

GUEST EDITORIAL

FEMA Funding: Two Wildfire Case Studies and How to Mitigate Your Funding Risks and Your System

This month's editorial was written by Ted Case, Executive Director of the Oregon Rural Electric Cooperative Association and Wendy Ellard, Co-Chair of Baker Donelson's Disaster Recovery and Government Services Group.

The Federal Emergency Management Agency (FEMA) has almost universally accepted that electric cooperatives are eligible private non-profit (PNP) applicants/subrecipients for its primary post-disaster funding program (Public Assistance Program).¹ Section 406(a)(1)(B) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)² allows PNP applicants that own or operate an eligible facility that has been damaged or destroyed by a major disaster to receive funding for repair, restoration, reconstruction, or replacement of the facility, and for associated expenses incurred.³ So, when a cooperative sustains damage to its electrical infrastructure due to a large disaster (including a fire, hurricane, tornado, or ice storm), so long as the event is declared a major disaster by the President of the United States, the cooperative is generally eligible to receive Public Assistance Program reimbursement funding from FEMA for costs of necessary work required for power restoration. But, cooperatives may also be eligible for additional funding to increase the resiliency of, or "mitigate," system components to better withstand future similar events.

A Tale of Two Co-ops— With a Happy Ending

On Labor Day 2020, high temperatures, extremely dry conditions, and exceptionally strong winds led to massive wildfires in Oregon's rugged Cascade Mountain range. The fires forced thousands of Oregonians to flee rural towns in the middle of the night with only what they could load into their vehicles, on the run from wildfires that moved the length of a football field every second. The fires damaged over 4,000 structures, claimed several lives, and led to widespread evacuations in the western part of the state. In a press conference immediately after the wildfires, Oregon Governor Kate Brown listed five Oregon communities as "substantially destroyed," including the towns of Detroit, served by Consumers Power, Inc (Consumers Power), and Blue River and Vida, served by Lane Electric Cooperative (Lane Electric). Just days after the wildfires, FEMA announced that Administrator Pete Gaynor was travelling to the state. FEMA officials asked if Roman Gillen, the CEO of Consumers Power, would conduct a briefing during Administrator Gaynor's tour of the devastation from the Beachie Creek Fire.

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The briefing also included U.S. Senators Ron Wyden and Jeff Merkley, and U.S. Representative Peter DeFazio, the Chairman of the U.S. House of Representatives Transportation and Infrastructure Committee, which has jurisdiction over FEMA. Amidst a charred landscape, Gillen showed the delegation a new electric system that Consumers Power, along with several other Oregon electric cooperatives, had built in only a few days.

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The facilities were necessary to serve the members who had brought temporary housing to their property and were seeking to be connected. However, Gillen made it clear the new power lines would also be temporary. Because of safety and reliability issues exacerbated by thousands of dead trees, a permanent solution called for converting overhead lines to underground lines in high-risk areas, and for which the federal government would play a critical role. Gillen credits this meeting of high-ranking federal officials as the beginning of a constructive relationship with FEMA. Praising the FEMA staff as professional, he also highlighted getting experienced help to “take advantage of things FEMA wants you to take advantage of.”

A little over an hour’s drive to the south, Debi Wilson, the General Manager of Lane Electric, which served portions of the towns of Blue River and Vida, faced a similar challenge. The Holiday Farm Fire had ravaged an area known as McKenzie, with harrowing images of residents fleeing from wildfires on both sides of the roads. Wilson was familiar with natural disasters. A year earlier, one of the worst winter storms to hit the region had leveled Lane Electric’s infrastructure, leaving many of their 10,000 consumer-members without power for up to two weeks. Yet, Wilson concluded that no two disasters are alike and that the level of destruction from the wildfire required a different kind of response. “The way FEMA works, we could handle a snowstorm application on our own,” she said. “A wildfire is next level.” To help them navigate through the FEMA process, Lane Electric hired expert consultants to assist in their reimbursement efforts.

On September 21, 2021, over a year after the wildfires, Oregon

Senators Ron Wyden and Jeff Merkley announced that Consumers Power and Lane Electric would receive a combined \$21 million in federal funds to help pay for infrastructure repairs related to the September 2020 wildfires.

“I’m gratified these resources are now secured to assist these two Oregon electric cooperatives that serve these rural communities and will keep working both to reduce the risk of wildfire throughout the West and to ensure federal funds are available to help any of our state’s communities recover when fire or other disasters strike,” Senator Wyden said.

For this round of funding, Lane Electric received a \$19.9 million grant from FEMA for repairs to its electric distribution and transmission systems, including power poles, pole heads, overhead and underground conductors, and ancillary equipment, that were damaged by the wildfires.

“Grants like this are essential to financing repairs to our transmission and distribution system after devastating events like the Holiday Farm Fire,” said Debi Wilson. “Lane Electric is committed to rebuilding our community stronger than before.”

The \$1.13 million FEMA grant for Consumers Power is for repairs to electric system components as well as system hardware including poles and transformers. Consumers Power was subsequently approved for 13 separate projects, totaling \$35 million. Consumer Power’s Gillen said the federal assistance was a vital part of the ongoing efforts to rebuild a more resilient power system for communities ravaged by this past year’s wildfires.

Mitigation of Risks to Funding—Advance Preparation for an Event

The above presents two examples of successful response efforts, thanks in

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large part to the personnel involved and cooperative spirit that these recovery operations invoked. However, restoring power after a large federally declared event and applying to FEMA for assistance is often anything but easy. There are unfortunately many program nuances and pitfalls that cooperatives must be mindful of, as FEMA's funding programs can be, as the saying goes, "more trouble than they are worth." The good news though is that many of the biggest risks to eligibility and later funding claw-back can be addressed proactively by keeping good records of the status of your system and costs incurred to address the damages caused by the event, and understanding and applying the federal procurement principles that are triggered in the event you seek federal funding to cover any costs.

Required "As a Result of the Disaster"

One of the initial thresholds to eligibility is establishing that the scope of work is required "as a result of the disaster."⁴ Until recently, satisfaction of this requirement had almost been presumed, it was but a mere formality. However, FEMA has recently been hyper-focused on this issue. Based on publicly available information issued by FEMA in 2021,⁵ of the 134 determinations issued during this time, 47 of them, which is more than 35 percent, addressed the issue of whether the applicant sufficiently demonstrated that the damage was a result of the declared event.

FEMA's policy guidance advises that it does not provide Public

Assistance Program funding for repair of damage caused by "deterioration, deferred maintenance, [or] the applicant's failure to take measures to protect a facility from further damage or negligence."⁶ While FEMA acknowledges that "distinguishing between damage caused by the incident and pre-existing damage" caused by non-disaster related factors "may be difficult,"⁷ FEMA places the responsibility on the applicant to demonstrate that damage was caused directly by the declared incident, and where pre-existing damage exists, to distinguish that damage from the disaster-related damage.⁸

Because of FEMA's newfound focus on this eligibility requirement, it is important to have documentation of the status of your system *before* a disaster strikes, so that you can confidently present your damages and resulting repair/replacement costs as incurred as a result of the disaster and eligible for FEMA funding. If you do not have reasonably current and detailed inspection reports for your system, remedying this should be a priority in order to establish a pre-disaster condition baseline for your facilities. Inspections should be performed by trained professionals, and reports should be detailed with supporting photographs. Any issues identified in the inspection should be addressed and remedial measures should be similarly documented. The same goes for any outside inspections performed by the Rural Utilities Service (RUS) or others; if issues are noted, be sure to document how they were addressed.

And do not forget your rights of way. Here, FEMA will ask to see evidence of some type of regular maintenance plan and documentation that it was consistently implemented. This is

done to ensure that the hanging limbs and trees you are seeking to remove were caused by the declared event, and not lack of proper regular maintenance.

Of course, storms may be unpredictable and can occur with little to no advanced warning, such as the devastating tornadoes that swept through Kentucky in December 2021. There may not be time to conduct new inspections before the next storm hits. Even under these circumstances, all is not lost. FEMA will also ask for, and review, maintenance records that document periodic work at the facility, evidence of a maintenance plan for the facility, and budgetary information showing that funds have consistently been dedicated and used to maintain your system. Photographs can also go a long way to establish pre-disaster condition, sometimes a picture really is worth a thousand words.

Mandatory Compliance with the Uniform Rules

Disaster assistance under FEMA's grant programs is administered as a federal grant and as such is subject to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, codified at 2 C.F.R. Part 200. These requirements have been a focus of FEMA for a while now, and hence have received a lot of attention; however, mandatory compliance bears repeating because failure in this area continues to be the Office of Inspector General's number one risk point for reduction or denial of otherwise eligible funding.⁹

Federal grant regulations set forth various procurement standards applicable to all non-federal entities receiving federal grant funds.¹⁰ This includes, among others, a requirement that an eligible cooperative applicant

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“use its own documented procurement procedures which reflect applicable [s]tate, local, and tribal laws and regulations, provided that the procurements confirm to applicable [f]ederal law and the standards identified in this part.”¹¹ It is critical to comply with these requirements to help mitigate risks that your otherwise eligible funding will be denied or retroactively deobligated. This is especially important to review now because the U.S. Office of Management and Budget recently revised some portions of the applicable regulations and these changes are now applicable to FEMA disaster declarations and awards issued on or after November 12, 2020.¹²

A good first step is having written standards governing procurements, including consideration of how potential conflict-of-interest situations, including gifting, will be evaluated. These standards are required for any cooperative currently receiving assistance from FEMA, and would be required should a cooperative receive FEMA assistance in the future. The regulations themselves do not dictate the substantive content of your internal procurement standards. However, because any services that will be used post-disaster, and the cost submitted to FEMA for funding, must be covered by a compliant procurement and contract, electric cooperatives should consult FEMA’s guidance to support compliance. FEMA has issued new guidance to include the November 2020 changes to the procurement regulations.¹³

Electric cooperatives must also take into consideration that the most restrictive applicable requirement will

control. For example, if a cooperative has a purchasing threshold that triggers competitive purchasing at \$5,000, which is lower than the federal standard (now \$10,000 for micro-purchases and \$250,000 for small purchase procedures), you will be required to follow your own requirement. The alternative is to ensure that your purchasing policy allows emergency exceptions to your internal requirements, and to document that the exception has been properly invoked. The key is to not shoot yourself in the foot by self-imposing more stringent requirements. Finally, always complete a cost analysis for any purchases that you will or may submit to FEMA for funding. The regulation requires that you “perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold [\$250,000] including contract modifications.”¹⁴ The formality and extent of this generally correlates to the size and nature of the purchase. Cooperative personnel have almost certainly completed a cost analysis in connection with every purchase — you have thought about the price offered and considered whether it is in line with what you expect, or whether it is “reasonable” — the question is typically whether and to what extent this is documented. Don’t rely on your memory. FEMA is focusing on this requirement more and more, and it is key to document and keep track of any and all actions done in this regard to help mitigate later denials.

Mitigation of System Impacts—FEMA Mitigation Opportunities

Of course, the best way to mitigate your losses is to do everything possible to strengthen your system and make it more resilient to the type of events most prevalent in your service area. But, it’s easier said than done, and can

be very expensive. Fortunately, FEMA has a new program that can potentially serve as a great resource for funding to build greater resiliency into your system and operations.

Building Resilient Infrastructure and Communities

The Building Resilient Infrastructure and Communities (BRIC) program was established pursuant to Section 1234 of the Disaster Recovery Reform Act of 2018¹⁵ and aims to categorically shift the federal focus away from reactive disaster spending and toward research-supported, proactive investment in community resilience. BRIC is funded regularly through a six percent “set-aside” of post-disaster grant expenditures, and augmented by any special allocations or appropriations made separately throughout the year. So, in active disaster years, like those experienced recently, BRIC is a well-funded possible resource for mitigation projects.

However, there is one major caveat to BRIC funding eligibility: electric cooperatives cannot directly apply for this funding. Only states, the District of Columbia, U.S. territories, and federally recognized tribal governments may serve as the “applicant” for BRIC funding. Additionally, for any state or territory to serve as an applicant, it must have received a major disaster declaration under the Stafford Act in the seven years prior to the annual grant application period start date. For federally recognized tribal governments to serve as an applicant, they must be located in a state or territory that meets this requirement. Currently, thanks to the continuing coronavirus (COVID-19) pandemic, all states, the District of Columbia, U.S. territories, and federally recognized tribal governments meet this requirement.

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Each applicant's designated agency may submit only one BRIC grant application to FEMA. An application can however be made up of an unlimited number of "subapplications." Local governments, including cities, townships, counties, special district governments, state agencies, and federally recognized tribal governments (who choose to apply as subapplicants) are considered subapplicants and may submit subapplications. Electric cooperatives cannot, yet, serve as subapplicants.

For electric cooperatives to access BRIC funds, for now, they must identify and successfully work through an eligible subapplicant. This can be through a memorandum of understanding or similar agreement. To do so, it is critical to approach any potential partner early enough in the funding cycle that the respective subapplicant can include consideration of the electric cooperative and any possible projects. There should also be consideration of many of the usual legal terms applicable to a partnering or joint venture agreement. This includes consideration of risk-sharing and liabilities. Also of note, the BRIC program carries a non-federal cost share of 25 percent, coverage of which will likely be the subject of some negotiation. All parties must have a mutual understanding of the goals and path ahead; this is important for the success of the project.

Beyond identifying and engaging with a willing eligible subapplicant, interested electric cooperatives must also identify a viable project, keeping in mind that most of the funds available under BRIC are

awarded pursuant to a national competition. This requires understanding of the eligible projects but also strategic evaluation of the criteria that will be reviewed when FEMA is considering all applications. The BRIC program is primarily a competitive grant. So, there will be far more requests for funding submitted than the amount to be awarded. For example, during Fiscal Year 2020, the inaugural year for full BRIC program implementation, FEMA had \$500 million to distribute, of which \$33.6 million was reserved for direct allocation to applicants, \$20 million was reserved to tribal entities, and \$446.4 million was made available under the national competition. FEMA received 1,227 subapplications that requested an estimated \$4 billion in funding across the BRIC and FEMA's separate Flood Mitigation Assistance grant program.¹⁶

Not unexpectedly, when FEMA announced its awards for the Fiscal Year 2020 BRIC program funding, there were many hurt feelings; there was considerable debate about the projects that FEMA accepted, the scope, and the geographic reach. FEMA has since confirmed that subsequent BRIC funding rounds will be more focused on infrastructure projects and "community lifelines." The community lifelines were tested and validated by federal, state, local, tribal and territorial partners in the aftermath of hurricanes Michael (October 2018), Florence (September 2018), and Dorian (August 2019), Super Typhoon Yutu (October 2018), the Alaska earthquake (December 2018), and the COVID-19 pandemic (2020). They were formalized in the National Response Framework, 4th Edition.¹⁷ There are seven recognized community lifelines, including energy which specifically refers to the power grid

and fuel. Electric cooperative projects that support a more resilient grid are therefore squarely within the focus of BRIC eligibility.

We suspect in part due to the criticisms raised by some following the Fiscal Year 2020 selections, FEMA has also advised that, "In order to increase transparency in decision-making while building capability and partnerships, FEMA will convene a national review panel to score subapplications based on qualitative evaluation criteria." When considering projects for discussion with possible public entity subapplicant partners, it will also therefore be beneficial to be aware of the six qualitative evaluation criteria and submit projects with an eye to garnering the highest score possible. The criteria and their relative scoring weight are below:¹⁸

1. Risk Reduction/Resiliency Effectiveness, to include consideration of whether the proposed project details effective risk reduction and increase to resilience; provides ancillary benefits; and leverages innovation. 35 possible points.
2. Climate Change and Future Conditions, including consideration of whether the subapplication: (1) describes how the project will enhance climate adaptation; (2) details how the project is being responsive to the effects of climate change (such as sea level rise); (3) details how the project is being responsive to the effects of other future conditions (population/demographic/land use, etc.); and (4) cites data sources, assumptions, and models. 20 possible points.
3. Implementation Measures, including whether the subapplication adequately describes: (1) how the costs will be managed; (2) how

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- the schedule will be managed;
- (3) how the project will be successfully implemented, and how innovative techniques to facilitate implementation will be incorporated; and
- (4) whether the project's scope of work identifies sufficient technical and managerial staff and resources to successfully implement this project. 15 possible points.
4. **Population Impacted**, including whether the subapplication demonstrates: (1) community-wide benefits; (2) the proportion of the population that will be impacted, including a description of the disadvantaged communities as referenced in Executive Order (EO) 14008; (3) how the project was selected and designed to maximize positive impacts and minimize negative impacts to any disadvantaged populations as referenced in EO 14008; and (4) the proposed project is clearly benefiting a disadvantaged community. 25 possible points.
5. **Outreach Activities**, including whether the subapplication describes: (1) the outreach strategy and supporting activities appropriate to the project and advancing community mitigation; (2) the types of community planning processes leveraged; and (3) how input from a diverse range of stakeholders, including people from disadvantaged communities, was gathered and incorporated into project conception and design. 5 possible points.
6. **Leveraging Partners**, including whether the project subapplication incorporates: (1) partnerships (e.g., state, territory, tribal, private,

district, or local community) that will ensure the project meets community needs; (2) an explanation on how these partnerships benefit disadvantaged communities; and (3) an explanation on the anticipated outcome of those partnerships (e.g., leveraging resources such as financial, material, and educational resources, coordinating multi-jurisdictional projects, or a heightened focus on equity-related issues). 15 possible points.

Status of Current Opportunities and Fiscal Year 2022

The Fiscal Year 2021 application period for the Hazard Mitigation Assistance Notices of Funding Opportunities (NOFO), which includes the BRIC program, opened on September 30, 2021, and will close at 3 p.m. Eastern on January 28, 2022, so it is likely too late for this year's funding cycle. However, now is the time to begin planning for next year's funding, as the anticipated Fiscal Year 2022 NOFO will likely open in September 2022, and the BRIC program will have significantly more funding than in past years due

to the current Administration increasing allocations to this fund.¹⁹ Electric cooperatives should touch base with their respective State Hazard Mitigation Officer to ask about project priorities and additional application requirements or deadlines for submitting information.

As we are all aware, virtually every aspect of disaster response and recovery depends on the efficient restoration and mitigation of the power grid. BRIC funding therefore may be a significant opportunity for electric cooperatives and any public entity partners who should be quite interested in joining the effort. Notably, sustainable power is so important that there is an ongoing, and growing, conversation about the possible expansion of the list of eligible subapplicants to include critical service providers, including electric cooperatives in particular. Regardless, BRIC is absolutely a funding source worthy of consideration.

If you have comments or questions, please contact Ted at (503) 585-9988 or tcase@oreca.org; or Wendy at (601) 969-4681 or wellard@bakerdonelson.com.

- 1 There have been a few occasions of confusion on FEMA's part, whereby the revenue generating nature of the cooperative model has raised questions as to whether cooperatives are eligible "not for profit" entities. In each such occasion, proper education has supported FEMA's confirmation of the eligible status of these entities.
- 2 Pub. L. No. 93-288, as amended, 42 U.S.C. § 5121 *et seq.*
- 3 See Stafford Act § 406(a)(1)(B), Repair, Restoration, and Replacement of Damaged Facilities (42 U.S.C. § 5172).
- 4 44 C.F.R. § 206.223, *General work eligibility*, at (a)(1).
- 5 See FEMA Public Assistance Appeals Database, <https://www.fema.gov/assistance/public/appeals> (last visited Jan. 14, 2022).
- 6 See, e.g., FEMA Public Assistance Program and Policy Guide – Version 4, FP 104-009-2 (June 1, 2020), at 52, https://www.fema.gov/sites/default/files/documents/fema_pappg-v4-updated-links_policy_6-1-2020.pdf (last visited Jan. 14, 2022) (hereinafter "PAPPG"); 44 C.F.R. § 206.223(e).
- 7 See PAPPG at 172.
- 8 *Id.* at 52.
- 9 See, *OIG Report: FEMA Needs Revised Policies and Procedures to Better Manage Recovery of Disallowed Grant Funds*, OIG-21-28 (Mar. 11, 2021), <https://www.oig.dhs.gov/sites/default/files/assets/2021-03/OIG-21-28-Mar21.pdf> (last visited Jan. 14, 2022).
- 10 2 C.F.R. §§ 200.317 through 327.

- 11 2 C.F.R. § 200.318, *General procurement standards*, at (a).
- 12 See *FEMA Fact Sheet – Purchasing Under a FEMA Award: OMB Revisions* (Dec. 22, 2020), https://www.fema.gov/sites/default/files/documents/fema_purchasing-under-fema-award-omb-revisions_fact-sheet_0.pdf (last visited Jan. 14, 2022).
- 13 See, e.g., *Procurement Disaster Assistance Team (PDAT) Field Manual*, FM-207-21-0002 (Oct. 2021), https://www.fema.gov/sites/default/files/documents/fema_PDAT-field-manual_102021.pdf (last visited Jan. 14, 2022); *FEMA Contract Provisions Guide: Navigating Appendix II to Part 200 – Contract Provisions for Non-Federal Entity Contracts Under Federal Awards*, FI-207-21-0001 (Jun. 2021), https://www.fema.gov/sites/default/files/documents/fema_contract-provisions-guide_6-14-2021.pdf (last visited Jan. 14, 2022).
- 14 2 C.F.R. § 200.323, *Contract cost and price*, at (a).
- 15 Division D of the FAA Reauthorization Act of 2018, Pub. L. No. 115-254 (Oct. 5, 2018).
- 16 See *Summary of Fiscal Year 2020 Selections*, <https://www.fema.gov/grants/mitigation/building-resilient-infrastructure-communities/after-apply/fy-2020-subapplication-status> (last visited Jan. 14, 2022).
- 17 *National Response Framework*, <https://www.fema.gov/emergency-managers/national-preparedness/frameworks/response> (last visited Jan. 14, 2022).
- 18 For more details on the factors, see *FEMA Program Support Material, BRIC Qualitative Criteria* (Aug. 2021), https://www.fema.gov/sites/default/files/documents/fema_fy21-bric-qualitative-criteria-psm.pdf (last visited Jan. 14, 2022).
- 19 Notably, the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, will generate an allocation to BRIC of \$200 million.

The comments and opinions in this editorial are the author's, and may or may not be consistent with NRECA's.

Legal Developments

Board Policy is Not an Offer

Indiana court holds former director health insurance policy was not a contract—*Contract; Governance*

On December 29, 2021, the Supreme Court of Indiana (Court) held that a policy adopted by the Clark County Rural Electric Membership Corporation (Cooperative) Board of Directors (Board) was not an “offer.” The policy, therefore, did not result in a contract between the Cooperative and any Board member (Director) or former Director. The policy addressed health insurance benefits for former Directors. **Clark Cnty. Rural Elec. Membership Corp. v. Reis, No. 21S-CT-343, 2021 Ind. LEXIS 780, 2021 WL 6136736 (Ind. Dec. 29, 2021)**

Under a 1972 Board policy (1972 Policy), a Director who served for 20 years, or served for 12 years and was

forced to retire at age 65 (collectively, Former Director), could participate in Cooperative’s group health insurance plan (Plan), with Cooperative paying the premiums.

Under a 2014 change to the 1972 Policy (2014 Policy): (1) a Former Director could not participate in the Plan; (2) a Former Director must obtain his or her own health insurance, with Cooperative reimbursing the premiums subject to certain limits; (3) the “policy will be reviewed periodically;” and (4) the updated policy revoked and replaced the 1972 Policy.

Under a 2018 change to the 2014 Policy (2018 Policy), Cooperative would not reimburse health insurance premiums paid by a Former Director.

After the 2018 Policy became effective, four Former Directors—all of whom began service before 2014 and ended service during or before 2018 (collectively, Suing Directors) sued Cooperative. The trial court granted summary judgement for Suing Directors on their breach of contract claim. The Suing Directors settled their promissory-estoppel and other claims. The court of appeals affirmed the trial court. Cooperative appealed.

Initially, the Court explained that a unilateral or bilateral contract requires an offer, an acceptance, and consideration. The Court reviewed the 2014 Policy as the “purported moment of contract formation.”

Next, the Court explained that an “offer” manifests a willingness to enter a bargain and justifies another person in understanding that his or her assent to the bargain is invited and will conclude the bargain. According to the Court, the 2014 Policy was “simply the [Board’s] internal communication with itself.” It did not indicate Cooperative’s intent to contract with another person.

The 2014 Policy was not styled as a “contract” or “agreement” with, or as an offer to, a Director. Instead, it was styled as a “Policy of the Board of Directors.” The 2014 Policy did not state terms and conditions. Instead, it stated the “practice of the Cooperative.” The 2014 Policy was not signed by the Suing Directors or the Board on Cooperative’s behalf. Instead, it was signed “only” by the Board secretary.

The 2014 Policy “fell explicitly under the category of ‘Governance Process.’” The secretary’s signature affirmed official Board action adopting the policy. No evidence indicated the policy was directed to any Suing Director in any capacity outside his role as a Director acting collectively on Cooperative’s behalf.