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June 30, 2003
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 070-03098
DUKE COGEMA STONE & WEBSTER	)	
	)	
Mixed Oxide (MOX) Fuel Fabrication Facility (Construction Authorization Request)	)	

NRC STAFF'S RESPONSE TO ASLB ORDER INSTRUCTING ALL PARTIES TO ADDRESS QUESTIONS REGARDING PAYMENT OF EXPERT WITNESS FEES

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's (ASLB) June 20, 2003, Order, pages 1-2, the U.S. Nuclear Regulatory Commission (NRC) answers the following five questions.

ANALYSIS

A. 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?

1. 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

In 1962, the federal district courts rarely addressed the issue of what constituted sufficient payment of expert witnesses for depositions. Rather, the courts primarily addressed whether an expert witness could be deposed by the opposing party. A majority of the cases prohibited depositions of expert witnesses, because "to permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a considerable sum of money, would be equivalent to taking another's property without making any compensation

therefor." *Lewis v. United Air Lines Transport Corp.*, 32 F. Supp. 21, 23 (W.D. Penn. 1940). Other courts indicated that judicial discretion must be exercised in determining whether to order an expert witness to testify. *See Boynton v. R.J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (D. Mass. 1941). The Massachusetts District Court stated that the judge could "decline to order the [expert] witness to testify unless compensation is tendered, and such tender having been made, order the witness to express an expert opinion already formed." *Id.* at 595. However, the offer of compensation from the opposing party does not always obligate an expert to testify. *See id.* The court stated, it is the expert's "privilege, if not his duty, to refuse compensation from one of the parties when he has already accepted employment from the other, and such refusal ought not of itself to result in his being ordered to testify." *See id.*

A number of cases supported the position that an expert witness may be deposed. In a rare appeals court case addressing the issue of expert witness depositions, prior to 1962, the Sixth Circuit held that an expert witness was required to answer questions regarding his expert opinion. *See Sachs v. Aluminum Co. of America*, 167 F.2d 570, 570 (6th Cir. 1948). The court reasoned that the expert's opinions did not qualify as privileged or attorney work product; therefore, the information must be divulged to the opposing party. *See id*.

The issue of adequate payment of an expert witness for a deposition was not widely discussed. Moore's Federal Practice indicated: a court generally should not permit the deposition of expert witnesses

> in the absence of a showing that the facts or information sought are necessarily for the moving party's preparation for trial and cannot be obtained by the moving party's independent investigation or research. However, since one of the purposes of the Federal Rules as stated in Rule 1 is to facilitate the inexpensive determination of causes, the court should have discretion to order discovery *upon condition that the moving party pay a reasonable portion of the fees of the expert.*

U.S. v. Certain Acres of Land in Decatur and Seminole Counties, Georgia, 18 F.R.D. 98, 101 (M.D. Georgia 1955)(quoting Moore's Federal Practice, Vol. 4, Par. 26.24, p.1158)(*emphasis added*).

Similarly, where the cases did mention payment of an expert witness, the party taking the deposition usually paid or offered to pay transportation costs and a reasonable fee. *See generally Smith v. Hobart Manufacturing Co.*, 188 F. Sup. 135, 136 (E.D. Penn. 1960).

2. Effect of the 1970 changes to the Federal Rules of Civil Procedure upon the payment of experts during depositions in the federal court system

The 1970 changes to the Federal Rules of Civil Procedure added Rule 26(b)(4)(C) which states: "Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for the time spent in responding to discovery under subdivision (b)(4)(A)(ii) and (b)(4)(B) of this rule." Fed. R. Civ. P. 26(b)(4)(C)(i). The Advisory Committee's Explanatory Statement Concerning Amendments of the discovery rules indicated that the new requirement regarding payment of expert witness fees resolves "the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum." 48 F.R.D. 487 at 505 (1970). The rule appears to codify the common law practice of paying a reasonable expert witness fee for a deposition.

3. Impact of the 1972 amendments to 10 C.F.R. § 2.740 upon the payment of experts for depositions in NRC proceeding

The 1972 amendments to 10 C.F.R. § 2.740 had no effect on the payment of experts for depositions in NRC proceedings. In 1962, 10 C.F.R. Part 2 was amended to include a new provision, § 2.740(h), for the payment of witnesses for depositions. *See* 27 Fed. Reg. 377, 385 (1962). Section 2.740(h) stated, "A deponent whose deposition is taken and the officer taking a deposition 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." 10 C.F.R. § 2.740(h) (1962). This provision applied to the payment of all witnesses for depositions, including expert witnesses. The 1972 amendments moved the provision on payment of witnesses for depositions from § 2.740(h) to § 2.740a(h). However, the text of the provision remained unchanged from the 1962 version.

4. Amendments to the Federal Rules influence on the Commission's decision to amend 10 C.F.R. § 2.740 in 1972

It is difficult to discern whether the decision to amend § 2.740 in 1972 was influenced by the changes to the Federal Rules of Civil Procedure. However, the amendments to § 2.740 in 1972 did incorporate a portion of the changes to the Federal Rules relating to discovery. In the *Federal Register* Notice for the publication of the final rule, the Commission stated, "A new § 2.740 has been added to Part 2 containing general provisions relating to discovery ... the new section adapts Rules 26 and 37 of the Federal rules of Civil Procedure to Commission proceedings. Of particular interest are the provisions pertaining to discovery of trial preparation materials and supplements to discovered material." 37 Fed. Reg. 15127, 15128 (1972).

As previously noted, the text of the newly created § 2.740a(h), relating to payment of witnesses for depositions, remained unchanged from when it was located at § 2.740(h) prior to the 1972 amendments. The argument that the Commission rejected payment of a reasonable fee to expert witnesses for depositions, by failing to amend § 2.740a(h) to specifically address payment of expert witnesses as contained in Rule 26(b)(4)(C), is without merit. The NRC regulations already contained a provision dealing with the payment of witnesses for depositions, that would reflect changes in the federal district courts' procedures. Thus, § 2.740a(h) did not need to be amended, because it contained language that automatically incorporated the 1970 changes to Federal Rule 26(b)(4)(C) and any future changes to the district courts' procedures on payment of expert witnesses for depositions.

B. 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?

The regulatory history of 10 C.F.R. § 2.740a and § 2.720 suggests no apparent connection between the two provisions.

C. 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")?

The regulatory history provides no indication as to whether the Commission intended the language in both §§ 2.720(d) and 2.740a(h) to refer to the statutory witness fees found in 28 U.S.C. § 1821. Despite the Licensing Board's position in *Black Fox*, the use of different language in § 2.720(d) and § 2.740a(h), regulations which were promulgated simultaneously in 1962, allows for the inference that the difference was intentional.

In particular, § 2.720(d) states, "Witnesses summoned by subpoena shall be paid, by the party at whose instance they appear, the fees and mileage paid to *witnesses in the district courts* of the United States." 10 C.F.R. § 2.720(d)(*emphasis added*). The district courts follow 28 U.S.C. § 1821, which indicates that witnesses in the district courts will be paid an attendance fee of $40 per day (including days traveling to and from the court) and travel costs. By specifically referring, in § 2.720(d), to the fees and mileage received by witnesses in the district court, it is clear that 28 U.S.C. § 1821 sets the fees for subpoenaed witnesses in NRC proceedings.

Section 2.740a(h), significantly, does not use language which refers to the fees paid witnesses in district court. Rather, § 2.740a(h) indicates that a deponent is "entitled to the same fees *as are paid for like services* in the district courts of the United States ...." 10 C.F.R. § 2.740a(h). The inference from the difference in the language between §§ 2.720(d) and 2.740a(h) is that § 2.740a(h) does not refer specifically to the statutory witness fee in 18 U.S.C. § 1821. Rather, § 2.740a(h) is not tied to a specific dollar amount. It simply requires the deponent receive a fee that is the same as the fees paid in the district court for similar services. For the deposition of an expert witness, the district courts pay a reasonable fee under Rule 26(b)(4)(C).

See Mathis v. NYNEX, 165 F.R.D. 23, 24 (E.D.N.Y. 1996). Thus, § 2.740a(h) would require that the party deposing an expert witness pay the expert a reasonable fee.

D. 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?

1. Applicability of 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"

The provision in 5 U.S.C. § 504 note, regarding the Energy and Water Development Appropriations Acts, is a statutory prohibition that prevents the NRC from using funds appropriated by Congress to pay the expenses of, or compensate, intervenors. In 1983, the NRC General Counsel requested the Comptroller General respond to several questions regarding the use of appropriated funds for payments to intervenors under the Equal Access to Justice Act (EAJA). *See Matter of: Availability of funds for payment of intervenor attorney fees–Nuclear Regulatory Commission*, 62 Comp. Gen. 692 (1983). The Comptroller General indicated payments of fees and costs under the EAJA "constitute a form of compensation to intervenors and are therefore within the scope of the [5 U.S.C. § 504 note] prohibition." *Id.* at 695. The D.C. Circuit reached a similar conclusion in *Business and Professional People for the Public Interest v. NRC*, 793 F.2d 1366 (D.C. Cir. 1986). However, taking an expert witness' deposition and compensating the expert for his time is distinguishable from paying an intervenor's attorney's fees and costs. Where an intervenor's expert witness is being deposed by a party, any payment the expert witness receives does not constitute compensation to the intervenor. Rather, the party's payment is compensation

to the expert for time spent at, and in preparation for, the deposition. Furthermore, a payment to an expert witness for a deposition is part of a party's litigation costs in developing and pursuing its case. Each party choosing to participate in litigation must bear its own litigation expenses. It is in the deposing party's interest to depose the expert witness and the payment for the expert's time is a cost of reaping that benefit. Given that a payment to the intervenor's expert witness is distinguishable from compensating the intervenor, 5 U.S.C. § 504 has no applicability to the issue at hand.

2. Applicability of 5 U.S.C. § 504 note to a contractor for the Department of Energy

It is not immediately clear how 5 U.S.C. § 504 note affects a contractor for the Department of Energy. However, as stated above, the provision has no application to the current issue. If a contractor for the Department of Energy seeks to depose an intervenor's expert, and pays a reasonable fee for that expert's time, the payment to the expert does not constitute compensation of the intervenor. The contractor's payment compensates the expert and constitutes normal litigation costs.

3. Effect of the 5 U.S.C. § 504 note on the payment of expert fees if the NRC Staff is the party seeking discovery of an intervenor's witness

Likewise, if the NRC Staff is the party seeking discovery of the intervenor's expert witness, the NRC would have to pay a reasonable fee for the expert's time. The payment would not constitute compensation of the intervenor. The deposition, and the payment therefor, would assist the NRC's preparation for litigation and would be a normal litigation cost.

4. Effect of 5 U.S.C. § 504 note on 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

The prohibition on using appropriated funds to assist intervenors, in 5 U.S.C. § 504 note, does not affect the payment of an NRC staff expert that has been hired as an outside consultant for the proceeding. Both §§ 2.740a and 2.720 have provisions making them inapplicable to NRC

personnel. *See* 10 C.F.R. §§ 2.740a(j) and 2.720(h). Thus, NRC personnel may not receive payment under §§ 2.740a(h) and 2.720(d). NRC hired consultants are, by definition, NRC personnel and also excluded from the application of §§ 2.740a(h) and 2.720(d). *See* 10 C.F.R. § 2.4. An NRC payment for time spent at a deposition to an expert under contract with the NRC would be part of the NRC's litigation costs and would not constitute assistance to the intervenor.

E. 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?

Under the governing law in the district court, Rule 26(b)(4)(C), the court may release a party from their obligation to pay the reasonable fee if it would constitute manifest injustice to require the party to pay. *See* Fed. R. Civ. P. 26(b)(4)(C). In the Advisory Committee's Note that accompanied the revisions to Federal Rule 26, the Committee indicated that the court is "authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery." Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 505 (1970). The Committee further stated, however, "even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party." *Id.* Therefore, the Board should apply the manifest injustice standard to determine if a party claiming hardship should be excused from paying a reasonable fee to an expert witness for a deposition.

There is no definition of what constitutes manifest injustice. *See Reed v. Binder*, 165 F.R.D. 424, 427 (D.N.J. 1996). Likewise, there is a limited amount of case law interpreting what constitutes manifest injustice with respect to the requirement to pay an expert witness a reasonable

fee for a deposition. *See id.* In *Reed*, the court noted that the phrase manifest injustice is also used with respect to Rule 16(e), which allows modification of a final pretrial order only to prevent manifest injustice. *See id.; see also* Fed. R. Civ. P. 16(e). The court in *Reed* recognized that with regard to Rule 16(e), the manifest injustice standard has been identified as a stringent standard. *See id.* at 427-28; *see also Royal Maccabees Life Ins. v. Malachinski, D.O.*, 2001 WL 290308, *16 (N.D. Ill. 2001)(indicating that the manifest injustice standard is a stringent standard). Thus, in deciding whether to relieve a party of the requirement to pay an expert witness a reasonable fee, "the court must exercise restraint while balancing the respective hardships of doing justice to parties and the need to maintain orderly and efficient procedural arrangement." *Royal Maccabees*, 2001 WL 290308, at *16.

The case of *Edin v. Paul Revere Life Ins. Co.*, 188 F.R.D. 543 (D. Ariz. 1999), demonstrates that the manifest injustice standard is a stringent standard. The court in *Edin* began by assessing whether the party was "indigent" or whether requiring the party "to pay a deposition fee incurred in litigation that [it] voluntarily initiated would create an undue hardship." *Edin v. Paul Revere Life Ins. Co.*, 188 F.R.D. 543, 547-48 (D. Ariz. 1999). The court concluded that the plaintiff, who had a monthly income of $3564.41 in addition to the funds received from a substantial settlement in an earlier lawsuit, did not qualify as indigent. The court stated, "although plaintiff may have difficulty budgeting his monthly income to pay his monthly debts, this is not a case in which a manifest injustice would occur were Plaintiff required to pay an expert's reasonable deposition fee." *Id*. at 548.

Ultimately, each party has the responsibility to bear its own litigation costs. Unless the burdened party can demonstrate that requiring it to pay a reasonable expert witness fee would result in manifest injustice, the party must choose between spending the money for the deposition or not deposing the expert witness.

CONCLUSION

Based on a plain reading of the regulation, an analysis of the regulatory history, and an examination of Federal Rule 26(b)(4)(C) and district court case law, the Board should conclude that § 2.740a(h) requires expert witnesses be paid a reasonable fee for their time at depositions.

Respectfully submitted,

/RA/

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Dated at Rockville, Maryland
this 30th day of June, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DUKE COGEMA STONE & WEBSTER	)	Docket No. 70-3098
	)	
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	

CERTIFICATE OF SERVICE

I, Cassie E. Bray, hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO ASLB ORDER INSTRUCTING ALL PARTIES TO ADDRESS QUESTIONS REGARDING PAYMENT OF EXPERT WITNESSES," have been served upon the following persons this 30th day of June, 2003, by electronic mail, and by U.S. mail, first class (or as indicated by an asterisk (*) through the Nuclear Regulatory Commission's internal distribution system).

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