

August 29, 2013

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

In the Matter of )  
 ) Docket No. 50-228  
Aerotest Operations, Inc. ) License No. R-98  
(Aerotest Radiography and )  
Research Reactor) )

JOINT ANSWER TO 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

Pursuant to 10 C.F.R. § 2.323(c), Aerotest Operations, Inc. (“Aerotest”), the holder of the operating license for the Aerotest Radiography and Research Reactor (“ARRR”), and Nuclear Labyrinth, LLC (“Nuclear Labyrinth”) (together, “Applicants”) submit this Answer in opposition to the 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 (“Motion”). The NRC Staff’s Motion would create two and possibly three separate hearings where only one is needed, and as a result, would needlessly, arbitrarily, and inefficiently complicate the resolution of two issues that the NRC Staff itself has joined together in denying Aerotest’s license renewal application and the Applicants’ joint license transfer application, and in ordering Aerotest to take certain actions based on those denials.

## I. Background

By letters dated July 15, 2013 and July 24, 2013, the NRC Staff notified Nuclear Labyrinth and Aerotest that it was denying their joint application for NRC consent to the indirect transfer of control of the ARRR license to Nuclear Labyrinth (“ILTA”). The denial was based on the NRC Staff’s conclusion that it did not have reasonable assurance that Nuclear Labyrinth would have sufficient funding.<sup>1</sup> The July 24 letter to Aerotest also denied Aerotest’s February 28, 2005 application to renew the ARRR operating license (“LRA”) because the letter asserted that Aerotest’s ultimate parent, Autoliv, Inc., is a foreign corporation and Autoliv’s ownership of Aerotest is prohibited by the Atomic Energy Act and NRC’s regulations. The July 24 letter stated that Aerotest “[has] the right to demand a hearing on the license transfer denial and the license renewal denial.” The July 15 letter stated that Nuclear Labyrinth “[has] the right to demand a hearing on the license transfer denial.” Also issued on July 24 was the NRC Office of Enforcement’s Order Prohibiting Operation of Aerotest Radiography and Research Reactor, Facility Operating License No. R-98 (the “Order”). The Order was based on the NRC Staff’s determination on financial qualifications and foreign ownership, which resulted in the denial of the LRA and the ILTA.<sup>2</sup> The Order directed that “the licensee and any other person adversely affected by this Order may request a hearing on this Order within 20 days of its publication in the

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<sup>1</sup> Letter from E. Leeds, Director, Office of Nuclear Reactor Regulation (“NRR”), to M. Anderson, President Aerotest Operations, Aerotest Operations, Inc., re: Denial of License Renewal, Denial of License Transfer, and Issuance of Order to Modify License No. R-98 to Prohibit Operation of the Aerotest Radiography and Research Reactor, Facility Operating License No. R-98 (TAC Nos. ME8811 and MC9596), dated July 24, 2013 (ADAMS Accession No. ML13120A598) (“July 24 letter”). *See also* Letter from E. Leeds, Director, NRR, to D. Slaughter, Chief Executive Officer, Nuclear Labyrinth, LLC, re: Denial of License Transfer Regarding the Aerotest Radiography and Research Reactor, Facility Operating License No. R-98 (TAC No. ME8811 ), dated July 15, 2013 (ADAMS Accession No. ML13134A390)(“July 15 letter”). By letter of August 2, 2013 to D. Slaughter from G. Bowman, Acting Deputy Director, Div. of Policy and Rulemaking, NRR, the NRC clarified that the July 15, 2013 letter was not issued until July 24, 2013 (ADAMS Accession No. ML13214A343).

<sup>2</sup> EA-13-097, Order Prohibiting Operation of Aerotest Radiography and Research Reactor (July 14, 2013)(ADAMS Accession No. ML13158A164). 78 Fed. Reg. 46,618 (Aug. 1, 2013).

[Federal Register].”<sup>3</sup> As directed in the letters and the Order, Nuclear Labyrinth and Aerotest jointly filed demands for hearing on the license denials<sup>4</sup> and the Order.<sup>5</sup> Notwithstanding the unavoidable interconnections between the NRC Staff’s conclusions on foreign ownership and financial qualifications and the resulting denials and Order, the NRC Staff’s Motion would create at least two separate hearings and (since the Motion at n.2 explicitly states the Applicants’ demand for hearing on the Order “is not part of this motion”) probably a third.

## **II. Discussion**

### **A. The Staff’s Proposal Violates the Commission Policy for Efficient Hearings**

The NRC Staff’s Motion has taken the Commission’s longstanding policy on holding efficient hearings and turned it on its head. The Commission has for decades made clear that its regulations should be applied so that proceedings before the Commission and its adjudicatory bodies are carried out so as to minimize the burdens on all parties consistent with its statutory objectives of protecting the public health and safety, the environment, and the common defense and security. The Commission has issued policy statements and updated its rules on several occasions since the early 1980’s with the goal of “ensuring that agency proceedings are conducted efficiently.”<sup>6</sup> Indeed, the Commission’s first Statement of Policy on Conduct of Licensing Proceedings was issued in 1981 to address the “efficient conduct” of hearings.<sup>7</sup> The 1981 Policy Statement expressed “the need for the balanced and efficient conduct of all phases

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<sup>3</sup> Order at 7.

<sup>4</sup> Joint Demand for Hearing on Denial of License Renewal and Denial of Indirect License Transfer (Aug. 13, 2014) (ADAMS Accession No. ML13226A407).

<sup>5</sup> Joint Answer to and Demand for Hearing on the Order (August 13, 2014) (ADAMS Accession No. ML13226A412).

<sup>6</sup> See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 18 1998 (“1998 Policy Statement”).

<sup>7</sup> Statement of Policy on Conduct of Licensing Proceedings, 46 Fed. Reg. 28,533, 28,534 (May 27, 1981)(“1981 Policy Statement”).

of the hearing process” and “encouraged” the “adjudicatory boards to expedite the hearing process by using those management methods already contained in Part 2.”<sup>8</sup> In 1998, when the Commission expected an increase in hearings as a result of license renewal applications and license transfers, the Commission issued a Policy Statement on the Conduct of Adjudicatory Proceedings. This Policy Statement, which included an endorsement of the 1981 Policy Statement, noted that the Commission had “critically reassessed its practices and procedures for conducting adjudicatory proceedings . . . to ensure that agency proceedings are conducted efficiently.”<sup>9</sup> Again, the Commission directed its hearing boards and presiding officers to “employ certain measures . . . to ensure efficient conduct of proceedings.”<sup>10</sup> The Commission revised its rules in Part 2 in 2004, and again in 2012, with the goal of making its rules of practice “more effective and efficient.”<sup>11</sup> In 2004, the Commission made extensive revisions to Part 2 because it had concluded that it needed to identify improvements that would “result in a better use of all participants’ limited resources.”<sup>12</sup> And in 2012, the Commission amended its adjudicatory rules to “promote fairness, efficiency, and openness.”<sup>13</sup>

For the past thirty-plus years, the Commission has worked to improve its adjudicatory policies and rules to make hearings fair and efficient. The NRC Staff’s Motion would, on the other hand needlessly burden Aerotest, Nuclear Labyrinth, the NRC Staff, and whichever adjudicatory bodies were appointed to respond to the demands for hearings. Instead of one

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<sup>8</sup> *Id.*

<sup>9</sup> 1998 Policy Statement at 18.

<sup>10</sup> *Id.*

<sup>11</sup> Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2182 (Jan. 14, 2004).

<sup>12</sup> *Id.*

<sup>13</sup> Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,562 (Aug. 3, 2012).

hearing on two relatively straight-forward and interrelated issues, the Staff's Motion calls for at least two hearings and, using its logic, would call for a third. The only basis for the Staff's request is that hearings on license transfers are ordinarily conducted under 10 C.F.R. Part 2, Subpart M while hearings on license renewals are typically held under 10 C.F.R. Part 2, Subpart L. But as its history demonstrates, this proceeding is not a typical situation. Here, we have two license application denials and an Order, all issued on the same day, interconnected, and arising from the same historical issue – the NRC Staff's foreign, ownership, control, or domination (“FOCD”) determination.

The Staff has requested that the hearing on the ILTA and the LRA be separated merely because Subpart M normally applies in hearings on license transfer applications and Subpart L normally applies in hearings on license renewal applications. As noted above, the Staff's Motion omits the Demand for Hearing on the Order, which is conducted under Subpart G (unless the parties agree to a Subpart L proceeding).<sup>14</sup> The Staff's logic therefore suggests that we have three separate hearings where one would suffice.

Interestingly, the NRC Staff sent *one* letter to Aerotest stating that the LRA was denied, the ILTA was denied, and that it was issuing an Order. And yet, the Staff insists that the issues leading to this one letter should be separated. The letter directed that Aerotest submit “a” request for hearing on the denials. Aerotest complied and now the Staff wants multiple proceedings. This can only be inefficient. There is ample flexibility in the Commission's procedural rules to address the two underlying issues – FOCD and financial qualification – in one proceeding, conserving all participants' resources.

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<sup>14</sup> 10 C.F.R. § 2.310(b).

## **B. The Proceedings are Inextricably Intertwined**

The two application denials and the issuance of the Order can all be traced back to a single issue: FOCD. This issue led to the submission of the license transfer application, which was denied based on the NRC Staff's financial qualifications finding, and led to the denial of the LRA.

The NRC Staff issued the Order prohibiting operation of the ARRR because the Staff had “den[ied] the license transfer and the license renewal[.]”<sup>15</sup> The Staff's basis for the Order demonstrates the interrelationship between the license renewal denial and the license transfer. The NRC Staff directed Autoliv ASP<sup>16</sup> to divest itself of the ARRR, and thus transfer its license, because the NRC Staff determined that Autoliv exercised impermissible foreign ownership. The NRC Staff denied the license transfer application based on financial qualifications. Thus, the financial qualification of Nuclear Labyrinth and Aerotest and foreign ownership are all issues underlying the NRC Order. Furthermore, the sole reason that the NRC Staff provided for denying the LRA was that “the reactor owned by Aerotest is under foreign ownership, control, or domination by Autoliv.”<sup>17</sup> The Staff's FOCD determination is the impetus for the license transfer, the basis for denying the LRA, and in part, the basis for the Order.

Aerotest discontinued ARRR operations on the threat of a shutdown order following an unsuccessful attempt to transfer the ARRR license to X-Ray Industries.<sup>18</sup> This NRC-compelled shutdown, resulting from the Staff's interpretation of FOCD restrictions, left Aerotest in a

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<sup>15</sup> July 24 Letter at 2.

<sup>16</sup> Autoliv ASP is a Michigan subsidiary of Autoliv and an intermediate parent of Aerotest.

<sup>17</sup> July 24 Letter at 2.

<sup>18</sup> Aerotest's “voluntary” shutdown is memorialized in a February 26, 2011 Confirmatory Action Letter. *See* Letter from E. Leeds (NRR) to D. Brisighella (Aerotest) (Feb. 26, 2011) (ADAMS Accession No. ML103640183).

position where it had no current revenue to rely on to demonstrate financial qualifications in the post-transfer environment. Thus, the FOCD determination has impacted the Applicants' ability to demonstrate financial qualification.

In sum, the foreign ownership determination set the stage for the license transfer and adversely impacted the ability of the Applicants to meet the Staff's financial qualification demands. It also resulted in the denial of the license renewal application.

**C. Consolidating the Proceedings is Conducive to the Proper Dispatch of Business and Ends of Justice**

Contrary to the NRC Staff's request to bifurcate or trifurcate these interrelated proceedings, a single hearing on the two related issues is in the best interest of all participants. There are overlapping issues, the same litigants are involved, and a single hearing conserves scarce resources. Commission rules provide for consolidating or separating proceedings if doing so is "conducive to the proper dispatch of its business and to the ends of justice."<sup>19</sup> Traditional grounds for consolidating proceedings include "similarity of issues in the proceedings, the commonality of litigants, and the convenience and saving time or expense."<sup>20</sup> The same two issues underlie the Order, the denial of the LRA, and the denial of ILTA – financial qualification and foreign ownership. Nuclear Labyrinth and Aerotest have the same interest in the resolution of these issues - *transferring* a renewed *operating* license. Nuclear Labyrinth has no interest in acquiring a license for a facility without an operating license. The transfer of a renewed operating license is impacted by both the FOCD and financial qualification determination.

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<sup>19</sup> 10 C.F.R. § 2.317(b).

<sup>20</sup> *Safety Light Corp.* (Bloomerg Site Decontamination and License Renewal Denials), CLI-92-13, 36 N.R.C. 79, 89 (1992) (footnote omitted).

Holding two or three separate hearings on two straight-forward issues would squander all participants' resources. There will be duplicate filings, duplicate travel to proceedings, and likely many of the same witnesses participating in the proceedings.

**D. Consolidated Proceedings are Consistent with Commission Rules and Precedent**

Commission rules provide ample flexibility to consolidate all three proceedings for hearing. The rules specifically allow the Commission to issue a case-specific order allowing a hearing on a license transfer application to be conducted under provisions other than Subpart M.<sup>21</sup> A hearing on the Order, which is an enforcement matter, though nominally heard under Subpart G, can be heard under Subpart L if the parties agree.<sup>22</sup> Applicants for their part would agree to hold the hearing they have demanded on the Order under Subpart L. And, as discussed below, the Commission has previously approved consolidating a hearing on a license renewal denial, subject to Subpart L, with a hearing on an order, subject to Subpart G, with the consolidated proceeding heard under Subpart G. Thus, the rules can be managed to provide for a single hearing in this case.

In *Safety Light*,<sup>23</sup> as in the current proceeding, the NRC Staff had denied the licensee's license renewal application and issued a concurrent order establishing certain decommissioning criteria and standards. The Atomic Safety and Licensing Board ("Board") appointed to handle the hearing on the order consolidated the Subpart G proceeding with the Subpart L hearing on *Safety Light*'s license renewal application. The NRC Staff challenged the Board's authority to

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<sup>21</sup> 10 C.F.R. § 2.310(g) and 10 C.F.R. § 2.1300.

<sup>22</sup> 10 C.F.R. § 2.310(b).

<sup>23</sup> CLI-92-13, 36 N.R.C. 79 (1992).

do so.<sup>24</sup> The Board based its decision on the common factual settings and unresolved novel issues in the two proceedings.<sup>25</sup> The Commission found that the Board’s reasoning in consolidating the proceedings was sound and approved the consolidation under Subpart G.<sup>26</sup> The Commission stated that the Board had based its decision on “factors that are well within the traditional grounds for consolidating proceedings: i.e., the similarity of issues in the proceedings, the commonality of litigants, and the convenience and saving of time or expense.”<sup>27</sup> The Commission’s decision in *Safety Light* shows that proceedings can be consolidated even where the actions are ordinarily subject to different hearing procedures.

The Motion relies on one of the underlying purposes for promulgating Subpart M as the basis for separating the ILTA proceeding and the LRA proceeding. The Staff argues that the license transfer issues to be considered in Subpart M proceedings were “unique” and “could not be efficiently and appropriately addressed under other Subparts of 10 C.F.R. Part 2.”<sup>28</sup> License transfer issues, in the Staff’s view, “do not involve the type of technical issues that ‘might benefit from review by a multi-member, multi-disciplined Atomic Safety and Licensing Board.’”<sup>29</sup> That argument does not support the conclusion that separate proceedings should be created here. The

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<sup>24</sup> *Id.* at 84. At the time, Subpart G proceedings were held before a panel, while Subpart L proceedings were held before a single presiding officer. The Chief Administrative Judge had established a panel to hear both proceedings. The Staff motioned the panel to apply Subpart L proceedings arguing that the Order proceeding should be held under Subpart L because it “flowed” from the denial of the license renewal application. The Board initially determined that the rules required that the proceedings be held under different subparts and referred the proceedings back to the Chief Administrative Judge, who in turn severed the proceedings. Ultimately, however, the Subpart G Board and the Subpart L Presiding Officer decided that “the consolidation of these two proceedings for all purposes would be in the best interests of justice and be most conducive to the effective resolution of the issues and the proceedings.” *Id.* (footnote omitted). The Staff then sought Commission review of Board’s consolidation order.

<sup>25</sup> *Id.* at 88.

<sup>26</sup> *Id.* at 89.

<sup>27</sup> *Id.* (footnote omitted).

<sup>28</sup> Motion at 4.

<sup>29</sup> *Id.* (footnote omitted).

Staff rightly notes that a license transfer proceeding does not typically involve “technical issues” that would benefit from review by a multi-disciplined Atomic Safety and Licensing Board. But, the Staff’s FOCD determination is arguably an even less technical issue than whether an applicant is financially qualified. There is no basis to create different proceedings to resolve the two non-technical issues. Choosing the Staff’s course of action could result in three proceedings presided over by three different entities. This is the height of inefficiency.

Furthermore, the basis for the streamlined license transfer hearing process created in Subpart M does not apply where, as here, the NRC Staff has denied the application. The expedited Subpart M procedures were “designed to provide for *public participation* in the event of request for a hearing . . . while at the same time providing an efficient process that recognizes the time-sensitivity normally present in transfer cases.”<sup>30</sup> These streamlined rules contemplate that the NRC Staff has approved the license transfer, an intervenor has submitted a hearing request to challenge the Staff’s approval, and in all likelihood, that the transaction has closed.<sup>31</sup> In the circumstance anticipated by Subpart M, it is important that the proceedings be expedited to minimize the difficulties associated with unwinding a corporate restructuring. Here, the ILTA has been denied and the transaction has not closed. Thus, while Applicants support an efficient hearing process, the expediency of the Subpart M procedures is not necessary and should not provide the basis for severing proceedings into three separate hearings. Nor is it necessarily the case that a Subpart L proceeding need be slower than a Subpart M proceeding.

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<sup>30</sup> 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998)(emphasis added).

<sup>31</sup> A search of past Commission decisions did not identify any other Subpart M proceeding where the license transfer application has been denied and applicants are seeking a hearing.

Finally, the fact that the Commission is ordinarily the presiding officer in a Subpart M proceeding is also no basis to sever these proceedings. First, the Commission can and has delegated this role.<sup>32</sup> Second, the Commission can designate itself as the presiding officer in any of the Subparts applicable to the actions subject to this Answer.<sup>33</sup> And finally, if the Commission does not designate a presiding officer in a Subpart G, Subpart L, or Subpart M proceeding, the Chief Administrative Judge can appoint either an Atomic Safety and Licensing Board Panel or an individual administrative law judge as the presiding officer.<sup>34</sup> Thus, there is ample flexibility in the procedures to allow the Commission to consolidate all three proceedings and have the proceeding heard by “one or more members of the Commission, an administrative law judge, an administrative judge, an Atomic Safety and License Board”<sup>35</sup> or any other person permitted by law.

#### **E. Nuclear Labyrinth Need Not Petition to Intervene**

The Staff’s suggestion that Nuclear Labyrinth must submit a petition for intervention in the proceeding for a denial of the LRA elevates form over function.<sup>36</sup> Nuclear Labyrinth set forth its basis for standing in the Joint Answer to and Demand for Hearing on Order<sup>37</sup> as directed

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<sup>32</sup> 10 C.F.R. § 2.1319(a) provides that the “Commission will *ordinarily* be the Presiding Officer at a hearing under this part. However, the Commission may provide in a hearing notice that one or more Commissioners, or any other person permitted by law, will preside.” (emphasis added); *See, e.g., Power Authority of the State of New York and Entergy Nuclear FitzPatrick LLC, Entergy Nuclear Indian Point 3 LLC, Entergy Operations, Inc.* (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3); CLI-00-22, 52 N.R.C. 266, 320 (2000), *See also* 65 Fed. Reg. 78,198, 78,212 (Dec. 14, 2000) (“The Commission directs the Chief Administrative Judge promptly to appoint a Presiding Officer for this proceeding.”)

<sup>33</sup> 10 C.F.R. § 2.313(a).

<sup>34</sup> 10 C.F.R. § 2.313(a)(1)-(2).

<sup>35</sup> *Id.*

<sup>36</sup> Motion at 1 n.1.

<sup>37</sup> *See supra* note 5.

in the Federal Register Notice.<sup>38</sup> Its contentions, along with Aerotest's, are set forth in that pleading. Thus, Nuclear Labyrinth has already met whatever procedural and substantive requirements that Staff's suggestion might contemplate. Furthermore, even if further procedural steps are required, those steps are as yet premature. When the Commission determines that a hearing is required under its rules, it will issue a notice indicating the date by which petitions for intervention must be filed.<sup>39</sup> Thus, even if Nuclear Labyrinth were required to submit such a petition, it should be submitted in accordance with Commission's notice, yet to be issued.

### **III. Conclusions**

Creating separate proceedings on the ILTA denial, the LRA denial, and the Order is inefficient and unnecessary given the flexibility afforded by the Commission's rules. Similar interests, factual settings, and overlapping issues are present in the proceedings. The participants' limited resources will be better used by holding one hearing on the issues rather than three. For the reasons stated above, Aerotest and Nuclear Labyrinth respectfully request NRC Staff's Motion be denied.

Respectfully Submitted

/signed electronically by/

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<sup>38</sup> See 78 Fed. Reg. 46,618 (Aug. 1, 2013).

<sup>39</sup> 10 C.F.R. § 2.104.

**UNITED STATES OF AMERICA  
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	)	Docket No. 50-228
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	)	
(Aerotest Radiography and	)	
Research Reactor)	)	

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Joint Answer to 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 has been served through the E-Filing system on the participants in the above-captioned proceeding this 29<sup>th</sup> day of August 2013.

/Signed electronically by/

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Kimberly A Harshaw