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Title: Savannah River MOX Fuel Fabrication Facility

Docket Number: 70-3098-ML

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June 25, 2003 (9:32AM)

Date: Thursday, June 19, 2003

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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TELECONFERENCE

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IN THE MATTER OF: :
DUKE COGEMA STONE AND : Docket No.
WEBSTER, : 70-3098-ML
(Savannah River Mixed Oxide :
Fabrication Facility) :

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Thursday, June 19, 2003

Teleconference

The above-entitled teleconference was conducted
at 9:00 a.m.

BEFORE:

JUDGE THOMAS MOORE, Chairman
JUDGE CHARLES N. KELBER
JUDGE PETER S. LAM

1 APPEARANCES:

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On Behalf of Duke Cogema Stone and Webster:

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 MARJAN MASHHADI, ESQ.

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And ALEX S. POLONSKY, ESQ.

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On Behalf of the NRC:

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 JOHN T. HULL, ESQ.

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On Behalf of Georgians Against Nuclear Energy:

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 DIANE CURRAN, ESQ.

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P R O C E E D I N G S

9:00 a.m.

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2
3 JUDGE MOORE: Good morning. The purpose
4 of this telephone call, as you know, it's being
5 recorded so that the Board can ask some questions on
6 GANE's motion for a protective order that was filed
7 June 17.

8 First of all, Ms. Curran, am I correct
9 that this is just a question as to who pays?

10 MS. CURRAN: Yes.

11 JUDGE MOORE: So that there -- it appears
12 there is no reason why this deposition currently
13 scheduled for June 25 needs to be delayed.

14 MS. CURRAN: We have a refundable plane
15 ticket for Dr. Long for those dates, but we believe it
16 would be unduly burdensome if we were required to go
17 ahead with this deposition and pay for it.

18 JUDGE MOORE: Ms. Curran, if it's a
19 question of who pays, then the Board after having this
20 matter briefed by the parties fully, which it has not
21 been done, and, frankly, if I might digress, this is
22 a very slippery slope in the view of the Board, that
23 if we are going to wrestle with this question, we
24 would like it fully briefed, but why should we delay
25 the deposition? If it's just a question of who pays,

1 the Board then can make its ruling and determine who
2 pays subsequently.

3 MS. CURRAN: The reason is that this is
4 quite a bit of money for GANE, which has very limited
5 resources, and if we have to pay this much money for
6 a deposition, it's questionable whether we'll make it
7 all the way through the case. We have gone out and --
8 you know, GANE is a public interest group that raises
9 money through its members and through foundation
10 grants and has very limited resources. We hired an
11 expert to do a good job on Contention 3 and this
12 deposition is going to cost us thousands of dollars --
13 the plane fare, two days of Dr. Long's time, and Dr.
14 Long is going to charge us \$200 an hour for his
15 deposition.

16 JUDGE MOORE: Fine, Ms. Curran. If the
17 Board were to rule, hypothetically speaking, against
18 your position, deny your protective order, the
19 deposition goes forward. The point is simply you have
20 scheduled a deposition, there is one notice for next
21 Wednesday. Why is it necessary for this ruling to
22 come down before this deposition?

23 MS. CURRAN: We're asking you to either
24 grant us these costs or quash the deposition. We're
25 saying that either we should be given costs or the

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1 deposition should be canceled. You're entitled to
2 issue a protective order on our behalf under the
3 rules. We're asking you for two alternative forms of
4 relief, and we'd like to have a ruling before the
5 deposition goes forward.

6 JUDGE MOORE: Before the Board delves into
7 any other questions, Mr. Polonsky, what is your
8 response to my question to Ms. Curran?

9 MR. POLONSKY: DCS doesn't see any reason
10 why the deposition can't go forward as it's been
11 noted. And just to respond to Diane, we've already
12 agreed to pay for actual travel expenses, so the plane
13 fare and hotel and things like that we've -- I believe
14 DCS has already stated we would pay those. The issue
15 is the fees, the hourly fee that Dr. Long would be
16 paid for travel, prep and attending the deposition, if
17 at all.

18 JUDGE MOORE: Let's digress further. You
19 have attempted, Ms. Curran and Mr. Polonsky, to reach
20 a settlement. Ms. Curran's papers indicate you were
21 unable to agree on this. Is there any likelihood that
22 if you set about with further diligent effort that you
23 could agree and then have this motion withdrawn? Ms.
24 Curran?

25 MS. CURRAN: Well, if you look at the cost

1 to us of two days of preparation and two days of
2 deposition, that's almost \$5,000, and that's the nut
3 that we haven't been able to crack. And I had hoped
4 that we could come to some kind of an agreement on
5 that, but DCS has made it pretty clear to us that
6 they're not willing to hourly fees. So I don't know
7 where to go from here.

8 JUDGE MOORE: Okay. Frankly, the Board
9 thinks this matter should be settled and should not be
10 in front of it, but if the parties can't reach
11 agreement, then we'll deal with it. But this, in the
12 Board's view, is a question that, as I mentioned, is
13 a very slippery slope. And the Black Fox decision by
14 the Licensing Board 25 years ago is hardly a
15 definitive determination of the question. Are the
16 parties prepared to answer our questions now on the
17 merits of this?

18 MR. POLONSKY: DCS is, Your Honor.

19 MS. CURRAN: We'll certainly do the best
20 we're able.

21 JUDGE MOORE: Mr. Polonsky, can you tell
22 me I'm troubled in the sequence of how the NRC's rule
23 occurred in relation to amendments to Federal Rule 26,
24 the Federal Rules of Civil Procedure. The provision
25 that now stands as 10 CFR 2.740A(h) has been in

1 existence since 1962; is that correct?

2 MR. POLONSKY: I can't confirm when that
3 particular provision was added, but it certainly was
4 added prior to 1978.

5 MS. CURRAN: Judge Moore, I can tell you
6 it was added in 1962.

7 JUDGE MOORE: In 1970, the Federal Rules
8 of Civil Procedure, Rule 26, were amended and there
9 were some amendments made to other provisions of the
10 Commission's deposition rule, 10 CFR 2.740. Is that
11 correct, Mr. Polonsky?

12 MR. POLONSKY: Yes. That is my
13 understanding.

14 JUDGE MOORE: Now, if that is the
15 chronology of how these amendments took place and if
16 the language of 2.740A(h) has remained unchanged since
17 1962, I am at a loss to understand the logic of the
18 Black Fox decision that you recite in your filing.
19 Could you help me out?

20 MR. POLONSKY: Your Honor, we were relying
21 on the Black Fox decision itself. We assumed that the
22 Black Fox Licensing Board judges took into account the
23 issues you're raising now. We have not pulled the
24 briefs that were submitted by each party; we only have
25 the case itself. But this case in 1977 we assumed

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1 that the judges would have taken into the account the
2 issues that you raise now since it's true that this
3 provision first appeared in 1962 and the provisions of
4 '72 are explicitly referenced in the case, so that we
5 assume the judges understood that.

6 JUDGE MOORE: Mr. Polonsky, on its face,
7 do you see anything in 2.740A(h) that precludes what
8 Ms. Curran claims?

9 MR. POLONSKY: What Ms. Curran claims is
10 very broad. What Ms. Curran claims and what Black Fox
11 says -- I don't presume to say what GANE claims. What
12 Black Fox I believe says is that the 28 -- that the
13 1821 applies but that the Board has discretion to take
14 other action. That's our position today. I think
15 GANE is also in agreement on that, but I'll let Diane
16 speak for that.

17 JUDGE MOORE: Mr. Hull?

18 MR. HULL: Yes, Your Honor.

19 JUDGE MOORE: When the Board mentioned
20 that we see this as a very slippery slope, what is the
21 staff's position on fees of staff witnesses that are
22 outside experts that are deposed?

23 MR. HULL: As far as I've been able to
24 determine, Your Honor, the \$40 rate still applies. An
25 outside witness is entitled to reimbursement for

1 travel expenses and that sort of thing, but as far as
2 professional time for a deposition, it's still \$40.
3 And to my knowledge, the staff has -- that that's been
4 followed in NRC cases up to date.

5 JUDGE MOORE: Assume for the moment that
6 2.740A(h) permits what Rule 26 A4 of the Federal Rule
7 of Civil Procedure requires in the vast majority of
8 districts in this country, that an expert's time is to
9 be reimbursed. Would the statutory prohibition
10 against intervenor funding that is in effect for NRC
11 expenditures come into play?

12 MR. HULL: I think it definitely does,
13 Your Honor, and that law was enacted after the Black
14 Fox decision was rendered in 1977. So I think a --
15 I'm not sure if it was Black Fox or another NRC case,
16 the Licensing Board indicated that NRC funds could be
17 used to reimburse a witness for his time but that was
18 effectively overruled by the subsequent law that
19 Congress enacted.

20 JUDGE MOORE: So you could have a
21 situation where the staff could seek reimbursement
22 from an intervenor that would not be able to be
23 reciprocated, is that correct, if Ms. Curran's view of
24 the world is accurate?

25 MR. HULL: I think that the \$40 figure

1 applies only to non-government witnesses, so any NRC
2 staff people that might be deposed in the future in
3 this case would not be entitled to any reimbursement
4 for their time.

5 JUDGE KELBER: But what about staff
6 outside experts? This is Judge Kelber.

7 MR. HULL: The only such expert the NRC
8 staff has right now is Dr. Stamaticos, but there's
9 already a contract in place with Southwest Research
10 Institute, so there would be no additional fees due
11 Dr. Stamaticos for any of his time.

12 MS. CURRAN: Judge Moore?

13 JUDGE MOORE: Yes, Ms. Curran?

14 MS. CURRAN: Well, I honestly didn't think
15 about the intervenor funding ban, but to me it seems
16 like a very different kettle of fish, because if we
17 were going to depose DCS' outside experts, we would
18 feel obligated under the rule to pay for their time
19 and their expenses. It's a reciprocal thing. And,
20 you know, the rule is pretty straightforward to
21 parties entitled to this, and so we would feel
22 obligated, you know, that would be our obligation
23 under the rules. So I think it has to do with just
24 kind of fair play among litigants in a hearing.

25 I think the theory of this, and certainly

1 under the federal rule is that the witness is being
2 asked to come and testify in a deposition for the
3 opposing party, and so the party who hired the expert
4 to come to the trial shouldn't have to pay for the
5 opposing party's request to have this witness testify
6 earlier at a deposition and help them in preparing
7 their case. So I guess I don't see that as an
8 intervenor funding issue. Anyway, I guess that's all
9 I have to say.

10 JUDGE MOORE: Ms. Curran, very frankly,
11 the Board is troubled by changing what is a customary
12 practice, whether it is technically correct under
13 2.740A(h) or not. That this truly, in my view, the
14 issue you have raised here opens a Pandora's box and
15 one must be very careful when opening Pandora's box
16 what you ask for, because this one is, very frankly,
17 from the intervenor standpoint, going to bite very
18 heavy in the future if the Board were to accept your
19 position.

20 MS. CURRAN: Well, just when you talk
21 about what the custom is, I can tell you what my
22 experience has been --

23 JUDGE MOORE: Well, let's back up, Ms.
24 Curran. Can you tell me why in all of the years of
25 NRC adjudication Black Fox is the only time this

1 question appears to have been raised?

2 MS. CURRAN: Well, okay, here's one
3 possible reason, and that is, and this is certainly my
4 experience in other cases where all sides are taking
5 depositions oftentimes every agrees we'll all bear our
6 own costs, because it all comes out in the wash
7 anyway. And in this case, we're in a situation that
8 we have very limited resources, we have one expert who
9 works for a public interest group that isn't charging
10 us any expert fees.

11 So we're seeking to be made whole, we're
12 not seeking to make a profit off this, and we've made
13 a decision that we can't afford to depose DCS'
14 witnesses, but it doesn't seem fair to us that DCS
15 should be able to have our witness on the stand for
16 two days, basically, and it's at DCS' behest, for DCS'
17 benefit, and GANE must absorb that cost. And I think
18 this rule is kind of a corrective to that to just
19 maintain fairness among the parties.

20 JUDGE MOORE: Well, if -- Ms. Curran, if
21 you and Mr. Polonsky cannot settle this matter and you
22 insist on going forward with this, the Board wants
23 this much more thoroughly briefed than it has been for
24 the very reasons I stated: This is a very slippery
25 slope, and it is indeed passing strange that in all of

1 these years and all the experience that's sitting on
2 this particular case, we have never entertained such
3 a request. And, frankly, the Black Fox decision
4 leaves a great deal to be desired in its purported
5 rationale as to its explanation for a rationale. It
6 doesn't jive with the chronology, on the one hand,
7 although the result it reaches I think is clearly very
8 sensible. But if you do not -- if you wish to open
9 this Pandora's box, that is your right, but what we
10 will do is we will require this to be fully briefed by
11 the parties so that we can have a full airing of the
12 legislative history of this, and we want to understand
13 how the intervenor funding provision comes into play.

14 MS. CURRAN: Judge Moore?

15 JUDGE MOORE: Just one moment, Ms. Curran.
16 And, frankly, we see no reason why this deposition
17 schedule should be changed and why it can't go forward
18 and we will determine who pays after we have the issue
19 fully briefed. Yes, Ms. Curran?

20 MS. CURRAN: Well, I was going to say if
21 you -- well, two things. First of all, where things
22 stand GANE is interested in having further discussions
23 with DCS, but where things stand now is that I believe
24 DCS is unwilling to go beyond the \$\$0 a day. If
25 there's some indication from Mr. Polonsky that we

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1 could get beyond that, then perhaps we could talk and
2 get back to you about that by the end of the day today
3 or something.

4 JUDGE MOORE: That would be fine.

5 MS. CURRAN: But the other point I want to
6 make is that I do request you if you are not going to
7 make this ruling right away to at least postpone the
8 deposition, because we would ask you -- we are asking
9 you to quash the deposition because of the hardship to
10 us if --

11 JUDGE MOORE: One of the other areas, Ms.
12 Curran, that when I mentioned that this was a slippery
13 slope and you're opening Pandora's box is you would by
14 going down this road be putting the Licensing Board
15 into an auditing function of indigency, hardship,
16 proof of such matters, all of which are things that in
17 the past have been avoided by going down this road.
18 And this is not a matter to be undertaken lightly in
19 the view of the Board.

20 And in that regard, Mr. Polonsky, what
21 does any postponement of this deposition schedule do
22 to the overall schedule that the parties are pursuing?

23 MR. POLONSKY: Well, without revealing any
24 litigation strategy, I think there should not be any
25 delay in the deposition. We've already, frankly,

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1 Diane and I worked together to come up with this date,
2 and we had initially proposed an earlier date by a
3 week, and we agreed to this based on Dr. Long's
4 schedule. We just don't see any reason for it to be
5 delayed.

6 JUDGE MOORE: I understand that you don't
7 see any reason. Is there any reason that -- is it
8 impossible to delay it two weeks? What would that do
9 to the overall schedule?

10 MR. POLONSKY: Unfortunately, we could not
11 do it in two weeks. The individuals who we would need
12 at the deposition for ourselves are not available for
13 most of July.

14 JUDGE MOORE: All right. That answers
15 that question then.

16 MR. POLONSKY: And also to the extent that
17 any briefing schedule would be required, from what I'm
18 hearing from Diane, she would want a ruling from you
19 on whether there would be payment or not.

20 JUDGE MOORE: The Board sees this simply
21 as a matter of who pays. And so, Ms. Curran, if the
22 Board were to deny your protective order today, you
23 are in no better or worse shape than you would be
24 after we've had time to fully consider this at a later
25 date. And we are not inclined to rule without having

1 it fully briefed so that we can understand precisely
2 the slope that you wish to grease. So the Board will
3 issue an order listing the questions it wants the
4 parties to respond to and the schedule for those
5 responses. I don't see any need for replies, although
6 that might become self-evident, so simultaneous
7 filings will probably suffice. And, Ms. Curran, the
8 deposition should go forward, and you will -- we view
9 this, as I said, as a matter of who pays and you will
10 get a ruling after we have it fully briefed as to
11 whether or not you should be reimbursed for the expenses
12 of your expert's time as you seek. Do you have any
13 questions of us?

14 MR. HULL: Your Honor, this is John Hull
15 for the staff. So is it my understanding from what
16 you just stated that the Motion to Quash this June
17 deposition is denied?

18 JUDGE MOORE: No. The Board will issue a
19 formal ruling on that Motion to Quash when it
20 undertakes its wrestling with this question, but we're
21 not going to delay this deposition. If Ms. Curran
22 wants me to deny the Motion to Quash, that can be
23 done, but frankly we think the deposition should go
24 forward. We will take up this question after it's
25 fully briefed by the parties, but that can't be done

1 by Wednesday.

2 MR. HULL: Because I am in a situation
3 where I had arranged for Dr. Stamaticos to fly in to
4 attend this deposition of Dr. Long, and obviously I
5 need to let him know whether it's going forward or
6 not.

7 JUDGE MOORE: The deposition, in the
8 Board's view, should go forward.

9 MR. HULL: Okay.

10 JUDGE MOORE: Ms. Curran, is that -- do
11 you have any questions?

12 MS. CURRAN: No.

13 JUDGE LAM: This is Judge Lam. Let me ask
14 the parties a couple quick questions so that we can
15 expedite this while we're being fully briefed. The
16 first question is to Mr. Hull. Mr. Hull, is there any
17 prohibition against the parties to pay more than \$40
18 a day?

19 MR. HULL: I'd have to look at the law
20 that we referenced earlier, Judge Lam, more closely.
21 I know that's a prohibition about the government
22 funding any intervenor efforts. I don't know whether
23 that would apply to any private agreements that non-
24 government litigants might enter into with one
25 another.

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1 JUDGE LAM: Okay. Thank you. A question
2 for Mr. Polonsky: In your June 18 brief, you
3 indicated you are asking the Board to inquire as to
4 what the actual consulting rate is being charged by
5 Dr. Long. Now, the implication here is are you saying
6 that you are willing to do that as soon as we find out
7 how much Dr. Long is actually being paid, which came
8 in immediately after your brief by Ms. Curran that
9 he's charging GANE \$100 per hour. Are you implying in
10 your June 18 brief that you're willing to pay that
11 rate?

12 MR. POLONSKY: DCS' brief of June 18
13 states that we believe that Black Fox is correct, that
14 28 USC Section 1821 applies, but we do recognize that
15 Black Fox has stance for the proposition that the
16 Board has discretion to provide other mechanisms in a
17 deposition for payment of fees and expenses. If the
18 Board orders DCS to do something, DCS will comply.
19 But absent a Board ruling in an exercise of its
20 discretion, DCS sees no reason and would object to any
21 proposal by GANE to pay its experts an hourly fee.

22 JUDGE LAM: Okay. Thank you.

23 JUDGE MOORE: The Board will then issue an
24 order outlining the questions that it wishes the
25 parties to address, among any of the other matters the

1 parties to address. And I guess from our questions
2 you can see why the Board believes this is a very
3 slippery slope and the question of hardship and
4 indigency in such matters makes -- brings the Board
5 into areas where historically they've never gone
6 before.

7 And although the parties have come forward
8 with the Black Fox case, we expect the parties to do
9 much more thorough research to see that if ever this
10 question has arisen and how it has been dealt with.
11 Because our institutional memory here is that it has
12 never arisen. But we may well be -- have faulty
13 memory, and we would like to ensure that that is
14 corrected.

15 MS. CURRAN: Judge Moore?

16 JUDGE MOORE: Yes.

17 MS. CURRAN: This is Diane Curran. I'd
18 just like to make it clear that we researched NRC case
19 law and Black Fox was the only case we came up with,
20 but it was not for lack of looking. There's no other
21 case, we're not hiding anything from the Board.

22 JUDGE MOORE: Ms. Curran, there's no
23 implication that you are hiding it. We are struck by
24 the historical fact that in all of these years it has
25 arisen once and the significance of that. Be that as

1 it may, the Board will be issuing an order outlining
2 the areas it wishes all of the parties to address and
3 the schedule for addressing those. The deposition
4 should go forward next Wednesday as noticed, and
5 you'll be getting our order shortly.

6 If there's nothing else, we'll conclude
7 this call. Do any of the parties have any other
8 matter? Thank you and good day.

9 Whereupon, at 9:32 a.m., the
10 Teleconference was concluded.)

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CERTIFICATE

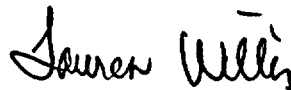
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Name of Proceeding: Savannah River MOX Fuel
Fabrication Facility

Docket Number: 70-3098-ML

Location: telephone conference

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



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