July 20, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of: HONEYWELL INTERNATIONAL INC. (Metropolis Works Uranium Conversion Facility)	))))))	Docket No. 40-3392

HONEYWELL REPLY TO NRC STAFF RESPONSE TO HEARING REQUEST

Pursuant to 10 C.F.R. § 2.309(h)(2), Honeywell International, Inc. ("Honeywell") hereby replies to the NRC Staff's answer, dated July 15, 2011, opposing Honeywell's request for hearing that was filed on June 22, 2011. *See* "NRC Staff's Opposition To Hearing Request" ("NRC Staff Answer"). The sole basis for the NRC Staff's opposition to the request for a hearing is the assertion that the request is untimely under 10 C.F.R. § 2.103(b). *Id*. at 5-10. As discussed further below, the timing provisions of 10 C.F.R. § 2.103(b) are not applicable here, and Honeywell's hearing request was timely under 10 C.F.R. § 2.309. Furthermore, under the present unusual circumstances, the hearing request on the denial of the requested exemption and amendment should be granted.

The NRC Staff Answer asserts that 10 C.F.R. § 2.103(b) addresses the right of an applicant for a license to demand a hearing. Section 2.103(b) in fact applies to the NRC Staff rather than to the applicant. The regulation states that, if the appropriate NRC director decides that an application for a "license" does not satisfy NRC requirements, the director may issue a notice of denial of the application and inform the applicant in writing of (1) the reason for the denial; and (2) the right of the applicant to request a hearing within 20 days of the denial or such

longer period as may be specified in the notice. 10 C.F.R. § 2.103(b)(1), (2). Here, the NRC Staff letter denying Honeywell's request contains no information regarding hearing rights or the timing of the exercise of such rights. Indeed, in its answer, the NRC Staff expressly concedes that it did not comply with Section 2.103(b). *See* NRC Staff Response at 9 ("The Staff acknowledges that, in the denial letter, it did not state that the applicant could seek a hearing within 20 days. This was inconsistent with § 2.103(b)(2), which requires such notice."). Any notice period under Section 2.103(b) would not begin until such time as the NRC Staff complies with its obligation under 10 C.F.R. § 2.103(b).[1] As a result, the request for hearing on the NRC denial of Honeywell's license amendment request in not late.

Unlike the letter denying Honeywell's request for an exemption and amendment, which does not mention any right to demand a hearing or contain a related deadline, the NRC Staff included specific information regarding hearing rights under Section 2.103 in denying the Safety Light license renewal application and the GrayStar initial license application — two cases that it cites as precedent. *See* C. Richter White Ltr. re: Denial of Safety Light Corporation's Application to Review Licenses and Order Suspending Licenses (Effective Immediately), dated December 10, 2004 (ADAMS Accession No. ML043440646) ("As provided by 10 C.F.R. § 2.103(b), you may, as explained below, request a hearing concerning the denial of the license renewal requests, within 20 days from the date of this letter."); Ltr to N. Stein, GrayStar,

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[1] This result would be consistent with the NRC Staff's approach in a prior case cited in the NRC Staff Answer. *See In the Matter of Dr. James E. Bauer* (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-95-7, 41 NRC 323, 328 (1995) (noting NRC Staff agreement that the time for the applicant to request a hearing could be tolled until the 10 C.F.R. § 2.103(b) notice issued); NRC Staff Answer at 9. This is also consistent with approaches in Federal Courts. *See, e.g.*, *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103, 107-108 (2d Cir. 2003) (finding that a notice failing to specify the time limits applicable to administrative review, as required by regulation, does not trigger a time bar).

"Technical Evaluation of Application for Certificate of Registration of GrayStar Irradiator," dated May 24, 2000 (ADAMS Accession No. ML003716824) ("In accordance with 10 CFR 2.103 you may request a hearing with respect to this denial of your source design application within 20 days of the date of this letter.").[2] These examples highlight the absence of a specific notice provision in the letter denying Honeywell's application.

In addition, Honeywell's current hearing request relates to an application for an exemption from NRC regulations and a related license amendment. Section 2.103 refers repeatedly to applications for "licenses," but does not mention exemptions or license amendments. The three examples cited by the NRC Staff all involved initial or renewed licenses rather than exemptions or amendments. Section 2.103(b) is at least ambiguous as it applies to Honeywell's circumstances. This is exactly why the provision describes actions for the NRC Staff director (not the applicant) to take. The NRC Staff when denying an application should notify applicants in writing of their hearing rights and any related deadlines — particularly where, as here, the requested actions do not fall squarely within the terms of the regulation. In this case, the director did not notify Honeywell of its rights to demand a hearing or specify any related deadlines, and the NRC Staff may not invoke the regulation as a bar to administrative review.[3]

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[2] The NRC Staff cited both of these examples. NRC Staff Answer at 6. With respect to the third example cited by the NRC Staff, GrayStar, the procedural posture differed in that the NRC Staff did not issue any denial letter to the applicant. As noted above, in that case the NRC Staff agreed that the period of time for requesting a hearing should be tolled.

[3] Contrary to the NRC Staff's assertions (NRC Staff Answer at 5-7), Section 2.103(b) does not by its terms impose any requirements on an applicant. The NRC Staff, in effect, seeks to take credit for the reference to 10 C.F.R. § 2.103(b) by NRC counsel in a legal brief in the prior federal court litigation related to this matter. *Id*. at 7-8. However, the statement of counsel in a brief is not the same as a notice from the NRC Staff director specifically made in the written notice of denial of an application, and therefore is not the

In contrast with Section 2.103(b), which discusses actions to be taken by the NRC Staff, the actions that interested persons must take to request a hearing are discussed in 10 C.F.R. § 2.309, which contains the NRC's generally-applicable hearing request provisions. Honeywell's hearing request is timely under 10 C.F.R. § 2.309(b). Section 2.309 applies to "any person" whose interest may be affected. *See also* 10 C.F.R. § 2.4 (defining "person" to include, among others, any corporation). Section 2.309 by its terms does not exclude applicants such as Honeywell — which is clearly an interested person in this matter. Consequently, Honeywell could rely on the timing provisions in 10 C.F.R. § 2.309(b). Section 2.309(b)(4) applies where, as here, there is no *Federal Register* notice of agency action.[4] For such proceedings, the deadline is "no later than the latest of" (i) 60 days after publication of a notice on the NRC website or (ii) 60 days after the requestor receives actual notice of a pending application but not more than 60 days after agency action on the application. Here, there was no notice on the NRC website. While Honeywell obviously had notice of its application, it did not have notice of the agency action (*i.e.*, denial) until April 24, 2011. As a result, no dispute that could be the subject of a hearing request was ripe until such time as the NRC denied the application.[5] Consistent with

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same as the notice contemplated under the regulation. Moreover, as a factual matter the reference by NRC counsel made no mention of any specific time for requesting a hearing. At most, the reference by counsel might have led an applicant to believe that a notice of specific hearing rights would be given in the future. However, it provided no guidance regarding a situation in which 10 C.F.R. § 2.103(b) was in fact not followed by the NRC Staff.

[4] Neither 10 C.F.R. § 2.309(b)(1), (2), or (3) apply here because the application did not involve a license transfer, a high-level waste repository, or a proceeding in which a *Federal Register* notice was published.

[5] The NRC Staff suggests that a timely request for hearing under Section 2.309(b) was due prior to June 1, 2009 — more than six months prior to the NRC's first (arbitrary) denial of the amendment/exemption and more than 22 months prior to the second denial letter. This makes no sense from a procedural or factual perspective. The NRC Staff's reading would have the effect of requiring applicants to file appeals in conjunction with the

the second part of Section 2.309(b)(4)(ii), Honeywell filed its request within 60 days of agency action on the application. Thus, in light of the absence of a clearly applicable timing provision in Section 2.309(b), Honeywell reasonably took action in a timely manner.[6]

Finally, nothing in 10 C.F.R. § 2.103(b) excludes consideration of a hearing request on a discretionary basis. In light of the NRC Staff's failure to specify Honeywell's right to request a hearing in writing and ambiguity in NRC regulations regarding the applicability of Section 2.103(b) to license amendments/exemptions, Honeywell's hearing request should be granted. The NRC Staff's position is a clear attempt to prevent review of a Staff position, contrary to all notions of a fair and open administrative process.[7] Indeed, the net effect of the Staff's position would be to force Honeywell to re-apply for an exemption from the

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application on the off chance that the NRC Staff will eventually deny the application. And, in the present case, the Staff reading would have required Honeywell to request a hearing on an application for an exemption/amendment similar to one that the NRC had granted twice previously. The NRC Staff's position on this point would also unreasonably insulate the second denial letter from any administrative review.

6 The NRC Staff argues that "tolling" of the 20-day period is not appropriate here because Honeywell was aware of the provisions in Section 2.103(b). Setting aside the fact that the NRC failed to comply with the notice provisions in Section 2.103(b) and that therefore there was no time limit to toll, the cases cited by the NRC Staff in support of their argument are inapplicable here. NRC Staff Answer at 9-10. The three cases cited all involved statutory (*i.e.*, jurisdictional) deadlines for appeals. There is no deadline for requesting a hearing in the Atomic Energy Act. And, the Licensing Board has the authority to modify filing deadlines in Part 2. *See* 10 C.F.R. § 2.307(a). Thus, if the Licensing Board concludes that the 20-day period in Section 2.103(b) is applicable, it should nonetheless grant the hearing request given the complex procedural history, the defective notice, and the absence of clearly applicable deadline in Section 2.309 for a hearing request on the exemption/amendment.

7 The NRC Staff can point to no harm in considering the hearing request filed based on 10 C.F.R. § 2.309(b) versus 10 C.F.R. § 2.103(b). There is a "delay" in the process of less than 40 days. In that time, based on the NRC Staff's denials of the exemption to date, Honeywell has maintained in place a financial assurance instrument that fully meets NRC regulations. It is Honeywell that bears the cost of any delay in the administrative review process that would lead to a delay in the relief that it seeks.

decommissioning funding assurance requirements and again seek a hearing on a denial of that application. This would cause both the licensee and the agency to incur the unnecessary costs of another application and review, likely with the same result. This approach would simply delay the resolution of the issues addressed in the Hearing Request.[8] The Licensing Board should therefore grant the request for a hearing on the NRC's 2011 decision to deny the license amendment application.

Respectfully submitted,

/s/ signed electronically by
David A. Repka
Tyson R. Smith
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

COUNSEL FOR HONEYWELL INTERNATIONAL, INC.

Dated at Washington, District of Columbia
this 20th day of July 2011

[8] As explained in Honeywell's request for hearing, Honeywell's application relates to an annual financial test. The application at issue relates to the 2009 test. Honeywell can re-apply at any time based on the latest financial data. However, the issues raised by the 2009 application will continue to recur until resolved, and the most efficient administrative process will be to address these issues now. *See generally Honeywell v. NRC*, 628 F.3d 568, 576-578 (D.C. Cir. 2010) (concluding that Honeywell's challenge to the NRC Staff decision to deny the exemption/amendment remains a live controversy even though NRC Staff requires Honeywell to re-apply on an annual basis).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "HONEYWELL REPLY TO NRC STAFF RESPONSE TO HEARING REQUEST" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 20th day of June 2011, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Michael J. Clark
Patricia A. Jehle
Emily L. Monteith
E-mail: michael.clark@nrc.gov
E-mail: patricia.jehle@nrc.gov
E-mail: emily.monteith@nrc.gov
OGC Mail Center : OGCMailCenter@nrc.gov

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

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

Respectfully submitted,

/s/ signed electronically by
Tyson R. Smith
Winston & Strawn LLP
101 California St.
San Francisco, CA 94111

COUNSEL FOR HONEYWELL INTERNATIONAL INC.

SF:314545.3