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Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Contact Person:

Telephone Number:

In Reference to:
T:EP:RA:T3

Date:
FEB 16 2000

Legend

Company A =

Company B =

Company C =

Company D =

Station E =

Station F =

Station G =

Department M =

Commission N =

State P =

Plan X =

Dear

This is in response to your request for a ruling dated August 6, 1999, submitted by your authorized representative regarding the federal income tax consequences, under section 401(k) of the Internal Revenue Code ("Code"), of a proposed distributions from Plan

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X. Letters dated October 20, 1999, November 15, 1999, and January 14, 2000, supplemented the request. The following facts and representations have been submitted by your authorized representative.

Plan X, a profit-sharing plan which includes a cash or deferred arrangement ("CODA") described in section 401(k) of the Code, is maintained by company A for the benefit of its employees. Plan X as amended and restated effective January 1,1993 is qualified under section 401(a) of the Code.

Company A, through certain of its operating subsidiaries, historically has been engaged in all aspects of the energy industry, including the provision of electricity to end-users in State P. The process of providing electricity to end-users usually is divided into the following three processes: (1) *Generation,* which involves the conversion of other energy forms to electricity; (2) *Transmission,* which involves the transportation of electricity to central distribution points; and (3) *Distribution,* which involves the actual delivery of electricity to end-users.

Company A's electricity generation business was carried out through two of its wholly owned subsidiaries: Company B and Company C. This business had a workforce, comprised of management, professional, operational, clerical and support staff, that was separate and distinct from the workforces of the other electricity and energy businesses operated by Company A. The electricity generation business was operated as a separate profit center. The facilities used in the electricity generation business (Stations E, F, and G) were geographically distinct from those used in Company A's other businesses. The electricity generation business had separate customers and billing. The electricity generation business was regulated separately by Department M, whereas the other parts of Company A's electricity operations, electricity transmission and distribution, are regulated by the Commission N.

As a result of State P utility deregulation, Company A is in process of divesting itself of its electricity generating business.

On December 30, 1998, Company A, through Company B and Company C, respectively, sold all its Station E, Station F, and Station G assets (the "Sold Facilities") to Company D (the "Sale Transaction"). The assets represent more than 85% of the assets of Company A's electricity-generating business. Company D is unrelated to Company A or any member of Company A's controlled group.

In connection with the Sale Transaction, approximately 160 employees previously employed by Company B and Company C at the Sold Facilities transferred employment to Company D (the "Transferred Employees"). Assets and liabilities of Plan X relating to the Transferred Employees will not be transferred to any plan sponsored by Company D.

Upon receipt of the ruling requested, Company A intends to adopt an amendment to Plan X and provide the Transferred Employees with the right to receive lump-sum

distributions of their account balances. Such distributions will be made as soon as practicable, but in no event later than the close of the second calendar year after the calendar year in which the Sale Transaction occurred. Company D will not in any manner maintain Plan X, become an employer whose employees accrue benefits under Plan X, or assume any liabilities or assets of Plan X.

Based on the foregoing, you request the following rulings:

1. Whether the Sale Transaction constitutes the disposition of substantially all of the assets (within the meaning of section 409(d)(2) of the Code) used by Company A in a trade or business within the meaning of section 401(k)(10)(A)(ii).

2. Whether the distribution of amounts attributable to elective deferrals held in the trust under Plan X to a Plan X participant who continues employment with the corporation acquiring such assets is an event described in section 401(k)(2(B)(I)(II) of the Code.

Section 401(k)(2)(B)(i) of the Code provides, in relevant part, that distributions from a qualified cash or deferred arrangement may not be made earlier than the occurrence of certain stated events. Section 401(k)(2)(B)(i)(II), when read together with 401(k)(10)(A)(ii) further provides that one of these distributable events is the disposition by a corporation of substantially all of the assets (within the meaning of section 409(d)(2)) used by such corporation in a trade or business of such corporation, but only with respect to an employee who continues employment with the corporation acquiring such assets.

Section 1.401(k)(d)(4) of the Income Tax Regulations provides rules applicable to distributions upon the sale of assets. Section 1.401(k)(d)(4) of the regulations provides, in part, that (i) the seller must maintain the plan, and the purchaser may not maintain the plan after the disposition; (ii) the employee must continue employment with the purchaser of the assets; (iii) distribution must be in connection with the disposition of the assets; (iv) the sale of substantially all the assets used in a trade or business means the sale of at least 85 percent of the assets. Section 1.401(k)(d)(5) provides, in part, that a distribution may be made only if it is a lump sum distribution within the meaning of section 402(d)(4) of the Code.

In this case, Company A sold to Company D over 85 percent of the assets of its electricity generating business, which, based on the facts and circumstances presented herein, has been determined to be a trade or business as that term is used in section 401(k)(10)(A)(ii) of the Code. Company A will amend Plan X and Plan X will make the proposed distributions to the participants who are employed by Company D. Company D will not in any manner maintain Plan X, become an employer whose employees accrue benefits under Plan X, or assume any liabilities or assets of Plan X. Distributions in the form of a lump sum distribution will be made to the transferred employees no later than the close of the second calendar year after the calendar year in which the Sale Transaction occurred.

Accordingly, we conclude with respect to your ruling requests thatthe Sale Transaction constitutes the disposition by Company A of substantially all the assets used by such

corporation in a trade or business of such corporation within the meaning of section 401(k)(10)(A)(ii) of the Code and, therefore Plan X may make distributions to transferred employees of amounts attributable to elective deferrals, and the distribution of amounts attributable to elective deferrals held in the trust under Plan X to the Transferred Employees who continue employment with the corporation acquiring such assets will be in accordance with section 401(k)(2(B)(I)(II).

Your third and fourth ruling requests relate to the continued qualification of Plan X and are not addressed in this private letter ruling pursuant to section 6.04 of Rev. Proc 2000-4, 2000-1 I.R.B. 115.

These rulings are based on the assumption that Plan X at all relevant times continues to be qualified under section 401(a) of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that this ruling may not be used or cited by others as precedent.

A copy of this letter has been sent to your authorized representative, in a accordance with a power of attorney on file in this office.

Sincerely,

Frances V. Sloan

Frances V. Sloan, Manager
Employee Plans, Technical Group 3
Tax Exempt and Government Entities Division

Enclosures:
Deleted Copy of Letter
Notice of Intention to Disclose

CC: