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)	))))))	Docket No. 40-3392

HONEYWELL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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I. INTRODUCTION

1.1. This Initial Decision pertains to an application, dated April 1, 2009, as supplemented on October 13, 2009, filed by Honeywell International Inc. ("Honeywell) for a license amendment and exemption that would authorize continued use of an alternate method for demonstrating decommissioning funding assurance for the Metropolis Works ("MTW") uranium conversion facility in Metropolis, Illinois.[1] Specifically, Honeywell is seeking relief from 10 C.F.R. § 40.36(e) to the extent that it requires licensees to pass the financial test in 10 C.F.R. Part 30, Appendix C, in order to use the self-guarantee method of decommissioning funding. Honeywell proposes instead to change one of the financial test criteria in Appendix C to include the intangible asset of goodwill. The other financial test criteria would remain unchanged.

1.2. After granting the request on two prior occasions, and after Honeywell successfully appealed a December 2009 NRC denial of Honeywell's request to the Court of

[1] The MTW chemically converts uranium ore concentrates, commonly known as "yellowcake," into uranium hexafluoride (UF_6), a material used in the production of fuel for nuclear power reactors.

Appeals for the D.C. Circuit, the NRC Staff again denied Honeywell's request in a letter, dated April 25, 2011. That denial is the subject of this hearing.

1.3. As discussed below, the Board finds that the application and the record of the proceeding contain sufficient information to support a finding that the applicable standards in 10 C.F.R. Part 40 have been met and that the amendment and exemption should be issued. In short, Honeywell's proposal provides reasonable assurance that decommissioning funds will be available when needed. Moreover, the reasons given by the NRC Staff for denying the request are not supported by the record. If anything, the NRC Staff's ever-changing reasons for denying the request suggest a result in search of a rationale rather than an impartial review of the record.

II. BACKGROUND

2.1. This proceeding has a complex history, involving a series of related amendment requests and appeals. Because the prior decisions bear, to some degree, on the application at issue, we set forth the procedural and regulatory background at length.

A. Self-Guarantee Method of Decommissioning Funding

2.2. The Commission's regulations provide that licensees that operate facilities possessing or using uranium source material must provide financial assurance for the decommissioning of such facilities.[2] Where, as here, the licensee is a company that issues bonds, it may, in lieu of other methods, such as obtaining a surety or letter of credit, "provide reasonable assurance of the availability of funds for decommissioning based on furnishing its own guarantee that funds will be available for decommissioning costs and on a demonstration that the company passes the financial test of Section II."[3]

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[2] 10 C.F.R. § 40.36(e).

[3] 10 C.F.R. Part 30, Appendix C, Section I.

2.3. Section II requires that a company have: (1) "[t]angible net worth at least 10 times the total current decommissioning cost estimate for the total of all facilities ... for all decommissioning activities for which the company is responsible as self-guaranteeing licensee"; (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"; and (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."[4] A licensee using a self-guarantee also must annually repeat passage of the financial test, including a showing that it meets the "10:1 tangible net worth ratio."[5]

2.4. The NRC regulations governing source material licenses specifically include a provision for exemptions. The Commission may grant exemptions that (1) are authorized by law; (2) will not endanger life or property or the common defense and security; and (3) are otherwise in the public interest.[6]

B. History of Self-Guarantee at MTW

2.5. Starting in 1994, Honeywell began using a self-guarantee to provide decommissioning financial assurance for MTW, as permitted by 10 C.F.R. Part 30, Appendix C. On November 3, 2006, Honeywell notified the NRC that it no longer satisfied the financial test for a self-guarantee in Appendix C.[7] In the letter, Honeywell also notified the NRC that it intended to request an exemption from the part of the financial test in Appendix C, that requires

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4 *Id.* at Section II.A.

5 *Id*. at II.B.3.

6 10 C.F.R. § 40.14. The NRC has clarified its exemption authority for power reactor licensees in promulgating 10 C.F.R. § 50.12. Under Section 50.12, exemptions would be issued in special circumstances, including where full compliance is not necessary to meet the intent of the regulation.

7 Exh. HNY000004 at 1.

licensees to have a tangible net worth at least 10 times the total current decommissioning cost estimate.[8]

C. Initial Self-Guarantee Exemption Request

2.6. On December 1, 2006, Honeywell formally requested that the NRC approve an alternate financial test formula under 10 C.F.R. § 40.14.[9] Specifically, Honeywell sought to include the value of "goodwill" in calculating the 10:1 ratio in Appendix C. In accordance with generally accepted accounting practice, goodwill is an intangible asset that reflects the cash generating potential of a business.[10] Honeywell acknowledged that licensees traditionally had not been permitted to include the value of goodwill in the definition of tangible net worth under Appendix C to Part 30. But, Honeywell explained that allowance for goodwill would provide an equivalent level of assurance in Honeywell's particular circumstances. Honeywell sought an open-ended exemption and did not propose an expiration date for its request.[11]

2.7. The NRC addressed Honeywell's proposal to use an alternate decommissioning test in a Technical Evaluation Report ("TER") for renewal of the operating

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8 *Id*.

9 Exh. HNY000004.

10 In almost all business combinations, the consideration paid by the acquiring company exceeds the fair value of the assets acquired and liabilities assumed from the target. The reason for this excess of goodwill is that the acquired company is valued on the basis of its cash flow or net income generating potential, not on the simple fair value of its assets and liabilities. Exh. HNY000001 at ¶25. This is in contrast to "tangible assets," which include, for example, a company's buildings, factories, and machinery. *Id*. at ¶29.

11 *See generally* Exh. HNY000004; *see also* Tr. at 102 (acknowledging that the NRC issues exemptions that are "open ended, there's not necessarily a termination date").

license for MTW, dated May 11, 2007.[12] The NRC explained that the basis for decommissioning financial assurance is to assure that funds for decommissioning are available when needed — both under normal circumstances and in times of financial distress.[13]

2.8. The NRC noted that a licensee's financial ability to pay under normal circumstances is regularly rated by the bond rating agencies, such as Moody's and Standard and Poor's, and that a rating of "A" or higher indicates a very low probability of default on a company's bonds.[14] Consequently, the NRC concluded that Honeywell's "A" rating is a reliable indicator that it has the ability to pay its decommissioning obligations under normal circumstances. [15]

2.9. Even in times of "financial distress," the NRC explained, "a transition from the 'A' rating to a default has not occurred within a one year time span during the period 1983 to 2005 for bonds rated by either Moody's or Standard and Poor's."[16] Noting, however, that "[t]he default rate rises as the time span for default extends greater than one year," the NRC stated that "the financial test to qualify for using the self guarantee must be repeated annually, to assure that the risk of default remains low for the next year."[17] The NRC also noted that, considering tangible assets alone, Honeywell did not meet the 10 to 1 ratio. But, if goodwill

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12 Exh. HNY000009 at 52-55.

13 *Id*.

14 *Id*. at 53.

15 *Id*.

16 *Id*.

17 *Id*.

assets were considered in net worth, Honeywell's ratio exceeded 35 to 1.[18] The NRC deemed these assets (tangible assets plus goodwill) sufficient to assure decommissioning funds in times of financial distress.[19]

2.10. Accordingly, the NRC imposed License Condition 27 in conjunction with issuance of the renewed license for MTW.[20] License Condition 27 authorized Honeywell to use the alternate decommissioning financial assurance test. Because the NRC was considering a rulemaking on decommissioning financial assurance and would consider including goodwill in the financial test as part of the rulemaking,[21] the NRC incorporated a one-year time limit on the amendment in order to consider comments on the proposed rule.[22]

D. Second Self-Guarantee Amendment

2.11. Honeywell sought to extend its ability to use the alternate financial test in a license amendment request, dated April 11, 2008.[23] When the financial test was calculated at that time allowing for goodwill, Honeywell met the 10:1 ratio; however, without goodwill Honeywell's tangible net worth was insufficient to meet the self-guarantee requirement and in

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18 *Id*.

19 *Id*.

20 *Id*.

21 On January 22, 2008, the NRC published a proposed rule on facility decommissioning. 73 Fed. Reg. 3812. The NRC proposed to add language to the financial test in Section II.A of Appendices A, C and D of Part 30 to include the value of goodwill when calculating net worth and performing the financial test. *Id*. at 3831. The NRC Staff concluded that permitting the use of intangible assets (*e.g.*, goodwill) in conjunction with an investment grade bond rating would not materially increase the risk of a shortfall in decommissioning funding. *Id*. at 3825.

22 Exh. HNY000009 at 54; Tr. at 102.

23 Exh. HNY000005 at 1.

fact declined to a negative amount during this period — primarily due to an increase in goodwill.[24]

2.12. Honeywell stated that "[t]he rationale for seeking an extension of the exemption granted to Honeywell in the May 11, 2007 [TER] is largely the same as" in Honeywell's initial request.[25] Honeywell further explained that the "[t]he NRC should also grant Honeywell's request for an extension to the exemption granted in May 2007 because the exemption is entirely consistent with a proposed rule promulgated by the NRC on January 22, 2008."[26] After discussing the request with the NRC, Honeywell provided additional information to the NRC regarding its tangible net worth.[27]

2.13. On August 22, 2008, the NRC authorized Honeywell to continue to use goodwill in performing the financial test.[28] The NRC found that Honeywell had increased its net income, current assets, and earnings per share.[29] The NRC also pointed to the fact that Honeywell maintains $21.9 billion in total assets in the United States.[30] The NRC explained that if the value of goodwill is included in Honeywell's net worth test, the ratio of Honeywell's net worth to decommissioning liability far exceeded 10 to 1.[31] The NRC observed that Honeywell

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24 Exh. HNY000007 at 2.

25 *Id*.

26 *Id*.

27 *Id*.

28 Exh. HNY000010 at 4.

29 *Id*. at 2.

30 *Id*.

31 *Id*. Although the NRC calculated the financial test ratio to be 21:1, the actual ratio was approximately 34:1. Regardless, the ratio was well beyond 10:1.

continued to maintain a long-term credit rating of "A" as assigned by Standard & Poor's.[32] "Because the basis for granting the original exemption still applies," the NRC again permitted use of the alternate financial test.[33]

E. Third Self-Guarantee Amendment

2.14. On April 1, 2009, Honeywell again sought to extend the license amendment to permit continued use of goodwill.[34] The request was nearly identical to the 2008 request. Honeywell explained that "[t]he rationale for seeking an extension of the exemption granted to Honeywell in the August 22, 2008 action is largely the same as" in Honeywell's initial request.[35] And, as before, Honeywell noted that "[t]he NRC should also grant Honeywell's request for an extension to the exemption granted in August 2008 because the exemption is entirely consistent with a proposed rule published on January 22, 2008."[36]

2.15. The NRC subsequently sought additional, clarifying information from Honeywell regarding the license amendment request, which Honeywell provided on October 13, 2009.[37] The supplemental information including information showing:

(1) The default rate was "still less than 0.244%" for A2 Moody's rated bonds and that there had been only 3 defaults in the last 25 years;

(2) Honeywell's strong financial condition, as evidenced by the fact that "[t]o the extent that the recent economic turmoil has led to a historically anomalous number of defaults, the majority ... were in the banking, finance, insurance, and real estate finance sectors," and

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32 *Id*.

33 *Id*. at 2-3

34 Exh. HNY000006 at 1.

35 *Id.* at 1-2.

36 *Id*. at 2.

37 Exh. HNY000008.

additionally that "Honeywell is in a stronger financial condition than many of the third parties that it would turn to in the event that it became necessary to obtain a letter of credit";

(3) Significant annual free cash flow was available for decommissioning MTW, including $3.1 billion in free cash flow in 2007 and in 2008;

(4) Honeywell maintained more than $22.5 billion in assets in the United States at the end of 2008, more than in 2006 or 2007; and

(5) The basis for concluding that the tangible net worth test does not accurately reflect the financial stability or low risk of default of a diversified technology and manufacturing company like Honeywell.[38]

2.16. On December 11, 2009, the NRC denied Honeywell's request to continue using goodwill in performing the financial test.[39] The NRC stated only that it found unpersuasive Honeywell's argument that the proposed exemption was "consistent" with the then-pending proposed decommissioning rule.[40] Although the proposed rule in fact would allow for consideration of goodwill in the financial test ratio, the NRC noted that the draft rule also proposed adding a minimum tangible net worth requirement of $19 million.[41]

2.17. As a result of the NRC's decision, Honeywell was required to make alternate financial assurance arrangements by April 11, 2010. Honeywell subsequently purchased and executed a surety bond to provide the necessary financial assurance.[42]

2.18. Honeywell appealed the NRC's decision to deny the license amendment to the U.S. Court of Appeals for the District of Columbia Circuit. Honeywell argued that the NRC's decision was arbitrary and capricious for failing to adequately explain the reasoning for

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38 *Id*. at 3-7.

39 Exh. HNY000011 at 3.

40 *Id*. at 2.

41 *Id*.

42 Exh. NRC000056.

the denial of the license amendment. The Court of Appeals agreed.[43] The Court of Appeals found that the NRC's decision denying the amendment was inconsistent with its precedent addressing Honeywell's prior exemption requests and failed to address the data included in the October 2009 supplement.[44]

2.19. The Court of Appeals also found the NRC's explanation for is decision to deny the application inadequate. The Court of Appeals explained that the mere fact that Honeywell's tangible net worth declined did not provide a reasonable basis to distinguish the 2009 decision because Honeywell's tangible net worth was declining when it granted the 2007 and 2008 exemptions.[45] Accordingly, the Court of Appeals vacated the NRC's December 11, 2009 denial, and remanded Honeywell's April 11, 2009 exemption request to the NRC for further proceedings.

2.20. On remand from the D.C. Circuit, on April 25, 2011, the NRC Staff again denied the license amendment.[46] The Staff provided new (and different) reasons for denying the exemption. For the first time, the NRC Staff asserted that bond ratings are not as reliable as previously thought, that the reliability of free cash flow is uncertain in the event of a bankruptcy, and that Honeywell had experienced a significant and uncorrected decrease in its tangible net worth.[47]

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

44 *Id*. at 580-581.

45 *Id*. at 581.

46 Exh. HNY000012.

47 *Id*. at 4-7.

2.21. On June 22, 2011, Honeywell filed a request for hearing.[48] The Licensing Board granted the hearing request on July 27, 2011.[49]

2.22. The parties submitted pre-filed direct testimony on October 14, 2011.[50] The parties submitted pre-filed rebuttal testimony on November 3, 2011.[51] The evidentiary hearing was held in Rockville, Maryland, on December 15, 2011.

III. LEGAL STANDARDS GOVERNING THE BOARD'S REVIEW

A. Applicable Regulatory Criteria

3.1. This hearing involves the NRC Staff's decision to deny Honeywell's license amendment request, dated April 1, 2009. Honeywell applied for a license amendment using NRC Form 313, "Application for a License." And, as the D.C. Circuit recognized, "the Commission has treated Honeywell's requests for an exemption from the 10:1 tangible net worth to decommissioning cost requirement under 10 C.F.R. § 40.36(e) and 10 C.F.R. Part 30, Appendix C, Section II, as an amendment to its Source Materials License."[52] The first amendment was granted as part of a license renewal proceeding and memorialized as License Condition 27 to Honeywell's license.[53] The second amendment was granted as an amendment to

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48 *See* "Request for Hearing on Denial of Decommissioning License Amendment Request."

49 *Honeywell International Inc.* (Metropolis Works Uranium Conversion Facility), LBP-11-19, 74 NRC __ (slip op. July 27, 2011).

50 *See* Exh. NRC000001, "NRC Staff's Testimony Regarding Honeywell's 2009 Exemption Request," dated October 14, 2011; Exh. HNY000001, "Testimony of John Tus and Bruce Den Uyl," dated October 14, 2011.

51 *See* Exh. NRC000053, "NRC Staff's Reply Testimony," dated November 3, 2011; Exh. HNY000059, "Rebuttal Testimony of John Tus and Bruce Den Uyl," dated November 3, 2011.

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

53 Exh. HNY000009 at 55.

License Condition 27.[54] The third request, which is the subject of this proceeding, simply would have amended License Condition 27 to substitute a new date.[55] The NRC Staff and Honeywell therefore have consistently treated the request to use an alternate financial test as a license amendment.

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

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

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

> This license condition shall be imposed until of the earlier occurrence of (1) May 11, 2009, or (2) the effective date of a final rule amending 10 CFR Part 30 consistent with the proposed rule published in the *Federal Register* on January 22, 2008.

[55] The original proposed dates for expiration have been superseded by intervening events as a result of actions within the NRC's control (*e.g.*, the NRC's initial review, D.C. Circuit appeal and remand, this appeal). The agency, as a whole, still has not reached a final determination on the application first filed in April 2009. As a result, the exemption should have a revised expiration date to reflect the change in circumstances. Revising the expiration date is well within the agency's discretion, particularly where, as here, the initial exemption request was not for a specified period (*see* Exh. HNY000004) and the one-year limitation was imposed by the NRC Staff without input from Honeywell.

3.3. The request also involves an exemption from NRC regulations. Under 10 C.F.R. § 40.14(a), the Commission may grant exemptions from NRC requirements that it determines (a) are authorized by law; (b) will not endanger life or property or the common defense and security; and (c) are otherwise in the public interest. Accordingly, the exemption standards in Section 40.14 also must be met for the amendment to be issued.[56]

B. Burden of Proof

3.4. Unlike NRC hearings that involve contentions raised by an intervenor, this proceeding involves a challenge brought by an applicant. This distinction has implications for the applicable burden of proof, though, as a practical matter, there is little difference in the ultimate standard used.

3.5. Under 10 C.F.R. § 2.325, the applicant or the proponent of an order has the burden of proof. Here, Honeywell, as the proponent of the amendment, has the burden of proof with respect to issuance of the amendment — that is, the amendment cannot be issued unless Honeywell meets its burden of proof to demonstrate that the license amendment application meets 10 C.F.R. §§ 40.32 and 40.14. But, because the NRC Staff issued an order[57] denying the amendment request and exemption, the Staff has become the proponent of the

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[56] While an exemption is discretionary under the standard, guidance on the application of that discretion is inherent in 10 C.F.R. § 50.12 (applicable to power reactors), which allows issuance of exemptions (assuming the criteria in Section 50.12(a)(1) are met) in "special circumstances," which are defined in Section 50.12(a)(2).

[57] Although the NRC Staff argued that its decision was not an "order" because it was not issued under 10 C.F.R. § 2.202 (Tr. at 125, 127-128), a decision to deny a license amendment is an order under the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et al*. An "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making, but including licensing. *Id*. at § 551(6), *see also* Tr. at 118.

agency action under review (not Honeywell) and has the burden of proof with respect to its decision to deny an exemption.

3.6. For both parties, the showing necessary to meet their respective burdens of proof is the "preponderance of the evidence" standard.[58]

C. Role of Licensing Board

3.7. Under the Atomic Energy Act, the Commission has a choice of hearing and determining cases in the first instance itself, or delegating that responsibility to subordinates while reserving the right to review their decisions.[59] Here, the NRC Staff was given responsibility to review the application and make an initial determination. But, the Commission has authority to reverse the Staff's decision.[60] In the present case, the Board has been delegated the authority to act in place of the Commission.[61] The Board must decide, based on governing

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

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

60 *Id.* at 404 ("'In making its decision, whether following an initial or recommended decision, the [Commission] is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision – as though it had heard the evidence itself.'") (internal citations omitted).

61 The Commission delegates to licensing boards the authority to make initial decisions. 42 U.S.C. § 2241; 10 C.F.R. § 2.319. The grant of authority in 42 U.S.C. § 2241 (AEA Section 191) includes decisions involving the "granting, suspending, revoking, or amending of any license or authorization under the [AEA], any other provision of law, or any regulation of the Commission issued thereunder." The D.C. Circuit and the NRC Staff both agree that Honeywell's request is an amendment. The Board therefore has authority to render decisions involving the specific request at issue.

regulatory standards and the evidence submitted, whether the amendment and exemption should be issued.[62]

3.8. This hearing is by its nature a *de novo* review.[63] Consistent with *de novo* review, the Board may substitute its "own judgment for that of the [NRC Staff]."[64] This necessarily extends to the exemption criteria that are tied to the amendment request.[65] A *de novo* hearing assures that Honeywell has a full and fair opportunity for independent evaluation of the NRC Staff's decision, including consideration of the information provided by Honeywell in support of its application and all testimony and evidence presented during this hearing.[66] The Board is empowered to review the entirety of the record and make its own assessment of the licensing request at issue.[67]

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62 *See* 10 C.F.R. § 2.318(b) ("Any order related to the subject matter of the pending proceeding may be modified by the presiding officer as appropriate for the purpose of the proceeding.")

63 The parties are in agreement on this point. *See* Tr. at 116-118 (Honeywell); *id*. at 125 (NRC Staff).

64 *Atlantic Research Corp.*, ALAB-594, 11 NRC 841, 849 (1980). The Board is the ultimate finder of fact and has authority to order issuance of the amendment if it determines that the standards have been met.

65 The mere fact that an exemption is a discretionary act does not preclude Board review of the application. Permitting the NRC Staff to have unfettered discretion over exemptions would exclude critical technical questions from licensing hearings merely on the basis of an "exemption" label.

66 The NRC Staff may not claim for itself the sole discretion to apply the exemption criteria. This argument would fundamentally alter the scope of the hearing opportunity provided by the regulations.

67 *See* 10 C.F.R. § 2.318(b) (authorizing Board to modify NRC Staff licensing order at issue in hearing).

3.9. The Board does not, however, operate in a vacuum. Agencies, including the NRC, create law through rulemakings and on a case-by-case basis.[68] Here, the Commission as an agency (through the NRC Staff) issued an exemption permitting use of goodwill on two prior occasions. Those prior decisions represent the Commission's — not just the NRC Staff's — determination that the applicable standards in Part 40 were satisfied. Those decisions carry precedential weight as a result. While "an agency is free to alter its past rulings and practices even in an adjudicatory setting," it is "equally settled that an agency must provide a reasoned explanation for any failure to adhere to its own precedents."[69] Thus, any decision to deny the exemption must also include a non-arbitrary explanation as to why the agency is not following its earlier decisions granting the exemption.[70]

3.10. If, based on the record and in light of Commission precedent, the Board determines that Honeywell has demonstrated by a preponderance of the evidence that the amendment criteria (and, as part of that showing, the exemption criteria) have been met, the Board is authorized to direct the NRC Staff to issue the license amendment to Honeywell.[71]

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68 *See NLRB v. Bell Aerospace Co.*, 416 US 267, 292-294 (explaining that agencies have discretion to create agency law through general rules or by individual, *ad hoc* litigation).

69 *Hatch v. FERC*, 654 F.2d 825, 834 (D.C.Cir. 1981). The NRC "may change its policy only if it provides 'a reasoned analysis indicating that prior policies and standards are deliberately changed, not casually ignored.'" *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 12 (D.C.Cir. 2005) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir. 1970)).

70 Under the APA, this action may not be arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2).

71 10 C.F.R. § 2.318(b).

D. Scope of Information Considered

3.11. The NRC Staff has argued that the scope of the hearing should be limited to information that was available at the time the NRC Staff initially denied the application in December 2009.[72] However, the NRC Staff has provided no legal basis for its position and this approach is, if nothing else, impractical.[73] Honeywell's application remains pending before the Board. There are no restrictions in the regulations on the dates of information that can be considered by the Board in this proceeding. The only limitations are that the information and testimony be "relevant, material, and reliable," and not repetitious.[74] The Board must consider all relevant, material, and reliable information as part of its review — regardless of its availability or use by the NRC Staff in December 2009.[75] Anything less would amount to an abdication of the Board's responsibility to conduct a thorough review of the application.[76]

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72 Exh. HNY000012 at 2 ("The denial is based solely on the information available to the NRC as of the date of the original denial on December 11, 2009."); "NRC Staff Initial Statement of Position," dated October 14, 2011, at 21 ("[O]n remand the Staff limited its review to information available as of December 11, 2009.").

73 For example, it is not clear how agency reviewers can "unknow" information and arguments that they already know (*e.g.*, arguments made before the D.C. Circuit). Likewise, in the course of identifying information that pre-dates its December 2009 decision, it is difficult to not be influenced by prior decisions and, consciously or not, favor data and sources that support those prior decisions over those that run counter to the earlier decisions. For this reason, post hoc rationalizations are generally considered suspect. *See e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 50 (1983).

74 10 C.F.R. § 2.337.

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

76 The NRC Staff has indicated that it did not consider information that was not available prior to its December 2009 decision denying the exemption. As we explain below, the NRC has not demonstrated that it was rigorous in following this self-imposed restriction. Nor do we think that such a restriction was a useful means of conducting a review on

3.12. The NRC Staff's argument that a limited scope on remand is dictated by the U.S. Court of Appeals decision is misguided. On remand, an agency is not limited to considering information previously on the record before it, but instead may consider all relevant information, including new information bearing on its decision.[77] This is inherent in the very nature of a remand. Indeed, the Court of Appeals remand here was general in nature and did not limit the NRC to reconsidering the information available at the time of its initial decision.[78] It is often necessary for an agency to consider new information in order to satisfy its obligation to assess all relevant and material information.[79] The NRC Staff was not restricted in the information to be considered on remand; it should have considered all information in the record in reaching its decision. The Board must do so now.[80]

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remand. The NRC Staff's willful burying of its head in the proverbial sand leads to nonsensical outcomes. For example, the NRC Staff decision at issue states that Honeywell has experienced an "uncorrected" decline in its tangible net worth. But, the Staff is undoubtedly aware of information that was submitted on the agency docket by Honeywell, under oath, indicating that its tangible net worth has in fact increased for two straight years. We think that the better course of action is to consider all available information when conducting a review so as to ensure a full and fair consideration of all relevant and material information.

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

78 The Court vacated the NRC's decision and remanded the exemption request to the NRC simply for "further proceedings." 623 F.3d at 581. *But see* "NRC Staff's Reply to Honeywell's Initial Statement of Position," dated November 3, 2011, at 7-9 ("To the extent the Court's remand is viewed as directing the NRC to address the specific questions the Court raised, the Staff necessarily had to limit its review to information available at the time of its December 11, 2009 decision."). The remand was not so limited.

79 *Costle*, 657 F.2d 275 at 284. Remand proceedings need not be limited to mere "pencil whipping" of the NRC Staff's initial justification for denial, but instead should encompass an evaluation of the totality of the information available to the NRC Staff.

80 The situation is no different than an application for a license. A license, once issued, could have a defined term (*e.g.*, 40 years for a power reactor operating license). If a license was denied, and the denial was challenged and remanded, the NRC could

3.13. Consideration of relevant new information is also necessary because the NRC Staff, in denying Honeywell's application on remand, itself considered new information and provided new explanations for denying the application — without providing Honeywell at opportunity to address the NRC Staff's concerns. In assessing the two prior exemptions requests, the NRC Staff applied the same criteria on both occasions (ability to pay under normal circumstances and ability to pay in times of financial distress) and relied on the same data to support its conclusions. But, in its post-remand denial, the NRC Staff took a different approach. Rather than use the same factors and data sources to evaluate Honeywell's ability to pay, the NRC Staff focused on the reliability of bond ratings (an attribute already used explicitly in the NRC's own regulations) and the availability of free cash flow.[81]

3.14. The NRC Staff also considered new and different information than it had in its December 2009 denial.[82] By considering new materials, the NRC Staff effectively

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consider new information from the applicant. If subsequently issued, the license would have a term running from the date of effectiveness of the license.

81 An agency may not change its mind without providing a reasoned explanation. *State Farm*, 463 U.S. at 43. The NRC Staff cannot change the standards that it applies in evaluating an amendment request without providing an opportunity to address the new standards and provide relevant information. Had Honeywell known that the NRC was focusing on the reliability on bond ratings, Honeywell could have supplied additional information to address those concerns. But, Honeywell was not given that opportunity. As discussed below, this same concern extends to the reasons presented by the Staff for the first time in this hearing (*e.g.*, liquidity of intangible assets and goodwill impairment).

82 For example, the Staff references two documents that were not part of the Certified Index of the Record submitted to the D.C. Circuit (Exh. HNY000041) in denying Honeywell's application. Exh. HNY000012 at 4, *citing* Exhs. NRC000037 and NRC000044. The NRC also relies on other exhibits that were not identified in the Index in this proceeding. *See, e.g.*, Exhs. NRC000023, NRC000025, NRC000027, NRC000028, NRC000034, NRC000039, NRC000041, and NRC000043. And, the NRC Staff relied on post-December 2009 documents in its filings. *See, e.g.*, Exhs. NRC000047 and NRC000048. By relying on these documents, the NRC Staff waived any argument that the scope of information considered should be limited to that available to the agency prior to December 2009.

augmented the original administrative record.[83] Having opened the original record to new information, the NRC cannot selectively augment that record to support its position while simultaneously ignoring other information before it that is contrary to its position.[84] The NRC cannot skew the record in its favor by excluding pertinent but unfavorable information;[85] an agency cannot "cherry pick" which information to consider, selectively ignoring information and data that is contrary to its position.[86] Nor may the Staff exclude information based on the circular reasoning that it did not "rely on the excluded information in its final decision."[87]

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

84 *See Thompson* at 555, citing *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 32 (N.D. Tex. 1981) ("The 'whole' administrative record, therefore, consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position") (emphasis in original); *Portland Audubon Soc'y v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993); S.Rep. 752, 79th Cong., 1st Sess. 28 (1945) ("The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case.").

85 *Envtl. Def. Fund v. Blum*, 458 F.Supp. 650, 661 (D.D.C. 1978).

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

87 *Ad Hoc Metals Coalition v. Whitman*, 227 F.Supp.2d 134, 139 (D.D.C. 2002). Accepting the NRC Staff's view of the limited scope of the administrative record would permit it to manipulate the administrative process by picking and choosing which materials support its position, and concealing those materials — although indisputably "before" the agency at the time of decision — that may cast doubt on its actions. This would include, for example, information showing that Honeywell's tangible net worth has increased since the end of 2008.

3.15. Because the final licensing decision of the NRC — as an agency, not just the Staff — must be based on the entire record at the time the decision is made, and because there is no basis for limiting the record to information that pre-dates the initial NRC decision to deny Honeywell's application,[88] the Board must consider all relevant, material, and reliable information presented to the agency on the record in this hearing.[89]

IV. FINDINGS OF FACT

4.1. The NRC Staff applied a two-part test in evaluating prior exemption requests: (1) ability to pay in normal circumstances; and (2) ability to pay in times of financial distress. With the qualification that we do not see the rapid or instantaneous onset of "financial distress" as credible for a company of the size, diversity, and credit rating of Honeywell (as discussed further below),[90] we find that an approach based on these two scenarios is reasonable. We therefore apply these criteria below.

A. Ability to Pay in Normal Circumstances

1. Honeywell's Financial Condition

4.2. Honeywell International Inc. is a Fortune 75 diversified technology and manufacturing company, serving customers worldwide with aerospace products and services; control technologies for buildings, homes and industry; automotive products; turbochargers; and

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88 The NRC Staff's failure to consider the complete record before it on remand is of limited consequence at this point; all the information is now before the Board and will be independently assessed in this hearing.

89 *See, e.g.*, *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. HHS,* 396 F.3d 1265, 1278 (D.C. Cir. 2005) (finding agency action "arbitrary and capricious because [it] failed adequately to address relevant evidence before it").

90 Indeed, as discussed below, the self-guarantee rule is premised on the assumption that the financial test will identify declining performance and require alternate financial assurance prior to financial distress.

specialty materials.[91] Honeywell International Inc. is the ultimate parent company for all Honeywell subsidiaries and affiliates. 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.[92]

4.3. 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%),[93] and transportation systems (13%).[94] Under Honeywell's corporate structure and under the self-guarantee previously used for MTW, all of these lines of business are available to provide funds for decommissioning MTW, which is estimated to cost approximately $187 million.[95]

4.4. Honeywell's long term bonds are rated "A2" by Moody's and "A" by Standard & Poor's.[96] These bond credit ratings have been unchanged for 17 years. And, since December 31, 2005, Honeywell's quarter-end cash balances have been no less than $1.2

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91 Exh. HNY000001 at ¶15.

92 Exh. HNY000013 at 2.

93 MTW is part of the specialty materials business unit.

94 Exh. HNY000001 at ¶15. Honeywell forecasts 2011 sales between $36.1 billion and $36.7 billion. *Id*. at ¶17.

95 *Id*. at ¶16. At the hearing, the Board drew a comparison to the Louisiana Energy Services ("LES") enrichment facility (Tr. at 63-64), noting that LES relied upon a letter of credit to provide decommissioning financial assurance. The Board recognizes that the LES example is different from Honeywell with respect to the financial test for self or parent guarantees in significant ways: LES is a single-asset company, does not issue bonds, and has limited assets in the U.S. (essentially limited to the enrichment facility itself). Likewise, a comparison to Florida Power & Light and Duke Energy is inapposite as those entities are power reactor licensees, have a larger decommissioning cost per unit, operate multiple units, and have smaller market capitalizations than Honeywell. Tr. at 62-63.

96 Exh. HNY000001 at ¶17; Exh. HNY000013 at 13.

billion.[97] These cash balances could be used to pay for decommissioning. And, in contrast to many other companies, Honeywell did not experience any limitations on its ability to access the commercial paper markets throughout the recent financial crisis.[98] Honeywell currently has a $2.8 billion five-year committed revolving credit facility that could be drawn upon immediately in the event that decommissioning funds were needed for MTW.[99]

4.5. Other financial indicators support Honeywell's ability to meet its MTW decommissioning obligations under normal circumstances. For example, Honeywell has consistently produced high levels of free cash flow. Free cash flow is the cash a company generates from its operations less the cost of maintaining and expanding its asset base for purchases of property, plant and equipment (*i.e.*, capital expenditures).[100] It is essentially the money that the company could return to shareholders if the company was to grow no further. Honeywell's free cash flow grew from $2.2 billion in 2006 to $3.6 billion in 2010, even after making a $600 million voluntary pension contribution.[101] While sales and net income declined by 15% and 23% respectively between 2008 and 2009, Honeywell maintained its free cash flow at $3.1 to $3.3 billion.[102] The company forecasts 2011 free cash flow (excluding any optional

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97 Exh. HNY000001 at ¶44. At the time of the hearing, Honeywell had on the order of $4 billion in cash on hand. Tr. at 38, 73.

98 *Id*.; Tr. at 73.

99 Exh. HNY000001 at ¶17; Exh. HNY000059 at ¶14. Unlike most companies, Honeywell's revolver does not contain any financial covenants. *Id*.

100 Exh. HNY000001 at ¶31.

101 *Id.* at ¶18 (Table 7), ¶52.

102 *Id.* at ¶18.

pension payments) in the range of $3.5 to $3.7 billion.[103] The total decommissioning liabilities for MTW are relatively very small — approximately 5% of one year's actual free cash flow.

4.6. Net worth is another metric that demonstrates Honeywell's financial strength and ability to pay. Net worth (or shareholder equity) is a measure of the residual interest or claim that the shareholders in a company have in the event that a firm was liquidated and all liabilities were extinguished.[104] Net worth is the total assets minus total liabilities of a company. Thus, it is a rough measure of a company's financial condition. Honeywell's net worth grew from $7.1 billion in 2008 to $10.8 billion in 2010.[105] Even a net worth test is conservative because it does not reflect the market value of Honeywell's assets.[106] The market value of Honeywell reflects the value of all of Honeywell's assets (including intangible assets). The value of Honeywell in the marketplace is a multiple of Honeywell's net worth.

4.7. Honeywell also has significant tangible assets. Tangible assets are assets having a physical existence, such as cash, equipment, inventory and real estate.[107] Accounts receivable are also usually considered tangible assets for accounting purposes. These tangible assets would be available to pay for decommissioning, if necessary. Honeywell's tangible assets have increased from approximately $21 billion at the end of 2006 to approximately $24 billion at

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103 *Id.* at ¶17.

104 *Id.* at ¶59.

105 *Id.* at ¶19.

106 *Id.* at ¶59; *see also* Tr. at 41.

107 *Id.* at ¶29; *see also* Tr. at 57-58.

the end of 2010.[108] These tangible assets far exceed the decommissioning cost estimate for MTW.

4.8. In light of the objective information on the record regarding Honeywell's current financial condition, we agree with Honeywell's witness, who stated that Honeywell has a "tremendous amount of firepower" available to provide decommissioning funding.[109] We therefore find that the most important financial indicators (and the ones historically used by the NRC) support Honeywell's ability to pay under normal circumstances.

2. Tangible Net Worth

4.9. To support its decision to deny Honeywell's application, the NRC Staff argued that Honeywell experienced a "significant and uncorrected" decrease in tangible net worth.[110] However, Honeywell provided uncontroverted evidence showing that there is no direct correlation between negative (or declining) tangible net worth and ability to pay decommissioning costs (if it became necessary to do so). For an "A-rated" company such as Honeywell, a negative tangible net worth is not a reflection of financial weakness.[111] Instead, a negative tangible net worth simply reflects that a company has sought to grow and increase its product and geographic diversification, in part, by purchasing companies.[112]

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108 *Id.* at ¶29 (Table 6).

109 Tr. at 73.

110 Exh. HNY000012 at 6.

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

112 Tr. at 49-50. For example, from early 2003 to late 2011, Honeywell acquired approximately 65 companies at a cost of approximate $8.5 billion. Exh. HNY000001 at ¶25. One accounting-related result of buying cash generating businesses is that Honeywell must book either specific intangibles or goodwill to reflect the difference

4.10. For example, as of year-end 2010, Honeywell, United Technologies, and Danaher — all "A-rated" large multi-industry industrial corporations — each had a tangible net worth that was negative.[113] Companies such as IBM and Proctor & Gamble, which have higher credit ratings than Honeywell, also had negative tangible net worth as of year-end 2010.[114] Proctor and Gamble had a tangible net worth of approximately *negative* $22 billion as of its June 30, 2011, year end, generated free cash flow of $10 billion in fiscal 2011, and had an AA-/Aa3 credit rating.[115] The Honeywell witness also explained that, over the course of his many years of interactions with bond credit rating agencies and investors, they never once asked about Honeywell's tangible net worth.[116] This demonstrates that the NRC Staff's focus on tangible net worth is not meaningful, at least as applied to large and diversified companies like Honeywell.[117]

4.11. In contrast to Honeywell's objective evidence and expert testimony, the NRC Staff provided nothing to suggest that declining tangible net worth is an indicator of declining financial performance or an inability to meet decommissioning obligations. The NRC Staff offered no data to support its views. And, the NRC Staff's witnesses never explained any relationship between tangible net worth and the risk of default (or ability to pay).[118]

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between the fair value of the purchased tangible assets and liabilities and the price paid (*i.e.*, value associated with the ability of those assets to generate cash flow).

113 Exh. HNY000001 at ¶58; *see also* Tr. at 49-50.

114 *Id*.; *see also* Tr. at 49-50.

115 *Id*., *citing* Exh. HNY000046.

116 Tr. at 47. The implication is that tangible net worth is not a useful tool for evaluating a company's financial strength. *Id*. at 47-49.

117 *See also* Exh. HNY000001 at ¶58.

118 The Staff witnesses mention the general "deterioration in the economy" and "indicators in the macro sense that were troubling." Tr. at 79. But, the exemption review should be

4.12. Moreover, contrary to the NRC Staff assertion that "Honeywell has experienced a significant and uncorrected decrease in tangible net worth,"[119] Honeywell's tangible net worth actually increased during the course of the NRC Staff review of the pending amendment application at issue here. At the end of 2008, Honeywell had negative tangible net worth of $5.3 billion.[120] At the end of 2009 and 2010, Honeywell had a negative tangible net worth of $3.7 billion and $3.4 billion, respectively.[121] Thus, one of the bases given by the NRC Staff in April 2011 for denying the requested amendment was not true at the time of the decision — that is, tangible net worth was not on a year-to-year declining trend.[122]

4.13. Based on the information presented by the parties, we find that Honeywell has satisfactorily demonstrated its considerable financial strength — both at present and at the time of the initial exemption request (and denials). This supports our finding that Honeywell has an ability to pay for decommissioning in normal circumstances.

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focused on Honeywell's particular financial circumstances rather than the economy at large. As discussed below, the Staff's misguided focus infects other aspects of the NRC Staff review, such as its vague concerns with the overall number of defaults in 2008 and 2009, rather than the number of defaults for "A" rated companies. The Staff's fuzzy logic appears to lead to unnecessary and overly-conservative regulatory decisions.

119 Exh. HNY000012 at 6-7.

120 Exh. HNY000001 at ¶28 (Table 5).

121 *Id.*

122 This failure to recognize more recent financial information highlights the arbitrary nature of the Staff's self-imposed cut-off date for reviewing Honeywell's request. The Staff's rigid approach, which is not based on any particular legal theory and is not dictated by the Atomic Energy Act or NRC regulations, leads to clearly erroneous statements that undermine its overall conclusions. We cannot, in good conscience, ignore data that we know to contradict the statements made in the NRC Staff's denial letter. And, we cannot see the logic behind the NRC Staff's refusal to consider such clearly probative information on remand.

3. Risk of Default for Companies with "A" Bond Credit Rating

4.14. Bond credit ratings are useful indicators of the financial strength of a corporate issuer like Honeywell.[123] Bond ratings take into account numerous financial metrics and qualitative analyses, including the assessment of a business's market position, diversification, liquidity, and ability to generate future cash flows.[124] The bond rating agencies also monitor a company to determine whether its rating should be changed, and then downgrade or upgrade the rating as appropriate.[125]

4.15. There is a very low likelihood of default for "A-rated" companies, particularly within one year of having an "A" rating.[126] The risk of an "A-rated" company defaulting in one year is somewhere between 0.065% and 0.080%.[127] As calculated by Moody's and S&P, the risk of an "A-rated" company defaulting in five years is between 0.680% and 0.788%.[128] For the few companies rated "A" by S&P that have eventually defaulted, it was more than 10 years, on average, between when they were rated "A" and when they eventually

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123 Exh. HNY000001 at ¶45; *see also* Exh. HNY000009 at 53 (reflecting NRC conclusion that ability to pay under normal circumstances can be assessed by looking at bond credit ratings).

124 Exh. HNY000001 at ¶45.

125 *Id*. at ¶48.

126 One year is the time period of the NRC's financial testing and reporting requirements, and the period of past amendments. In 2009, the year with the highest number of defaults, there were only three defaults out of the 1,396 companies with an A rating at the beginning of the year. *See* Exh. HNY000031, S&P 2009 Global Default Study, at 22 (Table 14). There were no defaults for companies rated AA or AAA. *Id*. In 2010, there were no defaults for any companies rated A, AA, or AAA at the beginning of the year. *See* Exh. HNY000032, S&P 2010 Global Default Study, at 21 (Table 14).

127 Exh. HNY000001 at ¶45.

128 *Id.*

defaulted.[129] The data includes the experience of the recession from 2008-2010.[130] We therefore find that "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.[131]

4.16. In denying Honeywell's application, the NRC Staff asserted that bond ratings are not as reliable as previously thought, in part because bond credit rating agencies may be reluctant to downgrade companies due to impacts on private contracts.[132] This assertion is not supported by sound financial analysis or any objective evidence.

4.17. Bond credit ratings remain reliable indicators of a company's financial condition. Since 2005, there were only defaults for "A-rated" companies (S&P) in 2008 (0.38%) and in 2009 (0.22%).[133] For companies rated A2 by Moody's, there were only defaults in 2008 (0.259%).[134] This demonstrates that, despite a period of significant financial upheaval in the broader markets, "A-rated" companies did not default at unexpectedly large rates.

4.18. While the NRC Staff points to higher global default rates in 2009, the actual data provided by the NRC Staff indicates only that companies with lower credit ratings

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129 *Id.*

130 *Id*.

131 *Id*.; *see also* Exh. HNY000009 at 53 (containing NRC Staff conclusion that the "[t]he likelihood that Honeywell will face financial distress during a particular time span can be assessed with the bond rating" and noting that, "[f]or 'A' rated and higher bonds, a transition from the 'A' rating to a default has not occurred within a one year time span"); Exh. HNY000010 at 2 (granting the exemption after citing the low probability of default for an A-rated company and concluding that the "basis for granting the original exemption still applies").

132 Exh. HNY000012 at 4-5. The Staff's position here is at odds with the NRC's use of bond credit ratings in the Appendix C financial test.

133 Exh. HNY000001 at ¶23 (Table 3).

134 *See id.* at ¶23 (Table 2).

than Honeywell had higher default rates. Default rates are expected to be higher for companies with lower credit ratings.[135] Honeywell has an "investment grade" rating. Companies rated at the highest grade of "speculative" by Moody's (*i.e.*, just below "investment grade") are 14 to 16 times more likely to default than an A-rated company, and companies rated below that are even more likely to default.[136] For "A-rated" companies, the Moody's and S&P data clearly demonstrate that corporate default rates during the 2008-2009 recession were not dissimilar from the default rates for the 2001 recession and would not materially alter the long term average default rates for "A-rated" corporate issuers.[137] Overall, all objective data shows that bond credit ratings are very good indicators of cumulative default probability for corporate issuers.

4.19. The NRC Staff provided several examples to support its conclusion that bond ratings are unreliable. However, those examples are not applicable to Honeywell's circumstances. For example, the non-financial companies that the NRC cited were speculative, or junk, rated companies well before they defaulted on their debts.[138] The NRC Staff also introduced a number of articles describing defaults during 2008 and 2009. However, those defaults have limited relevance to Honeywell's particular circumstances. One article lists more

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135 *Id*. at ¶48.

136 *Id.* at ¶45. None of these companies are eligible to use a self-guarantee.

137 A particular letter rating is meant to connote the same general level of creditworthiness for issuers in different sectors and at different times. Rating comparability is maintained by measuring default behavior across different industries and over time. *Id*. It would be expected that default rates would be higher during a recession but those default rates should not materially alter the long term default averages for that particular rating. That was the case in the recent recession. *Id*. Thus, the most recent data on defaults actually supports the reliability of bond ratings for investment grade companies. *Id*.

138 *See* Exh. HNY000062 (compiling bond credit rating histories for companies cited by the NRC Staff).

than 90 defaults from 2009.[139] But, only two of those examples had "A" bond credit ratings and both were credit unions (*i.e.*, financial institutions). The vast majority of the defaults were "C-rated" companies.

4.20. Another article cited by the NRC references an S&P report for the proposition that number of defaults in 2009 will exceed the number of defaults in 2008.[140] However, the underlying reports did not address investment-grade borrowers such as Honeywell. The two S&P reports used in the article describe only speculative-grade, or "junk," companies.[141] Honeywell was and is rated "A," an "investment-grade" rating, which corresponds to a very low default rate.[142]

4.21. Other companies that the NRC Staff selected as examples to show the risk of default are not diversified companies like Honeywell, but instead are focused on specific industries (*e.g.*, chemical, automotive). Several NRC-identified companies were financial companies that experienced difficulties starting with the subprime mortgage crisis. Financial companies are quite different from other industries and face unique challenges and dynamics. In contrast, Honeywell is a well-diversified company with numerous customers and end markets for its goods and services in four primary lines of business: automated control solutions, aerospace, specialty materials, and transportation systems.[143] This diversity serves as a natural buffer to the issues that the NRC-selected companies faced.

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139 Exh. NRC000039.

140 *See* Exh. NRC000001 at ¶¶24-25, *citing* Exh. NRC000041.

141 Exh. HNY000059 at ¶11, *citing* Exhs. HNY000063 and HNY000064.

142 Exh. HNY000001 at ¶¶22, 44.

143 Exh. HNY000013 at 2.

4.22. The NRC Staff also fails to support its assertion that bond credit ratings agencies are reluctant to downgrade ratings. Bond rating agencies continually re-evaluate the corporate ratings.[144] The credit quality of most issuers and their obligations is not fixed and steady over a period of time, but tends to undergo change. For this reason changes in ratings occur, as necessary, so as to reflect variations in the intrinsic relative position of issuers and their obligations.[145] A change in rating may occur at any time in the case of an individual issue or issuer.[146] Because of their very nature, changes are to be expected more frequently among bonds of lower ratings than among bonds of higher ratings.[147]

4.23. Honeywell provided objective evidence demonstrating that ratings agencies have been willing to downgrade, and indeed have been actively downgrading companies, where appropriate. For S&P, credit degradation among non-defaulting issuers was widespread and pronounced, especially in the first half of 2009, with the percentage of issuers downgraded during the course of the year reaching 18.34%.[148] There were 3.85 downgrades for every upgrade and the average number of notches recorded among downgrades was 1.76.[149] According to Moody's, the quarterly downgrade-to-upgrade ratio for corporate issuers rose

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144 Exh. HNY000001 at ¶45, ¶48.

145 *Id*. at ¶48.

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

147 *Id*.

148 *Id*.

149 *Id.*

sharply in late 2008, reaching a peak of 18.3x in the first quarter of 2009, though by the fourth quarter it had returned to approximately pre-recession levels.[150] These two examples (S&P and Moody's) demonstrate that ratings agencies are not reluctant to downgrade ratings when conditions warrant. In contrast, the NRC Staff did not provide any objective data or evidence to support their assertion that credit rating agencies are reluctant to downgrade ratings when conditions warrant.

4.24. The history of low default rates for highly-rated companies shows that bond ratings remain a reliable indicator of financial health, long-term performance, and, therefore, ability to pay decommissioning costs.[151] The mere fact that there were more defaults in 2008 and 2009 is unsurprising given the financial circumstances at that time, but there is no objective evidence indicating anything other than a very low risk of default for a diversified "A-rated" company such as Honeywell.

4.25. We therefore find that Honeywell's bond credit rating is a very strong indicator of its ability to meet its decommissioning obligations under a self guarantee. We also find that "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. As discussed further below, the NRC's regulatory mechanisms (the annual financial test and other reporting requirements) would capture declining financial conditions and revise, if needed, the approach to decommissioning funding assurance. We further find that there is no objective evidence to

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150 *Id.*, *citing* Exh. HNY000025.

151 This is consistent with the NRC's treatment of bond credit ratings generally. The NRC presently relies upon bond credit ratings in the financial test for self guarantees in Appendix C. And, during the recent decommissioning rulemaking, the NRC did not propose changing or eliminating bond credit ratings as one criterion in the financial test.

support the NRC Staff's assertion that bond ratings agencies are reluctant to downgrade ratings, at least for corporate ratings.

4.26. Overall, we find, based on the preponderance of the objective, reliable, and material evidence presented by the parties, that Honeywell has demonstrated an ability to pay for decommissioning funding under normal circumstances.

B. Ability to Pay in Times of Financial Distress

4.27. The other criterion used by the NRC Staff to assess Honeywell's application is ability to pay in times of financial distress. This assumes that, somehow, "financial distress" will occur before alternate decommissioning financial assurance is provided.[152] As discussed below, we find this assumption to be very unlikely. Nonetheless, Honeywell would still have substantial means to cover decommissioning costs should financial distress occur while Honeywell was still relying on a self guarantee.

1. Measures to Capture Declining Financial Performance and Require Alternate Financial Assurance Mechanism

4.28. The NRC regulations and MTW license conditions provide assurance that developments that call into question Honeywell's ability to pay will be captured in advance of any increased risk in decommissioning shortfall, and that corrective measures will be taken prior to "financial distress" or a default on its obligations.

4.29. During reviews of prior exemption requests, the NRC Staff specifically concluded that ability to pay in times of financial distress can be assessed using the bond credit rating. The NRC determined that an "A" rating indicates a low default rate over a one year period and that the requirement to perform the financial test annually ensures that the risk of

[152] As noted above, the self-guarantee rule is premised on the assumption that the financial test will identify declining performance and require alternate financial assurance prior to financial distress.

default remains low for the following year.[153] As discussed above, bond ratings remain a reliable indicator of the likelihood of default. We therefore agree with Honeywell that its "A" rating supports its ability to pay in times of financial distress.

4.30. In addition to the minimum bond rating criterion (Part 30, Appendix C, Section II.A.3), which establishes the low likelihood of a near-term default, other regulatory requirements provide assurance that adequate decommissioning financial assurance will remain in place. The bond rating downgrade reporting requirement (Part 30, Appendix C, Section III.E), the annual recertification requirement (Part 30, Appendix C, Section II.B.3), and the requirement to submit annual Securities and Exchange Commission reports (Part 30, Appendix C, Section III.D) provide mechanisms to identify potential problem situations. The regulations also mandate that corrective actions be taken in a timely manner so that additional financial assurance mechanisms can be employed, as needed.[154]

4.31. Under Part 30, Appendix C, Section III, Honeywell must notify NRC within 20 days if its rating ceases to be in any category of A or above for Moody's and S&P. Such a change triggers a further requirement to seek alternate financial assurance within 120 days.

4.32. Under 10 C.F.R. Part 30, Appendix C, Section II.B, Honeywell must also verify that it meets the financial test allowing it to utilize the self-guarantee within 90 days of the close of each fiscal year (*i.e.*, annually).[155]

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153 Exh. HNY000009 at 53.

154 Exh. HNY000001 at ¶36.

155 *Id.* at ¶35.

4.33. Honeywell is further required, by License Condition 26, to submit to NRC for review and approval the results of the modified financial test and supporting documentation required by Appendix C, Section II.B(3), within 120 days of the close of each fiscal year.[156]

4.34. In addition to the annual financial test (Part 30, Appendix C, Section II.B.3), Honeywell must inform NRC within 90 days of any matters coming to the attention of the company's independent certified public accountant that cause the auditor to believe that the data specified in the financial test should be adjusted and that the company no longer passes the test (Part 30, Appendix C, Section III.E).[157]

4.35. If Honeywell no longer meets the requirements of Appendix C, Section II.A, as modified, Honeywell must send immediate notice to the NRC of its intent to establish alternate financial assurance within 120 days.[158] This includes, for example, downgrades by the bond credit ratings agencies (below the reporting threshold).

4.36. Although the NRC Staff assumes as part of its analysis that Honeywell would experience financial difficulties (tantamount to bankruptcy) in a short period of time,[159] the Staff did not provide any basis for assuming that Honeywell would "instantaneously" default. Nor did the Staff posit any circumstances in which Honeywell's financial condition would

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156 *Id.*

157 *Id.*

158 *Id.*

159 *See* Exh. NRC000001 at ¶31 ("If a company goes out of business and ceases operations, free cash flow may drop substantially overnight."); *see also* Tr. at 83 (positing scenario where Honeywell goes bankrupt without discussing whether there would be indicators of financial distress that would trigger alternate financial assurance mechanisms prior to that time); Exh. HNY000012 at 6 (considering a hypothetical bankruptcy scenario but not discussing whether such a scenario is realistically possible without prior changes in indicators that the NRC Staff relies upon in the financial test).

deteriorate so rapidly that the NRC would be unable to take appropriate corrective action. In fact, in the event that Honeywell was forced to sell assets in a distressed sale to pay for decommissioning, the causes of the distress likely would have caused — well before that distress — deterioration in Honeywell's bond credit rating[160] or in other financial metrics that would be captured by the NRC's reporting requirements and alternate financial assurance mechanisms. As a result, we give no weight to the NRC Staff's arguments regarding a hypothetical instantaneous deterioration of Honeywell's financial condition.

4.37. Overall, the mechanisms in Appendix C that will continue to apply to Honeywell under the requested exemption provide reasonable assurance that appropriate steps can be taken to assure the availability of decommissioning funds in the event of financial distress.

2. Availability of Assets

4.38. Honeywell has several avenues for obtaining decommissioning funds, even in the event of some unspecified "financial distress" scenario. In addition to having $4 billion in cash and ready access to the credit markets,[161] Honeywell has a $2.8 billion five-year committed revolving credit facility that could be drawn upon immediately in the event that decommissioning funds were needed for MTW. Unlike most companies, Honeywell's revolver does not contain any financial covenants and therefore would be available even during a

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160 Bond ratings agency reviews are not limited to "snapshots" in time. Rather, the ratings agencies may re-evaluate a company's rating any time new information becomes available, including the release of quarterly financial statements. Bond ratings are therefore responsive to changing conditions, and an adverse ratings change would trigger a notification to the NRC.

161 Tr. at 73.

hypothetical financial distress scenario.[162] Honeywell also has substantial tangible and intangible assets that could be sold.[163] Honeywell has significant free cash flow as well.[164] In short, Honeywell has a "tremendous amount of financial flexibility" and "firepower" to cover the $187 million decommissioning obligation at MTW even in times of financial distress.[165]

4.39. The NRC Staff argues that free cash flow is not "committed" to the NRC.[166] However, this ignores the fact that NRC regulations explicitly allow companies to rely on "uncommitted" funds. For example, neither tangible nor intangible assets are "committed" to the NRC when a company is relying on a parent or self guarantee. In addition, Honeywell confirmed that its goodwill has not been "committed" to another entity.[167] This argument therefore cannot support denial of the application.

4.40. Honeywell has significant tangible assets that could be used to generate decommissioning funds, if necessary. These assets would be available in times of financial distress. Honeywell's tangible assets have increased from approximately $21 billion at the end

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162 Exh. HNY000001 at ¶17; Exh. HNY000059 at ¶14.

163 Exh. NRC000059 at ¶14.

164 Exh. NRC000001 at ¶42.

165 Tr. at 73, 74.

166 Exh. NRC000001 at ¶31.

167 Exh. HNY000065; *see also* Exh. HNY000066 ("[N]one of the indebtedness of any Honeywell subsidiary encumbers or restricts in any manner the goodwill of that subsidiary."). We find the NRC's comments regarding encumbering goodwill to be misguided. The covenants described in Exhs. HNY000065 and HNY000066 are designed to prevent Honeywell from effectively encumbering goodwill by mortgaging its principal manufacturing properties or pledging the shares of any subsidiary owning such properties. The covenants assure that facilities that generate income are not being used as collateral for loans and therefore will be available to generate cash to pay for decommissioning.

of 2006 to approximately $24 billion at the end of 2010.[168] These tangible assets far exceed the decommissioning cost estimate for MTW ($187 million).

4.41. With respect to Honeywell's substantial intangible assets, the NRC Staff asserts that intangible assets and goodwill are relatively illiquid and therefore may not be available to pay for decommissioning, when needed.[169] Putting aside that Honeywell has substantial tangible assets that it could sell, Honeywell does not agree that there should be a distinction between tangible and intangible assets or a preference for tangible assets. The NRC asserts that goodwill cannot be accessed as quickly or as easily as tangible assets, such as cash, accounts receivable, inventory and hard assets like equipment and machinery.[170] But, while cash and near-cash equivalents are obviously liquid, other tangible assets are at least as illiquid as intangible assets.[171] For example, large pieces of equipment or machinery tend to be industry or task-specific, and it often takes a considerable period of time to market the asset and secure a purchaser.[172] In addition, it is quite uncommon for a business to sell a tangible asset that is in

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168 Exh. HNY000001 at ¶29 (Table 6).

169 Exh. NRC000001 at ¶34. This argument was raised for the first time in this adjudication. The NRC Staff's ever-changing explanations for denying the amendment are troubling, in that they suggest an inconsistent approach to reviewing Honeywell's application. To the extent that the NRC Staff's rationale is linked to the resource burden associated with reviewing exemption requests on an annual basis (Tr. at 87), we note that this is a burden of the Staff's own making. There is no reason that the initial exemption could not have been issued for an open-ended period, as requested by Honeywell, or until completion of the NRC decommissioning rulemaking.

170 *Id*.

171 Exh. HNY000059 at ¶¶13-14; Tr. at 69-70.

172 *Id*. at ¶13.

good working condition unless the company is exiting that business line or is facing some sort of extraordinary liquidity need.[173]

4.42. In fact, according to the expert testimony, intangible assets may be a better source of decommissioning funds than tangible assets. It often will be easier to sell an entire ongoing business or business unit, as there is a relatively liquid market for business units.[174] In addition to corporate strategic buyers that purchase entire businesses, there is a significant amount of capital committed to private equity firms in the United States and globally. Many of these private equity firms focus on purchasing individual business units from diversified conglomerates such as Honeywell.[175] Furthermore, Honeywell's own history of purchasing whole, ongoing businesses (not individual tangible assets) highlights that such a market exists for businesses and their associated goodwill.[176]

4.43. The NRC Staff suggests that the time needed to monetize intangible assets may be substantial or disqualifying as a source of funds.[177] However the time for such transactions could be entirely consistent with the regulatory time frame for decommissioning a site.[178] The NRC's regulations in 10 C.F.R. § 40.42 indicate that a licensee must prepare a decommissioning plan within 12 months and submit it for NRC approval if, for example, no principal activities have been conducted under the license for a period of 24 months. The 12

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173 *Id*.

174 *Id*.

175 *Id*.

176 Exh. HNY000001 at ¶25.

177 Tr. at 81-82; *see also* Exh. NRC000001 at ¶¶35-36.

178 Honeywell's expert witness recounted a recent sale of a $950 million business that took less than a year. Tr. at 69-70.

months provided by regulation to prepare a decommissioning plan, following up to 24 months of inactivity, together with the period needed for NRC Staff review and approval of the plan, provides more than ample time for Honeywell to obtain decommissioning funds even if it was necessary to convert intangible assets such as goodwill into cash.[179]

4.44. Honeywell's net worth confirms the overall availability of sufficient assets — whether tangible or intangible.[180] Honeywell's net worth grew from $7.1 billion in 2008 to $10.8 billion in 2010.[181] Net worth is a conservative valuation of assets because it does not reflect the market value of Honeywell's assets. The market value of Honeywell reflects the value of all of Honeywell's assets (including intangibles). The value of Honeywell in the marketplace is a multiple of Honeywell's net worth.[182]

4.45. In light of the availability of both tangible and intangible assets to pay for decommissioning funding, we find that the NRC Staff's concerns regarding the illiquidity of intangible assets are too narrowly focused and not supported by the preponderance of the evidence. Instead, we agree with Honeywell that sufficient assets — whether tangible, intangible, or both — would be available for use by Honeywell in the unlikely event that decommissioning funding is needed in a "financial distress" scenario while the self-guarantee is in place.

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179 The site's insurance policy provides coverage for environmental clean-up in the event of an accidental release at the site.

180 Exh. HNY000001 at ¶59; Exh. HNY000059 at ¶14. Net worth is the total assets minus total liabilities of a company. Exh. HNY000001 at ¶32.

181 Exh. HNY000001 at ¶19, ¶32.

182 *Id*. at ¶¶58-59.

3. Goodwill Impairment

4.46. The NRC Staff also expressed a concern that there could be impairment of goodwill.[183] Honeywell performs its goodwill impairment test annually as of March 31st. Based on a review of annual reports dating back to the 2006 annual report (the period of time covered by the various exemption requests), there were no impairments of goodwill.

4.47. Even in 2008, when the NRC expressed concern that Honeywell needed to apply 67% of its goodwill to the financial test, Honeywell would have to write down more than 30% of its goodwill before it would no longer meet the financial test. Given that Honeywell has not taken any impairment charges since at least 2005, an impairment charge of this magnitude is very unlikely.[184]

4.48. Even if Honeywell had reduced goodwill, we find that there would be no material increase in the risk of a shortfall in decommissioning funding. Goodwill is tested for impairment annually, or whenever there might be a change of circumstances potentially affecting

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[183] Exh. NRC000001 at ¶39. This argument was raised for the first time in this litigation. Post hoc rationalizations are inherently suspect, particularly where there is no indication in the record of any Staff concerns regarding impairment prior to this hearing.

[184] The NRC Staff provided one example of an NRC licensee that took a significant write-down in goodwill. The parent company for Western Nuclear, Freeport-McMoRan, took a goodwill impairment charge of $6 billion at the end of 2008. Because Western Nuclear was relying on a parent company guarantee to provide decommissioning financial assurance, under 10 C.F.R. Part 30, Appendix A, the minimum bond rating is only BBB (S&P) or Baa (Moody's) and the required financial test ratio is only 6:1. In contrast, the NRC rules for self-guarantees require a 10:1 ratio and an "A" rating. *Compare* 10 C.F.R. Part 30, Appendix A *and* Appendix C. Freeport-McMoRan had a BBB- bond credit rating in 2008. Exh. HNY000059 at ¶18. Moreover, the impairment charge was based on significant declines in copper and molybdenum prices. *Id*. Unlike mining companies that have a relatively narrow set of assets and are susceptible to large changes in commodity prices, Honeywell is a globally diversified company spanning several industries and geographic regions. At bottom, this isolated example is unconvincing and of no probative value.

its value.[185] This annual test for impairment aligns with the NRC's requirement for an annual financial test. If the results of the test indicated that goodwill was impaired and that, as a result, Honeywell no longer met the 10:1 test permitted under the exemption, then Honeywell would be required to put in place alternate financial assurance.

4.49. In addition, the reporting requirements in 10 C.F.R. Part 30, Appendix C, Section II.B.2, require notice to the NRC of any adjustments in the financial data used in the annual financial test that would cause the company to no longer pass the financial test. This mechanism, which is in place precisely to capture declining financial performance, would continue to apply under the exemption. Thus, in the event that goodwill was impaired such that Honeywell no longer met the test, the NRC would have notice of that fact as part of the annual financial test process and there would be a self-executing requirement for Honeywell to obtain alternate financial assurance (such as a surety bond or a letter of credit).

4.50. The NRC Staff also argues that Honeywell has had to rely over time on a greater percentage of goodwill to cover the 10:1 test.[186] Given the intrinsic value and relative liquidity of goodwill, it is not clear why this represents a material diminution of decommissioning financial assurance. But, in any event, the Staff's assessment is no longer accurate. The same calculation based on 2009 and 2010 data demonstrates that Honeywell would need to rely on less, not more, goodwill than in 2008. The Staff's logic is also inconsistent with its conclusions in related contexts, as it is allowing use of goodwill under the new decommissioning planning rule regardless of whether a company needs more (or less) goodwill to meet the test on a year-over-year basis.

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185 *See* NRC Staff Testimony at ¶39 (citing Exh. HNY000033 at 14-15).

186 Exh. NRC000001 at ¶40.

4.51. We find, based on the preponderance of the objective, reliable, and material evidence presented by the parties, that Honeywell has demonstrated reasonable assurance of decommissioning funding during times of financial distress or, alternatively, that adequate measures are in place to capture declining performance and require corrective action within an acceptable period of time.

C. Public Interest

4.52. The NRC Staff argues in its denial letter that issuance of the amendment and exemption is not in the public interest.[187] The NRC Staff found "unpersuasive" Honeywell's arguments that the exemption was in the public interest because Honeywell would otherwise be required to obtain a costly letter of credit or surety. However, the NRC Staff's stated reasons are inconsistent with prior NRC determinations on the same topic and, in any event, impose requirements that have no basis in the Atomic Energy Act or NRC regulations.

4.53. On two prior occasions, the NRC Staff found that the requested exemption was in the public interest — for the very same reasons as those given by Honeywell. In granting the amendment the first time, the NRC Staff stated that "[t]he exemption is in the public interest because resources will not be expended on alternate financial assurance methods that would not increase the likelihood that funds for decommissioning will be available when needed."[188] And, in granting the amendment the second time, the NRC Staff again stated that "[t]he exemption is in the interest of the public because resources will not be expended on the alternate financial

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187 Exh. HNY000012 at 7.

188 Exh. HNY000009 at 53.

assurance methods that would not increase the likelihood that funds for decommissioning will not be available when needed."[189] We find Honeywell's reliance on NRC precedent compelling.

4.54. Regardless of Honeywell's ability to pay for a surety or letter of credit, the surety or letter of credit is not necessary to meet the regulatory intent. Unnecessary expenditures of funds to obtain a surety or letter of credit will increase regulatory burdens without a corresponding increase in financial assurance. Those funds could, for example, be used instead on other capital projects at MTW or investments that would benefit the overall economy. Surety bonds and letters of credit are also an inefficient use of lines of credit, particularly when a company is in strong financial condition. Reducing an unnecessary regulatory burden is a legitimate basis for an exemption.[190]

4.55. The NRC Staff applied inappropriate criteria when judging whether the exemption is in the public interest. For example, the NRC Staff states that "[t]he financial burden associated with Honeywell's full compliance with 10 CFR Part 30, Appendix C, is relatively small and no different than that incurred by every other materials licensee that is required to provide financial assurance but does not rely on a self or parent guarantee as financial assurance."[191] The NRC Staff also argues that the cost of obtaining a surety or letter of credit is "relatively small compared to $2.2 billion in free cash flow and is less than 1.5 percent of the

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189 Exh. HNY000010 at 3.

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

191 Exh. HNY000012 at 7.

amount of financial assurance provided as estimated in the aforementioned rulemaking."[192] But, the relative cost of obtaining alternate financial assurance is not a criterion against which to judge whether an exemption is in the public interest. The NRC regulations do not require a showing of significant financial harm or any other "need" for the exemption. Likewise, Honeywell need not prove that its burden in obtaining a surety or letter of credit is "unique."[193]

4.56. The NRC Staff also states that "Honeywell has not distinguished the financial burden of its fee payment from that of other compliant materials licensees."[194] However, there is no explanation as to why such a showing is necessary for an exemption to be in the public interest. An exemption, by its very nature, is issued to one licensee at a time and authorizes activities that would otherwise not be allowed. The exemption in this case relates to the special circumstances of Honeywell's financial performance and balance sheet. Comparing a reduced burden for one licensee (where justified) to the impact on other licensees of otherwise-applicable regulations (where no exemption was requested or justified) sets up a false distinction that does not support the NRC Staff's conclusion. It is also a distinction with no regulatory basis.

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192 *Id*.

193 *See* Exh. NRC000001 at ¶44. There is no explanation as to how this establishes that the exemption is not in the public interest. The exemption relates to the special circumstances of Honeywell's financial performance and balance sheet rather than a comparison to the impact on other licensees of otherwise-applicable regulations (where no exemption is requested or justified). For this same reason, it makes no difference whether 10, 50, or 100 companies in the Fortune 500 have a negative tangible net worth. Tr. at 49-52. The exemption request is based on Honeywell's particular circumstances and is not an opportunity to assess whether the same exemption would (or should) be granted to other companies.

194 *Id*. at 7-8.

4.57. Applying the test for evaluating the public interest criteria in light of prior NRC precedent, we conclude that issuance of the exemption is in the public interest. The exemption, at least in Honeywell's particular circumstances, does not increase the risk of a default or lead to an increased risk to the public health and safety. And, the exemption would avoid unnecessary regulatory expenditures.

D. Remedy

4.58. Having determined that Honeywell satisfies the applicable regulatory standards by a preponderance of the evidence, we must address the appropriate remedy. As noted above, the request at issue seeks a one-year extension of the exemption (until May 11, 2010), consistent with prior NRC decisions granting the exemption for a one-year period.[195] The NRC Staff argues that, because the period of the request has passed, our review is backwards-looking and limited to the period of time before December 2009.[196] But, this is disingenuous. The fact that the initial period of the request has passed is a circumstance of the NRC's own making. And, because the NRC as an agency has not yet reached a final decision on Honeywell's request, Honeywell's application is still a "live" licensing request.

4.59. The NRC Staff's decision denying the exemption in December 2009 came eight months after Honeywell's request and only five months before the exemption would have expired had it been granted.[197] In December 2010, when the D.C. Circuit reversed the Staff's

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[195] Exh. HNY000006 at 1. We note again that in its original request, dated December 1, 2006, Honeywell sought an open-ended exemption. Exh. HNY000004. The NRC Staff imposed the one-year limitation on its own initiative. Exh. HNY000009.

[196] *See* NRC Staff Initial Statement of Position at 21 ("[T]he Staff considered whether in December 2009 it made the right decision based on available information.").

[197] *See Honeywell*, 628 F.3d at 576-577 (highlighting the fact that the length of the exemption review period is within the Staff's control).

December 2009 decision and remanded the request to the agency for further proceedings, the one-year period requested by Honeywell had already passed (by more than six months). By the time that the NRC Staff issued the denial at issue here, more than two years had passed since Honeywell first filed the request. Now, nearly three years after Honeywell first filed its request, the agency is still in the process of completing its review of Honeywell's request. Throughout the review process, Honeywell has diligently pursued its rights under the Atomic Energy Act and NRC regulations. And, Honeywell already has been irreparably harmed by the Staff's decision, having been forced to expend funds to obtain alternate decommissioning funding assurance.[198] Given these circumstances, the equities are clearly in favor of Honeywell.[199] Honeywell should not be penalized for the NRC's failure to complete its review in a timely manner.[200] Modification of the time period of the exemption therefore is appropriate.[201]

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198 Exh. NRC000056.

199 Our decision today will allow Honeywell to avoid at least some of the costs associated with alternate financial assurance mechanisms until the effective date of the decommissioning rule. Our decision also in no way precludes Honeywell from seeking a new exemption from the decommissioning rule's new requirement that a licensee have a minimum tangible net worth of $21 million. We have seen nothing in the hearing record to suggest that a minimum tangible net worth is a meaningful financial indicator in Honeywell's circumstances.

200 If anything, it could be inferred from the Staff's constant changing of the bases for its decision that the Staff had a result in mind and has been searching for a rationale that will pass muster and support their pre-ordained result. Such an approach is unlikely to ever lead to prompt or justifiable agency decisions.

201 It would be nonsensical, bordering on the Kafkaesque, to deny the exemption as moot and force Honeywell to re-file only because the date the Staff had in mind had passed due to the Staff's own actions. *See Honeywell*, 628 F.3d at 577 (noting that "another exemption request would be pointless until the Commission adequately explains the reasons for rejecting Honeywell's third request").

4.60. The NRC Staff argues that "[i]t would … exceed the Board's authority to rule on whether Honeywell should be granted an exemption for any period after May 2010."[202] But this hearing involves circumstances that are fundamentally different from those in the case cited by the Staff. In *San Onofre*, the Appeal Board concluded that the Board did not have the authority to issue an exemption *on its own initiative* — that is, the Board could not decide that an NRC regulation precludes issuance of a license, but then independently authorize an exemption from that provision. Here, in contrast, the Board is reviewing an exemption application that was submitted to and reviewed by the NRC Staff (as part of a license amendment request) in the first instance. Under these circumstances, the Board has delegated authority to act in place of the Commission.[203] And, under 10 C.F.R. § 2.318(b), the Board is authorized to modify the licensing determination of the NRC Staff as appropriate for the purpose of a proceeding.

4.61. For these reasons, we find that it is within our discretion to modify the time period of applicability for the requested amendment and exemption, and that exercise of that discretion is appropriate and warranted under the circumstances. Although we believe that Honeywell has provided sufficient evidence to support granting the exemption for an open-ended period,[204] we recognize that the NRC's decommissioning planning rulemaking will impose an additional criterion for use of a self guarantee. This rulemaking becomes effective in December 2012. We therefore find that the exemption should be granted for a period of one year or until the effective date of the decommissioning planning rule.

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202 "NRC Staff Rebuttal Statement of Position" at 6, *citing Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-77-35, 5 NRC 1290, 1291 (1977).

203 The Board's decision would, of course, be subject to review by the Commission upon request by one of the parties or *sua sponte*.

204 Tr. at 102 (acknowledging that the NRC issues exemptions that are "open ended").

V. CONCLUSIONS OF LAW

5.1. The Board has considered all of the evidence presented by the parties. Based upon a review of the entire record in this proceeding and the proposed findings of fact and conclusions of law submitted by the parties, and based upon the findings of fact set forth above, which are supported by reliable, probative, and substantial evidence in the record, the Board has decided all matters in controversy and reaches the following conclusions.

5.2. We conclude that the record supports a finding, by a preponderance of the evidence, that there is reasonable assurance that decommissioning funds will be available, if necessary, both under normal circumstances and in times of financial distress.

5.3. We conclude that Honeywell has demonstrated, by a preponderance of the evidence, that the requested exemption from NRC requirements (a) is authorized by law; (b) will not endanger life or property or the common defense and security; and (c) is otherwise in the public interest. The amendment is for a purpose authorized by the Atomic Energy Act. Honeywell also is qualified to implement the alternate test in such manner as to protect health and safety and minimize danger to life or property. Granting the exemption does not materially increase the risk that funds will not be available to pay for decommissioning or create a potential for delays in decommissioning. Honeywell has access to several different sources of decommissioning funding, including cash, free cash flow, lines of credit, tangible assets, goodwill and other intangible assets, or the sale of business units. This conclusion is further buttressed by the fact that the minimum bond rating, reporting requirements, and requirements to obtain alternate financial assurance (in the event that Honeywell no longer satisfies the modified financial test) remain unchanged. And, because the underlying purpose of the NRC's self-guarantee financial test is met by the alternate financial test ratio, the bond rating, and the ratio of

U.S. assets to decommissioning liabilities, granting the exemption will avoid unnecessary expenditures of funds and therefore is in the public interest.

5.4. Conversely, we conclude that the NRC Staff has failed to demonstrate by a preponderance of the evidence that Honeywell's application does not satisfy the applicable criteria. There is insufficient evidence to support the NRC Staff's conclusion that bond ratings are unreliable, that the "illiquidity" of intangible assets undermines decommissioning funding assurance, or that negative or declining tangible net worth represents a deteriorating financial condition. The NRC Staff also did not address the role of the Appendix C's reporting requirements, the limited time scope of the exemption, or Honeywell's ongoing obligation to obtain alternate financial assurance mechanisms under certain conditions in evaluating ability the application.

5.5. Based on the above, the issues in this hearing are resolved on the merits in favor of the applicant-licensee, Honeywell. The NRC Staff's decision to deny the amendment is hereby reversed. Within 10 days, the NRC Staff is directed to issue the exemption and amendment to Honeywell for a period of time of one year from the date of issuance or until the effective date of the decommissioning planning final rule, whichever comes first.

5.6. All issues, arguments, testimony, or exhibits presented by the parties but not addressed herein are found to be without merit or are unnecessary for issuance of this decision.

5.7. In accordance with 10 C.F.R. §§ 2.1210(a) and (d), this Initial Decision is effective immediately and constitutes final action of the NRC within forty (40) days of the date of issuance unless a petition for review is filed in accordance with 10 C.F.R. § 2.1212 or the Commission directs otherwise. Any petition for review must be filed within fifteen (15) days

after service of this Initial Decision and shall conform with the requirements of 10 C.F.R. § 2.341(b)(2) and must be based on the grounds specified in 10 C.F.R. § 2.341(b)(4).

Respectfully submitted,

/s/ signed electronically by
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Dated at Washington, District of Columbia
this 10th day of February 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "HONEYWELL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 10th day of February 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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