State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

NATIONAL STATE BANK BLDG., 12th FLOOR
28 W. STATE STREET, CN 185
TRENTON, NEW JERSEY 08625-0185
(609) 292-8700

April 14, 1994

Attorney General Deborah T. Poritz
CN-080
Trenton, New Jersey 08625-0080

Re: Request for Advisory Opinion, ELEC File No. A.O. 03-1994

Dear Attorney General Poritz:

On behalf of the Commission, I am referring to your office as a request for an advisory opinion correspondence from the New Jersey Republican State Committee (RSC) asking whether cogeneration companies are prohibited from making political contributions pursuant to N.J.S.A. 19:39-45. At its meeting of April 13, 1994, by a vote of 3-0, the Commission directed staff to refer this request for advisory opinion consideration by your office. The Commission declined to express any opinion as to the outcome.

I am enclosing a letter received from Dean Armandroff, Executive Director, RSC dated February 15, 1994, and a letter from Michael R. Cole, Esq., on behalf of Public Service Electric and Gas Company, dated February 22, 1994, which letters were referred to our office by Secretary of State Lonna Hooks I am also enclosing a copy of the staff memorandum circulated to the Commission members. Since N.J.S.A. 19:35-45 is not part of the Campaign Contributions and Expenditures Reporting Act, the Commission does not have authority to issue an advisory opinion pursuant to N.J.S.A. 19:44A-6(f).

While the Commission has declined to express any opinion concerning the outcome of this particular request, it has asked me to note that the Commission has recommended to the Legislature that all corporate entities be prohibited from making political contributions.

Thank you for your consideration of this request. The Commission

would appreciate being advised of any advisory opinion that ultimately is issued by your office.

Very truly yours,

FREDERICK M. HERRMANN, PH.D.
Executive Director

FMH/jah
enclosures

c/ Dean Armandroff, Executive Director RSC
Michael R. Cole, Esq.
Assistant Attorney General
Mark J. Fleming

A.O. 03-1994

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW

RICHARD J. HUGHES JUSTICE COMPLEX
25 MARKET STREET
CN 112
TRENTON, NJ 08625-0112

DEBORAH T. PORITZ
ATTORNEY GENERAL

(609) 292-3212

October 12, 1994

Frederick M. Herrmann, Ph.D.
Executive Director
Election Law Enforcement Commission
28 West State Street - CN-185
Trenton, New Jersey 08625-0185

Re: 94-0104: Political Contributions by Cogenerators

Dear Mr. Herrmann:

You have asked for our opinion as to whether statutory prohibitions on the making of political contributions apply to qualifying cogeneration facilities (cogenerators).[1] For the following reasons you are advised that cogenerators are prohibited by N.J.S.A. 19:34-45 from making political contributions.

A "cogenerator" is defined by the Public Utility Regulatory Policies Act of 1978, P.L. 95-617 (PURPA), as a facility which produces both electrical energy and other forms of energy (such as heat or steam) which are used for commercial and industrial purposes. See 16 U.S.C. §796(18)(A). A typical cogenerator will produce both electricity and steam heat. The cogenerator will then sell the electricity wholesale to an electric public utility and sell the steam heat to its "host." The host is usually an industrial or commercial business located on the same or nearby site as the cogenerator.

The pertinent statute, N.J.S.A. 19:34-45, provides as follows:

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[1] Alternative energy facilities which meet certain federal criteria are designated "qualifying facilities" and are entitled to certain federal benefits and protections. See 16 U.S.C. §796; 18 C.F.R. §292.101 et seq.

> No corporation carrying on the business of a bank, savings bank, co-operative bank, trust, trustee, savings indemnity, safe deposit, insurance, railroad, street railway, telephone, telegraph, gas, electric light, heat or power, canal or aqueduct company, or having the right to condemn land, or to exercise franchises in public ways granted by the state or any county or municipality, and no corporation, person, trustee or trustees, owning or holding the majority of stock in any such corporation, shall pay or contribute money or thing of value in order to aid or promote the nomination or election of any person, or in order to aid or promote the interests, success or defeat of any political party.

This Office has previously advised that the mandate of N.J.S.A. 19:34-45 is "absolute and unambiguous" and "[t]he words of the statute are to be given their ordinary and well understood meaning according to approved usage of the language." Attorney General Formal Opinion No. 4 - 1983, citing Service Armament Company v. Hyland, 70 N.J. 550 (1976). Cogenerators "carry on the business" of producing electric power and, in most instances, steam heat. Therefore, it appears they fall within the prohibition of N.J.S.A. 19:34-45.

Moreover, the underlying statutory purpose supports a conclusion that cogenerators are prohibited from making political contributions. In Attorney General Formal Opinion No. 4 - 1983, then Attorney General Kimmelman stated that it was the intent of the Legislature "to insulate elected officials from the influence of regulated industries." The opinion stresses that each business listed in N.J.S.A. 19:34-45 is "strongly affected with a public interest" and "has been made the subject of extensive and pervasive government regulation." Attorney General Kimmelman opined that the statute was enacted to prevent political contributions by these industries, which could create "political debt[s]" that might be repaid by granting "unduly favorable regulatory treatment" to the contributing companies.[2] This Office has also stated that the statute "further[s] the important governmental interest in insuring that organizations which amass great wealth in the economic marketplace do not gain an unfair advantage in the political

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[2] These conclusions were based on reference to the legislative history of federal counterpart to N.J.S.A. 19:34-45, 2 U.S.C. §441(b), which was enacted three years before the initial passage of the State statute. In Formal Opinion No. 4 - 1983, we inferred that N.J.S.A. 19:34-45 was intended to address the same evil, i.e, corporate influence over government officials.

marketplace." Attorney General Opinion 89-0141, Request for Advisory Opinion from New Jersey Election Law Enforcement Commission (Mobil Oil Corp.), quoting Federal Election Commission v. Massachusetts Citizens for Life Inc., 479 U.S. 238, 256-57, 107 S.Ct. 616, 628, 631, 93 L.Ed.2d 539, 555-56 (1986).[3]

Our conclusion that N.J.S.A. 19:34-45 applies to cogenerators is not changed by the fact that cogenerators are presently exempt under PURPA from certain types of State regulation that could govern the sale of electricity wholesale to electric public utilities. See 16 U.S.C. §824a-3(e)(1); 18 C.F.R. §292.602(c); 16 U.S.C. §§ 791a et seq.; United States v. Public Utilities Comm'n of California, 345 U.S. 295, 73 S.Ct. 706, 97 L.Ed. 1020 (1953). Specifically, PURPA and the FERC rules exempt cogenerators from State laws and regulations respecting the rates, finances and organization of electric utilities.[4] The Board of Public Utilities (Board) has also ruled that selling steam heat to its host does not qualify a cogenerator as a public utility under N.J.S.A. 48:2-13 because it is not done "for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof." See e.g., In re Petition for Approval of Power Purchase Agreement between Atlantic City Elec. Co. and Chambers Cogeneration Ltd. Partnership, Docket No. EM88111219 (March 31, 1989).[5]

Despite the limitations placed on state regulation of cogenerators by Congress, the cogeneration industry is an integral part of the mix of power utilized by electric utilities to serve the public, and cogenerators are involved in and affected by the

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[3] In view of this important governmental state interest, this Office has previously opined that N.J.S.A. 19:34-45 is constitutional and not violative of the First Amendment. See Attorney General Opinion 89-0141, Request for Advisory Opinion from New Jersey Election Law Enforcement Commission (Mobil Oil Corp.).

[4] Although cogenerators have been exempted under PURPA from certain state regulations, there is no federal exemption from state election laws.

[5] It is possible for a cogenerator to serve a broader base of customers by selling its steam heat, or cold water produced from steam heat for air conditioning, to off-site customers. The Board has yet to rule on whether such action subjects a cogenerator to regulation as a public utility. A cogenerator might also be regulated as a public utility if it sells electricity retail to a broader base of customers than its host. The exemption from regulation as an electric utility contained in PURPA and the FERC rules does not cover retail sellers of electric power. 16 U.S.C. §824a-3(a)(2).

regulatory activities and decisions of the Board. Under the federal statutory and regulatory scheme designed to encourage cogeneration, implementation is left primarily to state utility commissions such as the Board. 16 U.S.C. §824a-3(f)(1). The Board fulfilled the obligation that it implement the rules promulgated by FERC under PURPA in I/M/O Consideration of Cogeneration and Small Power Production Standards Pursuant to the Public Utility Regulatory Policies Act of 1978, Docket No. 8010-687 (October 14, 1981) (Cogeneration Standards). This Order established the method for determining a utility's avoided costs, which is the level at which rates can be set under PURPA if a contract between a cogenerator and an electric utility cannot be negotiated. It requires Board approval of all power purchase agreements between cogenerators of capacity greater than one megawatt and electric utilities. In addition, the Order set standards for interconnection, protection and safety which cogenerators selling power to public utilities must meet to obtain Board approval. Cogenerators were part of negotiations that resulted in a Board approved Stipulation of Settlement that controls the manner in which cogenerators submit bids to and are awarded contracts from public utilities for the purchase of electric power. Cogeneration Standards, Docket No. 8010-687B (Sept. 28, 1988).

The Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992), amended several federal statutes to enable non-utility generators of electric power to compete with utility generators. The Act also requires the Board to develop Integrated Resource Planning (IRP) regulations. 16 U.S.C. §2621(d)(7). For electric utilities, IRP "involves a planning and selection process for new energy resources that evaluates the full range of alternatives, including ... power purchases." 16 U.S.C. §2602(19). Under the draft IRP regulations,[6] each electric utility in New Jersey must submit a forecast of future energy needs and a plan for meeting those needs to the Board. The purchase of power from non-utility generators of electricity is one of six options available to the utilities to meet future needs.[7] At present, review of these various options are governed by separate statutes, regulations and policies. Once the IRP regulations are implemented, the

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[6] The draft IRP regulations have been completed by the Board's staff. The regulations now require final Board approval before being published in the New Jersey Register for public comment.

[7] The other options for an electric utility are to produce the power itself, purchase power from other utilities, implement conservation or demand side management programs, purchase demand side management implemented by third parties or rehabilitate or upgrade its existing facilities. Any combination of these options can be used to meet the forecasted needs.

various resource options will be evaluated on a more comparable and comprehensive basis. The proposed regulations would require the formation of a Statewide IRP Working Group which would establish State planning objectives to be considered by the utilities in developing their forecasts and plans. The cogeneration industry would be represented in the Working Group. The manner in which the final IRP regulations and the State planning objectives are interpreted and enforced by the Board will obviously affect the status of the cogeneration industry in New Jersey.

The Board is also developing, on a parallel path with the IRP regulations, supply-side procurement procedures which will outline the method for electric utility selection and Board approval of the different types of electricity generation projects, including cogenerators. Both the supply-side procedures and Board policy related to those procedures will affect the ability of cogenerators to obtain power purchase agreements with electric utilities.

In addition, the Legislature is currently considering several different bills that would grant the Board the power to approve electric utility rates that are not arrived at by the traditional rate base, rate of return method. A-1420, A-1098 and S-408. In practical terms this would allow electric utilities to offer rate discounts to industrial customers who might otherwise contract with an on-site cogenerator to supply that company with steam and electricity at a rate below that which the electric utility can offer through its tariff. If such a bill is passed it will result in increased competition between electric utilities and cogenerators for industrial customers in New Jersey.[8] The Board has held several public hearings on the matter in order to aid it in reaching a decision on what position, if any, it should take in regard to these bills. Members of the cogeneration industry have attended these hearings and voiced their opposition to the proposed pieces of legislation. In addition to whatever effect the Board's stance on regulatory flexibility may have on the passage of such a bill, cogenerators will be directly affected by Board implementation of any such regulatory flexibility legislation which may be enacted. Moreover, the Board has already allowed one electric utility to offer a rate discount to an industrial customer in order to dissuade the customer from pursuing an on-site cogeneration plant as its source of electricity. I/M/O the Petition of Public Service Electric and Gas Company for Approval of its Proposed Indigenous Refinery Gas Conversion Tariff; I/M/O the Joint Petition

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[8] Cogenerators are not prohibited from selling their electricity retail but, as set forth above, a cogenerator could be subject to regulation as a public utility if it sells electricity retail to a broad base of customers.

of Public Service Electric and Gas Company and Bayway Refinery Company, Docket Nos. ET93070264 and EM93070265 (Nov. 24, 1993).

Cogenerators are part of a regulated electric power generation industry that is strongly affected with a public interest. That industry is currently being opened up to non-utility generators of electric power, such as cogenerators, by changes in federal law. As set forth above, as cogenerators begin to directly compete with utilities for customers of electric power, the decisions of the Board of Public Utilities will directly influence how competition will exist. In addition, the Board will continue the role it plays in regulating wholesale sales of electric power from cogenerators to electric utilities. Therefore, a cogenerator is the type of company that could create a "political debt" via campaign contributions that might be repaid by the granting of "unduly favorable regulatory treatment." Such a monetary influence over governmental functions is what the Legislature intended to prevent by enacting N.J.S.A. 19:34-45. See Attorney General Formal Opinion No. 4 - 1983.

Given the language of N.J.S.A. 19:34-45 and its underlying purpose, it appears that inclusion of cogenerators under its prohibitions is the more reasonable interpretation. This interpretation is also consistent with the "probable legislative intent doctrine." In AMN, Inc. v. South Brunswick Township Rent Leveling Board, 93 N.J. 518, 525 (1983), the Supreme Court of New Jersey held that:

> In cases such as this, where it is clear that the drafters of a statute did not consider or even contemplate a specific situation, this Court has adopted as an established rule of statutory construction the policy of interpreting the statute "consonant with the probable intent of the draftsman 'had he anticipated the situation at hand.'" [citations omitted] Such an interpretation will not "turn on literalisms, technisms or the so called rules of interpretation; [rather] it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation." J.C. Chap. Prop. Owner's Protection Ass'n v. City Counsel of Jersey City, 55 N.J. [86] at 100 [(1969)].

The Legislature clearly did not foresee the possibility of federal law preempting state regulation of cogeneration facilities as public utilities. However, the Legislature did intend that N.J.S.A. 19:34-45 would prohibit companies involved in the electric power production industry from making political contributions

because of the effect such contributions could have on the regulation of electric power production in New Jersey. Therefore, to place cogenerators outside the reach of this statute would ignore the Legislature's objectives in passing this act.

For the above reasons, you are advised that because cogenerators are "electric power companies" affected by the regulatory actions of the Board of Public Utilities, N.J.S.A. 19:34-45 bars them from making contributions to candidates for State elective office or to political parties. However, because this is an issue of first impression whose resolution was not clearly foreshadowed, it was not unreasonable for cogenerators to act under the belief that they were not prohibited from making political contributions. See e.g., Coons v. American Honda Motor Co., 96 N.J. 419, 432 (1984), cert. denied 469 U.S. 1123, 105 S.Ct. 808, 83 L.Ed.2d 800 (1985). Accordingly, we recommend that N.J.S.A. 19:34-45 should not be enforced retroactively against cogenerators, but instead should be given a purely prospective application.

Very truly yours,

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY

By: Mark J. Fleming
Mark J. Fleming
Assistant Attorney General

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