

September 9, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF ANSWER TO JOINT DEMAND FOR HEARING ON DENIAL OF
INDIRECT LICENSE TRANSFER REGARDING
AEROTEST RADIOGRAPHY AND RESEARCH REACTOR
FACILITY OPERATING LICENSE NO. R-98

INTRODUCTION

By letter dated July 24, 2013, the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) denied Aerotest Operations, Inc.'s (Aerotest) application for the indirect transfer of license number R-98 for the Aerotest Radiography and Research Reactor (ARRR) to Nuclear Labyrinth, LLC (Nuclear Labyrinth) and Aerotest's application for the license renewal of the ARRR.¹ On August 13, 2013, Aerotest and Nuclear Labyrinth filed a joint demand for hearing on the denial of the license renewal application and the denial of the license transfer application.² On August 21, 2013, the NRC Staff moved to sever any hearing on the denial of

¹ Letter to Michael Anderson, President, Aerotest Operations, Inc. from Eric Leeds, NRC, Re: Aerotest Operations, Inc. – 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 (July 24, 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13120A598) (Denial Letter).

² 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, 2013) (ADAMS Accession No. ML13226A407) (Joint Demand).

the license renewal from any hearing on the denial of the indirect license transfer.³ The Staff hereby files its answer to the joint demand for hearing on the denial of the indirect license transfer.⁴

BACKGROUND

This matter arises from Aerotest and Nuclear Labyrinth's May 30, 2012 application for an indirect license transfer.⁵ Transfers of licenses are governed by the Commission's regulations at 10 *Code of Federal Regulations* (C.F.R.) § 50.80. Section 50.80(a) states that:

No license for a production or utilization facility . . . or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission gives its consent in writing.

Additionally, section 50.80(b)(1)(i) states, in part, that an application for a license transfer shall include "as much of the information described in 10 C.F.R. §§ 50.33 and 50.34 with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license."

³ 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 (Aug. 21, 2013) (ADAMS Accession No. ML13233A371) (Motion to Sever). In its Motion to Sever, the Staff noted that the basis for denial of the license renewal was founded on Foreign Ownership, Control, and Domination (FOCD), while the denial of the indirect license renewal is clearly separately based on Financial Qualifications. The indirect license transfer proceedings have traditionally been adjudicated under the unique regulatory Subpart M procedures for hearing (10 C.F.R. § 2.1300 provides that "[t]his subpart provides the only mechanism for requesting hearings on license transfer requests, unless contrary case specific orders are issued by the Commission."). On the other hand, license renewal proceedings have been consistently adjudicated under the Subpart L hearing procedures.

⁴ Along with this Answer, the Staff is filing a separate answer to respond to the request for hearing on the denial of the license renewal application.

Additionally, on August 27, 2013, the Staff filed a separate response to Aerotest and Nuclear Labyrinth's Joint Answer and Demand for Hearing on the order prohibiting operation of Aerotest Radiography and Research Reactor. NRC Staff Response to Joint Answer to and Demand for Hearing on Order Prohibiting Operation of Aerotest Radiography and Research Reactor Facility Operating License No. R-98 (Aug. 27, 2013) (ADAMS Accession No. ML13239A225).

⁵ See ADAMS Accession Nos. ML12152A233 and ML12180A384.

As a nonelectric utility,⁶ Aerotest must meet the financial qualification requirements outlined in 10 C.F.R. § 50.33(f)(2), which states, in part, that:

If the application is for an operating license, the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs.⁷

In its license transfer application, Aerotest and Nuclear Labyrinth provided financial projections, which the Staff reviewed to determine if Nuclear Labyrinth possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operating costs for the period of the license.⁸ Specifically, the Staff reviewed *pro forma* projected financial statements (projected net income statement for Aerotest and projected balance sheet for Nuclear Labyrinth), and also evaluated the financial condition of Nuclear Labyrinth, which would be the ultimate owner of Aerotest following the proposed indirect license transfer, as it relates to its obligations and the Support Agreement between Nuclear Labyrinth and Aerotest.⁹ After considering the reasonableness of estimating operating costs, the reasonableness of financial projections and underlying assumptions, and the sensitivity of plant revenue projections, among other things,¹⁰ the Staff concluded that “neither Aerotest nor Nuclear Labyrinth meets the

⁶ See 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 3. (ADAMS Accession No. ML13129A001) (License Transfer SE) (determining that Aerotest does not qualify as an electric utility as defined in 10 C.F.R. § 50.2).

⁷ See also 10 C.F.R. § 50.33(f) (providing that application shall state “information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance with the regulations in this chapter, the activities for which the permit or license is sought.”).

⁸ The Staff’s review was documented in the License Transfer SE.

⁹ *Id.* at 4-9.

¹⁰ *Id.* at 3-9.

financial qualification requirements under 10 CFR 50.33(f) because they have not demonstrated that they possess or have reasonable assurance of obtaining the funds necessary to cover estimated operating costs for the period of the license.”¹¹

Accordingly, on July 24, 2013, the Staff denied the license transfer request because “the NRC does not have reasonable assurance, as required by 10 CFR 50.33, that Nuclear Labyrinth, LLC, would have sufficient funding to conduct the activities authorized by the ARRR license if the license were transferred.”¹² On August 13, 2013, Aerotest and Nuclear Labyrinth filed a joint demand for hearing on the denial of the license renewal application and the denial of the indirect license transfer.¹³ The Staff hereby files its answer to the joint demand for hearing on the denial of the indirect license transfer.

DISCUSSION

The Staff does not oppose Aerotest and Nuclear Labyrinth’s timely-filed joint demand for hearing on the denial of the indirect license transfer. As previously stated in the Staff’s Motion to Sever, the Staff does not dispute Aerotest and Nuclear Labyrinth’s assertion that the provisions of 10 C.F.R. § 2.309 relating to a “request for hearing” do not apply to the Joint Demand as to the license transfer proceeding.¹⁴ Nevertheless, for purposes of clarity and judicial economy, the Staff respectfully requests that Aerotest and Nuclear Labyrinth be granted an opportunity to provide a statement outlining their areas of controversy and/or concern regarding their joint demand for hearing on the denial of the license transfer.¹⁵

¹¹ License Transfer SE at 9.

¹² Denial Letter at 2.

¹³ See *generally* Joint Demand.

¹⁴ *Id.* at 1 n.1. As discussed in the Staff’s Motion to Sever, the Staff requests that the Commission sever any hearing on the license renewal denial from any hearing on the license transfer denial. *Id.* at 3-6.

¹⁵ The Commission has previously recognized the importance of placing “other parties in the proceeding on notice of the Petitioners’ specific grievances and thus [giving] them a good idea of the (...footnote continued)

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 9th day of September, 2013

(footnote continued...)

claims they will be either supporting or opposing.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). The Appeal Board has also recognized the importance of assuring “that other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against or oppose.” *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 931-33 (1987) (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20-21 (1974)). Aerotest’s briefly worded demand for hearing cites the Board’s (LBP-13-03) holding in the pending *Charlissa C. Smith* proceeding as sufficient in demanding a hearing. Joint Demand at 2 n.2. However, in the *Smith* proceeding both the Board and the Staff were able to determine several separate issues that had been raised by Ms. Smith’s demand for a hearing and needed to be addressed in that proceeding. See *Charlissa C. Smith* (Denial of Senior Reactor Operator License), LBP-13-03, 77 NRC __ (slip op. at 4-5) (Feb. 19, 2013); NRC Staff Response to Ms. Charlissa C. Smith’s Request for Hearing on Denial of Application for a Senior Reactor Operating License, at 5-6 (Dec. 31, 2013) (ADAMS Accession No. ML12366A259).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO JOINT DEMAND FOR HEARING ON DENIAL OF INDIRECT LICENSE TRANSFER REGARDING AEROTEST RADIOGRAPHY AND RESEARCH REACTOR OPERATING LICENSE NO. R-98", dated September 9, 2013, have been served upon the Electronic Information Exchange, in the above-captioned proceedings, this 9th day of September.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 9th day of September, 2013