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

DOCKETED 10/29/03

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Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

DUKE COGEMA STONE & WEBSTER
(Savannah River Mixed Oxide Fuel
Fabrication Facility)

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

October 29, 2003

MEMORANDUM AND ORDER

(Denying in Part and Granting in Part GANE's Motion for Clarification and/or Partial Reconsideration of LBP-03-14)

We have before us the Intervenor's, Georgians Against Nuclear Energy (GANE), Motion for Clarification and/or Partial Reconsideration of LBP-03-14, in which the Licensing Board ruled upon an expert witness fee issue.¹ In that ruling, the Board ordered the Applicant, Duke Cogema Stone & Webster (DCS), to pay GANE's expert witness, Dr. Leland Timothy Long, a reasonable fee for preparation and time spent at his deposition.² GANE now asks the Board to clarify and reconsider the scope of that decision and order DCS to compensate Dr. Long for his time spent traveling to and from the deposition, his travel, lodging and meal costs, and the time he spent reviewing and correcting his deposition transcript.

¹ See Georgian's Against Nuclear Energy's Motion for Clarification and/or Partial Reconsideration for LBP-03-14 at 1-2 (September 8, 2003) [hereinafter GANE Motion].

² See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-14, 58 NRC 104 (2003).

DCS opposes this motion, arguing that it has already agreed to pay Dr. Long's travel, meal, and lodging costs, therefore making this issue moot.³ DCS also argues that compensation for travel time and deposition review are not within the scope of LBP-03-14, and therefore are not appropriate subjects for either clarification or reconsideration.⁴ DCS further contends that, even if such subjects are appropriate, Dr. Long should not be paid for his time spent traveling and reviewing his deposition because caselaw offers no bright line test for either issue.⁵ The Staff supports GANE's motion with regard to Dr. Long's travel time, and agrees with DCS that the question of Dr. Long's travel expenses is moot. The Staff opposes the motion as it pertains to Dr. Long's review of his deposition.⁶ For the reasons set forth below, the Board grants GANE's motion with respect to Dr. Long's travel time, and denies the motion with respect to Dr. Long's travel expenses and deposition review.

A motion to reconsider a Board's ruling is appropriate when it elaborates or refines previously advanced arguments.⁷ Such a motion is not appropriate when it advances an entirely "new thesis."⁸ Furthermore, a motion to reconsider will not be granted unless some controlling decision or principle of law has been overlooked or there has been a

³ See DCS Response to GANE's Motion for Clarification and/or Partial Reconsideration of LBP-03-14 at 2 (September 11, 2003) [hereinafter DCS Response].

⁴ Id.

⁵ Id.

⁶ See NRC Staff's Response to GANE's Motion for Clarification and/or Partial Reconsideration of LBP-03-14 (September 25, 2003).

⁷ See Central Electric Power Co. (Virgil C. Summer Nuclear Station, Unit No.1), CLI-81-26, 14 NRC 787, 790 (1981) (citing Tennessee Valley Authority (Hartville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-418, 6 NRC 1, 2 (1977)); Sequoyah Fuels Corp., LBP-94-39, 40 NRC 314, 317 (1994).

⁸ Central Electric Power Co. (Virgil C. Summer Nuclear Station, Unit No.1), CLI-81-26, 14 NRC 787, 790 (1981).

misapprehension of the facts in the ruling at issue.⁹ In order for GANE to succeed on its motion for Dr. Long's travel costs, travel fees, and deposition review fees, it must be seeking clarification or reconsideration of an argument it previously advanced.

A. Travel Fees

GANE's motion for clarification regarding Dr. Long's travel fees is granted. In GANE's initial June 24, 2003 motion, GANE requested the Board to instruct DCS to "pay reasonable expert fees for Dr. Long's preparation for, *travel to and from*, and participation in the deposition" (emphasis added).¹⁰ In its ruling, the Board ordered DCS to pay Dr. Long a "reasonable fee for his preparation and time at the deposition."¹¹ Because GANE's present motion concerns the travel fees previously requested, and the extent to which LBP-03-14 covers said fees, this portion of the motion is procedurally proper. Consequently, the Board may appropriately consider GANE's request for Dr. Long's travel fees.

GANE requests that Dr. Long be compensated for his time spent traveling to and from his deposition. As noted in LBP-03-14, 10 CFR § 2.740a(h) governs the resolution of the expert fee dispute and provides that an expert deposed under the regulation is entitled to the same fees as are paid for like services in the district courts. In LBP-03-14, the Board concluded that 10 C.F.R. § 2.740a(h) necessarily incorporates the provision for expert witness fees found in Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure.¹² As such, the Board may look to the federal district practice for guidance in the application of Rule 26(b)(4)(C). In

⁹ Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 139-40 (1994).

¹⁰ Georgians Against Nuclear Energy's Motion for Protective Order and Request to Quash Deposition (June 24, 2003) at 7 [hereinafter GANE Motion for Protective Order].

¹¹ LBP-03-14, 58 NRC at 106.

¹² See id. at 107.

the federal courts, the weight of authority holds that Rule 26(b)(4)(C) permits recovery of fees for an expert's travel time.¹³ Accordingly, pursuant to 10 C.F.R. § 2.740a(h), an expert's travel fee may appropriately be recovered. Therefore, in the circumstances presented, DCS must pay Dr. Long for his travel time at the rate of \$100 per hour.¹⁴

B. Travel Costs

The Board denies GANE's motion for clarification regarding Dr. Long's travel costs. As DCS has already agreed to compensate Dr. Long for his actual travel, meal and lodging expenses, this matter is moot.

C. Transcript Review

GANE's motion for clarification regarding Dr. Long's fee for reviewing and correcting his transcript is denied. A motion for clarification is only appropriate when it elaborates or refines previously advanced arguments. GANE admits that its original motion did not request fees for the time Dr. Long spent reviewing and correcting his deposition. Similarly, GANE does not argue that recovering transcript review costs is somehow an elaboration or refinement of any

¹³ See Haarhuis v. Kunnan Enterprises, Ltd., 177 F.3d 1007, 1015-16 (D.C. Cir. 1999); Ellis v. United Airlines, Inc., 73 F.3d 999, 1011 (10th Cir 1996); New York v. Solvent Chemical Co., Inc., 210 F.R.D. 462 (W.D.N.Y. 2002); Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 645 (E.D.N.Y. 1997); see also Bonner v. American Airlines, Inc., 1997 WL 802894 (S.D.N.Y. 1997), at *1; Sean v. Okuma Machine Tools, Inc., 1996 WL 256587, at *2 (E.D. Pa 1996)

¹⁴ See Letter from Diane Curran, Harmon, Curran, Spielberg & Eisenberg, LLP, to Administrative Judges, Atomic Safety and Licensing Board Panel (June 18, 2002) (citing \$100 fee for Dr. Long's travel time). DCS claims that it would be inequitable to have DCS pay for Dr. Long's travel time because GANE's motion for a protective order was filed only a week before the scheduled deposition, thereby making it impracticable for DCS to change the venue for the deposition to avoid the fee. See DCS Response at 3-4. DCS's argument is unpersuasive. As set forth in GANE's initial motion, Dr. Long's deposition was noticed on May 21, 2003 and the dispute over fees for that deposition began June 3, 2003 -- a chronology never disputed by DCS. See GANE's Motion for Protective Order at 2. Thus, DCS had ample opportunity to reschedule the location of the deposition and/or resolve the fee dispute before GANE filed its protective order motion on June 17, 2003.

other arguments previously advanced.¹⁵ As such, GANE's motion for clarification regarding Dr. Long's transcript review fees is not properly before the Board and it must be denied. GANE is free, however, to file a motion to recover fees for Dr. Long's transcript review if it deems that action appropriate.

In that regard, the Board notes that it finds DCS's argument that 10 C.F.R. § 2.740a(e) does not require an expert to review and correct his deposition unpersuasive.¹⁶ Under 10 C.F.R. § 2.740a(e), the transcript of a deposition "shall be submitted to the deponent for examination and signature unless he is ill or cannot be found or refuses to sign."¹⁷ The plain meaning of the rule requires that the deponent examine the transcript.¹⁸ Clearly, a witness would not be required to "examine" (i.e. review) a transcript unless the witness also was required to correct inaccuracies. Otherwise, there would be no point in reviewing the transcripts. To suggest the contrary ignores the plain meaning of the regulation. For additional guidance on the interpretation of 10 C.F.R. 2.740a(e), the Board may look to the analogous federal rules.¹⁹ Rule 30(e) of the Federal Rules governs a deponent's transcript review in the federal courts, and unlike section 2.740a(e), such review is not mandatory.²⁰ Additionally, Rule

¹⁵ GANE Motion for Protective Order at 3.

¹⁶ See DCS Response at 5.

¹⁷ 10 C.F.R. § 2.740a(e).

¹⁸ DCS objects to GANE's argument that 10 C.F.R. § 2.740a(e) requires an expert to review deposition testimony because GANE's own witness, Glenn Carroll, failed to examine and sign her own testimony. The Board notes that the adequate remedy for failure to comply with § 2.740a(e) is to file a motion to compel compliance.

¹⁹ See Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 581 (1975).

²⁰ Fed. Rule Civ. P. 30(e).

26(b)(4)(C) governs the payment of an expert for time spent responding to discovery²¹.

Whether a court analyzes fees for deposition review under Rule 30(e) or Rule 26(b)(4)(C), the better reasoned view is that deposition review is normally compensable.²² The recoverable fee for transcript review, however, is not without limits. For example, it is not appropriate for an expert to spend time editing the deposition questions, correcting the transcript's grammar, or substantively changing something accurately transcribed under oath. A deposition is not "a take home examination."²³

The Board trusts that the parties will act reasonably and settle this matter between themselves. The Board does not expect to deal with this issue further. Accordingly, the Board grants GANE's motion for reconsideration with respect to travel fees, but denies the motion with respect to travel expenses and deposition review.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²⁴

/RA/

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 29, 2003

²¹ Fed. Rule Civ. P. 26(b)(4).

²² See Brew v. Ferraro, 1998 WL 34058048, at *3 (D.N.H. 1998); Anderson v. Siemens Medical Sys., Inc., 2002 WL 199878, at *3 (N.D. Tex. 2002); McNerney v. Archer Daniels Midland Co., 164 F.R.D. 584, 587 (W.D.N.Y. 1995).

²³ Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992).

²⁴ Copies of this Order were sent this date by Internet e-mail transmission to (1) GANE; (2) BREDL; (3) DCS; and (4) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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DUKE COGEMA STONE & WEBSTER)	Docket No. 70-3098-ML
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Fabrication Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING IN PART AND GRANTING IN PART GANE'S MOTION FOR CLARIFICATION AND/OR PARTIAL RECONSIDERATION OF LBP-03-14) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3098-ML
LB MEMORANDUM AND ORDER (DENYING IN
PART AND GRANTING IN PART GANE'S MOTION
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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of October 2003