholders, which it claims is all Radium Corporation did here. Next, USR Industries states, without elaboration, that prior to Radium Corporation's restructuring the NRC did not have notice of, or reply upon, the existence of that corporation's assets in granting the material licenses and that Radium Corporation gave timely notice of its restructuring to the Securities and Exchange Commission in proxy and registration statements that were disseminated publicly. From this, USR Industries concludes that the transfer of Radium Corporation's nonregulated assets to other entities did not give the NRC jurisdiction over those entities and "[t]o conclude otherwise would lead to the unreasonable result that the NRC has regulatory jurisdiction over all entities to whom its licensees donate or contribute any nonregulated assets of value."[182]

USR Industries is correct that there is no regulatory requirement that a material licensee notify the NRC before transferring nonregulated assets to its stockholders. Such an assertion is irrelevant, however, to the question of the agency's regulatory jurisdiction over USR Industries and the other USR Companies here. It is not, as USR Industries claims, the transfer of nonregulated assets to stockholders per se that provides the basis for agency jurisdiction. As already explained, the restructuring of Radium Corporation violated section 184 by transferring control of Radium Corporation's 02 and 08 material licenses to USR Industries without the agency's express written consent as required by the Atomic Energy Act. It is that violation and the role USR Industries and the other USR Companies played in the restructuring that gives the NRC regulatory jurisdiction over them.

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[181] USR Industries' Answer at 13-14.
[182] *Id.* at 16.

Indeed, as long as section 184 and any other regulation or license condition is not violated, a material licensee may transfer its assets without notifying and obtaining the agency's permission. Nor is the fact that Radium Corporation notified the SEC through the filing of publicly disseminated proxy and registration statements relevant to the jurisdictional question. The SEC does not enforce the provisions of the Atomic Energy Act and, in any event, notice to it is not notice to the NRC. Moreover, when the transfer of control of NRC licenses is involved as occurred with the restructuring of Radium Corporation, section 184 requires the agency's express written consent, not just that the agency be notified.

As its next argument, USR Industries assets that well-settled principles of corporate law preclude the NRC from holding it or the other USR Companies responsible for the liabilities of Radium Corporation, renamed Safety Light. Specifically, it recites corporate law principles to the effect that a parent corporation is not liable for the obligations of its subsidiary and the separate existence of distinct sister corporations should not be disregarded solely because the assets of one are not sufficient to discharge its obligations. USR Industries argues that neither the Atomic Energy Act nor the agency's regulations indicate that the NRC is to reject these well-settled corporate law principles.[183]

Although USR Industries casts its argument in terms of ultimate liability and not initial regulatory jurisdiction, we already rejected USR Industries' basic argument in our earlier alternative holding that the NRC had jurisdiction over USR Industries because its 1982 sale of Safety Light violated section 184. In reaching that decision, we adopted the Appeal Board's reasoning and decision in ALAB-931.[184] As previously noted, USR Industries argued that the 1982 sale of its Safety Light stock to that corporation's operating management was not a transfer of control over the 02 and 08 licenses within the meaning of section 184 because of the established tenet of corporate law that a transfer of stock does not operate to transfer any of the corporate assets. In rejecting that argument, the Appeal Board stated that "[w]e find nothing in the legislative history of section 184 that significantly aids the USR Companies' insistence that Congress enacted the section with that principle — or any other specific tenet of corporate law — in mind."[185] That reasoning, which we already adopted, is equally applicable to the asserted principles of corporate law that USR Industries recites here. Accordingly, these asserted tenets of corporate law do not immunize USR Industries and the other USR Companies from the applicability of section 184, which provides the basis for the agency's regulatory jurisdiction over them.

Moreover, the language of the Atomic Energy Act itself demonstrates that Congress placed no importance on the corporate form in enacting section 184.

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[183] *Id.* at 17-18.
[184] *See supra* pp. 447-48.
[185] ALAB-931, 31 NRC at 363 (footnote omitted).

That provision prohibits, *inter alia*, the direct or indirect transfer of control of any license "to any person" without the Commission's express written consent. Section 11s of the Act then defines "person" in the broadest possible manner to mean

> (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.[186]

Thus, contrary to USR Industries' assertion, the inclusion of a "corporation" in the definition of a "person" and the use of the latter term in the inalienability of licenses provision indicates that Congress intended a corporation to be treated in the same manner as all other entities. It follows therefore, that USR Industries' asserted corporate law principles, which are applicable only to the corporate form of organization, are entitled to no consideration under section 184 and do not thwart NRC regulatory jurisdiction over it or the other USR Companies for violating that provision.

Further, with respect to USR Industries' arguments about its ultimate liability, Congress, in effect, already has pierced the corporate veil for corporate violators of section 184 by definitionally including corporations in the inalienability of licenses provision.[187] This being so, USR Industries' corporate separateness does not shield it against responsibility for the obligations of its former subsidiary, Radium Corporation. Such liability attaches because USR Industries was the transferee of control over the 02 and 08 licenses from the original licensee as a result of the corporate makeover of Radium Corporation that violated section 184.

In any event, we note it long has been established that the fiction of corporate separateness of state-chartered corporations will not be permitted to frustrate the policies of a federal statute. As the Supreme Court has observed:

> [A State] may chose such rules of limitation on the liability of stockholders of her corporations as she desires. And those laws are enforceable in federal courts . . . . But no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy . . . which Congress has announced.[188]

As we already have explained, USR Industries' conduct here offends the federal statutory policy against inalienability of NRC licenses. To remedy this situation,

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[186] 42 U.S.C. § 2014(s).

[187] *See Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1093 (1st Cir.), *cert. denied*, 464 U.S. 961 (1983).

[188] *Anderson v. Abbott*, 321 U.S. 349, 365 (1944) (citations omitted).

the statutory frustration principle permits the NRC to disregard the corporate form and impose liability on USR Industries, the parent corporation shareholder, for the obligations of its subsidiary, Radium Corporation.[189] And, contrary to USR Industries' assertion,[190] this is true whether or not its intent was to avoid the statutory prohibition of section 184 for "[i]ntention is not controlling when the fiction of corporate entity defeats a legislative purpose."[191]

The same principle of statutory frustration also permits the NRC to hold the other USR Companies liable for the obligations of Radium Corporation. The corporate restructuring of Radium Corporation that violated section 184 was effectuated through the instrumentalities of USR Industries and affiliated subsidiary corporations that received the bulk of Radium Corporation's pre-restructuring assets. In such circumstances, "[w]here the statutory purpose could thus be easily frustrated through the use of separate corporate entities, the Commission is entitled to look through corporate form and treat the separate entities as one and the same for purposes of regulation."[192] Accordingly, USR Industries' various arguments that corporate law principles preclude it and the other USR Companies from being held liable for the obligations of Radium Corporation also are wide of the mark.[193]

The foregoing reasons constitute the basis upon which we previously granted the Staff's motion for summary disposition on the jurisdictional issue and concluded that the NRC has regulatory jurisdiction over USR Industries and its

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[189] *See, e.g., Ouimet*, 711 F.2d at 1093; *H.P. Lambert Co. v. Secretary of Treasury*, 354 F.2d 819, 822 (1st Cir. 1965).

[190] USR Industries' Answer at 20.

[191] *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 717 (7th Cir. 1965).

[192] *General Telephone Co. of the Southwest v. United States*, 449 F.2d 846, 855 (5th Cir. 1971).

[193] USR Industries also asserts that, at the time of its corporate restructuring, Radium Corporation was under no obligation to decontaminate the Bloomsburg site. Even assuming the validity of such a dubious assertion, any clean up responsibilities with respect to the Bloomsburg site are irrelevant to the question of the NRC's regulatory jurisdiction over USR Industries and the other USR Companies for their part in the corporate restructuring that violated section 184. That statutory provision requires the agency's express written consent for transfers of control over NRC licenses, regardless of any outstanding decontamination obligations. Here, whether or not Radium Corporation had any cleanup responsibilities in 1980, the NRC did not consent in writing to the transfer of control over the 02 and 08 material licenses.

four wholly owned subsidiaries, USR Lighting Products, Inc., USR Chemical Products, Inc., USR Metals, Inc., and U.S. Natural Resources, Inc.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

James H. Carpenter
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 8, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

B. Paul Cotter, Jr., Chairman
Dr. Richard F. Cole
Dr. Peter S. Lam

In the Matter of **Docket No. 50-458-OLA**
(ASLBP No. 93-680-04-OLA)

GULF STATES UTILITIES COMPANY, *et al.*
(River Bend Station, Unit 1) **June 15, 1995**

The Licensing Board denies a motion for summary disposition after determining that material facts remained in dispute. The Intervenor had shown that there were disputed material facts as to whether River Bend would be safely operated, shut down, and maintained during adverse financial conditions.

SUMMARY DISPOSITION: MATERIAL FACTS NOT PROVIDED

Summary disposition is not appropriate when the movant fails to carry its burden setting forth all material facts pertaining to its summary disposition motion.

SUMMARY DISPOSITION: BANKRUPTCY OF A LICENSEE

In response to a movant's claim that a bankruptcy court will ensure that a nuclear reactor receives sufficient funding to ensure safety, the board concludes that this claim involves disputed factual questions for which summary disposition is inappropriate.

FINANCIAL QUALIFICATIONS: NON-UTILITY APPLICANTS FOR OPERATING LICENSES

Non-utility applicants for operating licenses are required by the NRC's financial qualifications rule to demonstrate adequate financial qualifications before operating a facility. A board is not authorized to grant exemptions from this rule or to acquiesce in arguments that would result in the rule's circumvention.

THE FINANCIAL QUALIFICATION RULE: SAFETY SIGNIFICANCE

Safety considerations are the heart of the financial qualifications rule. The Board reasoned in this regard that insufficient funding can cause licensees to cut corners on operating or maintenance expenses. Moreover, the Commission has recognized that a licensee in financially straitened circumstances would be under more pressure to commit safety violations or take safety "shortcuts" than one in good financial shape.

MEMORANDUM AND ORDER

(Ruling on Licensee's Motion Requesting Summary Disposition of Contention 2)

On January 5, 1995, Gulf States Utilities Company (GSU) moved for summary disposition on Contention 2 of Cajun Electric Cooperative, Inc. (Cajun), the only remaining contention in this proceeding. For the reasons stated herein, GSU's motion is denied.

BACKGROUND

In August 1993, Cajun, a 30% owner of the River Bend Nuclear Reactor and a co-licensee on the River Bend license, filed a Petition to Intervene in this licensing proceeding in response to a Notice of Opportunity for Hearing published in the *Federal Register*. 58 Fed. Reg. 36,423, 36,435-36 (July 7, 1993). That notice included two proposed amendments to the River Bend operating license belonging to GSU. The first amendment would change the ownership of GSU by authorizing Gulf States to become a wholly owned subsidiary of Entergy Corporation (Entergy Corp.). The second would add Entergy Operations Inc. (EOI) as a non-owner licensee and would authorize EOI to operate River Bend.

On January 27, 1994, the Board found GSU's objections on standing and the lack of an admissible contention without merit and allowed Cajun to intervene in this proceeding. LBP-94-3, 39 NRC 31 (1994). Of the seven contentions proffered by Cajun, the Board admitted only Contention 2 which reads: "The proposed license amendments may result in a significant reduction in the margin of safety at River Bend." *Id.* at 41. Cajun provided four bases for this contention:

> (a) The proposed River Bend Operating Agreement runs only between Gulf States and EOI. Therefore, Gulf States has the full obligation under the Operating Agreement to compensate EOI for River Bend operation and EOI cannot look to Entergy or Cajun for payment. . . .
>
> (b) EOI is very thinly capitalized. If Gulf States ceases to make its Operating Agreement payments, EOI has no other sources of funds to maintain safe and reliable River Bend operation. . . .
>
> (c) Gulf States faces severe financial exposure from litigation with Cajun and from certain Texas regulatory proceedings which could render Gulf States bankrupt and unable to make adequate payments to EOI to maintain safe and reliable River Bend operation. . . .
>
> (d) Entergy views its obligations to support EOI in the event of lack of funding from Gulf States to be very limited. Officials of Entergy and EOI have admitted that EOI would be forced to shut down River Bend if EOI lacked adequate funds. . . .

Id.

Acting on GSU's appeal of that decision, on August 23, 1994, the Commission affirmed the Board's decision to allow Cajun to intervene and to litigate Contention 2. CLI-94-10, 40 NRC 43 (1994).

Following the Commission's decision, discovery was conducted by all parties. A prehearing conference was held on October 4, 1994, in an attempt to define and limit the issues and to settle outstanding discovery disputes. The Board ordered that all discovery be completed by November 24, 1994, and that Motions for Summary Disposition, or a written Waiver of Motions for Summary Disposition, be filed on or before January 9, 1995. Unpublished Memorandum and Order (Revised Prehearing Schedule) (Oct. 20, 1994). The discovery phase of this proceeding thus has been concluded.

On January 9, 1995, GSU filed a Motion for Summary Disposition[1] in this case arguing that there remain no outstanding factual issues to be resolved concerning the admitted contention. The Motion was predicated in part upon the responses to interrogatories GSU had received from Cajun and the Staff during the discovery period. Cajun filed an answer to the GSU Motion asserting

[1] Gulf States Utilities Company's Motion for Summary Disposition (Jan. 9, 1995) (hereafter GSU Motion).

that there are disputed material facts pertaining to the licensing of EOI.[2] Cajun appended two affidavits in support of its position.[3] The Staff of the Nuclear Regulatory Commission (Staff) filed its response to the Motion supporting GSU's position.[4] The Staff supported its response with the affidavit of one David L. Wigginton. Cajun subsequently filed an answer in opposition to the Staff's response.[5]

THE PARTIES' POSITIONS

The GSU Motion asserts that it is undisputed that under the terms of the new River Bend Operating Agreement (the Operating Agreement between GSU and EOI), EOI may look only to GSU as the source for payment of operating costs. Neither EOI nor Entergy Corp., the parent of EOI, will provide those funds. GSU also states that it is undisputed that GSU faces the potential for financial difficulties if Cajun prevails and is awarded the relief it has sought in its litigation against GSU.

GSU alleges that the responses elicited through discovery establish that Cajun has no factual or evidentiary basis on which to support its contention that safety at River Bend will be reduced as a result of the merger. To the contrary, GSU asserts that no safety problem exists because the NRC Staff has found that EOI and GSU "collectively" are financially qualified. GSU Statement of Undisputed Facts at 1. It further asserts that EOI intends to operate River Bend safely with the funds made available to it and, if such funds are not available to operate River Bend safely, that it will safely shut down and maintain the facility in accordance with the plant's operating procedures and technical specifications. GSU Motion at 10.

A major portion of the GSU Motion is given to the assertion that the NRC's oversight and enforcement powers over the safe operation of River Bend, including those that could theoretically arise from financial difficulties, ensure that River Bend will be safely operated by EOI. Moreover, according to GSU, even if the dire circumstances predicted by Cajun were to occur, the only experience the Commission has with bankrupt commercial light-water nuclear reactor power plants is that they are safely operated under the jurisdiction of

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[2] Cajun Electric Power Cooperative, Inc.'s Answer in Opposition to Gulf States Utilities Company's Motion for Summary Disposition (Jan. 23, 1995) (hereafter Cajun Answer to GSU Motion).

[3] Affidavits of John M. Griffin and Werner T. Ullrich.

[4] NRC Staff's Response in Support of GSU's Motion for Summary Disposition (Jan. 23, 1995) (Staff Response to GSU Motion).

[5] Cajun Answer in Opposition to NRC Staff Response in Support of GSU's Motion for Summary Disposition (Feb. 6, 1995) (hereafter Cajun Answer to Staff's Response).

the bankruptcy court and that the funds necessary for safe operation would be made available through that court. *Id.* at 21-35.

In support of its Motion, GSU attaches six statements about which it says no material disagreement exists:

1. The River Bend Operating Agreement, pursuant to which Entergy Operations operates River Bend, runs between Entergy Operations and Gulf States only.
2. Under the Operating Agreement, Entergy Operations looks only to Gulf States for the funds needed to operate River Bend.
3. Gulf States faces the potential for adverse financial conditions as a result of the litigation initiated by Cajun and Texas regulatory procedures.
4. The NRC Staff has examined the financial qualifications of Entergy Operations and Gulf States and has found them to be collectively financially qualified.
5. In every instance in which the owner of a commercial light water nuclear power plant has gone into bankruptcy, adequate funds were made available through the bankruptcy court to safely operate the facility.
6. Entergy Operations intends to safely operate River Bend within the requirements of the Operating License as long as funds are available for that purpose, and in the event such funds are not available, River Bend will be safely shut down and maintained in a safe condition.

GSU Statement of Undisputed Facts at 1-2.

The NRC Staff's Response agrees that any potential financial difficulties GSU may face from civil litigation would not pose a threat to the public health and safety, even if GSU were to declare bankruptcy. The Staff argues that its inspection and enforcement processes will ensure safe operations at the plant regardless of the level of funding. Moreover, the Staff asserts that it would be involved in any bankruptcy proceeding involving River Bend and that bankruptcy courts themselves have held the protection of the public's health and safety to be an important interest in a bankruptcy proceeding. Thus, according to the Staff, the mere fact that GSU faces bankruptcy does not indicate that the River Bend facility could not be operated safely.

In contesting GSU's Motion, Cajun asserts that important material facts are in dispute that prevent the granting of summary disposition. Its primary argument is that statements in the affidavits of Cajun's two expert witnesses, Werner T. Ullrich and John M. Griffin, establish that there are disputed material issues of fact regarding the safe operation of River Bend in the event of insufficient funding. In their affidavits, these individuals assert that a lack of funding will reduce safety at River Bend by impairing: (1) safe performance during operation; (2) safe shutdown; and (3) adequate decommissioning once shutdown is achieved. Cajun Answer to GSU Motion at 24-32. Cajun contends that the statements of these experts directly contradict GSU's Statement of Facts that

health and safety would not be jeopardized if there are insufficient funds to operate River Bend.

Citing to *National Association of Government Employees v. Campbell*, 593 F.2d 1023, 1027 (D.C. Cir. 1978), Cajun further states that summary disposition cannot be granted because GSU's Statement of Facts does not include all necessary material facts in dispute in this proceeding. Cajun contends that, as a matter of law, summary disposition is not appropriate when an adequate factual basis is not provided by the moving party for the trier of facts to conclude that no material facts are in dispute. According to Cajun, the GSU Statement of Facts fails to include facts establishing: (1) that River Bend will be adequately funded to continue safe operation in the event of an adverse determination in the River Bend litigation; (2) that a bankruptcy court would be obligated to provide sufficient funding to allow EOI to meet the terms of the River Bend license; (3) that there will be sufficient funding for River Bend's safe shutdown and storage if funding becomes insufficient for continued operation; and (4) that sufficient funding for decommissioning will be available in the event of an adverse determination in the River Bend litigation. Cajun Answer to GSU Motion at 10-14, 35-36.

Cajun also advances a legal and policy argument w summary disposition should not be granted. It contends that summary .sposition should not be sanctioned when, as is the case here, important health and safety issues associated with the operation of nuclear power plants are at stake. Citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-44, 32 NRC 433, 437 (1990). Cajun Answer to GSU at 37-?3.

In addressing the Staff's Response, Cajun asserts that the Staff is short-sighted in its support f.r GSU. In rebuttal of Staff's arguments, Cajun makes five assertions. First, it asserts that the obligation for a nuclear facility to stop operating when necessary funds are unavailable does not excuse an applicant from meeting financial qualification requirements under 10 C.F.R. § 50.33(f) and section 182 of the Atomic Energy Act of 1954. Second, the Staff's inspection and oversight process is not sufficient to ensure that inadequate funding will not affect safe operations. Third, Staff has failed to establish that no genuine issue exists with respect to the funding of River Bend Operation in the event of a GSU bankruptcy. Fourth, Staff's reliance on the electric utility exception to the financial qualification rule is misplaced because EOI is not an electric utility, and fifth, Staff ignores the significant concerns the Commission has had in the past regarding potential licensee bankruptcy.

STANDARDS FOR SUMMARY DISPOSITION

Summary disposition is appropriate where, based on the filings, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, there is no genuine issue of material fact and the movant has demonstrated that it is entitled to judgment as a matter of law. 10 C.F.R. § 2.749(d); *see also Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993) (*AMS*). The movant seeking summary disposition has the burden of demonstrating the absence of any genuine issue of material fact. *Id.* The evidence submitted by the movant must be construed in favor of the party opposing the motion, and that party receives the benefit of any favorable inference. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994). Yet a party opposing the motion may not rely on a simple denial of material facts stated by the movant, but must set forth specific facts showing that there is a genuine issue. 10 C.F.R. § 2.749(b); *AMS*, 38 NRC at 102.

Summary disposition is favored by the Commission as "an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982) (citation omitted). *See also Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 457 (1981). However, in an operating license proceeding, where significant health and safety or environmental issues may be involved, a licensing board should only grant summary disposition if it is convinced that the public health and safety and environment will be satisfactorily protected. *Seabrook*, LBP-90-44, 32 NRC at 437, *citing Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Station), LBP-81-2, 13 NRC 36, 40-41 (1981). Even if no party opposes a motion for summary disposition, the movant's filing must still establish the absence of a disputed material fact. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977).

DISCUSSION

Reduced to its simplest terms, the central issue in this proceeding is whether underfunding of River Bend, which may result from ongoing litigation and regulatory proceedings involving the River Bend facility, can adversely affect safety at the facility. GSU concedes, for purposes of this motion, that it will be the only source of funds for operating River Bend and that its ability to continue with this funding could be jeopardized by the River Bend litigation. Having made these concessions, however, it claims, as an uncontroverted fact,

that no safety concern is involved because the facility will be safely shut down if funds become unavailable. To support the assumption that safety would not be adversely affected, GSU claims that the NRC's oversight and enforcement power will ensure safe operations during financial hardship. It also claims that financially troubled reactors have been operated in the past without safety problems, and that sufficient funds for safe operation of River Bend would be made available through the bankruptcy courts. In addition, GSU argues that there is no safety concern because River Bend will be safely shut down if EOI lacks sufficient funds for its operation. The NRC Staff also adopts most of this same rationale. *See* Staff Response at 3-7.

As we have stated, to defeat GSU's motion for summary disposition, Cajun need only demonstrate that material facts are in dispute, and not that it will prevail in litigation. In our opinion, the affidavits of Cajun's two expert witnesses, John M. Griffin and Werner T. Ullrich, demonstrate such factual disputes.[6] Their statements, if correct, may be grounds for concluding that insufficient funding for River Bend could result in: (1) impairment of EOI's ability to safely operate River Bend; (2) impairment of the safe shutdown of River Bend after a determination is made that sufficient funding is unavailable to continue operating; and (3) impairment of safe and adequate decommissioning once shutdown is achieved. The bases for these assertions are as follows:

1. Factual Disputes Presented by Messrs. Griffin and Ullrich

a. Impairment of Safe Operations at River Bend Caused by Insufficient Funding

Mr. Ullrich contends that if funding is reduced while River Bend is being operated, its safety performance may be impaired in a number of ways. According to Mr. Ullrich,

> Reduced funding generally results in reduction of the variable costs that are more easily controlled by the plant management. In most cases, this impacts administrative and engineering staffing and workload; limits the amount of internal or external services purchased;

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[6] Mr. Ullrich is currently a Senior Management Consultant with United Energy Services Corporation, a nationwide management consulting firm. He states that he holds a Bachelor of Science degree in Electrical Engineering from Drexel University and has completed a nuclear engineering course and graduate level courses in atomic physics, electrical engineering, and advanced mathematics. He has held a variety of management positions with electric utilities including Plant Manager for the Peach Bottom nuclear unit, various support management positions for Limerick Unit 2, and Field Service Manager for the restart of Brown's Ferry Unit 3.

Mr. Griffin is currently President of United Energy Services Corporation. He states that he holds a Bachelor of Science Degree in Naval Science from the United States Naval Academy. He has been a member of the Board of Directors of the American Nuclear Society and the Institute of Nuclear Operations National Nuclear Accrediting Board. He has held positions as the Assistant Manager of Nuclear Operations for the New York Power Authority, Manager of Nuclear Operations for Arkansas Nuclear Unit 1, and Start-Up Manager for the Brunswick Nuclear Units.

> and extends time schedules for implementation or completion of costly corrective action, mandated NRC study programs, and discretionary preventive and corrective maintenance. It may also impact discretionary training for the plant staff. When O&M budgets are reduced, staff workload typically increases because purchased service such as engineering support and vendor support is curtailed.
>
> . . . .
>
> Reduction of O&M funding also stimulates middle management to look for departmental activities that can be eliminated or curtailed without immediate detrimental effect . . . . Reduction of staffing in these groups has the potential for decreasing the effectiveness of training and quality oversight and transferring more of the workload to other groups that are more directly involved in the day-to-day operation of the facility. Typically, when a utility is forced to reduce O&M budgets, capital budgets are also reduced. This means that only the most important modifications mandated by the NRC or required for continued plant operation are funded, engineered and installed.

Ullrich Affidavit at 3.

Mr. Ullrich goes on to assert that River Bend's safety performance has been deficient and that additional funding is necessary for improvement. He states that once a plant's safety performance has declined, significantly increased funding is required to re-establish the plant's safety performance to an acceptable level. A declining safety performance, according to him, will increase the potential for a plant to experience a significant safety event. He estimates that the Long Term Performance Plans (LTPP) for River Bend being initiated by EOI will require additional funding, at least in the near term, to maintain safety. *Id.* at 2, 5-7.

Mr. Griffin, like Mr. Ullrich, believes that the overall cost of operation and maintenance of River Bend will be elevated at least in the near term. He also agrees with Mr. Ullrich that there is significant potential at River Bend for reduced funding which could substantially impact River Bend's operations and its long-term safety performance. Griffin Affidavit at 3-4.

b. Impairment of Safe Shutdown at River Bend Caused by Insufficient Funding

Mr. Griffin contends that River Bend cannot be shut down and maintained in a safe condition without significant funding. He estimates that the facility will require from $90 million to $110 million for the first 2 years to be maintained in a safe shutdown condition. Then, when the facility receives a Possession Only License, an additional $20 million to $30 million annually will be needed to protect spent fuel and control radioactivity. *Id.* at 4-5.

Mr. Ullrich agrees that safe shutdown will require substantial funding which GSU may not be able to provide. He claims that if insufficient funding forces River Bend to close, EOI will still be required to pay maintenance, testing,

training, programs, and O&M costs during shutdown. However, at the same time it is incurring these expenses, River Bend will no longer be generating revenue from its operations. Mr. Ullrich estimates that a plant that is permanently shut down on short notice could spend about $100 million prior to receipt of its Possession Only License. Ullrich Affidavit at 6-7.

c. Impairment of Safe and Adequate Decommissioning at River Bend by Insufficient Funding

Mr. Ullrich claims EOI may not be able to provide long-term funding to support River Bend's decommissioning. He explains that River Bend's decommissioning deficit will be made greater because reactor decommissioning costs for electric utilities are now higher than original estimates, caused in part by a lack of permanent high-level and low-level waste storage facilities. He contends that the total decommissioning costs for River Bend will be at least $20 million per year for about 30 years, which is considerably higher than the $382 million originally estimated by GSU. *Id.*

2. Analysis of Cajun's Disputed Facts

The assertions by Messrs. Ullrich and Griffin that insufficient funding may adversely affect safe operations, shutdown, and decommissioning of River Bend directly contradict GSU's Statement of Fact Number 6 that River Bend will be operated safely and will be safely shut down and maintained in a safe condition in the event sufficient funds become unavailable. The conflicting assertions clearly establish a dispute over material facts regarding Contention 2. What remains is to examine the rationale for GSU's Statement of Fact Number 6 and to determine whether it is sufficient to compel a finding in favor of the summary disposition motion despite the contradicting factual assertions of Messrs. Ullrich and Griffin.

Briefly stated, GSU's rationale for contending that River Bend will be safely operated, shut down, and maintained during adverse financial conditions is that: (1) NRC oversight and inspection will ensure safety; (2) financially troubled reactors have been operated safely in the past; (3) sufficient funding for safety will be supplied by bankruptcy courts, and (4) there is no safety concern because River Bend will be safely shut down if EOI lacks sufficient funds for its operation. We deal with each of these rationales in turn.

a. GSU's Assertion That NRC Oversight and Inspection Will Ensure Safe Operation During Financial Hardship

GSU contends that the NRC's reactor inspection program, combined with the input of the Office of Nuclear Reactor Regulation, enables the NRC Staff to ensure that its rules and regulations are being met and that the River Bend facility will be operated in accordance with all NRC requirements. GSU reasons that these Staff resources enable the Staff to ensure that River Bend will be safely operated or safely shut down even if the unit experiences financial difficulties. GSU Motion at 22-28. Cajun responds that Staff oversight and inspection programs are not sufficient to ensure safety. It points out that if these programs were enough, Congress and the Commission would not have required applicants to furnish assurance of obtaining funds necessary to cover estimated operation costs for the period of their licenses. Cajun Answer to GSU at 13-14; Answer to Staff at 8-9.

The Board agrees with GSU and Staff that Staff enforcement programs are vitally important in ensuring the safety of a nuclear facility. However, such programs will not always ensure that safety problems would not occur. Indeed, it is a fundamental principle of NRC regulation of civilian nuclear reactors that responsibility for safe facility operation rests primarily in the licensee and not the Staff. Moreover, as stated by Cajun, the financial qualification rule is indicative that Congress and the Commission wished to rely on more than just Staff oversight and inspection in ensuring that a nuclear facility will have sufficient funding.

The question of whether Staff oversight and inspection will ensure safety at River Bend involves factual issues that should not be resolved by summary disposition. Although GSU may wish to rely heavily on the existence of such programs in ultimately proving its case regarding Contention 2, these programs will not support the grant of its present motion.

b. GSU's Assertion That Financially Troubled Reactors Have Been Operated Safely in the Past

GSU cites experiences at the Seabrook and Palo Verde nuclear reactors for the proposition that River Bend's financial difficulties will not impair health and safety. As GSU points out, the NRC had allowed those facilities to operate while the owner(s) were in Chapter 11 bankruptcy. Cajun responds that GSU should not be allowed to rely on the experience of Palo Verde and Seabrook reactors since their situations may differ from River Bend's. It points out in this

regard that those reactors did not have to experience plant shutdown.[7] Cajun also emphasizes that GSU's rationale does not address the material issue of funding for shutdown or decommissioning. Cajun Response to GSU at 11-12, 15.

Aside from listing the Palo Verde and Seabrook bankruptcies, GSU has supplied very little information concerning the situations of the owners and operators of those utilities or the underlying situations involving the reactors. Certainly, the treatment at those facilities was dependent, at least in part, on the factual situations involved for each. Because there is insufficient information here for us to make meaningful comparisons on which to base summary disposition, GSU has failed to carry its burden of establishing all material facts. *National Association of Government Employees v. Campbell*, 593 F.2d 1023, 1027 (D.C. Cir. 1978). Moreover, comparing those situations with River Bend could involve factual disputes for which summary disposition would be inappropriate.

c. *GSU's Assertion That Sufficient Funding for Safety Will Be Supplied by Bankruptcy Courts*

GSU and Staff contend that if GSU is forced to declare bankruptcy, a bankruptcy court will ensure that River Bend receives sufficient funding to ensure safety. For support, they cite various bankruptcy regulations and court cases which they contend establish that bankruptcy courts will protect the public interest. GSU Motion at 29-31; Staff Response in Support of GSU at 6-7. Cajun's primary argument in opposition to summary disposition is that GSU has not supplied enough information to establish that a bankruptcy court would or could supply sufficient funding to safely operate, shut down, and decommission River Bend. Cajun Answer to GSU at 11, 15-16. Cajun also attempts to discredit reliance on bankruptcy courts by citing past Staff and Commission concerns about the bankruptcy process. Cajun's Response to Staff at 10-12.[8]

Based on the record before us, the Board concludes that the question of whether bankruptcy courts will adequately fund nuclear facilities to ensure safety is a disputed factual question for which summary disposition is inappropriate.

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[7] The Board also notes that for Palo Verde, El Paso Natural Gas was neither the operator nor a principal owner of the Palo Verde units.

[8] For example, Cajun cites the history of 10 C.F.R. § 50.54(cc) requiring licensees to notify Regional Administrators following petitions for bankruptcy. According to Cajun, the Commission, in promulgating the notification requirements for this regulation, was concerned that "a licensee who is experiencing severe economic hardship may not be capable of carrying out licensed activities in a manner that protects public health and safety" and that "financial difficulties also can result [from bankruptcy] in problems affecting the licensee's waste disposal activities" (51 Fed. Reg. 22,531 (1986). Cajun also cites a statement in a SECY paper for Proposed Rulemaking on the Potential Impact on Safety of Power Reactor Licensee Ownership Arrangements. In that paper, Staff reported to the Commission that "it is not clear how the Bankruptcy Court will treat [El Paso's] operational and decommissioning obligations vis-a-vis obligations to other creditors . . . ." (SECY-93-075 at 3 (Mar. 24, 1993)).

Even if, as a matter of law, bankruptcy courts are legally required to favor a non-utility licensee operator of a nuclear reactor over a utility's other creditors, a principle that has not been established by the pleadings in this proceeding, factual questions would exist about whether sufficient funds would be available to the courts for necessary reactor expenses.

d. GSU's Assertion That There Is No Safety Concern Because River Bend Will Be Safely Shut Down if EOI Lacks Sufficient Funds for Its Operation

GSU and the Staff assert that no link exists between the financial qualifications of licensees and the safety of the nuclear reactors they operate. They base this assertion on the exemption in 10 C.F.R. § 50.33(f) excusing electric utilities from financial qualification requirements at the operating license stage. In allowing that exemption, the Commission employed the rationale that an electric utility will safely operate and then shut down a nuclear reactor if funds become insufficient. According to the Commission, this safety will be ensured by funding that a regulated utility can obtain through their regulator's ratemaking process. 49 Fed. Reg. 35,747, 35,749 (Sept. 12, 1984); GSU Motion at 32-33; Staff Response at 4-5.

GSU previously made this same "safe shutdown" claim at the intervention phase of this proceeding. What GSU wanted then, and requests now, is that EOI be treated in the same way as an electric utility is treated under the Commission's financial qualifications rule so that it can be presumed that a lack of EOI funding will not adversely affect River Bend's safety. In the alternative, GSU appears to be asking that its financial qualifications, and not EOI's, be an issue in this proceeding. In either case, what GSU requests is that EOI be exempted from the Commission's financial qualifications rule.

The Board and the Commission rejected these GSU arguments at the intervention stage. As the Board then stated, section 50.33(f) requires applicants for operating licenses to demonstrate that they possess reasonable assurance of obtaining funds necessary to cover estimated operation costs for the period of the licenses. Although electric utilities were exempted (with certain exceptions) in 1984 from these financial disclosure requirements, the Board found that this exemption does not apply to EOI because EOI is not an electric utility as defined by 10 C.F.R. § 2.4 (1994). LBP-94-3, 39 NRC at 39, 42. Therefore, we concluded in this earlier decision that EOI is bound by section 50.33(f) and that a "safe shutdown" presumption for River Bend is not appropriate. *Id.* On appeal, the Commission also declared that:

> We cannot accept GSU's conclusion that "[t]he financial qualification of EOI is not at issue in this proceeding." GSU Appeal Brief at 32-33. Our regulations make EOI's financial

qualification an issue. *See* p. 48, *supra*. GSU's arguments simply fail to recognize that EOI as the new operator is subject to the financial qualifications rule, and that the reliability of funding for River Bend's operations has been placed into question. Cajun's contention and its bases bear directly on whether the Commission's regulations are satisfied.

CLI-94-10, 40 NRC at 52.

Safety considerations are the heart of the financial qualifications rule. Both the Commission's and Board's intervention decisions stressed that non-utility applicants for operating licenses must be required to demonstrate adequate financial qualifications before operating a facility. The Board reasoned that insufficient funding could cause licensees to cut corners on operating or maintenance expenses and that even during shutdown there are accident risks associated with a nuclear reactor. LBP-94-3, 39 NRC at 39. The Commission decision likewise stated that:

> Commission regulations recognize that underfunding can affect plant safety. Under 10 C.F.R. § 50.33(f)(2), applicants — with the exception of electric utilities — seeking to operate a facility must demonstrate that they possess or have reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. Behind the financial qualifications rule is a safety rationale. In drafting the original financial qualifications rule (which did not exempt utilities), the Atomic Energy Commission "'must have intuitively concluded that a licensee in financially straitened circumstance would be under more pressure to commit safety violations or take safety "shortcuts" than one in good financial shape.'" [Citation omitted].

CLI-94-10, 40 NRC at 48.

GSU and Staff now would have us ignore these safety considerations, either by allowing EOI an exemption from the rule or by looking only to GSU's financial status and not to EOI's. We cannot do so. This Board is not authorized to grant exemptions to NRC regulations or to acquiesce in arguments that would result in circumvention of those regulations. Even if we had this authority, we would not grant exemptions when important safety considerations are at stake such as those underlying the financial qualifications rule. Nor would we summarily grant an exemption where, as here, expert witnesses disagree about the safety effects.

Under these circumstances, EOI is not entitled to the "safe shutdown" presumption granted to electric utilities in section 50.33(f). Because EOI is not an electric utility, GSU cannot invoke the regulatory presumption that River Bend be operated safely and then safely shut down in the event that it does not receive sufficient funding. GSU's Summary Disposition Motion regarding this request, therefore, must be denied.

CONCLUSION

For all the foregoing reasons, we find that material issues of disputed fact have been presented by Cajun as to whether River Bend will be safely operated, shut down, and maintained during adverse financial conditions. Accordingly, GSU's Motion for Summary Disposition for Contention 2 is denied.

THE ATOMIC SAFETY AND
LICENSING BOARD

B. Paul Cotter, Jr., Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 15, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of **Docket No. IA 94-017**
(ASLBP No. 95-705-03-EA)

DANIEL J. McCOOL
(Order Prohibiting Involvement in NRC-Licensed Activities)

June 23, 1995

MEMORANDUM AND ORDER
(Dismissing Proceeding)

In an October 25, 1994 hearing petition, Daniel J. McCool requested that this proceeding be convened to permit him to challenge an August 26, 1994 immediately effective order of the NRC Staff. The basis for the order was alleged misconduct by Mr. McCool involving NRC-licensed activities while he was president of the American Inspection Company, Inc. (AMSPEC). Among other things, that order (1) prohibits Mr. McCool from engaging in any NRC-licensed activities for a period of five years from the date of the order, and (2) requires that for a period of five years thereafter Mr. McCool must notify the agency within twenty days of accepting any employment offer involving NRC-licensed activities or otherwise becoming involved in such activities. *See* 59 Fed. Reg. 46,676, 46,677 (1994).

The question now before the Board is whether we should dismiss this proceeding because of Mr. McCool's failure to prosecute this case in a timely

manner. For the reasons set forth below, we conclude that this action should be terminated.

As part of his initial filings requesting a hearing, Mr. McCool indicated that he preferred that the start of the adjudicatory process be delayed until after March 15, 1995. He contended that this date was significant because it was the day of his scheduled release from the Federal Prison Camp in Pensacola, Florida, where he was serving a sentence for two Atomic Energy Act felony convictions relating to his activities as AMSPEC president. As grounds for delaying the proceeding until his release, he cited the difficulty while incarcerated of meeting with his counsel to discuss the Staff's order.

By memorandum and order issued December 1, 1994, we directed Mr. McCool to submit a pleading addressing more fully why he wanted to delay the start of the hearing process until after his release from prison and provided the Staff with an opportunity to respond to his filing. In a December 17, 1994 pleading, he reiterated that he anticipated extreme difficulty in preparing his case while in prison because he would not have ready access to his lawyer. In response, the Staff stated that it did not oppose Mr. McCool's request to delay the proceeding.

On January 9, 1995, we granted Mr. McCool's request for a delay, with several caveats.[1] We directed that by April 3, 1995, Mr. McCool should submit a filing providing a mailing address where pleadings and orders can be served upon him; a daytime telephone number where he can be reached; and, if available, a telephone number where he can receive facsimile transmissions. We also directed Mr. McCool to advise us promptly of any change in his release date.

April 3 came and went, but Mr. McCool neither supplied the information requested in our January 9 issuance nor contacted the Board to obtain a further delay in the proceeding. Therefore, on May 4, 1995, we issued a memorandum and order directing that Mr. McCool show cause why this proceeding should not be dismissed because of his failure to prosecute his case. In that order, we directed that by June 5, 1995, Mr. McCool should provide the Board with the information requested in our January 9 issuance as well as an explanation of why this proceeding should not be dismissed given his failure to follow the Board's earlier directive. In addition, we advised Mr. McCool that failing to respond to this Board request could lead to the summary dismissal of his case. Finally, in an effort to ensure that Mr. McCool received our show cause order, we asked that the Office of the Secretary contact Staff counsel to obtain other

[1] Notwithstanding his seeming reliance upon his lack of access to counsel as a basis for delaying this proceeding, in his December 17 filing Mr. McCool indicated that he intended to represent himself in this proceeding. In our January 9 issuance we asked that in his next filing Mr. McCool clarify whether he intended to retain counsel to represent him in this proceeding. With our dismissal of this proceeding, his answer to that question no longer is of any moment.

addresses where Mr. McCool might be found and that the Secretary serve the Board's order at those locations as well.

As before, Mr. McCool has not responded by the filing date established by the Board. Because Mr. McCool now has failed on several occasions to provide information that is important to his continued participation in this proceeding, we can only conclude that he now longer wishes to contest the Staff's August 1994 enforcement order in this litigation. Accordingly, we dismiss this proceeding.

For the foregoing reasons, it is, this twenty-third day of June 1995, ORDERED that

1. In accordance with the terms of the Board's May 4, 1995 order to show cause, this proceeding is *dismissed* because of petitioner McCool's failure to prosecute this action.

2. The Office of the Secretary shall serve this memorandum and order on Mr. McCool at all the addresses it used for service of the Board's May 4, 1995 memorandum and order.[2]

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 23, 1995

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[2] A copy of this memorandum and order is being sent this date to Staff counsel by E-mail transmission through the agency's wide area network system.

Cite as 41 NRC 478 (1995) LBP-95-12

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III
Thomas D. Murphy, Alternate Board Member

In the Matter of

Docket No. 40-8027-EA
(ASLBP No. 94-684-01-EA)
(Source Material License No. SUB-1010)

SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)

June 30, 1995

MEMORANDUM AND ORDER

(Denying General Atomics' Motion Regarding NRC Staff "Reliance" Issues and Establishing Schedule for Bifurcated Issue of Agency Jurisdiction)

As part of this proceeding regarding an October 15, 1993 NRC Staff enforcement order concerning the adequacy of decommissioning funding for the Sequoyah Fuels Corporation (SFC) Gore, Oklahoma uranium hexafloride facility, petitioner General Atomics (GA) has submitted a filing raising questions about the validity of certain bases cited by the Staff in support of its order. Specifically, by motion filed June 6, 1995, GA has requested various forms of relief relating to Staff claims in the October 1993 order about purported reliance by the Commission or other agency officials on statements by GA Chairman J.

Neal Blue concerning decommissioning funding for the SFC Gore facility. The NRC Staff and Intervenors Native Americans for a Clean Environment (NACE) and the Cherokee Nation oppose GA's requests for relief.

For the reasons that follow, we deny GA's motion *in toto*. In addition, we bifurcate the jurisdictional issue of the agency's authority to subject GA to the decommissioning funding requirements set forth in the Staff's October 1993 enforcement order and establish a schedule for discovery and summary disposition motions relating to that issue.

I. BACKGROUND

The genesis of the dispute now before the Board is a portion of our April 1995 decision in LBP-95-5, 41 NRC 253, 272 (1995), that established a discovery completion date of July 31, 1995. In response to that deadline, on April 28, 1995, GA counsel sent a letter to the Board Chairman in which he expressed the opinion that it was unlikely discovery could be completed by the end of July, in part because GA intended to take discovery from each of the NRC Commissioners. This letter, in turn, prompted the Board on May 15, 1995, to hold a telephone conference with the parties, including petitioners GA and SFC, the Staff, and Intervenors NACE and the Cherokee Nation, to discuss discovery scheduling. Based on the parties' presentations during that conference, we asked them to confer and attempt to reach agreement on whether it would be more efficient to conduct discovery on, and then have the Board undertake to resolve, the issue of the agency's regulatory "jurisdiction" over petitioner GA before going forward with discovery and any evidentiary hearing on the other issues in this proceeding. *See* Tr. 243-45.

Subsequently, in letters to the Board dated May 17 and 19, 1995, the parties made it clear that they were unable to reach an agreement regarding bifurcation. The Staff and Intervenors NACE and the Cherokee Nation generally favored bifurcation, while GA and SFC opposed it. From the May 15 telephone conference and the parties' letters, a major point of contention appeared to be the exact nature of the Staff's theory of regulatory jurisdiction.

In this regard, in the October 1993 enforcement order that is the focus of this litigation, the Staff made the following statements relative to the agency's regulatory jurisdiction over GA:

> Although at the time of the purchase [of the Gore, Oklahoma uranium hexafloride facility] GA may have refused to guarantee SFC's obligation to decontaminate the facility, GA's actions in control over the day-to-day operations and business of SFC, and GA's representations of financial guarantees described above, *on which the Commission has relied*, make GA responsible, along with SFC to satisfy the NRC financial assurance requirements.

> After review of the responses to the Demands for Information, the NRC staff finds that there is no basis to change its conclusion that the degree of GA's control over the business of SFC and Mr. Blue's representations of financial assurance, *on which the Commission relied*, make GA responsible, along with SFC, for satisfying NRC financial assurance requirements.

58 Fed. Reg. 55,087, 55,091 (1993) (emphasis supplied). In an attachment to a January 13, 1994 memorandum discussing the agenda for our initial prehearing conference, we suggested that from these and other statements in the order, the Staff appeared to be basing regulatory jurisdiction upon one or more of three theories: (1) GA is a *de facto* licensee; (2) GA is a "person otherwise subject to the jurisdiction of the Commission" in accordance with 10 C.F.R. § 2.202 and 10 C.F.R. Part 2, App. C; and (3) GA has a contractual obligation or legal duty to SFC or the agency flowing from, among other things, the Commission's purported reliance upon representations made by GA. *See* Memorandum (Posing Matters for Consideration at Prehearing Conference) (Jan. 13, 1994), attach. at 3-4 (unpublished).

Thereafter, during our initial prehearing conference on January 19, 1994, in response to a Board question about the Staff's jurisdictional theory, Staff counsel responded that

> to the extent that there is conceivably a quasi-contractual reliance theory, I will say again that that is not one that the Staff at this time intends to pursue, but I am not sure what need be done with the order, the order to the Staff clearly put General Atomics on notice that we were concerned with the day-to-day control of GA as we have alleged over the licensee, and that that principally is the angle that we were taking.

Tr. 109. During our May 15 telephone conference, Staff counsel indicated that the Staff continues to "stand by" this statement. Tr. 241. But, despite its own intimation that something might need to be done to the order to reflect this position, the Staff has not taken any steps to amend or further clarify the order.

Notwithstanding the Staff's representations that a "quasi-contractual reliance" theory is not a basis for the order, in its May 19 letter to the Board regarding bifurcation, GA continued to assert that without some Staff action relative to the order it was unsure about the validity of any "reliance" theory. This, according to GA, had important implications for bifurcation of the regulatory jurisdiction question. GA contended that if it must still pursue this reliance theory, discovery will take substantially longer, which weighs significantly against bifurcation. *See* Letter from Stephen M. Duncan to Administrative Judge James P. Gleason, Chairman, Atomic Safety and Licensing Board (May 19, 1995) at 2-3.

By order issued May 23, 1995, we directed the Staff to appear at a May 31, 1995 hearing and show cause why the Board should not declare that the "reliance" theory set forth in its October 1993 order had been abandoned such that any legal or factual statements in the order that relate solely to that

theory would be deemed irrelevant to this proceeding. *See* Memorandum and Order (Order to Show Cause) (May 23, 1995) at 4 (unpublished). During the May 31 hearing, the Staff stated that regulatory jurisdiction in this case was not based upon either theory two or theory three suggested by the Board in the attachment to its January 13 memorandum, which the Staff described in shorthand, respectively, as the "wrongdoing" and "quasi-contractual/detrimental reliance" theories. *See* Tr. 252. Instead, the Staff asserted that its theory of the case, which is more along the line of suggested Board jurisdictional theory one (i.e., GA as a *de facto* licensee), was set forth most fully in an April 13, 1994 pleading as follows:

> 1. By reason of GA's 100% ownership of SFC, and its direct involvement in certain activities of SFC going beyond the mere exercise of voting control over SFC, GA has affected or engaged in matters over which the NRC has subject matter jurisdiction, and has become subject to the NRC's broad authority to issue the Order to it, which under these facts constitutes a reasonable, necessary, rational, and lawful exercise of the NRC's broad authority granted by Congress to enable the NRC to fulfill its statutory mandate to protect health and minimize danger to life or property.
>
> 2. By reason of GA's 100% ownership of SFC, and its direct involvement in certain activities of SFC going beyond the mere exercise of voting control over SFC, GA has affected or engaged in matters over which the NRC has subject matter jurisdiction and has become a *de facto* licensee, fully subject to the NRC's regulations and NRC's broad authority to issue the Order to it, which under these facts constitutes a reasonable, necessary, rational, and lawful exercise of the NRC's broad authority granted by Congress to enable the NRC to fulfill its statutory mandate to protect health and minimize danger to life or property.
>
> 3. By reason of GA's 100% ownership of SFC, and its direct involvement in certain activities of SFC going beyond the mere exercise of voting control over SFC, GA has affected or engaged in matters over which the NRC has subject matter jurisdiction, and has become subject to the NRC's broad authority to issue the Order to it, which under these facts, coupled with GA's voluntary commitment to guarantee financially the decommissioning funding for cleanup of the SFC site, constitutes a reasonable, necessary, rational, and lawful exercise of the NRC's broad authority granted by Congress to enable the NRC to fulfill its statutory mandate to protect health and minimize danger to life or property.

Tr. 254-56 (quoting NRC Staff's Answer in Opposition to General Atomics' Motion for Summary Disposition or for an Order of Dismissal (Apr. 13, 1994) at 26-27).

Further, in response to Board questions concerning the significance of the wording in the October 1993 order, referencing GA representations of financial assurance "on which the Commission relied," the Staff explained that this phrasing was not intended to pose a theory of regulatory jurisdiction (or GA liability) that depends upon actual reliance by the Commission or any other agency employee on such commitments. According to the Staff, those commitments potentially are relevant in two contexts: first, as one of the indicia

that GA had the requisite degree of control over SFC to establish that GA is subject to the agency's authority, perhaps as a *de facto* licensee; and second, as a discrete factor that, when considered in conjunction with circumstances showing GA control of SFC, establishes GA is subject to the agency's authority. *See* Tr. 256-57, 278-81.

The Staff also asserted that an important step in establishing the relevance of those commitments is to show they were material to the agency in that there was regulatory reliance on the commitments. To demonstrate such reliance, however, the Staff maintained it is not necessary to show "actual" reliance on the commitments by individual Commissioners or other agency personnel. Instead, drawing an analogy to the Commission's decisions on the nature of "material false statements" in *Randall C. Orem, D.O.*, CLI-93-14, 37 NRC 423 (1993), and *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), *aff'd sub nom. Virginia Electric and Power Co. v. NRC*, 571 F.2d 1289 (4th Cir. 1978), the Staff declared that the materiality of the commitments is a question of law that requires a Board determination about whether the circumstances involved support the conclusion that a reasonable agency decisionmaker would take the commitment into account in doing his or her job. *See* Tr. 257-60, 281-82. As a consequence, the Staff declared that GA's concerns about having to pursue extensive discovery of Commission members and agency officials to contest any Staff "reliance" theory was groundless and so did not weigh against bifurcation of the jurisdictional issue. *See* Tr. 261.

In response, GA asserted that given the impact on GA's dealings with financial institutions and other business entities of the Staff's allegations about commitments purportedly made by GA Chairman Blue and agency reliance on those commitments, it was unjust and unfair now to permit the Staff to disavow reliance on those allegations without amending the October 1993 order. GA argued that all allegations about reliance and statements by Chairman Blue should be stricken from the record and that discovery should proceed on all remaining Staff claims without bifurcation of the jurisdictional issue. *See* Tr. 262-64, 291. SFC supported GA's position. *See* Tr. 276-77. For their part, Intervenors NACE and the Cherokee Nation agreed with the Staff's substantive position regarding reliance, but now expressed skepticism that bifurcation would be efficient given that the Staff's position obviated GA's supposed need for extensive discovery regarding agency reliance. *See* Tr. 287-89.

At the conclusion of the hearing, the Board requested that GA put its request to strike portions of the October 1993 order in writing. *See* Tr. 292-93. GA did so in the June 6, 1995 motion now pending before the Board. In addition, GA requests summary disposition in its favor on all issues and claims in the October 1993 order that relate to any purported reliance by NRC officials on any statements or representations of GA Chairman Blue. Further, GA asks that the Board limit the Staff's theories of liability to only the first two of the three

theories specified by the Staff in its April 1994 opposition to GA's motion for summary disposition and reiterated during the May 31 hearing. *See* [GA's] Motion for Summary Disposition, to Strike Language from the October 15, 1993 Order, and to Limit Issues in the Proceeding (June 6, 1995) [hereinafter GA Reliance Motion]. Both the Staff and Intervenors NACE and the Cherokee Nation oppose all aspects of GA's motion. *See* NRC Staff's Answer to [GA's] Motion for Summary Disposition, to Strike Language from the October 15, 1993 Order and to Limit Issues in the Proceeding (June 12, 1995) [hereinafter Staff Reliance Response]; [NACE's] and Cherokee Nation's Opposition to [GA's] Motion for Summary Disposition, to Strike Language from the October 15, 1993 Order, and to Limit Issues in the Proceeding (June 12, 1995) [hereinafter NACE/Cherokee Nation Reliance Response].

II. ANALYSIS

In its motion, GA uses the same arguments to justify all three forms of relief requested. GA begins by asserting that the Staff has conceded that under the October 1993 order agency regulatory jurisdiction over GA and GA decommissioning cost liability are not founded upon any quasi-contract, detrimental reliance theory. *See* GA Reliance Motion at 2. GA also declares that the Staff has recognized that in the order GA is not alleged to have been involved in any wrongdoing. *See id.* at 3-4. GA further contends that the Staff has acknowledged that it will not attempt to establish GA's liability based upon any statements made by GA Chairman Blue and relied upon by the Commission, but instead will use such statements to establish that GA exercised some degree of control over its subsidiary SFC. *See id.* at 4.

GA then declares that, in light of these various Staff concessions, the Board should both reject any Staff attempt to use the statements in this manner and strike any reference in the October 1993 order that relates to any statements or representations made by Chairman Blue. Such Board action is justified, according to GA, because (1) use of the statements is clearly wrong as a matter of law under either (a) the case authority cited by the Staff, or (b) the general legal concept of "materiality"; (2) use of the statements adds nothing to the case, but rather is so prejudicial to GA as to be inconsistent with any notion of fundamental fairness in the conduct of this proceeding; and (3) permitting the statements to be used will significantly and adversely affect the orderly conduct of this proceeding by prolonging discovery. *See id.* at 5-12. We address each of these arguments in turn.

A. Staff Legal Basis for Using the Statements

GA declares that the *North Anna* and *Orem* cases cited by the Staff in support of its use of the statements are irrelevant because both cases define the standard for determining in a civil penalty case whether a material false statement exists. Here, GA maintains, the Staff already has stated that it is not contending Chairman Blue made material false statements. *See id.* at 6-7. In addition, equating the term "material" with the term "relevant" used in Federal Rule of Evidence 401, GA declares that Chairman Blue's statements cannot be considered relevant (i.e., material) to the factual question of corporate control because as "[v]oluntary, non-binding, true statements" that contained no directive content instructing its subsidiary SFC, they cannot constitute indicia of control that would support a determination to "pierce the corporate veil" and reach a parent corporation. *Id.* at 7-9.

In response, both the Staff and the Intervenors maintain that under the three theories identified by the Staff as the conceptual basis for asserting regulatory jurisdiction and funding liability vis-a-vis GA, Chairman Blue's statements are certainly relevant as probative of the relationship between GA and its subsidiary SFC. Both also declare that the *North Anna* and *Orem* cases cited by the Staff provide a framework for determining how the references to "reliance" in the October 1993 order should be understood in the context of those three theories. Specifically, the Staff contends that the definition of "material" in these two cases illustrates its position that in utilizing the statements to support the Staff's jurisdictional/liability theories, the pertinent question is not whether agency personnel, including the Commission, actually relied on the statements. Instead, as the analysis in these cases suggests, the issue is whether the Staff is able to demonstrate reliance as an objective matter based on the pertinent factual circumstances. *See* Staff Reliance Response at 5-6.

From the various Staff statements before us, it is apparent that any reference in the October 1993 order to "reliance" on Chairman Blue's statements was not intended to incorporate a quasi-contractual theory of regulatory jurisdiction and decommissioning funding liability. On the other hand, the Staff has indicated that agency "reliance" on those statements is a relevant concern because reliance is a valid consideration under the second and third jurisdictional/liability theories the Staff has identified. Regarding those theories, however, based on the cursory GA arguments we have before us currently, we cannot say that the Staff is precluded from pursuing either concept because agency "reliance" on statements by GA Chairman Blue forms a basis for each theory. Nor can we grant GA summary disposition relative to those theories.

For instance, based on what GA has presented thus far, we see no reason to preclude a Staff argument that statements such as those of Chairman Blue may be relevant to the issue of control. GA suggests that a parent corporation's

statement before the agency that supports a subsidiary but does not constitute a directive to the subsidiary is outside the realm of circumstances that will support imposing liability on a parent corporation. *See* GA Reliance Motion at 8-9. Yet, if parental control can be utilized as a means of establishing agency jurisdiction over a nonlicensee parent, the fact that a parent corporation's statements are directed to the agency rather than the subsidiary hardly seems dispositive.

GA also has not provided any convincing argument to counter the Staff's position that one measure of the significance of those statements as an indicia of control would be their relevance to regulatory decisionmakers, thereby making agency "reliance" on such a statement a matter "material" to the issue of control. Moreover, based on what GA has asserted, we do not see that the Staff's "objective" approach to determining agency "reliance" is inapplicable. Certainly, the fact that the statements in question are not alleged to be "false" is not dispositive of the validity of the "objective reliance" approach outlined in the *North Anna* and *Orem* cases. This is particularly so, as the Intervenors point out, given the judicial authority suggesting that attempts to probe the actual mental processes of agency decisionmakers generally are disfavored. *See* NACE/Cherokee Nation Reliance Response at 10 (citing, among others, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)).

We thus find no basis in the present motion for rejecting or limiting any of the Staff's jurisdictional/liability theories as a matter of law because they may be based on "reliance" on GA Chairman Blue's statements.

B. Prejudicial Nature of the Statements in the Order

Besides seeking to eliminate any Staff jurisdictional/liability based on reliance, GA also asserts that the statements in the order regarding Chairman Blue's statements and agency reliance on those statements should be stricken. According to GA, because the Staff has admitted that its order is not based on a quasi-contractual reliance theory, the prejudice that inures to GA from having those statements in the order warrants this relief. As GA describes it, the present wording of the order prejudices GA's ability to conduct business with its existing and potential customers, financial institutions, and its vendors and employees because they will be misled about the nature of the order and the fact that it is not based on any "wrongdoing" by GA. *See* GA Reliance Motion at 10-11. Both the Staff and the Intervenors respond that the nature of any prejudice is not clear and, in any event, the statements by Chairman Blue, which are a matter of public record, are indeed relevant to the jurisdictional/liability theories that underlie the Staff's order. *See* Staff Reliance Response at 4-5; NACE/Cherokee Nation Reliance Response at 7-8.

The October 1993 order leaves much to be desired in terms of providing a clear explanation how and why Chairman Blue's statements and agency reliance

on those statements provide a basis for the order. Nonetheless, as we indicated under section II.A, above, based on the information now before the Board and the parties, it appears that those statements and the issue of agency reliance on them do have an appropriate place in this litigation, only as evidence relevant to the issue of corporate control. Evidence concerning any claimed quasi-contractual liability will not be considered. However, this is not intended to rule adversely at this time concerning any of the Staff's three theories supporting its claim of jurisdiction. Certainly, in light of GA's amorphous claims of prejudice, we find no basis at present for striking any portion of the October 1993 order.

C. Prolonging Discovery

GA also claims that the Board's general authority to maintain order in and regulate the course of this proceeding supports striking all portions of the October 1993 order relating to Chairman Blue's statements and agency reliance on those statements. According to GA, failure to exercise this authority will result in prolonged discovery that will have a significant adverse effect on the proceeding. If those statements remain, GA asserts, it will have to probe the relevancy of the statements in relation to the issue of its purported control over SFC, including seeking discovery from the Commission and Staff personnel on the question of their reliance. *See* GA Reliance Motion at 11-12. Both the Staff and Intervenors label this argument a "threat" that is without substance because the Staff's admission that its jurisdictional/liability theories are not based upon "reliance in fact" means that such discovery is irrelevant to the proceeding and so not appropriate. *See* Staff Reliance Response at 6-7; NACE/Cherokee Nation Reliance Response at 10.

In our discussion in section II.A, above, we have indicated that, based on the information now before us, we see no reason to preclude the Staff from pursuing its second and third jurisdictional/liability theories notwithstanding the fact that they may be based on an "objective" reliance theory. The need for discovery from individual agency personnel regarding their actual "reliance" that is the particular focus of GA's argument thus appears problematic. As such, we see no basis for granting this relief sought by GA.

III. BIFURCATION

Having ruled on GA's motion, we are back to the initial question that prompted its filing: Should the Board bifurcate and decide the issue of agency regulatory jurisdiction over GA before proceeding to the "merits" of the order as it relates to the adequacy of SFC decommissioning funding? After reviewing the positions of the parties on this question, we have concluded that, for reasons

of economy and expedition, the central nature of the jurisdiction issue to this proceeding merits separate consideration at this time.

The parties thus should proceed with discovery on the question of the agency's regulatory authority to impose joint and several liability upon GA for providing site remediation funding and decommissioning financial assurance. Discovery and the submission of any additional motions for summary disposition relating to that issue will be in accordance with the following schedule:

Discovery Closes:[1]	Friday, September 15, 1995
Dispositive Motions Due:[2]	Friday, October 13, 1995
Dispositive Motion Responses Due:	Friday, November 17, 1995
Dispositive Motion Replies Due:	Friday, December 8, 1995

If the Board finds on the basis of the motions filed that it is unable to grant summary disposition on this issue because there are material factual issues in dispute, it is the Board's intent to convene an evidentiary hearing promptly to resolve the regulatory jurisdictional issue.

IV. CONCLUSION

The June 6, 1995 GA motion provides no basis either for limiting the Staff's theories of regulatory jurisdiction that are based upon "reliance" by agency personnel on statements made by GA Chairman Blue or for granting summary disposition in favor of GA on all issues or claims that relate to such "reliance." Nor does that motion provide support sufficient to cause us to strike any portion of the Staff's October 1993 order relating to Chairman Blue's statements or representations. We thus deny the motion.

For the foregoing reasons, it is this 30th day of June 1995, ORDERED that

1. The June 6, 1995 motion of GA for summary disposition, to strike language from the October 15, 1993 order, and to limit issues in the proceeding is *denied.*

2. This proceeding is bifurcated to permit the jurisdiction issue herein to be resolved initially and separately.

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[1] To be timely under this schedule, a discovery request must be filed or a deposition noticed on or before Friday, August 18, 1995.

[2] We establish this date based on the Staff's previous representation that it intends to file a dispositive motion on the issue of jurisdiction once discovery on that question is completed. *See* Tr. 241. If the Staff intent in this regard should change, it should notify the Board promptly.

3. The parties shall conduct discovery and file any additional motions for summary disposition on the issue of the agency's regulatory jurisdiction to impose joint and several liability upon GA for providing site remediation funding and decommissioning financial assurance in accordance with the schedule set forth on p. 487, *supra*.

THE ATOMIC SAFETY AND
LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland
June 30, 1995

Directors' Decisions Under 10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Carl J. Paperiello, Director

In the Matter of **Docket No. 70-364**

BABCOCK AND WILCOX COMPANY
(Pennsylvania Nuclear Service
Operations, Parks Township,
Pennsylvania) **June 26, 1995**

The Director of the Office of Nuclear Material Safety and Safeguards grants in part two requests for action under 10 C.F.R. § 2.206 (initially raised as concerns by Citizens' Action for a Safe Environment and the Kiski Valley Coalition to Save Our Children in their joint request for an informal hearing pursuant to 10 C.F.R. Part 2, Subpart L) referred, pursuant to 10 C.F.R. § 2.1205(k)(2), by the Presiding Officer in the Initial Decision, dated January 3, 1995.

The Petitioners, based on a concern about radioactive releases from the Babcock & Wilcox Company's (B&W) Apollo facility, request the Commission to test for radioactive contamination in the general vicinity of Kepple Hill and Riverview in Parks Township. This request has been granted insofar as the Nuclear Regulatory Commission (Commission) Staff calculated the potential airborne uranium concentration and potential contamination of soil, reviewed the environmental monitoring and aerial radiological survey data, and concluded that the radioactive releases from the Apollo facility have been within regulatory limits and have not resulted in concentrations of radioactivity in the soil greater than the Commission's current release criteria for uranium.

The Petitioners, based on a concern about the past operations of the B&W Parks Township facility, request the Commission to investigate radiological contamination on the Farmers Delight Dairy Farm. This request has been granted insofar as the Commission Staff has reviewed the environmental monitoring data collected from the area of the Parks Township facility since 1969, as well as soil samples from the area, and concluded that there has been no significant increase

in background levels outside of the immediate site area of the Parks Township facility.

REGULATIONS: CONCENTRATION VALUES OF 10 C.F.R. PART 20, APPENDIX B

The values set forth in 10 C.F.R. Part 20, Appendix B, Table II, are regulatory limits applicable at the site boundary, not at the stack discharge point.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By Petition dated January 5, 1994, Citizens' Action for a Safe Environment (CASE) and the Kiski Valley Coalition to Save Our Children (the Coalition) (together referred to as Intervenors or Petitioners) filed a joint request for an informal hearing pursuant to 10 C.F.R. Part 2, Subpart L, with regard to Babcock & Wilcox Company's (Licensee) application for renewal of Special Nuclear Material (SNM) License SNM-414 issued to the Licensee by the U.S. Nuclear Regulatory Commission (NRC or Commission) for the Pennsylvania Nuclear Service Operations facility located in Parks Township, Armstrong County, Pennsylvania (Parks Township facility). In a Memorandum and Order dated April 22, 1994, the Presiding Officer granted the request for hearing and admitted the Petitioners as Intervenors.[1] An informal hearing was conducted pursuant to Subpart L of the Commission's procedural regulations. In the Initial Decision, dated January 3, 1995, authorizing the renewal of the materials license, the Presiding Officer, pursuant to 10 C.F.R. § 2.1205(k)(2), referred to the Commission's Executive Director for Operations for consideration, as a request for action under 10 C.F.R. § 2.206, twelve areas of concern raised in that proceeding by the Intervenors.[2] These concerns were referred to my office for review. Each of these concerns was reviewed with respect to the requirements of section 2.206. Two concerns[3] (Sections Q and X) were found to satisfy the requirements of section 2.206. On March 7, 1995, a letter was sent to the

[1] LBP-94-12, 39 NRC 215 (1994).
[2] LBP-95-1, 41 NRC 1, 35 (1995).
[3] As the Commission recently noted, there were three concerns (Sections Q, R, and X). However, one of the concerns (Section R) was included within Section Q. *See* CLI-95-4, 41 NRC 248, 252 (1995).

Intervenors acknowledging the treatment of the Intervenors' Sections Q and X as requests for action under section 2.206.[4]

Section Q has been interpreted as a request for the Commission to test for radioactive contamination in the general vicinity of Kepple Hill and Riverview in Parks Township. The apparent concern is that this area is downwind of the Apollo facility, which the Intervenors assert had been releasing radioactivity at a rate above regulatory limits. The Intervenors rely on letters dated April 20, 1966, and May 26, 1969, concerning the need for experimental data for an air surveillance program at the Apollo plant and authorization by the Commission's predecessor, the Atomic Energy Commission (AEC), for the discharge of radioactive materials in concentrations exceeding 10 C.F.R. Part 20 limits.

Section X has been interpreted as a request for the Commission to investigate radiological contamination on the Farmers Delight Dairy Farm (apparently located in Parks Township). The apparent concern is that past operations of the Parks Township facility caused radioactive contamination of the farm. As basis for this request, the Intervenors assert that there is information in a 1966 U.S. Department of Agriculture (USDA) study that indicates that the cattle on the farm were having thyroid problems and that radionuclides were showing up in the cows' milk.

I have completed my evaluation of the matters raised by the Intervenors and have determined that, for the reasons stated below, no further action by the Commission is warranted.

II. BACKGROUND

The Nuclear Material and Equipment Company (NUMEC) began operations at the Apollo and Parks Township facilities in the late 1950s. The Atlantic Richfield Company (ARCO) purchased the stock of NUMEC in 1967. In 1971, Babcock & Wilcox (B&W) purchased NUMEC and is the current owner of the Apollo and Parks Township facilities.

The primary function of the NUMEC Apollo facility was the conversion of low-enriched (less than 5 wt % U-235) uranium hexafluoride to uranium oxide for use in fuel for light-water-moderated power reactors and to produce high-enriched (greater than 93 wt % U-235) nuclear fuel material for use in naval reactors. The B&W Apollo facility ceased manufacturing nuclear fuel in 1983

[4] In the acknowledgment letter it was noted that the other concerns (Sections B, H, I, M, P, S, T, U, W, and Y) had been addressed by the Commission Staff in affidavits of Michael A. Lamastra and Heather M. Astwood. These affidavits were submitted to the Atomic Safety and Licensing Board in the Subpart L proceeding on September 22, 1994.

and has completed site decommissioning. The Commission Staff expects to terminate the Apollo facility license in 1995.

The primary function of the NUMEC Parks Township facility was the fabrication of plutonium fuel, the preparation of high-enriched uranium fuel, and the production of zirconium/hafnium bars. The Parks Township facility ceased fuel fabrication activities in 1980 and is currently conducting decontamination and refurbishment of nuclear reactor components and equipment. The Parks Township license was last renewed on May 16, 1984, with an expiration date of May 31, 1989, and the license is currently under timely renewal.[5]

III. DISCUSSION

The NRC Staff has evaluated the Intervenors' two requests for action pursuant to section 2.206. The evaluation and my disposition for each request are discussed below.

1. Test for Radioactive Contamination in the General Vicinity of Kepple Hill and Riverview Areas in Parks Township

The Intervenors' request is based on their interpretation of letters dated April 20, 1966, and May 26, 1969, from Roger D. Caldwell, Manager, Health, Safety and Licensing, of NUMEC concerning the need for experimental data for an air surveillance program at the NUMEC Apollo plant[6] and authorization by the Atomic Energy Commission for the discharge of radioactive materials in concentrations exceeding 10 C.F.R. Part 20 limits.[7]

By application dated November 13, 1968, and supplement dated March 5, 1969, and pursuant to section 20.106(b), NUMEC requested that License SNM-145 be amended to permit concentrations up to 100 times the limits specified in Part 20, Appendix B, Table II, in any stack effluent, provided that concentrations at the roof edge and in the local environment complied with Part 20 limits. By License Amendment 31, dated May 26, 1969, the AEC authorized NUMEC to

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[5] The Commission on April 26, 1995, denied the Intervenors' petition for review of the Presiding Officer's January 3, 1995 Initial Decision (License Renewal), LBP-95-1, 41 NRC 1 ("Initial Decision"). The Staff expects to renew the license in 1995.

[6] One of the subareas of concern accepted as an issue in the informal hearing was "[w]hether B&W Management practices as manifested by the management of the Apollo facility threaten offsite releases of radiation from the Parks Township facility." LBP-94-12, 39 NRC 215, 222-23 (1994).

[7] Prior to January 1994, NRC regulations for radioactivity in effluents to unrestricted areas were contained in 10 C.F.R. § 20.106. The current requirements are found in 10 C.F.R. § 20.1302. Section 20.106(a) limited radioactivity in air effluents to unrestricted areas to less than those listed in Appendix B, Table II, except as authorized in 10 C.F.R. § 20.106(b). Section 20.106(b) allowed licensees to propose limits higher than those specified in section 20.106(a), if certain conditions were met. Section 20.106(d) clarified that the limits listed in Appendix B, Table II, apply at the boundary of the restricted area and not at the stack discharge point.

discharge radioactive material from any stack, in concentrations up to 100 times the values specified in Appendix B, Table II, of Part 20[8] subject to the following conditions:

> (a) concentrations of radioactive material measured by the continuously operating air samplers positioned at the plant roof perimeter shall not exceed the values specified in Appendix B, Table II, of 10 C.F.R. Part 20; and
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> (b) an environmental air sampling program shall be conducted in the neighboring unrestricted areas[9] of the plant.

Accordingly, even though NUMEC was authorized to discharge *at the stack* up to 100 times the values specified in Appendix B, Table II, NUMEC was still required to meet the limits *at the site boundary* (*see* note 8). Moreover, NUMEC was required to meet these same values at the plant roof perimeter.

To evaluate the Intervenors' concern about the alleged contamination in the general vicinity of the Kepple Hill and Riverview areas of Parks Township, the Staff estimated the average airborne uranium concentrations using the results from the environmental monitoring program, which was a condition of the license. The NRC Staff calculated the average airborne uranium concentrations to be 3.6×10^{-13} $\mu Ci/cm^3$.[10] This calculated value is less than one tenth of the maximum permissible concentration in air for insoluble uranium-238 and uranium-235; the requirement for unrestricted air effluent set forth in Part 20, Appendix B, Table II. Accordingly, the releases from the facility were within Part 20 requirements for unrestricted release and, therefore, were not a safety concern.

The NRC Staff also estimated the potential contamination of soil outside the plant boundary from facility operations.[11] Using conservative assumptions, the Commission Staff calculated a maximum concentration of 12 pCi per gram of soil. This is less than the Commission's current release criteria for uranium.[12]

The Commission Staff also reviewed environmental radiation monitoring data collected during the facility's period of operation. Environmental radiation mon-

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[8] The values set forth in Part 20, Appendix B, Table II, are the regulatory limits applicable at the site boundary, not at the stack.

[9] Section 20.1003 of 10 C.F.R. defines "unrestricted area" as "an area, access to which is neither limited nor controlled by the licensee." Prior to January 1, 1994, an unrestricted area was defined as "any area access to which is not controlled by the licensee for purposes of protection of individuals from exposure to radiation and radioactive materials, and any area used for residential quarters."

[10] An estimate of the average airborne uranium concentration can be calculated using a uranium deposition rate of 20 pCi/ft^2 per week (measured by NUMEC during plant operation) and assuming a gravitational settlement rate of 0.001 meter per second.

[11] An estimate of the soil uranium concentration can be calculated using a uranium deposition rate of 20 pCi/ft^2 per week (measured by NUMEC during plant operation) and assuming a 1-centimeter depth, a soil density of 1.5 g/cm^3, and a 15-year operating period at Apollo.

[12] The current release criteria for uranium, which is 30 pCi per gram, is set forth in the Commission's "Branch Technical Position" (BTP) published in the *Federal Register*, October 23, 1981.

itoring has been conducted at the Apollo site since 1968. Monitoring programs included measurements of radioactive materials in the environment (river water, and sediment, air, soil, and vegetation) and thermoluminescent dosimetry (TLD) measurements of direct radiation in the environment. Radiological monitoring stations have been active in the Apollo facility area for as long as three decades, monitoring the Allegheny and Kiskiminetas Rivers and various tributaries, as well as other surface waters and groundwater. These include Commission, state, and B&W stations. Based on its review of these data, the Commission Staff concludes that operation of the Apollo facility did not result in any significant changes to normal background levels outside the immediate site area.

The Commission Staff also reviewed the results of an aerial radiological survey to measure gamma radiation[13] levels in the area of the Apollo facility. At the request of the Commission, the survey was conducted by EG&G Energy Measurement Group from June 15-19, 1981. The survey data identified only background levels of radiation.

In summary, the Commission Staff calculated the potential airborne uranium concentration and potential contamination of soil, reviewed the environmental monitoring and aerial radiological survey data, and concluded that the radioactive releases from the Apollo facility have been within regulatory limits and have not resulted in concentrations of radioactivity in the soil greater than the NRC release criteria stated in the Branch Technical Position (*see* note 12). In reaching this conclusion, the Staff took into account the fact that in 1969, the AEC authorized NUMEC to release at the stack, radioactive materials in concentrations up to 100 times the values (applicable at the site boundary) listed in Appendix B of Part 20. The Intervenors' request that the Commission test for radiological contamination in the general vicinity of Kepple Hill and Riverview in Parks Township is granted to the extent of the review described above. However, the Intervenors have failed to raise any substantial health or safety issues. Therefore, no further action is warranted.

2. *Investigate Potential Radiological Contamination on the Farmers Delight Dairy Farm Located in the Vicinity of the Parks Township Facility*

In its request for the Commission to investigate radiological contamination on the Farmers Delight Dairy Farm, the Intervenors assert that information contained in a U.S. Department of Agriculture (USDA) report entitled NUMEC-1966 indicates that cattle on the farm are having thyroid problems and that radionuclides are showing up in the cows' milk. The Intervenors indicate that

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[13] Gamma radiation is electromagnetic photons originating from the nucleus of an atom. Gamma rays are similar to x-rays.

the report was read to them over the telephone by a reference librarian at the USDA Library in Beltsville, Maryland. The Intervenors also assert that the report "vanished" from that Library.

To evaluate the NUMEC-1966 report, the Commission Staff searched its files, requested both B&W and ARCO to search their files, and requested the USDA to check its files for a copy of the report. No copy was found. However, the USDA did confirm that the only copy in its system was missing from the USDA Beltsville, Maryland library. It was also determined that NUMEC-1966 was not a USDA report but a NUMEC-published document. The Commission Staff again searched its files and requested that B&W and ARCO search their files for a NUMEC report entitled NUMEC-1966. Again, no copy was found.

Since the Commission Staff was unable to evaluate the NUMEC-1966 report, the Staff reviewed environmental radiation monitoring data collected from the area of the Parks Township facility. Environmental radiation monitoring has been conducted at the Parks Township site since 1969. The monitoring program includes measurements of radioactive materials in the environment (air, soil, and vegetation) and TLD measurements of direct radiation in the environment. These include Commission, state, and B&W monitoring stations. The NRC Staff has also taken soil samples from private residences and other locations in the Parks Township area.[14] The NRC Staff has reviewed the environmental monitoring data, including the soil samples, and concluded that there has been no significant increase in background levels outside of the immediate site area of the Parks Township facility. The Intervenors' request that the Commission investigate potential radiological contamination on the Farmers Delight Dairy Farm is granted to the extent of the review described above. The Intervenors have, however, failed to raise a substantial health or safety concern; therefore, no further action is warranted.

IV. CONCLUSION

The institution of proceedings pursuant to section 2.206 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175-76 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard that I have applied to determine whether the actions requested by the Intervenors are warranted. Since no substantial health and safety issues have been raised by

[14] The NRC soil sampling results were reported in NRC combined Inspection Reports Nos. 70-135/93-01 and 70-364/93-02, 70-135/93-02 and 70-364/93-03, 70-135/93-03 and 70-364/93-04, 70-135/94-01 and 70-364/94-01, and 70-135/94-02 and 70-364/94-02.

the Intervenors and for the reasons discussed above, no basis exists for taking any further action in response to the requests beyond that described above. Accordingly, in this matter, the Commission is taking no further action pursuant to section 2.206.

As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes a review of the Decision.

FOR THE NUCLEAR
REGULATORY COMMISSION

Carl J. Paperiello, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 26th day of June 1995.