



STATE OF IOWA

TERRY E. BRANSTAD
GOVERNOR

KIM REYNOLDS
LT. GOVERNOR

IOWA HOMELAND SECURITY AND
EMERGENCY MANAGEMENT DEPARTMENT
MARK J. SCHOUTEN, HOMELAND SECURITY ADVISOR
AND EMERGENCY MANAGEMENT DIRECTOR

December 24, 2013

Beth Freeman, Regional Director
Federal Emergency Management Agency Region VII
9221 Ward Parkway Bldg. Suite 300
Kansas City, MO 64114-3372

RE: State First Appeal Recommendation, Lyon Rural Electric Cooperative (000-UZXIA-00).
FEMA-IA-DR#4114, FEMA PW #81

Dear Ms. Freeman:

Iowa Homeland Security and Emergency Management Department (HSEMD) received an appeal from the above sub-recipient related to the determination of ineligibility. The date received by the State was documented as October 28th, 2013 and in accordance with 44 CFR Section 206.206(c)(2.);

The grantee will review and forward appeals from an applicant or sub-grantee, with a written recommendation, to the Regional Director within 60 days of receipt.

HSEMD as the grantee has reviewed and is forwarding this appeal with recommendations.

Lyon Rural Electric Cooperative is requesting reconsideration of the ineligibility determination related to PW#81.

State Recommendation:

Based on review of the Applicant's correspondence and 44 CFR, the State supports the Applicant's appeal arguments that among other things, FEMA has added criteria to DAP 9580.6 to include items never before needed to comply with the policy. These new criteria change the policy to such an extreme degree that the standards applied to this PW in this disaster constitute a major policy change which must be publicly vetted according to Section 325 of the Stafford Act (PL 93-288).

Sincerely,

A handwritten signature in blue ink, appearing to read "Patrick J. Hall".

Patrick J. Hall
Alternate Governor's Authorized Representative

CC: Lyon Rural Electric Cooperative
Mark Landa, Sullivan and Ward PC

**Iowa Homeland Security and Emergency Management
Recommendations and Analysis
Lyon Rural Electric Cooperative PW#81
FEMA-4114-DR-IA
First Appeals**

I. Introduction.

On October 28, 2013, the four Applicants in this matter filed their appeals with Iowa Homeland Security and Emergency Management Department (HSEMD). The appeals were filed in respect to project worksheets (PWs) prepared as part of a major disaster declared by President Obama occurring in Northwest Iowa in April of 2013. The project worksheets were prepared in respect to assistance sought by Lyon Rural Electric Cooperative, Iowa Lakes Electric Cooperative, Osceola Electric Cooperative and Sanborn Electric and Telecommunications Utility, herein referred to as the Applicants.¹

HSEMD has reviewed these combined appeals, the project worksheets and their supporting documentation, finds the arguments contained in them to be compelling, and recommends that the Regional Administrator approve these appeals.

The balance of this document set forth the HSEMD analysis as to why the Applicants' appeals in respect to the public assistance sought in the project worksheets should be granted.

II. Analysis.

A. Summary of Disaster and Project Worksheets at Issue.

From April 9, 2013, through April 11, 2013, Northwest Iowa suffered significant ice storms. Each of the Applicants—three rural and one municipal electric utilities—in Northwest Iowa, suffered significant damage and lost power for a number of days because of multiple broken poles and downed transmission lines. Power was ultimately reestablished over a period of weeks, in many instances with the assistance of neighboring electric cooperatives through mutual aid agreements among rural electrical utilities in northern Iowa.

On April 26, 2013, Governor Terry E. Branstad requested a Presidential Disaster Declaration. On May 6, 2013, President Obama declared this matter a major disaster and FEMA later assigned it the disaster designation FEMA-4114-DR-IA.

¹ The Project Worksheets for the four appeals are as follows: DR-4114-00081, DR-4114-00082, DR-4114-00083, and DR-4114-00084, issued to the Lyon Rural Electric Cooperative, Iowa Lakes Electric Cooperative, Osceola Electric Cooperative and Sanborn Electric and Telecommunications Utility, respectively. See Exhibits 1-4 for the project worksheets in question.

The subject of these appeals involved the costs of reconductoring the electric lines and poles lost in the ice storms. The monetary amount for each of the Applicants as requested in their project worksheet is as follows:

Lyon Rural Electric Cooperative	\$4,505,572.50
Iowa Lakes Electric Cooperative	\$145,057.65
Osceola Electric Cooperative	\$14,495,545.44
Sanborn Electric and Telecommunications Utility	\$69,316.50
Total	\$19,215,492.09

FEMA denied the four project worksheets requesting reimbursement for the reconductoring costs and the Applicants have appealed from the determination.

The combined appeal filed by the Applicants asserts that FEMA incorrectly denied the application for Permanent Work under 44 CFR §206.226 Category F (Utilities) for the purposes of reconstruction of electrical distribution utility lines for the following reasons:

1. FEMA re-wrote FEMA Policy 9580.6, thereby constituting an effective change in this policy, changes that require a formal public review process in accordance with 42 U.S.C. 5165c.
2. FEMA improperly applied the criteria set forth in 44 CFR §206.226 (d) (1)-(5) dealing with the standards to be applied to the reconstruction of the utility lines.
3. FEMA incorrectly evaluated the condition of the applicants' facilities.
4. FEMA incorrectly interpreted the documentation submitted in support of their Category F claims.
5. FEMA improperly found that repair activities are contingent on Federal funding.

The Applicants' identification of issues in this appeal correspond with FEMA's explanation regarding their denial of the reconductoring costs, as set out in the project worksheets in this case.

Each of the reasons HSEMD advances in support of the Applicants' appeals is set out in the balance of the analysis contained in Section II of this document. Although issues (b) through (e) were discussed by the parties during this case, the only issue of significance was the application of FEMA Policy DAP 9580.6 and whether pre- and post-disaster laboratory testing was required to establish eligibility.

In a Determination Memorandum filed November 5, 2013, FEMA argued for the first time that pre-disaster maintenance records on the Applicants' poles was inadequate and that too made it impossible for the Applicants to establish the pre-disaster condition of the conductors the Applicants applied for assistance to replace. Since that Determination Memorandum was filed after the Applicants filed their appeals in this matter, Region VII should be considered to have waived that argument. However—as indicated in the balance of this document—the Applicants

have satisfactorily established the pre-disaster condition of the Applicants' utility poles, as it relates to the reconductoring issue.²

Attached to this document is a listing of the State/Grantee's supporting exhibits, listed alphabetically as Exhibits A-AU. These exhibits should be contrasted with the Applicants' exhibits, listed numerically as Exhibits 1- 43 and filed with the Applicants' combined appeal in this matter.

B. FEMA Improperly Required Pre-disaster Laboratory Testing Beyond the Scope of DAP 9580.6.

1. Introduction.

At the center of this dispute in all four combined appeals is FEMA's insistence that the Applicants failed to make a sufficient showing that their conductors were damaged as a result of this event. FEMA has argued throughout this case that pre-disaster laboratory testing is the only way to satisfactorily make that showing that the conductors were damaged by the disaster.

2. What FEMA Policy DAP 9580.6 requires.

No provision of the Stafford Act nor any FEMA regulation specially deals with the requirements for pre-disaster conditions of utility conductor lines that applicants seek to replace in a disaster. As for all restoration of damaged facilities, 44 CFR § 206.226 requires that eligible work done to restore the utility facilities be done "on the basis of the design of [the] facilities as they existed immediately prior to the disaster."

FEMA Policy DAP 9580.6 fills this gap by dealing specifically with the reconductoring issue for rural and municipal utilities. This policy was adopted on September 22, 2009 and only after extensive involvement with REC professionals. The FEMA policy deals specifically with the repair or replacement of distribution or transmission facilities. At page three it sets out what "[a]pplicants should provide . . . to establish [the] pre-disaster condition of their facility," the fighting issue in this appeal. Specifically, the policy allows utilities to show the following to establish pre-disaster condition:

- a. Certification of the pre-disaster condition and capacity of the conductor from a licensed professional engineer who has direct experience with the damaged electrical transmission or distribution system. Records providing satisfactory evidence of the condition and capacity of the conductor as it existed prior to the disaster. The certification may be supplemented by a professional engineering evaluation.
- b. If available, copies of construction work plans demonstrating the utility's past practices and current/future projects.
- c. If required by RUS, a copy of any corrective action plans submitted to RUS in compliance with 7 CFR §1730.25, Corrective action (RUS borrowers only).

² See the text corresponding to footnote 23 below.

3. HSEMD's Prior Experience with DAP 9580.6.

HSEMD has had extensive experience working with FEMA Region VII and the Iowa RECs since the adoption of DAP 9580.6 in September of 2009. Iowa has had five Presidential disaster declarations since 2009 where REC reconductoring damage following ice storms was a significant part of the disaster recovery operation. Each reconductoring project involved the application of DAP 9580.6 in ways that are identical to the reconductoring issues raised by FEMA in these current appeals.

The cumulative dollar total of reconductoring projects that have involved the application of DAP 9580.6 in Iowa since 2009 is nearly \$150 million dollars. In none of these projects, did FEMA Region VII raise the arguments that it has raised in these four appeals in order to deny reconductoring costs.³

FEMA too has already considered the merits of pre- and post-disaster physical testing of conductor, and concluded that it is an impractical standard. According to Mark Barbee, Vice President of Engineering for Kansas Electric Power Cooperative, FEMA Region VII applied the same criteria to damaged lines in Kansas after DR-1741 in 2007. The product of the discussion regarding testing and the then-current standards that Kansas Cooperatives used—RUS Bulletin 1724D-106—resulted in the creation of DAP 9580.6.⁴

According to the affidavit of Mark Barbee, current FEMA Region VII staff Dennis Moffett, Deputy Disaster Assistance Director; and Jim Nelson, Infrastructure Branch Chief were not only aware of the development of DAP 9580.6 in Kansas, but were members of the FEMA group that ultimately decided that requiring physical testing of conductor was unnecessary and impractical.⁵

4. The Modified DAP 9580.6 FEMA Applied to the Applicants' Project Worksheets.

DAP 9580.6 is fairly straightforward and has been applied hundreds of times in disasters involving REC and conductor damage. But, FEMA did not apply DAP 9580.6 as written when it reviewed the Applicants' worksheets. Instead, FEMA Project Specialist Frank Cintron took the core of DAP 9580.6, added the additional conditions (d) and (e) set out in bold below, and made all the conditions mandatory rather than permissive. The results are as follows:

1. DAP 9580.6 requires that pre-disaster conditions for line sections pending conductor replacement must include:

³ Dennis Harper Affidavit (Exhibit 21), par. 5.

⁴ In fact, the bulletin that FEMA used as a basis for the development of DAP 9580.6 in Kansas (and Iowa prior to DAP 9580.6 being released) mandated proving a greater level of damage than FEMA mandated after issuing DAP 9580.6. Exhibit H contains the 2005 version of RUS Bulletin 1740D-106 which is significantly different from the current version, Exhibit I.

⁵ Mark Barbee Affidavit (Exhibit 39), par. 10, further see Exhibit 32 for a meeting sign in log of participants in the development of DAP 9580.6.

- a. Certification of the pre-disaster condition and capacity of the conductor from a licensed professional engineer who has direct experience with the damaged electrical transmission or distribution system. Records providing satisfactory evidence of the condition and capacity of the conductor as it existed prior to the disaster. The certification may be supplemented by a professional engineering evaluation.
- b. If available, copies of construction work plans (CWP) and long range plans (LRP) as per 7 CFR §1724.49 & 50, demonstrating the utility's past practices and current/future projects.
- c. If required by the Rural Utility Service (RUS), a copy of any corrective action plans submitted to RUS in compliance with 7 CFR §1730.25, Corrective Action (RUS borrowers only).
- d. **Load growth last five year's summary of the line section evaluated for conductor replacement.**
- e. **Inspection records, maintenance reports, information relating to age / capacity, and hardcore technical data that validates the mechanical and electrical characteristics of the conductor compared to the original manufacturer's design specifications must be provided by the applicant for lines being claimed for conductor replacement. (when it was originally installed, how long it has been in service, how many people it services, present tensile strength of the conductor, sag and tension readings, has it been annealed due to overload, corrosion level, burs, kinks, bird caging, etc.), to account for at least five (5) years prior to the declared disaster event; this list is not exhaustive and must be supplemented by additional records as required by the field inspection teams. Failure to establish a pre-disaster condition of the line will result in a negative eligibility determination for conductor replacement claims, as established by 44 CFR § 206.223 (a)(1).⁶**

It's important to note that in the Project Worksheets for each of the Appellants, Mr. Cintron passes the new DAP 9580.6 off as if it were the old policy. He fails to mention in the project worksheets that requirements (d) and (e) are wholly new requirements and that the permissive requirements of the old policy have become mandatory in the new policy. He merely and mistakenly says "DAP 9580.6 requires that pre-disaster conditions for line sections pending conductor replacement **must** include"⁷

In describing what the new paragraph (e) means, Mr. Cintron goes on to say that:

[t]he license[ed] Professional Engineer who will sign the re-conducting certification, again, has the responsibility to sample at random the conductors of the line sections under investigation and have these samples tested by **an**

⁶ Exhibits 1-4, [emphasis and underlining added to original].

⁷ Id, [emphasis added].

independent certifying laboratory to see if they meet their original mechanical and electrical characteristics. The reasonable costs of the testing are included as part of the consulting engineer’s invoice, which are normally paid by FEMA.⁸

In fact, Mr. Cintron says in an email discussing the laboratory testing requirement that it would be unethical for an engineer to base an opinion “on subjective conclusions reached by observation” and he must use “independent testing laboratories” to meet the requirements of DAP 9580.6.⁹

Mr. Cintron specifically notes in the projects worksheets that the Applicants failed to comply with the policy as rewritten:

The applicant has been unable to validate the pre- and post-disaster condition of the line conductors in question. Not a single document submitted by the applicant or the grantee presents **hardcore technical data** that establishes the mechanical and electrical characteristics of the conductor compared to the original manufacturer’s design specifications before and after the declared disaster that clearly justifies conductor replacement.¹⁰

The fact that FEMA insisted on laboratory testing requirements not included in FEMA DAP 9580.6 became the only point of contention in this case. On two occasions FEMA, HSEMD, and other parties to these appeals, met face-to-face to discuss these Project Worksheets and what the Applicants needed to show to demonstrate pre-disaster conditions to FEMA’s satisfaction. HSEMD and the Applicants asked for the meeting because both understood the new requirements would mean the reconditioning would be ineligible.

At both meetings, FEMA expressly said that DAP 9580.6 required pre-disaster laboratory testing. In both instances, FEMA insisted that the only way that pre-disaster condition could be demonstrated to FEMA’s satisfaction was by subjecting the actual conductor to controlled laboratory testing in order to demonstrate its condition before the disaster.

The first meeting was on August 14, 2013, when HSEMD, the Applicants, FEMA, and the Iowa Utilities Board met at the FCO headquarter in Urbandale to discuss the project worksheets and the reconditioning issue. Frank Cintron, FEMA Project Specialist, Public Assistance Group Supervisor, Greg Bosko, and FCO, Joe Girot were present at this meeting. The FEMA representatives said that it would require that the four utilities submit pre-disaster laboratory testing of their conductors to adequately demonstrate the pre-disaster conduction of the line.

FEMA also states that no disaster-related damage could be verified in the absence of post-disaster testing of the conductors.¹¹ At one point, Mr. Cintron went so far as to say that “no

⁸ Exhibit A. [emphasis added].

⁹ Id

¹⁰ Exhibits 1-4, par. 1 of PW Summary and Conclusion [emphasis added]

¹¹ Dennis Harper Affidavit (Exhibit 21), par. 7

reputable engineer or REC could possibly certify the pre- or post-disaster condition and capacity of the conductor without laboratory testing of the conductor.”¹²

A second meeting to discuss the reconductoring issue was held on August 22, 2013, and representative of HSEMD and the FEMA FCO staff were again in attendance. By this time, this matter had elevated in importance to warrant the attendance of a representative of Iowa Governor Terry Branstad.

At the second meeting, FEMA reiterated its earlier position and said that the reconductoring costs would be eligible expenses only if there had been laboratory testing before the April 2013 ice storm to establish their pre-disaster condition. As the meeting progressed, it became clear that it was FEMA’s position that it would be impossible for the Applicants to adequately demonstrate the pre-disaster condition of the conductors to FEMA’s satisfaction under any circumstances. It appeared that the new conditions were met solely as roadblocks rather than a good faith way to determining eligibility.

At one point, HSEMD Director Mark Schouten addressed the following hypothetical question to FEMA Project Specialist Frank Cintron:

- a. Assume that a rural electric utility had installed new conductor wire on its system on April 5;
- b. That the electrical conductor wire installed was in brand new condition, taken off the reel the day it was installed, installed in the same condition as manufactured by the manufacturer, and immediately placed on the utility’s poles;
- c. That on that same day, April 5, the utility energized the new conductor wire and it conducted electricity successfully; and
- d. That four days later, on April 9, the new conductor line was destroyed in an ice storm.

When asked if under these conditions—when the new conductor had hung on its poles for only four days—whether FEMA policy DAP 9580.6 as re-written would still require pre-disaster laboratory testing, Mr. Cintron replied that laboratory testing would still be necessary.¹³

5. Practical Effects of the New DAP 9580.6.

By making pre- and post-disaster laboratory testing a mandatory requirement, the reconductoring requested by the Applicants is ineligible for reimbursement. Like the REC disasters that have occurred in Iowa before this disaster, that laboratory testing was not performed. In the future, FEMA’s new mandates of pre- or post-disaster physical testing of conductor lines would place a huge financial burden on the Applicants, a burden that would quickly bankrupt the systems.

¹² Dennis Harper Affidavit (Exhibit 21), par. 11

¹³ Mark Schouten Affidavit (Exhibit AU), par. 6-8. This result—absurd as it seems—demonstrates what appears to be at work in this case: that whatever modification of FEMA policy would be necessary to make the reconductoring costs ineligible would be implemented.

According to Mr. Goodale, Director of Regulatory Affairs for the Iowa Association of Electric Cooperatives, the cost to test three 20-foot segments of conductor per mile of conductor in the way suggested by FEMA officials would approach \$1.6 billion dollars annually.¹⁴ The total value of the Iowa rural electrical cooperative systems in the state is \$1.4 billion.¹⁵

In conducting further analysis, HSEMD contacted Kinectrics, one of the world's preeminent electricity generation and transmission engineering and testing firms, to discuss the laboratory testing FEMA is requiring in re-writing DAP 9580.6. During the discussion, the Kinectrics officials stated that laboratory testing of conductor required by FEMA was not performed in the industry. The same officials stated that if the testing were to be performed and performed accurately, the costs would be some \$30,000 per sample. At that rate, the cost of laboratory testing would exceed the costs of reconductoring by a ratio of 1.9.¹⁶

C. FEMA Improperly Required Post-disaster Laboratory Testing Outside the Scope of DAP 9580.6

1. Introduction.

In the project worksheets, FEMA noted that the Applicants failed to adequately demonstrate both the pre- and post-disaster conditions of the reconductoring for which the Applicants sought reimbursement.

FEMA Policy DAP 9580.6 also describes the post-disaster conditions that must be met in order to justify replacing conductor line. The Applicants clearly met the requirements of the original policy in respect to post-disaster conditions of the conductor line to be replaced.

The post-disaster criterion for replacing damaged conductors is straightforward:

¹⁴ Goodale Affidavit (Exhibit 41), par. 23. See also Edwards Affidavit (Exhibit 43), par. 18

¹⁵ See Goodale Affidavit Exhibit 41), par. 23. See also the Affidavit of Mark Barbee (Exhibit 39), par 10. It's important to note that FEMA was never certain on the necessary sampling size necessary in order to do the pre-disaster laboratory testing. See the Pat Hall affidavit (Exhibit AT), the Tim Edwards affidavit (Exhibit 43), the Dennis Harper affidavit (Exhibit 21), the transcript of a radio interview with a FEMA Region VII PIO for differing reports of the correct sampling size (Exhibit 22), and the Des Moines Register article from Friday, September 20, 2013 (Exhibit 23).

¹⁶ See Exhibits 20 and 22. Furthermore, a laboratory could not conduct the tests as described by FEMA in a radio interview with the KDSN radio station on September 6, 2013, since the laboratories would require a 20 – 30 foot sections to do so—not the 1 foot section asserted by FEMA Region VII.

Kinectrics also stated that the 20 – 30 foot section test would not provide the absolute condition of the conductor data that Frank Cintron continually insisted was necessary to prove the post disaster condition of the conductor (Exhibit T). The test that would satisfy FEMA's newly interpreted DAP 9580.6 requirements would require a sample at least 200 feet in length and would cost at least \$30,000 per sample to complete.

At this price, it would cost the applicant no less than \$120,000 for Sanborn Municipal (4 tests for 1.5 miles assuming 1 conductor and 1 neutral), \$11,760,000 for Lyon County REC (196 tests for 97.5 miles assuming 1 conductor and 1 neutral), \$24,000,000 for Osceola Electric Cooperative (400 tests for 200 miles assuming 1 conductor and 1 neutral), and \$180,000 for Iowa Lakes Electric Cooperative (6 tests for 2.8 miles assuming 1 conductor and 1 neutral). Under these conditions, the costs of testing to satisfy FEMA's expanded requirements of DAP 9580.6 would exceed the reconductoring costs by a factor of 1.9.

FEMA considers a conductor eligible for replacement when it is stretched beyond the point where it can be effectively repaired and re-sagged through predictable modeling to meet appropriate clearances, sag and tension, and to meet pre-disaster reliability.¹⁷

DAP 9580.6 contains six specific criteria that further define when a conductor is stretched “beyond the point where it can be effectively repaired,” only one of which must be satisfied in order to justify the replacement of the conductor:

A conductor is beyond the point where it can be effectively repaired when one or more of the following criteria exist within a line section:

1. 25% or more of the conductor spans are damaged. Damage is defined as broken conductors, broken strands, the existence of new (disaster-related) splices, and/or if the conductor is severely pitted, burned, kinked, or damaged in other ways.
2. 30% or more of the line spans are visibly out of sag or do not meet clearances (for example, the conductor does not meet clearance requirements for conductor-to-conductor or conductor-to-ground).
3. 40% or more of the poles were replaced or need to be replaced or plumbed (straightened) due to the disaster.
4. 40% or more of the supporting structures have a disaster-related damaged component (for example, x-arms, braces, pin, ties, insulators, guys/anchors, or poles).
5. The sum of the percentages of the above criteria is 65% or more.
6. Other additional compelling information provided by a licensed professional engineer.¹⁸

The Frequently Asked Questions of DAP 9580.6 gives further explanation to these six criteria dealing with post-disaster condition determination. Question 3 elaborates on the first criteria requiring damage to 25% of the conductor spans and stresses the importance of visible inspection:

This criterion relates to visible damage to the conductor in a line section. A conductor span with damage such as broken strands, splices or sleeves (installed as a result of the disaster), birdcaging, severe pitting, burns, kinks or other visible conductor damage is counted in this criterion. . . . If 25% or more of the of the total conductor spans in a line section have visible damage as a direct result of the disaster, then the conductors of that line section are considered eligible for replacement.¹⁹

Question 4 of the DAP 9580.6 FAQs deals with the second criteria to determine post-disaster condition of the conductor lines and places the burden of determining conductor condition on the “good judgment of a qualified electrical inspector:”

¹⁷ DAP 9580.6, p 4.

¹⁸ Id, p 4.

¹⁹ Id, p Appendix 1.

This criterion relates to conductor elongation or stretch in a line section. Any conductors in a span that are out of sag or do not meet clearance requirements as a direct result of the disaster are counted in this criterion. If more than one conductor in a span is out of sag or does not meet clearance requirements it still counts as just one span. This evaluation does not require precise measurement of the conductor temperature or actual sag or clearances. This determination is to be made using the good judgment of a qualified electrical inspector. If 30% or more of the total spans in a line section are visibly out of sag or do not meet clearance requirements as a direct result of the disaster, then the conductors of that line section are considered eligible for replacement.²⁰

Nothing in DAP 9580.6 or its FAQs come remotely close to requiring the “hardcore technical data” or “laboratory testing” that FEMA Region VII requires in the Project Worksheets that are subject to these appeals. As is the case for the new pre-disaster requirements FEMA has sought to attach to the Applicants, FEMA has no legal right to enforce these new post-disaster requirements.

In respect to the requirements that **are** contained in DAP 9580.6, the Applicants have provided FEMA with qualified professional data from the Applicants themselves, the Iowa Utilities Board, and HSEMD to meet these requirements.²¹

HSEMD analysis confirms that the documentation provided was sufficient to prove the pre- and post-disaster condition of the lines in question according to the published requirements of DAP 9580.6. Further, the documentation supplied in these appeals is identical to the documentation HSEMD and the applicants submitted under DR-1854, DR-1877, DR-1880, DR-1930, and DR-1977 where DAP 9580.6 was also employed to determine eligibility. In those instances, FEMA found the substantiation of both pre- and post-disaster condition to be sufficient.

Recently, FEMA’s Greg Bosko and Frank Cintron have supplied another reason for finding that the Applicants’ pre- and post-disaster showings are deficient to justify reconductoring. They have stated that the Applicants haven’t provided sufficient information about pole condition; but they did so in a Determination Memorandum that was filed after the Applicants had already filed their appeals. On November 5, 2013, seven days after the filing deadline and after the Applicants had filed their appeals, FEMA added the Determination Memorandum dealing with the poles to EMMIE.

There is no reference regarding pole maintenance cited in the original project worksheets as a reason for their denial. Likewise, FEMA has never indicated to the Grantee or the Applicants that the documentation supplied regarding poles was deficient.

²⁰ DAP 9580.6, p Appendix 1. [emphasis added]

²¹ See Exhibits 10-12 and 25 for Iowa Utilities Board Inspections, Exhibits 12-17 for Evaluations of Storm Damaged Conductor forms, Exhibits L, M, N, and O for proof of system maintenance and construction activities, Exhibits P, Q, R, and S for the engineer’s certification of pre-disaster condition, and Exhibits K1-K4 for the entire body of supporting documentation submitted in each application.

In fact, in the September 12, 2013, in a letter to Pat Hall, State Coordinating Officer, Joe Girot, the Federal Coordinating Officer, stated that the applicant had supplied detailed documentation regarding the inspection of the poles, but noted that the applicant had failed to provide satisfactory documentation regarding the pre- and post-disaster condition of the conductor.²²

Clearly the Applicants have furnished ample evidence about the pre-disaster condition of the Applicants' poles. The Applicants are required to comply with the Iowa Utility Board (IUB) regulations set out in the Iowa Electrical Safety Code, 199 Iowa Administrative Code Chapter 25.²³ Rule 25.3 requires that each electric utility file a written plan for inspections and maintenance with the board, and that this plan include provisions for inspection of lines, poles, and substations. This information is to be set out in the REC's annual reliability report to the IUB.

The IUB rules specifically require the reliability report to indicate the following information about the utility's poles:

²² See Exhibit 9. It is important to note that FEMA never notified the Grantee or Applicants of the presence of this Determination Memorandum (Exhibit U), and it was only discovered at the request of the State Coordinating Officer, Pat Hall, on December 6 when he requested HSEMD staff make sure that the Grantee had the full record for these projects as it appeared on EMMIE. The timing of the release of this information was seven days after the applicant was due to file an appeal with the Grantee, meaning the applicant was unable to address this new argument against their eligibility as they were not made aware of it.

According to the *Public Assistance Program Appeal Procedures* manual (Exhibit AG), this memo should be included in a formal eligibility determination (Exhibit AG). FEMA Appeals Specialist Judith Young stated that this memo was originally sent to Craig Bargfrede, Project Officer, HSEMD, on August 30th by Greg Bosko, Public Assistance Group Lead, and sent again on November 5 to Katie Waters, Deputy Public Assistance Officer (see Exhibit AE). We have no record of receiving these memoranda on either occasion, and have conducted a journal entry search of our email system to confirm this – see Exhibits AC, AF, AO, and AP. As these memoranda were not attached to the original determinations (see Exhibits 1-4), and the Grantee was unaware of their existence, FEMA should have notified the applicant directly via certified mail in accordance with the *Public Assistance Program Appeal Procedures* manual, 2.5 (d)(4)(pp. 11). The applicants never received these memoranda either as shown in Exhibit AN.

If there was an issue with the pole documentation supplied, FEMA JFO staff failed to mention this fact in the PW or in two meetings held prior to the eligibility determination being released. These meetings occurred on August 14 and August 22, and FEMA never addressed poles (See Exhibit 21). On September 12, Joe Girot, Federal Coordinating Officer, in a letter to Pat Hall, Alternate Governor's Representative, stated that documentation had been supplied "specific to the condition of the poles, and other various appurtenances", but made no mention of the deficiency of this documentation to provide information to prove pre- or post-disaster condition of the poles (see Exhibit 9). Additionally, the date on the Determination Memos is August 3, meaning that according to this document, FEMA JFO staff knew that there was an issue with the poles, but continually hid this fact in numerous meetings, formal correspondence, and even in the PW.

In an effort to ensure that the Grantee had not overlooked documentation sent to it, Katie Waters, Deputy Public Assistance Officer, asked Judy Young, Appeals Specialist if she could send the original emails. Ms. Young replied that due to a problem with FEMA's email system, all sent mail records had been lost. Ms. Young further stated that the original notification with the Determination Memos was sent on August 30, so that was the official notification date (see Exhibit AE). As previously stated, the notification emails that were sent by Greg Bosko containing the PWs did not contain the Determination Memo, and neither the Grantee nor the Applicants have record of seeing these memos prior to their discovery on December 6.

²³ Exhibit 13.

The annual reliability report, starting with the reliability report for calendar year 2008, shall include the number of poles inspected, the number rejected, and the number replaced.²⁴

In respect to this appeal, the Applicants have filed reliability reports as part of the record created in this appeal.²⁵ The IUB does not provide any specific form that the inspections must take, nor does it prescribe the manner that the utility must record information.²⁶ As such, the formats for pole condition reported for the Applicants are different; however, the pole conditions are clearly documented and are sufficient to establish the Applicants' eligibility for reconductoring.

D. FEMA has Violated Section 325 of the Stafford Act by Adding New Requirements to DAP 9580.6.

In their appeals, the Applicants argue that FEMA has violated Section 325 of the Stafford Act requiring FEMA to provide notice and the opportunity for public comment before effecting new or modified policy.²⁷ This provision, captioned "Public notice and comment concerning new or modified policies," requires the following:

The President shall provide for public notice and opportunity for comment before adopting any new or modified policy that—

- (A) governs implementation of the public assistance program administered by the Federal Emergency Management Agency under this chapter; and
- (B) could result in a significant reduction of assistance under the program.²⁸

It is indisputable that the decision to reimburse the Applicants in this case involves the implementation of the FEMA Public Assistance program. Likewise, it is indisputable that FEMA has unilaterally adopted new policy in this case, since the new language in the PWs describing DAP 9580.6 was not included in the policy when it was adopted in 2007.²⁹

Likewise, no one can argue there were public hearings on this new language in DAP

²⁴ 199 Iowa Admin. Code 20.18 (7) (i).

²⁵ Documentation in the form of inspections and correspondence of inspections with the Iowa Utilities Board can be found as Exhibits 10, 11, 12, and 25. These documents can also be found in Exhibits K1, K2, K3, and K4, and were originally submitted by the applicants in support of their pre-disaster conditions, as required by DAP 9580.6.

²⁶ See Exhibit X and Exhibit 36, Affidavit of John Dvorak, regarding the inconsistencies in reporting between utilities.

²⁷ 42 USC 5165c (a) (1) (2).

²⁸ Id.

²⁹ It is unclear what level of FEMA actually made the decision to implement the new policy: the local FCO or FEMA Region VII level. Clearly Mr. Cintron indicated the modification of the existing version of DAP 9580.6 when he set out the new version in the project worksheets. Mr. Cintron is employed by FEMA Region VII. However, the FEMA Regional Administrator stated to HSEMD that she would not be part of the initial decision-making in this case since she expected to be called upon to decide any appeal from the FCO's actions in this case. On the other hand, the Regional Administrator directed the FCO to not meet with the engineers to discuss pre- and post-disaster conductor conditions. See Schouten Affidavit (Exhibit AU), par. 14. So although the level where the new policy implementation decision was made is unclear, it is certain the new policy was implemented.

9580.6. These new requirements first appeared in the project worksheets for this disaster and caught HSEMD and the Iowa RECs by complete surprise.

Finally, there is some \$20 million at stake to Iowa RECs alone in this appeal alone. If this new policy is implemented nationally, it will cost rural utilities billions of dollars annually just to meet the pre-disaster laboratory testing requirements. If instituted in Iowa, it will bankrupt Iowa utilities.

Ultimately, this new policy will change the face of Presidential disasters in rural states such as Iowa, since REC damages so often allow Iowa to meet the Presidential disaster thresholds. HSEMD assumes that will be true for other rural states also who are dependent on their RECs to bring electricity out to rural residents.

The ramifications presented by FEMA's decision to change DAP 9580.6 are huge. Changes of this scope should be made—if wise to make them at all—the way DAP 9580.6 was initially written in 2007: with all the stakeholders involved in the discussion. Clearly FEMA has violated 42 USC 5165c.

E. The Applicants Met the Standards Criteria of 44 CFR §206.226 (d) (1)-(5).

The Project Worksheet Summary and Conclusion 5(c) written by FEMA states that the claims for conductor replacement as a Category F permanent work project are ineligible because the Applicants failed to meet the 44 CFR §206.226(d)(1-5) standards criteria.

Pursuant to FEMA regulation 44 CFR §206.226, work to restore eligible facilities on the basis of the design of such facilities as they existed immediately prior to the disaster is eligible for reimbursement. The costs of repair or replacement that change the pre-disaster construction of the facility in order to comply with existing standard are eligible for reimbursement if five (5) criteria set out in 44 CFR §206.226 (d) are met. While FEMA was unclear regarding which specific criteria the Applicants failed to meet, we support the Applicant's position that all these criteria have been met. The analysis of each of the criteria is as follows:

1. Standards that Apply to the Type of Repair or Restoration Required—44 CFR §206.226(d)(1).

The applicable standards under which the Applicants applied for permanent restoration of damaged facilities in this case are set by the National Electrical Safety Code (NESC), codified by the State of Iowa under the Iowa Electrical Safety Code,³⁰ and are classified as Grade C level construction. Qualified engineering personnel who had extensive knowledge of the Applicants' systems evaluated the damaged segments according to these standards. The results of this analysis are presented as Exhibits 14, 15, 16, and 17. These evaluations were conducted in the same manner as accepted by FEMA for five previous disasters. HSEMD concludes that this criterion has been satisfied in accordance with 44 CFR §206.226 (d) (1).

³⁰ Iowa Admin. Code 199, Chapter 25, Exhibit 13.

2. Standards that are Appropriate to the Pre-disaster use of the Facility—44 CFR §206.226(d)(2).

The work in dispute is to reconstruct electrical power lines to current codes and standards in order to deliver electrical power to facilities that were served prior to the event by the same electrical distribution system. The applicants are not seeking to make any changes to their systems from the original pre-disaster condition. HSEMD’s review indicates that the appropriate codes were applied. Accordingly, this criterion has been satisfactorily met.

3. Standards that are Reasonable, in Writing, and Adopted Before the Disaster—44 CFR §206.226 (d) (3).

The code applicable to the Applicants’ work in this case is the Iowa Electrical Safety Code. The Iowa Electrical Safety Code formally adopts the National Electrical Safety Code, established as the standard construction code for utility systems in the United States by the Institute of Electrical and Electronics Engineers (IEEE) and recognized by the American National Standards Institute (ANSI).

The Iowa Electrical Safety Code was adopted on May 8, 2011, and took effect on June 22, 2011.³¹ This document clearly shows that there were formally adopted, nationally recognized, reasonable codes and standards in effect for all utilities operating under license of the Iowa Utilities Board prior to April 9, 2013.

According to DAP 9580.6 “FEMA recognizes local, state, and national codes (for example, the National Electrical Safety Code...)”³² under the criteria demanded by 44 CFR §206.226. As such, the Iowa Electrical Safety Code (NESC) should be acceptable to FEMA since it was adopted at the time of the event.

The Federal Coordinating Officer (FCO), Joe Girot, asserted in the letter attached to the Applicants’ appeals as Exhibit 9, that no formally written or adopted codes and standards information was provided to FEMA in support of 44 CFR §206.226(d)(3)(i). However, there have been no fewer than five (5) prior disasters in the state of Iowa in which private-not-for-profit and municipal utilities in the State of Iowa have engaged in Category F Permanent Work utilizing FEMA funds in which DAP 9580.6 was applied with a basis in code and standard of the NESC and Iowa Electrical Safety Code.³³ In the current disaster, this criterion has again been satisfactorily met.

4. Standards Applied Uniformly to all Facilities by the Owner—44 CFR §206.226(4).

The Iowa Electrical Safety Code is made the law of Iowa pursuant to 199 Iowa Admin. Code 25.1(2) wherein it is stated:

³¹ See Exhibit 13.

³² See DAP 9580.6, p. 3.

³³DR-1854, DR-1877, DR-1880, DR-1930, and DR-1977

The purpose of this chapter is to promote safe and adequate service to the public, to provide standards for uniform and reasonable practices by utilities, and to establish a basis for determining the reasonableness of such demands as may be made by the public upon the utilities. **The rules apply to electric and communication utility facilities located in the state of Iowa and shall supersede all conflicting rules of any such utility.** This rule shall in no way relieve any utility from any of its duties under the laws of this state.³⁴

One of the rules adopted by Iowa Administrative Code 199 chapter 25.2, which defines the Iowa electrical safety code to be the NESC with some modification and qualifications. The Iowa Electrical Safety Code applies to all electrical and communications utilities within the boundaries of the state of Iowa. Proof of compliance was provided to FEMA by the Applicant's in the form of Iowa Utilities Board inspections, which can be found as Exhibits 10, 11, 12, and 25.

5. Standard was Enforced During the Disaster—44 CFR §206.226(d)(5).

The Iowa Electrical Safety Code (Exhibit 13) in its form at the time of the disaster was approved and in effect on June 22, 2011. The Iowa code clearly establishes that there was a construction and maintenance of electrical utility distribution systems standard in place at the time of the event on April 9, 2013. The Applicants also provided FEMA with copies of their construction work plans and examples of construction that took place prior to the April 9th event showing that the code was being enforced they were actively replacing conductor in their systems pursuant to the same standards prior to FEMA involvement.³⁵ Additionally, paragraphs 17-21 of the affidavit of Reginald Goodale show that the cooperatives continually replace conductor pursuant to these same enforced standards.³⁶

The Applicants submitted documentation detailing the pre-disaster condition of their systems including ongoing maintenance budgets, inspections, and regulatory correspondence with the Iowa Utilities Board showing compliance with the Iowa Electrical Safety Code. These documents can be found as Grantee's Exhibit 11. Grantee's Exhibit 24 provides assistance in interpreting the inspections conducted by the applicants, which while similar, are not uniform and should not be reviewed as such.

HSEMD reviewed these documents and the nature of the information provided by them complied with DAP 9580.6 in no fewer than five previous disasters.³⁷ If FEMA were implementing DAP 9580.6 in the same way they have implemented it since 2009, this documentation would satisfy the requirements of the policy.³⁸ It is our determination that this criterion has been satisfied in accordance with the published criteria and intent of DAP 9580.6.

³⁴ See Exhibit 13. [emphasis added].

³⁵ These can be found as Exhibits 12 – 15.

³⁶ Reginald Goodale Affidavit (Exhibit 41), par. 17-21.

³⁷ DR-1854, DR-1877, DR-1880, DR-1930, and DR-1977.

³⁸ The occasions referred to are the September 6, 2013 Radio interview with KDSN radio found (Exhibit 22) and the Des Moines Register Article from September 20, 2013 (Exhibit 23).

F. Temporary Versus Permanent Repairs.

In its project worksheets, FEMA has misinterpreted the purposes of emergency repairs in the aftermath of the disaster. FEMA argues that because the permanent work wasn't done immediately after the disaster, it is ineligible for reimbursement now. FEMA Region VII's Electrical Utilities Task Force Lead, Frank Cintron, wrote the following under Item 5 of the project worksheet:

[I]nformation must be provided that reflects how the current claimed 'temporary repairs' are insufficient and require full replacement, (and the scope of work indicates that the system has been) totally energized and in operation for more than three months after the disaster.

Mr. Cintron seems to suggest that since the system was operating three months after the disaster and after emergency repairs were completed, it was undamaged and it is too late for the Applicants to request permanent replacement of the conductors. Likewise, it seems to suggest that because the permanent repairs were made during mutual assistance, they are not eligible as permanent work later. FEMA's lack of insight on this matter stems from its misunderstanding of how mutual aid was rendered among the Applicants in this case.

From conversations with the FEMA contractors who inspected the conductor damage, it is clear FEMA has misconstrued the concept of "mutual aid" to mean complete the permanent reconstruction of electrical lines, which would include bringing the lines up to the current National Electric Safety Code Standards. An email between FEMA's contractor, Don Collette of BVI, and Frank Cintron, Electrical Task Force Lead, dated Monday, August 23, 2013 states that "mutual aid only did repairs to restore the power that was out of service. The opportunity to restore all lines to a permanent status was missed." Mr. Collette further states that "these actions are different than other parts of the country when mutual aid is utilized."³⁹

In fact, electric utilities do not request or desire permanent repairs when power is being restored during an emergency, as is explained in the affidavit of John Dvorak, Director of the Iowa Association of Electric Cooperative's Safety and Loss Control Department.⁴⁰ They are concerned about getting power restored to their customers and not doing permanent work.

Likewise, the mutual aid agreements the Applicants used in this case were drafted pursuant to FEMA policy 9523.6, which make reimbursement of most permanent work ineligible for reimbursement if that work is done pursuant to mutual aid agreements.⁴¹

Exhibit C contains the mutual aid agreements for the Applicants. For good reason, they contain no provision requiring permanent work to be performed on an emergency. This is no

³⁹ See Exhibit B

⁴⁰ See Affidavit of John Dvorak (Exhibit 36), par. 4, 5, and 7.

⁴¹ The mutual aid agreements that were in effect during the storm were first entered into by the Applicants and electric cooperatives and municipal utilities, nationwide, in 2000 (see Exhibit C for the agreements). FEMA, in August 1999, adopted a new policy, No. 9523.6, Mutual Aid Agreements for Public Assistance, specifying the criteria by which FEMA will recognize the eligibility of costs under the PA Program incurred through mutual aid agreements between applicants and other entities.

reason for FEMA to refuse reimbursement for the reconductoring in these appeals.

G. Repair Activities Are Not Contingent Upon Federal Funding.

Paragraph 4 of the Summary and Conclusion section of the PW states: “[n]o information has been provided by the applicant to verify its plans moving forward; repair activities appear contingent upon Federal funding.” Mr. Cintron appears to suggest that because FEMA is not paying for the restoration of damaged facilities and doing those replacements immediately, these facilities will not be restored. This argument, too, is without merit.

According to Iowa Code 478.19 – Manner of Construction of Utility Lines, individual utilities have no discretion in repairing damaged electrical facilities. The Iowa Utilities Board has the regulatory responsibility to enforce rules governing the operations and maintenance of utility systems within the state of Iowa.⁴² The affidavit of Mr. Goodale shows that Iowa’s electrical cooperatives have continually invested in improving their systems regardless of FEMA’s presence in the State.⁴³ Additionally, the utility plant is the fundamental asset of the Applicants, and they must maintain this asset in order for them to finance continual maintenance and future construction. There is no evidence in this record that supports FEMA’s conclusion on this issue.

III. Conclusion.

It is important to note that the disagreement between FEMA and the Applicants doesn’t turn on the interpretation of FEMA Policy DAP 9580.6—or any other FEMA policy, for that matter. This case is not a question of whether certain words in DAP 9580.6 have a particular meaning or whether those words should be applied in a certain way, or whether professional engineers might have reasonable disagreements on how this policy should be implemented.

This case turns on steps taken by FEMA to explicitly change to content of DAP 9580.6 by adding new requirements, requirements that the utility industry does not recognize or find necessary, that are nearly impossible to comply with, and would cost Iowa rural utilities and the nation’s RECs billions of dollars to comply with.

These same new requirements have never been applied in the past, in projects involving millions of dollars of re-conducting repairs. In cases approving some \$150 million in reconductoring costs just like the reconductoring presented by the Applicants in this appeal, FEMA has found these same replacement costs eligible while applying DAP 9580.6, as written.

Perhaps most importantly, these new requirements were not arrived at by the public process contemplated by the Section 325 of the Stafford Act, with notice to the rural utility industry so that the process of making any changes would be a fair and informed one. Instead, FEMA made these new requirements on what best can be called an *ad hoc* basis, without requesting or even allowing input from utility engineering experts as to why these new requirements were unworkable, unnecessary, and financial untenable.

⁴² See Exhibit AA, p. 9.

⁴³ See Goodale Affidavit (Exhibit 41), par. 17-21.

LYON RURAL ELECTRIC COOPERATIVE

**116 S. MARSHALL P.O. Box 629
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PHONE: (712)472-2506**

October 28, 2013

Mark Schouten
Director
Iowa Homeland Security and Emergency Management
7900 Hickman Road, Suite 500
Windsor Heights, IA 50324

Re: Lyon Rural Electric Cooperative
Disaster #4114
PA ID#: 000-UZXIA-00
First Appeal of Project Worksheet: 81 (FCLEF00)

Dear Director Schouten:

Lyon Rural Electric Cooperative (Lyon REC) appeals the ineligibility determination for its Public Assistance (PA) application, Project Worksheet, PA-07-IA-4114-PW-00081(0) dated and received on August 30, 2013.

Lyon REC is a Private Non-Profit (PNP) with 2100 electrical energy and power measuring connected meters and 875 miles of high voltage distribution lines, (305 overhead and 570 underground). As a result of the ice and snow that occurred over a period from April 9, 2013 through April 11, 2013, all 2,100 meters lost power for up to 5 consecutive days as the result of the multiple broken poles and downed lines described under subgrantee application numbers PA-07-IA-4114-PW-00043(0) for Category B work (\$209,932.94) and PA-07-IA-4114-PW-00080(0) for Category F (\$657,967.70) for a total expense of \$867,900.64 to restore their electrical distribution system back to its pre-disaster condition.

Lyon REC has made application for additional repairs to its facilities damaged during the April, 2013 storm, PA-07-IA-4114-PW-00081(0), on the grounds that the repairs funded under PA-07-IA-4114-PW-00043(0) for Category B work and PA-07-IA-4114-PW-00080(0) for Category F described above are not enough to restore the Lyon REC system to its pre-disaster conditions. Lyon REC has supported its application for \$4,505,572.50 in additional assistance with, in part, a) Lyon REC's Line Storm Map, b) Lyon REC's engineer's Percentage Evaluation Forms, c) Lyon REC's Storm Damage Assessment Spreadsheet, d) 2005 - 2013 Iowa Utilities Board annual inspections reports, e) the 2010 - 2013 annual Reliability Reports, and the 2012 pole inspection report performed by Ameripole Inspection Company.

In addition to the entirety of the information submitted by Lyon REC to date, which with this letter is re-submitted, Lyon REC supports its application PA-07-IA-4114-PW-00081(0) with the attached First Appeal which consists of a document entitled; "FEMA-4114-DR-IA; First

Appeals”, a document describing the history of the REC’s and the development of DAP 9580.6 and the affidavits of Jim Sundermeyer, Don Stursma, Regi Goodale, Tim Edwards, and Stuart Lowry. This information is submitted in the name of and on behalf of the three Iowa electric cooperatives and one Iowa municipal utility which were damaged during the April storm. It is appropriate for the four applicants to each submit this First Appeal document because each of their applications for assistance were denied for the same reasons, their respective Project Worksheets being worded nearly identically.

Also submitted at this time is a document from Lyon REC’s engineer, DGR Engineering, certifying the pre-disaster condition of Lyon REC’s storm damaged facilities. This certification is included with the understanding that such a certification has not been required to be submitted as part of an application for assistance in this manner in any previous disaster events, prior to or following the adoption of DAP 9580.6.

Finally, next to the statement that appears on the last page of the PW, “Is there insurance on this facility?”, the box next to the word “Yes” is checked. Please be aware that Lyon REC does not have insurance of the facilities that were damaged in April which would duplicate any benefits which Lyon REC would otherwise be eligible to receive.

Please feel free to contact me if you have questions or require additional information.

Sincerely,



Ross Loomans
General Manager

Enclosures

RECEIVED

OCT 28 2013

Disaster Recovery Operations