

OFFICIAL TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA OCT 13 AM 10:52

NUCLEAR REGULATORY COMMISSION

**Title: PREHEARING CONFERENCE
DEPARTMENT OF THE ARMY
ABERDEEN PROVING GROUND
MARYLAND**

Docket No.: 30-34610-ML

Work Order No.: ASB-300-953

LOCATION: Rockville, MD

DATE: Wednesday, October 13, 1999

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 In the Matter of: :

5 PREHEARING CONFERENCE : Docket No. 30-34610-ML

6 DEPARTMENT OF THE ARMY :

7 ABERDEEN PROVING GROUND :

8 MARYLAND :

9 - - - - -X

10 Nuclear Regulatory Commission

11 One White Flint North

12 11545 Rockville Pike, Bldg. 2

13 Rockville, Maryland

14 Wednesday, October 13, 1999

15 The above-entitled matter came on for prehearing
16 conference, pursuant to notice, at 9:38 a.m.

17 BEFORE:

18 THE HONORABLE CHARLES BECHHOEFER,

19 Administrative Judge

20 APPEARANCES:

21 On behalf of the U.S. Nuclear Regulatory Commission:

22 ADMINISTRATIVE JUDGE LINDA W. LITTLE, Special Assistant

23 Atomic Safety and Licensing Board Panel

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25 Raleigh, North Carolina 27612

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1 APPEARANCES: [Continued]

2 On behalf of the NRC Staff:

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9 FRITZ STURZ, Section Chief

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13 ANTHONY KIRKWOOD

14 Materials Safety and Inspection Branch

15 U.S. Nuclear Regulatory Commission

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17 On behalf of the U.S. Department of the Army:

18 PHILLIP B. HUNTER, Esquire

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1 APPEARANCES: [Continued]

2 On behalf of the Army: [Continued]

3 TOM WITKOWSKI, Chemical Engineer

4 Soldier & Biological Chemical Command

5 Aberdeen Proving Ground, Maryland 21010

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7 DAN NOWAK, U.S. Army

8 Soldier & Biological Chemical Command

9 ACADA System Manager

10 Soldier & Biological Chemical Command

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C O N T E N T S

WITNESS

EXAMINATION

[NONE.]

E X H I B I T S

NUMBER

IDENTIFIED

[NONE.]

P R O C E E D I N G S

[9:38 a.m.]

JUDGE BECHHOEFER: Good morning, ladies and gentlemen. This is a prehearing conference in the case involving the Department of the Army and their license application to the NRC for a detector alarm which the Staff has denied the application.

Hearing the case, I am the Presiding Officer. My name is Charles Bechhoefer. I am an attorney. With me is my Special Assistant, Dr. Linda Little, and she has been giving me much-needed technical assistance. She is an environmental scientist.

For the benefit of the record I would like various parties and their representatives to identify themselves. I will from my left to right.

MR. KIRKWOOD: Anthony Kirkwood, U.S. Nuclear Regulatory Commission. I am with the Materials Safety and Inspection Branch.

MR. STURZ: I am Fritz Sturz. I am the Section Chief in the Materials Safety Inspection Branch.

MS. YOUNG: My name is Mitzi Young. I am an attorney with the NRC's Office of General Counsel, and these technical members are present today to provide assistance to me and if there is a question the Board has that they can answer, they probably could provide that information,

1 unsworn of course, but Michelle Burgess, who also is an
2 engineer in the Materials Safety Inspection Branch, could
3 not be with us today because she is having surgery.

4 JUDGE BECHHOEFER: Mr. Hunter?

5 MR. HUNTER: Phil Hunter. I am with the
6 Department of the Army, Soldier Biological Chemical Command
7 at Aberdeen Proving Grounds, attorney for the Army.

8 MR. NOWAK: Dan Nowak, U.S. Army at SBCCOM also,
9 and I am the ACADA System Manager.

10 MR. WITKOWSKI: I am Tom Witkowski. I am a
11 Chemical Engineer employed by the U.S. Army Soldier and
12 Biological Chemical Defense Command, Department of Defense.

13 JUDGE BECHHOEFER: Now the basic reason for the
14 conference was to attempt to define issues for eventual
15 adjudication somewhat more precisely than may appear in the
16 various papers that are before us, but in addition I, as the
17 Presiding Officer, have asked a few questions, which I would
18 like the parties to answer. We have gotten -- in advance we
19 got statements of their positions and summaries of their
20 answers.

21 [Discussion off the record.]

22 JUDGE BECHHOEFER: One thing that I was interested
23 in is whether there is any sort of guidance which the Staff
24 may have issued before a couple of days ago stating that the
25 word -- defining what the word "product" meant, because it

1 seems to me that there has been some confusion over that
2 term, at least, and maybe Ms. Young, you may wish to provide
3 to guidance as to that.

4 Is there anything published or any Reg Guide or
5 any statement or Branch position or anything like that that
6 people could have relied on or --

7 MS. YOUNG: I have asked that question many times
8 myself --

9 JUDGE BECHHOEFER: Oh, okay.

10 MS. YOUNG: -- Judge Bechhoefer. I am not aware
11 of anything that is written in terms of guidance as to what
12 a product is. What we do have is the Staff's regulatory
13 interpretation of 10 CFR 32.26 in terms of what types of
14 devices meet the definition of a device that may be
15 distributed to exempt persons.

16 JUDGE BECHHOEFER: And is that a published
17 document?

18 MS. YOUNG: No, no, just the regulation, words of
19 the regulation itself and then the statement of
20 consideration leading up to the promulgation of the
21 regulation, which is what the Staff relied on, and both of
22 those are cited in our reply to the order.

23 JUDGE BECHHOEFER: Yes, yes. I am aware of that.

24 MS. YOUNG: Hold on for one moment.

25 JUDGE BECHHOEFER: Okay.

1 [Discussion off the record.]

2 MS. YOUNG: Sorry for the delay, Judge Bechhoefer.

3 Mr. Kirkwood has handed me NUREG/CP-0001 entitled
4 "Radioactivity in Consumer Products," which was published in
5 August of 1978 by the NRC. And it does contain an excerpt
6 which addresses the NRC's role in regulating consumer
7 products, written by Robert B. Minogue of the Office of
8 Standards Development of the NRC. And in that writeup
9 there's a section entitled "What Are Consumer Products?" in
10 quotes, and a statement that essentially for the purposes of
11 regulatory control, consumer products are considered to be
12 those products, commodities, or materials containing
13 byproducts, source, or special nuclear material that are
14 available in the marketplace to the general public as "off
15 the shelf" items that are intended for widespread personal
16 or household use.

17 I don't know if that's any more helpful, but we
18 could make copies of this available to the Board and parties
19 today.

20 JUDGE BECHHOEFER: Yes, that would be useful.

21 MS. YOUNG: The copy I have, some of the pages are
22 cut off, so it might take a little time.

23 JUDGE BECHHOEFER: Oh. Okay. Well, does that
24 definition or statement that you read necessarily imply that
25 the product and its housing must be considered together or

1 not? Because that to me is the crucial question, whether
2 the product need include the paper it's wrapped in, or maybe
3 it's a little more than that, but --

4 MS. YOUNG: I don't know if this statement does
5 that, but to the extent it talks about off-the-shelf use and
6 to the extent the Commission in terms of identifying which
7 products could be exempt from license requirements intended
8 that the product not require any sophistication of the user
9 or any risk that the user might mishandle it, the staff
10 takes a position that it should be a whole product and not
11 something that could be separated and then some mishandling
12 could occur with respect to the source.

13 There's also a paper written by the U.S.
14 Department of Health, Education and Welfare -- I guess their
15 name has changed since -- that the staff has handed me that
16 was published regarding a meeting, an ionization chamber
17 smoke detector meeting held in Rockville, Maryland, January
18 12, 1978, and it describes a product as being the final
19 discrete end product that we will license and not a
20 particular component, even though it might be the one
21 component that contains the radioactive material. Now this
22 is not an NRC document, but it was an NRC employee
23 describing the NRC's view of what constituted a product.

24 We can also make copies of that available.

25 JUDGE BECHHOEFER: Yes, I think that would be

1 useful as well for all the parties as well as myself.

2 MS. YOUNG: But again, you know --

3 JUDGE BECHHOEFER: And special assistant.

4 MS. YOUNG: These papers are just examples of
5 statements that the NRC has made. I think the Presiding
6 Officer should focus on statements made in promulgating the
7 regulation and the NRC's whole scheme for the safety of
8 products that will be used by the general public. Which
9 again, the statement of considerations that accompanied
10 promulgation of 32.26 and other provisions that identified
11 what items could be distributed to exempt persons.

12 JUDGE BECHHOEFER: Well, given this history,
13 what's the explanation then for the position taken in the
14 letter dated July 2, '98 -- let's see, that was from Mr.
15 Baggett of the Materials Safety Branch of the Division of
16 Industrial and Medical Nuclear Safety to Mr. Vendora of the
17 Army -- which seemed to have taken a completely contrary
18 view, and that was one of the -- that's the basis for one of
19 the questions we posed that did reflect the views of Ms.
20 Burgess, I guess, but it was also under Mr. Baggett's
21 signature, so presumably he agreed.

22 MS. YOUNG: What words in that letter are you
23 specifically focusing on?

24 JUDGE BECHHOEFER: Well, I'm focusing on the NRC
25 staff discussed an alternate approach of registering the

1 internal cell nodule as the exempt use product. And then
2 they advised Army what to do to carry through on that.

3 MS. YOUNG: I think at the time --

4 JUDGE BECHHOEFER: They are leading them down the
5 golden path, in other words.

6 MS. YOUNG: Well, I think at the time those
7 discussions were held concerns about the viability of
8 licensing the source module itself as separate and apart
9 from the detector had not been fully considered nor had the
10 staff addressed with the Office of General Counsel whether
11 that was an appropriate application of the regulation.

12 JUDGE BECHHOEFER: But isn't the NRC in any way
13 bound by the interpretation?

14 MS. YOUNG: Well, I don't think there's any
15 precedent for that, Judge Bechhoefer. In addition, there's
16 numerous license correspondence that goes out between NMSS
17 and its licensees and potential license applicants that are
18 not reviewed by the legal office, and I think even when the
19 issue of whether this device could be licensed under 32.26
20 came up, it was an individual in the technical staff that
21 first raised the concern and floated, and then it was
22 elevated up to the Office of General Counsel, which that
23 later correspondence in '99 indicates, I think the March '99
24 letter.

25 It's kind of like the situation at the IRS. If

1 you call and get bad advice, you can't rely on that advice
2 to win your case.

3 JUDGE BECHHOEFER: I think Congress is trying to
4 do something about that.

5 MS. YOUNG: Not that the staff intends on giving
6 bad advice, but I think the information that was being
7 discussed at the time was to the best of the ability of the
8 individuals involved, and of course Mr. Baggett is not here,
9 nor is Ms. Burgess. But my understanding is that to the
10 extent Ms. Burgess conducts her reviews, she's worried about
11 whether the module itself meets certain requirements. Then
12 after the sealed-source-device review is done, it is
13 forwarded to a licensing branch for I guess preparation of
14 the registration and the license. So she's further back in
15 the process than actually the license being issued.

16 JUDGE BECHHOEFER: Right. Well, is Mr. Baggett
17 her supervisor?

18 MS. YOUNG: He was at the time.

19 JUDGE BECHHOEFER: At the time.

20 MS. YOUNG: He no longer is.

21 JUDGE BECHHOEFER: Well, at the time is what
22 matters.

23 MS. YOUNG: Judge Bechhoefer?

24 JUDGE BECHHOEFER: Yes.

25 MS. YOUNG: If I may also be heard.

1 JUDGE BECHHOEFER: Of course.

2 MS. YOUNG: That same paragraph indicates that
3 there were discussions at the time to determine what
4 information would be needed to address the new approach,
5 including to address what would constitute the exempt
6 product and to ensure that the component, if defined as
7 exempt product, would meet all the necessary regulations.

8 So I don't think that Mr. Baggett's letter is a
9 wholehearted endorsement of the alternative approach, it
10 just indicates something that the staff would consider at
11 the time. The license is an issue until the staff signs it
12 out and approves it, so I don't think that we have on this
13 record any advance approval of the license application
14 submitted by the Army.

15 JUDGE BECHHOEFER: Well, my question is really
16 wasn't the Army to some extent misled by this series of
17 discussions.

18 MS. YOUNG: Well, unfortunately the individual who
19 addressed this matter with me couldn't be here today because
20 he's on travel, but it's my understanding that the licensing
21 of modules themselves has been an issue between the NRC and
22 the Army for a number of years. It didn't just arise with
23 this application. But unfortunately Mr. Hickey, who
24 informed me of that, is not able to be here today.

25 JUDGE BECHHOEFER: I see.

1 MS. YOUNG: And he is the new branch chief in this
2 area.

3 JUDGE BECHHOEFER: Oh.

4 MS. YOUNG: And has worked in this area for a
5 number of years, although he had other assignments, and just
6 recently rejoined the section. So perhaps you could ask the
7 Army, but my understanding is there have been numerous
8 discussions over the years as to --

9 JUDGE BECHHOEFER: Yes, I was going to listen to
10 the Army once you have completed your explanation.

11 MS. YOUNG: What the Army basically has is
12 specific licenses for several devices that it uses.

13 JUDGE BECHHOEFER: Yes. I think you've attached a
14 copy of -- I don't know if it's their only license, but
15 attached a copy of a license at least.

16 MS. YOUNG: License under which the ACADA right
17 now --

18 JUDGE BECHHOEFER: Right.

19 MS. YOUNG: Is being distributed.

20 JUDGE BECHHOEFER: Right. Right.

21 Well, I'd like to get the Army's reaction, and I'd
22 also -- well, later on I would like the Army to address
23 whether under one of the alternate approaches they could
24 achieve virtually the same result as they seek through an
25 exemption, but first why don't you deal with the questions I

1 had before about the word "product" and were you aware of it
2 and all that kind of thing.

3 MR. HUNTER: Your Honor, the Army was not aware
4 and is not aware of a definition of "product," "complete
5 item," and the myriad of other names attached to the denial
6 letter. It's interesting, and we also reviewed the
7 statement of consideration, and we find no definition in the
8 statement of consideration that defines a product.

9 Ms. Young also -- and I have -- I'm not privy to
10 the citation and the information she just recently provided
11 concerning consumer products. The ACADA is not a consumer
12 product. Our concern throughout the process has been the
13 absence of definitions for various terms that are frequently
14 used by the NRC, as Ms. Young indicated that from 1969 or
15 from the early seventies, the NRC has had ample opportunity
16 to define various terms via the Federal Register and other
17 forums, and to date there's nothing in the NRC regulation
18 that defined the term "product," "entire product," "complete
19 product," et cetera. So the NRC is the expert. We, the
20 Army, we're simply trying to comply with whatever the NRC
21 says we must comply with.

22 So when there's an ambiguity in a definition or
23 there's no definition and at the last moment we're required
24 to satisfy an unknown definition, then we have great
25 difficulty, not only the Army or any other agency. And

1 we're not here to bash the NRC. We simply tried to
2 accommodate the issues and problems that they wanted
3 resolved.

4 We believe we resolved those issues and concerns,
5 and for the NRC at the last hour to say sorry, needless to
6 say we were dumbfounded, bewildered, et cetera, after going
7 through a laborious process of trying to satisfy their
8 concerns, from tamper-resistant screws to making the ACADA
9 more safe, and to receive just this one letter that says
10 your efforts, your application is denied, without a basis in
11 fact and law, we were just totally caught off guard.

12 So our response is that there are no definitions,
13 and the NRC is straining to come up with definitions that
14 may apply to this situation, and we contend that there are
15 none.

16 And not to throw a term in the process in terms of
17 contract law, if you say contra proferentem or something
18 like that, that if there's an ambiguity in a law, a
19 regulation, or document, that ambiguity is construed against
20 the drafter, and in this situation the drafting party is the
21 NRC, and we as being part of the public, even though we're a
22 governmental entity, we're not informed, we've not been
23 notified of these various definitions, so we've been
24 completely working at a disadvantage. We do believe we have
25 been misled, as our response indicates.

1 I think the record is pretty clear from where we
2 sit, and realizing that we are an interested party, but from
3 where we sit, the record is replete with requests the comply
4 and the Government and the Army complying. Requests to
5 comply, clarify, the Government satisfied those
6 requirements.

7 The letter dated July 2, 1998, to Vernon Vendora
8 kind of sums it up, that in essence Army take this approach,
9 it is a separate and distinct approach whereby you separate
10 the inner module from the casing. This was not our
11 approach. This was the NRC's approach.

12 Now if the NRC is confused about its regulations
13 or not sure, then we don't want to castigate the NRC, but we
14 were led down a trail, and we feel like we were misled, and
15 therefore the doctrine of estoppel would apply in this
16 situation. We just want an exemption.

17 One approach that Your Honor alluded to is an
18 approach that's acceptable by the Army if it will achieve
19 the results that the Army desires. We searched the
20 regulation. We could not find the user exemption. But
21 realizing that it seemed like the NRC within its discretion
22 can act upon that user exemption or any other type of
23 specific exemption. So we are receptive to whatever Your
24 Honor proposes or whatever the NRC proposes for the Army to
25 achieve its objective.

1 JUDGE BECHHOEFER: Mr. Hunter, when I referred to
2 a user -- well, a license for user -- I really wasn't
3 referring to an exemption, I was referring to a license with
4 minimal terms attached, and I don't know whether that's
5 feasible or not, but a license for unnamed military
6 individuals to use the device, subject to their being
7 trained to do so, and I assumed you had no objection to
8 that, because --

9 MR. HUNTER: No, sir. I think it's one approach
10 that may be a viable approach.

11 JUDGE BECHHOEFER: Now I wasn't aware of any
12 requirement that the device be serviced in a given place,
13 and I wasn't really anticipating anything like that. I was
14 thinking that it could be serviced wherever it had to be
15 serviced or maintained I guess. What actually must be done
16 to the device? Does it involve any safety considerations at
17 all as far as you're aware?

18 MR. HUNTER: Well, we have two technical experts
19 here, but it's my understanding that presently wipe tests
20 are required, and those tests are required from the
21 manufacturer before it leaves the manufacturer. Once it is
22 received by the Army, we perform a wipe test, and thereafter
23 I think wipe tests are performed every six months or
24 something to that effect. But if Your Honor will let me
25 turn it over to one of the experts.

1 JUDGE LITTLE: While you're answering this, I
2 would like for you to address this phrase. Ms. Young's
3 document of October 8, 1999, the response in the conclusion
4 says the device is designed to allow disassembly for
5 maintenance by any user. Now when it says any user, does
6 that mean that any person could casually pick it up and it
7 would be very easy to disassemble it, or does it require
8 some training and special tools or whatever to disassemble
9 it?

10 MR. HUNTER: Yes, ma'am. The item cannot easily
11 be disassembled.

12 JUDGE LITTLE: Okay.

13 MR. HUNTER: It would take approximately, with the
14 technicians, in order to get to that module, it's about an
15 hour and a half of effort to -- with the special tooling to
16 screw the outer housing off, and then you have to go through
17 various steps in order to get to that inner module, that
18 contained the byproduct. So it's not an easy task.

19 Jim Jones or Joe Blow off the street cannot get to
20 that module without an extensive amount of training and the
21 special tools, and those special tools are not out in the
22 public domain. Only those individuals who are trained to
23 service the ACADA are in possession of those special tools.

24 JUDGE BECHHOEFER: Well, would the Army desire
25 that this maintenance process be carried out in any

1 particular locations, or would you like it to be carried out
2 wherever the device is? And can it be done that way?

3 MR. HUNTER: Well, the ACADA is located throughout
4 the world.

5 JUDGE BECHHOEFER: Right. Right.

6 MR. HUNTER: And the users -- a user cannot -- a
7 user must be trained in the operation of the ACADA, and the
8 users -- and a user may not be the maintainer or the person
9 who serviced the ACADA. Is it okay if I allow Mr. Nowak to
10 respond?

11 JUDGE BECHHOEFER: Yes. This is not under oath or
12 anything like that, but --

13 MR. NOWAK: Good morning.

14 JUDGE BECHHOEFER: For guidance, yes.

15 MR. NOWAK: Our definition of "user" is the
16 operator in the field. They receive training on how to
17 operate the device, but they are not authorized to open the
18 device itself. We have maintenance personnel who are not
19 the users, they are not the ones on the front line, they are
20 in a rear echelon, and they are the ones who are authorized
21 to do maintenance on the item, to open the box.

22 He's got to use Allen screwdrivers. As Mr. Hunter
23 said, it takes about an hour and a half to get down to the
24 cell module, and then once he gets down to that, it has
25 tamper-resistant screws, so that maintenance man cannot

1 disassemble that cell module. It has to go back to the
2 manufacturer who has the special tool.

3 So we have the user in the field, who can be
4 anyone. But they're trained, and we have a training course
5 that does cover radiation, plus also how to operate it, et
6 cetera. How to operate your VCR, if you would. But he
7 never opens the box, ever. If it fails, he's got a few
8 things that he can do on the outside, and then he turns it
9 in for maintenance if he can't demonstrate that the device
10 is working, and then it goes to the maintenance cycle.

11 JUDGE BECHHOEFER: And where physically is the
12 maintenance performed?

13 MR. NOWAK: The maintenance can be performed at
14 any forward maintenance unit. It could be anywhere in the
15 world. It could be in a tent. It could be in a trailer.
16 It could be in any building that we occupy. And we have
17 some of the items here.

18 MR. HUNTER: Your Honor, can I show you what the
19 ACADA looks like?

20 JUDGE BECHHOEFER: Yes. Yes.

21 MR. HUNTER: We brought it just in case.

22 MR. NOWAK: And there are no radioactive sources.

23 JUDGE BECHHOEFER: You mean you're not going to
24 use it?

25 MR. NOWAK: We could bring one. It takes about an

1 hour to train you.

2 JUDGE BECHHOEFER: Okay.

3 MR. NOWAK: Yes. Can we come up?

4 JUDGE BECHHOEFER: Yes. Go ahead.

5 MR. NOWAK: Can you hear me?

6 JUDGE BECHHOEFER: Yes.

7 MR. NOWAK: This is a complete assembled module --
8 detector, excuse me. This is the detector. And it has on
9 the bottom a battery box which the user can obviously open,
10 because it operates on batteries. It's got to operate in
11 the field. To get into the device -- and I'll bring this up
12 here for you and show you this -- he has to take out this
13 whole group of screws all the way around with Allen
14 wrenches, and then this whole module slides out. And inside
15 this -- this is a cutaway model -- this top part will slide
16 up, and all these components you see in here come rising out
17 of the case.

18 And the components in here that he would repair
19 are several, but there are pumps in here to suck air in,
20 there's circuit cards, which you can cut away, that he might
21 have to replace. You've got to take all these screws out.
22 And what happens is this whole plate slides up, and all
23 these components come out of the device. And you can see
24 there's all kinds of electronics in here and components.
25 Some of these we would replace. Lots of them we wouldn't.

1 This right here is the product that we put in the request
2 for exemption for. It's got everything pretty much removed.
3 It's the module. We call it the drift tube and --

4 MR. WITKOWSKI: Manifold.

5 MR. NOWAK: Manifold module. And the radioactive
6 sources -- there's two of them in here -- are located right
7 here. And to get into here there are -- these don't have
8 it, because we have -- this isn't a production model -- but
9 it has tamper-resistant screws here, it has tamper-resistant
10 screws on the bottom side also. It's underneath this plate.
11 So he cannot get into the sources, ever. But he would never
12 get to this component anyhow. But this would be the exempt
13 product.

14 If everything we replace on here doesn't fix it,
15 and we talked to the NRC about this right at the end of our
16 discussions on the technical approach, was that if we got to
17 the part where this failed, we then take all the components,
18 which are still attached to this, and slide it back into the
19 detector and send it back to the manufacturer. And then he
20 would determine if this needed to be replaced, if it was
21 economically feasible to replace it also. If this component
22 failed.

23 So the Army would never maintain the part. But we
24 would replace circuit cards, we would replace pumps and, you
25 know, connectors, things like that in here. And, as I said,

1 I want to emphasize this again, it's got tamper-resistant
2 screws on this so you can't disassemble this part off and
3 get into the sources and take this part off and slide it
4 off, because the sources are right up here, and you've got
5 to slide the cells out. Okay?

6 JUDGE BECHHOEFER: Yes.

7 MS. YOUNG: Judge Bechhoefer, may I ask for a
8 clarification?

9 JUDGE BECHHOEFER: Certainly.

10 MS. YOUNG: It is my understanding that anyone can
11 use an Allen wrench which could be purchased from a hardware
12 store --

13 JUDGE BECHHOEFER: Yes.

14 MS. YOUNG: -- to remove the outer housing?

15 MR. NOWAK: They can slide it out, that is
16 correct.

17 MS. YOUNG: How long does that take?

18 MR. NOWAK: About five minutes, ten.

19 MS. YOUNG: So what you were explaining, it's to
20 remove the source, the drift to manifold assembly?

21 MR. NOWAK: Actually --

22 MS. YOUNG: -- from the inner housing? That is
23 what you are saying is an hour and a half? I believe at a
24 meeting at the NRC --

25 MR. NOWAK: -- that component that you see there

1 that is all metal, it would take about an hour and a half,
2 because you have got to take the circuit cards off, you've
3 got to take the --

4 MS. YOUNG: I was at a meeting with the NRC that I
5 attended. It was explained it would take 45 minutes, so I
6 don't know which it is, but it is going to take longer than
7 five minutes.

8 MR. NOWAK: Longer than five, definitely.

9 MS. YOUNG: So it is kind of a two or three step
10 process?

11 MR. NOWAK: It is multiple step. We had submitted
12 a videotape at one point which we withdrew which showed all
13 the steps.

14 MS. YOUNG: And the Army in getting an exempt
15 license would like to distribute it not even to soldiers in
16 the field, but also members of local police forces?

17 MR. HUNTER: Now we -- our focus at this time is
18 just service members.

19 MS. YOUNG: I understand that, but when you get an
20 exempt license it can go to anyone in the general public.
21 It is not going to stop with the Army. That is what 32.26
22 would allow you to do.

23 MR. HUNTER: The Army will -- I think ultimately
24 in terms of domestic preparedness there may be some talk in
25 that regard, but I don't think it would ever be out to Joe

1 Blow Public.

2 MS. YOUNG: That is not what was ascribed to the
3 Staff at a meeting also, Judge Bechhoefer but the point is
4 under the regulation there is no restriction on who the
5 product could go to -- to the general public. You know, the
6 user is the general public, no limitations.

7 JUDGE BECHHOEFER: If it comes with an exemption
8 then --

9 MS. YOUNG: If it comes under, if it is licensed
10 under 32.26 there is no limitation on who in the general
11 public could use it and have it.

12 JUDGE BECHHOEFER: I was really exploring whether
13 there are other means of licensing it so that the Army could
14 achieve the result that it wishes.

15 MS. YOUNG: And I think the regulatory scheme that
16 the NRC has right now, the best option for the Army is
17 rulemaking, to the extent that it needs to carve out a
18 special provision for this type of device. I mean that's
19 how we got 32.26. It was identified as, a smoke detector as
20 being something that should be given to the general public
21 without any limitation because it doesn't require any
22 special training or limitations on the uses that a member of
23 the public would apply.

24 JUDGE BECHHOEFER: Well, but what there seemed to
25 be is, couldn't there be a license for servicemen to use the

1 device subject to their training to do that?

2 MS. YOUNG: That is kind of what they have under
3 the specific license that we attached to the reply.

4 JUDGE BECHHOEFER: There were a number of other
5 conditions that seemed to be --

6 MS. YOUNG: There are a number of other conditions
7 and the Army could apply to have those relieved by making a
8 showing that they are not necessary.

9 In other words, they could ask for amendments to
10 their license.

11 MR. HUNTER: Well, we -- that process --

12 JUDGE BECHHOEFER: For the one product only
13 though.

14 MS. YOUNG: For any of the products -- well, right
15 now the only issue is the ACADA but the license covers a
16 number of products.

17 JUDGE BECHHOEFER: If they wanted an exemption of
18 certain of the license conditions --

19 MS. YOUNG: If they wanted certain license --

20 JUDGE BECHHOEFER: -- they could do it just for
21 the ACADA.

22 MS. YOUNG: If they want certain license
23 conditions removed, the license could be amended to indicate
24 that no leak tests would be required, for example, for the
25 ACADA device.

1 JUDGE BECHHOEFER: For just this device, not other
2 things that might be under the license?

3 MS. YOUNG: I think that is the only issue in
4 terms of the application they have.

5 JUDGE BECHHOEFER: Right. Right, but what I was
6 driving at is they would not need a general license
7 amendment to cover all products. They could just get it for
8 the single --

9 MS. YOUNG: In Materials space we have to be
10 careful using general license because that has a special
11 regulatory meaning.

12 JUDGE BECHHOEFER: Well, I wasn't referring to it
13 in that term, no -- in elimination of certain requirements
14 for this single product, rather than anything else that
15 might be covered by the license.

16 MS. YOUNG: Because again, 32.26 talks about a
17 device that acts as a detector. I am not sure once you pull
18 the ACADA apart the inner workings act as a smoke detector.
19 Again, once you start pulling it apart, it is not clear that
20 it really fits 32.26, so one approach, which could be
21 considered is whether you could amend the license to delete
22 certain requirements that apply to the ACADA based on the
23 Army satisfying certain showings.

24 JUDGE BECHHOEFER: Right. My question was could
25 that apply only to the ACADA and not to any other device

1 that might be covered by the same license.

2 MS. YOUNG: I think the Presiding Officer only has
3 jurisdiction over the ACADA, so I don't think you could make
4 findings in this proceeding that would result in
5 modification of the Army's license for other devices. You
6 don't have subject matter jurisdiction to that extent.

7 JUDGE BECHHOEFER: But what I was just questioning
8 is whether a license amendment could be limited to this --

9 MS. YOUNG: Theoretically speaking, it could be
10 drafted to only specifically remove requirements that apply
11 to the ACADA only.

12 JUDGE BECHHOEFER: Would that be in accord with --
13 assuming that they were satisfied, that the conditions could
14 be removed? Would that be in accord with Staff practice to
15 do something like that?

16 MS. YOUNG: The Staff has in the past modified
17 licenses based on applications that make the requisite
18 showing. That is correct -- but again, even the letter in
19 July talks about the device being denied or the application
20 being denied based on the Army's intention to disassemble
21 it, you know, for maintenance, so it's always been an issue,
22 even as far back as July, '98 on whether if you take this
23 device apart is it going to meet the regulations, is it
24 going to be a detector?

25 JUDGE BECHHOEFER: No, I recognize that. I was --

1 I would like to ask Mr. Hunter, would the Army be satisfied
2 with an amendment to its existing license which would delete
3 some of the terms applicable to that license for the one
4 device, for the single ACADA device?

5 Could that work? I mean you would have to define
6 what would have to be eliminated. You would obviously leave
7 training requirements. There may be other things too.

8 I don't know -- I mean that is what I am trying to
9 inquire. Could that approach be taken?

10 MR. HUNTER: It could be taken but it is another
11 approach that may lead us to a dead end, Your Honor.

12 We have -- we have detected some resistance to
13 various relaxation of so-called requirements that's not even
14 the regulation that's been imposed, and we discern that
15 there are no guarantees if we follow a certain path the way
16 we followed the approach that we're here now trying to
17 resolve that at the end there could still be a rejection.
18 That is the dilemma.

19 Now there are -- the NRC can grant a specific
20 exemption, as we indicated, under 30.11, I believe, of a
21 specific exemption, and that would relieve the Army of
22 various NRC-imposed requirements.

23 Now irrespective of the NRC, if we receive an
24 exemption the Army has its own requirements. We do not
25 allow these ACADAs to just float out here. We have certain

1 maintenance requirements that we impose upon ourselves and
2 our service members and the Air Force and other services, so
3 there are protections that are available, but a specific
4 exemption could achieve the result or a relaxation of
5 various burdensome requirements, but we have no assurance
6 that what we would like to see relaxed will be relaxed, and
7 that is the dilemma that we face.

8 JUDGE BECHHOEFER: Well, I am not sure if you
9 realize that as Presiding Officer I don't believe that I
10 have the authority to grant a specific exemption. I can
11 determine whether you should have -- fall under the
12 exemption of 32.26. I am not sure I have the authority to
13 grant a specific exemption.

14 MR. HUNTER: Yes, sir.

15 JUDGE BECHHOEFER: I just raise it as a question.
16 I don't say that I don't, but I think through some past
17 precedent I probably don't have that.

18 MR. HUNTER: Your Honor --

19 MS. YOUNG: The Staff would agree with that. The
20 Presiding Officer also doesn't have the authority to direct
21 the Staff in the fulfillment of its statutory duties, you
22 know, with respect to safety reviews.

23 JUDGE BECHHOEFER: Yes.

24 MS. YOUNG: There have been a number of cases that
25 talk about -- you cannot challenge the adequacy of a Staff

1 safety review and to the extent you heard comments from Mr.
2 Hunter earlier as to the NRC violating some contract terms
3 between it and the Army, you know, we are not really not in
4 contract space, we are in regulatory space where you have
5 the agency which has the expertise in this area, has the
6 expertise in applying its regulations, and tribunals
7 routinely defer to that expertise unless it is shown with
8 clarity that that application of the regulation is just
9 wrong.

10 That is kind of where we are in this proceeding.
11 Does the ACADA constitute a product once the inner source
12 module is remove that detects toxic agents, for example.

13 MR. HUNTER: Your Honor, I would like to just -- I
14 would say in response to your question, as we indicated in
15 our written response, we are open to various ways to
16 accomplish the goal, and if it is not burdensome then we
17 will look at it, but we also realize that you acknowledge
18 that you do have power from I think where we sit that to
19 dispense justice and to direct the NRC to do what's right,
20 and if there is some ambiguity or there is an absence of
21 clear expressed authority, they cannot just -- excuse the
22 expression -- willy-nilly come up with various rationale to
23 support decisions that are not defensible in law or fact.

24 When we look at Part 30.20 of the regulation, it
25 says all persons -- in essence it says all persons are

1 exempt from license requirements of 32.26 if such person
2 receives, possesses, uses, transfers, owns or acquires
3 byproduct material, unless they manufacture, process,
4 produce, or initially transfer for sale or distribution.

5 Now within the scheme of the regulation as we
6 indicated in our writing that this is within a commercial
7 context. We, the Army, we receive, we possess, we use, we
8 transfer, we own or we acquire. We are not the
9 manufacturer. We acquire these ACADAs to go only to DOD
10 personnel.

11 We don't, we are not in the business of dispensing
12 these ACADAs to civilian nonmilitary individuals, so we do
13 acquire these items from Graseby Limited for transfer to
14 service members, so 30.20 has some applicability as the Army
15 being exempt and there are other regulations that allow the
16 exemption to occur.

17 I think the water -- when you look at some of the
18 NRC regulations you find one here, one over there, and one
19 somewhere that reaches out and attempts to grab you in terms
20 of all-encompassing to stymie, from where we sit, the Army,
21 in achieving its objective.

22 You know, when we look at the big picture, Your
23 Honor, I mean if we just step back and look at the big
24 picture, here we have a -- the ACADA that is presently being
25 used by soldiers to protect themselves from chemical attack.

1 The beta particles that's emitted from those nickel cells
2 will not penetrate a sheet of paper. There's not a safety
3 issue here. The design -- there shouldn't be a design
4 issue.

5 MS. YOUNG: Judge Bechhoefer, unless he is going
6 to be sworn in as an expert I think you should ignore any
7 comments as to the safety hazards of Nickel-63. They are
8 just not relevant coming from an attorney that is unsworn.

9 What we have are NRC regulations that regulate the
10 material. What we have is a specific license that sets
11 certain requirements on the Army and what you had was Mr.
12 Hunger explaining that some people can get under 30.20
13 relieved or not subject to those requirements, but the
14 predicate for that is that someone has a 32.26 license,
15 which he neglected to mention, which Graseby does not have,
16 which the Army right now does not have.

17 MR. HUNTER: But Your Honor, the bottom line is
18 that the proof is in the pudding. What you see is what
19 we -- what we acquire from Graseby. We acquire the ACADAs
20 from Graseby via appropriated funds. We are not permitted
21 to provide ACADAs to nonmilitary personnel.

22 The ACADA is a safe device. It is used presently
23 and there is no reason why it should not be considered an
24 exempt item based upon NRC regulations. We can fit into a
25 whole lot of their regulations. We can nicely fit into

1 various parts of their regulation including 30.11 that talks
2 about specific exemptions that like you indicated, Your
3 Honor, the Commission is the only one that can grant that
4 exemption, but to us in essence it is a no-brainer, but for
5 some reason we are -- the NRC is resisting every effort to
6 do something that is reasonable that we don't understand,
7 and there is something that is preventing us from obtaining
8 an exemption that is not being said here, because on the
9 facts we should obtain the exemption based upon how we have
10 been led down this road.

11 We should have an exemption and at the last moment
12 someone in some position of authority said no. We don't
13 know why, because we did everything they say do. If they,
14 if the approach was flawed that they advanced, then they are
15 familiar with their own regulations. We followed their
16 advice as experts, but now we are being penalized for
17 following their advice and even in the file, I think it said
18 Tab -- part of the hearing file at Tab 21, it talks about a
19 Paragraph 1 and the letter is dated October the 26th, 1998,
20 from Colonel -- to Colonel Reeves from Mr. Baggett, who is
21 not here. The second sentence of that paragraph says, "We
22 have had several discussions with our Office of General
23 Counsel and have determined that for NRC to issue a license
24 the applicant must be an organization with --" so that is
25 only shown for purposes of indicating that the Office of

1 General Counsel has always been involved in the processing
2 of the application and the exemption, and we are at a loss,
3 Your Honor.

4 MS. YOUNG: Judge Bechhoefer, if I might address
5 the last subject raised.

6 JUDGE BECHHOEFER: Yes.

7 MS. YOUNG: Relating to the October 26th, 1998
8 letter --

9 JUDGE BECHHOEFER: Right. I was just getting it
10 out and I have it out now.

11 MS. YOUNG: I will be happy to wait.

12 JUDGE BECHHOEFER: Okay. I got it.

13 MS. YOUNG: I think that paragraph does not
14 indicate the position that the Army has advanced but rather
15 that the Office of General Counsel was contacted to
16 determine if the Army was a viable license applicant. That
17 is basically all it says, and again we are in a position
18 where under 32.26 of the regulations the Army can distribute
19 it to anyone.

20 Right now they have a specific license under which
21 the device is being distributed that limits it to Army
22 personnel at places I guess within the jurisdiction of the
23 NRC. That is specifically called out in the license, which
24 you received a copy of.

25 If they were to successfully obtain a 10 CFR

1 Section 32.26 license, there would be no restriction on the
2 individuals that could receive, use, mishandle the ACADA
3 device.

4 JUDGE BECHHOEFER: Could there be?

5 MS. YOUNG: Under 32.26 the whole point of the
6 regulations, you know, in terms of the way it is written, in
7 terms of the statement of consideration that there doesn't
8 have to be any limitation on the user, it is something that
9 you would just install or set in position and never
10 disassemble, never do anything special to other than change
11 out a battery, for example, in a smoke detector.

12 JUDGE BECHHOEFER: Could there be a use
13 limitation --

14 MS. YOUNG: That is not what 30 -- I'm sorry.

15 JUDGE BECHHOEFER: -- imposed upon 32.26? --

16 MS. YOUNG: No, that's not --

17 JUDGE BECHHOEFER: 32.26 subject to distribution
18 only to "x" individuals named --

19 MS. YOUNG: Right now the way the regulation is
20 drafted it is to go to exempt persons under 30.20 so there
21 is no limitation. That is not the kind of license that they
22 would like to have that we are in a position to give.

23 What we are in a position to do is evaluate a
24 request to eliminate requirements in the specific license
25 that they have, and if the Army is willing to submit

1 information on that, which it has indicated it is not
2 because it thinks it won't win, if the Army were to submit
3 that information, indicate that the leak test requirements
4 for example are not necessary because the Army does
5 something else instead, indicate that the Army does not have
6 to keep track of these sources when they become lost because
7 it's not necessary -- whatever it is -- if they are willing
8 to submit that information, we would consider it, just like
9 any other applicant.

10 You know, the Army is not in a special position
11 just because it is a Government agency. The NRC has
12 responsibilities to public health and safety apart from its
13 relationship being also a member of the Federal government,
14 so if it is missing information we can evaluate the adequacy
15 of that information in terms of have they made a showing
16 that these other requirements that are contained in this
17 specific license are not necessary for the use the Army
18 intends to put the device.

19 MR. HUNTER: Your Honor, we did --

20 JUDGE LITTLE: Just a second.

21 JUDGE BECHHOEFER: Ms. Young, could you give any
22 sort of an estimate about how long the staff would take to
23 process an amendment, a proposed amendment to their license
24 to delete with respect to the one ACADA device certain
25 requirements, whatever requirements are inconsistent with

1 the Army's desired use? Would that take -- if it took a
2 year or two, it might be too long. I mean, if you could --
3 you can't guarantee x days, but --

4 MS. YOUNG: I think you're right. I can't
5 guarantee --

6 JUDGE BECHHOEFER: But prompt consideration, what
7 would that amount to?

8 MR. HUNTER: Your Honor, can I say something
9 before --

10 MS. YOUNG: I think your question was directed to
11 the staff, though.

12 JUDGE BECHHOEFER: Well, it was. I just wanted to
13 get some idea about the timing, how long it would take.

14 MR. HUNTER: Can I just say this, Your Honor?

15 JUDGE BECHHOEFER: Yes.

16 MR. HUNTER: That is, we attempted -- we
17 approached the NRC about -- we were involved in discussions
18 to relax the license requirements, and it was our perception
19 at that time -- we had a meeting to discuss this relaxation,
20 and we perceived that here we go again, that we're no -- the
21 same question you are asking now is what we asked, is how
22 long would it take for you, NRC, to come up with a
23 definitive answer to the amendment. And we couldn't get an
24 answer. And that's why we're here, because we couldn't --
25 they were reluctant to say.

1 JUDGE LITTLE: If I can --

2 MS. YOUNG: May I be permitted to answer the
3 question?

4 JUDGE LITTLE: You will, but I want to make one
5 comment. Since public health and safety are the final
6 criteria, you cannot make a guarantee or a fixed estimate of
7 time. So it would be in the nature of prompt consideration
8 and evaluation of the issues as fully -- as promptly as
9 possible. That would be as much as she could commit.

10 MS. YOUNG: That's as much as we could commit.
11 Basically the NRC would fulfill its duties responsibly. We
12 would consider any application received from the Army. To
13 date we have received no application. The Army has been
14 unwilling to prepare one to identify specific provisions of
15 the specific license that could be either removed or relaxed
16 in order for it to use the ACADA with less intensive
17 resource burden. Generally speaking applications are
18 processed by the regions in the 30 to 60, 90 days -- depends
19 on what the workload is of the particular office. But that
20 depends on the date the application was received and how
21 complete that application is.

22 In particular what the staff is aware of -- and of
23 course before it's issued, it has to come to headquarters to
24 be reviewed by the licensing staff and get OGC approval
25 before it can be issued. But what we have is information

1 that the staff is aware of that there are nickel sources
2 similar to that used in the ACADA the have been leaking, and
3 the staff has been very concerned that the use of this
4 product not be unrestricted. And so the Army would have to
5 make a showing as to why the various leak-test requirements
6 specifically should be alleviated in its current specific
7 license. And the Army to date has been unwilling to do
8 that.

9 JUDGE LITTLE: Your general impression would be
10 that this route would be probably faster than a rulemaking.
11 Would you agree to that? Because rulemakings --

12 MS. YOUNG: That's the information --

13 JUDGE LITTLE: Tend to drag on.

14 MS. YOUNG: We shared with the Army at the time,
15 because rulemakings are totally unpredictable.

16 JUDGE LITTLE: Although starting a rulemaking --

17 JUDGE BECHHOEFER: We recall the ECCS one many
18 years ago.

19 MS. YOUNG: A rulemaking you could be talking
20 anywhere -- one to four years.

21 MR. HUNTER: Your Honor, the NRC keeps saying the
22 unwillingness of the Army to do certain things. We have
23 been willing to take any approach that the NRC recommends,
24 and generally we have come up short in following various
25 approaches. And we are expending money, paying money in the

1 process. So that's kind of a misstatement, saying that we
2 are unwilling.

3 We are willing, realizing that safety issues are
4 paramount and that we don't expect the NRC to do the Army
5 any special favors, but it seemed like there ought to be,
6 and it's kind of addressed in my response, is there ought to
7 be a regulation promulgated for military unique items, you
8 know, an exemption should exist. This is a military unique
9 item, and it's not just off-the-shelf type of item. And
10 there are a lot of like smoke detectors that you can easily
11 get to that contain various radioactive material, and it
12 doesn't present a safety issue to the general public.

13 We're saying that the ACADA doesn't present a
14 safety issue to the general public or to the individuals
15 that it's designed to be used by, service members. And we
16 are willing to exhaust various approaches, but I think at
17 this point we are trying to obtain an exemption, and the
18 regulation permits an exemption. And we fit within one of
19 those categories as we identified. So we would like to
20 obtain an exemption, but we're at the mercy of the NRC and
21 Your Honor and the various other forums. We realize that.

22 MR. NOWAK: Your Honors, can a guy say something
23 technical?

24 JUDGE BECHHOEFER: Sure.

25 MR. NOWAK: Over the last year plus we've worked

1 with the technical staff at the NRC, and it's been a good
2 exchange. We've talked back and forth, and they've asked
3 questions, and we've responded, and we've had lots of
4 meetings. But we were led to believe that at the end of the
5 process, at the end of the spring of '99, that we had
6 addressed all the issues for that module to meet the
7 criteria as far as safety and health, and that everything
8 that we had in our application met the criteria for the
9 Nuclear Regulatory Commission to meet the regulations until
10 it went to the legal staff and the interpretation on the
11 product, et cetera.

12 So we feel that that module by itself meets all
13 the criteria to remove monitoring, radiation monitoring on
14 an annual basis, and even accountability, which would be in
15 the exemption if it was granted. But we feel that that
16 module in and of itself was dropped, it was radiation
17 monitor, you know, we've checked the dose rate on the
18 outside, tamper-resistant screws. So as far as technical
19 information, the Army's approach would be is we've given it
20 to you already. We've shown that it's safe.

21 Thank you.

22 JUDGE BECHHOEFER: Well, do you think then there
23 should just be a cover sheet saying this is a request for a
24 license amendment? Throw in all the stuff you've already
25 given, if that's sufficient?

1 MR. NOWAK: It's only about a foot thick.

2 JUDGE BECHHOEFER: So --

3 MR. HUNTER: Every recommendation that the NRC has
4 generated the Army complied with.

5 I won't say every, excuse me.

6 MS. YOUNG: No, that's not correct.

7 MR. HUNTER: But there may be some that we may
8 have debated, whatever, but I believe we are in compliance.
9 We must be in compliance in order to have the license -- to
10 be licensed presently.

11 JUDGE LITTLE: Are you aware of the leaking nickel
12 sources that they were discussing and --

13 MR. HUNTER: Well, that's -- I have heard
14 something about that, and it was -- and it's been
15 exaggerated.

16 Do you want to talk to that?

17 MR. NOWAK: I don't have all the specific details,
18 but there's a -- right, it's a different product, but I
19 assume that's what you're talking about. Which one are you
20 talking about?

21 MR. HUNTER: Just talk to the one that you know
22 about.

23 MS. YOUNG: I am looking at an August 6, 1999
24 letter from Colonel Reeves to Michelle Burgess.

25 MR. NOWAK: Okay. That's on the chemical agent

1 monitor. Correct?

2 MS. YOUNG: Yes.

3 MR. NOWAK: Right.

4 MS. YOUNG: Yes, I believe so.

5 MR. HUNTER: That's a different device.

6 MS. YOUNG: Fort Stewart, Georgia.

7 MR. HUNTER: CAM -- Chemical Agent Monitor -- is a
8 totally different device.

9 MS. YOUNG: Yes, but does --

10 JUDGE LITTLE: But are the sources --

11 MS. YOUNG: Same nickel --

12 JUDGE LITTLE: The sources the same?

13 MS. YOUNG: And so whatever application they
14 submit, whether they go petition for rulemaking, whether
15 they go an amendment to the license, they're going to have
16 to address the safety of the source.

17 MR. NOWAK: Okay. I think that that letter states
18 that the items were mishandled, misstored, et cetera. I
19 think they were out in the environment. In other words,
20 they've taken the module and laid it out on the side of the
21 highway almost. Not quite, but they've had it in open
22 areas, and it's been rained on, et cetera. So from what I
23 know, which is only part of this, is that it wasn't in
24 accordance with what the directions and the training and all
25 the restrictions are that we put on the item in our license.

1 I also want to comment that that module is
2 replaced at our maintenance areas. This module would not
3 be. This module would not be replaced. You would never see
4 that spare part in the Army. We would never buy any of the
5 modules with radioactive sources in them.

6 In the CAM we do buy the modules, and if the
7 module fails, the maintenance man can take it out and
8 reinsert it. Of course, he's got these spares laying
9 around, and also some old ones, which obviously he didn't
10 take well enough care of, but also understand that some of
11 the radiation readings that were reported to the NRC, which
12 we have to, were not verified by independent laboratories or
13 by our laboratories. Because they were immediately checked.
14 But I don't know all the specific details on that.

15 MR. HUNTER: But I think the total quantities,
16 from what I understand, was less than five or six or
17 something like that. So we're not talking about great
18 numbers. Out of thousands out there, we're talking about
19 five that may have been mishandled in some manner.

20 Now on the way here I was talking to Dan Nowak,
21 who is the system manager, about the inner module, and what
22 he is saying is that we don't keep those modules in a depot
23 somewhere to insert. The manufacturer, Graseby, is the only
24 one that possessed those modules, and we must send the whole
25 ACADA back for the insertion of a module. So it's not

1 subject to be out there in one of our depots or someone to
2 have access to it. It must come from Graseby directly.

3 MS. YOUNG: I don't know whose nickel it is right
4 now, to use a pun, but I think what you have is information
5 that even with the Army's procedures, even with the Army's
6 training, even with the Army's expectations on how devices
7 containing radioactive sources would be used, there are
8 problems. And to the extent that the Army is willing to
9 address in an application to the NRC why certain leak-test
10 requirements should be removed, for example, the staff would
11 consider that.

12 And they can provide the specifics of why they
13 don't think the uses that the ACADA would be put to, the way
14 of assembling the radioactive source in the inner source
15 module would be distinct from that with the CAM. They can
16 address all that information in writing to the staff in an
17 application, whether it be one for an exemption from the
18 regulation, which again the staff doesn't see how that would
19 be possible, since it's a problem with what's a detector and
20 what's a product, but more appropriately a petition for
21 rulemaking or a removal of certain conditions from its
22 specific license.

23 JUDGE BECHHOEFER: Let me ask you one further
24 question. This may be -- maybe this is because of a layman
25 not understanding everything that he has heard, but would it

1 be possible to grant a 32.26 exemption, but have it only
2 apply while the product is in use -- in other words, that
3 when used, it will not be disassembled or anything like
4 that, but sent back to wherever -- the factory for
5 maintenance and service, or would it have to be done on the
6 spot? Or the servicing, that is. Or could you divorce it
7 from any servicing, so that any servicing would have to be
8 performed back at the manufacturer?

9 MS. YOUNG: Judge Bechhoefer, it's a good
10 question, but the problem again under 32.26, it contemplates
11 unrestricted use, no limitations on the user. Once the
12 product goes out, there's no reason to have limitations,
13 there's no requirements that persons who receive the product
14 to follow any particular conditions. I think it would be
15 very difficult to write a license under that provision that
16 would do what you suggest. It would be better to go the
17 specific license route, which would identify who the named
18 persons are by category or organization and then reduce the
19 limitations that are on that license.

20 For example, Judge Bechhoefer, many years ago, at
21 least a decade ago, the regulations talked about having
22 instructions, this provision, on smoke detectors saying when
23 you finish using it, return it to the manufacturer. That
24 was totally contrary to 30.26, which says you don't need to
25 do anything special with the product. So that was removed.

1 The NRC has no regulatory control over the device once it
2 gets out of the manufacturer's hands.

3 So, you know, again it's inconsistent with the
4 regulatory scheme of 32.26 to impose extra conditions. And
5 that's the difficulty the staff has faced in trying to work
6 with the Army to license a device that they want to
7 disassemble, to perform maintenance.

8 MR. HUNTER: Your Honor, that's the exact approach
9 that was recommended by the NRC.

10 JUDGE BECHHOEFER: What, the exemption approach?

11 MR. HUNTER: The approach of separating the module
12 from the casing.

13 JUDGE BECHHOEFER: Right. Right.

14 MS. YOUNG: No, I don't think that's absolutely
15 correct. I think the Army's application originally always
16 contemplated that the module would be separated to perform
17 maintenance.

18 MR. HUNTER: I don't think that's the case. I
19 think --

20 MS. YOUNG: You can ask your expert.

21 MR. HUNTER: Well, they've informed me that
22 previously that it was a different approach, but only based
23 upon the approach that was recommended by NRC is how we got
24 into dividing, separating the inner module from the other
25 parts.

1 MS. YOUNG: The NRC didn't --

2 MR. HUNTER: Is that correct?

3 MS. YOUNG: My understanding is the NRC didn't
4 want the Army to perform maintenance on the various
5 nonradioactive components. The Army wanted the latitude and
6 flexibility to be able to do that due to the cost of the --
7 per-unit cost of the item.

8 MR. NOWAK: Here we go again. You mentioned
9 modules earlier. I've been involved with the M8A1 and the
10 CAM licenses. I was the program manager on one of those,
11 and development engineer.

12 What we initially put in, and I'm going to make
13 this statement, and I don't think there's any record, before
14 we started this whole process of the exemption, we met with
15 the NRC staff, technical people, and asked for the viability
16 of getting an exemption for the detector, but also planning
17 to do maintenance on it, which we have a specific license to
18 do right now.

19 We had always envisioned doing maintenance on the
20 device, and at one point we did in fact have something that
21 had a few more components on it, but we did envision pulling
22 the module out and doing maintenance on it, or having that
23 whole module come out as a maintained item and plug back in.
24 That's similar to what we've used on previous items.

25 We mentioned the CAM. The M8A1 also has the same

1 approach. Actually the modules are licensed, as opposed to
2 the device. In this case, we have the approach that we do
3 not plan to have that module as a spare. It will not be in
4 the system ever. So we have to disassemble, you know, the
5 screws, nuts, bolts, electronics, and what not, to repair
6 those when they break, and open the box, yes, but we never
7 will repair that module that's sitting there, and it will go
8 back to the manufacturer for repair, which at this time is
9 in England.

10 MR. HUNTER: And what the NRC is saying in essence
11 is that once we separate the module from the casing, then
12 under the present regulation, we lose -- there's no way we
13 can obtain an exemption. Once it's separated, there's no
14 way we can obtain an exemption, because it is not a, quote,
15 complete item or product.

16 MS. YOUNG: But it's also not a detector. It's
17 not a gas and aerosol detector once you pull the thing
18 apart.

19 JUDGE LITTLE: The first thing I have in this file
20 is dated December the 8th, 1997. That speaks to application
21 for a license pursuant to 10 CFR 32.26.

22 We have not been provided with anything prior to
23 that, have we -- any discussions prior -- so that is what
24 you were referring to, that those were informal discussions
25 before you came in with this, okay.

1 MR. NOWAK: Yes, but -- excuse me -- I have looked
2 for e-mails or records of the thing and our computer
3 changed, so I have got some digging to do into the computers
4 to find out if I ever did minutes.

5 JUDGE LITTLE: So we don't have any discussions
6 prior to that --

7 [Discussion off the record.]

8 JUDGE LITTLE: Okay. Judge Bechhoefer, this
9 transcript is going to be very difficult to understand,
10 because we are throwing out the word "exemption" sometimes
11 when we mean 32.26 product and then we are using "exemption"
12 sometimes when we mean exemption from the regulations, so I
13 think we all have to do a better job in terms of
14 explaining --

15 JUDGE BECHHOEFER: Right. I recognize that.
16 Occasionally I tried, but I probably slipped a few times as
17 well.

18 MR. NOWAK: Excuse me. Mr. Witkowski says he
19 found minutes. We met with Brian --

20 MR. WITKOWSKI: Brian Smith, Doug Brotus and Susan
21 Green for the NRC Staff. That was in the July-August '97
22 timeframe, I recall, and we did generate minutes on our
23 return from the NRC that visit. We can provide those, yes.

24 MR. HUNTER: Your Honor, if I may, I think you and
25 Dr. Little identified, even though we are going around

1 trying to resolve the issue, but I think you in your
2 question one, you hit the nail on the head as far as SBCCOM
3 is concerned, and that is what transpired between July to
4 May, and I would like to come back to that, and I don't
5 think that the NRC has provided an answer to that, in my
6 opinion, profound question, what happened, and I don't think
7 a sufficient answer has been provided, and we would like to
8 know what happened from that, you know, during that period.

9 [Discussion off the record.]

10 JUDGE BECHHOEFER: Ms. Young, do you think your
11 response to our question covered everything that happened
12 during that period of time?

13 MS. YOUNG: I certainly do, Judge.

14 JUDGE BECHHOEFER: Well, everything relevant that
15 happened?

16 MS. YOUNG: Certainly. I mean it says in the
17 topic sentence on page 5 of the Staff's response it was
18 determined that licensing of the internal cell module was
19 not legally permissible. The individuals that the Army was
20 working with before were not lawyers. They were experienced
21 NRC reviewers. They do have limited areas of responsibility
22 and to the extent that the issue was forwarded to Counsel's
23 office and that concerns raised by both technical and legal
24 Staff had to be resolved, it was resolved in the interim
25 period after the July '98 correspondence, so I think the

1 Army has its answer. It just doesn't like the answer.

2 JUDGE BECHHOEFER: Well --

3 MS. YOUNG: It's a matter of regulatory
4 interpretation that was brought to a head as a result of the
5 Army's aggressive efforts at trying to get its 32.26 license
6 for a device that would be disassembled for maintenance.

7 [Discussion off the record.]

8 JUDGE BECHHOEFER: At this point I think it would
9 be useful if the parties perhaps could -- and we would like
10 to take a quick break for one reason or another -- but if
11 the parties could discuss whether it might be more
12 appropriate for the Army to submit a license amendment
13 application, which could be done expeditiously perhaps.

14 Is there any way that such an amendment request
15 could be given priority over other persons, entities,
16 because that would be just a matter of freeing up the Staff
17 to work on it.

18 We can't direct you to do something at a given
19 date or anything like that but could we --

20 MS. YOUNG: No. I think the Army can request that
21 the Regional Administrator for NRC Region III, which I think
22 this is subject to right now, expedite or give higher
23 priority. We are not in a position to guarantee that he is
24 in a position, he and his staff are in a position to do that
25 right now, but I think that is something the Army could

1 request.

2 We have licensees in reactor space that ask for
3 emergency amendments and we have people who explain that
4 they need things by a certain date in order to perform
5 certain functions at their facilities, so it doesn't seem to
6 me contrary to the way the NRC does business that the Army
7 could come in and ask for some type of expedited treatment.

8 No one in the room here is in a position to
9 guarantee that it will be granted.

10 JUDGE BECHHOEFER: Right, right.

11 MR. HUNTER: Your Honor, I think you asked a
12 direct question and it seemed like because we are in this
13 forum there ought to be some accommodation by counsel and
14 members present to contact the Region III or facilitate
15 something, but that is what we perceived in our sessions is
16 that we are not going to do anything extra for you -- under
17 the circumstances even in spite of going down this road, you
18 are still on your own.

19 [Discussion off the record.]

20 MR. NOWAK: Your Honors?

21 JUDGE BECHHOEFER: Yes.

22 MR. NOWAK: I'd like to make one comment.
23 Amendment to the license -- there is more than one license.
24 We are taking about three, four services. Each service we
25 have a registration, NRC registration for Department of

1 Defense, but we have four licenses in different regions in
2 the country, okay? -- so we are talking about four different
3 offices. It might be less than four, but at least two, so
4 each one of those would have to -- for the Navy, the Air
5 Force, the Marines -- they would have to parrot what we put
6 together and then send it through their regions and it would
7 come to the headquarters and then back. So we are talking
8 about --

9 JUDGE LITTLE: But it is less of a monster than
10 rulemaking, isn't it?

11 MR. NOWAK: Yes.

12 JUDGE BECHHOEFER: Well, I might say I am somewhat
13 troubled, just maybe not legally, but troubled with the idea
14 that anybody, any member of the public may use this device
15 without instructions, training or anything else, and that
16 seems to be what would happen if we granted an exemption,
17 and if the other approach would be -- to me would seem
18 somewhat more amenable.

19 I haven't made any final decisions yet but --

20 MR. NOWAK: Your Honor, there is another device
21 that an exemption was granted on. It has americium in it
22 rather than nickel, which is a more toxic isotope obviously,
23 and it does not have any tamper-resistant screws.

24 It has an exemption. It can be issued to anyone
25 in the public. It is a gas and aerosol detector and you can

1 get to the source in about -- to the source module in about
2 five minutes.

3 MS. YOUNG: Could you be specific as to what that
4 device is?

5 MR. NOWAK: It is called the M-90.

6 MS. YOUNG: Used by or manufactured by?

7 MR. NOWAK: It is manufactured by Environics Oy,
8 out of Finland and it is distributed in this country out of
9 one of their offices, and we mentioned that in our
10 discussions as a precedent.

11 I don't believe the exemption says anything about
12 maintenance and -- I know it doesn't -- but I can get into
13 it in five minutes, but we didn't bring one.

14 MS. YOUNG: And I think he raises an interesting
15 point. To the extent the Staff was aware that devices would
16 be disassembled, in the past it didn't seem to be an issue,
17 but in the Army's application it was specifically brought
18 out that this is one of the uses they wanted to employ with
19 the device, so that is how we got to grappling with whether
20 under 32.26 that usage would be consistent with the scheme
21 of the regulation.

22 The Staff, I believe, will be conducting
23 inspections or deciding whether it should issue any orders
24 with respect to licensees that had devices that they may be
25 disassembling.

1 MR. NOWAK: I didn't say disassembling. I am just
2 saying you can disassemble it. You can disassemble it --
3 like that.

4 [Discussion off the record.]

5 JUDGE BECHHOEFER: I think we will take a brief
6 recess, but I do think the Army should consider and discuss
7 with the Staff whether the viability of the approach of,
8 say, filing a license amendment in two regions, assuming it
9 is two -- presumably you could use a boilerplate approach
10 and if the Staff could at least encourage the regions to
11 give expedited treatment to such an application, that
12 might -- I am not saying that we would necessarily conclude
13 that an exemption shouldn't be granted, but as I say, the
14 thought that any member of the public can -- could use this
15 device without training, without instruction, without
16 anything else, would be a little troublesome to me, I mean
17 theoretically if not practically.

18 So in any event, let's take a fairly -- well, 15
19 minute break maybe and maybe you can talk it over a little
20 bit.

21 You can have a little longer if you want to
22 discuss maybe with Ms. Young the process of getting
23 expedited applications so that they could be acted upon.

24 Actually, if we went to formal litigation here,
25 it's going to take -- you would have to allow at least, oh,

1 probably a month for the initial presentation and another
2 month for the response or close to that, perhaps a reply.

3 This sub-part L proces is not fast by any means.

4 MR. HUNTER: Mrs. Young -- I will say this, Your
5 Honor --

6 JUDGE BECHHOEFER: I don't say that I approve of
7 it, but that is the way the rules run and then it might take
8 me a week or two to write a decision after I got the
9 final -- maybe more than that.

10 MR. HUNTER: Mrs. Young has been very --

11 JUDGE BECHHOEFER: And of course any final order
12 would be subject to Commission review.

13 JUDGE LITTLE: Especially if it looks like
14 something that looks like it could be rulemaking.

15 JUDGE BECHHOEFER: That's right, and so litigation
16 is not the fastest way to resolve something. I mean it
17 would be better if it was a sub-part G proceeding and we
18 could bring in witnesses and stay and have proposed findings
19 and all that kind of stuff, so it takes awhile no matter how
20 you go through it, but I am wondering whether the separate
21 applications to two regions anyway --

22 MR. HUNTER: I think that Mrs. Young has been
23 accommodating at least from the Army's perspective to
24 certain things we have asked for. The question is whether
25 everybody follows her advice.

1 [Laughter.]

2 MR. HUNTER: And so we will talk and --

3 JUDGE BECHHOEFER: Well, why don't you do it for a
4 few minutes and we will take a short break and maybe 15
5 minutes and if you need a little longer, just let us know,
6 but there are other reasons for the break as well, so why
7 don't we do that for 15 or 20 minutes.

8 [Recess.]

9 JUDGE BECHHOEFER: Back on the record.

10 Do we have a report of anything that might have
11 happened in the last few minutes?

12 MS. YOUNG: Staff can't report anything
13 significant, but during that time staff counsel did contact
14 at least one region and found out generally their procedure
15 for processing requests for amendments, and we did correctly
16 indicate that the processing time is traditionally between
17 30 to 90 days, depending on the completeness of the
18 application and the simplicity of the matters raised in the
19 application.

20 To the extent that any relaxation or removal of
21 requirements from the specific license might also affect
22 regulations -- for example, reporting requirements for lost
23 sources -- that isn't done just at the regional level, it's
24 done in coordination with headquarters or referred to
25 headquarters for their read.

1 So what the Army has asked and Mr. Nowak has asked
2 on behalf of all branches of the Armed Forces, you'd be
3 talking about an application that would require personnel
4 from Regions II, III, and IV to be involved, and
5 headquarters personnel potentially.

6 So the suggestion was made that the Army could
7 submit a letter which would indicate that they were
8 preparing an application to remove or relax requirements in
9 the licenses issued at those various regions, and that it
10 was requesting expedited consideration of the application,
11 and the staff as in the past and could in this instance work
12 to develop some type of task force that could look at these
13 three requests for amendments to licenses on a generic
14 basis, working both at the region and headquarters level.

15 Right now, based on the phone calls we made and
16 the individuals in the room, we don't have each regional
17 administrator also agreeing to this, but it's not something
18 that's totally out of the realm of what's been done before
19 for other licenses. So if that request were to come in, I
20 think it would be favorably received in terms of their time
21 constraints and resource burden.

22 JUDGE BECHHOEFER: Mr. Hunter, anything further?

23 MR. HUNTER: Your Honor, we must go back and talk
24 to Colonel Reeves, the PM. I think we can make progress in
25 this area if Colonel Reeves, the PM, buys into this

1 approach.

2 We think it's workable if it's done within, you
3 know, in a timely manner. We do believe, we do feel at this
4 point that there is some real sincerity in getting something
5 done, accomplished. At least that's our impression at this
6 point.

7 So we are willing to talk about it, go back and do
8 what is appropriate, and then come back and advise Mitzi and
9 Your Honors concerning what we want to do concerning the
10 recommendation of the PM.

11 JUDGE BECHHOEFER: Well, I would propose to then,
12 as far as I'm concerned, defer any action to set issues or
13 to take further action in the proceeding pending receipt of
14 information from both the Army and the staff as to what's
15 happening and what measures are being invoked at the moment.
16 So would that approach be all right with both parties, I
17 hope?

18 I'll just defer. I won't dismiss anything or rule
19 on anything. Because actually absent presentations of
20 various sorts, I wouldn't be able to rule, and that would
21 take some time, as I outlined earlier.

22 MR. HUNTER: Yes, sir, that's okay with us, and
23 maybe impose, as you did previously, some type of reporting
24 time to get back with you to see what the progress is from
25 month to month or week to week or whatever, just to get it

1 off the ground.

2 JUDGE BECHHOEFER: That's a good idea.

3 MS. YOUNG: Staff would have no objection to that
4 procedure.

5 JUDGE BECHHOEFER: Would the staff suggest what,
6 30 days for reporting each time, each 30 days, or would you
7 suggest some other interval, less or more?

8 MS. YOUNG: I think that a 30-day joint status
9 report schedule would not be unreasonable.

10 JUDGE BECHHOEFER: Okay.

11 MS. YOUNG: At least for the first report, and
12 then perhaps --

13 JUDGE BECHHOEFER: Right.

14 MS. YOUNG: In that report we might know more
15 details about the timing of others.

16 JUDGE BECHHOEFER: Right. Right.

17 Because the 30 days precisely would involve a
18 holiday, how about a report back by Monday the 15th of
19 November, so people wanting to take a vacation over the
20 holiday might do that? So is Monday the 15th of November
21 okay?

22 MS. YOUNG: That's acceptable to the staff.

23 MR. HUNTER: Yes, sir.

24 JUDGE BECHHOEFER: Okay. We'll have a report then
25 on Monday the 15th, and we'll suspend further actions in the

1 proceeding at least pending our receipt of that report and
2 what it says.

3 So I guess --

4 MS. YOUNG: Judge Bechhoefer, will your ruling on
5 Graseby's participation also have to await the report?

6 JUDGE BECHHOEFER: We have ruled on Graseby.

7 MS. YOUNG: Well, one of the issues for today's
8 prehearing was what participation.

9 JUDGE BECHHOEFER: Well, both parties -- no, the
10 Army has said that Graseby is willing to participate as a
11 resource for the Army, and that was one of the ways we had
12 suggested in the first place, and the staff said they had no
13 objection. So I consider that settled, and we will --
14 certainly if this goes to further hearing, Graseby -- you
15 may use Graseby's evidence, testimony. It's not real
16 testimony, it's paper testimony, but --

17 MR. HUNTER: That's fine. Thank you.

18 JUDGE BECHHOEFER: So, you know, Graseby may be
19 used, and I had considered that just about settled. So --

20 MS. YOUNG: Staff was just looking for a ruling.

21 JUDGE BECHHOEFER: Okay.

22 MS. YOUNG: There was an issue raised in your
23 order.

24 JUDGE BECHHOEFER: Yes. Right. Well, we thought
25 there might be a difference of opinion, in which case

1 Graseby would have come in and perhaps did the same thing as
2 the Sun Ship did in the Virginia case, and established some
3 reason to be admitted as a matter of discretion. But since
4 they didn't wish to do that, that works out fine. So I
5 accept that, and that's my ruling on Graseby.

6 So anything further before we adjourn?

7 MR. HUNTER: Not from the Army.

8 JUDGE BECHHOEFER: Ms. Young, have we covered
9 everything before we adjourn?

10 MS. YOUNG: The staff owed copies of --

11 JUDGE BECHHOEFER: Oh.

12 MS. YOUNG: Two of the materials that --

13 JUDGE BECHHOEFER: Right. Right.

14 MS. YOUNG: Read from earlier this morning.

15 JUDGE BECHHOEFER: Right.

16 MS. YOUNG: They're not ready yet. If the Army
17 can wait for them to be reproduced, we can -- oh, that's
18 true. We'll provide them to the Board later today.

19 JUDGE BECHHOEFER: Okay. That's fine.

20 MS. YOUNG: How long will Dr. Little be here,
21 or --

22 JUDGE LITTLE: Early afternoon, but you can just
23 fax them up.

24 JUDGE BECHHOEFER: You could either fax or mail
25 them to Dr. Little.

1 MS. YOUNG: Well, we'll try to have them copied
2 quickly.

3 JUDGE LITTLE: If I could have them by 1:30? Is
4 that possible?

5 JUDGE BECHHOEFER: If not --

6 JUDGE LITTLE: If not, we can just mail them.

7 MS. YOUNG: That's -- we'll do our best, and we
8 think we can meet that.

9 JUDGE LITTLE: Okay.

10 JUDGE BECHHOEFER: Okay. Well, that's fine.

11 I guess with that we'll adjourn, and I thank you
12 all for being here and participating and helping us to help
13 you work things out, maybe, hopefully.

14 MR. HUNTER: Thank you.

15 JUDGE BECHHOEFER: Right.

16 MS. YOUNG: Thank you.

17 JUDGE BECHHOEFER: Goodbye.

18 [Whereupon, at 12:19 p.m., the prehearing
19 conference was concluded.]
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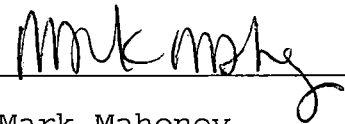
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before the United States Nuclear Regulatory Commission in
the matter of:

NAME OF PROCEEDING: PREHEARING CONFERENCE
 DEPARTMENT OF THE ARMY
 ABERDEEN PROVING GROUND
 MARYLAND

PLACE OF PROCEEDING: Rockville, Md

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Official Reporter

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