

August 21, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
AEROTEST OPERATIONS, INC.)	Docket No. 50-228-LR
)	50-228-LT
(Aerotest Radiography and Research)	
Reactor))	

NRC STAFF MOTION TO SEVER THE DEMAND FOR HEARING ON DENIAL OF
LICENSE RENEWAL FROM THE DEMAND FOR HEARING ON
INDIRECT LICENSE TRANSFER REGARDING AEROTEST
RADIOGRAPHY AND RESEARCH REACTOR

INTRODUCTION

On August 13, 2013, Aerotest Operations, Inc. (Aerotest) and Nuclear Labyrinth, LLC (Labyrinth), filed a joint demand for hearings on the denial of the license renewal and the denial of the indirect transfer of license number R-98 for the Aerotest Radiography and Research Reactor (ARRR).^{1 2} Pursuant to 10 C.F.R. § 2.323, the Nuclear Regulatory Commission (NRC)

¹ Joint Demand for Hearing on Denial of License Renewal and Indirect License Transfer Regarding Aerotest Radiography and Research Reactor Facility Operating License No. R-98 (Aug. 13, 2014) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13226A407) (Aerotest/Labyrinth Demand). The Staff does not dispute Aerotest and Labyrinth's assertion that the provisions of 10 C.F.R. § 2.309 relating to a "request for hearing" do not apply to the Aerotest/Labyrinth Demand as to the License Transfer matter. See *id.* at 2 n.2. As such, the Staff does not believe that an extension of time for Aerotest and Labyrinth to address section 2.309 requirements for the License Transfer matter is necessary. Regarding the separate License Renewal matter, however, while section 2.309 does not apply to Aerotest, it does apply to Labyrinth. Labyrinth is not named on the license and is not a party to the license renewal application. Thus, in order to participate as a party in the License Renewal matter, Labyrinth must file a petition to intervene in which it demonstrates standing and proffers an admissible contention, as required by section 2.309. Therefore, the Staff does not believe that an extension of time for Aerotest to address section 2.309 requirements for the License Renewal matter is necessary; however, a short extension may be appropriate for Labyrinth to file a petition to intervene in the License Renewal matter.

staff (Staff) hereby moves to sever the request for a hearing on the denial of the license renewal from the request for a hearing on the denial of the license transfer on the grounds that pursuant to the Commission's regulations, (1) the hearing on the indirect license transfer application is governed by the procedures in C.F.R § 2.1300, *et seq.* (Subpart M), and (2) the denial of the license renewal application should be addressed in accordance with the procedures in 10 C.F.R. § 2.1200, *et seq.* (Subpart L). Therefore, for the reasons more fully discussed below, the Staff respectfully requests that the Commission sever the two requests for hearing.

BACKGROUND

This matter arises from the indirect transfer of license number R-98 issued to Aerotest for the ARRR as the result of Autoliv, Inc.'s (Autoliv) acquisition of Aerotest in 2000. The ARRR is a commercial non-power reactor located in northern California. The license transfer was not the subject of an application for prior consent of the NRC as required by 10 C.F.R. 50.80, and, therefore, the transfer was neither reviewed nor approved by the NRC.

Autoliv is a company headquartered in Sweden and incorporated in Delaware. The majority of its Board of Directors, Executive Officers, and stockholders are non-U.S. citizens.³ The Staff determined that it was and is a foreign corporation and is, therefore, prohibited by Section 104.d of the Atomic Energy Act of 1954, as amended, and 10 C.F.R. § 50.38 from ownership, control or domination (FOCD) of a nuclear reactor. Therefore, Aerotest could not be licensed to own and operate the ARRR, unless Autoliv partially or fully divested itself of ownership of Aerotest. On October 7, 2003 (ADAMS Accession No. ML040430495), the NRC staff issued a letter to Autoliv instructing Autoliv to develop a full divestiture plan or partial

(footnote continued...)

² Aerotest and Labyrinth also filed a Joint Answer to and Demand for Hearing on Order Prohibiting Operation of Aerotest Radiography and Research Reactor Facility Operating License No. R-98 (August 13, 2013) (ADAMS Accession No. ML13226A412), which is not part of this motion.

³ Autoliv is the ultimate parent company of Aerotest. There are several subsidiary companies in the corporate chain between Autoliv and Aerotest, some of which are U.S. companies.

divestiture and negation action plan and to report progress on the plan every six months thereafter. Autoliv developed a plan but was unable to divest Aerotest of foreign ownership and control.⁴

On February 28, 2005, Aerotest applied for renewal of the ARRR operating license. The licensee has been operating under the timely renewal provisions of 10 C.F.R. § 2.109, since the expiration of the license on April 16, 2005. On July 24, 2013, the Staff denied the license renewal due to the Aerotest's failure to satisfy the requirements of section 104d. of the AEA and 10 C.F.R. § 50.38, which prohibit the issuance of a license for a utilization facility "if the Commission knows or has reason to believe [it] is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."⁵

Aerotest and Labyrinth submitted a license transfer application on May 30, 2012 (ADAMS Accession Nos. ML12152A233 and ML12180A384). On July 24, 2013, the Staff denied the license transfer due to a lack of reasonable assurance that the transferee, Labyrinth, "would have sufficient funding to conduct the activities authorized by the ARRR license..."⁶

DISCUSSION

The Commission's regulations at 10 C.F.R. § 2.1300, *et seq.*, set forth procedures for hearings on license transfer applications and limited them to Subpart M:

The provisions of [Subpart M], together with the generally applicable intervention provisions in Subpart C of [10 C.F.R. Part 2], govern all adjudicatory proceedings on an application for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's

⁴ Aerotest advised the Staff, by letter, in regular increments that they were unable to find a buyer for the ARRR. (See *e.g.* ADAMS Accession No. ML052790058) This continued for approximately six years, until 2009, when the Staff proposed to deny the license renewal. (ADAMS Accession No. ML090830578) It was at that time that Aerotest filed its first license transfer application with X-Ray Industries. (ADAMS Accession No. ML100490068) The Staff granted that application, but the transfer was never consummated. (ADAMS Accession No. ML101380218).

⁵ Letter to Michael Anderson, President, Aerotest Operations, Inc. from Eric Leeds, NRC, Re: Denial of License Renewal, Denial of License Transfer, etc. (July 24, 2013) (ADAMS Accession No. ML13120A598).

⁶ *Id.*

regulations, governing statutes, or pursuant to a license condition. This Subpart provides the only mechanism for requesting hearings on license transfer requests, unless contrary case specific orders are issued by the Commission.

The Commission's intent in promulgating Subpart M was to provide a set of procedures that "apply to *all* license transfer proceedings unless the Commission directed otherwise in a case-specific order."⁷ The Commission determined that license transfers presented unique issues that could not be efficiently and appropriately addressed under other Subparts of 10 C.F.R. Part 2.⁸ License transfer proceedings take place under a specific set of hearing procedures under Subpart M because:

[L]icense transfers [generally] do not involve any changes to plant operations or significant changes in personnel of consequence to the continued reasonable assurance of public health and safety, but rather involve changes in ownership or partial ownership of facilities at a corporate level.⁹

Further, license transfers do not involve the type of technical issues that "might benefit from review by a multi-member, multi-disciplined Atomic Safety and Licensing Board."¹⁰ Accordingly, the Commission added Subpart M to 10 C.F.R. Part 2 to "establish[] an efficient and appropriate informal process for handling hearing requests associated with transfer applications commensurate with the nature of the issues involved and the rights of all parties."¹¹ In license transfer proceedings, the Commission will ordinarily be the presiding officer; however, the

⁷ *Moab Mill Reclamation Trust* (Atlas Mill Site), CLI-00-07, 51 NRC 216, 221-22 (2000) (emphasis in original).

⁸ Streamlined Hearing Process for NRC Approval of License Transfers (Final Rule), 63 Fed. Reg. 66721, 66722 (Dec. 3, 1998).

⁹ Streamlined Hearing Process for NRC Approval of License Transfers (Proposed Rule), 63 Fed. Reg. 48644, 48644 (Sep. 11, 1998). See also 63 Fed. Reg. at 66721.

¹⁰ *Id.* at 66722.

¹¹ *Id.* The Commission observed that in reviewing a license transfer application, the Staff's review focuses on assuring that the ultimately licensed entity has the capability to meet financial qualification and decommissioning funding aspects of NRC regulations. *Id.*; 63 Fed. Reg. at 48644.

Commission may appoint a presiding officer who is responsible for collecting evidence and developing a hearing record for submission to the Commission.¹²

The indirect license transfer that Aerotest and Labyrinth request presents precisely the kind of proposed transaction for which the Commission drafted Subpart M hearing procedures: they propose that Aerotest continue in its role as the licensed operator of the facility and do not propose any physical changes to the facility.¹³ Therefore, a hearing on the denial of the joint license transfer application falls squarely under Subpart M hearing procedures.¹⁴ However, a hearing on the denial of the license renewal application may not take place under Subpart M because Subpart M is specifically drafted for and is limited to license transfer proceedings.

Instead, pursuant to 10 C.F.R. § 2.1200, a hearing on the denial of the license renewal application should take place under Subpart L. Section 2.1200 instructs that [t]he provisions of [Subpart L], together with [S]ubpart C of this part, govern all adjudicatory proceedings conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act, and 10 CFR [P]art 2” except for specifically exempted proceedings.¹⁵

¹² 10 C.F.R. § 2.1319; 63 Fed. Reg. at 66727. The Commission may select one or more Commissioners to serve as the presiding officer or “any other person permitted by law.” § 2.1319(a). The Commission may appoint a presiding officer from the Atomic Safety and Licensing Board. 63 Fed. Reg. at 66727.

¹³ Application for Approval of Indirect Transfer of Control of License Pursuant to 10 C.F.R. § 50.80 at 1 (May 30, 2012) (ADAMS Accession No. ML12152A233).

¹⁴ The Staff’s denial was based on financial issues—a failure to meet 50.33(f) financial qualification requirements. Safety Evaluation by the Office of Nuclear Reactor Regulation Indirect License Transfer of Aerotest Radiography and Research Reactor Due to the Proposed Acquisition of Aerotest Operations, Inc., by Nuclear Labyrinth LLC, Facility Operating License No. R-98 at 9 (July 24, 2013) (ADAMS Accession No. ML13129A001).

¹⁵ The specifically exempted proceedings in 10 C.F.R. § 2.1200 (emphasis added) are:

[1] proceedings on the licensing of the construction and operation of a uranium enrichment facility,

[2] proceedings on an initial application for construction authorization for a high-level radioactive waste geologic repository at a geologic repository operations area noticed under §§ 2.101(f)(8) or 2.105(a)(5),

[3] proceedings on an initial application for a license to receive and possess high-level radioactive waste at a geologic repository operations area,

(...footnote continued)

License renewal is not a specifically exempted proceeding.¹⁶ Therefore, a hearing on the Staff's denial of Aerotest's license renewal application should take place under Subpart L hearing procedures.

Moreover, because the license transfer and the license renewal were denied on two entirely different grounds, it is appropriate to sever the hearings. The transfer was denied due to the lack of financial qualifications of the transferee, Labyrinth, while the renewal was denied because the licensee, Aerotest, is FOCD.

CONCLUSION

For the reasons described above, the NRC Staff respectfully requests that the Commission sever the Aerotest/Labyrinth demand for hearings into two parts: (1) a request for a hearing on the Staff's denial of the joint indirect license transfer application, which would take place under Subpart M hearing procedures, and (2) a request for a hearing on the Staff's denial of the license renewal application, which would take place under Subpart L hearing procedures.

CERTIFICATION OF COUNSEL

On Friday, August 16, 2013, Staff counsel spoke with co-counsel for Aerotest and informed her that the Staff intended to file the within motion. On Monday, August 19, 2013, Staff counsel spoke with counsel for Aerotest regarding this motion. Counsel for Aerotest

(footnote continued...)

[4] proceedings on enforcement matters unless all parties otherwise agree and request the application of Subpart L procedures, and

[5] *proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statutes, or pursuant to a license condition.*

¹⁶ Further, 10 C.F.R. § 2.310 instructs that Subpart L applies to proceedings involving license renewal *unless* those proceedings involve contentions that meet criteria set forth in § 2.310(d) for use of Subpart G formal hearing procedures. Per § 2.310(d), a proceeding for license renewal must be conducted under Subpart G formal hearing procedures *if* the presiding officer finds that resolution of the matter requires resolution of either “[1] issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or [2] issues of motive or intent of the party or eyewitness material to the resolution of the contested matter.” 10 C.F.R. § 2.310(d) (emphasis added). This license renewal proceeding does not involve contentions that meet the § 2.310(d) criteria.

advised that he could not take a position on the staff's motion because he had not yet been able to discuss it with his clients. As of this date he has not advised me of any change. I certify that I have made a sincere effort to resolve the issues raised in the motion and have been unsuccessful.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 CFR 2.304(d)

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Executed at Rockville, Maryland
this 21st day of August, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
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AEROTEST OPERATIONS, INC.)	Docket No. 50-228-LR
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(Aerotest Radiography Research Reactor))	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF MOTION TO SEVER THE DEMAND FOR HEARING ON DENIAL OF LICENSE RENEWAL FROM THE DEMAND FOR HEARING ON INDIRECT LICENSE TRANSFER REGARDING AEROTEST RADIOGRAPHY AND RESEARCH REACTOR", dated August 21, 2013, have been served upon the Electronic Information Exchange, in the above-captioned proceedings, this 21th day of August.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 21st day of August, 2013