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Lawrence H. Norton, General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request on Proposed Contributions and Expenditures in Connection with State and Local Elections

Dear Mr. Norton:

We are submitting this advisory opinion request pursuant to the Federal Election Campaign Act of 1971, as amended ("FECA"), and the Federal Election Commission's ("FEC" or "Commission") regulations thereunder on behalf of TransCanada Corporation ("TransCanada"), a Canadian corporation, and its domestic subsidiaries, Gas Transmission Northwest Corporation ("GTN") and TransCanada Hydro Northeast Inc. ("TC Hydro"). Specifically, we are requesting an advisory opinion concerning the application of the FECA and the Commission's regulations to the making of contributions by GTN and TC Hydro in connection with state and local elections.

GTN and TC Hydro plan to make corporate contributions in connection with state and local elections in certain states, to the extent allowable under the applicable state and local laws. We request that the Commission confirm that, where and to the extent permitted by state and local laws, such contributions are permitted under 2 U.S.C. § 441e(a) and 11 C.F.R. § 110.20, which restrict the participation of foreign nationals in the making of contributions in connection with federal, state, and local elections.

## I. Factual Background

GTN is a corporation established under the laws of the State of California, with its principal place of business in Portland, Oregon. The GTN system consists of approximately 620 miles of natural gas pipeline, extending from the British Columbia-Idaho border through northern Idaho, Southeastern Washington and Central Oregon to the Oregon-California border. The GTN system can transport more than 2.9 billion cubic feet of gas a day (Bcf/d). GTN's Board currently is comprised of three directors, two of whom are U.S. citizens. GTN has 15 individual corporate officer positions. Two of these positions are held by U.S. citizens.

TC Hydro is a corporation established under the laws of the State of Delaware, with its principal place of business in Westborough, Massachusetts. TC Hydro is a holding company for hydro-electric generation assets consisting of more than 500 MW of hydro-electric generating capacity on the Deerfield and Connecticut Rivers in Vermont, New Hampshire, and Massachusetts. TC Hydro's Board is comprised of three directors, one of whom is a U.S. citizen and one of whom is has permanent residence status in the U.S. There are currently seven corporate officer positions, one of which is occupied by a U.S. citizen and one of which is occupied by an individual with permanent resident status in the U.S.

Both GTN and TC Hydro are wholly-owned by TransCanada, a Canadian corporation with its principal place of business in Calgary, Alberta, Canada.

Neither GTN nor TC Hydro has established, or has immediate plans to establish, a separate segregated fund (*i.e.*, a political action committee ("PAC")). Rather, each subsidiary proposes to make direct corporate contributions in connection with state and local elections, where and to the extent permissible under applicable state and local law.

Such contributions would be made from funds generated by the subsidiaries' domestic U.S. operations. As proposed, the overall budget amounts from which each subsidiary's political contributions and expenditures will be made will be set on an annual basis by each subsidiary's Board and officers, including foreign national Board members and officers. These budget levels will set a "not to exceed" amount that could be used for such contributions and expenditures. Beyond the setting of these overall budget levels, all decisions concerning the making of political contributions or expenditures will be made by individuals who are U.S. citizens or permanent residents to whom such responsibilities will be delegated. The selection of such individuals will be made only by officers and members of the subsidiaries' Boards who are not foreign nationals; members of the subsidiaries' Boards who are foreign nationals will be required to abstain from voting on the selection of individuals to exercise decisionmaking authority with respect to political contributions and expenditures.

## II. GTN's and TC Hydro's Contributions in Connection With State and Local Elections, Where and to the Extent Permitted Under Applicable State and Local Law, are Permissible Under FECA and the Commission's Regulations

The FECA and Commission regulations prohibit "foreign nationals" from directly or indirectly making any contribution or expenditure in connection with any Federal, State, or local election.[1] The statute and regulations also make it unlawful to solicit, accept, or receive a contribution from a foreign national.[2] In addition to the prohibition against the making of contributions and expenditures, Commission regulations implementing the foreign national prohibition, at 11 C.F.R. § 110.20, impose certain

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1 2 U.S.C. § 441e(a); 11 C.F.R. § 110.20.

2 2 U.S.C. § 441e(a); 11 C.F.R. § 110.20(g).

additional restrictions on foreign national participation in election-related activities. Among others, the regulations provide that:

> A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee.[3]

Unlike most of the other provisions of the FECA, these provisions apply to any election for any political office, including state and local offices as well as Federal offices.

### A. GTN and TC Hydro are not Foreign Nationals Under the FECA and Commission's Regulations

As defined by the FECA and Commission regulations, the term "foreign national" includes a "foreign principal," as defined in 22 U.S.C. § 611(b), but does not include any citizen of the United States.[4] Section 611(b) defines the term "foreign principal" to include:

> (1) a government of a foreign country and a foreign political party;
>
> (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and
>
> (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.[5]

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[3] 11 C.F.R. § 110.20(i).
[4] 2 U.S.C. § 441e(b); 11 C.F.R. § 110.20(a)(3).
[5] 22 U.S.C. § 611(b).

Accordingly, under section 611(b)(2) and (3), a corporation that is organized under the laws of any State within the United States and that has its principal place of business in the United States is not a foreign principal.[6] It therefore follows that such a corporation would not be a foreign national under the FECA and Commission regulations.

GTN is a discrete corporate entity established under the laws of the State of California, with its principal place of business in Portland, Oregon. TC Hydro is a discrete corporate entity established under the laws of Delaware, with its principal place of business in Westborough, Massachusetts. Therefore, GTN and TC Hydro are not "foreign nationals" within the meaning of the FECA and the Commission's regulations, and they are not subject to the prohibition of 2 U.S.C. § 441e.[7]

**B. The Making of Contributions by GTN or TC Hydro Would Not Result in Their Parent, TransCanada, or Any Other Foreign National Making Prohibited Contributions Through Another Person**

The FECA prohibits foreign nationals from making contributions, directly or through any other person, in connection with any election to any political office. GTN and TC Hydro's parent, TransCanada, is a foreign national, by virtue of 22 U.S.C. § 611(b)(3). Under 2 U.S.C. § 441e(b)(2), "foreign national" includes an individual who is not a U.S. citizen and who is not lawfully admitted for permanent residence, as defined in 8 U.S.C. § 1101(a)(20). Thus, in addition, several officers and members of the Board of both GTN and TC Hydro are foreign nationals under the FECA and Commission regulations.

Because the FECA prohibits contributions by a foreign national through any other person, and since GTN's and TC Hydro's parent Canadian corporation, TransCanada, is both a person, 2 U.S.C. § 431(11), and a foreign national by application of 22 U.S.C. § 611(b)(3), contributions by GTN and TC Hydro may only be made or accepted under certain conditions. Specifically, TransCanada may not directly or indirectly provide the funds for any such political contribution. Moreover, neither TransCanada nor any other person who is a foreign national under 2 U.S.C. § 441e may have any decision-making role or control with respect to the making of any political contribution by GTN or TC Hydro.[8]

GTN's and TC Hydro's Canadian parent corporation will not directly or indirectly provide the funds for any political contribution. Moreover, neither the Canadian parent corporation nor any other person who is a foreign national under 2 U.S.C. § 441e will have any decision-making role or control with respect to the making of any political contribution by either subsidiary. As a result, the making of contributions by GTN or TC Hydro will not result in their parent, TransCanada, or any other foreign national making prohibited contributions through another person.

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6 *See, e.g.*, Advisory Opinion 1985-3 (Mar. 4, 1985).

7 *See, e.g.*, Advisory Opinion 1982-10 (Mar. 29, 1982).

8 *See* Advisory Opinion 1985-3 (Mar. 4, 1985); Advisory Opinion 1983-31 (Nov. 10, 1983).

### 1. TransCanada Would Not Directly or Indirectly Provide the Funds for GTN's or TC Hydro's Political Contributions

The making of contributions by GTN or TC Hydro would not result in their parent, TransCanada, a foreign national, making prohibited contributions through another person. Neither GTN nor TC Hydro is predominantly funded by its Canadian parent, whether through loans or contributions to capital.[9] Rather, both GTN and TC Hydro are separate profit centers from TransCanada. Each domestic subsidiary derives substantial net earnings (*i.e.*, income exceeding expenses after debt service) from its U.S. operations that are more than sufficient to cover the subsidiary's political contributions. Actual 2005 net income and funds generated from operations for GTN and TC Hydro are as follows:

- GTN net income: $58MM
- GTN funds from operations: $169MM
- TC Hydro net income: $36MM
- TC Hydro funds from operations: $48MM

Each subsidiary's contributions would be made from the respective subsidiary's corporate accounts, and no contributions would be made using funds loaned or provided by the subsidiaries' Canadian parent.[10] Both GTN and TC Hydro maintain separate bank accounts located in the U.S., into which are deposited the receipts from their U.S. operations, and from which the expenses of these operations, including any debt service, are paid. Neither subsidiary receives any subsidies—*e.g.*, as loans or contributions to capital—from TransCanada or any other affiliated foreign company, for instance to meet debt service or fund development costs and operating expenses.[11]

### 2. Neither TransCanada nor any Director or Officer who is a Foreign National Will Participate in the Decisionmaking Process With Regard to Making the Proposed Contributions

In permitting a corporation that is not a foreign national, but is a subsidiary of a foreign national parent, to make contributions in connection with state and local campaigns for political office, the Commission also has conditioned such permission on assurances that no director or officer of the company or its parent who is a foreign

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[9] *See* Advisory Opinion 1989-20 (prohibiting contributions by a real estate development company that was predominantly funded by a foreign national parent, and whose projects were not yet generating income).

[10] *See* Advisory Opinion 1992-16 (June 26, 1992).

[11] GTN and TC Hydro have received funds from intercompany loans from other U.S. subsidiaries of TransCanada (*e.g.*, TCPL USA), but not from their Canadian parent or any other affiliated foreign company. These loans are interest bearing and were made as part of GTN's and TC Hydro's normal capital structure decision-making. Since the initial acquisition of these companies by TransCanada, they have not received any capital contributions from their Canadian parent or any other affiliated foreign company.

national will participate in any way in the decision-making process with regard to making the proposed contributions.[12] Neither TransCanada nor any officer or director of GTN, TC Hydro, or TransCanada who is a foreign national under 2 U.S.C. § 441e would be permitted to participate in any way in the decision-making process with regard to making the proposed contributions. The proposed contributions and expenditures will be made independent of, and will not be dictated or directed by, TransCanada or any directors or officers of GTN, TC Hydro, or TransCanada who are foreign nationals.

Generally, past FEC advisory opinions addressing the application of the prohibition against participation by foreign nationals to state and local activities of domestic subsidiaries have involved situations where the corporation proposed to act through a separate segregated fund (*i.e.*, a political action committee ("PAC"). In such cases, the FEC has conditioned its approval of such activity on the following:

- abstinence of the foreign national members of the subsidiary's Board from voting on matters concerning the PAC and its activities;
- abstinence of the foreign national members of the subsidiary's Board from voting on the selection of individuals to operate the PAC and exercise decision-making authority with respect to PAC contributions and expenditures; and
- abstinence of foreign nationals from participation in the functions and operations of the PAC.[13]

The FEC also has addressed the extent to which foreign national directors or officers may exercise control and oversight authority over a PAC with respect to personnel and financial matters. In particular, the Commission, in Advisory Opinion No. 2000-17, addressed the extent to which foreign national directors may be involved in the review and approval of a budget for the establishment, administration, and solicitation costs of a PAC and for the PAC's making of permitted contributions and expenditures. In this regard, the Commission concluded that:

> a reasonable approach, one which comports with 110.4(a)(3)'s bar on foreign national participation in decisions concerning the administration of a PAC, should

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[12] *See* Advisory Opinion 1989-20 ("In determining whether a corporation that is not a foreign national, but is a subsidiary of a foreign national parent, is permitted to make contributions in connection with state and local campaigns for political office, the Commission has also considered the status of the decision-makers involved. The Commission has conditioned such permission on the basis that no director or officer of the company or its parent who is a foreign national may participate in any way in the decision-making process with regard to making the proposed contributions. See Advisory Opinions 1985-3 and 1982-10."); Advisory Opinion 1982-10 (Mar. 29, 1982) (concluding that since company was a domestic rather than a foreign corporation, the FECA would not prohibit it from making contributions and expenditures in connection with campaigns for state or local political office, based upon the company's representation that no director or corporate officer of the company or its parent who is a foreign national would participate in any way in the decision-making process with regard to making the proposed contributions or expenditures for state and local elections to political office).

[13] Advisory Opinions 1992-16 and 2000-17.

> be followed. With respect to direct costs, one such approach would be to set a specific budget level for PAC direct costs at a "not to exceed" amount. The board's review power of direct costs (short of a decision to terminate the PAC entirely), should be limited to ascertaining and enforcing compliance by the Special Committee or the PAC Committee with the budget levels established by the board in accord with the above described procedures. Other budget setting and review procedures for the direct costs of PAC operations may also be reasonable if they assure compliance with Commission regulations. With respect to the indirect costs to [the subsidiary] for PAC operations, the usual and normal corporate procedures for budget decisions and review may be followed and would not be prohibited by Commission regulations.

As stated above, neither GTN nor TC Hydro has established, or has immediate plans to establish, a PAC. GTN and TC Hydro, however, believe that the following mechanism for making contributions in connection with state and local elections, is consistent with the FECA and the Commission's application of 11 C.F.R. § 110.4(a)(3):

1. The overall budget amounts from which each subsidiary's political contributions and expenditures will be made will be set on an annual basis by each subsidiary's Board and officers, including foreign national Board members and officers. These budget levels will set a "not to exceed" amount that could be used for such contributions and expenditures.
2. Beyond the setting of such overall budget levels (and reviewing and enforcing compliance with such budget levels), all decisions concerning the making of political contributions or expenditures will be made by individuals who are U.S. citizens or permanent residents to whom such responsibilities will be delegated.
3. Foreign national members of GTN's and TC Hydro's Boards will be required to abstain from voting on matters concerning any contributions or expenditures made by the subsidiaries. Only non-foreign national Board members, who presently constitute a majority of the Board of each subsidiary, will be permitted to vote on such matters.
4. Similarly, foreign national officers of the subsidiaries will be prohibited from participating in any decisions concerning the making of political contributions or expenditures. Only non-foreign national officers will be permitted to participate in any such decisions.
5. Each subsidiary's Board will delegate to a subset of its Board members, comprised exclusively of U.S. citizens and permanent residents, the authority to select the individual or individuals who will exercise decisionmaking authority with respect to political contributions and expenditures and to delegate such authority to such individual or

individuals. This subset of Board members will then vote on the selection and delegation to the individual or individuals (each of whom will be a U.S. citizen or permanent resident of the United States) who will exercise such authority. Thus, foreign national members of the subsidiaries' boards will not be permitted to vote on the selection of individuals to exercise decisionmaking authority with respect to political contributions and expenditures.

We believe that adherence to these policies, practices, and procedures will ensure that neither TransCanada nor any director or officer who is a foreign national will participate in the decisionmaking process with regard to making contributions in connection with state and local elections. And, therefore, the FECA would not prohibit GTN and TC Hydro from making contributions and expenditures in connection with state and local elections.

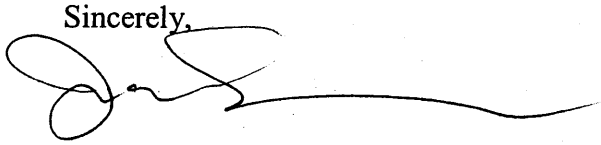
## III. Conclusion

A U.S. corporation that is a wholly-owned subsidiary of a foreign national corporation may make political contributions to state and local candidates either directly, or indirectly through a PAC, to the extent permitted by state and local laws, provided that the making of such contributions by the subsidiary would not result in its foreign national parent or any other foreign national making prohibited contributions through another person. GTN and TC Hydro are both organized under the laws of States within the United States and have their principal place of business in the United States, and are therefore not "foreign nationals" subject to the prohibition of 2 U.S.C. § 441e. Moreover, the making of contributions by GTN or TC Hydro would not result in their foreign national parent or any other foreign national making prohibited contributions through another person. Their foreign parent would neither directly nor indirectly provide the funds for either of the subsidiaries' political contributions. And the subsidiaries will adhere to policies, practices, and procedures that will ensure that neither their foreign national parent nor any foreign national director or officer will participate in the decisionmaking process with regard to making the proposed contributions. Accordingly, GTN and TC Hydro may make political contributions to state and local candidates to the extent permitted by state and local law.

Our client respectfully requests an Advisory Opinion confirming the above.

Thank you for your consideration of this Advisory Opinion request. Please do not hesitate to contact me if you need any additional information.

Sincerely,



Jonathan D. Simon
Counsel, TransCanada Corporation