



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 18, 2023

CBCA 7719-FEMA

In the Matter of TRI-COUNTY ELECTRIC COOPERATIVE, INC.

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Julie Masek, Assistant General Counsel, The Texas A&M University System, College Station, TX, counsel for Grantee; and Joshua Bryant, Division Chief–Recovery, and Andrea Sanders, Regional Section Chief, Texas Division of Emergency Management, Austin, TX, appearing for Grantee.

Emanuel Rier Soto, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Guaynabo, PR; and Maureen Dimino, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **KULLBERG**, **SULLIVAN**, and **CHADWICK**.

KULLBERG, Board Judge, writing for the panel.

The applicant, Tri-County Electric Cooperative, Inc. (TCEC), seeks public assistance (PA) in the amount of \$456,121,275.99, which it claims to have incurred during Winter Storm Uri (Uri). The Federal Emergency Management Agency (FEMA) contends that TCEC is claiming the increased cost of purchasing electrical power, and such increased operating expenses are not eligible for public assistance. For the reasons stated below, the panel denies TCEC's claim for public assistance.

Background

TCEC is a private, nonprofit electric cooperative that purchases and supplies electric power to approximately 225,000 people who reside in urban, suburban, and rural areas in a north central part of Texas. Because TCEC did not have its own electricity generating capability, it purchased electricity from Brazos Electrical Power Cooperative, Inc. (Brazos), under an “all-contracts requirement.” The management of the electrical grid in Texas is subject to the Public Utility of Commission of Texas (PUCT), and PUCT has delegated the management of the grid to the Electric Reliability Council of Texas (ERCOT). Uri began on February 10, 2021, when much of the central portion of the United States, which included Texas, suffered a period of severe cold temperatures accompanied by snow and freezing rain. On February 12, 2021, the governor of Texas declared a state of disaster. On February 15, 2021, ERCOT declared an emergency energy alert (EEA) that was initially an EEA 1, but ERCOT then escalated it to an EEA 3, which ended on February 19.¹

To cope with the increased demand and reduced supply of electricity during Uri, TCEC followed emergency protocols such as load shedding and short-term power outages to protect against failure of the electrical grid. As a result of directives from PUCT, ERCOT increased the market price for electricity to the “system-wide offer cap” of \$9000 per megawatt hour (MWh), which usually ranged from \$20 to \$30/MWh. Brazos, consequently, charged TCEC for electricity during Uri at that increased rate, and TCEC had no choice but to pay the increased rate.

On November 9, 2021, TCEC submitted its PA request to FEMA in the amount of \$786,719,578.04 for the cost of purchasing electricity during the period from February 12 to 19, 2021. FEMA denied TCEC’s request for PA in its entirety and determined that purchasing electricity was an increased operating cost, which was not an eligible emergency protective measure. On September 3, 2022, TCEC appealed the denial of its request for PA, which FEMA also denied. TCEC then submitted its request for arbitration, which the Board docketed on March 28, 2023. As a result of a settlement in a bankruptcy proceeding with Brazos, TCEC had reduced its request for PA to \$456,121,275.99. The panel conducted a hearing on May 24, 2023, and the parties submitted briefs.

¹ An EEA 1 means that ERCOT “ha[s] started emergency operations because of low power reserves. This means electric demand is high and electric generation supply is low. There are no controlled outages at this time.” Electric Reliability Council of Texas, <https://www.ercot.com/energyemergone> (last visited July 18, 2023). An EEA 3 means that ERCOT “ha[s] instructed local electric utilities to begin implementing controlled outages to protect the electric grid, because there is not enough generation to serve customers.” <https://www.ercot.com/energyemergthree/> (last visited on July 18, 2023).

Discussion

The issue before the panel is whether TCEC is entitled to PA for the increased cost of electricity charged by Brazos. FEMA is statutorily authorized to provide PA “essential to meeting immediate threats to life and property resulting from a major disaster.” 42 U.S.C. § 5170b(a) (2018). Regulation defines eligible emergency work as “[e]mergency protective measures to save lives, to protect public health and safety, and to protect improved property.” 44 CFR 206.225(a) (2022). FEMA’s Public Assistance Program and Policy Guide (PAPPG) provides the following:

Increased cost of operating a facility or providing service are generally ineligible, even when directly related to the incident. However, short-term increased costs that are directly related to accomplishing specific emergency health and safety tasks as part of emergency protective measures may be eligible, as discussed in Chapter 7:11.F, *Expenses Related to Operating a Facility or Providing a Service*.

PAPPG (June 2020) at 96. In a similar matter, the Board denied a claim for the increased cost of natural gas for generating electricity during Uri and noted that “[t]he fluctuations in its operating costs were consistent with the applicant’s agreements to purchase natural gas, albeit impacted by the declared disaster, not reflective of a specific emergency health and safety risk.” *City of Bryan, Texas*, CBCA 7735-FEMA, slip op. at 2 (June 22, 2023). The same reasoning applies in this matter. TCEC provided electricity during Uri, as it was required to do, subject to the rate charged by Brazos, which rose from \$20-30/MWh to \$9000/MWh. The panel finds that TCEC has not established eligibility for PA where its request amounts to simply paying the escalated cost of electricity as directed by certain entities within Texas.

TCEC contends that it is entitled to PA for the increased cost of electricity because it had to take various measures, such as load shedding and short-term outages, in order to maintain the electric grid and prevent a more serious loss of power that would have had far more serious consequences. Such an argument conflates two different problems during Uri, which were maintaining electrical service and paying for electricity. While the panel acknowledges that TCEC provided electricity under severe cold during Uri, its claim for the increased cost of electricity is for the cost of its operation as a provider of electricity. Such an increased cost for the service that TCEC provided is not eligible for PA.

Decision

The panel denies the request for public assistance.

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge

Kyle Chadwick

KYLE CHADWICK

Board Judge