



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

October 4, 1994

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 Company. There are three different types of contributions that employees can make into the Plan: "elective employer contributions," "participant contributions," and "voluntary contributions." See Plan, Sections 5.1, 5.2 and 5.3. Elective employer contributions are deducted from the employee's compensation before taxes, pursuant to a 401(k) pension program. These are limited to a maximum of 12% of salary. Participant contributions and voluntary contributions are after-tax employee contributions, the amounts of which are limited by the level of an employee's elective contributions.<sup>1/</sup> The Company will make matching contributions of one half an employee's contributions up to a maximum of 3%. Additional Company matching contributions can be made pursuant to an

incentive program in which more funds are contributed should certain Company-wide performance goals be met. See Plan, Sections 5.10 and 5.10. Each dollar of a contribution is valued as a Plan unit, and all units are recorded according to the type of employee or Company contribution that is made.

Employees may designate the contributions to three different investment Funds. Fund A consists of investment contracts by insurance companies, financial institutions, U.S. Government obligations and other debt instruments. Fund B consists of common stock of non-CMS companies. Fund C consists of CMS Energy Corporation common stock and temporary investments. See Plan, Sections 2.1 and 5.4. All Company contributions, as well as dividends earned from CMS stock, are placed in Fund C. An employee's right to the matching Company contributions vests at the rate of 10% per year for the first four years of employment and 20% for each of the next three years of service. The employee is 100% vested after seven years of Plan participation and Company employment. See Plan, Section 8.4.

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 Funds that consist of elective employer units may only be withdrawn in case of emergency situations or heavy financial need for medical reasons, purchase of a residence, college tuition or to prevent eviction. Participant units may be withdrawn partially, but only one withdrawal a year may be made. Voluntary units may be withdrawn, in part or fully, at any valuation date which is the last day of each month.

The withdrawal of units made up of Company matching contributions is subject to a different set of limitations. See Plan, Section 8.4. An employee can only withdraw those units which form the vested portion of that employee's matching contributions from the Company. Even vested units cannot be withdrawn until they have been in the account for two years. Should any unit be withdrawn before an employee is fully vested, all the non-vested portions are forfeited until the amount the employee withdrew is repaid into the account. Finally, if units consisting of Company matching contributions are withdrawn, the employee is suspended from participating in the Plan for a period from three months to one year, depending on the amount (or value) that was withdrawn.

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

The Act permits a corporation or its separate segregated fund to solicit its individual stockholders and their families. 2 U.S.C. 441b(b)(4)(A)(i). A corporation may also solicit the stockholders or their families of its subsidiaries and its parent corporation. 11 CFR 114.5(g)(1). Under Commission regulations, 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 (if it is voting stock); and (iii) has the right to receive dividends. 11 CFR 114.1(h); See also Advisory Opinions 1988-36, 1988-19, 1984-5, 1983-35 and 1983-17.

Any employee with any funds invested in Fund C, either by that employee's own contributions or the Company's matching contributions, would meet the first requirement if their contribution purchased one share of stock. If the share of stock was purchased by the Company's matching contribution, the unit of value produced by the contributions would have to be a fully vested unit. The information contained in your request states that each employee that acquires stock through the Plan has the right to give voting instructions and that the trustee must comply with those instructions. See Plan, Section 6. Therefore, the second requirement of the regulations is met.

In past treatments of employee stock purchase plans, the third requirement--the right to receive dividends--is the element that has received the most analysis. Most of the Plans discussed in the past have contained some limitations regarding the withdrawal of either the accumulated dividends or the underlying stock. See Advisory Opinion 1988-36 and the opinions cited therein. The test that the Commission has used is whether "participants are able to withdraw at least one share of stock purchased with employer matching contributions without incurring a suspension period..." to conclude that those participants had the right to receive dividends and were stockholders under 11 CFR 114.1(h).

If an employee has actually withdrawn stock, which formed part of his investment in Fund C, (the CMS stock fund), that employee would have the right to receive dividends in the same manner as any other CMS stockholder and so would be considered as stockholder for purposes of the regulations. As in the past opinions, the remaining issue is whether, absent any actual withdrawal of stock, any vested Plan participant may qualify as a shareholder under section 114.1(h).

If an employee used the voluntary contribution option to invest in Fund C, that person would qualify as a shareholder. As noted above, voluntary contributions may be withdrawn without any penalty at any time. Therefore, there are no restrictions on the receipt of dividends. Participant employee contributions are limited to partial withdrawals once a year; however, this is sufficient to constitute a right to receive dividends. The situation is otherwise with stock obtained through elective contributions or any Company matching contributions. The restrictions on withdrawals are too significant to regard employees obtaining stock solely through one of these options as shareholders under the regulation. As noted above, elective contributions can only be withdrawn in limited emergency situations.<sup>2/</sup> The withdrawal of any Company contributions (matching or incentive) incurs an automatic suspension and forfeiture of non-vested value units.

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

For the Commission,

(signed)

Trevor Potter  
Chairman

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

#### ENDNOTES

1/ The Plan is designed so that the more an employee utilizes the elective option, the less the other two options may be 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.

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

3/ For example, a corporation or separate segregated fund that solicited contributions of a particular amount must inform the person solicited that such amount is only a suggestion and that the person is free to contribute more or 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).