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**Testimony**

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Committee on Energy and Commerce, House of  
Representatives

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**MANAGING DOE**

**Tighter Controls Needed Over  
the Department of Energy's  
Outside Litigation Costs**

Statement of Victor S. Rezendes,  
Director, Energy and Science Issues,  
Resources, Community, and Economic  
Development Division



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Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to discuss the Department of Energy's (DOE) controls over the costs it has incurred related to litigation against contractors who have operated the Department's facilities. As you know, numerous class action lawsuits have been filed against these contractors, and the costs associated with their defense are being borne by DOE. My testimony today is based on an ongoing review of these costs at three DOE operations offices--Albuquerque, Oak Ridge, and Richland--which we are conducting at your request. We are currently preparing a report on this work which we expect to issue this summer.

In summary, our findings to date show that DOE has had little control over contractors' litigation costs. Specifically,

-- DOE does not know the total amount it has spent and continues to spend to defend its contractors in litigation. Such information is not maintained by DOE, and its only effort to collect data on litigation costs showed that the agency spent about \$31 million in fiscal year 1992 on outside legal fees. However, significant costs for litigation-related activities, such as the development and operation of litigation data bases--averaging over \$8 million annually--were not included in DOE's estimate.

-- DOE is not effectively controlling the costs it is reimbursing for outside legal charges. The agency has not established criteria directing contractors to seek discounted fees or to set limits on travel and other administrative costs charged by law firms.

-- DOE does not have effective procedures for reviewing legal bills. The agency has not required detailed review of bills nor has it directed that bills be in a format specific enough to facilitate detailed review. Consequently, bills are being paid with little or no detailed review or without sufficient information to fully justify the amounts charged.

These problems demonstrate that DOE has limited oversight and control of contractors' litigation costs. The Office of General Counsel within DOE recognizes the need to improve its management of these costs, and it has recently issued guidance to field counsel and contractors on this subject. However, this guidance does not go far enough in that it still leaves much of the cost control responsibility with the contractor. In the report we will be issuing to this Subcommittee, we will discuss in greater detail what DOE will need to do to take a more "hands on" role in overseeing litigation costs. The need for stronger DOE controls will become more critical as additional information is disclosed about past radiation experimentation conducted on individuals and

populations. These disclosures are likely to lead to more lawsuits against the operators of DOE's facilities and thus increased litigation costs for DOE.

Before I discuss these problems in greater detail, I will briefly describe DOE's responsibility for reimbursing contractors for litigation expenses.

DOE'S LIABILITY FOR  
CONTRACTORS' LITIGATION COSTS

DOE's responsibility for contractors' litigation costs has its roots in the early nuclear programs. Since the inception of these programs in the 1940s, the federal government has relied on contractors to operate its facilities. However, because of the high risk associated with operating these facilities, the agencies responsible for managing nuclear activities--from the Atomic Energy Commission to DOE--included litigation and claims clauses in the contracts. These clauses provide that litigation expenses are allowable costs under the contracts. Furthermore, judgments against the contractors arising from their activities under the contracts are reimbursable by DOE.

Over the past several years, class action law suits have been filed against past and present contractors who operated DOE facilities. In general, these suits contend that during the

operation of the facilities, radioactive or toxic emissions were released, causing personal injury, emotional distress, economic injury, and/or property damage. These suits have been filed against DOE contractors throughout the country, such as the Hanford Site in Washington, the Fernald Plant in Ohio, the Rocky Flats Plant in Colorado, the Los Alamos National Laboratory in New Mexico, and various other facilities.

DOE has the option of undertaking the defense against such litigation on its own; however, it has generally opted to have the contractors defend the case in good faith. DOE's standard practice is to authorize contractors to proceed with the defense, with virtually no DOE involvement other than to approve the hiring of outside counsel, review billings, and agree upon settlement amounts. The funding for each contractor's litigation, and oversight of the litigation, is handled by the cognizant DOE field office.

#### PROBLEMS GAO IDENTIFIED TO DATE

Our ongoing work of contractors' litigation costs found that DOE does not (1) collect or maintain data on the costs that are being incurred, (2) have criteria that clearly specify what costs are allowable, and (3) have procedures in place to ensure thorough review of legal bills. As a result, DOE has limited oversight and control of contractors' litigation costs.

## Full Extent of Litigation

### Costs Not Known

Information on the costs of litigation is important not only for DOE to understand the overall costs it is incurring but also to weigh the merits of an individual case against its cost. DOE headquarters maintains little data on contractors' litigation costs. Because oversight of this litigation is handled by DOE field offices, no central collection of this data is conducted by the agency. In 1993, however, DOE's Contract Reform Team attempted to assess the magnitude of litigation expenditures. The team found that over \$31 million was paid in fiscal year 1992 for outside legal fees by DOE contractors, and it estimated that a similar amount was expended in fiscal year 1993. However, DOE was unable to provide complete and comparable data for fiscal year 1993.

During our review, we found additional costs related to contractor litigation were not being included in DOE's litigation cost estimate. The most substantial of these costs were for litigation data bases. In at least four lawsuits, DOE is funding the development of computer data bases of litigation-related information. These data bases provide capabilities designed to identify and retrieve information needed for the litigation defense. The data base costs are substantial. From fiscal years 1991 through 1993, DOE had spent about \$25 million on data base

development. Of that amount, the greatest cost--\$14 million--was spent on a single data base developed for one major litigation.

In addition to the data base costs, certain contractors' litigation costs were not included in DOE's cost estimate. For example, as much as \$3.7 million was paid to one contractor for costs directly related to litigation, such as salaries for consultants and employees assisting in litigation-related activities and fees to the company managing the litigation. In addition, current management and operating contractors use their own corporate counsel to manage and/or assist in litigation. None of these costs are included in DOE's estimate.

#### No Allowable Cost Criteria

Another problem has been the lack of DOE criteria for allowable costs. Cost criteria or guidelines are necessary for contractors and law firms to know what will or will not be reimbursed by DOE. While there is no overall federal criteria, two federal corporations--the Federal Deposit Insurance Corporation and the Resolution Trust Corporation--have developed cost guidelines for outside counsel. Using the corporations' criteria as a guide, we found that DOE is paying significantly higher costs than these guidelines would allow. For example:

- The federal corporations require that discounts on fees for legal services be sought. A Federal Deposit Insurance Corporation official said that the corporation receives at least a 5-percent discount, with the majority of firms discounting their rates 10 percent--some even as high as 20 percent. DOE, however, does not require that contractors seek discounts for outside legal fees. Only 2 of the 16 law firms' bills we examined contained any discounts.<sup>1</sup>
  
- The federal corporations' criteria limit document duplication charges to \$0.08 per page. All of the law firms retained by DOE contractors were charging more--as much as \$0.25 per page. This could be significant, as duplication costs for one firm over a 3-year period were over \$175,000.
  
- The federal corporations' criteria require that facsimile transmissions--faxes--be billed at actual cost. In this regard, a Federal Deposit Insurance Corporation official said that only the relevant telephone charges would be an allowable cost. DOE is reimbursing some contractors' law firms as much as \$1.75 per page plus telephone charges for faxes. For one firm, the charges for faxes totaled over \$48,000 during a 3-year period.

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<sup>1</sup>Both firms provided 10 percent discounts on their fees.



-- The federal corporations' criteria limit travel costs to coach airfare, moderately priced hotels, and federal per diem rates for meals. Travel costs reimbursed by DOE were significantly higher. For example, two firms billed first-class airfare for their senior partners. Additionally, some firms billed for meals costing almost \$100 per person.

Furthermore, other costs were incurred and charged to DOE that the two federal corporations' guidelines consider to be law firm overhead costs that are generally subsumed within the professional fees. These costs include wordprocessing services, overtime charges, utilities and supplies, and charges for legal publications. In many instances, DOE has allowed these charges. While it is conceivable that there may be instances where those costs could be appropriately charged and reimbursed, we found many instances where the charges were inappropriate. For example, one law firm billed for purchasing American Bar Association publications, such as a guide to taking depositions. Additionally, according to the federal corporations' guidelines, activities conducted by lawyers relating to development of subject matter expertise are not to be charged to the federal corporations. Instead, law firms must absorb the cost of developing an understanding of specialty issues. In contrast, some law firms billed DOE contractors for staff to attend seminars relating to toxic/radiation litigation.

No Requirements for  
Reviewing Billings

Finally, we found that requirements do not exist that mandate and facilitate detailed contractor and DOE review of the bills submitted by law firms. As a result, the quality of review varied greatly and, in some cases, the review was inadequate. For example, one contractor performed an internal audit 2 years into the litigation and found that its monthly detailed reviews were lacking and that some excessive costs had been paid, such as first class airfares. In another case, the contractor never examined detailed billings from its lead law firm and instead approved all the bills based on a monthly two-page billing summary. These summaries did not specify, either individually or in the aggregate, the number of hours lawyers had worked on the case.

DOE's review of bills was also inadequate. Only at one DOE operations office--Oak Ridge--did Chief Counsel officials perform detailed reviews of the legal costs. This office determined that numerous costs--including meals charged by lawyers while in nontravel status and expenses for seminars--should not be paid. At Albuquerque, little detailed review of bills was performed. In those instances when detailed reviews were performed, it was after the bills had been paid. At Richland, bills were approved for payment by the Chief Counsel primarily on the basis of billing summaries. In our view, the summaries lacked the specificity that

would enable a reviewer to determine what the costs actually were for and their appropriateness.

DOE has not required that the bills be in a format with sufficient detail that would provide information to understand the basis of the charges. Consequently, even when the detailed bills are reviewed, many of the charges in the bills cannot be adequately assessed. For example, many charges were listed simply as "research" or "reviewing documents." In one case, no activity was listed at all. In other instances, activities would be accumulated into a daily total with a brief description of activities, which provided little insight on the time spent on each activity and whether the time spent was appropriate.

RECENT DOE ACTIONS TO  
IMPROVE ITS CONTROLS WILL  
NOT BE SUFFICIENT

DOE has recognized problems with its controls over contractors' litigation costs and has taken some actions to improve them. In this regard, DOE's General Counsel issued litigation management guidelines in March 1994 intended to improve oversight of litigation and reduce costs. The guidelines also require that contractors develop for each case a formal understanding of, among other things, allowable expenses, billing procedures, and contractor review of bills.

Although a step in the right direction, these actions do not go far enough. The new guidelines still give the contractor considerable discretion in how costs will be controlled. On the basis of past application of cost controls by contractors, we are not convinced that this step will ensure that consistent and effective cost controls are developed and applied to all legal bills. In our view, the development of cost guidelines rests with DOE's Office of General Counsel, and it needs to take the lead in developing specific criteria--similar to the federal corporations'--that would clarify which costs are allowable and which are not. Furthermore, once cost criteria are established, consistent procedures for reviewing contractors' litigation costs should also be implemented.

#### SUMMARY

In summary, we believe that DOE has limited oversight and control of the costs it is incurring related to contractor litigation. The agency does not know the full costs associated with defending its contractors in litigation, does not have criteria that set forth what costs are allowable for legal services, and does not have procedures requiring detailed contractor and DOE review of billed costs. In our view, these problems have resulted in higher costs than necessary to DOE for contractor litigation. Additionally, as I noted earlier, these problems need to be resolved, as more lawsuits are likely to result

as more information becomes public about the past operation of DOE facilities. In our report to this Subcommittee, we will be making specific recommendations to address these problems.

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Thank you, Mr. Chairman and Members of the Subcommittee. That concludes our testimony. We would be happy to respond to any questions you or members of the Subcommittee may have.

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