UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
E. Roy Hawkens
Paul B. Abramson

In the Matter of	Docket No. 40-3392-MLA
HONEYWELL INTERNATIONAL, INC.	ASLBP No. 11-910-01-MLA-BD01
(Metropolis Works Uranium Conversion Facility)	July 27, 2011

MEMORANDUM AND ORDER
(Granting Request for Hearing)

Before the Board is a request by Honeywell International, Inc. (Honeywell) for a hearing on the Nuclear Regulatory Commission (NRC) Staff's decision not to exempt it from certain provisions of 10 C.F.R. § 40.36(e) and 10 C.F.R. Part 30, Appendix C.[1] Specifically, the Staff denied Honeywell permission to use an alternate method for demonstrating decommissioning funding assurance for its Metropolis Works uranium conversion facility in Metropolis, Illinois.[2]

The NRC Staff opposes a hearing, solely on the ground that Honeywell should be denied a hearing because allegedly its request was late.[3]

[1] Request for Hearing on Denial of Decommissioning License Amendment Request (June 22, 2011) [hereinafter Hearing Request].

[2] Id. at 1.

[3] NRC Staff's Opposition to Hearing Request (July 15, 2011) at 5–10 [hereinafter NRC Staff Opposition]. On July 20, 2011, Honeywell filed a timely reply to the NRC Staff's response. Honeywell Reply to NRC Staff Response to Hearing Request (July 20, 2011) at 1 [hereinafter Honeywell Reply].

The Board disagrees. The NRC Staff denied Honeywell's exemption request on April 25, 2011,[4] and Honeywell requested a hearing on June 22.[5] The parties differ on the applicable regulatory deadline, and hence on whether Honeywell met it.[6] Regardless, however, to deny Honeywell a hearing in the circumstances presented would be neither fair nor sensible, for three independent reasons.

First, if the NRC Staff is correct that the 20-day deadline in 10 C.F.R. § 2.103(b) applies, then the Staff's failure to comply with its own responsibilities under that provision bars the Staff from invoking it. As the Staff admits,[7] its April 25, 2011 letter denying Honeywell's exemption request failed to inform the applicant of the 20-day deadline, as section 2.103(b) expressly requires.[8] Having failed to notify Honeywell of the regulatory deadline for requesting a

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[4] Hearing Request at 10. The Staff's decision was on remand from the United States Court of Appeals for the District of Columbia Circuit, which ruled that the Staff had not adequately explained its reasons for previously denying Honeywell's exemption request. See Honeywell v. NRC, 628 F.3d 568 (D.C. Cir. 2010).

[5] Hearing Request at 1.

[6] See Hearing Request at 11; NRC Staff Opposition at 2, 5–10; Honeywell Reply at 1-6. The Atomic Energy Act imposes no statutory deadline for requesting a hearing.

[7] NRC Staff Opposition 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.").

[8] 10 C.F.R. § 2.103(b). That section specifically states that:

> (b) If the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Material and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, finds that an application does not comply with the requirements of the Act and this chapter he may issue a notice of proposed denial or a notice of denial of the application and inform the applicant in writing of:
>
> (1) The nature of any deficiencies or the reason for the proposed denial or the denial, and
>
> (2) The right of the applicant to demand a hearing within twenty (20) days from the date of the notice or such longer period as may be specified in the notice.

Id.

hearing—in violation of that very same regulation—the Staff will not be heard to enforce it.[9] We find unpersuasive the Staff's attempts to carve out an exception to this well-established equitable rule.[10]

Second, if, on the other hand, Honeywell is correct that the 60-day deadline in 10 C.F.R. § 2.309(b)(4) applies, then its hearing request was timely. Alternatively, Honeywell has at least raised sufficient question as to the appropriate deadline[11] to permit the Board to conclude that it would likewise be unfair to penalize Honeywell on account of what might be ambiguity in the NRC's own regulations.[12]

Third, it would be wasteful and inefficient to deny Honeywell's hearing request. As Honeywell points out,[13] if the Board were to deny its hearing request as untimely, Honeywell could (and presumably would) simply apply again for the exemption it seeks and appeal from

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[9] See Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-95-7, 41 NRC 323, 328 (1995) (noting NRC Staff acknowledgement that the time for applicant to request a hearing should be tolled until 10 C.F.R. § 2.103(b) notice was issued, given that NRC Staff had failed to provide the notice and hearing opportunity mandated by section 2.103(b)); Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 107–08 (2d Cir. 2003) (holding that a notice failing to contain a specific time limit for administrative review, as required by federal regulations, "does not trigger a time bar").

[10] NRC Staff Opposition at 7–10. The Staff argues that Honeywell should have reviewed section 2.103(b) because the provision was previously cited by the Staff in the D.C. Circuit. Id.

[11] Honeywell Reply at 3–5. Honeywell argues that section 2.103(b) is ambiguous as it applies to this proceeding because section 2.103(b) repeatedly refers to license applications, not exemptions or license amendments, while Honeywell's hearing request concerns an application for an exemption and a corresponding license amendment. Id. at 3. In addition, Honeywell asserts its hearing request is timely under 10 C.F.R. § 2.309(b)(4), and that this is the applicable timing provision because 10 C.F.R. § 2.103(b) addresses actions to be taken by the Staff, whereas 10 C.F.R. § 2.309 concerns actions that an interested person, such as Honeywell, must take to request a hearing. Id. at 4–5.

[12] See, e.g., Huang v. I.N.S., 47 F.3d 615, 617–18 (3rd Cir. 1995) (holding that notice of appeal of immigration judge's deportation order was timely filed because regulations governing timing of appeals were ambiguous); Investment Co. Institute v. Board of Governors of the Federal Reserve System, 551 F.2d 1270, 1282-83 (D.C. Cir. 1977) (excusing applicant from filing in the wrong court because the rules were unclear).

[13] Honeywell Reply at 5–6.

the Staff's denial of its new application. There is no reason to force the parties to go through such a meaningless exercise.

Honeywell's request for a hearing is therefore GRANTED.

In accordance with the provisions of 10 C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

/RA/

Paul B. Abramson
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 27, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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HONEYWELL INTERNATIONAL INC.	)	DOCKET NO. 40-3392-MLA
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (Granting Request for Hearing) (LBP-11-19), dated July 27, 2011, have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001

Paul S. Ryerson, Chair
Administrative Judge
paul.ryerson@nrc.gov

E. Roy Hawkens
Administrative Judge
roy.hawkens@nrc.gov

Paul B. Abramson
Administrative Judge
paul.abramson@nrc.gov

Anthony C. Eitreim, Esq.
Chief Counsel
ace1@nrc.gov
Kirsten A. Stoddard
Law Clerk
kirsten.stoddard@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001
Michael Clark, Esq.
michael.clark@nrc.gov
Patricia Jehle, Esq.
patricia.jehle@nrc.gov
Emily Monteith , Esq.
emily.monteith@nrc.gov
Carrie Safford, Esq.
carrie.safford@nrc.gov
Catherine Scott, Esq.
clm@nrc.gov
OGC Mail Center
OGCMailCenter@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001
ocaamail@nrc.gov

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

Counsel for Applicant

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111
Tyson R. Smith, Esq.
trsmith@winston.com

Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
David A. Repka, Esq.
drepka@winston.com
Carlos L. Sisco, Sr. Paralegal
csisco@winston.com

[Original signed by Christine M. Pierpoint
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of July, 2011