



BERKELEY

ELECTRIC COOPERATIVE, INC.

Your Touchstone Energy® Partner 

Letter of Comment No: 94
File Reference: 1100-LEU
Date Received: 10/29/03

October 29, 2003

Mr. Robert Herz, Chairman
Financial Accounting Standards Board
401 Merritt 7, P.O. Box 5116
Norwalk, CT 06856-5116

Re: FASB 150

Dear Chairman Herz:

Berkeley Electric Cooperative, Inc. is an electric distribution cooperative selling electricity in the areas surrounding Charleston, South Carolina. Formed in 1940, we supply approximately 66,000 customer/members with electricity. We are incorporated as a 501 (c) (12) organization in accordance with IRS regulations.

As an electric cooperative, much of our capital comes from our members. The excess of revenues over expenses is mostly retained and re-invested in electric plant additions similar to other for-profit corporations.

A section of our By-laws were established to provide a mechanism to return a portion of our member's equity as the Board of Directors see fit. There have been many years since Berkeley Electric Cooperative was established that there was no return of member's equity to them.

As an electric cooperative we have three primary institutions to obtain loan funds. These institutions have become very familiar with electric cooperative operations. The distribution of electricity is a very capital intensive operation with the payback sometimes taking in excess of thirty years.

These institutions, while recognizing our 510 (c) (12) classification, limit the amount of patronage dividends that can be returned to our members through mortgage covenants. There is no floor, but there is a cap depending on the remaining equity after the patronage dividend is paid.

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The method of returning any patronage varies among cooperatives. Some of these are LIFO, FIFO, hybrids of both, weighted average, and a percentage of each year. The assignment of patronage to a member does not create a vested interest.

A member's right to payment of capital credits does not vest until the Board of Directors makes the required determination that by refunding the patronage capital the financial position of the cooperative will not be impaired. There have been a number of state and federal court cases that have determined that the patronage dividends are not due and payable until the cooperative's Board of Directors determines that they are due and payable.

Some of these cases are:

Great Rivers Coop of S.E. Iowa v. Farmland Industries – U.S. Court of Appeals for the Eighth Circuit
Universal Coop Inc. v. FCX, Inc. – U.S. Court of Appeals for the Fourth Circuit
Atchison County Farmers Union Coop Assn. v. Turnbull – Supreme Court of Kansas
Lake Region Packing Assn. v. Furze – Supreme Court of Florida
Howard v. Eatonton Coop Feed Co. – Supreme Court of Florida
GoldKist, Inc. v. Wilson – Supreme Court of Florida
Georgia Turkey Farms, Inc. v. Hardigree – Supreme Court of Florida

Comments from these cases indicated there was nothing in the Articles of Incorporation or the By-laws that specified a time frame for the payment nor are they due upon demand.

Another section of our By-laws allow for the Board to approve payment of patronage dividends to the estate of deceased members in one lump sum. This payment is upon Board approval once the estate has made the request in writing and the determination is made that the payment will not financially impair the Cooperative. In *Evanenko v. Farmers Union Elevator*, The Supreme Court of North Dakota determined the cooperative was not required to pay the deceased member estate for all the member assigned patronage capital. The Court commented that "The Board cannot be compelled to jeopardize the financial status of the cooperative by being forced to make such payments".

Like many electric cooperatives we have a subsidiary which offers services not covered by the 501(c) (12) umbrella on a for-profit basis. Our primary service is the sale and distribution of liquefied propane and appliances. This is a very competitive business where a few pennies can mean the difference between getting a customer and losing one. Hedging strategies, caps, collars, and swaps have become an integral part in our ability to compete and

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become profitable. Most of the counter parties in the hedging activities are large, national companies that look at the financial statements of the cooperative as a guarantor of the hedging contracts. They are not interested in being educated about cooperative financial statements. The operations of the cooperative and propane company depend on the amounts reflected in these statements. Any negative material changes would have an adverse effect on the cooperative to borrow funds and the propane company to remain competitive through hedging contracts.

Although electric cooperatives are considered non public entities, we have a unique operating criteria. Our Bylaws can be changed by the vote of our members. Board approval is required and the financial position cannot be jeopardized for any patronage dividend to be paid. Our mortgages define the maximum patronage dividend payments.

We hope the FASB will take these items into consideration when considering any current and future proposals.

Sincerely,



Michael Kearney
V. P. Finance and Business Development

MK/jc