



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

August 30, 1983

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1983-17

Nicolas R. Ysursa, Esquire  
Idaho Power Company  
Box 70  
Boise, Idaho 83707

Dear Mr. Ysursa:

This responds to your letter of June 9, 1983, as supplemented by two letters dated August 1 and 2, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the use of a payroll deduction system to collect voluntary contributions from employees who may also be stockholders.

According to your request, the Idaho Power Company ("the Company") wishes to use a payroll checkoff plan to facilitate the making of contributions to its separate segregated fund, IDA-PAC. The Company already has such a plan for its executive and administrative personnel, and intends to expand this system to include employees who are also stockholders.

You state that the Company has established two separate employee benefit plans that permit an employee to be a stockholder. Under the Company's Employee Savings Plan ("ESP"), an employee may contribute from 1 percent to 6 percent of his or her base pay toward the purchase of Company stock. Stock purchased in this manner is credited to the employee's Participant Account. The Company, in turn, contributes 60 cents for every \$1 contributed by the employee. The Company's contribution under the ESP is credited to the Employer Account of the employee. The ESP also contains a Deferred Salary Option ("DS Option"), which enables participants to make contributions to the plan in before-tax dollars. Under this option, a participant may elect to take up to 6% of his or her base compensation in the form of a contribution by the Company to the ESP. Such contributions are added to the employee's Deferred Account. As under the regular ESP, the Company contributes an amount equal to 60% of the amount contributed by the participant. Such amounts are also credited to the participant's Deferred Account.

An employee participating in the ESP immediately acquires a fully vested interest in common stock which is purchased with his or her own contributions and allocated to the employee's Participant Account, and has a fully vested interest in stock allocated to his or her Employer Account after three years of participation in the ESP, or upon termination of employment by death, disability or retirement, or for lack of work. Contributions allocated under the DS Option to a participant's Deferred Account vest in the participant immediately. A participating employee has the right to direct how all his or her stock, whether or not fully vested, will be voted. All dividends on stock held by an employee are automatically reinvested in additional common stock of the Company.

With respect to the Employee Stock Ownership Plan ("ESOP"), you state that the Company purchases common stock for every employee depending upon the tax status of the Company during previous years. In certain circumstances, the employee is also eligible to make contributions under this plan. An ESOP participant has the power to vote stock credited to his or her account. All dividends earned on the stock are used to purchase additional shares of common stock for the participant. Under the ESOP, stock attributable to employer contributions, as well as stock attributable to participant contributions, vests immediately with the participant. An ESOP participant may elect to receive a distribution of the common stock in his or her account which has been allocated to such account for a period of 84 months.

Given this factual situation, you ask whether the Company may use a payroll deduction plan to facilitate the making of voluntary contributions to IDA-PAC by employees who are also stockholders.

The threshold issue raised by your question is whether participants in the ESP and the ESOP are stockholders under 11 CFR 114.1(h) and thus individuals who may be solicited by IDA-PAC for voluntary contributions.<sup>1</sup> Under 114.1(h) of the Commission's regulations, a stockholder is defined as a person who has a vested beneficial interest in stock, has the power to direct how that stock shall be voted, if it is voting stock, and has the right to receive dividends.

A participant in the Employee Savings Plan satisfies the first two requirements of this definition: he or she has a fully vested interest in stock purchased from allocations made to his or her

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<sup>1</sup> The Commission notes that the issue of whether participants in a company's employee stock ownership plan are stockholders under the Act was considered in Re: AOR 1976-106. That opinion, which involved the Continental Oil Company's Employee Stock Ownership Plan, concluded that because employees did not have the right to receive dividends until such time as they ceased employment with the company, they did not qualify as stockholders. Subsequently, the Commission voted to reconsider this opinion and thus vacated it. On December 8, 1977, the Commission, by a recorded vote of three to three, failed to approve a draft advisory opinion reaching the same conclusion as the vacated opinion, Re: AOR 1976-106. In Advisory Opinion 1977-49, the Commission was unable to reach a conclusion on the stockholder status of employees of the Kerr-McGee Corporation who participated in a savings investment plan sponsored by the corporation. The opinion, as issued, responded to several other questions but did not address the issues presented here.

Participant Account, and has the power to vote stock held in his or her name. With respect to an ESP participant's right to receive dividends, all dividends earned on stock held in the ESP are used to purchase additional shares of Idaho Power Company stock for the participant's account. A participant may receive dividends only when he or she withdraws all of the full shares of stock credited to his or her account as of the end of a calendar quarter. Upon such withdrawal, the participant cannot contribute to the plan for a period of one year. Such withdrawals may be made not more than once in any calendar year. In addition, a participant may withdraw the stock in his or her Employer Account (to the extent it is vested) only when he or she ceases to be an employee.

Because of these restrictions and consequences attaching to an exercise of the right to receive dividends<sup>2</sup>, the Commission concludes that employees who have not actually withdrawn stock purchased on their behalf under the ESP would not be considered "stockholders" under the Commission's regulations. An employee who actually withdraws stock purchased on his or her behalf would, however, be considered a stockholder. Such employees would at that time fulfill all the requirements of 11 CFR 114.1(h), i.e., they would have a vested beneficial interest in stock, the power to direct how the stock is voted, and the right to receive dividends.

In contrast to the ESP participants discussed above, employees with the DS Option who reach the age of 59 1/2 have relatively unrestricted stock withdrawal rights. They may withdraw either all or any lesser number of the shares of stock which are credited to the Deferred Account. In addition, they may withdraw stock in their Deferred Account that was purchased with matching contributions by the Company. (Other ESP participants may only withdraw Company-purchased stock upon termination of their employment.) These age 59 1/2 DS Option participants are also free to continue contributing to their Deferred Accounts immediately after any withdrawal, whether full or partial. They are not subject to any waiting period as is the case with regular ESP participants. In view of the foregoing differences between the regular ESP participants and the DS Option participants who have reached age 59 1/2, the Commission concludes that such DS Option participants would be considered stockholders under Commission regulations at 11 CFR 114.1(h).

Under the Employee Stock Ownership Plan, stock attributable to employer contributions and participant contributions (if any) vests immediately with the participant. In addition, the participant has voting rights with respect to stock purchased on his or her behalf. Regarding dividend rights, participants have no right to receive dividends until such time as they withdraw stock allocated to their accounts. Participants may only elect to receive a distribution of stock that has been allocated to their accounts for a period of 84 months. Dividend rights under the ESOP contrast with those afforded ESP participants: under the ESOP, an employee who elects to receive a distribution of stock does not lose, even temporarily, the right to continue participating in the plan.

The Commission concludes that ESOP participants who are eligible to withdraw stock allocated to their accounts for 84 months, whether or not they actually elect to receive stock credited to

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<sup>2</sup> The Commission notes that according to the plan, dividend income on all shares purchased is not taxable until distributed to the participant.

their accounts, would be considered "stockholders" under the Commission's regulations. As with the ESP, such participants would then have satisfied all of the requirements of 114.1(h) for the attainment of stockholder status.

In view of the foregoing conclusions and in response to the specific question you raise, the Commission concludes that the Company may use a payroll deduction plan to facilitate contributions to IDA-PAC from Company employees who qualify as stockholders. See the preceding discussion. Your request cites a Commission regulation, 11 CFR 114.6(e), which prohibits a corporation's use of a payroll deduction plan in connection with twice-yearly contribution solicitations outside of its restricted class. See 2 U.S.C. 441b(b)(4)(B). However, to the extent that Company employees qualify as stockholders under 114.1(h), and assuming they are solicited under the general solicitation procedures of 11 CFR 114.5(g), the cited 114.6(e) would not prohibit otherwise proper use of payroll deduction to facilitate voluntary contributions to IDA-PAC from stockholder employees.<sup>3</sup>

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Danny L. McDonald  
Chairman for the Federal Election Commission

Enclosures (RE: AOR 1976-106 and AO 1977-49)

P.S. Commissioners Aikens and Elliott voted against approval of this opinion and will file dissenting opinions at a later date.

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<sup>3</sup> The Commission notes that contributions from stockholder employees must be solicited in accordance with the requirements of Commission regulations at 11 CFR 114.5(a).