LBP-03-14

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 6754 **DOCKETED 08/28/03**

ATOMIC SAFETY AND LICENSING BOARD

SERVED 08/28/03

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 August 28, 2003

MEMORANDUM AND ORDER
(Ruling on Expert Witness Fee Issue)

On June 17, 2003, Georgians Against Nuclear Energy (GANE) filed a motion seeking a protective order to postpone or cancel Duke Cogema Stone & Webster's (DCS) deposition of Dr. Leland Timothy Long because DCS was unwilling to pay Dr. Long a reasonable expert witness fee.[1] During a June 19, 2003, telephone conference, the Licensing Board ordered Dr. Long's deposition to go forward as scheduled. See Tr. at 16. The Board then directed GANE, DCS, and the NRC Staff to answer several questions regarding payment of expert witness fees. See Licensing Board Order (June 20, 2003) (unpublished). On June 25 and June 26, 2003, the deposition took place at the offices of DCS's counsel. The parties simultaneously filed their responses on June 30, 2003,[2] and the Board subsequently directed DCS to respond to the

[1] See Georgians Against Nuclear Energy's Motion for Protective Order and Request to Quash Deposition (June 17, 2003); Duke Cogema Stone & Webster's Response to Georgians Against Nuclear Energy's Motion for Protective Order and Request to Quash Deposition (June 18, 2003).

[2] See Georgians Against Nuclear Energy's Brief in Support of Motion for Protective Order and Request to Quash Deposition of Dr. Leland Timothy Long (June 30, 2003) [hereinafter GANE Brief]; Brief of Duke Cogema Stone & Webster in Response to the Board's Order Regarding Payment of Expert Deposition Fees (June 30, 2003) [hereinafter DCS Brief]; NRC

arguments of GANE and the NRC Staff regarding the applicability of the prohibition on intervenor funding in 5 U.S.C. § 504 note.[3] For the reasons set forth below, the Board concludes that 10 C.F.R. § 2.740a(h) requires DCS to pay Dr. Long a reasonable fee for his preparation and time at the deposition.

The Commission's Rules of Practice, specifically 10 C.F.R. § 2.740a(h), govern the resolution of this disagreement between DCS and GANE. Pursuant to 10 C.F.R. § 2.740(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." GANE and the Staff argue that this Commission regulation incorporates Rule 26(b)(4)(c) of the Federal Rules of Civil Procedure requiring that "the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery." DCS, on the other hand, asserts that section 2.740a(h) requires only payment of the witness fees set out in 28 U.S.C. § 1821, the statutory fees and mileage allowances for witnesses appearing in federal court. The Board finds that the 10 C.F.R. § 2.740a(h) reference 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. In reaching this conclusion, the Board relies on the history, structure, and plain language of the Commission's regulation.

Staff's Response to ASLB Order Instructing All Parties to Address Questions Regarding Payment of Expert Witness Fees (June 30, 2003) [hereinafter Staff Brief].

[3]See Licensing Board Order (July 3, 2003) (unpublished); Brief of Duke Cogema Stone & Webster in Response to the Board's Second Order Regarding Payment of Expert Deposition Fees (July 8, 2003) [hereinafter DCS Second Brief].

DCS correctly notes that, in 1956 when the NRC deposition rule was enacted,[4] the Federal Rules of Civil Procedure did not contain a provision governing discovery of an opposing party's expert. Similarly, DCS is correct in asserting that "[a]t that time, the applicable statute addressing payment of deposition witness fees and costs was 28 U.S.C. § 1821." DCS Brief at 8 (emphasis added). Although there was no statute that dealt specifically with expert witness depositions when the NRC rule was adopted, if federal district courts allowed expert witness depositions at all,[5] they often required the party taking the deposition to pay the expert's fee.[6] In contrast to expert witness fees for depositions, fees paid to a fact witness were controlled by 28 U.S.C. § 1821, which required payment of travel expenses and a nominal attendance fee. DCS's argument overlooks the fact that prior to the adoption of the NRC regulation, the federal district courts had the discretion to require a deposing party to pay reasonable expert witness fees. Thus, by adopting the federal district court practice in its deposition rule, the Commission

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[4]See 21 Fed. Reg. 804 (Feb. 4, 1956). The deposition rule was originally codified in 10 C.F.R. § 2.745(h), but a 1962 revision redesignated the rule as 10 C.F.R. § 2.740(h), and slightly altered the language to comport with new regulations. See 27 Fed. Reg. 377 (Jan. 13, 1962).

[5]Prior to 1972, some federal district courts did not allow a party to depose their opponent's expert witnesses because it was considered to be "equivalent to taking another's property without making any compensation therefor." Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21, 23 (W.D. Pa. 1940); Walsh v. Reynolds Metal Co., 15 F.R.D. 376, 378-79 (D.N.J. 1954). Other courts, however, indicated that judicial discretion must be exercised in determining whether to order an expert witness to testify. See, e.g., Boynton v. R.J. Reynolds Tobacco Co., 36 F. Supp. 593, 595 (D. Mass. 1941); United States v. 88 Cases, etc., of Bireley's Orange Beverage, 5 F.R.D. 503, 507 (D.N.J. 1946).

[6]See, e.g., United States v. Certain Acres of Land, 18 F.R.D. 98, 101 (M.D. Ga. 1955) (quoting 4 Moore's Federal Practice, ¶ 26.24, at 1158, as noting "the court should have discretion to order discovery upon condition that the moving party pay a reasonable portion of the fees of the expert"); Jeremiah M. Long, Discovery and Experts Under the Federal Rules of Civil Procedure, 38 F.R.D. 111, 132-33 (1965) (citing cases where expert depositions were permitted and noting that courts generally required payment of expert fees by the party seeking to take the deposition).

necessarily intended a deposing party to pay reasonable fees to expert witnesses and the statutory fees to fact witnesses.

In 1970, Rule 26(b)(4)(C) was added to the Federal Rules of Civil Procedure to "meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum." Fed. R. Civ. P. 26(b)(4) advisory committee's note, 1970 amendment, 48 F.R.D. 487, 505 (1970). The Staff is correct that the "rule appears to codify the common law practice of paying a reasonable expert witness fee for a deposition." Staff Brief at 3. Two years later, in 1972, the NRC amended 10 C.F.R. § 2.740 and moved the provision on payment of witnesses for depositions from section 2.740(h) to section 2.740a(h). See 37 Fed. Reg. 15,127 (July 28, 1972). The text of the provision, however, remained unchanged from the 1962 version. Other provisions in section 2.740 were changed in 1972 to incorporate changes to the Federal Rules relating to discovery. Upon adopting these changes, the Commission noted, without elaboration, that the "new § 2.740 has been added to Part 2 containing general provisions relating to discovery" and "[t]he new section adapts Rules 26 and 37 of the Federal Rules of Civil Procedure to Commission proceedings." 37 Fed. Reg. 15,127, 15,127 (July 28, 1972).

DCS argues that by failing to amend section 2.740a(h) to address specifically the payment of expert witnesses as provided by Rule 26(b)(4)(C) of the Federal Rules, the Commission affirmatively rejected the payment of reasonable fees to expert witnesses for depositions. When regulatory history indicates that the Commission has rejected an amendment, that rejection may be evidence the Commission did not intend the regulation to include the provision embodied in the rejected amendment. See 2A Norman J. Singer, Sutherland Statutory Construction § 48.18, at 482-83 (6th ed. 2000). It is well recognized,

however, that "such rejection may occur because the bill already includes those provisions." Id. at 484. As explained in the Sutherland treatise:

> An amendment may have been adopted, only because it better expressed a provision already embodied in the original bill or because the provision in the original bill was unnecessary as unwritten law would produce the same result without it. Thus caution must be exercised in using the action of the legislature on proposed amendments as an interpretive aid. Action on a proposed amendment is not a significant aid to interpretation of an act that was passed years before.

Id. at 485-87 (footnotes omitted). The history of section 2.740a(h) stands as an excellent example of the situation discussed in the Sutherland treatise. Although the regulatory history is silent, the most reasonable and rational explanation in light of the plain language of the agency rule, is that the Commission, in adapting its rules to the new Rule 26 of the Federal Rules, simply concluded that it was unnecessary to amend section 2.740a(h) to address specifically the payment of expert witnesses, as had been done in the recently enacted Rule 26(b)(4)(C), because the NRC regulations already contained a provision dealing with the payment of witnesses for depositions. Thus, any subsequent changes in the procedures of federal district courts regarding payments to expert witnesses for depositions would automatically be incorporated into the NRC regulations through the reference in section 2.740a(h) to "the same fees as are paid for like services in the district courts of the United States."

Instead of relying upon the history or plain language of section 2.740a(h), DCS suggests that the Board look to 10 C.F.R. § 2.720(d), the Commission's subpoena regulation, to help interpret section 2.740a(h). Section 2.720(d) provides that "[w]itnesses summoned by subpoena shall be paid, by the party at whose instance they appear, the fees and mileage paid to witnesses in the district courts of the United States." 10 C.F.R. § 2.720(d) (2003) (emphasis added). This regulatory language clearly refers to 28 U.S.C. § 1821, which provides that

witnesses in the district courts will be paid a statutorily set attendance fee and travel costs.[7] DCS argues that there should be no difference in the fees paid to deponents summoned by subpoena under section 2.720(d) and those summoned by notice under section 2.740a(h), despite the fact that the two regulations contain significantly different language. See DCS Brief at 12. This argument is unpersuasive because, in contrast to section 2.720(d), section 2.740a(h) does not use language which refers to the "fees and mileage paid witnesses in district court." Rather, section 2.740a(h) indicates that a deponent is "entitled to the same fees as are paid for like services in the district courts of the United States." 10 C.F.R. § 2.740a(h) (emphasis added). The inference to be drawn from this disparate language is that section 2.740a(h) does not refer exclusively to the statutory witness fees in 28 U.S.C. § 1821. Thus, section 2.740a(h) is not tied to a specific dollar amount, but instead simply requires that the deponent receive a fee that is the same as those fees paid in federal district court for similar services. When a non-expert witness is deposed, the district courts require the deposing party

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[7] 28 U.S.C. § 1821 provides in part:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate Judge, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
> . . . .
>
> (b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
> . . . .
>
> (2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

to pay the witness's expenses and a nominal fee of $40 per day under 28 U.S.C. § 1821. When an expert witness is deposed, however, the district courts require the party seeking the deposition to pay a reasonable fee under Rule 26(b)(4)(C).[8] Therefore, because section 2.740a(h) requires that same outcome, DCS must pay Dr. Long his reasonable fee.

In arguing that the witness fees referred to in both 10 C.F.R. §§ 2.740a(h) and 2.720(d) were intended to refer to the statutory fees found in 28 U.S.C. § 1821, DCS relies on Public Service Co. of Oklahoma (Black Fox, Units 1 and 2), LBP-77-18, 5 NRC 671 (1977). In Black Fox, the Licensing Board determined that the witness fees referred to in 10 C.F.R. § 2.740a(h) and 10 C.F.R. § 2.720(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." Black Fox, 5 NRC at 673. Unreviewed Board rulings, however, do not constitute binding precedent. See, e.g., Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998) (citing Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1988)). Furthermore, Black Fox is unpersuasive because it is devoid of rational analysis. The Black Fox Board ignored the plain language of 10 C.F.R. § 2.740a(h) that adopts the federal district court practice -- a practice that includes the requirement that a deposing party pay an expert witness a reasonable fee. It then failed to analyze or explain why the Commission used different language in 10 C.F.R. §§ 2.740a(h) and 2.720(d) if it intended both to refer to the statutory fees found in 28 U.S.C. § 1821. Thereafter, in an ipse dixit fashion, the Board merely concluded that "it has the authority to order the payment of such [reasonable] expert witness fees." Black Fox, 5 NRC at 673. Thus, the unreviewed Black Fox decision cannot stand as precedent, and its holding is unsupported by

[8]See Haarhuis v. Kunnan Enter., 177 F.3d 1007, 1015-16 (D.C. Cir. 1999) (holding that 28 U.S.C. § 1821 does not preclude an award of reasonable expert witness deposition fees).

the history, structure, and plain language of the Part 2 regulations. Accordingly, that decision provides no valid foundation for DCS's argument.

DCS also argues that the statutory prohibition on intervenor funding that appears in 5 U.S.C. § 504 note bars them from paying Dr. Long. The prohibition provides that "[n]one of the funds in this Act or subsequent Energy and Water Development Appropriations Acts [EWDAA] shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts." Energy and Water Development Appropriations Act, 1993, Pub. L. No. 102-377, § 502, 106 Stat. 1342 (1992) (codified at 5 U.S.C. § 504 note).[9] DCS argues that, as a contractor of the Department of Energy (DOE), it is prohibited from paying Dr. Long because such payments would constitute intervenor funding.

Like the NRC, DOE is funded by Congress under the EWDAA. In arguing that the 5 U.S.C. § 504 note bars it from paying any deposition expert witness fees, DCS relies solely upon a Comptroller General decision holding that the intervenor funding prohibition precluded the NRC from paying an award under the Equal Access to Justice Act (EAJA) to intervenors in an NRC adjudication. See Availability of Funds for Payment of Intervenor Attorney Fees–Nuclear Regulatory Comm'n, 62 Comp. Gen. 692, 695 (1983). Based upon this decision, DCS claims that expert witness deposition fees would constitute a form of compensation to intervenors within the statutory prohibition. DCS Brief at 15-16. Here, however, the applicant is DCS, a DOE contractor, not DOE. The Comptroller General's decision neither involved nor discussed the payment of EAJA awards by a NRC contractor or a contractor's attorney. Therefore, DCS's argument cannot be sustained solely on the basis of this authority and DCS

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[9]The prohibition first appeared in the EWDAA of 1982, Pub. L. No. 97-88, § 502, 95 Stat. 1135 (1981), but did not apply to future appropriation acts. Some later acts also contained this prohibitory language, but the EWDAA of 1993 made the prohibition applicable to all subsequent EWDAAs. See Energy and Water Development Appropriations Act, 1993, Pub. L. No. 102-377, § 502, 106 Stat. 1342 (1992) (codified at 5 U.S.C. § 504 note).

has cited to us no other authority for its claim that as a DOE contractor it cannot be obligated to pay intervenor expert witness deposition fees.[10]

Even assuming arguendo that DCS, as a contractor of the DOE, somehow stands in DOE's shoes with regard to intervenor funding, the statutory prohibition is inapplicable in this instance. First, the 5 U.S.C. § 504 note does not come into play because the expert deponent, not the intervenor, receives payments under 10 C.F.R. § 2.740a(h). As previously noted, the Comptroller General found the statutory prohibition to preclude the NRC from using appropriated funds to pay intervenor fees and costs under the EAJA because such payments "constitute a form of compensation to intervenors and are therefore within the scope of the prohibition." Availability of Funds, 62 Comp. Gen. at 695. The Comptroller General held that "[t]he plain terms of section 502 . . . unambiguously prohibit the use of appropriated funds for payments of any kind to intervenors." Id. at 695. From this quote, DCS emphasizes the prohibition of using funds "of any kind." DCS Second Brief at 2. The fact that the prohibition covers only payments made "to intervenors," however, is equally important because both 10 C.F.R. § 2.740a(h) and Rule 26(b)(4)(C) require direct payment to the deponent by the party seeking to take a deposition. The case law indicates that Rule 26(b)(4)(C) creates a direct relationship between the party seeking discovery and the expert witness, and that the expert's fee is a cost of the party taking the deposition.[11] Thus, taking the deposition of an expert witness and compensating the expert for his time is clearly distinguishable from paying an

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[10]See infra note 14.

[11]See Bosse v. Litton Unit Handling Sys., 646 F.2d 689, 695 (1st Cir. 1981) ("It was defendant, however, who took their depositions. . . . [T]hey were not then plaintiff's witnesses at that time, but were called by defendant, and defendant, not plaintiff, is the one under whatever may be the obligation."); Dominguez v. Syntex Labs., Inc., 149 F.R.D. 166, 170 (S.D. Ind. 1993) ("The rule plainly requires defendant to pay the expert, not the plaintiff.").

intervenor's attorney's fees and costs because expert witness fees are paid directly to the expert to compensate the expert, not the intervenor.

Second, the 5 U.S.C. § 504 note is inapplicable because 10 C.F.R. § 2.740a(h) does not require appropriated funds to be used to provide special assistance just to intervenors. In another Comptroller General decision dealing with the prohibition on intervenor funding not referenced by DCS, a proposal for the NRC to provide free transcripts to all parties in its adjudications was approved, even though intervenors would incidentally benefit from the program. See Free Transcripts of Adjudicatory Proceedings–Nuclear Regulatory Comm'n, B-200,585, 1981 WL 23995 (Comp. Gen. 1981). The Comptroller General reasoned that the purpose of the statutory prohibition was "to preclude the Commission from implementing any program which was intended to and had the principal effect of paying the adjudicatory expenses of intervenors as a special class." Free Transcripts, 1981 WL 23995, at *2. Because the NRC's proposal was aimed at increasing efficiency in agency proceedings, incidental benefits that accrued to intervenors would not cause the proposal to violate the statutory prohibition. Free Transcripts, 1981 WL 23995, at *3. Although the Commission did not state its purpose in adopting 10 C.F.R. § 2.740a(h), the rule does not provide any special benefits to intervenors as a class. Rather, the rule treats all parties the same, making it similar to Rule 26(b)(4)(C). The Federal Rules of Civil Procedure Advisory Committee Notes on the 1970 Amendments explain that Rule 26(b)(4)(C) was adopted to "meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum." Fed. R. Civ. P. 26(b)(4) advisory committee's note, 1970 amendment, 48 F.R.D. 487, 505 (1970). Similarly, section 2.740a(h) does not single out intervenors for some special privilege because it applies evenly to all intervenors and applicants. Any benefits that GANE receives in this case are incidental to the equitable purposes of section 2.740a(h).

Accordingly, just as the Comptroller General held that the statutory prohibition on intervenor funding does not prevent EWDAA funds from being used to pay for transcripts, that prohibition does not bar DCS from paying expert witness fees.

Indeed, to read the statutory prohibition as DCS proposes, would not only be in the teeth of the Comptroller General's transcript decision, but it would produce inequitable results. For example, GANE could be required to pay DCS's experts pursuant to 10 C.F.R. § 2.740a(h), but DCS would be excused from paying GANE's experts by operation of 5 U.S.C. § 540 note. Additionally, the Commission's rule has the salutary effect of giving parties such as DCS every incentive to conduct an efficient deposition. This conclusion is bolstered by the fact that the party deposing the expert witness, here DCS, is the party that benefits from the deposition. It is in the deposing party's interest to depose the expert witness because the deposition allows that party to develop and strengthen its case. Reimbursing the expert for his time is simply a cost of reaping that benefit.[12] Therefore, the statutory prohibition on intervenor funding is not applicable to the issue at hand.

Finally, the 5 U.S.C. § 504 note is inapplicable in these circumstances because DCS, as a government contractor, need not use appropriated funds to pay Dr. Long. Under its MOX contract, DCS asserts that it is reimbursed by DOE for its costs in obtaining construction authorization for the MOX Facility. DCS in effect acknowledges, however, that it may pay some litigation expenses "out of funds that will not be reimbursed by DOE." DCS Brief at 18. Although DCS reserves the right to contest such payments with respect to other deponents, it has voluntarily agreed to use other funds to pay Dr. Long $40 per day and reasonable travel expenses. DCS Brief at 18. Similarly, Comptroller General decisions indicate that

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[12]See 8 Charles Alan Wright et al., Federal Practice and Procedure § 2034, at 469 (2d ed. 1994) ("a party that takes advantage of the opportunity afforded by Rule 26(b)(4)(A) to prepare a more forceful cross-examination should pay the expert's charges for submitting to this examination").

appropriation restrictions that prevent government agencies from using federal funds to lobby do not prevent government contractors from lobbying using their own corporate funds.[13] These decisions are sufficiently analogous to support the proposition that the statutory prohibition on intervenor funding in the 5 U.S.C. § 504 note does not prevent a government contractor from paying expert witness fees with non-restricted funds.[14] Thus, there is no reason why the 5 U.S.C. § 504 note should prevent DCS from paying Dr. Long here. Accordingly, the Board concludes that 10 C.F.R. § 2.740a(h) requires that DCS pay Dr. Long an expert witness fee, calculated at a rate not to exceed that which he charges GANE, for his reasonable preparation time and time at the deposition.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD[15]

/RA/
Thomas S. Moore
ADMINISTRATIVE JUDGE

/RA/
Charles N. Kelber
ADMINISTRATIVE JUDGE

/RA/
Peter S. Lam
ADMINISTRATIVE JUDGE

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[13]See 1 GAO, Principles of Federal Appropriations Law, at 4-176 (2d Ed. 1991); Honorable Fortney H. (Pete) Stark–House of Representatives, B-216,239, 1985 WL 668789 (Comp. Gen. 1985).

[14]Furthermore, any funds used to pay Dr. Long may well lose their identity as federal appropriated funds because DCS's retained attorneys in all likelihood would initially pay Dr. Long, then seek reimbursement from DCS, who in turn would seek reimbursement from DOE. DCS has cited no authority that such an attenuated chain does not break the link of federal appropriations.

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
DUKE COGEMA STONE & WEBSTER	)	Docket No. 70-3098-ML
	)	
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON EXPERT WITNESS FEE ISSUE) (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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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of August 2003