PBGC
Protecting America's Pensions
Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

August 8, 2011

Re: Appeal 2010-[ ] [ ] Plan Name: Bendix Commercial Vehicle Systems LLC Pension Plan for Hourly Employees ("Bendix Plan" or "Plan")

Dear Mr.[ ]:

The Appeals Board has reviewed your appeal, on behalf of your client Bendix Commercial Vehicle Systems LLC ("Bendix"), of PBGC's January 29, 2010 initial determination. PBGC's initial determination stated that Bendix has incurred liability in the amount of $16,947,933.00 under section 4062(e) of the Employee Retirement Income Security Act ("ERISA") with respect to the Bendix Plan.[1] For the reasons explained in this decision, we made the following three rulings that are favorable to your client:

- As you advocated in your appeal, we decided that January 1, 2008 is the correct date for valuing Bendix's liability under section 4062(e), rather than the December 31, 2007 date that PBGC used;
- We granted your request to have Bendix's liability calculated using the information in the Bendix Plan's January 1, 2008 actuarial valuation report ("2008 AVR") and using the Bendix Plan's 2008 Form 5500 Schedule SB filing with the IRS ("2008 Schedule SB"); and
- Using the January 1, 2008 valuation date, the 2008 AVR, and the 2008 Schedule SB, we recalculated Bendix's liability under section 4062(e) as $16,637,695.00, which is a reduction of $310,238.00 from the amount PBGC had determined.

In all other respects, your appeal is denied for the reasons explained in this decision. This decision is PBGC's final Agency action with respect to your appeal of PBGC's January 29, 2010 determination.

[1] ERISA § 4062(e) (which we will refer to as "section 4062(e)") is published at 29 United States Code ("U.S.C.") § 1362(e). In this decision, we will cite only to ERISA, without the parallel citations to the U.S.C.

Introduction

Section 4062(e) provides financial protection to pension plans, their participants, and PBGC. The section 4062(e) liability rules are triggered when "an employer ceases operations at a facility in any location and, as a result of cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment."[2]

ERISA section 4063 provides that an employer may satisfy section 4062(e) liability by placing the amount owed in escrow with PBGC.[3] Alternatively, PBGC may require a bond for up to 150 percent of the section 4062(e) liability.[4] If the pension plan remains underfunded and terminates within five years of the section 4062(e) event, the escrowed amount is forfeited, or PBGC will "realize on the bond."[5] The proceeds held in escrow (or covered under the bond) then become assets of the terminated pension plan.[6] If the plan does not terminate within the five-year-period, the escrow will be refunded to the employer, without interest, or the bond is cancelled.[7]

On December 31, 2007, Bendix ceased operations at its Frankfort, Kentucky manufacturing facility (the "Frankfort facility"). The Frankfort facility's closure meets the criteria of a section 4062(e) event in that more than 20% of the employees who were participants under the Bendix Plan were separated from employment with Bendix. Bendix is the Plan's contributing sponsor.[8] PBGC applied the formula in PBGC's section 4062(e) regulation[9] and calculated Bendix's section 4062(e) liability as $16,947,933.00.

The issues raised in your 35-page appeal brief have not previously been addressed by the Board. We have carefully reviewed the issues you have raised, and we provide a detailed explanation of our rulings in this decision.

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[2] PBGC uses the term "section 4062(e) event" when it refers to the conditions under which section 4062(e) liability is incurred. *See* 29 C.F.R. § 4062.8(b) (example of "section 4062(e) event"). In this decision, we similarly use the term "section 4062(e) event" to refer to the conditions under which section 4062(e) liability is incurred.

[3] ERISA § 4063(b).

[4] ERISA § 4063(c).

[5] ERISA § 4063(c)(3).

[6] *Id.*

[7] ERISA § 4063(c)(2).

[8] The term "contributing sponsor" is defined in ERISA § 4001(a)(13).

[9] 29 C.F.R. § 4062.8.

PBGC's Determination

PBGC's January 29, 2010 determination notified Bendix that the company had incurred liability under section 4062(e) in the amount of $16,947,933.00 for the following reasons:

- In the company's ERISA section 4043 filing, Bendix had notified PBGC that more than 20 percent of the number of active participants in the Bendix Plan had been separated from employment. PBGC confirmed that the participant reduction was the result of the closure of the Frankfort facility and that 100 percent of the active participants in the Bendix Plan were separated from employment; [10]
- The "cessation of operations" with respect to the Frankfort facility occurred on December 31, 2007;
- As of the December 31, 2007 cessation-of-operations date, the Bendix Plan's "unfunded benefit liabilities" ("UBLs") – which is an actuarial measure, defined in ERISA, of a pension plan's underfunding [11] – were $16,947,933.00; and
- Based on the Bendix Plan's UBLs on December 31, 2007 and the 100% cessation of operations with respect to the Bendix Plan's active participants, Bendix is liable to PBGC for $16,947,933.00 pursuant to ERISA sections 4062(e) and 4063 and PBGC's regulation at 29 C.F.R. § 4062.8.

PBGC's January 29, 2010 determination further states that Bendix must satisfy its liability under ERISA sections 4062(e) and 4063 by placing that amount in escrow with PBGC, or, alternatively, by posting a bond for up to 150 percent of the 4062(e) liability. PBGC also informed Bendix that, in appropriate cases, PBGC has the authority to consider alternative arrangements for satisfying the 4062(e) liability.

Finally, PBGC's January 29, 2010 determination notified Bendix that: (1) the determination is subject to appeal under PBGC Regulations at 29 C.F.R. § 4003, Subpart D: Administrative Appeals; and (2) in the absence of a timely appeal, PBGC's determination will become final upon the expiration of the 45-day appeal period. Since Bendix filed a timely appeal, PBGC has taken no further action with respect to Bendix's liability under section 4062(e) while this appeal has been pending.

[10] PBGC's determination states that "the Cessation of Operations meets the criteria under section 4062(e) of ERISA, 29 U.S.C. § 1362(e), and accordingly, the provisions of sections 4063, 4064, and 4065 of ERISA apply and subject Bendix to liability."

[11] As PBGC's determination indicates: (1) the term "unfunded benefit liabilities" is defined in ERISA section 4001(a)(18); and (2) UBLs also are addressed in ERISA section 4062(b), which imposes liability upon a pension plan sponsor and members of its controlled group in the event that an underfunded single-employer pension plan terminates.

Your Appeal

On June 30, 2010, you filed a 35-page appeal brief ("Appeal Brief" or "AB") that requests the Appeals Board to either: (1) reverse PBGC's January 10, 2010 determination and issue a final order that Bendix has no liability under section 4062(e); or (2) remand the matter to the PBGC department that issued the initial determination, with instructions to issue a revised determination that "complies with . . . applicable statutory and regulatory requirements." AB at 1.

Your June 30, 2010 appeal lists three general topics, under which you raise several more-specific issues. Also, after you received several documents pursuant to Freedom of Information Act ("FOIA") requests, you filed a supplement to your appeal on March 4, 2011. The supplement elaborates on some of the issues raised in your June 30, 2010 appeal.

We list below the three general topics in your appeal. Additionally, under the third general topic we list five more-specific issues that you have raised.

*A: **Was the Bendix Plan "established and maintained" by Bendix within the meaning of section 4062(e)?*** (AB at 11-18)

*B: **Is the liability formula in PBGC's regulation, in general or as applied to Bendix, contrary to law?*** (AB at 18-27)

*C: **Did PBGC err in calculating the amount of Bendix's section 4062(e) liability?*** (AB at 27-34)

- ***Issue #1***: Did PBGC use the correct valuation date in calculating Bendix's section 4062(e) liability? (AB at 27-28)
- ***Issue #2***: Should PBGC be required to use the PBGC Actuarial Technical Manual procedures that apply to calculating UBLs for terminated pension plans? (AB at 28-29)
- ***Issue #3***: Should PBGC have used the Bendix Plan's January 1, 2008 Actuarial Valuation Report and its 2008 Form 5500 Schedule SB in calculating the Bendix Plan's UBLs? (AB at 29-30)
- ***Issue #4***: Are PBGC's 4062(e) liability calculations flawed because PBGC used a "roll-forward" methodology for some purposes but actual data for other purposes? (AB at 30-31)
- ***Issue #5***: Should PBGC, in calculating Bendix's section 4062(e) liability, have deducted the value of the contingent claim under ERISA section 4062(c) for the shortfall amortization "charge" and "installments"? (AB at 31-34)

Background

1. ***Corporate and pension plan history.***

Bendix develops and supplies safety technologies, air brake charging, and control systems and components under the Bendix brand name for medium and heavy duty trucks, tractors, trailers, buses, and other commercial vehicles throughout North America. In 1993, AlliedSignal Inc. ("AlliedSignal") and the Knorr Brake Truck Systems Company ("Knorr") formed a joint venture through their subsidiaries called the AlliedSignal Truck Brake Systems Company (the "JV"). AlliedSignal owned a 65% ownership stake in the JV, which it received in exchange for certain business assets. Knorr owned the remaining 35% of the JV, which it received in exchange for $124,000,000 in cash. Later, following certain corporate transactions, the JV changed its name to "Bendix Commercial Vehicle Systems LCC."[12]

On or near November 1, 1993, the JV established the Bendix Plan.[13] The Bendix Plan covers collectively-bargained participants (and their beneficiaries) who had worked at Bendix's Frankfort, Kentucky plant. Between the end of 1998 and 2007, the Frankfort facility was the only Bendix facility that employed active Bendix Plan participants. The Bendix Plan also covers retirees who earlier had worked at facilities in Salisbury, North Carolina; Charlotte, North Carolina; Elyria, Ohio; Oklahoma City, Oklahoma; Reno, Nevada; and Huntington, Indiana.

2. ***The cessation of operations at Bendix's Frankfort facility.***

Bendix ceased operations at the Frankfort facility on December 31, 2007, when it terminated the employment of fifty-nine collectively-bargained employees, all of whom had been active participants in the Bendix Plan.[14] As of January 1, 2008, four active Bendix Plan participants remained to assist Bendix with final shutdown tasks; these participants were terminated from employment on January 31, 2008.

Bendix's Frankfort facility had produced air compressors and air disc brakes for commercial vehicles. The company attributed its decision to close the facility to its need to reduce costs and to its business strategy of aligning factories and product lines. Following the Frankfort facility closure: (1) Bendix shifted production of its air compressors from Frankfort to

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[12] In 1999, following AlliedSignal's merger with Honeywell International, the JV was renamed the Honeywell Commercial Vehicle Systems. The association with Honeywell was short-lived, however, because on March 28, 2002, it was announced that Honeywell had divested its interest in the JV to Knorr. From that point forward, the JV was known as "Bendix Commercial Vehicle Systems LCC."

[13] *See* Preamble to the Bendix Commercial Vehicle Systems LLC Pension Plan for Hourly Employees Amended and Restated as of January 1, 1997 ("1997 Bendix Plan Restatement"), which states that the Bendix Plan was established effective November 1, 1993. We provide a copy of the preamble as Enclosure 1. In 1993, when the Bendix Plan was established, it was known as the "AlliedSignal Truck Brake Systems Company Pension Plan for Hourly Employees."

[14] On January 30, 2008, Bendix filed a Post-Event Notice of Reportable Event (PBGC Form 10) with PBGC regarding the cessation of operations at the Frankfort location on December 31, 2007. This notice informed PBGC that the number of active participants in the Bendix Plan decreased from 63 to 4.

an existing Bendix facility in Acuna, Mexico that also manufactures other components used within a vehicle's air charging system; and (2) Bendix's air disc brake production was transferred to a new dedicated foundation brake manufacturing facility for Bendix Spicer Foundation Brake LLC (a wheel-end joint venture between Bendix and Dana Corporation) located in Bowling Green, Kentucky.

3. ***Relevant statutory provisions.***

a. The statutory language in section 4062(e)

Section 4062(e), which applies to single-employer plans covered by Title IV of ERISA, states:

> (e) **Treatment of substantial cessation of operations.**—If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections [4063, 4064, and 4065 of ERISA] shall apply.

b. Additional requirements in ERISA section 4063

Section 4062(e) provides that, if an event triggering liability occurs, the employer "shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections [4063, 4064, and 4065 of ERISA] shall apply."[15] While (as discussed below) the requirements in ERISA section 4063 are important with respect to your appeal, ERISA sections 4064 and 4065 do not appear to impact upon the issues you have raised.[16]

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[15] Under section 4001(a)(2) of ERISA, "substantial employer," for any plan year of a single-employer plan, means one or more persons--

> (A) who are contributing sponsors of the plan in such plan year,
>
> (B) who, at any time during such plan year, are members of the same controlled group, and
>
> (C) whose required contributions to the plan for each plan year constituting one of--
>
> > (i) the two immediately preceding plan years, or
> >
> > (ii) the first two of the three immediately preceding plan years,
>
> total an amount greater than or equal to 10 percent of all contributions required to be paid to or under the plan for such plan year.

[16] ERISA section 4064 applies to the termination of a single-employer pension plan that has, or had, two or more sponsors that are not members of the same controlled group. ERISA section 4065 requires PBGC-covered, single-employer plans to file annual reports with PBGC.

ERISA section 4063 applies to single-employer plans that have two or more contributing sponsors, at least two of whom are not under common control (i.e., multiple employer plans). Liability under section 4063 is triggered when a "substantial employer" withdraws from a multiple employer plan. As PBGC stated in its preamble to its section 4062(e) regulation, the cessation of operations at a facility (as defined in section 4062(e)) is "analogous," but not "equivalent," to a withdrawal from a multiple employer plan.[17]

Section 4063 contains the following provisions that apply to a section 4062(e) event (as well as to a withdrawal from a multiple employer plan):

- The employer is required to notify PBGC of the event within 60 days. PBGC shall, as soon as "practicable" thereafter, determine the amount of the liability and notify liable persons;[18] and
- Any amount collected by PBGC shall be held in escrow.[19] In the alternative, the employer may be required to furnish a bond to PBGC in an amount not exceeding 150 percent of the liability.[20]

ERISA section 4063(b) further provides that, "[i]n addition to and in lieu of" the manner of computing the liability prescribed in that provision, PBGC "may also determine such liability on any other equitable basis prescribed by the [PBGC] in regulations."

c. The duration and end of section 4062(e) liability

ERISA section 4063(c)(2) provides that, if the plan does not terminate within five years, "the liability is abated and any payment held in escrow shall be refunded without interest (or the bond cancelled) in accordance with bylaws or rules prescribed by the corporation."

ERISA section 4063(c)(3) provides that the following shall occur in the event of pension plan termination within the five-year-period:

> If the plan terminates under [ERISA] section 4041 (c) or 4042 within the 5-year period . . . , [PBGC] shall—
>
> (A) demand payment or realize on the bond and hold such amount in escrow for the benefit of the plan;
>
> (B) treat any escrowed payments under this section as if they were plan assets and apply them in a manner consistent with this subtitle; and
>
> (C) refund any amount to the contributing sponsor which is not required to meet any obligation of [PBGC] with respect to the plan.

[17] 71 Fed. Reg. 34,819, 34,821 (June 16, 2006).

[18] ERISA § 4063(a).

[19] *Id.*

[20] ERISA § 4063(c).

d. Alternative arrangements for satisfying section 4062(e) liability

ERISA section 4067 authorizes PBGC to make "alternative arrangements" with any contributing sponsors or members of their controlled group for satisfaction of section 4062(e) liability. As authorized by this provision, PBGC has taken a flexible enforcement approach as to how a plan sponsor satisfies its section 4062(e) liability, evaluating each case based on its facts and circumstances. For example, PBGC and employers often agree on "alternative arrangements" for section 4062(e) liability under which additional funding contributions are made to pension plans.

4. Uncontested matters and matters in dispute.

With regard to section 4062(e) liability, your appeal does not dispute that: (1) the closure of the Frankfort facility, which occurred on December 31, 2007, is an event that met the criteria in section 4062(e); (2) Bendix was the employer of the Frankfort facility's employees; (3) the Frankfort employees are Bendix Plan participants; and (4) at the time of the closure and afterwards, Bendix maintained the Bendix Plan. You also do not dispute PBGC's finding that 63 employees were separated from employment as a result of the December 31, 2007 cessation of operations, and that the 63 employees comprised all of the active participants in the Bendix Plan just prior to the cessation-of-operations date.

You claim, however, that Bendix is not the employer who "established" the Bendix Plan, and, therefore, it did not incur liability under section 4062(e). You further challenge the validity and reasonableness of PBGC's section 4062(e) regulation. Finally, you dispute PBGC's calculation of the amount of Bendix's section 4062(2) liability. We address each of these contentions in the sections that follow.

Discussion

The "Discussion" section of this decision contains three parts. In Part I, we respond to the issues raised in your appeal. In Part II, we present the Appeals Board's revised determination of the amount of Bendix's section 4062(e) liability. In Part III, we respond to certain other requests made in your appeal.

I. OUR RESPONSE TO ISSUES RAISED IN THE APPEAL

A. Was the Bendix Plan "established and maintained" by Bendix within the meaning of ERISA section 4062(e)?

Liability under ERISA section 4062(e) is incurred "[i]f an employer ceases operations at a facility in any location, and as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants *under a plan established and maintained by him* are separated from employment" (emphasis added).

You assert that Bendix is not liable under section 4062(e) because it was not the employer who "established" the Bendix Plan. AB at 11. In making this argument, you do not dispute that the Bendix Plan came into existence when it was adopted by the "newly-formed" JV

in 1993. AB at 12. You also do not dispute that the JV subsequently became Bendix. Rather, your contention is: (1) the Bendix Plan is the "successor" to a prior plan that had been established by a different employer (Allied Corporation); and (2) under the "successor plan" definition in ERISA section 4021(a), Allied Corporation (rather than Bendix) should be treated as the employer who established the Bendix Plan. AB at 12-13.

For the reasons discussed below, we have denied your appeal on the "established and maintained" issue. We decided that, even if the Bendix Plan is the successor to an Allied Corporation pension plan, this does not mean that the two pension plans – which were established by two separate companies – should be treated as a single legal entity. Accordingly, we decided that Bendix is the employer who both had "established" and "maintained" the Bendix Plan, notwithstanding that Allied Corporation had established what may be a predecessor plan.

Factual background. Before we respond further to your claims regarding this issue, we first provide additional factual information concerning the relationship between the Bendix Plan and the prior plan established by Allied Corporation.

As previously stated, a joint venture named the "AlliedSignal Truck Brake Systems Company" ("the JV") established the Bendix Plan on or near November 1, 1993.[21] The JV later became Bendix. The preamble to the 1997 Bendix Plan Restatement clearly states that Bendix established the Plan:

> *Bendix* Commercial Vehicle Systems LLC (f/k/a AlliedSignal Truck Brake Systems Company) (the "Company") *established the Allied Signal Truck Brake Systems Company Pension Plan for Hourly Employees (the "Plan"), effective as of November 1, 1993.* Effective January 10, 2002, the Company changed its name to Bendix Commercial Vehicle Systems LLC. The Plan is hereby amended and restated in its entirety, effective January 1, 1997, and the name of the Plan is changed to Bendix Commercial Vehicle Systems LLC Pension Plan for Hourly Employees, effective January 10, 2002. (Emphasis added).

As you indicate in your appeal, AlliedSignal and Knorr formed the JV in 1993 through a Contribution Agreement, Joint Venture Agreement, and related agreements (collectively, the "Joint Venture Agreements").[22] The Contribution Agreement provided: (1) former AlliedSignal employees who became the JV's employees will continue to receive the same level of benefits as was provided under the AlliedSignal Inc. Pension Plan for Hourly Employees (the "AS Plan" or

[21] The actual date of establishment is somewhat unclear. Section 13.6(A)(1) of the Contribution Agreement executed by AlliedSignal and Knorr, through their respective subsidiaries, states that the JV "shall have established effective as of the Closing Date a tax-qualified defined benefit pension plan or plans which shall discharge the pension obligations of the partnership...." Section 5 of the Contribution Agreement defines the "Closing Date" as "[t]he date on which the Closing actually occurs[,]" which was "the end of business on October 16, 1993, unless otherwise agreed to by the parties." As discussed above, however, the preamble to the 1997 Bendix Plan document states that Bendix established the Bendix Plan on November 1, 1993.

[22] You provided a copy of the Contribution Agreement as Exhibit 4A to your appeal and a copy of the Partnership Agreement as Exhibit 4B.

"Prior Plan"), and (2) the benefits under the new JV Plan will be "substantially equivalent to the Benefit Plans in effect as of the Closing Date[.]"[23]

The AS Plan previously had been established by the Allied Corporation. AlliedSignal became the sponsor and administrator of the AS Plan in 1987, after the Allied Corporation merged with the Signal Companies.

As of the Bendix Plan's effective date, certain eligible employees and former employees who were participants in the AS Plan became participants in the Bendix Plan, including the collectively-bargained employees who worked at the Frankfort facility. Also, the Contribution Agreement provided for the transfer of AS Plan assets to the Bendix Plan to fund the benefit liabilities for the transferred participants.[24]

Your appeal. You assert that, under the "plain statutory language" of section 4062(e), an employer "who maintains, but did not establish" the plan that experienced the cessation of operations cannot be liable under that provision. You accordingly contend that, if Bendix is not the employer who "established" the Bendix Plan, then Bendix cannot be held liable under section 4062(e) with respect to the Bendix Plan. AB at 11.

Your appeal asserts that, although the Bendix Plan was adopted in 1993 by the "newly-formed" JV, for Title IV purposes it should be "deemed to have been established . . . when the relevant predecessor plan was established." AB at 12. In making this claim, you refer to the language in ERISA section 4021(a) that a successor plan is "considered to be a *continuation* of a predecessor plan" for purposes of Title IV of ERISA. AB at 12. You assert that this language means, for purposes of section 4062(e), that the determination of "when and by whom" a successor plan was "established" must be based "on when and by whom the predecessor plan was established." AB at 12.

You further claim that the relevant predecessor plan for purposes of this appeal is the AS Plan. AB at 12. You assert that the Bendix Plan is a "successor plan" to the AS Plan within the meaning of ERISA section 4021(a) because it "covers a group of employees which includes substantially the same employees and provides substantially the same benefits as a previously established plan, the AlliedSignal Plan." AB at 12. Based on this alleged successor plan relationship, you contend that Allied Corporation, who established the AS Plan, should be treated as the employer who established the Bendix Plan, rather than Bendix.

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[23] *See* Contribution Agreement §§ 13.3, 13.6(A), which provide that the transfer of pension plan assets and liabilities would be accomplished in accordance with Internal Revenue Code sections 414(l) and 401(a)(12). In addition, the Contribution Agreement required the JV to "grant...under any successor employee benefit plans, to all Employees all service with AlliedSignal credited to them and to be credited to them in respect of the Benefit Plans, including, without limitation, all such service credited to them for purposes of eligibility, vesting and benefit accrual under...the Allied-Signal Inc. Pension Plan for Hourly Employees...." Contribution Agreement § 13.3.

[24] *See* Contribution Agreement § 13.6(A) (providing for transfer of plan assets and liabilities as of the Contribution Agreement's closing date).

Finally, your appeal recognizes that, in the context of Title IV coverage determinations under ERISA sections 4021(b)(2) and 4021(b)(9), "PBGC has declined to interpret the conjunction of the terms 'established and maintained' strictly."[25] You contend that PBGC should not depart from the strict statutory language in interpreting the meaning of "established and maintained" in the context of section 4062(e) liability.[26] You assert that departure from the statutory language with respect to section 4062(e) is improper because "it would not resolve a statutory ambiguity but instead would conflict with plain statutory language that clearly serves one of Title IV's purposes."[27]

Consequently, under your view that the same employer must have both established and maintained the pension plan, you argue that "the liability provisions of section 4062(e) do not apply (and thus cannot be applied) to Bendix." AB at 12-13.

Our response. This appeal does not involve a dispute of the relevant facts concerning how the Bendix Plan was established or maintained. It is undisputed that the Bendix Plan did not exist before 1993, which is also the year when the JV (which later became Bendix) was created. Additionally, as discussed above, the Bendix Plan's own formal document states that the JV "established the [Plan], effective as of November 1, 1993." There is also no dispute that Bendix has maintained the Bendix Plan since 1993. Finally, while your appeal presents information indicating that the Bendix Plan was a "successor" (within the meaning of ERISA section 4021(a)) to the prior AS Plan,[28] there is no evidence that the Bendix Plan and the prior AS Plan ever were a single legal entity. Rather, the Bendix Plan and the AS Plan are two separate pension plans sponsored by two different companies.

Your argument rests on two premises, both of which must be satisfied if Bendix is to avoid section 4062(e) liability. The first premise is that section 4062(e) applies only to a pension plan that is both established and maintained by the same employer. The second premise is that the successor plan language in ERISA section 4021(a) requires a finding that Bendix did not establish the Bendix Plan. For the reasons discussed below, we concluded that, even if we accept your first premise (which we do not), your second premise is incorrect and does not

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[25] AB at 13. Your appeal refers to PBGC Opinion Letters 75-44 and 90-6 as examples of how PBGC has interpreted "established and maintained" in the context of Title IV's coverage requirements.

[26] You refer to two court cases – *Rose v. Long Island R.R. Pension Plan*, 825 F.2d 910 (2d Cir. 1987) and *Hightower v. Texas Hospital Assn.*, 65 F.3d 443 (5th Cir. 1995) – that address "established and maintained" in the context of the coverage exemption under ERISA Title IV for governmental plans. You contend that, while the court in *Rose* agreed with PBGC's position concerning the meaning of "established and maintained," the court in *Hightower* "took a more straightforward approach: it simply followed the plain statutory language." AB at 15. You contend that *Hightower* supports your position that PBGC should not depart from the statute's plain language in interpreting section 4062(e). AB at 17.

[27] AB at 16. You refer to ERISA's purpose "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants," which is one of the three Title IV purposes stated in ERISA section 4002(a)(1). AB at 17.

[28] Because we are rejecting your position as to how the "established and maintained" language in section 4062(e) should be interpreted with respect to a successor plan, we need not (and do not) reach the question of whether the Bendix Plan, in fact, is a successor to the AS Plan based on the definition in ERISA section 4021(a).

provide Bendix with a basis for relief. Accordingly, we decided that Bendix had both established and maintained the Bendix Plan notwithstanding the successor plan definition in ERISA section 4021(a).

A linchpin of your "established and maintained" argument is that section 4021(a) requires PBGC *to deem* the employer who established a predecessor plan as the employer who established its successor, even if the employer who *actually* established the successor plan is a different entity. Thus, under your view, section 4062(e) liability would not exist in the situation where the employer who established the predecessor plan is different from the employer who maintained the successor plan at the time of the section 4062(e) event.

We disagree with this position. Although a successor plan is to be treated as a continuation of its predecessor for purposes of Title IV of ERISA, this does not mean that a predecessor plan and its successor are to be treated as a single, combined plan. Furthermore, because a successor plan and its predecessor are separate legal entities, the "continuation" language in ERISA section 4021(a) does not preclude a finding that the two plans were "established" by different employers. That, in fact, is what happened here: Allied Corporation established what may be a predecessor plan (the AS Plan), and Bendix established the Bendix Plan in 1993, as stated in the preamble to the 1997 Bendix Plan Restatement.

As you state in your appeal, ERISA section 4021(a) defines a successor plan, for purposes of Title IV of ERISA, through the following language:

> For purposes of this title, a successor plan is *considered to be a continuation of a predecessor plan*. For this purpose, unless otherwise specifically indicated in this title, a successor plan is a plan which covers a group of employees which includes substantially the same employees as a previously established plan, and provides substantially the same benefits as that plan provided.[29]

This successor plan definition, however, does not address the meaning of "established and maintained." Additionally, there is nothing in ERISA's terms, or in its legislative history, that would indicate that "established and maintained" was intended to have a different meaning for a successor plan than in the situation where there is no successor plan relationship.

Furthermore, PBGC historically has applied the successor plan definition only to plan coverage determinations under ERISA section 4021(a) and to PBGC's insurance limits under ERISA section 4022(b).[30] As is explained below, the areas where PBGC has applied the successor plan definition are not analogous to section 4062(e) liability.

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[29] ERISA § 4021(a) (emphasis added). In the above-quoted language, the phrase "[f]or purposes of this title" means for purposes of ERISA Title IV.

[30] We observe that the Title IV provisions for single-employer pension plans contain only two references to "successor plan." The first, in ERISA section 4021(a), is located in the Title IV section (section 4021) that pertains to "coverage." The second, in ERISA section 4022(b)(2), applies to the "phase-in" limit to PBGC's guarantee. Although Title IV contains detailed liability provisions for single-employer plans (ERISA sections 4061 through 4071), there is no reference in those provisions to "successor plan."

It is PBGC's experience that the successor plan definition has the following three impacts:

- a successor plan may meet the requirements for coverage under ERISA Title IV based on the status of the predecessor plan;[31]
- for purposes of the "phase-in" limit to PBGC's guarantee, the time a successor plan has been in effect includes the time a predecessor plan had been in effect;[32] and
- in applying the "maximum guaranteed benefit" ("MGB") limit in ERISA section 4022(b)(3) to a successor plan, PBGC takes into account the total benefits a participant has earned under the predecessor plan and under the successor plan.

Significantly, however, in none of these three instances does the "continuation" language mean that the two plans are to be treated as, or deemed to be, a single plan. We observe in this regard that:

- Although the plan coverage status of the predecessor plan may be relevant with respect to the coverage status of its successor, the two plans nevertheless remain separate entities;
- For "phase-in," the "continuation" language simply operates as a time-counting mechanism for purposes of guaranteed benefit reductions in recently-established pension plans. Ordinarily, because of the "phase-in" limit, PBGC cannot fully guarantee benefits under a pension plan if the plan was in existence for less than five full years before it terminated. But for a successor plan, the combined time period that a predecessor plan and a successor plan were in existence is taken into account in computing any phase-in reduction; and
- For the MGB, PBGC has concluded that the monthly cap ERISA places upon the benefits PBGC guarantees with respect to a participant is to be applied to the total benefits the participant receives from the predecessor plan and the successor plan. Despite this consideration of both plans' benefits for purposes of computing the MGB, the benefits under the successor plan and its predecessor are not merged. Thus, when PBGC allocates plan assets to benefit liabilities pursuant to ERISA section 4044, the successor plan is a separate entity from its predecessor.[33]

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[31] ERISA section 4021(a) states that Title IV applies (except as provided under section 4021(b)) to "any plan (including a successor plan)" which (among other things) has: (1) in practice met the tax-qualification requirements for pension plans under the Internal Revenue Code for the preceding 5 plan years; or (2) has been determined by the Treasury Secretary to meet the requirements for tax qualification. Thus, one of the intended purposes of the successor plan definition is to allow a successor plan to "piggy-back" upon the tax-qualified status of a predecessor plan.

[32] The phase-in limit applies to: (1) pension plans that were in effect for less than five years before plan termination; and (2) benefit increases under plan amendments that were in effect for less than five years before plan termination. ERISA § 4022(b)(1), (7). With respect to these requirements, ERISA § 4022(b)(2) states: "For purposes of this subsection, the time a successor plan (within the meaning of section 4021(a)) has been in effect includes the time a previously established plan (within the meaning of section 4021(a)) was in effect." *See also* ERISA § 4022(b)(5) (a 30-year phase-in requirement applies to a "majority owner").

[33] When a predecessor plan terminates, section 4044 of ERISA requires that the predecessor plan's assets be allocated to the benefit liabilities of the predecessor plan (without reference to the successor plan). Furthermore, if

Additionally, in a 1986 Opinion Letter, PBGC rejected the position that a successor plan and its predecessor should be treated as a single pension plan for all Title IV purposes. The opinion letter concerned a premium refund request by an employer who paid premiums for both a predecessor and successor plan during the year in which the termination process overlapped with the employer's establishment of the successor plan. The employer based its refund request on the belief that the new plan was a "successor plan" to the old plan, as that term is defined in section 4021(a) of ERISA. As a result, the employer claimed that the new plan should be considered a "continuation" of the old plan for purposes of precluding a duplication of premium payments. PBGC rejected this argument, stating:

> It is clear that both the Old Plan and the New Plan -- two separate plans -- were in existence during the 1985 plan year for the purpose of accrual of premium payments. This is so even assuming, as you assert, that the New Plan is a "successor plan" to the Old Plan and therefore, . . . "is considered to be a continuation of" the Old Plan for purposes of Title IV. The mere fact that one plan is considered to be a "continuation" of another in no way negates the separate nature of the two plans or changes their respective periods of existence. . . . The two plans clearly coexisted for a period of time, and must pay premiums accordingly.

PBGC Op. Letter 86-14 (Jun. 26, 1986).[34]

Moreover, there are no requirements in ERISA Title IV that relate to how a single-employer pension plan is "established" or "maintained." Instead, ERISA requirements relating to the establishment and maintenance of pension plans are set forth in Title I. *See*, for example, ERISA section 402(a) (titled "Establishment of Plan") and ERISA section 403 (titled "Establishment of Trust").[35] As you acknowledge in your appeal, there is no successor plan provision in Title I that is analogous to the Title IV successor plan provision. AB at 14-15 (footnote 9). Thus, we concluded that the "continuation" language as to how a successor plan is to be "considered" for purposes of Title IV is unrelated to the identification of the employer who "established" the plan.

In summary, for all of the above reasons, we conclude that Bendix "established and maintained" the Bendix Plan. This conclusion is consistent with the Joint Venture Agreements and the Bendix Plan's own formal document, which states that the Bendix Plan was established in 1993 by Bendix. That the Bendix Plan may be considered a successor plan under section

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the successor plan later terminates, PBGC would *not* do a new 4044 allocation based on the combined assets and benefit liabilities of the two plans. This is true even though a successor plan is treated as a "continuation of a predecessor plan" for purposes of Title IV.

[34] Language consistent with Opinion Letter 86-14 later was included in PBGC's "Premium Rates" regulation. That regulation defines the term "new plan" as follows: "*New Plan* means a plan that did not exist before the premium payment year and includes a plan resulting from a consolidation or spinoff. A plan that meets this definition is considered to be a new plan even if the plan constitutes a successor plan within the meaning of section 4021(a) of ERISA." 29 C.F.R. § 4006.2.

[35] In particular, ERISA § 402(a)(1) states: "Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."

4021(a)—and thus a "continuation" of a predecessor plan for purposes of Title IV—does not change this conclusion. Given our conclusion, we need not address the hypothetical question of whether Bendix could be liable under section 4062(e) if it had only "maintained" the Bendix Plan. We note, however, that PBGC has declined to interpret the conjunction of the terms "established and maintained" strictly under sections 4021(b)(2) and 4021(b)(9) of ERISA, and we see no reason why PBGC should depart from such an interpretation under section 4062(e) of ERISA.[36]

B. Is the liability formula in PBGC's regulation, in general or as applied to Bendix, contrary to law?

Your appeal contains several assertions that relate to the validity and reasonableness of PBGC's section 4062(e) regulation. As discussed below, the Appeals Board has concluded it lacks the authority to grant Bendix relief with respect to these assertions.

Background concerning PBGC's section 4062(e) regulation. As stated above under "Background," ERISA section 4063(b) authorizes PBGC to issue a regulation that prescribes how ERISA section 4062(e) liability is determined.[37] Pursuant to that authority, PBGC issued a regulation in 2006 that establishes the formula for computing section 4062(e) liability.[38]

PBGC's regulation establishes a section 4062(e) liability formula that PBGC considers to be "a simple, practicable, and equitable method for determining the liability for a section 4062(e) event."[39] Specifically, the rule established by PBGC regulation is that the section 4062(e) liability equals the liability under ERISA section 4062(b)[40] multiplied by a fraction—

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[36] PBGC Opinion Letters 75-44 and 90-6. *See also* 75 Fed. Reg. 48,283, 48,284 (August 10, 2010) (discussion of "established and maintained" issue in preamble to PBGC's proposed section 4062(e) regulation).

[37] Section 4063(b) provides: "In addition to and in lieu of" the manner of computing the liability prescribed in that provision, PBGC "may also determine such liability on any other equitable basis prescribed by the [PBGC] in regulations."

[38] This PBGC regulation, codified at 29 C.F.R. § 4062.8, is published at 71 Fed. Reg. 34,819 (June 16, 2006).

Although PBGC has proposed a regulation that would provide additional guidance on the applicability and enforcement of section 4062(e) liability, PBGC has not issued a final regulation as of the date of this decision. PBGC's proposed regulation is published at 75 Fed. Reg. 48,283 (August 10, 2010).

[39] 71 Fed. Reg. 34,819, 34,820 (June 16, 2006).

[40] ERISA § 4062(a) provides that a contributing sponsor of a pension plan or a member of a contributing sponsor's control group may be liable to PBGC in any case in which a single-employer plan is terminated under a distress termination under ERISA § 4041(c) or a termination by PBGC under ERISA § 4042. Among other things, ERISA § 4062(b) provides:

> (b) Liability to corporation
>
> (1) Amount of liability
>
> (A) In general

(1) the numerator of which is the number of the employer's employees who are participants under the plan and are separated from employment as a result of the cessation of operations; and

(2) the denominator of which is the total number of the employer's current employees, as determined immediately before the cessation of operations, who are participants under the plan.[41]

PBGC's regulation further provides that "[t]he liability under section 4062(b) is determined as if the plan had been terminated by the PBGC immediately after the cessation of operations."[42] The preamble to PBGC's regulation explains that a change in the applicable date was needed because "the date of the withdrawal" (as specified in section 4063(b)) does not "literally apply" in the case of a section 4062(e) event.[43]

Your appeal. You assert that PBGC's section 4062(e) regulation impermissibly deviates from the "core principle" of section 4063.[44] In particular, you state that PBGC's formula: (1) expands the employer's liability beyond its "fair share," as measured by the funding support the employer will provide to the plan (AB at 19); (2) does not correlate to the financial impact that the section 4062(e) event has on the plan (AB at 20); (3) does not relate to the "magnitude of increased risk" resulting from the triggering event (AB at 21); and (4) "stacks the deck to maximize liability" by

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. . . the liability to the [PBGC] of a person described in subsection (a) shall be the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan, together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by the [PBGC].

ERISA § 4001(a)(18) states:

"amount of unfunded benefit liabilities" means, as of any date, the excess (if any) of—

(A) the value of the benefit liabilities under the plan (determined as of such date on the basis of assumptions prescribed by [PBGC] for purposes of [ERISA] section 4044), over

(B) the current value (as of such date) of the assets of the plan.

[41] 29 CFR § 4062.8(a)(1)-(2).

[42] *Id.*

[43] 71 Fed. Reg. at 34,820.

[44] AB at 18-25. In making this argument, you refer to the section 4062(e) requirement that the employer's liability be determined by treating that employer "as if he were a substantial employer under a plan under which more than one employer makes contributions" and that the provisions of section 4063 "shall apply." AB at 18. You further note that section 4063(b), in turn, requires a withdrawing employer in a multiple employer plan to pay a specified portion of the liability under section 4062 for the entire plan as if the plan had been terminated by PBGC on the date of the withdrawal. AB at 18. Finally, you acknowledge that, through ERISA section 4063(b), "Congress explicitly empowered PBGC to determine the amount of liability 'on any other equitable basis prescribed by the [PBGC] in regulations. . . .' ERISA section 4063(b)." AB at 19.

focusing only on the number of employees on the eve of the shutdown and only on the number of employees who are plan participants (AB at 18-25).

You also argue that, based on the terms of ERISA section 4063(b), PBGC has a legal obligation to ensure that the formula in its section 4062(e) regulation determines liability on an "equitable basis." AB at 25-26. You claim that PBGC did not meet this obligation because PBGC's rule "makes no attempt to measure the amount of section 4062(e) liability on a basis that captures the employer's fair share [of pension plan underfunding]." AB at 26.

You further contend that it would be inequitable, based on Bendix's particular circumstances, to impose liability on it for 100 percent of the Bendix Plan's UBLs. AB at 26. In your view, imposing this amount of liability is inequitable because the shutdown of Bendix's facility "accounted for less than 5 percent of the Company's revenues and less than 1 percent of the [controlled] group's global revenues and the resulting separation from employment of less than 3 percent of the Company's employees and less than 1/2 of 1 percent of the controlled group's total employees." AB at 26. You accordingly contend that PBGC's regulation as applied to Bendix "is arbitrary, capricious, an abuse of discretion, and contrary to law." AB at 26.

Our response. PBGC determined Bendix's section 4062(e) liability amount by applying the formula in its section 4062(e) regulation. In the arguments summarized immediately above, you do not claim that PBGC failed to follow its own regulation. Rather, your contention is that PBGC's regulation concerning section 4062(e) liability is invalid or unreasonable.

PBGC's regulation was issued after notice-and-comment rulemaking. Thus, before issuing the regulation, PBGC invited interested parties to submit comments concerning its proposed rule.[45] PBGC further considered the comments it received before it issued its final regulation.[46] The Appeals Board has concluded that it lacks the authority to review the validity or the reasonableness of a regulation issued through notice-and-comment rulemaking.

Furthermore, in its section 4062(e) regulation, PBGC established a rule of general applicability. By the regulation's terms, the liability formula is to be applied whenever a section 4062(e) event occurs, regardless of the facts of a given case. Furthermore, there is nothing to indicate that PBGC intended for the Appeals Board to review in an appeal the validity or reasonableness of the regulation as it is applied to a particular employer. The Appeals Board accordingly concluded that it lacks the authority to determine whether or not PBGC's regulation is invalid as applied to Bendix.

C. Did PBGC err in calculating the Bendix Plan's Unfunded Benefit Liabilities ("UBLs")?

PBGC determined that Bendix incurred liability under section 4062(e) in the amount of $16,947,933.00. Your appeal raises five specific issues that relate to the amount of Bendix's section 4062(e) liability. For the reasons explained below, we granted your appeal on two of

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[45] *See Liability Pursuant to Section 4062(e) of ERISA*, 70 Fed. Reg. 9258 (proposed February 25, 2005). The comments PBGC received are available on its website at www.pbgc.gov/Documents/section4062_ERISA.pdf.

[46] In the preamble to its final section 4062(e) regulation, PBGC discussed in detail the comments it received. 71 Fed. Reg. at 34,820 - 821.

these issues, denied it with respect to two others, and concluded that a fifth issue was resolved by the Board's recalculation of Bendix's section 4062(e) liability. Before we discuss your individual issues, however, we provide additional background.

Additional Background concerning PBGC's section 4062(e) determination. A January 28, 2010 PBGC document, titled "Section 4062(e) Determination Memorandum" ("Determination Memorandum" or "Det. Memo"), provides an explanation of PBGC's determination of Bendix's section 4062(e) liability amount. The Determination Memorandum (Enclosure 2), which was prepared by PBGC's Department of Insurance Supervision and Compliance ("DISC"), was provided to you on April 28, 2010.

As is stated in the Determination Memorandum, DISC actuaries calculated the Bendix Plan's UBLs, based on a valuation date of December 31, 2007, as $16,947,933.00. Det. Memo at 1.

PBGC then determined the fraction by which the UBLs should be multiplied. According to the information provided by Bendix, fifty-nine participants were separated from employment on December 31, 2007, and four additional participants were separated from employment on January 31, 2008. Det. Memo at 2. All of the separations were the result of the cessation of operations. Det. Memo at 2. Accordingly, PBGC concluded that the numerator of the fraction should be sixty-three. Det. Memo at 4. Further, since these sixty-three employees were all of the active participants in the Bendix Plan just prior to the cessation-of-operations date, PBGC determined that the denominator is also sixty-three. Det. Memo at 5.

Since the numerator and denominator were identical, PBGC determined that the UBL amount ($16,947,933.00) should be multiplied by one, resulting in a 4062(e) liability amount of $16,947,933.00.

Issue #1: Did PBGC use the correct valuation date in calculating Bendix's section 4062(e) liability?

Your appeal. You point out that PBGC's initial determination used a liability estimate based on a valuation date of December 31, 2007. AB at 27. You contend this is an incorrect date for determining Bendix's liability because PBGC's section 4062(e) regulation states: "PBGC will determine the amount of liability under section 4063(b) of ERISA to be the amount described in section 4062 of ERISA for the entire plan, as if the plan had been terminated by the PBGC *immediately after the date of the cessation of operations* . . . ."[47]

Thus, you argue that the correct date for determining any section 4062(e) liability incurred by Bendix is January 1, 2008 – which is the date "immediately after" the December 31, 2007 cessation-of-operations date for the Frankfort facility. AB at 27. Consequently, you contend that PBGC must recalculate the value of the Bendix Plan's benefit liabilities under section 4001(a)(18)(A) using a January 1, 2008 valuation date.[48]

[47] AB at 27 (*citing* 29 CFR § 4062.8(a)).

[48] AB at 28. You state that "using the correct termination date, which in this case requires shifting from a 2007 date to a 2008 date, means that the key actuarial assumptions must be changed to comply with PBGC regulatory

Our response. We agree with you that: (1) the cessation of operations for purposes of section 4062(e) liability occurred on December 31, 2007; (2) PBGC's regulation requires that section 4062(e) liability be calculated as if the Bendix Plan had terminated on the day after the cessation-of-operations date, which is January 1, 2008; and (3) PBGC erred by calculating Bendix's section 4062(e) liability based on a December 31, 2007 valuation date. PBGC's use of the December 31, 2007 date appears to have been a mistake, rather than one involving a legal interpretation.

The Appeals Board has recalculated Bendix's section 4062(e) liability based on a January 1, 2008 valuation date. This change in the valuation date has resulted in a slight reduction to the amount of Bendix's section 4062(e) liability.

Issue #2: ***Should PBGC be required to calculate Bendix's section 4062(e) liability using the PBGC Actuarial Technical Manual procedures that apply to terminated pension plans?***

Your appeal. You claim that PBGC did not use the correct methodology to calculate Bendix's section 4062(e) liability. AB at 28-29. Noting that PBGC's section 4062(e) regulation references the liability described under ERISA section 4062 for a plan's UBLs as of its termination date, you contend that PBGC must use the same methodology and apply the same procedures in computing section 4062(e) liability that PBGC uses and applies in computing UBLs for terminated plans.[49]

You argue that the appropriate methodology, which PBGC consistently has used with respect to terminated plans, is the one prescribed in PBGC's Actuarial Technical Manual ("Actuarial Manual"). AB at 28. You assert that, under the procedures in the Actuarial Manual, PBGC: (1) determines the plan's UBLs by using the plan's participant census data to perform participant-by-participant calculations;[50] and (2) uses estimates only in limited circumstances and only as permitted under specific instructions.

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requirements for determining the value of benefit liabilities since those assumptions are dependent upon the applicable plan termination date." AB at 28 (*citing* 29 CFR § 4044, subpt. B (Valuation of Benefits and Assets)). 29 CFR § 4044 prescribes the methodology for valuing benefit liabilities, including the assumptions that must be used with respect to interest, mortality, and expected retirement age.

[49] You refer to the following language in PBGC's section 4062(e) regulation: "PBGC will determine the amount of liability under section 4063(b) of ERISA to be the amount described in section 4062 of ERISA for the entire plan, as if the plan had been terminated by the PBGC immediately after the date of the cessation of operations, multiplied by a fraction . . . ." 29 CFR § 4062.8(a).

[50] AB at 29. You cite Section II of the Actuarial Manual, titled "Participant & Plan Data," which states: "Whenever possible, all valuations should be made using audited participant and plan data. Deviations from this rule should be documented in the Actuarial Case Report. No questions with respect to participant data should pass unresolved from ASD to PSD. If a given data item cannot be determined, even by writing to participants, then such must be stated in writing, preferably in the audit."

You claim that the actuarial calculations PBGC made to determine Bendix's section 4062(e) liability did not comply with the Actuarial Manual because they are based on estimates.[51] You state:

> It appears from the documentation supplied by the [PBGC] Disclosure Officer that PBGC simply used the computer model that generates claims estimates for bankruptcy purposes. When filing those claims, PBGC discloses that they are estimates, not final determinations of the amount of the claims. While using estimates is acceptable in a bankruptcy context for purposes of filing initial claims, it is not acceptable here.

AB at 28. [52]

Our response. Neither ERISA nor PBGC's regulations prescribe a particular procedure for computing section 4062(e) liability.[53] There further is nothing in either ERISA or PBGC's regulation that indicates that PBGC must use the plan's participant census data to perform participant-by-participant calculations for purposes of calculating section 4062(e) liability. Accordingly, we reject your position that PBGC is required to use any particular data source, procedure or methodology.

PBGC's Actuarial Manual sets out in detail PBGC's procedures for calculating benefit liabilities for terminated pension plans for purposes of (among other things) ERISA section 4062(b) liability.[54] PBGC has not developed written actuarial procedures, however, that

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[51] AB at 29. You assert that PBGC "knew, or should have known, that the necessary participant census data was readily available from the Company, but PBGC never requested that data." *Id.*

[52] You note that "perhaps PBGC could have promulgated a rule that permitted the agency to use estimated UBL numbers for its section 4062(e) cases, but PBGC failed to do so." You assert that, in the absence of such a rule, PBGC must determine UBLs for purposes of section 4062(e) liability "in the same manner as [UBLs] would be determined for any terminated plan—i.e., in accordance with the methodology prescribed in PBGC's Actuarial Technical Manual . . . ." AB at 29. You state that "the Company will gladly supply upon request" the relevant participant-by-participant census data with respect to the Bendix Plan. *Id.*

[53] Section 4062(e) requires that an employer who incurs section 4062(e) liability "shall be treated with respect to [the] plan as if he were a substantial employer" as provided under ERISA section 4063. ERISA section 4063(b) provides that "[t]he amount of liability shall be computed on the basis of an amount determined by [PBGC] to be the amount described in section 4062 for the entire plan, as if the plan had been terminated by [PBGC] on the date of the withdrawal . . . ." Aside from changing the "date of withdrawal" to the date "immediately after the date of the cessation of operations," PBGC's regulation at 29 C.F.R. § 4062.8 did not change the UBLs component of the section 4062(e) liability formula. These, and other, ERISA provisions and PBGC regulations do not elaborate upon how PBGC's calculations shall be made.

[54] PBGC's determination of a pension plan's benefit liabilities as of its termination date serves several purposes. As you indicate in your appeal, the liability calculation is used to establish the amount the employer owes to PBGC under ERISA section 4062(b). *See* 29 C.F.R. § 4062.3 (PBGC regulation concerning amount and payment of ERISA § 4062(b) liability) and § 4068 (regulation concerning PBGC's lien for employer liability). Furthermore, PBGC needs to determine accurately the benefit liabilities in a terminated plan because those amounts often impact upon the benefits PBGC is authorized pay to pension plan participants *See* ERISA § 4044 (allocation of plan assets to benefit liabilities in a terminated plan) and ERISA § 4022(c) (allocation of PBGC's claim recoveries to certain benefits). Finally, PBGC's calculations of benefit liabilities are used in preparing PBGC's financial statements.

specifically apply to section 4062(e). Because there are obvious differences between the two situations, we disagree with your position that PBGC must use the same procedures and methodology for calculating UBLs for section 4062(e) liability purposes as it uses for valuing UBLs in terminated plans.

Section 4062(e) liability differs from ERISA section 4062(b) liability in the following significant ways: (1) section 4062(e) requires a liable employer provide "security" to PBGC for a limited time period (five years), while ERISA section 4062(b) liability can be viewed as the employer's "final bill" to PBGC for the plan's underfunding; (2) in contrast to the finality of a section 4062(b) assessment, the employer is released from section 4062(e) liability if the plan does not terminate within five years, with the escrowed funds returned to the employer or the bond canceled; and (3) even if the plan terminates within the five-year-period, the escrowed fund or bond amount will become a plan asset as of the plan's termination date, and PBGC then will do a final accounting under ERISA of what the employer owes to PBGC and to the plan's trustee as of the termination date.

Although PBGC has concluded that the use of estimates is inappropriate in the final valuation of benefit liabilities in a terminated plan (except in limited circumstances), we see no reason why PBGC cannot use estimates in determining section 4062(e) liability. Unlike section 4062(b) liability, the amounts paid by the employer for section 4062(e) liability are refunded or may (in effect) be corrected at a later date, i.e., at the expiration of the five-year-period or upon a final accounting at plan termination. Accordingly, the need for precision is not as great for calculating section 4062(e) liability as it is for calculating section 4062(b) liability.

PBGC also must be able to determine section 4062(e) liability without undue delay. This is necessary because of the limited duration of the liability and the provision's obvious intent that PBGC obtain financial security with respect to the affected pension plan. If PBGC were required to use participant census data and participant-by-participant benefit calculations before assessing section 4062(e) liability, PBGC's ability to obtain financial security could be frustrated because of the length of time needed to obtain the necessary data and to make the necessary calculations. In any event, what you seek is more than what ERISA requires, since ERISA section 4063(a) directs only that PBGC, after receiving notice, "shall, as soon as practicable thereafter, determine whether there is liability . . . and notify the liable persons of such liability."

Finally, an employer may make its own calculations of section 4062(e) liability.[55] If, as here, PBGC issues an initial determination to an employer that provides for Appeals Board review, on appeal the Board will review any calculations the employer timely submits. In this case, however, Bendix has not provided the Appeals Board with its own liability calculations, even though the Appeals Board provided you with a lengthy time period to supplement your appeal.

Accordingly, we reject your claim that PBGC did not correctly determine Bendix's section 4062(e) liability amount because PBGC did not perform participant-by-participant

[55] Such calculations, however, would need to be based on the actuarial assumptions for calculating benefit liabilities for terminating plans that are specified in PBGC's regulations at 29 C.F.R. § 4044.

calculations in accordance with PBGC's Actuarial Manual's procedures for terminated pension plans.

Issue #3: Should PBGC have used the January 1, 2008 Actuarial Valuation Report and the 2008 Schedule SB in calculating the Bendix Plan's UBLs?

Your appeal. You assert that, even assuming that PBGC properly may use a liability estimate to support a determination of section 4062(e) liability, its UBL estimate must be revised because PBGC used "outdated actuarial information." AB at 29-30. You note that the UBL estimate in PBGC's January 29, 2010 determination is based on the Bendix Plan's January 1, 2007 Actuarial Valuation Report ("AVR") and the 2007 Schedule SB. AB at 30. Both of those documents provide data as of January 1, 2007. You contend that PBGC should have used the January 1, 2008 AVR and the 2008 Schedule SB, both of which reported numbers as of January 1, 2008. AB at 30.

You state that both the 2008 AVR and the 2008 Schedule SB were completed long before PBGC's January 29, 2010 determination was issued. AB at 30. You contend that, if PBGC had used these more-recent reports, it would have computed Bendix's section 4062(e) liability more accurately.[56]

Our response. We have granted your request to have Bendix's liability calculated using the 2008 AVR and the 2008 Schedule SB. We concluded that use of those documents is appropriate because they report the Bendix Plan's pension obligations as of January 1, 2008, which is the relevant date for determining Bendix's section 4062(e) liability. We further found that, under the particular circumstances of this case, the use of the more-recent documents would not cause undue delay.[57]

As discussed later in this decision, the Appeals Board, with the assistance of enrolled actuaries, has recalculated Bendix's section 4062(e) liability using the January 1, 2008 valuation date, the 2008 AVR, and the 2008 Schedule SB. Our recalculated amount is $310,238.00 less than the amount PBGC had determined.

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[56] In your view, PBGC's use of the outdated actuarial information caused "a number of errors resulting from the improper "roll-forward" methodology." In your discussion of Issue #4, you elaborate further as to why PBGC's "roll-forward" methodology" in valuing the Bendix Plan's benefit liabilities led to what you consider to be "flawed results."

[57] The 2008 AVR is dated August 2009. The 2008 Schedule SB was signed by the Bendix Plan's actuary on October 12, 2009. Thus, these documents were not completed until 19 months and until 21 months, respectively, after the cessation of operations at the Frankfort facility occurred. Although PBGC did not issue its section 4062(e) determination to Bendix until a later date (January 29, 2010), in cases involving other employers it may be in PBGC's interest to issue its determination of section 4062(e) liability soon after the triggering event and/or to have an expedited process for reaching a final decision on appeal. Thus, our grant of your request to use the 2008 AVR and the 2008 SB does not establish a precedent to be applied in other cases.

Issue #4: Are PBGC's 4062(e) liability calculations flawed because PBGC used a "roll-forward" methodology for some purposes but actual data for other purposes?

Your appeal. In your initial appeal and in your appeal supplement, you contend that PBGC's failure to use the 2008 AVR and 2008 Schedule SB led to a "flawed" calculation of Bendix's section 4062(e) liability. AB at 29-31; AB Supplement ("AB Supp.") at 4-5. Specifically, you state that: (1) for purposes of determining the Bendix Plan's benefit liabilities, PBGC used data as of January 1, 2007, to which it made "unspecified adjustments and assumptions to roll-forward the data" to December 31, 2007; but (2) for purposes of determining the Bendix Plan's assets, PBGC used data as of December 31, 2007. AB at 30. You assert that this "disconnect" in the data PBGC used for valuing the plan's assets and liabilities is likely to have produced "inaccuracies" in the calculation of the Bendix Plan's UBLs as of January 1, 2008.[58]

Our response. We concluded that your claims with respect to Issue #4 are resolved by our recalculation of Bendix's liability using the January 1, 2008 valuation date, the 2008 AVR, and the 2008 Schedule SB. *See* our response to Issue #3. No roll-forward adjustments and assumptions were made in our recalculation.

We note that, in other cases involving section 4062(e) liability, PBGC may not have actuarial data that reflects a pension plan's liabilities as of the applicable date, i.e., the day after the cessation-of-operations date. In such cases, PBGC may need to adjust available actuarial data in calculating the plan's UBLs for purposes of section 4062(e) liability. Because it is not necessary to our decision, we do not address the data sources, actuarial assumptions and methodology PBGC should use in such cases.

Issue #5: Should PBGC, in calculating Bendix's section 4062(e) liability, have deducted the value of the contingent claim under ERISA section 4062(c) for the shortfall amortization "charge" and "installments"?

Your appeal. You state that, under PBGC's section 4062(e) regulation, the starting point for determining 4062(e) liability is the amount of a plan's UBLs, determined as if the plan terminated immediately after the cessation-of-operations date. AB at 27. You assert that: (1) the plan's UBLs "equals the value of the plan's benefit liabilities minus the fair market value of plan assets . . . as of the termination date;" and (2) "the value of plan assets includes the value, . . . as of the assumed termination date, of any plan receivables." AB at 32.

You contend that PBGC's $16,947,933.00 section 4062(e) liability determination for Bendix "inappropriately disregards the value of a key receivable—the claim that the successor trustee of the Plan would have, on behalf of the Plan, under ERISA Section 4062(c)." AB at 32. You note that ERISA section 4062(c) provides the "Section 4042 Trustee" with a claim upon plan termination for the sum of the "shortfall amortization charge" for the current plan year (i.e., the plan year containing the plan's termination date) and the "shortfall amortization installments"

[58] AB at 29-31; AB Supp. at 4-5. Referring to certain data in the 2008 AVR, such as the benefit payments the Bendix Plan made in 2007 and terminations of employment that occurred in 2007, you further claim that PBGC's "roll-forward" methodology is likely to have resulted in an inflated amount with respect to Bendix's section 4062(e) liability.

for all future plan years. AB at 32. Referring to the 2008 AVR's computation of the Bendix Plan's shortfall amortization installment amount, you calculate the Section 4042 Trustee's 4062(c) claim to be $15,717,450, based on a January 1, 2008 valuation date. AB at 32.

You contend that "PBGC has suggested no basis, and the Company believes that none exists," for failing to include the Section 4042 Trustee's $15,717,450.00 section 4062(b) claim as a Bendix Plan asset. AB at 32. Accordingly, in your view, the value of the Bendix Plan's assets as of January 1, 2008, must be increased by $15,717,450.00, with a corresponding decrease in the amount of the Bendix Plan's UBLs as of that date. AB at 32.

You further refer to a PBGC policy that explains how PBGC finalizes its claims for UBLs and for "Due and Unpaid Contributions" ("DUEC") in the situation where PBGC ends up with a combined recovery for its various claims upon plan termination. You state that this policy "explain[s] the methodology PBGC uses to determine how much of a combined recovery is allocable to its DUEC recovery and thus serves to reduce the amount of its UBL claim." AB at 33. You assert that PBGC should apply a methodology similar to the policy's, which prevents "double-counting" by PBGC. AB at 33. Additionally, you observe that, "[a]lthough the section 4062(c) claim may have little value in a bankruptcy, it clearly has significant value in this case, where the Plan sponsor remains ongoing and is a part of a robust controlled group." AB at 33. Accordingly, you contend that PBGC erred in determining Bendix's section 4062(e) liability because it did not include a deduction for the Section 4042 Trustee's section 4062(c) claim. AB at 33-34.

Our response. In the plan termination context, PBGC applies a valuation rule that takes into account that PBGC may recover (often simultaneously) on its employer liability claim under section 4062(b) and on its claim (as trustee) under section 4062(c).[59] This PBGC rule adjusts recovery values to reflect that the recovery on the section 4062(c) claim – which is valued as a plan asset – has the effect of reducing the amount of PBGC's section 4062(b) claim for UBLs. Your appeal proposes to apply a similar rule to section 4062(e) liability – even though, during the relevant section 4062(e) time period, only one recovery could occur with respect to the Bendix Plan. As is further explained below, we reject your position on this issue.[60]

As you state in your appeal, section 4062(e) liability is based on the plan's UBLs and is determined as if the plan terminated immediately after the cessation-of-operations date. The ERISA section 4062(c) claim, which you propose to offset, is payable to the "Section 4042 trustee" (who ordinarily is PBGC) and arises upon the plan's actual termination. The section 4062(c) liability is incurred by the plan's contributing sponsor and members of its controlled group and is for the sum of: (1) the "shortfall amortization charge" for the current plan year (i.e.,

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[59] *See* PBGC Operating Policy Manual Chapter 8.2-1 (5th Ed. 07/31/2008), titled "Valuation and Allocation of Recoveries," which is Exhibit 9 to your appeal.

[60] We do not address in this decision whether the Section 4042 trustee's claim under ERISA § 4062(c) equals the $15,717,450.00 amount that you state in your appeal. Because we decided that there should be no deduction in the section 4062(e) liability calculation for the trustee's claim under section 4062(c) (which would arise upon plan termination), it is unnecessary to determine the amount of the trustee's potential section 4062(c) claim.

the plan year containing the plan's termination date); and (2) the "shortfall amortization installments" for succeeding plan years.[61]

Significantly, PBGC's claim under section 4062(e) – which arose on the date of the section 4062(e) event – is the only Title IV employer liability claim that Bendix could incur unless (and until) the Bendix Plan terminates.[62] Bendix's potential future liability under section 4062(c), by contrast, is only a contingent claim. The section 4062(c) claim is contingent because the Bendix Plan has not terminated, a Section 4042 Trustee has not been appointed, and no recovery is possible under section 4062(c) unless and until the Bendix Plan terminates. Accordingly, you are asking that Bendix's liability amount under section 4062(e), which was triggered immediately on the December 31, 2007 cessation-of-operations date, be reduced by a section 4062(c) claim amount that may only *possibly* be payable as of a later date.

Moreover, if the pension plan terminates within the five-year-period covered by section 4062(e), the section 4062(e) liability effectively ends. This is because, upon plan termination, the section 4062(e) amounts paid into escrow or covered under a bond are to be treated as plan assets.[63] Consequently, the forfeiture of section 4062(e) funds has the immediate impact of increasing the plan's assets and reducing its UBLs. This reduction in UBLs is favorable to the employer because it reduces its liability under ERISA section 4062(b) to PBGC. The practical result of these employer liability provisions is that, at plan termination, a final accounting is made and PBGC will not collect more than what is needed to fully satisfy the plan's benefit obligations as of the plan termination date.[64] Accordingly, we see no reason why section 4062(e) liability should be reduced based on a section 4062(c) claim that could only arise on the Bendix Plan's termination date.

II. APPEALS BOARD'S CALCULATION OF BENDIX'S SECTON 4062(e) LIABILITY

In an effort to expedite the processing of your appeal, the Appeals Board has recalculated Bendix's section 4062(e) liability amount. Specifically, with the assistance of enrolled actuaries, we calculated the 4062(e) liability amount based on: (1) a valuation date of January 1, 2008; and (2) the Bendix Plan's January 1, 2008 actuarial valuation report and the 2008 Form 5500 Schedule B. We also obtained a second calculation that shows the 4062(e) liability as of a

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[61] It also captures other amounts tied to funding waivers, which are not applicable here.

[62] Although Subtitle D of ERISA Title IV contains several employer liability provisions, only two of the provisions provide for liability before plan termination – section 4062(e) and section 4063 (withdrawal of a substantial employer from a multiple employer plan). Since the Bendix Plan is not a multiple employer plan, the only pre-termination employer liability with respect to that plan is under ERISA section 4062(e). Our reference to employer liability does not encompass PBGC's claims for premiums under ERISA § 4007 or its penalty assessment authority under ERISA § 4071, which are immaterial to our analysis of this issue.

[63] ERISA § 4063(c)(3)(B).

[64] Although we would not expect it to occur, it is theoretically possible that, after the section 4062(e) amount becomes a plan asset of a terminated plan, the plan will be fully funded and the employer will not otherwise owe any additional amounts to PBGC or to the plan. In that situation, PBGC would refund any surplus amounts to the employer with respect to the section 4062(e) liability it had incurred, as is provided in ERISA section 4063(b)(3)(C).

valuation date of January 1, 2008, but without using the information in the 2008 valuation and 2008 Schedule B. Thus, this second calculation uses the same information that DISC used in its 4062(e) calculation, but reflects a valuation date that is one day later. The calculations show:

- if a January 1, 2008 valuation date is used and the liability is determined using the 2007 AVR and the 2007 Schedule SB, the Bendix Plan's UBLs are $16,904,622.00 (which is a decrease of $43,311 from the amount DISC calculated); and
- if a January 1, 2008 valuation date is used and the liability is determined using the 2008 AVR and the 2008 Schedule SB, the Bendix Plan's UBLs are $16,637,695.00 (which is a decrease of $310,238.00 from the amount DISC calculated).

The table below summarizes the calculations for the Bendix Plan's UBLs:

	(1)	(2)	(3)
	Calculations completed by DISC	**Appeals Board's calculations**	**Appeals Board's calculations**
Actuarial Valuation Report (AVR) Date	01/01/2007	01/01/2007	01/01/2008
Part I -- Actuarial Assumptions			
Valuation Date	31-Dec-07	01-Jan-08	01-Jan-08
PBGC Interest Factors			
First 20 Years	5.37%	5.42%	5.42%
Thereafter	5.04%	4.49%	4.49%
Part II -- Underfunding Details (in dollars)			
Assets	$21,622,103	$21,622,103	$21,643,430
As of date for assets	12/31/2007	12/31/2007	12/31/2007
Source	2007 Sch H	2007 Sch H	1/1/2008 AVR
Estimated Unfunded Benefit Liability - UBL			
Retired	$24,263,677	$24,191,354	$25,668,368
Terminated Vested	$3,819,160	$3,823,943	$11,322,643
Active	$9,962,058	$9,984,750	$770,427
Expenses	$525,141	$526,678	$519,687
Total	$38,570,036	$38,526,725	$38,281,125
UBL	**$16,947,933**	**$16,904,622**	**$16,637,695**
Change from Column (1)		($43,311)	($310,238)
Part III -- Number of Participants at Plan Valuation Date			
Total	1,109	1,109	1,061

The Appeals Board also obtained two additional worksheets that each use a January 1, 2008 valuation date. These additional worksheets show the Bendix Plan's UBLs under the assumption that the Bendix Plan did not provide for supplemental benefits. The amounts without supplemental benefits are: (1) $16,373,298.00, if the 2007 AVR and the 2007 Schedule SB are used; and (2) $16,442,923.00, if the 2008 AVR and the 2008 Schedule SB are used. Since the Bendix Plan provides for supplemental benefits, we did not use the calculations without supplements in determining Bendix's section 4062(e) liability amount.[65]

We are providing you with copies of the following documents that relate to the calculations:

- a "Summary of UBL Results" (Enclosure 3);
- Worksheets showing UBLs calculations based on a January 1, 2008 valuation date and information in the 2007 AVR and the 2007 Schedule SB. Enclosure 4 shows the UBLs calculations with supplements, and Enclosure 5 shows the calculations without supplements; and
- Worksheets showing UBLs calculations based on a January 1, 2008 valuation date and information in the 2008 AVR and the 2008 Schedule SB. Enclosure 6 shows the UBLs calculations with supplements, and Enclosure 7 shows the calculations without supplements.

As is stated in the "Discussion of Results" in Enclosure 3, the liabilities shown in Column (3) in the above table are based on the following assumptions that are favorable to Bendix:

- The 2008 AVR does not specifically state the eligibility provisions for the special early retirement benefit (unreduced benefit and supplement payable to age 65), but in all three calculations we assume a participant must be age 60 with 10 years of service (the same as for early retirement);
- Page 5 of the attachment to the 2008 Schedule SB states that "the special early retirement benefit has been excluded from the valuation." During 2007, 6 employees retired from active service but it is unclear whether they retired as a result of the shutdown. If they did retire due to the shutdown, it is unclear whether the actuary included their special early retirement benefits in the valuation liabilities. If the benefits were not included, the liabilities would increase.

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[65] On page 5 of your Appeal Supplement, you refer to a PBGC "discussion notes" document that PBGC's Disclosure Officer provided to you on March 1, 2011. The document you refer to indicates that DISC had calculated UBLs both with and without supplemental benefits. You requested an explanation of a "comment" that appears on the document.

As discussed above, we decided that Bendix's section 4062(e) liability includes supplemental benefits. We also have recalculated Bendix's liability. For these reasons, we concluded it is unnecessary to provide you with an explanation of a "comment" that refers to a calculation of supplemental benefits by DISC's actuaries. Please note that we are providing, as exhibits to this appeal, worksheets that show our calculations both with and without supplemental benefits.

- As of 1/1/2007, there were 15 active participants who were age 60 with 10 years of service. The participant reconciliation shows 6 active participants retired during 2007. As of 1/1/2008, there are 3 active participants who are age 60 with 10 years of service. Therefore, we conclude that there are at least 6 active participants (15 minus 6 minus 3) (and probably more since some of the participants age 55-59 shown in the 1/1/2007 valuation likely turned 60 by 12/31/2007) who are included as terminated vested participants but may actually be entitled to special early retirement benefits as of 1/1/2008. If they are entitled, the liability would be higher.

The Appeals Board, based on the above-discussed calculations, found that the Bendix Plan's UBLs, as of January 1, 2008, and using assumptions that are favorable to Bendix, are $16,637,695.00.

The Board further found no reason to change PBGC's determination that the fraction by which the UBLs amount should be multiplied is one. As previously stated, the fraction of one reflects that: (1) 63 participants were separated from employment as a result of the cessation of operations at the Frankfort facility, and (2) those 63 employees were all of the active participants in the Bendix Plan just prior to the cessation-of-operations date.[66] Accordingly, the Appeals Board determined that Bendix's sections 4062(e) liability amount is $16,637,695.00.

III. OUR RESPONSE TO ADDITIONAL REQUESTS IN YOUR APPEAL

In your appeal, you made several requests that primarily are procedural. Your requests and our responses are as follows:

- You ask the Appeals Board to remand this case to the department that issued the initial determination with specific instructions to recalculate the amount of liability in accordance with applicable law, with that department to issue a revised initial determination to Bendix in accordance with 29 CFR part 4003 that Bendix would have the right to appeal. AB at 34.

Our Response: For the reasons discussed above, the Appeals Board determined that Bendix is liable to PBGC under section 4062(e). To expedite the processing of your appeal, the Appeals Board further has recalculated, with the assistance of enrolled actuaries, the section 4062(e) amount. Having decided all of the issues that were raised in your appeal and the amount of liability, the Appeals Board concluded that there is no need to remand this matter to the department that issued the initial determination.

- You request the Appeals Board to notify Bendix if the Appeals Board shares this appeal with any other PBGC department, including the department that issued the initial determination. You state that this request is "in the interest of ensuring a fair and independent review of this matter." AB at 34.

[66] PBGC's regulation provides that the denominator for the liability calculation is the "total number of the employer's current employees, as determined immediately before the cessation of operations, who are participants under the plan." 29 C.F.R. § 4062.8(a)(2). In this decision, "active participant" refers to an individual who is (as of a particular date) both a current employee of the employer and a participant under the Bendix Plan.

- You also request that, if there are any communications or submissions to the Appeals Board from any other PBGC department relating to this appeal, Bendix be provided with all such communications and submissions and be afforded an opportunity to respond. AB at 34.

Our Response: The Appeals Board declines these requests. The rules governing administrative review of agency decisions are found in part 4003 of PBGC's regulations. The regulations provide, among other things, that the Chairperson of the Appeals Board "shall designate the three officials who will constitute the Appeals Board with respect to a case, *provided that a person may not serve on the Appeals Board with respect to a case in which he or she made a decision regarding the merits of the determination being appealed.*" 29 CFR § 4003.2 (emphasis added). Such was the case here. Your appeal was decided by the undersigned and two other Appeals Board members, none of whom were involved in issuing the initial section 4062(e) determination.

PBGC regulations also provide that, in reaching its decision, "the Appeals Board shall consider those portions of the file relating to the initial determination, all material submitted by the appellant and any third parties in connection with the appeal, and any additional information submitted by PBGC staff." 29 C.F.R. § 4003.59(a). The regulations further state that the Board's decision "shall be in writing, specify the relief granted, if any, state the bases for the decision, including a brief statement of the facts or legal conclusions supporting the decision, and state that the appellant has exhausted his or her administrative remedies." 29 C.F.R. § 4003.59(c). The regulations accordingly delineate the information the Board may consider and the requirements for an Appeals Board decision. The Appeals Board has followed PBGC's regulations in deciding your appeal.

The regulations, however, do not require the Appeals Board to provide an appellant with an "opportunity to respond" to any information or submissions that the Appeals Board obtains before the Board renders its decision. Nor do the regulations require the Appeals Board to notify an appellant if the Board provides a copy of an administrative appeal to PBGC staff.

Finally, the Appeals Board notes that, subject to certain limitations contained in FOIA and the Privacy Act, your administrative appeal became subject to disclosure both inside and outside of the agency after you filed it with the Appeals Board.

- You request the Appeals Board: (1) determine whether PBGC has any other documents relevant to the section 4062(e) liability determination; and (2) either provide Bendix with copies of those documents or with confirmation that none exist. You state that you received a "discussion notes" document only three days before you filed your March 4, 2011 supplemental appeal, and that document "leads to a logical inference that other documents may exist." AB Supp. At 5-6.

Our Response: PBGC's Disclosure Officer is responsible for processing all of your requests for information on behalf of Bendix. Appeals Board personnel, as well as other PBGC employees, work with the Disclosure Officer to ensure that you are provided with the information you are entitled to receive under applicable law. We note that, in reviewing your

appeal, the Appeals Board has examined a number of PBGC documents, and, when they are relevant to the issues you have raised, has discussed them in this decision. To the extent you are suggesting that the Appeals Board has an additional obligation to search for documents and to provide them to you, we disagree with your view and, accordingly, deny your request.

Decision

The Appeals Board has reviewed your appeal of PBGC's determination that Bendix had incurred liability, in the amount of $16,947,933.00, under ERISA section 4062(e). For the reasons explained in this decision, the Board decided: (1) January 1, 2008 is the correct date for valuing Bendix's liability under section 4062(e), rather than the December 31, 2007 date that PBGC used; and (2) the information in the Bendix Plan's January 1, 2008 actuarial valuation report ("AVR") and in the Bendix Plan's 2008 Form 5500 Schedule SB filing with the IRS should be used in computing Bendix's liability.

The Appeals Board further decided that, based on the January 1, 2008 valuation date, the 2008 AVR, and the 2008 Schedule SB, Bendix's liability under section 4062(e) is $16,637,695.00, which is $310,238.00 less than the amount PBGC initially determined.

In all other respects, your appeal is denied for the reasons explained in this decision. This decision is PBGC's final Agency action with respect to Bendix's section 4062(e) liability. Bendix, accordingly, has exhausted its administrative remedies. Bendix, if it wishes, may seek review of this decision in federal court.

Sincerely,

Charles W Vernon

Charles W. Vernon
Appeals Board Chair