Dated at Arlington, Virginia, this 27th day of April, 2007.

David L. Meyer,

Director, Office of Administration and Management.

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0038]

Electrical Reliability Services, Inc. (ERS) (Formerly Electro-Test, Inc.); Application for Renewal of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: This notice announces the application of Electrical Reliability Services, Inc. (formerly Electro-Test, Inc.) for renewal of its recognition, and presents the Agency's preliminary finding to deny renewal of its request.

DATES: You must submit information or comments, or any request for extension of the time to comment, by the following dates:

<bullet≤ *Hard copy:* Postmarked or sent by July 2, 2007.

<bullet≤ *Electronic transmission or facsimile:* Sent by July 2, 2007.

ADDRESSES: You may submit comments by any of the following methods:

Electronically: You may submit comments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions on-line for making electronic submissions.

Fax: If your submissions, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger or courier service: You must submit three copies of your comments to the OSHA Docket Office, Docket No. OSHA–2007–0038 (formerly NRTL2–94), U.S. Department of Labor, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.–4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and the OSHA docket number (OSHA Docket No. OSHA–2007–0038; formerly NRTL2–94). Submissions, including any personal information you provide, are placed in the public docket without change and may be made available online at *http://www.regulations.gov.*

Docket: To read or download submissions or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket are listed in the *http://www.regulations.gov* index, however, some information (e.g., copyrighted material) is not publicly available to read or download through the Website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

Extension of Comment Period: Submit requests for extensions concerning this notice to the Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–3655, Washington, DC 20210. Or, fax to (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: MaryAnn Garrahan, Director, Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–3655, Washington, DC 20210, or phone (202) 693–2110.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Occupational Safety and Health Administration (OSHA) is giving notice that Electrical Reliability Services, Inc. (formerly Electro-Test, Inc.) (ETI) has applied for renewal of its recognition as a Nationally Recognized Testing Laboratory (NRTL). (OSHA will refer to this NRTL by its former name throughout this notice.) OSHA's current scope of recognition for ETI may be found in the following Web page: *http://www.osha.gov/dts/otpca/nrtl/ers.html.* OSHA has reviewed ETI's renewal application and has preliminarily determined that ETI is not ''independent'' (29 CFR 1910.7(b)(3)), a prerequisite to initial and continued NRTL recognition. For this reason, OSHA is proposing to deny ETI's application.

OSHA requests comments on this preliminary determination, in accordance with Appendix A to 29 CFR 1910.7. Any comments must be received by July 2, 2007.

The most recent application processed by OSHA specifically related to ETI's recognition granted an expansion of recognition. The final notice for this expansion was published on March 9, 1999 (64 FR 11500). The only other **Federal Register** notice related to ETI's recognition that OSHA published covered its recognition as an NRTL, which OSHA granted as described below. The current address of the only ETI site recognized by OSHA is: Electro-Test, Inc., 6900 Koll Center Parkway, Suite 416, Pleasanton, CA 94566.

II. Background

a. The NRTL Program and Application Process

Many of OSHA's safety standards require that equipment or products used in places of employment covered by the Occupational Safety and Health Act of 1970 be tested and certified to help ensure they can be used safely (*see, e.g.*, 29 CFR 1910, Subpart S). In general, this testing and certification must be performed by an NRTL. In order to ensure that the testing and certification are done appropriately, OSHA implemented the NRTL Program. The NRTL Program establishes the criteria that an organization must meet in order to be and remain recognized as an NRTL.

The NRTL Program requirements are set forth at 29 CFR 1910.7, ''Definition and requirements for a nationally recognized testing laboratory.'' To be recognized by OSHA, an organization must: (1) Have the appropriate capability to test, evaluate, and approve products to assure their safe use in the workplace; (2) be completely independent of the manufacturers, vendors, and major users of the products for which OSHA requires certification; (3) have internal programs that ensure proper control of the testing and certification process; and (4) have effective reporting and complaint handling procedures. OSHA recognition of an NRTL signifies that the organization has met the legal requirements in Section 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the products covered within its scope of recognition and is not a delegation or grant of government authority.

OSHA requires NRTLs to submit a detailed application when applying for recognition under the program. Once granted, an NRTL's recognition is for a period of five years, near the conclusion of which the NRTL must apply for renewal of recognition. Appendix A to Section 1910.7 establishes the renewal process. This process provides NRTLs with several opportunities to present information to the Agency to justify their continued recognition under the program.

The regulations provide for OSHA staff to make a preliminary finding as to whether an NRTL continues to meet the program requirements (Appendix A.1.B). If the staff makes a negative finding, OSHA notifies the applicant of this in writing and allows a reasonable period for a response (Appendix A.1.B.3). After receipt of this written notification, the applicant may either: (1) submit a revised application; or (b) request that the original application be forwarded to the Assistant Secretary of OSHA to determine whether the renewal application warrants approval (*Id.*).

After these initial steps, the Assistant Secretary of OSHA makes a preliminary finding as to whether the applicant has met the requirements for renewal of recognition (Appendix A.1.B.4). The Agency notifies the applicant of the preliminary decision and publishes a **Federal Register** notice informing the public, which also provides the public an opportunity to comment on the applicant's ability to meet the recognition requirements (Appendix A.1.B.5). After the public comment period, the Assistant Secretary may make a final decision on the renewal application. Alternatively, if there is public objection, the Assistant Secretary may initiate a special review of the information submitted during the public comment period and may supplement the record by either reopening the public comment period or convening an informal hearing (Appendix A.1.B.7). At the conclusion of this process, a final decision is made by the Assistant Secretary and published in the **Federal Register** (*Id.*).

b. ETI's Application

ETI applied to OSHA for its initial recognition in November 1992. At that time, it was a privately held organization, incorporated in California. After processing the application, including performing the necessary on-site assessments, OSHA announced its preliminary finding on the application in a notice published in the **Federal Register** on June 9, 1995 (60 FR 30595). At the time and unknown to OSHA, ETI was in the process of being acquired by Emerson Electric Company (Emerson).

The acquisition of ETI by Emerson was consummated on October 4, 1995. The notice to recognize ETI as an NRTL was published in the **Federal Register** on October 6, 1995, and ETI provided written notification of the acquisition by letter dated October 16, 1995. In that notification, ETI stated that, as a result of the acquisition, it would report to a new Board of Directors. This new Board consisted of one person who worked directly for Emerson (''Corporate Development'') and one who worked for another subsidiary of Emerson (''Customer Service & Support''), the latter named as the new Chairman of the Board.

Emerson is a global manufacturer of electrical, electromechanical, and electronic products and systems. It is a Fortune 500 company with more than 60 divisions that operate over 270 manufacturing locations around the world. In 2006, Emerson received over $20 billion in revenues. The electrical products manufactured by Emerson's subsidiaries, divisions, and units, are the types of products for which OSHA requires NRTL approval. In its October 16 letter informing OSHA of the acquisition, ETI stated that the ''acquisition will provide [ETI] the necessary capital to accelerate its growth as a nationwide organization'' (*see* Exhibit 9–1).

In December 1999, ETI submitted its renewal application. It stated that the ownership and independence of ETI had not changed since 1995. Two individuals closely associated with Emerson remained on the ETI Board of Directors, a ''Vice President Emerson Electric'' and a ''Director Corporate Development Emerson Electric.'' The Chairman of the Board was the ''Vice President of Emerson Electric'' (*see* Exhibit 16–1).

On April 19, 2000, OSHA first informed ETI that the information supplied in its application did ''not meet the policy on independence'' (*see* Exhibit 16–4). In that letter, OSHA asked ETI to respond and submit additional documentation regarding its independence: ''Please provide a statement to explain or clarify how ETI does meet the [independence] policy. As a minimum, your statement * * * must present clear and convincing information showing that the particular relationship is not applicable to ETI or, if it is applicable, showing how ETI still meets the requirement for complete independence.'' OSHA also attached its policy on independence (described below).

ETI responded to OSHA on May 17, 2000 (*see* Exhibit 16–5). The company informed OSHA that it was changing its policies and procedures to address the independence requirement by including the following statement in its proposals regarding NRTL work: ''In accordance with [ETI's] corporate policy and due to [ETI's] affiliation with Emerson Electric, to prevent the appearance of any conflict of interest we will not knowingly perform any listing or product recognition projects for other Emerson companies.'' (Hereinafter this is referred to as the ''corporate no-testing policy.'') The May 17 letter indicated no changes to ETI's Board of Directors. It also did not explain how ETI intended to implement its corporate no-testing policy.

OSHA again responded to ETI and reiterated its concerns about independence: (1) ETI had described no policies or procedures to implement the corporate no-testing policy; (2) two ETI Board members were still associated with Emerson; and (3) ETI had received significant financing from Emerson when it was acquired (*see* Exhibit 16–6).

ETI responded by providing OSHA some internal procedures it implemented for the corporate no-testing policy. It also informed OSHA that it was changing its Board of Directors. However, one of the members of the new Board was President of an Emerson subsidiary, albeit one that ETI claimed manufactured no products. Another member was the former Chairman of ETI's Board, who had since retired from Emerson (*see* Exhibit 16–7).

OSHA again carefully reviewed ETI's ownership situation and the efforts it took to address the independence issue. OSHA concluded, however, that ETI simply did not comply with its independence policy. In November 2004, OSHA formally informed ETI of the negative finding and indicated that ETI could either submit a revised application for further review or submit the original application to the Assistant Secretary with a statement of reasons supporting application approval. That letter, and accompanying **Federal Register** notice document, set forth in detail the reasons for the negative finding. The notice explained how ETI's ownership situation violated the independence policy and how ETI had not addressed the ''fundamental relationship of concern, i.e., its ownership by a manufacturer of the types of products that must be approved by NRTLs and from which NRTLs must be 'completely independent' '' (*see* Exhibit 16–8).

Upon receipt of this letter, ETI requested additional time to respond to OSHA, which the Agency granted. The company also asked for more information from the Agency to further explain OSHA's negative finding on independence. OSHA responded on July 7, 2005 (*see* Exhibit 16–9). It reiterated the reasons for denial, and further explained OSHA's independence policy. On September 1, 2005 (*see* Exhibit 16–10), ETI submitted its original application to the Assistant Secretary for review, along with a

supplemental statement of reasons supporting the application.

c. The NRTL Independence Policy

OSHA requires NRTLs to be ''completely independent'' of manufacturers of equipment being tested (29 CFR 1910.7(b)(3)). This independence requirement is fundamental to the third-party testing and certification system. When OSHA instituted the NRTL program, it intended to extend the practices that two NRTLs—Underwriters Laboratories (UL) and Factory Mutual Research Corporation (FMRC)—had instituted in their testing and certification programs. UL and FMRC were at the time, and still are, not affiliated with manufacturers of the equipment they certify. In many ways, ''independence'' is the cornerstone of the NRTL program, which is designed to ensure that certain dangerous equipment is tested and certified as safe by organizations that have no affiliation with manufacturers of the products or employers that might use the products in the workplace.

The NRTL Program application guide that was in effect when ETI applied for recognition in 1992 addressed independence by specifying the following: ''Written evidence of the independence of the applicant should be presented to achieve objectivity and preclude conflict of interest and to meet the provisions of 29 CFR 1910.7, i.e., *the NRTL may not be owned by manufacturers or suppliers of the product(s) to be tested and certified*'' (*Affiliation,* page 2, A Guide For Applying As A Nationally Recognized Testing Laboratory (Exhibit 17–1) (emphasis added)). ETI's application letter claimed that it followed the guide in preparing its application.

In December 1999, OSHA finalized a Directive implementing certain policies and procedures of the NRTL program. In the Directive, OSHA further interpreted the independence requirement (*see* NRTL Program Policies, Procedures, and Guidelines—CPL 01–00–003—CPL 1–0.3 (NRTL Program Directive), Appendix C.V). The Directive stated that in order to meet the independence requirement, NRTLs ''must be free from commercial, financial and other pressures that could compromise the results of its testing and certification processes.'' The Directive makes clear that NRTLs must avoid these pressures from manufacturers of equipment.[1]

Under its independence policy, OSHA presumes that ''pressures'' exist if there is a substantial relationship between the NRTL and a manufacturer ''of products that must be certified which could compromise the objectivity and impartiality in determining the results of its testing and certification processes.'' Substantial, for purposes of the policy, ''means of such a nature and extent as to exert undue influence on the testing and certification processes.'' The policy recognizes that certain relationships between an NRTL and a manufacturer of products that need to be certified can affect the objectivity of an NRTL's testing and certification processes. A laboratory that has these relationships generally would not be independent and could not be recognized by OSHA as an NRTL.

The Directive also sets forth a non-exclusive list of relationships that are ''substantial'' for purposes of the policy:

<bullet≤ The NRTL is a supplier or major user of products that an NRTL must certify, or is organizationally affiliated with such a supplier or major user;

<bullet≤ The NRTL significantly finances, invests in, sells product design, similar services or products to a supplier or major user of products that an NRTL must certify;

<bullet≤ The NRTL is owned in excess of two percent (2%) by a supplier or major user of products that an NRTL must certify, or their major owners;

<bullet≤ The NRTL receives significant financing from a supplier or major user of products that an NRTL must certify, or their major owners;

<bullet≤ A person holding a substantial position with the NRTL has a significant financial interest in a supplier or major user of products that an NRTL must certify, or is a director or key personnel of either.

OSHA has determined that if a laboratory has these relationships it would not be free from undue influences on its testing and certification operations and OSHA presumes that pressures exist in these situations. As stated, however, this is a non-exclusive list; OSHA may determine in a specific case that other relationships would be ''substantial'' for purposes of the policy.

Applicants can rebut the presumption that such pressures exist by clear and convincing evidence. OSHA intended this rebuttal to provide applicants an opportunity to clarify their organizational relationships and explain how the nature of those relationships does not create pressures. If the applicant cannot rebut the presumption, then the applicant would not meet the independence requirement.

In some limited situations, the policy allows OSHA to prescribe ''conditions'' on NRTLs for initial or continued recognition even when the Agency determines that pressures exist. Such conditions, however, ''must be consistent with the policy,'' in that they must effectively eliminate the pressures stemming from the substantial relationship. The Directive also provides examples of conditions OSHA may consider imposing: (1) Restricting the suppliers for whom the NRTL may test and certify products; or (2) restricting the type of products the NRTL may test and certify.

Whether imposing conditions on an applicant is appropriate is a judgment made by the Agency on a case-by-case basis. OSHA has discretion whether to impose conditions in a particular case. The independence policy does not require OSHA to impose conditions; it only allows for conditions to be imposed. In most cases, pressures stemming from a substantial relationship could not be effectively eliminated and thus OSHA could not impose conditions ''consistent with the policy.'' OSHA's ability to impose conditions is limited to those rare instances when the substantial relationships cause only ''minimal'' pressures.

In analyzing these situations, OSHA must carefully examine the ownership situation, the types of products at issue, the scope and magnitude of the NRTL's operations and the operations of manufacturers or employers using the products, as well as other factors. OSHA also must consider the degree to which it can monitor NRTL compliance with any conditions. This is particularly important. OSHA typically audits NRTLs once a year to ensure they continue to meet the NRTL requirements and to maintain the quality of their testing and certification operations. If imposing conditions on an NRTL would be impossible for OSHA to audit effectively, on that basis alone conditions would not be appropriate.

OSHA intends its policy on NRTL independence to be a straightforward approach for judging the NRTL's compliance with the Agency's independence requirement under 29 CFR 1910.7. OSHA cannot perform in-depth analyses of an applicant's or NRTL's ownership or financial relationships and interests. The applicant or NRTL has the burden of showing it is independent, and, in considering if it meets the requirement, those relationships must present none or only minor pressures.

For the reasons set forth below, OSHA preliminarily finds that ETI does not

[1] NRTLs, including ETI, were given the opportunity to comment on an early draft of the key policies in the Directive, including the independence policy. ETI provided no comments on it (Exhibit 17–2).

meet OSHA's NRTL independence requirement. There is a substantial relationship between ETI and Emerson, one of the leading global manufacturers of electric and electronic equipment. This relationship creates pressures that could compromise the results of ETI's testing and certification processes, which have not been rebutted by clear and convincing evidence. In addition, there are no conditions that OSHA could impose to mitigate the pressures. And, even if such conditions could be imposed, OSHA has preliminarily concluded that it could not effectively monitor ETI's compliance with them. In making this preliminary determination regarding ETI's independence, the Agency emphasizes that this determination does not include any positive or negative finding about ETI's other technical capabilities that would be needed to support continued recognition.

III. Preliminary Finding of Non-Independence

a. ETI Has a ''Substantial Relationship'' With Emerson

ETI is wholly-owned by Emerson. Emerson is a manufacturer of electrical and electronic products, many of which require NRTL certification if used in the workplace. Under the NRTL independence policy, this constitutes a ''substantial relationship'': ETI is organizationally affiliated with—and is owned in excess of two percent by—a supplier of products requiring NRTL certification. ETI does not dispute that it has a substantial relationship with Emerson. Because there is a substantial relationship, OSHA presumes that pressures exist that could compromise the results of its testing and certification processes and that ETI is not independent.

b. ETI Has Failed To Rebut the Presumption of Pressures

ETI has attempted to rebut the presumption of pressures. In various letters to the Agency ETI has explained why it believes it is not subject to pressures from Emerson that could compromise the results of its testing and certification processes. ETI states that it has decision making independence from Emerson, as well as economic independence. Furthermore, it contends that the organizational relationship between ETI and any Emerson manufacturing company is indirect and, as a result, should raise fewer concerns that pressures exist. Finally, ETI claims that it has taken a variety of steps to ensure that it does not test or certify any products from Emerson. The Agency has carefully considered this information; however, it finds that the presumption of pressures has not been adequately rebutted.

1. ETI's Independence From Emerson

ETI states that it ''receives no financing whatsoever from Emerson, [and] [t]here is no evidence in the record suggesting that Emerson wields any decision making influence on ETI'' (ETI's Statement of Reasons, p. 6 (Exhibit 16–10)). ETI suggests that it is a completely separate entity that operates independently from Emerson. OSHA is not convinced by these statements.

ETI's statements that Emerson possesses no decision making influence over ETI do not address the fundamental aspect of control that a parent company has over a ''controlled'' subsidiary (e.g., a wholly-owned or majority-owned subsidiary). According to the Securities and Exchange Commission, control is the ''possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise'' (17 CFR 230.405). The parent company of a wholly-owned subsidiary has ultimate control over the subsidiary even though it may delegate some aspects of that control to the subsidiary. Control can be exerted through changes in policy, changes to the leadership of the wholly-owned subsidiary, and even buying and selling the subsidiary. As the Supreme Court has stated in the antitrust context:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate: their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal ''agreement,'' the subsidiary acts for the benefit of the parent, its sole shareholder. * * * *[T]he parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.*

Copperweld Corp. et al. v. *Independence Tube Corp.,* 467 U.S. 752, 771–72 (1984) (emphasis added). At any time, Emerson has the power to dictate ETI's actions. ETI does not have decision making independence.

ETI's claims of economic independence from Emerson are also unpersuasive. First, acquisition itself is a form of financing. The cash or other assets of the purchased company are maintained and typically enhanced by the purchasing company. In fact, after the acquisition of ETI by Emerson, ETI stated that ''[t]he acquisition will provide [ETI] the necessary *capital to accelerate its growth as a nationwide organization*'' (*see* Exhibit 9–1) (emphasis added)). Second, while ETI states that to date it has received no additional financing from Emerson (since the initial acquisition), this could change at any time. OSHA has received no assurances from Emerson that it will refrain from making financial contributions to ETI.[2] In fact, on its Web page ETI suggests the opposite: ''As a wholly-owned subsidiary [of Emerson], we have direct access to the combined resources of one of the world's most respected industrial leaders'' (*see* Exhibit 17–3).

2. ETI's Organizational Relationship to Emerson

ETI also contends that Emerson is simply a holding company, which owns only a ''few'' subsidiaries that manufacture products that require NRTL certification (ETI's Statement of Reasons, p. 6. (Exhibit 16–10)). For this reason, ETI contends that its relationship with Emerson ''is indirect and, as a result, should raise a significantly less concern that pressures could be exerted on the NRTL'' (*Id.*). Furthermore, ETI suggests that because no member of its Board of Directors is directly affiliated with an Emerson owned manufacturer, there is little opportunity for pressures to be exerted on ETI. OSHA finds that the organizational relationship between ETI and Emerson does not rebut the presumption of pressures.

When ETI was first purchased, ETI's Board, which includes a total of only three members, consisted of two Emerson executives: Director Corporate Development Emerson; and President, Customer Service & Support, a subsidiary of Emerson Electric Co. As stated above, ETI changed its Board of Directors in response to concerns raised by OSHA. Even so, the replacement Board still consisted of two individuals closely affiliated with Emerson: One was a former longtime Emerson employee who was a Vice President of Emerson; and one was the President of an Emerson-owned subsidiary. The third member was ETI's President. As a result, these changes in the Board of Directors provided little organizational separation between ETI and Emerson. With the exception of the retired Emerson employee, the Board of

[2] Even if such assurances were provided, OSHA would be unable to verify that no financial contributions occurred, given the technical (non-financial) nature of OSHA's audits and the vast scope of Emerson's operations.

Directors still included a director who was part of the Emerson family of companies. Even the retired member had considerable ties to Emerson and its management from his many years of working with the company in a variety of capacities. Due to these close associations, comprising a majority on the ETI Board of Directors, the potential remains for Emerson to influence ETI's testing and certification operations, as would be expected with a wholly-owned subsidiary. At the very least, these associations make Emerson privy to the Board's deliberations on behalf of ETI.

Furthermore, it is clear that ETI is an integral part of Emerson's operations. ETI is part of the Emerson Process Management™ brand platform of Emerson. Emerson Process Management™ is one of the largest Emerson brand platforms with over 20 divisions and subdivisions. ETI is considered a ''division'' of Emerson and is highlighted on Emerson's Web pages. ETI itself describes its important role in Emerson's operations: ''Within the Emerson family of companies, we are an integral part of the Asset Optimization team of Emerson Process Management which aggregates the service divisions of over 100 Emerson companies. Our goal is to create solutions to optimize the process industry'' (*see* Exhibit 17–3).

Emerson's Web pages emphasize a close relationship between Emerson and ETI. For example, Service Data Sheets put out by ETI include the Emerson Process Management™ logo, copyright information, and address (*see* Exhibit 17–4). When ETI announced its name change to Electrical Reliability Services, it stated: ''While our new identity symbolizes our comprehensive solutions offering, it also demonstrates our relationship to our parent company, Emerson. As part of Emerson's Asset Optimization Division, Electrical Reliability Services provides you with full access to Emerson's vast technical and human resources'' (*see* Exhibit 17–5). OSHA is not convinced that ETI's relationship with Emerson is so distant that pressures do not and will not exist that could compromise the results of its testing and certification processes.

3. Corporate No-Testing Policy

ETI has established a policy that no NRTL testing, evaluation or certification work will be knowingly completed for Emerson owned companies. The policy states further that ''[t]he ownership of each client will be verified as not being part of Emerson prior to [ETI] submitting a proposal and on an ongoing basis for as long as the listing relationship between the client and [ETI] exists'' (*see* Exhibit 16–7, Attachment 2, page 1). This is a key aspect of ETI's rebuttal. ETI contends that it will have no pressures because it will not knowingly test or certify any products produced by Emerson companies. While OSHA appreciates the steps taken by ETI, these policy changes do not rebut the presumption of pressures.

First, ETI's policy does not address the fundamental ownership situation of ETI and the control that Emerson can assert over its operations. At any time, Emerson can change ETI's policies, including the corporate no-testing policy. The bottom line is that ETI is owned in excess of 2% by a major supplier of products that must be NRTL approved when used in the workplace. This relationship and the control that can be asserted are not addressed by the corporate no-testing policy.

Second, ETI's corporate no-testing policy appears to deal only with final products manufactured by Emerson, and not component parts. Emerson-owned and affiliated companies produce countless electrical components used by other manufacturers in final products, and use major components or products of other manufacturers in Emerson's electrical final products. The corporate no-testing policy does not affect this part of Emerson's business, which is a major area of pressures that could be exerted on ETI. Even if other organizations perform the testing now, this does not prevent Emerson from establishing a policy in the future that instead relies on ETI testing for components if Emerson found this to be beneficial for itself and affiliated organizations.

Third, the policy does not appear to cover contractors hired by Emerson or the other affiliations and joint ventures Emerson has throughout the world. According to Emerson Web pages, Emerson operations in China alone consist of ''30 wholly owned and joint venture facilities'' (*see* Exhibit 17–6). OSHA anticipates that the number and scope of these relationships will only increase as Emerson continues to grow its sales and manufacturing presence around the world, in such areas as Asia, Latin America, and Eastern Europe (*see* Exhibit 17–7). Products from these operations could enter the U.S. market and thus U.S. workplaces. ETI's corporate no-testing policy in no way alleviates the pressures that can result from these relationships.

Furthermore, Emerson's operations are so vast that OSHA seriously doubts ETI's ability to effectively enforce its own policy. ETI says that Emerson has a ''significant'' number of subsidiaries, a ''few'' of which manufacture products requiring NRTL certification. OSHA reviewed Emerson's 2006 10–K filing with the Securities and Exchange Commission, and it shows that Emerson has over 800 subsidiaries in countries throughout the world (*see* Exhibit 17–8). Emerson owns over 270 manufacturing sites and employs approximately 128,000 people worldwide.

Emerson's product lines are also vast. The company's 10–K provides just a snapshot of the variety of products Emerson companies manufacture, including: electrical distribution conduit and cable fittings, plugs and receptacles; industrial lighting, and controls; uninterruptible AC and DC power systems; cooling products for computers, telecommunications, and other equipment; refrigeration products in industrial applications; electric motors, HVAC equipment, furnaces, fans, heat pumps; professional tools such as wet-dry vacuums; and other assorted power tools that can be used in the workplace. Some of these products fit within the two test standards included in ETI's current scope of recognition. For example, Emerson produces power conversion units, which can be tested pursuant to UL 508C Power Conversion Equipment. ETI is currently recognized to test products in accordance with that test standard. ETI has also requested that OSHA expand its NRTL recognition to add new test standards that would also include other Emerson products. Given the vast nature of Emerson's operations, OSHA believes it is virtually impossible for ETI to effectively enforce its corporate no-testing policy.

It would also be virtually impossible for OSHA to monitor ETI's corporate no-testing policy. OSHA typically audits its NRTLs annually to ensure they are complying with the NRTL regulations and procedures, as well as their own internal policies and procedures. These audits are technical in nature and focus on the quality of the NRTL's testing and certification operations. OSHA does not have, nor did it ever intend to have, the resources to enable it to audit ETI's corporate no-testing policy, especially given the vast scope of Emerson's operations. The number of subsidiaries and other affiliated companies, manufacturing facilities, and the broad array of products manufactured by Emerson and its affiliated organizations, would prohibit OSHA from effectively performing its audit functions.

To add to an already complex situation, OSHA's ability to audit would be made more difficult because of the changing nature of Emerson's operations. Emerson is continually

buying and selling new companies. For example, according to its 2005 Annual Report (*see* Exhibit 17–9, page 18):

> The Company acquired Do+Able, a manufacturer of ready-to-assemble storage products, and Numatics, a manufacturer of pneumatic and motion control products, and several smaller businesses during 2005. * * * During 2004, the Company acquired the North American outside plant and power systems business of Marconi Corporation PLC, as well as several other small businesses for a total of approximately $414 million in cash.

Emerson describes as part of its business focus to ''seek to grow through emphasis on ''strategic acquisitions and divestitures * * * that better position our company in terms of markets and breadth of product offerings'' (*see* Exhibit 17–10). Based solely upon the nature of Emerson's continually changing holdings, it would be almost impossible for OSHA to continually monitor ETI's adherence to the corporate no-testing policy.

For all of these reasons, OSHA finds that ETI has failed to rebut the presumption of pressures. One of the largest electrical manufacturers in the world wholly owns an NRTL that tests the types of equipment that the manufacturer produces. This does not satisfy OSHA's requirement that NRTLs be ''completely independent.''

c. OSHA Cannot Impose Conditions on ETI

While OSHA has considered its ability to impose conditions in this case, and discussed this with ETI, OSHA has concluded that conditions are not appropriate. The relationship between Emerson and ETI is such that imposing conditions would not be consistent with the independence policy.

As described above, OSHA's independence policy permits conditions to be imposed only in those circumstances where there are minimal pressures and the conditions would not negate the underlying independence requirement. The extent to which conditions may be imposed in a situation of a manufacturer-owned NRTL depends upon the ownership situation, the scope of testing of the NRTL, and the scope of the products manufactured, among other things.

In this case, Emerson wholly owns ETI; this is not a situation where a manufacturer owns only a small, minority percentage of an NRTL and thus could exert only minimal pressures over the NRTL. Furthermore, the scope of products that Emerson produces is enormous. Emerson produces a litany of products that require NRTL certification, as described above. In addition, the types of products that ETI tests cover the products that Emerson produces. ETI is currently recognized to test products according to the following test standards: UL 508 Electric Industrial Control Equipment; UL 508C Power Conversion Equipment. These standards include the products that Emerson companies produce. ETI has also requested that it be recognized to test products according to several other test standards that include other products produced by Emerson. Given these circumstances, OSHA cannot impose conditions without negating the fundamental requirement that NRTLs be independent of ''any manufacturers or vendors of equipment or materials being tested for [equipment requirements]'' (29 CFR 1910.7(b)(3)).

Finally, when imposing conditions, OSHA must consider whether it can reasonably monitor an NRTL's compliance with those conditions. OSHA is simply not equipped to monitor the various aspects of ETI's ownership relationships and affiliations with the numerous subsidiaries of Emerson. As noted earlier, the Agency's policy on independence provides a straightforward, practical approach to determining whether an organization meets the requirement for independence. OSHA is not requiring through the policy that its staff analyze actual or potential business activities or determine possible activities that cause actual or potential conflicts and pressures. This information is beyond the reach of OSHA's auditing capabilities under the NRTL Program.

d. OSHA Has Taken a Consistent Position on Independence

ETI contends that OSHA has applied a stricter definition of independence in ETI's case than it has in other cases (ETI's Statement of Reasons, pp. 5–6 (Exhibit 16–10)). In particular, it suggests that OSHA treated another NRTL—Intertek Testing Services NA, Inc. (Intertek)—differently than it treated ETI. It also suggests that OSHA has taken different positions on independence in its dealings with ETI over the last several years. OSHA disagrees. The Agency has consistently applied its independence policy across the board to all NRTLs and throughout its dealings with ETI.

OSHA did not apply a different standard for independence in its dealings with Intertek. Intertek's parent had acquired, and merged into Intertek's overall laboratory operations, a small manufacturer of laboratory test equipment, Compliance Design. In discussing this ownership situation in the context of an application for expansion of recognition, OSHA stated:

> In accordance with OSHA policy, if [Intertek] were to certify the type of products manufactured or sold by Compliance Design, then [Intertek] would not meet the requirement in 29 CFR 1910.7 for complete independence. Also, [Intertek's] parent company is Intertek Testing Services, Ltd. (ITSLtd). If [Intertek] were to certify a type of product for an entity owned by ITSLtd, and that entity is also a supplier of that type of product, then [Intertek] would not be ''completely independent'' (65 FR 71124, November 29, 2000).

In short, Intertek was not independent because its parent company owned a manufacturer of equipment that, under certain circumstances, needed NRTL approval.

In the case of Intertek, however, OSHA was able to impose a condition to effectively eliminate the pressures stemming from Intertek's relationship with Compliance Design.[3] The condition included a no-testing policy for Compliance Design, and for any manufacturer affiliated with Intertek. OSHA had no information showing that Intertek or its parent owned any other manufacturing interest but imposed the broader condition as a precaution. This condition could be imposed because, unlike ETI's situation, the manufacturer at issue was very small and produced just one type of product. Intertek could enforce the no-testing policy, and, due to the very small nature of the operations of Compliance Design, OSHA was able to effectively monitor Intertek's compliance with the policy. In fact, Intertek's relationship to Compliance Design was brought to light in the report of an audit of Intertek. ETI's case, on the other hand, is much different. Emerson's operations are so vast—with 800 subsidiaries, 270 manufacturing locations, and countless products manufactured—that there are no conditions that could mitigate all the pressures and that OSHA could effectively monitor.[4]

In addition, OSHA has previously informed laboratories that they could

[3] OSHA announced the removal of the condition on January 28, 2002 (67 FR 3913), after Intertek informed OSHA that the unit had ceased operation.

[4] The only other instance where OSHA imposed a condition on an NRTL with a known conflict related to independence was for Wyle Laboratories, Inc. At the time of its recognition, Wyle was part of an organization with a division that manufactured and distributed electronic enclosure cabinets. Like Intertek, OSHA was able to impose a condition that Wyle not test or certify any equipment that utilized an electronic enclosure manufactured by Wyle. This condition was easy for Wyle and OSHA to monitor since the only product at issue was electrical enclosure cabinets. OSHA notes that the condition is no longer in place since, in 1997, Wyle informed OSHA that it had sold this division.

not become NRTLs because they were owned by a manufacturer. In a recent case, a laboratory applied but stopped the application process after it better understood OSHA's concerns over its relationship with its owner-manufacturer, a manufacturer of computer and telecommunications hardware products. OSHA has applied its policy fairly and its determinations regarding ETI's independence are consistent with the Agency's previous positions.

ETI also argues in its rebuttal statement that a draft fax it received from OSHA staff constituted an ''interpretation'' of the independence requirement that is at odds with OSHA's current interpretation. In December 2001, OSHA staff sent a draft fax to ETI that detailed some preliminary findings and conclusions about ETI's lack of independence. These preliminary findings in many ways mirrored OSHA's other correspondence with ETI. It expressed concerns about the vast nature of Emerson's operations, the Board of Directors of ETI, and the fact that neither ETI nor OSHA could effectively monitor the corporate no-testing policy (*see* Exhibit 17–11). It also listed some conditions that ETI could consider as it was evaluating the independence criteria and its relationship with Emerson.

The draft fax is not a statement of Agency policy (*Miller* v. *Youakim,* 440 U.S. 125, 146 n.25 (1979)). It was intended as a discussion piece between OSHA and ETI. It is not signed by an Agency official and is clearly marked draft on each page. ETI knew at the time that the document was simply a draft that was sent out to solicit comment from ETI. This is supported by the fact that ETI made no attempts to implement any of the suggestions included in the draft. In fact, ETI never formally responded to the draft.

OSHA's official statements regarding ETI's ownership situation have been entirely consistent. Starting with the first correspondence related to the independence issue, OSHA has consistently stated that ETI was not independent because it was wholly owned by Emerson:

<bullet≤ See Exhibit 16–5: ''Under our policy on independence, Emerson would be a 'supplier' of products that must be certified by an NRTL. As described in our policy, since Emerson owns ETI and two of its officers are Directors of ETI, ETI would fail to meet the requirement for complete independence of an NRTL, under paragraph (b)(3) of 29 CFR 1910.7.''

<bullet≤ See Exhibit 16–6: ''After consulting with attorneys in the Department of Labor's Office of the Solicitor, we believe that the information in your May 17 letter does in fact confirm that ETI does not meet our independence requirement.''

<bullet≤ See Exhibit 16–8: ''The independence requirement in § 1910.7 is intended to prevent relationships that could unduly influence and thereby compromise the NRTL's testing and certification process. OSHA considers an NRTL not to be independent if it is owned by a manufacturer of the type of products for which OSHA requires certification by NRTLs.''

<bullet≤ See Exhibit 16–9: ''The fundamental reason for denial is ETI's ownership by Emerson Electrical Corporation (Emerson), a manufacturer of a wide variety of equipment that OSHA requires to be approved (i.e., tested and certified) by NRTLs. As such, this violates the NRTL requirement for independence set forth under 29 CFR 1910.7(b).''

As these statements demonstrate, OSHA has consistently informed ETI that its ownership by Emerson violated the independence requirement. OSHA has provided ETI several opportunities to rebut the presumption of pressures. ETI simply has not met its burden of demonstrating by clear and convincing evidence that pressures do not and will not exist that could compromise the results of its testing and certification processes.

Request for Renewal of Recognition

ETI seeks renewal of its recognition for the site that OSHA has previously recognized. ETI also seeks renewal of its recognition for testing and certification of products for demonstration of conformance to the following two test standards, which OSHA has previously recognized for ETI. Each of these standards is an ''appropriate test standard,'' within the meaning of 29 CFR 1910.7(c): UL 508 Industrial Control Equipment; UL 508C Power Conversion Equipment. The designations and titles of these test standards were current at the time of the preparation of this notice.

Preliminary Finding

Following a review of the application file and other pertinent information, and for the reasons summarized above, OSHA has determined that ETI has not met all the requirements for renewal of its recognition. OSHA staff, therefore, recommended to the Assistant Secretary that the application be denied.

The Assistant Secretary has made a preliminary finding that ETI fails to meet all the requirements prescribed by 29 CFR 1910.7 for the renewal of its recognition, and, therefore, OSHA proposes to deny renewal of that recognition. This preliminary negative finding does not constitute OSHA's final decision on the application for renewal.

As stated above, OSHA welcomes public comments, in sufficient detail, as to whether ETI has met the requirements of 29 CFR 1910.7 for the renewal of its recognition as a NRTL. Your comments should consist of pertinent written documents and exhibits. Should you need more time to comment, you must request it in writing, including reasons for the request. OSHA must receive your written request for extension no later than the last date for comments. OSHA will limit any extension to 30 days, unless the requester justifies a longer period. We may deny a request for extension if it is not adequately justified. You may obtain or review copies of the ETI request, the on-site review report, ETI's statement of reasons, other pertinent documents, and all submitted comments, as received, by contacting the Docket Office, Room N2625, Occupational Safety and Health Administration, U.S. Department of Labor, at the above address. Docket No. NRTL2–94 contains all materials in the record concerning the ETI application.

The NRTL Program staff will review all timely comments and, after resolution of issues raised by these comments, will recommend whether to grant the ETI renewal request. The Assistant Secretary will make the final decision on granting the renewal and, in making this decision, may undertake other proceedings that are prescribed in Appendix A to 29 CFR Section 1910.7. OSHA will publish a public notice of this final decision in the **Federal Register**.

Signed at Washington, DC, this 23rd day of April, 2007.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E7–8455 Filed 5–2–07; 8:45 am]

BILLING CODE 4510–26–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2007–4]

Notice of Intent to Audit

AGENCY: Copyright Office, Library of Congress.

ACTION: Public notice.

SUMMARY: The Copyright Office of the Library of Congress is announcing