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FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 31, 2001

AGENDA ITEM

For Meeting of: 6-07-01

MEMORANDUM

TO: The Commission *JPL*

THROUGH: James A. Pehrkon
Staff Director

FROM: Lois G. Lerner *LGL*
Acting General Counsel

N. Bradley Litchfield *NBL*
Associate General Counsel

Jonathan M. Levin *JML*
Senior Attorney

Subject: Draft AO 2001-07

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 7, 2001.

Attachment

1 ADVISORY OPINION 2001-07

2
3 George Aandahl, Treasurer
4 Nuclear Management Company
5 Political Action Committee
6 700 First Street
7 Hudson, WI 54016
8

DRAFT

9 Dear Mr. Aandahl:

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

16 ***Background and Questions***

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

25 You state that NMC is the successor to the previous nuclear plant sectors of the
26 individual owner companies. At this time, the services of NMC are provided almost
27 entirely to the five owner companies. The owner companies each retain ownership of
28 both the physical assets of their nuclear plant(s) and the electricity produced by them. The
29 owner companies reimburse NMC for its costs for the operation of the plants and the
30 management of nuclear personnel. As the operating authority under the Nuclear
31 Regulatory Commission operating license for each plant is transferred from the owner
32 company to NMC, the non-union personnel are also transferred to NMC and are formally

1 separated from their original employer.¹ It is anticipated that, over time, contracts will be
2 negotiated with union personnel such that some or all will eventually be employed by
3 NMC. NMC is actively seeking additional utilities to join in the joint venture. As each
4 new member is added, the share of each current member will be reduced accordingly.

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

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

- 18 (1) Is NMCPAC affiliated with any or all of the SSFs of the five owner companies?
19 (2) If NMCPAC is affiliated with the SSFs of all of the owners, are contributions by
20 NMCPAC to be attributed to each of those SSFs at 20 percent of the amount of the
21 contribution?
22
23 (3) Will NMCPAC be required to amend its statement of organization each time another
24 company obtains a share of NMC?
25

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 cost 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.

1 (4) If NMPAC is affiliated with any of the owner's SSFs, is each affiliated corporation a
2 connected organization of NMCPAC?

3
4 (5) May NMC pay for NMCPAC's administrative support and function as NMCPAC's
5 connected organization?

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

9
10 The responses to your questions will first address the issue of affiliation and then
11 the consequences of that discussion.

12 **Responses**

13 *Question 1 - Affiliation*

14 The Act and Commission regulations provide that committees, including separate
15 segregated funds, that are established, financed, maintained or controlled by the same
16 corporation, person, or group of persons, including any parent, subsidiary, branch,
17 division, department, or local unit thereof, are affiliated. 2 U.S.C. §441a(a)(5); 11 CFR
18 100.5(g)(2), 110.3(a)(1)(ii). Contributions made to or by such committees shall be
19 considered to have been made to or by a single committee. 2 U.S.C. §441a(a)(5); 11
20 CFR 100.5(g)(2), 110.3(a)(1). In addition, a corporation may make communications to,
21 and solicit, the restricted class (i.e., executive and administrative personnel and
22 stockholders, and the families thereof) of its subsidiaries or other affiliates for
23 contributions to the corporation's separate segregated fund. 2 U.S.C. §441b(b)(2)(A) and
24 (4)(A)(i); 11 CFR 114.3(a)(1) and 114.5(g)(1). The Commission has long held that
25 affiliates may include entities other than corporations, such as partnerships and limited
26 liability companies. Advisory Opinions 2000-36, 1997-13, 1994-11, and 1992-17; *see*
27 *also* Advisory Opinion 1996-38.

28 Where an entity is not an acknowledged subsidiary of another entity, as in 11 CFR
29 110.3(a)(2)(i),⁴ Commission regulations provide for an examination of various factors in
30 the context of an overall relationship to determine whether one company is an affiliate of

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).

1 another and, hence, whether their respective SSFs are affiliated with each other. 11 CFR
2 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J).⁵

3 The relevant factors are: (A) whether a sponsoring organization owns a
4 controlling interest in voting stock or securities of another sponsoring organization; (B)
5 whether a sponsoring organization or committee has the authority or ability to direct or
6 participate in the governance of another sponsoring organization or committee through
7 provisions of constitutions, by-laws, contracts or other rules, or through formal or
8 informal practices or procedures; (C) whether a sponsoring organization or committee has
9 the authority or ability to hire, appoint, demote or otherwise control the officers, or other
10 decisionmaking employees of another sponsoring organization or committee; (E) whether
11 a sponsoring organization or committee has common or overlapping officers or
12 employees with another sponsoring organization or committee which indicates a formal
13 or ongoing relationship between the organizations or committees; (F) whether a
14 sponsoring organization or committee has any members, officers, or employees who were
15 members, officers, or employees of another sponsoring organization or committee which
16 indicates a formal or ongoing relationship or the creation of a successor entity; (G)
17 whether a sponsoring organization or committee provides funds or goods in a significant
18 amount or on an ongoing basis to another sponsoring organization or committee; (H)
19 whether a sponsoring organization or committee causes or arranges for funds in a
20 significant amount or on an ongoing basis to be provided to another sponsoring
21 organization or committee; (I) whether a sponsoring organization or committee had an
22 active or significant role in the formation of another sponsoring organization or
23 committee; and (J) whether the sponsoring organizations or committees have similar
24 patterns of contributions or contributors which indicates a formal or ongoing relationship
25 between the sponsoring organizations or committees. 11 CFR 110.3(a)(3)(ii)(A), (B), (C),
26 (E), (F), (G), (H), (I), and (J). The list of ten circumstantial factors set out at 11 CFR

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.

1 110.3(a)(3)(ii) is not an exclusive list, and other factors may be considered. *See* Advisory
2 Opinion 1995-36.

3 The five corporations each own a twenty percent interest in NMC, and you state
4 that no single owner has a controlling interest. The board of directors consists of six
5 persons: NMC's CEO and one person appointed by each owner; those appointees are
6 currently the CEOs of two of the companies and high level executives in the three other
7 companies. See NMC Operating Agreement ("OA"), §5.4. The board appoints NMC's
8 officers and directs, manages, and controls the business, affairs, and property of the
9 company, subject to certain requirements of supermajority (i.e., three-quarters) or
10 unanimous votes by the member companies for certain actions. See OA, §5.1 and 5.2. As
11 indicated, the NMC Operating Agreement also provides, in Article 5, that votes by the
12 member (owner) companies are needed before the board can take seven specific actions,
13 but you explain that, in practice, there is no significant difference between the board and
14 the members voting as members because each owner company's representative director
15 also exercises his company's vote as a member, and there is no practical difference
16 between a board meeting and a members' meeting.⁶ Most actions by the board or by the
17 members require a majority vote of all directors (not just those present) or all members
18 (not just those present). Each director has equal voting power on the board, and each
19 member has equal voting power. The consequence of these facts is that, with the
20 exception of those few actions requiring unanimity, no one owner company can prevent
21 an action by NMC. Although each owner company, through its representative director,
22 has the ability to participate in the governance of NMC and participates in hiring and the
23 exercise of authority over the officers of NMC, it appears that no company exerts

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

1 dominant authority or even substantially more authority than any other company. See 11
2 CFR 110.3(a)(3)(ii)(A), (B), and (C).⁷

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

19 Pursuant to the business arrangements under which NMC provides operational
20 and management services, an extensive amount of funds are exchanged between NMC
21 and the owner companies. However, these are part of a business arrangement of payment
22 for services, and it does not appear that any owner provides the dominant or substantial
23 plurality of funds for NMC's operations. See 11 CFR 110.3(a)(3)(ii)(G) and (H). NMC
24 was founded by four of the five owners (all except CMS Energy), and although each

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.

1 company thus had a significant role in its formation, the number of founders reduces the
2 importance of the factor in this situation. *See* 11 CFR 110.3(a)(3)(ii)(I).

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

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

18 Although the relationship of each owner company to NMC indicates that some
19 situations described in the factors are present, these factors must be examined in the
20 context of the overall relationship. As illustrated above, the context is a joint venture
21 where several companies have equal shares and equal opportunity for financial and
22 management control, and no one company's role is anywhere near dominant. The
23 Commission has examined joint ventures where the issue is the affiliation of the joint
24 venture with the venture owners. Where two companies have 50-50 ownership over a
25 joint venture, with equal control by each over the governing bodies and top management
26 so that the assent of each was necessary for key venture operations, the Commission has
27 concluded that both owner companies were affiliated entities of the joint venture for

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.

1 purposes of the Act. *See* Advisory Opinions 1997-13, 1992-17, and 1987-34; *see also*
2 Advisory Opinion 1996-49 (where a joint venture was owned 50-25-25 and the
3 Commission concluded that the SSF of the 50 percent owner, but not the SSFs of the
4 other two corporations, was affiliated with the PAC of the joint venture.) In a joint
5 venture where one corporation held a 60 percent interest, as well as the management and
6 control of the venture, and the other was a 40 percent holder and a limited partner, the
7 Commission concluded that the 60 percent owner, and not the 40 percent owner, was an
8 affiliate of the joint venture. Advisory Opinion 1994-11.¹⁰

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

16 *Questions 2-6 - Consequences of Non-Affiliation*

17 *Question 2* - As indicated above, contributions by affiliated committees are treated
18 as contributions by one committee and cannot exceed the limits of 2 U.S.C. §441a when
19 aggregated with each other. 2 U.S.C. §441a(a)(5); 11 CFR 110.3(a)(1). In advisory
20 opinions addressing situations involving PACs of joint ventures owned and controlled on
21 a 50-50 basis by corporations, the Commission has determined that half of each
22 contribution made by the joint venture's PAC should be apportioned to the SSF of one
23 owner and half to the SSF of the other owner. Advisory Opinions 1997-13, 1992-17, and
24 1987-34. In NMCPAC's situation, however, no such aggregation, using any percentage,
25 is necessary because it is not affiliated with any of the owner's SSFs.

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.

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

14 *Questions 4 and 5* - Under 2 U.S.C. §441b(b)(2)(C), a corporation may use its
15 general treasury funds to pay for the costs of establishing, administering, or soliciting
16 contributions to its SSF, without a resultant contribution or expenditure. *See also* 2
17 U.S.C. §§431(8)(B)(vi) and (9)(B)(v). The corporation is considered to be the connected
18 organization of its SSF. 2 U.S.C. §431(7) and 11 CFR 100.6(a). Applying these rules in
19 the context of affiliation, the Commission has concluded that a corporation that is
20 affiliated with another corporation may pay the administration and solicitation costs of
21 the latter corporation's SSF. Advisory Opinions 1996-26 and 1983-19. Similarly, it has
22 permitted incorporated entities to pay such costs for the political committees of its
23 affiliated entities that are not incorporated. The affiliated corporate entities are the
24 connected organizations of the political committee of the unincorporated entity.
25 Advisory Opinions 1997-13, 1996-49, and 1992-17.

26 A multi-member LLC that does not have publicly traded shares and does not elect
27 to be treated as a corporation by the Internal Revenue Service is treated as a partnership
28 for the purposes of the Act. 11 CFR 110.1(g)(2) and (3). The Act does not extend to a
29 partnership the ability granted to a corporation at 2 U.S.C. §441b(b)(2)(C) to conduct
30 itself as a connected organization and avail itself of the contribution and expenditure

1 exemptions. Advisory Opinions 1991-1 and 1990-20. Nevertheless, the Commission has
2 treated joint venture partnerships differently as a result of the partnership's ownership by,
3 and affiliation with, corporations. See Advisory Opinions 1996-49, 1994-11, and
4 1992-17; see also Advisory Opinion 1997-13. If a partnership is owned entirely by
5 corporations and affiliated with at least one of them, it may perform the functions of a
6 connected organization for its PAC. Advisory Opinions 1997-13, 1996-49, and 1994-11.

7 However, NMC is not affiliated with any of its owner corporations for purposes
8 of the Act and therefore does not fall within the category of partnerships or LLCs able to
9 pay for the establishment, administration and solicitation costs of a PAC created by its
10 directors, officers, or employees without a contribution or expenditure resulting.

11 Moreover, none of the owner companies may act as a connected organization for
12 NMCPAC and pay such costs. The payments of such costs would be contributions to
13 NMCPAC, and such costs must be paid for with funds from permissible sources (i.e., not
14 prohibited by 2 U.S.C. §§441b, 441c, 441e, 441f, and 441g), and must comply with the
15 limits of 2 U.S.C. §441a(a)(1)(C). Because NMC is an LLC that is treated as a
16 partnership under IRS regulations, any contributions it makes would be attributed not just
17 to NMC itself but also to its members, the owner companies, in direct proportion to their
18 shares or by arrangement of the members. 11 CFR 110.1(g)(2), 110.1(e)(1) and (2).

19 Because all the members are corporations, NMC may not contribute to NMCPAC or use
20 any of its funds for the support of NMCPAC. Such funds will have to come from
21 permissible sources, such as individuals who are not foreign nationals or Federal
22 contractors.¹¹

23 You state that NMCPAC anticipates receiving assistance from NMC in the future,
24 citing "office supplies, promotional material, or administrative assistance" as examples.
25 The Commission has reviewed the provision of services and materials to a non-connected
26 political committee by a corporate entity whose personnel (acting as individuals)
27 establish, organize, and direct the committee. In doing so, it has explained how the
28 corporate entity may provide such support without being considered a connected

1 organization under 2 U.S.C. §431(7) and 11 CFR 100.6, or, in the alternative, without
2 making a prohibited contribution. See Advisory Opinions 2000-20, 1997-26, and 1997-
3 15 (and opinions cited therein). Although it has been established that NMC cannot act as
4 a connected organization, the guidance in those opinions as to services and materials
5 provided is relevant to NMC and NMCPAC, particularly in view of NMC's inability to
6 make contributions; NMC and NMCPAC may wish to review those opinions.

7 Although you do not provide details or ask about proposed future arrangements
8 where NMCPAC would not be an SSF, the Commission provides some general guidance.
9 NMC may provide legal and accounting services to the PAC without charge so long as
10 such services are rendered by a regular employee of NMC and are provided solely to
11 ensure compliance with the Act. 2 U.S.C. §431(8)(B)(ix)(II), (9)(B)(vii)(II); 11 CFR
12 100.7(b)(14), 100.8(b)(15). By analogy to 11 CFR 114.9(c) and (d), NMCPAC may pay
13 NMC the usual and normal charge for the use of office facilities such as telephones
14 within a commercially reasonable time. See Advisory Opinion 1979-22. However, other
15 goods or services provided by NMC or its employees should be paid for in advance, such
16 as where NMC's ordinary course of business does not entail providing such goods or
17 services. See 2 U.S.C. §431(8)(A) and 11 CFR 11 CFR 100.7(a)(1) (which define
18 "contribution" to include loans or advances); see also Advisory Opinions 1997-26 and
19 1997-15; 11 CFR 114.2(f) and 116.3.¹²

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

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 (D). NMC, however, may not pay for any solicitation costs.

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).

