

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

DOCKETED
USNRC

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

July 15, 2003 (3:07PM)
OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	July 8, 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 SECOND ORDER REGARDING
PAYMENT OF EXPERT DEPOSITION FEES**

Provided below is Duke Cogema Stone & Webster's ("DCS") response to the above-referenced Order dated July 3, 2003.

5 USC § 504 note plainly prohibits the use of funds from the Energy and Water Development Appropriations Act ("EWDAAs") "to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts."¹ The NRC Staff and GANE agree that this statutory prohibition precludes payment of

¹ See e.g., Energy and Water Development Appropriations Act 1982, Pub. L. 97-88, § 502, 95 Stat. 1135 (1981) (this prohibitory language is contained in some but not all of the EWDAAs, but has continuous applicability because the language of the 1981 EWDAAs refers to "the funds in this Act or subsequent Energy and Water Development Appropriations Acts...") (emphasis added).

EDWAA funds to an intervenor,² but argue that it does not preclude payment of those same funds to an intervenor's expert.³ This argument violates both the letter and the spirit of the Section 504 prohibition, and has been expressly rejected by the Controller General of the United States, and the D.C. Circuit Court of Appeals.

In a 1983 opinion regarding payment of attorney's fees, written in response to questions by the NRC General Counsel, the Comptroller General held that "the plain terms of [EWDA]... unambiguously prohibit the use of appropriated funds for payments of any kind to intervenors."⁴ Accordingly, the Comptroller General concluded that money from the EWDA could not be used to pay a prevailing intervenor any costs otherwise authorized by the Equal Access to Justice Act ("EAJA"), including "attorney fees, expert witness fees, and other costs."⁵ This decision was upheld in *Business and Professional People for the Public Interest v. NRC*,⁶ in which the D.C. Circuit denied payment of attorney's fees and expenses to an intervenor in a proceeding funded by EWDA.

There is no legal distinction between attorney's fees and expert witness fees in this context, and indeed the Comptroller General's opinion broadly addresses both. In either case, although the payment of money is ultimately received by a professional retained by the intervenor and not the intervenor itself, such payment serves to defray the costs which would

² NRC Staff's Response to ASLB Order Instructing All Parties to Address Questions Regarding Payment of Expert Witness Fees, at 6 (June 30, 2003) ("NRC Staff Brief"); Georgians Against Nuclear Energy's Brief in Support of Motion for Protective Order and Request to Quash Deposition of Dr. Leland Timothy Long, at 13-14 (June 30, 2003) ("GANE Brief").

³ NRC Staff Brief at 6-7; GANE Brief at 11-12.

⁴ Availability of Funds for Payment of Intervenor Attorney Fees – Nuclear Regulatory Commission, 62 Comp. Gen. 692, 695 (1983) (emphasis added).

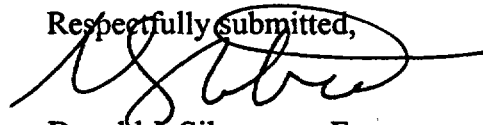
⁵ *Id.* at 692-93.

⁶ 793 F.2d 1366, 1367 (D.C. Cir. 1986).

otherwise be borne by the intervenor, in direct contravention of the statutory language. Indeed, GANE acknowledges that it is ultimately responsible for the payment of fees to Dr. Long⁷ As such, GANE's attempt to circumvent the Section 504 prohibition by requesting that the check be addressed to Dr. Long rather than to GANE is disingenuous. In either case, as GANE readily concedes, the payment of expert fees would be used to defray the intervenor's litigation costs.

Because GANE is an intervening party in an NRC adjudicatory proceeding funded by EWDA, the NRC is barred by the 5 USC § 504 statutory note from reimbursing GANE for any fees incurred by its expert in a deposition. Likewise, Section 504 note prohibits the use of DOE funds to reimburse GANE for any fees incurred by its expert in a deposition.⁸

Respectfully Submitted,



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July 8, 2003

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⁷ GANE Brief at 15, n.13.

⁸ 62 Comp. Gen. at 694 ("the same appropriations act includes a similar prohibition applicable to the Department of Energy").

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Brief of Duke Cogema Stone & Webster in Response to the Board's Second 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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