

U.S. DEPARTMENT OF LABOR
LABOR-MANAGEMENT SERVICES ADMINISTRATION
Pension and Welfare Benefit Programs
Washington, D.C. 20216



May 8, 1979

OPINION 79-28 A

Mr. Robert Scheff
Hughes Hubbard & Reed
One Wall Street
New York, New York 10005

407(a) (3)

407(a) (4)

Dear Mr. Scheff:

This is in reply to your request for an advisory opinion whether the aggregate value of employer securities which must be divested by the Pennsylvania Enterprises, Inc. Employees' Retirement Plan (the Plan) on or before December 31, 1979 under section 407(a) (4) of the Employee Retirement Income Security Act of 1974 (ERISA) is \$25,201, and whether this remaining divestiture requirement may be met by sales by the Plan of whatever number and type of employer securities the proceeds of which total \$25,201. I regret that our heavy workload has prevented us from replying sooner.

You represent the following:

1. For purposes of the formula of 29 C.F.R. §2550.407a-4(c) (1), the Plan (a) has selected January 1, 1975, as the "valuation date" and (b) has decided that the actuarial estimate of the fair market value of Plan assets as of December 31, 1984 shall be deemed to be the fair market value of all Plan assets on the "valuation date."
2. An actuarial estimate of the fair market value of Plan assets as of December 31, 1984 is \$10,000,000.
3. On January 1, 1975, the fair market value of the qualifying employer securities held by the Plan was \$1,400,402, including common stock of Pennsylvania Enterprises, Inc. (PEI) valued at \$10.75 per share.
4. The excess of the fair market value of employer securities as of January 1, 1975 (\$1,400,402) over ten percent of the fair market value of Plan assets projected by December 31, 1984 (10% of \$10,000,000) is \$400,402.
5. Fifty percent of the excess determined in item 4 is \$200,201.

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6. On September 12, 1977, the Plan sold 10,000 shares of PEI common stock at a price of \$17.50 per share, or \$175,000 in the aggregate,
7. The Plan held no qualifying employer real property as of December 5, 1977. No information was submitted as to the amount, if any, of qualifying employer real property held by the Plan on January 1, 1975.

You wish to know whether the term "amount," as used in section 2550.407a-4(c)(1)(i) of the Department's regulations, may be measured by proceeds of a sale, as in item 6 above.

Under section 407(a)(3) of ERISA, a defined benefit plan may not hold, after December 31, 1984, qualifying employer securities or qualifying employer real property (or both) whose aggregate fair market value exceeds 10 percent of the fair market value of the assets of the plan. Various dates are specified for determining fair market values for this purpose.

Section 407(a)(4) of ERISA and section 2550.407a-4(c)(1) of the regulations require a plan to divest itself by December 31, 1979 of 50 percent of the holdings of employer securities and employer real property which the plan would be required to divest before January 1, 1985, under section 407(a)(3). In this regard, section 2550.407a-4(c)(1)(i) of the regulations states:

A plan which would be required to divest qualifying employer securities or qualifying employer real property before January 1, 1985, pursuant to section 407(a)(3), and which has not met the requirements of that section by December 31, 1979, will be in compliance with the requirements of section 407(a)(4) of the Act and this section if the plan divests by December 31, 1979, qualifying employer securities and qualifying employer real property which have, on any date between December 31, 1974 and January 1, 1980 (hereafter referred to as the "valuation date"), a fair market value equal to 50 percent of the amount by which such qualifying employer securities and qualifying employer real property exceed 10 percent of the fair market value of plan assets as of the valuation date. For purposes of this section, the fair market value of plan assets on the valuation date shall be deemed to be an amount equal to:

- (A) The fair market value of the assets of the plan on the valuation date, or
- (B) An actuarial estimate of the fair market

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value of the assets of the plan on any date between December 31, 1979 and January 1, 1985. The actuarial estimate under paragraph (c)(1)(i)(B) of this section must be made in good faith and its basis must be set forth in writing.

Section 5.02(p) of ERISA Procedure 76-1 (copy enclosed) explains that the Department ordinarily will not issue opinions relating to section 407(a)(2) and (3) and (c)(1), relating to fair market value, as applied to whether the value of any particular security or real property constitutes fair market value.

We agree that if the amounts shown in items 2 and 3 above represent the fair market values indicated on the dates specified and if the Plan held no qualifying employer real property on January 1, 1975, the amount of employer securities required to be divested by December 31, 1979 would be \$200,201, as shown in item 5 above. However, since section 2550.407a-4(c)(1)(i) of the regulations requires divestiture of qualifying employer securities and qualifying employer real property which have a fair market value on the valuation date equal to 50 percent of the excess over the 10 percent limitation of section 407(a)(3) of ERISA, we believe that the value of the 10,000 shares of PEI common stock sold September 12, 1977, to be subtracted from the \$200,201 mentioned above, must be the fair market value of such shares on the valuation date selected by the Plan, January 1, 1975, which you state was \$10.75 per share, or \$107,500 total. Thus, we conclude that based on your representations, as described above, and assuming the Plan held no qualifying employer real property on January 1, 1975, the balance of the qualifying employer securities that the Plan must divest by December 31, 1979 would be \$92,701 (the remainder of \$200,201 minus \$107,500).

Section 8 of ERISA Procedure 76-1 (41 FR 36281, August 27, 1976) states that if a conference has been requested with respect to a request for an advisory opinion and the Department of Labor (the Department) determines that a conference is necessary or appropriate, the individual or organization or authorized representative will be notified of the time and place of the conference; a conference will normally be scheduled only when the Department in its sole discretion deems it will be necessary or appropriate in deciding the case. Our analysis of the information submitted leads us to believe that a conference is not necessary or appropriate in deciding this case.

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This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10, relating to the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator
Office of Fiduciary Standards

Enclosure