

FROM THE EDITOR

Federal Election Law Considerations for Electric Cooperatives

This month's editorial was written by Jessica Tiahrt, NRECA Member Counsel, and is part 1 of a 2-part series.

Electric cooperatives often ask whether, and if so how, they may participate in local, state, or federal campaigns and elections.¹ In particular, they ask whether they may support, directly or indirectly, specific candidates. As a federal election year approaches, it may be helpful to address these questions.

Electric cooperatives can be involved in the political arena in a variety of ways, such as inviting candidates to speak at cooperative meetings or soliciting employees and directors for personal financial contributions to a political committee.

Federal law prohibits corporations, labor organizations, or incorporated membership organizations from making contributions to federal candidates.² Electric cooperatives, therefore, may not contribute to federal candidates. However, these entities are allowed to establish separate segregated accounts with personal funds from eligible employees or members for the purpose of making contributions to federal candidates.³ The account is more commonly referred to as a political action committee (PAC). PACs contributing to federal candidates are regulated by the Federal Election Commission (FEC)⁴ under the Federal Election Campaign Act of 1971 (FECA), as amended.⁵

NRECA's PAC, the Action Committee for Rural Electrification® (ACRE®), is the

largest PAC in the electric utility sector⁶ with nearly 28,000 employees, directors, and member-owners participating from more than 800 of NRECA's member systems.

In addition to ACRE, various electric cooperative state associations and generation and transmission cooperatives have established federal PACs.⁷ All federal PACs established by NRECA members are affiliated with ACRE and viewed by the FEC as one political action committee.⁸

Any electric cooperative participating in ACRE or an affiliated federal PAC must comply with solicitation regulations.

Solicitations

An important part of participating in any PAC is understanding which individuals can be asked to contribute personal funds and the legal methods of asking those individuals to contribute.

Who May be Solicited. NRECA and its member cooperatives are permitted to solicit the cooperatives' boards of directors and executive personnel – a group referred to as the "restricted class."⁹ The restricted class includes salaried employees who have "policymaking, managerial, professional, or supervisory responsibilities."¹⁰ Immediate family residing in the same home may also be solicited.¹¹ Minors may contribute provided that: (1) they are in possession of their own funds; (2) the decision to contribute is made

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knowingly and voluntarily; and (3) the contribution does not come from a gift given to the minor for the purpose of contributing to the PAC.¹²

In addition to directors and eligible staff, the FEC recognizes distribution cooperative member-owners as part of the cooperative's restricted class.¹³ In an Advisory Opinion issued to NRECA, the FEC explained that an individual who "affirmatively decides to become a member [of an electric cooperative affiliated with NRECA], affirms the membership frequently through the payment of monthly electric bills, and

has the ability to vote directly for the board of directors" is eligible for solicitation.¹⁴ Following the Advisory Opinion, NRECA created the ACRE Co-op Owners for Political Action® program to promote ACRE to distribution cooperative member-owners.¹⁵ Currently, more than 6,200 member-owners are participating.

An important result of the FEC's Advisory Opinion is that cooperative employees who would not ordinarily be in the restricted class due to their job function, but are member-owners of a distribution cooperative affiliated with NRECA, are part of the restricted class and eligible for solicitation.

Employees who are not part of the restricted class (*i.e.* not member-owners of an NRECA member distribution cooperative and not eligible according to their job function) cannot be solicited for ACRE contributions. This "non-restricted class" includes employees paid on an hourly basis, salaried foremen with supervision over hourly employees, and individuals who are retained by the cooperative but not employees of the cooperative.¹⁶

Although the FEC allows solicitation of the non-restricted class twice yearly by mail,¹⁷ due to additional requirements¹⁸ and prohibitions on recognizing these memberships,¹⁹ NRECA and its members do not conduct these solicitations or accept voluntary contributions from these individuals.

Cooperatives with non-residential members, such as farms or other businesses, must take additional factors into consideration when soliciting and collecting contributions. A limited liability company (LLC) that elects to be treated as a partnership under IRS rules²⁰ and has at least one named partner who is also a member-owner of an electric cooperative may be solicited for ACRE.²¹ If the LLC has elected to be treated as a corporation, or if the LLC has publicly traded shares, contributions from the LLC are considered corporate contributions and therefore prohibited.²²

Legal Methods of Solicitation. The FEC interprets solicitation broadly with asking an individual to contribute to a PAC as the clearest example of a solicitation. Statements that encourage

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PAC support, statements that announce PAC fundraising events, and even statements that inform individuals of their right to contribute to a PAC have been interpreted as solicitations.²³ Educational, historical, or statistical statements, such as the amount of PAC receipts or the candidates that the PAC supports, are not considered to be solicitations.²⁴

State associations and distribution cooperatives may use employee meetings or annual meetings to solicit for ACRE. However, any event or communication that includes employees who are ineligible for solicitation should only make educational, historical, or statistical references to ACRE.

Supervisors may solicit subordinates who are members of the restricted class.²⁵ Nonetheless, it is advisable that supervisors avoid soliciting subordinates in one-on-one situations. Moreover, physical force, job discrimination, financial reprisal, or threats thereof are prohibited when making a solicitation.²⁶

Whether oral or written, solicitations must include a disclaimer²⁷ – a statement that notifies the individual of the political purpose of ACRE, that contributions are voluntary, and that he or she has the right to refuse to contribute without reprisal.²⁸ When solicitations are printed, the disclaimer should be in the same size font as the main message of the brochure, letter, or advertisement with the first sentence explaining that ACRE contributions are not deductible for income tax purposes.²⁹

Solicitations may be printed in a cooperative newsletter or magazine provided that no more than a *de minimis* amount of the total circulation reaches recipients outside of the restricted class, which is, at most, three percent.³⁰ Since ACRE is prohibited

from soliciting the general public, cooperative websites must place solicitations on password-protected pages accessible solely by the restricted class.³¹

Contributions

Contributions to ACRE must be voluntary³² and made from personal funds.³³ Since corporate contributions are prohibited, cooperatives may not subsidize or reimburse any individual for an ACRE contribution.

An individual can contribute up to \$5,000 per year to a PAC.³⁴ Contributions can be made in a variety of ways including: personal check; credit card; electronic transfers³⁵; cash contributions of no more than \$100.00 per contributor per year³⁶; payroll deduction plan authorized by the employee.³⁷ Directors may also designate a portion of a per diem payment.³⁸

Contributions from Member-Owners. In addition to the methods above, the FEC allows contributions to be added as a separate line item on a monthly electric bill with pre-authorization from the member-owner (bill addition).³⁹ Each bill must include a statement that the combined bill payment and ACRE contribution is made with personal funds.⁴⁰ If subject to state utility commission regulation, cooperatives should confirm that bill additions are allowed by their commission. Cooperatives may also permit member-owners to contribute retired capital credits to ACRE, provided that all prior bill payments were made with personal funds.⁴¹ The disclaimer language for bill additions or capital credit solicitations must include a statement that corporate contributions are prohibited.⁴²

Collecting and Transmitting Contributions. As “collecting agents” for ACRE, cooperatives can collect and deposit payroll deduction, per

diem allocation, capital credit allocation, and bill addition amounts into the cooperative’s general treasury account provided that the cooperative keeps separate records of all receipts and deposits of ACRE contributions.⁴³ A cooperative check can then be forwarded with an accompanying statement that includes the contributors’ names, addresses, and the amount attributed to each individual.⁴⁴ Contributions of \$50 or less must be forwarded within 30 days; contributions greater than \$50 must be forwarded within ten days.⁴⁵

State Election Law Considerations

Campaign contributions to state candidates are regulated under state laws. Many statewide associations of electric cooperatives have established state PACs for contributing to state candidates.

Unlike federal law, approximately half of the states allow corporate contributions made directly to state candidates. In these states, electric cooperatives may contribute to state candidates. Contribution limits vary and additional regulations may exist for contributions made while the state legislature is in session.

PACs contributing only to state candidates are not required to register or file reports with the FEC. Cooperatives interested in contributing general treasury funds to state candidates should review state and local rules or consult state election officials.

Part 2 in next month’s issue will continue the discussion of federal election law considerations when using cooperative resources and staff time for political purposes, financing political communications from cooperative funds (including *Citizens United v. Federal Election Comm’n*⁴⁶), and tax implications of

Continued on page 4

participating in political activities. If you have questions or comments, please contact me at 703-907-5846 or jessica.tiaht@nreca.coop.

- ¹ This editorial applies to electric cooperatives. Unless otherwise noted, it is unclear to what extent election law considerations differ for public power districts (PPD).
- ² 2 U.S.C. § 441b(a).
- ³ *Id.* § 441b(b)(2)(C).
- ⁴ *Id.* § 437c(b)(1).
- ⁵ *Id.* § 431.
- ⁶ Center for Responsive Politics, <http://www.opensecrets.org/pacs/industry.php?txt=E08&cycle=2010> (last visited Sept. 21, 2011).
- ⁷ For a list of affiliated federal PACs, please contact Jessica Tiaht at jessica.tiaht@nreca.coop or 703-907-5846.
- ⁸ 11 C.F.R. § 114.7(k)(1).
- ⁹ *Id.* § 114.1(j); If a PPD is a member of NRECA or a member of a state association that belongs to NRECA, the PPD may solicit its restricted class.
- ¹⁰ *Id.* § 114.1(c).
- ¹¹ 2 U.S.C. § 441b(b)(4)(A)(i); 11 C.F.R. § 114.7(a); FEC Advisory Opinion 1980-102 (family includes the children and parents residing in the restricted class member's household).
- ¹² 11 C.F.R. § 110.19.
- ¹³ FEC Advisory Opinion 1999-40 (since distribution cooperatives are also membership organizations and local affiliates of NRECA, NRECA may solicit the members of distribution cooperatives for ACRE contributions).
- ¹⁴ *Id.* at 8; Since PPD residential customers are not member-owners of the PPD, they are not part of the PPD's restricted class.
- ¹⁵ The ACRE Co-op Owners for Political Action® Program Resource Guide is available at <https://www.cooperative.com/governmentaffairs/ACRE/ACREownersforpoliticalaction/Pages/default.aspx>.
- ¹⁶ 11 C.F.R. § 114.1(c)(2) and FEC Advisory Opinion 1984-55 (lawyers employed by their respective law firms and compensated by payment to the firm rather than by salary may not be solicited).
- ¹⁷ 11 C.F.R. § 114.6(a), (c).
- ¹⁸ Prior to mailing a solicitation to a non-restricted class employee's home, the cooperative must notify labor organizations representing any employee who works for the cooperative. Notification must be given within a reasonable time to allow the labor organization to make a similar solicitation. The cooperative must provide recipients' names and addresses to the labor organization or to an independent mailing service which will conduct the mailing for both the cooperative and the labor organization. 11 C.F.R. § 114.6(e); To fulfill monthly reporting requirements while maintaining the anonymity of individuals who choose not to respond to solicitations, the FEC requires a custodial arrangement independent of NRECA for accepting and processing non-restricted class contributions. 11 C.F.R. § 114.6(d).
- ¹⁹ The FEC prohibits the custodian from reporting, to the PAC or connected organization, the names of individuals who contributed a single amount of \$50.00

or less or multiple contributions of \$200.00 or less in the same calendar year. 11 C.F.R. § 114.6(d)(3).

²⁰ 26 C.F.R. § 301.7701-3.

²¹ 11 C.F.R. § 110.1(g)(2).

²² *Id.* § 110.1(g)(3).

²³ FEC Advisory Opinion 1976-27 (informing individuals of a fundraising activity) and FEC Advisory Opinion 1979-13 (describing PAC activities and commending the enthusiasm of employees who participated).

²⁴ FEC Advisory Opinion 1979-66 (statement of financial activity does not constitute a solicitation) and FEC Advisory Opinion 1983-38 (a newsletter article announcing the formation of a PAC and stating that it would solicit funds only from high-level corporate employees was not a solicitation since it did not encourage participation or inform the reader that unsolicited contributions from employees outside the restricted class would be accepted).

²⁵ Jan W. Baran, *THE ELECTION LAW PRIMER FOR CORPORATIONS* 13 (5th ed. 2008).

²⁶ 2 U.S.C. § 441b(b)(3)(A).

²⁷ For sample disclaimer language please see the ACRE® Program Resource Guide, page 4. Available at: <https://www.cooperative.com/governmentaffairs/ACRE/Documents/ACREResourceGuide.pdf>.

²⁸ 11 C.F.R. § 114.5(a)(3)-(4); If contribution amounts are recommended, the disclaimer must explain that amounts are merely suggestions, more or less than the suggested amount may be contributed, and the employee or member will not be favored or disadvantaged by the amount given or a decision to not contribute. 11 C.F.R. § 114.5(a)(2).

²⁹ I.R.C. § 6113; I.R.S. Notice 88-120.

³⁰ FEC Advisory Opinion 1978-97 (3 percent of total circulation is *de minimis*).

³¹ FEC Advisory Opinion 2006-03, *citing* 11 C.F.R. § 114.5(h).

³² 11 C.F.R. § 114.5(a).

³³ 11 C.F.R. § 114.2 (contributions of corporate dollars to political committees are prohibited).

³⁴ *Contribution Limits 2011-2012*, Federal Election Commission, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last visited Sept. 27, 2011).

³⁵ FEC Advisory Opinion 1997-09 (contributions transmitted by electronic transfer with other various fees are permissible as long as only personal funds are transmitted into the PAC account).

³⁶ 11 C.F.R. § 110.4(c)(1).

³⁷ *Id.* § 114.8(e)(4).

³⁸ 11 C.F.R. § 114.2(f)(4)(i).

³⁹ 11 C.F.R. § 102.6(c)(3) and FEC Advisory Opinion 1999-40 (a combined payment of monthly electrical charges and a contribution to ACRE is permissible provided that all solicitation, collection and transmittal requirements are met).

⁴⁰ FEC Advisory Opinion 1999-40.

⁴¹ *Id.* (capital credits that are declared and retired by the cooperative are the property of the member).

⁴² *Id.*

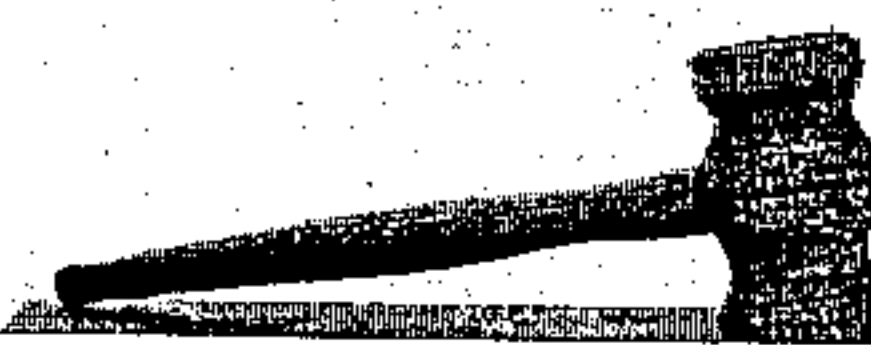
⁴³ *Id.* at 9.

⁴⁴ 11 C.F.R. § 102.6(c)(3); For contributions of more than \$200 in a calendar year, the individual's occupation and employer must also be reported. 11 C.F.R. § 100.12.

⁴⁵ 2 U.S.C. § 432(b)(2).

⁴⁶ *Citizens United v. FEC*, 130 S. Ct. 876 (U.S. 2010).

Recent Decisions



Assignment of Accounts Receivable is Not Assurance of Payment

Federal court refuses to order assessment or modify assurance of payment order – *Bankruptcy; Utility*

On August 25, 2011, the U.S. Bankruptcy Court for the District of Maryland (Court) ruled that an assignment of accounts receivable was not an “assurance of payment” under Bankruptcy Code section 366(c). Even if it was, the Court refused to order a special assessment and modify a debtor’s previous adequate assurance of payment order. *In re Bedford Town Condo.*, No. 10-15831-TJC, 2011 Bankr. LEXIS 3226, 2011 WL 3742203 (Bankr. D. Md. Aug. 25, 2011).

Bankruptcy Code section 366(c) (Section 366) prohibits a utility from discontinuing service to a chapter 11 debtor unless the debtor fails to furnish adequate assurance of payment for future service within 30 days. Section 366(c)(1) lists the acceptable forms of “assurance of payment.”

Bedford Town Condominium (Debtor) owns a condominium complex. Potomac Electric Power Company (Utility) provides electric service to Debtor. Debtor’s units are not individually metered. Instead, Debtor is