RAS 6602

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	)	June 30, 2003
DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	ASLBP No. 01-790-01-ML

BRIEF OF DUKE COGEMA STONE & WEBSTER IN RESPONSE TO THE BOARD'S ORDER REGARDING PAYMENT OF EXPERT DEPOSITION FEES

I. INTRODUCTION

Georgians Against Nuclear Energy ("GANE") has moved for a protective order compelling Duke Cogema Stone & Webster ("DCS") to pay: (1) $200 per hour in professional fees for Dr. Leland Timothy Long to prepare for, travel to, and attend the deposition held on June 25-26, 2003; and (2) travel expenses and lodging costs for each night that Dr. Long was required to stay in D.C. for the deposition. In previous pleadings, DCS agreed to pay Dr. Long's reasonable travel expenses and $40 per diem for time spent traveling to and participating in the deposition.[1]

[1] *See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility)*, Duke Cogema Stone & Webster's Response to Georgians Against Nuclear Energy's Motion for Protective Order and Request to Quash Deposition (June 18, 2003).

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DCS is seeking a Construction Authorization for the Mixed Oxide Fuel Fabrication Facility ("MOX Facility") on behalf of the Department of Energy ("DOE"). Research prompted by the Atomic Safety and Licensing Board ("Board") has revealed that no monies received by DCS from the DOE under the Mixed Oxide ("MOX") Fuel Fabrication and Reactor Irradiation Services Contract, No. DE-AC02-99CH10888 ("MOX Contract") may be paid to an intervenor in this proceeding, pursuant to congressional statute.[2] (*See* discussion at Section IV.4 below.) Nevertheless, DCS intends to honor its commitment to pay reasonable travel expenses and $40 per diem for Dr. Long's deposition, out of funds not to be reimbursed by DOE.

The Board has instructed the parties to this proceeding to brief a number of issues arising out of GANE's request for professional expert fees.[3] These issues, as well as other information that DCS believes will assist the Board in its deliberations, are discussed below.

II. SUMMARY OF DCS' POSITION

DCS believes that the Commission has made a conscious decision not to require a party before the NRC to pay the professional fees of the opposing party's expert deponent. The Board's decision on this issue is independent of the prohibitions on federal funding set forth in 5 USC § 504 note.

In addition, both NRC and DOE are prohibited by 5 USC § 504 note from utilizing funds from Energy and Water Development Appropriations Acts ("EWDAA") to pay <u>any</u> intervenor fees, costs, or expenses. DCS, as a DOE contractor funded under EWDAA,

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2 *See* 5 USC § 504 note (Prohibition on Use of Energy and Water Development Appropriations to Pay Intervening Parties in Regulatory or Adjudicatory Proceedings).

3 *Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility)*, Order (June 20, 2003).

cannot be obligated to pay any such fees, costs, or expenses, either. However, the Board need not decide whether DCS is required to pay expert witness per diems and travel expenses at this time, since DCS has previously agreed to do so with respect to GANE's expert Dr. Long, and will so do voluntarily out of funds not to be reimbursed by DOE.

III. LEGISLATIVE HISTORY OF APPLICABLE RULES, REGULATIONS, AND STATUTES

A. NRC DEPOSITION RULE

10 CFR Part 2, which has been in effect since 1956,[4] was originally published in the Federal Register without notice or comment as a document subject to codification, effective 30 days after publication in the Federal Register.[5] The NRC deposition provision was codified at that time as Section 2.745(h), stating:

> Deponents whose depositions are taken and the officers taking depositions 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 depositions are taken.[6]

In 1962, this provision was redesignated as 10 CFR § 2.740(h), and the language was altered minutely:

> 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.[7]

This language is identical to the modern 10 CFR § 2.740a(h).

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4 The Code of Federal Regulations indicates that the NRC deposition provision was enacted in 1962. DCS relied upon this citation in its previous pleadings on the matter. Further research has revealed, however, that Part 2 – including the deposition provision – was in fact promulgated in 1956.

5 21 *Fed. Reg.* 804 (Feb. 4, 1956).

6 *Id.* at 808.

7 9 *Fed. Reg.* 377, 385 (Jan. 13, 1962).

There was no discussion of the changes to Part 2 in the Federal Register notice for the 1962 amendment. Instead, the Commission explained that: "[i]nasmuch as this amendment relates to agency procedure and practice, the Commission has found that general notice of proposed rulemaking and the public procedure thereon are unnecessary, and that good cause exists why this amendment should be made effective forty-five (45) days after publication in the Federal Register."[8]

In 1972, the Commission substantially revised 10 CFR Part 2. In particular, a new Section 2.740 was added "containing general provisions relating to discovery – scope of discovery, protective orders, and motions to compel discovery."[9] The new section adapted Rule 26 of the Federal Rules of Civil Procedure ("FRCP") to Commission proceedings. However, where the new Rule 26 shifted the burden of expert professional fees to the party taking the deposition, the 1972 amendments to Part 2 did not alter the original language of the deposition provision (redesignated as Section 2.740a(h)).

B. NRC SUBPOENA RULE

Like the NRC deposition provision, the NRC subpoena provision was originally promulgated in 1956. Section 2.744(c), stated in relevant part:

> Service of a subpena upon a person named therein shall be made by delivering a copy of the subpena to such person and by tendering him the fees for one day's attendance and the mileage allowed by law. When the subpena is issued on behalf of AEC, fees and mileage may but need not be tendered, and the subpena may be served by registered mail.[10]

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8 *Id.* at 377.

9 37 *Fed. Reg.* 45127 (July 28, 1972).

Section 2.744(d) stated:

> Witnesses summoned before AEC shall be paid by the party at whose instance they appear the same fees and mileage that are paid to witnesses in the district courts of the United States.[11]

Subsequent amendments to Part 2 did not substantively alter the subpoena provision. In 1962, the provision was redesignated as 10 CFR § 2.720, and the language of Subsections (c) and (d) was modified slightly to resemble the current regulations:[12]

> Service of a subpoena shall be made by delivery of a copy of the subpoena to the person named in it and tendering him the fees for one day's attendance and the mileage allowed by law.[13]
>
> * * *
>
> Witness 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.[14]

As noted above, there was no discussion of the changes to Part 2 in the Federal Register notice for the 1962 amendment.

C. 28 USC § 1821

28 USC § 1821 was adopted in 1948 to provide for "a witness...before a United States commissioner or person taking his deposition pursuant to any order of a court of the United States" to receive:

> $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 7 cents per mile for going from and returning to his place of residence. Witnesses [who are so distant as to be unable to return home from day to

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10 21 *Fed. Reg.* at 807-808.

11 *Id.*

12 9 *Fed. Reg.* at 384.

13 *Id.* at 384.

14 *Id.*

> day]... shall be entitled to an additional allowance of $5 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance."[15]

The language of 28 USC § 1821 remained virtually unchanged, excluding inflation adjustments, until 1988 when it was amended to include the following relevant provisions:

> (a)(1) a witness in attendance...before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
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> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance....[and] for the time necessarily occupied in going to and returning from the place of attendance...
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> (c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel...at the most economical rate reasonably available.
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> (d)(1) A subsistence allowance shall be paid to a witness...when an overnight stay is required...
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> (d)(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.[16]

Today, 28 USC § 1821 is substantially identical to the 1988 provision quoted above, with the exception of an inflation increase in the per diem to $40.

D. Federal Rule of Civil Procedure 26

The FRCP as originally promulgated in 1938 had no provisions for pretrial discovery of an opposing party's expert. Until the adoption of FRCP 26 in 1970, Federal courts tended

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15 28 USC § 1821 (1948). The statute also provided for "actual expenditures of travel" for out-of-state witnesses.

16 28 USC § 1821 (1988).

to restrict expert discovery. The 1970 amendments were generally intended to permit the discovery of experts' opinions.

FRCP 26(b)(4), adopted in 1970, stated that discovery of "facts known and opinions held by experts ... and acquired or developed in anticipation of litigation or for trial" could be obtained by deposition only through a court order.[17] Rule 26(b)(4)(C) stated that:

> 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 subdivision (b)(4)(A)(ii)...and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require...the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.[18]

This approach required the party to proffer a rather sizeable fee in order to obtain discovery from the opposing party's expert. Fees were paid both for time spent by the expert "responding to discovery," and for time spent by the retaining party "in obtaining facts and opinion" from his/her expert.

In 1993 the FRCP were amended to eliminate the provision permitting a court to order payment of "fees and expenses reasonably incurred ... in obtaining facts and opinions" from a testifying expert witness. Since that time, the FRCP, in relevant part, has allowed payment only as follows:

> Unless manifest injustice would result...the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision.[19]

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17 *See* FRCP 26(b)(4) and (b)(4)(A)(ii) (1975).

18 FRCP 26(b)(4)(C) (1970).

19 *See* FRCP 26(b)(4)(C) (2003).

IV. DISCUSSION OF QUESTIONS RAISED BY THE BOARD'S JUNE 20, 2003 ORDER

1. The Commission's Refusal to Adopt the FRCP 26 Provision Granting a Professional Fee to Expert Deponents is Significant

A. What was the prevailing view in the federal district courts for payment of experts for depositions when 10 CFR § 2.740a(h) was enacted in 1962?

The NRC deposition rule was enacted in 1956.[20] At that time, the applicable statute addressing payment of deposition witness fees and costs was 28 USC § 1821. A review of the relevant, albeit scant, caselaw decided prior to 1956 reveals that payment of fees and costs for an expert deponent, if any, was limited to the amount allowed by this statutory provision.

Pre-1956 caselaw primarily addresses the question of taxable costs to a prevailing party at the resolution of a case. In *Banks v. Chicago Mill and Lumber Co.*, for example, the prevailing defendant sought reimbursement for the compensation he paid to his experts, including the cost of their preparation and testimony. The court disallowed the professional fees, but held that the defendant was entitled to "reimbursement for so much of the money paid to [the experts] as represents the statutory fees, mileage, and subsistence to which they would be entitled had they been merely lay witnesses."[21] This holding suggests that a court choosing to award payment for an expert deposition could only do so in accordance with 28 USC § 1821.

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[20] *See* FN 4, above.

[21] 106 F. Supp 234, 237 (E.D. Ark. 1950).

B. What impact, if any, did the 1972 amendments to 10 CFR § 2.740 have upon the payment of experts for depositions in NRC proceedings?

The only published NRC case addressing the issue of payment of expert deponents is *Public Service Co. of Oklahoma Associated Electric Cooperative, Inc. (Black Fox, Units 1 and 2).*[22] In that case, the Board examined the legislative history of the 1972 amendments to 10 CFR § 2.740, and found significant the Commission's decision not to incorporate the Rule 26 fee payment requirement into the NRC regulations. Accordingly, the Board held:

> [t]he witness fees referred to in the NRC subpoena rule, section 2.720, and 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 USC 1821. The Board, therefore, rejects the argument that that reference to witness fees in the above cited NRC rules incorporates by implication the provision for expert witness fees contained in Rule 26(b)(4) of the FRCP.[23]

Although DCS could identify no caselaw on point, it is reasonable to assume that prior to the 1972 amendments to 10 CFR § 2.740, the NRC allowed payments for expert deponents pursuant to 28 USC § 1821, since this was the controlling statutory provision of that era. Accordingly, we believe that the 1972 amendments to 10 CFR § 2.740 had no impact on the NRC's previous position regarding payment of expert deponents in an NRC proceeding.

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22 LBP-77-18, 5 NRC 671 (1977).

23 *Id.* at 673.

C. What effect, if any did the 1970 changes in the FRCP have upon the payment of experts during depositions in the federal court system?

The primary intent of the 1970 changes to FRCP 26 was to relax prior judicial restrictions on discovery of an adversary expert's opinion. Rule 26(b)(4)(A)(ii), as adopted in 1970, permits the discovery – including the taking of depositions – of an expert who is to testify at trial. The rationale of most district court cases prior to 1970 in denying discovery of an expert witness was the "unfairness which would result if a party were permitted by deposition to examine an expert employed by his adversary . . . [thus allowing] the party [to] advance his case at the expense of his opponent."[24] In an attempt to remedy the apparent injustice of "permit[ting] one party to establish his case at his adversary's expense,"[25] pre-1970 decisions would frequently apportion the expert's costs between the retaining and the deposing parties.[26]

The adoption of Rule 26(b)(4)(C)(i) in 1970 provided district courts with guidelines for the conduct and payment of expert discovery. Rule 26(b)(4)(C)(i) requires courts to order a "party seeking discovery [to] pay the expert a reasonable fee for time spent in responding to discovery."[27]

Application of Rule 26 is not straightforward, however. Although this rule has been applied in federal courts since 1970, there is no consensus among – or even within – the circuits on the definition of "a reasonable fee." In general, a reasonable hourly fee has been permitted for the time a deponent spends in a deposition. The reasonableness of an hourly fee is based upon a number of factors, such as: (1) the expert's area of expertise; (2) the

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24 *Dresser Industries, Inc. v. Doyle*, 40 F.R.D. 478, 479 (N.D. Ill. 1966); *see also Henlopen Hotel Corp. v. Aetna Ins. Co.*, 33 F.R.D. 306, 308, n.6 (D. Del. 1963); *Lewis v. United Airlines Transport Corp.*, 32 F. Supp 21, 23 (W.D. Penn. 1940).

25 *Henlopen*, 33 FRP at 308, n.6.

26 *See, e.g., id*; *Dresser*, 40 F.R.D. at 479; *Connell v. Biltmore Security Life Ins. Co.*, 41 F.R.D. 136, 137 (D.S.C. 1966).

27 FRCP 26(b)(4)(C)(i) (1970).

expert's necessary education and training; (3) the prevailing rates of comparable expert witnesses; (4) the nature, quality, and complexity of the discovery provided; (5) the cost of living in the relevant community; (6) the rate actually charged by the expert; and (7) any other factor likely to assist the court.[28]

The various courts disagree, however, as to whether an expert deponent should be paid an hourly fee by the deposing party for the time spent preparing for a deposition.[29] Likewise, there is no consensus as to whether Rule 26(b)(4)(C) requires the payment of fees for time spent traveling to and from the deposition, and the expenses incurred during travel.[30]

D. How, if at all, did these amendments to the Federal Rules influence the Commission's decision to amend 10 CFR § 2.740 in 1972?

As discussed above, the Commission adapted the new FRCP 26 for NRC proceedings because it "provid[ed] for production of documents, serving of interrogatories and taking of depositions without the necessity of motions and orders by the presiding officer or the

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28 *New York v. Solvent Chemical Co.*, 210 F.R.D. 462, 468 (W.D.N.Y. 2002), *citing Goldwater v. Postmaster General*, 136 F.R.D., 337, 340 (D. Conn. 1991); *see also Royal Maccabees Life Ins. Co. v. Malachinski*, 2000 WL 1377111 at *5 (N.D. Ill. 2000).

29 *See, e.g., Equal Employment Opportunity Comm. V. Johnson and Higgins, Inc.*, 1999 WL 32909 at 1 (awarding expert witness fees for time spent preparing for deposition but reducing the number of hours claimed); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 647 (E.D.N.Y. 1997) (allowing fees for "time spent by an expert preparing for deposition, but not for the time the expert spent preparing the attorney who retained him"); Compare *M.T. McBrian, Inc. v. Liebert Corp.*, 173 F.R.D. 491, 493 (N.D. Ill. 1997) (holding that Rule 26(b)(4)(C) "does not require the party deposing an expert witness to bear the expense of that expert's deposition preparation time, unless it involves a complex case in which there has been a considerable lapse of time between an expert's work on the case and the date of his actual deposition"); *see also Benjamin v. Gloz*, 130 F.R.D. 455 (D.C. Colo. 1990) (time spent by an expert preparing for deposition not compensable).

30 *Compare, Fleming v. United States*, 205 F.R.D. 188, 189-90 (holding that defendant need not pay travel costs to plaintiff's expert who traveled to plaintiff's counsel's office for deposition); *Slywka v. CMI-Equipment & Engineering, Inc.* 1997 WL 129378, *1 (M.D. PA 1997) (holding that plaintiff who retained out-of-state expert not entitled to travel expenses for that expert's deposition) *with New York v. Solvent Chemical Co.*, 210 F.R.D. 462, 472 (W.D. N.Y. 2002) (holding that reasonable expenses incurred during an expert deponent's travel to and from the deposition are compensable).

Commission."[31] Those provisions of FRCP 26 which the NRC wanted to incorporate into its regulations are now contained, in whole or in part, in Section 2.740 of the NRC regulations.

The new FRCP 26(b)(4)(C) required a party deposing an expert witness to pay professional fees to that expert. The Commission surely considered this option, and purposely declined to adopt the provision in the 1972 amendments to Part 2. Indeed, the new Section 2.740 incorporated all but two of the provisions of the new Rule 26. Only the material contained in two subsections: 26(b)(2) relating to "Insurance Agreements," and 26(b)(4) relating to "Trial Preparation Experts," was omitted from the Commission's new 10 CFR Part 2. As such, the Commission's refusal to incorporate the new FRCP subsection requiring a deposing party to pay a "reasonable fee" to an expert deponent speaks loudly to its intentions at the time.

This refusal to import the expert witness fee provision was plainly not accidental. It should be assumed that the Commission studied the new FRCP 26 in its entirety, and deliberately chose those provisions which it wanted to incorporate into NRC regulations, and omitted those which it did not believe were appropriate for use in NRC proceedings.

2. There Should Be No Difference in Fee Payment for Deponents Summoned by Notice and Those Summoned by Subpoena

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

As discussed above in Section II, the NRC regulatory provisions for subpoenas and for depositions were promulgated at the same time, without comment, in 1956. At that time the Commission regulations allowed a deponent to be summoned either by a notice of deposition[32] or by subpoena.[33]

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31 37 *Fed. Reg.* at 9331, 9332 (May 9, 1972).

32 *See* 10 CFR §§ 2.745(a) and (b) (1956) ("Upon application and good cause shown, the designated presiding officer...may order that the testimony of any person, including a party,

10 CFR § 2.720,[34] governing the issuance of subpoenas, was presumably based upon FRCP 45, which was in effect at that time.[35] This is evidenced by the identical language of the two provisions: Section 2.720 required a subpoena to be accompanied by "the fees for one day's attendance and the mileage allowed by law."[36] Likewise, Rule 45 provides for payment by a deposing party of "the fees for one day's attendance and mileage allowed by law."[37]

Importantly, the FRCP Advisory Committee Notes for the 1937 adoption explain that the fees referred to in Rule 45 are those provided for in 28 USC § 1821.[38] Accordingly, a witness summoned to a deposition by subpoena was entitled to fees and costs as provided for in 28 USC § 1821.

Equity - and logic - dictate that the fees and costs paid to a deponent should be the same regardless of the procedural method used to provide for his/her attendance. Accordingly, a witness summoned to a deposition by notice should also be entitled to fees and costs per Section 1821.

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be taken by deposition...the application...shall be served upon the parties and filed, giving reasonable notice of the proposed time and place for taking the deposition, the name and address of each person to be examined...and the reasons why such deposition should be taken."

33 *See* 10 CFR § 2.745(a) (1956) ("The attendance of witnesses [at a deposition] may be compelled by the use of a subpena").

34 This provision was designated as 10 CFR § 2.744 in 1956.

35 FRCP 45 was adopted in 1937. *See* Advisory Committee Notes to Rule 45. As noted above, there was no equivalent FRCP in effect at the time dealing with depositions.

36 10 CFR § 2.744(c) (1956).

37 FRCP 45(b)(1).

38 FRCP Advisory Committee notes to Rule 45 (1937 Adoption).

3. The NRC Subpoena Rule and NRC Deposition Rule Can Both be Used to Require the Presence of a Deponent, and Therefore Should be Read in Tandem

A. 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")?

As discussed above in DCS' response to question 2A, the NRC subpoena regulation was likely modeled after the applicable FRCP. However, in 1956, FRCP 26 regarding payment to expert deponents did not yet exist. As such, there was no federal rule on which to model the NRC regulation. Because Part 2 was promulgated without comment by the Commission, it is unclear why it used different language in the subpoena and deposition regulations. However, the exact language of the deposition and subpoena regulation is not as significant as the fact that the two procedural schemes were, to some extent, envisioned for the same purpose. That is, a witness could be summoned to a deposition via subpoena per Section 2.720, or via notice per Section 2.744 (now 2.740a). And, since the subpoena regulation clearly references the fee provisions of 28 USC § 1821,[39] so too must the deposition regulation.

[39] *Id.*

4. 5 USC § 504 Note Prohibits Use of Funds From EWDAAs for Payment of Intervenor Expenses

A. 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?

5 USC § 504, the Equal Access to Justice Act ("EAJA"), awards expenses to prevailing parties, including intervenors, in adversarial adjudicatory proceedings. A statutory note within the EAJA, however, expressly prohibits the use of funds from EWDAAs[40] "to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts."[41]

This statutory prohibition on intervenor funding first appeared in the 1981 EWDAA. In 1983, the NRC General Counsel asked the Comptroller General of the United States to resolve the question of whether the EWDAA precludes the agency from distributing funds to an intervenor who would otherwise be entitled to an award of costs under the EAJA.[42]

The Comptroller General found that "[t]he plain terms of [the EWDAA] ...unambiguously prohibit the use of appropriated funds for payments of any kind to intervenors. EAJA payments would constitute a form of compensation to intervenors and are

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40 EWDAA appropriates funds to, among other agencies, the NRC to carry out its responsibilities under the Energy Reorganization Act of 1974 and the Atomic Energy Act.

41 *See e.g.,* Energy and Water Development Appropriations Act 1982, Pub. L. 97-88, § 502, 95 Stat. 1135 (1981) (this prohibitionary language is contained in some but not all of the EWDAAs, but has continuous applicability because the original language in the EWDAA of 1981 refers to "the funds in this Act *or subsequent* Energy and Water Development Appropriations Acts...") (emphasis added).

42 62 Comp. Gen. 692, 693-694 (1983).

therefore within the scope of the prohibition."[43] The Comptroller General also noted that "it is a well-settled principle of statutory construction that specific terms covering a given subject matter will prevail over general language of the same or another statute which might otherwise apply."[44] The Comptroller General explained that the EAJA is a general statute, because it generally authorizes fee and expense awards to prevailing parties in relevant proceedings. In comparison, 5 USC § 504 note is the more specific provision because "it concerns only payments to intervenors in NRC proceedings funded under [EWDAA]."[45] Therefore, the specific language prohibiting payment of funds to intervenors overrides the broader provisions in 5 USC § 504.[46] And, similarly, the specific EWDAA statutory language prohibiting payment of funds to intervenors overrides the broad provisions of 10 CFR § 2.740a(h).

The D.C. Circuit has upheld the Comptroller General's interpretation. In *Business and Professional People for the Public Interest v. NRC*, intervenors appealed an NRC rejection of their EAJA application for fees and expenses, claiming that the proceeding had not been completely funded by the 1982 EWDAA.[47] In its petition, the intervenors requested funds only from those portions of the proceedings that were not funded by the 1982 EWDAA.[48] The D.C. Circuit denied the funds, holding that the NRC was prohibited from compensating an intervenor's involvement in any part of a proceeding that was even partially

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43 *Id.* at 695.

44 *Id.*

45 *Id.*

46 *Id.*

47 *See Business and Professional People for the Public Interest v. Nuclear Regulatory Commission*, 793 F.2d 1366 (D.C. Cir. 1986).

48 *Id.* at 1367.

funded by the EWDAA[49]:

> We affirm the Commission's decision. First, the language of the statute supports that interpretation. It does not bar funds to intervenors only with respect to *those portions of proceedings* funded in the Act, or only in proceedings funded *entirely by* the Act. It prohibits awards to intervenors in proceedings funded in the Act.[50]

Because GANE is an intervening party in an NRC adjudicatory proceeding funded by EWDAA, the NRC is barred by the 5 USC § 504 statutory note from reimbursing GANE for any fees incurred by its expert in a deposition:

> **B. As a contractor for the Department of Energy, does this provision apply to DCS as well?**

The EWDAAs provide the funds that DOE is expending – through its contractor DCS – for construction and operation of the MOX Facility.[51] Under the MOX Contract, DOE reimburses DCS for its costs in obtaining construction authorization for the MOX Facility.

The 5 USC § 504 note prohibits the use of funds from EWDAA "to pay the expenses of, or otherwise compensate, parties intervening in regulatory and adjudicatory proceedings funded in such Acts." As such, no DOE Funds may be used to "pay the expenses of, or otherwise compensate" GANE in this proceeding.[52]

Because DCS is a DOE contractor, funded by DOE through the EWDAAs, it as well

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49 *Id.* at 1368.

50 *Id.* at 1367 (emphasis in original).

51 In addition, NRC is funding the MOX Facility Construction Authorization hearing via funds provided by the EWDAA.

52 Indeed the Comptroller General has spoken to this issue: "our comments apply to any agency in any fiscal year in which it is subject to a prohibition" like that found in 5 USC § 504 note. 62 Comp. Gen. at 694-95.

cannot be obligated to pay any intervenor expenses in this proceeding.[53] With respect to the prohibition in Section 504 note as it may apply to DCS' obligation to pay $40 per diem and reasonable travel expenses, the Board need not decide this issue, since DCS has already agreed to pay these costs to Dr. Long, and will do so voluntarily out of funds that will not be reimbursed by DOE. DCS reserves all of its rights to contest the payment of the $40 per diem and reasonable travel expenses for other intervenor experts should the issue arise in the future.[54]

C. 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?

Pursuant to the language of 5 U.S.C. § 504 note, and the decision of the Comptroller General, the NRC is strictly prohibited from using EWDAA funds to compensate in any way, an intervenor in an adjudicatory proceeding funded by the EWDAA. Therefore, even if the NRC staff is a party, seeking discovery of an intervenor's witness, it cannot pay for expenses or fees incurred by the intervenor as a result of discovery because that contravenes the plain language of the prohibition.

D. 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?

10 CFR § 2.740a(j) states that: "[t]he provisions of paragraphs (a) through (i) of this section are not applicable to NRC personnel." "NRC personnel" is defined in Part 2 to

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53 DCS adheres to its position that there is no obligation under NRC regulations to pay an intervenor's expert professional fees, without regard to the language of Section 504 note.

54 DCS does not anticipate this issue arising again in this proceeding, since the only remaining GANE expert to be deposed is Dr. Lyman on Contention 6, and we understand that Dr. Lyman is working on a pro bono basis.

include "persons acting in the capacity of consultants to the Commission, regardless of the form of the contractual arrangements under which such persons act as consultants to the Commission."[55] Accordingly, an intervenor seeking discovery of an NRC outside expert is not subject to the fee requirement of 10 CFR § 2.740a(h).

5. FRCP 26 Requires Consideration of Indigency Under a Manifest Injustice Standard

A. 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?

If, as GANE urges, the Board should decide that 10 CFR § 2.740a(h) refers to FRCP 26(b)(4)(C), then all aspects of that provision, including the "manifest injustice" standard and the attendant case-by-case consideration of indigency, would presumably apply. DCS does not advocate that the NRC take on the burden of making such determinations.

V. OTHER MATTERS THE BOARD SHOULD CONSIDER

A. Administrative Efficiency Warrants Adherence to the Simple Calculation Provided by 28 USC § 1821

28 USC § 1821 requires a deposing party to pay the witness $40 per day plus his/her reasonable costs of travel. There is little room for dispute regarding this provision, since the per diem is clearly stated and all allowable costs are defined in detail by the provisions of the General Services Administration schedules.[56] The administration of fees under Rule 26(b)(4)(C), however, is substantially more complicated. Courts generally agree that the

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[55] 10 CFR § 2.4.

[56] 28 USC § 1821(d)(2).

Rule allows payment of a "reasonable hourly fee" to the expert deponent for the time spent in a deposition. Caselaw shows, however, that the consensus ends there. As discussed above, in Section IV.1.C, parties frequently disagree on issues such as the definition of a "reasonable" fee; the question of whether time spent preparing for a deposition is allowable (and if so, how much time was reasonably spent); and the question of whether travel expenses are allowable.

Because most of the witnesses before the NRC are experts testifying about scientific and technical matters, a reliance upon the subjective "reasonable fees" standards of Rule 26 would risk creating an entire subgenre of litigation. Inevitably, licensing boards would be called upon to arbitrate the reasonableness of an expert's actions and fees. DCS does not believe that it is in NRC's interest to bear the burden of making these determinations.

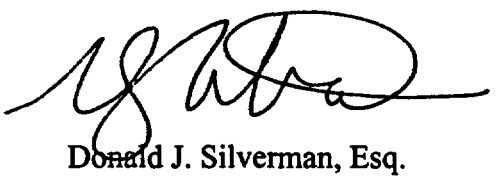
VI. CONCLUSION

The Commission declined to adopt the requirements of FRCP 26(b)(4)(C), which requires the payment of an hourly professional fee to expert deponents. Instead, 10 CFR § 2.740a(h) provides for the payment of a per diem and reasonable travel costs for an expert deponent in an NRC adjudicatory proceeding, pursuant to the provisions of 28 USC § 1821.

NRC and DOE are prohibited from paying any intervenor fees, costs, or expenses, including those provided for in 10 CFR § 2.740a(h), by the express terms of 5 USC § 504 note. DCS, as a DOE contractor, is likewise barred from expending any funds received from DOE pursuant to the MOX Contract to pay any intervenor fees, costs, or expenses. Nevertheless, DCS has agreed to honor its previous promise, and will pay the $40 per diem and reasonable travel expenses of Dr. Long for his deposition of June 25-26, 2003, without prejudice to DCS' rights to assert it is not obligated to pay such costs for future expert witnesses. Thus the Board need not decide this issue.

For the foregoing reasons, DCS respectfully requests that the Commission issue an order in this proceeding holding that DCS is not required to pay an hourly professional fee to Dr. Long under the provisions of 10 CFR § 2.740a(h).

Respectfully submitted,



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June 30, 2003

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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

In the Matter of	)	June 30, 2003
DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	ASLBP No. 01-790-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Brief of Duke Cogema Stone & Webster in Response to the Board's Order Regarding Payment of Expert Deposition Fees" were served this day, by electronic and regular mail, upon the persons listed below:

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