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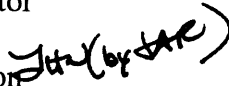
AGENDA ITEM


For Meeting of: 5-18-06


MEMORANDUM


TO: The Commission

THROUGH: Robert J. Costa 
Acting Staff Director

FROM: Lawrence H. Norton 
General Counsel

Rosemary C. Smith 
Associate General Counsel

Mai T. Dinh 
Assistant General Counsel

J. Duane Pugh 
Senior Attorney

Subject: Draft AO 2006-15

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 18, 2006.

Attachment

1 ADVISORY OPINION 2006-15

2 Jonathan D. Simon, Esq.
3 VanNess Feldman
4 1050 Thomas Jefferson Street, N.W.
5 Washington, D.C. 20007-3877

DRAFT

6 Dear Mr. Simon:

7 We are responding to your advisory opinion request on behalf of TransCanada
8 Corporation (“TransCanada”), concerning the application of the Federal Election Campaign Act
9 of 1971, as amended (the “Act”), and Commission regulations to political donations and
10 disbursements from two of TransCanada’s wholly owned domestic subsidiaries in connection
11 with State and local elections. The Commission concludes that the Act and Commission
12 regulations do not prohibit these political donations or disbursements because the funds used
13 for such donations and disbursements would not come from a foreign national and because the
14 domestic subsidiaries would ensure that no foreign national participates in making decisions
15 concerning non-Federal election-related activities.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received March 28,
18 2006.

19 TransCanada, a Canadian corporation, maintains its principal place of business in
20 Calgary, Alberta, Canada. TransCanada wholly owns two U.S. corporations, Gas Transmission
21 Northwest Corporation (“GTN”) and TransCanada Hydro Northeast Inc. (“TC Hydro”).

22 GTN, a California corporation, has its principal place of business in Portland, Oregon.

23 GTN’s Board of Directors currently includes three directors, two of whom are U.S. citizens.

1 TC Hydro is a Delaware corporation, with its principal place of business in
2 Westborough, Massachusetts. Three directors comprise TC Hydro's Board of Directors; one of
3 whom is a U.S. citizen, and one of whom has permanent resident status in the United States.

4 Both GTN and TC Hydro (collectively, "the Subsidiaries") propose to make direct
5 corporate political donations and disbursements in connection with State and local elections to
6 the extent permissible under applicable State and local law. The donations and disbursements
7 would be made from funds generated by the Subsidiaries' domestic U.S. operations. Each
8 Subsidiary's Board and officers, including foreign national Board members and officers, would
9 set an overall budget level for political donations and disbursements in connection with State
10 and local elections. Other than setting the overall budget amount, all decisions concerning the
11 making of political donations or disbursements will be made by individuals who are U.S.
12 citizens or permanent residents to whom such responsibilities will be delegated.

13 ***Question Presented***

14 *May GTN and TC Hydro make donations and disbursements of corporate funds in*
15 *connection with State and local elections, to the extent permitted by State and local law, from*
16 *funds generated by their U.S. operations?*

17 ***Legal Analysis and Conclusions***

18 Yes, GTN and TC Hydro may make corporate donations and disbursements in
19 connection with State and local elections to the extent permitted by State and local law,
20 provided that: (1) the donations and disbursements derive entirely from funds generated by the
21 Subsidiaries' U.S. operations; and (2) all decisions concerning the donations and disbursements

1 will be made by individuals who are U.S. citizens or permanent residents, except for setting
2 overall budget amounts.

3 The Act and Commission regulations prohibit a foreign national from directly or
4 indirectly making a contribution or donation of money in connection with a Federal, State, or
5 local election. 2 U.S.C. 441e(a)(1)(A);¹ 11 CFR 110.20(b). In addition, the Act and
6 Commission regulations prohibit a foreign national from directly or indirectly making an
7 expenditure, an independent expenditure, or a disbursement in connection with a Federal, State,
8 or local election. 2 U.S.C. 441e(a)(1)(C); 11 CFR 110.20(f). Commission regulations provide
9 that foreign nationals shall not direct, dictate, control, or directly or indirectly participate in the
10 decision-making process of any person, such as a corporation, with regard to such person's
11 Federal or non-Federal election-related activities, including decisions concerning the making of
12 contributions, donations, expenditures, or disbursements in connection with elections for any
13 Federal, State, or local office. 11 CFR 110.20(i). Thus, in order for a domestic subsidiary of a
14 foreign national to make donations or disbursements in connection with a State or local
15 election, the donations or disbursements may not be derived from the foreign national's funds
16 and no foreign national may have any decision-making authority concerning the making of
17 donations or disbursements.

18 In the Bipartisan Campaign Reform Act of 2002, Pub. Law No. 107-155, 116 Stat. 81
19 (2002) ("BCRA"), Congress amended the Act to strengthen and expand the ban on campaign
20 contributions and donations by foreign nationals. *See* BCRA, § 303, 116 Stat. at 96. Among
21 other changes, BCRA amended 2 U.S.C. 441e to prohibit foreign national contributions and

¹ Unlike many of the other provisions of the Act, section 441e applies to elections for State and local offices.

1 donations that are made “directly or indirectly.” Previously, 2 U.S.C. 441e(a) banned foreign
2 national contributions made directly “or through any other person.” In promulgating
3 regulations to implement this statutory amendment, the Commission sought comment on
4 whether BCRA’s new statutory language should be interpreted to prohibit U.S. subsidiaries of
5 foreign corporations from making donations in connection with State and local elections, or
6 from making contributions in connection with Federal elections from a separate segregated
7 fund, or both. *See Contribution Limitations and Prohibitions, Final Rules*, 67 Fed. Reg. 69928,
8 at 69943 (Nov. 19, 2002).

9 When promulgating the Final Rules, the Commission indicated that it found no
10 evidence of Congressional intent to broaden the prohibition on foreign national involvement in
11 U.S. elections to cover U.S. subsidiaries of foreign corporations. Consequently, the
12 Commission determined that “indirectly” did not apply to donations made by such entities. *Id.*
13 The Commission based its determination on the lack of Congressional intent and on substantial
14 policy reasons set forth in the long line of “advisory opinions over more than two decades that
15 have affirmed the participation of such subsidiaries in elections in the United States, either
16 directly in states where state law permits, or through separate segregated funds with regard to
17 Federal elections, so long as there is no involvement of foreign nationals in decisions regarding
18 such participation.” *See id.* at 69943 (citing Advisory Opinions 2000-17 (Extendicare Health
19 Services, Inc.), 1999-28 (Bacardi-Martini, USA, Inc.), 1995-15 (Allison Engine Company
20 Political Action Committee), 1992-16 (Nansay Hawaii, Inc.), 1992-07 (H&R Block, Inc.),
21 1990-08 (The CIT Group Holdings, Inc.), 1989-29 (GEM of Hawaii, Inc.), 1982-34 (Sonat Inc.
22 Political Action Committee), 1981-36 (Japan Business Association of Southern California),

1 1980-100 (Revere Sugar Corp.), and 1978-21 (Budd Citizenship Committee)). Consistent with
2 this determination, the Commission has continued to permit domestic subsidiaries of foreign
3 corporations to make contributions and donations in connection with U.S. elections after BCRA
4 and the Commission's implementing regulations became effective, provided that the conditions
5 set forth in Commission regulations and the advisory opinions cited above were satisfied. *See,*
6 *e.g.*, Advisory Opinion 2004-42 n.3 (Pharmavite LLC).

7 1. Foreign Nationals

8 The Act and Commission regulations define "foreign national" to include "foreign
9 principals," as defined in 22 U.S.C. 611(b), and individuals who are not citizens or nationals of
10 the United States and who are not lawfully admitted to the United States for permanent
11 residence. 2 U.S.C. 441e(b); 11 CFR 110.20(a)(3).² Under 22 U.S.C. 611(b)(3), "foreign
12 principal" includes corporations organized under the laws of or having its principal place of
13 business in a foreign country.

14 TransCanada is organized under Canadian law and has its principal place of business in
15 Canada. Therefore, TransCanada is a foreign national for purposes of 2 U.S.C. 441e.

16 Both GTN and TC Hydro are corporations organized under the laws of California and
17 Delaware, respectively, and both GTN and TC Hydro have principal places of business in the
18 United States. Therefore, both Subsidiaries are not foreign nationals for purposes of
19 2 U.S.C. 441e.

² *See also* 8 U.S.C. 1101(a)(22) (defining "national") and 8 U.S.C. 1101(a)(20) (defining "an individual lawfully admitted for permanent residence").

1 One director on each of the Subsidiaries' Boards is not a U.S. citizen and is not a
2 permanent resident, so both of these directors are foreign nationals for purposes of
3 2 U.S.C. 441e.

4 2. Funds Used for Donations and Disbursements in Connection with State and Local
5 Elections

6 As noted above, the Commission has applied these provisions of the Act and regulations
7 in past advisory opinions that considered factual situations and circumstances similar to those
8 presented here.³ In Advisory Opinion 1992-16 (Nansay Hawaii), the Commission considered
9 the same question at issue in this request—*i.e.*, which funds a domestic subsidiary of a foreign
10 corporation may use to make political donations to State and local candidates. In that advisory
11 opinion, the foreign parent corporation wholly owned the subsidiary, and it provided regular
12 subsidies in the form of loans or capital contributions to the subsidiary. However, the domestic
13 subsidiary proposed to use net earnings generated by the subsidiary in the United States and
14 from segregated accounts that were not subsidized by the foreign corporate parent to make
15 political donations. The Commission opined that such donations were permissible, provided
16 the subsidiary could demonstrate through a reasonable accounting method that it had sufficient
17 funds in its accounts, other than funds given or loaned by its foreign national parent
18 corporation, from which the donations were made.⁴

³ Section 110.20 was promulgated by the Commission in 2002. It recodified provisions that previously appeared in section 110.4(a), which were considered in the earlier advisory opinions.

⁴ The foreign national parent corporation and the domestic subsidiary were also required to monitor future subsidies to ensure that the parent corporation did not replenish all or any portion of the subsidiary's political contributions.

1 GTN and TC Hydro propose to use funds generated by their domestic operations for the
2 political donations and disbursements. Like the subsidiary in Advisory Opinion 1992-16
3 (Nansay Hawaii), both Subsidiaries generate substantial net earnings from their operations
4 within the United States (*i.e.*, income exceeding expenses after debt service).⁵ Neither
5 Subsidiary receives any subsidies from TransCanada or any other foreign national. Both GTN
6 and TC Hydro maintain separate bank accounts located in the United States, into which they
7 deposit the receipts from their domestic operations and from which they pay the expenses of
8 these operations. Both Subsidiaries would use these accounts for the political donations and
9 disbursements. Using funds that meet these conditions ensures that the foreign parent
10 corporation is not indirectly making or subsidizing the domestic subsidiary's donations and
11 disbursements in connection with State or local elections. Under these circumstances, the
12 Commission concludes that the Act and Commission regulations do not prohibit GTN and TC
13 Hydro from using the funds in their separate bank accounts to make donations or disbursements
14 in connection with State or local elections.

15 3. Decision Makers for Donations and Disbursements in Connection with State and Local
16 Elections

17 The Commission has also considered in past advisory opinions how a domestic
18 subsidiary of a foreign national parent corporation can ensure compliance with the prohibition
19 in 11 CFR 110.20(i) on foreign nationals participating in decision-making related to political
20 donations and disbursements. In Advisory Opinion 2000-17 (Extendicare Health Services,

⁵ In 2005, GTN's operations generated \$169 million in revenue, with a net income of \$58 million, and TC Hydro's operations generated \$48 million in revenue, with a net income of \$36 million.

1 Inc.), the domestic subsidiary had a Board of Directors that included one U.S. citizen and two
2 foreign nationals and which was wholly owned by a foreign national corporation. The
3 Commission concluded that the Board was permitted to make “general corporate policy
4 decisions” to establish or terminate a separate segregated fund (“SSF”), or to establish a Special
5 Committee or “other corporate personnel group” limited to U.S. citizens or lawfully admitted
6 permanent residents that would administer the SSF. The Board was also permitted to set a
7 specific budget level for the direct costs of the SSF at a “not to exceed” amount, and it could
8 enforce compliance with this overall budget level. The Commission determined that all other
9 decisions concerning the administration of the SSF must be made by the Special Committee or
10 other group limited to U.S. citizens or lawfully admitted permanent residents in order to comply
11 with 11 CFR 110.20(i).

12 GTN and TC Hydro propose similar arrangements to ensure compliance with the
13 prohibition on foreign national participation in decision-making regarding political donations
14 and disbursements. The Boards of Directors of the Subsidiaries, which include foreign
15 nationals, would set an overall budget for political donations and disbursements on an annual
16 basis at a “not to exceed” amount. The Subsidiaries’ Boards would review and enforce
17 compliance with these overall budget amounts. Each Board would delegate to a subset of its
18 Board members, comprised exclusively of U.S. citizens or permanent residents, the authority to
19 select the individual or individuals who will exercise all other decision-making authority over
20 political donations and disbursements. These arrangements ensure that foreign nationals do not
21 directly or indirectly participate in the decision-making process of GTN or TC Hydro with
22 regard to their non-Federal election-related activities.

