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MANAGING DOE

The Department's Efforts to Control Litigation Costs

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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 DOE incurs through litigation against contractors who have operated its 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. In 1994, we reported that DOE poorly managed the costs associated with these class action lawsuits. My testimony today is based on our follow-up review for your subcommittee of DOE's management of these costs with two major class action lawsuits—In re Hanford and Cook v. Rockwell/Dow.

In summary, we found that DOE has initiated a number of actions to better control its outside litigation expenses, which were over $25 million in fiscal year 1995. In this regard, DOE has instituted cost control guidance governing the litigation expenses that can be reimbursed by the department. This action has saved hundreds of thousands of dollars. However, in certain instances, the guidance is not being consistently applied or followed. Further, our work found that other issues are driving DOE' s overall litigation costs. These include the number of law firms representing DOE contractors, how discovery requests are handled,[1] and database development. DOE has begun to take action—such as consolidating the law firms and contractors in the In re Hanford case—to address these issues.

Background

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 nuclear 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 their management and operating contracts. These clauses generally provide that litigation expenses are allowable costs under the contracts. In addition, judgments against the contractors arising from their performance of the contracts are reimbursable by DOE.

Over the past several years, class action lawsuits have been filed against past and present contractors responsible for operating DOE's facilities. In general, these suits contend that the operation of the facilities released

[1]Discovery is a pretrial process that one party can use to obtain facts and information about the case from the other party or from a non-party.

radioactive or toxic emissions and caused personal injury, emotional distress, economic injury, and/or property damage. These suits have been filed against the current and former operators of certain DOE facilities throughout the country, including the Hanford Site near Richland, Washington; the Rocky Flats Site in Golden, Colorado; and, most recently, the Brookhaven National Laboratory in Upton, New York.[2]

DOE has the option of undertaking the defense against such class action litigation on its own, but it has generally opted to have the contractors defend these cases. As standard practice, DOE has authorized the contractors to proceed with their defense and has limited its own involvement to approving the hiring of outside counsel, reviewing billings, and agreeing upon settlement amounts. The cognizant DOE field office is responsible for funding each contractor's litigation and overseeing the litigation effort. DOE's outside litigation costs exceeded $25 million in fiscal year 1995.

On July 13, 1994,[3] we testified before the House Committee on Energy and Commerce's Subcommittee on Oversight and Investigations on our review of DOE's management of its outside litigation costs. As we indicated at that hearing, and subsequently reported,[4] we found that DOE had little control over litigation-related expenses. DOE (1) did not know how much it was spending to defend contractors in litigation, (2) had not established cost guidance or criteria for allowable costs, and (3) had not instituted effective procedures for reviewing the legal bills.

At that time, DOE's General Counsel acknowledged that the Department's management of outside litigation costs had been inadequate and said that DOE was initiating actions to strengthen its controls over these costs. DOE, in August 1994, issued cost control guidance and established detailed procedures for reviewing contractors' legal bills. Furthermore, DOE has recognized that major savings can be realized by reducing the number of law firms representing its contractors and it has begun efforts to consolidate cases involving multiple contractors and law firms. The General Counsel said that case consolidation was one of his office's

[2]Osarczuk v. Associated Universities, Inc., No. 96-02836 (Sup. Ct. Suffolk County, N.Y. filed Feb. 13, 1996).

[3]Managing DOE: Tighter Controls Needed Over the Department of Energy's Outside Litigation Costs (GAO/T-RCED-94-264, July 13, 1994).

[4]Managing DOE: The Department of Energy Is Making Efforts to Control Litigation Costs (GAO/RCED-95-36, Nov. 22, 1994).

highest priorities because it would allow DOE to improve its case management and greatly reduce costs.

DOE Has Improved Cost Controls

Since we first reviewed DOE's litigation costs, the Department has made considerable efforts to improve its procedures for controlling these costs, saving hundreds of thousands of dollars. However, in certain instances, the guidance is not being consistently applied or not followed. Furthermore, headquarters' oversight has not been as effective as it could be. Consequently, DOE is still being charged—and is paying—more than it should for litigation expenses.

DOE Has Instituted Several Policies and Procedures to Address Litigation Costs

As a result of our July 1994 testimony, DOE issued detailed interim guidance in August 1994 setting forth policies for contracting officers to consider in determining whether particular litigation costs are reasonable. This guidance—which became effective for all ongoing class action suits on October 1, 1994—establishes limits on the costs that DOE will reimburse contractors for outside litigation. For example, the guidance specifies that the cost of duplicating documents should not exceed 10 cents per page; the charges for telephone calls, facsimile transmissions, and computer-assisted research are not to exceed the actual costs of providing these services; airfare is not to exceed the coach fare; and other travel expenses must be moderate, consistent with the rates established in the Federal Travel Regulations. The new guidance also sets forth DOE's policy for reimbursing attorneys' fees, profit and overhead, and overtime expenses, and it designates specific nonreimbursable costs.

In addition, as part of its efforts to improve controls over litigation expenses, DOE has instituted detailed procedures for reviewing bills. DOE now requires contractors to submit copies of bills and accompanying supporting documentation to the responsible field offices for their review. Copies are also sent to headquarters so that if questions come up in the field, the Office of General Counsel's staff can review the charges in question. Staff in each field Chief Counsel's office are required to develop procedures for reviewing the bills each month to ensure compliance with the guidance. At headquarters, the Office of General Counsel hired an attorney with expertise in litigation management to coordinate DOE's efforts to control costs. As a separate audit function, the Office of General Counsel established a team to audit each Chief Counsel's office annually to ensure compliance with the guidance for managing litigation.

As a result of these initiatives, DOE has questioned and/or disallowed hundreds of thousands of dollars in unnecessary and/or undocumented costs. Such costs have appeared in many of the bills reviewed by DOE. For example, DOE has disallowed time charges for attorneys when the work is clearly for other cases or when the description of work was vague or incomplete. DOE has also questioned charges for work such as "document management," "filing," and entertainment expenses. Finally, charges for long-distance telephone calls, overnight delivery, special messenger services, computer database research and other disbursements have been denied for lack of supporting documentation.

DOE's Cost Control Guidance Not Consistently Applied or Not Followed

We reviewed the bills associated with the Cook v. Rockwell/Dow and In re Hanford cases for fiscal year 1995, and found problems in many of them. Specifically, we identified additional expenses—over and above those disallowed by DOE—that should not have been approved according to the guidance. These examples show that the existing guidance is not being consistently applied or not being followed in certain instances. The following examples illustrate some of the most frequently occurring problems:

- DOE's guidance directs that the legal fees be reasonable. Following this guidance, the Richland Chief Counsel's staff—who manage the In re Hanford case—routinely question if an attorney charges more than 8.5 hours per day unless they are in trial, and charges exceeding this limit have been disallowed. However, staff at Rocky Flats—managing the Cook case—made no effort to question these charges even though several attorneys and paralegals from one law firm have frequently billed more than 8.5 hours per day—including one attorney who billed 17 hours for one day.
- DOE's guidance says that the costs for meals and lodging for personnel while on travel should be billed at moderate rates using the Federal Travel Regulations as a guide. Nevertheless, the Rocky Flats office allowed lawyers to bill $28 for in-room breakfasts and for lodging that exceeded the government's per diem rates. For example, one law firm was reimbursed in full for hotel charges of $221 per night in Washington, D.C. (where the federal maximum allowance for hotel rooms was $113), and $177 per night in Denver (where the federal maximum allowance for hotel rooms was $77).
- DOE's guidance states that the cost controls are applicable to charges billed by consultants who work on the litigation. However, at Rocky Flats this criterion is not being adhered to. Consultants and expert witnesses are

being reimbursed for expenses that are significantly higher than the guidance allows. For example, consultants and expert witnesses are being reimbursed for their administrative expenses at rates higher than their actual costs. They are being reimbursed for overhead at a rate of 140 percent of the administrative and secretarial support costs. Additionally, the mileage charged by some consultants is 133 percent of the federal limits.

- DOE's guidance specifies that certain costs are nonreimbursable. However, some nonreimbursable expenses are being paid at both Rocky Flats and Hanford. Staff from these field offices are reimbursing purchases of reference materials, such as books and articles; costs for conference meals in excess of $10 per person; and overtime charges for secretaries—all of which are nonreimbursable under the guidance.
- DOE's guidance requires certain costs to be approved in advance. However, we found that expenses requiring advance approval, such as the costs of hiring temporary personnel, were reimbursed even though the advance approval had not been obtained.

Finally, we found that headquarters provided inadequate oversight of the field's review of the bills. Bills are being forwarded to headquarters at the same time as the field office receives them, yet the Office of General Counsel's staff was not aware of many of the problems we have identified. The Office of General Counsel's staff said that they had not reviewed the bills to ensure uniformity and consistency with the guidance because they had devoted their limited resources to other efforts. However, they now intend to examine the bills more closely and oversee the field offices' work. In fact, after learning of our findings, DOE headquarters staff clarified the applicability of the guidance to consultants and expert witnesses. On April 23, 1996, the Office of General Counsel issued a memo to all field office Chief Counsels stating that consultants, experts, and all other outside firms retained by the law firms are subject to the Department's cost control guidance. These actions should help tighten controls over litigation costs.

Other Issues Are Driving Costs

While DOE has taken a number of actions to institute cost controls over its outside litigation expenses, the dollar savings resulting from these actions are relatively small compared with DOE's overall costs for outside litigation. Other issues have a far greater impact on the costs associated with the class action suits. These include the number of law firms representing DOE contractors, responding to discovery requests, and database development. DOE's General Counsel is bringing more

management attention to these issues in order to further reduce the costs of the class action litigation.

Case Consolidation

Officials in DOE's Office of General Counsel believe that consolidating the law firms and contractors in a case gives the department its greatest cost-saving potential. This alleviates potential duplication of work, reduces the number of legal staff billing on the case, and helps the staff in the field streamline their management of the litigation expenses. Since we completed our 1994 work, DOE has consolidated its largest class action case—In re Hanford—which had six codefendants, each represented by at least one law firm and some by as many as three firms. The Office of General Counsel acknowledged in 1994 that duplication of effort was likely occurring and, with it, unnecessary costs. Today, only two law firms are handling the litigation.

DOE originally estimated that consolidating the defense for its lawsuits would significantly reduce its annual expenses for outside litigation. In 1995, DOE reduced its legal expenses by $1 million by consolidating the In re Hanford case. DOE explained that the savings at Hanford were less than expected this first year because the law firms experienced difficulties in reviewing and consolidating the voluminous work product of the former law firms. In future years, DOE expects the savings to be higher. To achieve further cost savings, DOE has considered consolidating the Cook case—which has two contractors as defendants. However, DOE has decided not to consolidate in light of the circumstances of this case.

To avoid future situations where multiple contractors each hire individual law firms to represent them, DOE instituted a policy requiring contractors to select joint counsel. Staff from the Office of General Counsel cited several recent cases filed against several current and former DOE contractors involved in human radiation experimentation in which the contractors were encouraged to select common counsel to represent them. In addition, the General Counsel has directed that all new management and operating contracts contain a clause that will allow DOE to require that contractors serving as codefendants select common counsel.

Discovery Costs

In both the Cook and the In re Hanford cases, DOE incurred high costs in responding to plaintiffs' discovery requests—requests to obtain facts from DOE. In the Cook case DOE failed to meet deadlines in a court order and the

judge issued a contempt order against DOE in November 1995. Consequently, DOE has rededicated staff and funds to identify, declassify and prepare hundreds of thousands of pages for review by the plaintiffs. After the contempt order was issued, DOE assigned as many as 82 people to the discovery effort. As of March 31, 1996, DOE had spent over $3 million for discovery efforts in Cook in fiscal year 1996. The Rocky Flats Chief Counsel estimates that DOE may spend as much as $11 million before discovery is completed.

Discovery matters in the In re Hanford case have also proven costly for DOE. To comply with a court discovery order and avoid a contempt order in that case, DOE temporarily suspended cleanup activities at its Richland facility for a week in February 1996 so that all staff could identify and index documents requested by the plaintiffs. DOE estimates that this effort alone cost over $2.3 million. Ongoing efforts to declassify and catalog discovery documents have cost DOE an additional $4.7 million in this case.

DOE recognizes that discovery is costly and that, in the past, it has lacked a coordinated approach for responding to discovery requests. To address this issue, the Office of General Counsel, in March 1996, began circulating draft guidance setting forth procedures for dealing with discovery issues, including procedures for assigning responsibility for contesting discovery requests. DOE's General Counsel issued this guidance in final form on May 3, 1996. The Office acknowledged that if these procedures had been in place during the initial stages of discovery in the Cook case, they would have helped DOE avoid the contempt citation and the additional discovery costs it entailed.

Database Development

The final area that is driving costs is the development and maintenance of litigation databases. Since 1989, DOE has spent over $27 million to develop a litigation support database—maintained at Los Alamos National Laboratory—to be used to provide assistance to ongoing and future cases involving DOE and its former and current contractors. In addition, DOE contractors have developed their own litigation databases at DOE's expense—that may be redundant and ineffective. In one instance, DOE allowed a law firm to get a copy of the scanned document tape from Los Alamos to search and organize on its own. The law firm maintained that this would be more cost-effective than its using the Los Alamos database directly. However, the final costs were double the amount estimated and the scanned documents were not as easily searchable as the law firm thought.

We identified seven databases used in support of the Cook case. In fiscal year 1995, DOE spent over $600,000 on these databases. When we questioned Rocky Flat's Chief Counsel about the purpose and need for these databases, she indicated that she was aware of only one database that DOE had developed in support of the Cook case. DOE's Attorney for Litigation Management acknowledges that the functions of the various Cook databases may overlap and she has begun to identify the databases and their functions in order to minimize or reduce costs.

For In re Hanford, we identified over 20 databases that had been developed by the contractors and their law firms before the case was consolidated. These databases are now being reviewed and combined by the lead law firm. In addition, DOE has reimbursed the contractors over $6.6 million for developing a separate database—the Westlake database—that serves as a repository for the plaintiffs' medical records. DOE has recently undertaken efforts to reduce the costs associated with this database by, first, relocating to a less expensive location and, second, scaling down the number of documents being entered into the database.

DOE has no formal written policy on developing databases. However, DOE's Office of General Counsel is looking closely at the number of databases for each class action case intending to consolidate as many as possible and eliminate those that are duplicative. Officials from this office told us that with the new policy encouraging contractors to select common counsel and the cost controls now in place, it is unlikely that a large number of databases will be generated in the future for any one case.

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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