FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 26, 1988

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-36

John F. Markes
Detroit Edison Political Action Committee
2000 Second Avenue
Detroit, MI 48226

Dear Mr. Markes:

This responds to your letters of July 25 and August 9, 1988, requesting an advisory opinion on behalf of the Detroit Edison Political Action Committee ("EdPAC") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of voluntary contributions from employees of Detroit Edison Company ("Detroit Edison") who purchase or receive stock through Detroit Edison's Employees' Savings Plan ("ESP").[1]

You explain that after six months of employment, Detroit Edison employees are eligible to participate in the ESP by contributing from one to six percent of their salary on either an after-tax or before-tax basis.[2] These employees may designate the contributions to three different investment Funds. Funds A and B are invested respectively in common stocks (selected from Standard and Poor's 500 Index) and in certain government obligations or bank deposits. ESP art. VI(a) and (b). Fund C, the Detroit Edison Common Stock Fund, invests solely in Detroit Edison Common Stock. ESP art. VI (c). In addition to ESP contributions funded by salary deductions, Detroit Edison will match 50 cents for every $1 that a participating employee designates to his or her ESP account. ESP art. V, §5.1. These matching employer contributions are deposited in the Detroit Edison Common Stock Fund and invested only in Detroit Edison Common Stock.

You explain that under the ESP, employee vesting and withdrawal rights affecting all types of ESP contributions are based on the "maturing of plan years."[3] ESP art. IX, §9.1. A plan year matures on January 1 of the fourth calendar year following such plan year. An employee has a 100% vested interest in matching employer contributions made on behalf of that employee during a matured plan year. Therefore, if an employee participant receives a $100 matching contribution in 1983 (plan year one), that contribution vests on January 1, 1987 (plan year four). An employee's interest in any other contribution, however, vests on the date it was made.

You explain that an employee participant may withdraw from the plan once a year, without penalty, all or part of the value of the employee's and the matching employer's contribution with respect to any matured plan year. ESP art. X, §10.3(a). Each time an employee participant makes more than one withdrawal during any plan year, subsequent contributions are suspended for a three month period. ESP art. X, §10.5. An employee who has withdrawn all contributions for matured plan years may withdraw from the plan 100% of the value of employee contributions with respect to all plan years that have not matured. ESP art. X, §10.3(b). If an employee makes such a withdrawal, however, all contributions are suspended for six months. Any employee participant who elects to withdraw his or her interest in the ESP may receive a check for the value of the shares credited to his or her account or receive whole shares of Detroit Edison Common Stock. ESP art. X, §10.8.

As an example of this withdrawal procedure, an employee who earns $20,000 a year, who decides to invest 1% ($200) of that salary in Fund A, will receive .5% ($100) of that salary in matching employer contributions. This $100 is invested in Detroit Edison Common Stock through Fund C, and after one year, that employee will have $100 in Detroit Edison Common Stock attributed to his or her account. Accordingly, on January 1st four years after that plan year ends, that employee may withdraw his or her vested interest in the stock represented by the $100 matching employer contribution four years earlier.

You also indicate that participating employees are given the right to vote all stock allocated to their accounts as exercised through a trustee. ESP art. VI, §6.3(c). Before a meeting of shareholders, the trustee must send participating employees a copy of the solicitation material for such meeting, together with a form that requests that employees provide instructions to the trustee on how to vote the common stock allocated to the employees' account. Id. Finally, the ESP provides that Detroit Edison will reinvest dividends, interest, and other income of any Fund in that same Fund. Id.

Given these facts, you ask whether employees participating in the ESP would be considered stockholders under 11 CFR 114.1(h) and thus solicitable for voluntary contributions to EdPAC on the basis of that status, even though they are not executive or administrative personnel. 2 U.S.C. 441b(b)(2)(A).

The Act permits a corporation or its separate segregated fund to Solicit individual stockholders. 2 U.S.C. 441b(b)(4)(A)(i). Under Commission regulations, a stockholder is defined as a person who (i) has a vested beneficial interest in stock; (ii) has the power to direct how that stock shall be voted; and (iii) has the right to receive dividends. 11 CFR 114.1(h); see also Advisory Opinions 1988-19, 1984-5, 1983-35, and 1983-17.

All employee participants in Fund C and all employee participants with matured matching employer contributions meet the first two requirements of this definition. The ESP provides that employee participants in Fund C, the Detroit Edison Common Stock Fund, are at all times fully vested in contributions credited to their account. ESP art. IX, §9.2. Similarly, those employee participants in Fund A and Fund B will acquire ownership in Detroit Edison Common Stock through matching employer contributions. These contributions will vest when the respective plan years mature which is a maximum of four years after the matching employer contribution is made. Additionally, all participants have an absolute right to vote Detroit Edison Stock attributed to their account. ESP art. VI, 6.3(c).

Regarding the right to receive dividends, those employees who actually withdraw Detroit Edison stock credited to their accounts would then satisfy all of the criteria of 11 CFR 114.1(h) and would be considered stockholders under the Act so long as they continue to hold at least one share.[4] See Advisory Opinions 1988-19 and 1984-5. With respect to the stockholder status of employee participants who have not exercised their withdrawal rights, the Commission concludes that they are also stockholders under 11 CFR 114.1(h) provided they own a vested interest in at least one share and otherwise meet the ESP qualifications to withdraw that share, if desired.

In Advisory Opinion 1984-5 the Pacific Gas and Electric Company ("PGE") offered its employees a savings plan very similar to that offered by Detroit Edison. PGE's plan permitted employees to contribute to three different funds, one of which was an investment fund in PGE common stock. PGE's plan also required PGE to apply 75 cents in matching contributions in PGE stock for every employee contribution made to any of the three funds in the savings plan. All employee participants in the PGE Common Stock Investment Fund and all other participants who received matching employer contributions had at all times a 100% vested interest in any shares attributed to their account. Moreover, all employee participants had full voting rights on those shares. The PGE plan, however, placed "significant restrictions" on many participants' withdrawal rights, automatically suspending subsequent contributions for a specified period or limiting withdrawals to once a year or to a one time only basis. The Commission concluded that where the exercise of withdrawal rights were limited or resulted in an automatic suspension the plan significantly restricted participants' rights to receive dividends. Accordingly, such participants were not stockholders under 11 CFR 114.1(h). The Commission concluded, however, that where participants were able to withdraw at least one share of stock purchased with employer matching contributions without incurring a suspension period, those participants had the right to receive dividends and were stockholders under 11 CFR 114.1(h).

Although Detroit Edison's plan restricts employee participants' ability to withdraw stock, such restrictions do not include automatic suspension or limitation on withdrawals to a once a year or a one time basis. Rather, participants may withdraw employee and matching employer contributions in Detroit Edison stock once a year, after the contribution matures, without automatic suspension of future contributions. ESP art. X, §10.3(a). Moreover, participants are not limited in their withdrawal rights to a once a year or a one time basis. ESP art. X, §§10.4 and 10.5. Accordingly, the Commission concludes that employee participants who have at least one share of Detroit Edison Common Stock credited to their account for a plan year that has matured have the right to receive dividends and thus are stockholders under 11 CFR 114.1(h).

Solicitations by EdPAC and Detroit Edison of voluntary contributions from any employee who qualifies as a Detroit Edison stockholder must meet the requirements for a proper solicitation under the Act and regulations. 2 U.S.C. 441b(b)(3)(A), (B), and (C); see 11 CFR 114.5(a). For example, a corporation or separate segregated fund that solicits contributions of a particular amount must inform the person solicited that such amount is only a suggestion and that the person is free to contribute more or less than the suggested amount. 11 CFR 114.5(a)(2). Moreover, any solicitation for a separate segregated fund must describe the political purposes of the fund and specify that persons have the right to refuse to contribute to the fund without reprisal. 11 CFR 114.5(a)(3), (a)(4), and (a)(5).

This response constitutes an advisory opinion concerning 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)

Thomas J. Josefiak
Chairman for the Federal Election Commission

Enclosures (AOs 1988-19, 1984-5, 1983-35 and 1983-17)

1/ You indicate that there are three Detroit Edison Employees' Savings Plans: (1) Employees' Savings Plan; (2) ESP for employees represented by Local 223 of the Utility Workers Union of America; and (3) ESP for employees represented by Local 17 of the International Brotherhood of Electrical Workers. You explain in a letter dated August 24, 1988, that except for their effective dates the rules and regulations governing each plan are the same. Accordingly, this opinion refers to all three plans as one ESP.

2/ An employee may choose to save before-tax, rather than after-tax, dollars. Such before-tax contributions, called employer elective contributions, are not subject to Federal, State or, local tax until paid out to the employee. ESP art. X, §10.4. After reaching the age of 59 1/2, an employee may withdraw from the plan once a year, without penalty, all or part of the elective employer contributions. ESP art. X, §10.5. Because all employee participants receive matching employer contributions, this opinion does not address the restrictions on the withdrawal of elective employer contributions.

3/ A plan year shall mean the period beginning with the effective date of the plan and ending December 31st of the same year and each calendar year thereafter. ESP art. II, §2.32. The effective dates of all three ESP's are in 1983.

4/ Any employee participants who elect to receive a check for the value of their full interest in Detroit Edison Common Stock will not hold at least one share and would not be stockholders under 11 CFR 114.1(h).