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Pension Benefit Guaranty Corporation  
1200 K Street, N.W., Washington, D.C. 20005-4026



JUL 28 2004

Re:  Case 184793; Atkinson 1987 Pension  
Plan

Dear

The Appeals Board has reviewed your appeal of PBGC's November 19, 2002 determination of your PBGC-payable benefit with respect to the terminated Atkinson 1987 Pension Plan (the "1987 Plan"). As explained below, the Board found no basis for changing PBGC's determination.

**BACKGROUND**

Benefit Determination, Appeal, and Related Correspondence

PBGC's November 19, 2002 letter informed you that you are entitled to a monthly benefit of \$1,471.21, instead of the estimated monthly benefit of \$1,777.43, which you were then receiving. PBGC's Benefit Statement indicated that as of the date of Plan termination, October 15, 1998, you were receiving a monthly benefit of \$1,952.64.

On March 17, 2003, PBGC's authorized representative sent you a letter explaining why your PBGC benefit is smaller than your benefit under the 1987 Plan. This letter is quoted below, in pertinent part:

. . . the sum of the Atkinson Pension Plan benefit and the Atkinson 1987 Pension Plan benefit are subject to one PBGC Maximum Guaranteed Benefit. The Atkinson 1987 Pension Plan is a successor to the Atkinson Pension Plan. In 1987, the Atkinson Pension Plan was terminated, annuities were purchased, and the Atkinson 1987 Pension Plan was created. The provisions of the Atkinson 1987 Pension Plan are nearly identical to the provisions of the Atkinson Pension Plan; therefore, they are subject to one PBGC Maximum Guaranteed Benefit. The PBGC Maximum Guaranteed Benefit for participants in plans terminating in 1998 is \$2880.68 per month, payable as a Straight Life Annuity at age 65. Because you're receiving more than

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\$2880.68 from the Atkinson Pension Plan, the maximum guaranteed benefit for the Atkinson 1987 Pension Plan is \$0.0 . . . .

On April 16, 2003, you filed an appeal in which you contended that the 1987 Plan was not a successor to the Atkinson Pension Plan ("Atkinson Plan"), and that, as a result, the sum of the Atkinson Plan benefit and the 1987 Plan benefit should not be subject to "one PBGC Maximum Guaranteed Benefit."

Plan History

Section 1 of the 1987 Plan describes its establishment as follows:

The Atkinson 1987 Pension Plan (the "Plan") was established effective December 1, 1987, by the Company to provide pensions for eligible employees and their surviving spouses or other beneficiaries. The Plan is a successor to the Predecessor Plan, which was terminated effective December 1, 1987. Benefits accrued by participants in the Predecessor Plan who were actively employed by a member of the Affiliated Group on December 1, 1987, were fully vested and transferred to the Plan as of December 1, 1987.

Section 13(v) of the 1987 Plan defines the "Predecessor Plan" as "the Atkinson Pension Plan, which was terminated as of December 1, 1987."

PBGC's audit report describes the history of the 1987 Plan as follows:

The Plan was originally established effective December 1, 1987, by the Guy F. Atkinson Company of CA ("Atkinson") to provide pensions for eligible employees and their surviving spouses or other beneficiaries. It is a successor to the Atkinson Pension Plan, which was terminated on November 30, 1987, after settlement of its benefit obligations through the purchase of annuity contracts with the TransAmerica Life Insurance Company.

*Benefits accrued by participants in the predecessor plan who were actively employed by Atkinson on December 1, 1987, were transferred to the 1987 Atkinson Plan on that date and those accrued benefits are provided by an annuity contract issued by Pacific Mutual Life Insurance which is held in the name of the Plan.*

PBGC's actuarial report addresses the successor plan issue, as follows:

The Atkinson 1987 Pension Plan was established effective December 1, 1987, by the Guy F. Atkinson Company of CA ("Atkinson"). It is a successor to the Atkinson Pension Plan, which was terminated on November 30, 1987, the day before the effective date of this plan. The provisions of the two plans are identical. Benefits accrued under the predecessor plan were transferred to this plan along with assets sufficient to purchase an annuity contract from Pacific Mutual Life Insurance Company to pay those benefits. The remaining assets in the predecessor plan reverted to the employer.

#### Joint Implementation Guidelines

PBGC News Release No. 84-23, May 23, 1984, announced that PBGC, the Department of Labor, and the Internal Revenue Service agreed to Joint Implementation Guidelines (copy attached) for processing defined benefit pension plan terminations involving asset reversions to the plan sponsor. The termination of the Atkinson Plan was a pension plan termination in which the employer recovered excess assets. Thus, it was subject to the Joint Implementation Guidelines.

The Joint Implementation Guidelines address two types of transactions: termination/re-establishments (Item 3 of the Guidelines) and spin-off/terminations (Item 4 of the Guidelines). In a termination/re-establishment, an employer that terminates a sufficient defined benefit pension plan creates a new defined benefit plan covering the same group of employees. In a "spin-off termination" - which appears to be the type of transaction that occurred in the case of the Atkinson Plan - a portion of the prior plan is spun-off (and thus remains ongoing), while the remainder of the prior plan is terminated.

With respect to spin-off/terminations, Item 4 of the Guidelines state:

In the case of a so-called "spin-off/termination", generally no termination will be recognized . . . unless the following conditions are satisfied:

\* The benefits of all employees (including those covered by the ongoing plan) must be fully vested and non-forfeitable as of the date of termination.

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\* All benefits accrued as of the date of termination in the ongoing plan must be provided by the purchase of annuity contracts which represent irrevocable commitments for the benefit of each individual participant.

• All employees who were covered by the original plan must be given advance notice of the transaction in similar time and manner as if the entire original plan were being terminated.

ERISA's Definition of a Successor Plan

The term "successor plan" is defined in Section 4021(a) of ERISA, which provides:

For purposes of this title, a successor plan is considered to be a continuation of a predecessor plan. For this purpose, unless otherwise specifically indicated in this title, a successor plan is a plan which covers a group of employees which includes substantially the same employees as a previously established plan, and provides substantially the same benefits as that plan provided.

PBGC's Maximum Guaranteed Benefit Limit

Since its enactment, ERISA has limited the amount of guaranteed benefits that participants can receive from PBGC as a result of the termination of an underfunded pension plan. This Maximum Guaranteed Benefit ("MGB") provision, which is found in ERISA section 4022(b)(3), provides that "the amount of monthly benefits . . . provided by a plan, which are guaranteed under this section with respect to a participant" cannot exceed the value of \$750 per month (in the form of a life annuity commencing at age 65), adjusted for changes in the Social Security contribution and benefit base. The maximum guaranteed benefit for a plan that terminated in 1998, as was the case with the 1987 Plan, is \$2,880.68.

PBGC has consistently treated predecessor and successor plans as one plan for purposes of applying the MGB limitation.

**DISCUSSION**

Successor Plan Issue

As is explained later in this letter, a successor plan analysis is not needed to resolve your appeal. For that reason, the basis for the Board's decision (which is discussed below) differs

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in certain respects from the explanation provided in PBGC's letter of March 17, 2003. But because both PBGC's correspondence with you and your appeal addresses the successor plan question, the Board will discuss that issue first.

As the statutory definition in ERISA section 4021(a) indicates, there are three key tests for determining whether a plan is a successor plan: (1) does it cover substantially the same employees? (2) does it provide substantially the same benefits? and (3) is there continuity of the two plans?

In various opinion letters involving successor plans, PBGC has examined one or more of these factors. See, for example, PBGC Opinion Letters 80-16, 81-7, and 88-9 (copies attached). In those letters, PBGC has concluded that the first test - that is, whether the new plan covers "substantially the same employees" - may be satisfied even if the new plan does not cover all the participants of the prior plan. In PBGC Opinion Letter 81-7, a company wanted to split three plans into 16 divisional plans as part of a corporate restructuring. The Opinion Letter concluded that the divisional plans would be successor plans. Also, Opinion Letter 88-9 concluded that, where a plan split into two plans that included all the participants and liabilities of the original plan, the new plans must be considered to be successor plans.

With respect to the "substantially the same benefits" test, several of these opinion letters addressed situations where one or more new plans assume the benefit liabilities of a prior plan with respect to a group of employees. In these situations, PBGC has advised that "one of the factors the PBGC considers in determining whether a plan provides 'substantially the same benefits' as a previously established plan is whether it assumes the defined benefit liabilities from the previously established plan." See Opinion Letter 81-7. The Opinion Letters concluded that such an assumption of liabilities satisfies the "substantially the same benefits" test.

These precedents indicate that the 1987 Plan is a successor to the Atkinson Pension Plan since (1) the plans covered "substantially the same employees" because the active Atkinson employees who were covered under the prior plan became covered by the new plan; (2) the benefits are "substantially the same" in that the 1987 Plan assumed benefit liabilities of the prior plan for the group of active employees; and (3) there was continuity between the plans because the effective date of the 1987 Plan coincided with the termination date of the Atkinson Pension Plan.

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Application of PBGC's MGB Limitation

As indicated above, a successor plan analysis is appropriate if a participant is entitled to pension benefits from two pension plans sponsored by the same employer and the participant's combined benefits from the plans exceeds PBGC's MGB limit. This is because PBGC treats a predecessor plan and its successor as one plan for purposes of applying the MGB.

While you participated in two pension plans sponsored by Atkinson, all of the benefits you had accrued under the first plan (Atkinson Plan) were transferred to the second (the 1987 Plan) in 1987. Accordingly, as a result of the transfer, the 1987 Plan became responsible for the full amount of the benefits you had earned during your entire employment with Atkinson. Thus, in your case it is not necessary to determine whether the 1987 Plan was a successor to the Atkinson Plan because there are no benefits from the terminated Atkinson Plan for PBGC to offset.

The MGB limit applies to "the amount of monthly benefits . . . provided by a plan, which are guaranteed . . . with respect to a participant." ERISA section 4022(b)(3). In your case, your accrued benefit under the 1987 Plan is equal to your "Past Service Benefit" and your "Current Service Benefit." The "Past Service Benefit," which is based on your service prior to December 31, 1995, includes your service with Atkinson prior to the termination of the Atkinson Plan in 1987. The "Future Service Benefit" covers your employment from 1996 to 1998. When you retired on February 1, 1998, the Plan Administrator ("PA") determined that your total monthly benefit under the Plan was \$5,236.91 based on a February 1, 1998 commencement date and a Joint and 66 2/3% Survivor Annuity form of benefit.

Because the 1987 Plan was created through a spin-off/termination transaction, the 1987 Plan had purchased an annuity from Pacific Mutual Life Insurance ("PM") to provide the portion of your benefit you had accrued prior to the termination of the Atkinson Plan. As discussed above under "Background," purchase of this annuity was required under the Joint Implementation Guidelines. In your appeal, you assert that your PM Annuity should not be included in the benefit which is subject to PBGC's Maximum Guaranteed Benefit ("MGB").

In Opinion Letter 86-28 (enclosed), PBGC rejected a similar argument in a case that also involved a pension plan's purchase of insurance annuities. PBGC stated in the Opinion Letter as follows:

The fact that the Plan assets used to purchase the annuity contract for [a participant] are not available to pay other outstanding Plan liabilities upon Plan termination does not affect the application of [the MGB limit] to benefits under the Plan. The irrevocable commitment exclusion [in PBGC's regulation at 29 C.F.R. 4044.3] pertains only to the allocation process; it does not change the amount of [the Plan's] regular retirement benefit. . . . It is that benefit which is subject to the maximum guarantee of Section 4022(b)(3) of ERISA. I note that a conclusion that Title IV's maximum guarantee limitation does not apply to [the] full accrued benefit under Plan Section 4.3 would ultimately result in the use of PBGC funds to ensure that a participant in an underfunded pension plan receive a benefit of more than \$3,000 per month. Such a result is inconsistent with both the statute's maximum guarantee limitation and with the PBGC's statutory mandate, set forth in Section 4002(a)(3) of ERISA, 29 U.S.C. § 1302(a)(3), to maintain premiums at the lowest level consistent with its obligations.<sup>1</sup>

Furthermore, PBGC's position in Opinion Letter 86-28 was upheld by the court's decision in Lami v. PBGC, No. 86-1709 (W. D. Pa. July 18, 1989). We have enclosed a copy of this unpublished decision for your reference. PBGC believes that the principles articulated in Opinion Letter 86-28 and in the Lami decision reflect a sound interpretation of ERISA.

Thus, PBGC's MGB applies to your full 1987 Plan benefit, which includes both the portion of your benefit payable under your PM Annuity (\$3,284.27) and the portion payable out of the 1987 Plan's trust fund (\$1,952.64). PBGC's MGB for participants in plans terminating in 1998 is \$2880.68 per month, payable as a Straight Life Annuity at age 65. Thus, since you are receiving more than \$2880.68 under your PM Annuity, you are already receiving more than your full MGB.

Your appeal also asserts that line (3) of PBGC's benefit statement - which shows a Monthly Benefit funded by Plan Assets of \$1,341.04 - is incorrect. Your argument with respect to this item, however, directly relates to your assertion that PBGC should have excluded the PM Annuity from your calculation of your MGB. As

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<sup>1</sup> For the pension plan addressed in Opinion Letter 86-28 (which terminated in 1985), the Maximum Guaranteed Benefit was \$1,687.50 per month.

discussed above, the Appeals Board has rejected that argument. The Board further concluded that you have not presented any basis for changing the amount of your PBGC benefit that is based upon a plan asset allocation. We note that PBGC's March 17, 2003 letter gave you a detailed explanation as to how the 1987 Plan's assets were allocated to your benefits.

**DECISION**

The Appeals Board found no basis presented in your appeal for changing PBGC's determination. This is the agency's final action regarding your appeal. You may, if you wish, seek court review of this decision. If you need other information from PBGC, please call the Customer Contact Center at 1-800-400-7242.

Sincerely,



Michel Louis  
Acting Chair, Appeals Board

Enclosures:

- (1) PBGC News Release No. 84-23 with the Joint Implementation Guidelines.
- (2) PBGC Opinion Letters 80-16, 81-7, 88-9, and 86-28.
- (3) Court's decision in Lami v. PBGC, No. 86-1709 (W. D. Pa. July 18, 1989).