No. 10-1022

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HONEYWELL INTERNATIONAL INC.,

Appellant,

v.

U.S. NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA

Appellees.

ON PETITION FOR REVIEW OF AN ORDER OF THE U.S. NUCLEAR REGULATORY COMMISSION

BRIEF OF APPELLANT HONEYWELL INTERNATIONAL INC.

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June 4, 2010

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), Honeywell International Inc. ("Honeywell") submits this certificate as to parties, rulings, and related cases.

(A) Parties, Intervenors and *Amici* in case 10-1022 and consolidated cases

The Petitioner is Honeywell International Inc. The Respondent is the U.S. Nuclear Regulatory Commission. There are presently no intervenors or *amici curiae*.

(B) Rulings Under Review

Honeywell seeks review of the United States Nuclear Regulatory Commission ("NRC") decision, entered December 11, 2009, for Honeywell's Metropolis Works Facility, NRC Material License No. SUB-526, Docket No. 40-3392. Letter from NRC to Honeywell Providing a Denial of the Honeywell Request for an Exemption from Decommissioning Financial Assurance Requirements ("Denial Letter"). App. 446. In the decision, the NRC denied a request to amend Honeywell's NRC-issued license and thereby extend an exception from aspects of the NRC's decommissioning financial assurance regulations.

(C) Related Cases

Honeywell is unaware of any related cases.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Honeywell International Inc. respectfully submits this disclosure statement.

Honeywell International is a diversified technology and manufacturing leader, serving customers worldwide with aerospace products and services; control technologies for buildings, homes and industry; automotive products; turbochargers; and specialty materials. Honeywell has no parent companies, subsidiaries, or affiliates whose listing is required by Rule 26.1.

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STATUTES

REGULATIONS

GLOSSARY

Add.	Addendum
APA	Administrative Procedures Act
App.	Appendix
EA	Environmental Assessment
EPA	U.S. Environmental Protection Agency
FAA	Federal Aviation Administration
MTW	Metropolis Works Facility
NMSS	Office of Nuclear Material Safety and Safeguards
NRC	U.S. Nuclear Regulatory Commission
TER	Technical Evaluation Report
U_3O_8	Triuranium octoxide or "yellowcake"
UF_6	Uranium hexafluoride

UNITED STATES COURT OF APPEALS
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HONEYWELL INTERNATIONAL INC.,	)	
Petitioner,	)	
v.	)	Case No. 10-1022
U.S. NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA	)	
Respondents.	)	

ON PETITION FOR REVIEW OF AN ORDER
OF THE U.S. NUCLEAR REGULATORY COMMISSION

BRIEF OF APPELLANT HONEYWELL INTERNATIONAL INC.

INTRODUCTION

Under NRC regulations, licensees such as Honeywell must provide assurance that sufficient funds will be available to decommission a facility at the end of its licensed life. 10 C.F.R. § 40.36(e). Add. 6. The amount of financial assurance required is based on a site-specific decommissioning cost estimate. The NRC permits licensees to use a variety of mechanisms to provide financial assurance, including a surety bond, a letter of credit, or a self-guarantee.

Since 1994, Honeywell has elected to use a self-guarantee to provide the required decommissioning funding assurance. In order to use the self-guarantee mechanism, Honeywell must satisfy the financial test in 10 C.F.R. Part 30, Appendix C. The financial test establishes, among other criteria, a minimum bond rating and certain financial ratios. Specifically, the NRC requires that licensees have a bond rating of "A" or better, as issued by Standard and Poor's or Moody's, and a "[t]angible net worth at least 10 times the total current decommissioning cost estimate." 10 C.F.R. Part 30, Appendix C, at II.A. Add. 4. Licensees must annually demonstrate passage of the financial test. *Id.* at II.B.3. Add. 5.

Honeywell initially sought, and in May 2007 received, permission from the NRC to implement an alternate financial test, which authorizes Honeywell to include the value of "goodwill" in performing the financial test. Goodwill is an intangible asset that reflects the cash generating potential of a business.[1] The fair value of goodwill is calculated using Financial Accounting Standards and is audited annually by independent accountants. The other aspects of the financial

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[1] In almost all business combinations, the consideration paid by the acquiring company exceeds the book value of the assets acquired and liabilities assumed from the target. The reason for this excess of goodwill is that the acquired company is valued on the basis of its cash flow or net income generating potential, not on the simple book value of its assets and liabilities. Thus, in the case of an acquisitive company like Honeywell, goodwill may make up a considerable portion of its assets. This is in contrast to "tangible assets," which include, for example, a company's buildings, factories, and machinery.

test, including the minimum bond rating, remained unchanged. The alternate test was authorized in an amendment to Honeywell's NRC-issued license. The license amendment, and Honeywell's ability to rely on the alternate financial test, was granted for a one-year period, ostensibly to enable the NRC to consider making a change to its regulations to permit use of goodwill for all NRC licensees required to provide decommissioning funding assurance. And, in fact, subsequent to authorizing Honeywell to use the alternate test, the NRC proposed a change in its decommissioning regulations that would permit other NRC licensees to use the value of goodwill in the financial test. 73 Fed. Reg. 3812, 3825, 3831 (Jan. 22, 2008). Add. 23-30.

In light of the prior license amendment and the NRC's rulemaking proposal to permit use of goodwill in performing the financial test, Honeywell sought an extension of the license amendment in 2008. The NRC granted the license amendment (for another one-year period). As the NRC's decommissioning rulemaking was still ongoing, Honeywell sought another license amendment in 2009. Despite having granted the amendment twice previously and despite the proposed rule language permitting all NRC licensees to utilize goodwill, the NRC denied on December 11, 2009 Honeywell's request to continue to use the alternate financial test. The NRC did not explain the basis for its reversal or engage in

notice-and-comment rulemaking. This decision was therefore arbitrary and made without observance of required procedures.

STATEMENT OF JURISDICTION

This petition for review challenges a final NRC decision, dated December 11, 2009, to deny a license amendment for Honeywell's uranium hexafluoride conversion facility. Honeywell timely filed the petition for review on February 8, 2010. This court has jurisdiction under the Administrative Orders Review Act, 28 U.S.C. § 2341 *et seq.*, commonly known as the Hobbs Act, to review NRC orders, including license amendments and rulemaking decisions.

STATEMENT OF THE ISSUES

Honeywell submits the following statement of issues to be raised in this case.

1. Whether the NRC order under review is arbitrary, capricious, and not in accordance with law because such order fails to provide an adequate basis or explanation for reversing the NRC's prior determinations that the value of goodwill could be used to support a self guarantee.

2. Whether the NRC order under review was made without observance of procedure required by law because such order improperly altered the NRC's consistent prior interpretations of its regulation without engaging in notice and comment rulemaking.

B. DECOMMISSIONING COST ESTIMATE

Under NRC regulations, Honeywell must provide assurance that sufficient funds will be available to decommission the facility at the end of its licensed life. 10 C.F.R. § 40.36(e). Add. 6. The amount of financial assurance required is based on a site-specific decommissioning cost estimate. The site-specific decommissioning cost estimate represents Honeywell's best approximation of all direct and indirect costs of decommissioning its facilities under routine facility conditions. The cost estimate assumes that work will be performed by an independent third-party contractor and includes a contingency. The cost estimate is reviewed and approved by the NRC. Honeywell is also required to update its cost estimate every three years.

In January 2007, Honeywell submitted its current cost estimate to the NRC for review and approval. On July 12, 2007, the NRC approved the Honeywell decommissioning cost estimate in the amount of $156,348,034.

C. SELF-GUARANTEE FOR DECOMMISSIONING FUNDING ASSURANCE

Since 1994, Honeywell has relied upon a self-guarantee to provide decommissioning financial assurance for MTW. In order to use the self-guarantee mechanism, Honeywell must satisfy the financial test in 10 C.F.R. Part 30, Appendix C. The financial test includes, among other criteria, a minimum bond rating and certain financial ratios that must be met. Specifically, the NRC requires

that licensees maintain a bond rating of "A" or better, as issued by Standard and Poor's or Moody's, and have a "[t]angible net worth at least 10 times the total current decommissioning cost estimate." 10 C.F.R. Part 30, Appendix C, at II.A.1. Add. 4. Licensees must annually repeat passage of the financial test, including a showing that it meets the "10:1" ratio. *Id.* at II.B.3. Add. 5.

On November 3, 2006, Honeywell notified the NRC that it no longer satisfied the financial test for a self-guarantee in 10 C.F.R. Part 30, Appendix C. Letter from Honeywell to NRC Re: Meeting to Review Financial Assurance Requirements for Decommissioning Liability. App. 210. In the letter, Honeywell also notified the NRC that it intended to request an exemption (in the form of a license amendment) from the part of the financial test in Part 30, Appendix C, that requires licensees to have a tangible net worth at least 10 times the total current decommissioning cost estimate. *Id.*

On December 1, 2006, Honeywell formally requested that the NRC approve an alternate financial test formula under 10 C.F.R. § 40.14. Letter to NRC from Honeywell Re: Request for Exemption from Decommissioning Financial Assurance Requirements ("Application to Use Alt. Financial Test"). App. 213. Specifically, Honeywell sought to include the value of "goodwill" in calculating the 10:1 ratio in Appendix C. Honeywell acknowledged that licensees traditionally have not been permitted to include the value of goodwill in the definition of

tangible net worth under Appendix C to Part 30. But, Honeywell explained that allowance for goodwill would provide an equivalent level of assurance for several reasons. App. 216.

First, the tangible net worth test — as typically applied — does not accurately reflect the financial strength, stability and low risk of default of a multi-industry conglomerate such as Honeywell.[2] Honeywell has maintained an "A" rating from both Moody's and Standard & Poor's since 1992 and in 2006 generated $2.2 billion in free cash flow. App. 217-18. Second, rigid application of the tangible net worth test would require Honeywell to divert substantial financial resources to obtain a letter of credit, surety bond, or some other third party credit support. No benefit to operational or public safety, or to the common defense and security, would accrue from this expenditure, and funds needed for operational improvements would be needlessly diverted. App. 221.

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[2] Unlike electric utilities or mining companies that rely on a relatively narrow category of tangible assets to generate cash, diversified, multi-industry conglomerates such as Honeywell rely on a wide range of products and revenue streams. Application to Use Alt. Financial Test at 4. App. 219. Like nearly all multi-industry conglomerates, Honeywell seeks to grow and diversify its businesses through acquisitions or other business combinations. As a result, between the ends of fiscal year 2002 and 2006, Honeywell made approximately 39 acquisitions and increased its revenues from $22 billion to over $30 billion. These acquisitions generated approximately $3 billion of goodwill. *Id.*

Honeywell also explained that, as required by 10 C.F.R. § 40.14, the alternate financial test criterion was authorized by law, "[would] not endanger life or property or the common defense and security and [was] otherwise in the public interest." Add. 5-6.

D. NRC ISSUES FIRST LICENSE AMENDMENT AUTHORIZING HONEYWELL TO APPLY ALTERNATIVE FINANCIAL TEST

The NRC addressed Honeywell's proposal to use an alternate decommissioning test in a Technical Evaluation Report ("TER") for renewal of the operating license for MTW, dated May 11, 2007. TER at 52. App. 264. The NRC explained that the basis for decommissioning financial assurance is to assure that funds for decommissioning are available when needed — both under normal circumstances and in times of financial distress. *Id.*

The NRC noted that a licensee's financial ability to pay under normal circumstances is regularly rated by the bond rating agencies, such as Moody's and Standard and Poor's, and that a rating of "A" or higher indicates a very low probability of default on a company's bonds. Consequently, the NRC concluded that Honeywell's "A" rating is a reliable indicator that it has the ability to pay its decommissioning obligations under normal circumstances.

For a licensee's ability to pay under conditions of financial distress, the NRC considers the ratio of assets to decommissioning liability. The NRC noted that, considering tangible assets alone, Honeywell did not meet the 10 to 1 ratio. But, if

goodwill assets were considered in net worth, Honeywell's ratio exceeded the 10 to 1 ratio. *Id.* The NRC deemed these assets (tangible assets plus goodwill) sufficient to assure decommissioning funds in times of financial distress.

In view of the "A" bond rating and the high ratio of net worth (including goodwill) to decommissioning obligation, the NRC found use of the alternate test acceptable under the criteria in 10 C.F.R. § 40.14. Accordingly, the NRC imposed License Condition 27, which authorized Honeywell to use the alternate decommissioning financial assurance test, in conjunction with issuance of the renewed license for MTW. *Id.* Because the NRC was considering a rulemaking on decommissioning financial assurance, the NRC incorporated a one-year time limit on the amendment in order to consider comments on the proposed rule. The NRC was contemplating allowing the value of goodwill for the financial test and, if it did so, the license amendment would no longer be needed.

E. NRC PUBLISHES PROPOSED RULEMAKING TO PERMIT USE OF GOODWILL

On January 22, 2008, the NRC published a proposed rule on facility decommissioning. 73 Fed. Reg. 3812. Add. 23. The NRC proposed to adopt the alternate financial test used for MTW with respect to the value of goodwill. Specifically, the proposed rule would add language to the financial test in Section II.A of Appendices A, C and D of Part 30 to include the value of goodwill when

calculating net worth and performing the financial test.[3] *Id.* at 3831. Add. 28. The NRC Staff concluded that permitting the use of intangible assets (*i.e.*, goodwill) in conjunction with an investment grade bond rating would not materially increase the risk of a shortfall in decommissioning funding. *Id.* at 3825. Add. 24. Thus, the NRC proposed to expand its conclusion that the value of goodwill could be used in the financial test for a self-guarantee to encompass all NRC licensees required to provide decommissioning funding assurance, not just Honeywell.[4]

F. NRC ISSUES SECOND LICENSE AMENDMENT AUTHORIZING HONEYWELL TO APPLY ALTERNATIVE FINANCIAL TEST

Because of the time-limited nature of License Condition 27 and because the proposed rulemaking was not complete, Honeywell sought to extend its ability to use the alternate financial test in a license amendment request, dated April 11, 2008. Letter to NRC from Honeywell Re: Request for Exemption of Decommissioning Financial Assurance Requirements. App. 287. Honeywell stated that "[t]he rationale for seeking an extension of the exemption granted to Honeywell in the May 11, 2007 [TER] is largely the same as" in Honeywell's

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3 Net worth was defined to exclude the value of the nuclear facility itself (*i.e.*, there is no credit for the facility that will be decommissioned). 73 Fed. Reg. at 3831. Add. 28.

4 The NRC also proposed to include a new criterion requiring licensees to maintain a minimum tangible net worth of $19 million. 73 Fed. Reg. at 3831. Add. 26. This proposed change will be discussed further below.

initial request. *Id.* App. 288. Honeywell also explained that the "[t]he NRC should also grant Honeywell's request for an extension to the exemption granted in May 2007 because the exemption is entirely consistent with a proposed rule promulgated by the NRC on January 22, 2008." *Id.*

On August 22, 2008, the NRC authorized Honeywell to continue to use goodwill in performing the financial test. Letter to Honeywell from NRC Re: Granting Extension of One-Year Exemption ("Second Approval"). App. 308. The NRC noted that if the value of goodwill is included in Honeywell's net worth test, Honeywell's net worth to decommissioning liability is approximately 21 to 1.[5] The NRC also observed that Honeywell continued to maintain a long-term credit rating of "A" as assigned by Standard & Poor's. "Because the basis for granting the original exemption still applies," the NRC again permitted use of the alternate financial test. *Id.* App. 312-13.

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[5] Although the NRC calculated the financial test ratio to be 21:1, the actual ratio was approximately 34:1. Honeywell's total decommissioning liability was $225 million, which included $156 million for MTW and another $68 million for self-guarantees for other Federal or State agencies (*e.g.*, EPA). The NRC apparently included the liability for MTW twice ($156 million + $156 million + $68 million = $380 million). Second Approval, Encl. 1, at 2. App. 312. Regardless, the ratio was well beyond the requisite 10:1.

G. NRC DENIES LICENSE AMENDMENT TO EXTEND AUTHORIZATION FOR HONEYWELL TO APPLY ALTERNATIVE FINANCIAL TEST

On April 1, 2009, Honeywell again sought to extend the license amendment to permit continued use of goodwill. Letter to NRC from Honeywell Re: Request for Extension of Exemption from Decommissioning Financial Assurance Requirements. App. 330. The request was nearly identical to the 2008 request. Honeywell explained that "[t]he rationale for seeking an extension of the exemption granted to Honeywell in the August 22, 2008 action is largely the same as" in Honeywell's initial request. *Id.* And, as before, Honeywell noted that "[t]he NRC should also grant Honeywell's request for an extension to the exemption granted in August 2008 because the exemption is entirely consistent with a proposed rule published on January 22, 2008." App. 331.

The NRC subsequently sought additional, clarifying information from Honeywell regarding the license amendment request. On October 13, 2009, Honeywell submitted supplemental information to the NRC. Letter from Honeywell to NRC Providing Supplemental Information to Request for Extension of Exemption from Decommissioning Financial Assurance Requirements ("Supp. Info."). App. 339. In the supplement, Honeywell provided updated information regarding the low risk of default for companies with bonds rated "A." *Id.* at 6. App. 346. Honeywell also explained that there was no apparent basis for the NRC

As a result of the NRC's decision, Honeywell was required to make alternate decommissioning financial assurance arrangements by April 11, 2010. Honeywell subsequently purchased and executed a costly surety bond to provide decommissioning financial assurance. On April 6, 2010, Honeywell submitted the surety bond, with supporting documentation, to the NRC.

SUMMARY OF THE ARGUMENT

The governing administrative law is clear and settled. The NRC may change its policies, but any deviation from prior rulings must be carefully reasoned and fully explained. Here, the NRC did not explain the reasons for its reversal of position. The NRC twice authorized use of the alternate financial test and has proposed to adopt Honeywell's alternate approach in a rulemaking. Yet, the NRC decision below ignores these prior decisions. Without any explicit recognition by the NRC that the standard has been changed, or any attempt to forthrightly distinguish or outrightly reject apparently inconsistent precedent, the NRC's denial letter is arbitrary. *Airmark Corp. v. FAA,* 758 F.2d 685, 687, 691-92 (D.C. Cir. 1985). In addition, the NRC is not entitled to any special deference for its new interpretation of its regulation. Deference to agency authority or expertise cannot permit an agency to treat like cases differently. And, to the extent that the NRC is actually relying on U.S. Environmental Protection Agency ("EPA") expertise,

rather than its own, the NRC's new interpretation also does not warrant any deference.

Second, under this court's precedent, when an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment. *Alaska Professional Hunters Ass'n, Inc. v. FAA,* 177 F.3d 1030, 1033-1034 (D.C. Cir. 1999). Here, the NRC determined that the value of goodwill could be used in the financial test to provide decommissioning funding assurance in two licensing decisions and has proposed a similar change to its rules. Honeywell subsequently relied upon the NRC's interpretation when entering into long-term contracts. In order to change its consistent interpretation of its regulations, the NRC must initiate informal rulemaking, which it did not do. The NRC also improperly relied on a proposed rule in denying Honeywell's application. Accordingly, the NRC denial letter was made in contravention of the required Administrative Procedures Act ("APA") procedures.

In light of the NRC's arbitrary and unexplained reversal of its prior position and its failure to follow required processes in changing its interpretation of its regulations, the court should vacate the NRC's denial of Honeywell's license amendment and remand the issue to the NRC for further consideration. Until the

Additionally, an agency must proceed with notice and comment rulemaking when it has given a regulation a definitive interpretation, but later seeks to amend that interpretation. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

B. THE DECISION BELOW IS ARBITRARY BECAUSE THE NRC FAILS TO PROVIDE AN ADEQUATE BASIS FOR REVERSING ITS PRIOR DETERMINATION THAT GOODWILL MAY BE USED TO SUPPORT A SELF GUARANTEE.

It is elemental that the NRC is obligated to follow its precedents. *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981). The NRC may, within the limits of established law, change its policies, but it must provide a reasoned explanation for doing so. *Id.* at 834; *Idaho Power Co. v. FERC*, 312 F.3d 454 (D.C. Cir. 2002); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 815-16 (D.C. Cir. 1998). The NRC cannot casually disregard its prior decisions. *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 11-12 (D.C. Cir. 2005) ("The Commission . . . may change its policy only if it provides 'a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'") (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

As discussed below, the NRC — without explanation — changed the criteria that it applies in interpreting 10 C.F.R. § 40.14, applied the new criteria inconsistently, and ignored information on the record that is contrary to its conclusions. There was no material change in circumstances that would

undermine the bases for the NRC's prior conclusion that the value of goodwill could be considered in the financial test and no record to support the NRC's decision to reverse its prior determinations. The NRC's denial of the license amendment was, therefore, arbitrary.

1. The NRC does not explain the basis for changing its interpretation of its regulations.

The basis for reversal is straightforward: in its decision to deny Honeywell's license amendment request, the NRC fails to provide an explanation for its new interpretation of its regulations. While by no means adequate, the closest that the NRC comes to an explanation is its remark that "since [the initial license amendment], Honeywell's tangible net worth has continued to decline."[7] Denial at 2. App. 447. But, this does not explain why the NRC drastically departed from its prior decision to allow intangible assets to be used for determining capital adequacy, nor does it explain how the relationship between tangible and intangible assets affects a licensee's ability to use self-guarantee to provide decommissioning financial assurance.

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[7] The NRC did not acknowledge that, over the same period, the alternate financial test ratio improved from approximately 13:1 based on 2006 data to 34:1 and 32:1 using 2007 and 2008 data, respectively. The recent data demonstrates that Honeywell's ratio is still well in excess of the 10:1 criterion.

As noted above, in granting the license amendment in 2007 and in 2008, the NRC concluded that a company's bond rating is a reliable indicator of its ability to meet decommissioning obligations under normal circumstances. TER at 52; Second Approval, Encl. 1 at 2. App. 264 and 312. The NRC also concluded that the ratio of assets (including the intangible asset of goodwill) to liabilities indicates a licensee's ability to pay under conditions of financial distress. *Id.* Over the relevant period (2006 to 2008), Honeywell's "A" bond rating did not change and, further, its intangible assets (*i.e.*, goodwill) continued to increase.[8] Yet, in 2009, the NRC denied the license amendment without addressing either factor (bond rating or intangible asset ratio) and without evaluating Honeywell's ability to pay under normal circumstances or under conditions of financial distress. In doing so, the NRC flatly ignored the logic of its prior decisions. The NRC's complete failure to apply consistent criteria in granting or denying amendments is patently arbitrary and compels the court to vacate its actions. *Airmark,* 758 F.2d at 687, 691-92.

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[8] Goodwill increased from $8.4 billion in 2006 to $10.2 billion in 2008. And, as noted above, Honeywell generated $3.1 billion in free cash flow in 2007 and in 2008, up from $1.7 billion in free cash flow in 2004, $1.8 billion in 2005, and $2.2 billion in 2006. Supp. Info. at 4. App. 344. Honeywell had more than $22.5 billion in assets in the United States at the end of 2008 (compared to $20.3 billion and $21.3 billion at the end of 2006 and 2007, respectively). *Id.*

Rather than addressing its previous decisions directly, the NRC focuses on the language in the proposed rule that would require a minimum tangible net worth. As discussed above, the NRC's proposed decommissioning rule would permit licensees to include the value of goodwill in performing the financial test — that is, the NRC's proposed rule would specifically extend to all licensees the ability to use the alternate financial test twice approved for use by Honeywell. 73 Fed. Reg. at 3831. Add. 28. The NRC's logic in the proposed rulemaking was the same as that applied in granting the license amendments to Honeywell: the value of goodwill supports a licensee's ability to pay for decommissioning both under normal circumstances and in times of financial distress. *Id.* at 3825. Add. 25-26.

In the proposed rule, the NRC also considered whether to adopt a new minimum tangible net worth criterion, which had not previously been announced or applied to Honeywell. *Id.* at 3831. Add. 26. Apart from meeting the 10:1 financial test ratio, the NRC would also require that licensees have a tangible net worth of at least $19 million. On May 8, 2008, Honeywell provided comments on the proposed rule opposing the new minimum tangible net worth criterion. The NRC has not yet addressed Honeywell's comments or promulgated a final rule.

Nevertheless, in denying Honeywell's amendment request, the NRC relied on the proposed new minimum tangible net worth criterion without explanation.

The NRC argues that "the minimum tangible net worth requirement must be met at all times." Denial Letter at 2. App. 447. However, proposed provisions in a proposed rule are irrelevant; the NRC is required to explain why its prior decisions were in error. In August 2008, NRC approved the use of the alternate test for the second time in a formal safety evaluation. This approval came after issuance of the proposed rule on January 22, 2008. At the time of the 2008 license amendment, Honeywell's tangible net worth was less than $19 million. Thus, the sole grounds upon which NRC denied the license amendment in 2009 were also present in 2008.

The NRC's decision below casually disregarded its prior orders. The NRC had previously determined that the minimum bond rating and alternate financial ratio constitute adequate decommissioning financial assurance. The NRC did not state why it took a different position below. The NRC also, for the first time, decided that Honeywell must have a minimum tangible net worth of $19 million, but failed to explain why it did not require a minimum tangible net worth in 2008.[9] Prior to the NRC's abrupt shift in its interpretation of 10 C.F.R. § 40.14 in December 2009, the NRC had twice authorized use of the alternate financial test

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[9] To the extent that the NRC has discretion to ignore its previous determination, it must cogently explain why it has exercised its discretion in a given manner. *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. Of Trade,* 412 U.S. 800, 806 (1973).

and had proposed to adopt the alternate approach in a rulemaking. The NRC denial letter simply ignores these prior orders.[10]

The NRC must act upon a request in a consistent manner, and any deviation from prior rulings must be carefully reasoned and fully explained. *See Airmark*, 758 F.2d at 693 (refusing to allow the FAA to interpret "good faith" differently for two exemption applications where both applicants had purchased noncompliant aircraft after the FAA set a deadline for achieving compliance). Having previously granted an extension of the alternate test to Honeywell after publication of the proposed minimum tangible net worth criterion, the NRC cannot subsequently deny an extension based on the same proposed tangible net worth criterion without a full and complete explanation. Deviating from prior precedents without discussion is the epitome of arbitrary. Without any explicit recognition by the NRC that the standard has been changed, or any attempt to forthrightly distinguish or outrightly reject apparently inconsistent precedent, Honeywell has no means to predict future action by the NRC. *Hatch*, 654 F.2d at 834-35. The failure to admit or explain such a basic change in the interpretation of a regulatory standard

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[10] The lack of formality in the NRC's denial letter underscores the arbitrary nature of its decision. In 2007, the NRC approved the alternate financial test in a Technical Evaluation Report that was accompanied by an Environmental Assessment. In 2008, the NRC approved the alternate financial test in a formal safety evaluation that was again accompanied by an Environmental Assessment. The 2009 denial, in contrast, was made in a simple letter to the licensee, without any environmental evaluation.

undermines the integrity of the administrative process and is impermissible under the APA. *Id.*

2. The NRC's new interpretation is not entitled to deference.

The NRC is not entitled to deference in its new interpretation of its regulation at 10 C.F.R. § 40.14. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "'entitled to considerably less deference' than a consistently held agency view." *INS v Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v Alaska*, 451 U.S. 259, 273 (1981)). Deference to agency authority or expertise "is not a license to . . . treat like cases differently." *U.S. v. Diapulse Corp.*, 748 F.2d 56, 62 (2d Cir. 1984).

Further, while an agency evaluating scientific data within its technical expertise may warrant an "extreme degree of deference to the agency," *City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003), no such deference is warranted here. The NRC has no special expertise in financial accounting. In fact, the NRC relied on EPA regulations — rather than its own research and independent judgment — in proposing to add the minimum tangible worth requirement. 73 Fed. Reg. at 3825. Add. 26. Although Honeywell pointed out the flaws in the NRC's wholesale application of the EPA rule, the NRC did not even attempt to explain how the EPA's reasoning was applicable to Honeywell. *See* Supp. Info. at 9-10 (explaining that the basis for the EPA's tangible net worth

requirement did not apply in Honeywell's circumstances). App. 349-50. The NRC's prospective application of its proposed rule, which is based on an EPA rule, ignores the actual results of the EPA's research and does not address the fundamental differences between Honeywell's circumstances and those considered by the EPA.

As Honeywell pointed out in its request to the NRC (Supp. Info. at 9; App. 349), the EPA initially proposed a $10 million minimum *net worth* requirement as part of its financial test because the business failure rate for firms with $10 million or more in *net worth* (not *tangible net worth*) was lower than for firms overall.[11] *See* "Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Financial Requirements; Revised interim final rule," 47 Fed. Reg. 15032, 15035 (April 7, 1982). Add. 12. The EPA viewed the $10 million *net worth* requirement as a surrogate for the size of the licensee. *See id.* (comparing firms with $10 million or more in net worth to "smaller" companies). Add. 12-13. With over $34 billion in annual revenue and a

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[11] Although the EPA ultimately elected to utilize a minimum *tangible net worth* criterion rather than a minimum *net worth* criterion, the EPA's research regarding the risk of default focused only on companies with *net worth* (not tangible net worth) less than $10 million. 47 Fed. Reg. at 15035. Add. 11. Honeywell has a net worth of greater than $4 billion. Thus, the EPA example does not provide the NRC with any basis for concluding there is a greater risk of default for a company with less than $10 million in tangible net worth.

net worth of greater than $4 billion, Honeywell is not a "small" business by any objective measure and, thus, the EPA's analysis is inapplicable.

The EPA's minimum net worth requirement was intended to reduce the use of self-guarantees where the hazardous waste facility itself represents the only significant income-producing asset of an owner or operator. 47 Fed. Reg. at 15035. Add. 11. The EPA reasoned that, if the facility is the operator's only source of income, closure will cut off all income and thus increase the risk that there will not be adequate funds to complete closure and post-closure care. *Id.* But, as Honeywell explained in its requests to the NRC, MTW is not the primary, or even a particularly significant, source of income for Honeywell. Indeed, MTW represents less than 1% of Honeywell's total revenue. And, given Honeywell's diversified revenue stream and free cash flow, the eventual closure of MTW will not eliminate funding for decommissioning.

Because the NRC is relying, at least in part, on an EPA analysis that is inapplicable to MTW, the NRC is not entitled to deference in its new interpretation of the criteria in 10 C.F.R. § 40.14. *See U.S. Dept. of the Air Force v. FLRA,* 952 F.2d 446, 450 (D.C. Cir. 1991) (declining to defer to an agency's interpretation of regulations promulgated by other agencies). The special weight that a court might give to an NRC position arises only with respect to the NRC's interpretation of the radiological health and safety statutes that it administers.

Congress did not intend that courts give any special weight to the NRC's view of the financial strength of a company — an area in which the NRC has no special expertise and, in fact, an area in which the NRC has deferred almost entirely (if inaccurately) to the expertise of a different federal agency. *Cf. Cousins v. Sec'y of the U.S. Dept. of Transp.*, 880 F. 2d 603, 610 (1st Cir. 1989) (affording less deference where agency is interpreting a statute it is not charged with administering and in respect to which it has no special expertise); *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001) (holding that Bureau of Immigration Affairs is not entitled to deference because a statute is not transformed into an immigration law merely because it is incorporated into the Immigration and Nationality Act).

For all of these reasons, the NRC's denial letter is arbitrary and capricious.

C. THE NRC FAILED TO FOLLOW REQUIRED NOTICE AND COMMENT PROCEDURES WHEN DEVIATING FROM ITS CONSISTENT PRIOR DECISIONS.

The NRC grants license amendments after concluding that the proposed amendment is "adequate to protect health and minimize danger to life or property" and "will not be inimical to the common defense and security or to the health and safety of the public." 10 C.F.R. § 40.45 (incorporating by reference 10 C.F.R. § 40.32). Add. 6, 10. Similarly, under 10 C.F.R. § 40.14, the NRC will grant exemptions from its regulations where the proposed exemption is "authorized by law and will not endanger life or property or the common defense and security and

[is] otherwise in the public interest." Add. 6. Here, the NRC twice concluded that considering the value of goodwill in the financial test will provide the requisite level of protection for public health and safety. And, the NRC twice concluded that the alternate test was authorized by law, would not endanger life, property, or the common defense and security, and was otherwise in the public interest. TER at 62; Second Approval, Encl. 1 at 2. App. 265 and 312. The NRC's conclusions were fully consistent with the conclusion it reached in its proposed decommissioning rule that the value of goodwill can appropriately be considered in the financial test. 73 Fed. Reg. at 3831. Add. 24-26.

The NRC's decision to invoke a proposed rule and deny Honeywell's license amendment request altered the NRC's well-established interpretation of its regulations and should have been promulgated pursuant to notice and comment rulemaking. "Rule making," as defined in the APA, includes not just the agency's process of formulating a rule, but also the agency's process of modifying a rule. 5 U.S.C. § 551(5). Add. 1. When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has, in effect, amended its rule, something it may not accomplish without notice and comment. *Alaska Prof'l Hunters,* 177 F.3d at 1033-1034; *see also Greater Boston*, 444 F.2d at 852 ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its

course must supply a reasoned analysis.") (footnote omitted), *cert. denied*, 403 U.S. 923 (1971).

The circumstances here are similar to those in *Alaska Prof'l Hunters*. Just as the Federal Aviation Administration had unmistakably ruled that Alaskan guides were not subject to commercial air regulations, the NRC conclusively determined that the value of goodwill could be used in the financial test to provide decommissioning funding assurance. Although the interpretation at issue in *Alaska Prof'l Hunters* had been in place for almost 30 years, there was no written statement explicitly outlining the guidance and advice. *Alaska Prof'l Hunters*, 177 F.3d at 1031-1032. In contrast, the NRC here articulated its bases for its decision — not once, but twice — in formal Technical Evaluation Reports and Environmental Assessments. The NRC also proposed similar changes to its decommissioning rules. 73 Fed. Reg. at 3825, 3831. Thus, the NRC's unambiguous position was reflected in multiple formats (site-specific license amendments and generic rulemaking statements) over a period of several years.

Honeywell also relied upon the NRC's interpretation. *See MetWest Inc. v. Sec'y of Labor*, 560 F.3d 506, 511 (D.C. Cir. 2009) ("A fundamental rationale of *Alaska Professional Hunters* was the affected parties' substantial and justifiable reliance on a well-established agency interpretation."). The prices agreed to in Honeywell's existing long-term conversion supply contracts are based, in part, on

Honeywell's expectation that the exemption would be available (on the assumption that, absent significant public comments on the proposed rulemaking, the NRC would eventually adopt the proposed rule language permitting goodwill in financial test calculations). The cost of using a different financial instrument is substantial — between $550,000 and $700,000 per year in 2007 dollars for a surety bond,[12] and between $1.5 million and $2 million for a letter of credit in 2009 dollars.[13]

Honeywell, the sole domestic UF_6 converter, competes directly with foreign UF_6 converters and foreign suppliers of bundled products that contain conversion, which are not subject to NRC fees or regulatory requirements.[14] The conversion market is highly competitive, and success in bidding on contracts often turns on differentials as small as a couple of pennies per kilogram of uranium. Adding the cost of obtaining third-party financial assurance will drive customers to foreign converters since Honeywell cannot pass the costs forward. *See, e.g.*, *Allied Signal v. NRC*, 988 F.2d 146, 149 (D.C. Cir. 1993). This threatens the viability of

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12 Application to Use Alternate Financial Test at 6. App. 221.

13 Supp. Info. at 11. App. 351.

14 Unlike regulatory agencies in other countries, the NRC charges licensees and applicants licensing, inspection, and annual fees. The Omnibus Budget Reconciliation Act of 1990 (OBRA–90), as amended, requires the NRC to recover through fees approximately 90 percent of its budget authority. *See* 75 Fed. Reg. 11376 (March 10, 2010). Add. 30.

domestic conversion supply and hampers the United States' efforts to achieve energy independence.

To the extent that the NRC's decision to change its interpretation was based on the portion of the proposed NRC rule that incorporates a minimum tangible net worth requirement of $19 million, the NRC is again violating the APA. *See* Denial Letter at 2. App. 447. The first part of the APA's definition of "rule" states that a rule:

> means the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . ." 5 U.S.C. § 551(4) (emphasis added). Add. 1.

The only plausible reading of the italicized phrase is that rules have legal consequences only for the future and only after they are finalized (and effective). As the NRC's proposed minimum tangible net worth criterion has not been promulgated, the proposed requirement cannot be applied prospectively to Honeywell. Any other conclusion would allow the NRC to evade the commands of the APA whenever it desires, and yet coerce the regulated industry into compliance. Allowing the NRC to enforce a non-final rule in subsequent adjudications completely trivializes the APA's rulemaking procedures.

At bottom, the NRC failed to observe required APA procedures. In denying Honeywell's amendment request, the NRC adopted a "reinterpretation" of

10 C.F.R. § 40.14 — a flip-flop that complies with the APA only if preceded by adequate notice and opportunity for public comment. As the NRC did not engage in the requisite APA procedures, the NRC's new interpretation is invalid.

D. THE COURT SHOULD VACATE THE DECISION BELOW AND REMAND THE LICENSE AMENDMENT FOR FURTHER PROCEEDINGS.

In light of the NRC's arbitrary and unexplained reversal of its prior decisions and its failure to follow required processes in changing its interpretation of its regulations, the court should vacate the NRC's denial of Honeywell's license amendment and remand the issue to the NRC for further consideration. The NRC must act upon license amendment requests in a consistent manner, and any deviation from prior rulings must be carefully reasoned and fully explained.

Until the NRC adequately explains its reasoning or conducts the necessary rulemaking, the NRC must adhere to its prior interpretations of 10 C.F.R. § 40.14. Pending compliance with the APA, Honeywell should be allowed to use the alternate financial test. The NRC's mistake has already penalized Honeywell financially by requiring it to obtain a costly surety bond. *See PDK Labs. Inc. v. DEA,* 362 F.3d 786, 799 (D.C. Cir. 2004) (explaining that vacatur and remand are appropriate remedies where the agency's mistake affected the outcome and prejudiced the petitioner). Permitting Honeywell to continue to use a self-guarantee (so long as it continues to meet the alternate test) would not create any

disruptive consequences as it would simply maintain the prior accepted practice pending NRC compliance with the APA. *Allied-Signal*, 988 F.2d at 150-51.

CONCLUSION

The NRC decision to deny Honeywell's license amendment request failed to adequately explain the agency's basis for reversing its consistent prior interpretations of its regulations. The NRC's new interpretation is not entitled to deference and, in any event, was made without following required APA procedures. Accordingly, the NRC decision below should be reversed and the amendment request remanded to the agency for further proceedings. Until it complies with any necessary procedures, the NRC must adhere to its prior interpretation of 10 C.F.R. § 40.14.

Respectfully submitted,

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June 4, 2010

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I hereby certify that the foregoing brief of Honeywell International Inc. contains 7,631 words, not including the Rule 28(a)(1) certificate, the tables of content and authorities, glossary, the certificates of counsel, and the addendums.

Dated at Washington, D.C. this 4th day of June, 2010.

/s/ Tyson Smith
Tyson R. Smith
Attorney for Honeywell International Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of June 2010 served a copy of the foregoing "BRIEF OF APPELLANT HONEYWELL INTERNATIONAL INC." and "APPENDIX" by electronic mail and by first-class mail, postage prepaid, on the following individuals at the following addresses:

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No. 10-1022

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HONEYWELL INTERNATIONAL INC.,

Appellant,

v.

U.S. NUCLEAR REGULATORY COMMISSION
AND THE UNITED STATES OF AMERICA

Appellees.

ON PETITION FOR REVIEW OF AN ORDER
OF THE U.S. NUCLEAR REGULATORY COMMISSION

ADDENDUM

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June 4, 2010

ADDENDUM

Table of Contents

STATUTES AND REGULATIONS

The pertinent statutes and regulations for this case are excerpted as follows:

5 U.S.C. § 551 (Definitions)

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * *

5 U.S.C. § 706 (Scope of Review)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

* * *

28 U.S.C. § 2342 (The Hobbs Act)

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

* * *

10 C.F.R. Part 30, Appendix C (Criteria Relating to Use of Financial Tests and Self Guarantees for Providing Reasonable Assurance of Funds for Decommissioning)

I. Introduction

An applicant or licensee may provide reasonable assurance of the availability of funds for decommissioning based on furnishing its own guarantee that funds will be available for decommissioning costs and on a demonstration that the company passes the financial test of Section II of this appendix. The terms of the self-guarantee are in Section III of this appendix. This appendix establishes criteria for passing the financial test for the self guarantee and establishes the terms for a self-guarantee.

II. Financial Test

A. To pass the financial test, a company must meet all of the following criteria:

(1) Tangible net worth at least 10 times the total current decommissioning cost estimate for the total of all facilities or parts thereof (or the current amount required if certification is used), or, for a power reactor licensee, at least 10 times the amount of decommissioning funds being assured by a self guarantee, for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor for the total of all reactor units or parts thereof (Tangible net worth shall be calculated to exclude the net book value of the nuclear unit(s)).

(2) Assets located in the United States amounting to at least 90 percent of total assets or at least 10 times the total current decommissioning cost estimate for the total of all facilities or parts thereof (or the current amount required if certification is used), or, for a power reactor licensee, at least 10 times the amount of decommissioning funds being assured by a self guarantee, for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor for the total of all reactor units or parts thereof.

(3) A current rating for its most recent bond issuance of AAA, AA, or A as issued by Standard and Poors (S&P), or Aaa, Aa, or A as issued by Moodys.

B. To pass the financial test, a company must meet all of the following additional requirements:

(1) The company must have at least one class of equity securities registered under the Securities Exchange Act of 1934.

(2) The company's independent certified public accountant must have compared the data used by the company in the financial test which is derived from the independently audited, yearend financial statements for the latest fiscal year, with the amounts in such financial statement. In connection with that procedure, the licensee shall inform NRC within 90 days of any matters coming to the attention of the auditor that cause the auditor to believe that the data specified in the financial test should be adjusted and that the company no longer passes the test.

(3) After the initial financial test, the company must repeat passage of the test within 90 days after the close of each succeeding fiscal year.

* * *

10 C.F.R. § 40.14 (Specific Exemptions)

(a) The Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulation in this part as it determines are authorized by law and will not endanger life or

6. Net Worth Requirements. The May 19, 1980, proposed financial test required net worth (total assets minus total liabilities) of at least $10 million. The Agency has decided to retain that requirement for several reasons. The business failure rate for firms with $10 million or more in net worth is significantly lower than for firms overall. The Agency estimates that it would enter into twice as many bankruptcy proceedings to recover funds for closure and post-closure care if the $10 million in net worth criterion were dropped, even if other criteria were retained. In addition, the number of instances in which the hazardous waste facility itself represents the only significant income-producing asset of an owner or operator will be reduced by a $10 million in net worth requirement. If the facility is the owner's or operator's only source of income, closure will cut off all his income and thus increase the risk that there will not be adequate funds to complete closure and post-closure care.

Since firms with $10 million or more in net worth are more stable than smaller companies, the Agency believes these larger firms are less likely to abandon hazardous waste facilities or otherwise avoid closure or post-closure responsibilities. The Agency furthermore believes that retaining the $10 million requirement will keep the burden of administering this new financial assurance mechanism at manageable levels; monitoring the use of the financial test by less stable firms can be expected to be more time consuming and a greater

administrative burden. The Agency will, however, continue to explore the possibilities of having a financial test for firms of less than $10 million in net worth. Suggestions from the public are invited on this issue.

A number of commenters suggested that a firm passing the financial test should be required to have a net worth at least as great as the net working capital requirement. While it is unusual for firms to have less net worth than net working capital, the possibility does exist, and such a firm would be very weak financially. The Agency agrees with these commenters and has added a requirement that a firm have a net worth of at least six times the closure and post-closure cost estimates.

One commenter recommended that owners and operators be allowed to meet requirements for amounts of net worth with tangible net worth only. Assets of firms often include intangibles such as goodwill, patents, and trademarks which may be difficult to convert into cash to pay for closure or post-closure costs. The Agency agrees with the commenter and is providing that only tangible net worth may be used to meet the requirements for $10 million in net worth and for net worth of at least six times the cost estimates. In the financial ratio requirements, however, net worth rather than tangible net worth is used since that is customary

for financial ratios, which were found to be effective predictors of financial stability.

* * *

58 Fed. Reg. 3515, 3517 (Jan. 11, 1993)

NUCLEAR REGULATORY COMMISSION

Self-Guarantee as an Additional Financial Assurance Mechanism

AGENCY: Nuclear Regulatory Commission

ACTION: Proposed Rule

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its regulations for decommissioning licensed facilities to allow certain non-electric utility licensees to use self-guarantee as a means of financial assurance. The proposed rule would reduce the cost burden of financial assurance while providing NRC with sufficient assurance that decommissioning costs will be funded. This proposed rule responds to a petition for rulemaking (PRM-30-59) from General Electric Company and Westinghouse Electric Corporation.

* * *

Stringent Financial Criteria

The financial criteria proposed for self-guarantee are exceptionally stringent. The Commission is confident that licensees able to meet the financial criteria provide the necessary reasonable assurance that funding will be available to meet decommissioning costs. The regulatory analysis estimates that only approximately 20 present NRC licensees could meet the criteria.

The criterion for tangible net worth, $1 billion, far exceeds that required for the NRC parent company guarantee ($10 million). In addition to the $1 billion tangible net worth requirement, the proposed rule would require that a licensee must have tangible net worth at least ten times the total current decommissioning cost estimate for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor, or the current amount required if certification is used. To assure that assets are within reach of the Commission's authority, 90 percent of total assets or at least ten times total decommissioning cost estimates for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor, or the current amount if certification is used, would need to be in the United States.

In addition to tangible net worth criteria, the financial criteria include a bond rating of A or above. This bond rating is above that required to classify debt securities as

"investment grade." The principal debt rating services, Moodys and Standard and Poors, classify bonds with a rating of Baa and BBB respectively, as "investment grade as opposed to bonds with a lesser rating which are classified as "speculative grade." Bond ratings are reviewed often, and changed in response to changes in the issuer's financial condition. A bond rating of A or better assures that the financial strength of a licensee offering a self-guarantee has been independently reviewed and affirmed. It provides an excellent guide to the ability of a company to meet its obligations. According to Moodys, default rates associated with companies whose bonds are rated A or above in I of 3 years prior to default are 0.13 percent annually (citation removed).

There could be concern that a self-guaranteeing licensee's financial condition could deteriorate over time, jeopardizing decommissioning funding. The proposed rule has the following safeguards against this possibility: (1) A licensee using self-guarantee would need to be re-certified each year as meeting the financial criteria, (2) Copies of all current financial reports filed with the Securities and Exchange Commission would also need to be provided to the Commission, (3) The company would need to notify NRC within 90 days of any matters which could prevent the company from any longer passing the financial criteria, and (4)

The company would need to notify NRQ within 20 days if its bonds are no longer rated A or better.

* * *

58 Fed. Reg. 68726, 68726-68728 (Dec. 29, 1993)

NUCLEAR REGULATORY COMMISSION

Self-Guarantee as an Additional Financial Assurance Mechanism

AGENCY: Nuclear Regulatory Commission

ACTION: Final Rule

SUMMARY: The Nuclear Regulatory Commission is amending its regulations for decommissioning licensed facilities to allow certain non-electric utility licensees to use self-guarantee as a means of financial assurance. The rule reduces the cost burden of financial assurance while providing NRC with sufficient assurance that decommissioning costs will be funded. This rule grants **a** petition for rulemaking (PRM-30-59) from General Electric Company and Westinghouse Electric Corporation and completes action on the petition.

* * *

A. Proposed Criteria

The proposed criteria for corporate self-guarantee included these financial criteria:

(1) Tangible net worth of at least $1 billion; (2) Tangible net worth at least 10 times the current decommissioning cost estimate (or the current amount required if certification is used) for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor; (3) Assets located in the United States amounting to at least 90 percent of total assets or at least 10 times the current decommissioning cost estimate (or the current amount required if certification is used); for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor; (4) A current bond rating of AAA, AA,. or A as issued by Standard and Poors (S&P), or Aaa, Aa, or A as issued by Moodys.

Procedural requirements proposed were: (1) The company must have at least one class of equity securities registered under the Securities Exchange Act of 1934; (2) The company shall provide the Commission with copies of all reports filed with the Securities and Exchange Commission under section 13 of the Securities Exchange Act of 1934; (3) The company's independent certified public accountant must compare the data used by the company in the financial test with the company's independently audited yearend financial statements; (4) The company must repeat passage of the test within 90 days after the close of each succeeding fiscal year; and (5) The company must notify NRC within 90 days of any matters

that may come to the attention of the auditor that may cause the auditor to believe that the data specified in the financial test should be adjusted and that the company no longer passes the test.

The self-guarantee would be available only for an applicant or licensee having no parent company holding majority control of its voting stock.

B. *Alternative Criteria*

Because a majority of commenters on the notice of receipt of the petition questioned the need for the financial criteria to be so stringent, the Commission offered an alternative set of criteria to that of the petition as contained in the proposed rule. The alternative was: the same financial criteria presented in the proposed rule, without the $1 billion net worth requirement.

A company's tangible net worth is an important factor in determining its bond rating. The rating itself, combined with the other criteria, may be a sufficient indicator of financial stability. Because all firms qualifying would need an A or better bond rating, this alternative may not be riskier in terms of financial assurance than the proposed rule. The regulatory analysis examined the effects on availability of the self-guarantee to licensees of deleting the $1 billion tangible net

worth requirement from the financial criteria in the proposed rule, all other criteria remaining constant. The conclusion was that this alternative, if adopted, would allow an additional 7 firms to use the proposed self-guarantee. (Approximately 20 firms would qualify with the $1 billion criterion included.) The additional availability would save industry an estimated $130,000 annually and, since all firms would need an A or better bond rating, would maintain a high level of assurance. An A or better bond rating indicates that a company has substantial net worth. A company which merits an A or better bond rating has passed a stringent review by the independent ratings agencies of its ability to meet its financial obligations. A report by Moody's gives the default rate associated with companies whose bonds are rated A or above in 1 of the 3 years prior to default as only 0.13 percent annually. In addition, all companies, irrespective of their overall size, must demonstrate that they possess tangible net worth of at least 10 times the current decommissioning cost estimate (or the current amount required if certification is used) for all decommissioning activities for which the company is responsible as self-guaranteeing license and as parent grantor.

The alternate criteria, as well as the criteria in the proposed rule, do not apply to electric utilities. Electric utilities would **be** excluded from using self-guarantee under either set of criteria. Public comments were requested on this alternative

financial criteria-the criteria in the proposed rule without the **$1** billion tangible net worth requirement.

* * *

Net Worth Criterion

Several commenters favored the self guarantee concept but argued for less stringent financial criteria.

Response: The Commission has considered various alternative financial criteria. It has decided to drop the $1 billion tangible net worth criterion. However, tangible net worth will be an important factor in the requirements for self-guarantee for several reasons: (1) The financial criteria in the final rule contain the requirement that to qualify to use self-guarantee, a licensee must have tangible net worth at least 10 times decommissioning costs, and (2) A company must have at least an A bond rating. The A or better bond rating indicates that a company has substantial net worth. Net worth is an important factor in comprising a bond rating.

Bond ratings are reviewed often, and changed in response to changes in the issuer's financial condition. A bond rating of A or better assures that the financial strength of a licensee offering a self-guarantee has been independently reviewed and affirmed. It provides an excellent guide to the ability of a company to meet its

obligations. According to Moodys, default rates associated with companies whose bonds are rated A or above in 1 of the 3 years prior to default are 0.13 percent annually (footnote omitted).

The criteria for parent guarantee were given consideration as financial criteria for self-guarantee in the final rule. Under current NRC decommissioning regulations, the parent company of a licensee that meets the financial criteria in 10 CFR part 30, appendix A may guarantee that funds will be available to decommission the facility of its subsidiary licensee. The financial criteria for the NRC parent guarantee include a lower bond rating (BBB or Baa) requirement and a lower net worth times decommissioning cost requirement (6, rather than 10 times decommissioning costs) than the criteria in this rule.

The Commission has decided against using the criteria for parent guarantee in the rule. This is the first instance in which self-guarantee is being allowed under the Commission's decommissioning regulations. The Commission prefers that the more conservative criteria be used. At some future time, when the Commission has gained some experience with self-guarantee, it may consider an appropriate revision of the financial criteria.

* * *

73 Fed. Reg. 3812, 3825, 3831 (Jan. 22, 2008)

NUCLEAR REGULATORY COMMISSION

Decommissioning Planning

AGENCY: Nuclear Regulatory Commission

ACTION: Proposed Rule

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to improve decommissioning planning, and thereby reduce the likelihood that any current operating facility will become a legacy site. The amended regulations would require licensees to conduct their operations to minimize the introduction of residual radioactivity into the site, including subsurface soil and groundwater. Licensees also would be required to survey certain quantities or concentrations of residual radioactivity, including in subsurface areas, and keep records of surveys of subsurface residual radioactivity identified at the site with records important for decommissioning. - The amended regulations would require licensees to report additional details in their decommissioning cost estimates, would eliminate two currently approved financial assurance mechanisms, and would modify the parent company guarantee and self-guarantee financial assurance mechanisms to authorize the NRC to require that guaranteed funds be immediately due and payable to a standby trust if the

guarantor is in financial distress. Finally, the amended regulations would require decommissioning power reactor licensees to report additional information on the costs of decommissioning and spent fuel management.

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N.6 Allow Intangible Assets, With an Investment Grade Bond, To Meet Some Financial Tests

The existing regulations allow guarantees to be used as financial assurance for decommissioning by companies whose financial statements demonstrate a low risk of default for corporate obligations. A set of financial tests are prescribed in 10 CFR part 30, appendices A, C, D and E for companies who may qualify to use the guarantee methods. A requirement to use the parent company guarantee or self-guarantee as a financial assurance option is passing the tests on an annual basis. Some of the financial tests in 10 CFR part 30, appendices A, C, and E are done using bond valuations. In the past, only tangible assets were considered within the calculations performed under the financial tests. In response to an inquiry during the public stakeholder meeting on January 10, 2007, NRC staff considered whether allowing the use of intangible assets would materially increase the risk of a shortfall in decommissioning funds. Staff concluded the risk of a shortfall in funding would not materially increase under the amendments in this proposed rule.

Financial accounting standards issued since the original decommissioning regulations were issued in 1988 now provide objective methods to value intangible assets. The change in accounting standards provides assurance that intangible asset valuation is reasonable. In addition, bond rating agencies include intangible assets in their evaluation of the financial stability of a company's bonds. This provides an independent check of the reasonableness of the company's valuation of its assets. The default rate remains low for bonds rated investment grade. To further assure a current bond rating adequately reflects the company's financial stability, amendments in the proposed rule would specify that the bond must be uninsured, uncollateralized, and unencumbered to be used in the financial test. Finally, the value of the nuclear facilities, both as tangible and intangible assets, are excluded from the calculation of net worth on grounds that those assets would not be available to produce funds for decommissioning after the facility is shut down. The staff concluded that permitting the use of intangible assets in conjunction with an investment grade bond rating would not materially increase the risk of a shortfall in decommissioning funding.

In addition, the guarantee methods require annual repassage of the test. Historical trends in bond ratings show that the time between receiving a rating that is below

investment grade to the time of default is five years, on the average. The annual repassage requirement will normally provide adequate time for the guarantor to obtain alternative financial assurance. For the few cases where a default may occur in a short time, the acceleration clause discussed in N.4 and N.5 of this document, will provide a method to obtain funds in situations of financial distress.

Therefore, the proposed rule would allow the use of intangible assets, used in conjunction with an investment grade bond rating, to meet specified criteria in the financial tests for parent company and self-guarantees.

N.7 Increase the Minimum Tangible Net Worth for the Guarantees' Financial Tests

The current regulations require the entity seeking to pass the relevant financial test to have tangible net worth of at least $10 million. The proposed rule amendments would require tangible net worth of at least $19 million.

The $10 million in tangible net worth requirement was first adopted by the EPA in 1981, and the financial test adopted by the NRC in 1988 used the same criterion. The NRC believes that the criterion should be adjusted to represent the value in current dollars of $10 million in 1981. Therefore, it has calculated the new

proposed tangible net worth amount using the most recent Implicit Price Deflator for Gross Domestic Product published by the Department of Commerce in its Survey of Current business, and the equivalent Implicit Price Deflator for 1981, by dividing the 2005 Implicit Price Deflator by the 1981 Implicit Price Deflator and multiplying the product times $10 million, as follows: (112.134 / 59.119) = 1.897 × $10 million = $19 million. The proposed rule also would add a requirement in Section II.A.(1) of appendix C to 10 CFR part 30 for tangible net worth of at least $19 million. Currently, that component of the financial test for self-guarantee specifies only that the applicant or licensee must have tangible net worth at least 10 times the current decommissioning cost estimate or certification amount. The proposed amendment would specify tangible net worth of $19 million and 10 times the amount required. This proposed amendment would make the selfguarantee financial test in appendix C to 10 CFR part 30 consistent with the tests in appendices A and D to 10 CFR part 30.

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Part 30 Appendices A, C, D, and E

The proposed rule would make a set of parallel amendments to 10 CFR part 30, appendices A, C, D, and E. More information on these proposed changes is discussed in Sections II.N.3 through II.N.8 of this document. The types of guarantors for which the financial tests in these appendices apply are:

* Appendix A, Parent company guarantees;

* Appendix C, Self-guarantees;

* Appendix D, Self-guarantees by companies that have no rated commercial bonds;

* Appendix E, Self-guarantees by non-profit colleges, universities and hospitals.

In the financial test in section II.A in appendices A, C and D of part 30, the proposed rule would add language to allow the inclusion of intangible assets in the determination of net worth. Net worth is defined to exclude the net book value and goodwill of the nuclear facility and site. Tangible net worth is defined to exclude all intangible. Assets and the net book value of the nuclear facility and site. In appendix A, section II.A.2.(ii) would be revised to require the licensee to perform a net worth calculation instead of a tangible net worth calculation.

In the financial test in section II.A in appendices A, C and D of part 30, the proposed rule would require that the guarantor's tangible net worth be at least $19 million to pass one of the criteria for that financial test. The current rule requires the company seeking to pass the Section II.A financial test to have tangible net worth of at least $10 million.

Each set of changes to Appendices A, C, D, and E would require the independent certified public accountant (who compares the data used in the financial tests against data in year-end financial statements) to evaluate the guarantor's off-balance sheet transactions regarding the impact these transactions may have on the guarantor's ability to pay decommissioning costs. The- accountant would also have to verify bond ratings if these are used to pass the financial test.

For those licensees or guarantors that issue bonds and use the financial test under section II.B of appendices A, C and E of part 30, the proposed rule would specify that the current rating of the most recent bond issuance of AAA, AA, or A by Standard and Poor's could include adjustments of + or-(i.e., AAA+, AA+, or A+ and AAA -, AA - and A - would meet the criterion) and the current rating of Aaa, Aa, or A by Moody's could include adjustments of 1, 2, or 3. In each of these appendices, the proposed rule also would require the bond to be the most recent "uninsured, uncollateralized, and unencumbered" bond issuance.

In each appendix A, C, D, and E of part 30; the proposed rule would make changes to the 90-day test to show continued eligibility for the licensee and guarantor. The current rule requires only the licensee to repeat passage of the test within 90 days

after the close of each succeeding fiscal year. The proposed rule would apply the same requirement to the guarantor.

In each appendix A, C, D, and E to part 30, the proposed rule would amend section III to clarify that the guarantor would be required to set up a standby trust, with new criteria for selecting an acceptable trustee. In appendix A to part 30, the proposed rule would amend section III to require that the parent company guarantor agree to make itself subject to Commission orders (e.g., order to make payments under the guarantee agreement). The parent company guarantor also would have to agree to make itself jointly and severally liable with the licensee for the full cost of decommissioning with any additional costs not paid by the licensee to be paid by the parent company guarantor.

In each appendix A, C, D, and E to part 30, the proposed rule would amend section III to allow the Commission, in cases of the guarantor company's financial distress, to declare the financial assurance guaranteed by the guarantor to be immediately due and payable to the standby trust. The guarantor companies also would be required to notify the NRC, in writing, immediately following the occurrence of events signifying financial distress.

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75 Fed. Reg. 11376 (Mar. 10, 2010)

NUCLEAR REGULATORY COMMISSION

Revision of Fee Schedules; Fee Recovery for FY 2010

AGENCY: Nuclear Regulatory Commission

ACTION: Proposed Rule

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend the licensing, inspection, and annual fees charged to its applicants and licensees. The proposed amendments are necessary to implement the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, which requires the NRC to recover through fees approximately 90 percent of its budget authority in fiscal year (FY) 2010, not including amounts appropriated from the Nuclear Waste Fund (NWF), amounts appropriated for Waste Incidental to Reprocessing (WIR), and amounts appropriated for generic homeland security activities. Based on the Energy and Water Development and Related Agencies Appropriation Act, 2010, signed by the President on October 28, 2009, the NRC's required fee recovery amount for the FY 2010 budget is approximately $912.2 million. After accounting for billing adjustments, the total amount to be billed as fees is approximately $911.1 million.

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