

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

DUKE COGEMA STONE & WEBSTER

(Savannah River Mixed Oxide Fuel
Fabrication Facility)

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

June 20, 2003

ORDER

In view of the potential implications of the June 17, 2003 motion of Georgians Against Nuclear Energy (GANE) for a protective order and to quash the deposition of Dr. Leland Timothy Long by Duke Cogema Stone & Webster (DCS), the Board is unwilling to rule on that motion without a full briefing of the issue in question by all parties involved. The deposition should proceed as scheduled on June 25, 2003. The issue raised by the June 17 motion, of which party is responsible for Dr. Long's expert fees incurred as a result of his deposition, is an issue that the Board believes should be settled by the parties, without Board intervention. Nonetheless, if the parties are unwilling or unable to settle the issue and wish to move forward with this matter, the issue should be fully briefed. In addressing this issue, the parties should answer the following questions:

1. What was the prevailing view in the federal district courts for payment of experts for depositions when 10 C.F.R. §2.740a(h) was enacted in 1962? What impact, if any, did the 1972 amendments to 10 C.F.R. § 2.740 have upon the payment of experts for depositions in NRC proceedings? What effect, if any did the 1970 changes to the Federal Rules of Civil Procedure have upon the payment of experts during depositions

in the federal court system? How, if at all, did these amendments to the Federal Rules influence the Commission's decision to amend 10 C.F.R. §2.740 in 1972?

2. What connection, if any, is suggested by the administrative regulatory history of the provisions of 10 C.F.R. §2.740a governing depositions and those of §2.720 governing subpoenas?

3. If, as the Licensing Board concluded in Public Service Company of Oklahoma (Black Fox, Units 1 and 2), LBP-77-18, 5 NRC 671 (1977), the Commission intended §2.740a(h) to refer to the statutory witness fees found in 28 U.S.C. §1821, why did the Commission use distinctly different language in 10 C.F.R. §2.740a(h) than that used in 10 C.F.R. §2.720 (i.e. §2.740a(h) "same fees as are paid for like services in district courts"; §2.720 "fees and mileage paid to witnesses in district courts")?

4. What applicability, if any, does the provision in 5 U.S.C §504 note, which states that: "None of the funds in this Act or subsequent Energy and Water Development Appropriations Acts shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts" have upon this issue? In addition, as a contractor for the Department of Energy, does this provision apply to DCS as well? How does this provision in 5 U.S.C. §504 note, affect the payment of expert fees if the NRC Staff is the party seeking discovery of an intervenor's witness? Conversely, how does this provision affect the payment of an expert witness if the intervenor is seeking discovery of a NRC Staff expert that has been hired as an outside consultant for the proceeding in question?

5. If the Board should adopt GANE's position and a future party is unable to pay the reasonable expert fees due to a claimed hardship, how should the Board address this situation? What standard should the Board apply and upon what evidentiary showing should the Board rely to determine whether the party has the ability to pay for this activity? Should the Board adopt the "manifest injustice" standard set forth in Rule 26, and if so, how should that standard be applied?

By 5:00 p.m. EDT Monday, June 30, 2003, all parties shall file responses to these questions and any other information that the parties believe will assist the Board in resolving this issue.

In a related matter, on June 12, 2003, DCS filed an unopposed motion to limit the scope

of Contention 3. That motion is hereby granted and GANE Contention 3 is revised to include the changes set forth in the June 12 motion.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹

/RA/

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 20, 2003

¹Copies of this Order were sent this date by Internet e-mail transmission to (1)GANE; (2) DCS; and (3) the NRC Staff.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER DATED JUNE 20, 2003 have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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LB ORDER DATED JUNE 20, 2003

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of June 2003