

October 14, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

HONEYWELL WRITTEN STATEMENT OF INITIAL POSITION

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 14th day of October 2011

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. SUMMARY OF ARGUMENT	2
III. BACKGROUND	3
A. History of Self-Guarantee for MTW.....	4
B. Honeywell Submits First License Amendment Request	5
C. NRC Issues First License Amendment Authorizing Honeywell To Apply Alternative Financial Test.....	6
D. NRC Publishes Proposed Decommissioning Rule Authorizing Considerations of Goodwill	7
E. NRC Issues Second License Amendment Authorizing Honeywell To Apply Alternative Financial Test.....	8
F. NRC Denies License Amendment To Extend Authorization For Honeywell To Apply Alternative Financial Test.....	9
G. Honeywell Successfully Appealed the Denial of the License Amendment	11
H. NRC Denies License Amendment on Remand.....	12
IV. DISCUSSION OF LEGAL ISSUES	14
A. Applicable Regulatory Criteria.....	14
B. Burden of Proof.....	17
C. Role of the Licensing Board	18
D. Scope of Information to be Considered	21
V. HONEYWELL’S WITNESSES.....	26
VI. DISCUSSION OF MERITS	27
A. Honeywell’s Alternate Financial Test Provides Strong Assurance that Decommissioning Funds Are Available	27
1. Honeywell Has Consistently Demonstrated its Financial Strength and Ability to Pay for Decommissioning	27

2.	Companies with “A” Bond Credit Rating Have Low Risk of Default	28
3.	Measures are in Place to Capture Declining Financial Performance and Require Alternate Financial Assurance Mechanisms	29
4.	Financial Metrics Support Issuance	30
B.	The NRC Staff’s Bases for Denying the Amendment Are Not Supported by the Record	32
1.	Bond Ratings Are Reliable Indicators of Financial Strength.....	33
2.	Although Not Part of the Financial Test, Free Cash Flow Ensures Ability to Pay Under Normal Circumstances.....	37
3.	Negative Tangible Net Worth Does Not Reflect Financial Weakness	38
4.	Alternate Test is in the Public Interest.....	41
5.	Alternate Test is Consistent with Decommissioning Planning Rule	43
C.	Honeywell’s Application Meets NRC Requirements for Issuance of an Amendment and Exemption	45
VII.	CONCLUSION.....	46

30, Appendix C.¹ Despite having approved the same amendment twice previously, the NRC Staff denied the amendment in late 2009. Honeywell sought review of the NRC decision by the U.S. Court of Appeals for the District of Columbia. The Court found in favor of Honeywell. The Court found that the NRC decision to deny of the amendment was arbitrary and capricious, reversed the NRC's decision to deny the amendment, and remanded the matter to the agency for further proceedings. On remand, the NRC Staff again denied the license amendment. Honeywell initiated this hearing to challenge that Staff decision. As discussed below, the NRC Staff's decision to deny the amendment is not supported by the record. To the contrary, the information presented by Honeywell in its application, in subsequent correspondence and presentations, and in evidence and testimony presented in this hearing, all support issuance of the amendment.

II. SUMMARY OF ARGUMENT

The alternate test previously approved by the NRC provides more than ample basis for the NRC to conclude that there is strong assurance that decommissioning funds will be available for the MTW. Honeywell has been and remains in a very strong financial position, as demonstrated by its A and A2 credit rating for 17 years. There is a very low likelihood of default for "A-rated" companies, particular within one year of having an A rating. Other financial indicators confirm Honeywell's ability to pay, including its high levels of free cash flow, net worth, and tangible assets. The NRC's requirement for reporting a bond rating downgrade, the annual recertification, and submittal of annual SEC reports further ensure that potential problem

¹ Section 40.36(e) states that a licensee may provide a guarantee of funds for decommissioning costs based on a financial test "if the guarantee and funds are as contained in appendix C to Part 30." Appendix C to Part 30 states that for a self-guarantee a licensee must, among other requirements, have a "[t]angible net worth at least 10 times the total current decommissioning cost estimate for the total of all facilities or parts thereof" to pass the financial test.

situations will be identified and addressed in a timely manner, and that additional assurance mechanisms can be employed if needed. For these reasons, the alternate test provides strong assurance that funds are available for decommissioning MTW.

The reasons given by the Staff do not support denial of the license amendment. Honeywell is an “A-rated” company. Bond ratings have been demonstrated to be reliable over long periods of time, and an “A” rating is a reliable indicator of financial strength. Honeywell also has demonstrated remarkable financial stability — even during the recent financial downturn. Honeywell is in a strong financial position by any objective measure. In contrast, a minimum tangible net worth bears no relation to the overall financial condition of Honeywell. More than adequate free cash is available to pay for MTW decommissioning under normal circumstances. And, net worth, tangible assets, and the annual financial testing requirements and reporting obligations for adverse changes in financial positions all provide assurance of Honeywell’s ability to pay in times of declining performance or financial distress.

III. BACKGROUND

Honeywell operates the MTW, which is the only uranium conversion facility in the United States. The MTW is only a small component of the diverse businesses of Honeywell. Honeywell 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. Unlike electric utilities, mining companies, or other NRC licensees that rely on a relatively narrow scope of tangible assets (or a single business) to generate cash, Honeywell is a multi-industry conglomerate with a wide range of products and revenue streams. Through its diversified businesses, Honeywell has annual revenues in excess of \$33 billion dollars and generates more than \$3 billion of free cash annually. As a measure of its financial strength and stability, Honeywell has maintained a stable

long-term credit rating (A, A2) for 17 straight years. The NRC has previously relied on Honeywell's stable and robust financial performance to provide assurance that decommissioning funds will be available for MTW when needed.

A. History of Self-Guarantee for MTW

Since 1994, Honeywell has relied upon a self-guarantee to provide decommissioning financial assurance for MTW.² In order to use the self-guarantee mechanism under NRC regulations, 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, Appendix C specifies 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."³ A licensee must annually repeat the financial test, including a showing that it meets the "10:1" ratio.⁴

On November 3, 2006, Honeywell notified the NRC that, for various business reasons, it no longer satisfied the financial test for a self-guarantee in Appendix C. In the letter, Honeywell also notified the NRC that, based on its special financial circumstances, it intended to request an exemption (in the form of a license amendment) from the part of the financial test in Appendix C that requires licensees to have a tangible net worth at least 10 times the total current decommissioning cost estimate.

² The businesses of Honeywell are all organized within one larger corporate entity, Honeywell International Inc. Honeywell International Inc. owns and operates MTW and is the NRC licensee. The decommissioning obligations relating to MTW rest with Honeywell International Inc. Therefore, Honeywell has utilized a self-guarantee rather than a parent guarantee.

³ 10 C.F.R. Part 30, Appendix C, at II.A.1.

⁴ *Id.* at II.B.3.

B. Honeywell Submits First License Amendment Request

On December 1, 2006, Honeywell formally requested that the NRC approve an alternate financial test formula under 10 C.F.R. § 40.14.⁵ Specifically, Honeywell sought to include the value of “goodwill” in calculating the 10:1 ratio in Appendix C. In accordance with generally accepted accounting practice, goodwill is an intangible asset that reflects part of the cash generating potential of an acquired business.⁶ Honeywell acknowledged that licensees traditionally have not been permitted to include the value of intangible assets, such as 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.

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. Honeywell has maintained an “A” rating from both Moody’s and Standard & Poor’s since 1992, and in 2006 the company generated \$2.2 billion in free cash flow.⁷ 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 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 use of credit lines. The funds would be better applied to

⁵ Letter to NRC from Honeywell Re: Request for Exemption from Decommissioning Financial Assurance Requirements (“Application to Use Alt. Financial Test”) (ADAMS Accession No. ML063390353) (Exh. HNY000004).

⁶ In almost all business combinations, the consideration paid by the acquiring company exceeds the fair 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.

⁷ By the end of 2010, Honeywell’s free cash flow had increased to more than \$3.6 billion.

operational improvements at MTW or investments that would benefit the economy. 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.”

C. **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, 2007.⁸ 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.

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 better 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 the company 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 liabilities. The NRC noted that, considering tangible assets alone, Honeywell did not meet the 10:1 ratio. But, if goodwill assets were included in tangible net worth, Honeywell’s ratio exceeded the 10:1 ratio. The NRC deemed these assets (tangible assets plus goodwill) sufficient to assure decommissioning funds in times of financial distress.

⁸ TER at 52-55 (ADAMS Accession No. ML062640369) (Exh. HNY000009).

In view of the “A” bond rating and the high ratio of net worth (including goodwill) to decommissioning obligations, the NRC found use of the alternate test to be 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. Because the NRC was considering a rulemaking on decommissioning financial assurance requirements, the NRC incorporated a one-year time limit on the amendment in order to consider comments on the proposed rule. The NRC was contemplating in the rulemaking specifically allowing the value of intangible assets, including goodwill, to be included in the financial test. If it did so, the license amendment for MTW would no longer be needed.⁹

D. NRC Publishes Proposed Decommissioning Rule Authorizing Considerations of Goodwill

On January 22, 2008, the NRC published a proposed rule on facility decommissioning.¹⁰ The NRC proposed to adopt the logic of the alternate financial test with respect to the value of intangible assets, including 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 all intangible assets (including goodwill) when calculating net worth and performing the financial test.¹¹ The NRC Staff concluded that permitting the use of intangible assets (such as goodwill) in conjunction with an “A” or better bond rating would not materially

⁹ As discussed below, the NRC subsequently promulgated a rule permitting licensees to consider intangible assets, including goodwill in the financial test for a self-guarantee.

¹⁰ 73 Fed. Reg. 3812 (Exh. NRC000014).

¹¹ *Id.* at 3831. 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).

increase the risk of a shortfall in decommissioning funding.¹² Thus, the NRC proposed to expand its conclusion that the value of intangible assets, including 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.¹³

E. 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 yet complete, Honeywell sought to extend its ability to use the alternate financial test in a license amendment request, dated April 11, 2008.¹⁴ 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 initial request.¹⁵ Honeywell further 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.”¹⁶ After discussing the request with the

¹² *Id.* at 3825.

¹³ Subsequent to ultimately denying the license amendment at issue here, the NRC Staff published the final decommissioning planning rule. 76 Fed. Reg. 35512 (June 17, 2011) (Exh. NRC000015). As did the proposed rule, the final rule permits consideration of all intangible assets, including goodwill, when performing the financial test. The effective date of the final rule is December 17, 2012.

¹⁴ Letter to NRC from Honeywell Re: Request for Exemption of Decommissioning Financial Assurance Requirements at 1 (“First Request for Extension”) (Exh. HNY000005).

¹⁵ *Id.*

¹⁶ *Id.*

NRC Staff, Honeywell provided additional information to the NRC regarding its tangible net worth.¹⁷

Finding that the supplemental information resolved their questions, on August 22, 2008, the NRC authorized Honeywell to continue to use goodwill in performing the financial test.¹⁸ The NRC noted that if the value of goodwill is included in Honeywell's net worth test, Honeywell's net worth to decommissioning liability was approximately 21 to 1.¹⁹ 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.²⁰

F. NRC Denies License Amendment To Extend Authorization For Honeywell To Apply Alternative Financial Test

In 2009, the rulemaking on decommissioning planning was still not final. Accordingly, on April 1, 2009, Honeywell again sought to extend the license amendment to permit continued use of goodwill.²¹ The request was nearly identical to the 2008 request.

¹⁷ Letter to NRC from Honeywell, dated May 15, 2008 ("Supplemental Information on First Request for Extension") (ADAMS Accession No. ML081410585) (Exh. HNY000007).

¹⁸ Letter to Honeywell from NRC Re: Granting Extension of One-Year Exemption ("Second Approval") (ADAMS Accession No. ML082250707) (Exh. HNY000010).

¹⁹ Although the NRC Staff calculated the financial test ratio to be 21:1, the actual ratio at the time 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. The NRC apparently included the liability for MTW twice (\$156 million + \$156 million + \$68 million = \$380 million). Second Approval, Encl. 1, at 2 (Exh. HNY000010). Regardless, the ratio was well beyond the requisite 10:1.

²⁰ *Id.*

²¹ Letter to NRC from Honeywell Re: Request for Extension of Exemption from Decommissioning Financial Assurance Requirements at 1 ("Second Request for Extension") (ADAMS Accession No. ML090920087) (Exh. HNY000006).

Honeywell again 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.²² 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.”

The NRC Staff subsequently sought additional, clarifying information from Honeywell regarding the license amendment request. On October 13, 2009, Honeywell submitted supplemental information to the NRC.²³ In the supplement, Honeywell provided updated information regarding the low risk of default for companies with bonds rated “A.”²⁴ Honeywell also explained that there was no apparent basis for the NRC to alter its conclusions regarding the proposed license amendment.²⁵ The bases that the NRC articulated for granting the exemption previously had not changed (*e.g.*, bond rating, accounting standards, annual financial test).

Nevertheless, on December 11, 2009, the NRC Staff denied Honeywell’s request to continue using goodwill in performing the financial test.²⁶ The NRC Staff stated only that it found unpersuasive Honeywell’s argument that the proposed exemption was “consistent” with

²² *Id.*

²³ Letter from Honeywell to NRC Providing Supplemental Information to Request for Extension of Exemption from Decommissioning Financial Assurance Requirements (“Supp. Info.”) (ADAMS Accession No. ML092940177) (Exh. HNY000008).

²⁴ *Id.* at 6.

²⁵ *Id.* at 8.

²⁶ Letter from NRC to Honeywell Providing a Denial of the Honeywell Request for an Exemption from Decommissioning Financial Assurance Requirements at 3 (“2009 Denial Letter”) (ADAMS Accession No. ML093170604) (Exh. HNY000011).

the then-pending proposed decommissioning rule.²⁷ The Staff noted — for the first time — that the pending draft rule proposed adding a minimum tangible net worth requirement of \$19 million.²⁸ The NRC did not explain why it reached a different conclusion than in the two prior years — it did not disavow its prior conclusions that goodwill could be used in performing the financial test or that the bond rating, in conjunction with the alternate financial test, provides reasonable assurance that sufficient funds will be available for decommissioning. Nor did the NRC address the supplemental information submitted by Honeywell on October 13, 2009.

As a result of the NRC’s decision, Honeywell was required to make alternate decommissioning financial assurance arrangements by April 11, 2010. Honeywell therefore 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.²⁹

G. Honeywell Successfully Appealed the Denial of the License Amendment

Honeywell appealed the NRC’s decision to deny the license amendment to the U.S. Court of Appeals for the District of Columbia Circuit. Honeywell argued that the NRC’s decision was arbitrary and capricious for failing to adequately explain the reasoning for denying the license amendment. The Court agreed. The Court found that the NRC’s decision denying the amendment was inconsistent with its precedent addressing Honeywell’s prior exemption

²⁷ *Id.* at 2.

²⁸ *Id.* Significantly, the proposed minimum tangible net worth test had been proposed prior to issuance of the first extension of the alternate test, but was not addressed in the NRC review of that extension.

²⁹ The surety bond was accepted and remains in place today, at Honeywell’s continuing expense.

requests.³⁰ The Court also found that the NRC’s explanation in the December 11, 2009 letter for its denial was inadequate. The Court explained that the fact that Honeywell’s tangible net worth had declined did not provide a reasonable basis to distinguish the 2009 decision because Honeywell’s tangible net worth was declining when it granted the 2007 and 2008 exemptions.³¹ The Court noted that the fact that Honeywell had a negative tangible net worth in 2009 cannot serve as the basis for the denial because Honeywell’s 2008 tangible net worth had also been negative. The Court also concluded that a proposed rule requiring a licensee to have a minimum tangible net worth before allowing consideration of goodwill was irrelevant, as the governing regulations had remained unchanged since Honeywell received its exemption in 2007. Accordingly, the Court vacated the NRC’s December 11, 2009 denial, and remanded Honeywell’s April 11, 2009 request to the NRC for further proceedings.

H. NRC Denies License Amendment on Remand

Following the Court’s decision, Honeywell met with the NRC Staff to discuss the path forward on the license amendment.³² At that meeting, Honeywell provided the Staff with information regarding its then-current financial position and explained why the bases for its request continued to support an extension of the amendment and to assure adequate decommissioning financial assurance. Honeywell also included up-to-date information on the low risk of default for “A-rated” companies. The NRC Staff did not request additional information from Honeywell on its current financial position or the financial performance of

³⁰ *Honeywell v. NRC*, 628 F.3d 568, 581 (D.C.Cir. 2010).

³¹ *Id.*

³² *See* Presentation to NRC Staff, “Financial Assurance for Decommissioning,” dated March 14, 2011, at 11 (ADAMS Accession No. ML110740344) (end-of-year 2010 data) (Exh. HNY000013); Meeting Notice (ADAMS Accession No. ML110480737) (Exh. HNY000043).

other “A-rated” companies. Nevertheless, on April 25, 2011, the NRC Staff denied the license amendment.³³

The NRC Staff provided several reasons for denying the request. First, as noted above, Honeywell’s bond rating was the principal basis relied upon by the NRC Staff in granting the first and second exemption requests. In denying the third request, the NRC relied on the financial and economic stresses affecting Honeywell in late 2009 (without reference to any particular financial data), the uncertainty of the global economy (without reference to Honeywell or its customer base), and the NRC Staff’s new understanding that bond ratings (supposedly) have limited reliability in the context of decommissioning financial assurance.

Second, the NRC Staff argued against a “straw man.” Although Honeywell only discussed free cash flow to demonstrate its financial strength and ability to pay under normal circumstances, the NRC Staff stated that, in a financial distress or bankruptcy scenario, Honeywell’s ability to draw on cash flow to fund decommissioning obligations would be highly uncertain because the funds would not be committed to the NRC.

Third, the NRC Staff cited a “significant and uncorrected” decline (that no longer exists) in Honeywell’s tangible net worth between December 2005 and December 2008 that purportedly contradicts the NRC Staff’s assumption when it granted the first exemption that Honeywell’s noncompliance would be temporary.

Finally, the NRC Staff disagreed with Honeywell’s assertions that an exemption would be in the public interest or consistent with the purpose and intent of the proposed decommissioning rule. Without explaining why it would be necessary, the Staff maintained that Honeywell’s financial burden in complying with the regulations is no different than that incurred

³³ Letter from NRC to Larry Smith, Plant Manager, Honeywell (“2011 Denial Letter”) (ADAMS Accession No. ML110600286) (Exh. HNY000012).

by every other materials licensee. And, according to the NRC Staff, although Honeywell might meet one component in the proposed rule based on its intangible assets, it would still need an exemption in the future because it would fail to meet the separate second component — a minimum tangible net worth of \$19 million.

For the reasons discussed below and in the attached testimony, Honeywell disputes all of these conclusions.

IV. DISCUSSION OF LEGAL ISSUES

In its Initial Scheduling Order, the Board requested the positions of the parties on four legal issues. These issues are discussed below.

A. Applicable Regulatory Criteria

This hearing involves the NRC Staff's decision to deny Honeywell's license amendment request, dated April 1, 2009. Honeywell applied for a license amendment using NRC Form 313, "Application for a License." And, as the D.C. Circuit recognized, "the Commission has treated Honeywell's requests for an exemption from the 10:1 tangible net worth to decommissioning cost requirement under 10 C.F.R. § 40.36(e) and 10 C.F.R. Part 30, Appendix C, Section II, as an amendment to its Source Materials License."³⁴ The first amendment was granted as part of a license renewal proceeding and memorialized as License Condition 27 to Honeywell's license. The second amendment was granted as an amendment to License Condition 27.³⁵ The third request, which is the subject of this proceeding, simply would

³⁴ *Honeywell v. NRC*, 628 F.3d at 575 (emphasis added).

³⁵ In granting the amendment for a second time, the NRC's review document revised the portion of LC-27 that stated "[t]his license condition will expire one year from the date of approval of this license renewal" to read:

This license condition shall be imposed until of the earlier occurrence of (1) May 11, 2009, or (2) the effective date of a final rule amending 10

have amended License Condition 27 to substitute a new date.³⁶ The NRC Staff and Honeywell therefore have consistently treated the request to use an alternate financial test as a license amendment.

Because the licensing action at issue here is a license amendment, the application should be reviewed against the NRC's license amendment standards. The applicable criteria against which to judge the license amendment application are therefore found in 10 C.F.R. § 40.32. Under 10 C.F.R. § 40.32, an application for a specific license will be approved if:

- (a) The application is for a purpose authorized by the Act; and
- (b) The applicant is qualified by reason of training and experience to use the source material for the purpose requested in such manner as to protect health and minimize danger to life or property; and
- (c) The applicant's proposed equipment, facilities and procedures are adequate to protect health and minimize danger to life or property; and
- (d) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.

Section 40.32 is not discretionary. Therefore, if the standards for issuance of the license amendment are met, the NRC Staff must grant the amendment.

The request also involves an exemption from NRC regulations in 10 C.F.R. Part 30. Under 10 C.F.R. § 40.14(a), the Commission may grant exemptions from NRC requirements that it determines (a) are authorized by law; (b) will not endanger life or property or the common defense and security; and (c) are otherwise in the public interest. Accordingly, Honeywell

CFR Part 30 consistent with the proposed rule published in the *Federal Register* on January 22, 2008.

³⁶ Because the NRC had already granted the exemption, which was embodied in LC-27, Honeywell simply was requesting an amendment to, once again, revise the date. The original proposed dates for expiration have been superseded by intervening events (e.g., the D.C. Circuit appeal and remand, this appeal). If the amendment is granted, it could have a revised expiration date to the extent necessary.

recognizes that the exemption standards in Section 40.14 also must be met for the amendment to be issued.

This proceeding involves the criteria both for issuing an amendment and for granting an exemption. While Section 40.14 is discretionary,³⁷ exemption-related issues may be litigated in the hearing process.³⁸ The Commission has delegated responsibility for reviewing exemptions in the first instance to the NRC Staff, but also has delegated responsibility for reviewing the NRC Staff's decision to the Licensing Board, if a hearing is requested. Here, Honeywell contends that its proposed amendment, which is dependent on an exemption from otherwise controlling regulations, is — in Honeywell's circumstances — adequate to provide reasonable assurance that decommissioning funding will be available when needed. The basis for the NRC Staff's denial of the amendment (including the exemption) also must be under review and subject to reconsideration by the Licensing Board. To hold that an exemption is discretionary to the NRC Staff would nullify the ability of the Licensing Board to effectively

³⁷ As discussed further below, Section 40.14 is discretionary with respect to the Commission. The Commission has defined that discretion for Part 50 licensees. An exemption should be granted if “special circumstances” exist, such as when compliance is not necessary to satisfy the purpose of the regulations from which an exemption is sought. *See, e.g.*, 10 C.F.R. § 50.12(a)(2)(ii).

³⁸ For example, the Commission held in *Zion* that there is a right to a hearing under the AEA where the exemption in question can properly be characterized as one of the “circumstances” specifically identified in Section 189a as giving rise to a hearing right, including a license amendment. *Commonwealth Edison Co. (Zion Nuclear Power Station)*, CLI-00-5, 51 NRC 90, 96, 99 (2000); *see also United States Department of Energy (Clinch River Breeder Reactor Plant)*, CLI-82-23, 16 NRC 412, 421 (1982) (concluding that there is a “a statutory right to a hearing on the granting of an exemption,” where the grant was “part of a proceeding for the granting, suspending, revoking, or amending ... any license.”). Both the NRC Staff and the D.C. Circuit agree that this licensing action involves an amendment.

review NRC Staff licensing decisions, thereby rendering this hearing meaningless.³⁹ The Licensing Board should authorize the amendment if the amendment and exemption criteria are met.

B. Burden of Proof

Under 10 C.F.R. § 2.325, the applicant or the proponent of an order has the burden of proof. Here, Honeywell, as the proponent of the amendment, has the burden of proof with respect to issuance of the amendment — that is, the amendment cannot be issued unless Honeywell meets its burden of proof to demonstrate that the license amendment application meets 10 C.F.R. § 40.32. Because the amendment involves an exemption and because the NRC Staff has issued an order denying the amendment request and exemption, the Staff has become the proponent of the agency action under review (rather than Honeywell). As a result, the NRC Staff has a burden of proof for denying the exemption. The NRC Staff must make a showing that Honeywell’s request does not meet the criteria for granting an exemption. Honeywell then must demonstrate that the standards under 10 C.F.R. § 40.14 are met.

This approach is consistent with the burdens of proof in other NRC cases. In a licensing case, the applicant, as the proponent of license issuance, has the burden of proof.⁴⁰ In an enforcement case, which involves an order issued by the NRC Staff, the NRC Staff has the

³⁹ Permitting the NRC Staff to have unfettered discretion over exemptions would exclude critical technical questions from licensing hearings merely on the basis of an “exemption” label.

⁴⁰ *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983) (explaining that the ultimate burden of proof in a licensing proceeding on the question of whether a permit or license should be issued is upon the applicant).

burden as the proponent of the action.⁴¹ Here, because the issues involve an order issued by the NRC Staff and a licensing action requested by Honeywell, both parties have burdens of proof — that is, the NRC Staff, as the proponent of denying the license amendment, has the burden of proof for its decision to deny an exemption, while Honeywell has the burden to show that its application satisfies the applicable regulatory standards and that the license amendment should be granted.

NRC administrative proceedings have generally relied upon the preponderance of the evidence standard.⁴² Thus, for both parties, the showing necessary to meet their respective burdens of proof is the “preponderance of the evidence” standard.⁴³ Therefore, in order to prevail in this proceeding, Honeywell must show by the preponderance of the evidence that the amendment and exemption criteria are satisfied, and that the NRC failed to carry its burden of proof in denying the exemption.

C. Role of the Licensing Board

This hearing is by its nature a *de novo* review. When resolving issues litigated through the adversary process, Licensing Boards must bring their own judgment to bear. The

⁴¹ See *Radiation Technology, Inc.*, ALAB-567, 10 NRC 533, 536-37 (1979); see also *Piping Specialists, Inc. and Forrest L. Roudebush*, LBP-92-25, 36 NRC 156, 186-187 (1992).

⁴² *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), *aff'd*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995); see also *Commonwealth Edison Co. (Zion Station, Units 1 & 2)*, ALAB-616, 12 NRC 419, 421 (1980) (stating that applicants are not held to an absolute standard or required to prove a matter conclusively but rather, consistent with the Administrative Procedure Act, are held to a preponderance standard).

⁴³ The definition of “preponderance of the evidence” in Black’s Law Dictionary, 6th ed. (p. 1182), is “[e]vidence which is of greater weight or more convincing than the evidence offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.”

Licensing Board must decide, based on governing regulatory standards and the evidence submitted, whether the amendment should be issued.

Because the NRC Staff is the proponent of the order denying the requested amendment, the circumstances here are in some ways analogous to an enforcement proceeding where the NRC Staff is also the proponent of an order. In enforcement cases, the hearing before the Licensing Board is a *de novo* hearing and it is the Licensing Board, not the NRC Staff, who finally determines, on the basis of the hearing record, whether the order is supported.⁴⁴ Consistent with *de novo* review, the Licensing Board may substitute its “own judgment for that of the [NRC Staff].”⁴⁵ The *de novo* nature of the hearing necessarily extends to the exemption criteria that are tied to the amendment request. This *de novo* hearing assures that Honeywell has a full and fair opportunity for independent evaluation of the NRC Staff’s decision, including consideration of the information provided by Honeywell in support of its application and all testimony and evidence presented during this hearing.⁴⁶

As discussed above, this hearing relates to a license and also mirrors a typical licensing hearing. Under the AEA, the Commission has a choice of hearing and determining cases in the first instance itself, or delegating that responsibility to subordinates while reserving

⁴⁴ *Radiation Technology, Inc.*, ALAB-567, 10 NRC 533, 536-37 (1979).

⁴⁵ *Atlantic Research Corp.*, ALAB-594, 11 NRC 841, 849 (1980). In *Atlantic Research*, the Appeal Board also noted that “if deemed to be warranted in the totality of circumstances, the adjudicator is entirely free to mitigate or remit the assessed penalty.” *Id.* Here, the Licensing Board is free to order issuance of the amendment if it determines that the standards have been met. In both circumstances, the NRC Staff is the proponent of the order, while the Board remains the ultimate finder of fact.

⁴⁶ As noted above, the NRC Staff may not claim for itself the sole discretion to apply the exemption criteria. This argument would fundamentally alter the scope of the hearing opportunity provided by the regulations.

the right to review their decisions.⁴⁷ Here, the NRC Staff was given responsibility to review the application and make an initial determination. But, the Commission has authority, of course, to reverse the Staff's decision.⁴⁸ In the present case, the Board has been delegated the authority to act in place of the Commission on a licensing matter.⁴⁹ Therefore, the Board has the power and the authority to review the record *de novo* and make its own assessment of the licensing issues.

At bottom, the NRC Staff's decision to deny the amendment is subject to plenary review by the Board. If, based on the record, the Board determines that Honeywell has demonstrated by a preponderance of the evidence that the amendment criteria (and, as part of that showing, the exemption criteria) have been met, the Board is authorized to direct the NRC Staff to issue the license amendment to Honeywell.⁵⁰

⁴⁷ *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 403 (1976).

⁴⁸ *See Duke*, 4 NRC at 404 (“In making its decision, whether following an initial or recommended decision, the [Commission] is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision – as though it had heard the evidence itself.”).

⁴⁹ The Commission delegates to licensing boards the authority to make initial decisions. 42 U.S.C. § 2241; 10 C.F.R. § 2.319. The grant of authority in 42 U.S.C. § 2241 (AEA Section 191) includes decisions involving the “granting, suspending, revoking, or amending of any license or authorization under the [AEA], any other provision of law, or any regulation of the Commission issued thereunder.” This authority is more expansive than the scope of Hobbs Act review under 42 U.S.C. § 2239a.(1)(A) (AEA Section 189a.(1)(A)), which reaches decisions involving “granting, suspending, revoking, or amending of any license.” The D.C. Circuit and the NRC Staff both agree that Honeywell's request is an amendment under Section 189a.(1)(A). The Board therefore has authority to render decisions involving the specific request at issue.

⁵⁰ This hearing involves circumstances that are fundamentally different from those in *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-77-35, 5 NRC 1290, 1291 (1977). In *San Onofre*, the Appeal Board concluded that the Licensing Board did not have the authority to issue an exemption on its own initiative — that is, the Board could not decide that a Commission regulation precludes issuance of a license, but then independently authorize an exemption from that provision. Here, in contrast, the Licensing Board is reviewing an exemption application that was submitted

D. Scope of Information to be Considered

The Licensing Board must consider all information in the record. Honeywell and the NRC Staff are submitting evidence and testimony to support their respective positions. There are no restrictions on the dates of information that can be considered by the Licensing Board in a proceeding. The only limitations are that the information and testimony be “relevant, material, and reliable,” and not repetitious.⁵¹ Accordingly, the Licensing Board should consider all relevant, material, and reliable information as part of its *de novo* review — regardless of its availability or use by the NRC Staff.⁵²

On remand from the U.S. Court of Appeals, an agency is not limited to considering the information previously on the record before it, but may consider all relevant information, including new information bearing on its decision.⁵³ Given the limited scope of the administrative record and the bases for the D.C. Circuit decision, it is necessary for the NRC to address any new information in order to satisfy the agency’s obligation to assess all relevant and material information.⁵⁴ The NRC Staff was not restricted in the information to be considered on

to and reviewed by the NRC Staff (as part of a license amendment request) in the first instance. Under these circumstances, the Licensing Board has delegated authority to act in place of the Commission. The Board’s decision would, of course, be subject to review by the Commission upon request by one of the parties or *sua sponte*.

⁵¹ 10 C.F.R. § 2.337.

⁵² The administrative record must be based on all information “before the agency at the time the decision was made.” *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). The relevant decision will be the Licensing Board’s decision, not the Staff’s decision.

⁵³ *Union Camp Corp. v. United States*, 53 F.Supp.2d 1310, 1327 (1999).

⁵⁴ *Costle*, 657 F.2d 275 at 284. The D.C. Circuit concluded that the NRC’s explanation for its denial in the December 11, 2009 letter was inadequate. The Court vacated the NRC’s decision and remanded Honeywell’s April 11, 2009 exemption request to the NRC for “further proceedings.” Such proceedings need not be limited to mere “pencil whipping”

remand; it should have considered all information in the record in reaching its decision. The Licensing Board must do so now.

For example, the D.C. Circuit found that the reasons given by the NRC Staff in the denial were inconsistent with agency precedent addressing Honeywell's exemption requests and that its explanation for its denial was inadequate. Specifically, the D.C. Circuit found that the NRC did not apply the same standards in denying the request that it had applied previously (*e.g.*, ability to pay in normal times and in times of financial distress).⁵⁵ This implied that the NRC must re-evaluate the request using the standards it had applied previously. Honeywell therefore provided additional and up-to-date information regarding the low risk of default for "A-rated" companies.⁵⁶ The NRC Staff had also argued in its first denial letter that Honeywell's tangible net worth had "continued to decline." Honeywell therefore provided the NRC with up-to-date information showing that Honeywell's tangible net worth was increasing.⁵⁷ In its first denial, the NRC had also discussed the proposed minimum tangible net worth test. On remand, Honeywell provided additional information demonstrating that such a test was not supported by any analysis and that the test, in any event, did not provide a basis for denying Honeywell's

of the NRC Staff's justification for denial, but instead should encompass an evaluation of the totality of the information available to the NRC Staff.

⁵⁵ 628 F.3d at 580.

⁵⁶ *See, e.g.*, Presentation to NRC Staff, "Financial Assurance for Decommissioning," dated March 14, 2011, at 13 (ADAMS Accession No. ML110740344) (Exh. HNY000013).

⁵⁷ *Id.* at 11; *see also* Letter from Larry Smith, Plant Manager, Honeywell, to NRC Document Control Desk, dated March 8, 2011 (ADAMS Accession No. ML110680249) (explaining that net worth, tangible net worth, and goodwill have improved relative to end-of-year 2008 numbers) (Exh. HNY000040).

amendment request.⁵⁸ As all of this new information was before the NRC, the Staff had an obligation to factor it into its decision.⁵⁹ And, more importantly, that information should be considered in this *de novo* review.

Consideration of relevant new information is also necessary because the NRC Staff, in again denying the request after remand, itself considered new information and changed the criteria that it applied in evaluating the amendment request — without notifying Honeywell or explaining the basis for changing those criteria. In assessing the alternate financial test previously, the NRC Staff applied the same criteria on two occasions (ability to pay under normal circumstances and ability to pay in times of financial distress). But, in its post-remand denial, rather than assess the new information against the criteria used before, the NRC Staff took an entirely different approach in denying the amendment — even though the D.C. Circuit remanded the proceeding in part because the NRC had applied new and previously unarticulated criteria. Rather than focus on Honeywell’s ability to pay, the NRC Staff focuses on the reliability of bond ratings.⁶⁰ In applying these new criteria, the NRC Staff considered new

⁵⁸ Presentation, dated March 14, 2011, at 15; *see also* “Financial Assurance Mechanisms Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities and Hazardous Waste Treatment, Storage, and Disposal Facilities; Proposed Rule,” 59 Fed. Reg. 51523 (October 12, 1994) (Exh. HNY000036); “Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities; Final Rule,” 63 Fed. Reg. 17706 (April 10, 1998) (Exh. HNY000037).

⁵⁹ “[T]he whole record” includes “any document that might have influenced the agency’s decision.” *See Bethlehem Steel Corp. v. United States Environmental Protection Agency*, 638 F.2d 994, 1000 (7th Cir. 1980) (quoting *Nat’l Courier Ass’n v. Bd. of Governors of the Federal Reserve System*, 516 F.2d 1229, 1241 (D.C. Cir. 1975)); *see also Portland Audubon Soc’y v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993) (“‘The whole record’ includes everything that was before the agency pertaining to the merits of its decision.”).

⁶⁰ The 2011 denial is also deficient for failing to explain “why” it applied the new criteria. An agency may not change its mind without providing a reasoned explanation. *Motor Vehicle Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 43 (1983). The NRC Staff also

information.⁶¹ By considering new materials, the NRC Staff effectively augmented the original administrative record.⁶² However, having opened the original record to new information, the NRC cannot selectively augment that record to support its position while simultaneously ignoring other information before it that is contrary to its position.⁶³ The NRC cannot skew the record in its favor by excluding pertinent but unfavorable information.⁶⁴ An agency may not cherry pick the information to consider, selectively ignoring information contrary to its

cannot change the standards that it applies in evaluating an amendment request without giving Honeywell an opportunity to address the new standards and provide relevant information. Had Honeywell known that the NRC was focusing on the reliability on bond ratings, Honeywell would have provided information to address any concerns.

⁶¹ For example, the Staff references two documents that were not part of the Certified Index of the Record submitted to the D.C. Circuit. 2011 Denial Letter at 4, citing to CBO's "The Budget and Economic Outlook: Fiscal Years 2009 to 2019" and J. Katz, et al. (2009), "Credit Rating Agencies No Easy Regulatory Solution, Crisis Response Public Policy for the Private Sector." Exhs. NRC000037 and NRC000044. Neither of these documents is included in the Certified Index of the Record. See Exh. HNY000041.

⁶² The NRC Staff claims that the April 25, 2011, denial is "based solely on the information available to the NRC as of the date of the original denial." While the new documents were arguable "available" to the agency in the broadest sense of the term because they had been published prior to the NRC's December 2009 decision, they presumably were not available to the agency in the sense that the agency had them in their possession and reviewed them in reaching a decision. If they were in the NRC's possession and had been reviewed, then they should have been included in the record before the D.C. Circuit.

⁶³ See *Thompson* at 555, citing *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 32 (N.D. Tex. 1981) ("The 'whole' administrative record, therefore, consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position") (emphasis in original); *Portland Audubon Soc'y v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993); *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); S.Rep. 752, 79th Cong., 1st Sess. 28 (1945) ("The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case."); see also *Pers. Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 546 n. 4 (D.C.Cir. 1995) (noting with approval that the "whole record" contained all materials "pertaining to the [challenged] regulation").

⁶⁴ *Env'tl. Def. Fund v. Blum*, 458 F.Supp. 650, 661 (D.D.C. 1978).

position.⁶⁵ Nor may the NRC exclude information based on the circular reasoning that it did not “rely on the excluded information in its final decision.”⁶⁶ The NRC Staff therefore should have considered all relevant materials before it, including the new information provided by Honeywell.⁶⁷ Because the NRC Staff failed to do so, the Licensing Board must now consider it as part of this *de novo* hearing.

Because the agency’s final licensing decision must be based on the entire record at the time the decision is made,⁶⁸ the Licensing Board must consider all relevant, material, and reliable information presented to the agency. This includes the new information submitted to the NRC Staff as well as the evidence and testimony presented in this hearing. Based on that

⁶⁵ *National Treasury Employees Union v. Seidman*, 786 F. Supp. 1041, 1046 (D.D.C. 1992) (citation omitted) (“[T]he agency may not unilaterally determine the scope of the record by leaving out records detrimental to its case.”); *Envtl. Def. Fund v. Blum*, 458 F.Supp. 650, 661 (D.D.C. 1978); *see also Natural Resources Defense Council v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975) (reversing district court that limited review to a partial record).

⁶⁶ *Ad Hoc Metals Coalition v. Whitman*, 227 F.Supp.2d 134, 139 (D.D.C. 2002). Accepting the NRC Staff’s view of the limited scope of the administrative record would permit it to manipulate the administrative process by picking and choosing which materials support its position, and concealing those materials — although indisputably “before” the agency at the time of decision — that may cast doubt on its actions.

⁶⁷ *See Morall v. Drug Enforcement Admin.*, 412 F.3d 165, 178 (D.C. Cir. 2005); *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. HHS*, 396 F.3d 1265, 1278 (D.C. Cir. 2005) (finding agency action “arbitrary and capricious because [it] failed adequately to address relevant evidence before it”).

⁶⁸ *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Solite Corp. v. EPA*, 952 F.2d 473, 500 (D.C. Cir. 1991) (quoting *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978)); *see also Kent County*, 963 F.2d at 396; *Indep. U.S. Tanker Owners Comm.*, 690 F.2d at 926; *Sierra Club*, 657 F.2d at 334, 398. This failure is of limited consequence at this point; all the information is now before the Board and will be independently assessed in this hearing.

information, the Licensing Board should reach a determination as to whether the amendment should be granted.⁶⁹

V. HONEYWELL'S WITNESSES

Honeywell's direct testimony is presented by two witnesses: John Tus and Bruce Den Uyl. John Tus is a Vice President and the Treasurer of Honeywell. In his role as Treasurer, Mr. Tus is responsible for overseeing aspects of Honeywell's capital structure, public debt ratings, and financial liquidity. Mr. Tus participates in the preparation of Honeywell's SEC filings and is familiar with the financial data that was used in support of the license amendment applications. He was personally involved in those applications and in meetings with the NRC Staff. Bruce Den Uyl is a Managing Director and co-head of the Financial Advisory Services practice at AlixPartners. Mr. Den Uyl was not involved previously with the amendment request or any other issues related to decommissioning financial assurance for the MTW. He therefore provides an outside expert opinion on a number of issues related to corporate financial metrics, Honeywell's financial condition, and the financial assurance for the \$187 million MTW decommissioning obligation.

Through the attached Tus/Den Uyl Testimony and supporting exhibits, Honeywell's expert witnesses demonstrate that the alternate financial test proposed by Honeywell provides strong assurance that decommissioning funds will be available for MTW, that strict compliance with the regulation is not necessary to serve the underlying purpose of the regulation, and that the NRC has not met its burden in denying the requested amendment.

⁶⁹ This is a *de novo* review, not the equivalent of an appellate review. There is no basis for remanding the application to the NRC Staff to consider the information that it should have considered originally. The NRC Staff had its opportunity. The Licensing Board should consider the new information now and reach a decision based on the totality of the record before it.

VI. DISCUSSION OF MERITS

A. Honeywell's Alternate Financial Test Provides Strong Assurance that Decommissioning Funds Are Available

The alternate test previously approved by the NRC provides more than ample basis for the NRC to conclude that there is strong assurance that decommissioning funds will be available for the MTW.

1. *Honeywell Has Consistently Demonstrated its Financial Strength and Ability to Pay for Decommissioning*

Honeywell has been and remains in a very strong financial position. Honeywell's long term bonds are rated "A2" by Moody's and "A" by Standard & Poor's.⁷⁰ These bond credit ratings have been unchanged for 17 years. During the last 5 years, Honeywell financial condition was very strong in spite of one of the deepest recessions in the United States in 80 years. Free cash flow grew from \$2.2 billion in 2006 to \$3.6 billion in 2010, after making a \$600 million voluntary pension contribution.⁷¹ While sales and net income declined by 15% and 23% respectively between 2008 and 2009, Honeywell was able to maintain its free cash flow at \$3.1 to \$3.3 billion.⁷²

Although the NRC Staff did not consider Honeywell's recent financial performance, Honeywell's financial position has even improved since 2008. While sales declined from a high of \$36.6 billion in 2008 to a low of \$30.9 billion in 2009, sales are forecast to be in the range of \$36.1 to \$36.7 billion in 2011.⁷³ Free cash flow was \$3.1 billion in 2008 and is forecast to increase to \$3.5 to \$3.7 billion in 2011. Net worth similarly grew from \$7.1

⁷⁰ Tus/Den Uyl Testimony at ¶17.

⁷¹ *Id.* at ¶18.

⁷² *Id.*

⁷³ *Id.* at ¶19.

billion in 2008 to \$10.8 billion in 2010.⁷⁴ In contrast to many other companies, Honeywell did not experience any limitations on its ability to access the commercial paper markets throughout the financial crisis.⁷⁵

2. Companies with “A” Bond Credit Rating Have Low Risk of Default

Bond credit ratings are excellent indicators of the financial strength of a corporate issuer like Honeywell. Bond ratings take into account numerous financial metrics and qualitative analyses, including the assessment of a business’s market position, diversification, liquidity, and ability to generate future cash flows. The bond rating agencies also monitor a company to determine whether its rating should be changed, and then downgrade or upgrade the rating as appropriate. Overall, the rating agencies’ track record for investment grade corporate issuers has been excellent.

As the Tus/Den Uyl Testimony demonstrates, there is a very low likelihood of default for “A-rated” companies, particular within one year of having an A rating.⁷⁶ The risk of an “A-rated” company defaulting in one year is somewhere between 0.065% and 0.080%.⁷⁷ As calculated by Moody’s and S&P, the risk of an “A-rated” company defaulting in five years is between 0.680% and 0.788%.⁷⁸ For the few companies rated “A” by S&P that have eventually defaulted, it was more than 10 years, on average, between when they were rated “A” and when

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ As discussed below, one year is the time period of the NRC’s financial testing and reporting requirements, and the period of past amendments.

⁷⁷ *Id.* at ¶45.

⁷⁸ *Id.*

they eventually defaulted.⁷⁹ Put simply, “A-rated” companies are unlikely to default, and, if they do, there is likely to be a significant time lag (and rating downgrades) prior to actual default.

3. *Measures are in Place to Capture Declining Financial Performance and Require Alternate Financial Assurance Mechanisms*

In addition to the minimum bond rating (Part 30, Appendix C, Section II.A.3), other regulatory requirements that ensure decommissioning financial assurance would remain in place under the requested amendment. The bond rating downgrade reporting requirement (Part 30, Appendix C, Section III.E), the annual recertification requirement (Part 30, Appendix C, Section II.B.3), and the requirement to submit annual SEC reports (Part 30, Appendix C, Section III.D) ensure that potential problem situations will be identified and addressed in a timely manner and that additional assurance mechanisms can be employed if needed.⁸⁰

Under Part 30, Appendix C, Section III, Honeywell must notify NRC within 20 days if its rating ceases to be in any category of A or above for Moody’s and S&P. Such a change triggers a further requirement to seek alternate financial assurance within 120 days. Under 10 C.F.R. Part 30, Appendix C, Section II.B, Honeywell must also verify that it meets the financial test allowing it to utilize the self-guarantee within 90 days of the close of each fiscal year (*i.e.*, annually).⁸¹ Honeywell is further required, by License Condition 26, to submit to NRC for review and approval the results of the modified financial test and supporting documentation required by Appendix C, Section II.B(3), within 120 days of the close of each fiscal year.⁸² In addition to the annual financial test (Part 30, Appendix C, Section II.B.3),

⁷⁹ *Id.*

⁸⁰ *Id.* at ¶36.

⁸¹ *Id.* at ¶35.

⁸² *Id.*

Honeywell must inform NRC within 90 days of any matters coming to the attention of the company's independent certified public accountant 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 (Part 30, Appendix C, Section III.E).⁸³ And, if Honeywell no longer meets the requirements of Appendix C, Section II.A, as modified, Honeywell must send immediate notice to the NRC of its intent to establish alternate financial assurance within 120 days.⁸⁴

The minimum bond rating, reporting requirements, and requirements to obtain alternate financial assurance (in the event that Honeywell no longer satisfies the modified financial test) will remain unchanged if the requested amendment is granted. Honeywell will be required to notify the NRC and take action to provide assurance that adequate funds will be available at any point in time to decommission the MTW — if Honeywell's financial condition deteriorates.

4. *Financial Metrics Support Issuance*

There are ample financial indicators that support Honeywell's ability to meet its MTW decommissioning obligations. For example, Honeywell has consistently produced high levels of free cash flow. Free cash flow is the cash a company generates from its operations less the cost of maintaining and expanding its asset base for purchases of property, plant and equipment (*i.e.*, capital expenditures).⁸⁵ It is essentially the money that the company could return to shareholders if the company was to grow no further. Honeywell's free cash flow grew from \$2.2 billion in 2006 to \$3.6 billion in 2010 after making a \$600 million voluntary pension

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at ¶31.

contribution.⁸⁶ While sales and net income declined by 15% and 23% respectively between 2008 and 2009, Honeywell was able to maintain its free cash flow at \$3.1 to \$3.3 billion.⁸⁷ Honeywell generated in excess of \$3.5 billion in free cash flow in 2010.⁸⁸ The company forecasts 2011 free cash flow (excluding any optional U.S. pension payments) in the range of \$3.5 to \$3.7 billion.⁸⁹ The total decommissioning liabilities for MTW are approximately 5% of one year's actual free cash flow. And, since December 31, 2005, Honeywell's quarter-end cash balances have been no less than \$1.2 billion.⁹⁰ For Honeywell, these cash balances could be used to pay for decommissioning.

Net worth is another metric that demonstrates Honeywell's financial strength and ability to pay. Net worth is the total assets minus total liabilities of a company. Net worth (or shareholder equity) is a measure of the residual interest or claim that the shareholders in a company have in the event that a firm was liquidated and all liabilities were extinguished.⁹¹ Thus, it is a rough measure of a company's financial condition. Honeywell's net worth grew from \$7.1 billion in 2008 to \$10.8 billion in 2010.⁹² Even a net worth test is conservative because it does not reflect the market value of Honeywell's assets. The market value of

⁸⁶ *Id.* at ¶18, Table 7.

⁸⁷ *Id.* at ¶18.

⁸⁸ *Id.* at ¶52.

⁸⁹ *Id.* at ¶17.

⁹⁰ *Id.* at ¶44.

⁹¹ *Id.* at ¶59.

⁹² *Id.* at ¶19.

Honeywell reflects the value of all of Honeywell's assets (including those intangibles). The value of Honeywell in the marketplace is a multiple of Honeywell's net worth.

Honeywell also has significant tangible assets. Tangible assets are assets having a physical existence, such as cash, equipment, inventory and real estate. Accounts receivable are also usually considered tangible assets for accounting purposes. Honeywell's tangible assets have increased from approximately \$21 billion at the end of 2006 to approximately \$24 billion at the end of 2010.⁹³ These tangible assets far exceed the decommissioning cost estimate for MTW (\$187 million) and provide significant value to Honeywell that further supports the conclusion that Honeywell has a strong ability to meet its decommissioning obligations for MTW.

B. The NRC Staff's Bases for Denying the Amendment Are Not Supported by the Record

The NRC denied Honeywell's request for the reasons given in a letter to Honeywell, dated April 25, 2011. In part, the NRC asserted that (1) bond ratings were no longer a reliable indicator of a company's ability to pay its decommissioning obligations, (2) free cash flow is unreliable in the event of a bankruptcy, (3) a decrease in tangible net worth is an adequate reason to deny Honeywell's request, (4) an exemption is not in the public interest, and (5) the amendment is inconsistent with the decommissioning planning rulemaking, which would adopt a minimum tangible net worth requirement.⁹⁴ None of these bases for denying the amendment are supported by the record or by sound financial analysis, particularly as applied to Honeywell's circumstances.

⁹³ *Id.* at ¶29 (Table 6).

⁹⁴ As discussed below, the decommissioning rule would also allow licensees to include all intangible assets in the financial test, which is precisely what Honeywell is requesting through this amendment.

1. Bond Ratings Are Reliable Indicators of Financial Strength

In its denial letter, the NRC Staff highlighted two developments that, in its view, supported changing its view on the usefulness of bond ratings in assessing ability to pay. First, the NRC Staff highlighted instability in the global economy that created uncertainty for future business and economic conditions.⁹⁵ Second, the NRC Staff asserted that bond ratings are not as reliable as previously thought, in part because bond credit rating agencies may be reluctant to downgrade companies due to impacts on private contracts.⁹⁶ As discussed in the Tus/Den Uyl testimony, neither of these assertions is supported by sound financial analysis.

Honeywell has weathered the recent economic turmoil without significant impact to its present or future financial condition. During the last 5 years, Honeywell financial condition was very strong in spite of one of the deepest recession in 80 years.⁹⁷ Free cash flow grew from \$2.2 billion in 2006 to \$3.6 billion in 2010 after making a \$600 million voluntary pension contribution.⁹⁸ Honeywell's net worth grew from \$7.1 billion in 2008 to \$10.8 billion in 2010.⁹⁹ While sales declined from a high of \$36.6 billion in 2008 to a low of \$30.9 billion in 2009, sales are forecast to be in the range of \$36.1 to \$36.7 billion in 2011.¹⁰⁰ Despite declines in sales and net income of 15% and 23% respectively between 2008 and 2009, Honeywell was able to maintain its free cash flow at \$3.1 to \$3.3 billion.¹⁰¹ And, in contrast to many other

⁹⁵ Second Denial Letter at 4 (Exh. HNY000012).

⁹⁶ *Id.*

⁹⁷ Tus/Den Uyl Testimony at ¶18.

⁹⁸ *Id.*

⁹⁹ *Id.* at ¶19.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at ¶18.

companies, Honeywell did not experience any limitations on its ability to access the commercial paper markets throughout the financial crisis. During this period, Honeywell's credit rating remained at the "A" level due to its superior ability to generate free cash flow in both economic expansions and contractions.¹⁰²

Despite the NRC Staff assertions in the denial letter, bond credit ratings remain reliable indicators of a company's financial condition. Since 2005, there were only defaults for "A-rated" companies (S&P) in 2008 (0.38%) and in 2009 (0.22%).¹⁰³ For companies rated A2 by Moody's, there were only defaults in 2008 (0.259%).¹⁰⁴ This demonstrates that, despite a period of significant financial upheaval in the broader markets, "A-rated" companies did not default at unexpectedly large rates. Overall, the default rate for "A-rated" companies has remained very low. The risk of an "A-rated" company defaulting in one year is, on average, somewhere between 0.065% and 0.080%.¹⁰⁵ The risk of an "A-rated" company defaulting in five years is, on average, between 0.680% and 0.788%.¹⁰⁶ The data includes the experience of the recession from 2008-2010. Moreover, the Moody's and S&P data clearly demonstrate that corporate default rates during the 2008-2009 recession were not dissimilar from the default rates for the 2001 recession and would not materially alter the long term average default rates for "A-rated" corporate issuers.¹⁰⁷

¹⁰² *Id.*

¹⁰³ *Id.* at ¶23 (Table 3).

¹⁰⁴ *See id.* at ¶23 (Table 2).

¹⁰⁵ *Id.* at ¶36.

¹⁰⁶ *Id.*

¹⁰⁷ A particular letter rating is meant to connote the same general level of creditworthiness for issuers and issues in different sectors and at different times. Rating comparability is

This history of low default rates for highly-rated companies shows that bond ratings remain a reliable indicator of financial health and long-term performance. Put simply, “A-rated” companies are unlikely to default, and, if they do, there is likely to be a significant time lag and rating downgrades prior to actual default. In fact, the data shows that ratings are very good indicators of cumulative default probability. For example, companies rated at the highest grade of “speculative,” or Ba by Moody’s, are 14 to 16 times more likely to default than an A-rated company, and companies rated below Ba are even more likely to default.¹⁰⁸

Moreover, bond rating agencies continually re-evaluate the corporate ratings. Any adverse changes in financial condition would trigger a downgrade in rating. The market and ratings agencies usually see the signs of distress well before a company is on the brink of bankruptcy, and will react accordingly. As applied in the present case, any meaningful downgrade, driven by a meaningful decline in Honeywell’s perceived credit quality, would trigger Honeywell securing another source of financial assurance for the MTW decommissioning costs within 120 days.¹⁰⁹ This serves as another buffer for covering the potential MTW costs

maintained by measuring default behavior across different industries and over time. It would be expected that default rates would be higher during a recession but those default rates should not materially alter the long term default averages for that particular rating. That was the case in the most recent recession. Thus, the most recent data on defaults actually supports the reliability of bond ratings for investment grade companies.

¹⁰⁸ *Id.* at ¶45.

¹⁰⁹ NRC regulations require companies to report downgrades and to also provide alternate financial assurance mechanisms. *See, e.g.*, 10 C.F.R. Part 30, Appendix C, Section II.A. The NRC’s regulations also contain a mechanism for re-assessing companies annually (*e.g.*, the annual financial test and certification). Thus, the NRC would have more than ample time to recognize declining performance and require alternative financial assurance.

since, for the few companies rated “A” by S&P that have eventually defaulted, it was more than 10 years, on average, between when they were rated “A” and when they eventually defaulted.¹¹⁰

The NRC Staff also fails to support its conclusion that bond credit ratings agencies are reluctant to downgrade ratings. The credit quality of most issuers and their obligations is not fixed and steady over a period of time, but tends to undergo change. For this reason changes in ratings occur, if necessary, so as to reflect variations in the intrinsic relative position of issuers and their obligations. A change in rating may occur at any time in the case of an individual issue or issuer.¹¹¹

Contrary to the NRC Staff’s assertions, there is substantial objective evidence demonstrating that ratings agencies were willing to downgrade, and indeed were actively downgrading companies, where appropriate. For S&P, credit degradation among non-defaulting issuers was widespread and pronounced, especially in the first half of 2009, with the percentage of issuers downgraded during the course of the year reaching 18.34%.¹¹² There were 3.85 downgrades for every upgrade and the average number of notches recorded among downgrades was 1.76.¹¹³ According to Moody’s, the quarterly downgrade-to-upgrade ratio for corporate

¹¹⁰ Tus/Den Uyl Testimony at ¶45 *citing* “Standard and Poor’s – 2010 Annual Global Corporate Default Study And Rating Transitions” at 19 (Tables 10 and 11) (Exh. HNY000032).

¹¹¹ A rating change should serve notice that the credit rating agency observes some shift in creditworthiness, or that the previous rating did not fully reflect the quality of the bond as now seen, given updated general economic, industry-specific or issuer-specific data. Because of their very nature, changes are to be expected more frequently among bonds of lower ratings than among bonds of higher ratings.

¹¹² Tus/Den Uyl Testimony at ¶48.

¹¹³ *Id.*

issuers rose sharply in late 2008, reaching a peak of 18.3x in the first quarter of 2009, though by the fourth quarter it had returned to approximately pre-recession levels.¹¹⁴

These two examples (S&P and Moody's) demonstrate that, contrary to the NRC Staff's assertions, ratings agencies are not reluctant to downgrade ratings when conditions warrant. The agencies take into account longer-term trends and expectations of future performance, particularly for highly-rated, diversified companies such as Honeywell. Taking the long-term perspective does have a tendency to stabilize bond ratings, but this is not a measure of any reluctance to appropriately downgrade companies; rather it is consistent with the ratings agencies' focus on long-term risk and the level and predictability of an issuer's future cash generation in relation to its commitments to repay debtholders.¹¹⁵ The Staff's perspective need be no different as it relates to decommissioning assurance. Despite this backdrop of relatively higher levels of default, and downgrades, neither S&P nor Moody's downgraded Honeywell, showing that they view Honeywell as having a very low probability of default. Overall, bond credit ratings have a proven record of accurately predicting relative default rates and are a reliable indicator of Honeywell's ability to pay for decommissioning at MTW.

2. *Although Not Part of the Financial Test, Free Cash Flow Ensures Ability to Pay Under Normal Circumstances*

As one basis for denying the amendment, the NRC Staff states that reliability of free cash flow is uncertain in the event of a bankruptcy (*i.e.*, in times of financial distress).¹¹⁶ The NRC Staff's argument misses the point. Honeywell has never asserted that free cash flow

¹¹⁴ *Id. citing* Exh. HNY000025.

¹¹⁵ *Id.* Investment-grade issuers generally possess sufficient financial strength to weather a recession. Consequently, for investment grade issuers in particular, ratings do not need to automatically change with business cycles.

¹¹⁶ Second Denial Letter at 6 (Exh. HNY000012).

would be available in the event of a bankruptcy. Rather, Honeywell highlighted its free cash flow to demonstrate its strong financial condition and as support for its long term financial stability. Indeed, the NRC Staff previously relied on free cash flow to support ability to pay in normal circumstances, not during times of financial distress.¹¹⁷ Thus, the NRC Staff's arguments regarding the availability of free cash in the event of a bankruptcy are immaterial.¹¹⁸ Free cash flow at Honeywell continues to demonstrate Honeywell's ability to meet its decommissioning obligations in normal circumstances. It also demonstrates that bankruptcy, at least in the near-to-medium term, is very unlikely.

As discussed above, in the unlikely event of financial distress, Honeywell could call upon other resources to provide financial assurance, including its very substantial assets. And, the minimum bond rating, reporting requirements, and requirements to obtain alternate financial assurance provide further support for the conclusion that Honeywell will meet its decommissioning obligations at all times. Honeywell would be required to notify the NRC and take action to provide assurance that adequate funds will be available to decommission the MTW if Honeywell's financial condition deteriorates.

3. Negative Tangible Net Worth Does Not Reflect Financial Weakness

The NRC Staff also argues that Honeywell has experienced a "significant and uncorrected" decrease in tangible net worth.¹¹⁹ The NRC Staff, however, fails to demonstrate

¹¹⁷ Technical Evaluation Report at 53 (Exh. HNY000009).

¹¹⁸ Regardless, cash balances which are held in normal circumstances could be used to fund liabilities in times of financial distress to the extent they were available. Since December 31, 2005, Honeywell's quarter-end cash balances have been no less than \$1.2 billion. Honeywell could also draw upon its \$2.8 billion committed revolving credit agreement. In addition, for a diversified company, such as Honeywell, asset sales could be used to pay for decommissioning even in times of financial distress.

¹¹⁹ Second Denial Letter at 6 (Exh. HNY000012).

that declining tangible net worth is an indicator of declining financial performance or an inability to meet decommissioning obligations. In addition, the NRC Staff ignored more recent information showing that Honeywell's tangible net worth has in fact increased.

First, for an "A-rated" company such as Honeywell, a negative tangible net worth is not a reflection of financial weakness as implied by the NRC Staff.¹²⁰ Honeywell's negative tangible net worth simply reflects that Honeywell has sought to grow and increase its product and geographic diversification, in part, by purchasing companies. Honeywell's business model is such that it often engages in acquisitions or other business combinations that generate significant amounts of goodwill. For example, during the relevant time period (2003 to September 30, 2011), Honeywell acquired approximately 65 companies at a cost of approximate \$8.5 billion.¹²¹ One accounting-related result of buying cash generating businesses is that Honeywell is required to book either specific intangibles or goodwill to reflect the difference between the fair value of the purchased tangible assets and liabilities and the consideration paid (*i.e.*, value associated with the ability of those assets to generate cash flow). As a result, assuming that shareholders equity remains constant, as the intangible asset of goodwill increases, tangible net worth necessarily decreases.

While financially weak companies may have a negative tangible net worth, the corollary that all financially strong companies have positive tangible net worth is not true.¹²² Likewise, the fact that a company's tangible net worth is declining does not indicate that its

¹²⁰ Tangible net worth equals shareholder equity less goodwill and other intangible assets. For Honeywell, shareholder equity was approximately \$10.8 billion as of December 31, 2010.

¹²¹ Tus/Den Uyl Testimony at ¶25.

¹²² *Id.* at ¶50.

financial condition is weakening.¹²³ Many financially strong firms that grew by acquisition also have a negative tangible net worth. For example, as of year-end 2010, Honeywell, United Technologies, and Danaher, all “A-rated” large multi-industry industrial corporations, had a tangible net worth that was negative.¹²⁴ Companies such as IBM and Proctor & Gamble, which have higher credit ratings than Honeywell, also had negative tangible net worth as of year-end 2010.¹²⁵ Proctor and Gamble had a tangible net worth of approximately *negative* \$24 billion as of its June 30, 2011 year end, generated free cash flow of \$13 billion in fiscal 2011, and had an AA-/Aa3 credit rating.¹²⁶ As this demonstrates, the minimum tangible net worth criterion is not particularly meaningful, at least as applied to large diversified companies like Honeywell.

The NRC Staff also ignored more recent data indicating that Honeywell’s tangible net worth had increased. At the end of 2008, Honeywell had negative tangible net worth of \$5.3 billion.¹²⁷ At the end of 2009 and 2010, Honeywell had a negative tangible net worth of \$3.7 billion and \$3.4 billion, respectively.¹²⁸ The NRC Staff did not address this new information in its denial letter. Thus, one of the stated bases for denying the amendment was no longer true at the time of the NRC Staff decision to deny the requested amendment — tangible net worth was not on a year-to-year declining trend. Regardless, a negative tangible net worth does not, by

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at ¶58.

¹²⁷ *Id.* at Table 5.

¹²⁸ *Id.*

itself, indicate declining or poor financial performance or an inability to meet decommissioning obligations.

4. Alternate Test is in the Public Interest

The NRC Staff argues in its denial letter that issuance of the amendment and exemption is not in the public interest.¹²⁹ The NRC Staff notes that Honeywell asserted that the exemption was in the public interest because Honeywell would otherwise be required to obtain a costly letter of credit or surety. The NRC Staff states that it disagrees with this statement and does not find this argument “persuasive.” However, the NRC Staff’s stated reasons are inconsistent with prior NRC Staff determinations on the same topic and, in any event, impose requirements that have no basis in the Atomic Energy Act or NRC regulations.

First, on two prior occasions, the NRC Staff found that the exemption was in the public interest for precisely the same reasons as those Honeywell gave again. In granting the amendment the first time, the NRC Staff stated that “[t]he exemption is in the public interest because resources will not be expended on alternate financial assurance methods that would not increase the likelihood that funds for decommissioning will be available when needed.”¹³⁰ And, in granting the amendment the second time, the NRC Staff again stated that “[t]he exemption is in the interest of the public because resources will not be expended on the alternate financial assurance methods that would not increase the likelihood that funds for decommissioning will not be available when needed.”¹³¹ The NRC Staff has wholly failed to explain why it no longer finds persuasive the arguments that it had accepted on two prior occasions.

¹²⁹ Second Denial Letter at 7 (Exh. HNY000012).

¹³⁰ TER at 53 (Exh. HNY000009).

¹³¹ First Extension of Alternate Test at 3 (Exh. HNY000010).

Second, the NRC Staff applied inappropriate criteria when judging whether the exemption is in the public interest. For example, the NRC Staff states that “[t]he financial burden associated with Honeywell’s full compliance with 10 CFR Part 30, Appendix C, is relatively small and no different than that incurred by every other materials licensee that is required to provide financial assurance but does not rely on a self or parent guarantee as financial assurance.”¹³² The NRC Staff also argues that the cost of obtaining a surety or letter of credit is “relatively small compared to \$2.2 billion in free cash flow and is less than 1.5 percent of the amount of financial assurance provided as estimated in the aforementioned rulemaking.”¹³³ However, the relative cost of obtaining alternate financial assurance is not a criterion against which to judge whether an exemption is in the public interest. The point is that, regardless of Honeywell’s ability to pay for a surety or letter of credit, the surety or letter of credit is not necessary. Unnecessary expenditures of funds to obtain a surety or letter of credit increase costs without a corresponding increase in financial assurance.¹³⁴ Those funds could, for example, be used instead on other capital projects at MTW or investments that would benefit the economy and the public interest. Surety bonds and letters of credit are also an inefficient use of lines of credit, particularly when a company is in strong financial condition. Reducing an unnecessary regulatory burden is a legitimate basis for an exemption.

¹³² Second Denial Letter at 7 (Exh. HNY000012).

¹³³ *Id.*

¹³⁴ This reasoning is consistent with the NRC’s treatment of exemptions for reactor licensees. For reactors, an exemption would be granted if compliance is not necessary to satisfy the underlying purpose of the regulation from which an exemption is sought. *See, e.g.,* 10 C.F.R. § 50.12(a)(2)(ii). Here, the purpose of the regulation — to assure that funds are available — is satisfied by the alternate test.

The NRC Staff also states that “Honeywell has not distinguished the financial burden of its fee payment from that of other compliant materials licensees.”¹³⁵ However, there is no explanation as to how this establishes that the exemption is not in the public interest. An exemption, by its very nature, authorizes activities that would otherwise not be allowed. The exemption relates to the special circumstances of Honeywell’s financial performance and balance sheet. Comparing a reduced burden for one licensee (where justified) to the impact on other licensees of otherwise-applicable regulations (where no exemption is requested or justified) sets up a false distinction that does not support the NRC Staff’s conclusion.

Overall, none of the reasons given by the NRC demonstrate that the requested exemption is not in the public interest.

5. *Alternate Test is Consistent with Decommissioning Planning Rule*

The NRC Staff also argues that the requested exemption is inconsistent with the decommissioning planning rule. While the NRC Staff acknowledged that it would be “inappropriate” to apply the rule before it was effective,¹³⁶ the NRC Staff then went on to reject the application, in part, because it did not comply with the proposed rule. Specifically, the NRC Staff stated that the proposed rule includes a minimum tangible net worth requirement that Honeywell does not meet.¹³⁷ The NRC Staff arguments here are inconsistent both with its prior decisions and with the proposed decommissioning rule itself. In addition, compliance with the

¹³⁵ *Id.* at 7-8.

¹³⁶ The D.C. Circuit concluded that a proposed rule requiring a licensee to have \$19 million in tangible net worth before allowing consideration of goodwill was irrelevant, as the governing regulations have remained unchanged since Honeywell received its exemption in 2007. 658 F.3d at 581.

¹³⁷ Second Denial Letter at 8 (Exh. HNY000012).

text of the new decommissioning rule is not, in any event, necessary for Honeywell to meet the purpose of the Part 30 test and an exemption would be appropriate.

The NRC Staff first argues that it does not find Honeywell's argument that the exemption is consistent with the proposed rule to be "persuasive." However, the NRC Staff previously found the exact same argument acceptable as a basis for issuing the amendment.¹³⁸ In 2008, the NRC Staff extended the exemption even though it had already published the proposed decommissioning planning rule (including the minimum tangible net worth criterion). Thus, merely referencing the minimum tangible net worth criterion is not enough to explain the NRC Staff's change in position.¹³⁹

Second, it makes little sense for the NRC Staff to look to the proposed decommissioning planning rule for the minimum tangible net worth criterion, while ignoring the proposed rule's treatment of intangible assets in the financial test ratio. The decommissioning rule would permit licensees to include all intangible assets in performing the financial test.¹⁴⁰ Thus, if the rule were effective, Honeywell would not need the requested exemption in order to satisfy the 10:1 ratio criteria. The NRC Staff is correct in stating that, if the rule were effective, Honeywell would not satisfy the minimum tangible net worth requirement. Under such circumstances, Honeywell would need an exemption from the minimum tangible net worth

¹³⁸ Honeywell used the exact same language in its first request for an extension, which was granted, and its second request for an extension, which was denied. *Compare* First Request for Extension at 2 (stating that "the exemption is entirely consistent with [the decommissioning planning proposed rule]") *and* Second Request for Extension at 2 (stating that "the exemption is entirely consistent with [the decommissioning planning proposed rule]") (Exhs. HNY000005 and HNY000006).

¹³⁹ *See Honeywell*, 658 F.3d at 581 (noting that the fact that Honeywell had a negative tangible net worth in 2009 cannot serve as the basis for the denial because its 2008 tangible net worth had also been negative).

¹⁴⁰ 76 Fed. Reg. at 35524.

criteria in order to continue to use a self-guarantee. But, the NRC Staff cannot penalize Honeywell for not applying for an exemption from a non-existent rule. Until the rule is effective, there is no need to seek an exemption (particularly given that the NRC had already granted the same exemption previously). The NRC Staff cannot selectively apply the proposed rule when it supports its position, while simultaneously ignoring those portions of the proposed rule that undermine its position.

Third, as noted above, the minimum tangible net worth criterion does not make sense as applied to Honeywell's particular financial circumstances and an exemption from the minimum tangible net worth criteria would be justified. A negative tangible net worth is not correlated with poor financial performance. And, while Honeywell may not have \$21 million in tangible net worth, it does have substantial assets that support its ability to meet the MTW decommissioning obligations, including significant free cash flow, cash balances, tangible assets, and intangible assets. At bottom, for Honeywell, application of a minimum tangible net worth criterion is not necessary to serve the underlying purpose of the Part 30 financial test.

C. **Honeywell's Application Meets NRC Requirements for Issuance of an Amendment and Exemption**

The information provided by Honeywell satisfies NRC criteria governing issuance of the amendment (and the related exemption). The underlying purposes of the three legs of the NRC's self-guarantee financial test are met by an alternate financial test (alternate net worth to decommissioning liabilities), the bond rating, and the ratio of U.S. assets to decommissioning liabilities. The other reporting requirements and triggers for providing alternate financial assurance will continue to apply and further support the conclusion that the alternate test ensures decommissioning financial assurance. The amendment is for a purpose authorized by the Atomic Energy Act, and Honeywell is qualified to implement the alternate test

in such manner as to protect health and safety and minimize danger to life or property. The MTW equipment, facilities and procedures, which are not impacted by the amendment, remain adequate to protect health and minimize danger to life or property, and issuance of the amendment is not inimical to the common defense and security or to the health and safety of the public.¹⁴¹

Further, the amendment will not endanger life or property or the common defense and security and is in the public interest.¹⁴² There is no significant benefit to requiring a Honeywell to obtain a surety bond or letter of credit given its strong financial position. And, under Honeywell's present circumstances, such a measure is not necessary to serve the underlying purpose of the rule. When combined with the other requirements (the minimum bond rating and ratio of assets to decommissioning liabilities), annual reviews, and mandatory reporting requirements for adverse changes in financial condition, there is strong assurance that funds will be available for decommissioning the MTW.

VII. CONCLUSION

For the reasons stated above, as supported by expert testimony and exhibits, Honeywell has met its burden of showing that the criteria for issuance of an amendment and exemption have been satisfied by the preponderance of the evidence. Conversely, the NRC Staff has failed to demonstrate by a preponderance of the evidence that the application fails to satisfy the NRC's exemption criteria. As a result, the NRC Staff's decision to deny the amendment should be reversed and the Licensing Board should direct the NRC Staff to issue the amendment.

¹⁴¹ 10 C.F.R. § 40.32.

¹⁴² 10 C.F.R. § 40.14(a).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of “HONEYWELL WRITTEN STATEMENT OF INITIAL POSITION” and “TESTIMONY OF JOHN TUS AND BRUCE DEN UYL” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 14th day of October 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.