

FEC Partially Deadlocks on Affiliation of Joint Venturers' PACs

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Companies that form joint ventures have to contend with a panoply of complex legal issues. Companies that have connected political action committees (PACs) face an added layer of complexity in such transactions, as illustrated by the advisory opinion that Enable Midstream Services, LLC recently sought from the Federal Election Commission (FEC). Enable is a joint venture formed by the coming together of CenterPoint Energy, Inc. and OGE Energy Corporation, but the FEC was not able to come together on entirely resolving the question of the relationship between the entities' PACs.

At the center of FEC Advisory Opinion 2016-02 was the issue of "affiliation." Under the federal campaign finance laws, PACs are considered to be affiliated with each other if they are established, financed, maintained, or controlled by the same entity, person, or group of persons. Political contributions made by affiliated PACs are treated as if they are all made by a single PAC and subject a single contribution limit. For example, if PACs A and B may ordinarily contribute up to \$5,000 each per calendar year to Candidate X, they may only contribute up to \$5,000 *combined* to Candidate X if the two PACs are determined to be affiliated. The purpose of the affiliation rule is to prevent one entity or person from circumventing the contribution limits by forming a multitude of different PACs and taking advantage of the additional contribution limit afforded to each PAC.

Under the FEC's regulations, parent companies are considered to be *per se* affiliated with the subsidiaries in which they own a majority interest, and thus their PACs are also considered to be *per se* affiliated. Entities and PACs that are not *per se* affiliated are subject

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to a case-by-case determination that typically involves an analysis by the FEC of ten factors. In most of the joint ventures that the FEC has considered where each of the joint venturer companies held a 50-50 ownership and controlling interest in the joint venture, the FEC generally has concluded that the joint venture is affiliated with each of the joint venturers. However, if each of the joint venturers and the joint venturer forms a PAC, only half of the amount that the joint venture's PAC contributes to any recipient will be attributed to each of the joint venturers' PACs with respect to that same recipient.

The scenario that Enable Midstream Services presented to the FEC was quite a bit more complex, however, than the typical joint venture the FEC is asked to consider. Enable is wholly owned by a limited partnership in which CenterPoint holds a 55.4% ownership interest, OGE holds a 26.3% ownership interest, and investors from the general public hold an 18.3% ownership interest. Enable is managed, however, by a general partnership in which CenterPoint and OGE each holds a 50 percent management interest, but in which CenterPoint holds a 40% economic interest and OGE holds a 60% economic interest. CenterPoint and OGE each are represented by two directors on the general partnership's board of eight directors.

Further complicating matters, of the more than 1,800 Enable employees, most of whom previously had worked for CenterPoint, OGE, and their subsidiaries, 164 remain on the OGE payroll (for which Enable reimburses OGE) in a temporary arrangement that is designed to protect the employees' vested employment benefits. Both CenterPoint and OGE also perform certain administrative services for the Enable limited partnership and are reimbursed by the limited partnership for those services.

Five of the six FEC commissioners were able to agree that, under these circumstances, CenterPoint and Enable are not considered to be affiliated, and thus neither are their PACs. This was principally because the commissioners determined that CenterPoint does not have a controlling interest in, or governance or hiring authority over, Enable by virtue of having only two representative members on the eight-member board of Enable's management entity. In addition, the lack of common officers or employees between CenterPoint and Enable also was significant.

The FEC commissioners were not able to agree, however, on whether OGE and Enable and their PACs are affiliated. As indicated by the opposing drafts that the commissioners considered, the number of Enable employees who remained on OGE's payroll, as well as an individual who was an officer in both entities, was a significant sticking point. According to one draft, this employment arrangement was evidence of an "extensive entanglement" between OGE and Enable that "weighs heavily in favor of affiliation" between the two entities, while the other draft did not consider this factor to be significant enough to establish affiliation.

While Enable's advisory opinion presented a complex scenario that is probably unique to this particular joint venture's structure, it is an important reminder of the more general issue of affiliation that companies must remember to consider when making political contributions. It is also important to note that affiliation matters not only at the federal level; many states also have affiliation rules—not only for PAC contributions, but also for direct corporate treasury contributions where such contributions are permitted. Pay-to-play laws also may incorporate affiliation rules in their reporting requirements and special contribution limits or prohibitions for contractors. Under these affiliation rules, the affiliation relationship may have to be examined not only

downstream (from the perspective of a parent company looking at its subsidiaries), but also upstream (from the perspective of a subsidiary looking at its parent company) and horizontally (from the perspective of a company looking at its sister entities).