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PENSION BENEFIT GUARANTY CORPORATION

Approval of Certain Plan Amendments Requiring PBGC Approval Under ERISA Section 4220

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of class approval.

SUMMARY: This notice advises the public of the Pension Benefit Guaranty Corporation's granting of approval to four classes of plan amendments requiring the PBGC's approval under section 4220 of the Employee Retirement Income Security Act of 1974, as amended. Under section 4220, certain plan amendments adopted after September 25, 1983, may not be put into effect without the PBGC's approval. The PBGC may disapprove an amendment only if it finds that the amendment creates an unreasonable risk of loss to plan participants and beneficiaries or to the PBGC. The PBGC has determined that these four plan amendments would not in any plan create an unreasonable risk of loss to plan participants and beneficiaries or to the PBGC. Therefore, the effect of this notice is to grant class approval for these amendments, so that plans may adopt them without filing individual requests for approval.

EFFECTIVE DATE: September 25, 1984.

FOR FURTHER INFORMATION CONTACT: John Carter Foster, Multiemployer Regulations Group, Corporate Policy and Regulations Department (611), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, D.C. 20006; (202) 254-4860. [This is not a toll-free number.]

SUPPLEMENTARY INFORMATION: Section 4220(a) of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act, (the "Act"), provides that certain multiemployer plan amendments adopted after September 25, 1983, may be put into effect only with the approval of the Pension Benefit Guaranty Corporation or if the PBGC fails to disapprove the amendment within 90 days after receipt of notice of the amendment. Under section 4220(c), the PBGC may disapprove an amendment only if it determines that the amendment creates an unreasonable risk of loss to plan participants and beneficiaries or to the PBGC. The PBGC's approval under section 4220 is required for all plan amendments authorized by sections 4201–4219 (other than an amendment permitted by section 4211(c)(5), dealing with the adoption of alternatives to the statutory methods for allocation of a plan's unfunded vested benefits).

The PBGC has determined that four plan amendments authorized by sections 4201–4219, and therefore covered by section 4220, would not in any case have the effect of creating an unreasonable risk of loss to plan participants and beneficiaries or to the PBGC. Consequently, the PBGC is granting approval for these four classes of amendments.

The plan amendments receiving this approval are those authorized by sections 4203(c)(4) (permitting plans that primarily cover employees in the entertainment industry to limit the applicability of the special withdrawal liability rule), 4205(c)(1) (allowing a retain food industry plan to be amended to substitute "35 percent" for "70 percent" in the partial withdrawal liability rule of section 4205(b)(1)(A)), 4210(b)(2) (allowing a plan, other than one primarily covering employees in the building and construction industry, to adopt the six-year "free look" rule), and 4211(c)(1) (permitting certain plans to adopt one of the three statutory alternatives for determining the unfunded vested benefits allocable to a withdrawing employer).

In a notice published in the **Federal Register** on May 2, 1983 (48 FR 19800), the PBGC advised the public that it was considering granting approvals for plan amendments authorized by section 4203(c)(4) and section 4205(c)(1) of the Act. The PBGC noted that an amendment under section 4203(c)(4) broadens the events giving rise to withdrawal liability by making the general withdrawal liability rules applicable to a group or class of employers that otherwise would be subject to the special, more limited withdrawal rules applicable to entertainment plans. The PBGC also observed that an amendment authorized by section 4205(c)(1) gives a retain food plan at least as much, and usually greater, protection against declines in covered work as that provided by the statutory rule requiring a 70 percent decline in contributions as a condition for the imposition of partial withdrawal liability.

For these reasons, the PBGC has concluded that an amendment under either section 4203(c)(4) or 4205(c)(1) would not in any case create an unreasonable risk of loss to plan participants and beneficiaries or to the PBGC. Therefore, a plan sponsor need not submit amendments authorized by these sections to the PBGC for approval.

The third amendment approved under this notice is one authorized by section 4210(b)(2). This so-called "free look" rule provides that a plan, other than one primarily covering employees in the building and construction industry, may be amended to provide that an employer that withdraws in a complete or partial withdrawal is not liable to the plan if the employer:

(i) Was first obligated to contribute to the plan after September 26, 1980;

(ii) Was obligated to contribute to the plan for no more than the lesser of six consecutive plan years preceding the date of withdrawal or the number of years required for vesting under the plan;

(iii) Contributed less than 2 percent of all employer contributions for each plan year in which it was required to contribute; and

(iv) Never previously used this section to avoid withdrawal liability to the plan.

In addition, this "free look" rule applies only if:

(i) The plan is amended to provide for its application;

(ii) The plan provides that benefits of participants accrued as a result of service with an employer before the employer was required to contribute to the plan may not be payable if the employer ceases contributions to the plan; and

(iii) The ratio of plan assets to benefit payments during the plan year preceding the first plan year for which the employer was required to make plan contributions was at least 8 to 1.

These standards ensure that adoption of the provision will not create an unreasonable risk. Plans can permit a "free look" only to small, short-term contributors—those contributing less than 2 percent of total plan contributions for less than 7 years—and the ratio of plan assets to benefit payments for the plan year preceding the first plan year for which the employer was required to contribute must be at least 8 to 1. Further, if the ratio of plan assets to benefit payments falls below 8 to 1, a "free look" amendment cannot be applied to any new employer. These statutory requirements make it unnecessary to consider whether, in a particular case, an amendment authorized by section 4210(b)(2) will pose an unreasonable risk of loss to plan participants and beneficiaries or to the PBGC. The PBGC therefore grants approval to all such amendments.

Finally, approval is extended to certain amendments authorized by section 4211(c)(1). With the exception of a plan described in section 404(c) of the Internal Revenue Code, an employer's

share of unfunded vested benefits is determined by the presumptive method of section 4211(b) unless the plan is amended pursuant to section 4211(c)(1). Section 4211(c)(1) permits a plan, other than one primarily covering employees in the building and construction industry, to adopt by amendment one of the three allocation methods described in sections 4211(c)(2) (the modified presumptive method), 4211(c)(3) (the rolling-5 method), and 4211(c)(4) (the direct attribution method).

The four statutory methods result in the same overall degree of allocation of a plan's unfunded vested benefits, notwithstanding the fact that different amounts may be allocated to individual employers under each method. Adoption of any of the three alternative methods could create a risk of loss only if the effect of changing methods were to shift liabilities to employers who were unable to pay the increase in withdrawal liability. However, because each method apportions liability based on the withdrawing employer's participation in the plan, measured either by that employer's contributions relative to the total contributions to the plan or by the unfunded vested benefits directly earned by employees of that employer, there is no reason to believe that changes in the allocation method shift liabilities in any substantial or systematic way toward weaker employers. Moreover, assessing this potential risk would require detailed inquiries into the financial situations of various employers, which would place a heavy burden on plan sponsors, employers, and the PBGC. Such a burden cannot be justified in light of the minimal possibility that an increased risk might be determined to exist. Therefore, the PBGC grants approval to all plan amendments that simply adopt one of the three allocation methods described in sections 4211(c)(2), 4211(c)(3), and 4211(c)(4).

This notice covers all plan amendments specified above, regardless of proposed effective date. It also extends to subsequent repeals of these amendments. However, this notice does not apply to any amendment that limits or otherwise modifies the statutorily prescribed amendments. Finally, the PBGC emphasizes that this approval relates only to the issue of risk under section 4220; it shall have no effect in determining whether a particular plan amendment was adopted in accordance with applicable statutory and plan provisions.

Issued at Washington, D.C. on this 19th day of September 1984.

C.C. Tharp,

Executive Director, Pension Benefit Guaranty Corporation.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 23425; (70-7021)]

Middle South Energy, Inc.; Proposal To Issue and Sell First Mortgage Bonds; Exception From Competitive Bidding

September 20, 1984.

Middle South Energy, Inc. ("MSE"), P.O. Box 61000, New Orleans, Louisiana 70161, a wholly owned subsidiary of Middle South Energy, Inc. ("MSU"), a registered holding company, has proposed a transaction subject to sections 6(a) and 7 of the Public Utility Holding Company Act of 1935 ("Act") and Rule 50(a)(5) thereunder.

MSE proposes to issue and sell First Mortgage Bonds ("Bonds") in one or more series through October 31, 1985, by means of an underwritten offering or offerings through an investment banker, in an aggregate principal amount not to exceed $400 million. The Bonds will be issued and sold under one or more supplemental indentures to MSE's existing Mortgage and Deed of Trust, as supplemented, and will have such other terms and conditions as shall be approved by this Commission. MSE proposes to apply the net proceeds from the issuance and sale of the Bonds to finance MSE's 90% interest in the Grand Gulf I Nuclear Station ("Grand Gulf I"). This will include the repayment of then outstanding short-term borrowings and/or to the repayment of borrowings then outstanding under its Second Amended and Restated Bank Loan Agreement, dated June 15, 1981 ("Domestic Bank Loan Agreement"). Borrowings under the Domestic Bank Loan Agreement are expected to total approximately $1.711 billion by the end of 1984. As of August 15, 1984, MSE had $1.698 billion of short-term debt outstanding under the Domestic Bank Loan Agreement. By the first quarter of 1985, when Grand Gulf I is expected to be placed into commercial operation, MSE will have expended $3.065 billion (excluding nuclear fuel) for its interest in Grand Gulf I.

The capital structure of MSE as of May 31, 1984 indicates:

	Per books percent	Pro forma percent
First Mortgage Bonds	11.3	19.7
Other Long-Term Debt	53.3	41.4
Common Equity	35.4	38.9
Total Capitalization	100.0	100.0

As additional security for its Bond obligations, MSE may be required to assign, for the benefit of the Bond holders, its rights under the Availability Agreement, dated June 21, 1974, as amended, pursuant to the terms of an Eleventh Assignment of Availability Agreement, Consent and Agreement. In addition, MSE may be required to assign its rights under the Capital Funds Agreement, dated as of June 21, 1974, pursuant to the terms of an Eleventh Supplementary Capital Funds Agreement and Assignment.

MSE requests an exception from the competitive bidding requirements of Rule 50 pursuant to Rule 50(a)(5) in connection with the proposed issuance and sale of Bonds to underwriters for sale to the public. MSE states that the exception is justified because the company lacks an earnings or operating history due to the fact that its only project, the Grand Gulf Station, has not been placed in commercial operation, and for other reasons stated in its proposal. MSE proposes, and is hereby authorized, forthwith, to select one or more investment banking firms which will act (or form a group of firms to act) as underwriters for the offering, and to negotiate the price and other terms on which the shares to be sold in that offering will be issued to such underwriters for public sale.

The proposal and any amendments thereto are available for public inspection through the Commission's Office of Public Reference. Interested persons wishing to comment or request a hearing should submit their views in writing by October 15, 1984, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the applicant at the address specified above. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for a hearing shall identify specifically the issues of fact and/or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice o order issued in this matter. After said date, the proposal, as filed or as it may be amended, may be authorized.