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ONE HUNDRED TENTH CONGRESS

**U.S. House of Representatives**  
**Committee on Energy and Commerce**  
**Washington, DC 20515-6115**

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August 2, 2007

DENNIS B. FITZGIBBONS, CHIEF OF STAFF  
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Mr. Richard C. Blum  
Chairman of the Regents  
Office of the Secretary and Chief of Staff  
Board of Regents  
University of California  
1111 Franklin Street, 12<sup>th</sup> Floor  
Oakland, CA 94607

Dear Mr. Blum:

The Committee on Energy and Commerce and its Subcommittee on Oversight and Investigations have conducted oversight of the security, and management of the Department of Energy's (DOE) national laboratories. The Subcommittee has held 13 hearings in the past 8 years regarding issues of DOE mismanagement at Los Alamos National Laboratory (LANL), the University of California (UC), and its successor, Los Alamos National Security, LLC (LANS), a joint venture of UC, Bechtel, and other contractors.

The recent series of Los Alamos security incidents include the Wen Ho Lee case in 1999, the missing Nuclear Energy Search Team hard drive incident in 2000, the unaccounted for Classified Removable Electronic Media (CREM) in 2004, and the October 2006 discovery during a drug arrest by Los Alamos County Police that a subcontractor employee had obtained 1,500 pages of classified documents from a secure vault at LANL and taken this information home.

On July 13, 2007, DOE issued UC a Preliminary Notice of Violation (PNOV) for \$3 million for violating DOE's security orders, under Section 234B of the Atomic Energy Act. DOE's PNOV followed an enforcement conference held on April 13, 2007, and consideration of supplemental information provided by UC on April 27, 2007.

In its April 27, 2007, submission<sup>1</sup>, signed by S. Robert Foley, Vice President for Laboratory Management, the University of California asked DOE to “consider” that the Eleventh Amendment to the U.S. Constitution bars this enforcement action because UC, as an instrumentality of the State of California, is immune from suits by the Federal Government. UC’s assertion that the Eleventh Amendment prohibits the Federal Government from assessing a fine against UC for violation of DOE security orders is frivolous.<sup>2</sup> The Eleventh Amendment bars suits in law and equity “commenced or prosecuted against one of the United States by the Citizens of another State, or by Citizens or Subjects of any Foreign State.”

This frivolous legal posture indicates that UC is more interested in evading accountability than in accepting responsibility under the terms of its contract for violations it made at LANL. Indeed, UC’s posture is a fundamental challenge to DOE’s authority to hold UC accountable for violations of DOE’s nuclear and worker safety regulations and its security rules. The failure to accept this responsibility for past failures raises significant questions as to whether UC is an appropriate contractor to manage national laboratories based upon its management and operating contracts at Lawrence Livermore National Lab and Lawrence Berkeley Lab.

We are deeply concerned that UC refuses to accept responsibility for these national security violations, and even more disturbed by the fact that UC, which in 2005 received approximately \$7 billion in Federal funds through contracts, grants, and reimbursements to the university, medical centers, and national laboratories, is contending that it cannot be sued by the Federal Government for violations of Federal law— unless it waives its immunity. This posture could immunize UC from accountability under additional numerous Federal laws. Indeed, UC’s posture stands as a fundamental challenge to the authority of the Federal Government to hold UC accountable for any manner of unlawful conduct.

Given this Constitutional challenge to the Federal Government’s authority to sue UC, the Committee respectfully requests that UC, through its Board of Regents, respond to the following questions:

- 1) Is it the Board of Regents’s position that UC is immune from suits by the Federal Government under the Eleventh Amendment of the U.S. Constitution? When was this position adopted?
- 2) In addition to the Atomic Energy Act, please provide a list of all Federal statutes where UC contends it is has immunity from suits brought by the Federal Government under the Eleventh Amendment.

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<sup>1</sup>UC marked its April 27 legal submission as “Official Use Only,” a designation that can only be applied to unclassified information of a sensitive nature and the unauthorized disclosure of which could adversely affect a person’s privacy or welfare, the conduct of Federal programs, or other programs or operations essential to national security. On July 31, 2007, DOE determined that UC’s submission should not be designated Official Use Only, and made this document available for public disclosure.

<sup>2</sup>Article III of the U.S. Constitution specifically confers on the federal courts jurisdiction over all controversies to which the United States is a party. The 11<sup>th</sup> Amendment did not change this provision.

Mr. Richard C. Blum

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- 3) Has UC obtained a Federal court ruling that would support its contention that UC, as an instrumentality of the State of California, is immune from suits by the Federal Government? Please provide a citation and copy of such case(s).
- 4) Has UC asserted Eleventh Amendment immunity in any other suits or administrative actions that have been brought by the Federal Government? Please provide a list of such matters over the past six years.
- 5) Please provide an itemized list and the amounts of all Federal grants, contracts, cooperative agreements, and Federal reimbursements or assistance received by UC and its various divisions and joint ventures in 2004, 2005, and 2006. Please identify the agency which provides funding for each item, and the part of UC that received these funds.

Your written response should be received by no later than August 8, 2007. If you have any questions or wish to discuss this matter, please contact us, or have your staff contact Richard Miller with the Committee staff at (202) 226-2424.

Sincerely,



John D. Dingell  
Chairman



Bart Stupak  
Chairman  
Subcommittee on Oversight and Investigations

cc: The Honorable Joe Barton, Ranking Member  
Committee on Energy and Commerce

The Honorable Ed Whitfield, Ranking Member  
Subcommittee on Oversight and Investigations

The Honorable Samuel W. Bodman, Secretary  
United States Department of Energy

Admiral S. Robert Foley (Ret.), Vice President  
University of California Laboratory Management