

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

HONEYWELL INTERNATIONAL INC.

(Metropolis Works Uranium
Conversion Facility)

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Docket No. 40-3392

ASLBP No. 11-910-01-MLA-BD01

NRC STAFF'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

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February 10, 2012

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I. INTRODUCTION

1.1. These findings and conclusions address the application Honeywell International Inc. (Honeywell) filed on April 1, 2009 for an exemption from the NRC's financial assurance requirements for decommissioning. The exemption would have allowed Honeywell to provide financial assurance through a method that did not meet the specific requirements in NRC regulations. The NRC Staff denied Honeywell's exemption request, and Honeywell challenges the Staff's denial decision.

1.2. For the reasons stated below, we find that Honeywell fails to prove it should be granted the requested exemption.

II. BACKGROUND

2.1. Honeywell operates the Metropolis Works Facility, a uranium conversion facility in Metropolis, Illinois. Honeywell holds NRC source materials license SUB-526, which allows it to possess and use NRC-licensed material at the Metropolis Works Facility.

2.2. Under NRC regulations, a licensee must assure it has sufficient funds to decommission its facility. 10 C.F.R. § 40.36.¹ A licensee has a number of options for meeting

¹ Section 40.36 applies to certain source materials licensees. Other NRC regulations establish financial assurance requirements for other types of licensees.

its decommissioning funding obligations. These options include prepayment or the use of a surety method such as a surety bond, letter of credit, parent company guarantee, or self-guarantee.² If the licensee chooses to self-guarantee, it must “furnish[] its own guarantee that funds will be available for decommissioning costs and . . . demonstrat[e] that [it] passes the financial test of Section II” in 10 C.F.R. Appendix C.³ Among other requirements, to pass the financial test of Section II a licensee must have tangible net worth at least 10 times its current decommissioning cost estimate.⁴

2.3. In 2005, Honeywell applied for renewal of its license for the Metropolis Works Facility.⁵ Although Honeywell had used a self-guarantee to provide financial assurance in previous years, by 2005 its tangible net worth had declined to the point where it no longer met the 10-to-1 requirement in § II.A.(1) of Appendix C.⁶ In December 2006, while its renewal application was still under review, Honeywell sought an exemption allowing it to use both tangible assets and goodwill,⁷ an intangible asset, to meet that requirement.⁸

² See 10 C.F.R. § 40.36(e) (establishing financial requirements and incorporating the financial tests in Appendices A, C, D and E of 10 C.F.R. Part 30).

³ 10 C.F.R. Part 30, Appendix C, § I. 10 C.F.R. Appendix E provides a self-guarantee method for non-profit institutions, but this method is not relevant to the issues before us.

⁴ Appendix C, § II.A.(1). The decommissioning cost estimate must cover all decommissioning activities for which the company is responsible as a self-guaranteeing licensee. *Id.*

⁵ Letter to M. Raddatz, NRC, from D. Edwards, Honeywell, Re: Renewal of Source Materials License for Honeywell with Enclosures that Include the 2004 Annual Report (May 27, 2005) (Agency Documents Access Management System (ADAMS) Accession No. ML052310382) (Exh. NRC000005).

⁶ Letter from Jeffrey Neuman, Honeywell, to Director, NRC/NMSS, Regarding a Meeting Held Between Honeywell Representatives and NRC Staff to Review the Financial Assurance Requirements for Decommissioning Liability at Honeywell for the Metropolis Facility (November 3, 2006) (ADAMS Accession No. ML11287A428) (Exh. NRC000006).

⁷ Goodwill “represent[s] the future economic benefits arising from other assets acquired in a business combination that are not individually identified and separately recognized.” Statement of Financial Accounting Standards No. 141 (Revised), Business Combinations (Exh. HNY000035) at 2.

⁸ Letter to NRC from Honeywell Re: Request for Exemption from Decommissioning Financial Assurance Requirements (December 1, 2006) (Exh. HNY000004).

2.4. On May 11, 2007, the Staff renewed Honeywell's license for the Metropolis Works Facility. On that same date, the Staff granted Honeywell's December 2006 request for an exemption allowing it to use goodwill to meet the 10-to-1 tangible net worth requirement in § II.A.(1) of Appendix C.⁹ However, the Staff also added a condition to Honeywell's license stating that the exemption would expire one year from the date of license renewal; that is, by May 11, 2008.¹⁰

2.5. On April 11, 2008, Honeywell applied for a one-year extension of its exemption.¹¹ The Staff approved Honeywell's application on August 22, 2008.¹² The condition limiting Honeywell's exemption to one year remained in its license, with a new expiration date no later than May 11, 2009.¹³

2.6. On April 1, 2009, Honeywell again sought a one-year extension of its exemption.¹⁴ This time the Staff found that an exemption could not be granted. On December 11, 2009, the Staff denied Honeywell's application.¹⁵

⁹ Honeywell International Inc., License Amendment 0 to Source Materials License SUB-526 (May 11, 2007) (ADAMS Accession No. ML071280120) (Exh. NRC000007).

¹⁰ *Id.*

¹¹ Letter to NRC from Honeywell Re: Request for Exemption of Decommissioning Financial Assurance Requirements (April 11, 2008) (ADAMS Accession No. ML081060399) (Exh. HNY000005); see also Letter to NRC from Honeywell, "Supplemental Information" (May 15, 2008) (ADAMS Accession No. ML081410585) (Exh. HNY000007).

¹² Letter to Honeywell from NRC Re: Granting Extension of One-Year Exemption (August 22, 2008) (ADAMS Accession No. ML082250707) (Exh. HNY000010).

¹³ Honeywell International Inc., License Amendment 2 to Source Materials License SUB-526 (August 22, 2008) (ADAMS Accession No. ML082310439) (Exh. NRC000008). Although the condition limiting Honeywell's exemption to one year remained in its license, the Staff revised this condition so that Honeywell's exemption expired the earlier of "(1) May 11, 2009, or (2) the effective date of a final rule amending 10 CFR Part 30 consistent with the proposed [revisions to the NRC's decommissioning planning] rule published in the *Federal Register* on January 22, 2008." *Id.* The Staff added part (2) to the license condition to address the possibility that the revised decommissioning planning rule, which proposed certain changes to the Appendix C financial test, might become effective before May 11, 2009. Because this did not occur, Honeywell's second exemption expired on May 11, 2009.

¹⁴ Letter to NRC from Honeywell Re: Request for Extension of Exemption from Decommissioning Financial Assurance Requirements (April 1, 2009) (ADAMS Accession No. ML090920087) (Exh. HNY000006); see also Letter from Honeywell to NRC Providing Supplemental Information to Request for

2.7. Honeywell appealed the NRC's decision to the United States Court of Appeals for the District of Columbia Circuit. On December 21, 2010, the Court vacated the NRC's decision, finding the NRC had not explained sufficiently why Honeywell's 2009 exemption request should be denied.¹⁶ The Court remanded Honeywell's 2009 exemption request to the NRC for further proceedings.¹⁷

2.8. On remand, the Staff considered whether it properly denied Honeywell's 2009 exemption request. After further review, the Staff determined that its initial decision was correct and that Honeywell's exemption request must still be denied. The Staff informed Honeywell of its decision in an April 25, 2011 letter.¹⁸

2.9. On June 22, 2011, Honeywell requested a hearing before the NRC on the Staff's April 2011 decision.¹⁹

2.10. On July 6, 2011, this Board was established to rule on Honeywell's hearing request and to preside over any adjudicatory proceeding held in connection with the Staff's denial of Honeywell's exemption request.²⁰

Extension of Exemption from Decommissioning Financial Assurance Requirements (October 13, 2009) (ADAMS Accession No. ML092940177) (Exh. HNY000008).

¹⁵ Letter from NRC to Honeywell Providing a Denial of the Honeywell Request for an Exemption from Decommissioning Financial Assurance Requirements (December 11, 2009) (ADAMS Accession No. ML093170604) (Exh. HNY000011).

¹⁶ *Honeywell v. NRC*, 628 F.3d 568, 580–81 (D.C. Cir. 2010).

¹⁷ *Id.* at 581.

¹⁸ Response to Court Remand on Denial of Exemption Request (April 25, 2011) (ADAMS Accession No. ML110600286) (Exh. HNY000012).

¹⁹ Request for Hearing on Denial of Decommissioning License Amendment Request (Jun. 22, 2011) (ADAMS Accession No. ML111730810).

²⁰ *Honeywell International Inc.; Establishment of Atomic Safety And Licensing Board*, 76 Fed. Reg. 41,311 (July 13, 2011).

2.11. On July 27, 2011, we granted Honeywell's hearing request.²¹ We thereafter issued a scheduling order establishing deadlines for the submission of evidentiary materials and legal pleadings.²² We also reserved dates for an oral hearing.²³

2.12. The hearing procedures we adopted for this proceeding are found in 10 C.F.R. Part 2, Subpart L, "Informal Hearing Procedures for NRC Adjudications."²⁴ These procedures specify that the parties submit testimony and exhibits in writing (prefiled testimony and prefiled exhibits).²⁵ This is followed by an oral hearing at which the Board questions the witnesses.²⁶ The parties are allowed to propose written questions for the Board to consider asking witnesses at the oral hearing.²⁷

2.13. On October 14, 2011, the parties submitted initial statements of position, initial testimony, and supporting exhibits.²⁸ On November 3, 2011, the parties submitted reply statements of position, reply testimony, and additional exhibits.²⁹

²¹ Memorandum and Order (Granting Request for Hearing) (Jul. 27, 2011) (ADAMS Accession No. ML11208C184).

²² Initial Scheduling Order (August 23, 2011) (ADAMS Accession No. ML11235A706), at 2–3.

²³ Notice of Hearing (September 13, 2011) (ADAMS Accession No. ML11256A154).

²⁴ Initial Scheduling Order at 3.

²⁵ 10 C.F.R. § 2.1207(a).

²⁶ 10 C.F.R. § 2.1207(b).

²⁷ 10 C.F.R. § 2.1207(a)(3).

²⁸ Honeywell Written Statement of Initial Position (October 14, 2011) (ADAMS Accession No. ML11287A261) (Honeywell Initial Statement); Testimony of John Tus and Bruce Den Uyl (October 14, 2011) (ADAMS Accession No. ML11349A265) (Exh. HNY000001); NRC Staff's Initial Statement of Position (October 14, 2011) (ADAMS Accession No. ML11287A451) (NRC Staff Initial Statement); NRC Staff's Testimony Regarding Honeywell's 2009 Exemption Request (October 14, 2011) (ADAMS Accession No. ML11349A297) (Exh. NRC000001).

²⁹ Honeywell Rebuttal Statement of Position (November 3, 2011) (ADAMS Accession No. ML11307A499) (Honeywell Reply Statement); Rebuttal Testimony of John Tus and Bruce Den Uyl (November 3, 2011) (ADAMS Accession No. ML11349A293) (Exh. HNY000059); NRC Staff's Reply to Honeywell's Initial Statement of Position (November 3, 2011) (ADAMS Accession No. ML11307A551) (NRC Staff Reply Statement); NRC Staff's Reply Testimony (November 3, 2011) (ADAMS Accession No. ML11349A339) (Exh. NRC000053).

2.14. On November 14, 2011, the parties proposed questions for us to consider asking witnesses at the oral hearing.³⁰

2.15. On December 15, 2011, we held an oral hearing at NRC Headquarters in Rockville, Maryland. At the hearing we admitted into evidence Honeywell's prefiled exhibits HNY000001 through HNY000064 and the Staff's prefiled exhibits NRC000001 through NRC000061.³¹ We also admitted into evidence exhibit NRC000062, which contains affidavits relating to the Staff's prefiled testimony.³²

2.16. During the oral hearing we heard testimony from panels of witnesses representing both Honeywell and the NRC Staff. We also heard opening and closing statements from counsel for both Honeywell and the NRC Staff.

2.17. At the close of the oral hearing, we directed Honeywell to submit additional information regarding the goodwill upon which it proposes to rely to satisfy the requirements in Appendix C.³³ On January 4, 2012, Honeywell submitted an affidavit addressing whether its goodwill is encumbered as a result of the company's indebtedness.³⁴ On January 5, 2012, we asked Honeywell to clarify its response.³⁵ Honeywell submitted a second affidavit on January 12, 2012.³⁶ We have admitted Honeywell's two new affidavits into evidence as exhibits

³⁰ The proposed questions were filed *in camera*. Now that the oral hearing is complete, these questions will become part of the public record for this proceeding.

³¹ Transcript of Oral Hearing (Honeywell International Inc., Metropolis Works Facility) (December 15, 2011) (ADAMS Accession No. ML11354A1040) (Transcript) at 7–8.

³² *Id.* at 7–8.

³³ Tr. at 129–31.

³⁴ Affidavit of John Tus (January 4, 2012) (ADAMS Accession No. ML12004A102) (Exh. HNY000065).

³⁵ Order (Requesting Clarification of Honeywell Response) (January 5, 2012) (ADAMS Accession No. ML12005A254).

³⁶ Affidavit of John Tus (January 12, 2012) (ADAMS Accession No. ML12012A291) (Exh. HNY000066).

HNY000065 and HNY000066.³⁷ On January 18, 2012, the NRC Staff filed a legal response to Honeywell's January 12, 2012 affidavit.³⁸

2.18. On January 25, 2012, we closed the evidentiary record in this proceeding.³⁹

2.19. On February 10, 2012, the parties submitted proposed findings of fact and conclusions of law, which we have considered in reaching our decision.

III. LEGAL STANDARDS GOVERNING THE BOARD'S REVIEW

A. Source of Honeywell's Hearing Rights

3.1. An NRC licensing action does not give rise to hearing rights unless the proposed action can be considered one of the circumstances specifically described in section 189a of the Atomic Energy Act.⁴⁰ Section 189a.(1)(A) states:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under section 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

An exemption is not one of the circumstances listed in section 189a. Accordingly, hearing rights do not attach to an applicant's request for a stand-alone exemption from NRC requirements.⁴¹

³⁷ Order (Admitting Additional Exhibits and Closing the Evidentiary Record) (January 25, 2012) (ADAMS Accession No. ML12025A038).

³⁸ NRC Staff's Reply to Honeywell's January 12, 2012 Filing (January 18, 2012) (ADAMS Accession No. ML12018A144).

³⁹ Order (Admitting Additional Exhibits and Closing the Evidentiary Record).

⁴⁰ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-05, 51 NRC 90, 94-96 (2000).

⁴¹ *Id.* at 99.

3.2. The situation is different when the applicant requests an exemption in connection with a related licensing action to which hearing rights attach.⁴² The Commission has found that, in such cases, a person may also request a hearing regarding the NRC action on the exemption request.⁴³

3.3. In this case, Honeywell originally requested an exemption in connection with its 2005 application for license renewal. Because a person could have requested an NRC hearing in connection with Honeywell's license renewal application, a person could also have sought a hearing on Honeywell's original exemption request.⁴⁴

3.4. When Honeywell applied for an exemption on April 1, 2009, it sought to extend for the second time a prior licensing action to which hearing rights attached. Honeywell's 2009 exemption request therefore was not a stand-alone exemption request, but a request tied to its license renewal application. For that reason, Honeywell and other interested persons had the right to seek an NRC hearing in connection with the 2009 exemption request. Honeywell has now exercised its hearing rights, which brings its dispute with the Staff before us.

B. Specific Exemptions

3.5. 10 C.F.R. § 40.14 governs an exemption request from a source materials licensee such as Honeywell. Section 40.14(a) states:

The Commission⁴⁵ may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulation in this part as it determines are [1] authorized by law and [2] will not endanger life or

⁴² *Private Fuel Storage LLC* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 465–67 (2001); *United States Dept. of Energy* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 421 (1982).

⁴³ *Private Fuel Storage*, CLI-01-12, 53 NRC at 466–67.

⁴⁴ *Id.*

⁴⁵ 10 C.F.R. § 40.4 states that “*Commission* means the Nuclear Regulatory Commission or its duly authorized representatives.” The NRC Staff has the delegated authority to review and act upon applications relating to licenses. 10 C.F.R. §§ 1.42, 2.100–2.103. Accordingly, the reference to “*Commission*” in § 40.14 includes the NRC Staff.

property or the common defense and security and [3] are otherwise in the public interest.

Each of these requirements must be met in order for an applicant to receive an exemption.⁴⁶

C. Decommissioning Funding

3.6. The NRC's regulations are designed to ensure that each licensee has sufficient funds to decommission its facilities in a timely manner. One of the NRC's goals is to "reduce the likelihood that any current operating facility will become a 'legacy site'"; that is, a facility "in decommissioning status with complex issues and an owner who cannot complete the decommissioning work for technical or financial reasons."⁴⁷ However, apart from legacy sites, the NRC seeks to avoid even lesser delays in decommissioning. Through its regulations the NRC seeks to provide "reasonable assurance that at the time of termination of operations adequate funds are available so 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."⁴⁸

3.7. For a source materials licensee like Honeywell, the NRC's decommissioning funding requirements are set forth in 10 C.F.R. § 40.36, "Financial assurance and recordkeeping for decommissioning." As pertinent here, § 40.36 states:

(e) Financial assurance for decommissioning must be provided by one or more of the following methods:

(1) Prepayment. Prepayment is the deposit prior to the start of operation into an account segregated from licensee assets and outside the licensee's administrative control of cash or liquid assets such that the amount of funds would be sufficient to pay decommissioning costs. Prepayment may be in the

⁴⁶ We would note that, even when all requirements are met, the Commission is not required to grant an exemption. Rather, § 40.14(a) states only that the Commission "may" grant an exemption, not that it "will" grant an exemption.

⁴⁷ *Proposed Rule; Decommissioning Planning*, 73 Fed. Reg. 3812, 3812–13 (January 22, 2008) (Exh. NRC000014 at 2–3).

⁴⁸ *General Requirements for Decommissioning Nuclear Facilities*, 53 Fed. Reg. 24,018, 24,037 (June 27, 1988) (Exh. NRC000012 at 20).

form of a trust, escrow account, government fund, certificate of deposit, or deposit of government securities.

(2) A surety method, insurance, or other guarantee method. These methods guarantee that decommissioning costs will be paid. A surety method may be in the form of a surety bond, letter of credit, or line of credit. . . . For commercial corporations that issue bonds, a guarantee of funds by the applicant or licensee for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix C to part 30. . . [.]

3.8. Before Honeywell requested its first exemption in 2006, it provided financial assurance through a self-guarantee as described in Appendix C to Part 30. A self-guarantee differs from the other financial assurance methods authorized by § 40.36(e) in that the licensee does not prepay decommissioning costs or otherwise set aside funds for decommissioning. Nor is there any third party responsible for providing decommissioning funding if the licensee is unable to do so.⁴⁹ Instead, the licensee itself guarantees the availability of decommissioning funding based on its ability to meet the criteria of a financial test. For these reasons, the financial test is relatively stringent in determining which licensees are eligible to use a self-guarantee.⁵⁰

3.9. The Appendix C financial test has two parts, the first of which is relevant here. Part A of the financial test requires that the licensee have:

- (1) Tangible net worth at least 10 times the total current decommissioning cost estimate for the total of all facilities or parts thereof [. . .]
- (2) Assets located in the United States amounting to at least 90 percent of total assets or at least 10 times the total current decommissioning cost estimate for the total of all facilities or parts thereof [. . .]
- (3) A current rating for its most recent bond issuance of AAA, AA, or A as issued by Standard and Poors (S&P), or Aaa, Aa, or A as issued by Moodys.

Part A.(1) of the financial test requires that a licensee's *tangible* net worth, not merely its net worth, be at least 10 times its total decommissioning cost estimate. This is the requirement

⁴⁹ Tr. at 89.

⁵⁰ Tr. at 98.

Honeywell could not meet, which is why it requested an exemption allowing it to use goodwill, an intangible asset, to meet § II.A.(1) of the financial test.

3.10. The tangible net worth requirement in § II.A.(1) of the Appendix C financial test is based on U.S. Environmental Protection Agency (EPA) financial standards that focus on tangible net worth. When developing its standards, the EPA considered, but rejected, allowing companies to use intangible assets to meet its financial tests for decommissioning. The EPA rejected this approach because it was concerned that companies may not be able to promptly convert intangible assets into cash for closure and post-closure costs:

One commenter recommended that owners and operators be allowed to meet requirements for amounts of net worth with tangible net worth only. *Assets of firms often include intangibles such as goodwill, patents, and trademarks which may be difficult to convert into cash to pay for closure or post-closure costs.* The Agency agrees with the commenter and is providing that only tangible net worth may be used to meet the requirements for \$10 million in net worth and for net worth of at least six times the cost estimates.⁵¹

Accordingly, the EPA incorporated certain tangible net worth requirements in its standards in part to ensure that a company's closure and post-closure activities would be carried out in a timely manner.⁵²

3.11. Six years after the EPA issued its financial assurance standards, the NRC adopted its own decommissioning planning rules. The NRC's rules established a parent company guarantee similar to that adopted by the EPA, and the NRC incorporated the tangible net worth requirements from the EPA test into its financial test for the parent company guarantee.⁵³ When the NRC revised its financial assurance rules to allow for the self-guarantee

⁵¹ *Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Financial Requirements*, 47 Fed. Reg. 15,032, 15,035 (April 7, 1982) (Exh. NRC000011 at 4) (emphasis added).

⁵² *Id.*

⁵³ Exh. NRC000012 at 18–19 (53 Fed. Reg. at 24,035–36).

method, it included a tangible net worth requirement in the related financial test.⁵⁴ This is the requirement presently in Part 30, Appendix C, § II.A.(1).

D. Standard of Review

3.12. In reviewing the Staff's denial of Honeywell's 2009 exemption request, we apply the same standards we would apply when reviewing other contested licensing actions. That is, we conduct a *de novo* review of the issues before us.⁵⁵ This does not mean, however, that we "start from scratch" in reviewing Honeywell's 2009 exemption request.⁵⁶ Rather, we "conduct an application review that is plenary in scope and [which] aggressively probe[s] the underlying basis for the principal health and safety . . . conclusions upon which the application (and the Staff's application review findings) are footed."⁵⁷

IV. RULINGS ON LEGAL ISSUES

A. Burden of Proof

4.1. Under NRC regulations, an applicant must prove it is entitled to the requested licensing action. See 10 C.F.R. § 2.325 ("Unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof.").⁵⁸ This adjudicatory proceeding concerns Honeywell's 2009 application for an exemption from the NRC's financial

⁵⁴ *Self-Guarantee as an Additional Financial Assurance Mechanism*, 58 Fed. Reg. 68,726, 68,728 (December 29, 1993) (Exh. NRC000013 at 3).

⁵⁵ *Cf. Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 39 (2005) ("when resolving contentions litigated through the adversary process . . . the boards bring their own 'de novo' judgment to bear").

⁵⁶ *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-07, 61 NRC 188, 197 n.11 (2005).

⁵⁷ *Id.*

⁵⁸ The applicant must prove that the preponderance of the evidence supports granting its application. *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12, NRC 419, 421 (1980); *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), LBP-05-10, 61 NRC 241, 245 (2005).

assurance requirements. Because Honeywell is the applicant, under § 2.325 it has the burden of proving it is entitled to the requested exemption.

4.2. The burden of proof does not change because the Staff denied, rather than approved, Honeywell's application. Under § 2.325 the burden of proof lies with the party that initiated a proceeding. Here, it was Honeywell that initiated a licensing proceeding by applying for an exemption. The nature of the Staff's licensing decision does not change Honeywell's status as the initiating party, nor does it shift the burden of proof to the Staff.

4.3. Our conclusion is consistent with the approach taken in other NRC proceedings. For example, in a case where the Staff denied approval of a sealed source model, the Board found that the applicant had the burden of proving its application should be granted. *Graystar, Inc.* (Suite 103, 200 Valley Road, Mt. Arlington, NJ 07856), LBP-01-07, 53 NRC 168, 179–80 and n.47 (2001) (assigning the burden of proof to the applicant based on the plain language of the former 10 C.F.R. § 2.1237(b), which contained the same language as the current § 2.325). In a case involving the denial of an application for an operator's license, a Presiding Officer reached the same conclusion. *Alfred J. Morabito* (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-87-23, 26 NRC 81, 83–84 (1987) (assigning the burden of proof to the applicant based the former 10 C.F.R. § 2.732, which also contained the same language as the current § 2.325).

4.4. Although § 2.325 provides that the Board may reassign the burden of proof, we have found no case under this regulation or its predecessor regulations where a Board or Presiding Officer has done so. In *Morabito*, for example, the Presiding Officer found the applicant had not offered any “persuasive” or “adequate” reason for shifting the burden of proof to the Staff.⁵⁹ Here, we similarly find there is no persuasive reason for relieving Honeywell of its burden of proof.

⁵⁹ *Id.*

4.5. Accordingly, Honeywell has the burden of proving that its application for an exemption should be granted.

B. Scope of the Exemption Request

4.6. The parties disagree over whether Honeywell's exemption request is time-limited or open-ended. The Staff argues that the issue before the Board is whether Honeywell should have been granted a one-year exemption for the period May 11, 2009 through May 11, 2010. Honeywell, on the other hand, argues that its exemption request is a "live" request and that we can grant Honeywell a current exemption from financial assurance requirements.⁶⁰

4.7. To resolve this issue, we turn to Honeywell's April 1, 2009 application for an exemption. Honeywell's application states:

Honeywell now requests that the NRC extend the exemption from the same portion of the financial test in 10 C.F.R. Part 30, Appendix C *until the earlier to occur of* (1) May 11, 2010 and (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, 2008.⁶¹

(Emphasis added.) This is the application the Staff reviewed and denied, initially in December 2009 and, after further review, in April 2011. Honeywell did not apply for an exemption covering later years, and the Staff never rendered a decision on any such application.⁶² Accordingly, the issue before us is limited to whether Honeywell should be granted an exemption for the one-year period from May 11, 2009 to May 11, 2010.

4.8. To the extent Honeywell is arguing that the Board can grant an exemption request that was not reviewed by the Staff, we reject Honeywell's argument. Honeywell's

⁶⁰ Tr. at 11.

⁶¹ Exh. HNY000006 at 1–2.

⁶² Tr. at 81.

proposed approach would result in the Board displacing the Staff in its role as the primary reviewer of license applications.⁶³ We find no authority for assuming such a role.⁶⁴

C. Scope of Information Considered

4.9. Apart from the scope of Honeywell's exemption request, the parties disagree over the scope of information relevant to the Staff's April 25, 2011 decision. The Staff argues that, because it was reconsidering a denial decision issued on December 11, 2009, it understandably limited the information it considered to that available at the time of the original decision. Honeywell, on the other hand, appears to argue that the Staff should have considered information available up to the date of its April 25, 2011 decision.

4.10. The issue, at bottom, is whether on remand it was permissible for the Staff to reconsider its initial decision denying Honeywell's exemption request, or whether the Staff had to review Honeywell's request as it would a new application. We find no error in the Staff's approach. In its remand order, the D.C. Circuit found that Honeywell's arguments regarding how the Staff weighed various factors in reaching its decision raised issues that were "capable of repetition, yet evading review."⁶⁵ Had the Staff based its decision on current information, rather than reconsidering the information available at the time of its December 11, 2009 decision, the issues the Court identified could have evaded review yet again. We find nothing in the Court's remand order directing an approach different from that taken by the Staff; to the contrary, we find the Staff's approach responsive to the specific concerns the Court raised in its order.

⁶³ Under NRC regulations, the NRC Staff has the delegated authority to take action on licensing requests. 10 C.F.R. §§ 1.142, 2.100–2.103.

⁶⁴ See *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).

⁶⁵ *Honeywell*, 628 F.3d at 576–78, 580–81. In particular, the Court found that "[w]hile the Commission might reasonably have concluded that [Honeywell's] 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 decision leaves too much to inference." *Id.* at 581.

4.11. In reaching our decision on Honeywell's exemption request, we have considered certain information postdating December 11, 2009, the date of the Staff's initial denial decision. This information includes the parties' testimony and certain exhibits. However, the core issue remains whether Honeywell can prove that the Staff improperly denied its 2009 exemption request. Information postdating December 11, 2009 therefore informs our decision only to the extent it helps explain whether the Staff acted properly or improperly on that date.

D. Inapplicability of 10 C.F.R. § 40.32

4.12. Honeywell and the Staff agree that Honeywell cannot be granted an exemption unless it meets the requirements in 10 C.F.R. § 40.14. However, Honeywell also argues that the additional requirements at 10 C.F.R. § 40.32(a)–(d) are relevant to its exemption request.⁶⁶ The Staff disagrees, for reasons we find persuasive.

4.13. Section 40.32 establishes general requirements for the issuance of licenses and license amendments.⁶⁷ As the Staff has explained, § 40.32 is not directly relevant to its review of an exemption request.⁶⁸ If the Staff reviews an exemption request under § 40.14 and finds an exemption should be granted, the Staff will document the exemption as a license condition, a process that involves an administrative amendment under § 40.32.⁶⁹ However, the Staff does not apply § 40.32 when reviewing the merits of an exemption request, and we find no reason to do so here. If Honeywell's requested licensing action could have been granted as an amendment, there would have been no reason for Honeywell to apply for an exemption in the first instance.

⁶⁶ Honeywell Initial Statement at 14–17.

⁶⁷ 10 C.F.R. § 40.45 states that the application criteria in § 40.32 apply to license amendment requests.

⁶⁸ NRC Staff Initial Statement at 16–18.

⁶⁹ *Id.* at 18 n.44.

E. Weight Accorded the Prior Exemptions

4.14. Honeywell argues that, because the Staff's 2007 and 2008 decisions granting exemptions became final orders of the NRC, they should be accorded precedential weight in our review of Honeywell's 2009 exemption request.⁷⁰ We disagree. Although the Staff's prior decisions became final orders,⁷¹ those decisions were never reviewed by the Commission. Because even an unreviewed Board decision has no precedential weight in NRC proceedings,⁷²—notwithstanding the fact that such a decision likewise becomes a final order of the NRC—it follows that an unreviewed Staff decision is entitled to no such weight.

4.15. Nor do the Staff's prior decisions have persuasive value in the present proceeding. Honeywell argues that the facts underlying its 2009 exemption request were essentially the same as those underlying its two prior exemption requests. However, we agree with the Staff that there were several changes of circumstances that weighed against granting Honeywell's 2009 exemption request. These changes distinguish Honeywell's 2009 exemption request from its first two requests, and they prevent Honeywell from establishing that it meets the requirements for granting an exemption set forth in 10 C.F.R. § 40.14.

⁷⁰ Tr. at 116–18.

⁷¹ See *Honeywell*, 628 F.3d at 575 (citing *Natural Res. Def. Council, Inc. v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982)).

⁷² *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998) (citing *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1988)).

V. FINDINGS OF FACT

5.1. The requirements for granting an exemption to a licensee like Honeywell have been set forth above. The first criterion in 10 C.F.R. § 40.14—whether the requested exemption is authorized by law—is not in dispute here, because Honeywell’s exemption is not expressly prohibited.⁷³

5.2. To receive an exemption, however, Honeywell must also prove that the exemption would avoid endangering life and property. We find that Honeywell has not provided such proof. As explained below, granting the 2009 exemption would have allowed Honeywell to rely on a self-guarantee that was not as strong as the self-guarantee described in Appendix C to Part 30. Allowing Honeywell to rely on a weaker form of self-guarantee in 2009, when the global economy was in the midst of a financial crisis, would have increased the risk that funds might not be readily available to decommission the Metropolis Works Facility. A delay in decommissioning is a circumstance that could endanger life and property. For example, a delay could “lead to increased occupational and public doses, increased amounts of radioactive waste to be disposed of, and an increase in the number of contaminated sites.”⁷⁴ Honeywell therefore has not shown that its exemption request meets the second criterion in § 40.14.

5.3. Honeywell must also prove that its requested exemption is in the public interest. For reasons stated in more detail below, we find that granting an exemption in 2009 would have increased the risk that funds might not be readily available to decommission the Metropolis Works Facility. We agree with the Staff that, at the time Honeywell requested the 2009 exemption, there was great uncertainty over how the company might be affected by the ongoing global financial crisis. We also agree with the Staff that Honeywell’s increased reliance on

⁷³ See *USEC, Inc. (American Centrifuge Plant)*, LBP-07-6, 65 NRC 429, 464 (2007) (“... the NRC has traditionally read the language ‘authorized by law’ to be the functional equivalent of ‘not prohibited by law’”) (collecting cases).

⁷⁴ Exh. NRC000012 at 2 (53 Fed. Reg. at 24,019).

goodwill to support its 2009 exemption request raised significant concerns that, if the company fell into financial distress, there might be a delay in converting assets into decommissioning funds. For these reasons, Honeywell is unable to show that its exemption request meets the third criterion in § 40.14.

5.4. We likewise find there are no special circumstances supporting Honeywell's 2009 exemption request. The "public interest" requirement in 10 C.F.R. § 40.14 could potentially be satisfied where there are special circumstances supporting the exemption request.⁷⁵ However, the factors upon which Honeywell relies in its request—including the company's size, market capitalization, "A" bond rating, and high amount of goodwill—do not present special circumstances. As Honeywell acknowledged at the oral hearing, many companies share some of these same characteristics.⁷⁶ Furthermore, the regulatory history of the NRC's self-guarantee rule demonstrates that during rulemaking the NRC considered many of the factors cited by Honeywell. The NRC concluded, however, that "all companies, *irrespective of their overall size*, must demonstrate that they possess tangible net worth of at least 10 times the current decommissioning cost estimate . . . for all decommissioning activities for which the company is responsible. . . ."⁷⁷ Honeywell's size, as measured by its assets or other criteria, therefore cannot be considered a special circumstance overlooked during rulemaking.⁷⁸

A. Basis for the 2007 and 2008 Exemptions

5.5. When the Staff granted Honeywell its first exemption in 2007, one issue the Staff considered was whether Honeywell would be able to pay decommissioning costs if the company

⁷⁵ The applicant would still have to meet the other requirements in § 40.14, including the requirement that the exemption avoid endangering life or property.

⁷⁶ Tr. at 47–52.

⁷⁷ Exh. NRC000013 at 2 (58 Fed. Reg. at 68,727).

⁷⁸ See Tr. at 94 (explaining that the NRC took into account the views of large companies such as General Electric and Westinghouse when drafting the self-guarantee rule).

fell into financial distress. The Staff found that “[i]n view of [Honeywell’s] ‘A’ bond rating and the high ratio of net worth (including goodwill) to decommissioning obligation, the likelihood that assets will be available for decommissioning in the event of financial distress in the next year is adequate.”⁷⁹

5.6. When the Staff granted Honeywell its second exemption in 2008, it again looked to whether Honeywell would be able to pay decommissioning costs if the company fell into financial distress. As before, the Staff took into account Honeywell’s bond rating and its ratio of tangible net worth (including goodwill) to decommissioning costs. The Staff found that, “[b]ecause the basis for granting the original exemption still applies, the staff considers that it is acceptable to allow an extension of this exemption[.]”⁸⁰

5.7. The Staff denied Honeywell’s third exemption request based in part on increased concerns over whether Honeywell would be able to pay decommissioning costs if the company fell into financial distress.⁸¹ The Staff reviewed the same factors it considered when granting the first two exemptions, including Honeywell’s bond ratings and its ratio of tangible net worth (including goodwill) to decommissioning costs.⁸² However, the Staff concluded that these factors no longer supported granting an exemption. For reasons discussed below, we agree with the Staff’s finding.

B. Global Financial Downturn of 2008–2009

5.8. In 2007, the global economy entered the early stages of what many consider the most severe economic crisis since the Great Depression.⁸³ In late 2008, not long after the Staff

⁷⁹ Technical Evaluation Report (TER) for Renewal of the Operating License for MTW (May 11, 2007) (Exh. HNY000009) at 53.

⁸⁰ Exh. HNY000010 at 5–6.

⁸¹ Exh. HNY000012 at 3–6; Exh. NRC000001 at A.31, A.40, A.43, A.49, A.56, A.60, A.63.

⁸² Exh. HNY000012 at 3–9; Exh. NRC000001 at A.16, A.20–A.30, A.33–A.42.

⁸³ Worst Crisis Since ‘30s, With No End Yet in Sight, Wall Street Journal (September 18, 2008) (Exh. NRC000028); Financial Crisis Inquiry Commission, Final Report of the National Commission on the

granted Honeywell's second exemption request, the global economy took a sharp downward turn.⁸⁴ These events are documented in numerous exhibits submitted by the Staff.⁸⁵

5.9. When Honeywell applied for an exemption in April 2009, future business and economic conditions remained highly uncertain.⁸⁶ The Congressional Budget Office, for example, had recently stated that "[t]he sudden decline in economic activity in the second half of [2008] signaled that the recession could be severe . . . [n]ormally, sharp contractions in economic activity are followed by rapid rebounds, but this forecast anticipates that the recovery in 2010 will be slow[.]"⁸⁷

5.10. 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:

In contrast to 2008, when the global financial crisis resulted in defaults by a number of large banks and financial institutions, non-financial corporate issuers were the main driver of default volumes in 2009. In fact, non-financial companies accounted for 74.8% of volume in 2009, compared to 20.6% in 2008. Measured by default counts, however, non-financial companies accounted for 87.4% of defaults in 2009, up modestly from 81.4% in 2008.⁸⁸

Accordingly, 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,

Causes of the Financial and Economic Crisis in the United States (January 2011) (Exh. NRC000047) at Chapter 20 (pages 353–86).

⁸⁴ Exh. NRC000001 at A.21–A.24. See also Federal Reserve Bank of St. Louis, *The Financial Crisis: A Timeline of Events and Policy Actions* (2011) (Exh. NRC000048) at 6–9; Ingo Fender & Jacob Gyntelberg, *Overview: Global Financial Crisis Spurs Unprecedented Policy Actions*, BIS Quarterly Review (December 2008) (Exh. NRC000034) at 1.

⁸⁵ Exhs. NRC000025–NRC000048, Exhs. NRC000057–NRC000060.

⁸⁶ Exh. NRC000001 at A.24, A.26–A.29.

⁸⁷ Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2009 to 2019* (January 2009) (Exh. NRC000037) at 4.

⁸⁸ Moody's *Default and Recovery Rates of Corporate Bond Issuers, 1920–2009* (Exh. HNY000025) at 3.

more than quadrupled the number of defaults during the same period in 2008.⁸⁹ By the time the Staff issued its December 2009 denial decision, corporate defaults were on pace to reach an unprecedented level.⁹⁰

5.11. This was the broad economic context in which the Staff reviewed Honeywell's 2009 exemption request. This broad economic uncertainty raised numerous concerns, including concerns over the reliability of bond ratings.

C. Reliability of Bond Ratings

5.12. 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. By 2009, however, there were numerous factors that understandably caused the Staff to reassess the weight it assigned bond ratings when granting the prior exemptions.

5.13. The financial downturn in late 2008 raised significant questions about the reliability of bond ratings. Credit rating agencies came under widespread scrutiny in 2008 and 2009 for failing to accurately rate companies that had fallen into financial distress.⁹¹ In October 2009, just two months before the 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

⁸⁹ Another Milestone: U.S. Corporate Defaults to Date Match Total for All '08, Wall Street Journal (May 29, 2009) (Exh. NRC000039).

⁹⁰ U.S. Corporate Defaults, The Economist (June 18, 2009) (Exh. NRC000041); Unprecedented U.S. Corp. Defaults Seen for '09, Reuters Business and Financial News (September 29, 2009) (Exh. NRC000043).

⁹¹ 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. See Standard & Poor's, Research Update: Lehman Bros. Holdings Downgraded To 'Selective Default'; Other Lehman Entities To 'BB-' Or 'R' (September 15, 2008) (Exh. NRC000026).

crisis. . . . That has brought them under intense scrutiny and led to proposals for radical reforms.”⁹²

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.⁹³

The World Bank further explained that factors such as incompetence and time horizon may also lead to delays in downgrading bond ratings.⁹⁴

5.14. The World Bank was not alone in questioning the reliability of bond ratings. In September 2009, the U.S. Securities and Exchange Commission unanimously approved a number of rulemaking actions to strengthen oversight of credit rating agencies.⁹⁵ In April 2009, the European Union approved regulations establishing registration and supervision requirements for credit rating agencies.⁹⁶ Also in April 2009, G-20 leaders reached an

⁹² JONATHAN KATZ ET AL., THE WORLD BANK GROUP, CREDIT RATING AGENCIES: NO EASY REGULATORY SOLUTIONS (2009) (Exh. NRC000044) at 1. See also Richard J. Herring, Pew Financial Reform Project, Policy Issues Concerning the Reform of the Credit Rating Agencies (November 19, 2009) (Exh. NRC000046) 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.”).

⁹³ Exh. NRC000044 at 4–5.

⁹⁴ *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.

⁹⁵ Press Release, U.S. Securities and Exchange Commission, SEC Votes on Measures to Further Strengthen Oversight of Credit Rating Agencies (September 17, 2009) (Exh. NRC000057); Fact Sheet, U.S. Securities and Exchange Commission, Strengthening Oversight of Credit Rating Agencies Open Meeting of the Securities and Exchange Commission (September 17, 2009) (Exh. NRC000058).

⁹⁶ Exh. NRC000044 at 5.

agreement stating that agencies whose ratings are used for regulatory purposes should be subject to oversight.⁹⁷

5.15. Accordingly, compared to prior years, in 2009 there was a heightened concern that a company's bond ratings might not accurately reflect its financial condition. In Honeywell's case, this raised the concern that Honeywell's bond rating of "A"—the minimum rating allowed under the self-guarantee financial test—should in fact have been "BBB" or lower, which would not have been enough to pass the test. It also raised the concern that, notwithstanding its bond rating, Honeywell might fall into financial distress during the period covered by its exemption request.

5.16. Honeywell argues that the Staff failed to support its conclusion that rating agencies may be reluctant to downgrade ratings.⁹⁸ However, in its April 2011 denial decision, the Staff relied on the same portion of the October 2009 World Bank report quoted above, which raises precisely this concern.⁹⁹ Honeywell has not submitted any evidence responding specifically to this concern or suggesting that, when the Staff was reviewing Honeywell's exemption request in 2009, this concern was unfounded.

5.17. In fact, Honeywell effectively acknowledges that credit rating agencies may not promptly downgrade companies' bond ratings. Honeywell states that 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."¹⁰⁰ This means, however, that bond ratings may not capture downward trends that the rating agencies perceive to be short-term, even

⁹⁷ *Id.*

⁹⁸ Honeywell Initial Statement at 36.

⁹⁹ Exh. HNY000012 at 4.

¹⁰⁰ Honeywell Initial Statement at 37; Exh. HNY000001 at A48.

where the agencies are aware of those trends.¹⁰¹ This calls into question the reliability of bond ratings as they related to Honeywell's 2009 exemption request, which was for a short-term (one-year) exemption during a period of rapidly changing global financial conditions.

5.18. Honeywell argues that, even during the financial crisis, companies with high bond ratings such as itself continued to have low rates of default. Honeywell states that "[s]ince 2005, there were only defaults for 'A-rated' companies (S&P) in 2008 (0.38%) and in 2009 (0.22%)."¹⁰² However, 2008 was the year most relevant to the Staff's review of Honeywell's 2009 exemption request.¹⁰³ The Standard & Poor's default rate for 2008 was, moreover, double that cited by Honeywell when companies in the higher-rated bond category of "AA" were included.¹⁰⁴ Overall, 14 companies Standard & Poor's rated as having investment-grade bonds¹⁰⁵ defaulted in 2008, with another 11 such companies defaulting in 2009.¹⁰⁶ Moody's likewise had 14 investment-grade defaults in 2008 and 11 in 2009.¹⁰⁷ This compares to only 2 investment-grade defaults for Moody's and 5 for Standard & Poor's over the entire period 2003–2007.¹⁰⁸

5.19. Honeywell also argues that the corporate defaults in 2008 and 2009 are of limited relevance because the investment-grade defaults involved primarily companies in the financial

¹⁰¹ Exh. NRC000053 at A.11, A.23, A.27.

¹⁰² Honeywell Initial Statement at 34. See also Exh. HNY000001 at A23, Table 3, and A46.

¹⁰³ Both Standard & Poor's and Moody's issued their 2008 annual default surveys in February 2009; they did not issue their 2009 surveys until February (Moody's) and March 2010 (Standard & Poor's).

¹⁰⁴ Standard and Poors – 2008 Annual Global Corporate Default Study And Rating Transitions (Exh. HNY000030) at 5, Tables 2 and 3.

¹⁰⁵ "Investment-grade" refers to a bond rated "BBB-" or higher by Standard & Poor's or "Baa3" or higher by Moody's.

¹⁰⁶ Exh. HNY000030 at 9, Table 4; Standard and Poors – 2009 Annual Global Corporate Default Study And Rating Transitions (Exh. HNY000031) at 1–2, Table 1.

¹⁰⁷ Moody's Default and Recovery Rates of Corporate Bond Issuers, 1920–2010 (Exh. HNY000026) at 15.

¹⁰⁸ Exh. HNY000026 at 15; Exh. HNY000031 at 1–2, Table 1.

sector, while the non-financial defaults involved companies whose bond ratings were not investment-grade.¹⁰⁹ We find, however, that these defaults raised significant questions about the reliability of bond ratings generally. The Staff did not need to wait for a company just like Honeywell to default until it could be legitimately concerned about Honeywell's bond rating. Further, the Staff was legitimately concerned not only with whether Honeywell might default during the period covered by its exemption, but whether Honeywell's "A" bond rating should in fact be "BBB" or less, which would not have allowed Honeywell to pass the self-guarantee financial test.¹¹⁰

5.20. Honeywell's focus on corporate defaults also fails to take into account that circumstances short of default could have affected Honeywell's ability to timely fund decommissioning activities. If a licensee's bond rating drops significantly in a short period of time, the licensee could have difficulty meeting the requirement in Appendix C, § II.C that it establish alternate financial assurance within 120 days after notifying the NRC of its downgrade.¹¹¹ Obtaining alternate financial assurance in a timely manner could be difficult during a period where there is a sudden tightening of loan conditions, which is what occurred in 2008 and 2009.¹¹² This creates the risk that for some period of time a licensee may be unable to provide financial assurance through any NRC-approved method.¹¹³

5.21. We further note that, although Honeywell's argues that bond ratings reliably measure a company's "financial condition,"¹¹⁴ this argument overlooks the specific concerns underlying the NRC's self-guarantee financial test. The self-guarantee test is not concerned

¹⁰⁹ Honeywell Reply Statement at 12–13.

¹¹⁰ NRC Staff Reply Statement at 12–15; Exh. NRC000053, at A.12.

¹¹¹ Exh. NRC000053 at A.13, A.32.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Honeywell Initial Statement at 27, 30, 33, 34, 37; Exh. HNY000001 at A14.

primarily with a licensee's overall financial condition, but with the licensee's ability to fund decommissioning activities in a timely manner.¹¹⁵ For that reason, the self-guarantee financial test does not rely solely on a strong bond rating. The other requirements in the financial test are designed to ensure not only that a self-guaranteeing licensee's overall financial condition is strong, but that the licensee is well-positioned in other areas that are relevant to its ability to pay decommissioning costs.¹¹⁶ One such area is tangible net worth, which we discuss next.

5.22. In sum, we find that the Staff's increased concerns over the reliability of bond ratings were well founded. These concerns reasonably caused the Staff to reassess the weight it previously assigned Honeywell's bond ratings. Given these increased concerns, we find that Honeywell is unable to prove its requested exemption was in the public interest and would have avoided endangering life or property.

D. Decline in Tangible Net Worth

5.23. Honeywell's tangible net worth when it requested the 2009 exemption was negative \$5.3 billion.¹¹⁷ This was a decline of \$3.8 billion from when it submitted its 2008 exemption request.¹¹⁸ As a point of comparison, Honeywell's decline in tangible net worth was approximately 24 times its total cost estimate for decommissioning the Metropolis Works Facility.¹¹⁹

5.24. Because of this decline in tangible net worth, for 2009 Honeywell would have needed to rely on significantly more goodwill to meet the 10-to-1 requirement in § II.A.(1) of

¹¹⁵ Exh. NRC000001 at A.34–A.37; Exh. NRC000053 at A.4, A.7, A.10, A.13, A.18; *see also* A.30–A.32, A.35–A.36, A.40–A.41.

¹¹⁶ Exh. NRC000053 at A.9, A.15, A.37.

¹¹⁷ NRC Staff Table, Honeywell Financial Data Relied on in Exemption Requests (September 15, 2011) (Exh. NRC000018).

¹¹⁸ *Id.*

¹¹⁹ Honeywell's decommissioning cost estimate at the time of its 2009 exemption request was \$156 million. Exh. NRC000018.

Appendix C. Whereas Honeywell needed \$3.7 billion in goodwill to meet the test in 2008, for 2009 that amount would have been \$6.8 billion.¹²⁰ This was an increase of \$3.1 billion.

5.25. We find that, given its significantly increased reliance on goodwill, Honeywell is unable to prove that granting its third exemption was in the public interest and would have avoided endangering life or property. Specifically, we find that Honeywell's growing reliance on goodwill increased the risk that during a period of financial distress Honeywell might have experienced a delay in obtaining funds to decommission the Metropolis Works Facility.

i. Goodwill Liquidity Concerns

5.26. Compared to tangible assets, and even compared to certain other intangible assets, goodwill is relatively illiquid. This means that a company may experience delays in converting goodwill into cash. Goodwill is relatively illiquid because it cannot be separated from a business or business line. "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 only as an inseparable intangible asset of an enterprise."¹²¹ In other words, to convert goodwill into cash, a company like Honeywell would have to negotiate and execute the sale of an entire business or business line.¹²²

5.27. 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

¹²⁰ Exh. NRC000018; NRC Staff Chart, Tangible Net Worth Shortfall to Meet 10-to-1 Test of 10 CFR 30, Appendix C (September 15, 2011) (Exh. NRC000021).

¹²¹ GENERALLY ACCEPTED ACCOUNTING PRINCIPLES (GAAP) GUIDE § 23.04 (Exh. NRC000023).

¹²² Exh. NRC000001 at A.34, A.37; Exh. NRC000053 at A.30, A.31.

actions.¹²³ In brief, the process is generally more complicated and more time-consuming than the sale of only tangible assets like buildings, vehicles, or equipment.¹²⁴

5.28. Honeywell's testimony at the oral hearing confirms that selling a business typically involves numerous steps that effectively reduce the liquidity of the goodwill associated with the business. Honeywell explained that purchasing a business requires assessing synergies that may result from acquiring the business, projecting cash flows, conducting a "due diligence" review of the business, creating financial models, and obtaining financing.¹²⁵ These steps may require the involvement of numerous professionals, including lawyers, accountants, and other financial advisors.¹²⁶ Although Honeywell described these steps in the context of explaining how it acquires another business or business line, it follows that the same types of steps can be expected of other companies considering the purchase of a Honeywell business or business line. Because these steps can delay the sale of a business, they can also lead to delays in converting goodwill into cash.

5.29. 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. . . ."¹²⁷ Accordingly, Honeywell's indebtedness encumbers or restricts its goodwill, at least to some degree. If Honeywell cannot mortgage certain properties, it will be unable to sell

¹²³ Exh. NRC000053 at A.31.

¹²⁴ *Id.*

¹²⁵ Tr. at 32–35.

¹²⁶ *Id.* at 34.

¹²⁷ Exh. HNY000065 at ¶ 4.

those properties, and the goodwill associated with the sale of such properties would be encumbered. Similarly, if Honeywell is unable to pledge the shares of a subsidiary owning certain properties, this could interfere with the sale of those shares and thereby encumber the goodwill associated with the subsidiary.

5.30. Honeywell argues that many of its tangible assets are no more liquid than its goodwill.¹²⁸ However, rather than resolving concerns about goodwill, this argument raises concerns about Honeywell's tangible assets. In particular, it raises the question of whether the Staff perhaps gave Honeywell's tangible assets too much weight when reviewing the first two exemption requests. To the extent Honeywell is making a general claim that tangible assets and goodwill are equally liquid, it offers no support for this assertion, which is inconsistent with the findings underlying both the EPA's and the NRC's self-guarantee rules.¹²⁹

5.31. The relative illiquidity of goodwill is a concern when assessing a licensee's ability to provide decommissioning funding. This is a concern reflected in both the NRC's self-guarantee financial test and the EPA test from which it derives, both of which contain minimum tangible net worth requirements. These liquidity concerns arise because delays converting assets into cash could lead to delays in decommissioning. Delays in decommissioning could, in turn, result in adverse health, safety and environmental impacts. In particular, delays in decommissioning ". . . could lead to increased occupational and public doses, increased amounts of radioactive waste to be disposed of, and an increase in the number of contaminated sites."¹³⁰

5.32. As stated above, 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

¹²⁸ Exh. HNY000059 at A.13.

¹²⁹ Exh. NRC000011 at 4; Exh. NRC000012 at 18–19; Exh. NRC000013 at 3.

¹³⁰ Exh. NRC000012 at 2 (53 Fed. Reg. at 24,019).

increased the chance that, if Honeywell fell into financial distress and had to begin decommissioning the Metropolis Works Facility, it would have needed to convert goodwill into cash in order to generate decommissioning funding. Because goodwill is a relatively illiquid asset, this could have caused delays in obtaining decommissioning funding, as well as adverse health, safety, or environmental impacts tied to those delays. Given these potential impacts, we find that Honeywell is unable to prove its requested exemption was in the public interest and would have avoided endangering life and property.¹³¹

ii. Goodwill Impairment

5.33. To support its 2009 exemption request, Honeywell also had to devote a much higher *percentage* of its goodwill toward meeting the 10-to-1 tangible net worth requirement in § II.A.(1) of Appendix C. In 2007, Honeywell needed only 7% of its goodwill to meet this requirement. By 2008 that percentage had increased to 40%. For 2009, however, Honeywell would have needed 67% of its goodwill to meet this requirement. This was a 67% increase over 2008, and an 857% increase over 2007.¹³² This meant that, for 2009, Honeywell would be *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.¹³³

5.34. Honeywell's reliance on such a high percentage of its goodwill to meet the 10-to-1 requirement in 2009 was a concern due to the possibility of goodwill impairment. Impairment occurs when the fair market value of goodwill is less than its stated value.¹³⁴ If Honeywell experienced goodwill impairment that was not promptly recognized, it could have fallen out of

¹³¹ In addition to their relative liquidity, there is another difference between tangible assets and goodwill that may be relevant to a licensee's ability to pay decommissioning costs. If a company needs to raise decommissioning funds quickly, it might be able to use tangible assets as collateral for a loan. Goodwill cannot be used this same way. Exh. NRC000053 at A.34.

¹³² Exh. NRC000018. See *also* NRC Staff Chart, Percentage of Honeywell's Total Goodwill Relied On to Meet Tangible Net Worth Test (September 15, 2011) (Exh. NRC000022).

¹³³ Exh. NRC000001 at A.39 and A.40; Exh. NRC000018; Exh. NRC000022.

¹³⁴ Tr. at 84; Exh. NRC000001 at A.39.

compliance with the conditions of its exemption without the NRC or even Honeywell itself becoming aware of the noncompliance.¹³⁵ This was a greater concern in 2009 than in prior years because of Honeywell's increased reliance on goodwill to meet the conditions of its prior exemptions.

5.35. In 2009, goodwill impairment of approximately \$3.36 billion would have caused Honeywell to fall out of compliance with the condition of its exemption allowing it to use goodwill to meet the 10-to-1 requirement in § II.A.(1) of 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.¹³⁶

5.36. The financial downturn of late 2008 and 2009 gave the Staff particular reason to be concerned about goodwill impairment.¹³⁷ In June 2009, KPMG, a major international auditing firm, 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. . . . [t]he number of companies in the U.S. study that had impairment in 2008 increased to nearly 20 percent; up almost three-fold from the previous year.”¹³⁸ KPMG stated that “the situation could actually worsen still further during the remainder of 2009.”¹³⁹ KPMG also 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.”¹⁴⁰

¹³⁵ Tr. at 86; Exh. NRC000001 at A.39–A.40; Exh. NRC000053 at A.39.

¹³⁶ 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.

¹³⁷ Tr. at 90; Exh. NRC000001 at A.39–A.40.

¹³⁸ Press Release, KPMG, Goodwill Impairment in 2009 (June 12, 2009) (Exh. NRC000040).

¹³⁹ *Id.*

¹⁴⁰ *Id.* See also Tr. at 88 (explaining that there is “a fair amount of subjectivity” involved in testing for goodwill impairment); Statement of Financial Accounting Standards No. 142, Goodwill and Other Intangible Assets (June 2001) (Exh. HNY000033) at 15 (requiring a company to test for goodwill

5.37. Moreover, 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.¹⁴¹ 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.¹⁴² 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.¹⁴³

5.38. This type of information raised concerns over whether Honeywell's goodwill might likewise suffer impairment during the period covered by its 2009 exemption request. Because in 2009 Honeywell sought to use an unprecedented percentage of its goodwill to meet the Appendix C financial test, these concerns were heightened for that year. Given these concerns, we find Honeywell has not proven that granting the exemption was in the public interest and would have avoided endangering life and property.¹⁴⁴

E. Honeywell's Other Arguments for the 2009 Exemption

5.39. Honeywell has cited a number of other factors in support of its 2009 exemption request. However, we find that none of these factors supports granting the exemption.

i. Free Cash Flow

5.40. Honeywell cites its annual free cash flow as a basis for granting the 2009 exemption. Honeywell argues that it "generates significant annual free cash flow that is

impairment between its annual tests only when "an event occurs or circumstances change that would more likely than not reduce the fair value of a reporting unit below its carrying amount").

¹⁴¹ Tr. at 92–93.

¹⁴² U.S. Securities and Exchange Commission, Freeport-McMoRan Copper & Gold Inc. Form 10-K Annual Report For Fiscal Year Ending Dec. 31, 2008 (Exh. NRC000036) at 141.

¹⁴³ 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 (Exh. NRC000051) at 94–95.

¹⁴⁴ See Exh. NRC000001 at A.39 and A.40.

available for decommissioning the MTW when necessary.”¹⁴⁵ However, Honeywell’s reliance on free cash flow is unpersuasive. If Honeywell falls into financial distress, it is highly uncertain whether its free cash flow will remain at a level necessary to fund decommissioning activities.¹⁴⁶ In other words, the same circumstances that might force Honeywell to cease operations and enter decommissioning might also eliminate free cash flow as a source of decommissioning funding.

5.41. In fact, Honeywell acknowledges that free cash flow is relevant to assessing its ability to fund decommissioning activities only under normal circumstances, not during times of financial distress.¹⁴⁷ Honeywell’s acknowledgement, however, does not remove the NRC’s concern over how Honeywell might fund decommissioning activities in times of financial distress. That concern was the primary basis for the Staff’s denial of Honeywell’s 2009 exemption request,¹⁴⁸ and Honeywell’s reliance on free cash flow does not address that concern.

ii. Market Capitalization

5.42. At the oral hearing, Honeywell cited its current market capitalization of approximately \$40 billion as a factor supporting its exemption request.¹⁴⁹ However, as with free cash flow, there is no guarantee Honeywell’s market capitalization will remain the same if the company falls into financial distress. To the contrary, the factors that cause Honeywell to enter financial distress are likely to be reflected in declining market capitalization. Honeywell’s market capitalization therefore does not provide adequate support for its exemption request.

¹⁴⁵ Exh. HNY000008 at 4.

¹⁴⁶ Tr. at 83; Exh. NRC000001 at A.31; Exh. NRC000053 at A.40.

¹⁴⁷ Honeywell Initial Statement at 37–38.

¹⁴⁸ Exh. NRC000001 at A.31, A.43, A.49, A.56, A.60, A.63; Exh. NRC000053 at A.40.

¹⁴⁹ Tr. at 59.

5.43. Further, as with its bond rating, Honeywell's market capitalization does not speak directly to certain concerns underlying the self-guarantee test in Appendix C. Among these concerns, the NRC seeks to ensure that a self-guaranteeing licensee's assets are in a form that can be promptly converted into cash for decommissioning. Honeywell's market capitalization does not address this concern, and it does not establish that Honeywell should be granted an exemption.

iii. Revolving Credit Facility

5.44. Honeywell also argues that it should be granted an exemption because it has a revolving credit facility that could be used to pay decommissioning costs. However, a revolving credit facility is not an asset owned by Honeywell. In fact, by drawing on the credit facility, Honeywell would be assuming additional liabilities. Further, Honeywell's access to funds under its credit facility could be terminated if Honeywell falls into financial distress.¹⁵⁰ Honeywell's reliance on its credit facility therefore fails to address the NRC's concerns about how Honeywell would provide decommissioning funding during a period of financial distress.

iv. Assets in the United States

5.45. Honeywell also argues that it has substantial assets in the United States, with \$22.5 billion in such assets at the end of 2008.¹⁵¹ However, the second part of the financial test in Appendix C already requires that the licensee have assets in the United States amounting to at least 90 percent of total assets or at least 10 times its total decommissioning cost estimate.¹⁵² Honeywell is in effect asking us to count the same factor twice for purposes of reviewing its exemption request. We decline to do so.

¹⁵⁰ Honeywell Form 10-K, Annual Report for Fiscal Year Ended Dec. 31, 2008 (Exh. HNY000018) at 76–77.

¹⁵¹ Exh. HNY000008 at 4.

¹⁵² App. C, § II.A.(2).

v. Revised Decommissioning Planning Rule

5.46. Honeywell argues that its exemption request is consistent with, or would at least satisfy the intent of,¹⁵³ the revised decommissioning planning rule that the NRC issued on June 17, 2011.¹⁵⁴ The Staff disagrees with both arguments.¹⁵⁵

5.47. We need not resolve this dispute between the parties. The revised decommissioning planning rule does not take effect until December 17, 2012.¹⁵⁶ Thus, the rule cannot be applied to Honeywell's exemption request, which covered the period May 11, 2009 through May 11, 2010. We therefore have not relied on either the proposed or final version of the revised rule in ruling on the issues before us.

vi. Cost of Complying With 10 C.F.R. § 40.36(e)

5.48. In its 2009 exemption request, Honeywell estimated that it would have to pay between \$1.5 and \$2 million annually in order to obtain a letter of credit for the Metropolis Works Facility.¹⁵⁷ Honeywell argued that granting the 2009 exemption would be in the public interest because it would reduce this unnecessary regulatory cost.

5.49. For reasons stated above, Honeywell fails to prove that in 2009 the cost of obtaining financial assurance through a third-party instrument was unnecessary. Despite Honeywell's arguments, we find that in 2009 there was substantial uncertainty over how the exemption could have affected life and property, as well as public health and safety. Accordingly, we reject the premise of Honeywell's argument that an exemption would have been

¹⁵³ Exh. HNY000006 at 2; Exh. HNY000008 at 9.

¹⁵⁴ *Decommissioning Planning*, 76 Fed. Reg. 35,512, 35,525 (June 17, 2011) (Exh. NRC000015 at 14).

¹⁵⁵ NRC Staff Initial Statement at 33–35; NRC Staff Reply Statement at 23; Exh. NRC000001 at A.25, A.53, A.54; Exh. NRC000053 at A.33.

¹⁵⁶ Exh. NRC000015 at 1 (76 Fed. Reg. at 35,512).

¹⁵⁷ Exh. HNY000008 at 11.

in the public interest. In other words, Honeywell has not proven that the regulatory costs in question were *unnecessary*.

5.50. In any event, Honeywell has not proven that its cost in obtaining a third-party financial instrument is a unique or special circumstance. When the NRC adopted the self-guarantee rule in 1993, it found that a licensee typically paid approximately 1.5% of its decommissioning cost estimate annually in order to obtain a surety bond or other form of financial assurance.¹⁵⁸ Honeywell's decommissioning cost estimate for 2009 was \$156 million, and 1.5% of that amount is \$2.34 million. Honeywell's estimated cost of obtaining third-party financial assurance, \$1.5 to \$2 million, therefore cannot be considered unusually high.¹⁵⁹ For additional context, \$2 million was less than one one-thousandth (approximately 0.09%) of Honeywell's expected free cash flow for 2009.¹⁶⁰

¹⁵⁸ Exh. NRC000013 at 1 (58 Fed. Reg. at 68,726).

¹⁵⁹ Payment Surety Bond for Honeywell International, Inc. (April 2, 2010) (ADAMS Accession No. ML100980033) (Exh. NRC000056) (non-public, because it includes proprietary information) contains Honeywell's *actual* cost of obtaining a surety bond after the Staff denied its 2009 exemption request. This information does not change our conclusion regarding the cost to Honeywell of complying with 10 C.F.R. § 40.36(e).

¹⁶⁰ See Exh. HNY000008 at 10 (stating that Honeywell "expects to generate a minimum of \$2.2 billion in free cash flow in 2009").

VI. CONCLUSIONS OF LAW

6.1. We conclude that Honeywell has not proven it should have been exempted from complying with 10 C.F.R. § 40.36(e) for the period May 11, 2009 through May 11, 2010.

6.2. We therefore affirm the Staff's April 25, 2011 denial of Honeywell's exemption request.

Respectfully submitted,

*/Signed (electronically) by/
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Dated at Rockville, Maryland
this 10th day of February 2012