



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

March 30, 1984

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1984-5

Mr. Robert Ohlbach  
Vice President and General Attorney  
Pacific Gas and Electric Company  
77 Beale Street  
San Francisco, California 94106

Dear Mr. Ohlbach:

This responds to your letter of February 3, 1984, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of voluntary contributions from employees of the Pacific Gas and Electric Company ("the Company") who purchase stock through the Company's savings plan and Tax Reduction Act Stock Ownership Plan Fund ("TRASOP") and Payroll-Based Stock Ownership Plan Fund ("PAYSOP").

According to your request, the Company is planning to solicit contributions from so called "management" employees to its separate segregated fund, the Pacific Gas and Electric Company Employees' Good Government Fund. You state that while many of these employees qualify as executive or administrative personnel as defined by 11 CFR 114.1(c), some may not meet this definition. Since many of the "management" employees participate in the Company's savings plan and/or TRASOP/PAYSOP plans, however, you ask whether they may be solicited as stockholders pursuant to the Commission's definition of stockholder at 11 CFR 114.1(h).

According to your request, a management employee becomes eligible to participate in the Company's savings plan ("the Savings Plan") upon completion of one year of service. Employees with at least one year but less than three years of service may contribute up to three percent of their "covered compensation" as defined in the Savings Plan. Employees with at least three years of service may contribute up to six percent of their covered compensation. These employee contributions, known as "basic contributions," can be invested in Company stock, but can also be invested in U.S. Bonds, a diversified equity fund (which excludes Company securities), a money market investment fund, or a guaranteed investment fund. Employee basic contributions are matched by the Company at a rate of 75 cents on the dollar. All employer contributions are invested in Company stock.

Those employees who are making the maximum allowable percentage of basic contributions may also make supplemental contributions. The total of basic and supplemental contributions cannot exceed 14 percent of covered compensation. Supplemental contributions are not matched by employer contributions. You state that under the Savings Plan, every participant is at all times fully vested as to both his or her own contributions and all employer contributions credited to his or her account. You also state that every participant has an absolute right to vote Company stock each and every time shareholders who are not participants are entitled to vote.

With respect to withdrawal of employee contributions, you state that participants may withdraw all or any part of their basic or supplemental contributions. You add, however, that the withdrawal of Company stock purchased with basic contributions, which are credited to the participant's account for the current year or for the two years immediately preceding the current year, will result in the participant's automatic suspension from the Savings Plan for six months.

Participants may also withdraw employer contributions on a once-a-year irrevocable basis. The participant may only withdraw all or any part of the whole shares of Company stock bought with employer contributions during the second preceding year. If the withdrawal is not made under this option, the stock, and the income attributable thereto, bought with the employer's contribution for that year remain in the participant's account and are not distributed until after the participant's service with the Company ends. You also note that, notwithstanding other withdrawal provisions, a participant may be granted the right to withdraw stock in his or her account upon a satisfactory showing of immediate financial need.

You also state that the Company maintains a TRASOP and PAYSOP Plan, which is composed of a TRASOP Fund and a PAYSOP Fund. You state that the Company is entitled by law to take a tax credit if it contributes stock, or cash which is used to purchase stock, to fund a TRASOP. The stock is then allocated to the accounts of employees entitled to participate in the TRASOP. The Company is also entitled by law to claim a tax credit if it contributes to the PAYSOP Fund Company stock, or cash to purchase Company stock, equal to a certain percentage of payroll. An employee is eligible to share in the TRASOP and PAYSOP allocations upon completion of three years of service with the Company. You note that while participants do not contribute to the PAYSOP Fund, under certain circumstances they may elect to make matching contributions to the TRASOP Fund. You, add that all employer contributions to the TRASOP and PAYSOP funds, and all employee matching contributions to the TRASOP Fund, are invested in Company stock. You also state that participants in the TRASOP and PAYSOP Funds have voting rights and that their stock is at all times fully vested.

With respect to withdrawal rights, a participant may, on a one-time basis only, withdraw all or any part of the whole shares of Company stock purchased with the participant's matching contributions to the TRASOP Fund which have been standing in the participant's matching TRASOP Fund account for 84 months. If such a withdrawal is not made, the stock bought with the participant's matching contributions for that year is then transferred to the participant's Savings Plan account, where it becomes subject to the Savings Plan withdrawal provisions. A participant may also, on a one-time basis only, withdraw all or any part of the whole shares of Company stock purchased by the Company and allocated to the participant's account which have

been standing in the Company's TRASOP or PAYSOP Fund account for 84 months. If such a withdrawal is not made, the stock is transferred to the participant's Savings Plan account, is recorded in that account as "Employer Contributions," and is not subject to distribution until after the participant's service ends or pursuant to the hardship withdrawal provisions.

Given these facts, you ask whether employees participating in the Savings Plan, the TRASOP Fund, or the PAYSOP Fund would be considered stockholders under 11 CFR 114.1(4).

Under 114.1(h), a stockholder is defined as a person who (i) has a vested beneficial interest in stock; (ii) has the power to direct how that stock shall be voted; and (iii) has the right to receive dividends. Participants in each of the Company's plans appear to meet the first two requirements of this definition (i.e., a vested interest and voting rights). Under Part I, paragraph 12, of the Savings Plan, a participant is at all times fully vested in his or her own contributions and all employer contributions credited to his or her account. Under Part I, paragraph 6(d), participants have an absolute right to vote Company stock. Similarly, under paragraph 8 of the TRASOP and PAYSOP Plan, all Company stock is at all times fully vested and unconditionally credited to the accounts of participants. In addition, under paragraph 7, participants in the TRASOP Fund and the PAYSOP Fund have an absolute right to vote Company stock each and every time shareholders generally are entitled to vote their stock.

Regarding the right to receive dividends, those employees who actually withdraw Company stock credited to their accounts under any of the plans would then satisfy all the criteria of 114.1(h) and would be considered stockholders under the Act so long as they hold at least one share. The stockholder status of employees who have not exercised their withdrawal rights is addressed below.

#### Stockholder status for Savings Plan participants

With regard to the Savings Plan, the Commission notes that varying restrictions and consequences apply to a participant's right to withdraw stock, depending on the type of contribution (basic, supplemental, or employer) that was used to purchase the stock.

A participant who withdraws stock purchased with basic contributions for the current year, or for the two years immediately preceding the current year, is automatically suspended from the Savings Plan and is not permitted to resume making contributions for six months. If the participant withdraws stock purchased with basic contributions for any years other than the current year, or the two years immediately preceding the current year, no suspension period is imposed. Because the Commission views the automatic suspension period as a significant restriction on a participant's right to withdraw stock and therefore on the right to receive dividends, those participants who are only eligible to withdraw stock purchased with basic contributions, which are credited to their accounts for the current year or the two years immediately preceding the current year, would not be considered stockholders. See Advisory Opinion 1983-17, wherein the Commission reached a similar conclusion regarding a savings plan that imposed a one-year suspension period on certain withdrawals. Also, compare Advisory Opinion 1983-35 wherein the savings plan had various disincentives to stock withdrawals, but did not impose any suspension period on the employee's right to make contributions to the plan.

The Commission also concludes that to the extent employees have the ability to withdraw at least one share of stock purchased with basic contributions, which are credited to their accounts for years other than the current year or two years immediately preceding the current year, such employees would be considered stockholders. Significantly, employees in that category who made stock withdrawals would not be subject to the six month suspension period and, accordingly, would be treated as having the right to receive dividends within the meaning of 11 CFR 114.1(h). In addition, the Commission concludes that participants who are eligible to withdraw stock purchased with supplemental contributions would be considered stockholders, since such participants would not be subject to any waiting period or suspension if they chose to withdraw such stock.

With respect to withdrawal rights for stock purchased with Company contributions, the Commission notes that a participant may only withdraw stock purchased with Company funds during the second preceding year, and such a withdrawal may only be made on a once-a-year irrevocable basis. Furthermore, if the participant does not exercise this option, the stock bought with employer contributions for that year remains in the participant's account and is not subject to distribution until after the participant's service ends. Because of these significant restrictions, the Commission concludes that employees who are only eligible to withdraw stock purchased with employer contributions would not be considered stockholders.

#### Stockholder status for TRASOP and PAYSOP participants

With respect to the TRASOP and PAYSOP Plan, the Commission concludes that employees who have participated in the TRASOP Fund for the requisite 84 months would be considered stockholders to the extent they are eligible to withdraw at least one share of stock purchased with their matching contributions without incurring a suspension period as to future matching contributions. In reaching this conclusion, the Commission notes that the decision to withdraw such stock may only be made on a one-time basis and is irrevocable. However, if such a withdrawal is not made, the unwithdrawn stock attributable to the participant's matching contributions is transferred to the Savings Plan account maintained for the participant. Such stock may then be withdrawn under the applicable provisions of the Savings Plan. See discussion above. Thus, withdrawal rights as to stock, which is purchased with a participant's matching contributions and transferred to the Savings Plan account, are the same as the withdrawal rights of employees who make basic contributions to the Savings Plan for three years and thereafter have the right to withdraw at least one full share of stock without incurring a suspension period.

Lastly, as to participants who are only eligible to make a withdrawal of stock attributable to employer contributions under the TRASOP Fund or a withdrawal from the PAYSOP Fund, the Commission concludes that because these participants have only one withdrawal opportunity as to stock held for 84 months and, if they fail to exercise this right, lose withdrawal rights as to that stock until their employment ends, such employees would not be considered stockholders under 114.1(h). The Commission views these provisions as significantly more restrictive than the provisions contained in the employer funded stock ownership plans which were at issue in Advisory Opinion 1983-17, and accordingly finds this situation to be distinguishable.

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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,

(signed)

Lee Ann Elliott  
Chairman for the  
Federal Election Commission

Enclosure (AO 1983-35 and 1983-17)