



September 7, 2010

## MEMORANDUM

TO: Jonathan Glazier  
National Rural Electric Cooperative Association

From: Ernest B. Abbott

**Re: FEMA Reimbursement of Labor Costs Incurred by an Eligible  
Electric Cooperative After a Major Disaster**

This memorandum responds to your request that I summarize FEMA's policies applicable to reimbursement of labor costs, and particularly overtime costs, incurred by electric cooperatives when performing emergency work eligible for assistance under the Public Assistance Program.

### Summary

1. FEMA reimburses only an applicant's *increased* costs incurred in paying its own employees to perform eligible emergency work: overtime and related benefits. Straight time of force account labor performing emergency work is ineligible.
2. The entire labor cost – straight time, overtime and related benefits – is eligible for labor performing permanent work to repair, restore, or replace damaged facilities.
3. Only the increased cost of force account labor performing emergency work is eligible. FEMA does not reimburse for time of employees sleeping, resting or being paid for "stand-by" duty. Reflecting its view on how long humans can work without sleeping, FEMA will not reimburse more than 48 consecutive hours of work and more than 16 hours per day thereafter.
4. For overtime costs to be eligible, the overtime must be paid pursuant to an applicant's personnel policies adopted prior to the disaster, and applied whether or not federal funds are available to pay for the overtime.

## Background

### ***Different Treatment of Labor Costs of Emergency Work and Permanent Work.***

Under FEMA's Public Assistance Program, electric cooperatives are eligible for disaster assistance reimbursing "not less than 75%" of the "net eligible cost" of (1) performing eligible emergency work, such as debris removal and the restoration of power to consumers; and (2) repairing, restoring, reconstructing, or replacing utility facilities that are damaged as a result of a major disaster declared by the President.<sup>1</sup>

FEMA classifies work to repair, restore, reconstruct, or replace utilities' facilities as "Category F" permanent work.<sup>2</sup> When applicants use their own labor force, called "Force Account Labor", to perform Category F "permanent work", FEMA includes the full cost of the labor of all employees – including straight time, overtime, and an allocation of the tax and benefit costs.<sup>3</sup> By contrast, in determining the eligible cost of "emergency measures" performed by the applicant's own labor force, FEMA only includes employee overtime and related benefits; the straight time cost of Force Account Labor performing emergency work is ineligible for assistance.<sup>4</sup>

FEMA began treating the labor costs of emergency work differently than for permanent work in 1992, after concluding that FEMA should only reimburse the *extra* costs, or incremental costs, which an applicant incurs as a result of a disaster:

Assistance under the Stafford Act is intended to be supplementary to the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused by a major disaster.

When an applicant for disaster assistance performs response or recovery work using regularly employed personnel, it is using its pre-disaster existing resources. The term for this practice is "Force Account Labor." *Considering just the straight or regular time salaries of these employees, there is no incremental cost to the applicant because of the disaster. This salary cost, including normal fringe benefits, would be incurred whether or not the disaster occurred.* In the aftermath of a disaster, an applicant will generally perform debris clearance and emergency protective measure activities with its own regular employees. Thus, no incremental cost is incurred by an applicant for the regular time portion of those salaries of their personnel engaged in these types of activities.

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<sup>1</sup> Section 403, 407, and 406 of Robert T. Stafford Disaster Relief and Emergency Assistance Act, PL 93-288 as amended, 42 USC §§ 5170b, 5172, and 5173.

<sup>2</sup> FEMA Public Assistance Guide, (FEMA 322), June 2007, at 66.

<sup>3</sup> *Id.* (FEMA 322) at 42.

<sup>4</sup> 44 CFR §206.228(a)(2); FEMA Public Assistance Guide, June 2007, at 42.



However, overtime wages of regular employees, including fringe benefits, and both regular and overtime wages for extra employees hired to perform eligible work, do represent an incremental disaster related cost to the existing regular time labor resources of the applicant.<sup>5</sup>

FEMA did not exclude straight time labor costs for permanent work funded under §406 of the Stafford Act, however, because these costs were specifically included in the Stafford Act's definition of eligible costs for permanent work:

Base and overtime wages for the employees and extra hires of a State, local government, or [owner of an eligible non-profit facility], plus fringe benefits on such wages to the extent that such benefits were being paid before the major disaster.<sup>6</sup>

In other words, FEMA does not have authority under the Stafford Act to declare ineligible the straight time costs of Force Account Labor performing permanent work.

***Distinguishing "Category B" Emergency Work to Restore Power from "Category F" Permanent Work That Restores Power***

The different treatment for eligibility of labor costs for Category B emergency measures to restore power and Category F permanent work makes it very important to know whether employees are performing emergency or permanent work. Unfortunately, this distinction has not been clear. Very frequently, the best way to restore power is to replace damaged poles and conductor with new (and permanent) poles and conductor; the new poles and conductor are "permanent."

FEMA recently attempted, in a formally published "fact sheet", to help utilities determine whether work on a particular power restoration project should be classified as a "Category B" temporary emergency measure to restore power or a "Category F" permanent repair.<sup>7</sup> FEMA correctly observes that "RECs, municipal utilities, and public power districts work to restore power to customers as soon as possible following disasters."<sup>8</sup> Although the Fact Sheet's discussion of this issue is not a model of clarity, it appears that:

1. When restoring power, FEMA assumes that utilities will make field judgments on whether to restore power using "temporary fixes" (e.g. reconnect spliced lines that can no longer sag to code), or accomplish a permanent repair (replacing poles or conductor). Temporary fixes are treated as Category B emergency work *if further repair work will be required* (such as sagging to code or replacing damaged conductor).

<sup>5</sup> 57 Fed. Reg. 18442 (April 30, 1992)(emphasis added).

<sup>6</sup> Stafford Act §406(a)(2)(C), 42 USC §5172(a)(2)(C). Prior to 2000, language was located at Stafford Act §406(f)(5), 42 USC §5172(f)(5).

<sup>7</sup> Disaster Assistance Fact Sheet, "Electric Utility Repair", (Herein: "DAP 9580.6"), 9/22/09, at pp. 2-3.

<sup>8</sup> *Id.*, p. 2.



2. If no further repairs are required, then the initial work is considered permanent and it should be classified as Category F.
3. After a utility restores power using a (Category B) temporary repair, its subsequent permanent repair work should be classified as Category F.

In general, FEMA believes that “most repairs are permanent in nature”<sup>9</sup>, so if applicants hope to gain FEMA funding for further work after power restoration, applicants must be prepared to demonstrate that the temporary work already performed did not in fact accomplish a permanent restoration of the damaged facilities.<sup>10</sup>

Note that, while the eligibility of force account labor costs is more limited for Category B emergency measures than for Category F permanent work, it may not always be advantageous to a cooperative for its costs in restoring power to be characterized as permanent work. Not infrequently, the “federal share” of eligible costs reimbursed by FEMA is higher for “emergency measures” than for permanent work.<sup>11</sup> Cooperatives should be aware of which classification would lead to greater total assistance from FEMA, and be prepared to advocate for that classification – particularly where FEMA’s policy appears ambiguous.

***Issues raised by FEMA Limitation on Eligibility of Labor Costs for Category B Emergency Work.***

FEMA has provided guidance on a number of different issues that can arise when determining whether labor costs incurred for emergency work are eligible. In all of the situations covered, FEMA is applying two basic principles: whether the costs are truly “incremental” and would not have been incurred had there been no declared major disaster or emergency event; and whether the facility was applying preexisting policies that provide for the costs at issue and do not depend on whether costs are reimbursable by the federal government. The importance of adopting a clear overtime policy *prior to a disaster* cannot be overemphasized.

*Determination of Straight Time and Overtime.* FEMA determines “straight time” and “overtime” in accordance with the Applicant’s own policies – *as established and implemented before the disaster*. Thus,

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<sup>9</sup> *Id.* FEMA’s determination that much of the work performed during the immediate restoration of power should be classified as “permanent work” raises a potential (and probably unintended) problem for eligibility of work performed by mutual aid crews restoring power in the immediate aftermath of a disaster. FEMA’s Mutual Aid Policy states that “mutual aid work” is not eligible if it is “permanent recovery work”. FEMA Disaster Assistance Policy 9523.6, ¶VII.F.b. See discussion at Page 8 of this memorandum.

<sup>10</sup> Utilities’ efforts to do so are aided by objective criteria for replacement of conductor also adopted by FEMA in its Electric Utility Repair Fact Sheet, *Id.* at p. 4.

<sup>11</sup> FEMA Recovery Policy, “100% Funding for Direct Federal Assistance and Grant Assistance”, (Herein: RP 9523.9), 6/09/06, ¶ VII.B.C.



straight-time and overtime will be determined in accordance with the applicant's pre-disaster policies, which should be applied consistently in both disaster and non-disaster situations. For example, one applicant may define labor exceeding 8 hours a day as overtime, while another might define labor exceeding 40 hours a week as overtime.<sup>12</sup>

FEMA will not reimburse overtime costs that become payable only under an overtime policy or decision adopted after a disaster. FEMA's position reflects an understandable concern that the change was adopted only because federal money was available to pay for it, not because it was a sensible and generally applicable employment policy that applicant is willing to pay for even when FEMA is not around. If an applicant believes that more generous overtime amounts should be paid when linemen work extremely long hours, it must establish and document a policy to that effect prior to the disaster.<sup>13</sup> FEMA has also stated that even if an Applicant can prove that a written policy was in effect prior to the disaster, FEMA will only reimburse Applicants who have consistently applied this pre-disaster policy in non-federally-declared situations.<sup>14</sup>

*Reasonable Costs.* Reassigned employees are permanent employees who are reassigned from administrative to field positions. Eligibility of the costs of these reassigned employees generates another concern: some administrative / executive employees are paid much more than the field employees who normally perform this work and overtime rates for expensive executives performing field work may be high. However, FEMA's Public Assistance Guide now confirms that "[t]he pay rate is based on the *reassigned* employee's normal rate of pay, not the pay level appropriate to the work."<sup>15</sup> Nonetheless, FEMA's Labor cost policy states that "all costs, including premium pay, must be reasonable and equitable for the type of work being

<sup>12</sup> FEMA Recovery Policy, "Labor Costs – Emergency Work", (Herein: RP 9525.7), 11/16/06, ¶ VII.C.

<sup>13</sup> In City of Lake Charles, PA ID# 019-41155-00, FEMA-1607-DR-LA, 6/17/2008, available at: [http://www.fema.gov/appeals/brief.jsp?Appeal\\_ID=2957](http://www.fema.gov/appeals/brief.jsp?Appeal_ID=2957), (as of 7/15/10). The Applicant had a "holiday pay" policy of compensating employees 2 ½ times their base pay in effect at the time of the disaster. But applicant changed its policy after the disaster by designating a new "emergency holiday." FEMA refused to reimburse the cost incurred for the extra overtime caused by this post disaster holiday designation.

<sup>14</sup> In St. Johns County, Florida, PA ID # 109-99109-00, FEMA – 1545/1561 –DR-FL, 2/09/07, available at: [http://www.fema.gov/appeals/brief.jsp?Appeal\\_ID=2237](http://www.fema.gov/appeals/brief.jsp?Appeal_ID=2237), (as of 7/15/10). FEMA determined the applicant's overtime policy was discretionary and did not apply uniformly to both Federal and non-Federal events, as prescribed for in OMB Circular A-87. Although the applicant argued that this was not the case, it did not provide documentation to the contrary.

<sup>15</sup> FEMA Public Assistance Guide, FEMA Publication 322, June 2007, at 43. This is a complete reversal of FEMA's position in the 1999 version of the Public Assistance Guide, which stated: "a reassigned employee may have a higher salary than the personnel normally performing the work. In this case, the eligible labor rate should be the average rate for the employees who normally do that type of work." (At 35.)



performed,”<sup>16</sup> and FEMA has denied eligibility of premium pay on ground the premium pay rate is unreasonably high.<sup>17</sup>

*Exempt Employees.* Exempt employees are generally paid on a salary basis and not on an hourly basis. They are “exempt” from the minimum wage and overtime provisions of the Federal Labor Standards Act and usually do not receive overtime for work beyond normal work days and work weeks. As a result, even if exempt employees are sent out to the field to restore power, and those employees work double time or more performing emergency work, FEMA will assume that they are not entitled to additional compensation – *unless* there was a preexisting policy in place that specifies that overtime *will* be paid– and how the amount of overtime is calculated.<sup>18</sup>

*Supervision and Management of Force Account Work.* Regular-time of a subgrantee’s supervisory employees for direct supervision of force account employees performing eligible emergency work is not an eligible cost. However, the regular and overtime for the same direct supervision of force account employees performing eligible permanent work generally is eligible. Labor costs of second level supervisors (and above) are ineligible unless the subgrantee can account for specific time spent on eligible permanent projects. (Generally, the labor costs of only first line supervisors of permanent work are eligible.)<sup>19</sup>

*Temporary and special hires vs. permanent workforce.* When a utility hires new employees, on either a permanent or temporary basis, in order to perform eligible emergency work caused by the disaster, the utility incurs costs that it would not have had to pay if no disaster had occurred. The full cost – straight time as well as overtime – of new employees hired specifically to perform emergency work is eligible. By contrast, “permanently employed personnel” (in other words, those already on the payroll) who perform emergency work would have been paid anyway; their “straight time” and regular benefits are not caused by the disaster and are ineligible.<sup>20</sup> Even seasonal employees “used for a disaster during a season of employment” are treated as pre-existing employees if they were covered under budgets established prior to the disaster.<sup>21</sup>

*Backfill employees.* Generally, the only costs that are eligible for reimbursement are those incurred paying those actually performing eligible work. But not infrequently,

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<sup>16</sup> RP 9525.7, ¶ VII.C.

<sup>17</sup> Louisiana Department of Social Services, PA ID # 000-UTY0F-00, FEMA-1548-DR-LA 3/31/06), available at [http://www.fema.gov/appeals/brief.jsp?Appeal\\_ID=1746](http://www.fema.gov/appeals/brief.jsp?Appeal_ID=1746) (as of July 16, 2010).

<sup>18</sup> RP 9527.7, ¶ VII.F.5. See City of Lubbock, PA ID # 303-45000-00, FEMA – 3216 – EM – TX, 10/24/07, available at: [http://www.fema.gov/appeals/brief.jsp?Appeal\\_ID=2337](http://www.fema.gov/appeals/brief.jsp?Appeal_ID=2337), (as of 7/15/10).

<sup>19</sup> Elk County Water District, PA ID#045-91000, FEMA – 1155 – DR – CA, 9/29/05, available at: [http://www.fema.gov/appeals/brief.jsp?Appeal\\_ID=1716](http://www.fema.gov/appeals/brief.jsp?Appeal_ID=1716), (as of 7/15/10).

<sup>20</sup> RP 9527.7, ¶ VII.A.

<sup>21</sup> RP 9527.7, ¶ VII.B.



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applicants ask their own administrative employees – because of previous field experience, for example – to perform the emergency work of restoring power. They then reassign other employees or hire temporary or contract personnel to 'backfill' and do the work of the displaced employees. In this event, the "new" or reassigned employees are not the ones performing eligible emergency work. However, FEMA has recognized that in these situations an applicant indeed may incur an incremental cost caused by the disaster. FEMA's Policy provides guidance on eligibility in five situations:

1. If the backfill employee is a contract or extra hire, the cost of this extra person represents an extra cost to the applicant. Regular and overtime are eligible. If the backfill employee was already permanently employed, straight time is not eligible. Only overtime costs are eligible.
2. The cost of straight-time salaries and benefits of an applicant's permanently employed personnel, of any department, regardless of any inter-departmental agreements, are not eligible.
3. If the backfill employee is a regular employee who is called in on his/her day off (weekend or other off day), there may be an extra cost to the applicant. Regular and overtime costs may be eligible.
4. If the backfill employee is called in from scheduled leave, there should be no extra cost as the leave can be rescheduled. Only the overtime is eligible.
5. Generally, exempt employees (i.e. those who are exempt from minimum wage and overtime provisions of the Fair Labor Standards Act) performing backfill work are not eligible for overtime, unless specified in an applicant's pre-disaster policy.<sup>22</sup>

*Contract Costs.* The costs incurred when using "contractors, other cooperatives under mutual aid agreements, or temporary hires" to perform eligible emergency work are clearly 'incremental' costs caused by the disaster, and hence all (reasonable) labor costs incurred under the applicable contract or mutual aid agreement would be eligible. Note, however, that the permanent workforce that supervises these contractors, mutual aid providers, and temporary hires would have been paid whether the disaster existed or not – and so only the overtime of these supervisory personnel would be eligible.<sup>23</sup>

FEMA's Mutual Aid Policy similarly establishes that "the labor force expenses of a Providing Entity will be treated as contract labor, with regular time and overtime wages and certain benefits eligible, provided labor rates are reasonable." VII.E.3.

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<sup>22</sup> RP 9525.7, ¶ VII.F.

<sup>23</sup> RP 9525.7, ¶ VII.E., See also Pascagoula, MS, FEMA – 1603 – DR – MS, PA ID# 059-55360-00/21/09, available at: [http://www.fema.gov/appeals/brief.jsp?Appeal\\_ID=3939](http://www.fema.gov/appeals/brief.jsp?Appeal_ID=3939) (as of 7/15/10).



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However, the Mutual Aid Policy also states that mutual aid work is only eligible if it is emergency work; “[e]xamples of mutual aid work that are not eligible include ... Permanent recovery work.”<sup>24</sup> Yet as noted above, mutual aid crews working to restore power may well effect a permanent restoration, and this work will be classified as a Category F permanent restoration. We do not believe that FEMA intended to render ineligible the cost of mutual aid work to restore power even if it will now be classified as permanent work, although NRECA may wish to clarify this matter with FEMA.

*Limitations on Hours.* In the immediate aftermath of a disaster event, utility linemen often work extraordinary hours in an effort to reestablish electric service to as many customers as possible as quickly as possible. Not infrequently, linemen work around the clock in the immediate aftermath of a disaster in order to restore power quickly. If outages remain, they must rest, though they will continue to work long hours until service is restored.

FEMA did not have formal policy limiting the reimbursement of cost incurred when linemen work these extraordinary hours until 2006 – after the issue was highlighted by the extended response efforts required by Hurricane Katrina.<sup>25</sup> However, FEMA has now stated in its formal “labor cost” policy document that it will not reimburse overtime costs of employees who have worked more than 48 consecutive hours without an extended rest period.

First, FEMA stresses that it only pays for time spent actually working, not for time spent sleeping or resting or standing by until deployment:

Reimbursement of labor costs for employees performing emergency work is limited to actual time worked, even when the applicant is contractually obligated to pay for 24 hour shifts... All requested hours must be for actual time worked. Standby time is not eligible under the Public Assistance Program or the Fire Suppression Assistance Program.<sup>26</sup>

Based on this policy, for example, FEMA has disallowed the costs incurred by a hospital when it calls off-duty medical and nursing and other personnel in to stay at

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<sup>24</sup> FEMA Disaster Assistance Policy 9523.6, “Mutual Aid Agreements for Public Assistance and Fire Management Assistance”, ¶VII.F.b.(i).

<sup>25</sup> Thus, for disasters declared prior to November 16, 2006, applicants whose linemen actually worked extended hours that are not reimbursable under the new policy may argue that that policy does not apply to them and that all time spent actually working to restore power should be eligible. For example, in 2008, FEMA approved reimbursement of fire department employees paid for 24 hours per day for 14 days – presumably because its policy allowing reimbursement of only 48 hours of consecutive work had not yet been adopted. City of Lake Charles, PA ID# 019-41155-00, FEMA – 1607-DR-LA, 6/17/2008, available at: [http://www.fema.gov/appeals/brief.jsp?Appeal\\_ID=2957](http://www.fema.gov/appeals/brief.jsp?Appeal_ID=2957), (as of 7/15/10).

<sup>26</sup> RP 9525.7, ¶VII.H.



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the hospital in advance of hurricane landfall – so that they are available to report when the “on-duty” staff reaches the end of their shift – even if storm conditions make travel to the hospital impossible. FEMA also disallows labor costs for employees sent home or told not to report due to emergency conditions.<sup>27</sup> Time spent at home because it is not safe to travel to work is not time spent actually performing eligible emergency work and is not eligible.

Second, FEMA has limited the consecutive hours that an employee of an applicant can work without rest – and have the overtime cost of that labor reimbursed by FEMA – to 48 hours. FEMA simply concludes that:

It is not reasonable for a person to work more than 48 hours continuously without an extended rest period.<sup>28</sup>

Finally, FEMA has announced that after the initial 48 hour non-stop effort, and an extended rest period, it would still not be reasonable for an employee to continue working more than 16 hours per day. Accordingly, FEMA policy limits reimbursement of emergency work to:

up to 24 hours for each of the first two days,<sup>29</sup> and up to 16 hours for each of the following days for emergency work.<sup>30</sup>

However, in a 2008 decision, FEMA made an exception to the application of this policy with respect to Hurricanes Rita and Katrina. Specifically, FEMA granted reimbursement to eligible firefighters “up to 24 hours per day during the first 14 days after the disaster for work performed beyond their regularly scheduled shifts.”<sup>31</sup>

*Donated and Voluntary Resources:* FEMA only reimburses “costs” incurred by eligible governments and non-profit entities. If a cooperative utility receives help from volunteers who remove debris or help free a bucket truck stuck in the mud – the volunteer’s time is a donation to, and not an eligible cost incurred by, the cooperative. Accordingly, neither the “straight time” nor the “overtime” of these volunteers is reimbursable.<sup>32</sup> However, cooperatives should still seek to record the total time spent by volunteers on these emergency measures. FEMA will credit the value of

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<sup>27</sup> *Id.* ¶VII.D.

<sup>28</sup> *Id.* ¶VII.H.

<sup>29</sup> FEMA does not clearly state that whether the 48 hour period non-stop effort period can be different for each employee, as opposed to approval of one single 48 hour period for the entire organization. However, since the agency’s judgment about the reasonableness of working more than 48 hours appears premised on how long human beings can reasonably be expected to work without rest, I believe that this 48 hour period applies to each employee and is not the same across the organization.

<sup>30</sup> *Id.*, ¶VII.H.

<sup>31</sup> City of Lake Charles, PA ID# 019-41155-00, FEMA – 1607-DR-LA, 6/17/2008.

<sup>32</sup> *Id.* ¶VII.I.

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this time against the non-Federal cost share in accordance with its donated resources policy.

Sincerely,

A handwritten signature in black ink, appearing to read "Ernest B. Abbott". The signature is stylized, with the first name "Ernest" written in a cursive script and the last name "Abbott" in a more blocky, capital-letter style. There is a horizontal line extending from the end of the signature.

Ernest B. Abbott