April 11, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

HONEYWELL'S REPLY BRIEF IN
SUPPORT OF PETITION FOR REVIEW OF LBP-12-06

Pursuant to 10 C.F.R. § 2.341(b)(3), Honeywell files this reply brief in support of its petition for review of the Licensing Board decision, LBP-12-06, dated February 29, 2012.

A. Licensing Board incorrectly required Honeywell to demonstrate the existence of special circumstances for an exemption under Part 40.

According to the NRC Staff, Honeywell "is wrong" when it states that the Board imposed an additional requirement for granting an exemption that is not found in 10 C.F.R. § 40.14.[1] But, the Board clearly held that, "as a matter of law," special circumstances must exist before the exemption could be granted.[2] Neither the Board nor the Staff cites any Commission precedent interpreting the Part 40 exemption provision in such a fashion. In fact, the NRC Staff acknowledges that "more recent Commission and Board decisions involving § 40.14 and similarly worded regulations do not expressly state that a special circumstances finding is necessary."[3] And, as importantly, the NRC Staff itself has not previously required a showing of

1 "NRC Staff's Answer to Honeywell's Petition for Review," dated April 6, 2012 at 4.

2 *Id*. at 16.

3 *Id*. at 9.

"special circumstances" in granting a similar exemption to Honeywell on two prior occasions.[4] In fact, the NRC Staff's prior analysis has applied only the public interest factor:

> The exemption is in the interest of the public because resources will not be expended on the alternate financial assurance methods that would increase the likelihood that funds for decommissioning will not be available when needed.

There is no basis for the NRC Staff to now argue that special circumstances has been a requirement all along when it has clearly not applied such reasoning previously. And, as the D.C. Circuit previously pointed out, "an agency must provide a reasoned explanation for any failure to adhere to its own precedents."[5] No such explanation has been provided here.[6]

B. Even assuming special circumstances are necessary under Section 40.14, the Licensing Board incorrectly found that no special circumstances exist.

The NRC Staff argues that the Board "reasonably concluded that the phrase 'special circumstance' implies an applicant needs to point to some factor the NRC did not consider."[7] The NRC Staff's interpretation has the same effect as Honeywell's characterization

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4 Exhs. HNY000009 (at 53) and HNY000010 (at 3).

5 *Honeywell v. NRC*, 628 F.3d 568, 579 (D.C.Cir. 2010) *citing Hatch v. FERC,* 654 F.2d 825, 834 (D.C.Cir. 1981).

6 The Board and the NRC Staff's interpretation of the exemption criteria in Section 40.14 has implications far beyond this proceeding. The new "special circumstances" test would also apply to uranium recovery, deconversion, fuel fabrication, and enrichment facilities. And, the Board's re-interpretation of the special circumstances criteria under Section 50.12(a)(2), discussed further below, undermines decades of precedent involving exemptions issued to reactor licensees, which have not historically been required to show the existence of circumstances that were not contemplated during the rulemaking.

7 *Id*. The NRC Staff cites (at n.24) a Board decision involving an exemption issued on the basis of "the realities of the Licensee's current financial situation." To the extent that the NRC Staff is arguing that this conclusion reflects application of special circumstances that were not considered in promulgating the rule, the same logic would apply to Honeywell. Honeywell's particular financial circumstances as they existed in 2009, 2010, or 2011 obviously could not have been contemplated during the self-guarantee

of the Board decision: limit application of 10 C.F.R. § 50.12(a)(2)(i)-(v) to situations not considered in promulgating the rule. But, there is no basis in Section 50.12 or the rulemaking history for limiting exemptions to situations involving circumstances that were not considered in promulgating the rule from which an exemption is sought. Even a cursory review of the rulemaking history shows that the Commission was concerned with a number of different situations (*e.g.*, equity, hardship, more effective implementation of policy) in addition to — not just in the case of — circumstances different from those considered in the rulemaking.[8] The Board's reading, with the NRC Staff's apparent concurrence, would fundamentally alter the Section 50.12 exemption criteria — which is contrary to the language of the rule and creates a significant precedent and policy issue.

The Board also failed to test Honeywell's application against all of the Section 50.12 special circumstances criteria. The Board concludes (LBP-12-06 at 50) that no special circumstances are present because "[s]pecifically, 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 ignores at least one other special circumstance that is present in this case: 10 C.F.R. § 50.12(a)(2)(ii), which applies where application of the rule would not serve or "is not necessary" to achieve rule's "underlying purpose."[9] This special circumstance was explicitly identified by Honeywell in its Written Statement of Initial Position (at 16 n.37), Rebuttal Statement of Position (at 17-18), and Proposed Findings of Fact and

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rulemaking. Under this approach, Honeywell has demonstrated special circumstances in the form of "the realities" of its "current financial situation."

8 "Specific Exemptions; Final Rule," 50 Fed. Reg. 50764, 50776-50777 (Dec. 12, 1985).

9 Other potentially applicable special circumstances include 10 C.F.R. § 50.12(a)(2)(iii), which applies where compliance would result in "undue hardship."

Conclusions of Law (at 3 n.6). By failing to properly apply the special circumstances criteria in Section 50.12(a)(2) and by failing to address at least one special circumstance present here, the Board compounded its initial error.

C. The Licensing Board erred in limiting its review of information available between May 2009 and May 2010.

The NRC Staff argues that the Board was correct to find that the exemption is not a "live" request.[10] But, this ignores basic administrative law. Until there is a final decision by the NRC, *as an agency* — not just a determination by the NRC Staff or an initial decision by the Board — the exemption request remains pending. Honeywell is entitled to a *de novo* review of the exemption request in the hearing process. The approach of the Staff and the Board in effect denies that opportunity, by turning the hearing into an after-the-fact assessment akin to an appellate review.

The NRC Staff cites the Board's assertion that basing a decision on current information, even though the exemption period is long-expired, "would be much like wagering on the outcome of the Super Bowl after the game has been played."[11] But, by adding facts and analysis to the record to support their ultimate conclusion (denial of the exemption) while ignoring new data and information that undermines that conclusion, the Board and the NRC Staff were allowed, using their analogy, to referee the Super Bowl having already decided which team should win the championship trophy. Post hoc rationalizations of agency decisions and cherry-picking of information are not permitted precisely for this reason.[12] On remand, an agency must

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10 Staff Answer at 12.

11 *Id*., *citing* LBP-12-06 at 21.

12 *See e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 50 (1983); *see also National Treasury Employees Union v. Seidman*, 786 F. Supp. 1041, 1046 (D.D.C. 1992)

consider all information to satisfy the Administrative Procedure Act — not just information that supports its initial position.

D. There is no support in the record for a finding that Honeywell could enter financial distress or be unable to fund decommissioning within a one-year period.

Lastly, the NRC Staff's answer is conspicuously silent on the lack of a basis in the record for a finding of financial distress or for finding that Honeywell has inadequate funds to pay for decommissioning even in the event of a hypothetical default. There is nothing in the record to show anything other than a very low risk of default for Honeywell. Nor is there any indication in the record that Honeywell's "A-rating" is unwarranted. There is likewise nothing in the record that even hints at a potential inability of Honeywell to pay for decommissioning, especially in light of Honeywell's net worth in excess of $10 billion, $4 billion in cash, and $24 billion in tangible assets that could be used first (in lieu of intangible assets).[13] These are critical links in the Board's logical chain that lack support in the record.

For the above reasons, the Commission should grant the petition for review.

Respectfully submitted,

/s/ signed electronically by
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Dated at Washington, District of Columbia
this 11th day of April 2012

(citation omitted) ("[T]he agency may not unilaterally determine the scope of the record by leaving out records detrimental to its case.")

[13] *See* Findings of Fact ¶¶35-37.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "HONEYWELL'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW OF LBP-12-06" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 11th day of April 2012, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

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