



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.^{1/} 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.

25
26 ^{1/} 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.^{2/} 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).^{3/}

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 ^{3/} 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).