



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 23, 2006

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2006-17

Michael Kearney, Treasurer
Berkeley Electric Cooperative, Inc. Political Action Committee
P.O. Box 1234
Moncks Corner, SC 29461

Dear Mr. Kearney:

We are responding to your advisory opinion request on behalf of the Berkeley Electric Cooperative, Inc. ("BEC" or "the Cooperative") and its separate segregated fund, the Berkeley Electric Cooperative, Inc. Political Action Committee ("BEC PAC"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to BEC's solicitation of its executive and administrative personnel and its members, including members who are employees, for contributions to BEC PAC and certain other organizations. The Commission concludes that BEC may solicit its executive and administrative personnel, and its members, for contributions to BEC PAC and to the Action Committee for Rural Electrification ("ACRE"). The Commission further concludes that BEC may use the proposed form to solicit these contributions from its executive and administrative personnel and its employees who are members, and that BEC may use its payroll deduction system to collect and forward these contributions from them.

Background

The facts presented in this advisory opinion are based on your letters received on March 8 and May 1, 2006, and your telephone conversation with Commission staff on May 4, 2006.

BEC is an electric distribution cooperative incorporated under the laws of South Carolina. It is composed of members who pay a membership fee to BEC and agree to purchase electricity from BEC, as well as to be bound by and comply with all of the other

provisions of BEC's Articles of Incorporation and Bylaws. BEC Bylaws, Article I, Section 1.02. BEC's bylaws provide that a Board of Trustees manages its business and affairs. BEC Bylaws, Article IV, Section 4.01. Members of the Board of Trustees must be members of the Cooperative. BEC Bylaws, Article IV, Section 4.02(d). BEC members elect the Board members at the Cooperative's annual meeting. BEC Bylaws, Article IV, Section 4.03. Membership may be evidenced by a certificate of membership. BEC Bylaws, Article VIII, Section 8.01. Many of BEC's employees, including executive and administrative personnel, are also members of BEC. BEC PAC is BEC's separate segregated fund and is registered with the Commission.

The National Rural Electric Cooperative Association ("NRECA") was established

To engage in the compilation and dissemination of information with respect to rural electrification and the furnishing of other services to rural electric cooperatives and others in connection with the coordination, advancement and development of rural electrification in the United States . . . for the primary and mutual benefit of the members of the Association and their members, as ultimate consumers.

NRECA Bylaws, Article II. NRECA is a nonprofit corporation under the District of Columbia Cooperative Association Act. NRECA Articles of Incorporation, Preamble. ACRE is NRECA's separate segregated fund and is registered with the Commission.

Electric Cooperatives Help Organization ("ECHO") is registered with the South Carolina Ethics Commission. ECHO supports South Carolina State and local candidates. The BEC Employee Fund is registered with the South Carolina Ethics Commission. It makes contributions to South Carolina State and local candidates.

BEC wishes to use a specific form to solicit contributions for BEC PAC and ACRE. *See* BEC proposed solicitation form (attached hereto as Exhibit 1). The form offers three options for contributing: 1) recommended contribution amounts to be deducted from the employee's paycheck each pay period; 2) a one-time contribution, the amount of which is left to the discretion of the employee; or 3) an election not to participate. The form notes that the recommended contribution amounts are "merely suggestions," and that employees may choose to give "more or less than those stated." The form further states, "BEC will not favor nor disfavor employees according to pledged donations." An additional statement reads "I am also fully aware that should I elect not to participate I may do so without any concern of retaliation." In addition, a bold faced sentence states that the purposes of the organizations for which contributions are being solicited is "for the benefit of political candidates and activities on a state and national level that support rural electric cooperatives."

Questions Presented

1. *May BEC solicit its executive and administrative personnel, and its members, including members who are employees, for contributions to BEC PAC?*

2. *May BEC solicit its executive and administrative personnel, and its members, including members who are employees, for contributions to ACRE?*
3. *If BEC may solicit these persons for contributions, may it use its proposed solicitation form, and may it collect contributions from them by means of payroll deductions?*

Legal Analysis and Conclusions

Question 1. May BEC solicit its executive and administrative personnel, and its members, including members who are employees, for contributions to BEC PAC?

Yes, BEC may solicit its executive and administrative personnel, and its members, including members who are employees, for contributions to BEC PAC because it is a membership organization and these individuals are within its solicitable class.

Commission regulations define a “membership organization” as a trade association, cooperative, or corporation without capital stock that:

- (i) Is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization, pursuant to the organization’s articles, bylaws, constitution or other formal organizational documents;
- (ii) Expressly states the qualifications and requirements for membership in its articles, bylaws, constitution or other formal organizational documents;
- (iii) Makes its articles, bylaws, constitution, or other formal organizational documents available to its members upon request;
- (iv) Expressly solicits persons to become members;
- (v) Expressly acknowledges the acceptance of membership, such as by sending a membership card or including the member’s name on a membership newsletter list; and
- (vi) Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office.

11 CFR 114.1(e)(1)(i)-(vi); *see also* 11 CFR 100.134(e)(1)-(6).

BEC is composed of members and its members qualify as members under the Commission’s regulations because they affirmatively decide to become a member, affirm their memberships frequently through the payment of monthly electric bills, and have the ability to vote directly for the Board of Trustees. *See* 11 CFR 114.1(e)(2) (defining “member”).

The members administer BEC by electing BEC’s Board of Trustees. The qualifications for membership in BEC are clearly set forth in BEC’s bylaws. The formal organizational documents are available to members upon request. Through its website, BEC solicits persons to become members of the Cooperative by establishing electric

service through BEC and the website provides an on-line application for membership. Membership in BEC may be acknowledged via issuance of a membership certificate. Finally, BEC was organized primarily to distribute electric service and not for the purpose of influencing elections. Because it satisfies these requirements, BEC qualifies as a “membership organization.”

Under the Act and Commission regulations, a membership organization or a cooperative may solicit contributions to its separate segregated fund from its members and its executive and administrative personnel. *See* 2 U.S.C. 441b(b)(4)(C) and 11 CFR 114.7(a).¹ Thus, BEC may solicit its executive and administrative personnel, and its members, including members who are employees, for contributions to its separate segregated fund, BEC PAC.

Question 2. May BEC solicit its executive and administrative personnel, and its members, including members who are employees, for contributions to ACRE?

Yes, BEC may solicit its executive and administrative personnel, and its members, including members who are employees, for contributions to ACRE because it is affiliated with ACRE’s connected organization, NRECA, and it may act as a collecting agent for ACRE.

A collecting agent may collect and transmit contributions to one or more separate segregated funds to which the collecting agent is related. *See* 11 CFR 102.6(b)(1). One example of a collecting agent is a “parent, subsidiary, branch, division, department, or local unit of the connected organization of the separate segregated fund.” 11 CFR 102.6(b)(1)(iii).

The Commission previously determined that NRECA and its member cooperatives, taken together, form the type of rural cooperative covered by 11 CFR 114.7(k)(1). *See* Advisory Opinion 1999-40 (ACRE).² As such, the member cooperatives are affiliated with NRECA. *Id.* BEC is a member cooperative of NRECA and, as stated in your request, its relationship with NRECA is identical to NRECA’s relationships with other local distribution cooperatives, as described in Advisory Opinion 1999-40 (ACRE). Thus, BEC is affiliated with NRECA.

The Commission further determined that, as affiliates of NRECA, distribution cooperatives are local units of NRECA. As local units, the distribution cooperatives may act as collecting agents for contributions to NRECA’s separate segregated fund, ACRE. *See* Advisory Opinion 1999-40 (ACRE). Thus, BEC may be a collecting agent for ACRE. As a collecting agent for ACRE, BEC may solicit contributions for ACRE from those persons permitted to be solicited under 11 CFR part 114. *See* 11 CFR 102.6(c)(2).

¹ “Executive or administrative personnel” is defined at 2 U.S.C. 441b(b)(7) and 11 CFR 100.134(d) and 114.1(c).

² The Commission presumes that the facts that formed the basis for this determination have not materially changed.

As noted above, those persons include BEC's executive and administrative personnel and its members, including members who are employees.

Because BEC and NRECA are affiliated, their separate segregated funds are considered one political committee for purposes of applicable contribution limitations. *See* 11 CFR 114.7(k)(1). Accordingly, you should ensure that no individual designates contributions to BEC PAC and ACRE in any calendar year that would, when combined, exceed the limitation at 2 U.S.C. 441a(a)(1)(C) and 11 CFR 110.1(d).

Question 3. If BEC solicits contributions from its executive and administrative personnel and its members, including members who are employees, may it use its proposed solicitation form and may it collect the contributions from them by means of payroll deductions?

Yes, BEC may use its proposed solicitation form (attached Exhibit 1 hereto) and may use payroll deductions to collect and forward certain contributions to BEC PAC and ACRE.

Under the Act and Commission regulations, at the time solicitations are made, solicitations for contributions to separate segregated funds must inform employees and members of the political purposes of the fund, and that any employee or member solicited must be informed of the right to refuse to contribute without any reprisal. *See* 2 U.S.C. 441b(b)(3)(B) and (C); *see also* 11 CFR 114.5(a)(3) and (4). If guidelines for contributions are suggested, the person being solicited must be informed that the guidelines are merely suggestions, that the individual is free to contribute more or less than the guidelines suggest, and that an individual will not be favored or disadvantaged by reason of the amount of their contribution or their decision not to contribute. 11 CFR 114.5(a)(2). A written solicitation for contributions to a separate segregated fund that is addressed to an employee or member must contain statements that comply with these requirements. 11 CFR 114.5(a)(5).³

The proposed form meets the requirements of 11 CFR 114.5(a). *See* 2 U.S.C. 441b(b)(3). A bold faced sentence states that the purposes of the organizations for which contributions are being solicited (including ACRE and BEC PAC) is "for the benefit of political candidates and activities on a state and national level that support rural electric cooperatives." *See* BEC proposed solicitation form (Exhibit 1). The form offers three options for contributing. It notes that the first option contains "merely suggestions," and that employees may choose to give "more or less than those stated." *Id.* The form further states, "BEC will not favor nor disfavor employees according to pledged donations." *Id.* An additional statement reads "I am also fully aware that should I elect not to participate I may do so without any concern of retaliation." *Id.* Taken together, these statements comply with 11 CFR 114.5(a)(2) and (a)(4). Accordingly, the proposed form meets all of the requirements of 11 CFR 114.5(a)(5).

³ Solicitations by collecting agents must also meet all of these requirements. *See* 11 CFR 102.6(c)(2).

The proposed form identifies five different categories of employees: supervisory hourly employees, non-supervisory hourly employees, supervisory salaried employees, non-supervisory salaried employees, and salaried staff. *See* Exhibit 1. BEC may solicit salaried supervisory employees and staff because they are “executive and administrative personnel.” *See* 2 U.S.C. 441b(b)(7); 11 CFR 100.134(d) and 114.1(c). Because hourly employees and salaried non-supervisory employees do not meet the definition of “executive and administrative personnel,” BEC may solicit only hourly employees and salaried non-supervisory employees who are also members of BEC. *See id.* To make clear that BEC is only soliciting contributions from its solicitable class, the proposed form should be modified to add “(BEC members only)” directly below “Non-supervisor” and “Supervisor” under “Hourly,” and directly below “Non-supervisor” under “Salaried.”

With respect to the use of payroll deductions to collect contributions for BEC PAC, the Act and Commission regulations allow a corporation to enroll members of its restricted class in a payroll deduction system that deducts contributions from payroll checks to make contributions to the corporation’s separate segregated fund. *See* 2 U.S.C. 441b and 11 CFR 114.2(f)(4)(i). Accordingly, BEC may use payroll deductions to collect and forward contributions to BEC PAC from its executive and administrative personnel and its employees who are BEC members.

BEC may also use payroll deductions to collect contributions to ACRE. Because BEC is a collecting agent for ACRE, see above, BEC may pay any or all costs incurred in soliciting and transmitting contributions to ACRE. *See* 11 CFR 102.6(c)(2)(i). The Commission previously determined that an affiliated entity acting as a collecting agent may use payroll deductions to collect contributions from its executive and administrative personnel for the separate segregated fund of another entity with which it is affiliated. *See* Advisory Opinion 2000-15 (CUNA). The Commission concludes that employees who are members of BEC should be treated in the same manner as executive and administrative personnel for purposes of payroll deductions. Accordingly, BEC may use payroll deductions to collect and forward contributions from executive and administrative personnel and member employees to ACRE.

The Commission expresses no opinion regarding BEC’s solicitation of its executive and administrative personnel and its members for donations to ECHO and the BEC Employees Fund. Given that these two organizations are not involved in Federal elections, questions regarding donations to them are not within the Commission’s jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Michael E. Toner
Chairman

Enclosure (Advisory Opinions 1999-40 and 2000-15)

RESTRICTED CLASS

BERKELEY ELECTRIC COOPERATIVE, INC.
VOLUNTARY EMPLOYEE DONATION FORM

Option 1 _____

I, the undersigned, do hereby certify my desire to voluntarily donate to the organizations listed below. **The purpose of these organizations is for the benefit of political candidates and activities on a state and national level that support rural electric cooperatives.** I authorize Berkeley Electric Cooperative, Inc. to deduct the following designated amounts per pay period from my paycheck. I understand that this authorization will remain in effect perpetually, unless and until rescinded by me in writing. I am also fully aware that should I elect not to participate I may do so without any concern of retaliation.

RECOMMENDED AMOUNTS PER PAY PERIOD

	Authorized Amount	HOURLY		SALARIED		
		NON-SUPERVISOR	SUPERVISOR	NON-SUPERVISOR	SUPERVISOR	STAFF
AMOUNT PPD		\$3.00	\$5.00	\$7.00	\$7.00	\$9.00
ACRE (Action Committee for Rural Electrification)		0.96	0.96	0.96	0.96	3.85
ECHO (Electric Cooperatives Help Organization)		0.42	0.42	0.42	0.42	0.42
EMPL FUND (State Candidate Support)		0.66	1.47	2.23	2.23	1.88
BEC PAC (Federal Candidate Support)		0.96	2.15	3.39	3.39	2.85

The recommended contribution amounts listed above are merely suggestions. Employees may choose to give more or less than those stated. BEC will not favor nor disfavor employees according to pledged donations.

Option 2 _____

I am providing a one time contribution in the amount of \$ _____ to be distributed as designated above.

Option 3 _____

I elect not to participate at this time.

Employee Name: _____ Employee Number: _____

Social Security Number: _____

Address: _____

Employee Signature: _____ Date: _____

cc: Payroll
Employee Donation Committee