

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer  
Dr. Linda W. Little, Special Assistant

OFFICE OF SECRETARY  
REGULATORY  
ADJUDICATORY STAFF

SERVED OCT 21 1999

In the matter of:

DEPARTMENT OF THE ARMY  
Aberdeen Proving Ground,  
Maryland

M22/GID-3 Automatic Chemical  
Agent Detector/Alarm

Docket No. 030-34610-ML

ASLBP No. 99-768-02-ML

October 21, 1999

PREHEARING CONFERENCE ORDER

This proceeding involves the request of the Department of the Army for a license authorizing an initial transfer for exempt usage, pursuant to 10 C.F.R. §§ 30.20(a) and 32.26, for a model M22/GID-3 Automatic Chemical Agent Detector-Alarm (ACADA). The NRC Staff has denied the requested exempt-usage license. In my Memorandum and Order (Request for Hearing), dated July 12, 1999 (unpublished), I granted Army's request for a hearing.<sup>1</sup>

Following distribution of the hearing file by the NRC Staff on September 13, 1999 (see 10 C.F.R. § 2.1231(a)), I conducted a prehearing conference on October 13, 1999, at the Atomic Safety and Licensing Board Hearing Room in Rockville, Md., to determine precise issues for litigation,

<sup>1</sup>At the same time, I issued a Notice of Hearing. 64 Fed. Reg. 38484 (July 16, 1999).

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to set schedules for various filings, to determine the method of participation, if any, of Graseby Dynamics, Ltd. (manufacturer of the ACADA, whose request for intervention I had denied for lack of standing<sup>2</sup>), and to hear parties' responses to requests for information that I raised in my Memorandum dated September 23, 1999 (unpublished).

Appearing at the conference, in addition to myself, as Presiding Officer, and Judge Linda W. Little, my Special Assistant, were Philip B. Hunter, Esq., on behalf of the Army, and Mitzi Young, Esq., on behalf of the NRC Staff. Several technical experts on behalf of each of the parties were also present to answer questions.

1. With respect to the manner in which Graseby may participate, both Graseby and the Army have advised that Graseby will not seek intervention but wishes to participate as a resource for the Army, to present evidence in support of the Army's case. The Staff had no objection to this approach. The Presiding Officer approved Graseby's participation in this manner, should testimony in this proceeding be necessary (Tr. 64-65).

2. With respect to defining issues in controversy, the Presiding Officer in his September 23, 1999 Memorandum had inquired into an apparent difference in position taken by the Staff on July 2, 1998 and May 17, 1999, concerning the permissible requirements for exempt-usage licenses. The

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<sup>2</sup> See LBP-99-38, 50 NRC \_\_\_ (September 13, 1999).

regulatory provisions in question, 10 C.F.R. §§ 30.20(a) and 32.26, permit issuance of a license that authorizes initial distribution for usage exempt from regulatory controls by any person of products containing defined quantities of byproduct material and designed to "protect life or property from fires and airborne hazards." The term "product" is not specifically defined by NRC regulations or regulatory guides, although the Staff referred to the Statement of Considerations for 10 C.F.R. § 32.26, as well as to several writings that tended to support the current Staff definition. According to the Staff, the exempt usage applies only to "consumer products," such as smoke detectors, designed for "off-the-shelf" use (Tr. 8-9). The Staff further takes the position that a "product" cannot be separated into component parts, such as the ACADA's radioactive module and the housing containing such module (Tr. 28-29, 51). Because the ACADA's module and its housing must be separated for maintenance and servicing, the Staff takes the position both that the ACADA cannot be licensed for exempt usage under 10 C.F.R. §§ 30.20(a) and 32.26 and also that the module itself cannot be so licensed inasmuch as, standing alone, it cannot serve the purpose of protecting property (Tr. 28).

The Army apparently desires soldiers and other military personnel, not further identified, to be able to use the ACADA device without adhering to specific terms of the

current ARMY materials licenses, such as leak testing and periodic servicing at defined locations (Tr. 18).<sup>3</sup> The Army agrees that all personnel using the device should be trained as to proper usage and that those responsible for maintenance should also be properly trained (Tr. 21, 30-31) --requirements that would not be applicable under the exempt usage that it was seeking but would be applied to the soldiers and other military personnel that the Army wished to use the device. As emphasized by the Staff, the sought exempt-usage license, if granted, would have permitted usage by any person, not limited to the military personnel sought by the Army (Tr. 25-26, 36-37, 48-49).

Apparently members of the NRC Staff had earlier suggested that the Army seek an exempt-usage license for the device itself and, later, for only the inner module--albeit, in each case, subject to review and approval by the NRC Office of the General Counsel (Tr. 43, 49-51). Now, however, it appears that the Army was in fact being led down these garden paths and advised to seek solutions that cannot be granted. (The NRC staff members providing such advice were not attempting to deceive the Army, however, inasmuch as the amenability of the ACADA for such exempt usage had not previously been legally determined.)

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<sup>3</sup>The Staff, in its filing dated October 8, 1999, responding to my inquiries prior to the prehearing conference, provided me a copy of one of the Army's materials licenses (No. 12-00722-06).

The Presiding Officer and his Special Assistant suggested that the better solution for the Army's achieving the result it seeks would be for the Army to seek an amendment to its current materials licenses (one in each NRC Region) to delete (with respect to the ACADA but not other devices covered by the licenses) terms and conditions that were not necessary to preserve the public health and safety with respect to usage of the ACADA but, if not deleted, would impede the Army in its intended usage of the ACADA. The Army did not desire, and the suggested amendments would not permit, usage by any member of the public (as would be permitted under the requested license for exempt usage). Under the amended licenses (as under the Army's existing licenses), only soldiers and other personnel who were specifically trained to use the ACADA would be permitted to do so, although they would not have to be personally identified in the licenses.

The Staff agreed that this approach would be workable (Tr. 29). The Army had no objection, although it was somewhat leery about following another uncertain regulatory path (Tr. 30). The Staff suggested that the proposed amendments, if properly supported, could be granted in a time frame of 30-90 days from application under the Staff's expedited procedures (Tr. 40, 55, 60). The Staff further offered to attempt to co-ordinate the efforts of various

Regions, so that similar results could be achieved in each Region.

Based on these considerations, the Presiding Officer agreed to defer further actions in this case, such as formally defining issues in controversy and establishing schedules for various filings, pending the Army's attempt to proceed as indicated above. Parties are jointly to report periodically to the Presiding Officer, initially on November 15, 1999, on the progress made in this new approach.

IT IS SO ORDERED.

  
Charles Bechhoefer  
ADMINISTRATIVE JUDGE  
Presiding Officer

Rockville, Maryland  
October 21, 1999

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of

U.S. DEPARTMENT OF THE ARMY  
  
(Denial of Materials License)

Docket No.(s) 30-34610-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER - PREH. CONF.- LBP-99-41 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)30-34610-ML  
ORDER - PREH. CONF.- LBP-99-41

Dated at Rockville, Md. this  
21 day of October 1999

*Alicia T. Byrdson*  
Office of the Secretary of the Commission