



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

SEP 15 4 36 PM '94

September 15, 1994

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** John C. Surina  
Staff Director

**FROM:** Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Michael Marinelli *m.m.*  
Staff Attorney

**SUBJECT:** Draft AO 1994-27

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for September 22, 1994.

Attachment

**AGENDA ITEM**  
For Meeting of: SEP 22 1994

**DRAFT**

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1994-27

Karen A. McCarthy  
Consumers Power Company Employees  
For Better Government  
212 W. Michigan  
Jackson, Michigan 49201

Dear Ms. McCarthy:

This refers to your letter of July 28, 1994, on behalf of Consumers Power Company Employees For Better Government ("the Committee") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the Committee's proposed solicitation for political contributions.

The Committee is the separate segregated fund of Consumers Power Company ("the Company"), a subsidiary of CMS Energy Corporation ("CMS"). You state that the Committee wishes to solicit shareholders of CMS. Among the shareholders to be solicited would be employees of the Company and other CMS subsidiaries whose employees are enrolled in what is described in your request as the Employees' Savings and Incentive Plan, ("the Plan"), and who, pursuant to the Plan, are shareholders in CMS. A copy of the Plan is provided with your request.

According to your request, all regular Company employees are eligible to join the Plan. As with most such programs, the funding of the plan is divided into Plan contributions made by the employee and Plan contributions made by the

1  
2 Company. There are three different types of contributions  
3 that employees can make into the Plan: "elective employer  
4 contributions," "participant contributions," and "voluntary  
5 contributions." See Plan, Sections 5.1, 5.2 and 5.3.  
6 Elective employer contributions are deducted from the  
7 employee's compensation before taxes, pursuant to a 401(k)  
8 pension program. These are limited to a maximum of 12% of  
9 salary. Participant contributions and voluntary  
10 contributions are after-tax employee contributions, the  
11 amounts of which are limited by the level of an employee's  
12 elective contributions.<sup>1/</sup> The Company will make matching  
13 contributions of one half an employee's contributions up to a  
14 maximum of 3%. Additional Company matching contributions can  
15 be made pursuant to an incentive program in which more funds  
16 are contributed should certain Company-wide performance goals  
17 be met. See Plan, Sections 5.10 and 5.10. Each dollar of a  
18 contribution is valued as a Plan unit, and all units are  
19 recorded according to the type of employee or Company  
20 contribution that is made.

21 Employees may designate the contributions to three  
22 different investment Funds. Fund A consists of investment  
23 contracts by insurance companies, financial institutions,  
24 U.S. Government obligations and other debt instruments.

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25  
26 <sup>1/</sup> The Plan is designed so that the more an employee utilizes  
27 the elective option, the less the other two options may be  
28 used. If no elective contributions are made, employees may  
contribute up to 6% of their salaries for participant  
contributions and up to 10% for voluntary contributions.

1  
2 Fund B consists of common stock of non-CMS companies. Fund C  
3 consists of CMS Energy Corporation common stock and temporary  
4 investments. See Plan, Sections 2.1 and 5.4. All Company  
5 contributions, as well as dividends earned from CMS stock,  
6 are placed in Fund C. An employee's right to the matching  
7 Company contributions vests at the rate of 10% per year for  
8 the first four years of employment and 20% for each of the  
9 next three years of service. The employee is 100% vested  
10 after seven years of Plan participation and Company  
11 employment. See Plan, Section 8.4.

12 Prior to an employee reaching retirement age (59 1/2),  
13 the ability to withdraw funds from the plan varies according  
14 to the type of contribution made. See Plan, Section 8.4.  
15 Funds that consist of elective employee units may only be  
16 withdrawn in case of emergency situations or heavy financial  
17 need for medical reasons, purchase of a residence, college  
18 tuition or to prevent eviction. Participant units may be  
19 withdrawn partially, but only one withdrawal a year may be  
20 made. Voluntary units may be withdrawn, in part or fully, at  
21 any valuation date which is the last day of each month.

22 The withdrawal of units made up of Company matching  
23 contributions is subject to a different set of limitations.  
24 See Plan, Section 8.4. An employee can only withdraw those  
25 units which form the vested portion of that employee's  
26 matching contributions from the Company. Even vested units  
27 cannot be withdrawn until they have been in the account for  
28 two years. Should any unit be withdrawn before an employee

1  
2 is fully vested, all the non-vested portions are forfeited  
3 until the amount the employee withdrew is repaid into the  
4 account. Finally, if units consisting of Company matching  
5 contributions are withdrawn, the employee is suspended from  
6 participating in the Plan for a period from three months to  
7 one year, depending on the amount (or value) that was  
8 withdrawn.

9 Given these facts, your request asks whether employees  
10 participating in the Plan would be considered stockholders  
11 under 11 CFR 114.1(h) and thus solicitable for voluntary  
12 contributions to the Committee on the basis of that status,  
13 even though they are not executive or administrative  
14 personnel as defined in the Act. 2 U.S.C. §§441b(b)(4),  
15 441b(b)(7).

16 The Act permits a corporation or its separate segregated  
17 fund to solicit its individual stockholders and their  
18 families. 2 U.S.C. §441b(b)(4)(A)(i). A corporation may  
19 also solicit the stockholders or their families of its  
20 subsidiaries and its parent corporation. 11 CFR 114.5(g)(1).  
21 Under Commission regulations, a stockholder is defined as a  
22 person who (i) has a vested beneficial interest in stock;  
23 (ii) has the power to direct how that stock shall be voted  
24 (if it is voting stock); and (iii) has the right to receive  
25 dividends. 11 CFR 114.1(h); See also Advisory Opinions  
26 1988-36, 1988-19, 1984-5, 1983-35 and 1983-17.

27 Any employee with any funds invested in Fund C, either  
28 by that employee's own contributions or the Company's

1  
2 matching contributions, would meet the first requirement if  
3 their contribution purchased one share of stock. If the  
4 share of stock was purchased by the Company's matching  
5 contribution, the unit of value produced by the contributions  
6 would have to be a fully vested unit. The information  
7 contained in your request states that each employee that  
8 acquires stock through the Plan has the right to give voting  
9 instructions and that the trustee must comply with those  
10 instructions. See Plan, Section 6. Therefore, the second  
11 requirement of the regulations is met.

12 In past treatments of employee stock purchase plans, the  
13 third requirement--the right to receive dividends--is the  
14 element that has received the most analysis. Most of the  
15 Plans discussed in the past have contained some limitations  
16 regarding the withdrawal of either the accumulated dividends  
17 or the underlying stock. See Advisory Opinion 1988-36 and  
18 the opinions cited therein. The test that the Commission has  
19 used is whether "participants are able to withdraw at least  
20 one share of stock purchased with employer matching  
21 contributions without incurring a suspension period..." to  
22 conclude that those participants had the right to receive  
23 dividends and were stockholders under 11 CFR 114.1(h). The  
24 Commission also considered it significant whether the right  
25 to withdraw stock or dividends was limited to only once per  
26 year.

27 If an employee has actually withdrawn stock, which  
28 formed part of his investment in Fund C, (the CMS stock

4 fund), that employee would have the right to receive  
5 dividends in the same manner as any other CMS stockholder and  
6 so would be considered as stockholder for purposes of the  
7 regulations. As in the past opinions, the remaining issue is  
8 whether, absent any actual withdrawal of stock, any vested  
9 Plan participant may qualify as a shareholder under section  
10 114.1(h).

11 If an employee used the voluntary contribution option to  
12 invest in Fund C, that person would qualify as a shareholder.  
13 As noted above, voluntary contributions may be withdrawn  
14 without any penalty at any time. Therefore, there are no  
15 restrictions on the receipt of dividends. The situation is  
16 otherwise with stock obtained through elective contributions,  
17 participant employee or any Company matching contributions.  
18 The restrictions on withdrawals are too significant to regard  
19 employees obtaining stock solely through one these options as  
20 shareholders under the regulation. As noted above, elective  
21 contributions can only be withdrawn in limited emergency  
22 situations.<sup>2/</sup> Participant employee contributions are limited  
23 to partial withdrawals once a year, while the withdrawal of  
24 any Company contributions (matching or incentive) incurs an  
25 automatic suspension and forfeiture of non-vested value  
26 units.

27 2/ None of the previous opinions have dealt with a situation  
28 where withdrawal of funds could only be made for emergency  
29 purposes. However, a purpose based limitation seems at least  
30 as restrictive as limitations based on frequency of permitted  
withdrawal or those providing for suspension as a penalty for  
withdrawal.

4 Accordingly, with respect to stockholder solicitations  
5 for the Committee, the Commission concludes that the  
6 Committee (or the Company) may solicit political  
7 contributions only from those Plan participants who have  
8 withdrawn at least one share of Company stock or, prior to  
9 withdrawal, have purchased Company stock held in Fund C  
10 through the employee's voluntary contributions. Of course,  
11 the solicitation by the Committee or the Company must  
12 otherwise meet the requirements for a proper solicitation  
13 under the Act and regulations. 2 U.S.C. §441b(b)(3)(A), (B)  
14 and (C); see 11 CFR 114.5(a).<sup>3/</sup>

15 This response constitutes an advisory opinion concerning  
16 application of the Act, or regulations prescribed by the Com-  
17 mission, to the specific transaction or activity set forth in  
18 your request. See 2 U.S.C. §437f.

19  
20 For the Commission,

21  
22 Trevor Potter  
23 Chairman

24 Enclosures (AOs 1988-36, 1988-19, 1984-5, 1983-35 and  
25 1983-17.)

26 <sup>3/</sup> For example, a corporation or separate segregated fund  
27 that solicited contributions of a particular amount must  
28 inform the person solicited that such amount is only a  
29 suggestion and that the person is free to contribute more or  
30 less than the suggested amount. 11 CFR 114.5(a)(2).  
Moreover, any solicitation for a separate segregated fund  
must describe the political purpose of the fund and specify  
that persons have the right to refuse to contribute to the  
fund without reprisal. 11 CFR 114.5(a)(3), (a)(4), and  
(a)(5).