



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 8, 2001

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2001-07

George Aandahl, Treasurer
Nuclear Management Company
Political Action Committee
700 First Street
Hudson, WI 54016

Dear Mr. Aandahl:

This responds to your letters dated April 12 and 24, and May 10 and 25, 2001, on behalf of the Nuclear Management Company Political Action Committee ("NMCPAC"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations to the affiliation of NMCPAC with the separate segregated funds ("SSFs") of corporations that own the Nuclear Management Company, LLC ("NMC").

Background and Questions

NMC was established in February 1999 as a joint venture limited liability company comprised of several utility corporations. It is organized under Wisconsin law. It functions as a service company for the purposes of operating a group of nuclear power plants and increasing the plants' economic value. NMC is owned in five equal shares by its members which are the following incorporated utilities ("the owner companies"): Alliant Energy, Northern States Power Company, Wisconsin Electric Power Company, Wisconsin Public Service Corporation, and CMS Energy. NMC has not elected to be treated as a corporation by the Internal Revenue Service.

You state that NMC is the successor to the previous nuclear plant sectors of the individual owner companies. At this time, the services of NMC are provided almost entirely to the five owner companies. The owner companies each retain ownership of

both the physical assets of their nuclear plant(s) and the electricity produced by them. The owner companies reimburse NMC for its costs for the operation of the plants and the management of nuclear personnel. As the operating authority under the Nuclear Regulatory Commission operating license for each plant is transferred from the owner company to NMC, the non-union personnel are also transferred to NMC and are formally separated from their original employer.¹ It is anticipated that, over time, contracts will be negotiated with union personnel such that some or all will eventually be employed by NMC. NMC is actively seeking additional utilities to join in the joint venture. As each new member is added, the share of each current member will be reduced accordingly.

You state that NMCPAC has been formed to provide employees an opportunity to focus political involvement on nuclear energy-related issues. NMCPAC intends to solicit contributions “only from its employee base.” Each of the five owner companies, or the parent of such a company, has an SSF registered with the Commission. NMCPAC has not received contributions from any of those SSFs and has not received “material financial support” from either NMC, the owner companies, or their SSFs.² NMCPAC anticipates receiving some direct assistance from NMC in the future in the form of office supplies, promotional material, or administrative assistance. NMCPAC filed its statement of organization with the Commission on March 13, 2001.³

You ask a number of questions pertaining to the question of the relationship between NMCPAC and the SSFs of the owner companies and the impact of this relationship on the payment of administrative support for NMCPAC and on the requirements for NMCPAC’s name. They are re-stated and re-ordered as follows:

- (1) Is NMCPAC affiliated with any or all of the SSFs of the five owner companies?
- (2) If NMCPAC is affiliated with the SSFs of all of the owners, are contributions by NMCPAC to be attributed to each of those SSFs at 20 percent of the amount of the contribution?
- (3) Will NMCPAC be required to amend its statement of organization each time another company obtains a share of NMC?
- (4) If NMPAC is affiliated with any of the owner’s SSFs, is each affiliated corporation a connected organization of NMCPAC?

¹ This personnel transfer occurred on January 1, 2001, with respect to four of the owner companies; it will occur on July 1, 2001, with respect to the newest owner, CMS Energy.

² You state that NMCPAC has received contributions from individual employees and is refraining from making any contributions pending the issuance of this advisory opinion. Most organizational work has been done by executive or administrative personnel on an uncompensated overtime basis, and support has been limited to use of NMC’s e-mail system and occasional phone calls over NMC’s phone system “for which the incremental expense is essentially zero.”

³ In its statement of organization, NMCPAC stated that it was an SSF and that it was affiliated with the SSF of the Wisconsin Public Service Corporation. You assert that the declaration of affiliation “was made in response to advice” from the FEC Information Division.

(5) May NMC pay for NMCPAC's administrative support and function as NMCPAC's connected organization?

(6) Is NMCPAC required to include the names of the owning companies in the PAC name?

The responses to your questions will first address the issue of affiliation and then the consequences of that discussion.

Responses

Question 1 - Affiliation

The Act and Commission regulations provide that committees, including separate segregated funds, that are established, financed, maintained or controlled by the same corporation, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2), 110.3(a)(1)(ii). Contributions made to or by such committees shall be considered to have been made to or by a single committee. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2), 110.3(a)(1). In addition, a corporation may make communications to, and solicit, the restricted class (i.e., executive and administrative personnel and stockholders, and the families thereof) of its subsidiaries or other affiliates for contributions to the corporation's separate segregated fund. 2 U.S.C. §441b(b)(2)(A) and (4)(A)(i); 11 CFR 114.3(a)(1) and 114.5(g)(1). The Commission has long held that affiliates may include entities other than corporations, such as partnerships and limited liability companies. Advisory Opinions 2000-36, 1997-13, 1994-11, and 1992-17; *see also* Advisory Opinion 1996-38.

Where an entity is not an acknowledged subsidiary of another entity, as in 11 CFR 110.3(a)(2)(i),⁴ Commission regulations provide for an examination of various factors in the context of an overall relationship to determine whether one company is an affiliate of another and, hence, whether their respective SSFs are affiliated with each other. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J).⁵

The relevant factors are: (A) whether a sponsoring organization owns a controlling interest in voting stock or securities of another sponsoring organization; (B) whether a sponsoring organization or committee has the authority or ability to direct or

⁴ According to Commission regulations, committees established by a single corporation and its subsidiaries are affiliated *per se*. 11 CFR 110.3(a)(2)(i).

⁵ Specifically, the regulations, at 11 CFR 110.3(a)(3)(ii), state in part:

The Commission will examine these factors in the context of the overall relationship between committees or sponsoring organizations to determine whether the presence of any factor or factors is evidence of one committee or organization having been established, financed, maintained or controlled by another committee or sponsoring organization.

participate in the governance of another sponsoring organization or committee through provisions of constitutions, by-laws, contracts or other rules, or through formal or informal practices or procedures; (C) whether a sponsoring organization or committee has the authority or ability to hire, appoint, demote or otherwise control the officers, or other decisionmaking employees of another sponsoring organization or committee; (E) whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the organizations or committees; (F) whether a sponsoring organization or committee has any members, officers, or employees who were members, officers, or employees of another sponsoring organization or committee which indicates a formal or ongoing relationship or the creation of a successor entity; (G) whether a sponsoring organization or committee provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization or committee; (H) whether a sponsoring organization or committee causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee; (I) whether a sponsoring organization or committee had an active or significant role in the formation of another sponsoring organization or committee; and (J) whether the sponsoring organizations or committees have similar patterns of contributions or contributors which indicates a formal or ongoing relationship between the sponsoring organizations or committees. 11 CFR 110.3(a)(3)(ii)(A), (B), (C), (E), (F), (G), (H), (I), and (J). The list of ten circumstantial factors set out at 11 CFR 110.3(a)(3)(ii) is not an exclusive list, and other factors may be considered. *See* Advisory Opinion 1995-36.

The five corporations each own a twenty percent interest in NMC, and you state that no single owner has a controlling interest. The board of directors consists of six persons: NMC's CEO and one person appointed by each owner; those appointees are currently the CEOs of two of the companies and high level executives in the three other companies. See NMC Operating Agreement ("OA"), §5.4. The board appoints NMC's officers and directs, manages, and controls the business, affairs, and property of the company, subject to certain requirements of supermajority (i.e., three-quarters) or unanimous votes by the member companies for certain actions. See OA, §5.1 and 5.2. As indicated, the NMC Operating Agreement provides, in Article 5, that votes by the member (owner) companies are needed before the board can take seven specific actions, but you explain that, in practice, there is no significant difference between the board and the members voting as members because each owner company's representative director also exercises his company's vote as a member, and there is no practical difference between a board meeting and a members' meeting.⁶ Most actions by the board or by the

⁶ A supermajority vote of all the members is required for issuing new interests in NMC, amending the operating agreement in connection with the issuance of new interests, and amending the articles of organization. A unanimous vote of all the members is required to engage in any action to contravene the operating agreement, to sell substantially all of NMC's property, to dissolve the company, or to amend the operating agreement other than with respect to the issuance of new interests. There are also five actions requiring a supermajority vote of all the directors; these pertain to borrowing money, leasing NMC property, exceeding the annual budget by a certain amount, confessing a legal judgment, or assigning rights in NMC assets for other than an NMC purpose. OA §§5.2(a) and (b), 5.4(d). Moreover, a supermajority

members require a majority vote of all directors (not just those present) or all members (not just those present). Each director has equal voting power on the board, and each member has equal voting power. The consequence of these facts is that, with the exception of those few actions requiring unanimity, no one owner company can prevent an action by NMC. Although each owner company, through its representative director, has the ability to participate in the governance of NMC and participates in hiring and the exercise of authority over the officers of NMC, it appears that no company exerts dominant authority or even substantially more authority than any other company. *See* 11 CFR 110.3(a)(3)(ii)(A), (B), and (C).⁷

You indicate that, other than the owner company representatives sitting on NMC's board, there are no officers or employees employed by both NMC and any owner company except for a CMS Energy vice president who is presently a "loaned executive" at NMC and who, after July 1, will be an officer of NMC, and not of CMS. (See footnote 1.) Of NMC's eleven board appointed officers, nine were previously employed by the owner companies and almost all of NMC's employees were previously employed by those companies. Although the substantial numbers of former officers and employees indicate a formal or ongoing relationship between the owner companies and NMC, the former officers or employees of no one company constitute the dominant part, or constitute anywhere near a substantial plurality, of the total of officers or total of employees of NMC. You also note that NMC's original corporate counsel left NMC to work for another joint venture involving one of the owner companies which was his former employer. This officer, however, was only one of the eleven board-appointed officers, and you state that there is no plan relating to rotation of either officers or employees between NMC and the owner companies.⁸ *See* 11 CFR 110.3(a)(3)(ii)(E) and (F).

Pursuant to the business arrangements under which NMC provides operational and management services, an extensive amount of funds are exchanged between NMC and the owner companies. However, these are part of a business arrangement of payment for services, and it does not appear that any owner provides the dominant or substantial plurality of funds for NMC's operations. *See* 11 CFR 110.3(a)(3)(ii)(G) and (H). NMC was founded by four of the five owners (all except CMS Energy), and although each company thus had a significant role in its formation, the number of founders reduces the importance of the factor in this situation. *See* 11 CFR 110.3(a)(3)(ii)(I).

vote of the members is required to elect any additional directors other than the company representatives. OA §5.4(a).

⁷ The Commission notes that none of the SSFs of the members have indicated affiliation with any of the other members' SSFs. The Commission therefore assumes that none of the members (the connected organizations) are affiliated with any of the others under the Act and regulations. If there were such affiliations, any analysis would have to consider the impact of the aggregated voting power of the affiliated members.

⁸ You have stated that the unionized employees in the plants operated by NMC are still employees of the member company that owns the particular plant. Although this may, in some way, suggest an overlap situation between NMC and each of the companies, no one company's overlap with NMC constitutes the dominant part or substantial plurality of those working in NMC-operated plants.

You state that there is currently no formal or ongoing relationship between NMCPAC and the owner companies' SSFs (other than the current listing of the Wisconsin Public Service Corporation's SSF as an affiliated committee in the statement of organization). You state that, as of July 1, 2001, there will be no overlap between the officers of NMCPAC and the officers of the other PACs.⁹ See 11 CFR 110.3(a)(3)(ii)(E). You state that, although some of the individuals involved in organizing NMCPAC had previous experience with the owner companies' SSFs, NMCPAC was organized without the active involvement of those SSFs. See 11 CFR 110.3(a)(3)(ii)(I).

You indicate that NMCPAC has received no "material financial support" or administrative support from either the owner companies or their SSFs and no owning company or SSF has directed or encouraged the provision of funds by or to NMCPAC. See 11 CFR 110.3(a)(3)(ii)(G) and (H). NMCPAC has not made any contributions to date. You state that some similarity in the recipients of contributions from NMCPAC and the owners' SSFs is likely to occur because all the companies are concerned with energy policy issues. See 11 CFR 110.3(a)(3)(ii)(J).

Although the relationship of each owner company to NMC indicates that some situations described in the factors are present, these factors must be examined in the context of the overall relationship. As illustrated above, the context is a joint venture where several companies have equal shares and equal opportunity for financial and management control, and no one company's role is anywhere near dominant. The Commission has examined joint ventures where the issue is the affiliation of the joint venture with the venture owners. Where two companies have 50-50 ownership over a joint venture, with equal control by each over the governing bodies and top management so that the assent of each was necessary for key venture operations, the Commission has concluded that both owner companies were affiliated entities of the joint venture for purposes of the Act. See Advisory Opinions 1997-13, 1992-17, and 1987-34; see also Advisory Opinion 1996-49 (where a joint venture was owned 50-25-25 and the Commission concluded that the SSF of the 50 percent owner, but not the SSFs of the other two corporations, was affiliated with the PAC of the joint venture.) In a joint venture where one corporation held a 60 percent interest, as well as the management and control of the venture, and the other was a 40 percent holder and a limited partner, the Commission concluded that the 60 percent owner, and not the 40 percent owner, was an affiliate of the joint venture. Advisory Opinion 1994-11.¹⁰

⁹ The only insignificant and temporary overlap is that a CMS Energy PAC board member serves on the NMCPAC board. That person will leave CMS and its PAC board when the CMS non-union nuclear employees officially become NMC employees on July 1. You state that this person will not participate in any votes regarding proposed contributions by NMCPAC until after the transition.

¹⁰ See also Advisory Opinion 1984-36 which involved a joint venture owned 60-40. In that opinion, the Commission concluded that the parent of the managing partner corporation that owned a 40% interest, but appointed only four of the nine members of the joint venture's board (while the other owner corporation appointed five), was not affiliated with the joint venture partnership, and therefore could not solicit the partnership's executive and administrative personnel for contributions to its SSF.

Your request presents a very different situation from those described above. Where the ownership, control, and decisionmaking authority is divided and diffused as it is in NMC, none of the owner companies can be characterized as affiliated with NMC for purposes of the Act and regulations. Moreover, the facts pertaining to the relationship of NMCPAC to the SSFs of the owners companies, or to the owner companies themselves, do not indicate affiliation among the committees within the context presented. Thus, NMCPAC is not affiliated with any of the SSFs of the owner companies.

Questions 2-6 - Consequences of Non-Affiliation

Question 2 - As indicated above, contributions by affiliated committees are treated as contributions by one committee and cannot exceed the limits of 2 U.S.C. §441a when aggregated with each other. 2 U.S.C. §441a(a)(5); 11 CFR 110.3(a)(1). In advisory opinions addressing situations involving PACs of joint ventures owned and controlled on a 50-50 basis by corporations, the Commission has determined that half of each contribution made by the joint venture's PAC should be apportioned to the SSF of one owner and half to the SSF of the other owner. Advisory Opinions 1997-13, 1992-17, and 1987-34. In NMCPAC's situation, however, no such aggregation, using any percentage, is necessary because it is not affiliated with any of the owners' SSFs.

Question 3 - The Act and regulations require a political committee to amend its statement of organization any time a change occurs in the information presented on its previous statements of organization (within 10 days of the change), including the name of any affiliated committees. 2 U.S.C. §433(b) and (c); 11 CFR 102.2(a)(2) and (b). You have indicated that, as each new owner is added to NMC, the share of each current owner will be reduced accordingly. Assuming that the structure and operations of NMC remain essentially the same as has been described above, each company in the expanded ownership group will have no greater share of the ownership and management than an owner company presently holds. Thus, it appears that the SSFs of any new members in an expanded group would not be affiliated, and they should not be added to NMCPAC's statement of organization. Upon receipt of this opinion, however, NMCPAC is required to amend its statement of organization to delete the SSF of the Wisconsin Public Service Corporation as an affiliated committee.

Questions 4 and 5 - Under 2 U.S.C. §441b(b)(2)(C), a corporation may use its general treasury funds to pay for the costs of establishing, administering, or soliciting contributions to its SSF, without a resultant contribution or expenditure. *See also* 2 U.S.C. §§431(8)(B)(vi) and (9)(B)(v). The corporation is considered to be the connected organization of its SSF. 2 U.S.C. §431(7) and 11 CFR 100.6(a). Applying these rules in the context of affiliation, the Commission has concluded that a corporation that is affiliated with another corporation may pay the administration and solicitation costs of the latter corporation's SSF. Advisory Opinions 1996-26 and 1983-19. Similarly, it has permitted incorporated entities to pay such costs for the political committees of its affiliated entities that are not incorporated. The affiliated corporate

entities are the connected organizations of the political committee of the unincorporated entity. Advisory Opinions 1997-13, 1996-49, and 1992-17.

A multi-member LLC that does not have publicly traded shares and does not elect to be treated as a corporation by the Internal Revenue Service is treated as a partnership for the purposes of the Act. 11 CFR 110.1(g)(2) and (3). The Act does not extend to a partnership the ability granted to a corporation at 2 U.S.C. §441b(b)(2)(C) to conduct itself as a connected organization and avail itself of the contribution and expenditure exemptions. Advisory Opinions 1991-1 and 1990-20. Nevertheless, the Commission has treated joint venture partnerships differently as a result of the partnership's ownership by, and affiliation with, corporations. *See* Advisory Opinions 1996-49, 1994-11, and 1992-17; *see also* Advisory Opinion 1997-13. If a partnership is owned entirely by corporations and affiliated with at least one of them, it may perform the functions of a connected organization for its PAC. Advisory Opinions 1997-13, 1996-49, and 1994-11.

However, NMC is not affiliated with any of its owner corporations for purposes of the Act and therefore does not fall within the category of partnerships or LLCs able to pay for the establishment, administration and solicitation costs of a PAC created by its directors, officers, or employees without a contribution or expenditure resulting. Moreover, none of the owner companies may act as a connected organization for NMCPAC and pay such costs. The payments of such costs would be contributions to NMCPAC, and such costs must be paid for with funds from permissible sources (i.e., not prohibited by 2 U.S.C. §§441b, 441c, 441e, 441f, and 441g), and must comply with the limits of 2 U.S.C. §441a(a)(1)(C). Because NMC is an LLC that is treated as a partnership under IRS regulations, any contributions it makes would be attributed not just to NMC itself but also to its members, the owner companies, in direct proportion to their shares or by arrangement of the members. 11 CFR 110.1(g)(2), 110.1(e)(1) and (2). Because all the members are corporations, NMC may not contribute to NMCPAC or use any of its funds for the support of NMCPAC. Such funds will have to come from permissible sources, such as individuals who are not foreign nationals or Federal contractors.¹¹

You state that NMCPAC anticipates receiving assistance from NMC in the future, citing "office supplies, promotional material, or administrative assistance" as examples. The Commission has reviewed the provision of services and materials to a non-connected political committee by a corporate entity whose personnel (acting as individuals) establish, organize, and direct the committee. In doing so, it has explained how the corporate entity may provide such support without being considered a connected organization under 2 U.S.C. §431(7) and 11 CFR 100.6, or, in the alternative, without making a prohibited contribution. *See* Advisory Opinions 2000-20, 1997-26, and 1997-15 (and opinions cited therein). Although it has been established that NMC cannot act as a connected organization, the guidance in those opinions as to services and

¹¹ In view of the fact that NMCPAC is not an SSF and is not affiliated with an SSF, the persons who may be solicited for contributions to NMCPAC is not limited by 2 U.S.C. §441b(b)(4)(A) or (B). NMC, however, may not pay for any solicitation costs.

materials provided is relevant to NMC and NMCPAC, particularly in view of NMC's inability to make contributions; NMC and NMCPAC may wish to review those opinions.

Although you do not provide details or ask about proposed future arrangements where NMCPAC would not be an SSF, the Commission provides some general guidance. NMC may provide legal and accounting services to the PAC without charge so long as such services are rendered by a regular employee of NMC and are provided solely to ensure compliance with the Act. 2 U.S.C. §431(8)(B)(ix)(II), (9)(B)(vii)(II); 11 CFR 100.7(b)(14), 100.8(b)(15). By analogy to 11 CFR 114.9(c) and (d), NMCPAC may pay NMC the usual and normal charge for the use of office facilities such as telephones within a commercially reasonable time. *See* Advisory Opinion 1979-22. However, other goods or services provided by NMC or its employees should be paid for in advance, such as where NMC's ordinary course of business does not entail providing such goods or services. *See* 2 U.S.C. §431(8)(A) and 11 CFR 11 CFR 100.7(a)(1) (which define "contribution" to include loans or advances); *see also* Advisory Opinions 1997-26 and 1997-15; 11 CFR 114.2(f) and 116.3.¹²

Question 6 - This question is premised on advice given in previous opinions with respect to the inclusion of an affiliated joint venturer's name in the PAC of the joint venture. *See* Advisory Opinions 1997-13 and 1996-49. Based on the above analysis, none of the owner companies' names should be included in NMCPAC's name.

This response constitutes an advisory opinion concerning the 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)

Danny L. McDonald
Chairman

Enclosures (AOs 2000-36, 2000-20, 1999-17, 1997-26, 1997-15, 1997-13, 1996-49, 1996-38, 1996-26, 1995-36, 1994-11, 1992-17, 1991-1, 1990-20, 1987-34, 1984-36, 1983-19 and 1979-22)

¹² You refer to the minimal support that has been provided by NMC employees in the form of e-mails and occasional phone calls (see footnote 2). Although the "incremental expense" of such use is not the standard for calculating the expense of e-mail use or phone use (*see, e.g.,* Advisory Opinions 1999-17 and 1997-15), the expense may still be minimal. In view of this probability and NMC's past uncertainty as to the nature of its relationship with NMCPAC under the Act, the Commission will not require NMCPAC to pay NMC for the expenses already incurred. *See, by analogy,* 11 CFR 114.9(a) (which addresses occasional, isolated, or incidental use by an employee of corporate facilities for individual volunteer activity in connection with a Federal election).