

September 8, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

September 16, 2003 (2:46PM)

Before Administrative Judges:
Thomas S. Moore, Chairman
Charles N. Kelber
Peter S. Lam

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)

DUKE COGEMA STONE & WEBSTER)

(Savannah River Mixed Oxide Fuel
Fabrication Facility))

Docket No. 0-70-03098-ML

ASLBP No. 01-790-01-ML

**GEORGIANS AGAINST NUCLEAR ENERGY'S
MOTION FOR CLARIFICATION AND/OR PARTIAL
RECONSIDERATION OF LBP-03-14**

Georgians Against Nuclear Energy ("GANE") respectfully requests clarification and/or partial reconsideration of LBP-03-14, Memorandum and Order (Ruling on Expert Witness Fee Issue). In that decision, the Atomic Safety and Licensing Board ("ASLB") ordered that Duke Cogema Stone & Webster ("DCS") must compensate GANE's expert witness, Dr. Leland Timothy Long, for "preparation time and time at the deposition" that DCS took on June 25 and 26, 2003. *Id.*, slip op. at 2. GANE asks the Board to clarify and reconsider the scope of LBP-03-14 and order that Dr. Long must be compensated for (a) time spent traveling to and from the deposition; (b) reasonable out-of-pocket expenses associated with travel, lodging and meals; and (c) time spent reviewing and correcting the

transcript of his deposition. GANE attempted to informally resolve these issues with DCS, but was unsuccessful.

In support of this motion, GANE provides the following information:

1. Although NRC regulations do not contain a standard for reconsideration of ASLB decisions, the Commission has established a standard in its case law:

Motions to reconsider should be associated with requests for re-evaluation of an order in light of an elaboration upon, or refinement of, arguments previously advanced. *See Tennessee Valley Authority* (Hartville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-418, 6 NRC 1,2 (1977). They are not the occasion for an 'entirely new theses.' *Id.*

Central Electric Power Co. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981). *See also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 139-40 (1994):

A motion for leave to reargue or rehear a motion will not be granted unless it appears that there is some decision or some principle of law which would have a controlling effect and which has been overlooked or that there has been a misapprehension of the facts.

Reconsideration is appropriate here, because GANE merely seeks a re-evaluation of the ASLB's decision, and clarification of the scope of expert fees and costs covered by the decision.

2. In its initial motion for a protective order, and in its subsequent brief, GANE requested compensation of Dr. Long for time spent traveling to and from the deposition, and cited several cases in support of its request. *Georgians Against Nuclear Energy Motion for Protective Order and Request to Quash Deposition of Dr. Leland Timothy Long* at 3 (June 17, 2003) (hereinafter "GANES Motion"); *Georgian Against Nuclear Energy Brief In Support of Motion for Protective Order and Request to Quash*

Deposition of Dr. Leland Timothy Long at 8 (June 30, 2003) (hereinafter "GANE's Brief"), citing *Haarhuis v. Kunnan Enterprises, Ltd.*, 177 F.3d 1007, 1015-16 (D.C. Cir. 1999); *Grdinich v. Bradlees*, *Grdinich v. Bradlees*, 187 F.R.D. 77, 82 (S.D.N.Y. 1999); *Sean v. Okuma Machine Tool, Inc.*, 1996 U.S. Dist. LEXIS 6617 (E.D. Pa. May 8, 1996).

GANE respectfully submits that, as the Court held in *Haarhuis*, Dr. Long's time is compensable "portal to portal." 177 F.3d at 1016. Because GANE anticipates that this question is likely to be a disputed issue between the parties, GANE requests clarification that Dr. Long may charge DCS a reasonable fee for his travel time.¹

3. In its initial motion for a protective order, and in its subsequent brief, GANE also requested compensation for Dr. Long's travel costs, lodging, and meals. GANE's Motion at 3; GANE's Brief at 8, citing Wright & Miller, Federal Practice and Procedure, § 2034 (2d ed. 1994); *Haarhuis*, 177 F.3d at 1015-16; *Grdinich v. Bradlees*, 187 F.R.D. at 82; *Sean v. Okuma Machine Tool, Inc.*, 1996 U.S. Dist. LEXIS 6617. The ASLB did not address the compensability of these costs in LBP-03-14. Because Dr. Long's out-of-pocket costs are not inconsiderable, and must be paid by GANE if DCS refuses to pay them, GANE seeks a ruling that they are covered.

4. At the time GANE filed its Motion for a Protective Order and its brief, GANE did not request compensation for time spent by Dr. Long reviewing and correcting his deposition. Instead, GANE's attention and concern were focused on the imminent cost of having Dr. Long prepare for and attend his deposition. After the deposition,

¹ In *Haarhuis*, the court held that the expert could recover for travel time at the rate he charged to attend the deposition, \$300/hour. In this case, Dr. Long has informed GANE that he charges \$100/hour for travel time, and will bill GANE at that rate if DCS is not required to pay for it.

however, Dr. Long also was required by NRC regulation 10 C.F.R. § 2.740a(e) to review his deposition transcript and make corrections. The deposition took two full days, and the transcript was over 400 pages long. Thus, Dr. Long was required to spend a considerable period of time reviewing the transcript.

Accordingly, GANE seeks reconsideration and clarification of the ASLB's order, to require that Dr. Long should be compensated for a reasonable amount of time spent reviewing and correcting his deposition transcript. While GANE is not aware of any case law directly addressing the compensability of such work, GANE respectfully submits that such a result would be in keeping with the purpose of F.R.C.P. 26(b)(4), on which the NRC's requirement is based, of meeting "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." *See* LBP-03-4, slip op. at 4. The task of reviewing and correcting the transcript was incident to the deposition, and was legally required by NRC regulations. Dr. Long had no choice but to perform the work. Moreover, GANE will have no choice but to pay for it if DCS refuses. Because the work was not done at GANE's request, it would be unfair to require GANE to pay for this task.²

Accordingly, GANE requests that the ASLB issue an order clarifying that DCS will be required to pay Dr. Long a reasonable fee for time spent traveling to and from the

² GANE anticipates that in responding to this motion, DCS may protest the reasonableness of Dr. Long's fee for reviewing and correcting his transcript. GANE respectfully submits, however, that the question of reasonableness can and should be postponed until such time as Dr. Long actually submits a bill to DCS and DCS refuses to pay it. GANE believes that with respect to this motion for clarification and reconsideration, the ASLB should address only the issue of the scope of fees that are compensable.

deposition and for the task of reviewing and correcting his deposition transcript, as well as reasonable out-of-pocket expenses.

Respectfully submitted,



Diane Curran

Harmon, Curran, Spielberg, & Eisenberg, L.L.P.

1726 M Street N.W., Suite 600

Washington, D.C. 20036

202/328-3500

FAX 202/328-6918

dcurran@harmoncurran.com

September 8, 2003

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2003, copies of the foregoing GEORGIANS AGAINST NUCLEAR ENERGY'S MOTION FOR CLARIFICATION AND/OR RECONSIDERATION OF LBP-03-14 were served on the following by e-mail and first-class mail:

Rulemakings and Adjudications Staff
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555
hearingdocket@nrc.gov

Administrative Judge Thomas S. Moore
Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
tsm2@nrc.gov

Administrative Judge Charles N. Kelber
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
cnk@nrc.gov

Administrative Judge Peter S. Lam
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
psl@nrc.gov

Donald J. Silverman, Esq.
Alex S. Polonsky, Esq.
Marjan Mashadi
Morgan, Lewis & Bockius
1111 Pennsylvania Avenue N.W.
Washington, D.C. 20004
dsilverman@morganlewis.com
mmashadi@morganlewis.com
apolonsky@morganlewis.com

Louis A. Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
bredl@skybest.com

Glenn Carroll
139 Kings Highway
Decatur, GA 30030
atom.girl@mindspring.com

John T. Hull, Esq.
Shelly D. Cole, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20552
jth@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555
hrb@nrc.gov


Diane Curran