

**U.S. Department of Labor**

Labor-Management Services Administration  
Washington, D.C. 20216



Reply to the Attention of:

OPINION 81-8A  
3(2)

JAN 12 1981

Mr. David M. Monroe  
Vice President-Finance  
Secretary and Treasurer  
Upper Peninsula Power Company  
616 Shelden Avenue  
Houghton, Michigan 49931

Dear Mr. Monroe:

This is in response to your letter of October 23, 1980, requesting a determination regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). You request an opinion that the Special Severance Pay Plan of Upper Peninsula Power Company (the Program) is a severance pay plan as defined in Department of Labor regulation 29 C.F.R. §2510.3-2(b).

The following is a summary of the material representations in your letter. On October 14, 1980, the Board of Directors of the Upper Peninsula Power Company (the Company) concluded that, subject to the government agency approval, it would adopt the Program as a Limited Program of Termination. The Program provides for a \$300 monthly benefit to each employee who, between January 1, 1981, and March 31, 1981, attains age 60 and has completed 5 years of service and who during the period January 1, 1981, through March 31, 1981, voluntarily terminates his or her employment with the Company. The monthly benefit will be paid until the terminated employee reaches age 65, dies, or is rehired by the Company. The total amount of benefits will not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the employee's termination of service. The benefits will be paid out of the Company's general assets. The Company also maintains a separate defined benefit pension plan which provides for early retirement after age 45 and completion of 10 years of service.

An "employee pension benefit plan" is defined in section 3(2) of ERISA to mean:

(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --

- (i) provides retirement income to employees, or
- (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which --

- (i) severance pay arrangements, and
- (ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment, a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

Regulation 29 C.F.R. §2510.3-2, clarifies the defined terms "employee pension benefit plan" and "pension plan" for purposes of title I of ERISA. Specifically, section 2510.3-2(b) as amended provides that if certain criteria are met, a plan which provides payments upon severance from employment will not be considered an employee pension benefit plan. Section 2510.3-2(b) states, in part, that:

- (1) For purposes of Title I of the Act and this chapter, an arrangement shall not be deemed to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service, provided that:
  - (i) Such payments are not contingent, directly or indirectly, upon retiring;
  - (ii) The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and
  - (iii) All such payments to any employee are completed,
    - (A) In the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and
    - (B) In the case of all other employees, within 24 months after the termination of the employee's service ....

Although benefits under the Program do not appear to be directly contingent on an employee's retiring, the Program provides that to be eligible for the described benefits an employee must have completed 5 years of service and attained age 60, or older. In view of the eligibility requirements, it is the Department's opinion that benefits under the Program are indirectly

contingent upon retirement. Therefore, the Program does not fall within the criteria of section 2510.3-2(b).

The preamble to section 2510.3-2 recognizes that the regulation provides guidance by setting forth conditions under which a severance pay plan will not be deemed to be a pension plan, without excluding the possibility that, in appropriate circumstances, a severance pay plan not meeting the conditions might also be deemed not to be an employee pension benefit plan. However, it is the opinion of the Department that the Program has been established as a means of providing retirement benefits to those eligible employees who chose to participate in the limited program of employment terminations and, therefore, is an employee pension benefit plan within the meaning of section 3(2)(A) of ERISA.

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

Sincerely,

Ian D. Lanoff  
Administrator of Pension and Welfare Benefit Programs