

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman  
Kristine L. Svinicki  
George Apostolakis  
William D. Magwood, IV  
William C. Ostendorff

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In the Matter of )

AEROTEST OPERATIONS, INC. )

(Aerotest Radiography and Research Reactor) )

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) Docket Nos. 50-228-LR,  
) 50-228-LT, &  
) 50-228-EA  
)  
)

**CLI-14-05**

**MEMORANDUM AND ORDER**

Today's decision stems from three separate but interrelated actions by the NRC Staff. First, the Staff denied an indirect license transfer application of both Aerotest Operations, Inc. and its proposed transferee, Nuclear Labyrinth, LLC (together, the companies). Second, the Staff denied Aerotest's application to renew its license to own and operate Aerotest Radiography and Research Reactor (ARRR). And third, the Staff issued a related enforcement order barring the future operation of the ARRR and directing other actions related to decommissioning.

Aerotest and Nuclear Labyrinth seek a consolidated hearing on all three staff actions. The Staff does not oppose the hearing requests, but moves to "sever" the license transfer adjudication from the license renewal adjudication. As discussed below, we decline to consolidate the proceedings, and, inasmuch as the proceedings were not consolidated or

otherwise joined to begin with, we deny the Staff's motion. We also grant the companies' request for a hearing on the Staff's denial of their license transfer application, and we hold that our Subpart M procedural rules apply to that proceeding. Regarding that proceeding, we instruct the Chief Administrative Judge to appoint a presiding officer, and direct the Staff to participate as a party. We defer consideration of the companies' hearing demands on the license renewal application and enforcement order pending completion of the license transfer matter. Finally, we impose certain filing requirements on the parties.

## I. BACKGROUND

In May 2000, Autoliv ASP, Inc., purchased Aerotest.<sup>1</sup> The purchaser was a wholly-owned subsidiary of Autoliv, Inc. (Autoliv), a company incorporated in Delaware with its headquarters in Stockholm, Sweden.<sup>2</sup> In October of that year, the NRC's technical staff informed our Executive Director for Operations that only one third of Autoliv's stock was held in the United States, close to half was held in Sweden, and most of the remainder in the United Kingdom.<sup>3</sup> These and other facts led the Staff to investigate whether the ownership transfer

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<sup>1</sup> See Tsukimur, Ray R., Aerotest, letter to Ledyard B. Marsh, NRC (Apr. 9, 2001), at 1 (ADAMS accession no. ML011140283); Application for Consent to Indirect Transfer of Control of License (May 30, 2012), at 2 (ML12180A384) (License Transfer Application), appended as Attachment 1 to Brisighella, Dario, Aerotest, and Slaughter, David M., Nuclear Labyrinth, letter to Document Control Desk, NRC (May 30, 2012) (ML12152A233); see also Warren, Sandra L., Aerotest, letter to Director of the Office of Nuclear Reactor Regulation, NRC (Apr. 14, 2000) (ML003704794) (informing the Staff of the impending purchase).

<sup>2</sup> License Transfer Application at 2. Aerotest Operations, Inc. is wholly owned by OEA Aerospace, Inc., which is wholly owned by OEA, Inc., which is in turn wholly owned by Autoliv ASP, Inc., which is wholly owned by Autoliv, Inc. *Id.*

<sup>3</sup> Matthews, David B., NRR, memorandum to John W. Craig, EDO (Oct. 17, 2000), at 1 (Matthews Memorandum), appended to Craig, John W., OEDO, Note to Commissioner[s'] Assistants (Oct. 19, 2000) (ML040430500). As of July 2013, the Staff reported that the majority of Autoliv's stock was still held by non-U.S. citizens and also that the majority of Autoliv, Inc.'s board of directors and executive officers were likewise foreign citizens. 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; Docket No. 50-228 (July 24, 2013), at 2

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violated the foreign ownership provisions of section 104d of the Atomic Energy Act of 1954, as amended, (AEA)<sup>4</sup> and 10 C.F.R. § 50.38, our regulation implementing that statutory provision.<sup>5</sup> At that point, Autoliv began a lengthy search for a domestic company that would buy Aerotest.<sup>6</sup>

In 2005, Aerotest filed the license renewal application at issue here.<sup>7</sup> Shortly thereafter, the operating license for the ARRR expired, and the reactor continued to operate under the “timely renewal” provisions of 10 C.F.R. § 2.109.<sup>8</sup> In 2009, the Staff announced its intent to deny the renewal application because of Aerotest’s noncompliance with the AEA’s foreign ownership provisions.<sup>9</sup> Aerotest continued to negotiate with a series of potential buyers for an additional year.<sup>10</sup>

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(ML13129A001) (Safety Evaluation), appended as Enclosure 2 to Leeds, Eric J., NRC, letter to Michael Anderson, Aerotest, “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 (TAC Nos. ME8811 and MC9596)” (July 24, 2013) (Denial Letter), at 2 (ML13120A598). The letter is included as part of ADAMS package ML13120A593 (Denial Package).

<sup>4</sup> 42 U.S.C. § 2134(d).

<sup>5</sup> See Matthews Memorandum at 1-2. At the time, Aerotest failed to submit a license transfer application with the NRC, as required by 10 C.F.R. § 50.80. *Id.*

<sup>6</sup> For a summary of Aerotest’s efforts from 2001 to 2009 to find a domestic purchaser, see Anderson, Michael S., Aerotest, letter to Cindy Montgomery, NRC, “Aerotest Operations Inc.—Request for Additional Information Regarding License Renewal Request (TAC No. MD2914)” (Mar. 9, 2009), at 5-7 (unnumbered) (ML120900629).

<sup>7</sup> License Renewal Application for the Aerotest Radiography and Research Reactor (ARRR), appended to Anderson, Michael S., Aerotest, letter to NRC Document Control Desk, “Renewal Application for ARRR, License No. R-98” (Feb. 28, 2005) (ML050660109).

<sup>8</sup> That regulation provides that “if at least 30 days before the expiration of an existing license authorizing any activity of a continuing nature, the licensee files an application for a renewal . . . , the existing license will not be deemed to have expired until the application has been finally determined.”

<sup>9</sup> Leeds, Eric J., NRC, letter to Dario Brisighella, Aerotest, “Aerotest Operations, Inc.—Proposed Denial of Application for Renewal of Facility License No. R-98 (TAC No. MD8177)” (July 9, 2009) (ML090830578).

<sup>10</sup> See, e.g., Leeds, Eric J., NRC, letter to Dario Brisighella, Aerotest, “Aerotest Operations,

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On October 15, 2010, Aerotest shut down the ARRR and began the process of developing a decommissioning plan for the reactor.<sup>11</sup> But while Aerotest was seeking bids from decommissioning contractors, it continued to look for a prospective purchaser.<sup>12</sup> In 2012, Aerotest announced that it had found a domestic buyer, Nuclear Labyrinth, to own and operate the ARRR, and on May 30 of that year, Aerotest submitted its current application for a license transfer. According to the license transfer application, Nuclear Labyrinth would purchase 100% of Aerotest from Aerotest's ultimate parent, Autoliv, and upon the closing of the sale, Autoliv would transfer to Nuclear Labyrinth enough funds to operate the facility for approximately twelve months.<sup>13</sup>

On July 24, 2013, the Staff denied Aerotest's and Nuclear Labyrinth's license transfer application and also denied Aerotest's application for the renewal of the ARRR license.<sup>14</sup> The Staff denied the license transfer application on financial assurance grounds and concluded that "neither Aerotest nor Nuclear Labyrinth meets the financial qualification requirements under

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Inc.—U.S. Nuclear Regulatory Commission Response to Request for Extension of Time to Request Hearing on Proposed Denial of License Renewal for Facility Operating License No. R-98 (TAC ME1887)" (Feb. 2, 2010) (ML100120418) (one of several extensions).

<sup>11</sup> Anderson, Michael S., Aerotest, letter to Document Control Desk, NRC, "Docket No. 50-228 Aerotest Radiography and Research Reactor License No. R-98" (Jan. 7, 2011) (ML110180463).

<sup>12</sup> See, e.g., *id.* at 2; Traiforos, Spyros, NRR, memorandum to Jessie Quichocho, NRR, "Summary of January 18, 2012, Public Meeting with Aerotest Operations, Inc., to Discuss the Status of the Items in the Confirmatory Action Letter No. NRR-2011-001" (Jan. 20, 2012), at 1 (ML120200203).

<sup>13</sup> License Transfer Application at 3, 8.

<sup>14</sup> See *generally* Denial Package. The Staff also issued a second letter and document package on the same day addressing just the license transfer. See Leeds, Eric J., NRC, letter to David M. Slaughter, Nuclear Labyrinth, "Aerotest Operations, Inc.—Denial of License Transfer Regarding the Aerotest Radiography and Research Reactor, Facility Operating License No. R-98 (TAC No. ME8811)" (dated July 15, 2013, but issued July 24, 2013) (ML13134A376) (package) (Transfer Denial). The safety evaluation included in this package is identical to that included in the Denial Package, *supra* note 3.

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.”<sup>15</sup> The Staff likewise determined that the companies had failed to provide reasonable assurance that they had sufficient funds to cover the annual costs for storing spent fuel until the Department of Energy accepts the fuel.<sup>16</sup>

Absent a transfer, the Staff found that the ARRR—as owned by Aerotest—remained under foreign ownership, control, or domination; the Staff therefore denied the license renewal application.<sup>17</sup> The Staff relied on the facts that Autoliv is headquartered in Sweden, that the majority of its board of directors and executive officers are not U.S. citizens, and that the majority of its outstanding stock is held by non-U.S. citizens.<sup>18</sup> Simultaneous with its denial of both the license transfer and the license renewal applications, the Staff issued to Aerotest an order prohibiting operation of the ARRR and directing other action.<sup>19</sup>

Aerotest and Nuclear Labyrinth have timely filed joint demands for hearings on the two denials and a separate hearing demand on the Order.<sup>20</sup> The Staff does not oppose Aerotest’s

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<sup>15</sup> Safety Evaluation at 9.

<sup>16</sup> *Id.* at 10-11. The license transfer denial did not turn on the foreign ownership question, but the Staff nevertheless expressed a concern that Autoliv could, in the future, subject Aerotest and Nuclear Labyrinth to foreign control. See *id.* at 12.

<sup>17</sup> *Id.* at 11 (citing 42 U.S.C. § 2134(d) and 10 C.F.R. § 50.38).

<sup>18</sup> Denial Letter at 1-2.

<sup>19</sup> Order Prohibiting Operation of Aerotest Radiography and Research Reactor, 78 Fed. Reg. 46,618 (Aug. 1, 2013) (Order). The Order also was included as Enclosure 3 of the Denial Package.

<sup>20</sup> *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) (Joint Hearing Demand); *Joint Answer to and Demand for Hearing on Order Prohibiting Operation of Aerotest Radiography and Research Reactor Facility Operating License No. R-98* (Aug. 13, 2013) (Joint Answer and Hearing Demand). The Transfer Denial, *supra* note 14, although issued on July 24, was dated July 15. The Staff subsequently clarified that

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and Nuclear Labyrinth's demand for a hearing on either the license transfer application or the Order.<sup>21</sup> The Staff likewise does not oppose Aerotest's demand for a hearing on the license renewal application.<sup>22</sup>

## II. DISCUSSION

### A. Structure of the Proceedings

We begin by considering the parties' assertions that the individual issues requiring resolution should either be consolidated or, conversely, severed. To answer this question, we first identify the procedures that govern resolution of the issues, as this determination is a significant driver of our conclusion that the issues are best considered individually.

#### 1. *Applicable Procedural Rules*

The Staff requests that the hearing on the license transfer be governed by 10 C.F.R. Part 2, Subpart M, and that the hearing on the license renewal application be conducted separately under 10 C.F.R. Part 2, Subpart L.<sup>23</sup> On the other hand, the companies would prefer

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the deadline for Nuclear Labyrinth to request a hearing on the denial was August 13, 2013. Bowman, Gregory T., NRC, letter to David M. Slaughter, Nuclear Labyrinth, "Clarification of Deadline for Requesting Hearing on the Denial of License Transfer of Aerotest Radiography and Research Reactor, Facility Operating License No. R-98" (Aug. 2, 2013) (ML13214A343).

<sup>21</sup> *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* (Sept. 9, 2013), at 4 (Staff Answer to Joint Demand on License Transfer); *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), at 2.

<sup>22</sup> *NRC Staff Answer to Joint Demand for Hearing on Denial of License Renewal Regarding Aerotest Radiography and Research Reactor Facility Operating License No. R-98* (Sept. 9, 2013), at 4. But the Staff argues that if Nuclear Labyrinth wishes to participate as a party in the license renewal case, it must file a petition to intervene that conforms to 10 C.F.R. § 2.309. *Id.* As discussed *infra*, we need not reach this question today.

<sup>23</sup> *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), at 2, 4-6 (Motion to Sever). The Staff does not include the hearing on the Order in its motion to sever.

that these two adjudications, along with the enforcement proceeding, be handled together under Subpart L.<sup>24</sup>

The procedural rules in Subpart L govern most adjudicatory proceedings, while the rules in Subpart M govern, specifically, adjudications on transfer applications.<sup>25</sup> Thus, in a typical license transfer case, we would apply Subpart M's procedural rules as a matter of course.

Today's case is somewhat atypical in that it stems not from an intervention petition but rather from a challenge to a Staff decision to deny the application.<sup>26</sup> We have the authority to rule that this license transfer case be adjudicated under Subpart L,<sup>27</sup> and could exercise our discretion to

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<sup>24</sup> See *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* (Aug. 29, 2013), at 8 (“Applicants . . . would agree to hold the hearing . . . under Subpart L”) (Joint Answer to Motion to Sever).

<sup>25</sup> See 10 C.F.R. §§ 2.310(a) (regarding Subpart L), 2.310(g) (regarding Subpart M), 2.1200 (Subparts C and L “govern all adjudicatory proceedings conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act, and 10 CFR part 2, except for . . . 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.”), 2.1300 (Subpart M, “together with the generally applicable intervention provisions in subpart C of this part, govern all adjudicatory proceedings” on license transfer applications).

<sup>26</sup> This is not to suggest that Subpart M applies *solely* to hearing requests from potential intervenors and not from licensees. Indeed, we find nothing in the relevant regulations, regulatory history, or case law that would support such a conclusion. Our regulation defining the scope of Subpart M proceedings provides that the Subpart governs “*all* adjudicatory proceedings on an application for the . . . transfer of control of an NRC license,” without distinction as to how the proceeding commences. 10 C.F.R. § 2.1300 (emphasis added). Similarly, the title of Subpart M indicates—in general terms and without any exceptions—our intent that those regulations apply to “hearings on license transfer applications.” And our Statements of Consideration for the 1998 final rule promulgating Subpart M takes the same approach—referring generally to “requests for hearings associated with license transfer applications.” Final Rule, Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721, 66,721 (Dec. 3, 1998) (Final Rule, Streamlined Hearing Process).

<sup>27</sup> See, e.g., 10 C.F.R. §§ 2.1300 (“This subpart provides the only mechanism for requesting hearings on license transfer requests, unless contrary case[-]specific orders are issued by the Commission.”), 2.310(g) (“Proceedings on a [license transfer application] . . . shall be conducted under the procedures of subpart M of this part, unless the Commission determines otherwise in a case-specific order.”).

adjudicate the license transfer case under that Subpart. And as the companies point out, doing so here would enable us to apply one set of procedural rules (i.e., those in Subpart L) to all three consolidated proceedings.<sup>28</sup>

Notwithstanding our authority to proceed under Subpart L, we agree with the Staff that the license transfer proceeding should be conducted under Subpart M. We justified the creation of the new Subpart M by citing “the need for expeditious decisionmaking . . . for these kinds of transactions”<sup>29</sup>—a justification that logically applies to all license transfer hearing requests, regardless of who files them. Indeed, the types of issues litigated in license transfer cases (e.g., financial assurance, technical qualifications, foreign ownership, and staffing levels<sup>30</sup>) are likely to be similar regardless of whether they are initiated by intervention petitions or by challenges to a staff action. The streamlined hearing process provided in Subpart M is therefore equally appropriate for adjudications that arise out of a licensee’s hearing request and those arising from a potential intervenor’s hearing request. We do not view the fact that our review arises out of a licensee’s hearing request to warrant departure from the general rule in this case, and we decline to exercise our discretion in the manner that the companies propose.

Further, we have made clear that any discretionary diversion from the usual Subpart M procedural track will be rare—requiring “extraordinary” and “unusual” circumstances.<sup>31</sup> We see

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<sup>28</sup> See Joint Answer to Motion to Sever at 8.

<sup>29</sup> Final Rule, Streamlined Hearing Process, 63 Fed. Reg. at 66,721.

<sup>30</sup> See *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 290-91 & nn.10-11 (2000).

<sup>31</sup> Final Rule, Streamlined Hearing Process, 63 Fed. Reg. at 66,723. We have declined all requests to date to provide a non-Subpart M hearing in a license transfer case. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 334-35 (2002); *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 129-30 (2001); *FitzPatrick*, CLI-00-22, 52 NRC at 290-91; *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 162 (2000); *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2),

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nothing in Aerotest’s particular case that is out of the ordinary for a license transfer case. Our review of the record indicates that the Staff denied the license transfer application on grounds of operating costs and ability to pay the annual cost for spent fuel storage—typical license transfer issues under 10 C.F.R. § 50.33.<sup>32</sup> These issues are thus neither “extraordinary” nor “unusual.”<sup>33</sup>

Finally, as detailed in the next section, we are not convinced that consolidation of the proceedings will necessarily promote a more efficient resolution of the parties’ dispute. We therefore find that the potential benefits of consolidation provide insufficient justification for us to apply a different procedural framework from the one contemplated by our regulations for the resolution of disputes relating to license transfer.

Given that we find Subpart M appropriate for consideration of the license transfer case here, we turn to whether the proceedings are appropriately handled separately, as the Staff requests, or together, as the companies request. We also consider whether the cases should be adjudicated in sequence or in parallel.

## **2. Consolidation and Sequencing of the Proceedings**

The companies filed a single request for a hearing on both the license transfer and license renewal applications and requested that these two cases, along with the enforcement proceeding, be considered as part of a single proceeding.<sup>34</sup> The companies rely on our

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CLI-99-30, 50 NRC 333, 345 (1999).

<sup>32</sup> See *Nine Mile Point*, CLI-99-30, 50 NRC at 345 (“When promulgating Subpart M, we were well aware that most license transfer issues would be . . . financial in nature.”); see also *FitzPatrick*, CLI-00-22, 52 NRC at 290-91 and nn.10-11; see generally 10 C.F.R. § 50.33 (general information required for an application).

<sup>33</sup> Final Rule, Streamlined Hearing Process, 63 Fed. Reg. at 66,723.

<sup>34</sup> *Joint Hearing Demand; Joint Answer and Hearing Demand; Joint Answer to Motion to Sever* at 8. See generally Denial Letter at 2 (“In accordance with 10 CFR 2.103(b), you have the right to demand a hearing on the license transfer denial and license renewal denial within 20 days of the date of this letter.”).

conclusion in *Safety Light* that related proceedings may be consolidated, taking into consideration three factors: “the similarity of issues in the proceedings, the commonality of litigants, and the convenience and saving of time or expense.”<sup>35</sup> The companies assert that the proceedings involve similar issues and similar litigants, and they further argue that holding multiple hearings here would both contravene our policy favoring adjudicatory efficiency and needlessly burden the litigants and the presiding officers.<sup>36</sup>

We deny the companies’ request for consolidation. Our regulations contemplate separate hearings on individual proceedings unless they are consolidated.<sup>37</sup> Separate hearings have been shown to be appropriate for cases governed by different procedural rules.<sup>38</sup> The companies have not shown us why we should depart from this default rule. While we agree that the three proceedings share common factual underpinnings, the operative facts are undisputed and need not be resolved at hearing. Both the license transfer and license renewal cases focus instead on whether the Staff appropriately interpreted our regulations and applied them correctly to the undisputed facts common to the two proceedings. The license renewal and license

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<sup>35</sup> *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 89 (1992). In *Safety Light*, the Commission deferred to the Board’s decision to consolidate an “informal” Subpart L proceeding with a “formal” Subpart G proceeding.

<sup>36</sup> Joint Answer to Motion to Sever at 3-11.

<sup>37</sup> Our rule explicitly empowering presiding officers to consolidate proceedings demonstrates that consolidation is the exception rather than the rule. See 10 C.F.R. §§ 2.317(b), 2.319(c); see also 10 C.F.R. § 2.402. A litigant asking us to depart from this regulatory approach has the burden of showing that such a departure “will be conducive to the proper dispatch of [the Commission’s] business and to the ends of justice and will be conducted in accordance with the other provisions of [Subpart C].” 10 C.F.R. §§ 2.317(b).

<sup>38</sup> See *FitzPatrick*, CLI-00-22, 52 NRC at 291 (“CAN moves for a consolidated hearing by the Commission, [the Federal Energy Regulatory Commission] and [the New York State Department of Environmental Conservation]. . . . We believe holding a consolidated hearing would be impractical in the particular circumstances of this proceeding, given that each agency would be operating under a different set of procedural rules and governing statutes.”).

transfer cases also involve different issues: the challenged basis for the Staff's denial in the license renewal case is foreign ownership, control, and domination, while the challenged basis for the Staff's denial of the license transfer application is financial assurance.<sup>39</sup>

Separately, we find that the companies' perspective on adjudicatory efficiency is too narrow. It is by no means assured that consolidation of the proceedings will result in the litigants and our agency expending fewer resources and less time than if they were treated separately. As noted above, the Staff denied the two licensing actions on different grounds (foreign ownership and financial assurance). This difference provides a strong justification for separate adjudications—the litigants and presiding officers can focus on the core issue at hand in each case. This focus should streamline the decisionmaking process in each adjudication and thereby provide the adjudicatory efficiency that the companies seek. Without in any way suggesting how we may eventually resolve the substantive issues regarding foreign ownership and financial assurance, we offer the following two scenarios as examples supporting our conclusion that separate sequential adjudications may be more efficient than a consolidated one.

First, a consolidation of the cases and a simultaneous adjudication of all issues could well yield adjudicatory inefficiencies. By the conclusion of such a consolidated adjudication, the resolution of the license transfer case's financial assurance issues may have rendered moot some (or even all) of the issues in the license renewal and enforcement cases—thereby rendering unnecessary a portion of the parties' and the agency's expenditure of time and

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<sup>39</sup> Cf. *Advanced Medical Systems, Inc.* (1020 London Road, Cleveland, Ohio), LBP-98-32, 48 NRC 374, 377-78 (1998) (consolidating proceedings (1) for the renewal of a materials license and (2) contesting the Staff's denial of that renewal in order to, among other things, litigate a common issue only once).

resources in the litigation of the latter two cases.<sup>40</sup> The initial, separate adjudication of the license transfer case would, by contrast, preclude such potential waste of time and resources.

Second, the sequential adjudication of the cases may provide adjudicatory efficiencies from an unexpected quarter. If we simultaneously adjudicate the license transfer case and continue our current generic (non-adjudicatory) analysis of the foreign ownership issue,<sup>41</sup> then our subsequent consideration of that same issue in the license renewal and enforcement cases may well benefit from our generic analysis and conclusions. This benefit may not be available were we to proceed on those latter two cases prior to the conclusion of our generic analysis.

For these reasons, we will adjudicate the transfer and renewal proceedings separately.<sup>42</sup> We will address first the license transfer case and will hold in abeyance the other two cases pending our resolution of the first proceeding.

#### **B. Procedural Issues Associated With Conduct of Subpart M Proceeding**

In view of our conclusions that consolidation is not warranted and that we will consider the license transfer case first, we address several housekeeping matters associated with the Subpart M proceeding.<sup>43</sup>

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<sup>40</sup> In particular, were we to reverse the Staff's denial of the license transfer application, the new owner would be a U.S. company—a fact that likely would render moot some or all of the questions involved in the license renewal and enforcement cases.

<sup>41</sup> See Staff Requirements—SECY-12-0168—Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), Docket No. 52-016-COL, Petition for Review of LBP-12-19 (Mar. 11, 2013) (ML13070A150).

<sup>42</sup> Because the license transfer and license renewal proceedings are not consolidated, the relief sought in the Staff's Motion to Sever is unnecessary. Thus, even though the effect of our decision is to consider the license renewal and license transfer issues separately, we deny the Staff's motion.

<sup>43</sup> Because we defer our consideration of the license renewal and enforcement proceedings until we have issued a final decision in the license transfer proceeding, we likewise defer our consideration of related issues, including the procedural rules that will govern those two proceedings, whether those proceedings should be consolidated, and the question of Nuclear Labyrinth's party status in the license renewal matter.

## **1. Presiding Officer in the License Transfer Proceeding**

We direct the Chief Administrative Judge to appoint a single administrative judge within the next five business days to serve as Presiding Officer for this license transfer proceeding for the purposes of compiling the hearing record, ruling on any motions related to developing the factual record while the proceeding is before the Presiding Officer, presiding at any oral hearing, and certifying the compiled record to us.<sup>44</sup> We expect that this certification will resemble the prior certification of the record from the Presiding Officer to the Commission in the *FitzPatrick* license transfer proceeding.<sup>45</sup> If the Presiding Officer has any question regarding the scope of delegated authorities, we expect the Presiding Officer to immediately certify those questions to the Commission.<sup>46</sup> Until the appointment of a Presiding Officer, the parties should address any written submissions directly to us.

## **2. The Staff's Party Status**

Section 2.1316(b) of our regulations provides that the Staff is not required to be a party to a license transfer adjudication.<sup>47</sup> But here the Staff's denial is directly at issue. We therefore

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<sup>44</sup> Our rules provide that, "ordinarily," the Commission itself will preside over license transfer hearings. 10 C.F.R. § 2.1319(a). But our rules also allow us to designate "one or more Commissioners" or "any other person permitted by law" to preside. *Id.* Where the Commission does not preside, "The Presiding Officer will certify the completed hearing record to the Commission, which may then issue its decision on the hearing or provide that additional testimony be presented." 10 C.F.R. § 2.1320(b)(3); *see also* 10 C.F.R. § 2.1331 ("Upon completion of a hearing, the Commission will issue a written opinion including its decision on the license transfer application and the reasons for the decision.").

<sup>45</sup> *E.g., Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3), Certification of Record to Commission (Apr. 5, 2001) (unpublished) (ML010950574).

<sup>46</sup> *See* 10 C.F.R. § 2.1320(b)(1) (noting that the "Presiding Officer may certify questions or refer rulings to the Commission for decision").

<sup>47</sup> 10 C.F.R. § 2.1316(b); *see also* Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,580, 46,586 (Aug. 3, 2012) (Section 2.1316 requires the NRC staff to notify the presiding officer and the parties whether it desires to participate as a party in the proceeding).

direct the Staff to become a party to the license transfer proceeding pursuant to 10 C.F.R. § 2.1309(a)(7), which provides for the Staff to “participate as a party” in such proceedings if “so . . . directed by the Commission.”<sup>48</sup>

### **3. *Schedule for License Transfer Proceeding***

Section 2.1308 provides that license transfer hearings are to be oral in nature unless the parties unanimously move for a hearing consisting of written comments.<sup>49</sup> That regulation provides that, within fifteen days from an order granting a hearing, each party must indicate what kind of hearing it prefers. Absent a unanimous preference for a “hearing consisting of written comments,” the hearing will be an oral one.

Once the nature of the hearing is settled, Subpart M and our Model Milestones set a default schedule for the remainder of the proceeding,<sup>50</sup> subject to modification by the Presiding Officer. We direct the Presiding Officer to certify the hearing record to us within twenty-five days after the conclusion of the hearing. If the Presiding Officer concludes that unforeseen circumstances justify an expansion of this period, then we direct the Presiding Officer to notify us promptly of the reasons for the delay and also to provide us with an anticipated new schedule.

Further, we grant the Staff’s request that the companies be given the opportunity to provide a statement outlining areas of controversy in the license transfer case.<sup>51</sup> We direct the companies to do so within fifteen days.

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<sup>48</sup> This result is also consistent with section 2.1202(b)(1)(i), which provides that the Staff will become a party to cases “involv[ing] an application denied by the NRC staff.” 10 C.F.R. § 2.1202(b).

<sup>49</sup> 10 C.F.R. § 2.1308.

<sup>50</sup> 10 C.F.R. pt. 2, app. B, pt. III (Model Milestones for a Hearing on a Transfer of a License Conducted Under 10 CFR Part 2, Subpart M).

<sup>51</sup> Staff Answer to Joint Demand on License Transfer at 4.

### III. CONCLUSION

For the reasons set forth above, we

(1) *deny* as moot the Staff's Motion to Sever the license transfer and license renewal proceedings, and *deny* the companies' request that we consolidate the three proceedings;

(2) *grant* the companies' unopposed request for a hearing on the denial of the license transfer application;

(3) *defer* consideration of the companies' requests for hearings (and associated issues) on the denial of the license renewal application and the enforcement order;

(4) *direct* that the license transfer proceeding be adjudicated under our Subpart M rules;

(5) *direct* the Chief Administrative Judge to appoint a single administrative judge within the next five business days to serve as Presiding Officer in the license transfer proceeding for the purposes outlined in section II.B.1;

(6) *direct* the Staff to participate as a party to the license transfer proceeding;

(7) *direct* each litigant to state, within the next fifteen days, whether it prefers an oral hearing or a hearing consisting of written comments in the license transfer proceeding;

(8) *direct* the companies to file, within the next fifteen days, a statement outlining areas of controversy in the license transfer case; and

(9) *direct* the Presiding Officer to certify the hearing record to us within twenty-five days after the conclusion of the hearing in the license transfer proceeding.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER CLI-14-05 (with Corrected Certificate of Service)** have been served upon the following persons by Electronic Information Exchange.

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Aerotest Operations, Inc., Docket No. 50-228-LT  
**COMMISSION MEMORANDUM AND ORDER CLI-14-05**

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[Original signed by Brian Newell]  
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Dated at Rockville, Maryland  
this 10<sup>th</sup> day of April, 2014