

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HONEYWELL INTERNATIONAL INC.,

115 Tabor Road

Morris Plains, New Jersey 07950

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. _____

COMPLAINT

Plaintiff Honeywell International Inc. (“Honeywell”) brings this Complaint for illegal exaction to recover damages for payments unlawfully assessed and collected by the United States of America, acting through the Nuclear Regulatory Commission (“Commission” or “NRC”).

In support thereof, Plaintiff states:

NATURE OF THIS ACTION

1. This Complaint seeks recovery of fees unlawfully assessed and collected by the NRC from Honeywell under 10 C.F.R. § 170.31, in connection with civil sanctions imposed on Honeywell’s Metropolis Works uranium conversion facility (“Metropolis”) between 2012 and 2014. The Metropolis plant is licensed by the NRC under 10 C.F.R. Part 40.

2. In the wake of the 2011 Fukushima incident, beginning in 2012, the NRC conducted inspections of all major nuclear fuel cycle licensees. During their review of the Metropolis plant in May 2012, NRC inspectors identified two apparent violations of NRC regulations that required resolution by Honeywell. In view of the inspectors’ findings, Honeywell agreed to halt uranium hexafluoride (UF₆) production until it addressed the NRC’s concerns. The NRC memorialized Honeywell’s commitment in a Confirmatory Action Letter.

3. Thereafter, pursuant to 10 C.F.R. § 2.202, the Commission issued a Confirmatory Order amending Metropolis's license and requiring Honeywell to undertake several actions prior to resuming UF₆ production. Notably, the Confirmatory Order stated that it superseded the Confirmatory Action Letter and was entered into in lieu of a Notice of Violation and civil penalties.

4. Consistent with the Confirmatory Order, Honeywell made more than \$50 million in capital improvements to Metropolis. Honeywell also developed and submitted to the NRC evaluations demonstrating the adequacy of the capital improvements, as required by the Confirmatory Order.

5. Between April and June 2013, NRC inspectors reviewed Honeywell's compliance efforts and concluded that Metropolis was safe to operate. On June 25, 2013, the NRC completed its review of Honeywell's Safety Basis and Corrective Action Plan, which was required by the Confirmatory Order and describes the safety basis for Honeywell's modifications. The NRC authorized Honeywell to resume UF₆ production on July 2, 2013.

6. The applicable NRC regulation concerning fees for fuel cycle licensees provides, in pertinent part, that "[f]ees will not be charged for orders related to civil penalties or other civil sanctions issued by the Commission under 10 CFR 2.202 or for amendments resulting specifically from the requirements of these orders." 10 C.F.R. § 170.31, n. 2. And 10 C.F.R. § 2.202(d) provides that orders that have been consented to "have the same force and effect" as orders issued after a hearing. Notably, the NRC indicates on its "Enforcement Program Overview" webpage that "Orders" that "modify, suspend, or revoke licenses or require specific actions by licensees or persons" are one of its "three primary enforcement sanctions." *See* <https://go.usa.gov/xnySg> (last accessed Jan. 4, 2018).

7. Thus, because the Confirmatory Order was issued pursuant to 10 C.F.R. § 2.202, imposed civil sanctions, and modified Metropolis's license, Honeywell was exempt from the fees in connection with the Confirmatory Order.

8. Nevertheless, from 2013 to 2014, the NRC sent to Honeywell five invoices for, among other things, the costs of the NRC's activities undertaken in connection with the Confirmatory Order. The total sum billed by the NRC for efforts related to the Confirmatory Order was \$1,914,223.30.

9. Although Honeywell paid each of the NRC's invoices in full, it timely disputed in writing the payments for inspections and technical reviews made in furtherance of the Confirmatory Order as contrary to 10 C.F.R. § 170.31. The NRC rejected each of Honeywell's disputes.¹

JURISDICTION

10. Jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1491(a)(1), which provides that this Court has "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . for liquidated or unliquidated damages" In this case, Plaintiff seeks damages for monies illegally exacted by the United States contrary to regulations.

¹ On December 18, 2014, the NRC indicated that approximately \$100,000 in fees had been erroneously charged to Honeywell in connection with the Confirmatory Order (for reasons not directly related to Honeywell's disputes) and would be refunded. *See* Ex. O (NRC Letter of Dec. 18, 2014). However, the NRC has yet to issue this refund.

PARTIES

11. Honeywell International Inc. is a publicly traded Delaware corporation with its headquarters in Morris Plains, New Jersey. Honeywell owns and operates the Metropolis Works uranium conversion facility.

12. The defendant is the United States of America, acting through the Nuclear Regulatory Commission.

FACTUAL BACKGROUND

13. The Metropolis plant is located in Metropolis, Illinois, and began operating in 1958. Metropolis is the only facility in the United States that converts natural uranium (i.e., “yellowcake”) into UF₆, an essential compound in enriching uranium for use as fuel in nuclear power plants.

14. The Metropolis facility is licensed by the NRC pursuant to 10 C.F.R. Part 40, titled: “Domestic Licensing of Source Materials.” In particular, Metropolis operates under Materials License No. SUB-526, which was initially issued in December 1958 and last renewed in 2007.

A. The Fukushima Incident and NRC Response

15. On March 11, 2011, a magnitude 9.0 earthquake occurred near the east coast of Japan, triggering a 45-foot tsunami. Flooding from the tsunami caused significant damage to at least four of the six units of the Fukushima Daiichi Nuclear Power Station.

16. As a result of the events at Fukushima, on September 30, 2011, the NRC issued Temporary Instruction 2600/015 (the “Temporary Instruction”), titled: “EVALUATION OF LICENSEE STRATEGIES FOR THE PREVENTION AND/OR MITIGATION OF EMERGENCIES AT FUEL FACILITIES”.

17. The purpose of the Temporary Instruction was to independently verify that licensees were adequately prepared to prevent and/or mitigate the consequences of selected events. It also sought to evaluate the adequacy of those emergency prevention and mitigation strategies for dealing with the consequences of selected events. The Temporary Instruction applied to all Part 40 licensees with a license-required Integrated Safety Analysis, including Metropolis. The NRC performed inspections under the Temporary Instruction at all major fuel cycle facilities.

B. The NRC's Inspection and Subsequent Actions

18. Pursuant to the Temporary Instruction, the NRC inspected the Metropolis plant from May 21, 2012, through May 24, 2012. The inspection was not part of the NRC's usual inspection process, nor was it the result of any action or inaction by Honeywell.

19. The NRC detailed its findings in Inspection Report No. 40-3392/2012-006 (the "TI Report"), which was released to Honeywell on July 11, 2012. In the TI Report, the Commission staff identified two apparent violations at Metropolis: "(1) the failure to identify all relevant accident sequences related to credible seismic events and tornadoes that could result in large uranium hexafluoride (UF₆) releases for which protective actions may be needed as required by 10 CFR 40.31(j)(3); and (2) the failure to provide complete and accurate information related to Honeywell Metropolis Works' emergency response plan as required by 10 CFR 40.9(a)."

20. In a letter to the NRC dated July 11, 2012, Honeywell committed to not producing UF₆ at Metropolis prior to its submitting to the NRC an action plan and schedule for addressing the apparent violations. Thereafter, on July 13, 2012, the NRC issued Confirmatory Action Letter No. 2-2012-002, confirming that Honeywell would suspend all UF₆ production activities at Metropolis while Honeywell analyzed the apparent violations in the TI Report and implemented

corrective actions. The Confirmatory Action Letter further provided that Honeywell was not permitted to restart UF₆ production at Metropolis until it obtained written consent from the NRC.

21. On October 15, 2012, pursuant to 10 C.F.R. § 2.202, the Commission issued Confirmatory Order No. NRC-2012-0244 (the “Confirmatory Order”), modifying Metropolis’s license and requiring Honeywell to undertake a number of “significant corrective actions” at Metropolis, consistent with the findings of the TI Report. The Confirmatory Order, which was issued with Honeywell’s consent, required Honeywell to, among other things, submit an evaluation of external events, provide a safety basis for seismic and wind design, revise its Emergency Response Plan, and document necessary modifications to the Metropolis facility. The NRC also directed Honeywell to submit a revised Integrated Safety Analysis Summary no later than six months after resuming licensed operations. Notably, the Order states: “This Confirmatory Order will supersede the CAL [Confirmatory Action Letter] issued on July 13, 2012.”

22. The corrective actions mandated by the Confirmatory Order were developed by the NRC with limited input from Honeywell. These actions were not required in the Confirmatory Action Letter. Moreover, the Confirmatory Order was issued in lieu of a Notice of Violation.

23. On November 30, 2012, Honeywell submitted its Safety Basis and Corrective Action Plan describing its efforts to resolve the NRC-identified issues. The NRC completed its review of the Safety Basis and Corrective Action Plan on June 25, 2014, finding that Honeywell met the requirements of Section IV.1 of the Confirmatory Order.

24. The NRC conducted inspections at the Metropolis facility from April 2013 through June 2013. In a report issued on June 14, 2013 (Inspection Report 40-3392/2013-003), the inspectors concluded that they had identified no violations of the NRC’s requirements. The report documented completion of Sections IV.2, IV.3, and IV.5 of the Confirmatory Order.

25. By letter dated July 2, 2013, the NRC authorized Honeywell to resume full licensed operations at the Metropolis plant in accordance with Section IV.4 of the Confirmatory Order.

26. The NRC subsequently completed its review of the revised Integrated Safety Assessment Summary on June 2, 2014, finding that the document satisfied Section IV.6 of the Confirmatory Order.

27. By letter dated July 21, 2014, the NRC determined that Honeywell fully satisfied the terms of the Confirmatory Order.

C. NRC Fee Regulations, Fee Assessment, and Dispute

28. The NRC's fee rules distinguish between the Agency's enforcement program activities and licensee-specific inspection and licensing reviews. NRC enforcement program activities, which benefit the public at large, are paid for through licensees' annual fees. *See* 10 C.F.R. § 171.16.

29. For fuel cycle licensees, fees for other licensing services, inspection services, and special projects are defined in 10 C.F.R. § 170.31. Section 170.31 of 10 C.F.R. contains no schedule of fees for enforcement-related activities.

30. Critically, footnote 2 of 10 C.F.R. § 170.31 provides, in pertinent part: "Fees will not be charged for orders related to civil penalties or other civil sanctions issued by the Commission under 10 CFR 2.202 or for amendments resulting specifically from the requirements of these orders."

31. Thus, the NRC will not charge fees where there is (a) an order (b) issued under 10 CFR § 2.202 that is (c) related to civil sanctions or (d) for amendments resulting from the order.

a. The Confirmatory Order is an order.

- b. Section IV of the Confirmatory Order specifically invokes 10 C.F.R. § 2.202. Section 2.202(d) of 10 C.F.R. further provides, in pertinent part: “An order that has been consented to shall have the same force and effect as an order made after hearing by a presiding officer or the Commission, and shall be effective as provided in the order.”
- c. The Confirmatory Order relates to civil sanctions because it imposes specific legally enforceable obligations on Honeywell related to resolution of the apparent violations identified by the NRC. The Confirmatory Order specifically acknowledges that it was issued in lieu of “issuance of a Notice of Violation...”²
- d. The Confirmatory Order also specifically amended the license for Metropolis. Section IV of the Confirmatory Order states that License No. SUB-526 is modified to, among other things, require Honeywell to submit certain “documentation for review.”

32. Because the Confirmatory Order was issued under 10 C.F.R. § 2.202, imposed civil sanctions by requiring Honeywell to undertake corrective actions, and modified Metropolis’s license, Honeywell was exempt from fees associated with the Confirmatory Order by 10 C.F.R. § 170.31.

² Although 10 C.F.R. Part 170 does not define “civil sanctions”, the Administrative Procedures Act defines the term “sanction” as including agency actions imposing a licensing requirement or directing other compulsory or restrictive actions. 5 U.S.C. § 551(10). Indeed, the NRC “Enforcement Program Overview” webpage lists three available enforcement “sanctions”, including “Orders”, which “modify, suspend, or revoke licenses or require specific actions by licensees or persons.” See <https://go.usa.gov/xnySg> (last accessed Jan. 4, 2018). The other sanctions are Notice of Violation and civil penalty.

33. Nevertheless, between January 2013 and January 2014, the NRC sent to Honeywell five invoices for, among other things, activities undertaken pursuant to the Confirmatory Order. *See* Exs. A-E. The total sum billed by the NRC for its activities related to the Confirmatory Order was \$1,914,223.30. *See id.*

34. Honeywell paid each NRC invoice. But, pursuant to 10 C.F.R. § 15.31, Honeywell timely submitted letters to the NRC disputing the charges related to the Confirmatory Order in light of 10 C.F.R. § 170.31. *See* Exs. F-J.

35. The NRC responded to each of Honeywell's dispute letters, denying that Honeywell had been erroneously billed. *See* Exs. K-O. The NRC offered differing rationales for rejecting Honeywell's arguments. *Compare* Ex. K *with* Ex. L.

36. In its letter of December 14, 2014 (Ex. O), responding to Honeywell's dispute of invoice LFB 14-1691, the NRC explained that it had erroneously billed Honeywell for approximately 370 hours of time for the preparation of the Confirmatory Order. Accordingly, the NRC indicated that it would issue a refund of approximately \$100,000 (the NRC's offer of a refund was not specifically related to Honeywell's disputes). However, the NRC has yet to issue the promised refund.

37. The NRC assessed and exacted a total of \$1,914,223.30 in connection with enforcement activities related to the Confirmatory Order.

38. A summary of the invoices, Honeywell dispute letters, and NRC responses follows³:

Invoice/Quarter	Amount Billed	Amount Disputed	NRC Response
LFB13-2061, Q4-12 (Ex. A)	\$660,888.00	\$450,867.00 (Ex. F)	Ex. K
LFB13-3439, Q1-13 (Ex. B)	\$855,428.00	\$692,603.00 (Ex. G)	Ex. L
LFB13-4946, Q2-13 (Ex. C)	\$881,389.50	\$724,113.50 (Ex. H)	Ex. M
LFB14-0391, Q3-13 (Ex. D)	\$356,286.50	\$ 57,018.50 (Ex. I)	Ex. N ⁴
LFB14-1691, Q4-13 (Ex. E)	\$130,134.00	\$ 60,588.00 (Ex. J)	Ex. N

COUNT I
(Illegal Exaction)

39. Plaintiff re-alleges and incorporates paragraphs 1 through 38 above, as if fully set forth herein.

40. “[A]n illegal exaction claim may be maintained when ‘the plaintiff has paid money over to the Government . . . and seeks return of all or part of that sum’ that ‘was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.’” *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (quoting *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 605 (1967)); accord *Lummi Tribe of the Lummi Reservation, Washington v. United States*, 870 F.3d 1313, 1319 (Fed. Cir. 2017); *Norman v. United*

³ The invoices sent to Honeywell include charges for all of the NRC’s licensing and oversight activities for Metropolis, including activities unrelated to the Confirmatory Order or seismic-related corrective actions. Honeywell disputed only the portion of each invoice that related to the Confirmatory Order. Honeywell did not dispute the other charges.

⁴ The NRC’s letter of December 18, 2014 (Exhibit N), appears to pertain to Honeywell’s dispute of invoice LFB14-1691. However, in its response of February 9, 2018, to a Freedom of Information Act request submitted by Honeywell, the NRC indicated that its letter of December 18, 2014, is also responsive to Honeywell’s dispute of invoice LFB14-0391. See NRC Response to FOIA Request NRC-2018-000282 (ADAMS Accession No. ML18044A023).

States, 429 F.3d 1081, 1095 (Fed. Cir. 2005). Stated differently, an illegal exaction occurs when “the Government has the citizen’s money in its pocket.” *Aerolineas Argentinas*, 77 F.3d at 1573.

41. The NRC has assessed and exacted payments totaling \$1,914,223.30 from Plaintiff under 10 C.F.R. § 170.31, in connection with enforcement activities undertaken at Plaintiff’s Metropolis plant pursuant to the Confirmatory Order.

42. Footnote 2 of 10 C.F.R. § 170.31 states: “Fees will not be charged for orders related to civil penalties or other civil sanctions issued by the Commission under 10 CFR 2.202 or for amendments resulting specifically from the requirements of these orders.” And 10 C.F.R. § 2.202(d) provides: “An order that has been consented to shall have the same force and effect as an order made after hearing by a presiding officer or the Commission, and shall be effective as provided in the order.”

43. Pursuant to 10 C.F.R. § 170.31, Honeywell is exempt from fees in connection with the NRC’s Confirmatory Order because the Confirmatory Order was issued under 10 C.F.R. § 2.202, imposed civil sanctions by requiring Honeywell to undertake corrective actions, and modified Metropolis’s license.

44. The NRC assessed and exacted inspection and technical review fee payments totaling \$1,914,223.30 from Plaintiff, contrary to 10 C.F.R. § 170.31.

45. Plaintiff is entitled to a refund of \$1,914,223.30 that was illegally exacted and held by the NRC.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Honeywell respectfully requests the Court to enter judgment in its favor and against the United States as follows:

- a. Award Plaintiff damages equal to the illegally exacted Part 170 fees for activities undertaken in furtherance of the Confirmatory Order;
- b. Award Plaintiff costs and fees pursuant to 28 U.S.C. § 2412; and
- c. Award Plaintiff such other and further relief as the Court may deem just and proper.

Dated: February 16, 2018

Respectfully submitted,

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