

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

July 3, 2014

Memorandum And Order
(Denying the NRC Staff's Motion in Limine)

I. Background

On June 13, 2014, Aerotest Operations, Inc. and Nuclear Labyrinth, LLC [hereinafter the Companies] submitted their Initial Statement of Position regarding the NRC Staff's denial of their application for an indirect license transfer for the Aerotest Radiography and Research Reactor (ARRR),¹ as well as pre-filed testimony of several witnesses, including Michael S. Anderson.²

On June 23, 2014, the NRC Staff ("Staff") filed a Motion in Limine seeking to exclude portions of the Companies' Initial Statement of Position and of Mr. Anderson's testimony.³ The Staff argued that these documents included information related to two areas of controversy this

¹ See Aerotest Operations, Inc. and Nuclear Labyrinth, LLC's Initial Statement of Position in the Hearing on the Denial of Indirect License Transfer Application (June 13, 2014) [hereinafter Companies' Initial Statement of Position].

² See Pre-Filed Direct Testimony of Michael S. Anderson Regarding the Operational Status and Historical Commercial Activities of the Aerotest Radiography and Research Reactor ("ARRR") and Funding Agreement with Nuclear Labyrinth, LLC (June 13, 2014).

³ See NRC Staff Motion in Limine to Exclude Portions of the Companies' Initial Statement of Position and Pre-Filed Direct Testimony (June 23, 2014) [hereinafter Staff Motion in Limine].

Licensing Board previously had ruled were outside the scope of this proceeding.⁴ First, the Staff asserted that several sentences on page 31 of the Companies' Initial Statement of Position should be excluded because they effectively argue, in derogation of this Board's May 22 Order, "that [the Companies'] insufficient demonstration of financial assurance is excusable because it was allegedly due to Staff action."⁵ Second, the Staff asserted that all of Section II.A of the Initial Statement of Position (entitled "Foreign Ownership Issue") and several sentences in Mr. Anderson's testimony should be excluded because they improperly discuss FOCD-related matters.⁶

On June 30, 2014, the Companies filed a response opposing the Staff's motion.⁷

II. Discussion

This Board denies the Staff's Motion in Limine, because the language the Staff seeks to exclude is not outside the scope of this proceeding, nor is it "irrelevant, immaterial, unreliable, duplicative, or cumulative evidence and/or arguments."⁸

1. First, the Staff seeks to exclude, as outside the scope of this proceeding, three sentences in the Companies' Initial Statement of Position where the Companies argue that the

⁴ On May 22, 2014, this Board issued an order identifying the areas of controversy in this case that are litigable. See Memorandum and Order (Ruling on Admissibility of Areas of Controversy) (May 22, 2014) (unpublished) [hereinafter May 22 Order]. This Board concluded that the following two issues alleged by the Companies are outside the scope of this proceeding and, therefore, not litigable: "(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; 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." Id. at 3 (citations omitted).

⁵ Staff Motion in Limine at 4.

⁶ Id. at 4-5.

⁷ See 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 (June 30, 2014) [hereinafter Companies' Response].

⁸ 10 C.F.R. § 2.319(d)-(e).

Staff's "insistence on [having them demonstrate] 'committed sources of funds'" to cover the total operating costs for each of the first five years of operation of the ARRR is "unfair" in light of the fact that "the NRC Staff . . . compelled Aerotest to shut down the ARRR," thus depriving Aerotest of "current source[s] of revenue."⁹ In the Staff's view, these sentences improperly argue, contrary to this Board's May 22 Order (see supra note 4), that the Staff's denial of the license transfer application for insufficient funding is attributable to the Staff's actions, which caused Aerotest to be left without either current revenue or current contracts or commitments.¹⁰ The Staff's view of these sentences as being outside the scope of litigable areas of controversy is not unreasonable.

Nevertheless, this Board accepts the Companies' explanation that the three sentences, read in context, might be understood to support a conclusion that "the NRC Staff is being arbitrary, capricious, and unreasonable in its review by focusing solely on committed sources of funding,"¹¹ rather than focusing on Aerotest's historical financial performance, which the Companies characterize as the "best source of information regarding the potential earnings of the ARRR."¹² The Companies' presentation of its position, as embodied in those three sentences, is not a model of clarity. But although lack of clarity is highly undesirable in a written pleading,¹³ it is not a basis for granting a motion to exclude, and this Board does not agree with

⁹ Companies' Initial Statement of Position at 31.

¹⁰ Staff Motion in Limine at 3.

¹¹ Companies' Response at 4; accord Companies' Initial Statement of Position at 31.

¹² Companies' Initial Statement of Position at 31.

¹³ "[I]n the law, the power of clear statement is everything." William H. Rehnquist, *The Supreme Court: How It Was, How It Is* 122 (William Morrow and Co., Inc. 1987) (quoting Justice Joseph Story).

the Staff that the cited language is “essentially an argument that the financial qualifications regulations should not apply to the Companies because of the Staff’s prior actions.”¹⁴

Notably, the Companies expressly disavow any intent to argue either that (1) the financial qualification requirements “do not apply to [them] because of the Staff’s prior actions,” or (2) their “allegedly ‘insufficient demonstration of financial assistance is excusable because it was allegedly due to Staff action’ on foreign ownership.”¹⁵ Thus, these arguments, in addition to being outside the scope of this proceeding, have also been waived.

2. The Staff also argues that portions of the Companies’ Initial Statement of Position and of the pre-filed direct testimony of Mr. Anderson should be excluded from the record because they improperly discuss FOCD-related matters in derogation of this Board’s May 22 Order (see supra note 4).¹⁶ We disagree that the challenged language is outside the scope of this proceeding or that it is irrelevant and immaterial to the findings that have to be made in this proceeding. The Companies explain that the pre-filed testimony and its discussion in the Initial Statement of Position “provide necessary background and procedural history related to the purpose of the license transfer application.”¹⁷ Moreover, the Companies deny making any argument “that the NRC Staff improperly imposed FOCD conditions on financial support requirements.”¹⁸ Under these circumstances, and in light of the limited context in which the Companies discuss FOCD-related information, this Board concludes that the challenged language need not be excluded from the record.

¹⁴ Staff Motion in Limine at 4.

¹⁵ Companies’ Response at 5.

¹⁶ Staff Motion in Limine at 4.

¹⁷ Companies’ Response at 6. That FOCD-related information is, in fact, relevant to a full understanding of the procedural history of this proceeding is confirmed by the Staff’s candid concession that such information “is also presented in the Staff’s Initial Statement of Position.” Staff Motion in Limine at 6.

¹⁸ Companies’ Response at 6.

III. Conclusion

For the foregoing reasons, the Staff's Motion in Limine is denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. Roy Hawkens
PRESIDING OFFICER

Rockville, Maryland
July 3, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying the NRC Staff's Motion in Limine)** have been served upon the following persons by Electronic Information Exchange.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001

Pillsbury Winthrop Shaw Pittman LLP
2300 N Street NW
Washington, DC 20037-1122
Kimberly Harshaw, Esq.
Jay Silberg, Esq.

E. Roy Hawkens
E-mail: Roy.Hawkens@nrc.gov

Maria Webb
E-mail: Kimberly.Harshaw@pillsburylaw.com
Jay.Silberg@pillsburylaw.com
Maria.Webb@pillsburylaw.com

Kathleen Schroeder, Law Clerk
E-mail: Kathleen.Schroeder@nrc.gov

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

MEMORANDUM AND ORDER (Denying the NRC Staff's Motion in Limine)

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001

Anita Ghosh, Esq.

Christina England, Esq.

Catherine Kanatas, Esq.

Susan Uttal, Esq.

Edward Williamson, Esq.

Jeremy Wachutka, Esq.

Sabrina Allen, Paralegal

John Tibbetts, Paralegal

E-mail:

Anita.Ghosh@nrc.gov;

Christina.England@nrc.gov;

Catherine.Kanatas@nrc.gov;

Susan.Uttal@nrc.gov;

Edward.Williamson@nrc.gov;

Jeremy.Wachutka@nrc.gov

John.Tibbetts@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

[Original signed by Brian Newell]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 3rd day of July, 2014