

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

E. Roy Hawkens
Presiding Officer

In the Matter of

AEROTEST OPERATIONS, INC.

(Aerotest Radiography and Research Reactor)

Docket No. 50-228-LT

ASLBP No. 14-931-01-LT-BD01

May 22, 2014

MEMORANDUM AND ORDER
(Ruling on Admissibility of Areas of Controversy)

I. Background

In compliance with the Commission's directive,¹ on April 22, 2014, Aerotest Operations, Inc. and Nuclear Labyrinth, LLC [hereinafter the Companies] submitted a Statement of Areas of Controversy regarding the NRC Staff's denial of their application for an indirect license transfer for the Aerotest Radiography and Research Reactor (ARRR).² Thereafter, pursuant to this Board's Scheduling Order,³ the NRC Staff filed a response, arguing that "the claims outlined in the Companies' Areas of Controversy are without merit and/or fall outside the scope of this license transfer proceeding."⁴

¹ See Aerotest Operations, Inc. (Aerotest Radiography and Research Reactor), CLI-14-05, 76 NRC __, __ (Apr. 10, 2014) (slip op. at 15).

² See Aerotest Operations, Inc. and Nuclear Labyrinth, LLC's Statement of Areas of Controversy Regarding Denial of Indirect License Transfer of Aerotest Radiography and Research Reactor (Apr. 22, 2014) [hereinafter Companies' Statement of Areas of Controversy].

³ See Memorandum and Order (Initial Scheduling Order and Administrative Directives) (May 13, 2014).

⁴ See NRC Staff Response to Aerotest Operations, Inc. and Nuclear Labyrinth, LLC's Statement of Areas of Controversy Regarding Denial of Indirect License Transfer of Aerotest Radiography and Research Reactor (May 9, 2014) [hereinafter Staff Response to Statement of Areas of Controversy] at 2.

As discussed below, this Board concludes that the Companies generally are correct in identifying the litigable areas of controversy; however, two discrete claims alleged by the Companies are outside the scope of this proceeding.

II. Areas of Litigable Controversy

The areas of litigable controversy in this license transfer proceeding are those legal and factual conclusions averred by the NRC Staff -- expressly or by logical inference -- for denying the application, and the reasons relied upon by the Staff in support of those conclusions.⁵

Consistent with this principle, the Companies correctly identify the two conclusions articulated by the NRC Staff for denying the license transfer as broad areas of litigable controversy:

(1) whether the Staff correctly concluded that the Companies failed to demonstrate that they have, or with reasonable assurance will have, sufficient funding to conduct activities authorized by the ARRR license if the license is indirectly transferred; and (2) whether the Staff correctly concluded that the Companies failed to demonstrate that there will be sufficient funds to cover the annual cost of spent fuel storage until the Department of Energy (DOE) accepts ARRR's spent fuel. See Companies' Statement of Areas of Controversy at 1.⁶

The Companies also may challenge the reasons relied upon by the NRC Staff in support of the above two conclusions. Thus, with regard to the first issue above, the Companies may endeavor to show, inter alia, that the NRC Staff erred in concluding that they failed to provide an adequate showing of financial qualifications. See Companies' Statement of Areas of Controversy at 2-4 (the Companies argue that they provided an adequate showing of financial

⁵ As the Commission stated (CLI-14-05, 76 NRC at __ (slip op. at 9)), adjudication of these controversies will "focus . . . on whether the Staff appropriately interpreted our regulations and applied them correctly" to the record facts.

⁶ See also Safety Evaluation by the Office of Nuclear Reactor Regulation Indirect License Transfer of [ARRR] Due to the Proposed Acquisition of Aerotest Operations, Inc. by Nuclear Labyrinth, LLC Facility Operating License No. R-98 (July 24, 2013) at 9, 11 [hereinafter License Transfer SE]; see also CLI-14-05, 76 NRC at __-__ (slip op. at 4-5); Staff Response to Statement of Areas of Controversy at 1-2.

qualifications); id. at 5 & n.6 (the Companies argue that the Staff failed, in derogation of its own policies, adequately to consider “other relevant financial information”). And with regard to the second issue above, the Companies may endeavor to show, inter alia, that the Staff erred in concluding that there is no reasonable assurance that fuel storage costs will be available. See id. at 5-6 (the Companies argue that there is reasonable assurance that fuel storage costs will be available).

III. Areas of Controversy Alleged by the Companies that are Outside the Scope of this Proceeding

As stated above (supra Part II), the areas of litigable controversy in this license transfer proceeding are those conclusions averred by the NRC Staff -- expressly or by logical inference -- for denying the application, and the reasons relied upon by the Staff in support of those conclusions. A corollary to that principle is that conclusions and reasons the NRC Staff did not rely upon in its denial of the application are outside the scope of this proceeding.

Guided by this corollary principle, this Board concludes that the following two areas of controversy alleged by the Companies are outside the scope of this proceeding: (1) whether it is inappropriate for the Staff to deny this license transfer application for insufficient funding when that determination is attributable to the Staff's own actions, which caused Aerotest to be left without either current revenue or current contracts or commitments (see Companies' Statement of Areas of Controversy at 5); and (2) whether the Staff improperly seeks to impose foreign ownership, control and domination (FOCD)-related conditions on financial support arrangements made by Nuclear Labyrinth (see id. at 6). The former area of alleged controversy

is not relevant to the Staff's denial of the license transfer,⁷ and the latter area was not a basis for denying the license transfer application.⁸

IV. Conclusion

For the above reasons, the areas of litigable controversy in this proceeding are the following two conclusions the NRC Staff relied upon for denying the indirect license transfer application: (1) whether the Staff correctly determined that the Companies failed to demonstrate that they possess, or have reasonable assurance of obtaining the funds necessary to cover, estimated operating costs for the period of the license; and (2) whether the Staff correctly determined that the Companies failed to provide reasonable assurance that they had sufficient funds to cover the annual costs for storing spent fuel until DOE accepts the fuel. The Companies also may challenge the reasons relied upon by the NRC Staff in support of these conclusions.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. Roy Hawkens
PRESIDING OFFICER

Rockville, Maryland
May 22, 2014

⁷ See Staff Response to Statement of Areas of Controversy at 7. Indeed, to the extent the Companies argue that a regulation ought not be applied even though the criteria for applying it are satisfied, they are effectively challenging the regulation itself. This they may not do. See 10 C.F.R. § 2.335(a).

⁸ See Staff Response to Statement of Areas of Controversy at 5-6. As the Commission unequivocally stated “[t]he license transfer denial did not turn on the foreign ownership question.” CLI-14-05, 76 NRC at ___ (slip op. at 5 n.16). The Staff's intimation about including a provision to negate foreign control in Nuclear Labyrinth's financial support agreement with Autoliv (see License Transfer SE at 12) was contingent on future action resulting in a Staff determination of FOCD. See Staff Response to Statement of Areas of Controversy at 6. Speculation about putative action the Staff might take in the future is not a permissible basis for the Companies to advance an adjudicative challenge in this proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Admissibility of Areas of Controversy)** have been served upon the following persons by Electronic Information Exchange.

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Aerotest Operations, Inc., Docket No. 50-228-LT

MEMORANDUM AND ORDER (Ruling on Admissibility of Areas of Controversy)

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[Original signed by Brian Newell]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 22nd day of May, 2014