



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

March 20, 2000

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1999-40

Jan Witold Baran  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Dear Mr. Baran:

This responds to your letter dated December 29, 1999, as supplemented by your letters dated February 7, 14, and 23, 2000, on behalf of the National Rural Electric Cooperative Association ("NRECA") and the Action Committee for Rural Electrification ("ACRE"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the ability of ACRE to solicit the members of NRECA's distribution member cooperatives and to utilize the cooperatives' billing systems to collect voluntary contributions.

***Factual background***

*NRECA's structure and membership*

NRECA is a nonprofit corporation formed under the District of Columbia Cooperative Association Act. It 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 patrons of the Association and their patrons, as ultimate consumers.

NRECA Articles of Incorporation, Article I. ACRE is NRECA's separate segregated fund ("SSF") and is registered with the Commission as a multicandidate committee.

Comments in 1998 and 1999 submitted by counsel to NRECA with respect to proposed Commission rules on membership describe NRECA as a "national service cooperative owned by and representing" approximately 1,000 rural electric systems which provide electricity to more than 30 million consumer-owners in 46 States. The comments state that NRECA's owners are "a complex federated system of local, state, regional, and national cooperatives." Over 900 of the approximately 1,000 owner-cooperatives are operational cooperative utilities that are eligible for assistance under chapter 31 of title 7 of the United States Code (i.e., distribution cooperatives and generation and transmission cooperatives). The remainder consists generally of State and regional service entities that are "affiliate membership organizations" of NRECA's member utilities.

The above-described group consists of three types of voting members, each of which pays an initial membership fee and annual dues to NRECA. NRECA Bylaws, Article I, §§1.a and 2. One class of voting members is the distribution members, and the other two types of voting members of NRECA are generation and transmission members and service members.

The distribution members are the focus of this opinion and are described as follows:

Electric distribution cooperatives or nonprofit associations, nonprofit corporations, public utility districts, and government corporations or authorities located in a state, territory, possession or commonwealth of the United States and engaged in furnishing electricity at retail to their consumers.

NRECA Bylaws, Article 1, §1.a(1).<sup>1</sup> Each distribution member that is a local cooperative also has members, almost all of whom are individuals who pay a membership fee to

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<sup>1</sup> The more than 60 generation and transmission members are cooperatives or other nonprofit entities which, according to the above-referenced comments, are owned by and serve 778 of the nearly 900 distribution members. They are engaged in the marketing, generation, or transmission of wholesale bulk electricity for sale to others for the purpose of resale. The service members are associations, including 36 rural statewide associations, whose members consist of generation and transmission, or distribution cooperatives or associations. NRECA's website describes service members as "the glue that unites members in a single voice in their state," providing representation before State legislatures, a publication sent to consumer-owners, "or any of the services that can be achieved united as one."

belong to the local cooperative.<sup>2</sup> A member in the local cooperative purchases his or her electrical services from the cooperative and is billed monthly.

To become a distribution member of NRECA, an entity such as a cooperative must apply to the NRECA Board of Directors. Approval is granted by NRECA's top officers only after the applicant has paid the membership fees, dues, and a subscription rate for *Rural Electrification* magazine, and has agreed to be bound by the bylaws and articles of incorporation. NRECA Bylaws, Article I, §3. A distribution member pays annual dues to NRECA in an amount that is the greater of \$750 or a total based on the member's operating revenue, the cost of power, the number of consumers, and the number of megawatt hours sold. The member also pays for subscriptions to *Rural Electrification* for each of its key officers and staff members. NRECA Bylaws, Article I, §2.

NRECA's bylaws provide that its business and affairs shall be managed by a board of directors and an executive committee, which acts for the board during the intervals between board meetings and subject to policies agreed upon by the board. Bylaws, Article III, §1 and Article V, §4. The membership or board of each voting member selects one of its members, directors, or employees to be its delegate to NRECA's annual meeting and to State and regional meetings of the members. Bylaws, Article II, §5. The delegates of the distribution members and the generation and transmission members select the board and vote on other matters. The members located in each State elect a person who is a member, employee, officer, or director of a member in that State to serve on the board. Bylaws, Article II, §6 and Article III, §§3 and 4.<sup>3</sup>

#### *Distribution member's structure and membership*

You have enclosed the bylaws of two distribution members to serve as examples of the local cooperatives. They are the Southern Maryland Electric Cooperative, Inc. ("SMEC") and the Rappahannock Electric Cooperative ("REC"). The membership of each of the cooperatives consists of persons who purchase, from the cooperative, all the electric energy to be used on specific premises. The bylaws denote requirements for membership, including an agreement to purchase electric energy from the cooperative in accordance with the bylaws, and an agreement to comply with the articles of incorporation, bylaws, and other rules of the cooperative. SMEC Bylaws, Section 1.01; REC Bylaws, Article I, §1. REC bylaws provide for the issuance of a membership certificate, while SMEC bylaws state that membership is evidenced by compliance with the membership requirements section, including having a service connection. REC Bylaws, Article 1, §2; SMEC Bylaws, Section 1.02.

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<sup>2</sup> A few distribution members are not cooperatives. Your request seeks an opinion with respect to distribution members that are cooperatives, and you do not seek an opinion with respect to the members of any other members of NRECA.

<sup>3</sup> NRECA is also divided into ten regions, each consisting of several States. The board members from each region choose a director to be an executive committee member for that region.

The bylaws of both cooperatives provide that the business and affairs of the cooperative shall be managed by the board of directors. SMEC Bylaws, Section 4.01; REC Bylaws, Article IV, §1. In each organization, members of the board are elected by the members of the cooperative at the annual meeting of the members. SMEC and REC Bylaws, Articles III and IV.

*Capital credits of members of distribution cooperatives*

As nonprofit organizations, most cooperatives allocate, to their members, amounts paid by the members in excess of operating costs and funds needed by the cooperative for reserve funds. These excess amounts are often referred to as “capital credits” and are allocated to an account in the name of each member on an annual basis.<sup>4</sup> Once allocated, the cooperative may not change the amount of capital credits in the member’s account. The cooperative retains some discretion as to when to “retire” (i.e., return) these credits to the members.<sup>5</sup> You state that the cooperative’s board of directors declares whether capital credits will be “retired” and thus issued to the members, and, in general, may only retire capital credits if the retirement will not adversely affect the cooperative’s financial condition. Once the board of directors retires allocated capital credits to members, those members have a vested legal right in those credits. The retired capital credits are distributed to members either as a credit on a bill issued subsequent to the retirement declaration or as a check mailed to the member. The board determines the method of distribution.<sup>6</sup> If there is a credit on the member’s bill, the member may use the amount to reduce her monthly electricity payments.

***Proposal***

You state that NRECA wishes to engage in a program to solicit, in writing, the members of the local cooperatives for contributions to ACRE and have the cooperatives act as the collecting agents for the contributions. Specifically, each member of a cooperative who wishes to voluntarily participate in the program would pre-authorize the local cooperative to include, on the monthly bill to the member, a line item for the amount of the pre-authorized ACRE contribution. Payments would be made to the local cooperative which would then forward the collected contributions to ACRE directly or

through a state association (i.e., a service member) within 10 or 30 days as required by

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<sup>4</sup> The amount allocated to each member is based upon and proportionate to the value or quantity of business that the member did with the cooperative during the year. The bylaws of SMEC and REC provide that at the end of the fiscal year, the excess amounts (if there are any) furnished by each member are credited in an appropriate record to the capital account of the member. SMEC Bylaws, Section 7.02; REC Bylaws, Article VII, §2.

<sup>5</sup> You state that electric cooperatives generally retain allocated capital credits for a specified time to assist in operations.

<sup>6</sup> SMEC’s website further illustrates that the retired capital credits are the property of the member. It states that when a customer (i.e., member) discontinues service with SMEC, the customer must give SMEC a current mailing address and notify it of subsequent address changes so that capital credit refunds can continue to be sent to the customer. Moreover, if a customer dies, SMEC needs to be notified by a relative or representative so that the capital credits can be refunded to the deceased customer’s estate.

11 CFR 102.8.

NRECA and ACRE also wish to engage in an additional program whereby voluntary contributions would be deducted from the member's retired capital credits. Prior to the distribution of the capital credits to the member, NRECA, through the local cooperative, would solicit an authorization for deduction from the consumer member and the local cooperative would reduce the amounts of the member's retired credits based on the pre-authorized deduction. In a situation where the capital credits were to be distributed by check, the amount of the check would be reduced by the authorized amount. Where the credits appear on the bill for use by the member, the amount of the credits would be reduced by the authorized amount.

In soliciting the authorizations and accepting the contributions to ACRE, NRECA and the local cooperatives will take certain measures to ensure that only personal funds and no corporate funds will be used for the contributions. Generally, the local cooperatives classify their membership into at least three categories: residential, commercial, and industrial. Only residential members will be solicited. Residential members using capital credits for their contributions will be asked to affirm that all of their previous bill payments to the cooperative were made with personal (non-corporate) funds. Residential members making contributions to ACRE in combination with payments of their electric bill amount will be asked to affirm that the payments are from personal (non-corporate) funds. In all solicitations, a clear disclaimer that corporate funds are not permitted will be included.

You ask whether the local cooperatives may collect contributions by either of the methods described above.

***Act and Commission regulations***

The Act prohibits corporations from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. §441b(a). The Act states, however, that the term "contribution or expenditure" does not include "the establishment, administration, and solicitation of contributions to a separate segregated fund ("SSF") to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. §441b(b)(2)(C); see also 2 U.S.C. §431(8)(B)(vi) and (9)(B)(v). An organization such as a corporation, or an incorporated membership organization or cooperative, which is not itself a political committee, but which directly or indirectly establishes, administers or financially supports a political committee is a "connected organization" of that committee. 2 U.S.C. §431(7); 11 CFR 100.6(a). A connected organization or its subsidiary, branch, division, department or local unit is permitted to act as a "collecting agent" for the SSF and thus

may collect and transmit contributions to the SSF without thereby becoming a political committee. 11 CFR 102.6(b)(1)(ii) and (iii), and 102.6(b)(2).<sup>7</sup>

The connected organization and its SSF are subject to restrictions as to the personnel who may be solicited for contributions to the SSF. An incorporated membership organization or cooperative may solicit voluntary contributions to the fund from its executive and administrative personnel, its members, and the families thereof. 2 U.S.C. §441b(b)(4)(A) and (C); 11 CFR 114.1(j) and 114.7(a). 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 100.8(b)(4)(iv)(A)(1)-(6).

The term “members” includes all persons who are currently satisfying the requirements for membership in a membership organization, affirmatively accept the membership organization’s invitation to become a member, and either:

- (i) Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake; or
- (ii) Pay membership dues at least annually, of a specific amount predetermined by the organization; or
- (iii) Have a significant organizational attachment to the membership organization which includes: affirmation of membership on at least an annual basis and direct participatory rights in the governance of the organization. For example, such rights could include the right to vote directly or indirectly for at least one individual on the membership organization’s highest governing board; the right to vote directly for

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<sup>7</sup> The two other permissible categories of collecting agents are a committee affiliated with the recipient SSF and a local, national, or international union collecting contributions for the SSF of a labor federation with which the union is affiliated. 11 CFR 102.6(b)(1)(i) and (iv).

organization officers; the right to vote on policy questions where the highest governing body of the membership organization is obligated to abide by the results; the right to approve the organization's annual budget; or the right to participate directly in similar aspects of the organization's governance.

11 CFR 114.1(e)(2)(i)-(iii); see also 11 CFR 100.8(b)(4)(iv)(B)(1)-(3).

Commission regulations also provide that members of one tier of a multi-tiered organization may be members of the affiliates of the organization, including the highest tier, even if they may not have rights and obligations with respect to the highest tier. They provide:

In the case of a membership organization which has a national federation structure or has several levels, including, for example, national, state, regional and/or local affiliates, a person who qualifies as a member of any entity within the federation or of any affiliate by meeting the requirements of [11 CFR 114.1(e)(2)(i), (ii), or (iii)] shall also qualify as a member of all affiliates for purposes of this part. The factors set forth at 11 CFR 100.5(g)(2), (3) and (4) shall be used to determine whether entities are affiliated for purposes of this paragraph.<sup>8</sup>

11 CFR 114.1(e)(5); see also 11 CFR 100.8(b)(4)(iv)(E).

Commission regulations make special provisions with reference to rural cooperatives such as those addressed in this opinion, as follows:

A federated cooperative as defined in the Agricultural Marketing Act of 1929, 12 U.S.C. 1141j, or a rural cooperative eligible for assistance under chapter 31 of title 7 of the United States Code, may solicit the members of the cooperative's regional, state or local affiliates, provided that all of the political committees established, financed, maintained or controlled by the cooperative and its regional, State or local affiliates are considered one political committee for the purposes of the limitations in 11 CFR 110.1 and 110.2.

11 CFR 114.7(k)(1). This regulation was promulgated in 1993. In 1999, when the Commission revised the membership regulations and added the above regulation on federated membership organizations, the Commission reaffirmed the explicit coverage of rural cooperatives, and noted a concern stated by a commenter that the structure of most rural cooperatives does not readily correspond to the multi-tiered structure envisioned in

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<sup>8</sup> The factors set forth at 11 CFR 100.5(g)(2), (3), and (4) are the criteria for determining whether an organization or its political committee is sufficiently related to another sponsoring organization or committee so that the committees must share contribution limits and the organization may solicit PAC contributions from, or make communications on any subject to, the restricted class of the other organization.

11 CFR 114.1(e)(5). Explanation and Justification, *Definition of “Member” of a Membership Organization*, 64 Fed. Reg. 41266, 41271 (July 30, 1999).

### ***Analysis***

#### *NRECA and local cooperatives as membership organizations and as organizations of affiliates*

The Commission concludes that NRECA qualifies as a membership organization under the Act. It is composed of members who have the power to operate and administer the organization through delegates who have the right to select the board of directors and vote on other matters. NRECA’s bylaws expressly state the qualifications for membership including descriptions of the eligible organizations and the dues requirements. The Commission assumes that the formal organizational documents are available to members upon request. NRECA’s website promotes the benefits of membership and includes an application for associate membership, and the bylaws describe the application process for membership. NRECA expressly acknowledges membership in a number of ways, including the distribution of a magazine to members pursuant to mandatory subscriptions and notices of NRECA meetings that are sent to each member. Each distribution member qualifies as a NRECA member under the Commission regulations by affirmatively deciding to become a member and by paying annual pre-determined dues.

The local cooperatives are also membership organizations under the Act. They are administered by their members who elect the board of directors. The bylaws state the qualifications for membership, and the Commission assumes that the formal organizational documents are made available to the members upon request. SMEC’s website discusses the benefits of being a member of the cooperative.<sup>9</sup> Membership is acknowledged by the issuance of a certificate or the maintenance of a service connection. Each member of the local cooperative also qualifies as a member under the regulations. Such a person affirmatively decides to become a member, affirms the membership frequently through the payment of monthly electric bills, and has the ability to vote directly for the board of directors.

NRECA taken together with its member cooperatives is also the kind of organization contemplated under 11 CFR 114.7(k)(1). NRECA is itself a cooperative owned by the member cooperatives. The category of service members includes State associations of cooperatives, and the State associations are characterized on the NRECA website in a manner that comports with a State affiliate relationship. Distribution cooperatives own the generation and transmission members, and both types of members are members of the service members. (See footnote 1.) The distribution cooperatives, although the most basic unit of membership within NRECA, consist of members who vote for the delegates to NRECA or for those who choose the delegates. NRECA

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<sup>9</sup> Membership in the distribution cooperative is often a necessity for a customer so the requirement of express solicitation of members may not be applicable.



explicitly recognizes that it operates for the benefit of the members of such cooperatives. In view of this structure and 11 CFR 114.7(k)(1), the distribution member cooperatives and State associations are related State and local entities of a membership organization, NRECA, and thus are entities affiliated with NRECA. 11 CFR 100.5(g)(3)(iv) and 110.3(a)(2)(iv).

### *Implementation of proposal*

Since the distribution cooperatives are local affiliates of NRECA, NRECA may solicit the members of the cooperatives for contributions to ACRE. As affiliates of NRECA, the distribution cooperatives and the State associations are local units that may act as collecting agents for contributions to ACRE. As a collecting agent, the cooperative may pay all costs of soliciting and transmitting contributions to the SSF. 11 CFR 102.6(c)(2)(i).

The collecting agent procedures in Commission regulations provide that a contributor may combine a payment of dues or other fees with the contribution to the SSF. Specifically, the regulations refer to one check that a contributor may write, representing both the contributions and other fees, so long as it is drawn on the member's personal account. 11 CFR 102.6(c)(3). The Commission has also made clear that other vehicles such as credit cards or electronic transfers may be used for such combined payments. See Advisory Opinions 1997-9 and 1990-4. The cooperative may implement the program for combined payment of monthly electrical charges and a contribution to the SSF, subject to conditions set out below.

The full amount of each contribution collected by the cooperative must be transmitted to the SSF within 10 or 30 days of its receipt of the payment as required by 11 CFR 102.8. 11 CFR 102.6(c)(4). Contributions of \$50 or less must be forwarded to the SSF's treasurer no later than 30 days after the receipt, and contributions above \$50 must be forwarded within 10 days. Moreover, for contributions in excess of \$50, the cooperative must forward to ACRE, along with the contribution, the date of receipt and the contributor's name and address. For contributions in excess of \$200, the cooperative must also forward the contributor's occupation and name of employer. 11 CFR 102.8(b)(1) and (2).<sup>10</sup> In order to separate the contributions from the bill payments so that they may be transmitted to the SSF, the local cooperative (and the State association) must use one of two procedures. It may either establish a transmittal account to be used solely for the deposit and transmittal of funds collected on behalf of the SSF; or deposit the contributions in its treasury account and keep separate records of all receipts and deposits that represent contributions to ACRE. See, for example, Advisory Opinion 1990-4.

The Commission also concludes that the pre-authorized deduction in the amount of capital credits may be used for contributions by an individual member. According to

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<sup>10</sup> The receipt by the State association prior to the further transmittal to ACRE does not begin a new period for computing the time period. The time period is computed from the date of the local cooperative's receipt to the date of the receipt by ACRE's treasurer.

your description, the capital credits that are declared and “retired” by the cooperative are the property of the member. They are either returned to the member in a check or usable by the member for reducing the payment of the electrical bill.<sup>11</sup> Because of the unique nature of capital credits, including the fact that they are not always declared and retired by the cooperative, the Commission makes a number of assumptions about the conduct of the deduction program. In its solicitations of pre-authorization for contributions, the cooperative should explicitly solicit for this type of deduction if it intends to implement such a program. If the solicitation for contributions from capital credits is done together with a solicitation for the combined payment program, it should require a separate authorization from the authorization for the combined payment program (e.g., checking a separate box with a separate signature.) The Commission also assumes that the bill or other document which informs the member of the capital credits retired by the cooperative will explicitly denote the deduction of the pre-authorized amount for the contribution to ACRE.

The Commission also conditions its approval of the two solicitation programs on the procedures you have described for ensuring that corporate contributions will not be received. This means that the local cooperative will need to require a donor statement that a check containing a combined bill payment and ACRE contribution is made with personal funds, and such a statement should be included with each combined payment.<sup>12</sup> Furthermore, the solicitation for the authorizations should inform the member of the other prohibitions of the Act, as well as the corporate prohibition. In addition, the Commission understands that your requirement of affirmations by donors using capital credits, as to the funds used for their previous bill payments, means that the donor must make such an affirmation before each contribution deduction can be made from returned capital credits. This is because further bill payments will have been made after the initial authorization by the member for a deduction.<sup>13</sup>

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<sup>11</sup> You note that the reduction in the amount of a check for the payment of capital credits is similar to the situation in Advisory Opinion 1986-7. In that situation, an incorporated agricultural cooperative paid each of its individual grower/shareholders for their crop production. The Commission concluded that the cooperative could deduct contributions to its SSF from payments due from the cooperative, based on a pre-authorization signed by the member.

<sup>12</sup> Where the donor pays less than the combined amount of the electric bill and the ACRE contribution, the donor must also provide a statement to the local cooperative, with each such payment, that specifies the amount designated for the ACRE contribution.

<sup>13</sup> The Commission notes that the bylaws of SMEC and REC allow for the joint membership of two persons living in the same household (e.g., husband and wife). SMEC Bylaws, Section 1.03; REC Bylaws, Article I, §3. When a contribution is made through a deduction from capital credits in an account held by a joint membership, the contribution will be construed as made by the person (or persons) who signed the pre-authorization form. With respect to contributions made through bill payments on a joint membership account, the pre-authorization form should allow joint members to affirm that any contribution made through a bill payment should be construed as having been made by a specified member or members; if the members do not so affirm, any contribution will be construed as having been made by the person who signs the check or other instrument used to pay the bill. See 11 CFR 104.8(c) (stating that absent evidence to the contrary, any contribution made by check shall be reported as made by the person signing the instrument); see also 11 CFR 110.1(k)(1); 11 CFR 103.3(b)(3). These procedures will ensure that contributions are attributed correctly, and that no contributions are made in the name of another. See 2 USC §441f; 11 CFR 110.4(b).

The Commission also emphasizes that, in soliciting a pre-authorization from the member, the cooperative must comply with the voluntariness requirements set out at 11 CFR 114.5(a)(1)-(5). These include informing the solicitee of the political purposes of ACRE, that the solicitee is free to contribute more or less than any suggested guideline, that the solicitee will not be favored or disadvantaged by reason of the amount of the contribution or the decision not to contribute, and that the solicitee is free to contribute or refuse to contribute without reprisal.<sup>14</sup> 11 CFR 114.5(a)(2), (3), and (4).<sup>15</sup>

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.

Sincerely,

(signed)

Darryl R. Wold  
Chairman

Enclosures (AOs 1999-3, 1997-9, 1990-4, and 1986-7)

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<sup>14</sup> The right to refuse to contribute includes the right to revoke, or modify the amount of, an authorization for deduction at any time (e.g., from the returned capital credits). See, e.g., Advisory Opinion 1999-3.

<sup>15</sup> ACRE must ensure that the members' authorizations for both types of contributions are preserved in accordance with 11 CFR 104.14(b) and 102.9(c). See, e.g., Advisory Opinion 1999-3.