LBP-12-06

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of	Docket No. 40-3392-MLA
HONEYWELL INTERNATIONAL INC.	ASLBP No. 11-910-01-MLA-BD01
(Metropolis Works Uranium Conversion Facility)	February 29, 2012

INITIAL DECISION

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I. INTRODUCTION

Before the Board is a request by Honeywell International Inc. (Honeywell) for an exemption from the Commission's regulations pursuant to 10 C.F.R. § 40.14. The request concerns the Metropolis Works (MTW) uranium conversion facility in Metropolis, Illinois that Honeywell owns and operates. Specifically, Honeywell seeks an exemption from the requirements of 10 C.F.R. § 40.36 and 10 C.F.R. Part 30, Appendix C to allow it to act as a self-guarantor of the funds necessary for eventually decommissioning the MTW facility, without satisfying the financial test for self-guarantors set forth in those regulations.[1] The cost of decommissioning Honeywell's MTW facility is currently estimated to be $187 million.[2]

[1] See LBP-11-19, 74 NRC __, __ (slip op. at 1) (July 27, 2011); Request for Hearing on Denial of Decommissioning License Amendment Request (June 22, 2011) at 1 [Hearing Request].

[2] See Exh. HNY000001 (Testimony of John Tus and Bruce Den Uyl) at 8.

The Board denies Honeywell's request for two reasons. Each independently prevents the Board from concluding that the requested exemption from the Commission's regulations would be in the public interest or otherwise satisfy the requirements of 10 C.F.R. § 40.14.

First, no special circumstances exist. Honeywell does not claim that its failure to satisfy the Commission's financial test for self-guarantors results from a merely temporary condition, which is likely to be rectified soon. On the contrary, Honeywell candidly admits that it is unlikely to be able to comply with a key element of the Commission's test—that is, having a substantial positive tangible net worth—within the foreseeable future.[3] Nor has Honeywell demonstrated that its lack of a positive tangible net worth is a situation that the Commission failed to consider, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived. Rather, Honeywell simply disagrees with the Commission's determination that having a positive tangible net worth is a useful test of financial strength. Honeywell thinks the opposite: "Overall, we do not believe that a minimum tangible net worth criteria is useful or relevant."[4]

Second, Honeywell has failed to show that, despite its inability to satisfy the NRC's explicit regulatory requirements for self-guarantors during the relevant time period, the agency should rely solely on Honeywell's asserted financial strength. Honeywell must therefore guarantee the availability of decommissioning funding by other methods (such as providing a surety bond or letter of credit).

Although we deny Honeywell's request for an outright exemption, we emphasize that nothing in the Board's decision precludes Honeywell and the NRC Staff from negotiating a more suitable alternative if they wish to do so. For example, perhaps the NRC's concerns might be adequately protected if the NRC Staff were to condition a regulatory exemption allowing Honeywell to act as a self-guarantor (and thus to avoid the cost of a surety bond) upon

[3] Tr. at 70 (Dec. 15, 2011 Evidentiary Hearing).

[4] Exh. HNY000001 at 21.

Honeywell's collateralizing its decommissioning funding obligations with a first priority security interest in assets of sufficient aggregate value to more than cover such obligations.[5] We of course do not require such negotiations, or endorse any particular approach, but merely note that the opportunity remains available to the parties. Likewise, insofar as Honeywell contends that the Commission's requirements for self-guarantors are not useful or relevant in evaluating the financial condition of numerous similarly-situated corporations, Honeywell is free to petition the Commission to amend its rules at any time.[6]

I. BACKGROUND

Honeywell owns and operates the MTW uranium conversion facility in Metropolis, Illinois.[7] In accordance with 10 C.F.R. § 40.36, a source materials licensee such as Honeywell must demonstrate that sufficient funds will be available to cover the cost of decommissioning its facility.[8] Through its regulations, the NRC seeks to ensure "that decommissioning can be carried out in a safe and timely manner and that lack of funds does not result in delays that may cause potential health and safety problems."[9]

A licensee has numerous options for meeting its decommissioning funding obligation, including: (1) prepayment into an account segregated from the licensee's assets and outside its control; (2) an external sinking fund in which deposits are made annually, coupled with a surety method or insurance that decreases in value as the accumulated assets in the sinking fund increase; or (3) a surety or insurance method (surety bond, letter of credit, line of credit, or

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[5] See Tr. at 93–98 (Dec. 15, 2011 Evidentiary Hearing).

[6] 10 C.F.R. § 2.802.

[7] Hearing Request at 1–2.

[8] 10 C.F.R. § 40.36.

[9] Exh. NRC000014 (Proposed Rule; Decommissioning Planning, 73 Fed. Reg. 3,812 (Jan. 22, 2008)) at 3,812–13.

insurance policy) where proceeds are payable to a trust established for decommissioning costs.[10]

Only one permissible method—a guarantee of available funds by the licensee itself—does not involve the protection of either a prepaid segregated account or having a third party committed to paying the licensee's projected decommissioning costs if the licensee is unable, or otherwise fails, to do so. Understandably, the Commission requires a licensee that wishes to be the sole guarantor of its own liabilities to satisfy a stringent test. To use the self-guarantee mechanism to fulfill its decommissioning funding obligation, a licensee (such as Honeywell) that issues bonds must annually satisfy the financial test set forth in 10 C.F.R. Part 30, Appendix C.[11] That test requires, in pertinent part, that a licensee maintain a bond rating of "A" or better and have a "[t]angible net worth at least 10 times the total current decommissioning cost estimate."[12] Tangible net worth means shareholder equity less goodwill and other intangibles.[13]

From 1994 until 2006, Honeywell met the requirements for a self-guarantee in all years except 2002, when it briefly fell out of compliance with the 10:1 tangible net worth requirement.[14]

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[10] See 10 C.F.R. § 40.36(e); see also Exh. NRC000001 (Testimony of Roman Przygodzki, Kenneth Kline, and Thomas Fredrichs (Oct. 14, 2011)) at 3–4.

[11] 10 C.F.R. Part 30, Appendix C, at II.B.3.

[12] 10 C.F.R. Part 30, Appendix C, at II.A. The Appendix C test includes certain additional requirements, which are not in issue.

[13] Exh. HNY000001 at 20; Exh. NRC000001 at 5.

[14] Exh. HNY000012 (Letter from NRC to Larry Smith, Plant Manager, Honeywell, Denying Amendment Request (Apr. 25, 2011)) at 6–7; Exh. NRC000006 (Letter from Jeffery Neuman, Honeywell, to Director, NRC/NMSS, Regarding Meeting Held Between Honeywell Representatives and NRC Staff to Review the Financial Assurance Requirements for Decommissioning Liability at Honeywell for the Metropolis Facility (Nov. 3, 2006)) at 1; see also NRC Staff's Initial Statement of Position (Oct. 14, 2011) at 32–33 [NRC Staff Initial Statement of Position]; Honeywell Written Statement of Initial Position (Oct. 14, 2011) at 4 [Honeywell Initial Statement of Position].

Honeywell requested and received a temporary exemption, until it returned to full compliance in mid-2003.[15]

On November 3, 2006 Honeywell again notified the NRC Staff that it no longer satisfied the financial test for a self-guarantee in 10 C.F.R. Part 30, Appendix C.[16] Its tangible net worth had declined to $1.929 billion as of December 31, 2005, thus resulting in a 7.9:1 ratio instead of a 10:1 ratio.[17] Honeywell informed the NRC Staff that it intended to request an exemption, in the form of a license amendment, from the portion of the financial test that requires licenses to have a tangible net worth of at least 10 times the total current decommissioning cost estimate.[18]

On December 1, 2006, Honeywell requested that the NRC Staff approve an alternative financial test under 10 C.F.R. § 40.14,[19] which allows for exemptions from the requirements of 10 C.F.R. Part 40 (and thus of the Part 30, Appendix C requirements that are incorporated by reference in Part 40). Section 40.14 permits such exemptions as "are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest."[20] Specifically, Honeywell sought an exemption (in this case, a modification of the regulatory requirement) allowing it to include the value of goodwill, an intangible asset, toward meeting the 10:1 tangible net worth requirement.[21] In its exemption request, Honeywell

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[15] See Exh. NRC000006 at 1; NRC Staff Initial Statement of Position at 32–33.

[16] Exh. NRC000006 at 1.

[17] Exh. NRC000006 at 3; Exh. HNY000004 (Letter to NRC from Honeywell Re: Request for Exemption from Decommissioning Financial Assurance Requirements (Dec. 1, 2006)), Attachment 1 at 5; Exh. HNY000011 (Letter from NRC to Honeywell Providing a Denial of the Honeywell Request for an Exemption from Decommissioning Financial Assurance Requirements (Dec. 11, 2009)) at 2.

[18] Hearing Request at 3.

[19] Exh. HNY000004.

[20] 10 C.F.R. § 40.14.

[21] Exh. HNY000004.

acknowledged that licensees had traditionally not been permitted to include the value of goodwill to meet the 10:1 tangible net worth requirement of 10 C.F.R. Part 30, Appendix C.[22] Honeywell contended, however, that the 10:1 tangible net worth portion of the financial test did not accurately reflect the financial strength of a conglomerate such as itself.[23]

On May 11, 2007, the NRC Staff granted Honeywell's exemption request, but imposed a license condition limiting the term of the exemption to one year: that is, until May 11, 2008.[24] According to the NRC Staff, the purpose of the condition was to "allow[] the Staff to reassess Honeywell's financial situation within one year of the exemption and monitor the progress of the NRC's rulemaking relating to decommissioning planning."[25]

When Honeywell filed its exemption request in 2006, the NRC was considering revisions to its decommissioning funding guarantee regulations. The NRC Staff informed Honeywell that, although it would consider its exemption request, if Honeywell sought a permanent change in the tangible net worth requirement, it should argue for those changes in the rulemaking process.[26] On January 22, 2008, the NRC published a proposed rule on facility decommissioning that addressed issues similar to those contained in Honeywell's 2006 exemption request.[27] The proposed rule would have amended Appendix C of 10 C.F.R. Part 30 to permit inclusion of intangible assets, such as goodwill, in meeting the 10:1 net worth requirement.[28] In addition, however, the proposed rule also would have required that the

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[22] Id.

[23] Id.

[24] Exh. NRC000007 (Honeywell International, Inc. License No. SUB-526, Amendment 0 (May 11, 2007)).

[25] NRC Staff Initial Statement of Position at 4.

[26] Exh. NRC000001 at 6–7.

[27] Exh. NRC000014 at 3,831.

[28] Id.

guarantor's tangible net worth be at least $19 million.[29] Honeywell was aware of the proposed rule, and participated in the rulemaking process by submitting comments.[30]

On April 11, 2008 Honeywell requested an extension of its exemption for another year, claiming that the rationale for seeking an extension of the exemption was largely the same as in Honeywell's initial request, even though its tangible net worth had declined still further—to negative $1.451 billion as of December 31, 2007.[31] Honeywell also attempted to justify its request for an extension of the exemption by noting, inaccurately, that "the exemption [was] entirely consistent with a proposed rule promulgated by the NRC [Staff] on January 22, 2008."[32] On August 22, 2008 the NRC Staff granted Honeywell's request to extend the exemption.[33] However, in extending the exemption, the NRC Staff added the condition that the exemption would expire upon the earlier of "(1) May 11, 2009, or (2) the effective date of a final rule amending 10 C.F.R. Part 30 consistent with the proposed rule published in the Federal Register on January 22, 2008."[34]

On April 1, 2009, with its tangible net worth still at a substantial negative state, Honeywell applied for its third consecutive exemption from the 10:1 tangible net worth

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[29] Id.

[30] Tr. at 66 (Dec. 15, 2011 Evidentiary Hearing).

[31] Exh. HNY000005 (Letter to NRC from Honeywell Re: Request for Exemption of Decommissioning Financial Assurance Requirements (Apr. 11, 2008)); Exh. HNY000011 at 2.

[32] Exh. HNY000005 at 2. Honeywell's 2008 exemption request was not consistent with the proposed rule because Honeywell had a tangible net worth of negative $1.451 billion as of December 31, 2007, whereas the proposed rule required guarantors to have a minimum tangible net worth of $19 million. See HNY000011 at 2; supra note 29 and accompanying text.

[33] Exh. HNY000010 (Letter to Honeywell from NRC Re: Granting Extension of One-Year Exemption (Aug. 22, 2008)); Exh. NRC000009 (Letter to D. Anderson, Sr. VP, Honeywell Global Headquarters from M Tschiltz, NRC/NMSS, Re: Notice that Staff Found that Honeywell Passed Annual Self-Guarantee Financial Test and Has Met the Regulatory Requirements to Provide Financial Assurance (Aug. 22, 2008)).

[34] Exh. NRC000008 (Honeywell International, Inc. Materials License No. SUB-526, Amendment 2 (Aug. 22, 2008)) at 6.

requirement, requesting that the exemption be continued through the earlier of either (1) May 11, 2010, or (2) the effective date of a final rule amending 10 C.F.R. Part 30 consistent with the proposed rule published in the Federal Register on January 22, 2008.[35] Again, Honeywell claimed that the rationale for the exemption was "largely the same as" in Honeywell's initial exemption request in 2006 and, again erroneously, that the exemption was "entirely consistent with [the] proposed rule published on January 22, 2008."[36] However, Honeywell's tangible net worth had now declined by an additional $3.814 billion, resulting in a negative $5.265 billion tangible net worth by the end of 2008.[37] On December 11, 2009, the NRC Staff denied Honeywell's third exemption request.[38] In a three-page decision, the NRC Staff explained its denial on the ground that Honeywell's negative $5.265 billion tangible net worth failed to meet either the financial test contained in 10 C.F.R. Part 30, Appendix C or that contained in the proposed rule published on January 22, 2008.[39]

Honeywell appealed the NRC Staff's denial of its third exemption request to the United States Court of Appeals for the District of Columbia Circuit.[40] Upon review, the Court found that the NRC Staff's decision failed adequately to explain the basis for denying the 2009 exemption request.[41] The Court stated that "[w]hile the Commission might reasonably have concluded that a decline in tangible net worth over a given period is not rectified by a high goodwill value, or by other potential indicators of a company's financial health and stability, the Commission's

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[35] See Exh. HNY000006 (Letter to NRC from Honeywell Re: Request for Extension of Exemption from Decommissioning Financial Assurance Requirements (Apr. 1, 2009)) at 1.

[36] Id. at 1–2.

[37] Exh. HNY000011 at 2.

[38] Id. at 3.

[39] Id.

[40] Honeywell Int'l, Inc. v. NRC, 628 F.3d 568 (D.C. Cir. 2010).

[41] Id. at 580.

decision leaves too much to inference."[42] Accordingly, the Court vacated the NRC Staff's denial of Honeywell's 2009 exemption request, and remanded that request to the NRC for further proceedings.[43]

On remand, the NRC Staff again denied Honeywell's 2009 exemption request.[44] In a nine-page memorandum, dated April 25, 2011, the NRC Staff elaborated on the basis for its denial, noting that the global economic downtown in late 2008 had cast doubts on corporate bond ratings—which partially constituted the grounds upon which the NRC Staff had relied in granting Honeywell's 2006 and 2008 exemption requests.[45] In addition, the NRC Staff explained that, between 2007 and 2008, Honeywell's tangible net worth had declined significantly, from negative $1.451 billion to negative $5.265 billion—thus forcing Honeywell to rely more heavily on intangible assets, which the NRC Staff found to be relatively illiquid, to meet the 10:1 alternative net worth requirement.[46] Also of significance to the NRC Staff was the fact that the 2009 exemption request was Honeywell's third consecutive exemption request.[47] The NRC Staff concluded that multiple consecutive exemption requests implied that the circumstances underlying the 2009 exemption were not temporary, particularly when compared with Honeywell's isolated one-year exemption request for 2002.[48]

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[42] Id. at 581.

[43] Id.

[44] Exh. HNY000012 at 9.

[45] Id. at 4–6; see Exh. NRC000001 at 7.

[46] Exh. HNY000012 at 6.

[47] Id. at 4, 6–7

[48] Id.; see also NRC Staff Initial Statement of Position at 32–33; Exh. NRC000006 at 1.

Subsequently, on June 17, 2011, the NRC published a final rule addressing decommissioning financial assurance.[49] The final rule goes into effect on December 17, 2012, after which, although self-guaranteeing licensees will be allowed to use intangible assets, including goodwill, to meet the 10:1 net worth requirement in 10 C.F.R. Part 30, Appendix C,[50] they will still be required to maintain a minimum positive tangible net worth of at least $21 million.[51]

On June 22, 2011, Honeywell filed a request for a hearing concerning the NRC Staff's April 25, 2011 denial of Honeywell's remanded 2009 exemption request.[52] The Board granted Honeywell's hearing request on July 27, 2011.[53] On August 18, 2011, citing its primary interest in an expeditious resolution on the merits "at the earliest practicable date," Honeywell waived the opportunity for initial briefing of legal issues, stating that "any legal issues can and should be addressed as part of the written submissions of the parties" in connection with the evidentiary hearing.[54] On August 23, 2011, the Board issued an Initial Scheduling Order.[55]

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[49] Exh. NRC000015 (Final Rule; Decommissioning Planning, 76 Fed. Reg. 35,512 (Jun. 17, 2011)) at 35,512.

[50] Id. at 35,524.

[51] Id.

[52] Hearing Request at 1–2. The NRC Staff filed a response opposing Honeywell's hearing request on the ground that it was impermissibly late. NRC Staff's Opposition to Hearing Request (July 15, 2011) at 1–2. On July 20, 2011, Honeywell submitted a reply to the NRC Staff's response. Honeywell Reply to NRC Staff Response to Hearing Request (July 20, 2011) at 1 [Honeywell Reply to Hearing Request].

[53] LBP-11-19, 74 NRC at __ (slip op. at 4).

[54] Honeywell Position on Briefing Legal Issues (Aug. 18, 2011) at 1 [Honeywell Position on Briefing Legal Issues].

[55] Licensing Board Order (Initial Scheduling Order) (Aug. 23, 2011) at 1 (unpublished) [Initial Scheduling Order].

In accordance with the Board's Initial Scheduling Order, the parties completed disclosures on September 15, 2011.[56] On October 14, 2011, the parties submitted their written direct testimony, which included their respective initial statements of position, along with exhibits.[57] The parties submitted written rebuttal testimony, including respective reply statements of position, along with exhibits on November 3, 2011.[58] On November 14, 2011, the NRC Staff and Honeywell filed a Joint Statement informing the Board that they were not filing motions in limine.[59] The parties explained, that while they disagreed over the relevancy of certain testimony and exhibits, they considered motions in limine unnecessary because they would largely just repeat arguments already contained in the parties' respective statements of position.[60] The agreement, however, was without prejudice to either party's ability to argue, at

[56] Id. at 3.

[57] See, e.g., NRC Staff Initial Statement of Position at 1; Honeywell Initial Statement of Position at 1. The parties' written direct testimony, along with their written rebuttal testimony, were filed in accordance with the Board's instructions. See Licensing Board Order (Providing Direction on Pre-filed Evidentiary Material) (Sept. 9, 2011) at 1 (unpublished).

[58] See, e.g., NRC Staff's Reply to Honeywell's Initial Statement of Position (Nov. 3, 2011) at 1; Honeywell Rebuttal Statement of Position (Nov. 3, 2011) at 1. In response to the Board's Order (Scheduling Pre-Hearing Conference), on November 21, 2011 the NRC Staff filed a document containing affidavits from their witnesses attesting to the veracity of their respective direct and reply testimonies. Licensing Board Order (Scheduling Pre-Hearing Conference) (Nov. 18, 2011) at 1 (unpublished); Exh. NRC000062 (Affidavits of Roman Przygodzki, Kenneth M. Kline, Thomas L. Fredrichs, Paul Bailey, and John Collier (Nov. 21, 2011)). Although this document was not initially numbered as an exhibit, during the pre-hearing conference call on December 6, 2011, the Board and parties agreed that the affidavits would be collectively entered into the record as Exhibit NRC000062 at the evidentiary hearing. Tr. at 6 (Dec. 6, 2011 Pre-Hearing Conference Call).

[59] Joint Statement Regarding Filings Due November 14, 2011 (Nov. 10, 2011) at 1–2 [Joint Statement]. In addition, in their Joint Statement, the parties also informed the Board that neither party intended to file motions for cross-examination, but that both parties would be filing proposed questions for the Board in camera. Id. at 2. On November 14, 2011, the parties submitted their respective proposed questions for the Board. NRC Staff's Proposed Questions for Oral Hearing (Nov. 14, 2011) at 1 [NRC Staff Proposed Questions]; Honeywell's Questions for the Licensing Board on NRC Staff's Pre-filed Direct and Rebuttal Testimony (Nov. 14, 2011) at 1 [Honeywell Proposed Questions].

[60] Joint Statement at 1–2.

the hearing or in post-hearing briefs, concerning the relevance and materiality of evidence, or to provide further support for its positions on the nature of the exemption, the scope of review, or the relevant time period.[61]

The Board held an evidentiary hearing on December 15, 2011 in the Atomic Safety and Licensing Board Panel's Hearing Room in Rockville, Maryland.[62] By agreement of the parties, the hearing was conducted pursuant to Subpart L to 10 C.F.R. Part 2.[63] At the hearing, the Board admitted all the parties' respective exhibits into evidence and received live testimony.[64] Although given the opportunity in the Initial Scheduling Order, neither party sought permission to cross-examine any witnesses.[65]

During the hearing, and again in a January 5, 2012 Order (Requesting Clarification of Honeywell Response), the Board ordered Honeywell to submit supplemental information concerning whether the goodwill upon which it proposes to rely was encumbered.[66] Honeywell complied, submitting exhibits HNY000065 and HNY000066, which detailed the status of the goodwill of both Honeywell and its subsidiaries.[67]

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[61] Id. at 2.

[62] Tr. at 1 (Dec. 15, 2011 Evidentiary Hearing); Licensing Board Order (Notice of Hearing) (Sept. 13, 2011) at 1 (unpublished).

[63] See Tr. at 7 (Aug. 11, 2011 Pre-Hearing Conference Call).

[64] Tr. at 7–8 (Dec. 15, 2011 Evidentiary Hearing). The Board admitted Exhibits HNY000001 to HNY000064, NRC000001, NRCR00002, and NRC000003 to NRC000062 into the record. Id.

[65] See Joint Statement at 2.

[66] Tr. at 71–76, 129–131 (Dec. 15, 2011 Evidentiary Hearing); Licensing Board Order (Requesting Clarification of Honeywell Response) (Jan. 5, 2012) at 1 (unpublished).

[67] Exh. HNY000065 (Affidavit of John Tus (Jan. 4, 2012)); Exh. HNY000066 (Affidavit of John Tus (Jan. 12, 2012)). In addition, the parties also submitted joint proposed transcript corrections, which were adopted in their entirety by the Board. Joint Proposed Transcript Corrections (Jan. 4, 2012) at 1; Licensing Board Order (Adopting Transcript Corrections) (Jan. 6, 2012) at 1 (unpublished).

On January 25, 2012 exhibits HNY000065 and HNY000066 were admitted, and the evidentiary record for the proceeding was closed.[68]

II. KEY LEGAL ISSUES

We address five questions at the outset.

First, must the Board consider Honeywell's exemption request de novo, or is our role limited to testing the reasonableness of the NRC Staff's April 25, 2011 decision to deny Honeywell's request? Honeywell contends that the Board must consider its request de novo,[69] and the NRC Staff does not disagree.[70] Accordingly, we examine Honeywell's request de novo. The Board accords no weight to the NRC Staff's earlier determination, nor are we limited to consideration of the reasons given in the NRC Staff's analysis.

Second, what is the required burden of proof, and which party bears it? It is undisputed that the Board makes factual determinations in accordance with the preponderance of the evidence.[71] The NRC Staff contends that Honeywell, as the applicant for an exemption, bears the burden of proof on all issues.[72] Honeywell agrees that it bears the burden of proof on some issues, but not all. Specifically, Honeywell claims that, "because the issues involve an order issued by the NRC Staff and a licensing action requested by Honeywell, both parties have

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[68] Licensing Board Order (Admitting Additional Exhibits and Closing the Evidentiary Record) (Jan. 25, 2012) at 1 (unpublished). While the NRC Staff and Honeywell both submitted Proposed Findings of Fact and Conclusions of Law, along with Proposed Questions for the Board, these documents are not part of the evidentiary record. See NRC Staff Proposed Questions at 1; Honeywell Proposed Questions at 1; Honeywell's Proposed Findings of Fact and Conclusions of Law (Feb. 10, 2012) at 1 [Honeywell Proposed Findings]; NRC Staff's Proposed Findings of Fact and Conclusions of Law (Feb. 10, 2012).

[69] Honeywell Initial Statement of Position at 18–20.

[70] Tr. at 124–25 (Dec. 15, 2011 Evidentiary Hearing).

[71] Honeywell Initial Statement of Position at 18; Tr. at 125–26 (Dec. 15, 2011 Evidentiary Hearing).

[72] NRC Staff Initial Statement of Position at 14–16 (citing 10 C.F.R. § 2.325).

burdens of proof."[73] According to Honeywell, "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."[74]

We agree with the NRC Staff that Honeywell bears the burden of proving by a preponderance of the evidence that it is entitled to the exemption it requests. For one thing, Honeywell's assertion that "the issues involve an order issued by the NRC Staff" seems inconsistent with its claim that this Board must consider its exemption request de novo, and not merely review the NRC Staff's earlier order denying Honeywell's request.

Moreover, Honeywell's position—that is, that some burdens shift to the NRC Staff as the "proponent" of denying the license amendment—would lead to an anomalous result. As all parties appear to agree, if the evidence before the NRC Staff had been perfectly balanced—so that a preponderance of the evidence favored neither party—the NRC Staff would have been required to deny Honeywell's request because it failed to carry its burden. Honeywell posits, however, that this Board—viewing the very same, perfectly balanced evidence pursuant to its request for a hearing—would then be required to grant Honeywell's request in light of the NRC Staff's failure to carry its alleged burden. Honeywell would improve its position by losing its case in front of the NRC Staff. Surely that cannot be.

In any event, which party bears the burden of proof ultimately makes no difference in this case.[75] As explained below, we conclude that the preponderance of the evidence clearly requires the Board to deny Honeywell's request for an exemption on two separate and

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[73] Honeywell Initial Statement of Position at 18.

[74] Id.

[75] Honeywell appears to agree that, "as a practical matter, there is little difference in the ultimate standard used." Honeywell Proposed Findings at 13.

independent grounds. Our decision would be no different if we were to agree with Honeywell that the NRC Staff—rather than Honeywell—had the burden of proof on some issues.

Third, what findings must the Board make before it may consider granting Honeywell's requested exemption? The parties agree that 10 C.F.R. § 40.14 controls.[76] It provides that the NRC "may" grant such exemptions from the applicable regulatory requirements "as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest."[77]

Fourth, to justify granting the exemption Honeywell requests, must there be "special circumstances"—that is, either circumstances that are merely temporary or circumstances that were not considered by the Commission when it originally promulgated the pertinent regulation? Perhaps because Honeywell waived the opportunity to brief key legal issues prior to submission of the parties' statements of position in connection with the evidentiary hearing,[78] neither party directly addressed the issue. Implicitly, however, Honeywell appears to acknowledge such a requirement. Its 2006 exemption request expressly claimed "special financial circumstances"[79] and at the evidentiary hearing its counsel referred to Honeywell's "unique financial circumstances"[80] (although Honeywell's witnesses also claimed that the Commission's tangible net worth requirement "essentially is not a meaningful test for any major company").[81] For its

[76] NRC Staff Initial Statement of Position at 11–12, 16–20; see Honeywell Initial Statement of Position at 15–17.

[77] 10 C.F.R. § 40.14.

[78] Honeywell Position on Briefing Legal Issues at 1 ("Honeywell does not believe that initial briefing is necessary or warranted.").

[79] Honeywell Initial Statement of Position at 4.

[80] Tr. at 114 (Dec. 15, 2011 Evidentiary Hearing).

[81] See id. at 47–48 (Dec. 15, 2011 Evidentiary Hearing) (emphasis added).

part, the NRC Staff appears to agree that Honeywell cannot properly challenge the wisdom of the Commission's regulations under the guise of seeking a narrow exemption.[82]

The Board concludes, as a matter of law, that special circumstances must exist before it may grant the requested exemption. We are not free to re-examine fundamental policy judgments that are reflected in Commission regulations by creating exceptions to them in situations that will frequently recur. In such situations, the proper recourse lies in petitioning the Commission to change the regulation, not in seeking piecemeal revision of the Commission's rules by a licensing board. It is the role of the Commission to review licensing board decisions, and not the role of licensing boards to review and to reconsider the wisdom of the Commission's regulations.

This policy is expressed in numerous Commission regulations and decisions, and must be considered in determining whether Honeywell's requested exemption is "in the public interest" within the meaning of 10 C.F.R. § 40.14. Honeywell itself points the Board toward a "special circumstances" requirement. Honeywell contends that, in exercising our discretion under section § 40.14, the Board should be guided by the Commission's more detailed discussion of exemptions in the regulations that apply to Part 50 licensees.[83] Citing 10 C.F.R. § 50.12 (a)(2)(ii), Honeywell states: "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."[84]

Honeywell fails, however, to read section 50.12(a)(2)(ii) in its entire context. In addition to the provision on which Honeywell relies, section 50.12(a)(2) concludes with an overarching provision to the effect that an exemption may be appropriate where "[t]here is present any <u>other</u>

[82] Tr. at 20 (Aug. 11, 2011 Pre-Hearing Conference).

[83] Honeywell Initial Statement of Position at 16 n.37.

[84] <u>Id.</u>

material circumstance not considered when the regulation was adopted for which it would be in the public interest to grant an exemption."[85] For an exemption to be granted, section 50.12(a)(2) implies the existence of circumstances that were not considered by the Commission when it promulgated the pertinent regulation in the first place.

This interpretation of "special circumstances" is also consistent with the Commission's decisions under 10 C.F.R. § 2.335, concerning waivers of Commission regulations in adjudicatory proceedings. Much like section 50.12(a)(2)(ii), section 2.335(b) states that "[t]he sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted."[86] Expanding on the literal language of section 2.335, however, the Commission has further required that (1) such petitions must allege "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived," and (2) those circumstances must be "unique," rather than "common to a large class of facilities."[87]

In other words, when interpreting "special circumstances" under section 2.335—which employs language very similar to the definition of "special circumstances" under section 50.12(a)(2)(ii) upon which Honeywell relies—the Commission has made clear that more is required than that enforcement of a regulation might not be necessary in certain individual circumstances. Rather, it is also required that those circumstances be unusual if not unique, and that the Commission did not previously consider such circumstances—either explicitly or by necessary implication—when it promulgated the relevant regulation in the first place.

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[85] 10 C.F.R. § 50.12(a)(2)(vi) (emphasis added).

[86] 10 C.F.R. § 2.335(b).

[87] Dominion Nuclear Conn. Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559–60 (2005) (internal citations omitted).

This construction of "special circumstances" is also mandated by sound policy considerations. The Commission's regulations do not operate as a one-way street or safe harbor. In other words, they do not merely establish a standard that an applicant is entitled to invoke for its benefit, but that may then be disregarded whenever an applicant wants to argue its case on an individual, fact-specific basis. Not only would such a practice in effect transfer much ultimate policy-making from the Commission to its staff, but addressing case-by-case the inevitable multitude of requests for individual exemptions would divert resources that are better allocated to the agency's primary mission of ensuring that licensees comply with safety and environmental standards.

The pertinent regulatory history does not suggest that the tangible net worth requirement for self-guarantors should be lightly excused, either by the NRC Staff or by this Board. Indeed, when the Commission initially proposed financial requirements for self-guarantors, it included a $1 billion tangible net worth requirement.[88] When it ultimately decided to drop that absolute test in favor of the test in the final rule that tangible net worth must be at least ten times decommissioning costs, the Commission emphasized that nonetheless "tangible net worth will be an important factor in the requirements for self-guarantee."[89] The Commission voiced a preference for "conservative criteria," noting that "when the Commission has gained some experience with self-guarantee, it may consider an appropriate revision of the financial criteria."[90]

Honeywell's case presents especially strong reasons to apply the rule that fundamental and non-temporary modifications to regulations of the kind it seeks should be sought from the Commission rather than through exemption requests. It is significant that Honeywell in fact did

[88] Self-Guarantee as an Additional Financial Assurance Mechanism, 58 Fed. Reg. 68,726, 68, 726 (Dec. 29, 1993).

[89] Id. at 68,728.

[90] Id. (emphasis added).

participate in the recent Commission rulemaking proceeding concerning the regulation in question.[91] It was partially successful, in that, effective December 17, 2012, the Commission's requirements for self-guarantors will permit some recognition of goodwill.[92] Honeywell nonetheless failed to persuade the Commission to revise its regulations to allow a company to act as a self-guarantor if it lacks a positive tangible net worth of at least $21 million.[93] In effect, Honeywell's continued efforts to seek an exemption have the appearance of an attempted end-run around the Commission's decision not to revise its regulations in a way that would allow Honeywell to qualify as a self-guarantor without an exemption from the minimum tangible net worth requirement.

Fifth, must the Board evaluate Honeywell's exemption request on the basis of information that was available as of 2009, or should the Board consider more recent information? The NRC Staff argues for the first approach,[94] and Honeywell argues for the second.[95]

We agree with the NRC Staff. The Court of Appeals expressly remanded "Honeywell's April 11, 2009 exemption request to the Commission for further proceedings."[96] On remand before the NRC Staff, Honeywell never filed an NRC Form 313 (Application for Material License) seeking to expand the scope of that request, which sought an exemption only through May 11, 2010.

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[91] Tr. at 66 (Dec. 15, 2011 Evidentiary Hearing).

[92] Exh. NRC000015 at 35,524.

[93] See id.

[94] NRC Staff Initial Statement of Position at 20–21.

[95] Honeywell Reply to Hearing Request at 21–26.

[96] Honeywell, 628 F.3d at 581.

On the contrary, Honeywell expressly advised the NRC Staff on March 8, 2011 that it intended to submit "a new, updated request for an exemption . . . once the NRC completes its review of the pending request."[97] As Honeywell explained, "another exemption request would be pointless until the Commission adequately explains the reasons for rejecting Honeywell's third request."[98] Likewise, Honeywell's reply in support of a hearing before this Board characterized the issue to be heard as limited to re-consideration of its 2009 exemption request:

> As explained in Honeywell's request for hearing, Honeywell's application relates to an annual financial test. The application at issue relates to the 2009 test. Honeywell can re-apply at any time based on the latest financial data. However, the issues raised by the 2009 application will continue to recur until resolved, and the most efficient administrative process will be to address these issues now.[99]

Moreover, the Board will not consider an exemption request that was not made to the NRC Staff in the first instance. Although the Commission has delegated to the Board authority to adjudicate the issues raised by Honeywell's hearing request,[100] it has not empowered the Board to serve as an initial reviewer of exemption requests. That role belongs to the NRC Staff.[101]

Thus, in considering Honeywell's 2009 request, we must—as did the NRC Staff on remand—place ourselves in the shoes of the NRC Staff as of the time that request was initially ruled upon.[102]

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[97] Exh. HNY000040 (Letter from Larry Smith, Plant Manager, Honeywell, to NRC Document Control Desk, (Mar. 8, 2011)) at 3 (emphasis added).

[98] Id. (quoting Honeywell, 628 F.3d at 577).

[99] Honeywell Reply to Hearing Request at 6 n.8 (emphasis added).

[100] See 10 C.F.R. §§ 2.319, 2.321(c).

[101] See 10 C.F.R. §§ 2.100-2.103; Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-77-35, 5 NRC 1290, 1291 (1977) (finding no authority in the Atomic Energy Act or in NRC regulations for the Board to grant an exemption in the first instance).

[102] Exh. HNY000053 (Standard & Poor's, "Global Credit Portal, Ratings Direct, Summary: Honeywell Inc." (Feb. 11, 2011)) at 4–5.

On remand, as Honeywell points out,[103] the NRC must consider all relevant information. The key, however, is "relevant." Relevance is appropriately limited to the issues raised by the 2009 exemption application. We might of course conclude, after the fact, that Honeywell should have been accepted as a self-guarantor from May 2009 through May 2010—if we consider its financial condition as of the end of 2010 and 2011. But that would be much like wagering on the outcome of the Super Bowl after the game has been played.

In any event, the Board's ruling on this question also ultimately makes no difference. As explained below, our finding on at least one of the two dispositive issues—that is, whether "special circumstances" exist sufficient to justify an exemption from the Commission's regulations—necessarily would not change regardless of whether we look at Honeywell's circumstances as of 2009 or as of the present time.

III. SUMMARY AND ANALYSIS OF TESTIMONY AND EXHIBITS

The parties submitted their written direct pre-filed testimony on October 14, 2011 and their written rebuttal pre-filed testimony on November 3, 2011.[104] In total, the Board received pre-filed testimony from seven witnesses: two on behalf of Honeywell and five on behalf of the NRC Staff.[105]

During the evidentiary hearing, the Board heard live testimony, first from Honeywell's two witnesses, and then from the NRC Staff's five witnesses.[106] At the conclusion of the Board's witness questioning, the parties were given the opportunity to submit proposed rebuttal

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[103] Honeywell Initial Statement of Position at 21 (citing Union Camp Corp. v. United States, 53 F.Supp.2d 1310, 1327 (Ct. Int'l Trade 1999)).

[104] See Initial Scheduling Order at 3; Exh. HNY000001; Exh. NRC000001; Exh. HNY000059 (Rebuttal Testimony of John Tus and Bruce Den Uyl (Nov. 3, 2011)); Exh. NRC000053 (Reply Testimony of Roman Przygodzki, Kenneth Kline, Thomas Fredrichs, Paul Bailey, and John Collier (Nov. 3, 2011)).

[105] See Exh. HNY000001; Exh. NRC000001; Exh. HNY000059; Exh. NRC000053.

[106] See Tr. at 29, 76–77 (Dec. 15, 2011 Evidentiary Hearing).

questions for the Board to ask.[107] After reviewing the questions, the Board recalled the NRC Staff witnesses to respond to a question proposed by Honeywell.[108]

The veracity of all testimony, both pre-filed and live, was attested to by the respective witnesses, through either an affidavit or an oral oath.[109]

A. Honeywell's Testimony and Exhibits

Honeywell proffered two witnesses to testify on its behalf: John Tus and Bruce Den Uyl. Mr. Tus is the Vice President and Treasurer of Honeywell.[110] As such, he participates in preparing Honeywell's Securities and Exchange Commission filings and is responsible for overseeing aspects of Honeywell's capital structure, public debt ratings, and financial liquidity.[111] Mr. Den Uyl is the Managing Director and co-head of the Financial Advisory Services practice at AlixPartners.[112] He has over twenty-five (25) years of experience as a consultant to private companies and government agencies on financial and economic issues.[113]

In their testimony, Mr. Tus and Mr. Den Uyl discussed the basis for their opinion that the NRC Staff's denial of Honeywell's 2009 exemption request should be overturned.[114] Their main justification for why the 2009 exemption should have been granted was that the alternative test proposed in Honeywell's 2009 exemption, which would allow for inclusion of goodwill in meeting

[107] See, e.g., id. at 99–100.

[108] Id. at 101.

[109] See, e.g., id. at 29, 76–77; Exh. HNY000002 (Affidavit of John Tus (Oct. 14, 2011)); Exh. HNY000003 (Affidavit of Bruce Den Uyl (Oct. 14, 2011)); Exh. HNY000060 (Affidavit of John Tus (Nov. 3, 2011)), Exh. HNY000061 (Affidavit of Bruce Den Uyl (Nov. 3, 2011)); Exh. NRC000062.

[110] Exh. HNY000002.

[111] Id.

[112] Exh. HNY000003.

[113] Id.

[114] See Exh. HNY000059 at 2–3.

the 10:1 tangible net worth requirement in the 10 C.F.R. Part 30, Appendix C financial test, provided "more than ample basis for the NRC to conclude that . . . decommissioning funds will be available for the MTW."[115] In support of this view, Messrs. Tus and Den Uyl stated that Honeywell's free cash flow, which was in excess of $3.5 billion in 2010, could be used under normal circumstances to fund the MTW facility's decommissioning cost estimate, which is currently only $186,610,047, or 5% of Honeywell's 2010 free cash flow.[116] Moreover, the witnesses asserted that the alternative test would ensure that adequate funds would be available for decommissioning because numerous mechanisms, including a bond rating downgrade reporting requirement and the annual recertification requirement, "ensure that potential problem situations will be identified and addressed in a timely manner or that additional assurance mechanisms can be employed if needed."[117]

In addition, Messrs. Tus and Den Uyl pointed to bond ratings as strong indicators of Honeywell's financial strength, and hence its ability to pay any future decommissioning costs associated with the MTW facility. Mr. Tus described Honeywell as a "Fortune 75 diversified technology and manufacturing leader."[118] He testified that Honeywell's long term bonds are rated A2 by Moody's and A by Standard & Poor's, thus making them investment-grade.[119]

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[115] Exh. HNY000001 at 6–7; see also HNY000001 at 30, 31.

[116] See Exh. HNY000001 at 8, 32, 35, 41; see also Tr. at 38 (Dec. 15, 2011 Evidentiary Hearing). The estimated decommissioning cost for the MTW facility is based on a site reclamation cost estimate submitted to the NRC in January 2010. Exh. HNY000001 at 8.

[117] Exh. HNY000001 at 24, 26, 31, 32, 34.

[118] Id. at 8; see also Tr. at 35–36, 37 (Dec. 15, 2011 Evidentiary Hearing). Mr. Tus and Mr. Den Uyl emphasized the importance of Honeywell's diversification among multiple industries as a factor differentiating it from other A or A2 rated single industry companies that defaulted or nearly defaulted during the recent recession. See Exh. HNY000059 at 4–5. Similarly, they stressed that many of the articles that the NRC Staff rely on pertaining to default rates in 2009 focus on speculative-grade, or junk-rated, companies, while Honeywell was then and still is an "A-rated" investment-grade company. See id. at 5–7.

[119] Exh. HNY000001 at 9, 12; see also Tr. at 35 (Dec. 15, 2011 Evidentiary Hearing).

According to Mr. Tus, bond credit ratings are reliable indicators of financial strength, even during recessions such as the one experienced from 2008-2010, because they are the result of a rigorous quantitative and qualitative assessment of corporate creditworthiness.[120] In support of this proposition, Messrs. Tus and Den Uyl noted that the risk of an A or A2 rated company defaulting within one year is, on average, roughly between 0.065% and 0.08%, while the risk of an A or A2 rated company defaulting within five years is still on average only between 0.680% and 0.788%.[121] Thus, they stated that "[p]ut 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."[122]

Further, Messrs. Tus and Den Uyl asserted that Honeywell's intangible assets, including its goodwill, provide additional assurance of Honeywell's financial strength and ability to fully meet any decommissioning liabilities for the MTW facility. Mr. Tus testified that "Honeywell's business model is such that it often engages in acquisitions or other business combinations that generate significant amounts of goodwill."[123] According to Mr. Tus, this is exemplified by the fact that Honeywell has acquired approximately 65 companies at a cost of $8.5 billion since January 1, 2003.[124] A table included in Mr. Tus' initial pre-filed testimony showed that Honeywell's goodwill increased in value from $8.403 billion as of December 31, 2006 to $11.597

[120] Exh. HNY000001 at 10–12, 15, 26, 30, 33–34; see also Tr. at 43–47 (Dec. 15, 2011 Evidentiary Hearing). Similarly, Mr. Den Uyl contended that Moody's quarterly downgrade-to-upgrade ratio of 18.3:1 in the first quarter of 2009 along with Standard & Poor's report that 18.34% of non-defaulting issuers were downgraded during 2009 "demonstrate that, contrary to the NRC's assertions, ratings agencies are not reluctant to downgrade ratings when conditions warrant, but that they also take into account longer-term trends and expectations of future performance." Exh. HNY000001 at 38.

[121] See Exh. HNY000001 at 12–13, 25, 31, 33.

[122] Id. at 33; see also id. at 35.

[123] Id. at 16, 27.

[124] Id. at 16.

billion as of December 31, 2010.[125] Mr. Den Uyl contended that such goodwill could be used to meet Honeywell's decommissioning obligations because, contrary to the NRC Staff's assertions, goodwill is relatively liquid and "can often be converted into cash as quickly as tangible assets."[126]

While Honeywell's goodwill has steadily increased since 2006, Mr. Tus acknowledged that Honeywell's tangible net worth has significantly decreased since 2006: positive $70 million as of December 31, 2006; negative $1.451 billion as of December 31, 2007; negative $5.265 billion as of December 31, 2008; negative $3.697 billion as of December 31, 2009; and negative $3.384 as of December 31, 2010.[127] According to Mr. Tus, this decrease in tangible net worth is simply a result of Honeywell's business model, which focuses on acquisitions.[128] When asked whether Honeywell would again have a positive net worth, Mr. Tus testified that he "probably do[es] not see Honeywell returning to a positive tangible net worth situation given the strategy that we've laid out before us."[129]

In the opinion of Messrs. Tus and Den Uyl, however, tangible net worth is not a good indicator of financial strength given that many financially strong companies such as United Technologies Corp., Danaher, IBM, and Proctor & Gamble also had negative tangible net worth as of year-end 2010.[130] Specifically, the witnesses maintained that "for highly-rated companies, a negative tangible net worth is not a reflection of financial weakness," but instead "is at best a

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[125] Id. at 17. Mr. Tus and Mr. Den Uyl testified that goodwill is assessed annually using standard accounting practices to ensure that it is appropriately valued. Id. at 17–18. Honeywell's ratio of tangible net worth, including goodwill, to decommissioning liabilities was approximately 44:1 as of December 31, 2010, and 32:1 as of December 31, 2008. Id. at 31.

[126] Exh. HNY000059 at 7–9; see also Tr. at 69–70 (Dec. 15, 2011 Evidentiary Hearing).

[127] Exh. HNY000001 at 20.

[128] Tr. at 65 (Dec. 15, 2011 Evidentiary Hearing).

[129] Id. at 70.

[130] Exh. HNY000001 at 21, 40–41, 44.

crude measure of the worth of a diversified company in today's global environment."[131] Mr. Tus stated that tangible net worth bears no relation to the overall financial condition of any company in the Fortune 500 and that tangible net worth is essentially not a meaningful test for the financial strength of any major company.[132] Further, Mr. Tus estimated that of the Fortune 500 companies, approximately 100, or twenty percent, have a negative tangible net worth and thus would not meet the Commission's standards for a self-guarantee under 10 C.F.R. Part 30, Appendix C.[133] As a result, Messrs. Tus and Den Uyl concluded that "[o]verall, we do not believe that a minimum tangible net worth criteria is useful or relevant."[134]

Moreover, these witnesses both testified that they believe the recent final rule on decommissioning financial assurance, which will allow the use of intangibles in meeting the 10:1 financial test in 10 C.F.R Part 30, Appendix C but still require a minimum tangible net worth of $21 million for self-guaranteeing licensees, is baseless and inapplicable to Honeywell. That is because, in their view, "the proposed rule contains no recent analysis to support the use of a minimum tangible net worth."[135] Instead, they opined that "[a] minimum net worth test makes

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[131] Id. at 7, 27; see also id. at 29, 39–40; Tr. at 42, 47 (Dec. 15, 2011 Evidentiary Hearing). Further, Mr. Tus testified that:

> [T]hrough hundreds of hours of discussion with each of the rating agencies whose real[] responsibility [] is to evaluate our default risk when they give us a rating, [none] have [ever] raised the issue of tangible net worth as one of the factors considered in determining whether we should be A-rated or not.

Tr. at 47 (Dec. 15, 2011 Evidentiary Hearing).

[132] Tr. at 47–48 (Dec. 15, 2011 Evidentiary Hearing).

[133] Id. at 51–52.

[134] Exh. HNY000001 at 29; see also id. at 44 ("[T]he minimum tangible net worth criteria is not particularly meaningful as applied to large diversified companies like Honeywell.").

[135] Id. at 43–44.

more sense and would better reflect the strength of a company's ability to provide decommissioning financial assurance."[136]

Based on these factors, Messrs. Tus and Den Uyl concluded that the alternative test proposed by Honeywell is adequate to ensure Honeywell's ability to fund its decommissioning costs for the MTW facility and that denial of Honeywell's 2009 exemption request therefore cannot be justified.[137]

B. NRC Staff's Testimony and Exhibits

Five witnesses testified on behalf of the NRC Staff: Roman Przygodzki, Kenneth Kline, Thomas Fredrichs, Paul Bailey, and John Collier. Of those witnesses, three were directly involved in reviewing Honeywell's requests for an exemption from the 10:1 tangible net worth requirement in the 10 C.F.R. Part 30, Appendix C financial test—Roman Przygodzki, Kenneth Kline, and Thomas Fredrichs—and two were not—Paul Bailey and John Collier.[138]

Mr. Fredrichs was the primary financial reviewer for Honeywell's first exemption request in 2006.[139] He is a Senior Licensee Financial Policy Advisor in the NRC's Office of Nuclear Reactor Regulation. In that role, he serves as an expert on the evaluation of reactor licensee financial qualifications and provides guidance to the Commission and various NRC Offices on issues pertaining to licensee financial qualifications and performance.[140]

Mr. Kline was the primary reviewer for Honeywell's second exemption request in 2008. In addition, he also began reviewing Honeywell's third exemption soon after it was submitted in

[136] Id. at 45 (emphasis in original).

[137] Id. at 47.

[138] Exh. NRC000001 at 3; Exh. NRC000053 at 2.

[139] Exh. NRC000001 at 3.

[140] Id. at 1–2.

April of 2009, but became busy later that year with various other projects.[141] Mr. Kline is a Financial Assurance Project Manager in the NRC's Office of Federal and State Materials and Environmental Management Programs.[142] As such, he reviews and analyzes decommissioning funding plans, financial instruments, financial statements, and other documents associated with the NRC Staff's review of licensing actions.[143]

Mr. Przygodzki became the primary contributor to the NRC Staff's decision on Honeywell's third consecutive exemption request around October of 2009 when Mr. Kline became busy with other projects.[144] He was involved with both the NRC Staff's initial decision on Honeywell's 2009 exemption request and the NRC Staff's April 2011 decision on remand.[145] Until October 21, 2011, Mr. Przygodzki was a Financial Assurance Project Manager in the NRC's Office of Federal and State Materials and Environmental Management Programs and performed duties similar to Mr. Kline's.[146] He currently serves as a Financial Analyst with the U.S. Pension Benefit Guaranty Corporation.[147]

Messrs. Bailey and Collier both work for ICF International, Mr. Bailey as a Senior Fellow and Mr. Collier as a Vice President. ICF International is a professional services company that is active in public policy areas including energy, environment, health, and transportation.[148] While neither Mr. Bailey nor Mr. Collier specifically reviewed the exemption requests at issue in this

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[141] Id. at 3.

[142] Id. at 1.

[143] See id.

[144] Tr. at 78 (Dec. 15, 2011 Evidentiary Hearing).

[145] Exh. NRC000001 at 3.

[146] Id. at 1; Exh. NRC000053 at 1.

[147] Exh. NRC000053 at 1.

[148] Id. at 1–2.

proceeding, each has had over twenty years of experience in the areas of financial assurance and cost estimation.[149]

Messrs. Przygodzki, Kline, and Fredrichs testified that, in 2006, Honeywell applied for, and was granted, an exemption allowing it to include goodwill in the definition of "tangible net worth" for purposes of meeting the 10:1 tangible net worth requirement of the 10 C.F.R. Part 30, Appendix C financial test for self-guarantors.[150] According to Mr. Fredrichs, in granting the 2006 exemption request, the NRC Staff relied on Honeywell's bond ratings, along with other financial data, including Honeywell's tangible net worth to decommissioning cost ratio of 7.9:1.[151] Further, Mr. Fredrichs noted that, in granting the 2006 exemption request, the NRC Staff specifically informed Honeywell that, if it wished to use goodwill permanently to meet the 10:1 financial test, Honeywell would have to seek such a change through rulemaking.[152]

Unlike the 2006 exemption request, however, Mr. Kline acknowledged that, when Honeywell applied for a similar exemption from the 10:1 tangible net worth requirement of 10 C.F.R. Part 30, Appendix C in 2008, the NRC Staff's decision to grant the exemption request "was a much closer call."[153] Nonetheless, he justified the NRC Staff's decision to grant the 2008 exemption request, stating that 2007 was the first year Honeywell had a negative tangible net worth, and "its history suggested that it would come back into compliance with the 10-to-1

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[149] Exh. NRC000054 (Statement of Professional Qualifications of Paul Bailey (Nov. 3, 2011)) at 1; Exh. NRC000055 (Statement of Professional Qualifications of John Collier (Nov. 3, 2011)) at 1.

[150] Exh. NRC000001 at 3.

[151] Id. at 6. As Mr. Fredrichs testified, although the 7.9:1 ratio was lower than the 10:1 ratio required by 10 C.F.R. Part 30, Appendix C, it was actually higher than the 6:1 ratio required by the parent company guarantee test in 10 C.F.R. Part 30, Appendix A. Id.

[152] Id.

[153] Id. at 3, 7; Tr. at 79 (Dec. 15, 2011 Evidentiary Hearing).

test."[154] This was especially true, in Mr. Kline's opinion, given Federal Reserve reports at the time claiming that the economy was stabilizing and that economic growth would pick up gradually over the next two years.[155]

According to Messrs. Przygodzki and Kline, however, by the time that it applied for its third consecutive exemption in 2009, Honeywell's financial condition had deteriorated such that the exemption was no longer warranted.[156] They testified that, while the NRC Staff had numerous reasons for denying the 2009 exemption request, the stated basis for the denial of the exemption in the NRC Staff's 2009 decision centered on the multi-billion-dollar decline in tangible net worth that Honeywell experienced from 2007 to 2008.[157]

On remand from the United States Court of Appeals for the District of Columbia Circuit, the NRC Staff again denied Honeywell's 2009 exemption request in an April 2011 decision.[158] As Mr. Przygodzki testified, the first justification that the NRC Staff proffered in that decision concerned the unreliability of bond ratings.[159] According to Mr. Przygodzki, the global financial crisis had entered a far more serious phase by the time the NRC Staff was reviewing Honeywell's 2009 exemption request.[160] As a result, the reliability of the bond ratings was being called into question.[161] In support of this claim, the NRC Staff witnesses cited a 2009 World Bank report stating that "[i]n the United States . . . faulty credit ratings and flawed rating

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[154] Exh. NRC000001 at 7.

[155] Id.

[156] See id. at 2.

[157] Id. at 8.

[158] See id. at 2.

[159] See id. at 9.

[160] Id. at 13; Exh. NRC000053 at 3.

[161] Exh. NRC000001 at 9–13, 29; Exh. NRC000053 at 3, 9, 11–12.

processes are widely perceived as being among the key contributors to the global financial crisis . . . ."[162] Specifically, Mr. Przygodzki stated that the NRC Staff was concerned that the credit rating agencies either might not timely react to market events or might be reluctant to downgrade the ratings of certain companies for fear of the adverse impact that a downgrade could have on the company.[163] Even if bond ratings were reliable in 2009, Messrs. Przygodzki, Kline, and Fredrichs all reiterated that "although bonds ratings are relevant to whether a licensee can self-guarantee decommissioning funding, they by no means address all of the NRC's concerns in this area."[164]

In addition, Mr. Przygodzki asserted that numerous other reasons, as enumerated in the NRC Staff's April 2011 denial decision, caused the NRC Staff to deny Honeywell's 2009 exemption request, including concerns regarding the ability of Honeywell's free cash flow and assets to guarantee the availability of decommissioning funds. According to Mr. Przygodzki, the NRC Staff rejected Honeywell's claim that a large free cash flow supported issuance of the exemption, "[b]ecause free cash flow is not committed to the NRC and financial distress might substantially eliminate this potential source of funding."[165] Similarly, Mr. Przygodzki stated that the NRC Staff also rejected Honeywell's argument that its strong asset base provided decommissioning financial assurance because such assets were already accounted for in a separate part of the 10 C.F.R. Part 30 financial test.[166]

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[162] Exh. NRC000053 at 9 (quoting Exh. NRC000044 (Jonathan Katz, Emanuel Salinas & Constantinos Stephanou, The World Bank Group, Credit Rating Agencies: No Easy Regulatory Solutions (Oct. 2009)) at 1).

[163] Exh. NRC000001 at 12; Exh. NRC000053 at 6, 7–8, 15 ("Other reports identified additional concerns with credit rating agencies, particularly with respect to conflicts of interest and information disclosure.").

[164] Exh. NRC000053 at 5; see also id. at 5–7.

[165] Exh. NRC000001 at 14–15; see also Tr. at 83 (Dec. 15, 2011 Evidentiary Hearing).

[166] Exh. NRC000001 at 15.

Further, Mr. Przygodzki stated that Honeywell's significant decline in tangible net worth prior to its 2009 exemption request played a significant role in the NRC Staff's April 2011 denial decision.[167] He testified that Honeywell's tangible net worth when it requested the 2009 exemption was negative $5.3 billion—a $3.8 billion decline since its previous exemption request in 2008.[168] Such a drastic decline in tangible net worth, he noted, would require Honeywell to rely significantly more on goodwill in meeting the 10:1 net worth test than ever before.[169] Mr. Przygodzki and Mr. Collier asserted that such a heavy reliance on goodwill was problematic because goodwill is relatively illiquid, thus increasing the potential for delays in converting goodwill into cash, and hence delays in decommissioning.[170]

Moreover, Messrs. Przygodzki, Kline, and Fredrichs all testified that Honeywell's continuing decline in tangible net worth between 2008 and 2009 was significant because it "made clear that [Honeywell] would not soon return to compliance with § 40.36(e)."[171] As Mr. Fredrichs testified, Honeywell had initially claimed that the exemption would be temporary, and

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[167] Id.

[168] Id.

[169] Id. at 15, 17 ("[W]hereas Honeywell needed $3.7 billion in goodwill to meet the 10-to-1 test in 2008, for 2009 it would have needed $6.8 billion. . . . This meant that Honeywell was greatly increasing its reliance on an asset class that might not promptly pay for decommissioning costs."); see also id. at 30; Exh. NRC000053 at 21.

[170] Exh. NRC000001 at 15–17; Exh. NRC000053 at 17–19, 20, 21–22; Tr. at 80 (Dec. 15, 2011 Evidentiary Hearing); see also Exh. NRC000053 at 3 ("Honeywell's heavy reliance on goodwill to self-guarantee financial assurance in 2009 . . . created the risk that, if Honeywell fell into financial distress, it might experience a delay generating funds for decommissioning activities."). Further, according to Mr. Przygodzki, the global financial crisis led the NRC Staff to believe that Honeywell's goodwill, which it relied so heavily on in the 2009 exemption request, might be subject to significant impairment at rates faster than any financial tests could adequately capture. Exh. NRC000001 at 18; see also Tr. at 84–85, 86, 88 (Dec. 15, 2011 Evidentiary Hearing). According to the NRC Staff, in order to have fallen out of compliance with the 2009 exemption, Honeywell would have had to have sustained a goodwill impairment of roughly $3 billion. Tr. at 91 (Dec. 15, 2011 Evidentiary Hearing). Nonetheless, the NRC Staff claimed that comparable, and even larger, goodwill impairments have recently occurred. Id. at 91–92.

[171] Exh. NRC000001 at 19.

the NRC Staff relied on these claims in granting the exemptions because "we always thought that they would bridge that gap, that they would . . . come back into compliance."[172] However, according to these witnesses, by 2009 it was clear that "[w]hat might have been an anomaly was now a trend."[173]

In sum, Mr. Pryzgodzki testified that the April 2011 denial letter found that the unreliability of bond ratings during the global financial crisis, together with Honeywell's increased reliance on relatively illiquid goodwill, all elevated the risk that funds might not be available to decommission the MTW facility when needed: "[T]here were questions as to whether Honeywell would be able to timely produce the cash needed to decommission the facility."[174] Should decommissioning funds prove to be unavailable when needed, Mr. Przygodzki contended, the spread of contamination from a compromised facility could pose serious public health and safety concerns.[175] As a result, Mr. Przygodzki asserted that Honeywell's 2009 exemption request failed to meet the 10 C.F.R. § 40.14 requirement that the exemption must not endanger life or property of the common defense and security.[176] For similar reasons, the witness stated that Honeywell's 2009 application failed to meet the second part of 10 C.F.R. § 40.14, which requires that an exemption be in the public interest:[177] "[T]he

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[172] Tr. at 104–05 (Dec. 15, 2011 Evidentiary Hearing).

[173] Exh. NRC000001 at 19.

[174] Tr. at 81 (Dec. 15, 2011 Evidentiary Hearing); Exh. NRC000001 at 20.

[175] See Tr. at 81–82 (Dec. 15, 2011 Evidentiary Hearing).

[176] Exh. NRC000001 at 20; see also Exh. NRC000053 at 4.

[177] Exh. NRC000001 at 22; Tr. at 82 (Dec. 15, 2011 Evidentiary Hearing). Mr. Przygodzki conceded, however, that Honeywell's 2009 exemption request did meet the first requirement of 10 C.F.R. § 40.14 because it was "authorized by law" to the extent that it was not prohibited by law. Exh. NRC000001 at 22. As Mr. Przygodzki testified, the NRC Staff did not include discussions regarding whether Honeywell's 2009 exemption request met the "authorized by law," threat to "life or property or common defense and security," or "otherwise in the public interest" portions of 10 C.F.R. § 40.14 because the NRC Staff sought to respond only to the specific arguments that Honeywell made in support of its 2009 exemption request. Id.

statements of consideration for the financial assurance rules have stated that delays in decommissioning are of concern, and that would certainly endanger life or property."[178]

IV. FINDINGS OF FACT

Upon reviewing the evidentiary record, the Board finds the following facts by a preponderance of the evidence:

A. Circumstances Not Temporary

1. For the reasons more fully set forth in Findings 2 through 11, Honeywell's request for an exemption from the requirements of 10 C.F.R. § 40.36 and 10 C.F.R. Part 30, Appendix C does not involve circumstances that are expected to be only temporary.

2. Although Honeywell had used a self-guarantee method in previous years, as of December 31, 2005 Honeywell no longer satisfied the Appendix C requirement of having a tangible net worth at least ten times its current decommissioning cost estimate.[179]

3. As of December 31, 2005, Honeywell's tangible net worth had declined to $1.929 billion, thus resulting in a 7.9:1 ratio instead of the required 10:1 ratio.[180]

4. As of December 31, 2006, Honeywell's tangible net worth had further declined to $70 million.[181]

5. As of December 31, 2007, Honeywell's tangible net worth had further declined to a negative $1.451 billion.[182]

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[178] Tr. at 81–82 (Dec. 15, 2011 Evidentiary Hearing).

[179] Exh. NRC000006 at 1.

[180] Id. at 3: Exh. HNY000004, Attachment 1 at 5; Exh. HNY000011 at 2.

[181] Exh. HNY000001 at 20.

[182] Exh. HNY000005; Exh. HNY000011 at 2.

6. As of December 31, 2008, Honeywell's tangible net worth had further declined to a negative $5.265 billion.[183]

7. As of December 31, 2009, Honeywell's tangible net worth had somewhat improved, but remained a negative $3.7 billion.[184]

8. As of December 31, 2010, Honeywell had a tangible net worth of negative $3.4 billion.[185]

9. Honeywell continues to have a negative net worth, thus resulting in its failure to satisfy the requirements of 10 C.F.R. Part 30, Appendix C for seven consecutive years (2005-2011).[186]

10. Honeywell continues to pursue a business strategy (acquisition of other businesses with substantial intangible assets) that makes it unlikely that Honeywell will reverse its tangible net worth situation any time soon.[187]

11. In the opinion of Honeywell's Treasurer, John Tus, he "probably do[es] not see Honeywell returning to a positive tangible net worth situation given the strategy that we've laid out before us."[188]

B. Circumstances Considered by the Commission

12. For the reasons more fully set forth in Findings 13 through 19, Honeywell's request for an exemption from the requirements of 10 C.F.R. § 40.36 and 10 C.F.R. Part 30,

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[183] Exh. HNY000011 at 2.

[184] Exh. HNY000001 at 20.

[185] Id.

[186] Id.

[187] Exh. HNY000008 (Letter from Honeywell to NRC Providing Supplemental Information to Request for Extension of Exemption from Decommissioning Financial Assurance Requirements (Oct. 13, 2009)) at 2, 5; Exh. NRC000001 at 19–20.

[188] Tr. at 70 (Dec. 15, 2011 Evidentiary Hearing).

Appendix C does not involve circumstances that the Commission failed to consider, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived.

13. Honeywell's financial circumstances are not so unusual that the Commission might not have foreseen them when it promulgated the requirements of 10 C.F.R. Part 30, Appendix C. On the contrary, Honeywell itself contends that other, similarly-situated companies "often have a negative tangible net worth due, in part, to growing via acquisitions."[189]

14. As Honeywell points out, well-known companies such as United Technologies, Danaher, IBM and Proctor & Gamble each had a negative tangible net worth as of year-end 2010.[190]

15. Honeywell's Treasurer estimated that, of all Fortune 500 companies, approximately 20%—that is, 100 major corporations—might have a negative tangible net worth and thus could not satisfy the Commission's standards for a self-guarantee under Appendix C.[191]

16. Rather than demonstrate that its own financial circumstances are unusual or unique, Honeywell contends that "[o]verall, we do not believe that a minimum tangible net worth criteria is useful or relevant."[192]

17. Honeywell asserts that, "for highly-rated companies" (that is, the only companies that might possibly qualify under Appendix C, given the requirement for an "A" bond rating), "a negative tangible net worth is not a reflection of financial weakness."[193]

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[189] Exh. HNY000001 at 21 (emphasis added).

[190] Id. at 21, 40–41, 44.

[191] Tr. at 51–52 (Dec. 15, 2011 Evidentiary Hearing).

[192] Exh. HNY000001 at 29.

[193] Id. at 7, 29, 39–40.

18. Honeywell asserts that a tangible net worth "bears no relation to the overall financial condition" of any Fortune 500 company and "essentially is not a meaningful test for any major company."[194]

19. Rather than demonstrating that Honeywell's financial circumstances are unusual or unique, Honeywell's exemption request directly challenges the wisdom of the Commission's decision to employ a tangible net worth test in 10 C.F.R. Part 30, Appendix C.

C. Honeywell's Financial Condition

20. For the reasons more fully set forth in Findings 21 through 45, in 2009 Honeywell was a financially healthy Fortune 75 diversified technology and manufacturing company.

21. Honeywell serves customers worldwide with aerospace products and services; control technologies for buildings, homes and industry; automotive products; turbochargers; and specialty materials.[195]

22. Honeywell is the parent company for all Honeywell subsidiaries and affiliates.[196]

23. Honeywell has more than 130,000 employees doing business in more than 100 countries, with a market capitalization of approximately $34 billion as of September 30, 2011.[197]

24. In 2010, Honeywell's $33.4 billion in sales were distributed among four primary lines of business: automated control solutions (41%), aerospace (32%), specialty materials (14%), and transportation systems (13%).[198]

25. Bond credit ratings take into account numerous financial metrics and qualitative analyses, including the assessment of a business's market position, diversification, liquidity, and

[194] See Tr. at 47–48 (Dec. 15, 2011 Evidentiary Hearing).

[195] Exh. HNY000001 at 8.

[196] Id.

[197] Exh. HNY000013 (Presentation to NRC Staff, "Financial Assurance for Decommissioning" (Mar. 14, 2011)) at 2.

[198] Exh. HNY000001 at 8.

ability to generate future cash flows. Bond rating agencies also monitor a company to determine whether its rating should be changed, and then downgrade or upgrade the rating as appropriate.[199]

26. Honeywell's long term bonds have been rated "A2" by Moody's and "A" by Standard & Poor's, the minimum ratings allowed for a self-guarantor under the 10 C.F.R. Part 30, Appendix C financial test, for 17 years.[200]

27. An "A" rating is an "investment-grade" rating, which corresponds to a very low default rate.[201]

28. Honeywell did not experience any limitations on its ability to access the commercial paper markets throughout the global financial crisis that began in 2007.[202]

29. Since December 31, 2005, Honeywell's quarter-end cash balances have been no less than $1.2 billion.[203]

30. Free cash flow is the cash a company generates from its operations less the cost of its capital expenditures—essentially, the money that a company could return to shareholders if the company grew no further.[204]

31. Honeywell's free cash flow grew from $2.2 billion in 2006 to $3.6 billion in 2010, even after making a $600 million voluntary pension contribution.[205]

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[199] Id. at 33–35, 37–39.

[200] Id. at 9; Exh. HNY000013 at 13; 10 C.F.R. Part 30, Appendix C.

[201] Exh. HNY000001 at 12, 31–32.

[202] See id. at 31–32; Tr. at 73 (Dec. 15, 2011 Evidentiary Hearing).

[203] Exh. HNY000001 at 31–32.

[204] Id. at 21–22.

[205] Id. at 9.

32. While Honeywell's sales and net income declined by 15% and 23% respectively between 2008 and 2009, it maintained a free cash flow of $3.1 to $3.3 billion.[206]

33. Honeywell's total decommissioning liabilities for the MTW facility are approximately $187 million.[207]

34. Tangible assets are assets that have a physical existence, such as cash, equipment, inventory, and real estate. Accounts receivable are also usually considered tangible assets for accounting purposes.[208]

35. Honeywell's tangible assets have increased from approximately $21 billion at the end of 2006 to approximately $24 billion at the end of 2010.[209]

36. Net worth, or shareholder equity, represents a company's total assets minus its total liabilities.[210]

37. Honeywell's net worth grew from $7.1 billion in 2008 to $10.8 billion in 2010.[211]

38. Honeywell's tangible net worth increased during the course of the NRC Staff review of the pending amendment application at issue here: from negative $5.3 billion at the end of 2008, to negative $3.7 billion at the end of 2009, to negative $3.4 billion at the end of 2010.[212]

39. Honeywell's goodwill increased in value from $8.403 billion as of December 31, 2006 to $11.597 billion as of December 31, 2010.[213]

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[206] Id. at 9.

[207] Id. at 8.

[208] See id. at 20; see also Tr. at 57–58 (Dec. 15, 2011 Evidentiary Hearing).

[209] See Exh. HNY000001 at 20.

[210] See id. at 45.

[211] Id. at 9–10.

[212] Id. at 20.

[213] Id. at 17.

40. Honeywell's goodwill is assessed annually using standard accounting practices.[214]

41. Since at least 2005 (the period of time covered by the three consecutive exemption requests), Honeywell has had no impairments of goodwill.

42. Even in 2008, when the NRC expressed concern that Honeywell needed to apply 67% of its goodwill to satisfy the 10 C.F.R. Part 30, Appendix C financial test, if it had been permitted to include goodwill toward satisfaction of that test, Honeywell would have to write down more than 30% of its goodwill before it would no longer meet the financial test.

43. Honeywell's ratio of tangible net worth, including goodwill, to decommissioning liabilities was approximately 44:1 as of December 31, 2010, and 32:1 as of December 31, 2008.[215]

44. Honeywell currently has $4 billion in cash.[216]

45. Honeywell has a $2.8 billion five-year committed revolving credit facility.[217]

D. Adverse Factors

46. For the reasons more fully set forth in Findings 47 through 96, notwithstanding Honeywell's financial condition, granting its 2009 request for an exemption from the requirements of 10 C.F.R. § 40.36 and 10 C.F.R. Part 30, Appendix C could adversely affect the likelihood that adequate funds would be available to decommission Honeywell's MTW uranium conversion facility. Honeywell's bond ratings were not necessarily a good indicator of its financial condition at a time when markets were fluctuating rapidly and generally in decline. For

[214] Id. at 17–18.

[215] Id. at 31.

[216] Tr. at 73 (Dec. 15, 2011 Evidentiary Hearing).

[217] Exh. HNY000001 at 9; Exh. HNY000059 at 9–10.

this and other reasons, it was possible that Honeywell could fall into financial distress rapidly before the NRC's next annual re-evaluation.

47. In 2007, the global economy entered the early stages of possibly the most severe economic crisis since the Great Depression.[218]

48. In late 2008, not long after the NRC Staff granted Honeywell's second exemption request, the global economy took a sharp downward turn.[219]

49. When Honeywell applied for an exemption in April 2009, future business and economic conditions remained highly uncertain.[220]

50. The Congressional Budget Office had recently stated that "[t]he sudden decline in economic activity in the second half of [2008] signaled that the recession could be severe . . . [and that] [n]ormally, sharp contractions in economic activity are followed by rapid rebounds, but this forecast anticipates that the recovery in 2010 will be slow[.]"[221]

51. This significant uncertainty was not limited to narrow sectors of the economy. For example, although the financial sector experienced high numbers of corporate defaults in 2008 and 2009, other sectors of the economy were also affected.[222]

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[218] Exh. NRC000028 (Jon Hilsenrath, Serena Ng, & Damian Paletta, Worst Crisis Since '30s, With No End Yet in Sight, Wall Street Journal (Sept. 18, 2008)); Exh. NRC000047 (Financial Crisis Inquiry Commission, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States (Jan. 2011)) at 353–86.

[219] Exh. NRC000001 at 9–11; see also Exh. NRC000048 (Federal Reserve Bank of St. Louis, The Financial Crisis: A Timeline of Events and Policy Actions (2011)) at 6–9; Exh. NRC000034 (Ingo Fender & Jacob Gyntelberg, Overview: Global Financial Crisis Spurs Unprecedented Policy Actions, BIS Quarterly Review (Dec. 2008)) at 1.

[220] Exh. NRC000001 at 10–11, 12–14.

[221] Exh. NRC000037 (Congressional Budget Office, The Budget and Economic Outlook: Fiscal Years 2009 to 2019 (January 2009)) at 4.

[222] Exh. HNY000025 (Moody's Default and Recovery Rates of Corporate Bond Issuers, 1920–2009) at 3.

52. Throughout late 2008 and 2009, the economy experienced a rising number of corporate defaults across broad sectors. By the end of May 2009, the number of defaults, 135, more than quadrupled the number of defaults during the same period in 2008.[223]

53. By the time the NRC Staff issued its December 2009 denial decision, corporate defaults were on pace to reach an unprecedented level.[224]

54. When Honeywell requested its third exemption in 2009, it had the same bond ratings—an "A" rating by Standard & Poor's and an "A2" rating by Moody's—that it had when the Staff granted the first two exemptions. Although excellent ratings, they are the minimum ratings allowed under Appendix C. As Honeywell's Treasurer testified, Honeywell's amount of debt and level of profitability prevented it from qualifying for higher bond ratings.[225]

55. By 2009, the financial downturn in late 2008 also had raised significant questions about the reliability of bond ratings in general. Credit rating agencies came under widespread scrutiny in 2008 and 2009 for failing to accurately rate companies that had fallen into financial distress. For example, Standard & Poor's did not downgrade the "A" bond rating of Lehman Brothers until the very same day the company filed for bankruptcy, September 15, 2008.[226]

56. In October 2009, just two months before the NRC Staff initially denied Honeywell's exemption request, the World Bank reported: "In the United States and Europe faulty credit ratings and flawed rating processes are widely perceived as being among the key contributors to the global financial crisis. . . . That has brought them under intense scrutiny and

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[223] Exh. NRC000039 (David Wessel, Another Milestone: U.S. Corporate Defaults to Date Match Total for All '08, Wall Street Journal (May 29, 2009)).

[224] Exh. NRC000041 (U.S. Corporate Defaults, The Economist (June 18, 2009)); Exh. NRC000043 (Chelsea Emery & Emily Chasan, Unprecedented U.S. Corp. Defaults Seen for '09, Reuters Business and Financial News (Sept. 29, 2009)).

[225] Tr. at 68–69 (Dec. 15, 2011 Evidentiary Hearing).

[226] See Exh. NRC000026 (Standard & Poor's, Research Update: Lehman Bros. Holdings Downgraded To 'Selective Default'; Other Lehman Entities To 'BB-' or 'R' (Sept.15, 2008)).

led to proposals for radical reforms."[227]

57. In 2009, the World Bank identified several factors that might cause rating agencies to delay downgrading the bond ratings of even troubled companies. The World Bank explained that:

> A downgrade can have such an adverse effect on a rated sovereign or corporate issuer that it can destabilize the issuer or the market for its securities. Rating agencies may therefore be reluctant to downgrade because of the impact on the (usually not publicly disclosed) triggers in private financial contracts, even if the downgrade is already reflected in market prices.[228]

58. In 2009, the World Bank also explained that factors such as incompetence and time horizon may also lead to delays in downgrading bond ratings.[229]

59. Other organizations began to question the reliability of bond ratings in 2009. In September 2009, the U.S. Securities and Exchange Commission unanimously approved a number of rulemaking actions to strengthen oversight of credit rating agencies.[230]

60. In April 2009, the European Union approved regulations establishing registration and supervision requirements for credit rating agencies.[231]

61. Also in April 2009, G-20 leaders reached an agreement stating that agencies

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[227] Exh. NRC000044 at 1; see also Exh. NRC000046 (Richard J. Herring, Pew Financial Reform Project, Policy Issues Concerning the Reform of the Credit Rating Agencies (Nov. 19, 2009)) at 17 ("In view of the widespread criticism of the performance of the [credit rating agencies] before and during the credit crisis, it is surprising that we still lack consensus about how they should be reformed.").

[228] Exh. NRC000044 at 4–5.

[229] Id. at 4. "Time horizon" refers to the fact that "ratings are intended to be 'through the cycle' indicators—based on hard data and subject to appeal processes—that strike a balance between short-term accuracy and longer-term stability." Id. In other words, ratings are not necessarily intended to capture short-term changes in companies' financial positions.

[230] Exh. NRC000057 (Press Release, U.S. Securities and Exchange Commission, SEC Votes on Measures to Further Strengthen Oversight of Credit Rating Agencies (Sept. 17, 2009)); Exh. NRC000058 (Fact Sheet, U.S. Securities and Exchange Commission, Strengthening Oversight of Credit Rating Agencies Open Meeting of the Securities and Exchange Commission (Sept. 17, 2009)).

[231] Exh. NRC000044 at 5.

whose ratings are used for regulatory purposes should be subject to oversight.[232]

62. The widespread concern in 2009 that a company's bond ratings might not accurately reflect its financial condition likewise raised the concern that, notwithstanding its bond rating, Honeywell might fall into financial distress during the period covered by its exemption request.

63. As Honeywell asserts, credit rating 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." This means, however, that bond ratings may not capture downward trends that the rating agencies perceive to be short-term, even where the agencies are aware of those trends.[233]

64. Overall, among companies that Standard & Poor's rated as having investment grade bonds, fourteen defaulted in 2008, and another eleven defaulted in 2009.[234]

65. Likewise, among companies that Moody's rated as having investment–grade bonds, fourteen defaulted in 2008, and another eleven defaulted in 2009.[235]

66. In contrast, there were only two investment-grade defaults for Moody's and five for Standard and Poor's over the entire period 2003–2007.[236]

67. If a licensee's bond rating were to drop significantly in a short period of time, the licensee could have difficulty meeting the requirement in Appendix C, § II.C that it establish

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[232] Id.

[233] Honeywell Initial Statement of Position at 37; Exh. HNY000001 at 37–39; Exh. NRC000053 at 7–8, 14–15, 16.

[234] Exh. HNY000030 at 9, Table 4; Exh. HNY000031 (Standard & Poor's – 2009 Annual Global Corporate Default Study and Rating Transitions) at 1–2, Table 1.

[235] Exh. HNY000026 (Moody's Default and Recovery Rates of Corporate Bond Issuers, 1920–2010) at 15.

[236] Exh. HNY000026 at 15; Exh. HNY000031 at 1–2, Table 1.

alternate financial assurance within 120 days after notifying the NRC of its downgrade.[237]

68. Obtaining alternate financial assurance in a timely manner could be difficult during a period when there is a sudden tightening of loan conditions, as occurred in 2008 and 2009.[238] This would give rise to the risk that for some period of time a licensee could be unable to provide financial assurance through any NRC-approved method.[239]

69. Honeywell's tangible net worth when it requested the 2009 exemption was negative $5.3 billion. This was a decline of $3.8 billion from when Honeywell submitted its 2008 exemption request.[240]

70. Because of this decline in tangible net worth, for 2009 Honeywell would have needed to rely on significantly more goodwill to meet the alternative 10:1 ratio that the NRC Staff had previously approved.

71. Whereas Honeywell needed $3.7 billion in goodwill to meet this alternative financial test in 2008, for 2009 that amount would have been $6.8 billion. This was an increase of $3.1 billion.[241]

72. Compared to tangible assets, and even compared to certain other intangible assets, in certain circumstances goodwill may be relatively illiquid, and difficult to convert promptly into cash.

73. The rights to a patent, copyright, or franchise can be identified separately and bought or sold. Goodwill, on the other hand, is inseparable from a business and is transferable

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[237] Exh. NRC000053 at 8–9, 19.

[238] Id.

[239] Id.

[240] Exh. NRC000018 (NRC Staff Table, Honeywell Financial Data Relied on in Exemption Requests (Sept. 15, 2011)).

[241] Id.; Exh. NRC000021 (NRC Staff Chart, Tangible Net Worth Shortfall to Meet 10-to-1 Test of 10 CFR 30, Appendix C (Sept. 15, 2011)).

only as an inseparable intangible asset of an enterprise.[242]

74. To convert goodwill into cash, a company like Honeywell would have to negotiate and execute the sale of an entire business or business line.[243]

75. Selling a business or business line can involve numerous steps. These steps can include solicitations of interest, the execution of confidentiality agreements, analyses of business plans and staff qualifications, appraisals, negotiations, inspections of financial and accounting records, reviews of procedures, the drafting and execution of contracts, and other actions.[244]

76. The process of selling an entire business is often much more complicated and more time-consuming than the sale of only tangible assets like buildings, vehicles, or equipment.[245]

77. Another factor affecting the liquidity of goodwill is encumbrances related to corporate indebtedness. In its post-hearing response to the Board's questions, Honeywell stated that its "$7,117 million of senior unsecured public debentures are governed by bond indentures that restrict Honeywell's ability to mortgage principal manufacturing properties located within the U.S. or to pledge the shares of the capital stock of any subsidiary owing such properties. . . ."[246] Accordingly, to that degree Honeywell's indebtedness encumbers or restricts its goodwill.

78. If Honeywell cannot mortgage certain properties, it cannot raise funds from loans against, or sale of, those properties without permission of the bondholders, and the goodwill

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[242] Exh. NRC000023 (Generally Accepted Accounting Principles Guide § 23.04).

[243] Exh. NRC000001 at 15–17; Exh. NRC000053 at 18–19.

[244] Exh. NRC000053 at 18–19.

[245] Id.

[246] Exh. HNY000065 at 1–2.

associated with such properties is encumbered. Similarly, if Honeywell is unable to pledge the shares of a subsidiary owning certain properties, this restricts the sale of, or borrowing against, those shares and thereby makes difficult or impossible using the goodwill associated with the subsidiary as a foundation for financing or assuring decommissioning funding.

79. In 2009, Honeywell would have needed to rely on significantly more goodwill—$3.1 billion more—to meet the conditions of its prior exemptions. This increased the possibility that, if Honeywell fell into financial distress and had to begin decommissioning the MTW facility, it would have needed to convert goodwill into cash to generate decommissioning funding.

80. To support its 2009 exemption request, Honeywell also had to devote a much higher percentage of its goodwill toward meeting the 10:1 alternative net worth test that the NRC Staff had previously approved. In 2007, Honeywell needed only 7% of its goodwill to meet this requirement.

81. By 2008 the percentage of Honeywell's goodwill needed to meet the alternative financial test had increased to 40%.

82. For 2009, Honeywell would have needed 67% of its goodwill to meet the alternative financial test. This was a 67% increase over 2008, and an 857% increase over 2007.[247]

83. For 2009, to meet the alternative financial test, Honeywell would have been both increasingly relying on assets that might not be readily available to fund decommissioning activities and relying on a much greater share of those assets to provide financial assurance.[248]

84. Honeywell's reliance on such a high percentage of its goodwill to satisfy the 10:1 ratio in 2009 raised a concern regarding the possibility of goodwill impairment. Impairment

[247] Exh. NRC000018; see also NRC000022 (NRC Staff Chart, Percentage of Honeywell's Total Goodwill Relied On to Meet Tangible Net Worth Test (September 15, 2011)).

[248] Exh. NRC000001 at 17–19; Exh. NRC000018; Exh. NRC000022.

occurs when the fair market value of goodwill is less than its stated value.[249]

85. If Honeywell were to experience goodwill impairment that was not promptly recognized, it could have fallen out of compliance with the conditions of its exemption without the NRC or even Honeywell itself becoming aware of the noncompliance. This risk was greater in 2009 than in prior years because of Honeywell's increased reliance on goodwill to meet the conditions of its exemption.[250]

86. In 2009, goodwill impairment of approximately $3.36 billion would have placed Honeywell out of compliance with the condition of its exemption allowing it to use goodwill to meet the 10:1 net worth requirement in Appendix C. By comparison, in 2008 it would have taken goodwill impairment of approximately $5.48 billion for Honeywell to fall out of compliance with that condition.[251]

87. In June 2009, KPMG, a major international auditing firm, cautioned that goodwill valuation "is not an exact science and that it has never been more difficult than it is now to ascribe a value to an entity."[252] Over the time period in question, the goodwill reported on Honeywell's balance sheets associated with acquisitions remained at the value originally booked. KPMG, however, reported that in the United States "goodwill impairment in 2008 more than doubled to US$339.6 billion, with the median charge going up ten-fold. . . . [and] [t]he number of companies in the U.S. study that had impairment in 2008 increased to nearly 20

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[249] Tr. at 84 (Dec. 15, 2011 Evidentiary Hearing); Exh. NRC000001 at 17–18.

[250] Tr. at 86 (Dec. 15, 2011 Evidentiary Hearing); Exh. NRC000001 at 17–19; Exh. NRC000053 at 23–24.

[251] These amounts are obtained by taking Honeywell's goodwill for each year and subtracting its tangible-net-worth shortfall. On Exhibit NRC000018, this involves subtracting the first row in the bottom table from the second row in the top table.

[252] Exh. NRC000040 (Press Release, KPMG, Goodwill Impairment in 2009 (June 12, 2009)); see also Tr. at 88 (Dec. 15, 2011 Evidentiary Hearing); Exh. HNY000033 (Statement of Financial Accounting Standards No. 142, Goodwill and Other Intangible Assets (June 2001)) at 15.

percent; up almost three-fold from the previous year."[253] KPMG stated that "the situation could actually worsen still further during the remainder of 2009."[254]

88. It would not have been unprecedented for a large company like Honeywell to experience goodwill impairment of over $3 billion, the amount that would have caused Honeywell to fall out of compliance with the conditions of its exemption.[255]

89. At the end of 2008, the parent company of Western Nuclear, an NRC licensee that is covered by a parent company guarantee, had taken a goodwill impairment charge of almost $6 billion.[256]

90. In March 2002, Tyco International had taken a goodwill impairment charge of over $6 billion, a charge that reflected nearly all of the goodwill associated with Tyco Capital.[257]

91. If Honeywell were to fall into financial distress, it is uncertain whether its free cash flow would remain at a level necessary to fund decommissioning activities.[258]

92. Free cash flow could be diverted for purposes other than decommissioning and, if Honeywell were in financial distress, the NRC's claim on Honeywell's free cash flow might be subordinated to the claims of other stakeholders.

93. In the event of Honeywell's financial distress or bankruptcy, the use of any other permissible methods for assuring availability of decommissioning funds (use of dedicated set-

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[253] Exh. NRC000040.

[254] Id.

[255] Tr. at 92–93 (Dec. 15, 2011 Evidentiary Hearing).

[256] Exh. NRC000036 (U.S. Securities and Exchange Commission, Freeport-McMoRan Copper & Gold Inc. Form 10-K Annual Report For Fiscal Year Ending Dec. 31, 2008) at 141.

[257] Exh. NRC000051 (U.S. Securities and Exchange Commission, Tyco International Ltd. Amendment No. 2 on Form 10-K/A to Form 10-K Annual Report for Fiscal Year Ended September 30, 2002) at 94–95.

[258] Tr. at 83 (Dec. 15, 2011 Evidentiary Hearing); Exh. NRC000001 at 14–15; Exh. NRC000053 at 24.

aside funds or recourse to a letter of credit or other surety mechanism) provides a measure of security of the payment of decommissioning funding that is not provided through an assumption that funding obligations can be satisfied out of free cash flow.

94. As with free cash flow, there could be no guarantee Honeywell's market capitalization would remain the same if the company were to fall into financial distress. To the contrary, the factors that might cause Honeywell to enter financial distress would likely be reflected in declining market capitalization.

95. Although Honeywell contends that its revolving credit facility might be used to pay decommissioning costs, Honeywell's access to funds under its credit facility could be terminated if Honeywell were to fall into financial distress.[259]

96. Requiring Honeywell to incur the cost of complying with 10 C.F.R. § 40.36(e) is not unreasonable. No other NRC licensee has been granted an exemption allowing it to use goodwill to meet the financial test for either the self-guarantee method (Appendix C) or the parent guarantee method (Appendix A).[260]

V. CONCLUSIONS OF LAW

1. Honeywell's request for an exemption from the requirements of 10 C.F.R. § 40.36 and 10 C.F.R. Part 30, Appendix C does not involve special circumstances and therefore must be denied as a matter of law. Specifically, Honeywell's request involves neither circumstances that are expected to be only temporary nor circumstances that the Commission failed to consider, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived. This is so regardless of whether the Board considers Honeywell's circumstances as of 2009 or as of the present time.

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[259] Exh. HNY000018 (Honeywell Form 10-K, Annual Report for Fiscal Year Ended Dec. 31, 2008) at 76–77.

[260] Exh. NRC000001 at 20–21.

2. Honeywell's 2009 request for an exemption fails to satisfy the requirements of 10 C.F.R. § 40.14. Because granting the requested exemption could adversely affect the likelihood that adequate funds would be available to decommission Honeywell's MTW uranium conversion facility, granting the exemption would potentially endanger life or property. Thus, granting Honeywell's requested exemption would not be in the public interest.

VI. CONCLUSION

Honeywell's request for an exemption from the requirements of 10 C.F.R. § 40.36 and 10 C.F.R. Part 30, Appendix C is DENIED.

In accordance with 10 C.F.R. § 2.1210, this initial decision will constitute final action of the Commission on Honeywell's 2009 exemption request forty (40) days after its issuance (i.e., on April 9, 2012), unless: (1) a party files a petition for Commission review within fifteen (15) days after service of this initial decision; or (2) the Commission directs otherwise.[261] Within ten

[261] 10 C.F.R. § 2.1210(a); 10 C.F.R. § 2.1212; 10 C.F.R. § 2.341(b).

(10) days after service of a petition for Commission review, parties to the proceeding may file an answer supporting or opposing Commission review.[262] A party who seeks judicial review of this decision must first seek Commission review, unless otherwise authorized by law.[263]

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

/RA/

Paul B. Abramson
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 29, 2012

[262] Any petition for Commission review and any answer shall conform to the requirements of 10 C.F.R. § 2.341(b)(2)-(3).

[263] 10 C.F.R. § 2.1212.

Additional Statement of Judge Abramson

I concur with my colleagues in concluding that Honeywell has failed to demonstrate that it is entitled to an exemption from the requirement that it have a positive tangible net worth in order to be permitted to self-guaranty its decommissioning obligations. However, for me the decision is much simpler than we have explained in the Initial Decision to which this Additional Statement is appended.

The governing regulation provides, as we have noted, four permissible methods for providing adequate assurances that there will be sufficient funds for satisfaction of decommissioning obligations as and when needed. With one narrow exception, all of those permissible methods provide either set-aside dedicated funds that are outside the reach of Honeywell and its creditors, or a guaranty by a third party to fulfill the obligations of Honeywell should it fail to meet them itself. In the latter situation, the third party's obligations run directly to the NRC and are thereby similarly free of the reach of any of Honeywell's creditors. The NRC has agreed to accept the credit risk of Honeywell alone only under the very explicitly crafted conditions of 10 C.F.R. Part 30, Appendix C, and the provision from which Honeywell seeks an exception requires it to have a specified minimum tangible net worth. As we discussed at length in the Initial Decision, Honeywell seeks to modify that provision to permit it to include certain intangible assets; i.e., it seeks to amend that provision to enable it to use the sum of its tangible net worth and that portion of its intangible assets identified as goodwill in place of tangible net worth alone.

The Commission has quite explicitly crafted this provision for a specific purpose aimed at protecting the public from bearing the costs of decommissioning; to create a credit situation that gives the NRC, and therefore all of our stakeholders, confidence that licensees can fulfill their decommissioning financial obligations all by themselves.[1] The Commission has, as we noted,

[1] A good example of the importance of this matter to the Commission is evident in the fact that during the financial crisis referred to in the Initial Decision, the Commission required those

made perfectly clear that this provision is fundamental to its willingness to accept the credit risk of solely the licensee (when it accepts the self-guarantee of the licensee). It has reconsidered the necessity of the provision on several occasions, and has consistently retained some requirement for at least a minimally positive tangible net worth.

From my perspective, there is simply no rationale for a grant of the relief requested by Honeywell, nor should, in my view, the staff have granted the requested modification of this particular requirement on any of the times when Honeywell had a negative tangible net worth, with the possible exception of the first instance when the situation might indeed have been temporary. The modification previously accepted, and the proposed modification currently sought by Honeywell, both so modify the requirement as to gut its significance. Permission to include intangible assets of any sort is plainly outside the contemplation of the current regulation, and not only does goodwill represent a large portion of Honeywell's assets but it is not readily convertible into cash to fulfill the obligations at issue. Permitting this modification does not serve the public interest, instead substantially deviating from the financial risk profile established in the requirement.[2] For this reason alone, I would not grant the requested exemption.

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licensees of nuclear power plants who found that the value of assets in their set-aside decommissioning funds had decreased during that financial downturn to promptly "top up" those funds to the required levels.

[2] I note that the evaluations assigned to goodwill on Honeywell's balance sheets was established at the acquisition of the enterprises with which it was associated, and that amount is, although consistent with GAAP, simply the excess of the purchase price of each enterprise over the valuation of tangible and identifiable intangible (such as patents) assets less the assumed liabilities. As we indicated in the Initial Decision, goodwill can only be converted into cash available for payment of decommissioning obligations in connection with a sale of the enterprise with which it was associated—an activity that is complex and time-consuming and as to which there is no guarantee of receipt of sums represented by the booked valuation of goodwill. Therefore, I do not find it to be a reliable measure of Honeywell's ability to satisfy its decommissioning obligations in a timely manner, and I do not believe it appropriate, despite subsequent approval by the Commission, that the 10:1 ratio requirement be modified to be a computation of the ratio of the sum of tangible net assets plus goodwill to the decommissioning obligations. It is notable that even the Commission's new rule does not eliminate a requirement

Further, Honeywell asks that we accept, in addition to consideration of its goodwill toward the 10:1 ratio, its financial condition, as evidenced by its bond ratings, its free cash, and availability of potential drawings on its revolver, as sufficient financial backstop for its obligations. As we noted in the Initial Decision, the rating of Honeywell's bonds was at the minimum acceptable level and was subject to some uncertainty in the timeframe in question because of the possibility of a rapid change in financial stability as evidenced by occurrences affecting other similarly situated corporations. And, as our findings implied, so was the availability of either free cash or drawing on the Honeywell revolver to satisfy those obligations. For these reasons, I do not find that Honeywell's financial condition was such that it would be appropriate for the agency to directly accept the credit risk of Honeywell during that period when the tangible net worth test was also not met.

Nonetheless, I agree that there are undoubtedly other methods by which Honeywell can avoid the cost to which it objects of purchasing and supplying to the NRC a letter of credit or other surety. Among them are a myriad of collateralized first priority security arrangements that would put the NRC in substantively similar secure financial situations as it would be through use of any of the other permissible methods of assuring adequate decommissioning funding. Properly crafted, such collateralized obligations could be free of the reach of Honeywell's other creditors and accessible by the NRC as and when needed to satisfy the relevant decommissioning obligations. If, as Honeywell has testified, its assets are (except as we noted above) in essence unencumbered by its bond indentures and its revolving credit facility, then dedication of such collateral as is sufficient to provide adequate assurances should be a straightforward matter.

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for some minimal tangible net worth—although the revised test bears no relationship to decommissioning funding needs.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
HONEYWELL INTERNATIONAL INC.	)	DOCKET NO. 40-3392-MLA
(Metropolis Works Uranium Conversion Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing INITIAL DECISION (LBP-12-06) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of February 2012