

Pension Benefit Guaranty Corporation

83-16

July 12, 1983

REFERENCE:

[\*1] 4021(b)(2) Plans Covered. Government Plans

OPINION:

This is in response to your letter regarding coverage of the above pension plan (the "Plan") under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). You asked whether the Plan is excluded from Title IV coverage by Section 4021(b)(2) of ERISA. We have concluded that the Plan is not excluded from Title IV coverage by that Section.

Section 4021(b)(2) of ERISA excludes from Title IV coverage any plan "established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. . . ."

The facts as you represent them indicate that the Plan is maintained by a private entity rather than by a government instrumentality. \* \* \* Company \* \* \* is a wholly-owned subsidiary of \* \* \* Corporation, a private company. Pursuant to a contract between \* \* \* and the United States Department of Energy (the "DOE"), \* \* \* operates government-owned nuclear facilities at \* \* \* in \* \* \* State. All of \* \* \* employees work at these facilities. The contract specifically designates \* \* \* as a contractor rather [\*2] than as an instrumentality. \* \* \* earns a profit from the contract and is reimbursed by the DOE for its allowable expenses under the contract. Among these allowable expenses are employee salaries and employer contributions to the Plan, only to the extent those salaries and contributions are attributable to work performed under the contract. \* \* \* can perform non-contract work with the DOE's approval.

With respect to the payment of benefits under the Plan, you have stated that if the DOE were to close its facilities entirely, the contract provides for, as an allowable cost, the purchase of annuities from a private insurance carrier. Neither the Plan nor the contract provides for any direct payment by the DOE of Plan benefits in the event they become unavailable from other funding media. Moreover, the contract allows the DOE to indemnify and hold \* \* \* harmless only for those liabilities arising under the Plan which \* \* \* has a legal obligation to pay subsequent to termination of the Plan. If \* \* \* has no liability under ERISA in connection with the Plan, the DOE will not be obligated to guarantee the payment of benefits to Plan participants. Thus the contract clearly points [\*3] out one circumstance under which the DOE will not guarantee the payment of pension benefits in the event of Plan termination.

On the basis of the information furnished us, we conclude that the Section 4021(b)(2) exclusion does not apply to the Plan and, consequently, that the Plan is subject to the provisions of Title IV.

Enclosed for your review is an explanation and copy of the PBGC's Administrative Review regulation, 29 C.F.R. Part 2606. I trust this responds to your inquiry. If you have any questions please call \* \* \* of my staff at (202) 254-4895.

Henry Rose  
General Counsel