

FEDERAL ELECTION COMMISSION  
COMMISSION  
SECRETARIAT



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2006 JUN 15 A 9:03

June 14, 2006

## AGENDA ITEM

For Meeting of: 6-22-06

### MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa *RC*  
Acting Staff Director

FROM: Lawrence H. Norton *LHN (copy)*  
General Counsel

Rosemary C. Smith *RS*  
Associate General Counsel

Mai T. Dinh *MTD*  
Assistant General Counsel

Anthony Buckley *AB*  
Attorney

Subject: Draft AO 2006-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 22, 2006.

Attachment

1 ADVISORY OPINION 2006-17

2

3 Michael Kearney, Treasurer

4 Berkeley Electric Cooperative, Inc. Political Action Committee

5 P.O. Box 1234

6 Moncks Corner, SC 29461

7

8

9 Dear Mr. Kearney:

**DRAFT**

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

23 ***Background***

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

1           BEC is an electric distribution cooperative incorporated under the laws of South  
2           Carolina. It is composed of members who pay a membership fee to BEC and agree to  
3           purchase electricity from BEC, as well as to be bound by and comply with all of the other  
4           provisions of BEC's Articles of Incorporation and Bylaws. BEC Bylaws, Article I,  
5           Section 1.02. BEC's bylaws provide that a Board of Trustees manages its business and  
6           affairs. BEC Bylaws, Article IV, Section 4.01. Members of the Board of Trustees must  
7           be members of the Cooperative. BEC Bylaws, Article IV, Section 4.02(d). BEC  
8           members elect the Board members at the Cooperative's annual meeting. BEC Bylaws,  
9           Article IV, Section 4.03. Membership may be evidenced by a certificate of membership.  
10          BEC Bylaws, Article VIII, Section 8.01. Many of BEC's employees, including executive  
11          and administrative personnel, are also members of BEC. BEC PAC is BEC's separate  
12          segregated fund and is registered with the Commission.

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

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

20  
21          NRECA Bylaws, Article II. NRECA is a nonprofit corporation under the District of  
22          Columbia Cooperative Association Act. NRECA Articles of Incorporation, Preamble.

23          ACRE is NRECA's separate segregated fund and is registered with the Commission.

24           Electric Cooperatives Help Organization ("ECHO") is registered with the South  
25          Carolina Ethics Commission. ECHO supports South Carolina State and local candidates.

1 The BEC Employee Fund is registered with the South Carolina Ethics Commission. It  
2 makes contributions to South Carolina State and local candidates.

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

16 *Questions Presented*

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

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

21 3. *If BEC may solicit these persons for contributions, may it use its proposed*  
22 *solicitation form, and may it collect contributions from them by means of payroll*  
23 *deductions?*

1 ***Legal Analysis and Conclusions***

2 *Question 1. May BEC solicit its executive and administrative personnel, and its*

3 *members, including members who are employees, for contributions to BEC PAC?*

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

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

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

23  
24 11 CFR 114.1(e)(1)(i)-(vi); *see also* 11 CFR 100.134(e)(1)-(6).

25  
26 BEC is composed of members and its members qualify as members under the  
27 Commission’s regulations because they affirmatively decide to become a member, affirm  
28 their memberships frequently through the payment of monthly electric bills, and have the  
29 ability to vote directly for the Board of Trustees. *See* 11 CFR 114.1(e)(2) (defining  
30 “member”).

1           The members administer BEC by electing BEC’s Board of Trustees. The  
2           qualifications for membership in BEC are clearly set forth in BEC’s bylaws. The formal  
3           organizational documents are available to members upon request. Through its website,  
4           BEC solicits persons to become members of the Cooperative by establishing electric  
5           service through BEC and the website provides an on-line application for membership.  
6           Membership in BEC may be acknowledged via issuance of a membership certificate.  
7           Finally, BEC was organized primarily to distribute electric service and not for the  
8           purpose of influencing elections. Because it satisfies these requirements, BEC qualifies  
9           as a “membership organization.”

10           Under the Act and Commission regulations, a membership organization or a  
11           cooperative may solicit contributions to its separate segregated fund from its members  
12           and its executive and administrative personnel. *See* 2 U.S.C. 441b(b)(4)(C) and 11 CFR  
13           114.7(a).<sup>1</sup> Thus, BEC may solicit its executive and administrative personnel, and its  
14           members, including members who are employees, for contributions to its separate  
15           segregated fund, BEC PAC.

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

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

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

1           A collecting agent may collect and transmit contributions to one or more separate  
2 segregated funds to which the collecting agent is related. *See* 11 CFR 102.6(b)(1). One  
3 example of a collecting agent is a “parent, subsidiary, branch, division, department, or  
4 local unit of the connected organization of the separate segregated fund.” 11 CFR  
5 102.6(b)(1)(iii).

6           The Commission previously determined that NRECA and its member  
7 cooperatives, taken together, form the type of rural cooperative covered by 11 CFR  
8 114.7(k)(1). *See* Advisory Opinion 1999-40 (ACRE).<sup>2</sup> As such, the member  
9 cooperatives are affiliated with NRECA. *Id.* BEC is a member cooperative of NRECA  
10 and, as stated in your request, its relationship with NRECA is identical to NRECA’s  
11 relationships with other local distribution cooperatives, as described in Advisory Opinion  
12 1999-40 (ACRE). Thus, BEC is affiliated with NRECA.

13           The Commission further determined that, as affiliates of NRECA, distribution  
14 cooperatives are local units of NRECA. As local units, the distribution cooperatives may  
15 act as collecting agents for contributions to NRECA’s separate segregated fund, ACRE.  
16 *See* Advisory Opinion 1999-40 (ACRE). Thus, BEC may be a collecting agent for  
17 ACRE. As a collecting agent for ACRE, BEC may solicit contributions for ACRE from  
18 those persons permitted to be solicited under 11 CFR part 114. *See* 11 CFR 102.6(c)(2).  
19 As noted above, those persons include BEC’s executive and administrative personnel and  
20 its members, including members who are employees.

21           Because BEC and NRECA are affiliated, their separate segregated funds are  
22 considered one political committee for purposes of applicable contribution limitations.

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

1 *See* 11 CFR 114.7(k)(1). Accordingly, you should ensure that no individual designates  
2 contributions to BEC PAC and ACRE in any calendar year that would, when combined,  
3 exceed the limitation at 2 U.S.C. 441a(a)(1)(C) and 11 CFR 110.1(d).

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

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

11 Under the Act and Commission regulations, at the time solicitations are made,  
12 solicitations for contributions to separate segregated funds must inform employees and  
13 members of the political purposes of the fund, and that any employee or member solicited  
14 must be informed of the right to refuse to contribute without any reprisal. *See* 2 U.S.C.  
15 441b(b)(3)(B) and (C); *see also* 11 CFR 114.5(a)(3) and (4). If guidelines for  
16 contributions are suggested, the person being solicited must be informed that the  
17 guidelines are merely suggestions, that the individual is free to contribute more or less  
18 than the guidelines suggest, and that an individual will not be favored or disadvantaged  
19 by reason of the amount of their contribution or their decision not to contribute. 11 CFR  
20 114.5(a)(2). A written solicitation for contributions to a separate segregated fund that is



1 addressed to an employee or member must contain statements that comply with these  
2 requirements. 11 CFR 114.5(a)(5).<sup>3</sup>

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

15 The proposed form identifies five different categories of employees: supervisory  
16 hourly employees, non-supervisory hourly employees, supervisory salaried employees,  
17 non-supervisory salaried employees, and salaried staff. *See* Exhibit 1. BEC may solicit  
18 salaried supervisory employees and staff because they are “executive and administrative  
19 personnel.” *See* 2 U.S.C. 441b(b)(7); 11 CFR 100.134(d) and 114.1(c). Because hourly  
20 employees and salaried non-supervisory employees do not meet the definition of  
21 “executive and administrative personnel,” BEC may solicit only hourly employees and  
22 salaried non-supervisory employees who are also members of BEC. *See id.* To make

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

1 clear that BEC is only soliciting contributions from its solicitable class, the proposed  
2 form should be modified to add “(BEC members only)” directly below “Non-supervisor”  
3 and “Supervisor” under “Hourly,” and directly below “Non-supervisor” under “Salaried.”

4         With respect to the use of payroll deductions to collect contributions for BEC  
5 PAC, the Act and Commission regulations allow a corporation to enroll members of its  
6 restricted class in a payroll deduction system that deducts contributions from payroll  
7 checks to make contributions to the corporation’s separate segregated fund. *See* 2 U.S.C.  
8 441b and 11 CFR 114.2(f)(4)(i). Accordingly, BEC may use payroll deductions to  
9 collect and forward contributions to BEC PAC from its executive and administrative  
10 personnel and its employees who are BEC members.

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

22         The Commission expresses no opinion regarding BEC’s solicitation of its  
23 executive and administrative personnel and its members for donations to ECHO and the

1 BEC Employees Fund. Given that these two organizations are not involved in Federal  
2 elections, questions regarding donations to them are not within the Commission's  
3 jurisdiction.

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

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Sincerely,

Michael E. Toner  
Chairman

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

RESTRICTED CLASS

BERKELEY ELECTRIC COOPERATIVE, INC.  
VOLUNTARY EMPLOYEE DONATION FORM

*Option 1* \_\_\_\_\_

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

RECOMMENDED AMOUNTS PER PAY PERIOD

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

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

*Option 2* \_\_\_\_\_

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

*Option 3* \_\_\_\_\_

I elect not to participate at this time.

Employee Name: \_\_\_\_\_ Employee Number: \_\_\_\_\_

Social Security Number: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_

Employee Signature: \_\_\_\_\_ Date: \_\_\_\_\_

cc: Payroll  
Employee Donation Committee