

(c) The Plan did not pay any commissions or other expenses with respect to the contributions;

(d) The fair market value of the Securities represents at all times an amount of the Plan's total assets which is consistent with the Plan's investment guidelines and objectives;

(e) Additional Plan assets are not used to purchase any new securities which are considered "alternative investments" to the extent that such purchases, when added to the outstanding fair market value of the Securities owned by the Plan, would cause more than 5.2 percent of the Plan's total assets to be invested in "alternative investments" (other than as may be occasioned merely by an increase in value);¹

(f) Mellon Bank N.A. (Mellon), as an independent, qualified fiduciary for the Plan, determined that each contribution of the Securities to the Plan was in the best interests and protective of the Plan and its participants and beneficiaries at the time of the transactions;

(g) Mellon monitored each contribution made to the Plan and took all appropriate actions necessary to protect the interests of the Plan and its participants and beneficiaries;

(h) Mellon monitors the performance of the Securities as an investment for the Plan and takes whatever action is necessary to protect the interests of the Plan and its participants and beneficiaries;

(i) On the date on which the Plan no longer holds any of the Securities contributed by WEC on September 14 and October 29, 1993 (the Exercise Date), WEC shall contribute to the Plan the difference between the following:

(1) the sum of (i) the sales proceeds received by the Plan on the disposition of all of the Securities, plus (ii) interest accrued and interest and dividends received on the Securities; and

(2) the aggregate value of the Securities on the date that they were originally contributed to the Plan (i.e. \$188,882,694), plus any adjustments to such aggregate value requested by Mellon to reflect changes in the Consumer Price Index (CPI) during the period that the Securities were held by the Plan, upon demand by Mellon as the Plan's independent fiduciary under the terms of a "makewhole agreement" with the Plan (the Makewhole Agreement). Mellon shall have sole authority to determine the amount due to the Plan under the Makewhole Agreement (the

Makewhole Amount) at the time of the transaction;²

(j) On December 30, 1994, WEC made a cash contribution to the Plan in the amount of \$25 million to support any amounts that may become due under the Makewhole Agreement, provided that this cash contribution is held as a separate credit balance in the Plan's funding standard account until the termination date of the Makewhole Agreement (as amended pursuant to paragraph (i) above) and is not used to offset any other funding obligation owed by WEC to the Plan until such date. Mellon, as the Plan's independent fiduciary, shall be responsible for investing the \$25 million and ensuring that the Plan receives all interest and other income earned on the \$25 million; and

(l) Mellon monitors the compliance by all parties with the terms and conditions of the exemption.

EFFECTIVE DATE: The exemption is effective for each contribution as of September 14 and October 29, 1993, respectively.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Proposal) published on November 14, 1994, at 59 FR 56537.

WRITTEN COMMENTS AND MODIFICATIONS:

The Department received over 160 comment letters from interested persons. The matters raised in the comment letters concern: (1) Sufficiency of the notice to interested persons regarding the Proposal; (2) the decision made by WEC to contribute the Securities to the Plan rather than sell the Securities on the open market; (3) the effect of the contribution of the Securities on the Plan's funding status; (4) the investment performance of the Tops Securities since the Plan's acquisition of such Securities and the potential for losses by the Plan after the period covered by the Makewhole Agreement; and (5) the role of Mellon as the independent fiduciary for the Plan,

particularly with respect to its obligations to enforce the terms and conditions of the Makewhole Agreement.

The Department notes that in a letter dated December 27, 1994, the International Brotherhood of Electrical Workers (IBEW) expressed particular concerns regarding: (i) The apparent discretionary nature of Mellon's obligations to enforce the terms of the Makewhole Agreement on behalf of the Plan; (ii) the need to extend the period covered by the Makewhole Agreement beyond September 14, 1996 for the Tops Securities owned by the Plan to prevent losses during the 8-10 year period when the Plan cannot dispose of all of the Tops Securities as a result of the timing and volume restrictions of SEC Rule 144; (iii) the need for an overall limitation on total Plan assets that can be committed to "alternative investments", including the Securities, which should not exceed 5.2 percent (other than as may be occasioned merely by an increase in value); and (iv) the need for the Proposal, if granted, to clarify that Mellon's decisions regarding whether to exercise the Plan's rights under the Makewhole Agreement will be fully subject to the fiduciary responsibility rules of the Act, and that the Department, by granting the exemption, would not be expressing an opinion regarding whether any actions taken by Mellon are consistent with its fiduciary obligations under the Act. Notwithstanding these concerns, the IBEW stated that it favored the granting of the exemption if modifications were made to address these issues.

By letter dated February 9, 1995, WEC responded to the issues raised by the comment letters.

With respect to the sufficiency of the notice to interested persons regarding the Proposal, WEC states that it provided the broadest possible notice to Plan participants. Notice to active employees was provided through either posting in workplaces, inter-office mail, or both. Notice was sent to retirees and vested separated participants at the most current address available to the Plan. WEC states that in the case of a benefit program as large as the Plan, it is not unusual for some participants to fail to keep current addresses on file with the Plan, especially where a plant closing has resulted in the dispersal of the local workforce. Although some of the commenters indicated that adequate and timely notice was not provided in every instance, WEC represents that it acted in good faith by taking all practicable steps to provide the required notice, as prescribed by the Department's regulations (see 29 CFR

¹ Alternative investments generally are relatively illiquid investments in an asset class other than traditional classes of cash, stock, fixed income securities and real estate.

² The Department notes that any decision made by Mellon as the Plan's independent fiduciary with respect to the exercise of the Plan's rights under the Makewhole Agreement shall be fully subject to the fiduciary responsibility provisions of the Act. However, by granting this exemption, the Department is not expressing an opinion regarding whether any actions taken by Mellon would be consistent with its fiduciary obligations under Part 4 of Title I of the Act. In this regard, section 404(a) of the Act requires, among other things, that a plan fiduciary act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making decisions on behalf of a plan.