

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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

AEROTEST OPERATIONS, INC. AND NUCLEAR LABYRINTH, LLC'S RESPONSE
OPPOSING NRC STAFF'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE
COMPANIES' INITIAL STATEMENT OF POSITION AND PRE-FILED DIRECT
TESTIMONY

I. INTRODUCTION

Pursuant to the Commission's April 10, 2014 Memorandum and Order,¹ Aerotest Operations, Inc. ("Aerotest") and Nuclear Labyrinth, LLC ("Nuclear Labyrinth") (collectively "the Companies") submitted their Initial Statement of Position on June 13, 2014, outlining areas of controversy in the case involving the NRC Staff's denial of the Companies' request to transfer the license for the Aerotest Radiography and Research Reactor ("ARRR"). On June 23, 2014, the NRC Staff filed a Motion in Limine to Exclude Portions of the Companies' Initial Statement of Position and Pre-Filed Direct Testimony ("Motion"), arguing that such portions were outside the scope of the admissible areas of controversy. For the reasons set forth below, Aerotest and Nuclear Labyrinth disagree with the NRC Staff's Motion, and hereby submit their response in opposition. The portions of the Companies' Initial Statement of Position and pre-filed testimony that the NRC Staff seeks to strike are necessary background and context for arguments that

¹ *Aerotest Operations, Inc.* (Aerotest Radiography and Research Reactor), CLI-14-05, 79 N.R.C. ____ (Apr. 10, 2014), slip op. at 14, 15.

support positions that are within the scope of the litigable areas of controversy admitted in this proceeding. Furthermore, 10 C.F.R. § 50.80 requires an applicant to state the purposes for which the license transfer is requested.² The background information regarding foreign ownership is directly and necessarily relevant to the license transfer proceeding because the purpose of the license transfer is to comply with the NRC Staff's direction to transfer the license, which was the result of its foreign ownership finding. Striking this information explaining the purposes of the transfer would be inconsistent with the Commission's regulations.

II. DISCUSSION

On May 22, 2014, the Presiding Officer issued a Memorandum and Order Ruling on Admissibility of Areas of Controversy.³ This Memorandum and Order concluded, in part, that two areas of controversy were within the scope 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."⁴ In addition, the May 22 Order identified two areas of controversy that were 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,"

² 10 C.F.R. § 50.80(b)(2).

³ Memorandum and Order (Ruling on Admissibility of Areas of Controversy) (May 22, 2014) (ADAMS Accession No. ML14142A237) ("May 22 Order").

⁴ *Id.* at 2.

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.”⁵

First, the NRC Staff requests that the Presiding Officer exclude certain portions of the Companies’ Initial Statement of Position, which the Staff claims fall under the first area of controversy identified as outside the scope of the proceeding in the May 22 Order. The NRC Staff argues that Companies’ explanation on page 31 of their Initial Statement of Position is an argument “that their insufficient showing of funds to cover the total annual operating costs for each of the first five years of operation of the Aerotest Radiography and Research Reactor (ARRR) was in part due to the fact that ‘the NRC Staff . . . compelled Aerotest to shut down the ARRR’”⁶ NRC Staff states that this is an attempt by the Companies to argue that it was “inappropriate for the Staff to deny this license transfer application for insufficient funding when that determination is attributable to the Staff’s own actions.”⁷ This position is without merit. On the contrary, this portion of the Companies’ Initial Statement of Position is part of a “challenge [to] the reasons relied upon by the NRC Staff in support of the” first admitted area of controversy.⁸

NRC Staff selectively quotes from the Companies’ Initial Statement of Position in order to make the argument that this statement falls outside the scope of the proceeding. The full text that the NRC Staff seeks to exclude reads:

⁵ *Id.* at 3.

⁶ NRC Staff Motion at 3.

⁷ *Id.* at 2.

⁸ May 22 Order at 2.

The NRC Staff's insistence on "committed sources of funds" is particularly unfair in light of the fact that it was the NRC Staff that compelled Aerotest to shut down the ARRR due to what the Companies believe to be the NRC Staff's erroneous application of its foreign ownership rules. Exhibit AOI100 at Q22. For these same reasons, the NRC Staff for years failed to perform the technical review of the license renewal application of the ARRR, and ultimately denied that application not for technical reasons but based on foreign ownership issues reasons. Exhibit NRC028. For these reasons, Aerotest had no current source of revenue.⁹

These statements support the Companies' position that the NRC Staff is being arbitrary, capricious, and unreasonable in its review by focusing solely on committed sources of funding - knowing that the ARRR is shut down and the license has not been renewed based on foreign ownership issues - rather than evaluating the reasonableness of the Companies' projections based on the historical performance of the ARRR. The Staff's unreasonable insistence in requesting committed sources of funds is at the heart of this controversy.¹⁰ The May 22 Order specifically allows the Companies to "challenge the reasons relied upon by the NRC Staff".¹¹ The Companies are doing just that. These arguments are within the litigable area of controversy: "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."¹² The statements at issue explain that, in addition to not being in accordance with requirements, the Staff's insistence on "committed sources of funds" is "inappropriate, unfair, and unnecessarily restrictive" in light of the circumstances in which the NRC Staff has placed the Companies. Thus, the challenged

⁹ Attachment 1 to NRC Staff Motion at 31 ("Attachment 1").

¹⁰ Neither the NRC's regulations at 10 C.F.R. § 50.33(f)(2) nor its guidance in NUREG-1537 (NRC-029) are limited to "committed sources of funds".

¹¹ May 22 Order at 2.

¹² *Id.*

statements are within the scope of the first litigable area of controversy and “its reasonably inferred bounds.”¹³

These statements are not intended to argue that the Companies’ allegedly “insufficient demonstration of financial assurance is excusable because it was allegedly due to Staff action” (Motion at 4) on foreign ownership, but instead are presented to demonstrate that the Staff’s insistence on committed sources of funds is “inappropriate, unfair, and unnecessarily restrictive” (Attachment 1 at p. 31) as well as arbitrary and capricious. Nor is this discussion an argument that “financial qualifications do not apply to the Companies because of the Staff’s prior actions.” (Motion at 4). Rather, these statements support the Companies’ position that the NRC Staff is inappropriately seeking to apply its interpretation of the Commission’s financial qualifications requirements in a particularly unfair and restrictive manner. This discussion is provided as factual background to the litigable question of whether NRC Staff correctly determined that the Companies had not provided reasonable assurance of funding because the Companies had not supplied documented information concerning committed sources of funds. Therefore these statements are not outside the scope of the proceeding, contrary to the NRC Staff’s claims.

Second, NRC Staff requests that the Presiding Officer exclude certain portions of the Companies’ Initial Statement of Position and the Pre-Filed Direct Testimony of Michael S. Anderson because the Staff claims that these references to the foreign ownership, control and domination (“FOCD”) issues are outside the scope of the proceeding. While it is true that the Presiding Officer ruled that arguments about “whether the Staff improperly seeks to impose

¹³ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Order (Granting in Part and Denying in Part Applicant’s Motions in Limine) (Mar. 6, 2012), at 7(unpublished) (ADAMS Accession No. ML12066A170).

foreign ownership, control and domination (FOCD)-related conditions on financial support arrangements made by Nuclear Labyrinth” are outside the scope of this proceeding, this does not mean that these references to previous FOCD issues faced by the Companies should be stricken from the record. The Staff’s proposed limitations on the Companies’ statements are overly restrictive in light of the relevance of FOCD issues to the purpose of the transaction and the controversy at hand. The portions of the Companies’ Initial Statement of Position and of the Anderson Pre-Filed Direct Testimony that the NRC Staff seeks to exclude provide necessary background and procedural history related to the purpose of the license transfer application, *see* 10 C.F.R. § 50.80(b)(2), and are crucial for a complete understanding of the unreasonableness of the NRC Staff’s insistence on committed sources of funding. Consistent with this purpose, references to FOCD issues are included in the Background section of the Initial Statement of Position. There is no argument being made in these portions of the Companies’ Initial Statement of Position or Pre-Filed Direct Testimony that the NRC Staff improperly imposed FOCD conditions on financial support requirements. Therefore, contrary to the NRC Staff’s claim, these statements are not outside the scope of the proceeding.

III. CONCLUSION

In conclusion, Aerotest and Nuclear Labyrinth submit that the NRC Staff’s Motion in Limine to Exclude Portions of Companies’ Initial Statement of Position and Pre-Filed Direct Testimony as outside the scope of the proceeding is without merit and should be denied.

Respectfully Submitted

/signed electronically by/

Jay E. Silberg
Kimberly A. Harshaw

Counsel for
Aerotest Operations, Inc. and Nuclear
Labyrinth, LLC

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Aerotest Operations, Inc., and Nuclear Labyrinth, LLC's Response Opposing NRC Staff's Motion in Limine to Exclude Portions of the Companies' Initial Statement of Position and Pre-Filed Direct Testimony has been served through the E-Filing system on the participants in the above-captioned proceeding this 30th day of June 2014.

/Signed electronically by/

Kimberly A. Harshaw