

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

June 23, 2003 (11:17AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:
Thomas S. Moore, Chairman
Charles N. Kelber
Peter S. Lam

In the Matter of)	June 18, 2003
DUKE COGEMA STONE & WEBSTER)	Docket No. 070-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility))	ASLBP No. 01-790-01-ML

**DUKE COGEMA STONE & WEBSTER'S RESPONSE TO
GEORGIANS AGAINST NUCLEAR ENERGY'S MOTION FOR
PROTECTIVE ORDER AND REQUEST TO QUASH DEPOSITION**

I. INTRODUCTION

Georgians Against Nuclear Energy (GANE) has moved for a protective order seeking postponement or cancellation of the scheduled deposition of its seismic expert, Dr. Leland Timothy Long, on the basis of Duke Cogema Stone & Webster's (DCS) unwillingness to pay \$200 per hour in professional fees for Dr. Long for: (1) preparing for; (2) traveling to; and (3) attending the deposition now scheduled to begin on June 25, 2003. DCS has already agreed to pay Dr. Long's reasonable expenses of travel and \$40 per day per diem. For the reasons discussed below, the Atomic Safety and Licensing Board (Board) should order that the deposition of Dr. Long go forward; confirm that the parties should bear the costs of their own respective expert witnesses' professional fees for depositions; and clarify that a party taking the deposition of an outside expert witness is only required to pay reasonable travel expenses and

\$40 per day per diem. However, if the Board concludes that it has the discretion to order the parties to pay reasonable professional fees for the depositions of the opposing parties' outside experts, and intends to exercise that discretion, those fees should not exceed the consulting fees being charged by the expert to his client for this proceeding.

II. ARGUMENT

10 CFR § 2.740a(h) governs the resolution of this disagreement between DCS and GANE. Section 2.740a(h) states:

A deponent whose deposition is taken . . . shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party at whose instance the deposition is taken.

This provision was interpreted in Public Service Co. of Oklahoma (Black Fox, Units 1 and 2), LBP-77-18, 5 NRC 671, 673 (1977) as follows:

The Board does concur with the Applicant's rationale that the witness fees referred to . . . in the deposition rule [Section 2.740a(h)] are intended to be the statutory fees provided for witnesses appearing in courts of the United States as set out in 28 U.S.C. 1821.

Section 1821 of the United States Code provides for an attendance fee of \$40 per day and actual, reasonable travel expenses, including a travel allowance and subsistence allowance in accordance with General Services Administration schedules. DCS has agreed to pay fees and expenses for Dr. Long's deposition in accordance with this provision.

GANE, however, is requesting in addition that DCS pay \$200 per hour for Dr. Long's: (1) preparation for; (2) travel to; and (3) attendance at the deposition. In Black Fox the Licensing Board considered whether the witness fees called for by 10 CFR § 2.740a(h) required

payment of such professional fees. The Intervenor in that case argued that section 2.740a(h) “implicitly incorporate[s]” Federal Rule of Civil Procedure (FRCP) 26(b)(4) which provides for the payment of such professional fees. Black Fox, 5 NRC at 672. The Applicants, on the other hand, pointed out that when FRCP 26 was adapted as an NRC regulation, section 26(b)(4) in particular was omitted from the final rule.¹ The Board in Black Fox ruled as follows:

The Board . . . rejects the argument that that reference to witness fees in [section 2.740a(h)] incorporates by implication the provision for expert witness fees contained in Rule 26(b)(4) of the FRCP. The Board also notes that the Applicant has correctly analyzed the relationship between Rule 26 of the FRPC [sic] and its adaptation as Section 2.740 of the Commission’s Rules of Practice.

Black Fox, 5 NRC at 673. The Board went on, however, to state that the omission of Section 26(b)(4) from the NRC regulation is not a “blanket rejection” of NRC authority to order payment of expert witness fees in appropriate circumstances. The Board therefore concluded that it had the discretionary authority to order payment of such fees, and that in the circumstances of that case, it was “equitable” that the expert deponents receive “reasonable compensation.” Id. As a result, the Board ruled that the depositions should go forward and that if the parties could not agree on reasonable fees, then the Board would decide the issue after appropriate submittals. Black Fox at 674.

There is no reason for the Board to cancel or postpone the deposition of Dr. Long. DCS has already agreed to reimburse GANE for Dr. Long’s reasonable travel expenses, including airfare, airport transfer, and hotel expenses. GANE is only seeking a ruling that DCS reimburse

¹ The NRC modified 10 CFR Part 2 to incorporate the newly revised Federal Rules of Civil Procedure but omitted the provision on payment of professional fees. 37 Fed. Reg. 15127, 15143 (July 28, 1972).

GANE for Dr. Long's professional fees associated with the deposition. This is not a reason to postpone or cancel the deposition.

DCS believes that the simplest and best approach is for the parties to bear the respective costs of their own experts' professional fees.² Although DCS is now deposing Dr. Long, DCS presumes that GANE will depose one or more of DCS' experts. Under this approach, GANE would pay its outside experts' professional fees associated with the deposition and DCS would pay its experts' fees when GANE notices their depositions.

Alternatively, if the Board concludes that it has the discretion, and chooses, to order the payment of reasonable professional fees, DCS objects to paying \$200 per hour for Dr. Long's deposition if that rate exceeds the rate he is charging GANE for consulting services in this proceeding. It is DCS' understanding that Dr. Long is not charging GANE \$200 per hour for his services. DCS requests that the Board inquire into what consulting rate is being actually charged to GANE in this proceeding, and that the rate DCS is required to pay not exceed that consulting rate.

In addition, DCS requests that the Board confirm that only a reasonable amount of time for preparation for, and travel to, the deposition will be reimbursable. Finally, DCS asks that the Board confirm that GANE will pay the reasonable costs and fees of DCS's outside experts if their depositions are noticed.³

² This would be apart from the attendance fee and travel expenses required by Section 2.740a(h).

³ A number of DCS' experts are employees of DCS. DCS would not seek payment from GANE for depositions of these individuals, but would seek payment only for DCS' outside experts.

III. CONCLUSION

For the reasons stated above, DCS requests that the Board order that: (1) the deposition of Dr. Long proceed on schedule; and (2) the parties bear the costs of their own expert witnesses' professional fees for depositions. If the Board concludes that the parties should pay reasonable professional fees, those fees should not exceed the consulting fees being charged by the expert to his client in this proceeding.

Dated: June 18, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Duke Cogema Stone & Webster's Response to Georgians Against Nuclear Energy's Motion for Protective Order and Request to Quash Deposition," dated June 18, 2003, and all its attachments were served this day upon the persons listed below, by e-mail and first class mail.

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6/18/03

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Duke Cogema Stone & Webster's Response to Georgians Against Nuclear Energy's Motion for Protective Order and Request to Quash Deposition," dated June 18, 2003, and all its attachments were served this day upon the persons listed below, by e-mail and first class mail.

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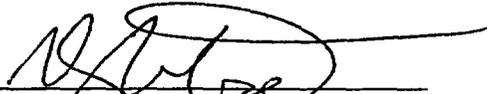
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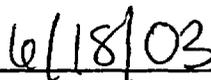
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