



EAST RIVER
ELECTRIC POWER COOPERATIVE
21 Southeast First St. Post Office Drawer 2
Madison, SD 57042 Telephone 605 256-4536

91-13-148

July 19, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets NW, Room 4041
Washington, D.C. 20405

RE: FAR Case 91-13

Dear Sir:

We have reviewed the proposed rules on Federal Acquisition of Utility Services published in the Federal Register of May 24, 1991 and appreciate this opportunity to comment on the proposed rules.

East River Electric Power Cooperative is a wholesale power supplier of electric power to 25 retail cooperatives and one municipal who serve the end use consumer. We have no retail customers. East River's patronage capital is allocated and paid to our member cooperatives, not to consumers, therefore these proposed rules would not directly affect East River. However, we are keenly aware of the impact Section 52.241-13, Capital Credits (b) and (c) would have on the retail cooperative noted as the 'Contractor' if these rules are adopted.

Paragraph (b) would require the Contractor to state "the amount of capital credits to be paid to the Government and the date the payment is to be made". Capital credits are assigned or allocated at the close of business for a calendar or fiscal year. The amount of capital credits could be stated. The requirement that the date the payment is to be made is another matter. Retirement of capital credits are governed by the Rural Electrification Administration mortgage which is the common mortgagage for rural electric cooperatives who borrow from the Rural Electrification Administration. It is our opinion that no Contractor, if a rural electric cooperative, could state when a capital credit allocated in a particular year will be retired.

The full retirement of capital credits upon termination of a contract for utility service under paragraph (c) would cause the Contractor to discriminate against the other cooperative membership. The model bylaws prescribed by the Rural Electrification Administration which have been adopted by nearly all rural electric cooperatives advocate a 'first in - first out' retirement of capital credits. An exception is

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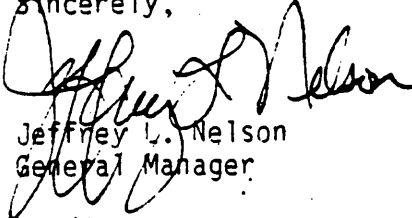
91-13-148
July 19, 1991

made by some cooperatives to retire capital credits of a deceased consumer whose descendants are not being served by the membership of the deceased. Generally such early retirement of capital credits is for an amount less than the full allocation accruals.

Inasmuch that the Government is a perpetual entity, there appears to be no valid reason why a Government agency should receive 'special' treatment as to retirement of capital credits. This provision could create a cash flow disaster for a small cooperative that may serve a substantial Government contract.

We would recommend that provisions (b) and (c) be revised to recognize that payment of capital credits be made in accordance with the Contractor's bylaws governing capital credit retirement.

Sincerely,



Jeffrey L. Nelson
General Manager

JLN/jc

91-13-149

North Star

Electric Cooperative, Inc.

BAUDETTE, MINNESOTA 56623

PHONE 218-634-2202

July 19, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, NW
Room 4041
Washington, D.C. 20405

RE: FAR Case 91-13

Dear Sirs:

I am writing in reference to "FAR Case 91-13", which relates to the payment of "Capital Credits" earned by any member of the Cooperative.

I would like to go on record as opposing this proposed rule. The current by-laws and rules of North Star Electric Cooperative address the return of Capital Credits to our members. The Capital Credits are returned to members on a first in, first out basis, and a rotating schedule. No member or business is paid prematurely simply because they leave the membership or close business. To do so would be unfair to the remaining membership! The proposed rule would require that the above action be performed and, therefore, it also would be unfair to the remaining membership.

Equal Opportunity Employer

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91-13-149

To close, I would ask that this rule be rescinded and that the Cooperatives be allowed to refund Capital Credits as dictated by the individual needs and rules of the Cooperatives.

Sincerely,

Harry M. Carls
General Manager

HMC/ld

91-13-150



JO-CARROLL Electric

COOPERATIVE

X 390 • 793 U.S. RT 20 W • ELIZABETH, ILLINOIS 61028-0390 • AREA 815-858-3311

General Services Administration
FAR Secretariat (MRS)
1848 and F Streets, N.W., Room 4011
Washington, D.C. 20405

Dear Administrator:

Jo-Carroll Electric Cooperative, a member owned, member controlled electrical distribution system located in Elizabeth, Illinois is strongly opposed to FAR Case 91-13. The cooperative opposes this for several reasons:

52.211-12 Capital Credit's paragraph (b) stated that the Contractor must furnish a statement of accrued credits within 60 days after the close of the fiscal year. This would be very difficult, if not impossible, due to the timing of our fiscal year close and the need to perform the annual audit, etc. Currently we furnish a statement of the annual and accrued capital credit during the month of July.

Also mentioned in this section is the requirement to state the date the payment of capital credit is to made. This is also strongly opposed by Jo-Carroll Electric Cooperative. We currently pay capital credits on a 24 year rotation, but we have no guarantee that our financial position will enable us to do so in the future. We may, per our by-laws, retain the accrued capital credits if the financial condition of the Coop warrants.

In paragraph (c), the wording states that upon termination of the contract the contractor makes payments of the capital credits. We do not make early retirements of the capital credits.

Please consider this strong opposition to the proposed FAR Case 91-13 by Jo-Carroll Electric Cooperative.

Sincerely,

JO-CARROLL ELECTRIC COOPERATIVE

John W. Selleck
John W. Selleck
Assistant Manager

day

JUL 23 1991

TOM W. GREGG, JR.

ATTORNEY AT LAW

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91-13-151

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July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets N.W., Rm. 4041
Washington, D.C. 20405

VIA: Federal Express

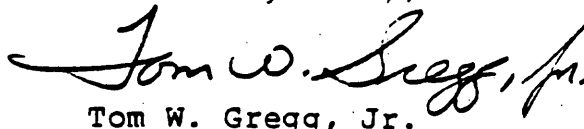
RE: FAR Case 91-13

Gentlemen:

On behalf of Concho Valley Electric Cooperative, Inc. and Southwest Texas Electric Cooperative, Inc., I am submitting the attached comments concerning 48 CFR 52.241-13 Capital Credits.

Your consideration of these comments will be most appreciated.

Yours very truly,


Tom W. Gregg, Jr.

TWGJR/eh
Enclosure

cc: Mr. Michael Oldak
NRECA Regulatory Counsel
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036

Mr. Alton Rollans, General Manager
Concho Valley Electric Cooperative, Inc.

Mr. Jim Martin, General Manager
Southwest Texas Electric Cooperative, Inc.

JUL 23 1991

91-13-151

COMMENTS

TO: General Services Administration
FAR Secretariat (VRS)
13 and F Streets, N.W. Room 4041
Washington, D.C. 20405

RE: FAR Case 91-13

FROM: Tom W. Gregg, Jr., Attorney at Law, on behalf of
Concho Valley Electric Cooperative, Inc., and
Southwest Texas Electric Cooperative, Inc.

On behalf of my clients and myself, I thank you for this opportunity to express my concerns about the proposed amendments to 48 CFR 52, Sec. 52.241-13 Capital Credits. I will discuss our concerns by paragraph in the order in which they appear in the proposed amendments.

"52.241-13. (a) The government is a member of the (cooperative name) _____, and as any other member, is entitled to capital credits consistent with the by-laws of the cooperative, which states the obligation of the Contractor to pay capital credits and which specifies the method and time of payment." (Emphasis mine)

It is our concern that the regulation indicates that there is an obligation of the cooperative ("Contractor") to "pay" capital credits to the Government or any other member, when in fact there is no such obligation. There is an obligation of the cooperative to "allocate" capital credits to the member account based upon the member's patronage.

The enabling act for electric cooperatives in Texas (Article 1528b, Vernon's Revised Civil Statutes) provides that the cooperative's revenues shall be sufficient at all times:

- (1) To pay all operating and maintenance expenses;
- (2) For the creation of reserves;
- (3) Revenues not required for the purposes set out above shall be returned, from time to time, to the members on a pro rata basis, "either in cash, in abatement of current charges for electric energy, or otherwise as the Board determines: but such return may be by way of general rate reduction to members, if the Board so elects."

As determined by the cooperative's board of directors, there may not be any capital credits paid, depending on the reserves desired. Further, if any return is possible, such return may not be to an individual member (i.e., the Government) but may be

returned to all the members by way of a general rate reduction.

Additionally, under the terms of the Cooperative's mortgage to the Government (Rural Electrification Administration--REA), if the equity level of a cooperative is below 40% then it cannot retire any patronage capital without the approval in writing from REA. In the case of my clients, both have equity levels less than 40%. The mortgage further provides that regardless of the equity level, if the cooperative is not delinquent in any payment of principal or interest to the Government, it may make distributions of capital credits to deceased patrons, if permitted by its articles of incorporation and bylaws in an amount not to exceed 25% of the patronage capital and margins received by the cooperative in the preceding year. Further, if the distributions to decedent's estates do not exceed the amount of 25% of the previous year's margins, the cooperative may make such additional distributions up to the 25% level of the preceding year's patronage capital and margins received. While it is anticipated that cooperatives will be in a position to make some cash retirement of capital credits each year, it does not appear wise to contract with the Government that it will do so when the Government's own mortgage restricts the cooperative's ability to pay and in some cases prohibits such payment.

Further, the by-laws of these cooperative clients do not require the payment of funds as implied by (a) and stated in (b) of the amendments. The by-law requirement is as follows:

"The Cooperative is obligated to pay by credits to a capital account for each patron all such amounts in excess operating costs and expenses.

.....All such amounts credited to the capital account of any patron shall have the same status as though they had been paid to the patron in cash in pursuance of a legal obligation to do so and the patron had furnished the Cooperative corresponding amounts for capital."

The by-laws further state that upon dissolution or liquidation of the Cooperative, after all outstanding indebtedness is paid, outstanding capital credits shall be retired, without priority, on a prorata basis. This is the only required retirement of capital credits that is not within the discretion of the board of directors.

Therefore, because we are of the opinion that subparagraph (a) is misleading, we offer the following amendment:

(a) The Government is a member of the (cooperative name) _____, and as any other member is entitled to capital credits consistent with the by-laws of the cooperative.

52.241-13(b). Within 60 days after the close of the Contractor's fiscal year, the Contractor shall furnish to the Contracting

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Officer, or the designated representative of the Contracting Officer, in writing a list of accrued credits by contract number, year, and delivery point. Also, the Contractor shall state the amount of capital credits to be paid to the Government and the date the payment is to be made. (Emphasis mine)

The 60 days after the close of the Contractor's fiscal year requirement is a concern because while electric cooperatives may have fiscal years that do not coincide with the calendar year, capital credits are usually allocated on a calendar year basis. This proposed regulation would require a separate calculation and allocation of the government's capital credits.

The last sentence of (b) indicates that a cash payment to the Government is expected. This is misleading for the reasons stated in the comments pertaining to subparagraph (a) above.

We therefore recommend that 52.241(b) be amended as follows:

(b) Within 60 days after the close of the annual period upon which the Contractor's annual allocation of capital credits is based, the Contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing a list of capital credits accrued during such annual period by a contract number, year and delivery point.

52.241-13(c) Upon termination or expiration of this contract, unless the Government directs that unpaid capital credits are to be applied to another contract, the Contractor shall make payment to the Government for the unpaid credits.

One of the basic premises of electric cooperatives--and one that has contributed greatly to their success, is that all members are treated fairly and non-discriminatorily. One consumer is not favored over another. In compliance with this basic premise, cooperatives retire capital credits based upon a plan or system. Most cooperative over the United States retire capital credits on a 20 year rotation cycle, first in - first out. Many other cooperatives use a percentage method and pay a percentage of the total outstanding capital credits to all members. Regardless of the method used, no preference, by contract or otherwise is given to any particular member. Subparagraph (c) requires the cooperative to execute a contract creating a preference for the Government. We do not find this acceptable. We therefore recommend that 52.241(c) be deleted.

52.241-13(d) Payment of capital credits will be made by certified check, payable to the Treasurer of the United States; and . . .

Again, the Government is attempting to require preferential treatment through contract. No other member receives capital credit payments by certified checks. Further, the Government

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does not require certified checks in the payment of the cooperatives' multi-million dollar loans nor does even the IRS require certified checks in the payment of citizens' tax obligations. To require certified checks for payment of capital credits to the Government would be burdensome and costly to the cooperatives.

We therefore recommend that 52.241-13(d) be amended as follows:

"(d) Payment of capital credits will be made by check, payable to the Treasurer of the United States; and . . ."

MILLER & HERN

ATTORNEYS AT LAW

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July 22, 1991

via Federal Express

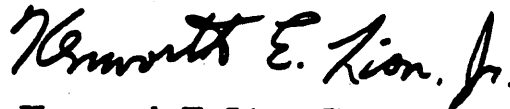
General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, DC 20405

Re: *Proposed Rule for Federal Acquisition of Utility Services*
FAR Case 91-13

Gentlemen:

Enclosed are an original and three copies of Comments on the above-captioned rulemaking proceeding to be filed on behalf of A&N Electric Cooperative, BARC Electric Cooperative, Choptank Electric Cooperative, Community Electric Cooperative, Craig-Botetourt Electric Cooperative, Delaware Electric Cooperative, Mecklenburg Electric Cooperative, Northern Neck Electric Cooperative, Northern Virginia Electric Cooperative, Powell Valley Electric Cooperative, Prince George Electric Cooperative, Rappahannock Electric Cooperative, Shenandoah Valley Electric Cooperative, Southern Maryland Electric Cooperative, and Southside Electric Cooperative.

Cordially,



Kenworth E. Lion, Jr.

KELJr/ctr/T91-0235

Enclosures

cc: Member Cooperatives
VMD Association of Electric Cooperatives

JUL 23 1991

91-13-152

COMMENTS OF THE MEMBERS
OF THE
VA. MD. AND DEL. ASSOCIATION OF ELECTRIC COOPERATIVES
REGARDING THE PROPOSED RULE FOR
FEDERAL ACQUISITION OF UTILITY SERVICES
FAR CASE 91-13

The comments presented below represent the collective comments of the cooperative members (Cooperatives) of the Virginia, Maryland and Delaware Association of Electric Cooperatives (Association) in response to the proposed rulemaking published at 56 *Federal Register* 23982 on May 24, 1991.

1. General. As public utilities, the Cooperatives have the obligation to provide service to anyone within their certificated service territories that applies for membership; however, the obligation is not unilateral. As a condition of membership, the individual or entity desiring service must agree to abide by the charter, bylaws, regulations, and terms of the membership agreement of the cooperative. These documents constitute a binding and enforceable contract between a cooperative and its members.

As will be discussed below, several of the proposed regulations violate the terms of the membership agreement, charter, bylaws, and/or regulations of the Cooperatives. Since the Cooperatives are regulated by the public service commissions in Virginia, Maryland, and Delaware, the terms and conditions of the bylaws and other controlling documents are subject to the jurisdiction and control of the commissions. Consequently, §8093 of the Department of Defense Appropriations Act of 1988, Public Law 100-202, mandates compliance with the Cooperatives' conditions of membership.

2. §41.001.1 Policy. The Cooperatives have acquired the necessary capacity to provide service to everyone, including federal facilities, within their certificated service territories. Pursuant to their obligation to serve their consumers, the Cooperatives have invested hundreds of millions of dollars to provide service, in part, in reliance upon the projected needs of the Federal Government. If federal agencies, unlike other consumers, are allowed to switch electric utilities, the fixed costs of capacity to serve federal facilities will be shifted to the Cooperatives' remaining consumers/members. This result is unfair to the remaining members and the unexpected switching of power suppliers could complicate utility system forecasting and capacity planning. Consequently, the Cooperatives are concerned about the integrity of their certificated service territories.

The Cooperatives' concern with territorial integrity arises from the confusion caused by the stated goal of the proposed regulations and the wide range of affected utilities. Although the policy statement acknowledges that §8093 of the Department of Defense Appropriations Act of 1988 requires federal agencies purchasing electricity to honor service territories established pursuant to state statute or state regulation, it emphasizes the goal of federal acquisition of utility services from supply sources that are most advantageous in terms of economy, efficiency, reliability or service. The proposed regulations place great emphasis on alternative suppliers and competitive bidding. At the same time, the regulations are intended to be applicable in a wide variety of situations. They are applicable to various combinations of the following:

- electric service,
- water service,

- steam service,
- sewage service,
- natural gas service,
- utilities with dedicated service territories,
- utilities without dedicated service territories,
- regulated utilities, and
- unregulated utilities.

In studying the proposed regulations, the Cooperatives believe that there is significant potential for confusion which could result in loss of the §8093 protection for electric utility service territories. To eliminate the potential for confusion, the Cooperatives strongly recommend that a paragraph (f) be added to §41.004-1 to read as follows:

(f) In accordance with §8093 of Public Law 100-202 as discussed in subsections (d) and (e) above, it is the policy of the Federal Government that, where electric utility franchises or service territories are established pursuant to state statute, state regulation, or state-approved territorial agreements, federal acquisition of electric utility service shall be from the appropriate electric utility subject only to the potential exceptions listed in subsection (d).

3. §41.006-1 Monthly and annual review. The language of this section is unclear with regard to the purpose of the monthly review of utility service invoices. Section 41.006-1 states:

Agencies shall review (a) utility service invoices on a monthly basis; and (b) each contract, authorization, purchase order, or other written request for service exceeding the small purchase dollar limitation on an annual basis. The purposes of such review are to ensure that the utility supplier is furnishing the services to each facility under the utility's most economical, applicable rate and to examine utility commercial markets for advantageous competitive resolicitations. The annual review shall be

based upon the facility's usage, conditions, and characteristics of service, at each individual delivery point, for the most recent 12 months. If a change in rate is appropriate, the Federal agency shall request the supplier to make such rate change immediately.

Monthly reviews seem to be unnecessary for the purpose of examining "utility commercial markets for advantageous competitive resolicitations," especially when a multi-year contract is in effect. This purpose appears to be more appropriate for the annual review. A more appropriate usage of the monthly review would be to monitor power usage for purposes of internal control. For instance, if electric usage suddenly increases, the agency would want to determine the reason and, possibly, take corrective action. Monthly monitoring could also be used to recognize changing trends in usage which would indicate a change in the rate schedule under which the agency is purchasing in order to reduce the overall level of charges. The Cooperatives recommend that this section be revised to clarify the purpose of the monthly review.

4. §41.006-2 Rate changes and regulatory intervention. Subsection (c) provides that rate changes made by the regulatory body "shall be made a part of the contract by contract modification." The initial contract should be written to automatically change the rate when a new rate is set by the regulatory body. Execution of contract modifications by the parties is unnecessary.

5. §41.007 Contract Clauses. As discussed in our general comments in paragraph 1 above, when the federal government becomes a member of a cooperative, it is expected to comply with all terms of the cooperative's membership certificate, charter, bylaws, and regulations. In this regard, the

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federal government is treated the same as every other member of the cooperative. Unfortunately, several of the contract clauses prescribed by §41.007 conflict with the Cooperatives' bylaws or regulations and, thus, will result in violation of §8093 of Public Law 100-202. To avoid this result, the Cooperatives recommend that a subsection (k) be added to §41.007 to read as follows:

(k) The contract clauses prescribed by this section shall be modified or deleted as necessary to be consistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements as mandated by §8093 of Public Law 100-202 (see 41.004-1(d)).

6. §41.009 Formats for utility service specifications. Subsection (b) provides that contracting officers may modify the specification format to attach "details on Government ownership of facilities and maintenance or repair obligations." To avoid any potential confusion regarding construction and maintenance of facilities, the Cooperatives recommend that the phrase be revised to read "details on Government ownership of facilities and maintenance or repair obligations on the Government's side of the interconnection point." The Cooperatives will own and maintain all facilities on their side of the interconnection point in accordance with standard utility practices.

7. §52.241-1 Conflicts. This proposed contract clause provides that, to the extent of any inconsistency between the terms of the contract and any rate schedule or rules or regulations of the utility, the terms of the contract control.

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This proposal is in direct violation of §8093 of the Department of Defense Appropriations Act of 1988 which provides that, in purchasing electricity, the Government must comply "with state law governing the providing of electric utility service, including state utility commission rulings." Since the tariffs and regulations of the Cooperatives are subject to state utility commission scrutiny and approval, §8093 mandates federal agency compliance with the terms of those tariffs and regulations. Consequently, this proposed clause must be rejected with regard to regulated electric utilities.

8. §52.241.2 Scope and Duration of Contract. Subsection (c) provides that the utility shall provide a complete set of rates, terms, and conditions to the federal agency. The Cooperatives recommend that the utility be required to provide only the rates, terms, and conditions related to the contract with the Government. Provision of rates and other material related to the provision of residential service or other unrelated services would serve no useful purpose.

9. §52.241-5 Service Provisions. The subsection (d)(1) requirement for an adjustment to monthly billing, including the minimum monthly charge, where service is interrupted for more than an hour is overreaching and inequitable. Cooperatives are owned by their members. There is no profit earned for providing service. Minimum charges are established to ensure that the Cooperatives recover at least their fixed costs. A reduction in the recovery of fixed costs would be detrimental to both the Cooperatives and their consumers/owners. If fixed costs are not recovered from Government agencies, the only alternative is subsidization by other ratepayers. This proposal is unacceptable and must be rejected.

10. §52.241-6 Change in Rates or Terms and Conditions of Service for Regulated Suppliers. The Cooperatives recommend that subsection (c) be revised to require utilities to provide a copy of public service commission regulations affecting the contract "within a reasonable time" rather than "immediately." The requirement for immediate action is unnecessarily onerous and provides no additional benefit to the Government.

11. §52.241-8 Connection Charge. When new consumers/owners initiate service with the Cooperatives, they may be responsible for a certain portion of the cost of the facilities required to provide such service. The connection fee is charged directly to the new customer. If a power line must be extended to provide service to a new customer, the customer pays for the cost of the extension in accordance with the individual cooperative's line extension policy. The policy is intended to place the responsibility for the cost above a certain level on the cost-causing entity. The proposed §52.241-8 will cause other consumers to subsidize Government agencies in certain circumstances. This is clearly improper. The Cooperatives believe that Government agencies should be subject to the same requirements as are all other consumers with regard to connection fees and line extensions. Government regulations should not mandate preferential treatment and subsidization by other ratepayers. The Cooperatives recommend that proposed §52.241-8 be rejected.

12. §52.241-13 Capital Credits. Subparts (b), (c), and (d) concerning the payment of capital credits violate the Cooperatives' bylaws and policies as well as the mortgage requirements imposed by the Rural Electrification Administration. These sections should be rejected.

Respectfully submitted,

- A&N ELECTRIC COOPERATIVE
- BARC ELECTRIC COOPERATIVE
- CHOPTANK ELECTRIC COOPERATIVE
- COMMUNITY ELECTRIC COOPERATIVE
- CRAIG-BOTETOURT ELECTRIC COOPERATIVE
- DELAWARE ELECTRIC COOPERATIVE
- MECKLENBURG ELECTRIC COOPERATIVE
- NORTHERN NECK ELECTRIC COOPERATIVE
- NORTHERN VIRGINIA ELECTRIC COOPERATIVE
- POWELL VALLEY ELECTRIC COOPERATIVE
- PRINCE GEORGE ELECTRIC COOPERATIVE
- RAPPAHANNOCK ELECTRIC COOPERATIVE
- SHENANDOAH VALLEY ELECTRIC COOPERATIVE
- SOUTHERN MARYLAND ELECTRIC COOPERATIVE
- SOUTHSIDE ELECTRIC COOPERATIVE

By: Thomas A. Dick
Thomas A. Dick
Director, Governmental Affairs
Va., Md. & Del. Association
of Electric Cooperatives

July 22, 1991

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Lone Star Gas Company

1111 - 11111111 - Dallas Texas 75201

MARSHA L. HUNTER
Attorney

LEGAL DEPARTMENT

July 22, 1991

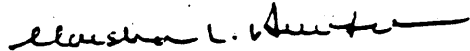
General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13

Ladies and Gentlemen:

Enclosed please find the Comments of Lone Star Gas Company, a Division of ENSERCH Corporation concerning proposed revisions of the Federal Acquisition Regulations. These Comments are being submitted in response to the rule proposed jointly by the Department of Defense, General Services Administration and National Aeronautics and Space Administration in Far Case 91-13, as published in the May 24, 1991 issue of the Federal Register. Your consideration of these comments will be appreciated.

Very truly yours,



Marsha L. Hunter

gah

JUL 23 1991

91-13-15E

UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF DEFENSE
GENERAL SERVICES ADMINISTRATION
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

IN THE MATTER OF: §
FEDERAL ACQUISITION § FAR CASE 91-13
REGULATION; ACQUISITION §
OF UTILITY SERVICES §

COMMENTS OF LONE STAR GAS COMPANY,
A DIVISION OF ENSERCH CORPORATION

Lone Star Gas Company, a Division of ENSERCH Corporation ("Lone Star"), files these Comments in response to the Notice of Proposed Rulemaking published in the Federal Register on May 24, 1991.

I.

Lone Star Gas Company is a division of ENSERCH Corporation. ENSERCH Corporation is a corporation duly organized and existing under the laws of the State of Texas with authority to transact business in said state. Lone Star's principal place of business is 301 South Harwood Street, Dallas, Texas 75201. Lone Star is an intrastate natural gas pipeline company. Lone Star owns and operates natural gas transmission lines, gathering lines, compressor stations, distribution facilities, and related properties by which it transports natural gas in intrastate commerce within the State of Texas and distributes same to

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domestic, commercial, and industrial customers within the state. Lone Star provides gas service to certain facilities owned and operated by the United States government and will therefore be affected by adoption of the proposed rule.

II.

Lone Star urges that the proposed rule be amended to provide that a review to determine whether or not alternative delivery systems exist should be completed prior to commencement of the bidding process. If no viable alternative delivery system for the utility services is identified, the agency acquiring the utility services should not be required to go through the bidding process because to do so under those circumstances would be an unnecessary expenditure of the resources of the agency acquiring the services.

III.

Lone Star supports the adoption of proposed Section 41.004-2(c), insofar as it permits an agency to issue a purchase order, or order utility service and pay for it upon the presentation of an invoice, if the utility supplier refuses to issue a written refusal to sign a tendered contract. Current Section 8.304-5(e) requires that acquisition of utility services be by bilateral written contract under certain circumstances, including situations in which service is available from more than one source or the annual cost of service is estimated to exceed the appropriate small purchase limitation. Current Section 8.304-5(g)

provides that a written definite and final refusal to sign a contract must be received from a utility before a purchase order may be issued. Elimination of the written refusal requirement would afford agencies flexibility needed in acquiring utility service.

IV.

Proposed Section 41.004-1(b) provides that, except for small purchase acquisitions, "agencies shall acquire utility services by a bilateral written contract, which must include the clauses required by 41.007, regardless of whether rates or terms and conditions of service are fixed or adjusted by a regulatory body." This provision requires that, even though the rates and services of a particular supplier are set by a regulatory body, the terms of the service are to be defined by contract. Impermissible intrusion upon state jurisdiction over the rates and terms and conditions for gas service from intrastate pipeline facilities and local jurisdiction over the rates and terms and conditions for gas service from distribution facilities within municipalities would result from the imposition of a requirement that federal agencies include in their contracts with utility companies terms which may be in conflict with state and local regulatory requirements. The proposed rule should be revised to provide that, if services are to be purchased from a utility, execution of a written contract would not be required.

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CONCLUSION

The proposed rules, if adopted, should be revised to provide that a review to determine whether or not alternative delivery systems exist should be completed prior to the commencement of the bidding process and that, if services are to be purchased from a utility, execution of a contract would not be required, as set forth in detail in the comments set forth above.

Respectfully submitted,



Marsha L. Hunter

Lone Star Gas Company, a
Division of ENSERCH Corporation
301 South Harwood Street
Suite 504 North
Dallas, Texas 75201
(214) 573-3415

91-13-154

GULF STATES UTILITIES COMPANY

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July 22, 1991

General Services Administration
FAR Secretariat (VRS)
Eighteenth & F Streets, N.W., Room 4041
Washington, D.C. 20405

Attention: Ms. Beverly Fayson

Dear Ms. Fayson:

Re: FAR Case 91-13

Gulf States Utilities Company is an investor-owned utility company providing service to about 558,000 customers in a 28,000 square mile area of Southeast Texas and South Louisiana. We were one of the first utility companies to enter into an Areawide agreement with the Federal Government and recently completed negotiations with GSA on a second ten (10) year renewal Areawide. I was personally involved in this very intensive negotiation, the many issues involved and current FAR requirements. This experience gave me the necessary insight to objectively review the proposed rulemaking in this case.

We applaud the Government's efforts to combine the utility service procurements under a new Part 41; however, additional attention should be given to paperwork reduction for both utility companies and the Government. Since the majority of the utility companies are regulated by either a State Commission or the Federal Energy Regulatory Commission, or both, there are several areas which propose unnecessary paperwork, i.e., SF26 under Section 41.004-4 and contract modification under 41.006-2(c).

There are several references to wheeling of power which raises concern since there is no mandate on utilities to provide this service. This issue is very controversial and should it be adopted, no one knows what form it will take nor the requirements. Specific regulation in this area seems premature and should not be addressed until a later date.

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Ms. Beverly Fayson
General Services Administration

-2-

July 22, 1991

The Edison Electric Institute, of which Gulf States Utilities is a member company, will be filing a comprehensive, detailed analysis of the proposed rulemaking and we request you give serious and thoughtful consideration to their comments.

Yours very truly,



G. W. Hiter
Manager
Governmental Accounts

CP&L

Carolina Power & Light Company

P. O. Box 1551 • Raleigh, N.C. 27602
(919) 546-7544

91-13-155

H. RAY STARLING, JR.
Manager - Legal Department
Associate General Counsel

July 22, 1991

Ms. Beverly Fayson
General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13
Proposed Federal Acquisition Regulations for the Acquisition of Utility Services

Dear Ms. Fayson:

Carolina Power & Light Company (CP&L) respectfully submits these comments on the proposed Federal Acquisition Regulations on the Acquisition of Utility Services (56 Fed. Reg. 23982 (1991)).

CP&L is an investor-owned electric utility serving approximately 950,000 customers in a 30,000-square-mile area in eastern North Carolina, northeastern South Carolina and around Asheville in western North Carolina. Among CP&L's customers are six major military bases: Fort Bragg; Camp Lejeune Marine Corps Base; Cherry Point Marine Corps Air Station; Pope Air Force Base; Seymour Johnson Air Force Base; and Shaw Air Force Base. CP&L also serves many federal office buildings, courthouses, post offices and other federal installations.

CP&L is a member of the Edison Electric Institute (EEI), the national association of investor-owned electric utilities. CP&L strongly supports and joins in the comments being filed in this case by EEI. These supplementary CP&L comments are being filed for the purpose of bringing GSA's attention to particular matters of specific concern to CP&L, proposing certain modifications to the regulations in addition to those proposed by EEI, and in some instances offering secondary alternatives to modifications that are being proposed by EEI.

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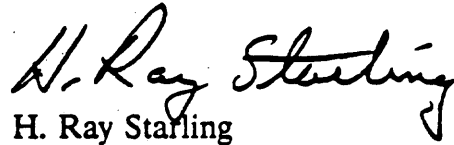
91-13-155

Ms. Beverly Fayson
July 22, 1991
Page 2

Attached to this letter are detailed discussions of specific issues raised by the proposed Federal Acquisition Regulations, outlining CP&L's concerns about the regulations and recommending specific changes. Please note that CP&L fully supports all the changes proposed by EEI; the fact that CP&L has chosen to address certain issues in these supplementary comments indicates only that these issues are of special concern to CP&L, and it should not be taken to imply any lesser degree of support for EEI's proposals on other issues.

CP&L would be pleased to have the opportunity to meet with FAR representatives to further explain these comments.

Yours very truly,


H. Ray Starling

RSG/ew
Attachments

cc: Mr. Charles Lloyd
Defense Acquisition Regulatory System
1211 South Fern Street
Arlington, Virginia 22202

Mr. Edward H. Comer
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

91-13-155

CAROLINA POWER & LIGHT COMPANY (CP&L)
CONCERNS AND RECOMMENDATIONS

PROPOSED SECTION 41.004-1
ACQUIRING UTILITY SERVICES: POLICY
PROPOSED SECTION 52.241-1
CONFLICTS

CONCERNS:

CP&L is gravely concerned that Section 41.004-1(b) of the proposed regulations, providing that government contracts for electric service "must include the clauses required by 41.007, regardless of whether rates or terms and conditions of service are fixed or adjusted by a regulatory body," and Section 52.241-1, the proposed standard "Conflicts" clause, are inconsistent with and tend to undercut Section 41.004-1(c), the provision that recognizes the validity of § 8093 of Public Law No. 100-202.

In § 8093 Congress specifically directed that no federal agency is authorized "to purchase electricity in a manner inconsistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories." Prior to the enactment of this statute, proposals had been made that Government agencies should seek to reduce costs by negotiating electric service terms and conditions more favorable than those available to non-Government customers; that they should look for opportunities to purchase power from electric suppliers other than the ones that had served them in the past; and that competitive bidding for electric service should be encouraged. With the adoption of § 8093 Congress expressed its concern about the adverse effects that such an approach could have on non-Government electric customers.

A fundamental provision of utility law, which has been incorporated into the North and South Carolina utility statutes as N.C. Gen. Stat. § 62-140 and S.C. Code Ann. § 58-27-840, respectively, is that there may be no discrimination among utility customers. When a group of customers pay the same rates for utility service, a utility may not single one out for benefits unavailable to the others or relieve one of duties that are imposed on the others. This, however, is exactly what happens when a Government agency is able to negotiate terms and conditions more favorable than those that apply to non-Government customers. When this occurs, the inevitable result is that the Government does not pay the full cost of the service it receives, while other customers must pay more than their true cost of service. Under § 8093, when a State chooses to prohibit discrimination of this type, the Government must be guided by the State's policy and refrain from seeking discriminatory terms and conditions of service. However, Section 52-241.1 of the proposed regulations disregards § 8093 by stating that the terms of the standard Government contract clauses prevail over "any rate schedule . . . incorporated in this contract by reference or otherwise, or any of the Contractor's rules and regulations."

A matter of particular concern to CP&L is the standard "Scope and Duration of Contract" clause in Section 52-241.2 of the proposed regulations, which specifies that every Government utility contract must have a specified termination date, "that neither the Contractor nor the Government is under any obligation to continue any services beyond the term of this contract," and that thereafter the Government is free to obtain service from another utility. Under Sections 41.004-1(b) and 52-241.1 of the proposed regulations, this clause must take priority over any conflicting provision in CP&L's rules, regulations or rate schedules.

The electric utility industry is highly capital-intensive. A large component of the cost of electric service consists of the fixed costs of generating plants, and transmission and distribution lines, which have been built to serve existing customers. When a customer leaves a utility's system, its share of these fixed costs must be absorbed by the utility's remaining customers. Thus, should a large Government customer (such as a military base) change its electric supplier, the unavoidable result would be that the non-Government customers of the original supplier would be faced with higher rates.

Congress was well aware of this situation when it passed § 8093. One of the main purposes of this statute was to enable the States, if they so choose, to limit the migration of customers from one electric utility system to another. North and South Carolina have chosen to do so. Each state has adopted a statute (N.C. Gen. Stat. §§ 62-110.2 and 160A-331 to -338, and S.C. Code Ann. §§ 58-27-610 to -690) directing its regulatory commission to allocate service territories to particular electric suppliers. Moreover, both the North Carolina Utilities Commission and the South Carolina Public Service Commission have approved section 1(g) of CP&L's Service Regulations, which provides that a customer may terminate its purchases of electricity from CP&L only if "Customer no longer has use for electricity at the premises." In light of the territorial assignment statutes and section 1(g) of the Service Regulations, it is clear that North and South Carolina state policy do not permit a customer to shift its load from one electric supplier to another simply for the sake of obtaining lower rates. Under § 8093 the Government is directed to respect this state policy; however, Sections 41.004-1(b) and 52.241-1 of the proposed Federal Acquisition Regulations disregard it.

RECOMMENDATIONS:

CP&L strongly urges, and indeed considers it essential, that the changes in Sections 41.004-1(b) and 52-241.1 proposed by EEI be adopted. The EEI changes will bring these sections into harmony with § 8093, and with Section 41.004-1(d) of the regulations, by ensuring that State law (whether expressed in statute, in regulatory commission rules and regulations, or in tariffs or terms and conditions approved by the regulatory commission) be given priority over the standard Government contract clauses where any conflict exists.

CAROLINA POWER & LIGHT COMPANY (CP&L)
CONCERNS AND RECOMMENDATIONS

PROPOSED SECTION 41.004-5(d)
ACQUIRING UTILITY SERVICES: SEPARATE CONTRACTS
PROPOSED SECTION 52.241-2
SCOPE AND DURATION OF CONTRACT

CONCERNS:

1. The present contracts CP&L has with DOD agencies have "indefinite terms." Over many years this arrangement has worked extremely well with the various military branches, as they have been able to issue contract modifications adding new points of delivery whenever required under the master contract for the base in question. Neither the military nor CP&L has had to be overly concerned about contract terms and termination charges for new services, because whenever a particular service has to be terminated, any applicable termination charges are calculated under CP&L's Service Regulations which have been approved by the North and South Carolina regulatory commissions. If the proposed Sections 41.004-5(d) and 52.241-2 become effective and all services are under ten-year contracts, CP&L will have to become more concerned about adding new services, particularly near the end of the ten-year contract period.
2. Proposed subsection (b) includes the following language: "It is expressly understood that neither the Contractor nor the Government is under any obligation to continue any services beyond the term of this contract." This presents the following concerns to CP&L:
 - a) This wording is in conflict with section 1(g) of CP&L's Service Regulations, which have been approved by the North and South Carolina regulatory commissions. Section 1(g) states: "If Customer desires to terminate the Agreement, Company will agree to such termination if Company is satisfied that Customer no longer has use for the electricity at the premises" The proposed standard contract clause grants the Government broader termination rights than are permitted under North and South Carolina law, and therefore it is in violation of § 8093 of Public Law No. 100-202, which provides that the Government is not authorized to purchase electricity in a manner inconsistent with State law.
 - b) As noted above, if ten-year contract terms are required, it may become necessary to have different contract termination provisions for a service added near the end of the ten-year term than one added at the beginning of the term.

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- c) CP&L's planning personnel annually request specific information regarding the ten-year load forecasts for military bases. The possibility of several large military bases being able to terminate service at the same time is likely to make CP&L's planning and load forecasting much more difficult, and in the long term this could increase CP&L's costs and potentially jeopardize reserve margins.

RECOMMENDATIONS:

1. The changes proposed by EEI in Section 41.004-5(d) should be adopted.
2. Section 52.241-2(a) should be amended as follows (bold type represents language to be added):

For the period (date) to (date), the Contractor agrees to furnish and the Government agrees to purchase (specify type) utility services in accordance with the applicable tariff(s), rules, and regulations as approved by the applicable governing regulatory body and as set forth in the contract. [Note: The phrase "For the period (date) to (date)" may be deleted if an indefinite term is desired.]

3. Section 52.241-2(b) should be deleted.

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CAROLINA POWER & LIGHT COMPANY (CP&L)
CONCERNS AND RECOMMENDATIONS

PROPOSED SECTION 52.241-3
CHANGE IN CLASS OF SERVICE

CONCERNS:

Subsection (a) states: "In the event of a change in class of service, such service shall be provided at the contractor's lowest available rate schedule applicable to the class of service furnished." This provision conflicts with section 1(c) of CP&L's Service Regulations, which have been approved by the North and South Carolina regulatory commissions, and therefore it is inconsistent with § 8093 of Public Law No. 100-202. Section 1(c) of the Service Regulations states that "Company will attempt to assist Customer to a reasonable extent in determining which rate schedule and/or rider to select. It is the customer's right and responsibility to select the available rate and/or rider." In many cases, customers have the opportunity to select between more than one rate schedule within the same class of service -- for example, time-of-use rates, traditional nontime-differentiated rates, curtailable rates, etc. -- and the lowest possible rate is dependent upon the manner in which the customer's facilities are operated. Since the customer must decide how its facilities will be operated, the selection of the rate schedule is a responsibility properly borne by the customer.

PRIMARY RECOMMENDATION:

The changes requested by EEI in Sections 41.004-1(b) and 52.241-1 of the proposed regulations should be adopted. These changes will ensure that State law takes priority over the provisions of the standard Government contract clauses if there is a conflict.

SECONDARY RECOMMENDATION:

Section 52.241-3(a) should be replaced with the following language, which is taken from Article 5(f) of the proposed Areawide Public Utilities Contract for Electric Services, Contract No. GS-00P-91-BSD-00__, drafted by GSA and submitted to CP&L in 1991:

In the event of a permanent change in the class of service furnished to the Government at a particular service location, electric services shall thereafter be available to the Government at such service location at the lowest available rate schedule of the Contractor, which is applicable to the class of service furnished, following such permanent change and which is applicable in the area where such services are furnished.

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**CAROLINA POWER & LIGHT COMPANY (CP&L)
CONCERNS AND RECOMMENDATIONS**

**PROPOSED SECTION 52.241-4
CONTRACTOR'S FACILITIES**

CONCERN NO. 1:

The last sentence of Section 52.241-4(a) provides that "the Contractor shall be responsible for all losses or damage" to its facilities serving the Government. This language conflicts with section 12(d) of CP&L's Service Regulations, which have been approved by the North and South Carolina regulatory commissions. This provision of the Service Regulations states: "In the event of any loss or damage to such property of Company caused by or arising out of carelessness, neglect, or misuse by Customer, his employees or agents, the cost of making good such loss or repairing such damage shall be paid by Customer." Under § 8093 of Public Law No. 100-202 the Government is not authorized to purchase electricity in a manner inconsistent with state law. The problem of damage to electric facilities is a matter of special concern to CP&L, because on several of the military bases CP&L serves, troops and military vehicles frequently damage distribution lines in the training areas. CP&L normally charges the Government for the necessary repairs, and the Government has not heretofore objected to these charges.

RECOMMENDATION NO. 1:

The changes requested by EEI in Section 52.241-4(a) should be adopted, in order to place a more appropriate degree of responsibility for damage to electric facilities on the Government, and in order to make this section consistent with North and South Carolina law. In addition, the changes requested by EEI in Sections 41.004-1(b) and 52.241-1 of the proposed regulations should be adopted, in order to ensure that State law takes priority over the provisions of the standard Government contract clauses if there is a conflict.

CONCERN NO. 2:

Section 52.241-4(d) provides that if the contract is revoked or terminated, the Contractor's "facilities shall be removed and Government premises restored to their original condition by the contractor at its expense" This language would create difficulties if CP&L were ever asked to remove a distribution or transmission line on one of the military bases. For example, how would one return several miles of 230 kV transmission right of way through a pine forest to "their original condition"?

91-13-15E

RECOMMENDATION NO. 2:

The changes requested by EEI in Section 52.241-4(d) should be adopted.

91-13-15E

CAROLINA POWER & LIGHT COMPANY (CP&L)
CONCERNS AND RECOMMENDATIONS

PROPOSED SECTION 52.241-5
SERVICE PROVISIONS

CONCERNS:

Subsection (d)(1) provides for an adjustment in the Government's electric billing whenever service to the Government is interrupted for more than an hour in any billing period. Similarly, subsection (d)(2) provides for a billing adjustment if the Government is unable to operate its service location for more than 15 days in a billing period. CP&L does not provide billing adjustments on this basis to its non-Government customers. If such adjustments were provided to the Government, this would be discriminatory and therefore would violate N.C. Gen. Stat. § 62-140 and S.C. Code Ann. § 58-27-840. It would result in the Government's paying less than the true cost of its electric service, while non-Government customers would pay more than their true cost of service.

RECOMMENDATION:

The changes proposed by EEI in Subsection 52.241-5(d) should be adopted.

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**CAROLINA POWER & LIGHT COMPANY (CP&L)
CONCERNS AND RECOMMENDATIONS**

**PROPOSED SECTION 52.241-6
CHANGE IN RATES OR TERMS AND CONDITIONS OF SERVICE
FOR REGULATED SUPPLIERS**

CONCERN NO. 1:

Sections 52.241-6(a) and (d) state that written notice must be provided to the Contracting Officers of all proposed changes in rates or terms and conditions of service, and that all such changes must be incorporated into the contract by the issuance of a contract modification. The current requirement that a contract modification be issued for every change in rates or conditions of service is a paperwork nightmare both for contracting officers and for utility representatives. The additional new requirement for advance notification would create even more paperwork, and it would compel CP&L to make special mailings to the many Contracting Officers in its service area. Such special mailings are not required for other customers.

PRIMARY RECOMMENDATION NO. 1:

The changes proposed by EEI in Section 52.241-6(a) should be adopted, and Section 52.241-6(d) should be deleted in its entirety.

SECONDARY RECOMMENDATION NO. 1:

If GSA chooses not to adopt the changes proposed by EEI in Section 52.241-6(a), then that subsection should be replaced with the following language, which is taken from Article 5(b) of the proposed Areawide Public Utilities Contract for Electric Services, Contract No. GS-00P-91-BSD-00__, drafted by GSA and submitted to CP&L in 1991:

If, during the term of this contract, the Contractor applies to any regulatory body for a change in rates or in the type of service to be performed under this contract, it shall take steps to see that the Contracting Officer and GSA receive at least the same notice of such application as is received by all other customers affected by such application.

CONCERN NO. 2:

Section 52.241-6(b) requires the Contractor to represent and warrant "that currently and during the life of this contract the applicable published and unpublished rate schedule(s) shall not be in excess of the lowest published and unpublished rate schedule(s) available to any other customers of the same class under similar conditions of use and service." This provision conflicts with section 1(c) of CP&L's Service Regulations, which have been approved by the North and South Carolina regulatory commissions, and therefore it is inconsistent with § 8093 of Public Law No. 100-202. Section 1(c) of the Service Regulations states that "Company will attempt to assist Customer to a reasonable extent in determining which rate schedule and/or rider to select. It is the customer's right and responsibility to select the available rate and/or rider." As previously noted, customers often have the opportunity to select between more than one rate schedule within the same class of service -- for example, time-of-use rates, traditional nontime-differentiated rates, curtailable rates, etc. -- and the lowest possible rate is dependent upon the manner in which the customer's facilities are operated. Since the customer must decide how its facilities will be operated, the selection of the rate schedule is a responsibility properly borne by the customer.

RECOMMENDATION NO. 2:

The changes requested by EEI in Section 52.241-6(b) should be adopted, in order to make this section consistent with North and South Carolina law and avoid placing an unreasonable warranty obligation on the Contractor. In addition, the changes requested by EEI in Sections 41.004-1(b) and 52.241-1 of the proposed regulations should be adopted, in order to ensure that State law takes priority over the provisions of the standard Government contract clauses if there is a conflict.

ROBERTS, HARRELL & LINDSEY, P.A.

ATTORNEYS AT LAW
201 JACKSON STREET, S.W.
P.O. BOX "K"
CAMDEN, ARKANSAS 71701

91-13-156

ALLEN P. ROBERTS
SEARCY W. HARRELL, JR.
PAUL E. LINDSEY

TELEPHONE
(501) 836-7725
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(501) 836-4944

July 22, 1991

FEDERAL EXPRESS

General Services Administration
FAR Secretariat (VRS)
Room 4041
18th and F Streets, N.W.
Washington, D.C. 20405.

RE: FAR Case 91-13
Ouachita Electric Cooperative Corporation

Gentlemen:

This law firm represents Ouachita Electric Cooperative Corporation, which has its principal offices in Camden, Arkansas. The Cooperative has asked that we respond to your proposed rule on the acquisition of services from utilities; in particular, the following provisions:

52.241-13 Capital Credits

(a) The Government is a member of the (cooperative name) _____, and as any other member, is entitled to capital credits consistent with the by-laws of the cooperative, which states the obligation of the Contractor to pay capital credits and which specifies the method and time of payment.

(b) Within 60 days after the close of the Contractor's fiscal year, the Contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing a list of accrued credits by contract number, year, and delivery point. Also, the Contractor shall state the amount of capital credits to be paid to the Government and the date the payment is to be made.

(c) Upon termination or expiration of this contract, unless the Government directs that unpaid capital credits are to be applied to another contract, the Contractor shall make payment to the Government for the unpaid credits.

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(d) Payment of capital credits will be made by certified check, payable to the Treasurer of the United States and forwarded to the Contracting Officer at _____, unless otherwise directed in writing by the Contracting Officer. Checks shall cite the current or last contract number and indicate whether the check is partial or final payment for all capital credits accrued.

We have the following comments:

(a) The Cooperative has no problem with proposed paragraph (a). It is appropriate. The government should be treated exactly the same as the other members. The problems occur with the remaining paragraphs which tend to give the government preferential treatment.

(b) Ouachita Electric furnishes capital credit information to all members on an annual basis. These capital credits are not considered to be "accrued" from a legal standpoint. To furnish specific information within 60 days would be burdensome and an unnecessary expense. It would not provide any particularly useful information to the government.

The second sentence creates significant problems. The Cooperative does not, on an annual basis, know the exact amount or dates when capital credits will be payable. Both REA and CFC prohibit full refunds of capital credits unless the Cooperative has 40% equity. In addition, refunds are subject to board approval, which is based upon sound economic policy for the Cooperative and may, therefore, vary from time to time. The Cooperative would not be in a position to advise the government, nor any other members, of the exact amount and date.

(c) This paragraph is unfair and unreasonable. It tends to provide benefits to the government that other members do not have. Capital credits should be paid to the government at the same time other members are paid, and based upon the considerations discussed in paragraph (b) above.

(d) The requirement of a certified check in routine cases is unreasonable and will also give the government preference over all other members. Capital credit checks describe the basis for payment. We again point out that capital credits are not accrued on an annual basis in the legal sense.

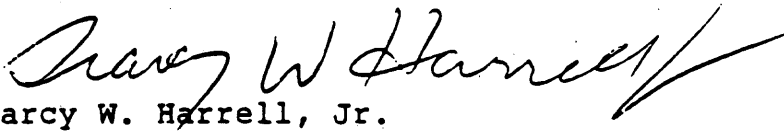
91-13-156

The Cooperatives have no problem in treating the government as any other member, but preferential treatment is not only unfair to the Cooperative and other members but could require a violation of agreements with REA and CFC.

We hope that the section identified above is not adopted.

Sincerely,

ROBERTS, HARRELL & LINDSEY, P.A.



Searcy W. Harrell, Jr.

SWH/jm

cc: Mr. Boyce Drake
Ouachita Electric Cooperative Corporation
P. O. Box 877
Camden, AR 71701



91-13-157

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, D.C. 20405

RE: FAR Case 91-13

This letter is in response to the proposed rule changes on the acquisition of services from utilities (56 Federal Register 23982).

Delta-Montrose Electric Association (DMEA) opposes the addition of language as proposed in Section 41.007(j)/52.241-13 Capital Credits, items b and c.

The proposed language in item (b) forces the contractor to allocate capital credits within 60 days after the close of the contractors' fiscal year. This requirement would force DMEA to make internal accounting changes that would comply with only one customer, the Federal Government. Also the proposal requires the Contractor to state when capital credits will be paid. But as a rural electric cooperative, the exact time that capital credits will be retired is difficult to project. Capital credits are retained by the cooperative until the financial condition permits the return of allocated capital credits. This requirement could force Bylaw changes of most of the cooperatives across the nation.

Item (c) states that upon termination of the contract, that capital credits may be required to be paid. This requirement is excessive and as explained above, counter to the wide spread organizational characteristics of rural electric cooperatives in general. This requirement would treat the Federal Government with discrimination in relation to our other member customers.

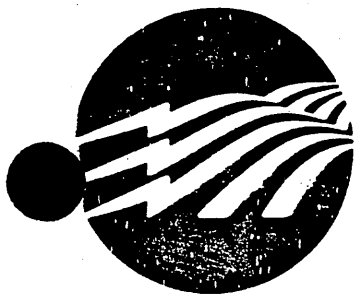
We do not believe that the intent and cost associated with these changes are to the best economical interest of our cooperative nor are the changes to the best interests of the citizens of our nation by discriminating against them.

Very truly yours,

M.R. Torres
General Manager

MRT/vea
cc: Ryan Whitfield, President DMEA

JUL 23 1991



GEMC

91-13-158

Georgia Electric Membership Corporation

151 Ellis Street, N.E., Suite 422 • Atlanta, Georgia 30303
(404) 659-3430 • GA WATS: 1-800-544-4362 • FAX (404) 659-3442

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, NW
Washington, DC 20405

RE: Comments of the Georgia Electric Membership Corporation (GEMC) on Proposed Federal Acquisition Regulation: Acquisition of Utility Services, 56 Federal Register 23982 (1991), (FAR Case 9-13)

On behalf of Georgia's 42 electric membership cooperatives, Georgia EMC, the statewide service organization, appreciates the opportunity to comment on the proposed rule regarding the return of capital credits to the United States Government. Georgia EMC supports the position of the General Services Administration (GSA) expressed in subsection (a) which states that federal facilities are "...entitled to capital credits consistent with the bylaws of the cooperative". Governmental agencies should have the same standing that other members of the cooperative have regarding the return of capital credits, and the return of these credits should be consistent with the cooperative's bylaws.

However, GSA's position is contradicted by the specific requirement in subsection (b) that a list of accrued credits shall be furnished to the Government Contractor within 60 days after the close of the Contractor's fiscal year along with a date for payment. The bylaws of the cooperative often provide for the retention of these credits for a variety of purposes including, for example, the maintenance of sufficient capital and capital ratios.

A mandatory payment to Government Contractors, as set forth by subsection (c), would result in an erosion of the capital and capital ratios that REA requires in its mortgage instrument. Other supplementary lenders rely upon this capitalization requirement in their loan underwriting considerations for cooperatives.

- Atlanta EMC
 - Buckhead EMC
 - Chamblee EMC
 - Decatur EMC
 - Douglas EMC
 - East Lake EMC
 - East Point EMC
 - Forest Park EMC
 - Grantville EMC
 - Hammond EMC
 - Highland EMC
 - Lawrenceville EMC
 - North Decatur EMC
 - North Lake EMC
 - North Springs EMC
 - Perimeter EMC
 - South Decatur EMC
 - South Lake EMC
 - South Springs EMC
 - Union City EMC
 - Washington EMC
- Associate Members
 Federal Credit Union
 GRESCO
 SEDCO, Inc



This erosion of capital ratios is additionally counter productive to any effort to move EMCs into the private financial markets.

These proposed regulations may also call into question the tax-exempt status of utility cooperatives. In order to qualify (and remain qualified) as a 501 (c) (12) organization, a utility cooperative must operate on a cooperative basis. The definition of cooperative operation is found in case law and administrative rulings. In essence, cooperative operation requires that the utility account, on a patronage basis, to all of its patrons for amounts received from furnishing utilities in excess of the amounts required for operating costs and expenses (including future business needs). This accounting is generally achieved by the annual allocation of "credits" to a capital account for each patron of utility cooperative by the patrons for capital needs (thereby, the term "capital credits"). See Puget Sound Plywood, 44TC 305; Rev. Rul. 78-238, 1978-1 CB, 161; Peninsula Light 77-1USTC 9401; and Rev. Rul. 72-36, 1972-1 CB, 151.

Cooperative principles allow the retention of capital credits for such purposes as retiring debt, expanding services or maintaining necessary reserves. Rev. Rul. 72-36, question 2.

Capital credits must be allocated to patrons in an equitable manner, generally on the basis of their patronage. See Pomeroy Cooperative Grain Co., 31TC 674; Lamesa Cooperative Gin, 78TC 894; Kingfisher Cooperative Elevator Association, 84TC 600. It is noteworthy in Lamesa that equitable allocations of capital credits are intended "to prevent inequitable treatment to some patrons at the expense of others..." It is a reasonable assumption that this logic would apply to capital credit retirements.

Capital credit retirements are typically determined by the cooperative's Board of Directors within the guidelines of the bylaws and with consideration of the cooperative's financial status. Historically, most utility cooperatives have returned capital credits on a first-in, first-out (FIFO) basis, as recommended by REA (see REA Bul. 102-1:402-3 Appendix A) and often required by their bylaws. This system returns older capital to patrons as newer capital is supplied by new patrons.

Generally cooperative's bylaws provide for "out-of-sequence" retirements in cases where the member has ceased to exist (specifically, estates, bankrupt corporations and

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page 3

dissolved entities). However, no member or class of members continuing in existence is given preferential rights to capital credit retirements.

The GSA position seeks to modify this historical treatment and place itself ahead of all other members in the retirement order by legislative change. This out-of-turn payment is unfair to the other cooperative members who do not receive their capital credit until one of the above described conditions occurs. This potential inequitable treatment may be inconsistent with the requirements of the Internal Revenue Service for cooperative status; therefore, the implementation of these proposed regulations may result in the revocation of the tax-exempt status of complying cooperatives. The loss of this status would be devastating to the cooperative system.

Additionally, as previously mentioned, the FIFO system of accounting is mandated by the bylaws of many electric cooperatives. These proposed regulations could violate the FIFO requirement. If so, these rules might impair a vested contractual obligation and violate the constitutional prohibition against laws impairing vested contractual rights in private contracts.


Another concern involves the difficulty of complying with the requirement of subsection (b) that demands that a specific date of payment of capital credits be stated within 60 days after the close of the Contractor's fiscal year. Many cooperatives do not have a regular payment cycle. This problem could be handled if the rules made clear that this requirement applies only if the cooperative has some regular cycle that it tries to follow and that circumstances could change that. For example: "Cooperative anticipates that payment will be made on or about December 1, 2011."

As demonstrated by the above concerns, Georgia EMC and its member systems have significant problems with the proposed regulations as currently written. GEMC has attempted to thoroughly explain these concerns in the above comments. In cooperation with our national organization, the National Rural Electric Cooperatives Association (NRECA), our statewide association is willing to further explain any of our concerns.

Thank you for your consideration of our comments.

Respectfully submitted,


Jere T. Thorne
Director of Governmental Affairs


Marybeth R. Atkins
Regulatory Counsel



**The Central Georgia
Electric Membership Corporation**

91-13-159

P.O. Drawer 309 923 S. Mulberry Street Jackson, Georgia 30233 Phone (404) 775-7857

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F. Streets, NW
Room 4041
Washington, DC 20405

RE: Acquisition of Utility Services, 56 Fed. Reg. 23982 (1991)
FAR Case 91-13

Gentlemen:

I respectfully submit the following comments concerning the Proposed Regulations Regarding Capital Credits (Part 52.241-13) and Connection Charges (Part 52.241-8).

Capital Credits

- . The proposed regulations may set a precedent that could jeopardize the basic means of capitalizing a cooperative. The capital credit in reality could become a liability rather than equity.
- . Furnishing a list of accrued capital credits within 60 days after the close of the cooperative fiscal year is not acceptable. With subsidiary (G&T) capital credits and other unknowns to consider, this may be impossible to determine.
- . Mandatory payment may erode capital and capital ratios which REA requires in its mortgage instrument and other lenders rely upon in their loan underwriting considerations for cooperatives.
- . By virtue of the erosion of capital ratios and the shift of cooperatives to more omnibus financial markets, cooperative consumers may have to pay higher rates to fund higher interest costs.
- . The proposed regulations may change the cooperative tax exempt status because it could be inconsistent with the requirements of the IRS for cooperative status.



JUL 23 1991

General Services Administration
July 22, 1991
Page 2


91-13-159

Connection Charge

- . Under the proposed regulations, the cost of providing connection facilities for the government could be shifted from the government to the other members.
- . The proposed regulations seem to be referring to a non-exempt, subchapter T cooperative. The non-exempt cooperative is subject to possible accelerated payment rules under the tax law. Their earned equity or excess margins are, as a rule, referred to as "patronage dividends." The term "capital credits" is commonly used in referring to excess margins only by 501(c) (12) tax-exempt organizations such as the EMCs.

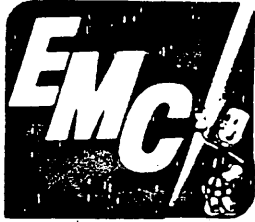
Thank you for your consideration of these stated comments.

Sincerely yours,



George L. Weaver
President

GLW/akm



**Canoochee
Electric Membership Corporation**

P. O. Box 497 / Reidsville, Georgia 30453 / Phone (912) 557-4391

91-13-160

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F. Street, N. W. Room 4041
Washington, D. C. 20405

Re: FAR Case 91-13

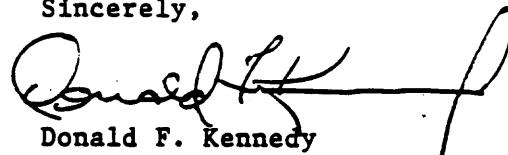
Gentlemen:

We have received the proposed rule referenced in the above FAR case as published in the Federal Register (56 Federal Register 23982) and feel the requirements imposed under Section 52.241-13 Capital Credits would not be in the best interest of the members of Canoochee EMC and inconsistent with provisions of Cooperative's By-Laws.

Likewise, the regulation appears to be placing reporting requirements even greater than the Internal Revenue Service requirements for exemption under Section 501 (c) 12.

We ask that the GSA proposed addition of language to contracts between Federal facilities and cooperative utilities be revised or stricken.

Sincerely,


Donald F. Kennedy
General Manager

DFK/mdk

JUL 23 1991

91-13-161

BALCH & BINGHAM

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July 22, 1991

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 WILLIAM P. COBB, II
 ALAN T. ROGERS
 JAMES A. BYRAM, JR.
 WILLIAM S. WRIGHT
 SUSAN B. BEVILL
 JOHN J. COLEMAN, III

VIA FEDERAL EXPRESS

General Services Administration
 FAR Secretariat (VRS)
 18th and F Streets, N.W.
 Room 4041
 Washington, D.C. 20405

RE: FAR Case 91-13

Dear Sir or Madam:

In accordance with the notice issued in the Federal Register on May 24, 1991, I am enclosing comments with respect to the proposed rewrite of the FAR coverage dealing with utility services. These comments are being filed by Southern Company Services, Inc., on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric & Power Company ("Southern Companies"). For your convenience, five (5) copies of the comments have been provided.

If you have any questions, or if there is anything further we need to do, please contact me.

Very truly yours,

Dan H. McCrary
 Dan H. McCrary

DHM/cld
Enclosure

|| 23 1991

91-13-161

REQUEST FOR WRITTEN COMMENTS
ON PROPOSED FEDERAL ACQUISITION
REGULATION REGARDING ACQUISITION
OF UTILITY SERVICES

FAR CASE 91-13

COMMENTS OF SOUTHERN COMPANIES

ALABAMA POWER COMPANY

GEORGIA POWER COMPANY

GULF POWER COMPANY

MISSISSIPPI POWER COMPANY

SAVANNAH ELECTRIC AND POWER COMPANY

SOUTHERN COMPANY SERVICES, INC.

July 22, 1991

JUL 23 1991

91-13-161

REQUEST FOR WRITTEN COMMENTS
ON PROPOSED FEDERAL ACQUISITION
REGULATION REGARDING ACQUISITION
OF UTILITY SERVICES

FAR CASE 91-13

COMMENTS OF SOUTHERN COMPANIES

These comments are filed by Southern Company Services, Inc., on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric and Power Company (collectively referred to as "Southern Companies"), in response to the request by the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration for comments on the proposed rewrite of the existing Federal Acquisition Regulation ("FAR") pertaining to the acquisition of utility services. FAR Case 91-13, 56 Fed. Reg. 23982.

Introduction

Southern Companies appreciate the opportunity to comment on the proposed regulation, and support the revision of the FAR to require the procurement of electric utility service to federal installations to be consistent with state regulation governing the distribution of such service. The revised FAR will help lower the overall cost of electric utility service, and thus will benefit not only federal installations but also all consumers of electricity. Southern Companies believe, however, that the wording of the proposed regulation should be revised to negate a possible ambiguity that could frustrate the underlying intent of Congress.

The ambiguity arises out of the use of the term "franchise service territory", which could improperly be read to refer only to "territorial" forms of state regulation. Since the intent is to respect all forms of state regulation governing the availability of electric service, it should be eliminated from the FAR.

Ambiguity in the Proposed Regulation

The focal point of Southern Companies' concern is the language of subsection 41.004-1(e) of the proposed regulations, which provides:

(e) Prior to acquiring electric utility services on a competitive basis in an area governed by a franchise service territory, the contracting officer shall determine, with the advice of legal counsel, by a market survey or any other appropriate means, that such competition would not be inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements. Proposals from alternative electric suppliers must provide a representation that service can be provided in a manner not inconsistent with section 8093 of Public Law 100-202 [see 41.004-1(d)]. The representation must be supported with appropriate legal and factual rationale.

(emphasis supplied). The limiting phrase "in an area governed by a franchise service territory" is disconcerting because its inclusion might severely limit the applicability of this subsection, and thus make it inconsistent with the remainder of the regulation. More specifically, the entire subsection could be construed to apply only in those states or areas of a state that are governed by a "franchise service territory." The extensive language that follows clearly recognizes, however, that the states

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have chosen a variety of mechanisms to regulate the provision of electric utility service, all of which are designed to avoid the uneconomic duplication of electric facilities. In those states which do not have "franchise service territories," but which do have pervasive state regulation that determines the appropriate supplier to serve each customer, competition would nonetheless "be inconsistent with state law governing the provision of electric utility service." In short, a contracting officer, prior to acquiring electric utility services on a competitive basis, should determine whether such competition would be inconsistent with any state law governing the provision of electric utility service, regardless of the mechanism chosen to implement a non-duplication policy. To do otherwise elevates form over substance, inviting arbitrary and inconsistent results.

Congress' Intent to Respect State Law

Southern Companies submit that Congress did not intend to require compliance with only some (but not all) forms of state law governing the provision of electric service. Indeed, Section 8093 plainly prohibits "any Department, agency or instrumentality of the United States" from "purchas[ing] electricity in a manner inconsistent with State law governing the provision of electric utility service" The House Report submitted in support of Section 8093 describes the effect as directing "the federal government, when procuring retail electric utility service, to abide by these service arrangements just like any other customer of

91-13-161

an electric utility." H.R. Rep. No. 410, 100th Cong., 1st Sess. 277 (1987).

The Congressional record is also clear as to the policy reasons underlying the above-described intent. As observed in the House Report:

The Federal Power Act specifically [left] retail rate and service regulation to the jurisdiction of the states Proposals by federal executive agencies to purchase power competitively, without regard to the separation of state and federal regulatory authority or to the means by which states have divided responsibility of serving customers, is contrary to the regulatory framework Congress, and, derivatively, the States, have so carefully designed.

Id. Congress specifically intended federal facilities to be subject to state utility regulation in this regard in order to "protect utility customers from the burden of increased rates that inevitably would result if Federal facilities abandon local utility systems." S. Rep. No. 406, 99th Cong., 2d Sess. 68 (1986). Such protection is appropriate because:

[U]tilitiès across the nation have invested billions of dollars to provide generating and transmission capacity, in part in reliance upon the projected needs of the Federal Government. . . .

If the Federal Government switches suppliers, the fixed costs of capacity built to serve federal facilities would almost immediately be shifted to the remaining customers of the utility.

H.R. Rep. No. 723, 99th Cong., 2d Sess. 79-80 (1986).

Proposed Regulatory Changes to Section 41.004-1(e)

In order to eliminate the possible ambiguity in the proposed FAR, Southern Companies suggest deleting the reference to "an area

91-13-161

governed by a franchise service territory." The proposed regulation would then read as follows:

(e) Prior to acquiring electric utility services on a competitive basis, ~~in an area governed by a franchise service territory,~~ the contracting officer shall determine, with the advice of legal counsel, by a market survey or any other appropriate means, that such competition would not be inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements. Proposals from alternative electric suppliers must provide a representation that service can be provided in a manner not inconsistent with section 8093 of Public Law 100-202 [see 41.004-1(d)]. The representation must be supported with appropriate legal and factual rationale.

With this change, the regulation would be a clear, straightforward and undeniable directive that a contracting officer seeking to acquire electric utility services on a competitive basis must do so in a manner consistent with state law governing the provision of such services (regardless of the form that state law has taken). In this way, Congressional intent will be properly implemented.

91-13-16

If you have any questions regarding these comments, please contact the undersigned.

Very truly yours,

BY:

Dan H. McCrary
Dan H. McCrary

BALCH & BINGHAM
Dan H. McCrary
John M. Wood
Post Office Box 306
Birmingham, Alabama 35201
(205) 251-8100

Attorneys for Southern Company
Services, Inc.

July 22, 1991

T. J. O'Neil
Vice President
Regulation

Post Office Box 26666
One James River Plaza
Richmond, Virginia 23261
814 771 713

91-13-162



VIRGINIA POWER

July 22, 1991

Ms. Beverly Fayson
General Services Administration
FAR Secretariat (VRS)
Room 4041
18th and F Streets, NW
Washington, DC 20405

Dear Ms. Fayson:

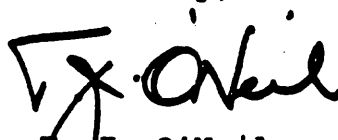
SUBJECT: FAR Case 91-13

On May 24, 1991, notice was given in the Federal Register (Volume 56, Number 101, Page 23982) of proposed changes to certain federal acquisition rules.

In our study of the proposed rules change, we have reviewed the comments prepared by the Edison Electric Institute (EEI). Our primary concerns are addressed in the EEI response and we concur with their findings and conclusions.

We recommend the Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council adopt the recommendations of EEI.

Sincerely,


T. J. O'Neil
Vice-President
Regulation

JUL 23 1991

CRISP, DAVIS, SCHWENTKER, PAGE & CURRIN

91-13-163

ATTORNEYS AT LAW

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RALEIGH, NORTH CAROLINA

27622

July 22, 1991

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WILLIAM T. CRISP II

OF COUNSEL

JOYCE L. DAVIS
ROBERT B. SCHWENTKER
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CYNTHIA M. CURRIN
M. JACKSON NICHOLS
LYNN FONTANA
ANNE M. FISHBURNE
ABIGAIL SAYBOR

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, DC 20405

Re: FAR Case 91-13

The following comments are being submitted with respect to the proposed rule carried in 56 Federal Register 23982, and in particular proposed Section 41.007(j), which would be supplemented with proposed "52.241.13 Capital Credits." The comments are specifically submitted on behalf of Oconee Electric Membership Corporation of Dudley, Georgia, and Black River Electric Cooperative, Inc. of Sumter, South Carolina. Additionally, the undersigned serve as general or special counsel to some 60 electric cooperatives and their affiliated organizations in some 15 states throughout the nation, including Alaska, and have from time to time represented literally hundreds of the some 1,000 such cooperative organizations in the United States. The comments thus bespeak not only concern for, but substantial legal experience with, capital credits as such and their preservation and implementation in ways that are legal and at the same time consonant with appropriate accounting principles and practical operation of the cooperatives.

Proposed subparagraph (a) assumes (mistakenly) that the capital credit bylaw "states the obligation of the Contractor to pay capital credits and . . . specifies the method and time of payment." The obligation never exists unless the cooperative's board of directors so resolves after finding that to retire the credits will not impair the cooperative's financial condition, which, for many cooperatives right now, would definitely be the case. No capital credit bylaw in the nation "specifies the method and time of payment." Most such bylaws call for retirements--if they are in fact authorized by the board--to be made on a first-in, first-out basis, that is, credits for 1975 would be retired before those for 1976, and so forth. It should be noted,

91-13-163

however, that while the first-in, first-out method may be specified, the Government's proposal for earlier payment would be in violation of that bylaw provision and would thus impair the vested contracted rights of other members and former members of the cooperative in that such premature payments to the government would lessen the ability of the cooperative to retire other members' capital credits and/or defer to a later time than would otherwise be the case the ability of the cooperative to make such retirements. In addition to laying the basis for class or derivative actions for restraint and/or damages against the cooperative for thusly favoring any consumer, government or otherwise, the cooperative could well lose its exemption from federal income taxes under the wording of and rulings issued by, IRS in connection with, Section 501(c)(12) of the Internal Revenue Code.

Proposed subparagraph (b) would, similarly, be in violation of the standard wording of capital credit bylaws. While such bylaws ordinarily call for notice of capital credits furnished the preceding year to be given to members during the succeeding year, such credits are seldom if ever rendered according to "delivery points" nor are they ordinarily calculated that way. As stated in the foregoing paragraph, the bylaw does not contemplate a time certain when capital credits may be retired; thus, the cooperative will not be in a position to inform, and is legally precluded from informing, any member when his capital credits will be "paid."

Under proposed subparagraph (c), the government would, upon conclusion of its service from the cooperative, be entitled to receive all of its accumulated capital credits by cash refund or by application to another account with the cooperative, if any. This is absolutely in conflict with the bylaw as written, interpreted and implemented for over 40 years. (The bylaw was drafted by lawyers for the United States Rural Electrification Administration, cleared with IRS, and has been accordingly adopted, implemented and honored by the cooperatives ever since.) Not only would such payment be violative of the bylaws' provisions; it would favor the government, giving it an unreasonably discriminatory preference and lay the foundation, again, for class-derivative-type actions by other members and former members to restrain such payments to the government or to exact damages from the cooperatives, or both; and would, as previously stated, unquestionably jeopardize the cooperatives' tax exempt status under Section 501(c)(12).

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets N.W.
Room 4041
Washington, D.C. 20405

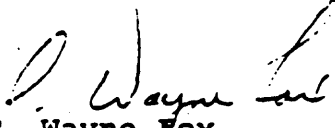
RE: Comments re FAR Case 91-13

Gentlemen:

Enclosed is an original and five copies of comments relative to proposed Federal Acquisition Regulations covering utility service.

Montanan-Dakota Utilities Co. appreciates the opportunity to comment on these proposals.

Sincerely,


C. Wayne Fox
Vice President -
Regulatory Affairs
& General Services

cc/enc. D. R. Ball
D. W. Schulz

JUL 23 1991

BEFORE THE GENERAL SERVICES ADMINISTRATION

91-13-164

Federal Acquisition Regulation;)
Acquisition of Utility Services)

FAR Case 91-13

COMMENTS OF MONTANA-DAKOTA UTILITIES CO.

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., (Montana-Dakota) herewith submits its comments in response to the proposed rule rewrite of the Federal Acquisition Regulations (FAR) dealing with utility services as published in 56 Fed. Reg. 23982 (May 24, 1991).

I.

Names, titles and mailing addresses of the persons who should be contacted concerning these comments are:

C. Wayne Fox, Vice President -
Regulatory Affairs & General Services
Montana-Dakota Utilities Co.
400 North Fourth Street
Bismarck, North Dakota 58501
(701) 222-7900

and

Douglas W. Schulz, Senior Attorney
Montana-Dakota Utilities Co.
400 North Fourth Street
Bismarck, North Dakota 58501
(701) 222-7900

II.

Montana-Dakota is a Division of MDU Resources Group, Inc., a Delaware Corporation, with its principal place of business located at 400 North Fourth Street, Bismarck, North Dakota 58501. Montana-Dakota conducts business in the states of North Dakota, South Dakota, Montana and Wyoming. Montana-Dakota is a public utility engaged in the production, transmission, distribution, and sale of electricity and the distribution and sale of natural gas.

JUL 23 1991

91-13-161

III.

Montana-Dakota, in its review of the proposed regulations, offers the following comments. Any department, agency or instrumentality of the United States is required to purchase electric utility services in a manner consistent with state law, state commission rules and regulations governing the furnishing of such services, just like any other customer of an electric utility. Pub. L. No. 99-500, § 620 (1986); Pub. L. No. 100-202, § 8093 (1987). If the United States Government were allowed to indiscriminately abandon local utility systems constructed to serve their needs as well as that of its other customers, it would place an unfair economic burden on the remaining customers. Congress clearly did not intend for this to happen. Id. See also Executive Order No. 12612, 52 Fed. Reg. 41685 (October 30, 1987).

While the proposed regulations recognize the government's statutory obligations for the purchase of electric services with a reference to Pub. L. No. 100-202, § 8093, the proposed regulations contain a number of ambiguities, and in fact, at times seem to fly directly in the face of the intent and spirit of the applicable legislation and its history dealing with the Government's procurement of such services. For instance, proposed Section 52.241-1 regarding conflicts specifies that the terms of the contract control over any utility rate schedule, rule or regulation. This is inconsistent with the general intent expressed throughout the proposed rules to adhere to state laws, rules and regulatory authority. There are a considerable number of other areas that are of concern to Montana-Dakota Utilities Co. As such,

91-13-16

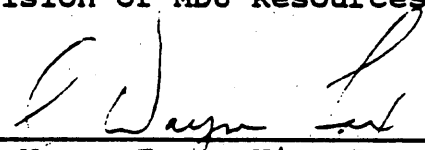
Montana-Dakota strongly endorses the specific comments of the American Gas Association and the Edison Electric Institute in this area.

IV.

Montana-Dakota appreciates the opportunity of commenting on the proposed federal acquisition regulations.

Respectfully submitted,

MONTANA-DAKOTA UTILITIES CO.,
a Division of MDU Resources Group, Inc.

By: 
C. Wayne Fox, Vice President - *en*
Regulatory Affairs & General Services

Date: July 22, 1991.



91-13-165

Chetumatchee
ELECTRIC COOPERATIVE, INC.
Cared by those we serve.

700 WEST BALDWIN AVENUE • P. O. BOX 512 • DEERUNAK SPRINGS, FLORIDA 32433 0512

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets NW Room 4041
Washington, DC 20405

RE: FAR-CASE 91-13

Dear Sirs:

I question the proposed wording of 52.241-13 Capital Credits in your proposed rule on the acquisition of service from utilities (FAR-CASE 91-13).

Most REA Electric Cooperatives are not-for-profit entities and have limited sources for capital needed for infrastructure. One source of capital is borrowing funds from REA. In order to be eligible for these loans, the cooperative must sign a mortgage agreement which requires the cooperative to reach and maintain certain marks of financial stability. By requiring cooperatives to give a specific date that the Capital is to be returned, you are asking them for something that is, in most cases, beyond their control.

The second source of capital a cooperative has is borrowing from its members. Paragraph C is calling for the return of this capital upon the termination or expiration of the contract. The return of these funds could (1) cause the cooperative to default its mortgage with REA or other lenders (FFB or CFC), (2) have one customer (government agency) become a privilege class of customer which may cause the cooperative to run into problems with IRS on its not-for-profit status, (3) cause severe cash flow problems and economic impact if the capital that the government wanted returned had to be borrowed from the other sources and/or the rates increased to cover the debt, or, (4) disqualify a cooperative from bidding on providing service if REA or other lenders refused to give mortgage concessions or the remaining members or rate payers declined to change bylaws that would allow for the return of capital as required in Paragraph C.

Kodiak

*Electric Association
Inc.*

91-13-166

(907) 486-3261

Box 787
KODIAK, ALASKA 99615

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets
NW Room 4041
Washington, DC 20405

RE: FAR Case 91-13

We have only recently received a copy of Reference Case 91-13.

We especially find 52.244-13 Capital Credits language a difficult problem. It will have a profound affect on our accounting system. As an electric cooperative we have by-laws controlling the assigning and distribution of capital credits. All members are treated equally and referenced case would treat government contracts different.

Additional comment time would allow for further review.

Sincerely,

Mary McFarland (Hmw)

Mary McFarland
Manager, Finance & Office Services

MM/hw

JUL 23 1991

COBANK

91-13-167

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, NW
Washington, DC 20405

Dear Sirs:

Subject: Comments of the National Rural Electric Cooperative Association on Proposed Federal Acquisition Regulation: Acquisition of Utility Services, 56 Fed. Reg. 23982 (1991) (FAR Case 91-13) ("Proposed Regulations")

CoBank is the largest bank in the Farm Credit System. It is chartered by the Farm Credit Administration, a federal agency. CoBank is privately owned by its borrowers-members and is organized and operated on a cooperative basis. Among those borrower-members are rural utilities. CoBank has loans and commitments of approximately \$2.5 billion to its over 300 rural utility customers.

As cooperatives, these utilities are organized and operated on a basis whereby members provide all capital. Capital is generated over time by retention of earnings and the issuance of capital credits. Pursuant to cooperative bylaws and cooperative principles these capital credits are retired in order of issuance when the board of directors determines that the capital strength of the cooperative permits. All members are treated on a non-discriminatory basis.

Because many rural utilities require significant leverage, their capital positions and retirement practices are subject to both cooperative principles and loan covenants. In general, the loan covenants will restrict capital credit retirements if such retirements would cause the utility to violate specified debt/equity ratios.

The proposed regulations, if adopted, could cause substantial weakening of the financial integrity of these utilities. If the federal government requires a pay-out of capital credits immediately upon termination of the customer relationship, the bylaws of the utility would also require the same treatment for all customers. Failure to treat all customers alike would result in a clear violation of the cooperative principles which govern these organizations. However, such a policy would remove from the board of directors control over the capital position of the utility. This would be a clear formula for financial disaster. As a major lender to this industry, CoBank would be quite concerned about lending to a utility that could not effectively manage its capital retirement policies. Loan agreements of any lender will carry debt/equity ratio covenants, and a significant retirement of capital credits could cause a loan default. The inability to maintain a stable capital base, which could result from the proposed regulation, will tend to restrict the credit available to rural utility cooperatives.

LGts/PA/137

JUL 23 1991



91-13-167

CoBank urges that the GSA reconsider this proposed regulation. It is clear that the federal government should not receive any less favorable treatment from cooperative rural utilities than other customers. On the other hand, the government will cause substantial damage to this industry if it demands more favorable treatment. We would hope that the GSA proposal will be modified to state that the government will have capital credits retired on a basis no less favorable than other customers.

If we can provide any further information, please call me at (303) 740-4038.

Very truly yours,



E. Dwight Taylor
Associate General Counsel
Rural Utilities

c: Cassidy
Sullivan

LGts/PA/137

JUL 23 1991

Barron Area Phone
715/537-3171

Spooner Area Phone
715.635-3635



F.E.
Kenneth A. Petersen
General Manager
1455 E. LaSalle Avenue
Barron, Wisconsin 54810

July 22, 1991

91-13-168

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13

Dear Sirs:

In reference to the subject, regulation for the acquisition of utility service, this letter will reference section 52.241-13 Capital Credits:

- (a) Barron Electric Cooperative objects to the proposed language as it is repetitious and redundant of cooperative bylaws. There is no need to repeat what is already represented by a unilateral contract for service protected by the bylaws, and established as a condition of service by the policies of the Cooperative.
- (b) Normally, 60 days does not allow adequate time after the close of the fiscal year to allocate margins and patronage. In order to properly close the year, allocations must of necessity be reviewed and presented to the board as part of approval of the annual audit to assure proper accounting. Allocations are normally made within five months of the close of the fiscal year when all audited statements would be complete. The rest of paragraph (b) is needlessly repetitive as these assurances are already protected under existing bylaw provisions and conditions of service established by cooperative policy.
- (c) No member, including the Federal Government, is entitled to full payment of unpaid credits upon termination of service, unless specifically provided for by the bylaws. In this particular instance, state statutes govern the form of the bylaws in order to qualify for cooperative status.
- (d) Barron Electric Cooperative objects to the need for paying the Federal Government by certified check. This is needlessly expensive and borders on harassment.

The bylaws of Barron Electric Cooperative establish a contract for service between the member (the Government in this case) and Barron Electric Cooperative. Conditions of service are established by Barron Electric Cooperative policy and are generally accepted as the means of providing service for all members. These conform to Chapter 185 Wisconsin State Statutes on cooperative operation and non-profit status. To discriminate for service based on no other reason than one member happens to be the Federal Government could jeopardize the integrity of existing bylaw and Barron Electric's cooperative status.

JUL 23 1991

JUL 23 11 05 AM '68
Page 2

91-13-168

Should you have any question in this regard, please feel free to contact me. I would appreciate your forwarding any information as a result of the hearing on the proposed rules for the acquisition of services from utilities (56 Federal Register 23982).

Sincerely yours,



Kenneth A. Petersen

KAP:ljs

C Bob Bergland

91-13-169
Brissenden, Coble & Milone

JAMES L. BRISSENDEN
ROBERT G. COBLE
GARY E. MILONE

ATTORNEYS AT LAW
832 WEST NORTH AVENUE, P.O. BOX 538
FLORA, ILLINOIS 62534
TEL: 662-4477
FAX: 6181-662-3825



July 22, 1991

FEDERAL EXPRESS

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, D. C. 20405

In re: FAR Case 91-13
Norris Electric Cooperative, Newton, Illinois

Gentlemen:

Please be advised that we represent Norris Electric Cooperative, Newton, Illinois. We have reviewed the proposed rule on the acquisition of services from utilities (56 Federal Register 23982). Paragraphs (b) and (c) of the rule are in conflict with the By-Laws and policy of Norris Electric Cooperative and would cause undue hardship upon the Cooperative. Norris Electric pays the Federal Government with its capital credits in the same manner as it does for all other members of the Cooperative. The policy of Norris is to pay capital credits on a first in-first out basis and it does not pay any advanced capital credits as would be required by Paragraph (c) of the proposed rules. In addition, the Cooperative does credit each account on an annual basis, but it does not provide each member with a list of accrued credits within 60 days after the close of the fiscal year. These records would be available and could be furnished to the Government in due course.

By reason of the above, we respectfully request that the rule set forth in 52.241-13 Capital Credits, not be approved or be amended by deleting Paragraphs (b) and (c).

91-13-169

Page 2
July 22, 1991

We would strongly urge that the proposed rule be reviewed with the National Rural Electric Cooperative Association and meet with its approval prior to passage.

Very truly yours,

BRISSENDEN, COBLE & MILONE



James L. Brissenden

JLB/pkh

cc: Mr. Ernest Weber, Manager
Norris Electric Cooperative
Route 130 South
Newton, Illinois 62448

91-13-170

**DEMCO**

DIXIE ELECTRIC MEMBERSHIP CORPORATION

POST OFFICE BOX 16659 504-281-1221

BATON ROUGE, LA. 70895

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets
N.W., Room 4041
Washington, DC 20405

Re: Comments on FAR Case 91-13

Dear Sirs:

The proposed rule to changes contained in federal contracts between Federal facilities and cooperative utilities would have a disproportionate impact upon the operations of DEMCO. Although we have only one part time Federal contract, it would require us to substantially alter our current accounting system, at unknown costs, as well as amend the cooperative's bylaws to permit special treatment for that contractor.

DEMCO is funded by the Rural Electrification Administration and as such must abide by the mortgage agreement with that Federal entity. One of the provisions of the mortgage is that a cooperative may not pay capital credits, without special permission of REA, if the cooperatives equity is below 40% of total assets. DEMCO's equity is currently approximately 14%. Furthermore, DEMCO has not paid capital credits to its members in the past and does not foresee a time that it can.

DEMCO has just finished a workout agreement with the REA that has restructured our debt to that agency due to the weak financial condition of the cooperative. The last thing that we need at the moment is additional Federal regulation, which would increase our costs, to address a nonexistent problem. Moreover, the cooperatives bylaws would have to be amended to give this particular part time contractor specific and preferential treatment over our other 57,621 members.

The issues raised by these proposed changes are not ones of minor inconvenience and costs. They are real and would have a dramatic

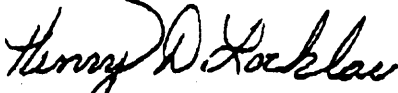
91-13-170

General Services Administration

Page 2

impact on the way the cooperative conducts its business. In addition they are all out of proportion to any perceived problem. We strongly urge you not to enact the changes as outlined in paragraphs (a) through (d) of 52.241-13.

Sincerely,



Henry D. Locklar
General Manager

HDL/dls

91-13-170

DIXIE ELECTRIC MEMBERSHIP CORPORATION

Mailing Address:
DEMCO
P. O. Box 15659
Baton Rouge, LA 70895
Phone: (504) 261-1221

Shipping Address:
DEMCO
16262 Wax Road
Greenwell Springs, LA 70739
Phone: (504) 261-1221

FACSIMILE TRANSMITTAL FORM

Fax # (504) 261-1383 -- DIXIE ELECTRIC MEMBERSHIP CORPORATION

DATE: JULY 23, 1991

TO: GENERAL SERVICES ADMINISTRATION FAR SECRETARIAT (VRS)

AT: 202-501-3341

FROM: HENRY D. LOCKLAR

NUMBER OF PAGES TO FOLLOW: 2

ADDITIONAL INFORMATION: ORIGINALS WILL BE MAILED OUT TODAY

JUL 23 1991

Oglethorpe Power Corporation

91-13-171

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, DC 20405

Dear FAR Secretariat:

Subject: FAR Case 91-13
Oglethorpe Power Corporation's Comments on
Proposed Rule 48 CFR Parts 6, 8, 15, 41 and 52
Federal Acquisition Regulation
56 Fed. Reg. 23982

Oglethorpe Power Corporation ("Oglethorpe Power") respectfully submits the following comments in response to Proposed Rule 48 CFR Parts 6, 8, 15, 41 and 52 ("Proposed Rule") to amend Federal Acquisition Regulation and Acquisition of Utility Services.

I. Introduction

Oglethorpe Power is an electric membership corporation organized and existing under the laws of the State of Georgia and operating as an electric generation and transmission cooperative supplying power and energy to thirty-nine (39) electric membership corporations (EMCs) in Georgia. The 39 EMCs serve more than two million retail member-consumers in Georgia in a service territory consisting of 71 percent of the land area of the State of Georgia. Under the provisions of the Georgia Territorial Electric Service Act, owners of new facilities having a connected load, at the time of initial full operation, of 900 kilowatts or greater may generally choose their electric supplier. Therefore, EMCs often engage in competitive bidding, in response to Requests For Proposals (RFPs) to provide electric service for planned federal facilities. Oglethorpe Power proposes that the Federal Acquisition Regulation; Acquisition of Utility Services be amended to provide that the General Services Administration consider additional information than that currently required when making a cost estimate of electrical service.

91-13-171

II. Oglethorpe Power's Comments on Proposed Rules

The Proposed Rule states, that it is the policy of the Federal Government that agencies obtain required utility services from sources of supply which are most advantageous to the Government in terms of economy, efficiency, reliability, or service. In pursuit of this policy, the current method of analysis, as provided at §41.005(b)(2) of the Proposed Rule, states that agencies are required to provide 12 months of load data, including maximum demand, monthly consumption, and annual cost of services to the General Services Administration (GSA). Based on this information, the GSA is then to make an analysis of bids for utility service which are received by the agency. However, Oglethorpe Power feels that the required data is not sufficient to make a detailed cost estimate for many electric rate schedules. In an era of increasing deregulation in the electric utility industry many innovative and economically attractive rates are available, such as those focusing on load management, energy conservation, peak shaving, etc. In order to fairly evaluate such rates, information and data which go beyond that currently specified in the regulations must be considered.

In the decision of Satilla Rural Electric Membership Corporation, B-238187.2; B-238187.3 the General Accounting Office found that since the RFP in question contained only monthly demand figures, not broken down by daily or hourly peaks, the GSA had to make some assumptions to compute an innovative rate proposal by Satilla EMC. The GSA determination was contrary to assumptions made by the EMC based on data which the EMC itself had obtained. The burden of proof was placed upon the utility to justify, in detail, that its calculations regarding the innovative and cost saving rate which it had developed were more accurate than that supposed by the GSA.

Government agencies may lose the financial benefit available from innovative rates offered by utilities if RFPs and subsequent GSA review of electrical rates are calculated solely on that information currently required, such as, estimated maximum demand, monthly consumption, and annual cost of services. Unless additional information is considered, agencies will receive only generic rates which require only demand and energy figures for twelve months in order for the total annual cost to be precisely calculated.

Oglethorpe Power proposes that magnetic tape data from similar facilities be made available to electric utilities wishing to offer various innovative rates. In the alternative, the GSA

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General Services Administration

Page 3

July 23, 1991

could agree beforehand to the necessary assumptions upon which a utility could then in confidence make its calculations.

III. Conclusion

Oglethorpe Power recognizes that the policy of the Federal Government in acquiring utility services is to obtain service which will be the most advantageous in terms of economy, efficiency, reliability, and service. To this end, where applicable and not prohibited by state law, utility service is to be obtained by full and open competition. To encourage competitive and economically attractive proposals, agencies should provide information to utilities beyond that specified in §41.005(b)(2) of the Proposed Rule (12 months of load data including maximum demand, monthly consumption, and annual cost). By providing and considering additional demand factors such as load management, and peak shaving, agencies can receive innovative rate structures which may result in cost savings for those agencies, rather than receiving merely generic rate structures which could, in essence, overcharge the government.

Therefore, Oglethorpe Power urges the General Services Administration to consider these concerns and take appropriate steps to incorporate them into the proposed changes to the Federal Acquisition Regulation; Acquisition of Utility Services.

Oglethorpe Power appreciates the opportunity to provide these comments. If you would like to discuss them further, please feel free to contact us.

Yours very truly,



T. D. Kilgore
President and
Chief Executive Officer

TDK:nc

fax Transmittal Memo

7872

No. of Pages 2

Today's Date 7/23/91 10:20 AM

91-13-172

GSA FAR SECRETARIAT
 GENERAL SERVICES ADMINISTRATION
 Washington, DC
 Telephone # 202-857-9607

From DEE M. REYNOLDS, GENERAL MANAGER
 Company FALL RIVER RURAL ELECTRIC COOPERATIVE
 Location Ashton, Idaho Dept. Charge
 Fax # 208-652-7825 Telephone # 202-652-7431
 Original Disposition Destroy Return Call for pickup

FAR CASE 91-13
 FALL RIVER RURAL ELECTRIC
 COOPERATIVE, INC.
 714 Main Street
 P. O. Box 830
 Ashton, Idaho 83440
 208-652-7431

91-13-172

Dee M. Reynolds - General Manager

July 23, 1991

General Services Administration
 FAR Secretariat (VRS)
 18th Nad F Street, N.W. Room 4041
 Washington D.C. 20405

REF: FAR Case 91-13

Dear Sir:

In the Federal Register 23982 the GSA is proposing to add several paragraphs concerning patronage capital from cooperatives that the Federal Government does business with. My cause for concern centers around at least two of the proposals.

In paragraph B the notification of the patronage to be accomplished within 60 days is not practical. Patronage capital is not allocated until the yearly audit is completed and the Board of Directors can determine what the actual return to be paid to the members should be. This paragraph should read "Within the next calendar year after the close of the cooperative's fiscal year."

Paragraph C is asking that the cooperative pay to the government out of rotation the patronage capital for an account that is terminated. The Government should abide by the same bylaw that works for every member, no special treatment should be given.

Paragraph D suggests that only certified checks be issued for the payment of capital credits. This is unrealistic as well as not being practical. The GSA should be treated as any other member and not require special treatment.

We believe that such rules as have been proposed will adversely affect our cooperative, cause undue burden to account for and process government accounts that are already controlled by the Rural Electrification Administration.

91-13-172

We disagree totally with the new proposal and suggest that the GSA donate back to the cooperatives all patronage capital to be spread among the members that actually built and operate the cooperative system.

Your consideration of these concerns will certainly be appreciated.

Respectfully,


Dee M. Reynolds

CC: Richard Stallings
Larry Larocco
Steve Symms
Larry Craig
Pat Williams
Max Baucus

91-13-173

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1000 SAVERS FEDERAL BUILDING
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 LITTLE ROCK, ARKANSAS 72201
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WRITERS DIRECT DIAL

501-688-8812

July 23, 1991

COUNSEL
 EDWARD B. DILLON, JR.

Ms. Beverly Fayson
 General Services Administration
 FAR Secretarial (VRS)
 18th and F Streets, N.W., Room 4041
 Washington, D.C. 20405

Re: FAR Case 91-13; Proposed Federal Acquisition
 Regulation; Acquisition of Utility Services

Dear Ms. Fayson:

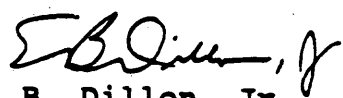
Enclosed are an original and three (3) copies of
 comments which were filed by telefax with your office on July 23,
 1991, in the Case 91-13. The comments were filed on behalf of
 Arkansas Power and Life Company, Louisiana Power and Light
 Company, Mississippi Power and Light Company, and New Orleans
 Public Service Inc.

If you have any questions concerning this matter,
 please do not hesitate to contact me.

Yours very truly,

MITCHELL, WILLIAMS, SELIG & TUCKER

By


 E. B. Dillon, Jr.

EBD:dkl
 Enclosure

cc: Mr. Kent Foster
 Mr. J. P. Herden
 Mr. Tom Lind
 Mr. Bob Greenfell
 Mr. Rodney Gilbreath
 Mr. Dempsey Ladner

JUL 23 1991

90-13-173

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 STACEY A. DEWITT

WRITER'S DIRECT DIAL

501/688-8812

July 23, 1991

COUNSEL
EDWARD B. DILLON, JR.

VIA FACSIMILE AND FEDERAL EXPRESS

Ms. Beverly Fayson
 General Services Administration
 FAR Secretariat (VRS)
 18th and F Streets, N. W.
 Room 4041
 Washington, DC 20405

Re: FAR Case 91-13; Proposed Federal Acquisition Regulation; Acquisition of Utility Services

Dear Ms. Fayson:

Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service Inc. (the "Companies") are wholly owned subsidiaries of Entergy Corporation, a public utility holding company. The Companies are engaged in the business of generating, transmitting and distributing retail electric power and energy to its customers in the states of Arkansas, Missouri, Louisiana, Mississippi, and the city of New Orleans, Louisiana. The Companies also provide retail electric service to federal agencies and facilities. The Companies are regulated either by the state regulatory bodies of each state in which they operate or, in the case of New Orleans Public Service Inc., by the Council of the City of New Orleans.

The Companies submit the following comments concerning the proposed Federal Acquisition Regulation; Acquisition of Utility Services, as published in 56 Fed. Reg. 23982 (May 24, 1991). The comments submitted by Edison Electric Institute ("EEI") address many of the concerns which the Companies have with the proposed regulations. The Companies concur with and endorse the comments submitted by EEI. However, the Companies have identified several areas of interest to them which require that EEI's comments be

Ms. Beverly Fayson
July 23, 1991
Page 2

expanded upon and have identified several issues not addressed by EEI. Where language is proposed, recommended deletions to the language in the proposed FAR will be indicated by a strike out of the language, and language additions to the text will be indicated by underlining the new material. In instances where EEI has already proposed additional language, we will use EEI's proposed language with our amendments indicated as stated above.

Comment 1. The Companies generally concur with EEI's proposed language revisions to § 241.004-1 of the proposed DFAR so that it will more closely reflect the intent of § 8093 of the Department of Defense Appropriations Act of 1988, Pub. L. No. 100-202. To insure that there are no ambiguities, we recommend that § 241.004-1 of the proposed DFAR be amended to read as follows:

In addition to the requirements of FAR 41.0004, which includes the requirement that federal agencies shall not purchase electricity in any manner inconsistent with State law, DoD recognizes the unique characteristics of electric utility systems built under State-created obligations to serve all customers, including federal facilities, within their service territories. In accordance with Pub. L. No. 100-202, § 8093, DoD shall comply with the current regulations, practices and decisions of independent regulatory bodies which are subject to judicial appeal, governing the provision of electric utility service, including State utility commission orders, rulings and electric utility franchises, certificates of public convenience and necessity, or service territories established pursuant to State statute, rule, regulation, or State-approved territorial agreements. This policy does not extend to regulatory bodies whose decisions are not subject to appeal nor does it extend to nonindependent regulatory bodies.

Comment 2. The Federal Government is to acquire electric services in conformity with state law pursuant to Pub. L. No. 100-202, § 8093. However, not all state regulatory bodies establish a service area by means of a franchise. Some commissions issue certificates of public convenience and necessity and in the certificate allocate to the electric utility the territory it is authorized to serve. Therefore, the definition of "Franchise Service Territory" set forth in § 41.001 should be amended as follows:

Ms. Beverly Fayson
July 23, 1991
Page 3

Franchise ~~s~~Service ~~t~~Territory means a franchise, a certificate of public convenience and necessity or service territory for a geographical area allocated to, defined or granted to a specific utility service supplier(s) under State law to supply customers in that area.

Comment 3. The term "areawide contract" set forth in § 41.001 should be amended to use the definition of "Franchise Service Territory" as stated in Comment 2 above. The proposed revision should be amended to read:

"* * * within the ~~f~~Franchise ~~s~~Service ~~area~~Territory of the supplier. Each areawide * * *"

Comment 4. The term "regulatory body" appears several times in the proposed regulations. For example, the term "regulatory body" is used in § 41.006-2(c) and § 52.241-2(a). This term should be defined in § 41.001 to include a state public service commission, public utility board, or to cover circumstances similar to that of New Orleans Public Service Inc., the City Council. We recommend the following:

Regulatory body includes a state utility commission, state utility board, city council, or city board of directors which, pursuant to state law, has jurisdiction to regulate retail electric service.

Comment 5. Section 41.004-1(b) should, in the case of electric utility service, be consistent with the provision of § 8093. It should be amended to include a reference to orders, rules and regulations issued by a regulatory body:

Except for acquisitions below the small purchase limit (see 13.000) agencies shall acquire utility services by a bilateral written contract, which must include the clauses required by 41.007, regardless of whether rates or terms and conditions of service are fixed or adjusted by a regulatory body. In the case of electric utility service, the contract should address the issues covered by 41.007 in a manner which is consistent with applicable state laws, a regulatory body's orders, rules, regulations, and filed tariffs. * * *

Comment 6. Section 41.004-1(d)(1) is consistent with the language of Pub. L. No. 100-202, § 8093. However, to remove any ambiguity and resolve potential questions as to the interpre-

Ms. Beverly Fayson
July 23, 1991
Page 4

tation of § 8093, the language should be modified to add words commonly used by many state regulatory bodies.

(d)(1) Section 8093 of the Department of Defense Appropriations Act of 1988, Public Law 100-202, provides that none of the funds appropriated by the Act of any other Act with respect to any fiscal year by any department, agency, or instrumentality of the United States, may be used for the purchase of electricity by the Government in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission orders or rulings and electric utility franchises, certificates of public convenience and necessity or service territories established pursuant to state statute, state rule, regulation, or state-approved territorial agreements.

Comment 7. The Companies agree with EEI's comments and proposed amendments to § 41.004-1(e). The proposed amendments should be consistent with the Companies' other wording changes suggested previously. Therefore, the language should be amended as follows:

Prior to acquiring electric utility services on a competitive basis in an area governed by a franchise, certificate of public convenience and necessity, or service territory established pursuant to State law as provided in 41.004-1(d)(1), the contracting officer shall determine, with the advice of legal counsel, and by consultation with the State agency or agencies responsible for regulating public utilities that such competition would not be inconsistent with State law governing the provision of electric utility service, including State utility commission orders or rulings and electric utility franchises, certificates of public convenience and necessity, or service territories established pursuant to State statute, State rule, regulation, or State-approved territorial agreements.
Proposals from * * *

Comment 8. Section 52.241-3(b) allows the Contractor and a federal agency to negotiate a rate schedule applicable to the class of service furnished if such a rate schedule is not on file with a regulatory body. In the case of an electric utility, if a rate schedule were negotiated, it would have to be approved by the regulatory body before becoming effective. An additional sentence should be added to the end of Paragraph (b) to clarify this point. We suggest:

Ms. Beverly Fayson
July 23, 1991
Page 5

In the case of regulated electric utilities, a negotiated rate schedule shall be approved by the appropriate regulatory body before taking effect.


Comment 9. Section 52.241-8 states that the Government will pay a "Connection Charge" to the Contractor for furnishing and installing new connection facilities. However, Section 52.241-4(a) states that the Contractor, at its expense, shall furnish and install all facilities required to furnish service. This section should be subject to the "Connection Charge" provisions of § 52.241-8. Therefore, the following language should be inserted at the beginning of § 52.241-4(a):

Subject to the Connection Charge provided for in Section 52.241-8, ¶, the Contractor, at its expense, shall
* * *

The Companies appreciate the opportunity to submit the above comments and if we can answer any questions concerning them, please contact me.

Very truly yours,

ARKANSAS POWER & LIGHT COMPANY
LOUISIANA POWER & LIGHT COMPANY
MISSISSIPPI POWER & LIGHT COMPANY
NEW ORLEANS PUBLIC SERVICE INC.

By 
E. B. Dillon, Jr.
MITCHELL, WILLIAMS, SELIG & TUCKER
1000 Savers Federal Building
320 West Capitol Avenue
Little Rock, Arkansas 72201

July 23, 1991

HAND DELIVERED

Ms. Beverly Fayson
General Services Administration
FAR Secretariat
18th & F Streets NW
Room 4041
Washington, D. C. 20405

RE: FAR Case 91-13; Federal Acquisition Regulation; Acquisition of
Utility Services

Dear Ms. Fayson:

San Diego Gas & Electric (SDG&E) is repsonding to the proposed rule published on May 24, 1991 (56 Fed. Reg. 23982) which relates to the Federal Acquisition Regulations governing the acquisition of utility services.

SDG&E is an investor-owned combined gas & electric utility serving over one million electric and 670,000 gas customers in the San Diego area. The federal government accounts for over 8% of SDG&E's sales. Thus, SDG&E is extremely interested in the proposed rewrite of the FAR coverage dealing with utility services.

Briefly stated, SDG&E concurs with the comments submitted by the Edison Electric Institute (EEI) in response to the FAR Case 91-13 proposed rule. SDG&E is a member of EEI and has been involved in the formulation of the Institute's comments. Upon review, the comments very adequately address concerns SDG&E has about the proposed rewrite. SDG&E also feels that points made in its comments (copy attached) submitted to DOD on the proposed Defense Acquisition Regulations Supplement, Part 241 should be taken into account when coordinating the DFARS with the FAR.

Thank you for your consideration and attention.

Respectfully submitted,


Mel Hall-Crawford
Manager, Federal Governmental Affairs

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San Diego Gas & Electric

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April 15, 1991

VIA FACSIMILE

Defense Acquisition Regulatory Council
OUSD(A) ATTN: Ms. Lucille Hughes
Room 3D139, the Pentagon
Washington, D.C. 20301-3062

Re: DAR Case 90-743: DFARS Part 241 - Acquisition of Utility Services.

Dear Council Members:

San Diego Gas & Electric Company ("SDG&E") submits these comments in response to the notice published at 56 Fed. Reg. 6056 et seq. (Feb. 14, 1991), which sets forth the fourth increment of proposed changes to the Defense Acquisition Regulation Supplement ("DFARS"). These comments focus on DFARS Part 241, which relates to the acquisition of utility services.

SDG&E is an investor-owned combined gas & electric utility serving over one million electric and 670,000 gas customers in San Diego County, California. Among SDG&E's customers are several United States Navy and Marine Corps facilities, including Camp Pendleton, NAS Miramar, NAS North Island, 32nd Street Naval Station, Naval Amphibious Base Coronado, the Marine Corps Recruiting Depot and the Naval Training Center. In aggregate, the military accounts for over 8% of SDG&E's sales, making SDG&E one of the nation's largest suppliers of utility services to DoD. SDG&E's retail sales are regulated by the California Public Utilities Commission, whose decisions may be judicially reviewed pursuant to Cal. Pub. Util. Code § 1756.

Although SDG&E finds that portions of the proposed Part 241 revision lack clarity or are incomplete, we have read the proposed rule in light of established interpretive principles, and, given this reading, SDG&E has no objections to the revisions. If, however, SDG&E's understanding of the proposed rule (set forth below) differs from the drafters' intent, SDG&E requests that such intent be clarified and the clarifications published for public comment.

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COMMENTS

I. Overview

Given that most utility services are provided by utilities with a franchised monopoly at retail, DoD has historically procured such services on a "sole source" basis. This is consistent with the premise for allowing regulated monopoly service. The utility services are deemed a "natural monopoly;" i.e., rather than yielding a more efficient allocation of resources, competition would result in wasteful duplication and impair service reliability. Fundamentally, utility regulation provides the utility with a retail monopoly in a specified area, and permits the utility to recover the any reasonable costs incurred, and a reasonable return on any investment made to provide the service. In turn, the utility is obliged to reliably serve the existing and foreseeable requirements of its retail customers.

In such a regulatory regime, for DoD installations to cease to procuring service from the local utility would result in "stranded investment." That is, compensation for investments made to serve DoD's existing and future requirements would be spread over the utility's remaining retail customers. Thus, any "savings" to the taxpayer would be at the expense of the utility's other retail customers. Moreover, under state law, the utility must remain the supplier of last resort for the DoD installation, and thus the installation's ultimate reliability would depend on investment costs borne by others.

By deferring to utility regulation, the proposed rule appears to recognize that it is not in the public interest for local utility customers to subsidize the taxpayer. At the same time, the proposal appears to permit DoD to competitively procure where there is no potential for stranded investment, such as where service has been deregulated. Many regulators recently have attempted to identify where competition might supplement or replace traditional utility regulation. For example, in the natural gas industry, this has resulted in the "unbundling" of the commodity of natural gas from its delivery, allowing large customers to procure their own gas directly from gas producers or brokers, and to purchase only transportation service from the local utility. State and federal regulators have managed this process to protect retail customers and utility shareholders from the risks of stranded investment. On the other hand, deregulation of electric service has not proceeded as far, largely because the economics of electric production favor

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vertical integration and there appears no way to fairly resolve the stranded investment problem. In any event, for DoD to respect state and local policy in its utility procurement is a sound way to avoid hurting local utility customers.

II. 241.004-1 Policy

SDG&E's comments focus on Part 241.004, Acquiring Utility Services." The first section, "Policy" (241.004-1) states that "DoD, as a matter of comity, will comply with the current regulations, practices and decisions of independent regulatory bodies which are subject to judicial appeal." SDG&E understands this policy statement would permit DoD to competitively procure utility services to the extent state or local regulation permits other retail utility customers to do so. As SDG&E understands it, this section appears to embody the procurement policy set forth in Section 8093 of the DoD Appropriations Act Of 1988 (P.L. 100-202). The reference to "comity" appears to reserve DoD's position that it is not bound by state or local utility regulation in the procurement of utility services for new load. In other words, without conceding that state or local regulation is otherwise controlling, DoD agrees to accept such regulation as long as there is some avenue for judicial appeal.

SDG&E also understands this policy to require the DoD to comply with all "current regulations practices and decisions," not just those associated with "accounting practices, allowability of costs and rates" as set forth in the currently applicable § S5-103.2(a) of the Armed Services Procurement Regulation (DFARS) Supplement No. 5. Procurement of Utility Services.

This policy would avoid unseemly and inefficient disputes with state regulators over jurisdiction. However, SDG&E has two concerns about the clarity of the proposed regulation. First, the rule is subject to an exception in "FAR 41.004" which does not currently exist and has not been published for comment. Thus there is no way to tell whether the exception might swallow an otherwise sound policy.

Second, the policy statement makes no reference to the currently effective Section 8093 of the 1988 DoD Appropriations Act governing the procurement of utility services. Reference to such legislation would reinforce the apparent intent of the proposed rule. Given that this legislation specifically addresses the proposed policy, SDG&E submits that the final rule should explicitly refer to the legislation.

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III. 241.004-2 Procedures

SDG&E understands this section to specify where it is appropriate for contracting officers to solicit competitive proposals from potential suppliers of utility services. In other words, the presumption remains that sole sourcing with the local utility is appropriate except as set forth in this section. Specifically, SDG&E understands this section to operate as follows:

- The contracting officer will determine whether competition is possible under state or other regulation consistent with the policy set forth in the preceding section (241.004-1).
- Per section 241.004-2 (a)(i), the contracting officer is to consider whether competitive supply is possible only in two circumstances: where a "new major utility service load develops or a new military installation is established." This section also indicates that competition is not possible where the governing regulatory body has determined that there is only one franchised territory or one franchised supplier.
- Per section 241.004-2 (a)(i)(B), the phrase "where competition exists" refers to the contracting officer's determination that competitive procurement may be possible pursuant to the prior section. This section (B) now consists of an incomplete sentence when the context requires a complete sentence, and this apparent drafting error lends some ambiguity. Nevertheless, rules of construction require one to interpret (B) with reference to the prior section (A)'s determination of "competition." To construe "where competition exists" without reference to the prior section would effectively nullify the prior section, an impermissible construction.
- Subsection 241.004-1(a)(i)(A)(2) refers to "other potential suppliers." Such other suppliers may exist only as specified in the prior subsection (1), i.e., where there is more than one franchise, or no franchise at all exists.
- With respect to periodic reviews for competition in "ongoing contracts" in 241.004-2(a)(ii), the "availability of competition" refers to competition as determined by the contracting officer under criteria in the prior section (i), which includes the requirement that the determination is

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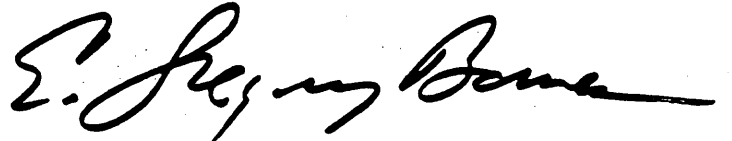
limited to "a new major utility service load" or "a new military installation" governed by existing contracts.

IV. Conclusion

SDG&E appreciates the opportunity to comment on the proposed regulations. In sum, the proposal for part 241, appears to respect the proper role for state, federal and local regulation of natural monopolies, while allowing the DoD an appropriate scope for competitive procurement.

As noted above, SDG&E's reading is hampered by lack of clarity in the proposed regulations. SDG&E has set forth its understanding of the proposal based on the plain meaning of the words and by applying standard rules of construction. If the Council's or the drafters' understanding of the proposed rules differs from that set forth above, SDG&E strongly urges that clarifications be published for comment prior to promulgation.

Respectfully submitted,



E. Gregory Barnes

Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY

cc: (via courier)
Defense Acquisition Regulatory Council
ATTN: Ms. Lucille Hughes

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**EDISON ELECTRIC
INSTITUTE**

Roger L. Baily
General Counsel and Executive
Vice President Policy and Issues

July 23, 1991

Transmitted By Hand Delivery

Ms. Beverly Fayson
General Services Administration
FAR Secretariat (VRS)
18th & F Streets, N.W.
Room 4041
Washington, D.C. 20405

Re: **FAR Case 91-13: Proposed Federal Acquisition Regulations For
the Acquisition of Utility Services**

Dear Ms. Fayson:

The Edison Electric Institute ("EEI"), on behalf of its member utilities, hereby submits these comments on the proposed Federal Acquisition Regulations concerning the Acquisition of Utility Services (56 Fed. Reg. 23982 (1991)).

EEI is the association of the nation's investor-owned electric utility companies. Its members serve 96 percent of all customers served by the investor-owned segment of the electric utility industry. They generate approximately 78 percent of all the electricity used in the country, and serve 74 percent of all ultimate electricity consumers in the nation.

Although these comments are directed toward the proposed FAR regulations published on May 24, 1991 (56 Fed. Reg. 23982), those regulations are intended to work in tandem with the proposed DFARs published on February 14, 1991

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(56 Fed. Reg. 6056). As a result, these comments also address issues relating to the coordination of the two sets of regulations.

A. General Comments: As you know, Congress has on two occasions enacted specific legislation requiring Federal facilities to comply with State public utility laws regulating electric utility services. See Pub. L. No. 99-500, § 620 (1986); Pub. L. No. 100-202, § 8093 (1987). Both Senate and House Committees published lengthy reports explaining the policy basis for these statutory directives. See, e.g., S. Rep. No. 406, 99th Cong., 2d Sess. 68 (1986); H.R. Rep. No. 723, 99th Cong., 2d Sess. 79 (1986); S. Rep. No. 100-235, 100th Cong., 1st Sess. 70 (1987); H.R. Rep. No. 100-498, 100th Cong., 1st Sess. 673 (1987).

In the first legislative enactment, Congress directed that:

None of the funds appropriated or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Fed. Reg. 16988-16991), or any other regulation issued pursuant to statute requiring competitive bidding for electricity, gas, or steam utility services acquired by the Federal Government.

Pub. L. No. 99-500, § 620 (October 18, 1986).

The Senate Report accompanying this Bill stated that:

The Committee has adopted this section to protect utility customers from the burden of increased rates that inevitably would result if Federal facilities abandon local utility systems. Utility systems have built necessary capacity under State-created obligations to serve all customers, including Federal facilities, within their service territories. As a general rule, under State law only one utility is authorized to provide retail utility service within its service territory. The proposal [for competitive bidding] has serious legal, technical, and economic

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repercussions. The Committee intends that this provision avoid these detrimental consequences.

S. Rep. No. 406, 99th Cong., 2d Sess. 68 (1986).

Similarly the House Report concluded that:

Pursuant to the paramount duty to serve its customers, utilities across the nation have invested billions of dollars to provide generating and transmission capacity, in part in reliance upon the projected needs of the Federal Government. The Federal Government has enjoyed the benefits of the reliable and efficient utility service provided by these systems. Now it has been proposed that the Federal Government seek competitive acquisition of utility supply, notwithstanding the fact that the local utilities have built their systems to accommodate the present and future needs of federal facilities.

If the Federal Government switches suppliers, the fixed costs of capacity built to serve federal facilities would almost immediately be shifted to the remaining customers of the utility.

H.R. Rep. No. 723, 99th Cong., 2d Sess. 79-80 (1986).

In 1987, Congress adopted additional legislation clarifying and extending these restrictions on federal procurement of electric utility services and directed that:

None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner inconsistent with State law governing the provision of electric utility service,

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including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements

Pub. L. No. 100-202, § 8093 (December 22, 1987) (emphasis added).

The Senate Report accompanying this 1987 Bill stated that:

This provision is intended to protect remaining customers of utility systems from the higher rates that inevitably would result if a Federal customer were allowed to leave local utility systems to obtain retail electric utility service from a nonlocal supplier.

* * *

Whether through service territory, a franchise, a service-related permit, a certificate of public convenience and necessity, a territorial agreement, or other means, retail electric utility service usually is provided by one supplier within any given area. When procuring retail electric utility service, the Federal Government should abide by these service arrangements just like any other customer of an electric utility.

S. Rep. No. 100-235, 100th Cong., 1st Sess. 70-71 (1987) (emphasis added).

These two statutes, and their accompanying legislative history, require that, in procuring electric utility service, all Federal departments, agencies or instrumentalities (i.e., facilities) shall comply with existing territorial divisions, and other requirements, established pursuant to State law for:

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- existing uses which are within a utility's State-assigned service territory;
- new load for those uses; and
- proposed new uses.

Consistent with this statutory obligation, the proposed regulation contains an explicit reference to § 8093 and the statutory language, which we strongly endorse. However, there is considerable ambiguity with respect to the application of this legislative requirement throughout the remainder of the proposed regulation. Our specific comments below address and provide some recommendations to clarify these ambiguities.

We understand that these regulations were designed to apply to a variety of types of utility services, not just electric utility service, and that they were intended to address both regulated and unregulated suppliers. The breadth of the regulations has caused them to contain overly broad provisions which in several circumstances do not adequately address the unique nature of electric utility services. In other instances, the regulations impose conflicting or unclear obligations upon the parties to electric utility contracts. Elsewhere, the regulations appear to require preferential treatment of the Government as a customer, or treatment in a manner inconsistent with applicable State law.

With respect to the coordination of the proposed FAR and DFAR regulations, we ask that you take into account the comments submitted to DoD on the proposed DFARs by EEI, and by two of its member companies, Central and South West Corporation and San Diego Gas & Electric Company. In addition, we specifically recommend that § 241.004-1 of the proposed DFAR be amended to read as follows in order to more closely reflect the intent of § 8093:

(1) ~~Except as provided in FAR 41.004, In addition to the requirements of FAR 41.004, which includes the requirement that federal agencies shall not purchase electricity in any manner inconsistent with State law, DoD recognizes the unique characteristics of electric utility systems built under State-created obligations to serve all customers,~~

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including federal facilities, within their service territories. In accordance with Pub. L. No. 100-202, § 8093, DoD shall ~~as a matter of comity, will,~~ comply with the current regulations, practices and decisions of independent regulatory bodies which are subject to judicial appeal, governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements. This policy does not extend to regulatory bodies whose decisions are not subject to appeal nor does it extend to nonindependent regulatory bodies.

B. Specific Comments: In order that the new regulation complies with existing federal law, and in order to improve the clarity of the regulations and reduce unnecessary ambiguities, we recommend the following revisions. For ease of reference, recommended deletions to quoted text are indicated by a ~~strike-out~~ and additions to quoted text are indicated by an *italicized print such as this*.

1. In order to reflect the other statute adopted by Congress governing the subject matter of these regulations, the "Authority" description following the Table of Contents for Part 41 should be amended to add "Pub. L. No. 100-202, § 8093."

2. Because Pub. L. No. 100-202, § 8093 requires that the Federal Government acquire electric services in conformity with State law and since service areas are not always established by "franchises," the definition of "*Franchise service territory*" in Section 41.001 should be amended for clarification to read as follows:

Franchise or service territory means a geographical area, defined or granted to a specific utility service supplier(s) under State law to supply customers in that area.

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3. When the Government terminates a utility service contract, it may be obligated to pay "termination liability" covering the cost of connection charges, as the definition of "Termination liability" indicates. In addition, however, the Government may also be obligated to pay other charges required by the contract (or in the case of electric utility service, other charges filed with or approved by the applicable State regulatory agency). As a result, the definition of "Termination liability" should be modified as follows:

Termination liability means a contingent Government obligation to pay a utility supplier the unamortized portion of a connection charge and any other applicable non-refundable service charge in the event that the Federal Government terminates the contract before the cost of connection facilities has been recovered by the utility supplier (see Connection charge).

4. Section 41.002(b)(6) should be amended to assure that the acquisition of electrical equipment and facilities are also consistent with applicable State law. Therefore we recommend that Section 41.002(b)(6) be amended as follows:

Acquisition of rights in real property, acquisition of public utility facilities, and on-site equipment needed for the facility's own distribution system, or construction/ maintenance of government-owned facilities so long as electric utility services provided by such acquisitions are consistent with State law governing the provision of electric utility service, and the Public Utilities Regulatory Policies Act of 1978 (Pub. L. No. 95-617, 92 Stat. 3117), as appropriate; or

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5. Sections 41.003(a)(1), (2), and (3) should be amended as follows:

(1) The General Services Administration (GSA) is authorized by section 201 of the Federal Property and Administrative Service Act of 1949 as amended (40 U.S.C. 481), *and Pub. L. No. 100-202, § 8093,*

(2) The Department of Defense is authorized by 10 U.S.C. 2301, 2304, ~~and~~ 40 U.S.C. 474(3), *and Pub. L. No. 100-202, § 8093,*

(3) The Department of Energy (DOE) is authorized by the Department of Energy Organization Act (42 U.S.C. ~~2751~~ 7251, et seq.), *and Pub. L. No. 100-202, § 8093,*

6. As noted above, Federal agencies are required by § 8093 to acquire electric utility services consistent with applicable State law. This includes rates, terms and conditions which are filed with or approved by the regulatory body assigned by State law to regulate such matters. In many cases, these are sufficiently detailed that a separate contract should not be necessary. In order to make this regulation consistent with this statutory mandate, Section 41.004-1(b) should be amended as follows:

Except for acquisitions below the small purchase limit (see 13.000) agencies ~~shall~~ which acquire utility services by a bilateral written contract, must include the clauses required by 41.007, regardless of whether rates or terms and conditions of service are fixed or adjusted by a regulatory body. *In the case of electric utility service, any contract should address the issues covered by 41.007 in a manner which is consistent with applicable State laws, regulations, and filed tariffs.* Agencies may not use the utility supplier's forms and clauses to avoid the inclusion of provisions or clauses required by 41.007 or by statute. (See 41.004-2(c) for procedures to be used

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when a supplier refuses to execute a written contract.)

7. Section 41.004-1(d)(2)(iii) should be modified to follow more closely Congress' explanation of the reliability exception to § 8093. The Senate Report describes the reliability exception by emphasizing that:

[T]he Committee expressly rejects any interpretation of this section that would permit reliability concerns to be used as a smokescreen for competitive procurement or other practices inconsistent with State law concerning the provision of electric service. Similarly, the mere fact that a military installation may be able to obtain better reliability from a different utility than the one in whose service territory it is located or the fact that the installation may obtain better reliability by receiving service from two utilities rather than one, is not sufficient to override the State law concerning the provision of electric service. In order for State law to be overridden, the degree of reliability sought for the military installation must be essential to realizing the installation's national defense purposes, and the installation must be unable to receive that degree of reliability from the utility (or utilities) that would otherwise provide electric service under State law.

S. Rep. No. 100-235, 100th Cong., 1st Sess. 71-72 (1987) (emphasis added). Because of this legislative intent, Section 41.004-1(d)(2)(iii) should be modified to read as follows:

(iii) The Secretary of a military department from purchasing electricity from any provider when the utility or utilities having applicable State-approved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are

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necessary for the purposes of national defense essential to realizing the installation's national defense purposes. In making this determination, the mere fact that a military installation may be able to obtain better reliability from a different utility than the one in whose service territory it is located or the fact that the installation may obtain better reliability by receiving service from two utilities rather than one, is not sufficient to override State law for the provision of electrical service.

8. Section 41.004-1(d)(3)(ii) as proposed authorizes any federal agency to enter into an interagency agreement with a federal power marketing agency or TVA (collectively referred to as "FPMAs") for the "transfer of electrical power." The proposed authorization is not limited to power produced by FPMAs, and could, therefore, be interpreted as authorizing FPMAs to act as power brokers in transferring power to federal agencies. However, this approach raises two serious legal problems.

First, the courts have recognized that an FPMA "does not have unlimited authority to purchase nonfederal power." Salt Lake City v. WAPA, 926 F.2d 974, 982 (10th Cir. 1991). Although Congress has directed the FPMAs to maximize "the sale of federally produced power at firm rates" (*id.*), and FPMAs may purchase non-federal power to firm-up the federal hydro-based power, Congress never intended FPMAs to become power brokers authorized to displace customary utility services by buying and reselling non-federal power to federal agencies or private purchasers. As a result, the courts have held that:

power marketing agencies may purchase such non-federal power and energy as reasonably incidental to the integration of federally produced hydroelectric power.

Id. (emphasis supplied); United States v. SMUD, 652 F.2d 1341, 1345 (9th Cir. 1981) (inherent authority to purchase power "when conditions prevent hydroelectric facilities from functioning at capacity"). Because of this limitation on the role of FPMAs, Section 41.004-1(d)(3)(ii)'s purported grant of authority to

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FPMA's to "transfer electrical power" can be no greater than the authority FPMA's have under the existing statutes and legislative history.

Second, under § 8093 where such transfers constitute retail sales within the meaning of State law, they must not be inconsistent with the governing State law.

For these reasons, Section 41.004-1(d)(3)(ii) should be amended to read as follows:

(3) Additionally, the head of a Federal agency may --

. . .

(ii) Enter into an interagency agreement, pursuant to 41.004-6 and 17.5, with a Federal power marketing agency ("FPMA") or the Tennessee Valley Authority ("TVA") for the transfer to the agency of electrical power ~~to the agency produced by the FPMA or the TVA~~ (or reasonably incidental to the integration of federally produced hydroelectric power), provided that where such a transfer constitutes a retail sale under State law, it is not inconsistent with State law; and

9. Section 8093 requires that the Government may not purchase electricity "in any manner that is inconsistent with State law governing the providing of electric utility service." As a result, the Government may not purchase electricity from a "non-utility" or from another electric utility in a manner inconsistent with State law. For these reasons, we recommend that 41.004-1(d)(3)(iii) be modified as follows:

(3) Additionally, the head of a Federal agency may --

(iii) *Consistent with applicable State law, enter into a contract*

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10. Pursuant to § 8093, the procurement of electric service through any means which are inconsistent with State law is prohibited. Accordingly, the appropriateness of competitive procurement is a legal issue, not a marketing issue, and a market survey is a wholly inappropriate mechanism for making such an assessment. The only means for determining the requirements of State electric utility law which is consistent with the mandate of § 8093 is through consultation with the applicable State agency or agencies. In addition, in order to assure the reliability of the representation by proposed alternative suppliers, the regulation should be adapted to employ requirements similar to those routinely prescribed for other certifications under the Federal Acquisition Regulations. See, e.g., FAR 52.203-8, "Requirement for Certification of Procurement Integrity;" and FAR 52.209-5, "Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters." Therefore, Section 41.004-1(e) should be amended as follows:

Prior to acquiring electric utility services on a competitive basis ~~in an area governed by a franchise service territory~~, the contracting officer shall determine, with the advice of legal counsel, and by *consultation with the State agency or agencies responsible for regulating public utilities* ~~a market survey or any other appropriate means~~, that such competition would not be inconsistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements. Proposals from alternative electric suppliers *must be supported by an order from the appropriate State agency confirming that service can be provided in a manner not inconsistent with § 8093 and must provide a certification under oath from a corporate vice president, or person of comparable authority in an unincorporated entity,* ~~representation~~ that service can be provided in a manner not inconsistent with § 8093 of Public Law

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100-202 (see 41.004-1(d)). The representation must be supported with appropriate legal and factual rationale.

Corresponding modifications are suggested for 52.241-11.

11. Consistent with Comment 10 above, Section 41.004-2(a) should be amended as follows:

Prior to executing a utility service contract, the contracting officer shall comply with Parts 6 and 7 and subsections 41.004-1(d) and (e). In accordance with Parts 6 and 7, *and if the contracting officer determines that the contract is not inconsistent with applicable State law governing the provision of electric utility service*, agencies shall, conduct market surveys and perform acquisition planning in order to promote and provide for full and open competition. If competition for an entire utility is not available, ~~the market survey~~ *this process* may be used to determine the availability of competitive sources for certain portions of the requirement. The scope of the term "entire utility service" includes the provision of the utility service capacity, energy, water, sewage, transportation, standby or back-up service, transmission and/or distribution service, quality assurance, system reliability, system operation and maintenance, metering, and billing.

12. As noted above, federal agencies are required by § 8093 to acquire electricity in a manner not inconsistent with applicable State law. State law frequently mandates the use of certain contract terms and conditions which have been filed with or approved by the appropriate State regulatory authority. As a result, State law may direct electric utilities and their customers to abide by certain filed terms and conditions which may be different from those suggested by Section 41.007 and incorporated into a tendered contract pursuant to Section 41.004-1 (b). To accommodate this

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potential conflict with State law, we recommend that Section 41.004-2(c) be amended as follows:

When a *non-electric* utility supplier refuses to execute a tendered contract as outlined in 41.004-1(b), or an *electric utility supplier* refuses to execute such a contract for reasons other than that it contains terms or conditions inconsistent with applicable State law, the agency shall obtain a written definite and final refusal signed by a corporate officer of the supplier (or if unobtainable, documentation of any verbal refusal by a corporate officer) and transmit this document, along with statements of the reasons for the refusal and the record of negotiations, to GSA at the address specified at 41.004-3(b). Unless urgent and compelling circumstances exist, or in the case of an *electric utility supplier* unless the tendered contract contains terms and conditions which are inconsistent with applicable State law, the contracting officer shall notify GSA prior to acquiring utility services without executing a tendered contract. After such notification, the agency may proceed with the acquisition and pay for the utility service under the provisions of 31 U.S.C. 1501(a)(8) –

13. Consistent with Comment 6, addressing Section 41.004-1(b), the second sentence of Section 41.004-2(e) should be changed to read as follows:

The contracting officer shall take actions to execute ~~a~~ any necessary bilateral written contract (see 41.004-1(b)) prior to expiration of the one-year period.

14. Section 41.004-4, concerning GSA areawide contracts, does not recognize the limitations imposed by § 8093. An agency in an area covered by an areawide contract may only acquire utility service under that

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contract if such an arrangement is not inconsistent with State law. Therefore, Section 41.004-4(a) should be amended as follows:

GSA enters into areawide contracts (see 41.001) for use by federal agencies in the acquisition of utility services. An agency in an area covered by an areawide contract shall acquire utility services under the areawide contract unless the agency determines that more advantageous rates or terms and conditions are available from another supplier under a separately negotiated contract; *provided that in the case of electric utility services, neither the areawide contract nor the separately negotiated contract is inconsistent with applicable State law.*

15. Section 41.004-5(b)(1) should recognize that the number of available suppliers may be limited by State law. Therefore, the Section should be amended as follows:

The number of available suppliers, *or in the case of electric utility suppliers, the number of suppliers permitted by State law to serve the area in question;*

16. Section 41.004-5(b)(7) imposes an obligation on the contracting officer to make a subjective evaluation of a utility's intent without providing any objective criteria. In addition, the regulation fails to recognize that, in some circumstances, a facility may not be authorized under State law to satisfy its electric service requirements by, for example, wheeling power from an alternative provider. Many States already restrict the availability of so-called "retail" or "self-service" wheeling such as this. In order to correct these deficiencies, we recommend that the proposed paragraph 7 be amended to read as follows:

(7) *In the case of utility service for which transportation services have been requested (and in the case of electric utility service, if under State law, the agency is allowed to acquire such service from a source which requires transmission services): (i)*

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any requests to the host utility for transportation or transmission services, (ii) the host utility's response to such requests, and (iii) any rates for such transportation or transmission services quoted by the host utility.

17. Since § 8093 provides no exemption for interagency agreements for the acquisition of electricity, Section 41.004-6 should be amended to recognize this limitation:

Agencies shall use interagency agreements (e.g., consolidated purchase, joint use, or cross-service agreements) to acquire when acquiring utility services or facilities from other Government agencies; provided that where such an acquisition constitutes a retail sale of electricity under State law, it is not inconsistent with State law and shall comply with the policies and procedures of Subpart 17.5, Interagency acquisitions under the Economy Act.

18. Section 41.005(a)(5) should be modified as follows to clarify that the available sources of supply may be limited by State law:

Identification of all available sources or methods of supply (which in the case of the procurement of electric utility services means identification of alternative sources, if any, for the provision of such service in a manner not inconsistent with State law), and an analysis of the cost effectiveness of each, and a statement of the ability of each source to provide the required services, including the location and a description of each available supplier's facilities at the nearest point of service, and the cost of providing or obtaining necessary backup and other ancillary services if not provided by a particular alternative source.

19. Section 41.006-1 provides for monthly invoice and annual contract reviews to, inter alia, "examine utility commercial markets for advantageous competitive resolicitations." To avoid confusion about the appropriateness of such reviews in the case of electric utilities subject to the provisions of § 8093, and to reduce the Government's costs of performing needless reviews, this Section should be modified to add a sentence to the end as follows:

In the case of electric utility services, competitive resolicitations are only authorized when consistent with State law, and reviews of utility commercial markets should be undertaken only after it is determined that competition is not inconsistent with State law.

20. Section 41.006-2(a) provides that the acquiring agency shall determine whether any changed rate for utility services is "reasonable, justified and not discriminatory." Since the rates for retail electric service are governed by State regulatory commissions, under § 8093 it is up to those commissions to make these determinations, rather than the acquiring federal agency. Accordingly, this Section should be modified to add the following proviso at the end:

; provided however that in the case of electric utility services, the agency shall abide by the rates, terms and conditions of service as they may be changed from time to time by the applicable State regulatory body in accordance with State law.

21. Section 41.006-2(c) also provides that "any rate change shall be made a part of the contract by contract modification." Typically the parties to electric utility service contracts agree that the governing rate shall be as approved by the public utility commission from time to time. It is tremendously wasteful and unduly time consuming to require that the contract actually be modified in writing for each State-approved change in rates, terms or conditions. Therefore, we suggest that the final sentence add the following proviso:

; provided however that in the case of electric utility services, the contract need not be modified in writing so long as the State-approved change in rate, terms or conditions is provided to the agency in writing by the supplier.

22. As now written, Sections 41.007(a) and (b) could be interpreted to elevate the Government's terms and conditions above applicable State laws, rules, regulations, and tariffs governing the provision of electric utility service. However, § 8093 (see 41.004-1(d)) clearly gives such State provisions complete precedence over these proposed federal contract terms and conditions, even if the State provisions are not mentioned in a contract. Indeed, 52.241-2(a) seems to recognize this situation. Therefore, Sections 41.007(a) and (b) should be modified as follows:

(a) *Because the terms and conditions under which utility suppliers furnish service may vary from area to area, the differences may influence the terms and conditions appropriate to a particular utility's contracting situation. To the extent that the terms and conditions under which electric utility suppliers furnish service are filed with or approved by a State regulatory body, or otherwise specified by State law or regulation, in accordance with Section 8093 of the Department of Defense Appropriations Act of 1988, Pub. L. No. 100-202, such terms and conditions shall govern the contractual relationship, and shall be treated as if incorporated into the contract as of the date first entered into and as modified by the State regulatory body from time to time thereafter. To accommodate requirements that are peculiar to the contracting situation, this section prescribes clauses on a "substantially the same as" basis (see 52.101) which permits the contracting officer to prepare and utilize variations of the prescribed provisions and clauses as appropriate.*

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(b) *Except in the case of electric utility service for which any term or condition is filed with or approved by a State regulatory body, or otherwise specified by State law or regulation, in which event pursuant to Section 8093 of the Department of Defense Appropriations Act of 1988, Pub. L. No. 100-202, those terms or conditions shall govern, ¶ the contracting officer shall as appropriate insert in solicitations and contracts for utilities services clauses substantially the same as the following:*

23. Sections 41.007(c) and (d) are apparently intended to be mutually exclusive, so that if one subparagraph applies the other does not. Subsection (c) calls for insertion of a certain clause when the Contractor is a regulated entity, while subsection (d) calls for a different clause when the Contractor is unregulated. However, a utility supplier may be a regulated entity but not necessarily for all electric service contracts. Therefore, the emphasis should be on which aspects of the contracted services are regulated. Accordingly, subsections (c) and (d) should be amended as follows:

(c) The contracting officer shall insert a clause substantially the same as the clause at 52.241-6, Change in Rates or Terms and Conditions of Service for Regulated ~~Suppliers Services~~, in solicitations and contracts for utility services ~~when the utility supplier is~~ *to the extent such services are subject to a regulatory body.*

(d) The contracting officer shall insert a clause substantially the same as the clause at 52.241-7, Change in Rates or Terms and Conditions of Service for Unregulated ~~Suppliers Services~~, in solicitations and contracts for utility services ~~when the utility supplier is~~ *to the extent such services are not subject to a regulatory body.*

24. Section 41.007 should make it clear that the insertion of particular clauses should not be read as a bar to adding other clauses that may

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be needed under the circumstances. These additional clauses should be subject to negotiation between the parties. Accordingly, a new Section 41.007(k) should be added as follows:

(k) When appropriate to enhance the economy, efficiency, reliability or quality of service, the contracting officer shall have authority to add other clauses as the parties may agree.

25. Section 52.241-1 on Conflicts appears to be a clause intended to avoid the "battle of the forms." The clause attempts to rank: (1) terms in the main body of the contract (including the specifications), (2) terms in a rate schedule, rider, or other writing incorporated into the contract by reference or otherwise as an exhibit to the contract, and (3) terms in the Contractor's rules and regulations entirely external to the contract.

As now written, however, Section 52.241-1 seems to overlook two key principles: (1) under § 8093 (see 41.004-1(d)), in the case of electric utility service, all applicable State laws and tariffs, rules, and regulations filed with or approved by the State regulatory body take precedence over all terms of the contract (including the specifications), whether set forth in the main body or in an exhibit; and (2) a cardinal rule of contract interpretation that all clauses should be interpreted consistently with one another and that a priority rule should apply only when there is unavoidable conflict.

Therefore, Section 52.241-1 should be clarified as follows:

The writings comprising the contract shall be treated as complementary and shall be interpreted, whenever possible, consistently with one another to achieve the parties' intent. To the extent of any inconsistency conflict among such writings, they shall take precedence in the following order: (a) ~~between~~ the terms and conditions of this contract (including the specifications), (b) the terms and conditions in ~~and~~ any rate schedule, rider, or ~~exhibit~~ other writing incorporated in this contract by reference or otherwise as an exhibit, and (c) the

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terms ~~or any~~ of the Contractor's rules and regulations not approved by the applicable governing regulatory body. ~~the terms of this contract shall control.~~ In the case of electric utility service, however, in accordance with Section 8093 of the Department of Defense Appropriations Act of 1988, Pub. L. No. 100-202, the terms and conditions filed with or approved by the State regulatory body, and all applicable State laws, and tariffs, rules, and regulations filed with or approved by the State regulatory body, whether or not expressly incorporated into the contract, shall take precedence over the writings described above in subsections (a), (b), and (c).

These changes coincide with Section 52.241-2(a), which requires the Government to purchase utility services in accordance with the approved tariffs, rules, and regulations of the applicable governing regulatory body.

26. Section 52.241-2(b) permits suppliers to discontinue service at the end of a contract. Electric utilities are specifically required by State law to provide service to all appropriate persons. This Section as worded would permit a violation of State law in contravention of § 8093 (see 41.004-1(d)). Therefore, Section 52.241-2(b) should be clarified as follows:

(b) Except as otherwise required by State law with regard to the provision of electric utility service, it is expressly understood that neither the Contractor nor the Government is under any obligation to continue any services beyond the term of this contract.

27. Section 52.241-2(c) requires that the supplier provide the agency with copies of all proposed changes in rates, terms or conditions concurrently with the filing of such proposals. This exceeds the requirements of State law in most cases, will be very burdensome to utilities with many federal facility customers, and is unnecessary because under State law all affected parties, particularly customers, are provided ample notice of the

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proposals in accordance with State procedures. The Government would no doubt be unwilling to waive its right to full compliance with these governing State procedures, and accordingly, it should be willing to abide by them as sufficient. There is no evidence that these procedures are deficient to provide timely notice. For these reasons, the second clause of Section 52.241-2(c) relating to notice of proposed changes should be deleted.

28. Section 52.241-3 on Change in Class of Service provides for the lowest available rate in the event of changes in class of service. This requirement should be limited to changes in class of service in the same vicinity and under similar conditions of use. In addition, the requirement should be clarified to specify its effective date. Accordingly, the Section should be amended to read as follows:

(a) In the event of a change in the class of service such service shall be provided at the Contractor's lowest available rate schedule applicable to the class of service furnished *in the same vicinity, and under substantially the same conditions of use and service. Such applicability shall be determined from and after the date when the change in the class of service first becomes effective.*

29. Concerning Section 52.241-4 on Contractor's Facilities, each party to the contract should be responsible for its own acts and omissions. Neither party should be responsible for the other's acts or omissions that cause loss, damage, or other injury. Therefore, the last sentence of Section 52.241-4(a) should be changed as follows, and a new sentence should be added at the end:

(a) The Contractor, at its expense, shall furnish, install, operate, and maintain all facilities required to furnish service hereunder to, and measure such service at the point of delivery specified in the Service Specifications. Title to all such facilities *shall remain with the Contractor and the Contractor shall be responsible for all loss or damage to such facilities caused by the Contractor's*

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acts or omissions. The Government shall be responsible to the extent that loss or damage to such facilities has been caused by the Government's acts or omissions.

30. Concerning Section 52.241-4(b), emergency and near emergency circumstances may make it all but impossible to obtain the prior approval of the Contracting Officer before the Contractor must act on the facilities. Also, the Contractor should be required to assume liability only for the acts and omissions of the Contractor. Finally, the Contractor should not be responsible for transactional-type taxes incurred by the Government in connection with the procurement of utility services. Therefore, the first and last sentences of Section 52.241-4(b) should be changed as follows:

(b) Notwithstanding any terms expressed in this clause, the Contractor shall *whenever reasonably possible during non-emergency circumstances* obtain approval from the Contracting Officer prior to any equipment installation, construction, or removal. The Government hereby grants to the Contractor, free of any rental or similar charge, but subject to the limitations specified in this contract, a revocable permit or license to enter the service location for any proper purpose under this contract. This permit or license includes use of the site or sites agreed upon by the parties hereto for the installation, operation, and maintenance of the facilities of the Contractor required to be located upon Government premises. All taxes (*other than sales or other transactional taxes*) and other charges in connection therewith, together with all liability *caused by the acts or omissions* of the Contractor in the construction, operation, or maintenance of such facilities, shall be assumed by the Contractor.

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31. Concerning Section 52.241-4(d), the Contractor should not be forced to keep his facilities in place indefinitely. Moreover, upon removal, premises can almost never be restored to their "original" condition, especially if the Government has also made substantial changes to the site. Therefore, Section 52.241-4(d) should be changed to read as follows:

(d) Such facilities shall be removed and Government premises restored *as near as practicable* to their original condition, *ordinary wear excepted*, by the Contractor at its expense within a reasonable time after the Government revokes ~~the or~~ terminates ~~ion of~~ this contract. In the event such termination of this contract is due to the fault of the Contractor, such facilities may be retained in place at the option of the Government ~~until~~ *for a reasonable time while the Government attempts to obtain elsewhere* service comparable to that provided for hereunder ~~is obtained elsewhere~~.

32. Concerning Section 52.241-5 on Service Provisions, subsection (a) on Measurement of Service mandates conjunctive billing for multiple meters at a single location. However, it may be beneficial in some cases for the Government to choose not to receive totalized billing. The Government should have the freedom to choose the most advantageous available billing option when consistent with State law. Therefore, the second sentence of Section 52.241-5(a) should be changed to say:

When more than a single meter is installed at the service location, the readings thereof *may* be billed conjunctively *if appropriate and consistent with applicable State laws, regulations and safety codes*.

33. Also concerning Section 52.241-5, the Government's request for testing should be subjected to a reasonableness standard. Therefore, the opening sentence in Section 52.241-5(b)(2) should be changed to say:

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(2) At the *reasonable* written request of the Contracting Officer, the Contractor shall make additional tests of any or all such meters in the presence of government representatives.

The particular standards for metering addressed in this Section 52.241-5 should be the subject of negotiation between the parties, subject to State rules and regulations in the case of electric utility service.

34. Similarly, concerning Section 52.241-5(d)(1), the Contractor should have available not only the traditional legal excuse of "force majeure," but also the modern notion of commercial impracticability. Therefore, Section 52.241-5(d)(1) should be changed as follows:

(1) The Contractor shall use reasonable diligence to provide a regular and uninterrupted supply of service at the service location, but shall not be liable for damages, breach of contract or otherwise to the Government for failure, suspension, diminution, or other variations of service occasioned by or in consequence of any cause beyond the *reasonable control (physical, economic, governmental action, or otherwise)* of the Contractor, including but not limited to acts of God or of the public enemy, fires, floods, earthquakes, or other catastrophe, strikes, or failure or breakdown of transmission or other facilities; Provided that when any such failure, suspension, diminution, or other variation of service shall aggregate more than one hour during any period hereunder, an equitable adjustment shall be made in the monthly billing specified in this contract (including the minimum monthly charge), *if in the case of electric utilities such adjustment is not discriminatory or otherwise inconsistent with State law.*

35. All of Section 52.241-5(d)(2) should be deleted because the Contractor should not be forced to assume the risk of force majeure affecting

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the Government's usage of utility services. This risk should fall solely upon the Government. This allocation of risk is also prevalent in the private commercial area, where a supplier of goods or services does not assume the risk of a buyer's inability to enjoy the goods or services which the supplier is otherwise ready, willing, and able to provide. For example, the tenant of a commercial warehouse does not get a reduction in rent just because business is so slow that he cannot use the warehouse to capacity for 15-day periods or longer.

Moreover, in the case of regulated electric utilities, the Contractor's filed tariffs, as well as other applicable laws and regulations, assume that the Contractor will not have to bear the Government's force majeure risks. If force majeure were redefined in this unusual manner, remaining electric utility customers could be forced to bear the risks of the Government's inability to utilize the contracted electric service. This would likely be inconsistent with State law and hence violate § 8093.

36. Consistent with Comment 23 above, Section 52.241-6 on Change in Rates or Terms and Conditions of Service for Regulated Suppliers should be revised to emphasize regulated services rather than suppliers. Also, the Contractor should not have a double compliance burden on giving notice. As long as the Contractor complies with State-law requirements, the Government will be protected. Therefore, Section 52.241-6(a) and the whole Section's heading should be changed as follows:

§ 52.241-6 Change in Rates or Terms and Conditions of Service for Regulated Suppliers Services

Change in Rates or Terms and Conditions of Service for Regulated Suppliers Services

(a) This Section 52.241-6 shall apply to the extent that § services furnished under this contract are subject to regulation by a regulatory body. The Contractor agrees to give the Contracting Officer written notice of the filing of an application for change in rates or terms and conditions of service concurrently with the filing of the application.

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Such notices shall fully describe the proposed change if, during the term of this contract, the regulatory body having jurisdiction approves any changes, the Contractor shall forward to the Contracting Officer a copy of such changes within 15 days after the effective date thereof. The Contractor agrees to continue furnishing service under this contract in accordance with the amended tariff, and the Government agrees to pay such service at the higher or lower rates as of the date when such rates are made effective. *An electric utility Contractor's compliance with State law governing notice shall constitute that Contractor's compliance with the notice provisions of this subsection (a).*

37. Section 52.241-6(b) is a "most favored nation" clause. This clause is not common in the electric utility industry, even with large electric customers. Moreover, it raises potentially serious questions of equity with respect to other customers whose terms of service do not include such preferred status. For example, a public utility commission may approve special incentive rates to stimulate new job creation or economic development within the State. The commissions should not be forced to offer these same incentive rates to all existing federal customers. Indeed, such a requirement would violate the mandate of § 8093. Accordingly, we recommend that the clause be deleted from the list of prescribed clauses at least as applied to electric utility service.

38. In the alternative, in the event that the Government retains the "most favored nation" concept in 52.241-6(b), a more balanced approach should at least be adopted for electric utilities covered by § 8093 as indicated in the following:

(b) The Contractor shall actively assist the Government in selecting the most favorable applicable rate schedule(s), based on the class and character of service provided during the term of this contract, as compared to service provided other customers hereby represents and warrants that

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~~currently and during the life of this contract the applicable published and unpublished rate schedule(s) shall not be in excess of the lowest published and unpublished rate schedule(s) available to any other customers of the same class, in the same vicinity, and under similar substantially the same conditions of use and service. The Government shall make the selection of rate schedule. In the event that a lower rate is found to be applicable, then the terms of the lower rate shall apply prospectively.~~

39. Section 52.241-6(c) also contradicts § 8093 (see 41.004-1(d)). Moreover, the phrase "inconsistent with" is overbroad and would nullify many regulations that would not contradict the operation or effect of Federal provisions. Therefore, Section 52.241-6(c) should be modified as follows:

(c) In the event that the regulatory body promulgates any regulation concerning matters other than rates which affects this contract, the Contractor shall immediately provide a copy to the Contracting Officer. *An electric utility's compliance with State laws governing notice shall constitute compliance with this notice requirement. Except for acquisitions of electricity, as required by Section 8093 of the Department of Defense Appropriations Act of 1988, Pub. L. No. 100-202, ¶* the Government shall not be bound to accept any new regulation ~~inconsistent with that contradicts~~ Federal laws or regulations.

40. Concerning Section 52.241-6(d), a change is needed to accommodate contract changes initiated privately between the parties rather than by the regulatory body governing the Contractor. Therefore, the last sentence of Section 52.241-6(d) should be changed as follows:

(d) *Except for acquisitions of electricity, as required by Section 8093 of the Department of Defense*

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Appropriations Act of 1988, Pub. L. No. 100-202, A any changes to rates or terms and conditions of service shall be made a part of this contract by the issuance of a contract modification. The effective date of the change shall be the effective date set by the regulatory body or the effective date of the modification, whichever is earlier.

41. Consistent with Comments 23 and 36, Section 52.241-7 on Change in Rates or Terms and Conditions of Service for Unregulated Suppliers should be revised to emphasize unregulated services rather than suppliers. Therefore, Section 52.241-7(a) and the whole Section's heading should be changed as follows:

§ 52.241-7 Change in Rates or Terms and Conditions of Service for Unregulated Suppliers Services

Change in Rates or Terms and Conditions of Service for Unregulated Suppliers Services

(a) This Section 52.241-7 applies to the extent services furnished under this contract are not subject to regulation by regulatory body. After (insert date), either party may request a change in rates or terms and conditions of service, unless otherwise provided in this contract. Both parties agree to enter in negotiations concerning such changes upon receipt of a written request detailing the proposed changes and specifying the reasons for the proposed changes.

42. Section 52.241-7(b) is essentially a "most favored nation" clause. We recommend that it be deleted for the reasons set forth in Comment 37. In the alternative, if the Government retains the concept, it should be amended as recommended in Comment 38.

43. Section 52.241-8(a) defines "connection charge" to mean either the estimated cost less agreed salvage value, or the actual cost less

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salvage value, whichever is less. However, the cost of removal will often exceed salvage value. As a result, the charge should be defined as: the estimated cost of installation less agreed salvage value plus estimated cost of removal, or the actual cost of installation less agreed salvage value plus the actual cost of removal, whichever is less.

44. Concerning Section 52.241-8 on Connection Charge, certain changes are needed to clarify the cost reimbursement for Contractor-installed facilities and to make this clause consistent with Section 52.241-4(b).

Subsection (a) contemplates that the Government pays the net cost of new facilities as a "connection charge," while subsection (c) contemplates that the Contractor provides the Government a credit to pay off all of this cost. Generally, State law and public utility commission practice requires that the electric utility customer pay for the costs of specialized facilities needed to meet its service requirements, such as a substation. Public utility commissions generally have a strong State interest in assuring that other customers are not indirectly required to subsidize the cost of such facilities dedicated primarily to serve one customer. As a result, subsection (c) dealing with credits, and the related references elsewhere in Section 52.241-8 to changes in the credit arrangements in various circumstances, should all be deleted as they relate to the provision of electric utility service.

In addition, the Contractor should be required to assume liability only for the acts and omissions of the Contractor and should not be liable for the Government's transactional taxes. Therefore, the last sentence of Section 52.241-8(b) should be changed as follows:

(b) Ownership, operation, and maintenance of new facilities to be provided. The facilities to be supplied by the Contractor under this clause, notwithstanding the payment by the Government of a connection charge, shall be and remain the property of the Contractor and shall, at all times during the life of this contract or any renewals thereof, be operated and maintained by the Contractor at its expense. All taxes (*other than sales or other transactional taxes*) and other charges in

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connection therewith, together with all liability ~~arising out of~~ *caused by the acts or omissions of the Contractor* in the construction, operations, or maintenance of such facilities, shall be the obligation of the Contractor.

45. Line 7 of Section 52.241-8(c)(2) should be changed to read "by *direct* means of these facilities." Without this change, the notion of multiple-use facilities is unbounded. The addition of the word "direct" prevents the language from being overbroad:

(2) In the event the Contractor, before any termination of this contract but after completion of the facilities provided for in this clause, serves any customer other than the Government (regardless of whether the Government is being served simultaneously, intermittently, or not at all) by *direct* means of these facilities, the Contractor shall promptly notify the Government in writing. Unless otherwise agreed by the parties in writing at that time, the Contractor shall promptly accelerate the credits provided for under subparagraph (c)(1) of this clause, up to 100 percent of each monthly bill until there is refunded the amount that reflects the Governments connection costs for that portion of the facilities used in serving others.

46. Concerning Section 52.241-8(d), a change is necessary to clarify that completion costs include both direct and indirect costs reasonably allocable to completed work through the time of termination. Therefore, a sentence should be added to the end of Section 52.241-8(d) as follows:

(d) Termination before completion of facilities. The Government reserves the right to terminate this contract at any time before completion of the facilities with respect to which the Government is to pay a connection charge. In the event the Government exercises this right, the Contractor

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shall be paid the cost of any work accomplished prior to the time of termination by the Government, plus the cost of removal, less the salvage value. *"Cost" shall include direct labor and material costs, reasonable overheads, reasonable administrative expenses, and reasonable profit on work completed through the time of termination, including any applicable non-refundable service charge.*

47. Lines 2-3 of Section 52.241-8(e)(1)(i) should be changed to say "by *direct* means of such facilities." The same reasoning applies here as for Section 52.241-8(c)(2), consistent with Comment 45 above. Without this change, the notion of multiple-use facilities is unbounded. The addition of the word "direct" prevents the language from being overbroad:

(i) If, during such twelve month period, the Contractor, serves any customer by *direct* means of such facilities, the Contractor, shall, in lieu of allowing any credits, promptly notify the Government in writing. Unless otherwise agreed by the parties in writing at that time, the Contractor shall pay the Government during such period installments in like amount, manner, and extent as the credit provided under paragraph (c) of this clause before such termination, and

48. Section 52.241-8(e)(2) leaves an interpretive gap between the time prescribed for Contractor removal, and what happens to the facilities if they remain in place beyond that period. Accordingly, we recommend that the phrase "within twelve months" in paragraph (2) be deleted.

49. In line 3 of Section 52.241-9(d), a typographical correction should be made changing "contractor" to "Contractor:"

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- (d) *Monthly facility cost recovery rate.* The monthly facility cost recovery rate which the Government shall pay the Contractor whether or not service is received is –

50. Section 52.241-9 dealing with Termination Liability should be conformed to our suggestion to modify Section 52.241-8(a) regarding calculation of the connection charge. See Comments 43 and 44.

51. Section 52.241-10(a) on Multiple Service Locations should be changed to recognize that in many States the public utility commission regulates the number and arrangement of the points of delivery of electric utility service for safety reasons, among others. Since § 8093 requires that procurement of electric utility service be consistent with State law, the proposed regulation must be amended to conform with this requirement. In addition, a change is necessary to make it clear that the parties must agree before the Contractor could be forced to supply unanticipated locations merely by changing the points of delivery under the contract. Therefore, Section 52.241-10(a) should be changed as follows:

(a) At any time by written order, the Contracting Officer may designate any location within the service area of the Contractor at which utility service shall commence or be discontinued. The contract shall be modified in writing, by adding to or deleting from the Service Specifications, the name and location of the service, specifying any different rate, the point of delivery, different service specifications, and any other terms and conditions, *all as agreed by the parties. In accordance with Section 8093 of the Department of Defense Appropriations Act of 1988, Pub. L. No. 100-202, any and all changes in service locations, including without limitation any different rate, the point of delivery, different service specifications, and any other terms and conditions with respect to provision of electric utility service shall be consistent with all applicable State laws,*

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regulations, rulings, tariffs, decisions, and safety code requirements.

52. In line 1 of Section 52.241-10(b), the word "minimum" should be deleted and "applicable" should be inserted; this change is necessary because the pertinent monthly charge may not necessarily be a "minimum" charge:

(b) ~~The minimum~~ *applicable* monthly charge specified in this contract shall be equitably prorated from the period in which commencement or discontinuance of service at any service location destination designated under the Service Specifications shall become effective.

53. In accordance with the earlier recommendation in Comment 10, and in keeping with the type of certifications required by the FAR for similar purposes (see, e.g., FAR 52.203-8, "Requirement for Certification of Procurement Integrity;" and FAR 52.209-5, "Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters"), the representation set forth in Section 52.241-11(a) relating to compliance with the mandate of § 8093, should be amended to read as follows:

(a) *The undersigned Vice President of the Offeror corporation, or person of comparable authority in an unincorporated entity, hereby certifies that to the best of his knowledge and belief the Offeror's sale of electricity in accordance with the terms and conditions of this solicitation is ~~is not~~ consistent with Section 8093 of the Department of Defense Appropriations Act of 1988, Pub. L. No. 100-202 ~~Public Law 100-202, section 8093~~ as evidenced by the attached order of the applicable regulatory body of the State of _____ and as reported in paragraph (b) below.*

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This certification concerns a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under Title 18, United States Code, Section 1001.

• • •

EEI would be pleased to have the opportunity to meet with FAR representatives as appropriate to further explain these comments.

Respectfully submitted,

Robert L. Baum
Robert L. Baum
General Counsel and Executive
Vice President, Policy and Issues

cc: Mr. Charles Lloyd
Defense Acquisition Regulatory System
1211 S. Fern Street
Arlington, VA 22202



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JUL

Ms. Beverly Fayson
FAR Secretariat
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Room 4041
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Washington, D.C. 20405

Dear Ms. Fayson:

In regard to your proposed rule, FAR Case 91-13, PART 41-ACQUISITION OF UTILITY SERVICES, we ask that the enclosed comments be considered. The Department of Agriculture, Rural Electrification Administration (REA), as a secured lender to many rural electric cooperatives, has a strong interest in the financial condition and financial actions of these borrowers. Specifically, REA opposes the proposed rule in 52.241-13, paragraphs (b) and (c), Capital Credits.

(1) In paragraph (b) the cooperative would have to furnish information on capital credit allocations within 60 days after the close of the cooperative's fiscal year. Many cooperatives do not have the staff resources to complete the required financial data and to allocate capital credits to all members within 60 days of the end of the fiscal year. We recommend that any such rule be stated in terms that would require the information be furnished at the same time that such information is furnished to other members of the cooperative.

(2) The rule proposed in (b) would also require that the cooperative "...state the amount of capital credits to be paid to the Government and the date the payment is to be made." As we comment below in regard to paragraph (c), REA opposes this proposal. In paragraph (c) the cooperative would be required to make payment of capital credits to the Government upon termination or expiration of the contract. REA has in its loan security documents, specifically Section 16, Article II of the typical Mortgage, limited the amount and timing of capital credit distributions by a borrower. Simply stated, without approval in writing by the mortgagees, the borrower may not make distributions of capital credits of more than 25 percent of prior year's margins if after such distributions the borrower's equity would be less than 40 percent of total assets. This limitation is needed for loan security purposes. In addition, where a contract is made for an electric load whose demand is expected to exceed 1,000 kilowatts, written approval of the mortgagees is normally required. Contract terms as would be required under proposed (b) and (c) would not be acceptable to REA. Contract

JUL 23 1991

Ms. Beverly Fayson

terms as proposed in (b) and (c) would be discriminatory and would be prohibited by the provisions of many cooperative bylaws and articles of incorporation.

We are enclosing copies of REA Bulletins 102-1 "Capital Credits-Consumer Benefits," and 102-2 "Waiver of Security Instrument Provisions Relating to Certain Retirements of Capital by Distribution Borrowers," dealing with capital credits, and a copy of Section 16, Article II, of the REA Mortgage.

for *Guyerhatt*
GARY C. BYRNE
Administrator

Enclosures

91-13-176

REA BULLETIN 102-1 (Electric)
REA BULLETIN 402-3 (Telephone)
MARCH 1964

Reprinted April 1974
with Appendix B August 28, 1974



CAPITAL CREDITS - CONSUMER BENEFITS



RURAL ELECTRIFICATION ADMINISTRATION • U.S. DEPARTMENT OF AGRICULTURE

UNITED STATES DEPARTMENT OF AGRICULTURE
Rural Electrification Administration

March 5, 1964

TO : Boards of Directors of Electric and Telephone Cooperatives

SUBJECT: Capital Credits and Related Consumer Benefits

REA has made important changes in its capital credit recommendations. We believe these merit the careful attention of your cooperative. These changes have been developed with the excellent help and cooperation of representatives from NRECA and NTCA. The basic objective behind these changes is to encourage active support and participation of member patrons in the affairs of the cooperative and to provide them with maximum benefits from its operation. These changes are set forth in detail in a revised REA Bulletin. A summary of these changes and the reasons why they are being made follows.

The unique position of electric and telephone cooperatives in the field of utility service is inescapably dependent upon their inherent characteristics as consumer-owned, nonprofit organizations. Their rightful claim to exemption from the usual pattern of utility regulation is based essentially on the fact that the consumer, the owner and the equity investor are one and the same, and consequently there are not the usual third party rights that require protection by regulatory agencies. Their income tax treatment is based on the fact of cooperative, nonprofit, operation.

It is important to preserve, within reasonable administrative limits, the essential identity of consumer, owner and equity investor. The revolving of capital on a systematic first in, first out basis provides an equitable method whereby each patron furnishes for a period of time his fair share of the capital needed by the cooperative and then has it returned to him as new capital is supplied in subsequent years. This results in a very desirable situation in that to the maximum possible extent the capital will be owned by the current member-patrons who are primarily concerned with the operations of the cooperative. Their active support and participation are of vital importance to the continued success of the cooperative as a member-owned and controlled enterprise.

Clear recognition of the nature of capital credits, including actual retirement as it is deemed proper, is also a critical factor in maintaining the essential position of the cooperative as a nonprofit organization.

The bylaws of a number of cooperatives provide that no retirements shall be made if after the retirement the capital would be below 40 percent of total assets. In view of the comprehensive financial planning by cooperative

borrowers, this bylaw net worth provision is considered unnecessary and may be in conflict with their current objectives. REA therefore recommends the elimination of the net worth restriction on retirements from the capital credit bylaw. A number of borrowers have already eliminated this provision.

The amount and timing of capital retirements should be determined by each board on the basis of the cooperative's overall financial plan, developed as recommended in REA Bulletins on financial planning. (REA Bulletin 105-4 dated May 12, 1960, is cancelled and a revision will be issued shortly.) By using the financial plan, the board can ascertain what retirements of capital are consistent with the current objectives of the cooperative, including those relating to working capital, reserve funds, rates, and net worth.

The revised bylaw provides that the so-called non-operating margins not needed for offsetting deficits will be included with the amounts furnished as capital and allocated to the patrons. The allocation of non-operating margins in this manner increases the patrons' capital credits, reduces their cost of service, and clearly establishes the interest of each patron in the cooperative's net worth.

The offsetting of deficits or losses against non-operating margins is recommended in order to avoid the carrying of deficits indefinitely on a cooperative's books. Up to this time any deficits incurred, usually during the early years of operation, have remained on the books as a separate item notwithstanding the accumulation of net worth in later years. The revised bulletin now provides an orderly method for offsetting deficits. These offsets will not affect the cash position or change the net worth of the cooperative.

The attached REA Bulletin 102-1 (Electric) and 402-3 (Telephone) and the accompanying capital credit bylaw provisions were submitted to the Internal Revenue Service. It has advised that "the information and recommendations set forth in the Bulletin and the proposed bylaw provisions do not appear to be in conflict with the position of the Service as based on applicable provisions of the Internal Revenue Code and Regulations."

In our judgment these capital credit recommendations provide a sound basic relationship between your cooperative and its member-patrons concerning the furnishing and retirement of capital. They deserve careful consideration by your cooperative. REA personnel will be glad to meet and discuss with your Board any aspects of the new bulletin and bylaw on which you desire more information.


Administrator

91-13-170
UNITED STATES DEPARTMENT OF AGRICULTURE
RURAL ELECTRIFICATION ADMINISTRATION
WASHINGTON, D.C. 20250

AUG 28 1974

SUBJECT: Patronage Capital in Power Supply Cooperatives

TO: Boards of Directors of Electric Cooperatives

Attached is new Appendix B to REA Bulletin 102-1 (Electric): 402-3 (Telephone), "Capital Credits - Consumer Benefits," dated March 5, 1964.

This appendix provides alternatives to recommendations set out in Appendix A of the bulletin with respect to patronage capital in power supply cooperatives. It also contains proposed bylaw amendments for implementing the alternatives should the boards of directors wish to adopt them after review by the cooperatives' attorneys for consistency with state law and for effect on any vested rights of patrons.

The alternatives would permit:

1. Distribution cooperatives to identify separately in their books and records and for patrons (a) that portion of their patronage capital which is reinvested in a power supply cooperative and (b) the remaining portion of their patronage capital.
2. Distribution cooperatives to coordinate retirements of patronage capital furnished by their patrons and reinvested in a power supply cooperative with the power supply cooperative's retirement in cash of such patronage capital. This would also permit the distribution cooperatives to retire such patronage capital separately from their other patronage capital.
3. Power supply cooperatives to use operating margins to offset and eliminate operating deficits of prior years.



DAVID A. HAMILL
Administrator

Attachment

UNITED STATES DEPARTMENT OF AGRICULTURE
RURAL ELECTRIFICATION ADMINISTRATION
WASHINGTON, D.C. 20250

DEC 12 1973

SUBJECT: U. S. Information Returns - Treasury Department
Form 1099--PATR

TO: Electric and Telephone Cooperative Borrowers

It appears that electric and telephone cooperative borrowers have been receiving in the mail copies of a new Treasury Department Form 1099--PATR, Statement for Patrons of Cooperatives, with instructions indicating that this form is required for each person to whom patronage dividends and other distributions, described in section 6044(b) of the Internal Revenue Code, aggregating \$10 or more, have been paid by the cooperatives.

In this connection it should be noted that section 1.6044--2(b)(2)(iii) of the Internal Revenue Regulations exempts from the reporting requirements any corporation operating on a cooperative basis which is engaged in furnishing electric energy, or providing telephone service, to persons in rural areas. Under this section of the regulations, it would appear that neither exempt nor nonexempt rural electric and telephone cooperatives need file Treasury Form 1099--PATR.



DAVID A. HAMIL
Administrator

91-13 114

UNITED STATES DEPARTMENT OF AGRICULTURE
Rural Electrification Administration

March 5, 1964
Supersedes 3/23/59*

REA BULLETIN 102-1 (Electric)
REA BULLETIN 402-3 (Telephone)

SUBJECT: Capital Credits - Consumer Benefits

I. Purpose: To set forth recommendations for electric and telephone cooperative borrowers concerning capital credits and related consumer benefits.

II. General:

- A. The Rural Electrification Administration and its cooperative borrowers have a special concern that the cooperatives operate on a non-profit basis and provide maximum benefits for their consumers. Non-profit operation also facilitates the furnishing of area-wide dependable service at the lowest possible cost in keeping with the objectives of the Rural Electrification Act.
- B. Effective bylaws, policies and practices concerning capital credits are essential in providing maximum consumer benefits and in encouraging active member participation in a cooperative's affairs.
- C. Borrowers are responsible for informing REA of changes in bylaws, policies or practices concerning capital credits, including proposed general retirements of capital or other cash distributions to patrons. (See REA Bulletin 100-2: 403-3)

III. Policy and Recommendations:

- A. REA recommends that each cooperative borrower operate under capital credit bylaws whereby all amounts received in excess of losses, costs and expenses will be included in the patrons' capital credit accounts. The bylaws should clearly establish an agreement between the cooperative and its members and patrons that:
 - 1. amounts paid in excess of costs and expenses of providing service are furnished as capital;
 - 2. such amounts will be determined annually on a patronage basis and credited to a capital account for each patron;

*REA Bulletin 102-1

APPENDIX A
CAPITAL CREDITS

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Purpose: The appendix provides information and guidance to cooperative borrowers concerning capital credits and related consumer benefits as recommended in REA Bulletin 102-1: 402-3. It includes:

1. A discussion of REA recommendations for establishing effective capital credit bylaws, policies and practices to assure non-profit operation and provide maximum benefit to consumers, and
2. A recommended capital credit bylaw provision.

Capital Credit Retirements: Capital credits should be returned to patrons on a revolving basis as soon as it is determined that the overall financial condition of a cooperative permits. Capital credit retirements on a systematic, continuing plan are basic to good cooperative functioning. Revolving the capital of a cooperative -- retiring the older capital as new capital is supplied -- encourages more active support and participation in the cooperative's affairs by present members. This revolving process means that to the maximum possible extent the capital will be owned by the current member-patrons who are vitally interested in the operations of the cooperative. Retirements of capital credits constitute tangible evidence to members and patrons that their cooperative is being operated on a non-profit basis and for their maximum benefit.

The bylaws of a number of cooperatives provide that no retirements shall be made if after the retirement the capital would be below 40 percent of total assets. In view of the comprehensive financial planning by cooperative borrowers, this bylaw net worth provision is considered unnecessary and may be in conflict with their current objectives. REA therefore recommends the elimination of the net worth restriction on retirements from the capital credit bylaw. A number of borrowers have already eliminated this provision.

- 3. all other amounts received by the cooperative from its operations in excess of costs and expenses will be (a) used to offset any losses incurred during the current or any prior fiscal year and (b) to the extent not needed for that purpose, allocated on a patronage basis and included as a part of the capital credited to the accounts of patrons;
 - 4. each patron will be notified annually of the amounts credited to his capital account; and
 - 5. capital credited to patrons will be returned to them on a revolving basis when the board determines that the financial condition of the cooperative will not be impaired thereby.
- B. The amount and timing of capital credit retirements should be consistent with REA mortgage requirements and the cooperative's overall financial plan developed as recommended in REA Bulletins on financial planning. Particular attention should be given to such matters as working capital, reserve funds, rates, financing capital additions, and net worth.
 - C. members and patrons should be given full information concerning capital credits to further their understanding and support of the cooperative.
 - D. The attached material includes appropriate bylaw provisions and additional information concerning the recommendations set forth above.

[Handwritten Signature]
 Administrator

Attachment
 Appendix A & B

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 CAPITAL CREDITS:
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 Capital Credits

the provisions of the bylaws in effect at the time the margins were received. Some cooperatives, at the time they adopted capital credits, took appropriate corporate action to assign and credit existing margins on an equitable basis to their members and patrons, and elected to treat such margins as patronage capital subject to the same rights and limitations as patronage capital furnished under the new capital credit bylaw. An analysis of any such corporate actions or former bylaw provisions would seem advisable before authorizing general retirements for a particular year or years.

Deficits and Non-Operating margins: Under capital credits, amounts paid by patrons in excess of costs and expenses of providing service are paid in as capital and are credited to the capital accounts of the patrons. Patrons' capital accounts are credited with the amounts of capital paid in each year even though deficits have been incurred during past years. The bulletin (paragraph III A 3) recommends that all other amounts received by the cooperative from its operations in excess of costs and expenses, usually referred to as "non-operating margins," be allocated to patrons on a patronage basis to the extent that such non-operating margins are not needed to offset any losses incurred during the current or prior years.

Before any allocations of non-operating margins are made, losses should be deducted from these margins. This will enable the cooperative to (a) offset deficits in an orderly manner, and (b) account on a patronage basis to its patrons for all amounts received from its operations in excess of costs and expenses. This means that any deficits will be systematically offset by non-operating margins and the patrons will always be credited with the capital they furnish the cooperative together with other allocable amounts. This furthers the objective of providing patrons with maximum benefits from the overall operation of the cooperative.

Non-operating margins arise principally from interest on Government bonds and savings accounts in banks and building and loan associations. Since a cooperative needs to maintain adequate funds for working capital and reserves for the conduct of the business, such as are recommended by REA in Bulletin 1-7: 300-5, it is only reasonable and in the best interests of both the cooperative and its patrons that an interest return on the funds be obtained until such time as the funds are actually used. Inasmuch as these activities are a normal part of operations and are merely incidental to the primary purpose of furnishing electric or telephone service, it is desirable to assign such amounts to patrons' capital accounts on a patronage basis. This increases the consumer benefits from the overall operations of the cooperative.

There may also be other miscellaneous amounts received by the cooperative which may not be classified in the accounts as non-operating margins. To the extent that there is a practical and equitable basis for allocation, it is contemplated that these amounts will be credited to the patrons'

to the problem of allocating to each consumer his proportionate part of one of the items of cost before arriving at the balance available for capital credits. This and any other method which seeks to break down any of the elements of cost on an equitable and reasonably determinable basis would appear to be proper.

Where service is being rendered to various groups of consumers (such as industrials and commercials) under different rate structures and possibly under different cost of service conditions, it may be appropriate in some cases, that in the determination of the amounts of capital, if any, furnished by such consumers, different approaches or factors be used for these different groups of consumers. To conform to the principle of non-profit operation, such determinations must be reasonably supportable by differences in the cost of service to and the rates paid by such consumers and be reasonably designed to ascertain as accurately as possible the amounts paid by the consumers in excess of the cost of service to those consumers.

Generation and Transmission Cooperatives: Generally, the handling of capital credits for either type of electric cooperative - G&T or distribution - would be the same. Capital credited to the account of a distribution cooperative by a G&T cooperative is an investment by the distribution cooperative in the capital of the G&T cooperative. This capital investment is made initially as a part of the payment for power purchased. While this payment is not broken down for reporting purposes by the distribution cooperative, the capital portion of the payment is, in effect, a reduction in the cost of power which would increase the amount available as capital credits to the distribution cooperative's consumers. The distribution cooperative should allocate to its patrons the capital credits assigned to it by the G&T cooperative at the same time it allocates other capital. In this way, allocation and retirement of capital credits arising from G&T operations will be treated by the distribution cooperative in the same manner and as part of any other capital credits allocated to its patrons.

Estates of Deceased Patrons: Capital credits of deceased patrons may be retired to facilitate the settlement of estates. Under the bylaws, settlements of this type are discretionary with the board so long as they are made under a policy of general application. Some boards have applied a discount because the retirements are made out of turn although many boards have found it more desirable to make such retirements on a 100 percent basis. The financial condition of the cooperative and the expected number of requests of this nature over the years are important factors to consider in establishing a general policy. REA Bulletins 102-2 and 402-2 waive the mortgage provision requiring certain amounts and kinds of assets as a prerequisite to retirements of capital credits of deceased patrons under specified conditions.

Patrons Who Discontinue Service: REA recommends that patrons who discontinue service should not be given a preference on capital credit retirements over other patrons who continue to take service, either by way of

immediate cash refunds or by applying capital credits against unpaid bills. Such a patron is not entitled by the termination of his service to an immediate capital credit refund. His credits normally would be paid off only at the time the cooperative is making a general retirement of credits for a particular year, either by cash or by offset against any unpaid bills. In the meantime his record is held as an inactive account. If a patron cannot be located through his last known address when a general retirement is made, his capital credit record should be retained, and the cooperative can continue using the capital until it is called for by the rightful claimant. If a patron terminates his service, he may under the bylaws assign his capital credits to his successor in interest or occupancy.

Income Tax Treatment of Electric and Telephone Cooperatives: The Federal income tax law has long contained language exempting certain non-profit organizations and cooperatives from the tax and these exemption provisions have been continued, although rewritten and modified in certain respects over the years. Section 501(c)(12) of the Internal Revenue Code of 1954* is the provision generally held applicable to electric and telephone cooperatives.

It provides exemption for:

"Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses."

Telephone cooperatives are specifically mentioned and electric cooperatives are considered "like organizations within the meaning of this language. Under applicable income tax regulations, tax exemption is not automatic and is recognized by the Internal Revenue Service only after a cooperative has filed an application therefor with the appropriate District Director of Internal Revenue. An organization that is authorized to pay or pays dividends on its stock or membership fees as distinguished from patronage refunds or capital credits would not be eligible for exemption under Section 501(c)(12) according to the position taken by the Internal Revenue Service.

*The Revenue Act of 1962, insofar as it affects the tax treatment of cooperatives and their patrons, does not apply to either (a) electric or telephone cooperatives exempt under Section 501(c)(12), or (b) presently taxable cooperatives which are engaged in furnishing electric energy, or providing telephone service, to persons in rural areas. (Sec. 1381(a)(2)(A) and (C), Internal Revenue Code of 1954, as amended by the Revenue Act of 1962) Electric and telephone cooperatives and their patrons are, of course, still governed by the previously applicable law.

Most electric and telephone cooperatives have qualified for exemption under Section 501(c)(12) and exemption, once established, would continue in effect from year to year as long as the cooperative meets the requirements for exemption under this Section.* As an exempt organization, however, annual information returns (Form 990) are required. The information return calls for a report on changes in a cooperative's articles of incorporation or bylaws, or any change in its method of operation in order that the effect, if any, of such changes upon the exempt status of the organization may be determined. Compliance with articles and bylaws upon which exemption was granted is, of course, always essential.

While as indicated above only one allocation would be made annually to each patron, care should be taken to insure that the cooperative's accounts will separately reflect the amounts of all operating and non-operating margins. Such segregation of these respective items on the cooperative's books may not be significant so long as it remains exempt from Federal income tax. However, if a cooperative does not have exempt status or has lost it after having been exempt for a period of years, only the amount of the allocations attributable to the operating margin would be deductible in computing the cooperative's taxable income.

Income Tax Status of Capital Credits to Patrons: For the patron of an electric or telephone cooperative who uses service for only non-business purposes, capital credits would in no way enter into his Federal income tax calculations. They merely have the effect of reducing the cost of the electricity or telephone service purchased for personal, living or family use. A patron of an electric or telephone cooperative who deducts all or a portion of his electric or telephone bill as a business expense may, however, have his individual Federal income tax liability affected. The cash received by such a patron, when his capital credits are retired, should normally be reported as ordinary income in the year received but only in the same proportion that payments for service had previously been deducted as business expenses. Patrons may have tax questions of an individual nature and these should be taken up by the patron with the Internal Revenue Director for his district.

Information to Patrons on Capital Credits and Notification of Capital Credited to Their Accounts: REA recommends that members and patrons be given full information concerning capital credits. This is essential to good cooperative relations with members and patrons and to their better understanding and support of the cooperative. It is equally important that members and patrons be notified promptly of the amount of capital

*An electric cooperative in Tennessee has, as a result of a decision of the U.S. Circuit Court of Appeals in U.S. v. Pickwick Electric Membership Corporation, 158 F (2d) 272 (C.A. 6th, 1946), been held exempt under Section 101 (8) of the Internal Revenue Code of 1939 (Section 501(c)(4) of the 1954 Code) as an organization for the promotion of social welfare. The Internal Revenue Service, however, does not agree with this decision. Revenue Ruling 57-494, 1957-2 C.B., 315.

credited to their accounts each year. As capital is returned to patrons, the cooperative not only should explain the payments to the patrons but also should acquaint the local community of its action and why the payments are being made. Information concerning each of these activities enables the members, patrons and the entire community to have a better understanding of the non-profit character of the cooperative and of the fact that it is locally owned and operated to provide maximum benefits to its consumers.

Recommended Capital Credit Bylaw Provisions: The attached bylaw provision entitled "Non-Profit Operation" incorporates REA recommendations set forth in Bulletin 102-1: 402-3 and discussed in the Appendix A. To effect these recommendations, the capital credit bylaw provision which many cooperatives have adopted would require amendment. The changes are indicated as follows:

1. Recommended additions are shown in italics and marked by the word "Addition" in the margin.
2. Recommended deletions are shown by a line drawn through the words to be deleted and are marked by the word "Deletion" in the margin.

In addition to this provision, other portions of a cooperative's bylaws may deal with capital credits. These other provisions also help in clearly establishing the contractual relationship between the cooperative and its members. For example, the provision obligating each member to purchase service from the cooperative, and to pay therefor monthly at rates to be determined from time to time by the board should also provide that it is expressly understood that amounts paid by members in excess of the cost of service are furnished by members as capital and each member shall be credited with the capital so furnished as provided in the bylaws. The provision in some of the older electric cooperative bylaws to the effect that "termination of membership shall operate as a release of all right, title and interest of the member in the property or assets of the cooperative" must be deleted since, under capital credits, a former member would not lose the right to any capital credited to his account while taking service merely upon termination of his membership. He may cease to be a member with voting rights but he would not forfeit his capital credits. In addition to the bylaws, there may be instances in which a cooperative's articles of incorporation include some or all of the provisions discussed above depending upon the requirements of the incorporation statute.

Cooperatives which have not yet adopted capital credits should amend their bylaws to include the attached "Non-Profit Operation" provision. The words shown in italics should, of course, be included and the words marked for "Deletion" omitted. Provisions of their bylaws dealing with the disposition of revenues and receipts should be repealed since the new language would replace these provisions and establish the basic contract between the cooperative and its members. In addition, other amendments of the bylaws may be necessary as indicated above. Appropriate revisions of articles of incorporation may also be necessary.

ARTICLE _____

"NON-PROFIT OPERATION"

SECTION 1. Interest or Dividends on Capital Prohibited. The Cooperative shall at all times be operated on a cooperative non-profit basis for the mutual benefit of its patrons. No interest or dividends shall be paid or payable by the Cooperative on any capital furnished by its patrons.

SECTION 2. Patronage Capital in Connection with Furnishing Electric Energy.* In the furnishing of electric energy* the Cooperative's operations shall be so conducted that all patrons will through their patronage furnish capital for the Cooperative. In order to induce patronage and to assure that the Cooperative will operate on a non-profit basis the Cooperative is obligated to account on a patronage basis to all its patrons for all amounts received and receivable from the furnishing of electric energy* in excess of operating costs and expenses properly chargeable against the furnishing of electric energy.* All such amounts in excess of operating costs and expenses at the moment of receipt by the Cooperative are received with the understanding that they are furnished by the patrons as capital. The Cooperative is obligated to pay by credits to a capital account for each patron all such amounts in excess of operating costs and expenses. The books and records of the Cooperative shall be set up and kept in such a manner that at the end of each fiscal year the amount of capital, if any, so furnished by each patron is clearly reflected and credited in an appropriate record to the capital account of each patron, and the Cooperative shall within a reasonable time after the close of the fiscal year notify each patron of the amount of capital so credited to his account. All such amounts credited to the capital account of any patron shall have the same status as though they had been paid to the patron in cash in pursuance of a legal obligation to do so and the patron had then furnished the Cooperative corresponding amounts for capital.

Additional All other amounts received by the Cooperative from its operations in excess of costs and expenses shall, insofar as permitted by law, be (a) used to offset any losses incurred during the current or any prior fiscal year and (b) to the extent not needed for that purpose, allocated to its patrons on a patronage basis and any amount so allocated shall be included as a part of the capital credited to the accounts of patrons, as herein provided.

In the event of dissolution or liquidation of the Cooperative, after all outstanding indebtedness of the Cooperative shall have been paid, outstanding capital credits shall be retired without priority on a pro rata basis before any payments are made on account of property rights of members. If, at any time prior to dissolution or liquidation, the board of directors shall determine that the financial condition of the Cooperative will not be impaired thereby, the capital then credited to patrons' accounts may be

*For telephone cooperatives, the words "electric energy" should be changed to read "telephone service."

Deletion

retired in full or in part. Any such retirements of capital shall be made in order of priority according to the year in which the capital was furnished and credited, the capital first received by the Cooperative being first retired. In no event, however, ~~may any such capital be retired unless, after the proposed retirement, the capital of the Cooperative shall equal at least forty per centum (40%) of the total assets of the Cooperative.~~

Capital credited to the account of each patron shall be assignable only on the books of the Cooperative pursuant to written instructions from the assignor and only to successors in interest or successors in occupancy in all or a part of such patron's premises served by the Cooperative unless the board of directors, acting under policies of general application, shall determine otherwise.

Notwithstanding any other provision of these bylaws, the board of directors, at its discretion, shall have the power at any time upon the death of any patron, if the legal representatives of his estate shall request in writing that the capital credited to any such patron be retired prior to the time such capital would otherwise be retired under the provisions of these bylaws, to retire capital credited to any such patron immediately upon such terms and conditions as the board of directors, acting under policies of general application, and the legal representatives of such patron's estate shall agree upon; provided, however, that the financial condition of the Cooperative will not be impaired thereby.

The patrons of the Cooperative, by dealing with the Cooperative, acknowledge that the terms and provisions of the articles of incorporation and bylaws shall constitute and be a contract between the Cooperative and each patron, and both the Cooperative and the patrons are bound by such contract, as fully as though each patron had individually signed a separate instrument containing such terms and provisions. The provisions of this article of the bylaws shall be called to the attention of each patron of the Cooperative by posting in a conspicuous place in the Cooperative's office.

Deletion

~~SECTION 3. Patronage Refunds in Connection with Furnishing Other Services. In the event that the Cooperative should engage in the business of furnishing goods or services other than electric energy, all amounts received and receivable therefrom which are in excess of costs and expenses properly chargeable against the furnishing of such goods or services shall insofar as permitted by law, be prorated annually on a patronage basis and returned to those patrons from whom such amounts were obtained."~~

47-13-17

UNITED STATES DEPARTMENT OF AGRICULTURE
Rural Electrification Administration

July 2, 1971
Supersedes 5/4/59

REA BULLETIN 102-2

SUBJECT: Waiver of Security Instrument Provisions Relating to Certain
Retirements of Capital by Distribution Borrowers

- I. Purpose: To waive the provisions of loan security instruments relating to the retirement of patronage capital under certain circumstances which are applicable to all loans to distribution borrowers approved pursuant to applications received prior to December 13, 1970.
- II. Definitions: "Mortgage" includes "deed of trust," and "mortgagor" includes a borrower which has executed a deed of trust given to secure a loan. "Borrower" refers only to a distribution borrower. "Retirement of patronage capital" includes any return, general cancellation or abatement of charges for electric energy or services furnished by the borrower.
- III. Waiver: Section 16 of Article II of the mortgage, insofar as it requires the possession of certain amounts and kinds of assets as a prerequisite to the retirement of patronage capital is waived, provided:
 - A. After all retirements of patronage capital made or ordered to be made in any one year, the borrower's equity will equal or exceed 40% of its total assets and other debits, except that if the retirements of capital permitted by paragraph IV below do not in such year exceed 25% of the capital and margins received in the previous year, a general retirement of patronage capital may be made equal to 25% of such margins less the distributions to estates of deceased patrons; and
 - B. No retirement is made when there is due and unpaid any installment of principal or interest on the borrower's notes payable to the United States, or when the borrower is otherwise in default under its mortgage; and
 - C. After the retirement of patronage capital the borrower's total current and accrued assets will equal or exceed its total current and accrued liabilities; and
 - D. The Administrator has not taken any specific contrary action.

*Revised to provide uniformity in the effect of mortgage provisions relating to retirement of patronage capital.

IV. Decedent's Estates: The borrower may retire capital contributed by deceased patrons to the extent required or permitted by the cooperative's articles of incorporation and bylaws if the conditions specified in paragraphs III B, III C, and III D above are met.

Active

Administrator

Index:

CAPITAL CREDITS

Waiver of Security Instrument Provisions Relating to
Certain Returns of Capital

DIVIDENDS

Waiver of Security Instrument Provisions Relating to
Certain Returns of Capital

MARGINS AND CAPITAL

Waiver of Security Instrument Provisions Relating to
Certain Returns of Capital

annualization of the payments required to be made with respect to the refinancing debt during the portion of such year such refinancing debt is outstanding or (ii) the payments of principal and interest required to be made during the following year on account of such refinancing debt.

SECTION 16. The Mortgagor will not, in any one year, without the approval in writing of both of the Mortgagees, declare or pay any dividends, or pay or determine to pay any patronage refunds, or retire any patronage capital or make any other cash distribution (such dividends, refunds, retirements and other distributions being hereinafter collectively called "distributions"), to its members, stockholders or consumers if after giving effect to any such distribution the total Equity of the Mortgagor will not equal or exceed 40% of its total assets and other debts; provided, however, that in any event the Mortgagor may make distributions to estates of deceased patrons to the extent required or permitted by its articles of incorporation and bylaws, and, if such distributions to such estates do not exceed 25% of the patronage capital and margins received by the Mortgagor in the next preceding year, make such additional distributions in any year as will not cause the total distributions in such year to exceed 25% of the patronage capital and margins received in such next preceding year, and provided, further, however, that in no event will the Mortgagor make any distributions if there is unpaid when due any installment of principal or interest on the notes, if the Mortgagor is otherwise in default hereunder or if, after giving effect to any such distribution, the Mortgagor's total current and accrued assets would be less than its total current and accrued liabilities.

For the purpose of this section, a "cash distribution" shall be deemed to include any general cancellation or abatement of charges for electric energy or services furnished by the Mortgagor, but not the repayment of a membership fee of not in excess of \$25 upon termination of a membership. As used or applied in this Mortgage (1) "Equity" shall mean the aggregate of Equities and Margins (as such terms are defined in the Uniform System of Accounts) and Subordinated Indebtedness; and (2) "Subordinated Indebtedness" shall mean unsecured indebtedness of the Mortgagor payment of which shall be subordinated to the prior payment of the notes by subordination agreement in form and substance satisfactory to the Government and CFC.

SECTION 17. In the event that the Mortgaged Property, or any part thereof, shall be taken under the power of eminent domain, all proceeds and avails therefrom, except to the extent that both of the Mortgagees shall consent to other use and application thereof by the Mortgagor, shall forthwith be applied by the Mortgagor: first, to the ratable payment of any indebtedness by this Mortgage secured other than principal or interest on the notes; second, to the ratable payment of interest which shall have accrued on the notes and be unpaid; third,

Ms. Beverly Fayson
FAR Secretariat
General Services Administration
Room 4041
18th and F Street, N.W.
Washington, D.C. 20405

Dear Ms. Fayson:

In regard to your proposed rule, FAR Case 91-13, PART 41-ACQUISITION OF UTILITY SERVICES, we ask that the enclosed comments be considered. The Department of Agriculture, Rural Electrification Administration (REA), as a secured lender to many rural electric cooperatives, has a strong interest in the financial condition and financial actions of these borrowers. Specifically, REA opposes the proposed rule in 52.241-13, paragraphs (b) and (c), Capital Credits.

(1) In paragraph (b) the cooperative would have to furnish information on capital credit allocations within 60 days after the close of the cooperative's fiscal year. Many cooperatives do not have the staff resources to complete the required financial data and to allocate capital credits to all members within 60 days of the end of the fiscal year. We recommend that any such rule be stated in terms that would require the information be furnished at the same time that such information is furnished to other members of the cooperative.

(2) The rule proposed in (b) would also require that the cooperative "...state the amount of capital credits to be paid to the Government and the date the payment is to be made." As we comment below in regard to paragraph (c), REA opposes this proposal. In paragraph (c) the cooperative would be required to make payment of capital credits to the Government upon termination or expiration of the contract. REA has in its loan security documents, specifically Section 16, Article II of the typical Mortgage, limited the amount and timing of capital credit distributions by a borrower. Simply stated, without approval in writing by the mortgagees, the borrower may not make distributions of capital credits of more than 25 percent of prior year's margins if after such distributions the borrower's equity would be less than 40 percent of total assets. This limitation is needed for loan security purposes. In addition, where a contract is made for an electric load whose demand is expected to exceed 1,000 kilowatts, written approval of the mortgagees is normally required. Contract terms as would be required under proposed (b) and (c) would not be acceptable to REA. Contract

Ms. Beverly Fayson

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terms as proposed in (b) and (c) would be discriminatory and would be prohibited by the provisions of many cooperative bylaws and articles of incorporation.


We are enclosing copies of REA Bulletins 102-1 "Capital Credits-Consumer Benefits," and 102-2 "Waiver of Security Instrument Provisions Relating to Certain Retirements of Capital by Distribution Borrowers," dealing with capital credits, and a copy of Section 16, Article II, of the REA Mortgage.

GARY C. BYRNE
Administrator

Enclosures

CC:
Official File-FMS-w/enclosures
Reading File-FMS-w/o enclosures
ADM-w/o enclosures
DAPO-w/enclosures
AAE-w/o enclosures
DAAE-w/o enclosures
Area Directors-w/o enclosures

REA:FMS:Dlessels:slc:X21932:7/17/91:FARCASE.DOC
REA:AAE:Retyped:jmz:7/22/91:GSA/FAR



**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Parts 6, 8, 15, 41, and 52

(FAR Case 91-13)

**Federal Acquisition Regulation;
Acquisition of Utility Services**

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering a rewrite of the FAR coverage dealing with utility services, including the establishment of a new part 41 for this purpose. This proposed rule will replace the existing coverage now located at FAR subpart 8.3 and will provide uniform coverage applicable to all executive agencies. The existing FAR coverage at subpart 8.3 in large measure does not apply to DOD, and it also exempts agency regulatory requirements in the utility area that predated the establishment of the FAR.

DATES: Comments should be submitted to the FAR Secretariat at the address shown below on or before July 23, 1991 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th and F Streets NW, Room 4041, Washington, DC 20405. Please cite FAR Case 91-13 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: For information pertaining to this case, contact Mr. Edward Loeb at (202) 501-4547. For general information, contact Ms. Beverly Fayson, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 501-4735. Please cite FAR Case 91-13.

SUPPLEMENTARY INFORMATION:

A. Background

In response to the need to provide uniform utility coverage in the FAR, a major rewrite of the existing FAR coverage was undertaken. The principle proposed changes follow:

(1) The proposed FAR part 41 would apply across the board to all executive agencies and would also enable agencies to delete most of the regulatory

requirements. The current FAR subpart 8.3 provides that agencies' procedures predating the FAR may continue to be used. In addition, subpart 8.3 specifically exempted DOD from much of the FAR coverage.

(2) Substantial additional guidance for contracting officers in acquiring and administering utility service contracts was included.

(3) Additional definitions applicable to utility service contracts were established.

(4) Coverage was established delineating the existing statutory and delegated authority for utility service contracting.

(5) FAR clauses to be used on a "substantially the same as" basis were established.

(6) Substantive coverage providing for handling rate changes by the agencies was established. This coverage would enable agencies to handle such matters without automatically referring such matters to GSA for action.

(7) Coverage was added providing generally for the use of a Standard Form 33 to acquire utility services.

(8) "Standard" specification formats have been established for use in acquiring utility services. Such formats will not be included in the FAR but will be available for agency use.

(9) "Standard" annual utility service review formats have been established for use in acquiring utility services. Such formats will not be included but will be available for agency use.

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most public utility companies are not small businesses.

Therefore, an Initial Regulatory Flexibility Analysis has not been prepared. However, comments are invited from small businesses and other interested parties. Such comments will be considered in the formulation of a final rule. Comments from small entities concerning the affected FAR subpart will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite 5 U.S.C. 610 (FAR Case 91-13) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping information collection requirements or collection of information from offerors.

which require the approval of OMB under 44 U.S.C. 1501, *et seq.*

List of Subjects in 48 CFR Parts 6, 8, 15, 41, and 52

Government procurement

Dated: May 12, 1991.

Albert A. Vicenziola,
Director, Office of Federal Acquisition Policy.

Therefore, it is proposed that 48 CFR parts 6, 8, 15, 41, and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 6, 8, 15, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 6—COMPETITION
REQUIREMENTS**

2. Section 6.302-1 is amended by revising paragraph (b)(3) to read as follows:

6.302-1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(b) . . .

(3) When acquiring utility services (see 41.001), circumstances may dictate that only one supplier can furnish the service (see 41.004); or when the contemplated contract is for construction of a part of a utility system and the utility company itself is the only source available to work on the system.

**PART 8—REQUIRED SOURCES OF
SUPPLIES AND SERVICES**

Subpart 8.3 (8.300-8.308) Removed

3. Subpart 8.3, consisting of sections 8.300 through 8.308, is removed and reserved.

**PART 15—CONTRACTING BY
NEGOTIATION**

15.812-2 (Amended)

4. Section 15.812-2 is amended in paragraph (a)(3) by removing "Subpart 8.3" and inserting in its place "part 41".

**PART 41—ACQUISITION OF UTILITY
SERVICES**

5. Part 41, consisting of sections 41.000 through 41.010, is added to read as follows:

Sec.

41.000 Scope of part.
41.001 Definitions.
41.002 Applicability.
41.003 Statutory and delegated authority.
41.004 Acquiring utility services.

- 41.002-2 Procedures.
- 41.004-3 CSA assistance and approval.
- 41.004-4 CSA areawide contracts.
- 41.004-5 Separate contracts.
- 41.004-6 Interagency agreements.
- 41.005 Pre-award contract review.
- 41.006 Administration.
- 41.006-1 Monthly and annual review.
- 41.006-2 Rate changes and regulatory intervention.
- 41.007 Contract clauses.
- 41.008 Utility services contract form.
- 41.009 Formats for utility service specifications.
- 41.010 Formats for annual utility service review.

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

41.000 Scope of part.

This part prescribes policies, procedures, and contract format for the acquisition of utility services. (See 41.002(b) for services that are excluded from this part.)

41.001 Definitions.

As used in this part.

Areawide contract means a contract entered into between the General Services Administration (GSA) and a utility service supplier to cover the utility service needs of Federal agencies within the franchise/service area of the supplier. Each areawide contract includes an "Authorization" form for requesting service, connection, disconnection, or change in service.

Authorization means the document executed by the ordering agency and the utility supplier to order service under that areawide contract.

Connection charge means an amount to be paid by the Government to the utility supplier for the required connecting facilities, which are installed, owned, operated, and maintained by the utility supplier (see Termination liability).

Delegated agency means an agency that has received a written delegation of authority from GSA to contract for utility services for periods not exceeding ten years (see 41.003(b)).

Federal Power and Water Marketing Agency means a governmental entity that produces, manages, transports, controls, and sells electrical and water supply services to customers.

Franchise service territory means a geographical area, defined or granted to a specific utility service supplier(s) to supply the customers in that area.

Intervention means action by GSA or a delegated agency to formally participate in a utility regulatory proceeding on behalf of all Federal agencies.

various locations or delivery points in the utility supplier's service area to which it provides service under a single contract.

Rates includes rate schedules, riders, rules, terms and conditions of service, and other tariff and service charges.

Separate contract means a utility services contract, other than a GSA areawide contract, an authorization under an areawide contract, or an interagency agreement, to cover the acquisition of utility services at a specific delivery point(s).

Termination liability means a contingent Government obligation to pay a utility supplier the unamortized portion of a connection charge in the event the Federal Government terminates the contract before the cost of connection facilities has been recovered by the utility supplier (see Connection charge).

Utility service means a service such as furnishing electricity, natural or manufactured gas, water, sewerage, thermal energy, chilled water, steam, hot water, or high temperature hot water. The application of part 41 to other services (e.g., rubbish removal, snow removal) may be appropriate when the acquisition is not subject to the Service Contract Act of 1965 (see 37.107).

41.002 Applicability.

(a) Except as provided in paragraph (b) of this section, this part applies to the acquisition of utility services for the Federal Government, including connection charges and termination liabilities.

(b) This part does not apply to—

(1) Utility services produced, distributed, or sold by another Federal agency. In those cases, agencies shall use interagency agreements (see 41.004-6);

(2) Utility services obtained by purchase, exchange, or otherwise by a Federal power or water marketing agency incident to that agency's marketing or distribution program;

(3) Cable television (CATV) and telecommunications services;

(4) Acquisition of natural or manufactured gas when purchased as a commodity;

(5) Acquisition of utilities services in foreign countries;

(6) Acquisition of rights in real property, acquisition of public utility facilities, and on-site equipment needed for the facility's own distribution system, or construction/maintenance of Federal Government-owned facilities;

(7) Third party financed shared-savings projects authorized by 42 U.S.C. 8257; however, agencies may utilize part

implementation of such measures during the term of the contract executed pursuant to 42 U.S.C. 8257 for periods not to exceed 25 years. "Shared-savings project" means a project to reduce energy and demand costs in existing facilities through privately financed energy efficiency and management projects.

41.003 Statutory and delegated authority.

(a) **Statutory authority.** (1) The General Services Administration (GSA) is authorized by section 201 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 481) to prescribe policies and methods governing the acquisition and supply of utility services for Federal agencies. This includes related functions such as managing public utility services and representing Federal agencies in proceedings before Federal and state regulatory bodies. GSA is authorized by section 201 of the Act to contract for utility services for periods not exceeding ten years.

(2) The Department of Defense (DOD) is authorized by 10 U.S.C. 2301, 2304, and 40 U.S.C. 474(3) to acquire utility services for military facilities.

(3) The Department of Energy (DOE) is authorized by the Department of Energy Organization Act (42 U.S.C. 2751, et seq.) to acquire utility services. DOE is authorized by the Atomic Energy Act of 1954, as amended (42 U.S.C. 2004) to enter into new contracts or modify existing contracts for electric services for periods not exceeding 25 years for uranium enrichment installations.

(b) **Delegated authority.** GSA has delegated its authority to enter into utility service contracts for periods not exceeding ten years to DOD and DOE, and for connection charges only to the Department of Veteran Affairs. Contracting pursuant to this delegated authority shall be consistent with the requirements of this part. Other agencies requiring utility service contracts for periods over one year, but not exceeding ten years, may request a delegation of authority from GSA at the address specified in 41.004-3(b). In keeping with its statutory authority, GSA will, as necessary, conduct reviews of delegated agencies' acquisitions of utility services to ensure compliance with the terms of the delegation and applicable laws and regulations.

41.004 Acquiring utility services.

41.004-1 Policy.

(a) Subject to paragraph (d) of this subsection, it is the policy of the Federal

required utility services from sources of supply which are most advantageous to the Government in terms of economy, efficiency, reliability, or service.

(b) Except for acquisitions below the small purchase limitation (see 13.000), agencies shall acquire utility services by a bilateral written contract which must include the clauses required by 41.007, regardless of whether rates or terms and conditions of service are fixed or adjusted by a regulatory body. Agencies may not use the utility supplier's forms and clauses to avoid the inclusion of provisions and clauses required by 41.007 or by statute. (See 41.004-2(c) for procedures to be used when the supplier refuses to execute a written contract.)

(c) Specific operating and management details, such as procedures for internal agency contract assistance and review, delegations of authority, and approval thresholds, may be prescribed by an individual agency, subject to compliance with applicable statutes and regulations.

(d)(1) Section 8093 of the Department of Defense Appropriations Act of 1988, Public Law 100-202, provides that none of the funds appropriated by the Act or any other Act with respect to any fiscal year by any department, agency, or instrumentality of the United States, may be used for the purchase of electricity by the Government in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements.

(2) The Act does not preclude—

(i) The head of a Federal agency from entering into a contract pursuant to 42 U.S.C. 8287 (which pertains to the subject of shared energy savings including cogeneration);

(ii) The Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2394 (which pertains to contracts for energy or fuel for military installations including the provision and operation of energy production facilities); or

(iii) The Secretary of a military department from purchasing electricity from any provider when the utility or utilities having applicable state-approved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense.

(3) Additionally, the head of a Federal agency may—

(i) Consistent with applicable state law, enter into contracts for the purchase or transfer of electricity to the agency by a non-utility, including a qualifying facility under the Public Utility Regulatory Policies Act of 1978;

(ii) Enter into an interagency agreement pursuant to 41.004-6 and 17.3, with a Federal power marketing agency or the Tennessee Valley Authority for the transfer of electric power to the agency; and

(iii) Enter into a contract with an electric utility under the authority or tariffs of the Federal Energy Regulatory Commission.

(e) Prior to acquiring electric utility services on a competitive basis in an area governed by a franchise service territory, the contracting officer shall determine, with the advice of legal counsel, by a market survey or any other appropriate means, that such competition would not be inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements. Proposals from alternative electric suppliers must provide a representation that service can be provided in a manner not inconsistent with section 8093 of Public Law 100-202 (see 41.004-1(d)). The representation must be supported with appropriate legal and factual rationale.

41.004-2 Procedures.

(a) Prior to executing a utility service contract, the contracting officer shall comply with parts 6 and 7 and subsections 41.004-1 (d) and (e). In accordance with parts 6 and 7, agencies shall conduct market surveys and perform acquisition planning in order to promote and provide for full and open competition. If competition for an entire utility service is not available, the market survey may be used to determine the availability of competitive sources for certain portions of the requirement. The scope of the term "entire utility service" includes the provision of the utility service capacity, energy, water, sewage, transportation, standby or back-up service, transmission and/or distribution service, quality assurance, system reliability, system operation and maintenance, metering, and billing.

(b) In performing a market survey (see 7.101), the contracting officer shall consider, in addition to alternative competitive sources, use of the following methods:

(1) GSA areawide contracts (see 41.004-4);

(2) Separate contracts (see 41.004-5); and

(3) Interagency agreements (see 41.004-6).

(c) When a utility supplier refuses to execute a tendered contract as outlined in 41.004-1(b), the agency shall obtain a written definite and final refusal signed by a corporate officer of the supplier or, if unobtainable, documentation of any verbal refusal by a corporate officer and transmit this document, along with statements of the reasons for the refusal and the record of negotiations, to GSA at the address specified at 41.004-3(b). Unless urgent and compelling circumstances exist, the contracting officer shall notify GSA prior to acquiring utility services without executing a tendered contract. After such notification, the agency may proceed with the acquisition and pay for the utility service under the provisions of 31 U.S.C. 1501(a)(8)—

(1) By issuing a purchase order in accordance with 13.3; or

(2) By ordering the necessary utility service and paying for it upon the presentation of an invoice, provided that a determination is approved by the head of the contracting activity that a formal contract cannot be obtained and that the issuance of a purchase order is not feasible.

(d) When obtaining service utilizing either of the methods at subparagraph (c)(1) or (c)(2) of this section, the contracting officer shall establish a utility history file on each acquisition of utility service provided by a contractor. This utility history file shall contain, in addition to applicable documents in 4.803, the following information:

(1) The unsigned, tendered contract and any related letter of transmittal;

(2) The reasons stated by the utility supplier for not executing the tendered contract, the record of negotiations, and a written definite and final refusal by a corporate officer of the supplier (or if unobtainable, documentation of the verbal refusal by a corporate officer);

(3) Services to be furnished and the estimated annual cost;

(4) Historical record of any applicable connection charges;

(5) Historical record of any applicable ongoing capital credits; and

(6) A copy of the applicable rate schedule.

(e) Determinations made and actions taken under (c) of this subsection to execute a contract, and related acquisition actions taken under this subsection, are valid for one year only. The contracting officer shall take actions to execute a bilateral written

contract prior to expiration of the one-year period.

41.004-3 GSA assistance and approval.

(a) The GSA office specified in 41.004-3(b) will, upon request, provide technical and acquisition assistance, and will arrange for the furnishing of the services described in this part for any Federal agency, mixed-ownership Government corporation, the District of Columbia, the Senate, the House of Representatives, or the Architect of the Capitol (and any activity under the Architect's direction. (See 41.005, Pre-award contract review.)

(b) Except as otherwise specified in 41.003, agencies shall submit all information required under this part to the General Services Administration, Public Buildings Service, Public Utilities Division (PPU), Washington, DC 20405.

(c) When contracting for utility services meeting the criteria in this paragraph, agencies, except delegated agencies (see 41.003(b)) or agencies performing their own review pursuant to paragraph (d) of this subsection, shall obtain GSA review and approval of their prospective contract document and shall provide the information described in 41.003, if—

(1) The annual cost of the service to be acquired is estimated by the using agency, at the time of initiation of the service or annual review, to exceed \$150,000 for separate contracts, or \$250,000 for authorizations under an areawide contract or

(2) A connection charge, termination liability, nonrefundable or nonrecurring service charge, or other facilities charge to be paid by the agency is estimated to exceed \$75,000 for separate contracts, or \$125,000 for authorizations under areawide contracts.

(d) Agencies may request, from the GSA office specified at 41.004-3(b), general authority to conduct their own pre-award contract reviews of the proposed utility contracts specified in 41.004-3(c). Such requests shall include a certification from the acquiring agency's Senior Procurement Executive that the agency has

(1) An established acquisition program;

(2) Personnel technically qualified to deal with specialized utilities problems; and

(3) The ability to accomplish its own pre-award contract review.

The request shall also include information regarding the agency's pre-award contract review procedures.

(e) Requests for review and approval of contract actions described in paragraph (c) of this section, shall contain the information required by

41.005 and shall be forwarded to GSA as early as possible, but not later than 20 working days prior to the date new services are to commence or expiration of an existing contract. If GSA does not respond to the referring agency within 20 working days after a proposed utility services contract is received for review and approval (or within a lesser period if agreed upon), the referring agency may complete negotiations and execute the contract.

(f) Agencies seeking GSA contracting assistance for utility services, shall forward such requests (see 41.005) to GSA not later than 120 days prior to the date new services are required to commence or the date of expiration of an existing contract.

41.004-4 GSA areawide contracts.

(a) GSA enters into areawide contracts (see 41.001) for use by Federal agencies in the acquisition of utility services. An agency in an area covered by an areawide contract shall acquire utility services under the areawide contract unless the agency determines that more advantageous rates or terms and conditions of service are available from another supplier under a separately negotiated contract. Upon request, the GSA office specified at 41.004-3(b) will furnish agencies with a list of the areawide contracts showing the types of utility services available and the geographical areas served. GSA will also provide a copy of any areawide contract upon request.

(b) Each areawide contract includes an authorization form for requesting service, connection, disconnection, or change in service. Upon execution of an authorization by the contracting officer, the utility service supplier is required to furnish services, without further negotiations, at the supplier's current, applicable published or unpublished rates, unless other rates, and/or terms and conditions are separately negotiated.

(c) The contracting officer shall implement the areawide contract by executing the authorization, and attaching it to a Standard Form (SF) 28, Award/Contract, along with any supplemental agreements on connection charges, special facilities, or service arrangements to be paid by the agency. The contracting officer shall also attach any specific fiscal, operational, and administrative requirements of the agency, applicable rate schedules, technical items, maps or drawings of delivery points, details on Government ownership, maintenance, or repair of facilities, and other information deemed necessary to fully define the service conditions in the authorization/contract.

(d) Agencies shall provide GSA at the address specified at 41.004-3(b) a copy of each SF 28 and executed authorization issued under an areawide contract within 20 days after execution.

41.004-5 Separate contracts.

(a) In the absence of an areawide contract or interagency agreement (see 41.004-6), agencies shall acquire utility services by separate contract subject to the requirements and limitations of 41.004-1, 41.004-3(c), and agency contracting authority (see 41.004-3(d)), 41.008, and 41.009.

(b) Subject to the procedures contained in 41.004-2, when an agency is entering into a separate contract, the contracting officer shall document the contract file with the following information:

(1) The number of available suppliers;

(2) Any special equipment, service reliability, or facility requirements and related costs;

(3) The utility supplier's rates, connection charges, and termination liability;

(4) Total estimated contract value (including costs in paragraphs (b) (2) and (3) of this section;

(5) Any technical or special contract terms required;

(6) Any unusual characteristics of services required; and

(7) The utility's willingness to wheel or otherwise transport utility service.

(c) When requesting GSA to enter into a separate contract, the requesting agency shall furnish the technical and acquisition data specified in 41.005(b), 41.004-5(b), and such other technical data as GSA may request to complete the contract.

(d) A contract exceeding a one-year period, but not exceeding ten years (except pursuant to 41.003), may be justified, and is usually required, where any of the following circumstances exist:

(1) The Government will obtain lower rates, larger discounts, or more favorable terms and conditions of service;

(2) A proposed connection charge, termination liability, or any other facilities charge to be paid by the Federal Government will be reduced or eliminated; or

(3) The utility service supplier refuses to render the desired service except under a contract exceeding a one-year period.

41.004-6 Interagency agreements.

Agencies shall use interagency agreements (e.g., consolidated purchase, joint use, or cross-service agreements) to acquire utility services or facilities from

other Government agencies and shall comply with the policies and procedures at Subpart 17.5, Interagency Acquisitions Under the Economy Act.

41.005 Pre-award contract review.

(a) Where pre-award contract review is required, the agency shall provide the following information to GSA with the proposed contract document sufficiently in advance of award to permit a complete review. Requests for GSA review, approval, or assistance shall be forwarded as provided in 41.004-3(e), and shall include the following information:

(1) A technical description or specification of the type, quantity, and quality of service required, and a delivery schedule;

(2) A copy of any service proposal or proposed contract;

(3) Copies of all current published or unpublished rates of the utility supplier;

(4) Identification of any unusual factors affecting the acquisition; and

(5) Identification of all available sources or methods of supply, an analysis of the cost effectiveness of each, and a statement of the ability of each source to provide the required services, including the location and a description of each available supplier's facilities at the nearest point of service.

(b) For new or initial utility services or suppliers, the agency shall furnish the information in paragraph (a) of this section and the following as applicable:

(1) The date initial service is required;

(2) For the first 12 months of full service, estimated maximum demand, monthly consumption, annual cost of the service, and connection charges to be paid by the agency;

(3) Known or estimated time schedule for growth to ultimate requirements;

(4) Estimated ultimate maximum demand and ultimate monthly consumption;

(5) A simple schematic diagram or line drawing showing the meter locations, the location of the new utility facilities to be constructed on Federal property by the Federal agency, and any required new connection facilities on either side of the delivery point to be constructed by the utility supplier to provide the new services;

(6) Accounting and appropriation data to cover the required utility services and any connection charges required to be paid by the agency receiving such utility services; and

(7) The following data concerning proposed facilities and related charges or costs:

(i) Proposed refundable or nonrefundable connection charge, termination liability, or other facilities

charge to be paid by the agency, together with a description of the supplier's proposed facilities and estimated construction costs, and its rationale for the charge;

(ii) A written, signed statement by the supplier that any proposed connection charge is not in excess of the charge that other customers would be required to pay for like facilities under similar class and conditions of service; and

(iii) A copy of the acquiring agency's estimate to make its own connection to the supplier's facilities through use of its own resources or by separate contract. When feasible, the acquiring agency shall provide its estimates to construct and operate its own utility facilities in lieu of participating in a cost-sharing construction program with the proposed utility supplier.

(c) For existing utility services or suppliers, the agency shall furnish GSA the information in paragraph (a) of this section and the following, as applicable:

(1) A copy of the most recent 12-month's service invoices;

(2) A tabulation, by month, for the most recent 12 months, showing the actual utility demands, consumption, connection charges, fuel adjustment charges, and the average monthly cost per unit of consumption;

(3) An estimate, by month, for the next 12 months showing the estimated maximum demands, monthly consumption, annual cost of the services, and any connection charges to be paid;

(4) Accounting and appropriation data to cover the costs for the continuation of utility services; and

(5) For electric connection contracts, a statement whether the transformer, or other system components, on either side of the delivery point is owned by the Federal agency or the utility supplier, and if the metering is on the primary or secondary side of the transformer.

(d) Agencies conducting their own pre-award contract reviews shall establish appropriate agency procedures.

41.006 Administration.

41.006-1 Monthly and annual review.

Agencies shall review (a) utility service invoices on a monthly basis; and (b) each contract, authorization, purchase order, or other written request for service exceeding the small purchase dollar limitation on an annual basis. The purposes of such review are to ensure that the utility supplier is furnishing the services to each facility under the utility's most economical, applicable rate and to examine utility commercial markets for advantageous competitive

resolutions. The annual review shall be based upon the facility's usage, conditions, and characteristics of service, at each individual delivery point for the most recent 12 months. If a change in rate is appropriate, the Federal agency shall request the supplier to make such rate change immediately.

41.006-2 Rate changes and regulatory intervention.

(a) When a supplier proposed a change in rates or terms and conditions of service to the Government, the agency shall promptly determine whether the proposed change is reasonable, justified, and not discriminatory.

(b) When a regulated supplier proposes changes in rates or terms and conditions of service that may be of interest to other Federal agencies, and intervention before a regulatory body is considered justified, the matter shall be referred to GSA. The agency may request from GSA a delegation of authority for the agency to intervene on behalf of the consumer interests of the Federal Executive agencies.

(c) If a regulatory body approves a utility supplier's request for rate change pursuant to 32.241-8, Change in Rates or Terms and Conditions of Service for Regulated Suppliers, any rate change shall be made a part of the contract by contract modification. The approved applicable rate shall be effective on the date determined by the regulatory body and resulting rates and charges shall be paid promptly to avoid late payment provisions. Copies of the modification containing the utility supplier's approved rate change shall be sent to the agency's paying office (see 41.006-1).

(d) When the utility supplier is not regulated and the rates, terms, and conditions of service are subject to negotiation pursuant to the clause at 52.242-7, Change in Rates or Terms and Conditions of Service for Unregulated Suppliers, any rate change shall be made a part of the contract by contract modification, with copies sent to the agency's paying office.

41.007 Contract clauses.

(a) Because the terms and conditions under which utility suppliers furnish service may vary from area to area, the differences may influence the terms and conditions appropriate to a particular utility's contracting situation. To accommodate requirements that are peculiar to the contracting situation, this section prescribes clauses on a "substantially the same as" basis (see 52.101) which permits the contracting

in accordance with agency procedures.
(b) The contracting officer shall insert in solicitations and contracts for utility services clauses substantially the same as the following:

- (1) The clause at 52.241-1. Conflicts;
- (2) The clause at 52.241-2. Scope and Duration of Contract;
- (3) The clause at 52.241-3. Change in Class of Service;
- (4) The clause at 52.241-4. Contractor's Facilities; and
- (5) The clause at 52.241-5. Service Provisions.

(c) The contracting officer shall insert a clause substantially the same as the clause at 52.241-6. Change in Rates or Terms and Conditions of Service for Regulated Suppliers, in solicitations and contracts for utility services when the utility supplier is subject to regulatory body.

(d) The contracting officer shall insert a clause substantially the same as the clause at 52.241-7. Change in Rates or Terms and Conditions of Service for Unregulated Suppliers, in solicitations and contracts for utility services when the utility supplier is not subject to a regulatory body.

(e) The contracting officer shall insert a clause substantially the same as the clause at 52.241-8. Connection Charge, when a connection charge is required to be paid by the Government to compensate the contractor for furnishing additional facilities necessary to supply service. When conditions require the incorporation of a nonrecurring, nonrefundable service charge or a termination liability, see paragraphs (f) and (i) of this section.

(f) The contracting officer shall insert a clause substantially the same as the clause at 52.241-9. Termination Liability, when payment is to be made to the contractor upon termination of service in lieu of a connection charge upon completion of the facilities.

(g) The contracting officer shall insert a clause substantially the same as the clause at 52.241-10. Multiple Service Locations, as defined in 41.001, when providing for possible alternative service locations is required.

(h) The contracting officer shall insert a clause substantially the same as the clause at 52.241-11. Electric Service Territory Compliance Representation, when proposals from alternative electric suppliers are sought.

(i) The contracting officer shall insert a clause substantially the same as the clause at 52.241-12. Nonrefundable, Nonrecurring Service Charge, when the Government is required to pay a nonrefundable, nonrecurring

of facilities construction. The Government may provide for inclusion of such agreed amount or fee as a part of the connection charge, a part of the initial payment for services, or as periodic payments to fulfill the Government's obligation.

(j) The contracting officer shall insert a clause substantially the same as the clause at 52.241-13. Capital Credits, when the Federal Government is a member of a cooperative and is entitled to capital credits.

41.008 Utility services contract form.

The Standard Form (SF) 33, Solicitation, Offer and Award, prescribed in 53.214(c) and illustrated in 53.301-33, shall be used when contracting for utility services unless

(a) An awards contract (see 41.004-4(c)) is utilized, or

(b) A purchase order form is authorized by this regulation. The contracting officer shall incorporate the applicable rate schedule to each contract, purchase order or modification.

41.009 Formats for utility service specifications.

(a) The following specification formats for use in acquiring utility services are available from the address specified at 41.004-3(b) and may be used and modified at the agency's discretion:

- (1) Electric service;
- (2) Water service;
- (3) Steam service;
- (4) Sewage service; and
- (5) Natural gas service.

(b) Contracting officers may modify the specification format referenced in paragraph (a) of this section and attach technical items, details on Government ownership of facilities and maintenance or repair obligations, maps or drawings of delivery points, and other information deemed necessary to fully define the service conditions.

(c) The specifications and attachments (see paragraph (b) of this section) shall be inserted in section C of the utility service solicitation and contract.

41.010 Formats for annual utility service review.

(a) Formats for use in conducting annual reviews of the following utility services are available from the address specified at 41.004-3(b) and may be used at the agency's discretion:

- (1) Electric service;
- (2) Gas service; and
- (3) Water and sewage service.

(b) Contracting officers may modify the annual utility service review format

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.208-3 (Removed)

Section 52.208-3 is removed and reserved.

7. Sections 52.241-1 through 52.241-13 are added to read as follows:

52.241-1 Conflicts.

As prescribed in 41.007(b)(1), insert a clause substantially the same as the following:

Conflicts (Date)

To the extent of any inconsistency between the terms of this contract (including the specifications) and any rate schedule, rider, or exhibit incorporated in this contract by reference or otherwise, or any of the Contractor's rules and regulations, the terms of this contract shall control.

(End of clause)

52.241-2 Scope and Duration of Contract.

As prescribed in 41.007(b)(2), insert a clause substantially the same as the following:

Scope and Duration of Contract (Date)

(a) For the period (date) to (date), the Contractor agrees to furnish and the Government agrees to purchase (specify type) utility services in accordance with the applicable tariff(s), rules, and regulations as approved by the applicable governing regulatory body and as set forth in the contract.

(b) It is expressly understood that neither the Contractor nor the Government is under any obligation to continue any services beyond the term of this contract.

(c) The Contractor shall provide the Government one complete set of rates, terms, and conditions of service which are in effect as of the date of this contract and any subsequently approved contractor shall also, concurrently with filing with the regulatory body, furnish the Government proposed revisions in rates or terms and conditions of service.

(d) The Contractor shall be paid at the applicable rate(s) under the tariff and the Government shall be liable for the minimum monthly charge, if any, specified in this contract commencing with the period in which service is initially furnished and continuing for the term of this contract. Any minimum monthly charge specified in this contract shall be equitably prorated for the periods in which commencement and termination of this contract become effective.

(End of clause)

52.241-3 Change in Class of Service.

As prescribed in 41.007(b)(3), insert a clause substantially the same as the following:

Change in Class of Service. (Date)

(a) In the event of a change in the class of service, such service shall be provided at the contractor's lowest available rate schedule applicable to the class of service furnished.

(b) Where the Contractor does not have on file with the regulatory body approved rate schedules applicable to services provided, no clause in this contract shall preclude the parties from negotiating a rate schedule applicable to the class of service furnished.

(End of clause)

52.241-4 Contractor's Facilities.

As prescribed in 41.007(b)(4), insert a clause substantially the same as the following:

Contractor's Facilities (Date)

(a) The Contractor, at its expense, shall furnish, install, operate, and maintain all facilities required to furnish service hereunder to, and measure such service at the point of delivery specified in the Service Specifications. Title to all such facilities remain with the Contractor and the Contractor shall be responsible for all loss or damage to such facilities.

(b) Notwithstanding any terms expressed in this clause, the Contractor shall obtain approval from the Contracting Officer prior to any equipment installation, construction, or removal. The Government hereby grants to the Contractor, free of any rental or similar charge, but subject to the limitations specified in this contract, a revocable permit or license to enter the service location for any proper purpose under this contract. This permit or license includes use of the site or sites agreed upon by the parties hereto for the installation, operation, and maintenance of the facilities of the Contractor required to be located upon Government premises. All taxes and other charges in connection therewith, together with all liability of the contractor in construction, operation, or maintenance of such facilities, shall be assumed by the Contractor.

(c) Authorized representatives of the Contractor will be allowed access to the facilities on Government premises at reasonable times to perform the obligations of the Contractor regarding such facilities. It is expressly understood that the Government may limit or restrict the right of access herein granted in any manner considered necessary for national security.

(d) Such facilities shall be removed and Government premises restored to their original condition by the contractor at its expense within a reasonable time after the Government revokes the termination of this contract. In the event such termination of this contract is due to the fault of the Contractor, such facilities may be retained in place at the option of the Government until service comparable to that provided for hereunder is obtained elsewhere.

(End of clause)

52.241-5 Service Providers.

As prescribed in 41.007(b)(5), insert a clause substantially the same as the following:

Service Providers (Date)

(a) **Measurement of service.** (1) All service furnished by the Contractor shall be measured by suitable metering equipment of standard manufacture, to be furnished, installed, maintained, calibrated, and read by the Contractor at its expense. When more than a single meter is installed at the service location, the readings thereof shall be billed commensurately. In the event any meter fails (to register (or registers incorrectly) the service furnished, the parties shall agree upon the length of time of meter malfunction and the quantity of service delivered during such period of time. An appropriate adjustment shall be made to the next invoice for the purpose of correcting such errors. However, any meter which registers not more than _____ percent slow or fast shall be deemed correct.

(2) The Contractor shall read all meters at periodic intervals of approximately 30 days or in accordance with the policy of the cognizant regulatory body. All billings based on meter readings of less than _____ days or more than _____ days shall be prorated accordingly.

(b) **Meter test.** (1) The Contractor, at its expense, shall periodically inspect and test Contractor-installed meters at intervals not exceeding one year or at intervals in accordance with the policy of the cognizant regulatory body. The Government will have the right to have representations during the inspection and test.

(2) At the written request of the Contracting Officer, the Contractor shall make additional tests of any or all such meters in the presence of government representatives. The cost of such additional tests shall be borne by the Government if the percentage of errors is found to be not more than _____ percent slow or fast.

(3) No meter shall be placed in service or allowed to remain in service which has an error in registration in excess of _____ percent under normal operating conditions.

(c) **Change in volume or character.** Reasonable notice shall be given by the Contracting Officer to the Contractor regarding any material changes anticipated in the volume or characteristics of the utility service required at each location.

(d) **Continuity of service and consumption.** (1) The Contractor shall use reasonable diligence to provide a regular and uninterrupted supply of service at the service location, but shall not be liable for damages, breach of contract or otherwise to the Government for failure, suspension, diminution, or other variations of service occasioned by or in consequence of any cause beyond the control of the Contractor, including but not limited to acts of God or of the public enemy, fire, floods, earthquakes, or other catastrophe, strikes, or failure or breakdown of transmission or other facilities. Provided that when any such failure, suspension, diminution, or other variation of

service shall aggregate more than one flow during any period hereunder, an equitable adjustment shall be made in the monthly billing specified in this contract (including the minimum monthly charge).

(2) In the event the Government is unable to operate the service location in whole or in part for any cause beyond its control, including but not limited to acts of God or of the public enemy, fire, floods, earthquakes, other catastrophe, or strikes, an equitable adjustment shall be made in the monthly billing specified in this contract (including the minimum monthly charge) if the period during which the Government is unable to operate such service location, in whole or in part, shall exceed 15 days during any period hereunder.

(End of clause)

52.241-6 Change in Rates or Terms and Conditions of Service for Requested Suppliers.

As prescribed in 41.007(c), insert a clause substantially the same as the following:

Change in Rates or Terms and Conditions of Service for Regulated Suppliers (Date)

(a) Services furnished under this contract are subject to regulation by a regulatory body. The Contractor agrees to give the Contracting Officer written notice of the filing of an application for change in rates or terms and conditions of service concurrently with the filing of the application. Such notices shall fully describe the proposed change. If, during the term of this contract, the regulatory body having jurisdiction approves any changes, the Contractor shall forward to the Contracting Officer a copy of such changes within 15 days after the effective date thereof. The Contractor agrees to continue furnishing service under this contract in accordance with the amended tariff, and the Government agrees to pay such service at the higher or lower rates as of the date when such rates are made effective.

(b) The Contractor hereby represents and warrants that currently and during the life of this contract the applicable published and unpublished rate schedule(s) shall not be in excess of the lowest published and unpublished rate schedule(s) available to any other customers of the same class under similar conditions of use and service.

(c) In the event that the regulatory body promulgates any regulation concerning matters other than rates which affects this contract, the Contractor shall immediately provide a copy to the Contracting Officer. The Government shall not be bound to accept any new regulation inconsistent with Federal laws or regulations.

(d) Any changes to rates or terms and conditions of service shall be made a part of this contract by the issuance of a contract modification. The effective date of the change shall be the effective date by the regulatory body.

(End of clause)

52.241-7 Change in Rates or Terms and Conditions of Service for Unregulated Suppliers.

As prescribed in 41.007(d), insert a clause substantially the same as the following:

Change in Rates or Terms and Conditions of Service for Unregulated Suppliers (Date)

(a) After (insert date), either party may request a change in rates or terms and conditions of service, unless otherwise provided in this contract. Both parties agree to enter in negotiations concerning such changes upon receipt of written request detailing the proposed change and specifying the reasons for the proposed changes.

(b) The effective date of any change shall be as agreed to by the parties. The Contractor hereby represents and warrants that the rates so negotiated will not be in excess of published and unpublished rates charged to any other customer of the same class under similar terms and conditions of use and service.

(c) The failure of the parties to agree upon any change after a reasonable period of time, shall be a dispute under the Disputes clause of this contract.

(d) Any changes agreed to rates, terms, or conditions as a result of such negotiations shall be made a part of this contract by the issuance of a contract modification.

(End of clause)

52.241-8 Connection Charge.

As prescribed in 41.007(e), insert a clause substantially the same as the following:

Connection Charge (Date)

(a) **Charge.** In consideration of the Contractor furnishing and installing at its expense the new connection facilities described herein, the Government shall pay the Contractor a connection charge. The payment shall be in the form of progress payments, advance payments or as a lump sum, as agreed to by the parties and as permitted by applicable law. The total amount payable shall be either the estimated cost of \$_____ less the agreed to salvage value of \$_____ or the actual cost less the salvage value, whichever is less. As a condition precedent to final payment, the Contractor shall execute a release of any claims against the Government arising under or by the virtue of such installation.

(b) **Ownership, operation, and maintenance of new facilities to be provided.** The facilities to be supplied by the Contractor under this clause, notwithstanding the payment by the Government of a connection charge, shall be and remain the property of the Contractor and shall, at all times during the life of this contract or any renewals thereof, be operated and maintained by the Contractor at its expense. All taxes and other charges in connection therewith, together with all liability arising out of the construction, operations, or maintenance of such facilities, shall be the obligation of the Contractor.

(c) **Credits.** The Contractor agrees to allow the Government, on each monthly bill for

service furnished under this contract to the Service Location, a credit of _____ percent of the amount of each such bill as rendered until the accumulation of credits shall equal the amount of such connection charge, provided that the Contractor may at any time allow a credit up to 100 percent of the amount of each such bill.

(2) In the event the Contractor, before any termination of this contract but after completion of the facilities provided for in this clause, serves any customer other than the Government (regardless of whether the Government is being served simultaneously, intermittently, or not at all) by means of these facilities, the Contractor shall promptly notify the Government in writing. Unless otherwise agreed by the parties in writing at that time, the contractor shall promptly accelerate the credits provided for under subparagraph (c)(1) of this clause, up to 100 percent of each monthly bill until there is refunded the amount that reflects the Government's connection costs for that portion of the facilities used in serving others.

(3) In the event the Contractor terminates this contract, or defaults in performance, prior to full credit of any connection charge paid by the Government, the Contractor shall pay to the Government an amount equal to the uncredited balance of the connection charge as of the date of the termination or default.

(d) **Termination before completion of facilities.** The Government reserves the right to terminate this contract at any time before completion of the facilities with respect to which the Government is to pay a connection charge. In the event the Government exercises this right, the Contractor shall be paid the cost of any work accomplished prior to the time of termination by the Government, plus the cost of removal, less the salvage value.

(e) **Termination after completion of facilities.** In the event the Government terminates this contract after completion of the facilities with respect to which the Government is to pay a connection charge, but before the crediting in full by the Contractor of any connection charge in accordance with the terms of this contract, the Contractor shall have the following options:

(1) To retain in place for twelve months or more after the notice of termination by the Government such facilities on condition that

(i) If, during such twelve-month period, the Contractor serves any other customer by means of such facilities, the Contractor, shall, in lieu of allowing credits, pay the Government during such period installments in like amount, manner, and extent as the credit provided for under paragraph (c) of this clause before such termination, and

(ii) Immediately, after such twelve-month period the Contractor shall promptly pay in full to the Government the uncredited balance of the connection charge.

(2) To remove such facilities at the Contractor's own expense within twelve months after the effective date of the termination by the Government. Provided that if the Contractor elects to remove such facilities, the Government shall then have the option of purchasing such facilities at the

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agreed salvage value set forth herein and provided further, that the Contractor shall, at the direction of the Government, leave in place such facilities located on Government property which the Government elects to purchase at the agreed salvage value.

(End of clause)

52.241-9 Termination Liability.

As prescribed in 41.007(f), insert a clause substantially the same as the following:

Termination Liability (Date)

(a) If the Government discontinues utility service under this contract before completion of the facilities cost recovery period specified in paragraph (b) of this clause, in consideration of the Contractor furnishing and installing at its expense, the new facilities described herein, the Government shall pay termination charges, calculated as set forth in this clause.

(b) **Facility cost recovery period.** The period of time, not exceeding the term of this contract, during which the net cost of the new facilities, shall be recovered by the contractor is _____ months. (Insert negotiated duration.)

(c) **Net facility cost.** The cost of the new facilities, less the agreed upon salvage value of such facilities, is—
\$_____ (Insert appropriate dollar amount.)

(d) **Monthly facility cost recovery rate.** The monthly facility cost recovery rate which the Government shall pay the contractor whether or not service is received is—

\$_____ (Divide the net facility cost in paragraph (c) of this clause by the facilities cost recovery period in paragraph (b) of this clause and insert the resultant figure.)

(e) **Termination charges.**

Termination charges = (Multiply the remaining months of the facilities' cost recovery period specified in paragraph (b) of this clause by the monthly facility cost recovery rate in paragraph (d) of this clause.)

(End of clause)

52.241-10 Multiple Service Locations.

As prescribed in 41.007(g), insert a clause substantially the same as the following:

Multiple Service Locations (Date)

(a) At any time by written order, the Contracting Officer may designate any location within the service area of the Contractor at which utility service shall commence or be discontinued. The contract shall be modified in writing, by adding to or deleting from the Service Specifications, the name and location of the service, specifying any different rate, the point of delivery, different service specifications, and any other terms and conditions.

(b) The minimum monthly charge specified in this contract shall be equitably prorated from the period in which commencement or discontinuance of service at any service location designated under the Service Specifications shall become effective.

(End of clause)

52.241-11 Electric Service Territory Compliance Representation.

As prescribed in 41.007(h), insert a representation substantially the same as the following:

Public Law 100-202, Electric Service Territory Compliance Representation (Date)

(a) The Offeror represents as part of its offer that the Offeror's sale of electricity in accordance with the terms and conditions of this solicitation is () is not () consistent with Public Law 100-202, section 8083.

(b) The Offeror's supporting rationale is as follows:

(End of clause)

52.241-12 Nonrefundable, Nonrecurring Service Charge.

As prescribed in 41.007(i), insert a clause substantially the same as the following:

Nonrefundable, Nonrecurring Service Charge (Date)

The Government may pay a nonrefundable, nonrecurring charge when the rules and regulations of a supplier require that a customer pay (1) a charge for the initiation of service, (2) a contribution in aid of construction, or (3) a nonrefundable membership fee. This charge may or may not be in addition to or in lieu of a connection charge. Therefore, there is hereby added to the Contractor's schedule a nonrefundable, nonrecurring charge for _____ in the amount of \$ _____ dollars payable

(specify dates or schedules) —

(End of clause)

52.241-13 Capital Credits.

As prescribed in 41.007(j), insert a clause substantially the same as the following:

Capital Credits (Date)

(a) The Government is a member of the (cooperative name) _____ and as any other member, is entitled to capital credits consistent with the by-laws of the cooperative, which states the obligation of the Contractor to pay capital credits and

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which specifies the method and time of payment.

(b) Within 90 days after the close of the Contractor's fiscal year, the Contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing, a list of accrued credits by contract number, year, and delivery point. Also, the Contractor shall state the amount of capital credits to be paid to the Government and the date the payment is to be made.

(c) Upon termination or expiration of this contract, unless the Government directs that unpaid capital credits are to be applied to another contract, the Contractor shall make payment to the Government for the unpaid credits.

(d) Payment of capital credits will be made by certified check, payable to the Treasurer of the United States and forwarded to the Contracting Officer at _____ unless otherwise directed in writing by the Contracting Officer. Checks shall cite the current or last contract number and indicate whether the check is partial or final payment for all capital credits accrued.

(End of clause)

[FR Doc. 91-12245 Filed 5-23-91; 8:45 am]
52.241-12 52.241-13

NEVADA POWER COMPANY

91-13-177
91-13-177

JOHN W. ARLOGE
Senior Vice President
Governmental Affairs

July 23, 1991

Ms. Beverly Fayson
General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13: Proposed Federal Acquisition Regulations
For the Acquisition of Utility Services

Dear Ms. Fayson:

Nevada Power Company submits these comments in support of the comments by the Edison Electrical Institute concerning the Acquisition of Utility Services (56 Fed. Reg. 23982 (1991)). Nevada Power Company is a member utility of the Edison Electrical Institute.

Founded in 1906, Nevada Power Company serves the electric utility needs of most of Clark County (Las Vegas) Nevada and a portion of Nye County, Nevada, covered by the Nevada Test Site. At the end of 1990 the Company served a customer base of 347,969 customers, an increase of almost 30,000 customers over the previous year. Included in the customer base are a number of federal facilities.

Providing reliable electrical service to a rapidly expanding customer base has required very careful resource planning over the last several years. We have worked closely with the federal facilities that we serve to assure that their needs are adequately addressed in our expansion efforts.

Nevada Power Company is regulated by the Public Service Commission of Nevada under authority granted to the Commission by state law. The rates charged for the provision of electrical service are set by the Commission through consideration of the entire customer base, including federal facilities. As in most regulated-utility contexts, the Company is not allowed to differentiate between customers in the same class.

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The Company recognizes that the regulations under consideration have taken into account the Congressional mandate contained in Pub. L. No. 99-500, and Pub. L. No. 100-202, that the acquisition of utility service by Federal facilities not be pursued in derogation of state public utility laws. As pointed out by the Senate in its report accompanying Pub. L. No. 99-500, Nevada Power and other electric utilities have built necessary capacity, as mandated by the State Public Service Commission, to serve all our customers, including the federal facilities within our service territory. Were the Federal facilities that the Company serves allowed to obtain electric power from an outside provider, the remaining customers of the Company would be obliged to pay higher rates to offset the decrease in customer base and resulting stranded investment.

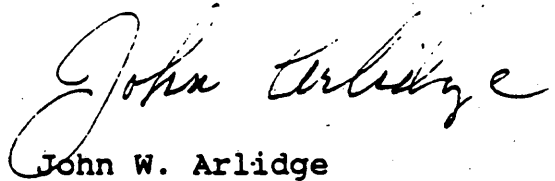
To help prevent a situation of this nature from arising through misinterpretation of the proposed regulations, Nevada Power Company fully supports the modifications to the regulations suggested by the Edison Electric Institute. The proposed amendments help to clarify certain parts of the regulations that may be interpreted in ways that would not conform to the intent of Congress.

The Company is particularly concerned that the proposed FAR and the DFAR regulations be coordinated to assure that the proposed DFAR regulations adequately reflect the intent of Pub. L. 100-202, Section 8093. Because of that concern we draw particular attention to Edison Electric Institute's recommended amendment to Section 241.004-1 of the proposed DFAR to read as follows:

(1) In addition to the requirements of FAR 41.004, which includes the requirement that federal agencies shall not purchase electricity in any manner inconsistent with State law, DoD recognizes the unique characteristics of electric utility systems built under State-created obligations to serve all customers, including federal facilities, within their service territories. In accordance with Pub. L. No. 100-202, Section 8093, DoD shall comply with the current regulations, practices and decisions of independent regulatory bodies which are subject to judicial appeal governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements. This policy does not extend to regulatory bodies whose decisions are not subject to appeal nor does it extend to nonindependent regulatory bodies.

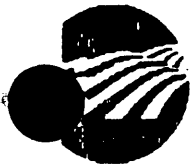
Nevada Power Company would be pleased to provide any additional information that FAR might require to supplement the Edison Electrical Institute comments.

Respectfully Submitted,



John W. Arlidge
Senior Vice President

91-13-178



Cuivre River Electric Cooperative, Inc.

1112 E. Cherry St., P. O. Box 160
Troy, MO 63379
Telephone: (314) 528-8261

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Washington, DC 20405

Re: Comments on Proposed Federal Acquisition Regulation:
Acquisition of Utility Services, 56 Federal Register
23982 (May 24, 1991) (FAR Case 91-13)

Dear Sir or Madam:

The National Rural Electric Cooperative Association (NRECA) is the national service organization for the more than 1,000 rural electric systems which service 25 million consumer-owners in 47 states. Many of these systems provide electric service to federal facilities; consequently, these proposed regulations will have a direct impact upon these systems.

NRECA and Cuivre River Electric Cooperative, Inc. (CREC) is concerned that many of the provisions of the proposed rule would unintentionally have serious impacts on cooperatives and their members because they ignore the unique way in which cooperatives are structured as member-owned, not-for-profit entities. Adoption of these rules as proposed could require violations of cooperative by-laws; articles of incorporation; United States Department of Agriculture, Rural Electrification Administration (REA) mortgage requirements; as well as state laws governing cooperative operations when electric service is provided to covered federal installations.

Part 52.241-13 Capital Credits.

Of primary concern to NRECA and CREC are subsections (b) and (c) of proposed Part 52.241-13 Capital Credits. NRECA and CREC agree with subsection (a) which indicates that the government, as any other member of a cooperative:

is entitled to capital credits consistent with the by-laws of the cooperative, which states the obligation of the [cooperative] to pay capital credits and which specifies the method and time of payment.

By contrast, NRECA and CREC believe that compliance with the requirement of subsection (b), *i.e.*, to state, within 60 days after the close of the fiscal year, the amount of capital credits to be paid to the government and the date the payment is to be made, would be difficult, if not impossible.

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Page 2

First, providing the amount of the capital credit accrued within 60 days of the fiscal year-end would pose a problem for some cooperatives. An electric cooperative typically provides notification of, or assigns, capital credits annually to each of its members as soon as practicable after the close of its fiscal year-end. Capital credits cannot be assigned, however, until the cooperative's annual financial statements have been audited. The amount of such capital credit assignment, therefore, may not be available within 60 days of the cooperative's fiscal year-end, depending upon whether its annual audit has concluded. Additionally, many distribution cooperatives are member-owners of generation and transmission cooperatives (G&T's), and as such, are entitled to receive capital credits from the G&T. Since these capital credits are considered by distribution cooperatives to be non-operating incomes which impact their margins, it would be virtually impossible to determine the appropriate capital credits due the distribution cooperative from the G&T, and consequently due the distribution cooperative's own member-owners, within 60 days after the close of the distribution cooperative's fiscal year.

Second, providing the timing of when the capital credit cash payout will be made is even more problematic. Capital credits are typically paid out in cash to members (i.e., retired) several years after the capital credit assignment. While many cooperatives, pursuant to policies of their boards of directors, have established capital credit retirement cycles which set the timing of capital credit cash payout, such timing can be changed at the discretion of the cooperative's board of directors in response to the changing capital needs of the cooperative. If, during the period before capital credit retirement, the cooperative experiences the need for increased capital resulting from some catastrophic circumstances such as tornadoes or severe ice storms, changes in available financing or other changing conditions, it might be necessary to withhold payment of those capital credits. Additionally, as discussed below, the cooperative is prohibited from paying capital credits unless the cooperative has met the financial standards established by the United States Department of Agriculture, Rural Electrification Administration, and anyone else who is a co-mortgagee with REA.

More importantly, NRECA and CREC believe that subsection (c) would require the cooperative to violate its own by-laws, articles of incorporation and, consequently, state laws governing cooperatives. Under subsection (c), cooperatives would be required, upon termination or expiration of a contract, to pay the government for all unpaid capital credits. As indicated in subsection (a) quoted above, the government is entitled to be paid for capital credit via

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the method and at the time provided for in the cooperative's by-laws. Provisions requiring payment at the expiration or termination of a contract would generally be inconsistent with the very terms and conditions which subsection (a) recognizes as controlling the provision of service from a cooperative to one of its members, the government. Such actions on the part of the cooperative would also most likely violate applicable state laws which govern the operation of cooperatives within the particular state.

Capital credits are unique to not-for-profit electric and telephone cooperatives and, of necessity, must be treated in a manner which is consistent with their by-laws, as well as all applicable federal and state laws. A cooperative has no "profits" to be disbursed as investors. Rather, to the extent that income exceeds costs, these "margins" accumulate as capital credits. They are, in accordance with the cooperative's by-laws, returned to the member-owners in direct proportion to their use of electricity. Return of capital credits to a cooperative's members is made in a manner which must be consistent with the requirements of the cooperative's by-laws. As a member of the cooperative, the government is entitled to be paid its capital credits consistent with the cooperative's by-laws; it is not however, entitled to special privileges. Provision of capital credits to the government in a manner which is inconsistent with the cooperative's by-laws would grant the government a preference over other cooperative members.

Preferential treatment for the government's capital credits over those of the other cooperative members could result in an electric cooperative's loss of cooperative status under federal income tax laws. Maintenance of cooperative status is required in order to preserve an electric cooperative's income tax exemption. In order to qualify for cooperative status, an electric cooperative must conduct its business in a cooperative manner, or on a "cooperative basis", treating similarly situated members equally.

Additionally, rural electric systems, as generally small "not-for-profit" entities, have limited sources of capital. The majority of their capital requirements are met by the REA. In order to be eligible for these loans, rural electric systems are required to develop and maintain certain equity levels. Disbursing capital credits may be restricted or prohibited by REA, depending upon the equity level of the borrower. Thus, repaying the capital credits as required in Part 52.241-13 could be in violation of the terms and conditions contained within the government's own mortgage requirements, could cause the cooperative to default on its mortgage with REA or other lenders, or at a minimum, could prevent the cooperative from competing to serve the government's load where such competition is consistent with state laws.

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Part 52.241-8 Connection Charges

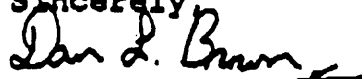
Part 52.241-8 Connection Charge, also creates a procedure which is inconsistent with the way in which cooperatives operate as not-for-profit member-owned systems. Under the proposed rules, the cost of providing connection facilities for the government would be shifted from the government to other cooperative members. While not only unfair to other cooperative members most probably this is also a violation of the cooperative's by-laws and the state statutes which govern the way cooperatives operate within the state.

Part 52.241-8 provides in relevant part that the government shall pay a connection charge to cover the contractor's cost of furnishing and installing new connection facilities. Then, on each monthly bill for service furnished, the government receives a credit until the accumulation of credits equals the amount of such connection charge. This is inappropriate where the contractor is a not-for-profit cooperative and these credits would require other cooperative members to bear the cost of facilities constructed to meet the requirements of the government, as well as their own.

In a cooperative utility, rates are based upon the actual cost of doing business. Connection fees are typically charged only in cases in which the rate applicable to the prospective consumer is not adequate to meet the expected costs of serving him. Since the rate does not cover the cost of the facility needed to serve the government, providing the government with a credit for connection facilities which were built to serve the government's own load would mean that those costs would have to be borne by the cooperative's other members. This would not only be unfair to those other members who are already paying the cost of facilities built to meet their loads, but would probably be in violation of the cooperative's by-laws, as well as state statutes which govern the way in which cooperatives operate within the state. Such action could also be considered as an unlawful disbursement of capital credits.

Because of the unique nature of rural electric cooperatives, we request a meeting with you to discuss the problems presented by the proposed rule. Should you have any questions, please feel free to contact Michael Oldak, NRECA's Regulatory Counsel, at (202) 857-9607.

Sincerely,



Dan L. Brown
General Manager/CEO

BB/ml

JUL 29

91-13-179

LAW OFFICES

BIRCH, HORTON, BITTNER AND CHEROT

A PROFESSIONAL CORPORATION

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FAIRBANKS, ALASKA 99701
907 452-6666
TELECOPIER 907 456-5055

ONE SEALASKA PLAZA, SUITE 301
JUNEAU, ALASKA 99801
907 586-2890
TELECOPIER 907 586-9814

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, N.W., Room 4041
Washington, D.C. 20405

RE: In Reference to FAR Case 91-13
Our File No.: 303,869.1

Dear Sir:

Golden Valley Electric Association, Inc., is a rural electric cooperative association in the State of Alaska, which serves nearly 50,000 interior residents. Golden Valley Electric Association and its members wish to express opposition to the proposed FAR Case 91-13.

In section 52.241-13 Capital Credits, subsection (a), the proposed regulation states that the government shall be treated "as any other member, entitled to capital credits consistent with the bylaws of the cooperative." Subsection (a) should be the light that guides the proposed regulation on the acquisition of services from utilities. Unfortunately, subsections (b), (c), and (d) are inconsistent and directly adverse to the interests and intent of the bylaws of Golden Valley Electric Association.

Capital credits, which are allocated from the operating margins of the cooperative, are the only equity within the cooperative utility system, and are paid to members depending on the financial condition of the cooperative.

Subsection (c), requiring payment of all unpaid credits upon termination or expiration of this contract is also in violation of

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the bylaws. All members of the co-op must leave the capital credits in the control of the co-op for several years after termination for use as its equity. Sound financial planning requires flexibility in paying out capital credits. The association cannot operate if required to pay out capital credits as proposed in FAR 91-13.

Additionally, it would be impossible for Golden Valley Electric Association to furnish a list of accrued credits by contract number, year, and delivery point within sixty days after the close of the contractor's fiscal year. The process of allocation and notice of capital credits is as follows:

1. The books have to be closed for the year;
2. The audit must be performed;
3. An analysis of the financial condition of the co-op must be done.
4. The board of directors for the co-op has to approve the proposed allocation of capital credits for the year.

On average, this process takes six months - well in excess of the two month limit that would be imposed by subsection (b). No other member of the cooperative may insist on notice within sixty days. To allow the government such preferential treatment would be a clear violation of the bylaws, and would result in unacceptable costs to all cooperative members.

Further, Golden Valley Electric Association questions the requirement that all capital credits be payable by certified check. However, as long as the cost of processing a certified check is deducted from the distribution, it may prove acceptable.

In conclusion, subsections (b), (c), and (d) are in direct conflict with subsection (a) of the proposed rule. It is Golden Valley Electric Association's mission to provide electric service to the members at the lowest cost consistent with sound economic use of resources through responsible management of its capital and equity. Section 52.241-13 would make it impossible for Golden Valley to adequately achieve its mission. Though the government is a valued customer of the cooperative, the imposition of this proposed rule would have a profoundly detrimental effect on the internal accounting issuing system of the cooperative, in addition to resulting in prejudicial discrimination against the other co-op members. As stated, the proposed rule is unacceptable, and if

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passed, Golden Valley Electric Association may be precluded from offering continued services to the government.

Yours,

BIRCH, HORTON, BITTNER & CHEROT

Edward H. Ross for Cory Borgeson

Cory R. Borgeson
Local Counsel for Golden Valley
Electric Association

JAG/lks

cc: Senator Ted Stevens
Senator Frank Murkowski
Congressman Don Young
NRECA Dave Hutchins

3014

91-13-186



Jackie Mani Erickson
Vice President
Corporate Counsel

July 23, 1991

VIA TELECOPIER (202) 501-3341

Ms. Beverly Fayson
General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington D.C. 20405

Dear Ms. Fayson:

These comments refer to FAR Case 91-13.

Hawaiian Electric Company, Inc. and its subsidiaries agree with and support the comments submitted by the Edison Electric Institute (EEI) which apply to the Acquisition of Utility Services under the Federal Acquisition Regulation (FAR) to the extent that they would apply to utility services in Hawaii.

It is important that the proposed FAR changes applicable to contracts for utility services comply with the intent of Congress under Section 8093 of the Department of Defense Appropriations Act of 1988, Public Law 100-202, which requires that federal purchases of utility services be consistent with State law. Adopting the comments of EEI will ensure that this happens. It is particularly important that the final regulations reflect the EEI comments and their many changes to the technical language. These changes are necessary to comply with the above intent and helpful in creating a workable system.

Should you have any questions regarding this issue, please call me at (808) 543-4700.

Very truly yours,

JUL 23 1991



National Rural Electric Cooperative Association

1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Telephone: 202 857-9500

91-13-181

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Washington, D.C. 20405

**RE: Comments on Proposed Federal Acquisition Regulation: Acquisition of
Utility Services, 56 Federal Register 23982 (May 24, 1991) (FAR Case 91-13)**

Dear Sir or Madam:

NRECA is the national service organization for the more than 1,000 rural electric systems which service 25 million consumer-owners in 47 states. Many of these systems provide electric service to federal facilities; consequently, these proposed regulations will have a direct impact upon these systems.

NRECA is concerned that many of the provisions of the proposed rule would unintentionally have serious impacts on cooperatives and their members because they ignore the unique way in which cooperatives are structured as member-owned, not-for-profit entities. Adoption of these rules as proposed could require violations of cooperative by-laws; articles of incorporation; United States Department of Agriculture, Rural Electrification Administration (REA) mortgage requirements; as well as state laws governing cooperative operations when electric service is provided to covered federal installations.

Part 52.241-13 Capital Credits.

Of primary concern to NRECA are subsections (b) and (c) of proposed Part 52.241-13 **Capital Credits.** NRECA agrees with subsection (a) to the extent that it indicates that the government is a member of the cooperative and, as such, must comply with the bylaws of the cooperative, just as any other member of the cooperative.

JUL 23 1991

By contrast, NRECA believes that compliance with the requirement of subsection (b), *i.e.*, to state, within 60 days after the close of the fiscal year, the amount of capital credits to be paid to the government and the date the payment is to be made, would be difficult, if not impossible.

First, providing the amount of the capital credit accrued within 60 days of the fiscal year-end would pose a problem for some cooperatives. An electric cooperative typically provides notification of, or assigns, capital credits annually to each of its members as soon as practicable after the close of its fiscal year-end. Capital credits cannot be assigned, however, until the cooperative's annual financial statements have been audited. The amount of such capital credit assignment, therefore, may not be available within 60 days of the cooperative's fiscal year-end, depending upon whether its annual audit has concluded. Additionally, many distribution cooperatives are member-owners of generation and transmission cooperatives (G&Ts), and as such, are entitled to receive capital credits from the G&T. Since these capital credits are considered by distribution cooperatives to be non-operating incomes which impact their margins, it would be virtually impossible to determine the appropriate capital credits due the distribution cooperative from the G&T, and consequently due the distribution cooperative's own member-owners, within 60 days after the close of the distribution cooperative's fiscal year.

Second, providing the timing of when the capital credit cash payout will be made is even more problematic. Capital credits are typically paid out in cash to members (*i.e.*, retired) several years after the capital credit assignment. While many cooperatives, pursuant to policies of their boards of directors, have established capital credit retirement cycles which set the timing of capital credit cash payout, such timing can be changed at the discretion of the cooperative's board of directors in response to the changing capital needs of the cooperative. If, during the period before capital credit retirement, the cooperative experiences the need for increased capital resulting from some catastrophic circumstance such as a hurricane, changes in available financing or other changing conditions, it might be necessary to withhold payment of those capital credits. Additionally, as discussed below, the cooperative is prohibited from paying capital credits unless the cooperative has met the financial standards established by the United States Department of Agriculture, Rural Electrification Administration and anyone else who is a co-mortgagee with REA.

More importantly, NRECA believes that subsection (c) would require the cooperative to violate its own by-laws, articles of incorporation and, consequently, state laws governing cooperatives. Under subsection (c), cooperatives would be required, upon termination or expiration of a contract, to pay the government for all unpaid capital credits. As indicated in subsection (a) quoted above, the government is entitled to be paid for capital credits via the method and at the time provided for in the cooperative's by-laws. Provisions requiring payment at the expiration or termination of a contract would generally be inconsistent with the very terms and conditions which subsection (a)

recognizes as controlling the provision of service from a cooperative to one of its members, the government. Such actions on the part of the cooperative would also most likely violate applicable state laws which govern the operation of cooperatives within the particular state.

Capital credits are unique to not-for-profit electric and telephone cooperatives and, of necessity, must be treated in a manner which is consistent with their by-laws, as well as all applicable federal and state laws. A cooperative has no "profits" to be disbursed to investors. Rather, to the extent that income exceeds costs, these "margins" accumulate as capital credits. They are, in accordance with the cooperative's by-laws, returned to the member-owners in direct proportion to their use of electricity. Return of capital credits to a cooperative's members is made in a manner which must be consistent with the requirements of the cooperative's by-laws. As a member of the cooperative, the government is entitled to be paid its capital credits, consistent with the cooperative's by-laws; it is not however, entitled to special privileges. Provision of capital credits to the government in a manner which is inconsistent with the cooperative's by-laws would grant the government a preference over other cooperative members.

Preferential treatment for the government's capital credits over those of the other cooperative members could result in an electric cooperative's loss of cooperative status under federal income tax laws. Maintenance of cooperative status is required in order to preserve an electric cooperative's income tax exemption. In order to qualify for cooperative status, an electric cooperative must conduct its business in a cooperative manner, or on a "cooperative basis," treating similarly situated members equally.

Additionally, rural electric systems, as generally small "not-for-profit" entities, have limited sources of capital. The majority of their capital requirements are met by the REA. In order to be eligible for these loans, rural electric systems are required to develop and maintain certain equity levels. Disbursing capital credits may be restricted or prohibited by REA, depending upon the equity level of the borrower. Thus, repaying the capital credits as required in Part 52.241-13 could be in violation of the terms and conditions contained within the government's own mortgage requirements, could cause the cooperative to default on its mortgage with REA or other lenders, or at a minimum, could prevent the cooperative from competing to serve the government's load where such competition is consistent with state laws.

Part 52.241-8 Connection Charges

Part 52.241-8 Connection Charge, also creates a procedure which is inconsistent with the way in which cooperatives operate as not-for-profit member-owned systems. Under the proposed rules, the cost of providing connection facilities for the government would be shifted from the government to other cooperative members. While not only unfair to

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Page 4

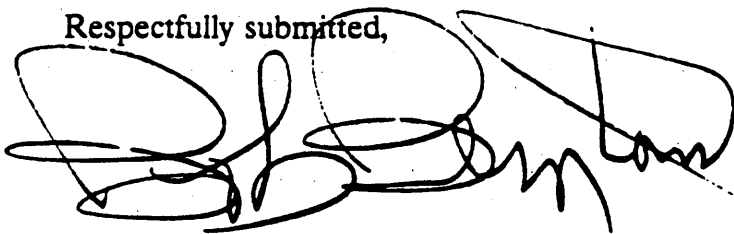
other cooperative members, most probably this is also a violation of the cooperative's by-laws and the state statutes which govern the way cooperatives operate within the state.

Part 52.241-8 provides in relevant part that the government shall pay a connection charge to cover the contractor's cost of furnishing and installing new connection facilities. Then, on each monthly bill for service furnished, the government receives a credit until the accumulation of credits equals the amount of such connection charge. This is inappropriate where the contractor is a not-for-profit cooperative and these credits would require other cooperative members to bear the cost of facilities constructed to meet the requirements of the government, as well as their own.

In a cooperative utility, rates are based upon the actual cost of doing business. Connection fees are typically charged only in cases in which the rate applicable to the prospective consumer is not adequate to meet the expected costs of serving him. Since the rate does not cover the cost of the facility needed to serve the government, providing the government with a credit for connection facilities which were built to serve the government's own load would mean that those costs would have to be borne by the cooperative's other members. This would not only be unfair to those other members who are already paying the cost of facilities built to meet their loads, but would probably be in violation of the cooperative's by-laws, as well as state statutes which govern the way in which cooperatives operate within the state. Such action could also be considered as an unlawful disbursement of capital credits.

Because of the unique nature of rural electric cooperatives, we request a meeting with you to discuss the problems presented by the proposed rule. Should you have any questions, please feel free to contact Michael Oldak, NRECA's Regulatory Counsel, at (202) 857-9607.

Respectfully submitted,



Bob Bergland
Executive Vice President

BB:rk

BEFORE THE
GENERAL SERVICES ADMINISTRATION
FAR SECRETARIAT

91-13-182

Federal Acquisition Regulation;
Acquisition of Utility Services

)
)

FAR Case 91-13

COMMENTS OF THE AMERICAN GAS ASSOCIATION

The American Gas Association (A.G.A.) files these comments on the proposed revision of the Federal Acquisition Regulations (FAR) (56 Fed. Reg. 23982 (May 24, 1991)).

A.G.A. is a national trade association comprising some 250 natural gas distribution and transmission companies located throughout the United States. A.G.A. members account for 85 percent of the nation's total annual natural gas utility sales. Many members sell and transport gas for the federal government. Hence, A.G.A. has a vital interest in this proceeding.

I. SUMMARY

In these comments, A.G.A. shows that Executive Order No. 12612, reprinted in 52 Fed. Reg. 41685 (Oct. 30, 1987), and the Federal Property and Administrative Services Act (FPASA), 40 U.S.C. §471, require that the proposed regulations be modified to make it clear that executive agencies and departments (collectively referred to here as federal agencies) must abide by state policies governing utility service, including service areas and service conditions.

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II. FEDERAL AGENCIES MUST COMPLY WITH STATE POLICIES

§41.004-1(d)(1) and (e) of the proposed regulations bar an agency from buying electricity in any way that is "inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements."

As discussed below, Executive Order No. 12612 and the FPASA mandate that this principle be applied to the acquisition of other utility services as well, including natural gas transportation service.¹

Executive Orders have "the force and effect of a statute".² As a result, federal agencies must comply with Executive Orders. Executive Order No. 12612 requires executive departments and agencies to abide by a prescribed set of federalism principles designed to ensure that the federal government does not encroach on the authority of the states to address local issues, as reserved by the Tenth Amendment to the U.S. Constitution. A copy of Executive Order No. 12612 is attached in Appendix A of these comments.

The Executive Order notes that "[i]n most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence

¹The revised regulations cover only "utility services" (§41.000). The regulations expressly do not encompass the purchase of commodities, such as natural gas, from a utility (§41.002(b)(4)).

²Association For Women In Science v. Califano, 566 F.2d 339, 344 (D.C. Cir. 1977).

to discern the sentiments of the people and to govern accordingly (§1(e)). The "constitutional authority" referred to are the powers reserved for states by the Tenth Amendment. The Executive Order observes that "[t]he nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires." (§1(f)).

As a result, the Executive Order declares that "Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope" (§3(b)).

Especially significant here is the directive in the Executive Order that requires federal agencies, "when undertaking to formulate and implement policies that have federalism implications", to "[r]efrain to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards." (§3(d)(2)). This directive is reinforced by the statement that "[a]ny regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated" (§4(c)).

The concern about infringing on state authority is highlighted by the establishment in the Executive Order of special procedures to be applied if there is even the possibility of an infringement. "As soon as an Executive Department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility", declares the Executive Order, "the department or agency shall

consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict" (§4(b)).

Moreover, the federal government has recognized that it is bound by state policies regarding utility service. The FPASA, 40 U.S.C. §§471, 481(a)(4), authorizes GSA to represent the federal government in proceedings before state public service commissions (PSCs). The federal government "submits to the state's determination, through its regulatory agency, as to the availability and cost of public utility service."³ A treatise notes:⁴

Since 1949, the GSA has closely monitored and, in some cases, intervened in rate hearings before state commissions where the rates requested by a utility would greatly affect the cost of services to the United States government. GSA gives close attention to rate design to insure that the government does not pay a disproportionate part of any increase and is not discriminated against in the setting of rates.

Indeed, a PSC cannot impair the right of GSA to represent the federal government in PSC proceedings.⁵

The proposed regulations recognize the federal government's interest in PSC proceedings. For example, the proposed regulations require federal agencies to notify GSA if "a regulated supplier proposes changes in rates or terms and conditions of service that may be of interest to other Federal agencies and intervention before a regulatory

³1 American Gas Association, Regulation of the Gas Industry, §4.12[4] (1990).

⁴Id.

⁵United States v. Public Service Commission, 422 F. Supp. 676 (D. Md. 1976).

body is considered justified" (§41.006-2(b)). The agency can ask GSA to authorize the agency to intervene on its own behalf in the PSC proceeding. In addition, the proposed regulations say that any PSC order that changes the rates of a utility that provides service to a federal agency "shall be made a part of the contract [between the utility and the federal agency] by contract modification" (§41.006(c)). Hence, the federal government recognizes that it is bound by PSC orders.

The federalism principles underlying Executive Order No. 12612 and the FPASA require that the proposed regulations make it clear that federal agencies must abide by policies established by states when procuring utility service. These policies include the franchises granted by most states to utilities, including natural gas local distribution companies (LDCs), to serve a specific service area.⁶ In return for a franchise, LDCs have an obligation to serve all of the needs of the consumers in the service area. LDCs built their distribution systems to serve these needs. This package of service obligations and business opportunities would be undermined if federal agencies could ignore service areas determined by a state. Hence, federal agencies must adhere to the service area determination by the state.

It bears emphasis that adherence to the service area determination by the state does not necessarily affect a federal agency's choice of a natural gas supplier. As noted, the proposed regulations address only natural gas transportation service, not sales

⁶National Association of Regulatory Utility Commissioners, "1989 Annual Report on Utility and Carrier Regulation" (referred to here as "NARUC Report"), table 69, pp. 564 (1990).

service. Moreover, virtually all LDCs provide transportation service.⁷

Likewise, the federalism principles underlying Executive Order No. 12612 and the FPASA require that the proposed regulations make it clear that a federal agency should negotiate a contract that is consistent with the service conditions in the tariff approved by the state's PSC. Service conditions, too, are a local concern and are best addressed by the state. Most states require utilities to obtain regulatory approval in order to construct facilities and provide service.⁸ Forty-nine states and the District of Columbia regulate the rates for natural gas service for ultimate consumers.⁹

There is a substantial risk that state policies regarding service conditions would be undermined if the proposed regulations allow federal agencies to insist upon service conditions that are inconsistent with conditions approved by the state. Likewise, an LDC might be subject to conflicting obligations. For example, the contract provision mandated by §52.241-10 authorizes the agency to "[a]t any time . . . designate any location within the service area of the Contractor [utility] at which utility service shall commence or be discontinued." An agency might argue that this provision allows it to "bump", or interrupt service to, an existing shipper at a delivery point or to require the utility to construct facilities to provide service at any location. That could conflict with the service priorities in the PSC-approved tariff and undermine state policies.

⁷A recent survey by A.G.A. found that 92 percent of LDCs provide transportation service. "Gas Distribution Industry Pricing Strategies - 1990 Update", p. 4.

⁸NARUC Report, tables 67 & 68, pp. 560-563.

⁹NARUC Report, table 4, pp. 420-421.

This compelling state interest in ensuring compliance with its policies is reinforced by the directive in the Executive Order that federal agencies "[r]efrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards" (§3(d)(2)). There is "no problem of national scope" that could justify deviating from this mandate to abide by state policies (§3(b)).

Hence, the federalism principles underlying Executive Order No. 12612 and the FPASA require that agencies abide by state policies regarding utility service areas and operations. The proposed regulations should incorporate a provision that reflects this directive.

Thank you for this opportunity to comment.

Respectfully submitted,

THE AMERICAN GAS ASSOCIATION

By: Michael Baly III
Michael Baly III, President

July 23, 1991

Kenneth M. Albert
Counsel, Legislative and
Regulatory Affairs
American Gas Association

Andrea R. Hilliard
Director, Legislative and
Regulatory Affairs and
Assistant General Counsel
American Gas Association

For further information concerning these comments, please contact:

Kenneth M. Albert
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American Gas Association
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Title 3—

Executive Order 12612 of October 26, 1987

The President

Federalism

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

Section 1. Definitions. For purposes of this Order:

- (a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.
- (b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

Sec. 2. Fundamental Federalism Principles. In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism principles:

- (a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.
- (b) The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.
- (c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.
- (d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.
- (e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."
- (f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

91-13-182

(g) Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

Sec. 3. Federalism Policymaking Criteria. In addition to the fundamental federalism principles set forth in section 2, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:

(1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

Sec. 4. Special Requirements for Preemption. (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

Sec. 5. Special Requirements for Legislative Proposals. Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Sec. 6. Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection (c) of this section, shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A-19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State governmental functions, or other aspects of State sovereignty.

Sec. 7. Government-wide Federalism Coordination and Review. (a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A-19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concerns. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress.

Sec. 8. Judicial Review. This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Ronald Reagan

THE WHITE HOUSE
October 26, 1987.

[FR Doc. 87-25331

Filed 10-29-87 4:53 pm
Billing code 3195-01-M

91-13-183



COPPER VALLEY ELECTRIC ASSOCIATION, INC.

PO BOX 45 GLENVALLEN, ALASKA 99588 0045

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Facsim (907) 835-4328
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FACSIMILE TRANSMITTAL LETTER

Date: 7/23/91 From: Robert Wilkinson

Total Number of Pages (including transmittal letter): _____

Please Deliver to: Name Edward Losh

Firm GSA Secretariat

Phone # _____ Fax # (202) 501 3341

Hard Copy to Follow Via USPS: Yes No

Message: attached are comments on 91-13 FAR
I am sending original in US mail
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CVEA Form 105

Rev. 6/91

SERVING MEMBER-OWNERS IN THE COPPER RIVER BASIN AND VALDEZ

JUL 23 1991



COPPER VALLEY ELECTRIC ASSOCIATION, INC.

P.O. BOX 45 GLENNALLEN, ALASKA 99586-0045

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July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets NW Room 4041
Washington, D.C. 20405

Subject: FAR Case 91-13

Dear Sir:

The purpose of this letter is to provide written comments concerning the proposed rule on acquisition of services from public utilities (56 Federal Register 23982) issued by the General Services Administration.

Specifically, Copper Valley Electric Association (CVEA), a member owned cooperative, is concerned about Section 41.007J. (Part 52.241-13 (a) through (d)) and would make the following comments.

- 52.241-13 (a) As part of it's Equity Management program, CVEA has established policy whereby a targeted rotation period of capital credits is determined; however, due to a number of unforeseen circumstances any cooperative cannot predict with absolute assurance the time of payment of capital credits.
- 52.241-13 (b) CVEA's Bylaws provide for annual noticing of capital credits assigned to each member within a reasonable time after the end of the fiscal year (December 31). CVEA policy further mandates this noticing take place by June 30 following the end of the fiscal year. The Rural Electrification Administration (REA) requires audit reports to be completed by April 30. CVEA would be unable to meet the 60 day requirement due to the short time frame allowed and would recommend a deadline a minimum of 30 days after the REA audit report due date. In addition, as mentioned in the preceding paragraph, CVEA would be unable to state a specific date that capital credits assigned could or would be paid.

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General Services Administration
July 23, 1991
Page 2

52.241-13 (c) CVEA is a tax exempt non-profit cooperative. Preferential (early) retirement of capital credits would not only be a violation of our Bylaws and Policy, but would be likely to jeopardize our tax exempt status. REA and Internal Revenue Service requirements are clear as to limitations imposed on retirement of capital.

52.241-13 (d) The requirements that payments be made by certified check, cite contract numbers and indicate status of unpaid capital credits is onerous. CVEA is considered a small cooperative, yet capital credit disbursements often involve thousands of checks. The record keeping burden imposed by this proposed rule will serve to increase the cost of providing service to current members. All capital credit refunds reference member numbers and are sent to the last forwarding address provided by the patron. Checks also reference the period for which the refund is made. CVEA believes this degree of reporting should be adequate for federal contracts.

To summarize, the proposed rule includes terminology which is inconsistent with CVEA Bylaws and the cooperative form of business organization. CVEA recommends the General Services Administration work directly with the National Rural Electric Cooperative Association to address these inconsistencies prior to issuance of the final rule on Acquisition of utility services. I have attached Article VII of CVEA's Bylaws which more specifically addresses the non-profit operation of our cooperative.

Sincerely,



Robert A. Wilkinson, CPA
Manager, Administration and Finance

Enclosure

Bylaws

obligated to account on a patronage basis to all its members for all amounts received and receivable from the furnishing of electric energy. All such amounts in excess of operating costs and expenses at the moment of receipt by the Association are received with the understanding that they are furnished by the member as capital. The Association is obligated to pay by credits to a capital account for each member all such amounts in excess of operating costs and expenses. The books and records of the Association shall be set up and kept in such a manner that at the end of each fiscal year the amount of capital, if any so furnished by each member is clearly reflected and credited in an appropriate record to the capital account of each member, and the Association shall, within a reasonable time after the close of the fiscal year, notify each member of the amount of capital so credited to his account;

(b) Provided, that individual notices of such amounts furnished by each member shall not be required if the Association notifies all members of the aggregate amount of such excess and provides a clear explanation of how each member may compute and determine for himself the specific amount of capital so credited to him.

(c) All such amounts credited to the capital account of any member shall have the same status as though they had been paid to the member in cash in pursuance of a legal obligation to do so, and the member had then furnished the Association corresponding amounts for capital.

Bylaws

tion. The Association may purchase insurance to cover such indemnification.

Section 6.13. Reports

The officers of the Association shall submit at each annual meeting of the members reports covering the business of the Association for the previous fiscal year and showing the condition of the Association at the close of such fiscal year.

ARTICLE VII**NON-PROFIT OPERATION****Section 7.01. Interest or Dividends on Capital Prohibited**

The Association shall at all times be operated on a cooperative, nonprofit basis for the mutual benefit of its members. No interest or dividends shall be paid or payable by the Association on any capital furnished by its members.

Section 7.02. Patronage Capital in Connection with Furnishing Electric Energy

(a) In the furnishing of electric energy the Association's operations shall be so conducted that all members will, through their patronage, furnish capital for the Association. In order to induce patronage and to assure that the Association will operate on a non-profit basis, the Association is

Bylaws

or other service or supply portion") of capital credited to the accounts of members which corresponds to capital credited to the account of the Association by an organization furnishing power supply or any other service or supply to the Association.

(g) Such rules shall (1) establish a method for determining the portion of such capital credited to each member for each applicable fiscal year, (2) provide for separate identification on the Association's books of such portions of capital credited to the Association's members, (3) provide for appropriate notification to members with respect to such portions of capital credited to their accounts and (4) preclude a general retirement of such portions of capital credited to members for any fiscal year prior to the general retirement of other capital credited to members for the same year or of any capital credited to members for any prior fiscal year.

(h) Capital credited to the account of each member shall be assignable only on the books of the Association pursuant to written instruction from the assignor and only to successors in interest or successors in occupancy in all or part of such members premises served by the Association, unless the Board of Directors, acting under policies of general application, shall determine otherwise.

(i) Notwithstanding any other provision of these Bylaws, the Board of Directors shall at its discretion have the power at any time upon the death of any member who was a natural person (or, if as so provided for in the preceding paragraph, upon the death

Bylaws

(d) All other amounts received by the Association from its operations in excess of costs and expenses shall, insofar as permitted by law, be (1) used to offset any losses incurred during the current or any prior fiscal year, and (2) to the extent not needed for that purpose, allocated to its members on a patronage basis, and any amount so allocated shall be included as part of the capital credited to the accounts of members, as herein provided.

(e) In the event of dissolution or liquidation of the Association after all outstanding indebtedness of the Association shall have been paid, outstanding capital credits shall be retired without priority on a pro rata basis before any payments are made on account of property rights of members: PROVIDED, that insofar as gains may at that time be realized from the sale of any appreciated asset, such gains shall be distributed to all persons who were members during the period the asset was owned by the Association in proportion to the amount of business done by such members during that period, insofar as is practicable, as determined by the Board of Directors before any payments are made on account of property rights of members.

(f) If, at any time prior to dissolution or liquidation, the Board of Directors shall determine that the financial condition of the Association will not be impaired thereby, the capital then credited to members accounts may be retired in full or in part according to policies adopted by the Board. The Board of Directors shall have the power to adopt rules providing for the separate retirement of that portion ("power supply

Bylaws

of an assignee of the capital credits of a member, which assignee was a natural person), if the legal representatives of his estate shall request in writing that the capital so credited or assigned, as the case may be, be retired prior to the time such capital would otherwise be retired under the provisions of the Bylaws, to retire such capital immediately upon such terms of general application to situations of like kind, and such legal representatives, shall agree upon: PROVIDED, however, that the financial condition of the Association will not be impaired thereby.

(j) The Association, before retiring any capital credited to any member's account, shall deduct therefrom any amount owing by such member to the Association, together with interest thereon at the Alaska legal rate on judgments in effect when such amount became overdue, compounded annually.

(k) The members of the Association, by dealing with the Association, acknowledge that the terms and provisions of the Articles of Incorporation and Bylaws shall constitute and be a contract between the Association and each member, and both the Association and the members are bound by such a contract, as fully as though each member had individually signed a separate instrument containing such terms and provisions. The provisions of this article of the Bylaws shall be called to the attention of each member of the Association by posting, in a conspicuous place, in the Association's office.

(l) The allocation of patronage capital shall be made by district as defined in

Bylaws

Article 1, Section 1.10 of these Bylaws as determined by the Board of Directors.

Section 7.03. Patronage Refunds in Connection with Furnishing Other Services

In the event that the Association should engage in the business of furnishing goods or services other than electric energy, all amounts received and receivable therefrom which are in excess of costs and expenses properly chargeable against the furnishing of such goods or services shall, insofar as permitted by law, be prorated annually on a patronage basis and returned to those members from whom such amounts were obtained at such time and in such order of priority as the Board of Directors shall determine.

ARTICLE VIII**FISCAL MANAGEMENT AND ACCOUNTING**

Section 8.01. Revenues and Expenditures

The Board of Directors shall adopt and maintain a system of accounting for receipts and expenditures in conformance with the laws of the United States and of the State of Alaska, applicable to cooperative associations and corporations, which system shall at all times provide the proper reserves for payment of interest and principal on outstanding indebtedness, reserves for taxes, insurance, depreciation, replacement of capital plant and facilities, and

Post Office Box 369
Marietta, Georgia 30061
(404) 424-1504

91-13-184

Paul E. Weatherby, President/CEO

To: General Services Administration, FAR Secretariat (VRS)
From: Paul E. Weatherby, President/CEO, Cobb Electric Membership Corporation
Date: July 22, 1991
Subject: General Services Administration, Proposed Rule Change On Federal Acquisition Regulation; Acquisition of Utility Services (FAR Case 91-13)

After reviewing the General Services Administration (GSA) proposed rule on the acquisition of services from utilities (56 Federal Register 23982) and more specifically section 52.241-13 Capital Credits, Cobb Electric Membership Corporation would like to make the following general comment about capital credits and the proposed rule and then comment on specific concerns related to the adoption of this rule in its proposed format.

First, we believe it is important to understand that capital is provided by a cooperative's membership through its rate structure. By nature, a rural electric cooperative and the bylaws under which it operates recognizes that each dollar received from its members in excess of its cost of electric service is an investment by the members in the cooperative which at some time in the future the member is entitled. The allocation of these margins (net revenues) to members or patrons should assure equitability and be credited to those members who provided the capital whether it is recorded in current year margins or deferred to a later period.

As one of the largest and fastest growing distribution cooperatives in the nation, Cobb Electric Membership Corporation recognizes the Government's entitlement to capital credits in a manner that is consistent with the bylaws of the cooperative. As a member of a cooperative the Government should be entitled to a list of accrued capital credits within a reasonable time after the close of the cooperative's fiscal year, or each calendar year, whichever is more appropriate for financial reporting purposes. A reasonable period might be that period currently provided for in section 17 of the Supplemental Mortgage and Security Agreements with the National Rural Electric Cooperative Finance Corporation (NRECF) and a cooperative for submitting the independent annual audit (90 days).

Spring Barton, Cherokee, Cobb,
Fulton and Paulding Counties

JUL 24 1991

91-13-184

Secondly and more specifically, this proposed rule on capital credits causes significant concern to Cobb Electric Membership Corporation. The rule jeopardizes the basic means for capitalizing a cooperative. The primary source of equity capital for a cooperative is its margins. Before a rural electric cooperative can consider efforts to raise capital from sources outside the Federal Government the financial stability of the cooperative must be sound. Investors have traditionally been concerned about financial stability and the going concern aspects of a business. One way of measuring a cooperative's financial stability and ability to meet its future obligations is to look at financial ratios. Ratios such as TIER (Times Interest Earned), current ratio (current assets to current liabilities) and debt to equity (long term debt as a percentage of equity) are important barometers. Investors want to make sure their investments are safe and that the level of risk is acceptable. Mandatory payments of capital credits erodes equity, cash and cash equivalents used to meet working capital requirements. This erosion appears to be counter productive to moving EMC's toward private financial markets. For a cooperative to meet its operating needs in such an environment would require higher rates to fund the higher cost of money needed to satisfy investors concerned about the increasing risks associated with the industry. Higher rates would make the cooperatives less competitive in the market place and would add to the financial problems already concerning the Rural Electrification Administration.

To pay the Government upon termination or expiration of a utility service contract with the GSA and the utility supplier for all capital credits assigned to them would not be consistent with the bylaws of most cooperatives since a specific method and time of payment is not always spelled out in the bylaws. Even when these elements are spelled out they would not normally provide for immediate payment upon the happening of a given event, specifically the termination of service. Allocation methods vary among electric distribution cooperatives. Some allocate margins based on the first-in, first-out method (FIFO), others use a last-in, first-out method (LIFO) and still others use a percentage method, or other special methods that may require discounting or payment to deceased patrons. Some cooperatives have rotating cycles others do not. The common thread among all is that the adopted method probably gave consideration to local political and economic factors as well as applicable state statutes. To disrupt current practice by providing an out-of-pocket payment without regards to existing bylaws is not only unfair to other members within the same customer class but also inequitable between classes. Most patronage capital methods provide for payments to be made over a number of years. Often cooperatives do not have regular cycles. This is particularly true for fast growing cooperatives having large capital project expenditures to meet service demands. To require that cash be available to meet

91-13-184

Government contract commitments in the future could impose undue hardships on these cooperatives by straining cash resources that are already scarce.

In summary, amounts to be refunded through capital credit payments should be driven by equity levels, capital improvements and cash flow considerations. To make exceptions for the Federal Government could violate the common law principles of cooperative taxation in that all earnings must be returned to members on an equitable basis. Patronage dividends must be allocated and paid in accordance with a pre-existing legal obligation which is democratically controlled. The proposed rule on capital credits may also violate the pre-existing legal obligation between all patrons and their cooperative, because it may disrupt existing bylaw provisions to such an extent that it actually impairs existing vested contractual rights.

Cobb Electric Membership Corporation appreciates the opportunity to submit the above comments to the General Services Administration. We hope that these comments along with any others received will be given careful consideration before adoption of the final rule..

Sincerely,



Paul E. Weatherby
President/CEO

cc: Mr. Bob Bergland, General Manager, NRECA
Ms. Brenda Edwards, GEMC
Mr. Jere T. Thorne, GEMC Director of Governmental Affairs



**Sawnee
Electric Membership Corporation**

P.O. Box 266
Cumming, Georgia 30130
Cumming — (404) 887-2363
Atlanta — (404) 577-4576

91-13-185

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, N. W.
Room 4041
Washington, D.C. 20405

RE: FAR Case 91-13

Dear Gentlemen:

I am writing you in response to the May 24, 1991 Federal Register Filing of the above referenced proposed rules. I serve as Executive Vice-President and General Manager of Sawnee Electric Membership Corporation, an electric cooperative located in Northern Georgia.

I am very concerned with this proposed ruling for several reasons. The first and most important reason centers around the government's entitlement to capital credits while consistent with our current bylaws should not establish the government as a privileged class of consumer. The second key centers around the government wishing to be advised of accrued capital credits within 60 days after the close of our fiscal year. This proposal is not acceptable and not practical for several reasons. Our complete capital credit base is not known by this date. We do know the operating margin by years end but other capital credits (associated organizations and G & T) are not known. With regard to payment of unpaid capital credits upon termination of the contract/service, this cannot be done since it would erode the capitalization philosophy which supports our corporation. Currently payment is only made upon death of the member/consumer.

The final point I would ask that you consider is the definition of payment date. As you well know these funds are used to provide strength and balance to the corporation between accounting periods. These funds support the day to day operation as well as insure future mortgage payments. Our bylaws allow our Board to decide if financial condition warrant the retirement of the prescribed year and further REA has certain criteria which must be considered if the capital credit retirement which could supersede the Boards wishes.

JUL 24 1991

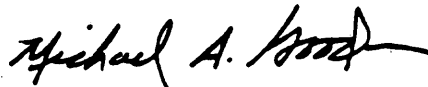
91-13-185

General Services Administration
July 22, 1991
Page two

These are thoughts for your consideration. Please review
these ideas in considering this proposed ruling. Thank you for
your consideration.

Sincerely,

SAWNEE ELECTRIC MEMBERSHIP CORPORATION



Michael A. Goodroe
Executive Vice-President
and General Manager

MAG/kr



**Lamar
Electric Membership Corporation**

91-13-186

P. O. Box 40 / 204 College Drive / Barnesville, Georgia 30204 / Phone (404) 358-1383

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F. Streets, NW
Room 4041
Washington, DC 20405

RE FAR Case 91-13

Below are comments from Lamar Electric Membership Corporation regarding proposed rules on Capital Credits and Connection Charges:

Government entitlement to capital credits "consistent with the bylaws of the cooperative..." as stated in subsection (a) is acceptable, but it is not entitled to become a privileged class of customer.

Furnishing a list of accrued capital credits within 60 days after the close of the cooperative fiscal year is not acceptable, because with subsidiary (G&T) capital credits and other unknowns to consider it may be impossible to determine. Also, in subsection (c) upon termination all unpaid capital credits would have to be paid to the government. Subsections (b) and (c) would cause bylaws to be violated in most cases. Also this could violate the FIFO requirement in most cooperative bylaws. If so it would impair a vested contractual obligation and violate the constitutional prohibition against laws impairing vested contractual rights in private contracts.

This sets a precedent which jeopardizes the basic means of capitalizing a cooperative. The capital credit in reality would become a liability rather than equity.

Mandatory payment erodes capital and capital ratios which REA requires in its mortgage instruments and other lenders rely upon in their loan underwriting considerations for cooperatives.

By virtue of the erosion of capital ratios and the shift of cooperatives to more omnibus financial markets, cooperative



JUL 24 1991

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consumers will have to pay higher rates to fund higher interest cost.

Starting the "date payment is to be made..." for cooperatives which don't have a regular cycle would be a problem. This problem could be handled if the rules made clear that this requirement applies only if the cooperative has some regular cycle that it tries to follow and that circumstances could change that. For example: "Cooperative anticipates that payment will be made on or about December 1, 2011."

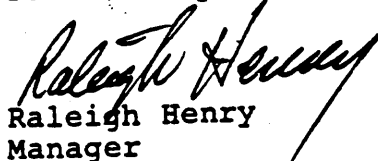
This out-of-turn payment is unfair to the other cooperative members who cannot have their capital credit until many years later or upon death instances where cooperatives pay "deceased capital credits." This requirement may change the cooperative tax exempt status because it could be inconsistent with the requirements of the IRS for cooperative status, that the cooperative operates on a "cooperative basis."

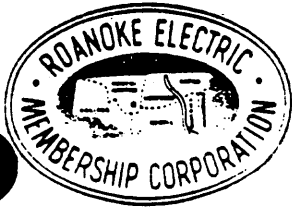
Under the proposed rules, the cost of providing connection facilities for the government would be shifted from the government to the other members. Unfairness is an issue, but probably this is also a violation of the bylaws and state statutes which govern the cooperative. The cooperative could also be exposed to unethical and maybe unlawful disbursement of capital credits. The procedure that would be created from this rule would be inconsistent with the way in which cooperatives operate as member-owned capital credit systems, not patronage dividend systems.

The drafter of the proposed rule seems to be referencing a non-exempt, subchapter T cooperative in making this change. The non-exempt cooperative is subject to possibly accelerated payment rules under the tax law. Their earned equity or excess margins are, as a rule, referred to as "patronage dividends." The term "capital credits" is commonly used in referring to as "patronage dividends." The term "capital credits" is commonly used in referring to excess margins only by 501(c) (12) tax-exempt organization such as the EMCs.

If you have questions or comments, please contact me.

Yours truly,


Raleigh Henry
Manager



91-13-187

ROANOKE ELECTRIC MEMBERSHIP CORPORATION

P. O. Drawer 440 • 114 N. Main St. • (Hwy 258 N)
Rich Square, N. C. 27869-0440

919 539-2236
FAX: 919/539-2677

July 22, 1991

GENERAL SERVICES ADMINISTRATION
FAR SECRETARIAT (VRS)
18TH & F STREETS NW
RM 4041
WASHINGTON DC 20405

REF: FAR CASE 91-13

Dear Sir:

Attached hereto is a copy of North Carolina AEC's comments regarding the above case on behalf of its 28 member EMCs. Roanoke EMC concurs fully with all items covered in these comments.

Paragraphs (b) and (c) of Section 52.241-13, "Capital Credits" are most offensive in that if placed into effect as stated, they would in effect place government agencies above laws and legal principles which ordinary citizens are subject to. We strongly feel such an action would not be in the best interest either of government agencies or the general citizenry; and, if publicized, would be offensive to the American public.

We respectfully request that these two paragraphs be changed to provide for government agencies to receive the same treatment as do ordinary citizens.

Very truly yours,

A handwritten signature in cursive script that reads "Eugene W. Brown, Jr.".

Eugene W. Brown, Jr.
General Manager

EWBJR:bsc

Enclosure

JUL 24 1991

91-13-187



**North Carolina
Association of Electric Cooperatives, Inc.**

3400 Sumner Boulevard
Post Office Box 27306
Raleigh, North Carolina 27611
Telephone: (919) 872-0800
July 19, 1991

**General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, D.C. 20405**

SUBJECT: FAR CASE 91-13

Dear Sir:

As the statewide organization representing the 28 electric membership corporations in the State of North Carolina, we have serious concerns regarding the above-referenced Federal Acquisition Regulation ("FAR"). The section which particularly concerns us is 52.241-13, entitled "Capital Credits."

Paragraph (b) of that section would require a cooperative furnishing electricity to a government agency pursuant to the FAR to provide a list of accrued capital credits by contract number, year, and delivery point within 60 days after the close of a cooperative's fiscal year. It also requires the cooperative to state the date payment would be made. These portions of the proposed regulations are contrary to State and Federal law and deference should be given to the requirements of law.

The requirement of providing a list of accrued capital credits within 60 days after the close of a cooperative's fiscal year runs counter to the following legal and administrative concerns. First, under Federal law cooperatives are not required to mail capital credit notices to their members and may satisfy capital credit notification requirements simply and cheaply by publishing a notice to the customers telling them how they themselves can calculate capital credits for a given year. Second, doing this within 60 days after the end of a given fiscal year may be an impossibility. Many cooperatives are themselves members of supply cooperatives and do not know the capital credits allocated to them by their supply cooperative within 60 days after the end of a given fiscal year and thus cannot include supply cooperative capital credit allocations within overall capital credits until they receive capital credit notices from their supply cooperatives.

Stating the date payment of capital credits is to be made is a problem until such time as the cooperative's board of directors authorizes the retirement of capital credits. It is only then that the cooperative can state the date that payment is to be made.

91-13-187

General Services Administration
FAR Secretariat (VRS)
July 19, 1991
Page Two

Paragraph (c) of section 52.241-13 raises some of the same concerns which have already been expressed. For a cooperative to pay capital credits to a government entity at the expiration of the contract would require violation of State and Federal legal principles.

We respectfully request that the offending sections of the proposed regulations be changed so that government agencies abide by the same legal principles as the citizens do. In these particular matters, the government and its agencies should not be above the law.

Sincerely yours,



Wayne D. Keller
Executive Vice President

cc: Managers, 28 NCAEC member systems

91-13-188

Randolph Electric
Membership Corporation

Post Office Box 40
Asheboro, North Carolina 27204-0040
Phone No. 708-625-3177

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., room 4041
Washington, DC 20405

Comments on FAR Case 91-13

I feel very strongly that the proposed section 52.241-13 should not be included in the proposed rule on the acquisition of services from utilities (Federal Register 5623982) at 41.007(j). The refund of capital credits by rural electric cooperatives is a very complex matter encompassing the cooperative by laws, many different state laws, federal laws, and REA regulations and guidelines. This arbitrary contract language would result in conflict between these aspects of management and regulation and the GSA.

One of the basic tenets of cooperative philosophy is that each member is treated fairly and equitably and all members are treated the same. This proposed contract provision would take away this right of the local cooperative. Some state laws might also be in conflict with this provision. The area that could really cause a conflict has to do with the REA mortgage. The mortgage states specific situations under which cooperatives cannot, under any circumstances, refund capital credits.

Many cooperatives have a provision in their by laws stating that capital credits will be refunded to deceased members. Some cooperatives consider a business that is no longer active a deceased member. Other cooperatives do not. In the cases that by laws provide that defunct businesses are considered to be deceased members, any Federal facility would automatically receive its capital credits.

One possible way to eliminate this problem would be for each Federal facility to negotiate into its contract rates

91-13-188

that would exclude the payment of capital credits. This is done by some cooperatives with large industrial loads. Even if this were considered, it would seem that the cooperative by laws would either have to allow this arrangement or be silent on it. I also believe that REA would have to approve any such contracts.

Let me stress that I feel that these matters should be handled on a case by case basis and that no across the board language should be included in this rule.

Submitted By:


Bob L. McDuffie
Executive Vice President and General Manager

91-13-189

DAVIS WRIGHT TREMAINE

700 WEST IDAHO STREET, SUITE 700, BOISE, IDAHO 83720
(208) 338-8200

ROY L. EIGUREN
PARTNER IN CHARGE

July 23, 1991

VIA EXPRESS COURIER

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, D.C. 20405

RE: Comments of the Idaho Cooperative Utilities Association on Proposed Federal Acquisition Regulation: Acquisition of Utility Services, 56 Fed. Reg. 23982 (1991)
FAR Case 91-13

Gentlemen:

The Idaho Cooperative Utilities Association (ICUA) is an Idaho nonprofit corporation that represents the collective interests of the fourteen rural electric cooperatives that provide electrical service to over 150,000 consumers in the state of Idaho. ICUA regularly represents its members in matters before Congress and various federal and state administrative agencies.

ICUA strongly objects to the General Services Administration's (GSA) promulgation of the proposed rule in this proceeding relating to the imposition of new requirements for electric services procurement contracts between the federal government and rural electric cooperatives. Specifically, ICUA objects to the proposed requirement that a Cooperative pay, within sixty days after the close of its fiscal year, any unpaid capital credits due the federal government. ICUA also objects to the proposed requirement that the cooperative pay the federal government any unpaid capital credits upon the termination or expiration of an electrical services contract.

A rural cooperative's capital base is funded through the payment of capital credits (generally in the form of a monthly incremental payment as a part of an electric service bill) by consumers/members of the cooperatives. Under existing accounting and capital reserve requirements imposed by the federal government (through Rural Electrification Administration lending requirements), by state law (through Idaho's corporate statutes, articles of incorporation and by-laws), a cooperative retires (pays back to consumer members) paid in capital credits only after such requirements are met. Accordingly, capital credits are only retired when mandated capital reserve requirements are met. Retirements, as a matter of law, occur on a nondiscriminatory, nonpreferential basis. The proposed rule totally contravenes the long

JUL 24 1991

Fax: (208) 338-8299

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RICHLAND, WASHINGTON · SEATTLE, WASHINGTON · WASHINGTON, D.C.

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established, legally mandated method of retiring capital credits. It violates both existing federal and state law. It could potentially jeopardize a cooperative's financial stability by taking critically important capital out of a cooperative at times when it may be inappropriate to do so.

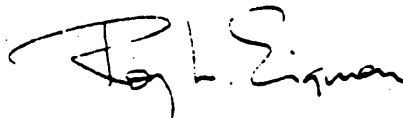
In addition to submitting these comments, ICUA fully supports and endorses the comments made in this proceeding by the National Rural Electric Cooperative Association, as well as the enclosed comments of ICUA members Kootenai Electric Cooperative, Northern Lights Cooperative and Raft River Rural Electric Cooperative.

We urge GSA representatives to follow the suggestion of the National Rural Electric Cooperative Association and arrange a meeting with staff from that organization to obtain a better understanding of how rural cooperatives operate. We believe that GSA will find it appropriate to modify the proposed rule in a manner that conforms to these comments after such a meeting.

Thank you for your consideration.

Sincerely,

DAVIS WRIGHT TREMAINE



Roy L. Eiguren
ICUA General Counsel

RLE/np
Enclosures

cc: Hon. Steve Symms, United States Senate
Hon. Larry Craig, United States Senate
Hon. Larry LaRocco, Member of Congress
Hon. Richard Stallings, Member of Congress

91-13-184

The General Services Administration (GSA) recently published a proposed rule on the acquisition of services from utilities (56 Federal Register 23982). As part of this rule, the GSA is proposing at section 41.007(j) that the following language be added to all contracts between Federal facilities and cooperative utilities (we find paragraphs (b) and (c) are specifically troubling):

52.241-13 Capital Credits

(a) The Government is a member of the (cooperative name) _____, and as any other member, is entitled to capital credits consistent with the by-laws of the cooperative, which states the obligation of the Contractor to pay capital credits and which specifies the method and time of payment.

(b) Within 60 days after the close of the Contractor's fiscal year, the Contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing a list of accrued credits by contract number, year, and delivery point. Also, the Contractor shall state the amount of capital credits to be paid to the Government and the date the payment is to be made.

(c) Upon termination or expiration of this contract, unless the Government directs that unpaid capital credits are to be applied to another contract, the Contractor shall make payment to the Government for the unpaid credits.

(d) Payment of capital credits will be made by certified check, payable to the Treasurer of the United States; and forwarded to the Contracting Officer at _____, unless otherwise directed in writing by the Contracting Officer. Checks shall cite the current or last contract number and indicate whether the check is partial or final payment for all capital credits accrued.

Kootenai Electric Cooperative, Inc.



AC Consumer and Electric Utility

July 19, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F. Streets, N.W., Room 4041
Washington, D.C. 20405

Ref: FAR Case 91-13

Gentlemen:

We are alarmed by your proposed rule on the acquisition of services from utilities (56 Federal Register 23982).

The proposed rule would blatantly require us to discriminate against the consumers-owners of this cooperative in favor of the U.S. government. We, like our sister cooperatives all across the nation, are governed by state corporate law and our by-laws.

Now comes the General Services Administration with the arrogance to propose over riding the state's authority to govern as well as the cooperative's by-laws. Further, to stipulate special treatment right down to dictating accounting procedures and payment of capital credits by certified check. Maybe we should require GSA to pay its utility bills on time with a certified check?

The proposed rules are ill advised and totally unnecessary. We are a nonprofit business. That means whatever margin we earn is owned (capital credits) by the people who paid it, including GSA. As required by our state law and our by-laws all of our members will be refunded their capital credits on exactly the same basis. We do not discriminate between the poor elderly widow trying to survive on social security and the powerful GSA. You should not either.

Sincerely,

A handwritten signature in cursive script, reading "Charles Y. Walls", is written over a horizontal line.

Charles Y. Walls
General Manager

cc: Richard Stallings
Larry Larocco
Steve Symms
Larry Craig

91-13-184



1423 Dover Highway

P.O. Box 310

Sandpoint, Idaho 83864

208-263-5141

July 19, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13

Dear Sir or Madam:

Careful review of the proposed rules found at 23982 Federal Register/Vol. 56. No. 101/Friday, May 24, 1991, appear to be nothing more than an attempt to circumvent federal law which requires "that none of the funds appropriated by the Act or any other Act with respect to any fiscal year by any department, agency, or instrumentality of the United States may be used for the purchase of electricity by the Government in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and elective utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements," by requiring contract clauses that would require many cooperatives to violate their own By-laws, Articles of incorporation, state law, and/or provisions in their mortgage agreements with the Rural Electrification Administration, National Rural Utilities Cooperative Finance Corporation and/or others.

Starting at 23982 and running through 23987, there are many references to Area Wide Contracts, Standard Specification Formats, Standard Annual Review Formats, Authorization Forms, Standard Form (SF) 26 Award/Contract. However, there are no samples or specifications included, so it is impossible to anticipate just how time consuming this paperwork will be. no final rules should be published until after interested parties have had an opportunity to comment on these items.

The proposed rules state that "The paperwork reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping information collection requirements or collection of information from offerors, contractors, or members of the public. This is a direct contradiction of the requirements under 41.004-5 which has a detailed list of items that will be required, many of which will require detailed analysis.

Section 41.005 also requires a substantial amount of paperwork of both the agency desiring service and the utility that will supply that service, again in direct conflict with the statement made concerning the Paperwork Reduction Act.

There are a number of items under Part 52-Solicitation Provisions and Contract Clauses that would force us to refuse to be a party to any contract that contained them. They are:

1. Service Provisions

(a) Measurement of Service

(1) "and read by the contractor at its expense." We are a rural electric cooperative serving a large area with low density. To hold down costs, our members read their own meters and supply them to us. This provision would force us to give preferential treatment to government installations and would increase the costs to our other members.

(2) "The contractor shall read all meters at periodic intervals of approximately 30 days, etc." Again, we are a low density rural electric cooperative and require our members to read their meters and supply us with them. As pointed out above, this provision would require preferential treatment for government installations at the expense of other members.

(b) Meter Test

(1) "test contractor-installed meters at intervals not exceeding one year, etc." Electric meters are probably the most accurate and dependable measuring device used in a trade or business today. Requiring annual testing is absolutely not cost-effective. It will only add to the already high costs of system operations and provide no benefit.

(2) (3) These two items are part of the operating requirements of every electric utility that I am familiar with and are not needed in a contract.

(d) Continuity of Service

(1) "or other variation of service shall aggregate more than one hour during any period hereunder, an equitable adjustment shall be made in the monthly billing, etc." Billings for electric service are based on the amount of power actually used. During outages, no power would be used so there would be no bill for power used. For this reason, this clause is unnecessary and excess verbiage.

(2) This section poses a problem in that it could transfer costs from the government to the other members on an inequitable and discriminatory basis. Depending on the circumstances, it could provide for preferential treatment of the government at the expense of the other members.

52.241-7 Change in Terms and Conditions of Service for Unregulated Suppliers. This entire clause is unacceptable as written. It would confer on the government rights and privileges not available to any other members of the cooperative. It would require that the cooperative incur additional costs for the benefit of the government at the expense of the other members.

Also under item (c), it refers to a Disputes clause, but I can find nothing in these proposed rules to indicate what might be required to settle a dispute. Until the proposed procedures for settling a dispute are published and we have an opportunity to comment on them, no final rule should be published.

52.241-B Connection Charge. This section again gives preferential treatment to the government at the expense of the remaining members of the cooperative and, therefore, would be totally unacceptable.

52.241-13 Capital Credits.

(b) This section would be impossible to comply with. We would be unable to ascertain the amount of capital credits to be allocated until after the year-end audit is completed and the Board of Directors authorizes the allocation of capital credits. This would normally be somewhere between 120 to 180 days after the close of the fiscal year. Also at this time, we would have serious problems trying to list out accrued capital credits by contract number, year, and delivery point. At the time of the allocation, it would be impossible to give a date that the capital credits would be refunded. We are currently retiring capital credits accumulated in the early 1970s and attempting to maintain a 20-year cycle. However, the retirement of capital credits is at the discretion of the Board of Directors after an analysis of the financial condition of the cooperative and a determination that such a retirement will not impair the financial integrity of the cooperative. This is done annually.

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(c) This clause must be eliminated completely as it would require us to violate our By-laws, Articles of Incorporation, Idaho State law, Montana State law, provisions of our Mortgage Agreements with the Rural Electrification Administration and provisions of our Mortgage Agreement with National Rural Utilities Cooperative Finance Corporation.

(d) This clause must also be eliminated completely as it would require us to give preferential treatment to the government at the expense of the rest of our members.

Sincerely,

NORTHERN LIGHTS, INC.

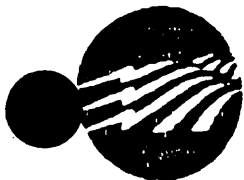
La Verne Stolz

LaVerne Stolz,
Director of Finance & Adm.

LS:blp

cc: Senator Larry Craig
Senator Steven Symms
Senator Max Baucus
Senator Conrad Burns
Congressman Larry LaRocco
Congressman Richard Stallings
Congressman Ron Marlenee
Congressman Pat Williams
Mike Oldak
Roy Eiguren

91-13-189



**Raft River Rural
Electric Cooperative, Inc.**

250 North Main
P.O. Box 617
Mesa, ID 83342
Telephone: 208-645-2211
FAX: 208-645-2300

July 17, 1991

General Services Administration
FAR Secretariat (VRS)
18th Nad F. Street, N.W. Room 4041
Washington, D.C. 20405

RE: FAR Case 91 13

Dear Sir,

Your recently published proposed rule on the acquisition of services from utilities (56 Federal Register 23982) certainly causes me a great amount of concern.

As I understand the GSA is proposing in section 41.007 (j) that the following four paragraphs be added to all contracts between federal facilities and cooperative utilities. To be perfectly honest, I find each of the four paragraphs not only offensive but, additionally find several elements contained in your proposal extremely discriminatory.

I shall address each of the paragraphs individually referenced 52.241-13:

(A) The government is a member of the (Cooperative Name) _____, and as any other member, is entitled to Capital Credits consistent with the By Laws of the cooperative, which states the obligation of the contractor to pay Capital Credits and which specifies the method and time of payment.

RESPONSE:

I support the idea of treating all members exactly the same and paying them on the same rotation. Plus, I believe the method should be consistent with that provided for in the By-Laws. The only method of changing this method should be limited to the vote of the members. Further, the idea of specifying a specific time as to the payment of such, should be solely at the discretion of the duly elected Board of Directors and not mandated as you have proposed.

(B) Within 60 days after the close of the contractor's fiscal year, the contractor shall furnish to the contracting officer, or the designated representative of the contracting officer, in writing a list of accrued credits by contract number, year, and delivery point. Also, the contractor shall state the amount of Capital Credits to be paid to the Government and the date payment is to be made.

91-13-189

RESPONSE:

This particular paragraph is extremely offensive since your proposed rule making appears to be an end run effort to circumvent the authority of the members of the Cooperative, plus usurping the discretionary authority of the duly elected members of the Board, which by the way the Government agency, as a member, had the privilege of electing.

For you to arbitrarily set 60 days is also an invasion of the members authority, since once again the By-Laws as established may be something more or less than your time frame. Again, we feel that it is our responsibility to inform you as soon as possible as to the amount of Capital which will be credited to your capital account each year. However, your desire to have this reported by delivery point and contract number is again asking for special handling and preferential consideration. Why should we discriminate against all of our other members, for your convenience? Personally, your proposal requesting that each contract number be segregated for the purpose of showing the amount of capital credited to that specific service would be no problem, provided each member had only one service. But, the Government as well as the majority of our members have more than one contract or one service. We continue to feel obligated and proud to notify each one of our members as to their accrual each year. But, to ask for this to be done on a service by service or contract by contract is extremely self-ish on your part. To ask that coincidental to this notification you be given the date of the actual retirement is totally impossible. When you consider the unknowns that can and will effect the cooperatives financial condition, plus the restrictions that in our and many others cases could be prohibited by our mortgage agreement with our bankers.

(C) Upon termination or expiration of this contract, unless the government directs that the unpaid Capital Credits be applied to another contract, the contractor shall make payment to the Government for the unpaid Capital Credits.

RESPONSE:

Again, you are asking for preferential treatment which would be a blatant discrimination against the other members of the cooperatives. Unless your assignment was to be made as provided in conformance to the By-Laws, as established by the members of each cooperative.

(D) Payment of Capital Credits will be made by certified check, payable to the Treasurer of the United States and forwarded to the contracting officer at _____, unless otherwise directed in writing by the contracting officer. Checks shall cite the current or last contract number and indicate whether the check is partial or final payment of all capital credits accrued.

RESPONSE:

It certainly seems funny that you would specifically request that a certified check is required. Through out the years the payments we receive are not by certified check. In fact, for years and years the Government agencies have been notorious for being late with their payments and refusing to pay any penalties. Unlike all other members who have been forced to pay or be subject to disconnection of service, in our case until all past due and penalties have been paid.

Please consider the abandonment of this proposal in preference of the By-Laws of those Cooperatives which the members (including you, the Government) have established and further have the ability to change by another vote of the members.

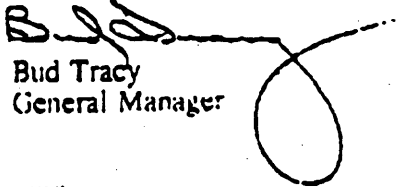
91-13-189

It has always been my belief that this country was founded on the principle of "of the people, for the people, by the people" not rules which are "of the Government, for the Government, by the Government!"

I am enclosing a copy of the pertinent section from our By-Laws, which show our technique and rules which we are proud to operate by.

Thank-You for considering these points in your deliberation.

Sincerely,



Bud Tracy
General Manager

BT/ha

CC: Richard Stallings
Larry Larocco
Steve Symms
Larry Craig



91-13-190

SOUTHERN MARYLAND ELECTRIC COOPERATIVE, INC

HUGHESVILLE MARYLAND 20637-1937 • 301 274-3111
FAX 301 274-3088

VIA FEDERAL EXPRESS

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, Room 401
Washington, D.C. 20405

Re: FAR Case 91-13

Gentlemen:

These comments on your proposed rule making on Federal Acquisition Regulation; Acquisition of Utility Services, 48 CFR Parts 6, 8, 15, 41, and 52, as referenced above are made on behalf of the Member-Consumers and Board of Directors of the Southern Maryland Electric Cooperative, Inc. (SMECO, Cooperative).. My comments will be limited to Section 52.241-13 Capital Credits.

SMECO is a rural electric distribution cooperative founded in 1937, by farmers who were unable to obtain electricity from private power companies. They borrowed capital from the Rural Electrification Administration, an agency of the federal government, and built the lines and provided services on a non-profit basis. Today, SMECO serves over 94,000 services with 7,100 miles of lines.

SMECO is owned and controlled by the people it serves, all of whom are members. Each member has one vote in the election of SMECO's directors. The goal of SMECO has always been to provide the best service possible at the lowest cost consistent with good business practice. Not only does the Electric Cooperative Act of Maryland, under which SMECO is incorporated, require SMECO to operate on a non-profit basis, in addition, its bylaws insure that it does operate on a nonprofit basis. The by-laws constitute a contract between the cooperative and its members. The by-laws provide that all money paid in by consumers under the applicable rate schedules, over and above the cost of furnishing electric service, is paid to the Cooperative not for electric service, but as capital. The bylaws further provide that at the end of each calendar year, the amounts paid in, pursuant to the rate schedules, over and above the actual cost of furnishing the service, must be credited on the books of the Cooperative to the individual consumers on the basis of patronage in the form of capital credits.

JUL 24 1991

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July 23, 1991
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Whenever the Cooperative is in a financial position to do so, the capital credits are retired by cash payments.

SMECO serves many governmental and military installations in our service area which includes Southern Prince Georges, Charles, St. Mary's and Calvert Counties. The above referenced rule making, if adopted in it's present form, would create undue hardship and incur additional record keeping costs to the Cooperative. In fact, the terms of the proposed rule would require alteration of our by-laws to provisions that have been in effect for over 50 years.

The proposed rule making would obligate the Cooperative to provide "within 60 days after the close of the Contractor's fiscal year...a list of accrued capital credits by contract number...and delivery point", at 52.241-13(b). The 60 day requirement would be onerous in that the Cooperative's books must be audited before capital credits are assigned. This process is generally completed within 90 days of the fiscal year close. An additional 30 to 60 days are required for the assignment process. Clearly, a 60 day allowance is inadequate. Also, capital credits are accounted for on a service account basis, which may not accommodate your requirement that they be listed by contract.

At 52.241-13(c) the proposed rule would require the Cooperative to "apply" unpaid capital credits to "another contract" or "make payment for the unpaid credits". There currently exists no provision for the transfer of capital credits as contemplated in this rule. Such a system would create additional record keeping and administrative costs solely for accounts covered by this General Services Administration(GSA) rule. Additionally, the payment of capital credits are governed by the by-laws of the Cooperative and the Board of Directors. Payments of capital credits to accounts covered by this rule would follow those precepts, with no provision for immediate payment occurring at the termination or expiration of a GSA contract.

Finally, at section 52.241-13(d), the proposed rule requires payment of capital credits to be by "certified check", and further, the check "shall cite the current or last contract number and indicate whether the check is partial or final payment for all capital credits accrued". Payment by certified check is an unnecessary and costly requirement. SMECO has refunded over \$17.7 million in capital credits through the issuance of regular disbursement checks, many to the Treasurer of the United States, with no problems. Also, as mentioned above, SMECO's accounting for

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GSA
July 23, 1991
Page 3

capital credits are by service account and consumer number. There currently exists no provision to supply contract numbers at time of refund. Similarly, no provision exists to advise the recipient of a capital credit check with advise of partial or final payment. These additional requirements would add to the administrative costs of the Cooperative, and again, only serve the requirements of a minority of accounts subject to these regulations.

I sincerely appreciate the opportunity to comment on your proposed rule making. If I may be of further assistance to you in clarifying or amplifying my comments, please don't hesitate to contact me.

Very truly yours,

I. Wayne Swann
I. Wayne Swann
President

IWS/AJS/ct

cc: Michael Oldak, NRECA

MAIN STREET
P.O. DRAWER 605
WEST LIBERTY KY 40372

91-13-191

91-13-191



BILL DUNCAN
General Manager

July 16, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N. W., Room 4041
Washington, D. C. 20405

RE: FAR Case 91-13

Dear Sir or Madam:

In reference to the proposed rule in 56 Federal Register 23982, Subsection 52.241-13 Capital Credits, we hereby state that we would be unable to comply with this rule if published as proposed. Subsection B under this proposed rule states that within sixty (60) days we shall furnish your office a list of accrued credits. Normally this accrued patronage is not assigned until six to eight months after the end of the physical year; therefore, it adherence to this part of the rule would prove impossible on our behalf.

Section C of this same rule states that upon termination or expiration of the contract we shall make payment to the Government for unpaid credits. As to date, our Board of Directors have not declared payout of any patronage capital. Therefore, at this time, it would also be impossible for us to comply to this section. In addition we feel it would be discriminatory to our other consumers to give the Government preferential treatment on the disbursement of the said capital credits.



JUL 25 1991

General Services Administration
July 16, 1991
Page 2

91-13-191

Sincerely,



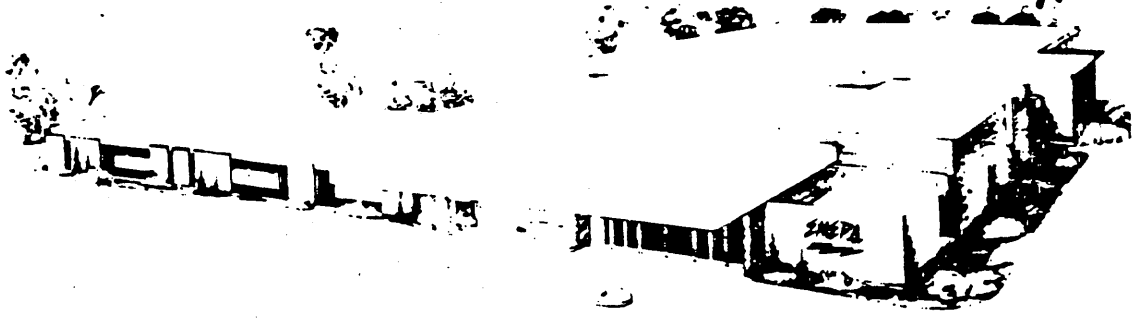
Bill Duncan
General Manager

BD:slv

c: LVRECC Attorney Thomas S. Miller

EAST MISSISSIPPI ELECTRIC POWER ASSOCIATION

91-B-192



2128 HIGHWAY 39 NORTH
PHONE (601) 483-7361

MERIDIAN, MISSISSIPPI 39301

July 17, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, NW
Room 4041
Washington, DC 20405

Re: FAR Case 91-13

Gentlemen:

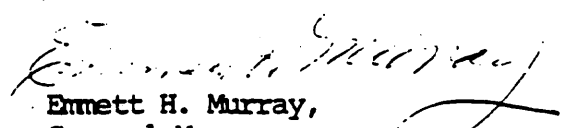
I wish to state EMEPA's opposition to GSA's 41.007(j), Section 52.241-13 Capital Credits (b) and (c). Our cooperative has accrued capital credits for its members over the years as prescribed by the Rural Electrification Administration (REA). However, the 60 day notification period would be too restrictive as set forth in this rule. Requiring a date for payment of capital credits to be specific, due to a changing economic condition, is also not acceptable.

Under Section (c) making payments to the government upon expiration of a contract would cause financial hardships on systems in this nation.

I am opposed to having our system mandated into this requirement for government accounts. This clause will have a profound economic effect on, not only our cooperative, but all accounting systems of electric cooperatives in this country.

The margins of this system have been generated by the members and have been utilized by the board policies to finance system improvements and plant. The Board of Directors and myself believe this capital credit policy reduces the amount of funds we borrow and has, therefore, allowed us to keep our electric rates as low as possible.

Yours very truly,


Emmett H. Murray,
General Manager

EHM/ew

JUL 25 1991



Farmers' Electric
Cooperative, Inc.

Old Hwy. 36 East, P.O. Box 680
Chillicothe, Mo. 64601
Telephone: (816) 646-4281

91-13-193

July 19, 1991

General Services Administration
FAR Secretariat
18th and F Streets, N.W.
Room 4041
Washington, DC 20405

RE: FAR Case 91-13

Dear Sir:

The proposed FAR Case 91-13, if adopted as written, would create numerous problems and inconsistencies for rural electric cooperatives like Farmers' Electric.

Section 52.241-13 "Capital Credits" item (a) says, "--- is entitled to capital credits consistent with the bylaws of the cooperative ---". Much of the remainder of the proposed rule asks for special treatment and considerations for the government that are inconsistent with our bylaws.

Our bylaws state exactly how capital credits are to be returned, if they are returned. There is no mandate that they must be returned and the bylaws do allow for returns of capital credit if the cooperative's financial condition will allow it.

We must treat all members the same. No member is paid their capital credits at the time they disconnect. All are paid in an orderly rotation of first in-first out. The government cannot be treated any different than that proverbial "little old lady at the end of the line".

Subsection (c) of 52.241-13 is a specific case of being inconsistent with subsection (a). This dictates a procedure in violation of the bylaws.

Subsection (d) also calls for payments of capital credits paid by certified check, the citation of contract numbers and reference to a partial or full payment. We do not pay any capital credits or other bills by certified check. Neither do we have contract numbers at this time, nor do we indicate whether a full or partial payment is made. We can, however, tell the member what his capital credit balance is at any time he should request that information.

JUL 25 1991

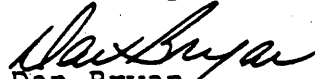
91-13-193

In addition in 52.241-5, subsection (b) the meter test provision is inconsistent with our policies governing meter testing. We do provide for testing when discrepancies occur.

This proposed rule seems not only to place a cooperative in conflict with its bylaws but to be unnecessary and a pointless use of time.

We would appreciate the reconsideration of the proposed rule and/or the total observance of our bylaw and policy limitations.

Sincerely,



Dan Bryan
General Manager

DB/jt



Rock County Electric
Cooperative Association

25.5 Kenbun Road
P.O. Box 1758
Limesville, Wisconsin 53547-1758
Telephone: 608/752-4550

91-13-194

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th & F. Streets, N.W., Room 4041
Washington, D.C. 20405

Re; FAR Case 91-13, Part 52.241-13

Gentlemen:

Rock County Electric Cooperative is making the following comments about FAR Case 91-13, part 52.241-13.

We are against Section 52.241-13 (B) as it is presently written. Under our By-Laws and Policy, Capital Credits are paid out using the percentage method. Therefore, no set time of payment can be given at the end of the year. One hundred and twenty days would be better for notification of the amount earned as Patronage. Our allocation of Patronage is done after our auditors have completed their work. Thus 60 days does not allow us enough time to complete this task, while 120 days would.

We are against Section 52.241-13 (C) totally. This section discriminates against other members in requiring early payout of Patronage, outside our normal rotation cycle. If this requirement is adopted into law, other businesses could also require early payout of unpaid credits. This section allows preferential treatment for distribution of Patronage and would subject the Cooperative to legal action by other members wishing to obtain their Capital Credits early.

We are against Section 52.241-13 (D) as it requires payment of Capital Credits by Certified Check. This is an un-necessary expense for the Cooperative to bear. If Certified checks are required, the Cooperative shall be allowed to deduct the extra cost.

If you have any questions we shall be pleased to answer them.

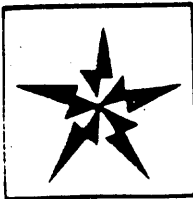
Sincerely,
ROCK COUNTY ELECTRIC COOPERATIVE ASSOCIATION

William B. Kayser, CPA
Accounting Manager

WBK/clw

cc; Bob Bergland, NRECA

JUL 25 1991



WISE
ELECTRIC COOPERATIVE, INC.

91-13-195

July 22, 1991

General Services Administration
FAR Secretariat VRS
18th and F Streets, N. W. Room 4041
Washington, D. C. 20405

Re: FAR Case 91-13

Gentlemen:

We are concerned with the proposed addition to all contracts between Federal facilities and Cooperative utilities.

Paragraphs (b) and (c) are particularly troubling to us. We feel that the sixty day period established by Paragraph (b) of this proposed change does not allow sufficient time for allocating capital credits and notifying patrons. Surely it must be recognized and considered that the majority of rural cooperatives have not reached the high level of automation which permits them to process information as rapidly as other larger organizations. In addition to this, it should be considered that most cooperatives work with a limited number of employees who perform many functions and they do not have at their disposal entire departments assigned to only one area, such as capital credits.

Our current bylaws contain the following language: "the Cooperative shall within a reasonable time after the close of the fiscal year notify each patron of the amount of capital so credited." To this point, we have never failed to comply with this stipulation. However, we seriously doubt our ability and that of other small rural utilities to meet a sixty day time limit.

We also find the proposal in Paragraph (c) to pay capital credits upon termination or expiration of contract objectional. This stipulation would provide special treatment for federal agencies not enjoyed by other patrons. Our bylaws provide that "any such retirement of capital shall be made in the order of priority according to the year in which the capital was furnished and credited, the capital first received by the Cooperative being the first retired." The only exception being one which permits the Board at its discretion to, upon the death of any patrons, to refund capital accrued prior to the time such credits would otherwise be retired provided that the financial condition of the cooperative would not be impaired thereby. Since cooperatives are based on the premises of equal treatment for all patrons, we feel that this proposed addition should be resisted. In addition to this important reason is also the fact that such exception would require an additional work load and changes to record keeping to meet its requirements.

JUL 25 1991

91-13-195

General Services Administration
Page 1
July 22, 1991

Your consideration of our position in this matter will be sincerely appreciated.

Sincerely,


LOYD JACKSON
Manager

LJ:ms



91-13-19 b
Jackson County Rural
ELECTRIC CO-OPERATIVE CORPORATION

MCKEE, KENTUCKY 40447 • TELEPHONE 606 287-7151

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F. Streets, N.W.
Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13

Gentlemen:

This is Jackson County RECC's response to the General Services Administration's (GSA) proposed rule on the acquisition of services from utilities, especially the adding of clause 52.241-13 Capital Credits to section 41.007(j) in all contracts between Federal facilities and cooperative utilities. Jackson County RECC has several concerns with the proposed rule:

In paragraph (b), the reporting requirement of detailing capital credit data within 60 days after close of Jackson County's Fiscal Year would be almost impossible to achieve. Our fiscal year end is December 31, but our last entry to December is not posted until about February 5th. There are then several adjustments that are required to our computer records before we can determine the amount of our capital credits to be allocated. This process can last until June, July or later.

In paragraph (b), the date that payment of the capital credits is to be made to the Government is also required. This assumes that the Cooperative is on a regular cycle of retiring capital credits. This also assumes that a Cooperative retiring capital credits always has the cash on hand to pay them and never has to delay payment for a year or so. This assumption has no validity in the real business environment. Jackson County RECC presently only refunds capital credits to estates of deceased members. As we do not know if or when we would ever start general refunds to all members, it would be impossible to fulfilling this requirement by stating a date of payment.

JUL 25 1991

JUL 25 1991

LEE ROY COLE
PRESIDENT & GENERAL MANAGER
MCKEE, KY.

FRED CALLAHAN
CHAIRMAN OF THE BOARD
BOONVILLE, KY.

EDWARD G. STAMPER
VICE CHAIRMAN OF THE BOARD
SEATONVILLE, KY.

JAMES H. HAYS II
SECRETARY-TREASURER
MCKEE, KY.

DIRECTORS: RAY MOORE • STEVE PATTON JR. • FRED M. BROWN • W. J. WATKINS, JR. • DON THOMPSON • DALE MADDEN

91-13-19 B
July 22, 1991

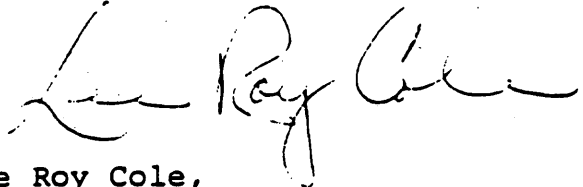
In paragraph (c), the Government requires payment of unpaid credits upon termination or expiration of the contract with the Cooperative. This requirement appears to:

- a. Allow the Government to circumvent the Cooperative By-Laws on capital credits. Paragraph (a) however states that the Government is entitled to capital credits consistent with the by-laws of the Cooperative.
- b. Put the Government in a special category ahead of any and all other members of the Cooperative since the Government would get their capital credits when disconnected, but other members would have to be deceased before their estates got their credits, a process which could take years from disconnect date. This is contrary to the very heart and core of the cooperative program which has all members treated equally.

Jackson County RECC feels the Government should be treated as any other member of the Cooperative with no less nor no more rights than other members. The Government is protected under the by-laws of each cooperative and should not demand nor legislate special treatment for itself, as Clause 52.241-13 in Section 41.007(j) would do. The requirements of the Government are also burdensome and almost impossible to fulfill and thereby should be rejected. Jackson County RECC thereby asks that the GSA reconsider and not adopt this change to Section 41.007(j).

Respectfully yours,

JACKSON COUNTY RURAL ELECTRIC
COOPERATIVE CORPORATION



Lee Roy Cole,
President and General Manager

MK:omc



Tideland Electric Membership Corporation

91-13-197

Main Office: PO Box 159
Pantego, North Carolina 27860
919 943-9048

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, D.C. 20405

SUBJECT: FAR CASE 91-13

Dear Sir:

As an electric cooperative representing 17,580 members in the State of North Carolina, we have serious concerns regarding the above referenced Federal Acquisition Regulation ("FAR"). The section which particularly concerns us is 52.241-13, entitled "Capital Credits".

Paragraph (b) of that section would require a cooperative furnishing electricity to a government agency pursuant to the FAR to provide a list of accrued capital credits by contract number, year, and delivery point within 60 days after the close of a cooperative's fiscal year. It also requires the cooperative to state the date payment would be made. These portions of the proposed regulations are contrary to State and Federal law and deference should be given to the requirements of law.

The requirement of providing a list of accrued capital credits within 60 days after the close of a cooperative's fiscal year runs counter to the following legal and administrative concerns. First, under Federal law cooperatives are not required to mail capital credit notices to their members and may satisfy capital credit notification requirements imply and cheaply by publishing a notice to the customers telling them how they themselves can calculate capital credits for a given year. Second, doing this within 60 days after the end of a given fiscal year may be an impossibility. Many cooperatives are themselves members of

JUL 25 1991

District Offices:

P.O. Box 38
Grantsboro, NC 28529
(919) 745-4127
(800) 882-1001

P.O. Box 98
Engelhard, N.C. 27824
(919) 925-3451
(800) 726-3451

P.O. Box 219
Ocracoke, NC 27960
(919) 928-3351

P.O. Box 118
Pantego, N.C. 27860
(800) 637-1079

91-13-19

General Services Administration
FAR Secretariat (VRS)
Washington, D.C. 20541
Page Two

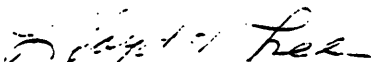
supply cooperatives and do not know the capital credits allocated to them by their supply cooperative within 60 days after the end of a given fiscal year and thus cannot include supply cooperative capital credit allocations within overall capital credits until they receive capital credit notices from their supply cooperatives.

Stating the date payment of capital credits is to be made is a problem until such time as the cooperative's board of directors authorizes the retirement of capital credits. It is only then that the cooperative can state the date that payment is to be made.

Paragraph (c) of section 52.241-13 raises some of the same concerns which have already been expressed. For a cooperative to pay capital credits to a government entity at the expiration of the contract would require violation of State and Federal legal principles.

We respectfully request that the offending sections of the proposed regulations be changed so that government agencies abide by the same legal principles as the citizens do. In these particular matters, the government and its agencies should not be above the law.

Sincerely yours,


Lloyd H. Lee
General Manager

LHL:mwr



91-13-198

P O. BOX 46

GREENSBURG, INDIANA 47240

PHONE 812-663-3391

FAX 812-663-8572

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, D.C. 20405

Reference: FAR Case 91-13

Gentlemen:

The General Services Administration recently published a proposed rule on the acquisition of services from utilities (56 Federal Register 23982). Section 41.007(j) addresses capital credits and their payment and references 52.241-13.

Paragraphs (b) of 52.241-13 requires that the capital credits be listed within 60 days of the fiscal year end. This is a significant hardship for cooperatives. We do not allocate capital credits until the fiscal year end audit report by an independent CPA is completed and accepted by our Board of Directors. This audit is not normally completed until at least 60 to 90 days after the fiscal year end. After the audit report has been accepted by the Board of Directors, it takes several more weeks to actually allocate the capital credits and verify the calculation. After this the notices of allocation are then mailed to our members.

From our standpoint, the 60 day requirement is too short of a time span and we would not be able to meet it. It appears that a 120 to 150 day requirement would be preferred.

Paragraph (c) of 52.241-13 requires actual payment of the capital credits when the contract expires and the Government is no longer a member. This proposed rule violates our By-Laws requirement that the Board of Directors has the sole decision when capital credits are to be paid. This proposed rule would require the cooperative to treat one member (the Government) differently than the other members. This rule could even force a cooperative to violate those parts of the mortgage agreement with the Rural Electrification Administration concerning capital credits payment when certain financial conditions are not met. This would be a no-win situation for the cooperative. I would suggest that paragraph (c) be removed.

Thank you for the opportunity to comment on these proposed regulations.

Sincerely,

Don R. Schilling, P.E.
President/General Manager

JUL 25 1991

Carteret-Craven

ELECTRIC MEMBERSHIP
CORPORATION

9/13-199

OFFICERS

DAVID W. CHAMBERS
SECRETARY

DAVID W. CHAMBERS
SECRETARY

NELLE C. BREWER
TREASURER

JOHN W. BROWN
PRESIDENT

H. EUGENE CLAYBORNE
GENERAL MANAGER



HIGHWAY 24 WEST
P. O. BOX 1499

MOREHEAD CITY, NC 28557

919-247-3107

1-800-682-2217

FAX 919-247-0235

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Washington, D.C. 20405

RE: Comments of Carteret-Craven Electric Membership Corporation
on Proposed Federal Acquisition Regulation: Acquisition of
Utility Services, 56 Fed. Reg. 23982 (1991), FAR Case 91-13

Gentlemen:

The Board of Directors of Carteret-Craven Electric Membership Corporation, a rural electric cooperative of the State of North Carolina, has reviewed the letter from NRECA to you concerning the difficulties that this and other rural electric cooperatives would experience with the Proposed Federal Acquisition Regulation referenced above.

This Cooperative receives its electric power from a generation and transmission cooperative. Since we never receive word from the generation and transmission cooperative of what capital credits have been allotted to this Cooperative from the generation and transmission cooperative within 60 days of the close of our fiscal year, we could not comply with the 60 day time limit to inform the government of its capital credits earned each year.

Furthermore, since these credits are not actually paid to this Cooperative but are credited to it on the books of the generation and transmission cooperative, these funds are not available to be paid out to our members. Consequently, if we ever paid the government these "phantom" credits, the money would have to come out of monies belonging to other consumers of the Cooperative which we believe would be a violation of law. We cannot take capital credits from some members in order to pay out monies to others.

JUL 25 1991

"Serving with Pride and Excellence"

91-13-199

General Services Administration
FAR Secretariat (VRS)
Page 2
July 22, 1991

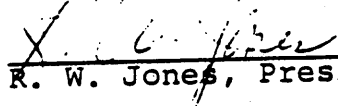
In addition, this Cooperative retires capital credits annually in two manners. First, capital credits are retired pro rata, that is paid out on a pro rata basis, to all members in accordance with their electric usage. Second, a portion of the margins earned by the Cooperative is paid each year to retire the oldest capital credits outstanding. To make an exception on the payment of capital credits for one member, in this instance the United States, would be a violation of our Bylaws, State law and regulations of the Internal Revenue Service. We are required by State law, regulations of the Rural Electrification Administration of the United States Department of Agriculture, and by the Internal Revenue Service to treat all member-consumers equally.

In all other respects, we adopt the comments made by NRECA in their letter to you regarding these proposed regulations.

Very truly yours,

Carteret-Craven Electric
Membership Corporation

By:


R. W. Jones, President

ph

Se - Ma - No Electric Cooperative

91-13-200

P.O. Box 318
17: 924-3243

MANSFIELD, MISSOURI 65704

July 2, 1991

General Services Administration
F A R Secretariat [VRS]
18th & F Streets, N.W., Room 4041
Washington, D.C. 20405

RE: FAR Case 91-13

Please accept this letter as my request that proposed items "b" and "c" under 52.241-13 not be adopted as published in the proposed rule on acquisition of services from utilities.

Adoption of part "b" would necessitate special attention to government sales and a complete revision of accounting procedures and by-laws dealing with distribution of capital credits. Since capital credits are returned at such a time as the Board of Directors deem feasible in the management of general funds it would be impossible, to within 60 days after the close of the year, accurately determine a feasible date for return of these credits.

Part "c" could place a financial hardship on some cooperatives as the return of capital credits is a part of the long range general funds management plan. Also, it would give the governmental entity preference over other members which would violate cooperative policies on non-preferential treatment of members.

Frankly, neither item is realistic and should not be adopted as it would cause administrative havoc.

Sincerely,



Lee Binley, Manager

Se Ma No Electric Cooperative.



JUL 25 1991

91-13-201

4111 State Street, North, P.O. Box 730, Bismarck, North Dakota 58502-0730. Telephone 701-223-1515
July 16, 1991

General Services Administration
FAR Secretarial (VSR)
18th and F Streets NW Room 4041
Washington DC 20405

RE: FAR CASE 91-13

Having reviewed the General Services Administration (GSA), Federal Acquisition Regulation for the Acquisition of Utility Services, (FAR Case 91-13), section 41.007 requiring the contracting officer to insert a clause substantially the same as the clause at 52.241-13 capital credits; Capital Electric Cooperative, Inc., hereby objects to the proposed language and regulation section noted above.

Our objections are to a requirement that within 60 days after the close of the Contractor's fiscal year, the Contractor shall furnish to the Contracting officer in writing, a list of accrued credits by contract number, year, and delivery point. We make our allocation 5 months after the close of our calendar year. The 60 day time period is simply not workable. In addition, the language stating, "The contractor shall state the amount of capital credits to be paid to the Government and the date the payment is to be made", simply is unacceptable.

Our retirement (payment) of capital credits is restricted by our (Government) mortgage agreement with the Rural Electrification Administration. To state a specific date a capital credit will be paid is simply impossible. We have set up a retirement schedule which is used as a general guideline in the fiscal planning and policies of the cooperative, however no specific dates are noted.

Paragraph C calls for payment of capital credits to the Government upon termination or expiration of the contract. Again this is simply unacceptable language. Our by-laws do not provide for the payment of capital credits upon a member terminating his service.

Further the capital credits which may be allocated to the Government may be in part capital credits which the cooperative receives from other cooperatives, such as data processing, power supply, equipment supply or financing cooperatives. The local distribution cooperative (contractor) cannot simply guarantee payment in cash of the capital credits of the other cooperatives capital credits, which may comprise the capital credits which were allocated to the Government. In addition, a cooperative which has financing via the Rural Electrification Administration (REA) has to have a 40% equity position before the retirement of capital credits are unrestricted by the REA.



91-13-201

July 16, 1991
Page 2

The contract language as proposed in the regulation regarding capital credits needs to be deleted or reworded so it is practical and workable for all parties.

The proposed language in 52.241-13 should be modified to read as follows:

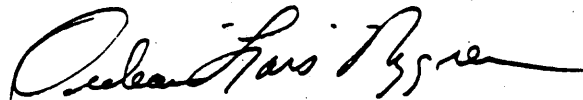
The Government is a member of the (cooperative name), and as any other member, is entitled to capital credits consistent with the by-laws, rules and regulations of the cooperative.

The above paragraph should provide the Government all that is necessary in order for the Government to obtain it's capital credits due the Government.

Thank you for the opportunity to respond.

Sincerely,

CAPITAL ELECTRIC COOPERATIVE, INC.



Ordean "Lars" Nygren
Manager

MINNKOTA POWER
COOPERATIVE, INC.

Box 1318 Grand Forks, ND 58206-1318 Phone: (701) 795-4000

91-13-202

July 19, 1991

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, N.W., Room 4041
Washington, D.C. 20405

SUBJECT: FAR Case 91-13

Gentlemen:

I would like to comment on the proposed rule as published in the Federal Register on Friday, May 24, 1991.

It appears that Section 52.241-13 dealing with capital credits may, if adopted, give the U.S. Government preferential treatment over other customers of Minnkota Power Cooperative, Inc. and many other rural electric cooperatives.

We agree that the paragraph (a) statement, "the government is entitled to capital credits consistent with the bylaws of the of the cooperative" is appropriate.

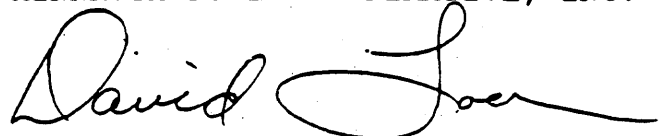
However, paragraph (b) gives us concerns. The 60 day requirement may put time constraints on the cooperatives' normal mode of operation. In addition, what is of most concern to us is paragraph (c). We do not feel the contractor should be required to pay the unpaid capital credits to the government upon termination or expiration of the contract, unless the capital credits were payable to the government on a discounted basis. Discounting for early capital credit payment considers the cost of money paid out earlier than normal retirement schedule. Any other payment basis would require the other customers of the cooperative to subsidize the federal government.

I request that this section be amended to read that the government's capital credits would be retired on a schedule similar to that used by the cooperative for like customers or to allow the discounting method of capital credits repayment.

If there are questions concerning my comments, please feel free to contact me.

Yours very truly,

MINNKOTA POWER COOPERATIVE, INC.

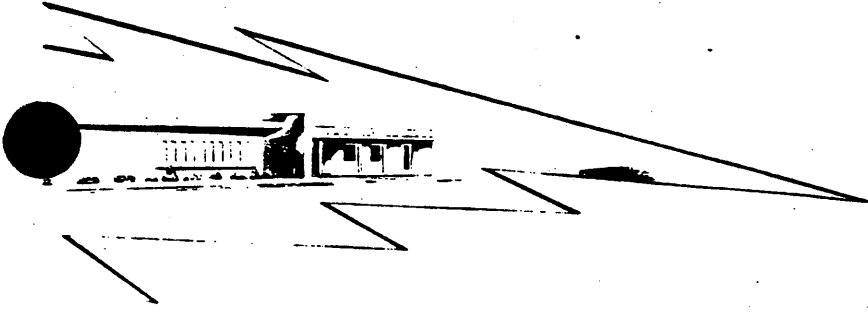


David W. Loer
General Manager

gae

JUL 25 1991

91-13-203



Turner-Hutchinson
ELECTRIC CO-OPERATIVE, INC.

508 SOUTH BROADWAY
P. O. BOX 388 MARION SOUTH DAKOTA 57043
PHONE (605) 648-3619

July 22, 1991

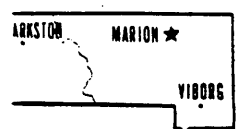
General Services Administration
FAR Secretariat
18th & F Streets, NW
Room 4041
Washington, DC 20405

Dear FAR Secretariat:

We have enclosed this letter in response to the Federal Register Notice (FRN) published by the General Services Administration on May 24, 1991. This F.R.N. concerns the Federal Acquisition Regulation: Acquisition of Utility Services and is cited per your request by FAR Case 91-13.

We have had the opportunity to review the F.R.N. and to study the proposed regulations as it pertains to its impact on this Cooperative. Turner Hutchinson Electric Cooperative, Inc., of Marion, S.D. (T.H.E.C.) is organized under the Rural Electrification Act of 1935 and the South Dakota Rural Electric Law. We are bound by the rules and regulations as set by the Rural Electric Administration Agency in Washington, D.C. Our by-laws and financial requirements are a product of models, rules and regulations required by REA, our primary lending agency, and the National Rural Utilities Cooperative Finance Corporation (CFC), our supplemental lending agency.

These models, rules and regulations as set by our lending agencies (REA & CFC) and the Bylaws of this Cooperative do not allow the retirement of capital credits upon termination or expiration of a contract. The Bylaws make no such provisions; therefore, the waiting period on retirement cannot be waived for corporate or other legal entity patrons who cease to exist. It is also provided in the Bylaws that "If .. the Board of Directors shall determine that the finances of the Cooperative will not be impaired thereby, the capital credited to patrons' accounts may be retired in full or in part". The rules



General Services Administration
FAR Secretariat
18th & F Streets, NW
Room 4041
Washington, DC 20405

91-13-203

page 2 continued

proposed in the FRN (FAR Case 91-13) obviously conflict with our Bylaws as detailed in section 52-241-13 which would require retirement other than normal by this Cooperative and would discriminate against other patrons/members.

The changes proposed may also require T.H.E.C. to receive approval from REA and CFC prior to any retirement of capital credits based on the Cooperative's equity position and will not allow any capital credit payments of more than 25% of the Cooperatives prior years margins. If that approval is necessary it will require significant lead time for a response from REA and must be approved by the Board of Directors prior to action from REA. These requirements are a direct result of our mortgages with REA and CFC and failure to meet them could result in default if not followed properly.

On behalf of T.H.E.C. this letter has been sent to indicate our concerns with the proposed rule on the acquisition of services from utilities (FAR Case 91-13). We believe these proposed regulations conflict with the existing Bylaws of this Cooperative, conflict with REA & CFC mortgages, rules and regulations, would financially impact the equity levels of several rural electric cooperatives, and promote discrimination amongst members of this Cooperative.

If you have any questions or comments please feel free to contact me at the address or phone number listed on this letterhead.

Respectfully



Bradley J. Schardin
Manager



Arkansas Electric
Cooperatives, Inc.

8000 Scott Hamilton Drive
P. O. Box 194208
Little Rock, Arkansas 72219
(501) 570-2200
FAX (501) 570-2205

July 22, 1991

91-13-204

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, D.C. 20405

Dear Sirs:

The purpose of this letter is to convey to you the comments and concerns of Arkansas Electric Cooperatives, Inc. (AECI), regarding the proposed changes in the Federal Acquisition Regulations for utility services, 48 C.F.R. Parts 6, 8, 15, 41, and 52. AECI is the statewide service organization for 17 rural electric cooperatives, and those cooperatives service over 318,000 customers in the state of Arkansas.

The federal government is a valued member-customer of many of the 17 rural electric cooperatives in Arkansas, and it is our hope and wish that this relationship will continue. However, some of the proposed changes in the government's acquisition regulations would make it difficult, if not impossible, for the cooperatives to continue providing service to the federal government.

The most troubling of the proposed regulation changes is the required service contract language regarding capital credits. Rural electric cooperatives operate on a non-profit basis. Customers are owners and members of the servicing cooperative. These members contribute operating capital to the cooperative through payments for electric service.

At the end of a fiscal year, the cooperative is required, by its bylaws and by state and federal law, to return in the form of capital credit certificates any excess operating capital to its members on a pro rata basis reflecting the amount of electric service purchased by that member during the fiscal year. A cooperative is required to treat all members equally and fairly in the allocation of capital credits.

However, the bylaws of most cooperatives give the board of directors the sole discretion to choose the time and the

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amount of any retirement (pay-off) of capital credit certificates. Such discretion is absolutely necessary in order to properly manage the capital requirements of the cooperative.

In order to provide service to a federal facility, the service contract language contained in proposed section 52.241-13 would require a rural electric cooperative to violate its own bylaws, jeopardize its cooperative status under state law, jeopardize its tax exempt status under federal law, and violate the terms of its Rural Electrification Administration (REA) mortgage or mortgages.

We agree completely with the concept stated in subsection (a) of section 52.241-13. As a customer of a rural electric cooperative, the federal government is a member of that cooperative and is entitled to receive capital credits as provided in the bylaws of that cooperative. However, the language of subsections (b) and (c), if required in service contracts with the federal government, would cause serious problems to a cooperative.

Subsection (b) would require that within 60 days of the close of a fiscal year, a cooperative must inform the federal government of the amount of capital credits to be paid to the government and the date of the payment. This presents three problems.

First, 60 days may not be enough time for a cooperative to receive any capital credits due it from generation and transmission or other cooperatives, close its books, have its financial statements audited, and determine whether, or in what amount, capital credits will be allocated, much less paid.

Second, providing the amount and time of a capital credit retirement at the end of each fiscal year would present serious problems for a cooperative. While cooperatives are required by state and federal law to allocate capital credits in years resulting in positive operating margins, retirement of these capital credits is, in almost every instance, only made at the discretion of the board of directors.

As with any business, the capital needs of a cooperative can change quickly. In addition, a cooperative with an REA mortgage is required by the REA to reach a certain level of capitalization before capital credits may be retired. It is absolutely essential that the board of directors have the

91-13-204

discretion to postpone a retirement of capital credits due to the financial condition of the cooperative.

If a commitment to retire a certain amount of capital credits on a certain date must be made to the federal government within 60 days of the end of every fiscal year, the board of directors would be stripped of that discretion given it by almost all cooperative bylaws and serious problems would almost certainly result.

It is possible that on the date of a promised retirement, the cooperative's capital situation would be such that, if any retirement at all was possible, it might be able to retire only capital credits belonging to the federal government, ignoring those of other cooperative members. Such a retirement would certainly violate the cooperative's bylaws, would violate state and federal laws regarding cooperatives and their tax exempt status, and would be completely unfair to the other members who have capital credit retirement rights equal with those of the federal government.

In addition, it is possible that on the date of a promised retirement, the cooperative's capital situation would be such that after making the retirement, the cooperative would not meet the capitalization requirement of its REA mortgage. In these circumstances, the REA would have the authority to treat the retirement as an event of default under the mortgage.

Subsection (c), which would require a cooperative to retire all of the federal government's outstanding capital credits upon the expiration or termination of the government's service contract, would greatly magnify the problems discussed above.

The federal government is entitled to capital credits as a member of a rural electric cooperative, and it is entitled to have those capital credits retired pursuant to the relevant provisions of the cooperative's bylaws. However, the federal government should not be entitled to a priority or preference over other cooperative members in the retirement of capital credits.

Likewise, the federal government should not be entitled to force a cooperative into an action that would jeopardize the cooperative's financial health, violate the cooperative's bylaws, violate the provisions of the cooperative's REA mortgage, and violate both state and federal law.

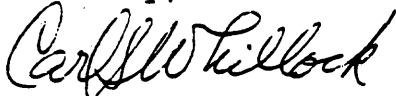
91-13-204

If a cooperative is forced to pay all of the outstanding capital credits of the federal government immediately upon termination of the government's service contract, the cooperative will also be required, under its bylaws and state and federal law, to at the same time retire all outstanding capital credits of all cooperative members. In most instances, the retirement of all outstanding capital credits will mean financial ruin for the cooperative.

AECI and its 17 member cooperatives strongly urge you to reconsider the inclusion of subsections (b) and (c) in 48 C.F.R. section 52.241-13. The potential harm of these two subsections to rural electric cooperatives, although unintentional, would be severe. In addition, AECI and its member cooperatives would like to adopt by reference the comments submitted by the National Rural Electric Cooperative Association regarding section 52.241-13 and the other proposed changes to the Federal Acquisition Regulation.

Thank you for the opportunity to submit these comments. If you have any questions or would like to discuss this matter further, please let me know.

Sincerely,



Carl S. Whillock
President and CEO

CSW:spw

MARSHALL COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

P O BOX 250

PHONE 936-3161

PLYMOUTH INDIANA 46563

91-13-205

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, D.C. 20405

Dear Sir:

Subject: Utility Contract Provisions
52.241-13 Capital Credits

Our Rural Electric System will not sign a contract for electric service that contains these provisions as published in the Federal Register 56-23982

Our comments apply to the following clauses under 52.241-13 Capital Credits.

- A. Our by-laws are applicable to all members including the federal government. These by-laws reserves to the Board of Directors the authority to determine when capital credits are redeemed. They do not specify a time or method of payment to any member. Consequently, we cannot change the by-laws by contract.
- B. Sixty days are unreasonable to provide notification. You are exceeding IRS requirements. Since the by-laws reserves the right to pay capital credits to the Board of Directors, we cannot change the by-laws by contract with a consumer.
- C. Upon termination of service, capital credits would be payable to the federal government under the same conditions as to any other member. Under our cooperative by-laws the federal government would have the same rights as any other member. They should not have more rights than other members. Consequently, they should not jeopardize the business for other members by asking for the capital they furnished upon termination of service.

91-13-205

D. We don't object to the payment to U.S. treasurer through contracting offices. However, we do object to keeping your contract number as part of the capital credit records. Our computer program is not set up to provide this information.

Yours truly,
Marshall County REMC

Wallace E. Summerville
Wallace E. Summerville
General Manager

WES:jm



91-13-206

LAMB COUNTY ELECTRIC COOPERATIVE, INC.
P. O. BOX 1071 LITTLEFIELD, TEXAS 79339

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th. & F Streets, N.W., Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13

We respectfully submit the following comments concerning FAR Case 91-13:

We believe, as stated, that all members are entitled to receive capital credits without discrimination. However, one of the primary reasons that the cooperatives have been a success is that our members furnish a substantial portion of the capital for the organization in the form of capital credits. To state that the cooperative is obligated to pay capital credits at a specific time could, and probably would, be discriminatory to other members of the cooperative and/or detrimental to the financial condition of the cooperative.

52.241-13 Capital Credits

Proposed Language:

(a) The Government is a member of the (cooperative name) _____, and as any other member, is entitled to capital credits consistent with the by-laws of the cooperative, which states the obligation of the Contractor to pay capital credits and which specifies the method and time of payment.

(b) Within 60 days after the close of the Contractor's fiscal year, the Contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing a list of accrued credits by the contract number, year, and delivery point. Also, the Contractor shall state the amount of capital credits to be paid to the Government and the date the payment is to be made.

(c) Upon termination or expiration of this contract, unless the Government directs that unpaid capital credits are to be applied to another contract, the Contractor shall make payment to the Government for the unpaid credits.

91-13-206

We suggest the following language:

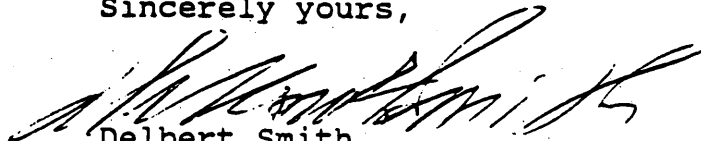
(a) The Government is a member of the (cooperative name) _____, and as any other member, is entitled to capital credits consistent with the by-laws of the cooperative.

(b) Each year the cooperative shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing a list of accrued credits by the contract number, year, and delivery point. Also, the cooperative shall state the amount of capital credits to be paid to the Government and that such capital credits will be paid without discrimination to any member according to the by-laws of the cooperative.

(c) Upon termination or expiration of this contract, the Government will inform the cooperative where to send capital credit retirement checks when capital credits are retired according the by-laws of the cooperative.

We at Lamb County Electric Cooperative urgently request that you give serious consideration to the suggestions contained herein. We would be happy to furnish further information upon request.

Sincerely yours,



Delbert Smith
General Manager



**Black Hills
Electric Cooperative, Inc.**

P.O. Box 112
Custer, SD 57730
Telephone: 605/673-4461

91-13-207

July 18, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W. Room 4041
Washington, D.C. 20405

Dear Sir:

Black Hills Electric Cooperative, Inc. wishes to submit the following comments of FAR Case 91-13.

Our comments deal specifically with section 52.241-13 Capital Credits.

Paragraph (a):

Our Bylaws state that, "In the furnishing of electric energy, the Cooperative's operation shall be so conducted that all patrons, members and non-members alike, will through their patronage furnish capital for the Cooperative". They go on to state, "The Cooperative is obligated to pay by credits to a capital account for each portion all such amounts in excess of operating costs and expenses."

Black Hills Electric Cooperative, as is any cooperative, is already obligated by law and by Cooperative Bylaws to accrue capital credits and retire them according to the Bylaws. Paragraph (a), therefore, is redundant and not needed.

Paragraph (b):

Black Hills Electric Cooperative by law already informs each member and non-member alike of their capital credit allocations. The first sentence in Paragraph (b) is therefore redundant and not needed. We retire capital credits on a twelve-year revolving cycle. These capital credits are only retired when and if the financial condition of the Cooperative is not impaired and the retirement is approved by the Board of Directors and REA. We cannot predict, with reasonable accuracy, the date, amount of payment, financial condition of the Cooperative, Board approval, or REA approval of a transaction that might possibly occur twelve years from now. Paragraph (b) is not feasible and therefore should be deleted.

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91-13-207

Paragraph (c):

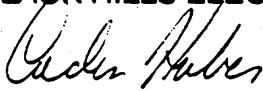
Black Hills Electric Cooperative, as most cooperatives, does not retire capital credits upon termination of service. Retiring capital credits upon termination of every service would be an accounting nightmare and put a heavy financial burden on the remaining membership. We believe that the current member should pay the operating and capital cost to greater extent than someone who has left the system. That is why we retire capital credits on a twelve-year cycle instead of a twenty-year cycle. In addition, plant is financed for 35 years, and after termination of a service, debt service and interest payments have to be made. The early retirement of capital credits would put a strain on our cash budget and ability to pay all of our bills in a timely fashion.

In summary, Paragraphs (a) and (b) are not necessary, as they are standard procedure for accounting and handling capital credits. Paragraphs (b) and (c) would impose unreasonable conditions on the Cooperative and membership. Also, these unreasonable conditions would place an unfair financial burden on the remaining membership.

We request that section 52.241-13 Capital Credits be deleted in its entirety.

Sincerely,

BLACK HILLS ELECTRIC COOPERATIVE, INC.


Crede W. Huber
General Manager

CWH/skg

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, NW
Room 4041
Washington, DC 20405

RE: FAR CASE 91-13

Ladies and Gentlemen:

On behalf of the members of Jackson Electric Membership Corporation, I am pleased to submit comments on the rule proposed in the May 24, 1991 edition of the Federal Register concerning "Federal Acquisition Regulations; Acquisition of Utility Services."

In regards to FAR Case 91-13, there are 2 specific areas which are not only troubling to electric cooperatives but which might also change the tax exempt status under which cooperatives operate. These 2 specific areas are discussed below:

I. Part 52.241-B Connection Charges.

- A. Under the proposed rules, the cost of providing connection facilities for the government would be shifted from the government to the other members. Unfairness is an issue, but probably this is also a violation of the bylaws and state statutes which govern the cooperative. The cooperative could also be exposed to unethical and maybe unlawful disbursement of capital credits. The procedure that would be created from this rule would be inconsistent with the way in which cooperatives operate as member-owned capital credit systems, not patronage dividend systems.
- B. The drafter of the proposed rule seems to be referencing a non-exempt, subchapter T cooperative in making this change. The non-exempt cooperative is subject to possibly accelerated payment rules under the tax law. Their earned equity or excess margins are, as a rule, referred to as "patronage dividends." The term "capital credits" is commonly used in

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referring to excess margins only by 501(c) (12) tax-exempt organization such as the EMCs.

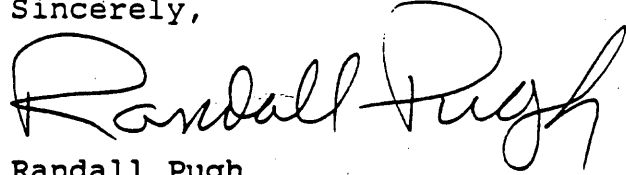
II. Part 52.241-13 Capital Credits.

- A. Governments entitlement to capital credits "consistent with the bylaws of the cooperative..." as stated in subsection (a) is acceptable, but is not entitled to become a privileged class of customer.
- B. Furnishing a list of accrued capital credits within 60 days after the close of the cooperative fiscal year is not acceptable because with subsiding (G&T) capital credits and other unknowns to consider it may be impossible to determine. Also, in subsection (c) upon termination all unpaid capital credits would have to be paid to the government. Subsections (b) and (c) would cause bylaws to be violated in most cases. Also, this could violate the FIFO requirement in most cooperative bylaws. If so it would impair a vested contractual obligation and violate the constitutional prohibition against laws impairing vested contractual rights in private contracts.
- C. This sets a precedent which jeopardizes the basic means of capitalizing a cooperative. The capital credit in reality would become a liability rather than equity.
- D. Mandatory payment erodes capital and capital ratios which REA requires in its mortgage instrument and other lenders rely upon in their loan underwriting considerations for cooperatives.
- E. By virtue of the erosion of capital ratios and the shift of cooperatives to more omnibus financial markets, cooperative consumers will have to pay higher rates to fund higher interest cost.
- F. Stating the "date payment is to be made..." for cooperatives which don't have a regular cycle would be a problem. This problem could be handled if the rules made clear that this requirement applies only if the cooperative has some regular cycle that it tries to follow and that circumstances could change that. For example: "Cooperative anticipates that payment will be made on or about December 1, 2011."
- G. This out-of-turn payment is unfair to the other cooperative members who cannot have their capital credit until many years later or upon death instances where cooperatives pay "deceased capital credits." This requirement may change the cooperative tax exempt status because it could be inconsistent with the requirements of the IRS for cooperative status, that the cooperative operates on a "cooperative basis."

91-13-28

Due to the concerns expressed in this letter as to the unfairness and possible change of our tax exempt status, this proposed rule should not be implemented as is.

Sincerely,

A handwritten signature in cursive script that reads "Randall Pugh". The signature is written in black ink and is positioned to the right of the typed name.

Randall Pugh
President/CEO

\nh

91-13-209

GENERAL SERVICES ADMINISTRATION
Federal Acquisition Regulation;
Acquisition of Utilities Services
FEDERAL REGISTER, Volume 56, No. 101, May 24, 1991
48 CFR, Parts 6, 8, 15, 41, and 52

FAR
Case 91-13
PROPOSED RULE

41.007 Contract Clauses.

These provisions require executive agencies to include certain contractual clauses on a "substantially the same as" basis whenever contracting with a utility. In particular, this provision requires contracting officers to insert the clause at 52.241-13, Capital Credits, when the agency would be a member of a cooperative and entitled to capital credits. The electric cooperatives find certain provisions of this contract clause to be especially troubling. Specific comments on the clauses are set forth below.

52.241-13 Capital Credits

-13(a) refers generally to the entitlement to capital credits. Comments: The proposed clause says that bylaws specify the method and time of payment of capital credits. In reality, most electric cooperative bylaws state that if, prior to dissolution or liquidation, the Board determines the financial condition of the cooperative will not be impaired, capital credits may be retired in full or in part. In fact, this language was first proposed to electric cooperatives by the Rural Electrification Administration in REA Bulletin 101-5, published in January, 1967. The bylaws generally do not specify the time of payment.

In addition, not all bylaws even specify the "method" of payment. Some cooperative bylaws allow limited discretion to the Board of Directors to determine how capital credits should be retired.

-13(b) describes the requirement for notifying contracting officers about accrued capital credits. Comments: This clause would require not only information that is potentially unavailable but requires information that is not made available to other consumers and would offer no benefit to the contracting agency. The clause requires a written list of credits by contract number, year, and delivery point within 60 days after the fiscal year end. Electric cooperatives may not establish the amount of accrued capital credits within 60 days after the fiscal year end and normally assign capital credits based upon the total usage of electricity by a member, not by contract number, year and delivery point. Therefore, this clause would impose

additional accounting and administrative requirements on electric cooperatives. No other member receives this type of specific information. In addition there surely could be no benefit to the contracting agency as this information is irrelevant to the assignment and payment of capital credits. The contracting agency should not impose this additional expense on electric cooperatives when there is no benefit to be gained, unless it is willing to compensate the cooperative. If the cooperative is not compensated these additional costs are included in the cost of service based upon the not-for-profit nature of electric cooperatives.

The clause also requires a statement of the amount of capital credits to be paid and the date payment is to be made. If this is referring to the same fiscal year referred to in sentence number one, the requirement regarding amount of capital credits to be paid is redundant, and the requirement of specifying a payment date is impossible to provide. It is uncertain whether payment of those capital credits will ever be made prior to liquidation. If this second sentence of clause (b) is intended to refer to other capital credits that might be retired during the upcoming year, the decision will quite possibly not have been made within 60 days after the fiscal year end. This clause requires information that again is of no use or benefit and simply increases the administrative burden in complying with federal contracts.

-13(c) refers to the ending of the contract between the government and the cooperative.

Comments: This clause would require cooperatives to pay all unpaid capital credits upon the end of its contract unless those credits are applied to another contract. For the vast majority of electric cooperatives this clause would create a violation of the bylaws. Most cooperative bylaws provide that capital credits shall be retired on a first-in, first-out basis. A contractual requirement to pay capital credits earlier would lead to a violation of this bylaw language and might expose the cooperative to legal liability. Surely there is no police purpose intended by this required contractual clause by which the federal government can justify impairment of the preexisting contracts established between cooperatives and their members by the bylaws.

Furthermore, such a required clause might create a conflict between the regulations of the General Services Administration and the Rural Electrification Administration. The Rural Electrification Administration has set forth guidance on the retirement of capital credits. The REA has also provided in its mortgage with its borrowers that capital credits cannot be paid unless the cooperative has achieved a certain equity position. If cooperatives were forced to pay capital credits pursuant to this contract clause it might lead to an automatic breach of their mortgage with REA. Thus, a conflict between federal regulations and contracts would be created.

July 22, 1991

91-13-209

-13(d) refers to payment of capital credits by certified check.

Comments: This paragraph would require all checks to cite a current or last contract number and indicate whether the check is partial or final payment for all capital credits accrued. Again, we feel that there is no benefit to the federal government in receiving this information and that it serves to increase the administrative burden on cooperatives.

Recommendations: We recommend that paragraph (a) of the Capital Credits clause be concluded at the end of the phrase "consistent with the bylaws of the cooperative." In other words, we recommend eliminating the last phrase of that paragraph.

With respect to paragraph (b) we recommend deleting the 60-day time frame and, instead, make reference to the notice requirements established by REA. In lieu of this change we recommend that the timeline be lengthened to at least 120 days. In addition, we recommend that the end of paragraph (b), following the phrase "in writing a list of," be replaced with the following language: "capital credits which have accrued to the contracting agency during the year and a statement of whether the contractor intends to retire capital credits during the upcoming year."

We recommend that paragraph (c) be deleted in its entirety.

We recommend that the last sentence of paragraph (d) be eliminated.

91-13-210

MOON LAKE ELECTRIC ASSOCIATION • PO BOX 278 • 188 WEST 2ND NORTH • ROCHESTER UTAH 84066 • PH 702 244

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W. Room 4041
Washington, D. C. 20405

RE: FAR Case 91-13

Dear Sirs:

A proposed rule was recently published in the Federal Register concerning contractual responsibilities between utilities and the Federal Government. We have serious concerns about some of the language in Section 41.007(j) and the burdensome requirements it would place on our business to comply with administering capital credits for the government. Please consider the following comments on part "52.241-13 Capital Credits":

Paragraph (b) 60 days after the close of the fiscal year is too little time to generate capital credit information. 120 - 180 days would enable the cooperatives to timely submit allocated notices to our membership. Also, because we are on a 15 year rotation cycle combined with refunding a percentage, we are not able to state when a refund payment would be made on any particular years capital credits. This is determined year by year by our Board of Directors.

Paragraph (c) Our cooperative does not feel it appropriate to issue a capital credit refund to any one customer upon termination of that customer's service. Years ago Moon Lake did refund to deceased persons' estates but stopped this practice due to the discrimination of this type of refunding. For the Federal Government to request refunds out of the normal sequence, places a like discrimination concern on our policies as well as an additional administrative cost. Refunding capital credits upon termination of service or contract could place an extreme financial burden upon our organization. We have, for

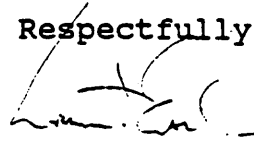
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example, one customer with capital credits totalling more than \$13 million. If this customer were to terminate service and Moon Lake were obligated to pay capital credits at that time, we would be in serious trouble.

Paragraph (d) Payment by certified check is an administrative burden which will increase the cost to issue capital credit refunds and slow the refunding process.

With slight modifications in the proposed rules, the government will be able to protect its interest without placing an undo burden upon the cooperatives in this great country. Thank you for your consideration of this issue.

Respectfully,



Grant J. Earl
General Manager

GJE:srd



91-13-211

SOUTH RIVER ELECTRIC MEMBERSHIP CORPORATION

701 East Broad Street P.O. Box 231 Telephone 919-892-8071 Dunn North Carolina 28334-0231

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N. W.
Room 4041
Washington, D. C. 20405

Subject: FAR Case 91-13

Dear Sir:

As Executive Vice-President and General Manager for South River Electric Membership Corporation, a North Carolina Electric Membership Corporation, we have a serious concern in reference to the above named case. We are particularly troubled with Section 52.241-13, entitled "Capital Credits".

Paragraph (b) would require a corporation to furnish the FAR a list of accrued capital credits within 60 days after the close of its fiscal year, also include the contract number, year, and delivery point. It would also require a stated date for payment. These proposed regulations are in contrast to existing State and Federal Law, therefore, should be eliminated.

The requirement of furnishing a list of accrued capital credits within 60 days is contrary to existing legal and administrative policies. Presently, Corporations are not required to mail individual capital credit notices to their consumers, they may satisfy capital credit notification requirements by publishing a notice to the consumer informing them on how they can calculate their own capital credits for a given year. This is done much cheaper and allows more capital credits to each member because of holding down the expense of individual notices. Notification within 60 days may be impossible because many cooperatives are members of Power Supply Cooperatives thereby not receiving its own capital credit allocation much later than 60 days. Also, the Federal law allows five months after the cooperatives year end to file its nonprofit income tax return for that year.

Notice of the date of payment of capital credits presents a problem until at such time the cooperative's board of directors authorizes the retirement of capital credits. It is only then that the cooperative can give a date as to when the capital credits payment is to be made.

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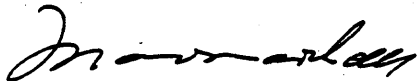
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Paragraph (c) of section 52.241.13 also raises concerns that have been previously expressed. Requiring a cooperative to pay capital credits at the expiration of the contract would be in violation of State and Federal legal principles.

We respectfully request that the proposed regulations be changed to abide by the same legal principles and administration as the consumers do.

Sincerely,

SOUTH RIVER ELECTRIC MEMBERSHIP CORPORATION



Marvin O. Marshall
Executive Vice President &
General Manager

MOM/lj

91-13-217

LUMBEE RIVER ELECTRIC MEMBERSHIP CORPORATION

Headquarters: Post Office Box 830
Red Springs, North Carolina 28377-0830
Telephone: (919)843-4131 FAX: (919)843-2079



91-13-212

July 19, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, DC 20405

Gentlemen:

Ref: FAR Case 91-13

I am writing this letter to express my opposition to proposed language to be added, at section 41.007(j), to all contracts between cooperative utilities and Federal facilities.

Each year the Cooperative furnishes to all members a list of all capital credits that they have accrued for the year or a factor that they can use to calculate their capital credits. Capital credits are accrued on each active service a member has in his name at a particular location. The member has a different account number for each service. The capital credits are accumulated from year to year by account numbers. An attempt to accrue capital credits by contract numbers will require more administrative time which will increase cost to members.

Lumbee River EMC pays capital credits on a 20-year revolving cycle. For example, in October, 1991, we will pay 1971 capital credits; in October, 1992, we will pay 1972 capital credits; etc. Each member's capital credits are held and used for 20 years to offset the need for borrowed funds. These funds are used to build new services and maintain existing electric plant. Payment of capital credits to Federal facilities prior to the 20-year time period would be unfair to other members which is a violation of Cooperative principles.

For the above reasons, I am strongly opposed to paragraphs (b) and (c), 52.241-13 Capital Credits, to be added to contracts between cooperatives and Federal agencies.

Sincerely,

Ronnie E. Hunt
General Manager

REH/jh

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Alaska Village Electric Cooperative, Inc.

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W. Room 4041
Washington, D.C. 20405

Subject: FAR Case 91-13

Dear FAR Secretariat:

The above proposed regulation changes, specifically Section 52.241-13 Capital Credits are not acceptable to member owned utilities.

- A) This paragraph contradicts paragraphs (B), (C) and (D). It states that the member is entitled to capital credits consistent with the by-laws of the Cooperative. Paragraphs (b), (c) and (D) require changes to the by-laws and discriminates in favor of federal agency members.
- B) Alaska Village Electric Cooperative's fiscal year ends December 31. However, our December 31 billing does not take place until January 25. Immediately after a preliminary closing of the December 31 books, our records are immediately audited as per REA regulations. This process is time consuming; therefore our audited financial records are not available for Board of Directors approval until the end of March. After approval by the Board of Directors patronage can be assigned to members. At this time, it is conceivable that an amount satisfactory to the Board of Directors and in compliance with REA Rules and Regulations will be approved for retirement and payment. Capital credit payments will not be issued until a minimum of 120 days after the close of the fiscal year. Our by-laws and Equity Management program sets our anticipated retirement schedule in an effort to maintain required equity levels.

Existing Cooperative bookkeeping methods maintain capital credit records by consumer number not by contract number. To make changes including by-law changes of this magnitude would be cost prohibitive and time consuming.

- C) A major component of working capital for a member owned utility consists of retained capital credits. This is the purpose and function of these monies. Arbitrary changes to the handling of capital credits must be reviewed and approved by all members with subsequent by-law changes.

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Depending on the financial condition of each utility, a portion of capital credits may be retired in full or in part upon approval by the Board of Directors. Retirements are made non-discriminately (regardless of affiliation) on a first in, first out basis. AVEC is currently maintaining a 15 year retirement schedule.

As an electric utility dependent on Rural Electrification Administration loan funds to subsidize major construction, it is not feasible to retire and pay the majority of all outstanding capital credits. A major portion of our assigned capital credits is allocated to Federal facilities including FAA, BIA, USDOT, etc. The termination or expiration of any large contracts (and resultant payments) of allocated capital credits would substantially impair the financial condition or jeopardize the financial stability of this utility.

- D) The requirement to make payment by "certified check" is also cost prohibitive and time consuming. The majority of utilities have special retirement accounts to manage the rotation of capital credits. Special certified checks are not warranted.

Please review and carefully study the implications of these proposed rules for a chosen few. Government entities can better understand the requirement of utilities to have readily available assets to invest in on-going construction and maintenance. Otherwise the capability to provide adequate service to these or other government agencies when required in the future could be jeopardized. Our consumers currently pay the highest electricity in the country. The proposed requirement to make early payments for capital credit could force borrowing at higher interest rates, thus further increasing our costs of service.

We do not think this is a proper area for the GSA to try to regulate. You would force changes in thousands of Cooperative by-laws which has evolved for over 50 years. The U.S. Dept. of Agriculture through REA has developed model by-laws which in fact deal with the real problems of trying to run a Cooperative starting with zero equity. That is the foundation basis for these by-laws.

If you have any questions or comments, please contact the undersigned.

Sincerely,



Patricia L. Stephenson
Manager, Finance & Control

PLS/sm
letters.158

cc: NRECA
Western Area Electric



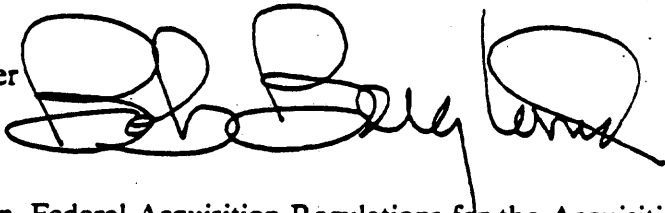
National Rural Electric Cooperative Association

1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Telephone: 202 857-9500

91-13-2/3

IMMEDIATE ATTENTION REQUIRED

TO: All Member Systems

FROM: Bob Bergland, General Manager 

DATE: July 12, 1991

RE: General Services Administration, Federal Acquisition Regulations for the Acquisition of Utility Services (FAR Case 91-13) -- COMMENTS DUE JULY 23

The General Services Administration (GSA) recently published a proposed rule on the acquisition of services from utilities (56 Federal Register 23982). As part of this rule, the GSA is proposing at section 41.007(j) that the following language be added to all contracts between Federal facilities and cooperative utilities (we find paragraphs (b) and (c) are specifically troubling):

52.241-13 Capital Credits

(a) The Government is a member of the (cooperative name) _____, and as any other member, is entitled to capital credits consistent with the by-laws of the cooperative, which states the obligation of the Contractor to pay capital credits and which specifies the method and time of payment.

(b) Within 60 days after the close of the Contractor's fiscal year, the Contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing a list of accrued credits by contract number, year, and delivery point. Also, the Contractor shall state the amount of capital credits to be paid to the Government and the date the payment is to be made.

(c) Upon termination or expiration of this contract, unless the Government directs that unpaid capital credits are to be applied to another contract, the Contractor shall make payment to the Government for the unpaid credits.

(d) Payment of capital credits will be made by certified check, payable to the Treasurer of the United States; and forwarded to the Contracting Officer at _____, unless otherwise directed in writing by the Contracting Officer. Checks shall cite the current or last contract number and indicate whether the check is partial or final payment for all capital credits accrued.

The addition of these clauses to the contracts between rural electric cooperatives and government agencies will profound affect on the accounting systems of electric cooperatives. For this reason, I urge you to submit comments to GSA by July 23, 1991. All comments should be sent to: General Services Administration, FAR Secretariat (VRS), 18th and F Streets, N.W., Room 4041, Washington, D.C. 20405. Your comments must reference FAR Case 91-13.

Should you have any questions regarding these proposed regulations, please contact Michael Oldak, NRECA's Regulatory Counsel, at 202/857-9607.

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 6, 8, 15, 41, and 52
(FAR Case 91-13)

Federal Acquisition Regulation;
Acquisition of Utility Services

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering a rewrite of the FAR coverage dealing with utility services, including the establishment of a new part 41 for this purpose. This proposed rule will replace the existing coverage now located at FAR subpart 8.3, and will provide uniform coverage applicable to all executive agencies. The existing FAR coverage at subpart 8.3 in large measure does not apply to DOD, and it also exempts agency regulatory requirements in the utility area that predated the establishment of the FAR.

DATES: Comments should be submitted to the FAR Secretariat at the address shown below on or before July 23, 1991, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th and F Streets NW., Room 4041, Washington, DC 20405. Please cite FAR Case 91-13 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: For information pertaining to this case, contact Mr. Edward Loeb at (202) 501-4547. For general information, contact Ms. Beverly Fayson, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 501-4735. Please cite FAR Case 91-13.

SUPPLEMENTARY INFORMATION:**A. Background**

In response to the need to provide uniform utility coverage in the FAR, a major rewrite of the existing FAR coverage was undertaken. The principle proposed changes follow:

(1) The proposed FAR part 41 would apply across the board to all executive agencies and would also enable agencies to delete most of the regulatory

coverage in their agency FAR supplements. The current FAR subpart 8.3 provides that agencies' procedures predating the FAR may continue to be used. In addition, subpart 8.3 specifically exempted DOD from much of the FAR coverage.

(2) Substantial additional guidance for contracting officers in acquiring and administering utility service contracts was included.

(3) Additional definitions applicable to utility service contracts were established.

(4) Coverage was established delineating the existing statutory and delegated authority for utility service contracting.

(5) FAR clauses to be used on a "substantially the same as" basis were established.

(6) Substantive coverage providing for handling rate changes by the agencies was established. This coverage would enable agencies to handle such matters without automatically referring such matters to GSA for action.

(7) Coverage was added providing generally for the use of a Standard Form 33 to acquire utility services.

(8) "Standard" specification formats have been established for use in acquiring utility services. Such formats will not be included in the FAR but will be available for agency use.

(9) "Standard" annual utility service review formats have been established for use in acquiring utility services. Such formats will not be included but will be available for agency use.

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most public utility companies are not small business.

Therefore, an Initial Regulatory Flexibility Analysis has not been prepared. However, comments are invited from small businesses and other interested parties. Such comments will be considered in the formulation of a final rule. Comments from small entities concerning the affected FAR subpart will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite 5 U.S.C. 610 (FAR Case 91-13) in correspondence.

C. Paperwork Reduction Act *

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping information collection requirements or collection of information from offerors,

contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 6, 8, 15, 41, and 52

Government procurement

Dated: May 23, 1991.

Albert A. Vicchiola,
Director, Office of Federal Acquisition Policy.

Therefore, it is proposed that 48 CFR parts 6, 8, 15, 41, and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 6, 8, 15, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 6—COMPETITION
REQUIREMENTS**

2. Section 6.302-1 is amended by revising paragraph (b)(3) to read as follows:

6.302-1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(b) . . .

(3) When acquiring utility services (see 41.001), circumstances may dictate that only one supplier can furnish the service (see 41.004); or when the contemplated contract is for construction of a part of a utility system and the utility company itself is the only source available to work on the system.

**PART 8—REQUIRED SOURCES OF
SUPPLIES AND SERVICES**

Subpart 8.3 (8.300-8.309 Removed)

3. Subpart 8.3, consisting of sections 8.300 through 8.309, is removed and reserved.

**PART 15—CONTRACTING BY
NEGOTIATION**

15.812-2 (Amended)

4. Section 15.812-2 is amended in paragraph (a)(3) by removing "Subpart 8.3" and inserting in its place "part 41".

**PART 41—ACQUISITION OF UTILITY
SERVICES**

5. Part 41, consisting of sections 41.000 through 41.010, is added to read as follows:

Sec.
41.000 Scope of part.
41.001 Definitions.
41.002 Applicability.
41.003 Statutory and delegated authority.
41.004 Acquiring utility services.

Sec.

- 41.004-1 Policy.
- 41.004-2 Procedures.
- 41.004-3 GSA assistance and approval.
- 41.004-4 GSA areawide contracts.
- 41.004-5 Separate contracts.
- 41.004-6 Interagency agreements.
- 41.005 Pre-award contract review.
- 41.006 Administration.
- 41.006-1 Monthly and annual review.
- 41.006-2 Rate changes and regulatory intervention.
- 41.007 Contract clauses.
- 41.008 Utility services contract form.
- 41.009 Formats for utility service specifications.
- 41.010 Formats for annual utility service review.

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

41.000 Scope of part.

This part prescribes policies, procedures, and contract format for the acquisition of utility services. (See 41.002(b) for services that are excluded from this part.)

41.001 Definitions.

As used in this part.

Areawide contract means a contract entered into between the General Services Administration (GSA) and a utility service supplier to cover the utility service needs of Federal agencies within the franchise/service area of the supplier. Each areawide contract includes an "Authorization" form for requesting service, connection, disconnection, or change in service.

Authorization means the document executed by the ordering agency and the utility supplier to order service under that areawide contract.

Connection charge means an amount to be paid by the Government to the utility supplier for the required connecting facilities, which are installed, owned, operated, and maintained by the utility supplier (see Termination liability).

Delegated agency means an agency that has received a written delegation of authority from GSA to contract for utility services for periods not exceeding ten years (see 41.003(b)).

Federal Power and Water Marketing Agency means a governmental entity that produces, manages, transports, controls, and sells electrical and water supply services to customers.

Franchise service territory means a geographical area, defined or granted to a specific utility service supplier(s) to supply the customers in that area.

Intervention means action by GSA or a delegated agency to formally participate in a utility regulatory proceeding on behalf of all Federal agencies.

Multiple service locations means the various locations or delivery points in the utility supplier's service area to which it provides service under a single contract.

Rates includes rate schedules, riders, rules, terms and conditions of service, and other tariff and service charges.

Separate contract means a utility services contract (other than a GSA areawide contract, an authorization under an areawide contract, or an interagency agreement), to cover the acquisition of utility services at a specific delivery point(s).

Termination liability means a contingent Government obligation to pay a utility supplier the unamortized portion of a connection charge in the event the Federal Government terminates the contract before the cost of connection facilities has been recovered by the utility supplier (see Connection charge).

Utility service means a service such as furnishing electricity, natural or manufactured gas, water, sewerage, thermal energy, chilled water, steam, hot water, or high temperature hot water. The application of part 41 to other services (e.g., rubbish removal, snow removal) may be appropriate when the acquisition is not subject to the Service Contract Act of 1965 (see 37.107).

41.002 Applicability.

(a) Except as provided in paragraph (b) of this section, this part applies to the acquisition of utility services for the Federal Government, including connection charges and termination liabilities.

(b) This part does not apply to—
(1) Utility services produced, distributed, or sold by another Federal agency. In those cases, agencies shall use interagency agreements (see 41.004-6);

(2) Utility services obtained by purchase, exchange, or otherwise by a Federal power or water marketing agency incident to that agency's marketing or distribution program;

(3) Cable television (CATV) and telecommunications services;

(4) Acquisition of natural or manufactured gas when purchased as a commodity;

(5) Acquisition of utilities services in foreign countries;

(6) Acquisition of rights in real property, acquisition of public utility facilities, and on-site equipment needed for the facility's own distribution system, or construction/maintenance of Federal Government-owned facilities; or

(7) Third party financed shared-savings projects authorized by 42 U.S.C. 3287; however, agencies may utilize part

41 for any energy savings or purchased utility service directly resulting from implementation of such measures during the term of the contract executed pursuant to 42 U.S.C. 3287 for periods not to exceed 25 years. "Shared-savings project" means a project to reduce energy and demand costs in existing facilities through privately financed energy efficiency and management projects.

41.003 Statutory and delegated authority.

(a) *Statutory authority.* (1) The General Services Administration (GSA) is authorized by section 201 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 481) to prescribe policies and methods governing the acquisition and supply of utility services for Federal agencies. This includes related functions such as managing public utility services and representing Federal agencies in proceedings before Federal and state regulatory bodies. GSA is authorized by section 201 of the Act to contract for utility services for periods not exceeding ten years.

(2) The Department of Defense (DOD) is authorized by 10 U.S.C. 2301, 2304, and 40 U.S.C. 474(3) to acquire utility services for military facilities.

(3) The Department of Energy (DOE) is authorized by the Department of Energy Organization Act (42 U.S.C. 2751, *et seq.*) to acquire utility services. DOE is authorized by the Atomic Energy Act of 1954, as amended (42 U.S.C. 2204) to enter into new contracts or modify existing contracts for electric services for periods not exceeding 25 years for uranium enrichment installations.

(b) *Delegated authority.* GSA has delegated its authority to enter into utility service contracts for periods not exceeding ten years to DOD and DOE, and for connection charges only to the Department of Veteran Affairs. Contracting pursuant to this delegated authority shall be consistent with the requirements of this part. Other agencies requiring utility service contracts for periods over one year, but not exceeding ten years, may request a delegation of authority from GSA at the address specified in 41.004-3(b). In keeping with its statutory authority, GSA will, as necessary, conduct reviews of delegated agencies' acquisitions of utility services to ensure compliance with the terms of the delegation and applicable laws and regulations.

41.004 Acquiring utility services.

41.004-1 Policy.

(a) Subject to paragraph (d) of this subsection, it is the policy of the Federal

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Government that agencies obtain required utility services from sources of supply which are most advantageous to the Government in terms of economy, efficiency, reliability, or service.

(b) Except for acquisitions below the small purchase limitation (see 13.000), agencies shall acquire utility services by a bilateral written contract, which must include the clauses required by 41.007, regardless of whether rates or terms and conditions of service are fixed or adjusted by a regulatory body. Agencies may not use the utility supplier's forms and clauses to avoid the inclusion of provisions and clauses required by 41.007 or by statute. (See 41.004-2(c) for procedures to be used when the supplier refuses to execute a written contract.)

(c) Specific operating and management details, such as procedures for internal agency contract assistance and review, delegations of authority, and approval thresholds, may be prescribed by an individual agency, subject to compliance with applicable statutes and regulations.

(d)(1) Section 8093 of the Department of Defense Appropriations Act of 1988, Public Law 100-202, provides that none of the funds appropriated by the Act or any other Act with respect to any fiscal year by any department, agency, or instrumentality of the United States, may be used for the purchase of electricity by the Government in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements.

(2) The Act does not preclude—

(i) The head of a Federal agency from entering into a contract pursuant to 42 U.S.C. 8297 (which pertains to the subject of shared energy savings including cogeneration);

(ii) The Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2394 (which pertains to contracts for energy or fuel for military installations including the provision and operation of energy production facilities); or

(iii) The Secretary of a military department from purchasing electricity from any provider when the utility or utilities having applicable state-approved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense.

(3) Additionally, the head of a Federal agency may—

(i) Consistent with applicable state law, enter into contracts for the purchase or transfer of electricity to the agency by a non-utility, including a qualifying facility under the Public Utility Regulatory Policies Act of 1978;

(ii) Enter into an interagency agreement, pursuant to 41.004-6 and 17.3, with a Federal power marketing agency or the Tennessee Valley Authority for the transfer of electric power to the agency; and

(iii) Enter into a contract with an electric utility under the authority or tariffs of the Federal Energy Regulatory Commission.

(e) Prior to acquiring electric utility services on a competitive basis in an area governed by a franchise service territory, the contracting officer shall determine, with the advice of legal counsel, by a market survey or any other appropriate means, that such competition would not be inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements. Proposals from alternative electric suppliers must provide a representation that service can be provided in a manner not inconsistent with section 8093 of Public Law 100-202 (see 41.004-1(d)). The representation must be supported with appropriate legal and factual rationale.

41.004-2 Procedures.

(a) Prior to executing a utility service contract, the contracting officer shall comply with parts 6 and 7 and subsections 41.004-1 (d) and (e). In accordance with parts 6 and 7, agencies shall conduct market surveys and perform acquisition planning in order to promote and provide for full and open competition. If competition for an entire utility service is not available, the market survey may be used to determine the availability of competitive sources for certain portions of the requirement. The scope of the term "entire utility service" includes the provision of the utility service capacity, energy, water, sewage, transportation, standby or back-up service, transmission and/or distribution service, quality assurance, system reliability, system operation and maintenance, metering, and billing.

(b) In performing a market survey (see 7.101), the contracting officer shall consider, in addition to alternative competitive sources, use of the following methods:

(1) GSA areawide contracts (see 41.004-4);

(2) Separate contracts (see 41.004-5); and

(3) Interagency agreements (see 41.004-6).

(c) When a utility supplier refuses to execute a tendered contract as outlined in 41.004-1(b), the agency shall obtain a written definite and final refusal signed by a corporate officer of the supplier (or if unobtainable, documentation of any verbal refusal by a corporate officer) and transmit this document, along with statements of the reasons for the refusal and the record of negotiations, to GSA at the address specified at 41.004-3(b). Unless urgent and compelling circumstances exist, the contracting officer shall notify GSA prior to acquiring utility services without executing a tendered contract. After such notification, the agency may proceed with the acquisition and pay for the utility service under the provisions of 31 U.S.C. 1501(a)(8)—

(1) By issuing a purchase order in accordance with 13.5; or

(2) By ordering the necessary utility service and paying for it upon the presentation of an invoice, provided that a determination is approved by the head of the contracting activity that a formal contract cannot be obtained and that the issuance of a purchase order is not feasible.

(d) When obtaining service utilizing either of the methods at subparagraph (c)(1) or (c)(2) of this section, the contracting officer shall establish a utility history file on each acquisition of utility service provided by a contractor. This utility history file shall contain, in addition to applicable documents in 4.803, the following information:

(1) The unsigned, tendered contract and any related letter of transmittal;

(2) The reasons stated by the utility supplier for not executing the tendered contract, the record of negotiations, and a written definite and final refusal by a corporate officer of the supplier (or if unobtainable, documentation of the verbal refusal by a corporate officer);

(3) Services to be furnished and the estimated annual cost;

(4) Historical record of any applicable connection charges;

(5) Historical record of any applicable ongoing capital credits; and

(6) A copy of the applicable rate schedule.

(e) Determinations made and actions taken under (c) of this subsection to execute a contract and related acquisition actions taken under this subsection, are valid for one year only. The contracting officer shall take actions to execute a bilateral written

contract prior to expiration of the one-year period.

41.004-3 GSA assistance and approval.

(a) The GSA office specified in 41.004-3(b) will, upon request, provide technical and acquisition assistance, and will arrange for the furnishing of the services described in this part for any Federal agency, mixed-ownership Government corporation, the District of Columbia, the Senate, the House of Representatives, or the Architect of the Capitol (and any activity under the Architect's direction. (See 41.005, Pre-award contract review.)

(b) Except as otherwise specified in 41.003, agencies shall submit all information required under this part to the General Services Administration, Public Buildings Service, Public Utilities Division (PPU), Washington, DC 20405.

(c) When contracting for utility services meeting the criteria in this paragraph, agencies, except delegated agencies (see 41.003(b)) or agencies performing their own review pursuant to paragraph (d) of this subsection, shall obtain GSA review and approval of their prospective contract document and shall provide the information described in 41.005, if—

(1) The annual cost of the service to be acquired is estimated by the using agency, at the time of initiation of the service or annual review, to exceed \$150,000 for separate contracts, or \$250,000 for authorizations under an areawide contract; or

(2) A connection charge, termination liability, nonrefundable or nonrecurring service charge, or other facilities charge to be paid by the agency is estimated to exceed \$75,000 for separate contracts, or \$125,000 for authorizations under areawide contracts.

(d) Agencies may request, from the GSA office specified at 41.004-3(b), general authority to conduct their own pre-award contract reviews of the proposed utility contracts specified in 41.004-3(c). Such requests shall include a certification from the acquiring agency's Senior Procurement Executive that the agency has

(1) An established acquisition program;

(2) Personnel technically qualified to deal with specialized utilities problems; and

(3) The ability to accomplish its own pre-award contract review.

The request shall also include information regarding the agency's pre-award contract review procedures.

(e) Requests for review and approval of contract actions described in paragraph (c) of this section, shall contain the information required by

41.005 and shall be forwarded to GSA as early as possible, but not later than 20 working days prior to the date new services are to commence or expiration of an existing contract. If GSA does not respond to the referring agency within 20 working days after a proposed utility services contract is received for review and approval (or within a lesser period if agreed upon), the referring agency may complete negotiations and execute the contract.

(f) Agencies seeking GSA contracting assistance for utility services, shall forward such requests (see 41.005) to GSA not later than 120 days prior to the date new services are required to commence or the date of expiration of an existing contract.

41.004-4 GSA areawide contracts.

(a) GSA enters into areawide contracts (see 41.001) for use by Federal agencies in the acquisition of utility services. An agency in an area covered by an areawide contract shall acquire utility services under the areawide contract unless the agency determines that more advantageous rates or terms and conditions of service are available from another supplier under a separately negotiated contract. Upon request, the GSA office specified at 41.004-3(b) will furnish agencies with a list of the areawide contracts showing the types of utility services available and the geographical areas served. GSA will also provide a copy of any areawide contract upon request.

(b) Each areawide contract includes an authorization form for requesting service, connection, disconnection, or change in service. Upon execution of an authorization by the contracting officer, the utility service supplier is required to furnish services, without further negotiations, at the supplier's current, applicable published or unpublished rates, unless other rates, and/or terms and conditions are separately negotiated.

(c) The contracting officer shall implement the areawide contract by executing the authorization, and attaching it to a Standard Form (SF) 28, Award/Contract, along with any supplemental agreements on connection charges, special facilities, or service arrangements to be paid by the agency. The contracting officer shall also attach any specific fiscal, operational, and administrative requirements of the agency, applicable rate schedules, technical items, maps or drawings of delivery points, details on Government ownership, maintenance, or repair of facilities, and other information deemed necessary to fully define the service conditions in the authorization/contract.

(d) Agencies shall provide GSA at the address specified at 41.004-3(b) a copy of each SF 28 and executed authorization issued under an areawide contract within 30 days after execution.

41.004-5 Separate contracts.

(a) In the absence of an areawide contract or interagency agreement (see 41.004-6), agencies shall acquire utility services by separate contract subject to the requirements and limitations of 41.004-1, 41.004-3(c), and agency contracting authority (see 41.004-3(d)), 41.008, and 41.009.

(b) Subject to the procedures contained in 41.004-2, when an agency is entering into a separate contract, the contracting officer shall document the contract file with the following information:

(1) The number of available suppliers;

(2) Any special equipment, service reliability, or facility requirements and related costs;

(3) The utility supplier's rates, connection charges, and termination liability;

(4) Total estimated contract value (including costs in paragraphs (b) (2) and (3) of this section);

(5) Any technical or special contract terms required;

(6) Any unusual characteristics of services required; and

(7) The utility's willingness to wheel or otherwise transport utility service.

(c) When requesting GSA to enter into a separate contract, the requesting agency shall furnish the technical and acquisition data specified in 41.005(b), 41.004-3(b), and such other technical data as GSA may request to complete the contract.

(d) A contract exceeding a one-year period, but not exceeding ten years (except pursuant to 41.003), may be justified, and is usually required, where any of the following circumstances exist:

(1) The Government will obtain lower rates, larger discounts, or more favorable terms and conditions of service;

(2) A proposed connection charge, termination liability, or any other facilities charge to be paid by the Federal Government will be reduced or eliminated; or

(3) The utility service supplier refuses to render the desired service except under a contract exceeding a one-year period.

41.004-6 Interagency agreements.

Agencies shall use interagency agreements (e.g., consolidated purchase, joint use, or cross-service agreements) to acquire utility services or facilities from

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other Government agencies and shall comply with the policies and procedures at Subpart 17.5, Interagency Acquisitions Under the Economy Act.

41.005 Pre-award contract review.

(a) Where pre-award contract review is required, the agency shall provide the following information to GSA with the proposed contract document sufficiently in advance of award to permit a complete review. Requests for GSA review, approval, or assistance shall be forwarded as provided in 41.004-3(e), and shall include the following information:

(1) A technical description or specification of the type, quantity, and quality of service required, and a delivery schedule;

(2) A copy of any service proposal or proposed contract;

(3) Copies of all current published or unpublished rates of the utility supplier;

(4) Identification of any unusual factors affecting the acquisition; and

(5) Identification of all available sources or methods of supply, an analysis of the cost effectiveness of each, and a statement of the ability of each source to provide the required services, including the location and a description of each available supplier's facilities at the nearest point of service.

(b) For new or initial utility services or suppliers, the agency shall furnish the information in paragraph (a) of this section and the following as applicable:

(1) The date initial service is required;

(2) For the first 12 months of full service, estimated maximum demand, monthly consumption, annual cost of the service, and connection charges to be paid by the agency;

(3) Known or estimated time schedule for growth to ultimate requirements;

(4) Estimated ultimate maximum demand and ultimate monthly consumption;

(5) A simple schematic diagram or line drawing showing the meter locations, the location of the new utility facilities to be constructed on Federal property by the Federal agency, and any required new connection facilities on either side of the delivery point to be constructed by the utility supplier to provide the new services;

(6) Accounting and appropriation data to cover the required utility services and any connection charges required to be paid by the agency receiving such utility services; and

(7) The following data concerning proposed facilities and related charges or costs:

(i) Proposed refundable or nonrefundable connection charge, termination liability, or other facilities

charge to be paid by the agency, together with a description of the supplier's proposed facilities and estimated construction costs, and its rationale for the charge;

(ii) A written, signed statement by the supplier that any proposed connection charge is not in excess of the charge that other customers would be required to pay for like facilities under similar class and conditions of service; and

(iii) A copy of the acquiring agency's estimate to make its own connection to the supplier's facilities through use of its own resources or by separate contract. When feasible, the acquiring agency shall provide its estimates to construct and operate its own utility facilities in lieu of participating in a cost-sharing construction program with the proposed utility supplier.

(c) For existing utility services or suppliers, the agency shall furnish GSA the information in paragraph (a) of this section and the following, as applicable:

(1) A copy of the most recent 12-month's service invoices;

(2) A tabulation, by month, for the most recent 12 months, showing the actual utility demands, consumption, connection charges, fuel adjustment charges, and the average monthly cost per unit of consumption;

(3) An estimate, by month, for the next 12 months showing the estimated maximum demands, monthly consumption, annual cost of the services, and any connection charges to be paid;

(4) Accounting and appropriation data to cover the costs for the continuation of utility services; and

(5) For electric connection contracts, a statement whether the transformer, or other system components, on either side of the delivery point is owned by the Federal agency or the utility supplier, and if the metering is on the primary or secondary side of the transformer.

(d) Agencies conducting their own pre-award contract reviews shall establish appropriate agency procedures.

41.006 Administration.

41.006-1 Monthly and annual review.

Agencies shall review (a) utility service invoices on a monthly basis; and (b) each contract, authorization, purchase order, or other written request for service exceeding the small purchase dollar limitation on an annual basis. The purposes of such review are to ensure that the utility supplier is furnishing the services to each facility under the utility's most economical, applicable rate and to examine utility commercial markets for advantageous competitive

resolicitations. The annual review shall be based upon the facility's usage, conditions, and characteristics of service, at each individual delivery point, for the most recent 12 months. If a change in rate is appropriate, the Federal agency shall request the supplier to make such rate change immediately.

41.006-2 Rate changes and regulatory intervention.

(a) When a supplier proposed a change in rates or terms and conditions of service to the Government, the agency shall promptly determine whether the proposed change is reasonable, justified, and not discriminatory.

(b) When a regulated supplier proposes changes in rates or terms and conditions of service that may be of interest to other Federal agencies, and intervention before a regulatory body is considered justified, the matter shall be referred to GSA. The agency may request from GSA a delegation of authority for the agency to intervene on behalf of the consumer interests of the Federal Executive agencies.

(c) If a regulatory body approves a utility supplier's request for rate change, pursuant to 52.241-3, Change in Rates or Terms and Conditions of Service for Regulated Suppliers, any rate change shall be made a part of the contract by contract modification. The approved applicable rate shall be effective on the date determined by the regulatory body and resulting rates and charges shall be paid promptly to avoid late payment provisions. Copies of the modification containing the utility supplier's approved rate change shall be sent to the agency's paying office (see 41.006-11).

(d) When the utility supplier is not regulated and the rates, terms, and conditions of service are subject to negotiation pursuant to the clause at 52.241-7, Change in Rates or Terms and Conditions of Service for Unregulated Suppliers, any rate change shall be made a part of the contract by contract modification, with copies sent to the agency's paying office.

41.007 Contract clauses.

(a) Because the terms and conditions under which utility suppliers furnish service may vary from area to area, the differences may influence the terms and conditions appropriate to a particular utility's contracting situation. To accommodate requirements that are peculiar to the contracting situation, this section prescribes clauses on a "substantially the same as" basis (see 52.101) which permits the contracting

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officer to prepare and utilize variations of the prescribed provision and clauses, in accordance with agency procedures.

(b) The contracting officer shall insert in solicitations and contracts for utility services clauses substantially the same as the following:

(1) The clause at 52.241-1. Conflicts;

(2) The clause at 52.241-2. Scope and

Duration of Contract;

(3) The clause at 52.241-3. Change in Class of Service;

(4) The clause at 52.241-4.

Contractor's Facilities; and

(5) The clause at 52.241-5. Service Provisions.

(c) The contracting officer shall insert a clause substantially the same as the clause at 52.241-6. Change in Rates or Terms and Conditions of Service for Regulated Suppliers, in solicitations and contracts for utility services when the utility supplier is subject to regulatory body.

(d) The contracting officer shall insert a clause substantially the same as the clause at 52.241-7. Change in Rates or Terms and Conditions of Service for Unregulated Suppliers, in solicitations and contracts for utility services when the utility supplier is not subject to a regulatory body.

(e) The contracting officer shall insert a clause substantially the same as the clause at 52.241-8. Connection Charge, when a connection charge is required to be paid by the Government to compensate the contractor for furnishing additional facilities necessary to supply service. When conditions require the incorporation of a nonrecurring, nonrefundable service charge or a termination liability, see paragraphs (f) and (i) of this section.

(f) The contracting officer shall insert a clause substantially the same as the clause at 52.241-9. Termination Liability, when payment is to be made to the contractor upon termination of service in lieu of a connection charge upon completion of the facilities.

(g) The contracting officer shall insert a clause substantially the same as the clause at 52.241-10. Multiple Service Locations, as defined in 41.001, when providing for possible alternative service locations is required.

(h) The contracting officer shall insert a clause substantially the same as the clause at 52.241-11. Electric Service Territory Compliance Representation, when proposals from alternative electric suppliers are sought.

(i) The contracting officer shall insert a clause substantially the same as the clause at 52.241-12. Nonrefundable, Nonrecurring Service Charge, when the Government is required to pay a nonrefundable, nonrecurring

membership fee, a charge for initiation of service, or a contribution for the cost of facilities construction. The Government may provide for inclusion of such agreed amount or fee as a part of the connection charge, a part of the initial payment for services, or as periodic payments to fulfill the Government's obligation.

(j) The contracting officer shall insert a clause substantially the same as the clause at 52.241-13. Capital Credits, when the Federal Government is a member of a cooperative and is entitled to capital credits.

41.008 Utility services contract form.

The Standard Form (SF) 33, Solicitation, Offer and Award, prescribed in 53.214(c) and illustrated in 53.301-33, shall be used when contracting for utility services unless

(a) An areawide contract (see 41.004-4(c)) is utilized, or

(b) A purchase order form is authorized by this regulation. The contracting officer shall incorporate the applicable rate schedule to each contract, purchase order or modification.

41.009 Formats for utility service specifications.

(a) The following specification formats for use in acquiring utility services are available from the address specified at 41.004-3(b) and may be used and modified at the agency's discretion:

- (1) Electric service;
- (2) Water service;
- (3) Steam service;
- (4) Sewage service; and
- (5) Natural gas service.

(b) Contracting officers may modify the specification format referenced in paragraph (a) of this section and attach technical items, details on Government ownership of facilities and maintenance or repair obligations, maps or drawings of delivery points, and other information deemed necessary to fully define the service conditions.

(c) The specifications and attachments (see paragraph (b) of this section) shall be inserted in section C of the utility service solicitation and contract.

41.010 Formats for annual utility service review.

(a) Formats for use in conducting annual reviews of the following utility services are available from the address specified at 41.004-3(b) and may be used at the agency's discretion:

- (1) Electric service;
- (2) Gas service; and
- (3) Water and sewage service.

(b) Contracting officers may modify the annual utility service review format

as necessary to fully cover the service used.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.208-3 [Removed]

6. Section 52.208-3 is removed and reserved.

7. Sections 52.241-1 through 52.241-13 are added to read as follows:

52.241-1 Conflicts.

As prescribed in 41.007(b)(1), insert a clause substantially the same as the following:

Conflicts (Date)

To the extent of any inconsistency between the terms of this contract (including the specifications) and any rate schedule, rider, or exhibit incorporated in this contract by reference or otherwise, or any of the Contractor's rules and regulations, the terms of this contract shall control.
(End of clause)

52.241-2 Scope and Duration of Contract.

As prescribed in 41.007(b)(2), insert a clause substantially the same as the following:

Scope and Duration of Contract (Date)

(a) For the period (date) to (date), the Contractor agrees to furnish and the Government agrees to purchase (specify type) utility services in accordance with the applicable tariffs, rules, and regulations as approved by the applicable governing regulatory body and as set forth in the contract.

(b) It is expressly understood that neither the Contractor nor the Government is under any obligation to continue any services beyond the term of this contract.

(c) The Contractor shall provide the Government one complete set of rates, terms, and conditions of service which are in effect as of the date of this contract and any subsequently approved contractor shall also, concurrently with filing with the regulatory body, furnish the Government proposed revisions in rates or terms and conditions of service.

(d) The Contractor shall be paid at the applicable rate(s) under the tariff and the Government shall be liable for the minimum monthly charge, if any, specified in this contract commencing with the period in which service is initially furnished and continuing for the term of this contract. Any minimum monthly charge specified in this contract shall be equitably prorated for the periods in which commencement and termination of this contract become effective.

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(End of clause)

52.241-3 Change in Class of Service.

As prescribed in 41.007(b)(3), insert a clause substantially the same as the following:

Change in Class of Service. (Date)

(a) In the event of a change in the class of service, such service shall be provided at the contractor's lowest available rate schedule applicable to the class of service furnished.

(b) Where the Contractor does not have on file with the regulatory body approved rate schedules applicable to services provided, no clause in this contract shall preclude the parties from negotiating a rate schedule applicable to the class of service furnished.

(End of clause)

52.241-4 Contractor's Facilities.

As prescribed in 41.007(b)(4), insert a clause substantially the same as the following:

Contractor's Facilities (Date)

(a) The Contractor, at its expense, shall furnish, install, operate, and maintain all facilities required to furnish service hereunder to, and measure such service at the point of delivery specified in the Service Specifications. Title to all such facilities remain with the Contractor and the Contractor shall be responsible for all loss or damage to such facilities.

(b) Notwithstanding any terms expressed in this clause, the Contractor shall obtain approval from the Contracting Officer prior to any equipment installation, construction, or removal. The Government hereby grants to the Contractor, free of any rental or similar charge, but subject to the limitations specified in this contract, a revocable permit or license to enter the service location for any proper purpose under this contract. This permit or license includes use of the site or sites agreed upon by the parties hereto for the installation, operation, and maintenance of the facilities of the Contractor required to be located upon Government premises. All taxes and other charges in connection therewith, together with all liability of the contractor in construction, operation, or maintenance of such facilities, shall be assumed by the Contractor.

(c) Authorized representatives of the Contractor will be allowed access to the facilities on Government premises at reasonable times to perform the obligations of the Contractor regarding such facilities. It is expressly understood that the Government may limit or restrict the right of access herein granted in any manner considered necessary for national security.

(d) Such facilities shall be removed and Government premises restored to their original condition by the contractor at its expense within a reasonable time after the Government revokes the termination of this contract. In the event such termination of this contract is due to the fault of the Contractor, such facilities may be retained in place at the option of the Government until service comparable to that provided for hereunder is obtained elsewhere.

(End of clause)

52.241-5 Service Provisions.

As prescribed in 41.007(b)(5), insert a clause substantially the same as the following:

Service Provisions (Date)

(a) *Measurement of service.* (1) All service furnished by the Contractor shall be measured by suitable metering equipment of standard manufacture, to be furnished, installed, maintained, calibrated, and read by the Contractor at its expense. When more than a single meter is installed at the service location, the readings thereof shall be billed conjunctively. In the event any meter fails to register (or registers incorrectly) the service furnished, the parties shall agree upon the length of time of meter malfunction and the quantity of service delivered during such period of time. An appropriate adjustment shall be made to the next invoice for the purpose of correcting such errors. However, any meter which registers not more than _____ percent slow or fast shall be deemed correct.

(2) The Contractor shall read all meters at periodic intervals of approximately 30 days or in accordance with the policy of the cognizant regulatory body. All billings based on meter readings of less than _____ days or more than _____ days shall be prorated accordingly.

(b) *Meter test.* (1) The Contractor, at its expense, shall periodically inspect and test Contractor-installed meters at intervals not exceeding one year or at intervals in accordance with the policy of the cognizant regulatory body. The Government will have the right to have representation during the inspection and test.

(2) At the written request of the Contracting Officer, the Contractor shall make additional tests of any or all such meters in the presence of government representatives. The cost of such additional tests shall be borne by the Government if the percentage of errors is found to be not more than _____ percent slow or fast.

(3) No meter shall be placed in service or allowed to remain in service which has an error in registration in excess of _____ percent under normal operating conditions.

(c) *Change in volume or character.* Reasonable notice shall be given by the Contracting Officer to the Contractor regarding any material changes anticipated in the volume or characteristics of the utility service required at each location.

(d) *Continuity of service and consumption.* (1) The Contractor shall use reasonable diligence to provide a regular and uninterrupted supply of service at the service location, but shall not be liable for damages, breach of contract, or otherwise to the Government for failure, suspension, diminution, or other variations of service occasioned by or in consequence of any cause beyond the control of the Contractor, including but not limited to acts of God or of the public enemy, fires, floods, earthquakes, or other catastrophe, strikes, or failure or breakdown of transmission or other facilities. Provided that when any such failure, suspension, diminution, or other variation of

service shall aggregate more than one hour during any period hereunder, an equitable adjustment shall be made in the monthly billing specified in this contract (including the minimum monthly charges).

(2) In the event the Government is unable to operate the service location in whole or in part for any cause beyond its control, including but not limited to acts of God or of the public enemy, fires, floods, earthquakes, other catastrophe, or strikes, an equitable adjustment shall be made in the monthly billing specified in this contract (including the minimum monthly charge) if the period during which the Government is unable to operate such service location, in whole or in part, shall exceed 15 days during any period hereunder.

(End of clause)

52.241-6 Change in Rates or Terms and Conditions of Service for Regulated Suppliers.

As prescribed in 41.007(c), insert a clause substantially the same as the following:

Change in Rates or Terms and Conditions of Service for Regulated Suppliers (Date)

(a) Services furnished under this contract are subject to regulation by a regulatory body. The Contractor agrees to give the Contracting Officer written notice of the filing of an application for change in rates or terms and conditions of service concurrently with the filing of the application. Such notices shall fully describe the proposed change. If, during the term of this contract, the regulatory body having jurisdiction approves any changes, the Contractor shall forward to the Contracting Officer a copy of such changes within 15 days after the effective date thereof. The Contractor agrees to continue furnishing service under this contract in accordance with the amended tariff, and the Government agrees to pay such service at the higher or lower rates as of the date when such rates are made effective.

(b) The Contractor hereby represents and warrants that currently and during the life of this contract the applicable published and unpublished rate schedule(s) shall not be in excess of the lowest published and unpublished rate schedule(s) available to any other customers of the same class under similar conditions of use and service.

(c) In the event that the regulatory body promulgates any regulation concerning matters other than rates which affects this contract, the Contractor shall immediately provide a copy to the Contracting Officer. The Government shall not be bound to accept any new regulation inconsistent with Federal laws or regulations.

(d) Any changes to rates or terms and conditions of service shall be made a part of this contract by the issuance of a contract modification. The effective date of the change shall be the effective date by the regulatory body.

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(End of clause)

52.241-7 Change in Rates or Terms and Conditions of Service for Unregulated Suppliers.

As prescribed in 41.007(d), insert a clause substantially the same as the following:

Change in Rates or Terms and Conditions of Service for Unregulated Suppliers (Date)

(a) After (insert date), either party may request a change in rates or terms and conditions of service, unless otherwise provided in this contract. Both parties agree to enter in negotiations concerning such changes upon receipt of written request detailing the proposed change and specifying the reasons for the proposed changes.

(b) The effective date of any change shall be as agreed to by the parties. The Contractor hereby represents and warrants that the rates so negotiated will not be in excess of published and unpublished rates charged to any other customer of the same class under similar terms and conditions of use and service.

(c) The failure of the parties to agree upon any change after a reasonable period of time, shall be a dispute under the Disputes clause of this contract.

(d) Any changes agreed to rates, terms, or conditions as a result of such negotiations shall be made a part of this contract by the issuance of a contract modification.

(End of clause)

52.241-8 Connection Charge.

As prescribed in 41.007(e), insert a clause substantially the same as the following:

Connection Charge (Date)

(a) *Charge.* In consideration of the Contractor furnishing and installing at its expense the new connection facilities described herein, the Government shall pay the Contractor a connection charge. The payment shall be in the form of progress payments, advance payments or as a lump sum, as agreed to by the parties and as permitted by applicable law. The total amount payable shall be either the estimated cost of \$_____ less the agreed to salvage value of \$_____ or the actual cost less the salvage value, whichever is less. As a condition precedent to final payment, the Contractor shall execute a release of any claims against the Government arising under or by the virtue of such installation.

(b) *Ownership, operation, and maintenance of new facilities to be provided.* The facilities to be supplied by the Contractor under this clause, notwithstanding the payment by the Government of a connection charge, shall be and remain the property of the Contractor and shall, at all times during the life of this contract or any renewals thereof, be operated and maintained by the Contractor at its expense. All taxes and other charges in connection therewith, together with all liability arising out of the construction, operations, or maintenance of such facilities, shall be the obligation of the Contractor.

(c) *Credits.* The Contractor agrees to allow the Government, on each monthly bill for

service furnished under this contract to the Service Location, a credit of _____ percent of the amount of each such bill as rendered until the accumulation of credits shall equal the amount of such connection charge, provided that the Contractor may at any time allow a credit up to 100 percent of the amount of each such bill.

(2) In the event the Contractor, before any termination of this contract but after completion of the facilities provided for in this clause, serves any customer other than the Government (regardless of whether the Government is being served simultaneously, intermittently, or not at all) by means of these facilities, the Contractor shall promptly notify the Government in writing. Unless otherwise agreed by the parties in writing at that time, the contractor shall promptly accelerate the credits provided for under subparagraph (c)(1) of this clause, up to 100 percent of each monthly bill until there is refunded the amount that reflects the Government's connection costs for that portion of the facilities used in serving others.

(3) In the event the Contractor terminates this contract, or defaults in performance, prior to full credit of any connection charge paid by the Government, the Contractor shall pay to the Government an amount equal to the uncredited balance of the connection charge as of the date of the termination or default.

(d) *Termination before completion of facilities.* The Government reserves the right to terminate this contract at any time before completion of the facilities with respect to which the Government is to pay a connection charge. In the event the Government exercises this right, the Contractor shall be paid the cost of any work accomplished prior to the time of termination by the Government, plus the cost of removal, less the salvage value.

(e) *Termination after completion of facilities.* In the event the Government terminates this contract after completion of the facilities with respect to which the Government is to pay a connection charge, but before the crediting in full by the Contractor of any connection charge in accordance with the terms of this contract, the Contractor shall have the following options:

(1) To retain in place for twelve months or more after the notice of termination by the Government such facilities on condition that:

(i) If, during such twelve-month period, the Contractor serves any other customer by means of such facilities, the Contractor, shall, in lieu of allowing credits, pay the Government during such period installments in like amount, manner, and extent as the credit provided for under paragraph (c) of this clause before such termination, and

(ii) Immediately, after such twelve-month period the Contractor shall promptly pay in full to the Government the uncredited balance of the connection charge.

(2) To remove such facilities at the Contractor's own expense within twelve months after the effective date of the termination by the Government; Provided that if the Contractor elects to remove such facilities, the Government shall then have the option of purchasing such facilities at the

agreed salvage value set forth herein; and provided further, that the Contractor shall, at the direction of the Government, leave in place such facilities located on Government property which the Government elects to purchase at the agreed salvage value.

(End of clause)

52.241-9 Termination Liability.

As prescribed in 41.007(f), insert a clause substantially the same as the following:

Termination Liability (Date)

(a) If the Government discontinues utility service under this contract before completion of the facilities cost recovery period specified in paragraph (b) of this clause, in consideration of the Contractor furnishing and installing at its expense, the new facilities described herein, the Government shall pay termination charges, calculated as set forth in this clause.

(b) *Facility cost recovery period.* The period of time, not exceeding the term of this contract, during which the net cost of the new facilities, shall be recovered by the contractor is _____ months. (Insert negotiated duration.)

(c) *Net facility cost.* The cost of the new facilities, less the agreed upon salvage value of such facilities, is—

\$_____ (Insert appropriate dollar amount.)

(d) *Monthly facility cost recovery rate.* The monthly facility cost recovery rate which the Government shall pay the contractor whether or not service is received is—

\$_____ (Divide the net facility cost in paragraph (c) of this clause by the facilities cost recovery period in paragraph (b) of this clause and insert the resultant figure.)

(e) *Termination charges.*

Termination charges = (Multiply the remaining months of the facilities cost recovery period specified in paragraph (b) of this clause by the monthly facility cost recovery rate in paragraph (d) of this clause.)

(End of clause)

52.241-10 Multiple Service Locations.

As prescribed in 41.007(g), insert a clause substantially the same as the following:

Multiple Service Locations (Date)

(a) At any time by written order, the Contracting Officer may designate any location within the service area of the Contractor at which utility service shall commence or be discontinued. The contract shall be modified in writing, by adding to or deleting from the Service Specifications, the name and location of the service, specifying any different rate, the point of delivery, different service specifications, and any other terms and conditions.

(b) The minimum monthly charge specified in this contract shall be equitably prorated from the period in which commencement or discontinuance of service at any service location designated under the Service Specifications shall become effective.

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(End of clause)

52.241-11 Electric Service Territory Compliance Representation.

As prescribed in 41.007(h), insert a representation substantially the same as the following:

Public Law 100-202, Electric Service Territory Compliance Representation (Date)

(a) The Offeror represents as part of its offer that the Offeror's sale of electricity in accordance with the terms and conditions of this solicitation is is not consistent with Public Law 100-202, section 8093.

(b) The Offeror's supporting rationale is as follows:

(End of clause)

52.241-12 Nonrefundable, Nonrecurring Service Charge.

As prescribed in 41.007(i), insert a clause substantially the same as the following:

Nonrefundable, Nonrecurring Service Charge (Date)

The Government may pay a nonrefundable, nonrecurring charge when the rules and regulations of a supplier require that a customer pay (1) a charge for the initiation of service, (2) a contribution in aid of construction, or (3) a nonrefundable membership fee. This charge may or may not be in addition to or in lieu of a connection charge. Therefore, there is hereby added to the Contractor's schedule a nonrefundable, nonrecurring charge for _____ in the amount of \$ _____ dollars payable

(specify dates or schedules)---

(End of clause)

52.241-13 Capital Credits.

As prescribed in 41.007(j), insert a clause substantially the same as the following:

Capital Credits (Date)

(a) The Government is a member of the (cooperative name) _____ and as any other member, is entitled to capital credits consistent with the by-laws of the cooperative, which states the obligation of the Contractor to pay capital credits and

which specifies the method and time of payment.

(b) Within 60 days after the close of the Contractor's fiscal year, the Contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing, a list of accrued credits by contract number, year, and delivery point. Also, the Contractor shall state the amount of capital credits to be paid to the Government and the date the payment is to be made.

(c) Upon termination or expiration of this contract, unless the Government directs that unpaid capital credits are to be applied to another contract, the Contractor shall make payment to the Government for the unpaid credits.

(d) Payment of capital credits will be made by certified check, payable to the Treasurer of the United States and forwarded to the Contracting Officer at _____ unless otherwise directed in writing by the Contracting Officer. Checks shall cite the current or last contract number and indicate whether the check is partial or final payment for all capital credits accrued.

(End of clause)

[FR Doc. 91-12245 Filed 5-23-91; 3:45 am]

BILLING CODE 4820-14-4

91-13-213



CENTRAL MONTANA Electric Power Cooperative, Inc.

P.O. BOX 50085 • BILLINGS, MONTANA 59105 • (406) 248-7936

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, NW
Room 4041
Washington, DC 20405

Re: FAR Case 91-13

Gentlemen:

We are just in receipt of a proposed rule on the acquisition of services from utilities (56 Federal Register 23982). Specifically, GSA is proposing at Section 41.007 (j) that the following language be added to all contracts between federal facilities and cooperative utilities:

52.241-13 Capital Credits

- (b) Within 60 days after the close of the contractor's fiscal year, the contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing a list of accrued credits by contract number, year, and delivery point. Also, the Contractor shall state the amount of capital credits to be paid to the Government and the date the payment is to be made.
- (c) Upon termination or expiration of this contract, unless the Government directs that unpaid capital credits may be applied to another contract, the Contractor shall make payment to the Government for the unpaid credits.

We have concern with those two paragraphs. I will try to enumerate our concerns below.

1. A rural electric cooperative usually cannot provide capital credit information within 60 days. It takes more time than that to complete an audit and an audit is required before assigning capital credits. Furthermore, the accounting for capital credits takes significant time and, therefore, capital credit assignment is usually made sometime after the 60-day period. We recommend paragraph (b) be changed to read "In accordance with the By-Laws of the cooperative, the Contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing a list of accrued credits."
2. Rural electric cooperatives generally retain capital credits for a period of ten to forty years. Since funding from REA is being reduced, rural electrics are being called upon to increase their equity position. The only way to increase equity position is through retaining of capital credits. Furthermore, cooperatives do not know when capital credits will be refunded. It depends upon the financial strength of the utility. Your proposed wording in paragraph (b) indicates the Contractor shall state to the Government the

General Services Administration

July 22, 1991

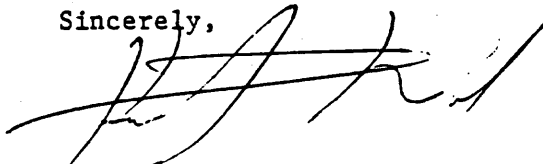
Page 1

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date payment is to be made. As stated above, this is almost impossible. Furthermore, in paragraph (c) it indicates that upon termination or expiration of the contract, the Contractor shall make payment to the Government for unpaid credits. This, as I state above, is almost impossible and should the rural electric make a special provision to the Government, it would be discriminatory and the rural electric would need to make payment to all customers. We recommend deletion of paragraph (c).

I hope this information is valuable to you. If we can be of further assistance, please let us know.

Sincerely,



Kent Wick
Manager

KW/tl

cc: Michael Oldak, NRECA

91-13-215

ADAMS ELECTRIC COOPERATIVE, INC.

153 North Stratton Street
Gettysburg, PA 17325-1065
717-334-9211

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, NW, Room 4041
Washington, DC 20405

RE: FAR CASE 91-13 WRITTEN COMMENTS
Federal Acquisition Regulation
Acquisition of Utility Services
48 CFR Parts 6, 8, 15, 41 and 52
Proposed Rule as Published 5/24/91
Federal Register, Vol. 56, No. 101

Dear Secretariat:

Adams Electric Cooperative, Inc. (AEC) is an electric distribution cooperative providing electric service to approximately 22,000 accounts in the rural areas of Adams, York, Cumberland, and Franklin counties in South-Central Pennsylvania. As such, AEC provides electric service to at least five federal agency accounts and may have an opportunity to serve additional accounts in the future.

AEC has reviewed the above referenced proposed rulemaking and is providing written comments herein on the following Parts and Subparts:

Part 52.241-13 Capital Credits

Subpart (a): Cooperative bylaws typically state that a cooperative is "obligated to pay by credits to a capital account for each patron" rather than the proposed language which states "the obligation of the Contractor (Cooperative) to pay capital credits". The first quotation implies an assignment or allocation process whereas the second quotation, as contained in the proposed rule, appears to denote an actual physical cash payment to the member.

Normally, a cooperative "allocates" its margin from operations for the prior fiscal year to all of the consumers based on their usage of electricity or patronage during the prior year. This allocation of patronage capital or "capital credits" is accumulated to any balance remaining from prior years. As financial conditions permit and upon the discretion of the Cooperative board of directors (as granted in the bylaws), a periodic "retirement" of a portion of the accumulated patronage capital is made to members in cash.

GETTYSBURG
717-334-2171

District Offices
SHIPPENSBURG
717-532-2214

JUL 25 1991

YORK
717-792-3666

91-13-215

AEC recommends that Subpart (a) be amended to only read:

"The Government is a member of _____, and as any other member, is entitled to capital credits consistent with the bylaws of the cooperative."

Subpart (b): Cooperatives are subject to annual CPA Audit requirements within 90 days after closing of their fiscal year pursuant to Rural Electrification Administration federal agency requirements. "Allocation" of the prior year margin does not occur until after the Audit has taken place.

AEC recommends that the references to the "60 days" notification requirement and the "accrued" credits language be stricken. The 60-day term is inconsistent with other primary federal agency jurisdiction and the term "accrued" can be problematical due to similar capital credit "allocation" processes occurring from other associated organizations to the distribution cooperative at different times during a year. To try to accrue such partial year allocations for associated organizations in order to comply with the proposed language would be fraught with difficulty, uncertainty, and future adjustments.

The last sentence in Subpart (b) also appears to confuse the "allocation" and "retirement" processes as highlighted in Subpart (a) comments above.

AEC recommends that Subpart (b) be amended to only read:

"The Cooperative shall furnish notification to the Contracting Officer, or the designated representative of the Contracting Officer, of any such capital credits in a manner consistent with its bylaws notification for all members of the Cooperative."

Subpart (c): While cooperatives probably would be able to accommodate the assignment of capital credits to another account, there are no provisions for making lump sum payment to the Government for unpaid capital credits if an account is terminated. Such a lump sum payment of unpaid capital credits would currently be considered as preferential treatment by the federal agency, the Rural Electrification Administration.

AEC recommends that Subpart (c) be amended to only read:

"If the contract account with the cooperative is terminated, the cooperative shall be notified as to the proper mailing address for any future payments of unpaid capital credits."

Subpart (d): The wording "certified check" should be changed to "check or other satisfactory means, i.e., bill credit". Other payment terms should be consistent with the majority of non-federal agency members. To request the use of certified checks for a few federal agencies is an unnecessary burden to the other non-federal agency members who will incur the cost for preferential treatment for the Government and do not request similarly certified checks. The "certified" requirement is considered to be overly onerous in considering that nearly all cooperatives have been in existence for 50 years or more and possess excellent credit experience.

9/13-2/5

AEC recommends that Subpart (d) be amended to only read:

"Payment of capital credits will be made by check, bill credit, or other satisfactory means. If a check is issued, it should be payable to the Treasurer of the United States and forwarded to the Contracting Officer at _____, unless otherwise directed by the Contracting Officer in writing. Other capital credits terms and conditions shall be in accordance with the bylaws of the Cooperative."

Part 52.241-8 Connection Charges

Subpart (c): AEC utilizes the standard Agreement for Electric Service as developed for cooperative use by the federal agency, the Rural Electrification Administration. To the extent that language appears to be inconsistent between the proposed rulemaking and the current Agreement for Electric Service, AEC recommends that the two federal agencies strive for uniformity in such agreements for electric service.

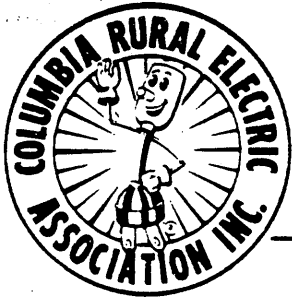
On behalf of Adams Electric Cooperative, Inc., I appreciate the opportunity to provide input into the proposed rulemaking prior to its adoption. I am also available to discuss any of the written comments contained in this letter should you so desire.

Sincerely,



A. Daniel Murray
General Manager

ADM:jb



OWNED BY THOSE IT SERVES

91-13-216

105 EAST MAIN STREET
BETHLEHEM
DAYTON, WASHINGTON, 99328

TELEPHONE (509) 382-2578
OR 337-6573

7-22-91

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, NW, Room 4041
Washington, DC 20405

Gentlemen:

We wish to comment on GSA proposed rule on the acquisition of services from utilities (56 Federal Register 23982 at section 41.007(j)).

We are particularly dissatisfied with paragraphs (b) and (c) of 52241-13 Capital Credits.

Paragraph (b): Equity is not computed and allocated until the Cooperative's audit has been approved by REA, and that audit is not due until 90 days after the close of the fiscal year, and takes another month or so for REA in Washington, DC, to give their approval. Also, the Bylaws of our Cooperative state that payment of equity is determined by the Board of Directors at it's discretion, and payment date cannot be set at the time the equity is earned.

Paragraph (c): Capital Credits are not paid out of normal date of retirement, so could not be paid when a contract is terminated.

Paragraph (d) would be a bookkeeping burden as we do not pay equity by contract number but by member number, and our Bylaws allow one membership to be issued per entity. Also we are not able to distinguish whether this is final payment of the equity at the time the check is made out.

Please consider our comments on these matters.

Very truly yours,

COLUMBIA RURAL ELECTRIC ASSN. INC.

Virginia Bamford
Virginia Bamford, Office Manager

vb

JUL 25 1991



91-13-217

FARMERS' ELECTRIC COOPERATIVE, INC.
OF NEW MEXICO

3701 THORNTON ST., P.O. BOX 550, CLOVIS, NEW MEXICO 88101
TEL: 505/762-4466
FAX: 505/769-2118

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N. W., Room 4041
Washington, D. C. 20405

Re: FAR Case 91-13

Dear Sirs:

I have been directed to comment on FAR Case 91-13 by the Board of Trustees of Farmers' Electric Cooperative, Inc., Of New Mexico. My comments will be confined to 52.241-13 Capital Credits.

This proposed regulation will have a profound effect on all electric and telephone cooperatives. Although sub part (a) says the Government "is entitled to capital credit payments consistent with the bylaws of the cooperative," sub parts (B) and (c) are in direct conflict with the bylaws of most or all such cooperative utilities.

The prepayment of these capital credits is not allowed to any businesses, and would cause an undue hardship if any business or Government agency could request payment when service at a particular location was terminated or merely changed ownership.

The retention of capital credits is one of the key sources of financing new facilities. Much of this comes from businesses and Government agencies which frequently terminate their service agreements when their need for utility service ends.

Additionally, capital credits are essentially the only equity that a cooperative maintains. The erosion of this equity by not being allowed to retain capital credits according to its bylaws will lead to financial deficiencies. This will cause higher utility rates and increased needs for borrowed money at higher interest rates.

52.241-13, Capital Credits, will cause an undue hardship on all rural utilities and should be deleted from FAR Case 91-13.

Sincerely,

Clifford G. Stewart
Executive Vice President
and General Manager



Habersham
Electric Membership Corporation

91-13-218

P.O. Box 25 / Clarkesville, Georgia 30523 / Phone (404) 754-2114

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, D. C. 20405

Reference: FAR Case 91-13

Dear Sir:

Thank you for the opportunity to comment on the proposed rule on the acquisition of services from utilities.

As a cooperative we are very proud to be able to repay capital credits. However, paying capital credits is an option that we may not always have. Whether or not to pay capital credits has always been a decision made by the local board of directors on an annual basis. As available capital becomes more and more uncertain, cooperatives may be compelled to forego or suspend the return of capital credits.

It would be very unfair and completely against the cooperative philosophy to be forced to treat one class of customer, i.e. "Govt" different from other members. This rule as it is proposed could (1) increase costs of capital to cooperatives; (2) decrease creditability and public relations; and (3) could very well jeopardize the tax exempt status of the cooperative.

Any special treatment of capital credits could and should be negotiated into each individual contract.

Yours truly,

HABERSHAM ELECTRIC MEMBERSHIP CORPORATION

A handwritten signature in dark ink, appearing to read 'WE Canup', is written over the typed name.

William E. Canup
General Manager

WEC/ej

JUL 25 1991

91-13-219

CHARLES CENTER • P.O. BOX 1475 • BALTIMORE, MARYLAND 21203-1475

PAUL W DAVIS
COUNSEL
3011 234-5609

July 23, 1991

CERTIFIED MAIL

General Services Administration
FAR Secretariat (VRS)
Room 4041
18th and F Streets, N.W.
Washington, DC 20405

Re: FAR Case 91-13
Federal Acquisition Regulation;
Acquisition of Utility Services

Dear Sirs:

In accordance with the Notice of Proposed Rulemaking published in the Federal Register of May 24, 1991, Baltimore Gas and Electric Company ("BG&E") submits the following comments regarding the proposed rules on acquisition of utility services.

I.

As a preliminary matter, BG&E will describe its interest in this rulemaking.

BG&E is an investor-owned public utility engaged primarily in the business of producing, purchasing and selling electricity and purchasing, selling and transporting natural gas. BG&E's utility service area includes Baltimore City and all or part of nine Central Maryland counties. BG&E supplies electricity to over one million customers in an area of approximately 2,300 square miles with a population of about 2.5 million residents. BG&E supplies gas to over 500,000 customers in an area of approximately 614 square miles with a population of about 1.9 million.

BG&E's utility operations are subject to regulation by the Public Service Commission of Maryland. This regulation includes rates, service, facilities, financial condition, capitalization, records, manner of operation, metering, and customer relations. The principles, policies and practices which BG&E follows are prescribed by Commission Orders, regulations, and the Tariff filed with and approved by the Commission.

JUL 25 1991

91-13-219

As the foregoing indicates, BG&E is a provider of utility services and presently provides gas and electricity to those Departments and agencies of the United States Government having operations and facilities within BG&E's service territory. As such, BG&E has an interest in this pending rulemaking which is directed at adopting rules governing the acquisition of utility services such as those supplied by BG&E.

II.

BG&E's principal concern relates to the interface between the proposed rules and BG&E's Tariff. A "tariff" is the public document containing the terms and conditions which govern the relationship between the utility and its customers. Southwestern Bell Tel. Co. v. State Corp. Comm'n, 664 P. 2d 798, 800 (Kan. Sup. Ct. 1983). BG&E's Gas Tariff is 50 pages long and its Electric Tariff over 70 pages (including schedules and riders). These Tariffs cover the entire spectrum of the utility-customer relationship including, for example, voltage, supply points, metering, customer-furnished versus utility-furnished equipment, service extensions, terminations of service and loss of service.

BG&E's Tariffs, thus, cover many of the same subjects as the contract clauses in proposed Part 41.007 and 52.241-1 (56 Fed. Reg. 23986-23990). We have, in fact, compared BG&E's Tariffs with the proposed contract clauses and found the following proposals to be in conflict with the Tariff:

<u>Proposed</u>	<u>Subject</u>
52.241-2(d) 52.241-10(b)	Proration of monthly minimum charge
52.241-4(a)	Facilities provided by utility and customer Loss or damage to equipment
52.241-4(d)	Removal of equipment
52.241-5(d)	Liability for damages Bill Adjustment for outages
52.241-9	Termination liability

The details of these specific conflicts are not important, since every utility has a different Tariff and general rules like these could not be expected to resolve all conflicts between the proposed contract clauses and hundreds of different utility Tariffs in effect in this country.

The point is that there are going to be conflicts between the proposed contract provisions and the utilities' tariffs and that there should be a lawful and reasonable rule applicable in those circumstances.

III.

This brings us to BG&E's specific concern and objection to what is being proposed in this rulemaking. Proposed Part 52.241-1 Conflicts reads as follows:

To the extent of any inconsistency between the terms of this contract (including the specifications) and any rate schedule, rider, or exhibit incorporated in this contract by reference or otherwise, or any of the Contractor's rules and regulations, the terms of this contract shall control.

There is no specific reference to the tariff but it is assumed that the intent is to include the tariff within the term "Contractor's rules and regulations." This construction seems reasonable, since rate schedules and riders are parts of utilities' tariffs. Thus, this proposed rule essentially states that, in any conflict between the terms of the utility's tariff and the terms of the utility-government contract, the contract supersedes the tariff. We object to this resolution of the conflict situation and submit that it is contrary to law and unreasonable. There are three reasons for this conclusion.

(1)

First, proposed Part 52.241-1 seems to be in conflict with Section 8093 of the Department of Defense Appropriations Act of 1988, Public Law 100-202, which is referred to in the Notice of Rulemaking itself at 56 Fed. Reg 23984. In pertinent part, Section 8093 provides as follows:

Sec. 8093. None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner inconsistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements.

In our view, BG&E's tariff is a product of the "State regulation" referred to in the statute. The tariff is proposed by the utility but then submitted to the Commission for review and approval and is subject to change by the Commission. We would submit that purchasing electricity pursuant to the contract clauses in proposed Part 52.241, which we pointed out above are in conflict with BG&E's Tariff, is directly inconsistent with State law and, therefore, contrary to the intent of Section 8093.

(2)

Second, proposed Part 52.241-1 seems to be premised on a distinction between the "Contractor's [i.e., utility's] rules and regulations", which are subject to being superseded by the utility-government contract, and State rules and regulations, which are not. This fails to recognize that

tariffs filed with a state regulatory agency, such as the PUC, are not mere contracts but have the force of law and are binding on the consumer and the utility....(citation omitted)

Stiteler v. Bell Tel. Co., 379 A. 2d 339, 341 (Pa. Cmwlth Ct. 1977). Accord: Application of Borough of Saddle River, 362 A. 2d 552, 560 (N.J. Sup. Ct. 1976); Illinois Central Gulf R.R. Co. v. Sankey Bros., Inc., 384 N.E. 2d 543 (Ill. App. Ct. 1978).

As these cases recognize, the utility's tariff is applicable to all customers alike and is thereby intended to prevent prohibited discrimination among customers. See, e.g., Annotated Code of Maryland, Art. 78, Section 26.

Accordingly, BG&E believes that proposed Part 52.241-1 fails to recognize the legal force of duly-filed and Commission-approved tariffs.

(3)

Lastly, the proposed contract clauses in Part 52.241-1 et seq. would enable the Federal agency in question (whichever one is negotiating the contract) to dictate the terms of the utility's providing it with service. With the obvious exception of national security factors, the Federal Government, as a utility customer, is no different from any other large customer of BG&E. However, none of the conflicts between the Tariff and proposed Part 52.241 appear to relate to national security. Hence, there is no reason for special rules to apply to the Federal Government and the Tariff to apply to all other customers. Such a situation would create practical problems, with the utility's representatives having to apply a wholly different set of rules to service locations serving the Federal Government.

It would also probably require Commission approval for BG&E to enter into contracts with the Federal Government which conflict with the terms and conditions found in BG&E's Tariff.

IV.

For the foregoing reasons, BG&E requests that proposed Part 52.241-1 be revised to read as follows:

91-13-219

To the extent of any inconsistency between the terms of this contract (including the specifications) and the terms and conditions (including any rate schedules, riders or exhibits) of the Contractor's Tariff duly-filed with the State regulatory agency, the terms of the Tariff shall control.

V.

In addition to those proposed contract clauses which conflict with BG&E's Tariffs, there are certain proposed clauses which conflict with the regulations adopted by the Maryland Public Service Commission or with Maryland statutory law. They are as follows:

<u>Proposed</u>	<u>Subject</u>
52.241-4(b)	Taxes
52.241-5(a)	Fast/slow meter bill adjustment
52.241-5(a), (b)2, (b)3	Percent meter error
52.241(b)	Meter tests

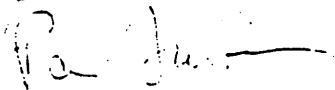
The reference to Section 8093 of the Department of Defense Appropriation Act of 1988, Public Law 100-202, in proposed Part 41.004-1 (56 Fed. Reg. 23984) implies that contract clauses which are inconsistent with state utility law are not to be included in contracts. However, since the Act refers only to the purchase of electricity and not other utilities like gas, there is some ambiguity. Moreover, the fact that the point is not explicitly stated in the FAR may leave contracting officers unsure of what to do in such cases.

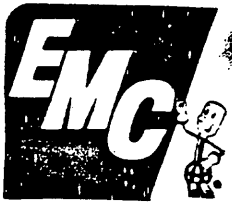
Accordingly, BG&E requests that a new subparagraph (k) be added at the end of Part 41.007 reading as follows:

- (k) No contracting officer shall insert any clause prescribed in 52.241-1 through 52.241-13 which any utility supplier shows to be inconsistent with state law (including statutes or administrative regulations) governing the providing of the particular utility service or the matter which is the subject of the clause.

We appreciate your consideration of BG&E's comments.

Very truly yours,





Walton
Electric Membership Corporation

91-13-220

P.O. Box 260 Monroe, Georgia 30655 Phone (404) 267-2505

WESTERN DISTRICT OFFICE
P.O. BOX 388
WATKINSVILLE, GA 30677
TELEPHONE 404 - 769-5622

WESTERN DISTRICT OFFICE
P.O. BOX 388
SNELLVILLE, GA. 30278
TELEPHONE 404 - 972 - 2917

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, D. C. 20405

RE: Comments on Proposed Regulations, 5 U.S.C. 610 (FAR Case 91-13)

Gentlemen:

The Walton Electric Membership Corporation (Walton EMC) appreciates the opportunity to comment on the above referenced proposed regulation which will have an adverse impact on future costs for electric service and will impair the ability of small cooperatively owned utilities to compete with large publicly held utilities.

The General Services Administration proposed rule on the acquisition of services from utilities (56 Federal Register 2982), section 41.007(j) proposes language to be added to all contracts between Federal facilities and utilities. Section 52.241-13, Capital Credits, includes language applicable only to cooperative utilities, all of which are small businesses. This section is particularly troubling to us as it would mandate provisions which are prohibited by our by-laws, Georgia state statute, and would increase cost of electric service.

Section 52.241-13 (a) which provides that "The Government.....is entitled to capital credits consistent with the by-laws of the cooperative, which states the obligation of the Contractor to pay capital credits and which specifies the method and time of payment," is sufficient language to protect the government's interest in capital credits of any cooperative of which it is a member. Sections 52.241-13(b)-(d), however, demand actions which are contrary to the Walton EMC by-laws and are therefore inconsistent with section 52.241-13(a). Furthermore, these sections would mandate that the government be treated as a privileged class of customer, which would be unfair to the other cooperative members and inconsistent with the requirements of the Internal Revenue Service for 501(c)(12) cooperatives.

91-13-220
July 23, 1991

Section 52-241-13(b) requires that "Within 60 days after the close of the Contractor's fiscal year, the Contractor shall furnish to the Contracting Officer....in writing a list of accrued credits by contract number, year, and delivery point...." This information is not readily available on the type of computer systems that cooperative's generally have. Cooperatives generally cannot afford in-house programmers or the type of custom designed software that can extract such specific information. In order to keep costs down, we process all accounts in the same manner and notify members of the assignment of capital credits through the use of our monthly every-member newsletter. This method is approved by the Internal Revenue Service. To provide the detailed information required by the proposed regulation would be time consuming and costly. Since our rates are cost based by class of service, the addition of these administrative costs could justify declaring service to federal installations as a separate class of service with the additional cost included in the government rate.

Section 52.241-13(b) further stipulates that ".....the Contractor shall state the amount of capital credits to be paid to the Government and the date the payment is to be made." As a borrower from the Rural Electrification Administration (REA), Walton EMC is required to adhere to REA policies, in general, and in regard to capital credits in particular. The REA restricts capital credit retirements within certain parameters and requires that capital credit retirements be made only when such retirements would not impair the financial stability of the borrower. Capital credits are generally retained for a period of ten to twenty years, at which time a determination is made as to which amounts will be retired; therefore it would not be possible to state the date payment will be made until such determination is made.

Section 52.241-13(c) states "Upon termination or expiration of this contract.....the Contractor shall make payment to the Government for the unpaid credits" The Walton EMC by-laws, in accordance with REA policies, permit the payment of capital credits only when a general refund is declared or when the payment is to the estate of a deceased member. We do not make payments of capital credits to any member upon termination of membership. Walton EMC by-laws and the "Georgia Electric Membership Corporation Act" (Ga. L. 1937, p. 644, § 1; Code 1933. §34-C 101, enacted by Ga. L. 1981, p. 1587, § 1.) provide that refunds of capital credits may be made only to estates of deceased natural persons.

Section 52.241-13(d) which requires payment by certified check and other information that is not provided to all other customers would also increase administrative costs out of proportion to the benefit received to the government. Capital credit checks are generated by computer and processed for mailing by a mailing service. We do not have the custom software that would allow us to run the government's checks as a separate batch.

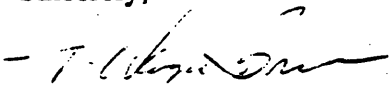
91-13-220
July 23, 1991

Section 52.241-8 Connection Charge. sets out procedures which would be a significant problem to Walton EMC as it also requires that the government be treated as a privileged class of customer. Walton EMC's Service Rules and Regulations provide that the cooperative will provide certain facilities to all new consumers. However, when the customer requires service different from or in addition to that provided, the customer is required to pay a non-refundable contribution in aid of construction. Walton EMC's retail rates are based on the premise that the cooperative will not include the cost of such special requirements in the retail rates. If the cooperative is required to refund such service connection charges to the government, retail rates would be inherently unfair unless the government were treated as a separate class of customer and the amortization of the connection charges recovered in the rates.

In conclusion, Walton EMC would like to comment on the "Supplementary Information" provided in the discussion of the proposed rule. Part B. Regulatory Flexibility Act states "The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. because most public utility companies are not small business." (emphasis added) If one considers only the number of business entities affected by the proposed regulation, the vast majority would fall in the small business category. In Georgia there are 43 cooperative electric utilities and an approximately equal number of small municipal systems and only one "large" electric utility. There are also numerous small telephone systems.

Walton EMC feels strongly that sections 52.241-13(b)-(d) and 52.241-8 should be deleted from the final approved regulations. Thank you for providing this opportunity for our comments.

Sincerely,



T. Wayne Brown
General Manager

TWB/mr



91-13-221

East Central Electric Association
• 412 North Main
Braham, Minnesota 55006-0039

July 23, 1991

General Services Administration
FAR Secretariat
18th and F Street N.W., Room 4041
Washington D.C. 20405

RE: FAR Case 93-13, Section 41.007(j)

Dear Sirs:

We are writing in response to FAR Case 93-13, specifically section 41.007(j), that deals with the capital credits of cooperative utilities that serve the government. We are a rural electric cooperative established in 1936.

We agree that if we are providing electric service to the government at the same rates as other members, then the government is a member of the cooperative and is entitled to the same rights as all other members under the bylaws of the cooperative. However, we feel that the language of 52.241-13 paragraphs (a) through (d) would grant the government special consideration and result in considerable extra expense to the cooperatives and their members. We do not feel that this is appropriate. The requirements may, in fact, be in violation of the bylaws of the cooperatives and the mortgage agreements between the cooperatives and the Rural Electrification Administration.

Paragraph (a) states that the time of payment of capital credits be specified in the bylaws of the cooperative and paragraph (b) states that the time and method of payment be specified in the notice of capital credits earned sent to the government. Retirement (payment) of capital credits depends upon the financial condition of the cooperative. It would not be in the best interest of the members to specify the time of payment when capital credits are allocated. The actual amount to be retired each year is authorized by our board of directors annually at the time they are retired.

The requirement in paragraph (b) that the government be notified within 60 days of the end of the cooperatives' year-end of the capital credits earned for the year would

91-13-221

put an undue hardship on the cooperatives. It is a very time consuming process to determine the capital credits for each member. This is normally not completed until nearly 180 days after year-end. Since in our case they are not retired for several years (15 at present), what difference could a few days make for allocation notification?

The requirement in paragraph (c) that the cooperative retire all capital credits earned when the government ceases to be a member is not allowed by our bylaws. All members must wait until the capital credits for a given year are retired in normal rotation which presently is 15 years after they are allocated. Only estates of deceased members are given the option of early retirement, and then the capital credits are discounted at a rate set by the board of directors to allow for the early retirement.

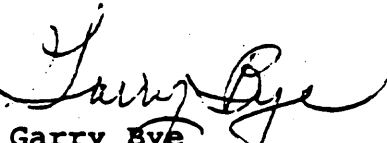
We do not believe that the requirement in paragraph (d) that the government be paid by certified check is reasonable. In our case all capital credits are paid by a computer prepared check. In order to issue a certified check to the government, we would have to void the computer prepared check and have our bank prepare a certified check to replace it. This again would result in additional time and expense that we do not regard as necessary.

In conclusion, we see no justification for the above proposed rules. At present the government is treated just as any other member, and these rules would grant special consideration to the government at the expense of all other members.

Thank you for your consideration.

Sincerely,

EAST CENTRAL ELECTRIC ASSOCIATION


Garry Bye
General Manager

GB:lj

CROWELL & MORING

1001 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20004-2505

(202) 624-2500

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FACSIMILE (RAPICOM): 202-628-5118

WORLDWIDE INTERNATIONAL: 64344

WORLDWIDE DOMESTIC: 89-2448

91-13-222

JEFFREY H. HOWARD
(202) 624-2909

July 23, 1991

Transmitted By Hand Delivery

Ms. Beverly Fayson
General Services Administration
FAR Secretariat (VRS)
18th & F Streets, N.W.
Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13: Proposed Federal Acquisition Regulations For
the Acquisition of Utility Services

Dear Ms. Fayson:

On behalf of Central and South West Corporation, a public utility holding company, and its electric utility operating companies, Central Power and Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and West Texas Utilities Company, we wish to record our support of the comments filed by the Edison Electric Institute.

Sincerely yours,


Jeffrey H. Howard

JUL 25 1991

91-13-22-

At Flint, the Board of Directors determines at its sole discretion when capital credits will be paid. Our history has been one of paying on FIFO rotating basis on a 14-year cycle; however, for the last 4 years we have been paying on a 13-year cycle, and for the year of 1991 the Board has just determined to pay on a 13½-year cycle. Therefore, it would be impossible for this co-op to notify the government of when capital credits will be paid until such time as the Directors determine each year, and we presently notify the government and all of the consumers when that determination is made.

52.241-13 (c).

This paragraph would require the co-op to treat the U.S. Government preferentially and differently than other co-op members. This discrimination is contrary to the IRS regulations that require us to treat all consumers the same as to capital credits. As stated earlier, it would mean that we would have to pay to the government all accrued capital credits every 10 years (at the termination of the contract). Preferential treatment required by this paragraph violates the regulations of the IRS, the regulations of REA and the spirit of the law of the cooperatives of the State of Georgia.

52.241-13 (d).

Flint Electric Membership Corporation has been in business for over 50 years and has never to our knowledge written a check having insufficient funds to any party. To require the expense of a certified check is ridiculous. Flint pays millions of dollars to the REA and never in certified funds. Our checks are computer generated, just like the United States Government's, and it is impossible for us to furnish the information required with the check without handling the same individually with great expense to the co-op.

We certainly appreciate your consideration of these comments in making the rules. If we can furnish any more information, or if you would like any additions to our comments, please let us know.

Sincerely,


Harold B. Smith
General Manager

HBS:kb

cc: Senator Sam Nunn
Congressman Richard Ray



FLINT
ELECTRIC MEMBERSHIP CORPORATION

P. O. Box 308 • Reynolds, Georgia 31076-0308 • (912) 847-3415

91-13-223

July 25, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N. W.
Washington, D. C. 20405

RE: Comments on Proposed Federal Acquisition Regulation:
Acquisition of Utility Services, 56 Federal Register 23982
(May 24, 1991) (FAR Case 91-13)

Dear Sir or Madam:

We understand that this comment was due on or before July 23, 1991, and we apologize for filing two days late; however, we ask that you please take this response into consideration in the formulation of the final rules.

Flint Electric Membership Corporation is a distribution co-op located in the middle of the State of Georgia, serving approximately 47,000 meters and included in that is a portion of two major military installations, Warner Robins Air Force Base, Warner Robins, Georgia, and Fort Benning in Columbus, Georgia. Our contracts with each of those installations are typically for a 10-year period, with modifications as appropriate.

This comment is directed to Part 52.241-13 **Capital Credits**, paragraphs (b), (c) and (d). We have no objections to paragraph (a).

52.241-13 (b).

Under the present REA regulations and accounting procedures used in this Co-op, it would be impossible for us to comply with the 60-day requirement. REA requires and allows the audit to be completed within 90 days of the end of our fiscal year, with the same to be forwarded to REA within 120 days for their comments and approval. Capital Credits cannot be assigned to the individual accounts until the REA approval of the audit has been filed. These reasons make the 60-day requirement impossible and unreasonable. At present, the computer capabilities that we have would not allow us to furnish the contracting officer the information required by (b). To furnish this information in the format set forth in (b) would require the individual accounting officer to spend valuable time and prepare the information by hand. We currently furnish every member, including the United States Government, every year with a formula, once the audit is approved, of the amount of capital credits accrued to their accounts based on their usage during the year. This procedure is in compliance with the directions and procedures of the Internal Revenue Service, as well as the REA.



91-13-224
Homer Electric Association, Inc.

CENTRAL OFFICE: 3977 LAKE STREET • HOMER, ALASKA 99603 • (907) 235-8167

July 25, 1991

Edward Loed
General Services Administration
Far Secretariat (VRS)
18th & F Streets, N. W., Room 4041
Washington D C 20405

Reference: FAR CASE 91-13

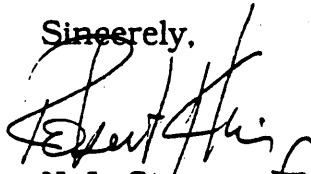
Dear Mr. Loed:

The National Rural Electric Cooperative Association, of which we are a member, requested our review and response to Far Case 91-13. We apologize for missing the July 23 deadline but, would appreciate your consideration of our comments.

Section 41.007(j), proposed a contract clause addressing capital credits for federal facilities who are members of cooperatives. Paragraphs (b) and (c), under 52.241-13 Capital Credits, would present Homer Electric Association with two problems. Paragraph (b) would not allow HEA enough time to complete its year end audit. Capital credits may not be allocated until the fiscal year's margins have become official. Paragraph (c) presents an insurmountable problem. Capital credits are paid only in accordance with the corporate by-laws. This is a twenty year rotation. Obviously paragraph (c) is in direct conflict with paragraph (a) under the same heading. The Federal facility would not be able to become a member in the first place without agreeing to abide by the cooperative's by-laws.

Thank you for your consideration.

Sincerely,


N. L. Story
General Manager

FARCASE:NLS:RE.jb

JUL 26 1991

91-13-225

Lynches River Electric Cooperative, Inc.

July 18, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, D. C. 20405

Re: FAR Case 91.13, Paragraph 52.241-13

Gentlemen:

The bylaws of our cooperative are not specific concerning the payment of capital credits. They permit our Board of Trustees to determine if and when and how the payments are to be made. The Trustees' decision depends on the financial condition of the cooperative.

Our cooperative does not allocate capital credits within 60 days after the close of the fiscal year. We do it within a reasonable time. This year, it was within about 180 days.

Please do not make a government regulation that will require us to change our bylaws concerning the payment of capital credits.

Sincerely,



Earl L. Belcher, Jr.
General Manager

bcs

P. O. Box 309
Lynch, South Carolina 29728
803 672 6111

W. W. and Martha Springs
+03 415 6855
Lynchester
+03 235 7701
W. W. and Martha Springs
803 623 6132

JUL 26 1991

91-13-226

Central Electric Power Cooperative, Inc.

P. O. Box 1455/121 Greystone Boulevard/Columbia, S. C. 29202/(803) 779-4975

July 23, 1991

General Services Administration,
FAR Secretariat {VRS}
18th and F Streets, N.W.
Room 4041
Washington, DC 20405

RE: S.C. 50 Santee
FAR Case 91-13
Proposed Rule Making at 48 CFR Parts 6, 8, 15, 41 and 52
Federal Acquisition Regulation; Acquisition of
Utility Services.

Dear Sir:

Enclosed please find the original and three copies of the
Comment by Central Electric Power Cooperative, Inc. regarding
the above-referenced proposed rule-making.

Sincerely,



C. Pinckney Roberts
Senior Vice President &
General Counsel

dsk

Enclosure

c/Electric Cooperatives of South Carolina
National Rural Electric Cooperative Association

JUL 26 1991

91-13-226

DEPARTMENT OF DEFENSE, GENERAL SERVICES ADMINISTRATION

and

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Comments of Central Electric Power Cooperative, Inc.
(South Carolina 50 Santee)
on the
May 24, 1991 Proposed Rule-Making
at
48 CFR Parts 6, 8, 15, 41 and 52
(FAR Case 91-13)

Federal Acquisition Regulation; Acquisition of Utility Services

Central Electric Power Cooperative, Inc. ("Central") hereby files these comments to the General Services Administration (GSA) relative to the May 24, 1991 publication¹ of the proposed rule-making, FAR Case 91-13, which is a rewrite of the existing FAR coverage at 48 CFR Parts 6, 8, 15, 41 and 52, as follows:

INTRODUCTION AND CENTRAL BACKGROUND

1. All communications concerning these comments by Central should be addressed as follows:

C. Pinckney Roberts
Senior Vice President & General Counsel
Central Electric Power Cooperative, Inc.
P. O. Box 1455
Columbia, South Carolina 29202

2. Central Electric Power Cooperative, Inc. is a G&T electric cooperative corporation organized and existing under the laws of the State of South Carolina. Its corporate members (owners) consist of fifteen distribution electric cooperatives serving approximately two-thirds of the State of South Carolina.

¹ 56 Fed. Reg. 23982

COMMENTS ON PROPOSED RULEMAKING AT

48 CFR PARTS 6, 8, 15, 41, AND 52

3. The proposed rewrite of the existing FAR coverage dealing with utility services is intended to establish uniform utility coverage in the FAR among all executive agencies, the Department of Defense in the past having been exempt. Central supports the general concept of uniformity among federal agencies.

4. Central agrees with that portion of the proposed rule-making that restricts the use of appropriated funds by any department agency or instrumentality of the United States in accordance with the Department of Defense Appropriations Act of 1988, Public Law 100-202. This law generally prohibits the purchase of electricity in a manner inconsistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation or State-approved territorial agreements. State policy precluding wasteful duplication of electric facilities should not be overridden by federal law merely to serve the "local" federal interest.

5. Section 41.004-5(b)(7). Central disagrees with the requirement in 41.004-5(b)(7) for the contract office to document the contract file with the utility's willingness to wheel or otherwise transport utility service. Presently federal law restricts requirements to wheel to a narrow set of circumstances. Since the Federal Courts have refused to mandate universal wheeling, these proposed regulations should not, under the guise of documenting the file, attempt to do what the Federal Courts have refused to do. The willingness of a utility to wheel should be given no weight in awarding the contract. Therefore there is no need to document the file and this provision should be omitted from the proposed regulations.

91-13-226

6. Section 41.002-2(b). The words "regulated supplier" should be clearly defined in the Definitions sections in order to avoid any possible confusion.

7. Section 52.241-5(d)(2). None of the contracts between Central and its other consumers contains a provision for an adjustment in the monthly billing due to the inability of the consumer to operate the service location for causes beyond its control (other than in accordance with a rate schedule under which Central purchases the applicable increment of power from its wholesale supplier). For this reason Central is opposed to this provision being required in federal contracts for electric utility service.

8. Section 52.241-13(b)(c) and (d). Since subsection (a) of 52.241-13 states that the Government is a member of the Cooperative, the Government should abide by all the by-laws of the Cooperative. Subsections (b), (c) and (d) relate to subjects covered by the cooperative's bylaws and REA regulations and should be omitted. If the provisions of subsections (b), (c) and (d) conform to the bylaws, these subsections are redundant; if they differ, the Government becomes a "special" member, unnecessarily creating significant problems for the Cooperative. Thus subsections (b), (c) and (d) of section 52.241-13 should be omitted from the final regulations.

9. Section 52.241-13(b). If subsections (b), (c) and (d) are not omitted as suggested in paragraph 8 above, the following specific comments apply. Subsection (b) would appear to require that the contracting electric cooperative agree to make payment of capital credits on a certain date to be stated by the Contractor. Under standard, REA-approved bylaws of rural electric cooperatives, capital credits are allocated annually by member and each member is notified of the amount of its capital credit allocation. In the event a member has more than one service location the allocation is broken down by service location. Therefore, the information

requested in the first sentence of this subsection is already provided to all consumers, but generally not within 60 days. The time requirement should be omitted.

However, this subsection places an additional requirement on electric cooperatives which is contrary to existing standard bylaws and REA mortgage requirements and could result in discriminatory treatment of other consumers vis-a-vis the Government as a consumer. The payment (as opposed to the allocation) of capital credits is subject to the approval of the board of trustees of the electric cooperative and the consent of REA, and is based upon a number of factors, including the cash condition of the cooperative at the time of payment. Most electric cooperatives pay capital credits on a first-in, first-out basis with a ten to fifteen year lag time. Some cooperatives use a combination of first-in, first-out and last-in, first-out so as to pay a portion of the capital credits based on the current year's sales. It may not be legally possible, and it certainly would not be wise, for the cooperative to contract to pay capital credits on a specific date to the Government. If it did so, its payment schedule would probably have to be made applicable to all consumers in order to avoid discriminatory treatment of any consumer. Furthermore, REA might refuse to agree to such a contractual provision, thereby putting electric cooperatives at a competitive disadvantage in supplying electricity to Government purchasers.

The electric cooperative incorporation statutes of the various States and provisions of the Internal Revenue Code and IRS Regulations recognize the need for a nonprofit, non-stock consumer-owned corporation to accumulate patronage capital through the retention of excess earnings. No business can accurately predict its need for such retained capital for years into the future. To require the cooperative to commit to that which it cannot foresee would be folly for the electric cooperative and all of its consumers. If, on the other hand, the proposed regulatory language can be complied with merely by stating that capital credits will be paid "when the board

91-13-226

N:REA\COMMENT.524

of trustees so directs, subject to the approval of REA," the regulation is unnecessary because the bylaws adequately cover the matter. The second sentence of this section should be omitted from the final regulations.

10. Section 52.241-13(e). While cooperative bylaws sometimes permit the immediate payment of capital credits to decedent's estates, the Government's proposed requirement is different. Since it is indistinguishable from paying any consumer (individual or corporate) its capital credits upon mere termination of service, non-discrimination toward the other consumers would require the cooperative to significantly change its method of paying capital credits in order to do business with the Government.

For the above reasons and those stated in paragraphs 8 and 9 above, this subsection should be omitted from the final regulations.

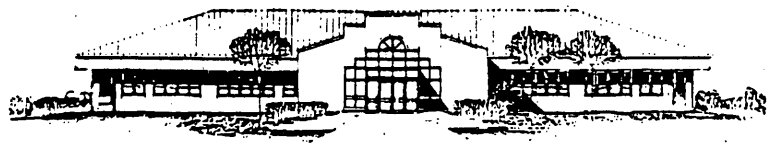
Respectfully Submitted,
CENTRAL ELECTRIC POWER COOPERATIVE, INC.

By: Patrick T. Allen
Patrick T. Allen
Executive Vice President & General Manager

Columbia, S.C.
July 23, 1991

91-13-227

Kansas Electric Cooperatives, Inc.



MAILING ADDRESS

P. O. Box 4267
Topeka, Kansas 66604-0267

Phone (913) 478-4554
Fax (913) 478-4852

Statewide Office at 7332 SW 21st Street, Topeka, Kansas 66615

July 23, 1991

Lester L. Murphy, Jr.
Executive Vice President

MEMBER COOPERATIVES

- Alfalfa REC, Cherokee, OK
- Ark Valley REC, Hutchinson
- Brown-Atchison REC, Horton
- Butler REC, El Dorado
- C & W REC, Clay Center
- Caney Valley REC, Cedar Vale
- CMS REC, Meade
- Doniphan REC, Troy
- D. S. & O. REC, Solomon
- Flint Hills REC, Council Grove
- Jewell-Mitchell REC, Mankato
- Kaw Valley REC, Topeka
- KEPCo, Topeka
- Lane-Scott REC, Dighton
- Lawrence-Jefferson REC, McLouth
- Lyon-Coffey REC, Burlington
- Midwest Energy, Hays
- NCK REC, Belleville
- Nemaha-Marshall REC, Axtell
- Ninnescah REC, Pratt
- Norton-Decatur REC, Norton
- Pioneer REC, Ulysses
- P. R. & W. REC, Warnego
- Radiant REC, Fredonia
- Sedgwick County REC, Cheney
- Sekan REC, Girard
- Smoky Hill REC, Ellsworth
- Sumner-Cowley REC, Wellington
- Sunflower, Hays
- Twin Valley REC, Altamont
- United REC, Iola
- Victory REC, Dodge City
- Western REC, WaKeeney
- Wheatland REC, Scott City

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room. 4041
Washington, DC 20405

Re: FAR Case 91-13; Federal Acquisition Regulation;
Acquisition of Utility Services

Dear Secretariat:

Enclosed for filing in FAR Case 91-13 is an original and three copies of comments submitted on behalf of Kansas Electric Cooperatives, Inc. (KEC). KEC is the statewide service association for the rural electric cooperatives operating in the state of Kansas. We would request that our comments be considered in your consideration of amendments to the FAR concerning acquisition of utility services.

Very truly yours,

Michael W. Peters
General Counsel

jh

Encl.

cc: Lester L. Murphy, Jr.
Wallace F. Tillman, NRECA

ENERGY PLUS



JUL 26

91-13-227

FAR Case 91-13 - Federal Acquisition Regulations;
Acquisition of Utility Services

Comments Submitted by Kansas Electric Cooperatives, Inc.
In Response to Notice of Proposed Rules
56 Fed. Reg. 23982, May 24, 1991

Kansas Electric Cooperatives, Inc.
7332 Southwest 21st Street
P.O. Box 4267
Topeka, Kansas 66604
(913) 478-4554

FAR Case 91-13 - KEC Comments

Kansas Electric Cooperatives (KEC) is the statewide service association representing the interests of the rural electric cooperatives providing electric service within the state of Kansas. Our membership includes thirty-two distribution cooperatives and two generation and transmission cooperatives, which together serve throughout 80% of the state of Kansas. KEC member cooperatives provide retail electric service to numerous federal installations, including military bases, Corp of engineer projects, and federally owned or operated buildings. The proposed amendments or additions to the FAR regarding acquisition of utility services (56 Fed. Reg. 23982), if adopted, would have a serious adverse economic impact on several Kansas rural electric cooperatives. For these reasons, KEC is interested in the proposed changes to the FAR.

Issues

For the following reasons, KEC opposes the proposed language regarding capital credits contained within 52.241-13, Capital Credits, specifically paragraphs (b) and (c).

1. The language in 52.241-13 (b) and (c), if adopted, may be inconsistent with many cooperatives' bylaws by granting the government greater rights to the payment of capital credits than other similarly situated members of the cooperative.
2. The proposed language in 52.241-13 (c) regarding the right to payment of capital credits, if adopted and complied with, may force many cooperatives to violate terms of the mortgages held by the federal government acting through the Department of Agriculture and the Rural Electrification Administration, as well as jeopardize the cooperative's financial viability.

Discussion

1. The language as proposed in 52.241-13 regarding capital credits is both inconsistent internally as well as being inconsistent with many cooperatives' bylaws. Paragraph 52.241-13 (a) states that the government, as a member of the cooperative, is entitled to capital credits consistent with the cooperative's bylaws, the same as any other member. KEC would not deny this fact. And, if the proposed contract language were to only contain paragraph (a), we would not be writing comments. However, inclusion of paragraphs 52.241-13 (b) and (c) cause serious concern for KEC as they are both inconsistent with paragraph (a) and are inconsistent with many cooperatives' bylaws.

Paragraph (a) correctly states that the government is a member of the cooperative and as such is entitled to the same rights as any other member. However, if adopted, paragraphs (b) and (c) would entitle the government to additional rights regarding capital credits not afforded other similarly situated cooperative members.

Paragraph (b) requires the following:

1. Notice of the government's accrued capital credits within sixty days after the close of the cooperative's fiscal year; and
2. The specific amount of and specific date in which the capital credits are to be paid to the government.

Both requirements go beyond many, if not all, of the cooperatives' obligations imposed by the bylaws with regard to notification of members' accrued capital credits. Many cooperatives' bylaws are quite similar to those proposed by REA and the U.S. Department of Agriculture in REA Bulletin 101-5, REA Model Act Bylaws. The specific provisions contained within the model bylaws and bylaws of many Kansas RECs provide that within a reasonable time after the close of the cooperative's fiscal year, the membership will be notified and informed of the amount of capital credits being held by the cooperative on behalf of each patron. The bylaws, however, are silent as to any requirement regarding notification of when the credits will be retired. The model bylaws and the bylaws of many Kansas RECs leave it to the discretion of the cooperative's board of trustees as to when and how much capital credits will be retired and paid out to the cooperative's members. This is determined after a thorough review of the cooperative's current and future financial condition.

The proposed contract language contained within paragraph (b) requires the cooperative to give detailed financial data to the government within an arbitrary sixty-day limit. The cooperatives are required by REA to have an independent CPA audit conducted at the close of each fiscal year. Rarely is that audit conducted and a report made to the cooperative within sixty days of the close of the fiscal year. In many cases, the independent CPA report is not available to the cooperative until four to six months following the close of the cooperative's fiscal year. Requiring the cooperative to provide specific capital credit information, including accrued credits by contract number, year, and delivery point within a sixty-day time limit goes beyond the capabilities of many systems.

Paragraph (b) attempts to bind the cooperative by requiring the cooperative to inform the government of a date certain when payment of the capital credits is to be made. It would be impossible for the cooperative's board, within sixty days after the close of the cooperative's fiscal year, to indicate with any degree of specificity the amount of capital credits and the date certain that they will be retired.

91-13-227

In many instances, cooperatives are on a fifteen or twenty-year rotation cycle, meaning that capital credits accrued fifteen or twenty years ago are being retired with current revenues. An economic reality is that the financial condition of any cooperative fluctuates from year to year. Hence, the money available to retire accrued capital credits will also fluctuate from year to year. By holding the cooperative to a date certain for the payment of capital credits long before the cooperative's board can accurately make that determination places the government's right to payment above all other cooperative consumers, as well as stripping the cooperative's board of directors of its authority and discretion as prescribed by state law and the cooperative's bylaws.

2. The proposed language in paragraph (c) regarding the government's right to payment of capital credits upon termination or expiration of the contract, if complied with, may cause the cooperative to violate its REA mortgage or even jeopardize the cooperative's financial condition.

Finally, we take strong exception to the inclusion of paragraph 52.241-13 (c) which provides as follows:

Upon termination or expiration of this contract, unless the Government directs that unpaid capital credits are to be applied to another contract, the Contractor shall make payment to the Government for the unpaid credits.

This provision clearly places the government's interests and its right to demand payment of capital credits above all other cooperative consumers. Currently, when a customer ceases to take service from the cooperative, the customer has no right to demand payment of capital credits. Current customers which leave the cooperative system have no greater right to payment of capital credits than do remaining cooperative customers. All customers, past or current, are generally paid when the cooperative makes a general rotation of capital credits, and not before.

Cooperatives which have borrowed money from REA have executed a standard form mortgage agreement which controls, to a certain degree, the cooperative's right to retire capital credits. A typical mortgage provides that the cooperative will not, in any one year, without the approval of its principal lenders, retire any capital credits to its members or consumers if after making the distribution the total equity of the cooperative will not equal or exceed 40% of its total assets and other debits.

Many KEC member systems do not currently meet the 40% equity requirement necessary to retire capital credits without the mortgagor's approval. The inclusion of paragraph (c) in a contract requiring a cooperative to retire capital credits to the government at the conclusion of the contract term, if complied with, would cause any cooperative with less than 40% equity to violate its mortgage with REA.

91-13-227

Additionally, several Kansas cooperatives serve very large federal installations which have accrued considerable amounts of capital credits during their years of service. If a cooperative were required to retire all of these capital credits at one time upon the termination of service to the government installation, the cooperative in all likelihood would not have the cash available to do so.

Conclusion

The proposed contract language contained within 52.241-13 (b) and (c) grants to the government greater rights than any other cooperative member, and if implemented and enforced will have a detrimental economic impact on cooperatives providing electric service to government installations. We would strongly recommend that paragraphs 52.241-13 (b) and (c) be deleted from the proposed contract language contained within the Federal Acquisition Regulation as published in 56 Fed. Reg. 23982.

At the very least, paragraphs (b) and (c) should be amended to provide that the government will be notified of its accrued capital credits within a reasonable time following the close of the cooperative's fiscal year, and delete the requirement of notifying the government of a date certain when the capital credits are to be retired. Further, paragraph (c) if not deleted should be amended to provide that upon termination or expiration of the contract between the cooperative and the government, the government will be paid capital credits in accordance with the cooperative's bylaws and general rotation policy.

Thank you for this opportunity to submit comments regarding the proposed amendments to the Federal Acquisition Regulations regarding Acquisition of Utility Services.

Respectfully submitted,



Michael W. Peters, General Counsel
Kansas Electric Cooperatives, Inc.
7332 Southwest 21st Street
P.O. Box 4267
Topeka, Kansas 66604
(913) 478-4554



Rushmore Electric Power Cooperative, Inc.

91-13-228

1715 Cambell, P.O. Box 2414
Rapid City, SD 57709-2414

Phone: (605) 342-4759
Fax: (605) 348-2026

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F. Streets, N.W.
Room 1041
Washington, DC 20405

RE: FAR Case 91-13

To Whom It May Concern;

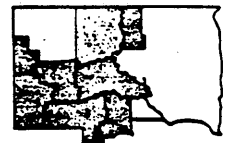
Rushmore Electric Power Cooperative is a wholesale electric power supplier to eight rural electric distribution cooperatives in western South Dakota. Some of these systems serve federal facilities and would be subject to your above referenced rules.

We became aware yesterday on return from vacation of the proposed GSA rule on the acquisition of services from utilities (56 Federal Register 23982). In this, GSA is proposing language be added to all contracts between federal facilities and cooperative utilities.

We are concerned with subpart "52.241-13 - Capital Credits". Subtitle (b) under this section calls for 60 day notice of accrued credits stating the amount and date payment is made. We are opposed to the 60 day notice as the books are not usually closed that soon and because it calls for treatment other than normal for the balance of the distribution cooperative membership. Additionally they would not yet have information on credits earned at the wholesale level which would be part of the assigned credits. Notice at that time of the method and time of payment would not be available because many systems are on an eight, ten or twelve year (example only) credit repayment schedule which are recommended by REA who also sets payment formulas. The boards of directors make repayment determinations at or near the time of payment based on factors then.



RECYCLED PAPER



26

91-13-228

General Services Administration
Page 2

We oppose subtitle (c) as well because it directs that credits will be paid upon termination of a contract unless assigned to another contract. This calls for payment out of sequence and not according to policy or organization bylaws. It may as a result place a financial hardship on the cooperative.

There are numerous other areas in the rules we have concerns with. These, however, pertain principally to retail power sales so we--because of limited time--will rely on our member distribution systems to address them.

Your consideration of our concerns in making your rule changes would be greatly appreciated.

Sincerely,



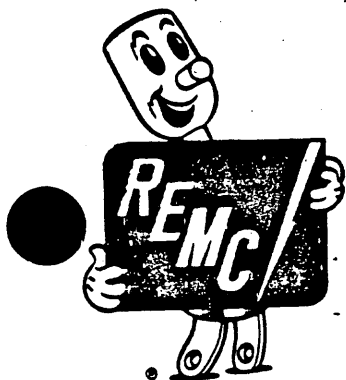
Robert F. Martin, General Manager

RFM/dt

"OWNED BY THOSE
WE SERVE"

DAVISS—MARTIN COUNTY

91-13-229



RURAL ELECTRIC MEMBERSHIP CORPORATION

P.O. Box 540
Washington, IN 47501
Phone: (812) 254-1870

July 24, 1991.

General Services Administration
FAR Secretariat (VRS)
18th and F Streets
N.W., Room 4041
Washington, D.C. 20405

In Re: FAR Case 91-13

Dear Sirs:

The recently published proposed rule on the acquisition of services from utilities (56 Federal Register 23982) has raised concern among the Daviess-Martin County REMC Directors. Especially, Section 41.007 (j) where it proposes that federal facility contracts with the cooperative electric utilities contain a clause substantially the same as the clause at 52.241-13, Capital Credits. This clause contains provision which would violate the principles by which cooperatives operate, and the provision would also hold the potential to do financial harm to the electric cooperative.

In paragraphs (b) and (c) it calls for government facilities to receive discriminatory, preferential treatment in recovery of capital credits. Cooperatives are run by democratically elected boards of directors who establish the criteria for if and when capital credits may be distributed to member-consumers. The boards of directors establish capital credit policies which are intended to treat all consumers equally in receiving capital credits. For the federal government to try to establish contractual requirements for preferential treatment in which case federal facilities would receive capital credits in advance of other consumers, violates this foremost principle of equal treatment for all consumers.

Thank you for the opportunity to offer our observation on this matter.

Sincerely,

A handwritten signature in cursive script that reads "Robert L. Barron".

Robert L. Barron
General Manager

RLB:tjs

JUL 26 1991



**Matanuska Electric
Association, Inc.**

P.O. Box 2929
Palmer, Alaska 99645
Telephone: (907) 745-3231
Fax: (907) 745-9328

91-13-230

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets NW, Room 4041
Washington, D.C. 20405

Dear Sir/Madam:

Re: FAR Case 91-13. Proposed Rule for Federal Acquisition Regulation; Acquisition of Utility Services

Matanuska Electric Association, Inc. (MEA) submits the following comments on the proposed regulations in FAR Case 91-13.

The proposed rules appear to establish very specific contract requirements for the acquisition of utility services. On the other hand, Part 41 - section 41.007(a) - Contract clauses provides for varying the contract terms to meet the specific conditions relating to a utility. More specifically, this section states:

"...To accommodate requirements that are peculiar to the contracting situation, this section prescribes clauses on a 'substantially the same as' basis (see 52.101) which permits the contracting officer to prepare and utilize variations of the prescribed provision and clauses, in accordance with agency procedures."

Given the apparent flexibility noted above, MEA still has a particular concern about the clause relating to capital credits. The concern relates to section 41.007(j), which requires a contract to contain a clause substantially the same as the clause at 52.241-13 - Capital Credits, when the Federal Government is a member of a cooperative and entitled to capital credits.

Specific to clause 52.241-13 - Capital Credits, MEA believes that only subparagraph (a) of this clause should be required. Subparagraph (a) would assure the contracting officer that the Federal Government will be treated, as relating to capital credits, the same as other members of the cooperative; i.e., on a basis consistent with the by-laws of the cooperative. MEA has an established policy, administered by the Board of Directors, to manage its capital credits pursuant to the terms of the co-op's by-laws. Also, MEA has paid capital credits each year since 1983. MEA recommends that the final rule include only subparagraph (a) of proposed section 52.241-13.

91-13-230

If subparagraphs (b), (c) and (d) of proposed section 52.241-13 are included in the final rule, MEA notes that in order to meet its peculiar circumstances, the language in such subparagraphs would have to be modified. It would be MEA's understanding that the language in such subparagraphs could be negotiated with the contracting officer to meet MEA's requirements.

Concerning 52.241-13(b) and (d), MEA's systems will not permit the allocation, notification of payment date and subsequent retirement payment of capital credits on the timeline, or by the method required in such subparagraphs. As noted above, MEA has an established policy and has paid capital credits each year since 1983. MEA believes it is unreasonable to expend the resources necessary to change its capital credits policy and systems to meet the requirements of one of its approximately 25,000 members.

More specifically to 52.241-13(c), MEA's by-laws do not provide for the payment of unpaid capital credits to members when they are no longer members of the co-op. The capital credits retirement payment is made on a percentage basis, as approved by the Board from year-to-year. Subparagraph (c) is not clear as to its intent. If the intent is that all capital credits allocated to the Federal Government under a specific contract would be paid in full at the end of the contract, MEA's membership probably would have to amend the by-laws to provide for this payment. This amendment would require MEA to treat the membership of the Federal Government, as to capital credits, differently than that of other members. MEA believes that this requirement is unreasonable and should be deleted from the final rule.

MEA again recommends that subparagraphs (b), (c) and (d) of proposed section 52.241-13 - Capital Credits be excluded from the final rule. Subparagraph (a) would assure the Federal Government that its capital credits will be handled pursuant to a cooperative's by-laws.

Sincerely,



James N. Woodcock
Manager of Administration

ldl



Wright-Hennepin Cooperative Electric Association

91-13-231

P.O. Box 330 • Maple Lake • MN 55358-0330

July 18, 1991

President

Donald J. Paumen
Maple Lake, Mn.

Vice President

Alvin E. Heinz
Rogers, Mn.

Secretary-Treasurer

E.S. Knickerbocker
Annandale, Mn.

Directors

Byron C. Gustafson
Buffalo, Mn.

Howard L. Ellis
Buffalo, Mn.

Chris A. Lantto
Annandale, Mn.

Thomas Mach
Maple Grove, Mn.

Sandra Hunz
Maple Plain, Mn.

Arthur E. Watkins
Hamel, Mn.

General Manager

David P. Larson
Buffalo, Mn.

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W. Room 4041
Washington, D.C. 20405

RE: FAR Case 91-13

To Whom It May Concern;

This letter is to express my concern for certain conditions detailed in proposed rule 41.007(j).

I have particular concern with two provisions in the proposed rule. The one provision states that the cooperative shall provide to the Contracting Officer a notice of accrued capital credits within 60 days after the close of the Contractors fiscal year and the date that payment is to be made. The second concern is that upon termination or expiration of the contract, the Contractor shall make payment to the Government for the unpaid credits.

Both of these conditions would:

1. Be contrary to the By-Laws of almost all of the cooperatives in this country.
2. Provide a hardship on some cooperatives where the Government is the largest and principal customer.
3. Would discriminate against the other members of the Cooperative by providing preferential treatment of one customer over another.
4. Contradict other rules established by the Government under the Rural Electrification Act which requires the Cooperative to maintain a certain level of equity.
5. Decreased equity would mean increased long term borrowing.

I strongly urge you to consider the above concerns and request that the rules be modified to eliminate changes that can seriously affect the operations and well being of the rural electric program.

Sincerely,

David P. Larson
General Manager

91-13-232



**Valley Electric
Association, Inc.**

July 23, 1991

800 E. Highway 372
P.O. Box 237
Pahrump, Nevada 89041
Telephone (702) 727-5312
Fax (702) 727-6320
1-800-742-3330 (In Nevada)

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, N.W.
Room 4041
Washington, D.C. 20405

Reference: FAR Case 91-13

Dear Sir:

We are a small electric distribution cooperative located in rural southern Nevada. We strongly object to the proposed rule on the acquisition of services from utilities at 41.007(j) and 52.241-13 Capital Credits. 52-241-13(b) states that the date the payment of capital credits to the government is to be made. Our bylaws state that payment shall be at the discretion of our board of directors. Their decision if and when to pay capital credits is based on various factors at the time and no date certain can be placed on payment of such credits in advance.

52.241-13(c) states that payment of capital credits to the government shall be made upon termination or expiration of the contract. Our bylaws state that capital credits are paid on a "first in first out" basis, thereby not allowing such payment any other way.

52.241-13(d) states payment will be made by certified check. I see no reason to treat any single consumer different from all others in this regard. Our regular general fund check is adequate for this purpose.

In my judgement, if these proposed regulations are required to be part of any new contract for services from utilities, we and probably many other utilities have signed our last contract for such services with the government.

Thank you for the opportunity to comment.

Sincerely,

Ross L. Dohlen,
General Manager

RLD/djb

JUL 26 1991



Washington Electric Membership Corporation

91-13-233

258 North Harris Street
Post Office Box 598
Sandersville, Georgia 31082
Telephone (912) 552-2577

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, D. C. 20405

Re: Proposed Acquisition Regulations: Acquisition of Utility
Services, 56 Fed. Reg. 23982 (1991) (FAR Case 91-13)

Gentlemen:

Washington Electric Membership Corporation offers the following
comments relative to the above proposed rule.

Subsections (b) and (c) of the proposed rule appear to be in
conflict with the bylaws of the cooperative and would cause the
bylaws to be violated should payments be made according to the
proposed rule. It also appears to be in direct conflict with the
guidelines from the Rural Electrification Administration that
requires the accumulation of equity through minimum Times
Interest Earnings Ratios and Debt Service Coverage ratios. The
early payment of capital credits to governmental contracts that
have terminated would require that other consumers be billed at
higher rates to provide capital for these refunds. This could be
determined to be a violation of the bylaws or state statutes
which govern the cooperative. The early payment of capital
credits to one class of customer relative to all other customers
may have an impact on the cooperatives tax exempt status because
it could be inconsistent with the requirements of the IRS for
cooperative status, that the cooperative operate on a
"cooperative basis".

Since there are so many areas that could significantly affect the
basic operation of a cooperative, we feel that subsections (b)
and (c) of the proposed rule be eliminated and capital credit
retirements to governmental agencies be retired under the same
conditions and at the same time as retirements to all other
customers.

Sincerely,


Robert S. Moore,
General Manager

"Owned By Those We Serve"



91-13-234

SOUTHWEST RURAL ELECTRIC

July 23, 1991

BOARD OF TRUSTEES

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Roosevelt Oklahoma

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District 8
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Ray Beavers
General Manager

700 North Broadway
P.O. Box 310
Tipton, Oklahoma
73570-0310

Phone 405 / 667-5281
405 / 667-5284
tts 1-800-256-7973

General Services Administration
FAR Secretariat (VRS)
18th and F. Streets, N. W., Room 4041
Washington, D. C. 20405

Ref: General Services Administration, Federal
Acquisition Regulations for the Acquisition of
Utility Services (FAR Case 91-13) (52.241-13
Capital Credits)

Gentlemen:

We are writing you in regard to the proposed
change in payment of Capital Credits to be paid to the
Government.

We strongly oppose paragraph (b) of article 52-241-
13 Capital Credits.

Southwest Rural Electric would be unable to meet
the sixty days after the close of our fiscal year and
also would be unable to give the date of payment because
that is determined by the financial condition of the
Cooperative and would have to be in compliance with the
bylaws of the Cooperative.

Under (c) Upon Termination or Expiration of the
Contracts; the Cooperative's bylaws state that Capital
Credits will be paid to a natural person and this
change, of course, would have to be submitted to the
Cooperative's membership for a change in the bylaws.
Currently, Southwest Rural is not refunding Capital
Credits because of the financial condition of the
Cooperative, and they will only be refunded upon the
discretion of the Board of Trustees and with the
approval of the Rural Electrification Administration and
the Central Finance Corporation. Therefore, we oppose
any change in the government contracts as proposed under
the above reference.

Sincerely,

Ray Beavers, General Manager
SOUTHWEST RURAL ELECTRIC ASSOCIATION

RB:mre



HOT SPRINGS REA, Inc.

P. O. BOX 630—504 FREMONT STREET / THERMOPOLIS, WYOMING 82443 / PHONE 307-864-3157
1-800-826-3446

91-13-235

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, DC 20405

Subject: FAR Case 91-13

Dear Ladies and Gentlemen:

In the May 24, 1991 Federal Register on page 23990, Section 52.241-13 Capital Credits, paragraph (b) reads as follows:

"Within 60 days after the close of the Contractor's fiscal year, the Contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing, a list of the accrued credits by contract number, year, and delivery point. Also, the Contractor shall state the amount of capital credits to be paid to the Government and the date payment is to be made."

The requirement to submit a complete capital credit report within 60 days of the close of the fiscal year is currently unachievable. Hot Springs hopes to have the member notices in the mail within the next 30 days, showing the outstanding capital credit balances and the 1990 allocation to the membership.

The rule further requires that notice be given as to when the capital credits will be paid. It is not possible for us to comply with that request for the following reason. In the first quarter of each year, the Hot Springs Board of Directors is required to review the financial health of the cooperative and make a determination as to the amount of capital credits that will be retired. A major portion of our members capital credit account is made up of power supplier capital credits that are paid only upon receipt of payment by the power supplier. This means that other than a review of the historical pattern, the future is indeterminate.

Paragraph (c) is restated below:

"Upon termination or expiration of this contract, unless the Government directs that unpaid capital credits are to be applied to another contract, the Contractor shall make payment to the Government for the unpaid credits."

91-13-235

Page 2
GSA - FAR Case 91-13
July 23, 1991

This paragraph calls for the retirement of capital credits upon termination of service. This is not consistent with our policy of rotating on a fixed dollar amount each year with a target of a fifteen year rotational period. It does not seem correct to provide the Government with an advantage that is unavailable to our other members.

Section 41.004-1 Acquiring Utility Services, Policy, page 23983, paragraph (e) reads as follows:

" Prior to acquiring electric utility services on a competitive basis in an area governed by a franchise service territory, the contracting officer shall determine, with the advise of legal counsel, by a market survey or any other appropriate means, that such competition would not be inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements. Proposals from alternative electric suppliers must provide a representation that service can be provided in a manner not inconsistent with section 8093 of Public Law 100-202 (see 41.004-1(d)). The representation must be supported with appropriate legal and factual rationale."

The Government should not be able to entertain bids for electric service on a competitive basis under any circumstances. In most states the electric utility has a legally protected service area. The U.S. Government should use the locally certified electric utility and pay the reasonable rates and tariffs established by the State Regulatory Public Utility Commission in the same manner as any other consumer.

Thank you for the opportunity to comment on your proposed rule. Please let me explain if my concerns are unclear.

Sincerely,

HOT SPRINGS R.E.A., INC.



James D. Kirsch
Manager

JDK/ddg

CC: Bob Bergland, NRECA
Tom Trowbridge, WREA

July 17, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, DC 20405

RE: FAR Case 91-13

Dear Sir:

This letter is in response to a proposed rule on the acquisition of services from utilities. The General Services Administration's proposal to add language at section 41.007 (j) concerning Capital Credits would be almost impossible to comply with and at the same time would not be in agreement with our cooperative's by-laws.

I will respond to the proposed rule by paragraph as it was printed in the Federal Register.

Paragraph A - In order for the Government to be treated like any other member and be consistent with the by-laws of the Cooperative, it would be impossible to specify the time of payment of the capital credits. Our by-laws call for a review of the financial condition of the Cooperative before any decisions are made to retire capital credits.

Paragraph B - As in paragraph A, the by-laws of the cooperative would make it impossible to furnish a date of payment. The other information asked in this paragraph is already being provided to all of our members.

Paragraph C - As in the first two paragraphs, in order to comply with this paragraph, the Cooperative would not be in compliance with our own by-laws. Our by-laws do not permit us to retire a member's capital credits when they disconnect their service. Their capital credits are retired at the same time as all other members. There is no differentiation between inactive and active members when retiring capital credits.

Paragraph D - The requirement that the payment of capital credits be made by certified check is both costly and insulting. The cost of a certified check in both time and money would be unnecessary. The other information required in this paragraph is already being provided.

91-13-236

General Services Administration
July 17, 1991
Page 2

In closing, I would like to emphasize the fact that a proposal like this would require our Cooperative to change our by-laws in order to comply. What our Federal Government is proposing would require that they receive preferential treatment over the other members of the Cooperative who are citizens.

Sincerely,

PALMETTO ELECTRIC COOPERATIVE, INC.



G. Thomas Upshaw
President & Chief Executive Officer

GTU:ncr



**Amicalola
Electric Membership Corporation**

91-13-237

P.O. Box 10
Jasper, Georgia 30143
Telephone: (404) 692-6471

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, DC 20405

RE: FAR Case 91-13

Gentlemen:

In reviewing the proposed regulations set out by 56 Fed.Reg. 23982 (1991) (FAR Case 91-13), we are concerned about these regulations.

It would not be possible to furnish an accurate list of capital credits with 60 days after the close of our fiscal year. We do not complete this list until our year end audit is completed and reviewed. This is generally after 120 days. We also are required to pay on a FIFO basis. Therefore, paying a government entity at termination of the account would violate our by-laws and in fact would impair vested contractual rights in private contracts.

We have always considered capital credits a part of owner's equity. Your suggested change would in reality change this to a form of liability that could jeopardize the basic means by which cooperatives are capitalized.

If we make an exception of paying governments, we feel that this would be unfair. Paying government capital credits prior to paying others is unfair to the rest of our members. We do not feel that a government entity is entitled to preferential treatment nor should such preference be legislated.

With respect to connection charges, our cooperative operates on a cost of service principal. Any costs that are not properly charged to our class of consumer are paid by other classes. To allow the government to escape their cost would also violate our by-laws and state status.

JUL 26 1991

91-13-237

General Services Administration
RE: FAR Case 91-13

Page-2-

This proposed rule may be in reference to a subchapter T cooperative. EMC's are 501 (C) (12) tax exempt. The subchapter T cooperatives excess margins are "patronage dividends" while EMC's refer to margins as "capital credits."

We ask that you review your proposed regulations in detail prior to making any decisions. If we can answer any questions, please feel free to contact us.

Sincerely,

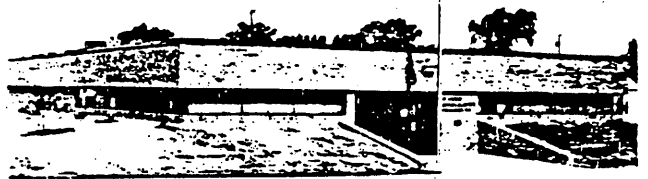
AMISALOLA ELECTRIC MEMBERSHIP CORPORATION

Charles Gibson
Manager, Finance & Accounting

CG:bg

Bringing POWER to this area for over 50 years

91-13-238



**BON HOMME YANKTON
ELECTRIC ASSOCIATION, INC.**

P.O. BOX 158 • TABOR, SOUTH DAKOTA 57063 • PHONE (605) 463-2507

July 23, 1991

MEMO TO: GENERAL SERVICES ADMINISTRATION
F A R SECRETARIAT (VRS)

FROM: RONALD E. KOUPAL, GENERAL MANAGER
BON HOMME-YANKTON ELECTRIC ASSOCIATION

SUBJECT: F A R CASE 91-13

We are writing this memo to voice our concerns about the proposed changes of legislation on F A R Case 91-13.

Bon Homme-Yankton Electric Cooperative opposes any of the proposed changes to 52.241-13 capital credits Parts B & C, 52.241-8 connections charge, and 52.241-5 service provisions Parts A, B, and D.

Bon Homme-Yankton Electric has by-laws and policies that provide guidance in the management of our day to day operations. It is the opinion and feelings of the Board of Directors and Management of Bon Homme-Yankton Electric that no member shall be given preference treatment in these areas, whether it be the federal government, a large industrial load, or a residential consumer.

REK:kjk

JUL 26 1991

91-13-239

GRAND ELECTRIC COOPERATIVE, INC.

SERVING NEARLY 10,000 SQUARE MILES OF NORTHWESTERN SOUTH DAKOTA
WITH DEPENDABLE ELECTRIC SERVICE

P. O. BOX 39

BISON, SOUTH DAKOTA • 57620

PHONE 605 • 244-5211

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N. W.
Room 4041
Washington, D.C. 20405

RE: FAR Case 91-13

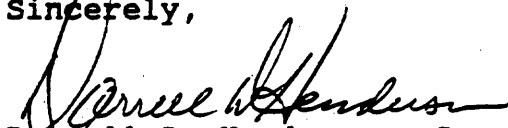
Dear Sirs:

The following are offered as comments in regard to FAR Case 91-13 proposed rules for the acquisition of services from utilities (56 Federal Register 23982).

We find the provisions of paragraph 52.241-13 on Capital Credits to be unworkable and in violation of established bylaws and procedures. Notification required per 52.241-13(b) is unworkable in that it does not allow adequate time for audit completion and Capital Credit allocation. We believe 120 days would be an adequate time frame. Paragraph 52.241-13(c) would violate the first-in, first-out principle adhered to by most cooperatives and would be unfair to other consumers who would be paid on a rotational basis.

We appreciate the opportunity to comment on the proposed rules so that these inequities can be caught before implementation.

Sincerely,



Darrell D. Henderson, General Manager

DDH:gj

JUL 26 1991

Ravalli County Electric Co-op

NE 1051 Eastside Highway
P.O. Box 109
Corvallis, MT 59828-0109

91-13-240

July 22, 1991


General Services Administration
FAR Secretariat (VRS)
18th and F Streets, NW
Room 4041
Washington, D.C. 20405

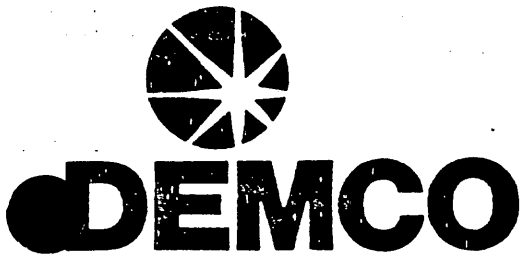
RE: FAR CASE 91-13

By this letter we are providing comments on the proposed rule under FAR Case 91-13 as published in the Federal Register Notice of May 24, 1991.

If a Federal agency is a member of an electric cooperative, then that agency should be granted the same right and privileges as any other member of that cooperative. By complying with subsections (b) and (c) of Section 52.241-13 Capital Credits, it would be discriminatory to the rest of the membership. Also, an audit of the cooperative is not always possible within the 60 day time frame stated. We suggest eliminating subsections (b) and (c).

Sincerely,


Richard J. Brown
General Manager



DIXIE ELECTRIC MEMBERSHIP CORPORATION

91-13-241

POST OFFICE BOX 15659 504-261-1221

BATON ROUGE, LA. 70895

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets
N.W., Room 4041
Washington, DC 20405

Re: Comments on FAR Case 91-13

Dear Sirs:

The proposed rule to changes contained in federal contracts between Federal facilities and cooperative utilities would have a disproportionate impact upon the operations of DEMCO. Although we have only one part time Federal contract, it would require us to substantially alter our current accounting system, at unknown costs, as well as amend the cooperative's bylaws to permit special treatment for that contractor.

DEMCO is funded by the Rural Electrification Administration and as such must abide by the mortgage agreement with that Federal entity. One of the provisions of the mortgage is that a cooperative may not pay capital credits, without special permission of REA, if the cooperatives equity is below 40% of total assets. DEMCO's equity is currently approximately 14%. Furthermore, DEMCO has not paid capital credits to its members in the past and does not foresee a time that it can.

DEMCO has just finished a workout agreement with the REA that has restructured our debt to that agency due to the weak financial condition of the cooperative. The last thing that we need at the moment is additional Federal regulation, which would increase our costs, to address a nonexistent problem. Moreover, the cooperatives bylaws would have to be amended to give this particular part time contractor specific and preferential treatment over our other 57,621 members.

The issues raised by these proposed changes are not ones of minor inconvenience and costs. They are real and would have a dramatic

NATIONAL SCIENCE FOUNDATION
1800 G STREET, N.W.
WASHINGTON, D.C. 20550

91-13-258

July 18, 1991

General Services Administration
FAR Secretariat (VSR)
18th & F Street, NW
Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13

Dear Sir or Madam:

The National Science Foundation has reviewed the Notice of Proposed Rulemaking regarding Acquisition of Utility Services. We have no comments or objections to the proposed rule in the FAR case cited above.

Sincerely,

Michael L. Kennedy 11/for
William S. Kirby
Division of Grants & Contracts

JUL 31 1991

91-13-259

24 July 1991

LANTNAVFACENGCOM COMMENTS ON DRAFT FAR PART 41

I. GENERAL COMMENTS

- * Part 41 still continues to be a GSA instruction. Sections 41.004-2, 41.004-5 and 41.005 are specific to GSA award and administration of their contracts. As DOD is a Contacting Agency these sections should be omitted from Part 41 or at least designated "Not Applicable To DOD". Each agency will establish required award and administrative procedures in their supplements to FAR.
- * In May 1991, we reviewed and provided comments on DFAR Part 241. Resolution on Part 41 language should precede resolution of DFAR Part 241 language.
- * Section 41.002 (5) specifies that Part 41 will not be applicable to acquisitions in foreign countries. Since there is very little guidance in this area, our next logical step would be to incorporate some basic guidance in DFAR.

II. SPECIFIC COMMENTS

- 41.001 Definition of Utility Service - Delete the last sentence. The problem with the wording of this sentence is that it says that other services (e.g., rubbish removal, snow removal) may be considered to be utilities when they are exempt from the Service Contract Act of 1965. This Act lists exemptions, one of which is utilities. This is an unbroken circle which solves nothing. Recommend that the wording be replaced with that in paragraph S5-101.1 of ASPR Supp 5 which says these services may be treated as utilities "when the services are performed by public agencies or utilities on a contractual basis and are subject to public regulation".
- 41.004-1 (b) - Change to read: "For utility services exceeding \$25,000 per annum including any connection and/or termination charges, agencies shall..."
- (b) - Delete everything after the first sentence. Acquisition of utility service from governmental agencies, quasi-governmental agencies, or municipalities makes it imperative that each agency have the flexibility to utilize the utility supplier's application form when it is in the best interest of the U.S. Government and the supplier's application form does not violate U.S. law. Each agency must address this issue with their own procedures.

91-13-259

- 41.004-2 Delete this entire section or designate it "NOT APPLICABLE TO DOD AGENCIES". These procedures are GSA specific and should not be applicable to DOD agencies. As with all other types of DOD contracting; DFAR, NAPS, and P-68 establish contracting procedures.
- 41.004-5 Same comment as included with 41.004-2.
- 41.005 Same comment as included with 41.004-2
- 41.006-1 Rewrite the first sentence to read, "Agencies shall review (a) utility service invoices exceeding \$25,000 per annum on a monthly basis; and (b) each contract or other written request exceeding \$100,000 on an annual basis."
- 41.008 This paragraph requires the use of SF 33 which stipulates the contract to comply with the standard format as specified in item 11 of the form. This conflicts with the ASPR Supp 5 format (paragraph S5-203) we are now using and which is recognized by the utility industry as the standard. We must have the ASPR Supp 5 flexibility of format. It has become increasingly more difficult to execute standard FAR contracts with sole-source utility suppliers. Changing to a new format with various sections that do not apply to utilities contracts will only hamper the contracting process. Part 41 must recognize that utilities contracts are sole-source and unique and have evolved in an environment of Federal, State and Local regulations.
- 41.010 (a) Service specifications should be included in the review of Part 41.
- (c) Delete this paragraph in its entirety. Comment on Section 41.008 eliminates the utilization of SF 33.
- 52.241-2 (a) - (c) - These subparagraphs effectively limit utility contracts to a ten year definite period. They are written around the GSA ten year standard authority and ignore the indefinite term contract authorization of ASPR Supp 5. The scope and term clauses of ASPR Supp 5 are more appropriate for a utility service contract. Therefore, replace subparagraphs (a) thru (c) with the ASPR Supp 5 clauses (paragraph S5-203.1).
- 52.241-5 (a) and (b) - The industry has moved away from the 2% range as being accurate. We need to follow suit. These subparagraphs should state that no meter should be placed in service that does not record 100% accurate under normal testing conditions.

(b) - Change the first sentence to read, "...test the meters installed by the contractor in accordance with the contractor's normal procedures as specified in the contractor's applicable rules and regulations". The remaining portion of the subparagraph gives the Government the right to request additional meter test and to pay for them if the Government requires meter test more frequently than the contractor's normal procedures.

52.241-9 An alternative clause is required to cover those situation where the Termination Liability is based on quantities consumed or minimum purchase requirements over a negotiated number of years.

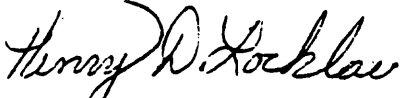
91-13-241

General Services Administration

Page 2

impact on the way the cooperative conducts its business. In addition they are all out of proportion to any perceived problem. We strongly urge you not to enact the changes as outlined in paragraphs (a) through (d) of 52.241-13.

Sincerely,



Henry D. Locklar
General Manager

HDL/dls

91-13-242



TALQUIN ELECTRIC COOPERATIVE, INC.

Post Office Box 1679 • 1640 West Jefferson Street • Quincy, Florida 32351

Quincy: (904) 627-7651

July 23, 1991

Tallahassee: (904) 878-4414

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N . W.
Washington, D. C. 20405

RE: Comments on Proposed Federal Acquisition Regulation:
Acquisition of Utility Services, 56 Federal Register 23982
(May 24, 1991) (FAR Case 91-13)

Dear Sir or Madam:

This is to advise you that Talquin Electric Cooperative, Inc. is in agreement with the comments made to you by the National Rural Electric Cooperative Association regarding the subject Proposed Federal Regulation. This Proposed Federal Acquisition Regulation is of concern to us as outlined in the NRECA letter.

We respectfully request your serious consideration of our Association's comments in hopes that any adopted version of the Regulation recognizes the way we are doing business as cooperatives.

Respectfully submitted,

TALQUIN ELECTRIC COOPERATIVE, INC.

William E. Laughlin
General Manager

WEL/bs

CC: National Rural Electric Cooperative Association

91-13-243

Union County Electric Cooperative, Inc.

POST OFFICE BOX 459

ELK POINT, SOUTH DAKOTA 57025

TELEPHONE: 605-356-3395

FAX 605-356-3397

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th And F Streets NW Room 4041
Washington, D.C. 20405

Dear Sir:

Re: FAR Case 91-13

On behalf of Union County Electric Cooperative, Inc., I would like to offer comments to be considered in relationship to the Federal Register # 23982, published May 24, 1991 pertaining to Federal Acquisition Regulation; Acquisition of Utility Service

We have grave concern over the section of this Federal Register that addresses Capital Credits when associated with any government contract. Particular discomfort arises with section 41.007(j), along with part 52.241-13 Capital Credits allocations that are addressed in items (b) and (c).

Paragraph (b) would require the Contractor to state "the amount of capital credits to be paid to the Government and the date the payment is to be made". Capital credits are assigned or allocated at the close of business for a calendar or fiscal year. The amount of capital credits could be stated. The requirement that the date the payment is to be made is another matter. Retirement of capital credits is governed by the Rural Electrification Administration mortgage which is the common mortgage for rural electric cooperatives who borrow from the Rural Electrification Administration. It is our opinion that no Contractor, if a rural electric cooperative, could state when a capital credit allocated, in a particular year, will be retired.

The full retirement of capital credits upon termination of a contract for utility service under paragraph (c) would cause the Contractor to discriminate against the other cooperative membership. The model bylaws prescribed by the Rural Electrification Administration, which have been adopted by nearly all rural electric cooperatives advocate a "first in - first out" retirement of capital credits. In accordance with this cooperatives' bylaws, any deceased members' capital credit allocation will be refunded to the estate at the discounted rate of 50% of allocation. Limit of refund will not exceed \$2,000 in any one fiscal year.

91-13-243

General Services Administration

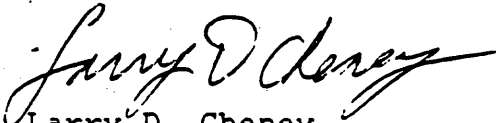
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July 23, 1991

We cannot support any change that would allow the government to withdraw its' capital credits upon termination of existing contracts. This procedure would create undue hardship on the remaining membership. The retirement of capital credits is scrutinized by the Rural Electrification Administration and this change would pose several legal questions in regard to our mortgage contracts with the Federal Government.

We would recommend that provisions (b) and (c) be revised to recognize that payment of capital credits be made in accordance with the Contractors's bylaws governing capital credit retirement.

Sincerely,



Larry D. Cheney
Manager.

91-13-244

Fayette-Union County

Rural Electric Membership

Corporation



WILLIE, WIREDHAND

PHONE 317-458-5171
P.O. BOX 349
LIBERTY, INDIANA 47353

TO: General Services Administration
 FAR Secretariat (VRS)
 18th and F Streets, N.W.
 Room 4041
 Washington, D.C. 20405

FROM: Leon Moore, Manager, Fayette-Union County R.E.M.C.

DATE: July 24, 1991

RE: FAR Case 91-13

To whom it may concern we find 52-241-13 Capital Credits; paragraphs (b) and (c) discriminatory to all of our members, as this REMC has not been in a position to pay capital credits to anyone since incorporation, in 1937. We would need to raise rates to pay capital credits and the Indiana Utility Regulatory Commission would not permit this action.

We have allocated capital credits to each account since 1950, this was the first year we had any margins. No capital credits have been paid to date. We are a small system with only 4,000 members, all rural residential and farm steads. All capital generated through rates is needed to reinvest in plant, to provide quality service to the membership.

We would be strongly apposed to this action.

Leon

cc: NRECA



Jay County REMC

P.O. Box 904
West Water Street At Highway 67
Portland, IN 47371-0904
Telephone: (219) 726-7121
FAX: (219) 726-6240

91-13-245

A Rural Electric
Membership Corporation
Serving Six Counties
in Eastern Indiana

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
Room 4041
18th and F Streets, N.W.
Washington, DC 20405

RE: FAR Case 91-13

Gentlemen:

These are comments on FAR Case 91-13, Federal Acquisition Regulation; Acquisition of Utility Services as published as a Proposed Rule in the Federal Register on Friday May 24, 1991 (Vol. 56, No. 101), page 23982-23990.

These comments are specific to Section 52.241-13 Capital Credits, paragraphs (b) and (c).

Jay County REMC has one membership from the Federal government--the U.S. Geological Survey in Indianapolis, Indiana, for an instrument building at a Salamonia River bridge.

Paragraph (b) would require our providing a list of accrued capital credits and the amount and date of payment. The Jay County REMC Bylaws Article VII, Section 2 "Patronage Capital in Connection with Furnishing Electric Energy" provide, in part, that "...individual notices of such amounts furnished by each patron shall not be required if the cooperative notifies all patrons of the aggregate amount of such excess and provides a clear explanation of how each patron may compute and determine for himself the specific amount of capital so credited to him. Said notice shall be deemed given if placed in the Rural News. All such amounts credited to the capital account of any patron shall have the same status as though they had been paid to the patron in cash in pursuance of a legal obligation to do so and the patron had then furnished the cooperative corresponding amounts for capital."

The Jay County REMC cannot state "the date the payment is to be made" because that is a determination made solely by the board of directors at a later, unscheduled date upon review of the cooperative's financial statements. The Federal Government is duly

91-13-245

notified of the amount of the capital credit through our publication in the member newsletter--they can calculate their capital credit like every other member of the cooperative. To require the cooperative to comply with Paragraph (b) would not be practical and would be unduly burdensome considering the additional labor, materials, and postage required to individually notify each member.


Paragraph (c) would require the REMC to make payment of capital credits upon termination of membership. This is in direct violation of our bylaws which do not provide for the payment of capital credits upon termination of membership.

Moreover, Article VII, Section 2, "Patronage Capital of Connection with Furnishing Electric Energy" of the Jay County REMC Bylaws states, in part, "The patrons of the cooperative, by dealing with the cooperative, acknowledge that the terms and provisions of the articles of incorporation and bylaws shall constitute and be a contract between the cooperative and each patron, and both the cooperative and the patrons are bound by such contract, as fully as though each patron had individually signed a separate instrument containing such terms and provisions." To make payment for capital credits upon termination of the government's membership would constitute special and preferential treatment. We do not do this for other members who terminate the membership; the federal government is not entitled to special consideration.

In summary, Section 52.241-13 Capital Credits, Paragraphs (b) and (c) should be deleted from the subject Proposed Rule because (b) is not practical and imposes an undue burden on the cooperative and (c) is in violation of existing bylaws and constitute special and preferential treatment not accorded other members.

Sincerely,

JAY COUNTY REMC


Thomas N. Seng
General Manager

91-13-246

KANKAKEE VALLEY REMC



14 SOUTH MAIN STREET
"OWNED BY THOSE WE SERVE"

WANATAH, INDIANA 46390
219-733-2511

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, D.C. 20405

Ref: FAR Case 91-13

Dear Secretariat:

Clause 52.241-13 Capital Credits of FAR Case 91-13 would be contrary to most by-laws of all REAs in the country.

Item (b) states that within 60 days of closing of our fiscal year, we are to notify the Government or contracting officer in writing, a list of accrued credits by contract number, year, and delivery point plus the amount to be paid and the payment dates.

Comment: Sixty days is not enough time for most utilities to make notification. Additionally, where more than one meter is served, the revenue for all meters for capital credit purposes is consolidated and one notification covering all meters is mailed. It would be extremely expensive to make the exception you are requesting.

Secondly, very few REAs would know when payment of these credits would be made. Our by-laws state that the board of directors will make that decision and only when the financial condition of the cooperative permits refunding.

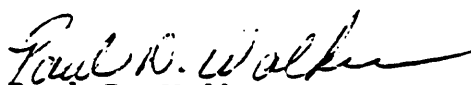
Item (c) is also in conflict with our by-laws. You are asking us to make an exception and pay the Government out of rotation and ahead of other members who might have to wait 25 years to receive payment.

Item (d) indicates that payment will be made by certified check. Our checks are computer printed and are not certified checks. Again, the adoption of this clause would required an exception for the Government.

The adoption of clause 52.241-13 Capital Credits would be expensive for the REAs. It also appears that requiring payment out of rotation would be discriminatory against our other members.

Sincerely,

KANKAKEE VALLEY R.E.M.C.


Paul D. Walker
General Manager

PDW:elm

Mille Lacs Electric Cooperative

91-13-247

Minnesota 81 Aitkin
(218) 927-2191

P.O. Box 230
Aitkin, MN 56431

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets
N. W. Room 4041
Washington, D.C. 20405

RE: FAR Case 91-13

The following are comments Mille Lacs Electric Cooperative has regarding the proposed rule on the Federal Acquisition of Services from Utilities (FAR Case 91-13):

We believe that all Federal facilities should be treated the same as any other member. That is they would be required to meet all membership requirements such as becoming a member by purchasing a refundable membership fee, providing an appropriate credit rating or paying a refundable deposit fee; and others as laid out in the Cooperative's By-Laws and Board Policies.

Comments relating to specific sections of FAR 91-13 are as follows:

1. Section 41-006-2 and 52-241-7 - To clarify our position, we believe that any consumer, including Federal Agencies, should be charged rates justified by a Cost of Service Study done by an independent Rate Specialist at times deemed appropriate by the Cooperative.
2. Section 52-241-5 (d) and (e) - We contend that no adjustment would be made in the monthly fixed charge as our fixed costs exist regardless of usage.
3. Section 52-241-8 (a) - Our current practice is to bill all new single phase construction for a Contribution in Aid of Construction at \$1.69 per foot with no allowance for salvage in order not to have our existing members subsidize any new members at the expense of load growth.
4. Section 52-241-8 (c) - Again in order not to have our existing members subsidizing new members, we feel it is imperative that our Cooperative charge all new members a nonrefundable contribution towards their electric service. We do not term it a connection charge.
5. Section 52-241-9 (d) - We believe the monthly Fixed Charge to recover fixed costs should be established by a Cost of Service Study done by an independent Rate Specialist.

JUL 29 1991

General Services Administration
RE: FAR Case 91-13
July 22, 1991
Page 2

91-13-247

6. Section 52-241-13 (b) - We feel 125 days would be more reasonable for reporting the Government's accrued capital credits as we do not allocate capital credits until after our annual CPA audit is completed. Also the requirement to state the date the capital credits are to be paid would depend upon our equity management plan and annual approval by our Board of Directors to continue on our current 15 year revolvment cycle.

7. Section 52-241-13 - This requirement is in complete conflict with our existing By-Laws and Board Policy. We do not prematurely retire capital credits other than on a discounted basis to the estates of deceased natural persons.

We would appreciate having our comments taken into consideration before the Final Ruling is published.

Sincerely,



Ralph D. Mykkanen
Financial Manager

RDM/jmr

91-13-248



SALMON RIVER ELECTRIC CO-OP, INC.

P. O. Box 384 CHALLIS, IDAHO 83226

208-879-2283

TELECOPIER 208-879-2596

"OWNED BY THOSE WE SERVE"

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th Nad F Street, N.W. Room 4041
Washington, D.C. 20405

REF: FAR Case 91-13

Dear Sir:

Your recently published proposed rule on the acquisition of services from utilities (56 Federal Register 23982) certainly causes me a great deal of concern.

I support the idea of treating all members exactly the same and paying them on the same rotation. I believe the method should be consistent with that provided for in the By-Laws. The only method of changing this should be limited to the vote of the members. Further, the idea of specifying a certain time as to payment of such, should be solely at the discretion of the duly elected Board of Directors and not mandated as you have proposed.

For you to arbitrarily set 60 days is an invasion of the members' authority, since once again the By-Laws as established may be something more or less than your time frame. Again, we feel that it is our responsibility to inform you as soon as possible as to the amount of capital which will be credited to your capital account each year. However, your desire to have this reported by delivery point and contract number is again asking for special handling and preferential consideration. Why should we discriminate against all of our other members, for your convenience? Your proposal requesting that each contract number be segregated for the purpose of showing the amount of capital credited to that specific service would be no problem, provided each member had only one service. The government, as well as the majority of our members, have more

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than one contract or one service. We continue to feel obligated and proud to notify each one of our members as to their accrual each year. To ask that coincidental to this notification, you be given the date of the actual retirement is totally impossible, when you consider the unknowns that can and will affect the cooperative's financial condition.

Your proposal upon termination or expiration of the contract, unless the government directs that the unpaid capital credits be applied to another contract, the contractor shall make payment to the government for the unpaid capital credits, is preferential treatment and discrimination against the other members of the cooperatives.

It certainly seems strange that you would specifically request that a certified check be required when throughout the years the payments we receive are not by certified check.

Please seriously consider the abandonment of this proposal in preference of the By-Laws of those cooperatives which the members (including you, the Government) have established and further have the ability to change by another vote of the members.

Thank you for considering these points in your deliberation.

Yours truly,

Dolores Ivie

Dolores Ivie
General Manager

Clay-Union Electric Corporation

P.O. Box 317

Vermillion, South Dakota 57069

Telephone 605 624-2673

91-13-249

July 23, 1991

Government Services Administration
FAR Secretariat (VRS)
18th and F Streets, NW, Room 4041
Washington, DC 20405

Subject: FAR Case 91-13

I am writing in response to the May 24, 1991 proposed rules concerning the acquisition of services from utilities (56 Federal Register 23982).

Although Clay Union Electric Corporation presently will not be directly affected by these rules should they be adapted, we still have very serious reservations because of possible future contracts we may have with the Government. We also feel the need to support fellow cooperatives that may be directly affected by these rules. Therefore we wish to contribute the following comments.

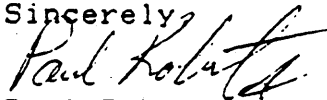
Briefly, our main objection to these proposed regulations concerns Part 52.241-13 Capital Credits, paragraphs (b & c). These paragraphs provides the payment of capital credits upon termination or expiration of a governmental contract. The question one needs to ask is: Why should the Government be granted rights in a Cooperative that are in direct conflict with its Bylaws?

Our Bylaws specifically state that capital credit retirements be made in order of priority according to the year in which the capital was furnished and credited. In other words, the capital first received by the Cooperative shall be the first retired. We cannot endorse any proposed regulations that affords certain members an unfair advantage over other members, such as this would.

Additionally, this section would also conflict with the provisions of our mortgage with the Rural Electric Administration and may jeopardize our Federal Tax-Exempt Status.

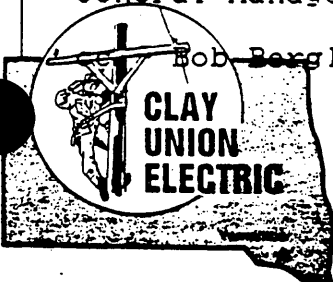
We appreciate the opportunity to comment on these rules and am sure they will be taken into consideration.

Sincerely,



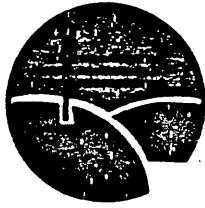
Paul Roberts
General Manager

Bob Bergland



— We put value on the line. —

JUL 29 1991



**SIoux
VALLEY**
ELECTRIC

P.O. Box 216 • Colman, South Dakota, 57017-0216

Phone: 605-534-3535

Toll Free: 1-800-234-1960

91-13-250

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Street, NW, Room 4041
Washington, DC 20405

SUBJECT: FAR Case 91-13

I am writing in response to the May 24, 1991 proposed rules published in the Federal Register relative to some proposed revisions to the Federal Acquisition Regulations relating to the Acquisition of Utility Services.

Our cooperative does provide electric service to the EROS Data Center near Sioux Falls, South Dakota, under the terms and conditions of a contract with the General Services Administration. To the best of our knowledge, we have complied with all of the federal regulations and all of the terms and conditions of the current contract. Our review of the proposed rules has prompted us to make the following comments.

Part 41.004-2 Procedures

We have no quarrel with the intentions of the rule to promote full and open competition in the acquisition of utility services by the federal government. However, in states such as South Dakota, state territorial laws dictate power suppliers who have been granted exclusive territories to serve electric loads throughout the state. Attention needs to be given as to whether or not this proposed rule would be in conflict with existing state territorial laws.

Part 52.241-5 Service Provisions (Paragraph d) Continuity of Service and Consumption

This provision which requires an adjustment to the monthly bill if service is interrupted for more than one hour in a monthly billing period is not presently a provision of our current contract with the General Services Administration. In the 19 years we have provided service to the EROS Data Center, this provision would not have applied as a result of an outage that exceeded one hour.

JUL 29 1991

91-13-250

General Services Administration
Subject: FAR Case 91-13
Page 2

Part 52.241-13 Capital Credits

First, regarding sub-paragraph (b), we follow the practice of allocating all of our capital credits for the prior year immediately after our annual financial audit as received and accepted by the cooperative's board of directors. While our fiscal year is the calendar year, our audit report is not normally presented to the board until our March board meeting. This would create a problem in complying with the proposed 60-day rule.

In addition, based on the provisions of our current mortgage with the Rural Electrification Administration, we are restricted to actual cash retirements of capital credits not to exceed 25% of the prior year's patronage capital. The decision to make cash retirements in this amount is additionally contingent upon the current cash position of the cooperative. These decisions are generally made in the last quarter of each year.

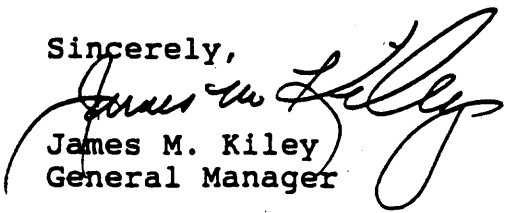
Sub-paragraph (c) provides that all capital credits shall be paid to the government upon termination or expiration of the contract. Here again, we find this provision to be in conflict with both the cooperative's bylaws and the provisions of our mortgage with the Rural Electrification Administration. It seems to us that the implementation of this provision could have severe financial impact on rural electric cooperatives who have major contracts with the federal government. We urge careful consideration of the potential impact of this provision.

The proposed requirement in Sub-paragraph (d) requiring that capital credits payments be made by certified check represents only a procedural inconvenience. Most rural electric's print capital credit checks as a part of a computer run. This would require that the capital credit checks to the federal government be voided and a certified check prepared and issued in its place.

This seems somewhat inconsistent and unnecessary as far as we are concerned because the U.S. Treasury has for years accepted our regular checks amounting to over \$1,000,000 a year for principal and interest payments on our loans.

We would appreciate your consideration of these comments on FAR Case 91-13.

Sincerely,



James M. Kiley
General Manager

cc: Bob Bergland

UNITED STATES GENERAL SERVICE ADMINISTRATION

91-13-251

RURAL ELECTRIFICATION ADMINISTRATION

Comments of Mid-Carolina Electric Cooperative, Inc.
on the May 24, 1991 proposed rule
amending 48 CFR Parts 6,8,15,41 and 52
(FAR Case 91-13)

Mid-Carolina Electric Cooperative, Inc. hereby files these comments to the United States General Service Administration relative to the May 24, 1991 publication of the proposed rule for the acquisition of utility services (56 Federal Register 23982) (FAR Case 91-13).

INTRODUCTION AND BACKGROUND

1. All communications concerning these comments by Mid-Carolina Electric Cooperative, Inc. should be addressed as follows:

Jack F. Wolfe, Jr.
General Manager
Mid-Carolina Electric Cooperative, Inc.
P. O. Drawer 669
Lexington, SC 29071

2. Mid-Carolina Electric Cooperative, Inc. is a distribution electric cooperation corporation organized and existing under the laws of the State of South Carolina. It has over 26,000 members and services approximately 32,000 meters in five counties located in the central section of South Carolina.

91-13-251

COMMENTS ON PROPOSED RULE
48 CFR PARTS 6, 8, 15, 41 AND 52
(FAR Case 91-13)

3. Mid-Carolina Electric Cooperative is opposed to certain sections contained in 52.241-13 Capital Credits which may exclude an electric cooperative from entering into a contract with the United States Government.

4. 52.241-13 Capital Credits

(a) The Government is a member of the (cooperative name) _____, and as any other member, is entitled to capital credits consistent with the by-laws of the cooperative, which states the obligation of the Contractor to pay capital credits and which specifies the method and time of payment.

This section is fine, but I would point out that the time of payment as specified in most cooperative by-laws is not a specific time but is determined by the Board of Trustees of the cooperative, the United States Department of Agriculture Rural Electrification Administration, and other banking entities. This decision is based upon the financial strength of the cooperative.

(b) Within 60 days after the close of the Contractor's fiscal year, the Contractor shall furnish to the Contracting Officer, or the designated representative of the Contracting Officer, in writing a list of accrued credits by contract number, year, and delivery point. Also, the Contractor shall state the amount of capital credits to be paid to the Government and the date the payment is to be made.

91-13-251

We oppose this section only because 60 days is an unreasonable time frame for the cooperative to audit its books, prepare capital credit notices, and mail them to all of its members. A more reasonable time frame to do all of this would be 6 months.

(c) Upon termination or expiration of this contract, unless the Government directs that unpaid capital credits are to be applied to another contract, the Contractor shall make payment to the Government for the unpaid credits.

Currently the by-laws of most cooperatives prohibit the payment of capital credits to one member and not to all members. Under our mortgage agreement with the United States Department of Agriculture Rural Electrification Administration a cooperative cannot retire capital credits unless its equity exceeds 40 percent without approval of the Rural Electrification Administration and other banking entities. By inclusion of this statement the approximately 1000 electric cooperatives could be excluded from serving any United States Government electric service.

(d) Payment of capital credits will be made by certified check, payable to the Treasurer of the United States; and forwarded to the Contracting Officer at _____, unless otherwise directed in writing by the Contracting Officer. Checks shall cite the current or last contract number and indicate whether the check is partial or final payment for all capital credits accrued.

91-13-251

We oppose being required to send a certified check for the capital credits. Sending a certified check is an unreasonable administrative burden upon the cooperative. We believe that a regular check is sufficient since most cooperative are well established businesses within the community and have been so for over 50 years.

Respectfully submitted,

MID-CAROLINA ELECTRIC COOPERATIVE, INC.

By: 

Jack F. Wolfe, Jr.
General Manager

Lexington, SC
July 22, 1991

Harrison County Rural Electric Cooperative

William H. Hutcheson, Manager



John A. Burbridge, President

91-13-252

Phone - 647-2727
P. O. Box 2
Woodbine, Iowa 51579
July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets N.W., Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13
Federal Acquisition Regulation: Acquisition of Utility Services

Dear Sir:

After examination of the proposed rule, we offer the following comments on behalf of this cooperative. The comments deal specifically with Section 52.241-13 Capital Credits.

- 1.) Sub-section (b) proposes that specific data pertaining to capital credits be furnished to the Contracting Officer within 60 days after the close of the fiscal year. Because of the necessary accounting to be done at year end and the needed report of legal counsel and others before assignment of patronage dividends, the time constraints are virtually impossible to meet. Although most cooperatives are on a specified cycle of retirement of patronage, it would not be possible to forecast payment of the patronage allocation at a specific date in the future. For instance, Rural Electrification Administration (REA) must approve refunds in many cases, after reviewing current financial and operating data of the cooperative requesting to refund.
- 2.) Sub-section (c) proposes that refund of capital credits be made at the time of contract termination or expiration. This type of payment method is contrary to the requirements of Iowa law. First in, first out (FIFO) method of capital credit retirement is mandated by statute.

Please feel free to contact us if there are questions or comments. We appreciate the opportunity to participate in the rule-making plans.

Sincerely,

A handwritten signature in cursive script that reads "William H. Hutcheson".

William H. Hutcheson, Manager

91-13-253



SOUTH ALABAMA ELECTRIC COOPERATIVE INC.

TROY, ALABAMA 36081 P. O. BOX 49

July 25, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, NW., Room 4041
Washington, DC 20405

RE: FAR CASE 91-13

Dear Sir:

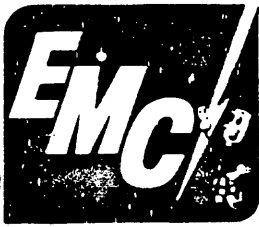
This letter is in reference to FAR Case 91-13, concerning the acquisition of services from cooperative utilities. We feel that if Section 52.241-13 Capital Credits, paragraph B & C is added to all contracts between Federal facilities and electric cooperatives it could be in violation of the By-laws under State Charter of Cooperatives. This would force the electric cooperatives to handle capital credit on all Federal accounts separate from other members allocated patronage capital. In our opinion accounting for capital credit allocations and retirements in this manner would have an adverse affect on the accounting systems of the cooperatives causing dual accounting and would be unfair to other cooperative members. We are opposed to this ruling and ask your consideration concerning the deletion of Paragraph B & C on Federal Register, Vol 56, No. 101, May 24, 1991.

Sincerely,



Malcolm Bundrick
Office Manager

JUL 29 1991



91-13-254

**The Satilla
Rural Electric Membership Corporation**

DISTRICT OFFICES

Douglas, Ga.
Hazlehurst, Ga.
Jesup, Ga.

101 West 17th St./P.O. Box 906/Alma, Georgia 31510/Phone (912) 632-7222

July 22, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N. W., Room 4041
Washington, DC 20405

Gentlemen:

The following comments are in reference to FAR Case 91-13:

52.241-13 Capital Credits

Paragraph (a)

Ability to pay is an important factor in determining when credits will be returned to members. For this reason, time of payment cannot be stated with certainty.

Paragraph (b)

Sixty days doesn't provide sufficient time to determine the amount of credit due federal facilities for the most recent year of service.

Credit calculations are only made after the end of an accounting year; in our case - the calendar year. If a contract was terminated in March, it would be the following year before credit amounts would be known.

Another reason is that the notice of credits due must include credits earned in associated organizations. In instances, annual audits must be completed before these announcements can be made and this could take several months.

Paragraph (c)

We are unable to comply with the requirements that checks be written for accrued credits earned at the time a contract is terminated.

The cooperative's bylaws state that capital credits shall be paid in order of priority according to the year in which the capital was received and the capital first received being the first to be returned. This has been our practice since inception of the cooperative. Our legal counsel advised that to do otherwise would be at risk of suit.

JUL 30 1991

91-13-254

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July 22, 1991

FAR Case 91-13

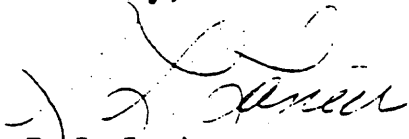
52.241-13 Capital Credits

If out-of-turn payments of capital credits were made on federal accounts, it would be treating one member differently than all others. Fairness would dictate that the privilege be extended to all members. If this was done, member equity could take the form of an obligation (liability) to the member instead of member ownership.

This would seriously impair - if not destroy - our ability to borrow money on capital markets. Certainly, any shift of equity to a liability classification as a result of mandatory payment procedures would greatly reduce the capital ratios required to borrow funds at reasonable rates.

Also, this requirement may change the cooperative's tax exempt status because it could be inconsistent with the requirements of the IRS for cooperative status.

Sincerely,



R. L. Lanier
President/CEO

RLL/wh



PIONEER RURAL ELECTRIC
COOPERATIVE, INC.

P.O. BOX 604 • 344 WEST U.S. ROUTE 36
PIQUA, OHIO 45356-0604 • PHONE 513-773-2523

91-13-255

July 23, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W.
Room 4041
Washington, D.C. 20405

Ref: FAR Case 91-13

Dear Sirs:

I would like to make the following comments in reference to Section No. 52.241-13 of your proposed rule on the acquisition of services from utilities.

Subsection (a), if passed, would direct that capital credits be allocated and paid to the Government on a basis consistent with the by-laws (Codes of Regulations) of the cooperative. However, Subsections (b), (c) and (d), if passed, would be in direct conflict with Subsection (a) unless the intent of the rule is to dictate to our membership how it should formulate its by-laws and operate its business.

Subsection (b) places an unreasonable time constraint on allocation of capital credits and notification of member/patrons. After the books are closed for any fiscal year an audit must be conducted by an independent auditing firm before allocation of capital credits is begun. Sixty days is unreasonably short for those of us with computers and virtually impossible for those without.

Subsection (c) would direct us to pay the Government ahead of our other patrons. The Rural Electrification Administration has always, and properly so, strongly recommended against refunding to patrons who have moved from the lines until they are paid in the normal cycle. The only exception has been for the estates of deceased member/patrons.

JUL 30 1991

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July 23, 1991
Page 2

91-13-255

Subsection (d) would once again impose requirements which are not justified and which would provide special favorable treatment for the Government. The Government accepts millions of checks annually which are not certified, and I know of no electric cooperative which has a history of bad checks. If we re-funded all capital credits by certified check our costs would rise dramatically without corresponding benefit.

We would perhaps understand the proposed rule better if some justification were offered for the additional burden it places upon us.

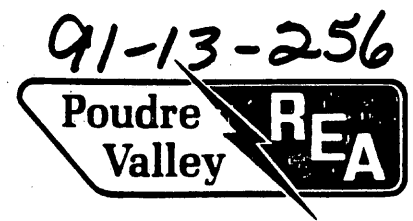
Sincerely,



Robert L. Roberts
General Manager

RLR:bjd

POUDRE VALLEY
RURAL ELECTRIC ASSOCIATION



P.O. BOX 1727

FORT COLLINS, COLORADO 80522-1727

PHONE 226-1234

July 24, 1991

General Services Administration
FAR Secretariat (VRS)
GS Building Room 4041
18th and F Streets, N.W.
Washington, D.C. 20405

Re: FAR Case 91-13

Ladies and Gentlemen:

These comments are in response to the May 24, 1991 Federal Register Notice referencing 48 CFR parts 6, 8, 15, 41, and 52.

No doubt every consumer thinks he/she would enjoy utility services from sources of supply which are most advantageous to themselves in terms of economy, efficiency, reliability, or service. Fortunately, in most areas this is not the case. Most public regulatory commissions and state legislatures have seen the wisdom in establishing fixed utility boundaries for electric utility service.

As expected, fixed utility service territories frequently mean neighbors have different utility rates and varying levels of reliability. Customers may sometimes feel captivated by high rates and poor service. Rarely, if ever, will a commission allow a customer, even in the worse of these conditions, to jump to the other utility. Such flip flopping would only further reduce revenue and the ability to invest in system improvements. If conditions are bad enough, a commission may initiate an investigation and order remedial action to lower rates or improve service.

The electric utility industry is a very capital intensive industry. Power plants, transmission lines, and substations cost billions of dollars and require ten to fifteen years of lead time to construct, based on existing and anticipated load projections. Large loads, like many governmental installations tend to be, represent significant percentages of existing loads and projected loads for many utility systems. Incorporating the low-bid process into the electric utility service to such loads may cause some utilities to suddenly have excess capacity and others to prematurely need to build new facilities.

Although I believe low-bid contracting of utility services is not in the public interest in the long run, I recognize that the government seldom looks very far into the future in the terms of public interest if it thinks it can save a buck today. However, before a government facility is allowed to contract for services from a supplier outside of the immediate service area, the government facility should be

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Page Two

required to conduct an environmental impact study and a utility impact study.

The EIS should determine the generation source of the resource providing the power. Is the fuel source more or less environmentally safer than the current local supplier? Will switching power suppliers cause one to have excess capacity, or the other be generation deficient? Will the loss of a significant load have a material effect on rates, jobs, local economy, etc.

Poudre Valley Rural Electric Association is an electric distribution cooperative duly organized under the laws of Colorado. As a member of Poudre Valley REA, the government is entitled to capital credits consistent with the by-laws of the Association, which state the obligation of the Association to pay capital credits and which specifies the method, conditions and time of payment.

Special notification in writing or otherwise to the Contracting Officer of a list of accrued credits by contract number, year, and delivery point is beyond the reasonable expectations of a cooperative member. The burden to accumulate the data far exceeds any possible benefit to the government. The Association does notify every consumer each year on their February or March billing of their capital credits allocated in the prior year. Each service is identified by a unique account number specific to each service. The government could associate this information to each contract number to keep its own records.

Capital credit refunds are made annually consistent with the Association's by-laws, policies established by the Rural Electrification Administration, and the financial condition of the Association as determined by the Board of Directors. Sending a special notice to the government regarding the amount of capital credits to be paid and when they will be paid cannot be done in advance of the decision being made on an annual basis. Checks are dispersed to all consumers within a very short period after the Board has decided to make a refund. Such notice would arrive at about the same time as the check.

Termination or expiration of service does not qualify the government for a premature refund of capital credits. Not only do our by-laws prohibit premature retirement of capital credits to any account, but such a practice could cause a severe hardship on the Association. Depending on the financial strength of a particular cooperative, rotation of capital credits ranges from seven to as long as twenty-five years. To expect a cooperative to come up with the cash to pay off even as few as seven years of capital credits for a large governmental service could ruin the financial viability of the cooperative. Certainly, to demand premature retirement of twenty-five years of retained capital credits would be beyond any ability of a cooperative to do.

91-13-256

General Services Administration
July 24, 1991
Page Three

Most cooperatives rotate capital credits on a first-in first-out basis. Demanding special treatment by the government would upset this commitment to the old-time consumers. By consuming cash to payoff the government accounts ahead of others, the cash reserves of the cooperative would be depleted and repayment unfairly delayed to the consumers to whom the payments are rightly due.

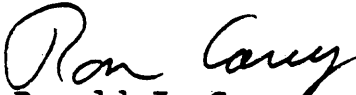
Cooperative checks are good. To expect a certified check is not only costly, it is an absurd insult to the entire rural electric program. If the cooperative were broke it probably couldn't write a certified check anyway.

Capital credit checks are identified in the same manner as account billings. Each check states for which period the refund covers. Information as to whether the payment is the final or partial payment for a particular year is provided to the government on an annual basis. Again, special treatment of government accounts is costly and time consuming to create and maintain.

In summary, this rule would be costly, discriminatory and a violation of our by-laws and the basic principles of the cooperative business philosophy.

Please contact me if you have any questions regarding the comments and issue positions hereby presented in FAR Case 91-13.

Sincerely,


Ronald J. Carey
General Manager

RJC/mrf

cc: Bob Bergland
Howard Barnes
Ray Clifton

QUENTIN N. BURDICK, NORTH DAKOTA, CHAIRMAN

DANIEL PATRICK MOYNIHAN, NEW YORK
GEORGE J. MITCHELL, MAINE
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ROBERT SMITH, NEW HAMPSHIRE

DAVID M. STRAUSS, STAFF DIRECTOR
STEVEN J. SHIMBERG, MINORITY STAFF DIRECTOR AND CHIEF COUNSEL

91-13-251
United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-8175

July 29, 1991

General Services Administration
FAR Secretariat
18th and F St., NW, Room 4041
Washington, D.C. 20405

Dear Sir or Madam:

The enclosed letters are submitted for your review and consideration.

A report on your agency's involvement and information regarding this matter would be most appreciated. For purposes of my own office archives, a duplicate of the report accompanying return of the enclosure would be helpful.

Thank you for your assistance on this matter. With best regards, I am

Yours for a free society.



STEVE SYMMS
United States Senator

SS:tjl

Enclosure

note: please address reply envelope to:

Senator Steve Symms
ATTN: Tom LeClaire
Senate Hart 509
Washington, D.C. 20510



**Raft River Rural
Electric Cooperative, Inc.**

250 North Main
P.O. Box 617
Malta, ID 83342
Telephone: 208-645-2211
FAX: 208-645-2300

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91-13-25

July 19, 1991

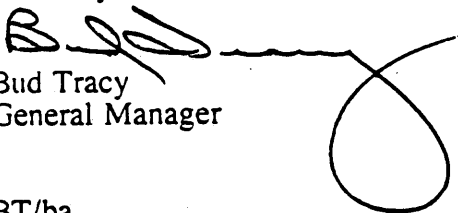
Honorable Steve Symms
Congress of the United States
United States Senate
Washington, D.C. 20510

Dear Senator Symms,

I am writing to you in regards to the proposed rule changes the General Service Administration (GSA) is currently working on between the federal facilities and cooperative utilities. It is my opinion the GSA is being extremely discriminatory with the proposed changes. I have enclosed a copy of the letter I am sending to the GSA with my response to the proposed changes. I would appreciate your support for the cooperatives with regards to the changes. Like all other cooperatives in the United States the members are the cooperative, and if the rules are to be changed the members should be responsible for the change not dictated to by a bureaucracy.

Again, I wish to express my concern with this issue and appeal for your support.

Sincerely,


Bud Tracy
General Manager

BT/ba

Enclosures



**Raft River Rural
Electric Cooperative, Inc.**

250 North Main
P.O. Box 617
Malta, ID 83342
Telephone: 208-645-2211
FAX: 208-645-2300

91-13-257

July 17, 1991

General Services Administration
FAR Secretariat (VRS)
18th Nad F. Street, N.W. Room 4041
Washington, D.C. 20405

REF: FAR Case 91-13

Dear Sir,

Your recently published proposed rule on the acquisition of services from utilities (56 Federal Register 23982) certainly causes me a great amount of concern.

As I understand the GSA is proposing in section 41.007 (j) that the following four paragraphs' be added to all contracts between federal facilities and cooperative utilities. To be perfectly honest, I find each of the four paragraphs not only offensive but, additionally find several elements contained in your proposal extremely discriminatory.

I shall address each of the paragraphs individually referenced 52.241-13:

(A) The government is a member of the (Cooperative Name) _____, and as any other member, is entitled to Capital Credits consistent with the By-Laws of the cooperative, which states the obligation of the contractor to pay Capital Credits and which specifies the method and time of payment.

RESPONSE:

I support the idea of treating all members exactly the same and paying them on the same rotation. Plus, I believe the method should be consistent with that provided for in the By-Laws. The only method of changing this method should be limited to the vote of the members. Further, the idea of specifying a specific time as to the payment of such, should be solely at the discretion of the duly elected Board of Directors and not mandated as you have proposed.

(B) Within 60 days after the close of the contractor's fiscal year, the contractor shall furnish to the contracting officer, or the designated representative of the contracting officer, in writing a list of accrued credits by contract number, year, and delivery point. Also, the contractor shall state the amount of Capital Credits to be paid to the Government and the date payment is to be made.

91-13-25'

RESPONSE:

This particular paragraph is extremely offensive since your proposed rule making appears to be an end run effort to circumvent the authority of the members of the Cooperative, plus usurping the discretionary authority of the duly elected members of the Board, which by the way the Government agency, as a member, had the privilege of electing.

For you to arbitrarily set 60 days is also an invasion of the members authority, since once again the By-Laws as established may be something more or less than your time frame. Again, we feel that it is our responsibility to inform you as soon as possible as to the amount of Capital which will be credited to your capital account each year. However, your desire to have this reported by delivery point and contract number is again asking for special handling and preferential consideration. Why should we discriminate against all of our other members, for your convenience? Personally, your proposal requesting that each contract number be segregated for the purpose of showing the amount of capital credited to that specific service would be no problem, provided each member had only one service. But, the Government as well as the majority of our members have more than one contract or one service. We continue to feel obligated and proud to notify each one of our members as to their accrual each year. But, to ask for this to be done on a service by service or contract by contract is extremely self-ish on your part. To ask that coincidental to this notification you be given the date of the actual retirement is totally impossible. When you consider the unknowns that can and will effect the cooperatives financial condition, plus the restrictions that in our and many others cases could be prohibited by our mortgage agreement with our bankers.

(C) Upon termination or expiration of this contract, unless the government directs that the unpaid Capital Credits be applied to another contract, the contractor shall make payment to the Government for the unpaid Capital Credits.

RESPONSE:

Again, you are asking for preferential treatment which would be a blatant discrimination against the other members of the cooperatives. Unless your assignment was to be made as provided in conformance to the By-Laws, as established by the members of each cooperative.

(D) Payment of Capital Credits will be made by certified check, payable to the Treasurer of the United States; and forwarded to the contracting officer at _____, unless otherwise directed in writing by the contracting officer. Checks shall cite the current or last contract number and indicate whether the check is partial or final payment of all capital credits accrued.

RESPONSE;

It certainly seems funny that you would specifically request that a certified check is required. Through out the years the payments we receive are not by certified check. In fact, for years and years the Government agencies have been notorious for being late with their payments and refusing to pay any penalties. Unlike all other members who have been forced to pay or be subject to disconnection of service, in our case until all past due and penalties have been paid.

Please consider the abandonment of this proposal in preference of the By-Laws of those Cooperatives which the members (including you, the Government) have established and further have the ability to change by another vote of the members.

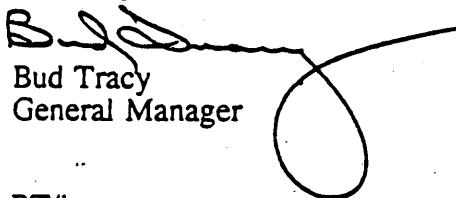
91-13-251

It has always been my belief that this country was founded on the principle of "of the people, for the people, by the people" not rules which are "of the Government, for the Government, by the Government!"

I am enclosing a copy of the pertinent section from our By-Laws, which show our technique and rules which we are proud to operate by.

Thank-You for considering these points in your deliberation.

Sincerely,

A handwritten signature in black ink, appearing to read "Bud Tracy", with a large, stylized loop at the end.

Bud Tracy
General Manager

BT/ba

CC: Richard Stallings
Larry Larocco
Steve Symms
Larry Craig

NORTHERN LIGHTS, Inc.

~~046075~~



91-13-25'

1423 Dover Highway

P.O. Box 310

Sandpoint, Idaho 83864

208-263-5141

July 19, 1991

General Services Administration
FAR Secretariat (VRS)
18th and F Streets, N.W., Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13

Dear Sir or Madam:

Careful review of the proposed rules found at 23982 Federal Register/Vol. 56. No. 101/Friday, May 24, 1991, appear to be nothing more than an attempt to circumvent federal law which requires "that none of the funds appropriated by the Act or any other Act with respect to any fiscal year by any department, agency, or instrumentality of the United States may be used for the purchase of electricity by the Government in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and elective utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements," by requiring contract clauses that would require many cooperatives to violate their own By-laws, Articles of incorporation, state law, and/or provisions in their mortgage agreements with the Rural Electrification Administration, National Rural Utilities Cooperative Finance Corporation and/or others.

Starting at 23982 and running through 23987, there are many references to Area Wide Contracts, Standard Specification Formats, Standard Annual Review Formats, Authorization Forms, Standard Form (SF) 26 Award/Contract. However, there are no samples or specifications included, so it is impossible to anticipate just how time consuming this paperwork will be. no final rules should be published until after interested parties have had an opportunity to comment on these items.

The proposed rules state that "The paperwork reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping information collection requirements or collection of information from offerors, contractors, or members of the public. This is a direct contradiction of the requirements under 41.004-5 which has a detailed list of items that will be required, many of which will require detailed analysis.

Section 41.005 also requires a substantial amount of paperwork of both the agency desiring service and the utility that will supply that service, again in direct conflict with the statement made concerning the Paperwork Reduction Act.

There are a number of items under Part 52-Solicitation Provisions and Contract Clauses that would force us to refuse to be a party to any contract that contained them. They are:

1. Service Provisions

(a) Measurement of Service

(1) "and read by the contractor at its expense." We are a rural electric cooperative serving a large area with low density. To hold down costs, our members read their own meters and supply them to us. This provision would force us to give preferential treatment to government installations and would increase the costs to our other members.

(2) "The contractor shall read all meters at periodic intervals of approximately 30 days, etc." Again, we are a low density rural electric cooperative and require our members to read their meters and supply us with them. As pointed out above, this provision would require preferential treatment for government installations at the expense of other members.

(b) Meter Test

(1) "test contractor-installed meters at intervals not exceeding one year, etc." Electric meters are probably the most accurate and dependable measuring device used in a trade or business today. Requiring annual testing is absolutely not cost-effective. It will only add to the already high costs of system operations and provide no benefit.

(2) (3) These two items are part of the operating requirements of every electric utility that I am familiar with and are not needed in a contract.

(d) Continuity of Service

(1) "or other variation of service shall aggregate more than one hour during any period hereunder, an equitable adjustment shall be made in the monthly billing, etc." Billings for electric service are based on the amount of power actually used. During outages, no power would be used so there would be no bill for power used. For this reason, this clause is unnecessary and excess verbiage.

91-13-25

(2) This section poses a problem in that it could transfer costs from the government to the other members on an inequitable and discriminatory basis. Depending on the circumstances, it could provide for preferential treatment of the government at the expense of the other members.

52.241-7 Change in Terms and Conditions of Service for Unregulated Suppliers. This entire clause is unacceptable as written. It would confer on the government rights and privileges not available to any other members of the cooperative. It would require that the cooperative incur additional costs for the benefit of the government at the expense of the other members.

Also under item (c), it refers to a Disputes clause, but I can find nothing in these proposed rules to indicate what might be required to settle a dispute. Until the proposed procedures for settling a dispute are published and we have an opportunity to comment on them, no final rule should be published.

52.241-B Connection Charge. This section again gives preferential treatment to the government at the expense of the remaining members of the cooperative and, therefore, would be totally unacceptable.

52.241-13 Capital Credits.

(b) This section would be impossible to comply with. We would be unable to ascertain the amount of capital credits to be allocated until after the year-end audit is completed and the Board of Directors authorizes the allocation of capital credits. This would normally be somewhere between 120 to 180 days after the close of the fiscal year. Also at this time, we would have serious problems trying to list out accrued capital credits by contract number, year, and delivery point. At the time of the allocation, it would be impossible to give a date that the capital credits would be refunded. We are currently retiring capital credits accumulated in the early 1970s and attempting to maintain a 20-year cycle. However, the retirement of capital credits is at the discretion of the Board of Directors after an analysis of the financial condition of the cooperative and a determination that such a retirement will not impair the financial integrity of the cooperative. This is done annually.

91-13-25'

General Services Administration
July 19, 1991
Page 4

(c) This clause must be eliminated completely as it would require us to violate our By-laws, Articles of Incorporation, Idaho State law, Montana State law, provisions of our Mortgage Agreements with the Rural Electrification Administration and provisions of our Mortgage Agreement with National Rural Utilities Cooperative Finance Corporation.

(d) This clause must also be eliminated completely as it would require us to give preferential treatment to the government at the expense of the rest of our members.

Sincerely,

NORTHERN LIGHTS, INC.

La Verne Stolz

LaVerne Stolz,
Director of Finance & Adm.

LS:blp

cc: Senator Larry Craig
Senator Steven Symms
Senator Max Baucus
Senator Conrad Burns
Congressman Larry LaRocco
Congressman Richard Stallings
Congressman Ron Marlenee
Congressman Pat Williams
Mike Oldak
Roy Eiguren

NATIONAL SCIENCE FOUNDATION
1800 G STREET, N.W.
WASHINGTON, D.C. 20550

91-13-258

July 18, 1991

General Services Administration
FAR Secretariat (VSR)
18th & F Street, NW
Room 4041
Washington, D.C. 20405

Re: FAR Case 91-13

Dear Sir or Madam:

The National Science Foundation has reviewed the Notice of Proposed Rulemaking regarding Acquisition of Utility Services. We have no comments or objections to the proposed rule in the FAR case cited above.

Sincerely,

Michael L. Kennedy // for
William S. Kirby
Division of Grants & Contracts

JUL 31 1991

91-13-259

24 July 1991

LANTNAVFACENGCOM COMMENTS ON DRAFT FAR PART 41

I. GENERAL COMMENTS

- * Part 41 still continues to be a GSA instruction. Sections 41.004-2, 41.004-5 and 41.005 are specific to GSA award and administration of their contracts. As DOD is a Contacting Agency these sections should be omitted from Part 41 or at least designated "Not Applicable To DOD". Each agency will establish required award and administrative procedures in their supplements to FAR.
- * In May 1991, we reviewed and provided comments on DFAR Part 241. Resolution on Part 41 language should precede resolution of DFAR Part 241 language.
- * Section 41.002 (5) specifies that Part 41 will not be applicable to acquisitions in foreign countries. Since there is very little guidance in this area, our next logical step would be to incorporate some basic guidance in DFAR.

II. SPECIFIC COMMENTS

- 41.001 Definition of Utility Service - Delete the last sentence. The problem with the wording of this sentence is that it says that other services (e.g., rubbish removal, snow removal) may be considered to be utilities when they are exempt from the Service Contract Act of 1965. This Act lists exemptions, one of which is utilities. This is an unbroken circle which solves nothing. Recommend that the wording be replaced with that in paragraph S5-101.1 of ASPR Supp 5 which says these services may be treated as utilities "when the services are performed by public agencies or utilities on a contractual basis and are subject to public regulation".
- 41.004-1 (b) - Change to read: "For utility services exceeding \$25,000 per annum including any connection and/or termination charges, agencies shall..."
- (b) - Delete everything after the first sentence. Acquisition of utility service from governmental agencies, quasi-governmental agencies, or municipalities makes it imperative that each agency have the flexibility to utilize the utility supplier's application form when it is in the best interest of the U.S. Government and the supplier's application form does not violate U.S. law. Each agency must address this issue with their own procedures.

91-13-259

- 41.004-2 Delete this entire section or designate it "NOT APPLICABLE TO DOD AGENCIES". These procedures are GSA specific and should not be applicable to DOD agencies. As with all other types of DOD contracting; DFAR, NAPS, and P-68 establish contacting procedures.
- 41.004-5 Same comment as included with 41.004-2.
- 41.005 Same comment as included with 41.004-2
- 41.006-1 Rewrite the first sentence to read, "Agencies shall review (a) utility service invoices exceeding \$25,000 per annum on a montly basis; and (b) each contract or other written request exceeding \$100,000 on an annual basis."
- 41.008 This paragraph requires the use of SF 33 which stipulates the contract to comply with the standard format as specified in item 11 of the form. This conflicts with the ASPR Supp 5 format (paragraph S5-203) we are now using and which is recognized by the utility industry as the standard. We must have the ASPR Supp 5 flexibility of format. It has become increasing more difficult to execute standard FAR contracts with sole-source utility suppliers. Changing to a new format with various sections that do not apply to utilities contracts will only hamper the contracting process. Part 41 must recognize that utilities contracts are sole-source and unique and have evolved in an environment of Federal, State and Local regulations.
- 41.010 (a) Service specifications should be included in the review of Part 41.
- (c) Delete this paragraph in its entirety. Comment on Section 41.008 eliminates the utilization of SF 33.
- 52.241-2 (a) - (c) - These subparagraphs effectively limit utility contracts to a ten year definite period. They are written around the GSA ten year standard authority and ignore the indefinite term contact authorization of ASPR Supp 5. The scope and term clauses of ASPR Supp 5 are more appropriate for a utility service contract. Therefore, replace subparagraphs (a) thru (c) with the ASPR Supp 5 clauses (paragraph S5-203.1).
- 52.241-5 (a) and (b) - The industry has moved away from the 2% range as being accurate. We need to follow suit. These subparagraphs should state that no meter should be placed in service that does not record 100% accurate under normal testing conditions.

91-13-259

(b) - Change the first sentence to read, "...test the meters installed by the contractor in accordance with the contractor's normal procedures as specified in the contractor's applicable rules and regulations". The remaining portion of the subparagraph gives the Government the right to request additional meter test and to pay for them if the Government requires meter test more frequently than the contractor's normal procedures.

52.241-9 An alternative clause is required to cover those situation where the Termination Liability is based on quantities consumed or minimum purchase requirements over a negotiated number of years.