RAS 6601

June 30, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

DOCKETED
USNRC

July 8, 2003 (2:26PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of	
DUKE COGEMA STONE & WEBSTER	Docket No. 0-70-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	ASLBP No. 01-790-01-ML

GEORGIANS AGAINST NUCLEAR ENERGY'S BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND REQUEST TO QUASH DEPOSITION OF DR. LELAND TIMOTHY LONG

I. INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("ASLB's") order dated June 20, 2003, Georgians Against Nuclear Energy ("GANE") hereby submits a brief in support of its June 17, 2003, request for a protective order and motion to quash the deposition of Dr. Leland Timothy Long by Duke Cogema Stone & Webster ("DCS"). Georgians Against Nuclear Energy's Motion for Protective Order and Motion to Quash Deposition (hereinafter "GANE Motion").[1] The questions posed by the ASLB in its June 20 Order are addressed in the body of this brief.

[1] As a practical matter, the question of whether to postpone or quash the deposition has now been mooted by the conduct of the deposition on June 25, 2003. Therefore, the only

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As demonstrated below, NRC regulations and relevant federal court rules and decisions support GANE's position that DCS should be ordered to pay Dr. Long's reasonable costs and fees. Moreover, Congress has imposed no statutory bar to such a payment.

II. FACTUAL BACKGROUND

A. Procedural Background

On May 21, 2003, DCS noticed the deposition of Dr. Leland Timothy Long, GANE's expert regarding Contention 3 (seismic issues). The notice scheduled the deposition for June 25, 2003, and subsequent day(s).[2]

By letter dated June 3, 2003, counsel for GANE asked for confirmation that DCS will compensate Dr. Long for reasonable expert fees at his customary rate of $200 per hour; reasonable travel expenses; and lodging costs for each night that Dr. Long is required to stay in D.C. for his deposition. By letter of June 10, 2003, DCS responded that, in accordance with 28 U.S.C. § 1821, DCS would agree to cover only Dr. Long's reasonable travel expenses, plus a $40 per day witness fee. GANE provided legal citations supporting its position in a letter dated June 13, 2003, but the parties were unable to reach agreement.

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question remaining before the ASLB is how to assign the expert costs and fees for Dr. Long.

[2] When counsel for GANE expressed concern at the length of the deposition, counsel for DCS suggested that the deposition could be shortened if there were greater clarity regarding the portions of the contention that GANE actually intends to pursue. Subsequently, the parties had correspondence and discussions that resulted in the filing by DCS of an unopposed motion to narrow the scope of Contention 3, on June 12, 2003.

On June 17, 2003, GANE filed a motion that asked the ASLB to either postpone or quash the deposition for DCS's failure to agree to pay Dr. Long's expert fee. DCS filed an opposition on June 18, 2003. Duke Cogema Stone & Webster's Response to Georgians Against Nuclear Energy's Motion for Protective Order and Request to quash Deposition. The ASLB held a telephone conference call on May 19, 2003. The parties again attempted to settle the dispute, but were unsuccessful. On June 20, 2003, the ASLB issued an order requiring the parties to brief the issue and respond to several questions.

B. Factual Background Regarding Dr. Long's Expert Fees

Late in the fall of 2002, GANE hired Dr. Timothy Leland Long to provide expert assistance and testimony regarding Contention 3. Dr. Long is a geophysicist with extensive experience in seismology. He has taught and conducted research at Georgia Institute of Technology for over 30 years. His principal area of research specialization has been the seismicity of Georgia and the southeastern United States. Since his hire, Dr. Long has charged GANE at his standard rate of $100 per hour for consulting time and preparation of responses to interrogatories. He has also informed GANE that he intends to charge his standard rate of $200 per hour for deposition and hearing testimony.

On June 24, 2003, Dr. Long traveled by air to Washington, D.C. for his deposition. The deposition took places at the offices of DCS's counsel, on June 25 and 26, 2003. Dr. Long flew back to Georgia on the evening of June 26.

GANE has requested Dr. Long to prepare an itemized bill for the time he spent traveling to and from the deposition, preparing for the deposition, and attending the

deposition. The bill will also include the cost of meals and hotel during Dr. Long's stay in Washington. As provided for in 10 C.F.R. § 2.740a(h), if it prevails on this motion, GANE intends to have Dr. Long send the bill directly to DCS.

III. ARGUMENT

A. Payment Of Dr. Long's Reasonable Expert Deposition Fee Is Required By The Plain Language of 10 C.F.R. § 2.740a(h).

NRC discovery rule 10 C.F.R. § 2.740a(h) provides that:

> (h) 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.[3]

For at least the past fifty years, the district courts have recognized two types of fees for "like services" of deposition witnesses. Expert witnesses must be paid a reasonable hourly fee. Fact witnesses must be paid $40 per day under 28 U.S.C. § 1821.[4]

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[3] Section 2.740a(h) is part of a substantial amendment to the NRC's Part 2 regulations that was promulgated in 1962. 27 Fed. Reg. 377 (January 13, 1962). As expressed in the preamble, one of the purposes of these rule changes was to incorporate "useful provisions of the rules of practice or (sic) other regulatory agencies and of the Federal Rules of Civil Procedure." *Id.*

[4] The requirement in F.R.C.P. 26(b)(4)(C) and 28 U.S.C. § 1821 that a party seeking to take a deposition must pay the deponent a fee should not be confused with other provisions that allow recovery of costs at the end of a district court case. *See Martin v. Howard University,* 209 F.R.D. 20 (D.C.D.C. 2002). As the Court explained:

> If a party pays the fees, then, upon prevailing, she may seek to recover those fees as costs pursuant to Fed. R. Civ. P. 54(d) and 28 U.S.C.A. § 1920 (1994). Thus, read together, one statute requires the tendering of fees as a condition of taking a witness's deposition while the second permits, in the court's discretion, the recovery of those fees if the party who takes the deposition prevails. . . .

Id. [footnote omitted]. While *Martin* interpreted only 28 U.S.C. § 1821, its reasoning also applies where a fee has been paid under F.R.C.P. 26(b)(4)(C). For intance, if the MOX CAR proceeding were being conducted in Federal District Court, DCS would be

1. By longstanding practice, and under current rules, the district courts require payment of a reasonable fee to expert deponents.

Prior to the 1970 amendments to the Federal Rules, depositions of experts were generally barred by the courts; but when an expert deposition was allowed, the courts often required the party taking the deposition to pay the expert's fee. In 1970, the rules were amended to allow the taking of expert depositions without leave of the court, and to require payment of a reasonable expert fee.

a. Prior to the 1970 amendments to the Federal Rules, the district courts required payment of reasonable fees where expert depositions were allowed.

Prior to the 1970 amendments to the Federal Rules of Civil Procedure, the district courts "seldom held that the discovery rules applied to experts or . . . confined such application of these rules to extremely narrow areas of expert information." Long, *Discovery and Experts under the Federal Rules of Civil Procedure,* 38 F.R.D. 111, 112 (1965).[5] As the Long treatise observes:

> The bases for such decisions are found outside the rules themselves and proceed either from considerations prompted by the interference such discovery may cause with trial preparation or by the view that discovery extends only to the facts.

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required to pay Dr. Long his expert witness fee, but later could seek to recover the fee from GANE if DCS were to prevail.

[5] The Long treatise contains a lengthy discussion of federal common law as applied to the taking of expert depositions before the 1970 amendments to the Federal Rules. It is cited by the 1970 Advisory Committee for its "full analysis of the problem and strong recommendations to the same effect." Advisory Committee Notes to F.R.C.P. 26, 1970 Amendments, Subsection (b)(4) – Trial Preparation: Experts. *See also* Friedman, *Discovery and Use of an Adverse Party's Expert Information,* 14 Stan. L. Rev. 455, 485-88 (1962).

Thus, while factual information known to experts was discoverable, their professional opinions generally were protected.

The courts had two general purposes in protecting expert opinions from discovery. First, the courts reasoned that discovery of expert opinions could unfairly allow one party to take advantage of another party's trial preparations. *Schuyler v. United Air Lines, Inc.*, 10 F.R.D. 111 (M.D. Pa. 1950). *See also* Friedman, *Discovery and Use of an Adverse Party's Expert Information,* 14 Stan. L. Rev. at 479.

Second, the courts considered expert opinions to be the property of the expert and/or the party who had hired the experts, and therefore were "not normally discoverable to a private party who does not pay for them." *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376, 379 (D.N.J. 1954). *See also Lewis v. United Air Lines Transport Corp.*, 32 F. Supp. 21, 22 (W.D. Penn. 1940); *United States v. 88 Cases etc. of Bierley's Orange Beverage*, 5 F.R.D. 503 (D. N.J. 1946).[6] Thus, in cases where expert depositions were permitted, the courts generally required payment of expert fees by the party seeking to take the deposition. Long, *Discovery and Experts Under the Federal Rules of Civil Procedure,* 38 F.R.D. at 38.

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[6] In *Boynton v. R.J. Reynolds,* 36 F.Supp. 593 (D. Mass. 1941), the court noted that in some cases, even a tender of expert fees would not necessarily compel deposition testimony:

> An expert employed by one of the parties ought not to be compelled to furnish expert testimony to the other just because the latter offers him compensation. It is his 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.

Id. at 595.

b. Under the 1970 amendments to the Federal Rules, the district courts continue to require payment of reasonable fees to expert deponents.

The 1970 amendments to the Federal Rules of Civil Procedure included provisions designed to "repudiate" previous decisions denying discovery of expert opinions, as well as to "adopt a form of the more recently developed doctrine of 'unfairness.'" Advisory Committee Notes to F.R.C.P. 26, 1970 Amendments, Subsection (b)(4) – Trial Preparation: Experts. As amended in 1970, F.R.C.P. 26(b)(4) provides in relevant part that:

> (4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule, and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.
>
> (B) [This section is not quoted because it relates to discovery of opinions held by non-witness experts and is therefore inapplicable to the instant case.]
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> (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonable incurred by the latter party in obtaining facts and opinions from the experts.

Under this provision, an expert who provides deposition testimony is entitled to a reasonable fee. *Haarhuis v. Kunnan Enterprises, Ltd.*, 177 F.3d 1007, 1015-16 (D.C. Cir. 1999).[7] Thus, the 1970 amendments to the Federal Rules codifies the previous judicial requirement that if expert depositions are taken, the party taking the deposition should cover their costs.

c. Compensable fees include travel time; preparation time; deposition time; and costs associated with transportation, food and lodging.

In addition to payment for time spent in the deposition, the fees and costs that must be compensated include the witness's preparation time. *See* Wright and Miller, Federal Practice and Procedure, § 2034 (2d ed. 1994), and cases cited therein ("The weight of authority appears to hold that Rule 26(b)(4)(C) permits recovery of fees for an expert's travel time and preparation time in connection with a deposition, along with the expert's out-of-pocket expenses.") Moreover, the expert must be compensated for time spent traveling to and from the deposition, travel costs, and lodging costs. *Haarhuis,* 177 F.3d at 1015-16; *Grdinich v. Bradlees,* 187 F.R.D. at 82; *Sean v. Okuma Machine Tool, Inc.,* 1996 U.S. Dist. LEXIS 6617 (E.D. Pa. May 8, 1996).

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[7] *See also Lancaster v. Lord,* 1993 U.S. Dist. LEXIS 3986 (S.D.N.Y. 1993); *Gordon v. Castle Oldsmobile,* 157 F.R.D. 438, 442 (E.D. Ill. 1994); *Great Lakes Dredge and Dock Co. v. Commercial Union Assurance Co.,* 2000 U.S. Dist. LEXIS 18893 (E.D. Ill. 2000); *Coleman v. Dydula,* 190 F.R.D. 320, 321-23 (W.D.N.Y. 1999); *Haslett v. Texas Industries, Inc.,* 1999 U.S. Dist. LEXIS 9358 (N.D. Tx. 1999); *Grdinich v. Bradlees,* 187 F.R.D. 77, 82 (S.D.N.Y. 1999); *Auto Wax Co. v. Mark V. Products, Inc.,* 2002 U.S. Dist. LEXIS 2944 (N.D. Tx. 2002).

2. The statutory fee of $40 per day applies to fact witnesses only.

The federal courts have generally interpreted 28 U.S.C. § 1821 to provide for payment of expenses and a nominal fee of $40 per day for *non-expert* fact witnesses. *Irons v. Karceski,* 74 F.3d 1262, 1264 (D.C. Cir. 1995). As the D.C. Circuit explicitly ruled in *Haarhuis,* however, 28 U.S.C. § 1821 does not preclude an award of reasonable fees for participation by an expert in a deposition. *See also Cary Oil Co. v. MG Refining and Marketing,* 2003 U.S. Dist. LEXIS 2479 (S.D.N.Y. February 20, 2003), in which the District Court for the Southern District of New York expressly followed *Haarhuis* and awarded reasonable expenses and fees.[8]

In *Public Service Company of Oklahoma* (Black Fox, Units 1 and 2), LBP-77-18, 5 NRC 671, 674 (1977) (hereinafter "*Black Fox*"), the ASLB found that the witness fees referred to in 10 C.F.R. § 2.740a(h) and the NRC's subpoena rule, 10 C.F.R. § 2.720(d), were "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." 5 NRC at 673. GANE respectfully submits that this aspect of the *Black Fox* decision is not supported by the

[8] Where an *expert* gives *factual* testimony, the courts have limited the expert to a $40 per day witness fee. For instance, the courts have consistently held that doctors and lawyers who testify regarding their observation, diagnosis and treatment of a patient are limited to statutory fees for factual testimony under 28 U.S.C. § 1821, and may not recover expert fees pursuant to F.R.C.P. 26(b)(4). *See Fisher v. Ford,* 178 F.R.D. 195, 197 (N.D. Oh. 1998), and cases cited therein. As the Court observed in *Fisher,* the Advisory Committee Notes to Fed. R. Civ. P. 26(b)(4)(C) state that a witness who is "an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit . . . should be treated as an ordinary witness." 178 F.R.D. at 197.

plain language or history of the Part 2 regulations, or by any reading of district court decisions setting deposition witness fees.[9]

First, nothing in the rule or its history suggests that the Commission intended 10 C.F.R. § 2.740a(h) to restrict witness fees to the $40/day limit set in 28 U.S.C. § 1821. Instead, the preamble refers to the Commission's intent to implement certain provisions of the Federal Rules.[10] As discussed above in Section III.A.1.a, at the time 10 C.F.R. § 2.740a(h) was promulgated, the prevailing interpretation of the Federal Rules was to either refuse to allow expert depositions altogether, or insist upon the payment of a reasonable fee for the deposition if it was allowed to go forward. Notably, the NRC's rules similarly placed a burden on any party seeking to take a deposition to file a motion and demonstrate "good cause." *See* 10 C.F.R. § 2.740(a), 377 Fed. Reg. 377, 385 (1962). Thus, if the ASLB were deciding this motion in 1962, it could have refused to allow an expert deposition altogether; or if it decided to allow the deposition, it could have required the payment of a reasonable expert fee.

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[9] To GANE's knowledge, the *Black Fox* decision is the only NRC reported case that applies 10 C.F.R. § 2.740a(h). Thus, it is not possible to answer the portion of the ASLB's Question 1 which asks: 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?

[10] Similarly, in proposing to amend Part 2 in 1972, the Commission expressed an intention to implement the 1970 amendments to the Federal Rules. 37 Fed. Reg. 9,331, 9,332 (May 9, 1972). Neither the 1962 notice nor the 1972 notices, however, provide any illumination of the Commission's specific intent with respect to the payment of witness fees under 10 C.F.R. § 2.740a(h) or 10 C.F.R. § 2.720(d). Thus, GANE is aware of no administrative regulatory history that sheds light on Question 2 of the ASLB's June 20 Order: "What connection, if any, is suggested by the administrative regulatory history of the provisions of 10 C.F.R. § 2.740 governing depositions and those of § 2.720 governing subpoenas?".

Moreover, as the ASLB implies in Question 3, it seems inappropriate for the *Black Fox* ASLB to lump together 10 C.F.R. §§ 2.740a(h) and 2.720, because their language is different. While § 2.740a(h) provides for payment of the "same fees as are paid for like services in the district courts of the United States," § 2.720(d) provides for payment of "the fees and mileage paid to witnesses in the district courts of the United States." The use of the word "services" in Section 2.740a(h) reflects the fact that the expert deponent is giving testimony as a service to the deponent, for which he is entitled to reasonable compensation under the practice of the U.S. district courts. In contrast, the reference to "fees and mileage" is similar to the language used in 28 U.S.C. § 1821.

There is no discussion in the rulemaking history of these regulations to explain the difference in the choice of language. It seems most likely, however, that 10 C.F.R. § 2.720(d) was modeled on 28 U.S.C. § 1821, under which attendance by a third-party expert or non-expert at a trial or deposition can be compelled by tendering the $40 per day witness fee.[11]

B. Enforcement of 10 C.F.R. § 2.740a(h) Is Needed To Maintain Fundamental Fairness in This Proceeding.

By its Motion, GANE has invoked the requirement of 10 C.F.R. § 2.740a(h) that any party who seeks to depose an expert witness is responsible for paying the expert's fee. The rule is seldom used, for the likely reason that in most situations, the parties are

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[11] This is not to say that subpoenaed third-party witnesses are never entitled to fees greater than the $40 per day witness fee. As noted in *Practice Commentaries* on the Federal Rules, the district courts have substantial discretion to order payment of higher witness fees to third-party deponents testifying under subpoena, pursuant to F.R.C.P. 45(c). *See* David D. Siegel, *Practice Commentaries,* U.S. Code Annotated, Rule 45, Commentary C45-19 (West Publishing Co. 1992) *See also United States v. Columbia Broadcasting System, Inc.*, 666 F.2d 364, 368 (9th Cir. 1982).

all taking depositions, and it makes the most sense for them to agree that each will carry its own deposition costs. In this particular situation, GANE has found that it is not cost-effective to take the depositions of DCS's witnesses. Moreover, GANE has limited resources with which to pay the costs and fees associated with the taking of depositions. Therefore, GANE has elected not to take the depositions of DCS's witnesses. Under these circumstances, because GANE is the only party whose experts are being deposed, only one party will have to pay an hourly rate for a witness who is deposed. The question is whether that party should be GANE or DCS.

As the courts have recognized, it is unfair to require a party who has hired an expert to testify at trial to also pay for the expert to testify at a deposition that has been called by the opposing party. *See* discussion in Section III.A.1.a, *supra.* In this case, Dr. Long has been required to travel to Washington, D.C.; to spend several hours preparing for a deposition; and to testify in two full days of depositions. While GANE has not received a bill from Dr. Long, it is reasonable to estimate that the fee for his time will be in the neighborhood of $4-5,000, not including travel and lodging costs. DCS, in contrast, has incurred no such expense for depositions by GANE of DCS witnesses.

Failure to enforce 10 C.F.R. § 2.740a(h) would have a manifestly unjust result, in two important respects. First, GANE would be unfairly forced to spend money on a deposition requested by DCS to aid in the preparation of DCS's own case. Second, if DCS does not have to pay Dr. Long his hourly fee, DCS would have less incentive to be efficient about the length of the deposition, or any future deposition. In fact, DCS would

have a built-in incentive to take as long as possible in a deposition, merely to deplete the concededly limited resources that GANE has to spend on the case.[12]

C. Payment of a Reasonable Expert Fee to Dr. Long Is Not Barred By the Equal Access to Justice Act, the Energy and Water Development Appropriations Act, or Any Other Statute.

In Question 4 of its June 20, 2003, Order, the ASLB asked the parties to address the applicability of Section 502 of the 1982 Energy and Water Development Appropriations Act, which provides 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.

Act Oct. 2, 1982, P.L. 102-377, Title V, § 502, 106 Stat. 1342. This provision is also referenced in a note to the Equal Access to Justice Act, 5 U.S.C. § 504. Given that DCS

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[12] In Question 5, the ASLB asked the parties to address what standard it should apply if the ASLB adopts GANE's position and a future party is unable to pay the reasonable expert fees due to a claimed hardship. GANE submits that it would be appropriate to apply the "manifest injustice" standard used by the courts, which seeks to maintain a level playing field between the parties. The "manifest injustice" standard, which gives the court great discretion, should be as workable for the NRC as it is for the courts. For instance, in *Reed v. Binder,* 165 F.R.D. 424, 426 (D.C.N.J. 1996), the Court ordered the defendant to pay for the depositions of its own witnesses where the indigent plaintiff had only one expert witness, while the defendants commissioned six highly paid experts. The court found that the case presented "one of those rare situations where manifest injustice would result if these impoverished plaintiffs had to pay the six (6) defense experts for their testimony at deposition." *Id.* at 428. In making this ruling, the Court considered three factors: the "possible hardships imposed on the respective parties," the "balance [between] the need for doing justice on the merits between the parties," and "the need for maintaining orderly and efficient procedural arrangements." *Id.* GANE submits that similar considerations would be relevant in an NRC licensing case. The financial condition of the petitioning party could be described in an affidavit from the petitioner, to be reviewed by the ASLB *in camera.*

is funded by Congress under the Energy and Water Development Appropriations Act, the ASLB has asked the parties to address the question of whether payment by DCS of Dr. Long's expert deposition fees is barred by the Appropriations Act.

Section 502 of the 1982 Energy and Water Development Appropriations Act is inapplicable to this case, because it is concerned with reimbursement or compensation of intervenors. In contrast, both 10 C.F.R. § 2.740a(h) and F.R.C.P. 26(b)(4)(C) require direct payment to the deponent by a party seeking to take a deposition. Section 2.740a(h) states that the deponent is entitled to a fee, payable by the party at whose instance the deposition is taken. Similarly, F.R.C.P. 26(b)(4)(C) states that the party seeking discovery must pay the expert a reasonable fee. "The rule plainly requires defendant to pay the expert, not plaintiff." *Dominguez v. Syntex Laboratories,* 149 F.R.D. 166, 170 (S.D. In. 1993). As the First Circuit Court of Appeals explained in *Bosse v. Litton Unit Handling Systems,* 646 F.2d 689, 695 (1st Cir. 1981), this is because, for purposes of the deposition, the deponent is considered to be a witness for the party taking the deposition:

> The fees charged plaintiff by the experts for testifying for him in court would be taxable as plaintiff's costs. It was defendant, however, who took their depositions. While it did so, no doubt, because of their anticipated trial testimony for plaintiff, *they were not then plaintiff's witnesses at that time, but were called by defendant, and defendant, not plaintiff, is the one under whatever may be the obligation.* F.R.Civ.P. 26(b)(4)(C)(i). In this event, it is not plaintiff's costs.

646 F.2d at 695 (emphasis added).

Therefore, pursuant to NRC regulations and the Federal Rules of Civil Procedure, a deponent is the witness of the party taking a deposition, and the financial relationship at

issue is between them alone. The Congressional prohibition against intervenor funding simply does not come into play.[13]

IV. CONCLUSION

For the foregoing reasons, the ASLB should order DCS to pay reasonable expert fees for Dr. Long's preparation for, travel to and from, and participation in the deposition; plus reasonable travel costs and lodging costs.

Respectfully submitted,

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June 30, 2003

[13] As a practical matter, if the ASLB refuses to order DCS to pay Dr. Long's bill, GANE has committed to pay it. However, the rules are designed to set up a direct financial relationship between DCS and Dr. Long for the deposition. If the rules are applied properly, DCS will pay Dr. Long directly, and will not be in a position of reimbursing GANE.

CERTIFICATE OF SERVICE

I hereby certify that on June 30, copies of the foregoing GEORGIANS AGAINST NUCLEAR ENERGY'S MOTION BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND REQUEST TO QUASH DEPOSITION OF DR. TIMOTHY LELAND LONG were served on the following by e-mail and/or first-class mail:

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