

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

INTRODUCTION

The NRC Staff (Staff) files this response to Georgians Against Nuclear Energy's (GANE) motion seeking clarification or reconsideration¹ of LBP-03-14,² the Atomic Safety and Licensing Board's (Board) decision regarding payment of expert witness fees. The Board, in its Ruling on Expert Witness Fee Issue, ordered Duke Cogema Stone & Webster (DCS) to pay Dr. Timothy Leland Long, GANE's expert witness on its Contention 3 (seismic issues), an expert witness fee for his reasonable preparation time and time attending the deposition conducted by DCS on June 25 and June 26, 2003. GANE's Motion requests that the Board also order DCS to pay Dr. Long for his travel time, reasonable travel expenses, and time spent reviewing and correcting his deposition transcript. As discussed below, the Staff supports GANE's request for clarification of the issue of compensation for travel time and opposes the remainder of GANE's Motion.

¹ See [GANE]'s Motion for Clarification and/or Partial Reconsideration of LBP-03-14 (GANE Motion) (September 8, 2003).

² LBP-03-14, Memorandum and Order (Ruling on Expert Witness Fee Issue), (Aug. 28, 2003).

BACKGROUND

On June 17, 2003, GANE filed a Motion for Protective Order and Request to Quash Deposition (GANE Motion to Quash), and DCS responded on June 18, 2003.³ GANE sought to quash DCS's deposition of Dr. Long unless DCS agreed to pay his reasonable expert fees.⁴ The Board refused to quash the deposition and ordered all parties to fully brief the issue, instructing the parties to address several specific questions regarding payment of expert witness fees.⁵ On June 25 and June 26, 2003, the deposition of Dr. Long took place at the offices of DCS's counsel. On June 30 all parties filed responses briefing the issue of expert witness fees as requested by the Board in its Order of June 20.⁶ The Board resolved this issue in its Ruling on Expert Witness Fee Issue, which is the subject of GANE's Motion.

ANALYSIS

1. Dr. Long's Travel Time

In previous pleadings, GANE included time spent traveling to and from the deposition in the list of expenses for which it believed DCS should compensate Dr. Long.⁷ The Board's Ruling on Expert Witness Fee Issue does not specifically grant or deny this request. However, it could be inferred from the Board's Order that it intended to include time spent traveling within the scope of expenses that DCS must pay. The Board explicitly holds that "the 10 C.F.R. § 2.740a(h) reference

³See [DCS]'s Response to [GANE]'s Motion for Protective Order and Request to Quash Deposition (June 18, 2003).

⁴GANE Motion to Quash at 1.

⁵See Licensing Board Order (June 20, 2003) (unpublished).

⁶See [GANE]'s Brief in Support of Motion for Protective Order and Request to Quash Deposition of Dr. Timothy Leland Long (GANE Brief) (June 30, 2003); Brief of [DCS] in Response to the Board's Order Regarding Payment of Expert Deposition Fees (DCS Brief) (June 30, 2003); NRC Staff's Response to ASLB Order Instructing All Parties to Address Questions Regarding Payment of Expert Witness Fees (June 30, 2003).

⁷GANE Motion to Quash at 4, GANE Brief at 9.

to ‘the same fees as are paid for like services in the district courts’ necessarily incorporates the provision for expert witness fees contained in Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure.”⁸ The Board goes on to hold that DCS must pay Dr. Long his reasonable fee, and in determining what fees are paid in district courts under Rule 26(b)(4)(C) the Board looks to *Haarhuis v. Kunnan Enter.*⁹ The court in *Haarhuis* upheld a decision that the expert witness should be paid “portal-to-portal” by the party deposing the witness.¹⁰ The *Haarhuis* decision explicitly included time spent traveling to and returning from the deposition.¹¹ While the Board did not specifically address compensation for travel time in its Ruling on Expert Witness Issues, its citation of *Haarhuis* without qualification would seem to indicate the Board’s intention to follow the holding in that case. DCS, however, argues for the opposite result, citing cases where district courts have declined to impose travel costs on the party deposing an expert witness.¹² Since the parties disagree on the inference to be drawn from the Ruling on Expert Witness Fee Issue regarding compensation for travel time,

⁸Ruling on Expert Witness Fee Issue at 2.

⁹177 F.3d 1007, 1015-1016 (D.C. Cir. 1999)

¹⁰*Id.* at 1016.

¹¹*Id.* at 1015.

¹²DCS cites *Fleming v. United States*, 205 F.R.D. 188, 189-190 (W.D.Va. 2000) and *Rosenblum v. Warner & Sons, Inc.*, 148 F.R.D. 237 (N.D.Ind. 1993). The Staff notes neither of these cases would conflict with a Board decision that DCS must compensate Dr. Long for his travel time, and if the Board intended that travel time be included under its Ruling on Expert Witness Fee Issue, these cases should not necessitate reconsideration of that decision. Neither case finds any bar to charging the deposing party for travel time, only that it is permissible for a court to refuse to do so. Also, in each of the cases there were extenuating circumstances. In *Fleming* the deponent traveled for the convenience of the party who had hired him, not for the convenience of the party deposing him. In fact, the court noted that if the deponent had been brought to the office of the party deposing him, it would seem logical for that party to bear the expenses. 205 F.R.D. at 189-190. In *Rosenblum* the court found it inappropriate for the deposing party to pay an expert witness for travel time because of the short distance he had to travel and because of the witness’s failure to submit a sufficiently detailed bill. 148 F.R.D. at 241.

the Board should grant GANE's motion and clarify whether payment for Dr. Long's travel time is within the scope of that order.

2. Dr. Long's Reasonable Out-of-Pocket Expenses Associated with Travel

DCS has already agreed to pay Dr. Long's reasonable and actual travel expenses, including airfare, transportation, meals, and hotel.¹³ This issue is moot, and it is unnecessary for the Board to address it. Thus, the Board should deny GANE's Motion with respect to this issue.

3. Dr. Long's Time Spent Reviewing and Correcting the Deposition Transcript

On this issue GANE is not simply requesting that the Board clarify its previous order. Instead, GANE asks that the Board consider an issue that was not raised in previous pleadings. In discussing the standard for reconsideration, the Commission has stated that "reconsideration motions are 'an opportunity to request correction of [an] error by refining an argument, or by pointing out a factual misapprehension or a controlling decision or law that was overlooked. New arguments are improper.'"¹⁴ In its Motion, GANE correctly states that a motion for reconsideration should be based on an elaboration on or refinement of an argument previously advanced, not an entirely new thesis.¹⁵ GANE also acknowledges that it did not raise the issue of payment for transcript review in previous filings.¹⁶ The idea of compensating Dr. Long for his review of the transcript is not an elaboration on any argument previously made by GANE; it is an entirely new argument. For this reason, GANE has not met the standard for reconsideration and its Motion should be denied as to this issue.

¹³See [DCS]'s Response to [GANE]'s Motion for Protective Order and Request to Quash Deposition at 3 (June 18, 2003); [DCS]'s Response to GANE's Motion for Clarification and/or Partial Reconsideration of LBP-03-14, at 4 (September 11, 2003).

¹⁴*Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), 55 NRC 5, 7 (2002).

¹⁵Gane Motion at 2 (citations omitted).

¹⁶*Id.* at 5.

If the Board elects to grant reconsideration on this issue, the Board should find that DCS is not obligated to compensate Dr. Long for time spent reviewing and signing his deposition transcript. As DCS notes, federal district court case law is limited and contradictory.¹⁷ *Patterson Farms* is the more recent of the two cases that address the issue and is arguably more persuasive because it provides a detailed analysis of its decision not to require the deposing party to pay transcript review fees.¹⁸ In *McNemey*, however, the court simply makes a conclusory statement that such fees are compensable by the deposing party, and it is unclear how thoroughly the court actually considered this issue.¹⁹ In addition, neither NRC regulations nor the Federal Rules of Civil Procedure require deponents to review and sign their deposition transcripts. The Federal Rules provide for review of the transcript only if it is requested by the deponent or a party before the end of the deposition.²⁰ Under NRC regulations, a deposition transcript must be submitted to the deponent for examination and signature, but the deponent may refuse to do so.²¹ Finally, unlike the deposition itself, the transcript review generally is not primarily for the benefit of the deposing party.²² For these reasons, if the Board decides to consider the issue of transcript review fees, it

¹⁷ See [DCS]'s Response to GANE's Motion for Clarification and/or Partial Reconsideration of LBP-03-14, at 5-6 (September 11, 2003) discussing *Patterson Farm, Inc. v. City of Britton*, 22 F.Supp.2d 1985 (D.S.D. 1998) and *McNemey v. Archer Daniels Midland Co.*, 164 F.R.D. 584, 587 (W.D.N.Y. 1995).

¹⁸ *Patterson Farm, Inc.*, 22 F.Supp.2d at 1096.

¹⁹ *McNemey*, 164 F.R.D. at 587.

²⁰ See F.R.C.P. 30(e).

²¹ See 10 C.F.R. § 2.740a(e).

²² As noted by the court in *Patterson Farms, Inc.*, if the "deposing party strongly encouraged the deponent to review the transcript so as to reduce that party's costs or to benefit its case in some way, then the relevant costs should be paid by the party seeking the deposition." 22 F.Supp.2d at 1096.

should find that DCS does not have to pay Dr. Long's fee for time spent reviewing and signing his deposition transcript.²³

CONCLUSION

For the reasons stated above, the Board should grant GANE's Motion with respect to the issue of fees for Dr. Long's travel time. The Board should decline to rule on the issue of travel expenses because there is no dispute among the parties on payment of these expenses. The Board should decline to consider the issue of transcript review time because GANE has not met the standard for reconsideration. If the Board does consider the issue of transcript review time, the Board should deny GANE's request that DCS pay those fees.

Respectfully submitted,

/RA/

Shelly D. Cole
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of September, 2003

²³The Staff also notes that if the Board requires DCS to compensate Dr. Long for time spent reviewing and signing his transcript and applies a reasonableness standard, this may lead to additional dispute between the parties requiring further Board intervention. This is because it will be difficult to separate the time spent ensuring that his testimony is accurately reflected from time spent making substantive changes to his testimony, grammatical corrections, or corrections to the statements of other parties.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO GANE'S MOTION FOR CLARIFICATION AND/OR PARTIAL RECONSIDERATION OF LBP-03-14," have been served upon the following persons this 25th day of September 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).

Administrative Judge *
Thomas S. Moore, Chairman
U. S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, D.C. 20555
E-mail: tsm@nrc.gov

Administrative Judge *
Peter S. Lam
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, D.C. 20555
E-mail: psl@nrc.gov

Administrative Judge *
Charles N. Kelber
U. S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, D.C. 20555
E-mail: cnk@nrc.gov

Office of Commission Appellate Adjudication*
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: hrb@nrc.gov

Louis A. Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
E-mail: BREDL@skybest.com

Glenn Carroll
Georgians Against Nuclear Energy
P.O. Box 8574
Atlanta, GA 30306
E-mail: atom.girl@mindspring.com

Donald J. Silverman, Esq.
Marjan Mashhadi, Esq.
Alex S. Polonsky, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
E-mail: dsilverman@morganlewis.com
mmashhadi@morganlewis.com
apolonsky@morganlewis.com

Office of the Secretary *
ATTN: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Diane Curran
Harmon, Curran, Speilberg & Eisenberg L.L.P
1726 M Street N.W., Suite 600
Washington, D.C. 20036
E-Mail: dcurran@harmoncurran.com

/RA/

Shelly D. Cole
Counsel for NRC Staff