RAS 6555

June 17, 2003

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	
DUKE COGEMA STONE & WEBSTER	Docket No. 0-70-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	ASLBP No. 01-790-01-ML

GEORGIANS AGAINST NUCLEAR ENERGY'S MOTION FOR PROTECTIVE ORDER AND REQUEST TO QUASH DEPOSITION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.740(c), Georgians Against Nuclear Energy ("GANE") hereby requests a protective order that the deposition of Dr. Leland Timothy Long by Duke Cogema Stone & Webster ("DCS") be cancelled or postponed. Pursuant to 10 C.F.R. § 2.70 and *Public Service Company of Oklahoma* (Black Fox, Units 1 and 2), 5 NRC 671, 674 (1977) (hereinafter "*Black Fox*"), GANE also requests the Atomic Safety and Licensing Board ("ASLB") to quash the deposition. The deposition, which is scheduled to begin on June 25, 2003, should not be permitted to take place unless and until DCS agrees to pay Dr. Long's reasonable expert fees, as required by 10 C.F.R. § 2.740a(h).

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GANE has made a diligent effort to resolve its dispute with DCS informally, but was unsuccessful. The deposition is now approximately a week away. Due to the time constraints involved, GANE asks that the ASLB give this motion expedited consideration.

II. STATEMENT OF FACTS

On May 21, 2003, DCS noticed the deposition of Dr. Leland Timothy Long, GANE's expert regarding Contention 3 (seismic issues). The deposition is scheduled to begin on June 25. Informally, counsel for DCS estimated that the deposition would take three days. When counsel for GANE expressed concern at the length of the deposition, counsel for DCS suggested that the deposition could be shortened if there were greater clarity regarding the portions of the contention that GANE actually intends to pursue. Subsequently, the parties had correspondence and discussions that resulted in the filing by DCS of an unopposed motion to narrow the scope of Contention 3, on June 12, 2003.

In the course of that correspondence, on June 3, 2003, counsel for GANE asked for confirmation that DCS will compensate Dr. Long for reasonable expert fees at his customary rate of $200 per hour; reasonable travel expenses; and lodging costs for each night that Dr. Long is required to stay in D.C. for his deposition. By letter of June 10, 2003, DCS responded that, in accordance with 28 U.S.C. § 1821, DCS would agree to cover only Dr. Long's reasonable travel expenses, plus a $40 per day witness fee. GANE replied in a letter dated June 13, 2003, and the parties made several further attempts to resolve the matter informally, but were unsuccessful.

II. ARGUMENT

NRC discovery rule 10 C.F.R. § 2.740a(h) provides that:

> (h) 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.

In the district courts of the District of Columbia, pursuant to F.R.C.P. 26(a)(4)(C)[1], it is customary to pay reasonable expert fees related to the conduct of a deposition. *Haarhuis v. Kunnan Enterprises, Ltd.*, 177 F.3d 1007, 1015-16 (D.C. Cir. 1999).

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[1] F.R.C.P. 26(a)(4) provides in relevant part that:

> (4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule, and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
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> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.
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> (B) [This section is not quoted because it relates to discovery of opinions held by non-witness experts and is therefore inapplicable to the instant case.]
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> (C) 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 subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonable incurred by the latter party in obtaining facts and opinions from the experts.

DCS has argued that under 10 C.F.R. § 2.740a(h), fees are limited to the $40 per day witness fee allowed by 28 U.S.C. § 1821. Nothing in the plain language of 10 C.F.R. § 2.740a(h) dictates such a result, however. The rule simply refers to "the same fees as are paid for like services in the district courts of the United States." As established in *Haarhuis,* the fee paid to experts in the district courts of the U.S. consists of a reasonable expert witness fee.[2]

Moreover, in *Haarhuis,* the D.C. Circuit explicitly ruled that 28 U.S.C. § 1821 does not preclude an award of reasonable expert fees for participation in a deposition. *See also Cary Oil Co. v. MG Refining and Marketing,* 2003 U.S. Dist. LEXIS 2479 (S.D.N.Y. February 20, 2003), in which the District Court for the Southern District of New York expressly followed *Haarhuis* and awarded reasonable expenses and fees, including the cost of a hotel if necessary, and payment of an hourly fee for travel time and attendance at the deposition.[3]

GANE is aware of only one NRC case in which 10 C.F.R. § 2.740a(h) has been applied, *Black Fox.* In that case, the ASLB held that the witness fees referred to in 10

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[2] The rule in *Haarhuis* is widely followed in district courts in other circuits. *See Lancaster v. Lord,* 1993 U.S. Dist. LEXIS 3986 (S.D.N.Y. 1993); *Gordon v. Castle Oldsmobile,* 157 F.R.D. 438, 442 (E.D. Ill. 1994); *Great Lakes Dredge and Dock Co. v. Commercial Union Assurance Co.,* 2000 U.S. Dist. LEXIS 18893 (E.D. Ill. 2000); *Coleman v. Dydula,* 190 F.R.D. 320, 321-23 (W.D.N.Y. 1999); *Haslett v. Texas Industries, Inc.,* 1999 U.S. Dist. LEXIS 9358 (N.D. Tx. 1999); *Grdinich v. Bradlees,* 187 F.R.D. 77, 82 (S.D.N.Y. 1999). While some district courts have not followed the rule in *Haarhuis, see, e.g., Auto Wax Co. v. Mark V. Products, Inc.,* 2002 U.S. Dist. LEXIS 2944 (N.D. Tx. 2002), GANE respectfully submits that the D.C. Circuit sets the most significant precedent for the NRC.

[3] The costs for which GANE seeks compensation include Dr. Long's preparation time; time spent traveling to and from the deposition; travel costs; and lodging costs while he is in D.C. for the deposition. *Haarhuis v. Kunnan Enterprises, Ltd.,* 177 F.3d at 1015-16; *Grdinich v. Bradlees,* 187 F.R.D. at 82.

C.F.R. § 2.740a(h) and the NRC's subpoena rule, 10 C.F.R. § 2.70(d), were "intended to be the statutory fees provided for witnesses appearing in courts of the United States as set out in 28 U.S.C. § 1821." 5 NRC at 673. Nevertheless, the ASLB found that the Commission had not withdrawn authority from the ASLB to order payment of expert witness fees "in proper circumstances." *Id.* In particular, the ASLB refused to accept the Applicant's argument that the Commission signaled its intent that 28 U.S.C. § 1821 would govern when, in a 1972 rulemaking that adopted other portions of F.R.C.P. 26, it failed to adopt the contents of F.R.C.P. 26(b)(4).[4] As the ASLB observed, "no explanation is given" for the Commission's failure to adopt F.R.C.P. 26(b)(4). *Id.* at 673.

The ASLB also found that under 10 C.F.R. §§ 2.720 and 2.740, it had the authority to set "just and reasonable terms" for the conduct of a deposition. In those circumstances, the ASLB found that an award of fees was reasonable, because:

> The experts involved were secured by the Intervenors because of their expertise and their opinions will no doubt be explored at the deposition. They will be acting in their professional capacity and the Board considers it equitable that they receive reasonable compensation for this. [footnote: Although the rationale is not identical, recognition of this obligation to pay the experts a reasonable fee for the time spent in deposition is set out in the opinion of the District Court in *Herpes v. ITT Corp.*, 65 F.R.D. 528 (D. Conn. 1975).]

GANE respectfully submits that the ASLB was correct in holding that NRC regulations do not preclude the award of reasonable expert fees to a deponent. There is

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[4] GANE respectfully submits another reason, not mentioned by the ASLB in *Black Fox,* why the 1972 rule's omission of language comparable to F.R.C.P. 26(b)(4) from the 1972 is understandable: because at that point the NRC already had a serviceable regulatory provision that addressed the awarding of expert fees for a deposition. Section 2.740a(h) was added to Part 2 in 1962. 27 Fed. Reg. 377 (January 13, 1962). 10 C.F.R. § 2.740a(h) is worded in a flexible way that allows the ASLB to follow the custom of the federal courts, which may change over time.

no language in the NRC's 1972 rule, or its preamble, which suggests that the ASLB is restricted to awarding the statutory witness fee in 28 U.S.C. § 1821. GANE respectfully submits, however, that the ASLB interpreted the scope of its authority under 10 C.F.R. 2.740a(h) to be overly narrow. The ASLB could have held that under the plain language of 10 C.F.R. § 2.740a(h), it was appropriate to follow the custom of the U.S. District Courts and award reasonable expert fees to the deponents.

In any event, even if the *Black Fox* ASLB were correct that the sole source of its authority consists of 10 C.F.R. §§ 2.740(c) and 2.70, the circumstances of this case are similar to *Black Fox*, thus warranting the issuance of a protective order. DCS seeks to question an expert that GANE hired to provide testimony at the hearing on DCS's Construction Approval Request. Dr. Long is to be deposed in his professional capacity. The deposition will assist DCS in preparing its case. It would be unfairly burdensome to GANE to require it to pay Dr. Long for time he spends on a deposition that was held at DCS's request.

Furthermore, while DCS has extensive resources to pay for the deposition, GANE's resources are extremely limited. GANE has been able to hire Dr. Long and otherwise participate in this proceeding only through contributions by its members and modest foundation grants.

Finally, GANE has been responsible and efficient in its use of resources. GANE has responded diligently to all of DCS's discovery requests regarding Contention 3. GANE has tried to minimize the costs of the deposition, by agreeing to narrow the language of the contention and thereby shorten the length of the deposition. It would be

extremely inequitable to provide DCS with several days of Dr. Long's time, at GANE's expense.

III. CONCLUSION

For the foregoing reasons, the ASLB should cancel or quash Dr. Long's deposition, or postpone until such time as DCS has agreed to pay reasonable expert fees for Dr. Long's preparation for, travel to and from, and participation in the deposition; plus reasonable travel costs and lodging costs.

Respectfully submitted,

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June 17, 2003

CERTIFICATE OF SERVICE

I hereby certify that on June 16, copies of the foregoing Georgians Against Nuclear Energy's Motion for Protective Order and Request to Quash Deposition were served on the following by e-mail and/or first-class mail:

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