

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

AEROTEST OPERATIONS, INC.

(Aerotest Radiography and Research Reactor)

Docket No. 50-228-LT

CLI-15-26

MEMORANDUM AND ORDER

Today we consider the 2012 application of Aerotest Operations, Inc. and Nuclear Labyrinth, LLC (together, the Companies) for an indirect transfer of Facility Operating License No. R-98 for the 250-kW Aerotest Radiography and Research Reactor (ARRR) to Nuclear Labyrinth, LLC.¹ In 2013, the NRC Staff denied the application on the ground that the Companies had failed to satisfy the Commission's financial qualifications requirements.² The Companies have requested that we overturn the Staff's determination.³ At our direction, a

¹ Ex. NRC-008P, "Application for Consent to Indirect Transfer of Control of Licenses" (May 30, 2012) (ADAMS accession no. ML14229A047) (non-public) (Application).

² Ex. NRC-028, letter from Eric J. Leeds, NRC, to Michael Anderson, Aerotest (July 24, 2013) (ML14229A088) (Denial Letter) (denying the application for the license transfer).

³ *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).

Presiding Officer conducted a hearing and compiled an adjudicatory record.⁴ Based on our review of that record, we remand the license transfer application to the NRC Staff, without prejudice, for further consideration as discussed herein.

I. BACKGROUND

This is one of three interrelated proceedings, which separately address this license transfer application, a 2005 license renewal application, and an associated 2013 Staff enforcement action.⁵ The event giving rise to all three proceedings is the May 2000 purchase of Aerotest, which owns and operates the ARRR, by Autoliv ASP, Inc. (Autoliv), a wholly-owned subsidiary of Autoliv, Inc., which is headquartered in Sweden.⁶ At the time, Aerotest did not seek Commission approval for the transfer to Autoliv.⁷ Aerotest did, however, notify the NRC of the purchase, state that Aerotest “would remain under the direct control of U.S. Citizens,” and commit to keeping the Commission informed of “any significant changes inimical to the safety and security of the ARRR.”⁸ The following year, Aerotest began seeking buyers for the ARRR—

⁴ CLI-14-5, 79 NRC 254, 255 (2014).

⁵ Ex. NRC-028, Denial Letter; *see also* Order Prohibiting Operation of Aerotest Radiography and Research Reactor, 78 Fed. Reg. 46,618 (Aug. 1, 2013) (Order Prohibiting Operation).

⁶ *See* CLI-14-5, 79 NRC at 254-55; Ex. NRC-027P, “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 (ML14229A049) (non-public) (SER); Ex. NRC-008P, Application, at 5-6.

⁷ *See* Ex. AOI-112, memorandum from David B. Matthews, NRR, to John W. Craig, EDO, “Transfer of Ownership at Research Reactor” (Oct. 17, 2000), at 1 (ML14229A054) (non-public). The Staff undertook several actions to assess the acceptability of the transfer. *Id.* at 1-2 & att., “Action Plan.”

⁸ Ex. NRC-012, letter from Sandra L. Warren, Aerotest, to Director of the Office of Nuclear Reactor Regulation, NRC (Apr. 14, 2000), at 1 (ML14229A076).

an effort that it would continue for the next decade and that has culminated in the proposed sale to Nuclear Labyrinth.⁹

In May 2012, Aerotest, joined by Nuclear Labyrinth, submitted its current application for an indirect license transfer.¹⁰ Nuclear Labyrinth proposed to operate the ARRR following the transfer to provide neutron radiography services along with nuclear science and engineering research and training.¹¹ As part of the application, the Companies submitted five years of financial revenue-and-expense estimates, as required by 10 C.F.R. § 50.33(f)(2).¹²

Under the proposed transfer, Autoliv would sell its 100% interest in Aerotest to Nuclear Labyrinth and, upon the closing of the sale, would provide Nuclear Labyrinth with enough funds to operate the facility for approximately twelve months.¹³ Autoliv also agreed to fully fund a decommissioning trust, and to provide funds for spent fuel disposal and the purchase of fuel element storage canisters for the ARRR's existing damaged fuel.¹⁴

On July 24, 2013, the Staff denied the license transfer application on the ground that the Companies had not provided sufficient assurance that they had, or would have, funds to perform the activities authorized by the license.¹⁵ Specifically, the Staff concluded that the

⁹ In the interim, Aerotest sought to transfer its license to another entity. That transfer, although approved by the NRC, did not take place. See Ex. AOI 119, Order Approving Indirect Transfer of Facility Operating License and Conforming Amendment (July 6, 2010), at 4 (ML14229A027) (non-public) (establishing deadline of September 13, 2010, to complete the transfer).

¹⁰ Ex. NRC-008P, Application.

¹¹ *Id.* at 5, 10-11.

¹² See, e.g., *id.*, att. 7, "5 Year Projected Income Statement for Aerotest Operations, Inc." (May 30, 2012), at 48.

¹³ See *id.* at 4, 11.

¹⁴ See *id.* at 5, 6, 12. In addition, Nuclear Labyrinth agreed to maintain a letter of credit for use in the event of a shortfall in the decommissioning fund. See, e.g., Ex. NRC-027P, SER, at 14.

¹⁵ Ex. NRC-028, Denial Letter, at 2.

Companies had not shown that (i) they “possess or have reasonable assurance of obtaining the funds necessary to cover estimated operating costs for the period of the license” or (ii) there would be “sufficient funds to cover the annual cost of fuel storage until the DOE accepts the fuel, which is expected to occur in 2055 or later.”¹⁶ The Staff denied the license renewal application on the ground that Aerotest is owned, controlled, or dominated by a foreign company.¹⁷ At the same time, the Staff issued an order prohibiting operation of the already-shutdown ARRR because of the denials.¹⁸

The Companies sought hearings on all three actions. We granted the hearing request in the license transfer proceeding and held in abeyance the requests for hearings on the license renewal application and the enforcement order.¹⁹ We instructed the Chief Judge of the Atomic Safety and Licensing Board Panel to assign the license transfer case to a Presiding Officer, who would conduct an evidentiary hearing and then certify the record to us, consistent with our regulations governing license transfer proceedings.²⁰ Chief Judge Hawkens conducted the hearing, including oral argument and the examination of five witnesses. Shortly thereafter, he certified the record to us for our decision.²¹

II. DISCUSSION

The Atomic Energy Act of 1954, as amended, requires a licensee to obtain the NRC’s written consent prior to transferring an NRC license.²² To gain such approval, the licensee must

¹⁶ Ex. NRC-027P, SER, at 9, 11, respectively.

¹⁷ Ex. NRC-028, Denial Letter, at 2.

¹⁸ See *id.*; see also Order Prohibiting Operation, 78 Fed. Reg. 46,618.

¹⁹ CLI-14-5, 79 NRC at 263.

²⁰ *Id.* at 263-64; see 10 C.F.R. § 2.1319(a).

²¹ LBP-14-10, 80 NRC 85 (2014).

²² Atomic Energy Act of 1954 § 184, 42 U.S.C. § 2234; see 10 C.F.R. § 50.80(a).

demonstrate that the proposed transferee is qualified to hold the license.²³ To qualify, the proposed transferee for an operating license must, among other things, satisfy the same financial qualification requirements that apply to an applicant for an initial operating license.²⁴ An applicant is required to show that the proposed transferee has the financial qualifications “to carry out ... the activities for which the ... license is sought.”²⁵ For the ARRR, these activities include both the operation of the facility and the subsequent onsite storage of spent fuel. Consequently, the Companies must demonstrate financial qualifications by showing that they will have sufficient funds to pay both the facility’s expenses during the ARRR’s operation and the spent fuel storage expenses following the ARRR’s shutdown.

The adjudicatory record in this case reflects a fundamental dispute about the evidence on the Companies’ financial qualifications. The evidence has come to the agency in two phases—during the Staff’s review of the license transfer application and later during the hearing to compile the adjudicatory record. The Staff asserts that the information submitted by the Companies after the Staff’s denial—that is, during the hearing—goes beyond the information provided to the Staff at the time of the denial.²⁶ Therefore, the Staff argues, we should consider only the evidence that was before the Staff during its review of the license transfer application. On the other hand, the Companies assert that we should consider all of the evidence they have provided, regardless of when it was submitted.

²³ 10 C.F.R. § 50.80(c)(1).

²⁴ *Id.* § 50.80(b)(1)(i).

²⁵ *Id.* § 50.33(f).

²⁶ See, e.g., *NRC Staff Post-Hearing Statement of Position Regarding Denial of the Indirect License Transfer of the Aerotest Radiography and Research Reactor* (Aug. 29, 2014), at 4, 24-28 (non-public) (Staff Post-Hearing Statement).

Both parties argue that we should look to our *Honeywell* decision to determine the admissibility of the evidence submitted by the Companies after the Staff's denial.²⁷ The Staff argues that, in applying *Honeywell*, we should consider only the information that the Companies submitted during the Staff's review of the application and that, at least in this proceeding, all subsequently submitted new information is inadmissible.²⁸ According to the Staff, the new evidence that the Companies ask us to consider is "information that the Staff was neither aware of nor could have known at the time of its decision."²⁹ To the extent the Companies possessed new information prior to issuance of the Staff's July 24, 2013 denial but failed to provide that information to the Staff, the Staff requests that we not consider it.³⁰

By contrast, the Companies argue that the disputed evidence "was available for the Staff's review," was mostly "identified within the application and responses to RAIs or could reasonably be determined to be available from information in the [a]pplication or RAI" responses, and "shed[s] additional light on the facts that existed and events that occurred during the relevant time period."³¹ The Companies therefore argue that we should consider all of the information they submitted—including the disputed information submitted for the first time at the hearing—in reaching a decision on the license transfer application.

²⁷ Cf. *Honeywell International, Inc.* (Metropolitan Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 29 n.158 (2013) (referring to "the *de novo* standard applicable to [a review of] a Staff decision on a license amendment application"); see also *id.* at 31-32.

²⁸ See, e.g., Tr. at 59, 65, 208-09. The Staff clarifies that an "expla[nation of] something that was already in Aerotest's application or [responses to requests for additional information] ... would be acceptable." *Id.* at 67.

²⁹ Staff Post-Hearing Statement at 23.

³⁰ *Id.* at 31-32.

³¹ *Aerotest Operations, Inc. and Nuclear Labyrinth, LLC Post-Hearing Statement of Position on the Denial of Indirect License Transfer Application* (Aug. 29, 2014), at 50 (non-public) (internal quotations omitted).

As a practical matter, the Staff evaluated much of the evidence now before us to reach its decision to deny the application. The Companies, however, submitted potentially significant additional information at the hearing. Further, we are cognizant of the length of time that has passed since the Staff's denial and of the changing economic conditions that could have affected the Companies' revenue projections related to the ARRR since the Staff completed its review in 2013. In view of these considerations, we decline to reach the admissibility question.

Rather, we find that judicial economy is best served by remanding the license transfer application to the Staff for further consideration.³² On remand, we direct the Staff to (1) consider the additional information submitted by the Companies at the hearing and (2) afford the Companies an opportunity to supplement the application and submit any additional relevant information within a time frame established by the Staff.³³

Pending our resolution of the current license transfer application, we have held in abeyance the Companies' requests for hearings on the license renewal application and the Staff's related enforcement order.³⁴ We will continue to hold these two requests in abeyance, pending the resolution of this license transfer matter.

³² Neither party should interpret our decision today as prejudging the outcome of the Staff's review. We expect the Staff to fully consider all information now on the record, along with any additional information submitted by the Companies consistent with this decision, in reaching a final decision on the application.

³³ Our decision today does not foreclose the Staff's ability to request additional information on any part of the license transfer application. See 10 C.F.R. §§ 2.102(a), 50.33(f)(5).

³⁴ CLI-14-5, 79 NRC at 263.

III. CONCLUSION

For the reasons set forth above, we *remand* the license transfer application to the Staff, without prejudice, for further consideration of all evidence submitted by the Companies at the evidentiary hearing. We further *direct* the Staff to provide the Companies with an opportunity to submit any additional relevant information, should they wish to do so, within a time frame established by the Staff.

IT IS SO ORDERED.

For the Commission

NRC SEAL

 /RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of December, 2015.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER CLI-15-26** 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
1200 Seventeenth Street NW
Washington, DC 20036
Kimberly Harshaw, Esq.
Jay Silberg, Esq.
E-mail: Kimberly.Harshaw@pillsburylaw.com
Jay.Silberg@pillsburylaw.com

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

Aerotest Operations, Inc., Docket No. 50-228-LT
COMMISSION MEMORANDUM AND ORDER CLI-15-26

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.
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;
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 23rd day of December, 2015