

RAS 6828

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

DOCKETED  
USNRC

September 17, 2003 (10:13AM)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

In the Matter of

DUKE COGEMA STONE & WEBSTER

(Savannah River Mixed Oxide Fuel  
Fabrication Facility)

September 11, 2003

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

DCS RESPONSE TO  
GANE'S MOTION FOR CLARIFICATION AND/OR  
PARTIAL RECONSIDERATION OF LBP-03-14

I. INTRODUCTION

Duke Cogema Stone & Webster ("DCS") files this response to Georgians Against Nuclear Energy's ("GANE") Motion of September 8, 2003 seeking clarification or partial reconsideration of LBP-03-14, Memorandum and Order (Ruling on Expert Witness Fee Issue). In its Motion, "GANE asks the Board to clarify and reconsider the scope of LBP-03-14 and order that Dr. Long must be compensated for (a) time spent traveling to and from the deposition; (b) reasonable out-of-pocket expenses associated with travel, lodging and meals; and (c) time spent reviewing and correcting the transcript of his deposition."<sup>1</sup>

<sup>1</sup> Georgians Against Nuclear Energy's Motion For Clarification And/Or Partial Reconsideration Of LBP-03-14, at 1-2 (Sept. 8, 2003).

DCS does not believe that LBP-03-14 addresses the first or third of GANE's requests, and the case law does not provide a bright line test for either issue. In fact, District Court cases can be found to support arguments for or against expert fees for travel time and transcript review time. However, the facts in this case demonstrate that Dr. Long should not be paid for his time for either. As for the second of GANE's requests, DCS previously agreed to pay for Dr. Long's reasonable (and actual) out-of-pocket expenses associated with travel, lodging and meals, so the Board need not address this issue.

## II. ANALYSIS

### A. Dr. Long's Fees for Time Traveling to and From the Deposition Should Not Be Compensable

The Board's Order (LBP-03-14) appears to be limited to preparation for and attendance at the deposition itself. Therefore, LBP-03-14 does not explicitly address the issue of Dr. Long's time spent traveling to and from the deposition, which GANE has stated would be some unspecified number of hours at \$100/hour. GANE cites three cases in support of its argument that an expert's travel time is compensable.<sup>2</sup> Each of those cases shows that a court has discretion to award an hourly fee for travel time under the Federal Rules of Civil Procedure. None of the cases holds that such fees must be compensable.<sup>3</sup> Indeed, other cases not cited by GANE demonstrate that a court has

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<sup>2</sup> *Id.* at 3.

<sup>3</sup> In *Haarhuis v. Kunnan Enterprises, Ltd.*, 177 F.3d 1007, 1015-16 (D.C.Cir. 1999), the case most relied upon by GANE, the Court of Appeals did not state that travel time must be reimbursed, but instead held that the District Court did not abuse its discretion by ordering the deposing party in that case to pay for an expert's travel time.

discretion not to award such costs.<sup>4</sup> Thus, the question is not whether 10 CFR § 2.740a(h) requires payment of such fees in all cases, but whether such fees should be paid to Dr. Long in this case.

The facts of this case are such that the Board should not award such costs. First, in our view, DCS should not be paying for Dr. Long's time travelling if he is not also preparing for the deposition during that time. Dr. Long stated during his deposition that he only spent four hours preparing for the deposition the day before the deposition.<sup>5</sup> It follows that he was not also preparing for the deposition while traveling to the deposition.

Second, the timing of GANE's June 17th Motion essentially prevented DCS from holding the deposition at a location that would have prevented Dr. Long from traveling.<sup>6</sup> DCS noticed the deposition of Dr. Long on May 21, 2003, more than a month before the planned deposition on June 25, 2003.<sup>7</sup> GANE waited until June 17th—practically four weeks later, and one week before the deposition—to file its Motion requesting payment of Dr. Long's expert fees. By June 17, DCS's consultants had already made their travel arrangements. Had GANE filed its Motion earlier, DCS could have held the deposition in Atlanta, eliminating Dr. Long's travel time. Thus, it seems inequitable for GANE to file a Motion one week before the deposition, and then ask for travel time for its expert

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<sup>4</sup> See e.g., *Fleming v. United States*, 205 F.R.D. 188, 189-190 (W.D.Va. 2000) (choosing not to require deposing party to pay deponents travel expenses which included "billable time spent traveling, mileage, two nights of hotel accommodations, and meals"); *Rosenblum v. Warner & Sons, Inc.* 148 F.R.D. 237 (N.D. Ind. 1993) (choosing not to require deposing party to pay deponents travel time).

<sup>5</sup> Deposition Transcript of Dr. Leland Timothy Long, at 137:2 (June 25, 2003).

<sup>6</sup> See Georgians Against Nuclear Energy's Motion for Protective Order and Request to Quash Deposition (June 17, 2003).

<sup>7</sup> Duke Cogema Stone & Webster Notice of Deposition (May 21, 2003).

when it was impracticable for DCS to change the venue of the deposition at that time.

DCS notes that GANE counsel would have incurred her own travel fees and expenses had the deposition been held in Atlanta, and that such fees would not have been reimbursable.

Finally, Dr. Long's travel time is not primarily within the control of DCS, unlike the duration of the questioning during the deposition itself. For example, Dr. Long could choose a connecting rather than a direct flight, and bad weather or mechanical delays could have kept Dr. Long stranded for hours or even overnight at his departing or connecting airport.

Each of the aforementioned reasons weighs in favor of not requiring DCS to pay Dr. Long's \$100/hour expert fee for travel time.

**B. The Issue of Reasonable Travel Expenses Is Moot**

DCS previously agreed to reimburse GANE for Dr. Long's reasonable and actual travel expenses, such as airfare, hotel, meals and transportation, so long as Dr. Long provides appropriate receipts.<sup>8</sup> DCS is at a loss as to why GANE has sought a Board decision on this matter. The Board need not address this issue because it is moot.

**C. Dr. Long's Time Spent Reviewing and Correcting the Deposition Transcript is Not Compensable**

LBP-03-14 also does not explicitly address the issue of Dr. Long's time spent examining and signing his deposition transcript. There are three reasons why the Board should deny GANE's request for these fees. First, the Board need not entertain GANE's request to rule on this issue because GANE failed to raise it in prior pleadings. GANE's argument is not "an elaboration upon, [or] refinement of, arguments previously

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<sup>8</sup> See Duke Cogema Stone & Webster's Response to Georgians Against Nuclear Energy's Motion for Protective Order and Request to Quash Deposition at 3 (June 18, 2003).

advanced" which GANE states is the standard for reconsideration of LBP-03-14.<sup>2</sup>

Rather, it is for an entirely new set of fees for an entirely distinct and optional task.

The second reason to reject this request is that GANE is simply wrong that NRC regulations require an expert to review and correct his deposition transcript. GANE states that Dr. Long should be reimbursed for his time reviewing and correcting the deposition transcript because "Dr. Long had no choice but to perform the work" and because he "was legally required by NRC regulations" to do so.<sup>10</sup>

GANE is not correct. 10 CFR § 2.740a(e) states that the transcript "shall be submitted to the deponent for examination and signature unless he is ill or cannot be found or refuses to sign." The plain language of this regulation simply requires that the transcript be submitted to Dr. Long. The "examination and signature" language is optional since the deponent can refuse to sign the transcript. Moreover, it is disingenuous for GANE to argue that 10 CFR § 2.740a(e) requires review and correction of a transcript, when Ms. Glenn Carroll did not review or sign her deposition transcript when it was submitted to her.<sup>11</sup>

Finally, while GANE is not aware of any case law directly addressing this issue, DCS identified two such District Court cases. In the most recent of the two, a District Court held that the deposing party was not required to pay for the deponent's review of

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<sup>2</sup> Georgians Against Nuclear Energy's Motion For Clarification And/Or Partial Reconsideration Of LBP-03-14, at 2 (citations omitted).

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Haarhuis* lacks any discussion of reimbursement of the expert's fee for reviewing the deposition transcript. See 177 F.3d at 1015-16. In addition, DCS notes that in District Courts, experts pay for their own copies of deposition transcripts. See *Mathis v. NYNEX*, 16 F.R.D. 23, 26 (E.D.N.Y. 1996).

his deposition transcript.<sup>12</sup> That court provided a detailed rationale for its ruling,

including that review of a deposition transcript is not mandatory, and that:

if the party seeking the deposition were always required to pay for the time spent by the deponents reviewing and making changes to the deposition transcript, expert witnesses would be encouraged to request the right to review the transcript in every deposition . . .<sup>13</sup>

In an earlier case, a District Court ruled before the deposition was held that time incurred reviewing and signing the transcript was compensable, but provided no rationale for its decision.<sup>14</sup>

The time spent examining a deposition transcript is solely within the control of the deponent. If the deposing party is required to pay for an expert's time, an expert can not only choose to review and correct the transcript, but will have no incentive to review it in an efficient manner, because he will know that he will be paid in full for his time. With a liberal reading of the term "correcting," the expert can even prepare his own errata sheets, thereby saving his party's law firm from incurring those otherwise non-reimbursable costs. The same equitable rationale supporting a decision that DCS pay for Dr. Long's fee for attending the deposition—that DCS is in control of its length—militates against DCS paying for transcript review time.

In fact, Dr. Long did much more than examine and sign his deposition transcript. As Dr. Long's errata sheets indicate, he made substantive changes to his testimony rather

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<sup>12</sup> *Patterson Farm, Inc. v. City of Britton*, 22 F.Supp.2d 1085 (D.S.D. 1998).

<sup>13</sup> *Id.* at 1096.

<sup>14</sup> *McNerney v. Archer Daniels Midland Co.*, 164 F.R.D. 584, 587 (W.D.N.Y. 1995).

than simply correcting the transcript to reflect the testimony actually given.<sup>15</sup> For example, the list of reasons for changing the transcript identified in Dr. Long's errata sheets includes "clarification[s]," "grammatical correction[s]" and "grammatical clarification[s]," and deletion of words as "redundant." Dr. Long even corrected the text of questions posed to him during the deposition. He also deleted almost entire sentences as "incorrect transcription" when it is highly unlikely that whole sentences were incorrect. The spirit of Dr. Long's changes demonstrate that he was interested in producing a transcript that was pleasant to read rather than a transcript that reflected what was actually said during the deposition. These types of changes are not required by any applicable regulation or Board Order. DCS should not be required to pay for these, or any other changes.

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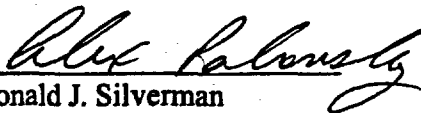
<sup>15</sup> At least some courts agree that "a deposition is not a take home examination." *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D.La. 1992); accord *Rio v. Welch*, 856 F. Supp. 1499 (D. Kan. 1994). The errata sheets were included in Appendix G to DCS's Motion for Summary Disposition on Contention 3 (August 22, 2003).

### III. CONCLUSION

DCS respectfully requests that the Board grant GANE's Motion but only to clarify the issue of Dr. Long's hourly fee for his travel time. As for the merits of Dr. Long's fee for travel time, DCS requests that the Board rule that those fees are not compensable in this case. The Board should deny the remainder of the Motion because it is moot (travel expenses) and because GANE can not now raise an issue (transcript review time) that it did not raise in prior pleadings. If the Board grants the Motion on the issue of transcript review time, DCS requests that the Board deny GANE's request that DCS pay those fees.

Dated: September 11, 2003

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of "DCS Response To GANE's Motion For Clarification And/Or Partial Reconsideration Of LBP-03-14," dated September 11, 2003 were served this day upon the persons listed below, by e-mail and first class mail.

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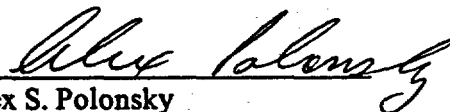
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9-11-03  
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