

**Official Transcript of Proceedings**  
**NUCLEAR REGULATORY COMMISSION**

**Title:** Savannah River MOX Fuel Fabrication Facility

**Docket Number:** 70-3098-ML

**Location:** (telephone conference)

DOCKETED  
USNRC

June 25, 2003 (9:32AM)

**Date:** Thursday, June 19, 2003

OFFICE OF SECRETARY  
RULEMAKINGS AND  
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**Work Order No.:** NRC-972

**Pages** 1-20

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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TELECONFERENCE

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IN THE MATTER OF: :

DUKE COGEMA STONE AND : Docket No.

WEBSTER, : 70-3098-ML

(Savannah River Mixed Oxide :  
Fabrication Facility) :

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Thursday, June 19, 2003

Teleconference

The above-entitled teleconference was conducted  
at 9:00 a.m.

BEFORE:

JUDGE THOMAS MOORE, Chairman

JUDGE CHARLES N. KELBER

JUDGE PETER S. LAM

1     APPEARANCES:

2  
3     On Behalf of Duke Cogema Stone and Webster:

4             MARJAN MASHHADI, ESQ.

5     And     ALEX S. POLONSKY, ESQ.

6     Of:     Morgan, Lewis & Bockius LLP

7             1111 Pennsylvania Ave, N.W.

8             Washington, D.C. 20004

9  
10    On Behalf of the NRC:

11            JOHN T. HULL, ESQ.

12    Of:     Office of the General Counsel

13            Mail Stop-O-15 D21

14            U.S. Nuclear Regulatory Commission

15            Washington, D.C. 20555

16  
17    On Behalf of Georgians Against Nuclear Energy:

18            DIANE CURRAN, ESQ.

19    Of:     Harmon, Curran, Spielberg & Eisenberg, LLP

20            1726 M Street, N.W., Suite 600

21            Washington, D.C. 20036

## P R O C E E D I N G S

9:00 a.m.

JUDGE MOORE: Good morning. The purpose of this telephone call, as you know, it's being recorded so that the Board can ask some questions on GANE's motion for a protective order that was filed June 17.

First of all, Ms. Curran, am I correct that this is just a question as to who pays?

MS. CURRAN: Yes.

JUDGE MOORE: So that there -- it appears there is no reason why this deposition currently scheduled for June 25 needs to be delayed.

MS. CURRAN: We have a refundable plane ticket for Dr. Long for those dates, but we believe it would be unduly burdensome if we were required to go ahead with this deposition and pay for it.

JUDGE MOORE: Ms. Curran, if it's a question of who pays, then the Board after having this matter briefed by the parties fully, which it has not been done, and, frankly, if I might digress, this is a very slippery slope in the view of the Board, that if we are going to wrestle with this question, we would like it fully briefed, but why should we delay the deposition? If it's just a question of who pays,

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1 the Board then can make its ruling and determine who  
2 pays subsequently.

3 MS. CURRAN: The reason is that this is  
4 quite a bit of money for GANE, which has very limited  
5 resources, and if we have to pay this much money for  
6 a deposition, it's questionable whether we'll make it  
7 all the way through the case. We have gone out and --  
8 you know, GANE is a public interest group that raises  
9 money through its members and through foundation  
10 grants and has very limited resources. We hired an  
11 expert to do a good job on Contention 3 and this  
12 deposition is going to cost us thousands of dollars --  
13 the plane fare, two days of Dr. Long's time, and Dr.  
14 Long is going to charge us \$200 an hour for his  
15 deposition.

16 JUDGE MOORE: Fine, Ms. Curran. If the  
17 Board were to rule, hypothetically speaking, against  
18 your position, deny your protective order, the  
19 deposition goes forward. The point is simply you have  
20 scheduled a deposition, there is one notice for next  
21 Wednesday. Why is it necessary for this ruling to  
22 come down before this deposition?

23 MS. CURRAN: We're asking you to either  
24 grant us these costs or quash the deposition. We're  
25 saying that either we should be given costs or the

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1 deposition should be canceled. You're entitled to  
2 issue a protective order on our behalf under the  
3 rules. We're asking you for two alternative forms of  
4 relief, and we'd like to have a ruling before the  
5 deposition goes forward.

6 JUDGE MOORE: Before the Board delves into  
7 any other questions, Mr. Polonsky, what is your  
8 response to my question to Ms. Curran?

9 MR. POLONSKY: DCS doesn't see any reason  
10 why the deposition can't go forward as it's been  
11 noted. And just to respond to Diane, we've already  
12 agreed to pay for actual travel expenses, so the plane  
13 fare and hotel and things like that we've -- I believe  
14 DCS has already stated we would pay those. The issue  
15 is the fees, the hourly fee that Dr. Long would be  
16 paid for travel, prep and attending the deposition, if  
17 at all.

18 JUDGE MOORE: Let's digress further. You  
19 have attempted, Ms. Curran and Mr. Polonsky, to reach  
20 a settlement. Ms. Curran's papers indicate you were  
21 unable to agree on this. Is there any likelihood that  
22 if you set about with further diligent effort that you  
23 could agree and then have this motion withdrawn? Ms.  
24 Curran?

25 MS. CURRAN: Well, if you look at the cost

1 to us of two days of preparation and two days of  
2 deposition, that's almost \$5,000, and that's the nut  
3 that we haven't been able to crack. And I had hoped  
4 that we could come to some kind of an agreement on  
5 that, but DCS has made it pretty clear to us that  
6 they're not willing to hourly fees. So I don't know  
7 where to go from here.

8 JUDGE MOORE: Okay. Frankly, the Board  
9 thinks this matter should be settled and should not be  
10 in front of it, but if the parties can't reach  
11 agreement, then we'll deal with it. But this, in the  
12 Board's view, is a question that, as I mentioned, is  
13 a very slippery slope. And the Black Fox decision by  
14 the Licensing Board 25 years ago is hardly a  
15 definitive determination of the question. Are the  
16 parties prepared to answer our questions now on the  
17 merits of this?

18 MR. POLONSKY: DCS is, Your Honor.

19 MS. CURRAN: We'll certainly do the best  
20 we're able.

21 JUDGE MOORE: Mr. Polonsky, can you tell  
22 me I'm troubled in the sequence of how the NRC's rule  
23 occurred in relation to amendments to Federal Rule 26,  
24 the Federal Rules of Civil Procedure. The provision  
25 that now stands as 10 CFR 2.740A(h) has been in

1 existence since 1962; is that correct?

2 MR. POLONSKY: I can't confirm when that  
3 particular provision was added, but it certainly was  
4 added prior to 1978.

5 MS. CURRAN: Judge Moore, I can tell you  
6 it was added in 1962.

7 JUDGE MOORE: In 1970, the Federal Rules  
8 of Civil Procedure, Rule 26, were amended and there  
9 were some amendments made to other provisions of the  
10 Commission's deposition rule, 10 CFR 2.740. Is that  
11 correct, Mr. Polonsky?

12 MR. POLONSKY: Yes. That is my  
13 understanding.

14 JUDGE MOORE: Now, if that is the  
15 chronology of how these amendments took place and if  
16 the language of 2.740A(h) has remained unchanged since  
17 1962, I am at a loss to understand the logic of the  
18 Black Fox decision that you recite in your filing.  
19 Could you help me out?

20 MR. POLONSKY: Your Honor, we were relying  
21 on the Black Fox decision itself. We assumed that the  
22 Black Fox Licensing Board judges took into account the  
23 issues you're raising now. We have not pulled the  
24 briefs that were submitted by each party; we only have  
25 the case itself. But this case in 1977 we assumed



1 that the judges would have taken into the account the  
2 issues that you raise now since it's true that this  
3 provision first appeared in 1962 and the provisions of  
4 '72 are explicitly referenced in the case, so that we  
5 assume the judges understood that.

6 JUDGE MOORE: Mr. Polonsky, on its face,  
7 do you see anything in 2.740A(h) that precludes what  
8 Ms. Curran claims?

9 MR. POLONSKY: What Ms. Curran claims is  
10 very broad. What Ms. Curran claims and what Black Fox  
11 says -- I don't presume to say what GANE claims. What  
12 Black Fox I believe says is that the 28 -- that the  
13 1821 applies but that the Board ha discretion to take  
14 other action. That's our position today. I think  
15 GANE is also in agreement on that, but I'll let Diane  
16 speak for that.

17 JUDGE MOORE: Mr. Hull?

18 MR. HULL: Yes, Your Honor.

19 JUDGE MOORE: When the Board mentioned  
20 that we see this as a very slippery slope, what is the  
21 staff's position on fees of staff witnesses that are  
22 outside experts that are deposed?

23 MR. HULL: As far as I've been able to  
24 determine, Your Honor, the \$40 rate still applies. An  
25 outside witness is entitled to reimbursement for

1 travel expenses and that sort of thing, but as far as  
2 professional time for a deposition, it's still \$40.  
3 And to my knowledge, the staff has -- that that's been  
4 followed in NRC cases up to date.

5 JUDGE MOORE: Assume for the moment that  
6 2.740A(h) permits what Rule 26 A4 of the Federal Rule  
7 of Civil Procedure requires in the vast majority of  
8 districts in this country, that an expert's time is to  
9 be reimbursed. Would the statutory prohibition  
10 against intervenor funding that is in effect for NRC  
11 expenditures come into play?

12 MR. HULL: I think it definitely does,  
13 Your Honor, and that law was enacted after the Black  
14 Fox decision was rendered in 1977. So I think a --  
15 I'm not sure if it was Black Fox or another NRC case,  
16 the Licensing Board indicated that NRC funds could be  
17 used to reimburse a witness for his time but that was  
18 effectively overruled by the subsequent law that  
19 Congress enacted.

20 JUDGE MOORE: So you could have a  
21 situation where the staff could seek reimbursement  
22 from an intervenor that would not be able to be  
23 reciprocated, is that correct, if Ms. Curran's view of  
24 the world is accurate?

25 MR. HULL: I think that the \$40 figure

1 applies only to non-government witnesses, so any NRC  
2 staff people that might be deposed in the future in  
3 this case would not be entitled to any reimbursement  
4 for their time.

5 JUDGE KELBER: But what about staff  
6 outside experts? This is Judge Kelber.

7 MR. HULL: The only such expert the NRC  
8 staff has right now is Dr. Stamaticos, but there's  
9 already a contract in place with Southwest Research  
10 Institute, so there would be no additional fees due  
11 Dr. Stamaticos for any of his time.

12 MS. CURRAN: Judge Moore?

13 JUDGE MOORE: Yes, Ms. Curran?

14 MS. CURRAN: Well, I honestly didn't think  
15 about the intervenor funding ban, but to me it seems  
16 like a very different kettle of fish, because if we  
17 were going to depose DCS' outside experts, we would  
18 feel obligated under the rule to pay for their time  
19 and their expenses. It's a reciprocal thing. And,  
20 you know, the rule is pretty straightforward to  
21 parties entitled to this, and so we would feel  
22 obligated, you know, that would be our obligation  
23 under the rules. So I think it has to do with just  
24 kind of fair play among litigants in a hearing.

25 I think the theory of this, and certainly

1 under the federal rule is that the witness is being  
2 asked to come and testify in a deposition for the  
3 opposing party, and so the party who hired the expert  
4 to come to the trial shouldn't have to pay for the  
5 opposing party's request to have this witness testify  
6 earlier at a deposition and help them in preparing  
7 their case. So I guess I don't see that as an  
8 intervenor funding issue. Anyway, I guess that's all  
9 I have to say.

10 JUDGE MOORE: Ms. Curran, very frankly,  
11 the Board is troubled by changing what is a customary  
12 practice, whether it is technically correct under  
13 2.740A(h) or not. That this truly, in my view, the  
14 issue you have raised here opens a Pandora's box and  
15 one must be very careful when opening Pandora's box  
16 what you ask for, because this one is, very frankly,  
17 from the intervenor standpoint, going to bite very  
18 heavy in the future if the Board were to accept your  
19 position.

20 MS. CURRAN: Well, just when you talk  
21 about what the custom is, I can tell you what my  
22 experience has been --

23 JUDGE MOORE: Well, let's back up, Ms.  
24 Curran. Can you tell me why in all of the years of  
25 NRC adjudication Black Fox is the only time this

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1 question appears to have been raised?

2 MS. CURRAN: Well, okay, here's one  
3 possible reason, and that is, and this is certainly my  
4 experience in other cases where all sides are taking  
5 depositions oftentimes every agrees we'll all bear our  
6 own costs, because it all comes out in the wash  
7 anyway. And in this case, we're in a situation that  
8 we have very limited resources, we have one expert who  
9 works for a public interest group that isn't charging  
10 us any expert fees.

11 So we're seeking to be made whole, we're  
12 not seeking to make a profit off this, and we've made  
13 a decision that we can't afford to depose DCS'  
14 witnesses, but it doesn't seem fair to us that DCS'  
15 should be able to have our witness on the stand for  
16 two days, basically, and it's at DCS' behest, for DCS'  
17 benefit, and GANE must absorb that cost. And I think  
18 this rule is kind of a corrective to that to just  
19 maintain fairness among the parties.

20 JUDGE MOORE: Well, if -- Ms. Curran, if  
21 you and Mr. Polonsky cannot settle this matter and you  
22 insist on going forward with this, the Board wants  
23 this much more thoroughly briefed than it has been for  
24 the very reasons I stated: This is a very slippery  
25 slope, and it is indeed passing strange that in all of

1 these years and all the experience that's sitting on  
2 this particular case, we have never entertained such  
3 a request. And, frankly, the Black Fox decision  
4 leaves a great deal to be desired in its purported  
5 rationale as to its explanation for a rationale. It  
6 doesn't jive with the chronology, on the one hand,  
7 although the result it reaches I think is clearly very  
8 sensible. But if you do not -- if you wish to open  
9 this Pandora's box, that is your right, but what we  
10 will do is we will require this to be fully briefed by  
11 the parties so that we can have a full airing of the  
12 legislative history of this, and we want to understand  
13 how the intervenor funding provision comes into play.

14 MS. CURRAN: Judge Moore?

15 JUDGE MOORE: Just one moment, Ms. Curran.  
16 And, frankly, we see no reason why this deposition  
17 schedule should be changed and why it can't go forward  
18 and we will determine who pays after we have the issue  
19 fully briefed. Yes, Ms. Curran?

20 MS. CURRAN: Well, I was going to say if  
21 you -- well, two things. First of all, where things  
22 stand GANE is interested in having further discussions  
23 with DCS, but where things stand now is that I believe  
24 DCS is unwilling to go beyond the \$\$0 a day. If  
25 there's some indication from Mr. Polonsky that we

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1 could get beyond that, then perhaps we could talk and  
2 get back to you about that by the end of the day today  
3 or something.

4 JUDGE MOORE: That would be fine.

5 MS. CURRAN: But the other point I want to  
6 make is that I do request you if you are not going to  
7 make this ruling right away to at least postpone the  
8 deposition, because we would ask you -- we are asking  
9 you to quash the deposition because of the hardship to  
10 us if --

11 JUDGE MOORE: One of the other areas, Ms.  
12 Curran, that when I mentioned that this was a slippery  
13 slope and you're opening Pandora's box is you would by  
14 going down this road be putting the Licensing Board  
15 into an auditing function of indigency, hardship,  
16 proof of such matters, all of which are things that in  
17 the past have been avoided by going down this road.  
18 And this is not a matter to be undertaken lightly in  
19 the view of the Board.

20 And in that regard, Mr. Polonsky, what  
21 does any postponement of this deposition schedule do  
22 to the overall schedule that the parties are pursuing?

23 MR. POLONSKY: Well, without revealing any  
24 litigation strategy, I think there should not be any  
25 delay in the deposition. We've already, frankly,

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1 Diane and I worked together to come up with this date,  
2 and we had initially proposed an earlier date by a  
3 week, and we agreed to this based on Dr. Long's  
4 schedule. We just don't see any reason for it to be  
5 delayed.

6 JUDGE MOORE: I understand that you don't  
7 see any reason. Is there any reason that -- is it  
8 impossible to delay it two weeks? What would that do  
9 to the overall schedule?

10 MR. POLONSKY: Unfortunately, we could not  
11 do it in two weeks. The individuals who we would need  
12 at the deposition for ourselves are not available for  
13 most of July.

14 JUDGE MOORE: All right. That answers  
15 that question then.

16 MR. POLONSKY: And also to the extent that  
17 any briefing schedule would be required, from what I'm  
18 hearing from Diane, she would want a ruling from you  
19 on whether there would be payment or not.

20 JUDGE MOORE: The Board sees this simply  
21 as a matter of who pays. And so, Ms. Curran, if the  
22 Board were to deny your protective order today, you  
23 are in no better or worse shape than you would be  
24 after we've had time to fully consider this at a later  
25 date. And we are not inclined to rule without having



1 it fully briefed so that we can understand precisely  
2 the slope that you wish to grease. So the Board will  
3 issue an order listing the questions it wants the  
4 parties to respond to and the schedule for those  
5 responses. I don't see any need for replies, although  
6 that might become self-evident, so simultaneous  
7 filings will probably suffice. And, Ms. Curran, the  
8 deposition should go forward, and you will -- we view  
9 this, as I said, as a matter of who pays and you will  
10 get a ruling after we have it fully briefed as to  
11 whether or not you should be reimbursed for the expenses  
12 of your expert's time as you seek. Do you have any  
13 questions of us?

14 MR. HULL: Your Honor, this is John Hull  
15 for the staff. So is it my understanding from what  
16 you just stated that the Motion to Quash this June  
17 deposition is denied?

18 JUDGE MOORE: No. The Board will issue a  
19 formal ruling on that Motion to Quash when it  
20 undertakes its wrestling with this question, but we're  
21 not going to delay this deposition. If Ms. Curran  
22 wants me to deny the Motion to Quash, that can be  
23 done, but frankly we think the deposition should go  
24 forward. We will take up this question after it's  
25 fully briefed by the parties, but that can't be done

1 by Wednesday.

2 MR. HULL: Because I am in a situation  
3 where I had arranged for Dr. Stamaticos to fly in to  
4 attend this deposition of Dr. Long, and obviously I  
5 need to let him know whether it's going forward or  
6 not.

7 JUDGE MOORE: The deposition, in the  
8 Board's view, should go forward.

9 MR. HULL: Okay.

10 JUDGE MOORE: Ms. Curran, is that -- do  
11 you have any questions?

12 MS. CURRAN: No.

13 JUDGE LAM: This is Judge Lam. Let me ask  
14 the parties a couple quick questions so that we can  
15 expedite this while we're being fully briefed. The  
16 first question is to Mr. Hull. Mr. Hull, is there any  
17 prohibition against the parties to pay more than \$40  
18 a day?

19 MR. HULL: I'd have to look at the law  
20 that we referenced earlier, Judge Lam, more closely.  
21 I know that's a prohibition about the government  
22 funding any intervenor efforts. I don't know whether  
23 that would apply to any private agreements that non-  
24 government litigants might enter into with one  
25 another.

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1 JUDGE LAM: Okay. Thank you. A question  
2 for Mr. Polonsky: In your June 18 brief, you  
3 indicated you are asking the Board to inquire as to  
4 what the actual consulting rate is being charged by  
5 Dr. Long. Now, the implication here is are you saying  
6 that you are willing to do that as soon as we find out  
7 how much Dr. Long is actually being paid, which came  
8 in immediately after your brief by Ms. Curran that  
9 he's charging GANE \$100 per hour. Are you implying in  
10 your June 18 brief that you're willing to pay that  
11 rate?

12 MR. POLONSKY: DCS' brief of June 18  
13 states that we believe that Black Fox is correct, that  
14 28 USC Section 1821 applies, but we do recognize that  
15 Black Fox has stance for the proposition that the  
16 Board has discretion to provide other mechanisms in a  
17 deposition for payment of fees and expenses. If the  
18 Board orders DCS to do something, DCS will comply.  
19 But absent a Board ruling in an exercise of its  
20 discretion, DCS sees no reason and would object to any  
21 proposal by GANE to pay its experts an hourly fee.

22 JUDGE LAM: Okay. Thank you.

23 JUDGE MOORE: The Board will then issue an  
24 order outlining the questions that it wishes the  
25 parties to address, among any of the other matters the

1 parties to address. And I guess from our questions  
2 you can see why the Board believes this is a very  
3 slippery slope and the question of hardship and  
4 indigency in such matters makes -- brings the Board  
5 into areas where historically they've never gone  
6 before.

7 And although the parties have come forward  
8 with the Black Fox case, we expect the parties to do  
9 much more thorough research to see that if ever this  
10 question has arisen and how it has been dealt with.  
11 Because our institutional memory here is that it has  
12 never arisen. But we may well be -- have faulty  
13 memory, and we would like to ensure that that is  
14 corrected.

15 MS. CURRAN: Judge Moore?

16 JUDGE MOORE: Yes.

17 MS. CURRAN: This is Diane Curran. I'd  
18 just like to make it clear that we researched NRC case  
19 law and Black Fox was the only case we came up with,  
20 but it was not for lack of looking. There's no other  
21 case, we're not hiding anything from the Board.

22 JUDGE MOORE: Ms. Curran, there's no  
23 implication that you are hiding it. We are struck by  
24 the historical fact that in all of these years it has  
25 arisen once and the significance of that. Be that as

1 it may, the Board will be issuing an order outlining  
2 the areas it wishes all of the parties to address and  
3 the schedule for addressing those. The deposition  
4 should go forward next Wednesday as noticed, and  
5 you'll be getting our order shortly.

6 If there's nothing else, we'll conclude  
7 this call. Do any of the parties have any other  
8 matter? Thank you and good day.

9 Whereupon, at 9:32 a.m., the  
10 Teleconference was concluded.)  
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CERTIFICATE

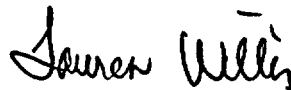
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in the matter of:

Name of Proceeding: Savannah River MOX Fuel  
Fabrication Facility

Docket Number: 70-3098-ML

Location: telephone conference

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