

**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 STATEMENT OF
AREAS OF CONTROVERSY REGARDING DENIAL OF INDIRECT LICENSE TRANSFER
OF AEROTEST RADIOGRAPHY AND RESEARCH REACTOR**

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”) hereby submit their statement outlining areas of controversy in this case. In sum, the Companies disagree with the NRC Staff’s conclusion, and each of the reasons supporting that conclusion, that Nuclear Labyrinth or Aerotest will have insufficient funding to conduct activities authorized by the Aerotest Radiography and Research Reactor (“ARRR”) license if the license is indirectly transferred and that insufficient information was provided for the NRC Staff to determine whether 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.

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

On May 30, 2012, the Companies jointly submitted an application for indirect transfer of control of the ARRR license to Nuclear Labyrinth (“the Application”).² As described in the Application, Nuclear Labyrinth, through Aerotest, intends to continue to operate the ARRR to provide neutron radiography services and to enhance the ARRR’s principle missions to include education, training and research.³

By letters dated July 15, 2013 and July 24, 2013, the NRC Staff notified Nuclear Labyrinth and Aerotest that it was denying the Application because it did not have reasonable assurance that Nuclear Labyrinth would have sufficient funding to conduct the activities authorized by the ARRR license if the license were transferred.⁴ The NRC Staff also issued a safety evaluation report providing the basis for this conclusion.⁵

II. STATEMENT OUTLINING AREAS OF CONTROVERSY

1. The Companies Have Provided an Adequate Showing of Financial Qualifications. In the Application and their subsequent responses to the Staff’s Requests for Additional Information (“RAIs”), Aerotest and Nuclear Labyrinth provided more than sufficient information

² Application for Approval of Indirect Transfer of Control of License Pursuant to 10 C.F.R. § 50.80 (May 30, 2012) (ADAMS Accession Nos. ML12152A233 and ML12189A384).

³ Application at 1-2.

⁴ Letter from E. Leeds, Director, Office of Nuclear Reactor Regulation (“NRR”), to M. Anderson, President Aerotest Operations, Aerotest Operations, Inc., re: 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), dated July 24, 2013 (ADAMS Accession No. ML13120A598) (“July 24 letter”). *See also* Letter from E. Leeds, Director, NRR, to D. Slaughter, Chief Executive Officer, Nuclear Labyrinth, LLC, re: Denial of License Transfer Regarding the Aerotest Radiography and Research Reactor, Facility Operating License No. R-98 (TAC No. ME8811), dated July 15, 2013 (ADAMS Accession No. ML13134A390). By letter of August 2, 2013 to D. Slaughter from G. Bowman, Acting Deputy Director, Div. of Policy and Rulemaking, NRR, the NRC clarified that the July 15, 2013 letter was not issued until July 24, 2013 (ADAMS Accession No. ML13214A343).

⁵ 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) (“SER”) (ADAMS Accession No. ML13129A001).

to provide reasonable assurance that the Companies would have the resources necessary to adequately support license activities. As required by 10 C.F.R. § 50.33(f)(2), the application included estimates for total annual operating costs for each of the first five years of operation for the facility and also indicated the source of funds for the facility being from the sale of commercial services such as radiography and training.⁶ The estimates for both the costs and sources of funds were based on the historical financial performance of the Aerotest facility and Nuclear Labyrinth's past experience and expert judgment.⁷ The NRC Staff did not take issue with the estimates of costs to operate the ARRR.⁸ It did, however, take issue with Aerotest's and Nuclear Labyrinths' estimate of the funds that ARRR operations and other Aerotest/Nuclear Labyrinth activities would generate. The NRC Staff apparently believes that Aerotest/Nuclear Labyrinth must identify specific customers that will generate specific revenues.⁹ Unlike a power reactor, the ARRR did not have long term contracts - it conducted its business in response to purchase orders.¹⁰ Thus, Aerotest and Nuclear Labyrinth could not rely on long term contracts to demonstrate the source of funds. Nor, for several reasons, was it practical for Aerotest to obtain letters of intent for long term contracts. This type of arrangement had never been used in the

⁶ Application at 8 and Attachments 6 & 7. *See also* Aerotest and Nuclear Labyrinth Response to Request to Supplement the License Transfer Application (July 19, 2012) (ADAMS Accession No. ML122021201); Aerotest and Nuclear Labyrinth Response to Request for Additional Information (Oct. 15, 2012) (ADAMS Accession No. ML12291A508); Aerotest and Nuclear Labyrinth Response to Request for Additional Information (Jan. 10, 2013). (ML13015A395).

⁷ *Id.*

⁸ SER at 4-7.

⁹ SER at 5-7.

¹⁰ Aerotest and Nuclear Labyrinth Response to Request to Supplement the License Transfer Application (July 19, 2012) (ADAMS Accession No. ML122021201); Aerotest and Nuclear Labyrinth Response to Request for Additional Information (Oct. 15, 2012) (ADAMS Accession No. ML12291A508); Aerotest and Nuclear Labyrinth Response to Request for Additional Information (Jan. 10, 2013).

past. Because the NRC Staff compelled ARRR to shut down the reactor,¹¹ the timing for restarting the reactor was unknown, and its license renewal was uncertain. Aerotest and Nuclear Labyrinth relied on Aerotest's historical performance and Nuclear Labyrinth's expert judgment to demonstrate that Aerotest would have the source of funds necessary to conduct license activities. The NRC Staff's selection of two prior customers out of the 65 customers that Aerotest served in 2009 and these two customers' 2009 revenues, which represented a very small percentage of Aerotest's total 2009 revenues, as the primary basis for its conclusion of the likely post-transfer revenues¹² was unreasonable and unnecessarily restrictive.

2. NRC's Determination that the Companies are not Financially Qualified Is Attributable to NRC Staff's Own Actions. Under the NRC Staff's compulsion based on what the Companies believe to be the Staff's erroneous application of Foreign Ownership, Control or Dominion ("FOCD") restrictions, Aerotest shut down the ARRR.¹³ For those same reasons, the NRC Staff for years did not complete its technical review of the license renewal application of the ARRR, and ultimately denied that application.¹⁴ For these reasons, Aerotest was left without current revenue. That lack of current revenue and current contracts or commitments, resulting from NRC Staff actions, are then used by the NRC Staff to find that Aerotest and Nuclear Labyrinth lack financial qualifications. Because the allegedly inadequate financial qualifications are

¹¹ Aerotest discontinued operations at the ARRR on the threat of a shutdown order, with Aerotest's "voluntary" shutdown memorialized in the February 26, 2011 Confirmatory Action Letter from E. Leeds (NRR) to D. Brisighella (Aerotest) (Feb. 26, 2011) (ADAMS Accession No. ML103640183).

¹² SER at 5-7.

¹³ Aerotest discontinued operations at the ARRR on the threat of a shutdown order, with Aerotest's "voluntary" shutdown memorialized in the February 26, 2011 Confirmatory Action Letter from E. Leeds (NRR) to D. Brisighella (Aerotest) (Feb. 26, 2011) (ADAMS Accession No. ML103640183).

¹⁴ See footnote 4, *supra*.

caused by the agency's own actions, it is inappropriate to place the Companies in this Catch-22 situation.

3. The NRC Staff Failed to Follow its Own Policies by not Adequately Considering "Other Relevant Financial Information". NRC guidance states that it will consider "other relevant financial information" when a power reactor does not have long-term contracts, such as whether an applicant has cash to pay fixed operating costs during an outage of at least six months, the amount of decommissioning funds collected or guaranteed, and any other relevant factors.¹⁵ As the NRC Staff has been fully informed, the funding agreements between Nuclear Labyrinth and Autoliv ASP provide for a fully funded decommissioning trust fund, a fully funded fuel transportation and disposal trust fund, and twelve months' worth of cash (twice the amount suggested in NUREG-1577 for a power reactor) to cover an outage. Thus, Aerotest and Nuclear Labyrinth maintain that Aerotest will have sufficient funds to support licensed activities.¹⁶

4. There is Reasonable Assurance that Fuel Storage Costs will be Available. Without explanation, the NRC Staff stated that it could not determine that there will be sufficient funds to cover the annual cost of fuel storage until the DOE accepts the fuel.¹⁷ Aerotest and Nuclear Labyrinth provided more than sufficient information to provide reasonable assurance that Nuclear Labyrinth and Aerotest would have the resources necessary to cover the annual cost of

¹⁵ See NUREG-1577, Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance, rev. 1 (1999), at 10.

¹⁶ The application also provides that Nuclear Labyrinth will obtain additional financial assurance in the form of a letter of credit. The application contains a bank commitment for this letter of credit, which states that the letter of credit can be obtained within 30 days of the license transfer. The NRC Safety Evaluation Report states that the letter of credit should be established at the time of, or before, the transfer. SER at 10. Nuclear Labyrinth and Aerotest disagree that the letter of credit needs to be in place at the time of the license transfer because Aerotest will have a fully funded pre-paid decommissioning fund at closing.

¹⁷ SER at 11.

fuel storage until DOE accepts the fuel.¹⁸ An RAI response provided the annual costs associated with fuel storage and stated that funds for these expenses would be collected annually and maintained in a trust until needed. Further, these fuel storage funds will be collected as fees from customers and these fees are reflected on the balance sheet submitted with the RAI response.¹⁹

5. The NRC Staff Seeks to Inappropriately Impose FOCD-Related Conditions on Autoliv's Financial Support Arrangements with Nuclear Labyrinth. While CLI-14-05 correctly states that “the challenged basis for the Staff’s denial in the license renewal case is foreign ownership, control and domination”, CLI-14-05, slip op. at 11, FOCD issues also played a role in the NRC Staff’s ruling in the license transfer case. As described in the SER (at 12), the NRC Staff would seek to impose “specific provisions, acceptable to the NRC, to negate Autoliv, Inc. control, if any over NRC regulated activities by Aerotest after the transfer. Further in order to ensure that Autoliv, Inc. does not exercise control of Aerotest, the license should contain a condition that no changes may be made to the funding agreement, including the negation provisions, without the prior notification and consent of the NRC.” Having essentially required Autoliv, Inc., the ultimate parent of Aerotest, Inc., to provide financial support to Nuclear Labyrinth, it is inappropriate for the NRC Staff to burden that support with unidentified and unspecified “specific provisions” and to condition approval of such financial support by requiring that no changes to the funding agreement can be made without “consent of NRC”, particularly where no standards are set for such consent.

¹⁸ See Aerotest and Nuclear Labyrinth Response to Request for Additional Information (Jan. 10, 2013), Enclosure 1 at 4.

¹⁹ *Id.*

III. CONCLUSION

In conclusion, Aerotest and Nuclear Labyrinth submit that, upon license transfer, as described in the Application and the Companies' responses to the NRC Staff's RAIs, there will be sufficient funding to conduct activities authorized by the License, to decommission the ARRR, and manage used fuel until DOE accepts the fuel.

Respectfully Submitted

/signed electronically by/

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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 Statement of Areas of Controversy Regarding Denial of Indirect License Transfer of Aerotest Radiography And Research Reactor” has been served through the E-Filing system on the participants in the above-captioned proceeding this 22nd day of April 2014.

/Signed electronically by/

Kimberly A. Harshaw