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January 14, 1994

Mr. Hugh L. Thompson, Jr.
Deputy Executive Director for
Nuclear Materials
Safety, Safeguards, and
Operations Support
United States Nuclear Regulatory Commission
Washington, DC 20555

Dear Mr. Thompson:

This letter is in further response to your letter of October 26, 1992,[1] raising several questions about the use of employees of the National Laboratories as members of the NRC's Advisory Committees on Reactor Safeguards (ACRS) and on Nuclear Waste (ACNW).

The ACRS was established by section 29 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2039 (1988), to "review safety studies and facility license applications . . . and advise the Commission with regard to the hazards and the adequacy of proposed or existing reactor facilities . . .." Section 29 also provides for the appointment of committee members to 4-year terms of office by the NRC, and directs that the committee members "shall receive a per diem compensation for each day spent in meetings or conferences, or other work of the Committee, and . . . shall receive their necessary traveling or other expenses while engaged in the work of the Committee." Under the Federal Advisory Committee Act (FACA), "no member of any advisory committee shall receive compensation at a rate in excess of the rate specified for grade GS-18 of the General Schedule. . . ."[2]

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[1]Our letter of Jan. 22, 1993, B-251181, responded to your questions concerning the service of as an ACRS member.

[2]5 U.S.C. Appendix, § 7(d)(1)(A) (1988). But see 5 U.S.C. § 5376, as added by Pub. L. No. 101-509, Title V, § 529

(continued...)

The NRC has, in the past, appointed regular full-time employees of a National Laboratory to be members of the two advisory committees. While the National Laboratories are owned by the Department of Energy (DOE), each laboratory is operated by a nongovernmental entity under a management contract with DOE and their employees are considered to be employees of the operator, not the federal government.

The procedure used to secure the services of a National Laboratory employee in the past was that, at the time the NRC prepared official personnel papers appointing the individual to committee membership as a special government employee,[3] it also submitted a standard work order for those services to the DOE pursuant to a DOE-NRC Memorandum of Understanding. The services of the individual were then supplied by the laboratory operator under terms of its contract with DOE. The laboratory operator then billed DOE for the services of the individual as a direct labor cost and DOE in turn billed the NRC for these services. The NRC did not make compensation payments directly to the individual member. The member continued to receive his full salary from the laboratory operator, which also provided material support needed to carry out ACRS-related activities between committee meetings of the ACRS. Travel arrangements for a committee member were made and paid for by the laboratory. In addition to the amount charged NRC for direct labor, a sum was usually added by the National Laboratory operator, for "indirect and overhead" costs, including supervision in some cases. In combination, the costs billed to NRC for services rendered by National Laboratory employees have been well in excess of the FACA compensation limitation.[4]

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[2](...continued)
[Title I, §101(c)(d) and § 102(a)(1)], Nov. 5, 1990, 104 Stat. 1443, which abolished grades GS-16 through 18 and replaced them with Senior Level positions and which provides that any reference to the salary for a grade GS-18 now refers to the salary for level IV of the Executive Schedule. See also Federal Personnel Manual Bulletin 534-27, January 26, 1993.

[3]Individuals who are full-time employees elsewhere, may serve as special government employees on an intermittent basis up to 130 days during any period of 365 consecutive days. A special government employee is not subject to the prohibition against supplementing the salary of a federal employee. 18 U.S.C. §§ 202(a) and 209(a) and (c) (1988). See also Federal Personnel Manual, ch. 304, paragraph 1-2(5) (Inst. 275, January 22, 1982).

[4]The NRC has reported having reimbursed DOE up to $875 a day for the services of one member and $778.50 for another under this billing procedure.

Those practices resulted in an Audit Report dated September 17, 1991, by your Office of Inspector General, entitled "Review of the Procurement Practices of the Advisory Committee on Reactor Safeguards" (OIG 90A-19). The report concluded that the arrangement for reimbursing the Department of Energy (DOE) for salary and other expenses of National Laboratory employees serving as advisory committee members raised questions which should be referred to the Comptroller General for a decision on the legality of the payment arrangements.

Your letter asks us whether it is permissible to obtain services of advisory committee members through NRC's interagency agreement with DOE and to pay the laboratory via DOE for these services rather than paying the employee directly. You also ask whether the FACA compensation limit applies to payment in the above manner for "direct labor" only or does it also apply to payment for "indirect and overhead costs," including supervision of the individual employee.

Following a meeting of our respective staffs on September 13, 1993, at which my staff raised certain questions about these issues, we received a letter dated October 22, 1993, from Joseph F. Scinto, NRC's Deputy General Counsel. Mr. Scinto advised us that, in 1993, two National Laboratory employees were appointed as ACRS members and that, because of the questions raised regarding NRC's arrangements with the National Laboratories, NRC did not arrange for their services by contracting with the laboratory. Instead, NRC dealt directly with the two individuals involved and, for purposes of payment of compensation and expenses, they are treated in the same way as other advisory committee members who are not laboratory employees. The arrangements between these members and the laboratories for the time spent on work for NRC are left to the member and the laboratory. Mr. Scinto further advises that, although historically travel arrangements for the members have been made and paid for by the laboratory and billed to NRC, recent employment arrangements call for travel of members to be handled the same way as travel of other government employees.

We believe that the arrangements adopted by NRC in 1993 to pay the advisory committee members employed by the National Laboratories directly for their compensation and expenses are consistent with the statutory requirements regarding compensation and expenses.

In our view, the prior practices raise serious legal questions which we would like to address. Essentially, the arrangement NRC had with DOE and the National Laboratories as one of contract, not employment. Since the Atomic Energy Act of 1954 and the Federal Advisory Committee Act

clearly contemplate an employment arrangement between the agency and a committee member, we believe that the practice of contracting with a laboratory for the services of its employees as advisory committee members is inconsistent with the statutory intent.

We also understand that the amount billed by a National Laboratory and paid by the NRC was for the gross daily rate of compensation, which payment was treated as in the nature of an expense item of the laboratory. However, compensation payments to special government employees are remuneration for services performed for the agency and are subject to collection of income tax at the source by withholding a portion of the employee's wages by the employing agency.[5] Additionally, that compensation is subject to a hospital insurance tax,[6] and, since a special government employee is not entitled to retirement benefits from the federal government,[7] those wages are subject to withholding for old-age, survivors and disability insurance benefits as well.[8] Moreover, compensation to federal employees for services performed is payable to the employee or at his specific direction. Under 5 U.S.C. § 5525 (1988) each federal employee is permitted to make assignments and allotments from his disposable pay for such purposes as the head of his agency considers appropriate.[9] We are not aware of other instances in which an employee's pay is payable to a third party.

We further understand that when the laboratory operator bills NRC for "direct labor," such labor has always been billed at the maximum rate of compensation which could be paid to an advisory committee member. While the majority of advisory committee members are compensated at that maximum rate, occasionally there may be members whose rate of agreed to compensation from the government may be less than the maximum rate. In those instances, any billing by the laboratory operator for direct labor must be based on the

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[5]Chapter 24 of title 26, United States Code (1988). See also 5 U.S.C. § 5516 (D.C. Income Taxes); 5 U.S.C. § 5517 (State Income Taxes); 5 U.S.C. § 5520 (City or County Income Taxes).

[6]26 U.S.C. § 3101(b) (1988).

[7]Advisory Committee on Reactor Safeguards, B-207515, Oct. 5, 1982.

[8]26 U.S.C. § 3101(a) (1988).

[9]See also 5 U.S.C. § 5527 (1988) and 5 C.F.R. Part 550, Subpart C (1993).

rate of compensation agreed to be paid by the NRC to the committee member as shown on the SF-50 "Notification of Personnel Action."

Turning to the laboratories' method of charging for "indirect and overhead costs" for the support provided to these individuals by the laboratories while carrying out ACRS-related activities, we understand that their charges for indirect and overhead costs have been based on a percentage of the direct labor charge.[10] It is our view that such method of billing is impermissible since it does not relate to actual expenses incurred.

Although legitimate expenses are not compensation subject to the FACA limitation, we believe that reimbursement of expenses may be made only for specific cost-quantifiable goods and services provided by the laboratories to the advisory committee members for committee purposes. Furthermore, the charges for supervision of the committee members clearly cannot be justified. As special government employees, the members of the ACRS and the ACNW are not answerable to the laboratories for their committee work. The same view is applicable to the inclusion of any cost for fringe benefits to ACRS members who are National Laboratory employees. See Advisory Committee on Reactor Safeguards, B-207515, Oct. 5, 1982. However, we do not consider as unreasonable the payment of specific costs associated with use of laboratory facilities and services as long as those costs are itemized and subject to proper accounting controls and fully justified to the NRC. See the Audit Report by the NRC Office of Inspector General, dated September 17, 1991, supra.

As to the ACNW, membership is not based on a specific statutory provision as is the case of ACRS membership. The ACNW was created by the NRC under the broad statutory authority of the FACA based on need, and the services of the ACNW members are secured and compensated in the same manner as is done for the ACRS members. We see no reason why they should be treated differently as to their compensation, but we recognize that there is an apparent difference between the ACRS and the ACNW as relates to expenses. Section 29 of the Atomic Energy Act, supra, provides that ACRS members "shall receive their necessary traveling or other expenses while engaged in the work of the committee." (Emphasis added.) The FACA on the other hand allows only travel expenses and does not refer to "other expenses." 5 U.S.C. Appendix, § 7(d)(1)(B).

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[10]We have been informally advised that, although it varies among the laboratories, the normal charge for overhead is 200 percent of direct labor.

We do not regard this difference as significant because the FACA provides a procedure for the funding of advisory committees expenses through the Administrator of General Services (5 U.S.C. Appendix, § 7(e)), and it also provides that each agency shall be responsible for providing support services for each advisory committee reporting to it (5 U.S.C. Appendix, § 12(b)). Therefore, the necessary expenses incurred by an ACNW member may be reimbursed as approved by NRC and budgeted for by GSA.

In view of the changes made by NRC in the recent appointments to the ACRS, we do not believe that it is necessary for us to specifically decide the legality of the prior practices for paying compensation and expenses to the National Laboratories. Suffice it to say that those practices are inconsistent with the normal methods used to compensate advisory committee members and appear to us to involve serious legal difficulties. We strongly recommend that the Commission change its policies for ACRS and ACNW to incorporate the recent arrangements as described in the letter of October 22, 1993.

We hope this letter is helpful to you in addressing the concerns you have raised. Please let us know if we may be of further assistance.

Sincerely yours,

Robert P. Murphy
Acting General Counsel

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DIGEST

1. Nuclear Regulatory Commission (NRC) has followed practice of obtaining services of National Laboratories' employees as members of advisory committees by work order and by payment directly to the laboratory of compensation and expenses. NRC is advised that such practice is essentially one of contract, not employment, and is inconsistent with Atomic Energy Act of 1954 and Federal Advisory Committee Act which contemplate an employment arrangement.

2. Nuclear Regulatory Commission (NRC) is advised that arrangements adopted by NRC in 1993 to pay advisory committee members employed by the National Laboratories directly for their compensation and expenses are consistent with statutory requirements and avoids necessity of specifically deciding the legality of prior practice of making such payments to the National Laboratories.