



IDAHO
DEPARTMENT OF FINANCE

C.L. "BUTCH" OTTER
Governor

GAVIN M. GEE
Director

August 13, 2010

Re: Applicability of the Public Utility Exemption from Registration to Bonds of

Dear M

We are responding to your request letter dated June 28, 2010 on behalf of (An Electric Membership Corporation) in connection with the offer and sale of its bonds, through one or more registered broker-dealers, in our state. To further clarify matters related to the regulation of , your firm provided a supplemental letter dated July 30, 2010. To avoid having to recite each representation, this response is attached to the enclosed copies of the above referenced letters.

As the offer and sale of the first mortgage bonds by does not fall within the definition of a "federal covered security" the bonds must be either registered or exempt as defined under § 30-14-301 of the Idaho Uniform Securities Act (2004) (IUSA). You have requested that this Department issue an interpretive opinion or take a "no enforcement action" position concerning the use of the public utility exemption contained in § 30-14-201(5) of the IUSA for the proposed offer and sale of investment grade first mortgage bonds which are registered with the Securities and Exchange Commission.

This Department does not view the above exemption available without federal or state government regulation of the utilities rates and charges. However it is our understanding from the representations included within the attached letters that:

- Rate regulation is accomplished through provisions in loan contract with the Rural Utilities Service (RUS) that require RUS approval of the formula that determines rates. RUS is an agency of the United States Department of Agriculture charged with providing public utilities to rural areas of the United States.
- Should terminate its participation in RUS loan programs, it would then be regulated as a "public utility" by the Federal Energy Regulatory Commission; such regulation would include rate regulation.

SECURITIES BUREAU

Bureau Chief – Marilyn T. Chastain
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Based on these representations, the Idaho Department of Finance, Securities Bureau will not take enforcement action against _____ or any registered broker-dealer acting on _____ behalf, in connection with the offer and sale of _____ first mortgage bonds, in the State of Idaho.

The foregoing position is based solely on representations and facts presented in the letters you sent to us on behalf of _____ dated June 28 and July 30, 2010. Any different facts or circumstances may require a different conclusion. We direct your attention to the anti-fraud provisions of the IUSA and emphasize that _____ and any registered broker-dealers who may offer or sell bonds on _____ behalf still have the responsibility for compliance with these and other applicable provisions of the IUSA.

Sincerely,



Walt Bitner
Securities Analyst

June 28, 2010

VIA FEDERAL EXPRESS

Idaho Department of Finance, Securities Bureau
Marilyn T. Chastain, Bureau Chief
800 Park Blvd, Suite 200
Boise, ID 83712

Re: (An Electric Membership Corporation) –
Request for Interpretive Opinion or No-Action Position

Dear Sir or Madam:

We are writing on behalf of (An Electric Membership Corporation) to request an interpretive opinion or no-action position from the staff of your office with respect to the applicability of the public utility exemption contained in § 30-14-201(5) of the Idaho Code (the "*Public Utility Exemption*") to the proposed offer and sale in your state by including through one or more registered broker-dealers, of investment grade first mortgage bonds registered on a Form S-3 registration statement with the Securities and Exchange Commission. Enclosed with this request letter is the \$50.00 mandatory filing fee.

I. Factual Background

A. General

is a Georgia electric membership corporation that was incorporated in 1974 under Title 46 – Public Utilities and Public Transportation of the Georgia Code.¹ is owned by 39 retail electric distribution cooperative members. Its principal business is providing wholesale electric power to its members. As with cooperatives generally, operates on a not-for-profit basis. is the largest electric cooperative in the United States in terms of assets, kilowatt-hour sales to members and, through its members, consumers served. is also the second largest power supplier in the state of Georgia.

¹ See Ga. Code Ann. § 46-3-200.

B. Cooperative Principles

Cooperatives like _____ are business organizations owned by their members, which are also either their wholesale or retail customers. As not-for-profit organizations, cooperatives are intended to provide services to their members at the lowest possible cost, in part by eliminating the need to produce profits or a return on equity. Cooperatives may make sales to non-members, the effect of which is generally to reduce costs to members. Today, cooperatives operate throughout the United States in such diverse areas as utilities, agriculture, irrigation, insurance and credit. A utility cooperative is a type of cooperative that is tasked with the delivery of a public utility such as electricity, water or telecommunications to its members.

All cooperatives are based on similar business principles and legal foundations. Generally, an electric cooperative designs its rates to recover its cost-of-service and to collect a reasonable amount of revenues in excess of expenses, which constitutes margins. The margins increase patronage capital, which is the equity component of a cooperative's capitalization. These margins are considered capital contributions (that is, equity) from the members and are held for the accounts of the members and returned to them when the board of directors of the cooperative deems it prudent to do so. The timing and amount of any actual return of capital to the members depends on the financial goals of the cooperative and the cooperative's loan and security agreements.

C. Wholesale Power Contracts and Rate Regulation

_____ provides wholesale electric service to its members pursuant to long-term, take-or-pay wholesale power contracts. The wholesale power contracts obligate _____ members jointly and severally to pay rates sufficient for it to recover all the costs of owning and operating its power supply business, including the payment of principal and interest on its indebtedness. These rates are established in a formulary rate set forth in a rate schedule to the wholesale power contracts. Each of _____ wholesale power contracts with its 39 members was approved by the Rural Utilities Service, an agency of the United States Department of Agriculture charged with providing public utilities (e.g., electricity, telephone, water and sewer) to rural areas in the United States, and any changes to the wholesale power contract and the rate schedule in the wholesale power contracts are generally subject to Rural Utilities Service approval. The Rural Utilities Service also has approval rights over certain other significant actions and arrangements of _____ including, without limitation, the following:

- significant additions to or dispositions of system assets,
- significant power purchase and sale contracts,
- changes to plant ownership and operating agreements,

- amounts of short-term debt outstanding exceeding 30% of its total utility plant through December 31, 2014 and 15% of total capitalization thereafter, and
- in limited circumstances, issuance of additional secured and unsecured debt.

These approval rights are contained in a loan agreement that initially entered into with the Rural Utilities Service (formerly known as the Rural Electrification Administration) in the 1970s, which agreement has been subsequently amended and restated over the years.

In the event that repays all \$1.7 billion outstanding under the loan agreement with the Rural Utilities Service and terminates such agreement, then the formulary rate set forth in the rate schedule to wholesale power contracts with each of its 39 members will be required to be filed with, and accepted by, the United States Federal Energy Regulatory Commission. At this time, does not have any intention on terminating its participation in the loan programs administered by the Rural Utilities Service.

D. SEC Reporting History and Form S-3 Registration Statement

is subject to the reporting requirements under the Securities Exchange Act of 1934 and has filed reports thereunder since 1986. On May 27, 2010, filed a registration statement on Form S-3 (File No. 333-167135) with the SEC in connection with its proposed offer and sale from time to time of investment grade first mortgage bonds in one or more transactions up to an aggregate principal amount of \$1 billion. The first mortgage bonds will be secured equally and ratably under mortgage indenture by a lien on substantially all of its tangible and some of its intangible assets, including those it acquires in the future. The SEC staff has informed that the SEC staff is in a position to accelerate the effectiveness of the registration statement on Form S-3 upon submission of an acceleration request to do so. However, in order to maintain the option of using the registration by coordination process if it needs to do so, has decided to delay the submission of such an acceleration request to the SEC staff until it has received a response from your office with respect to the request set forth herein. For your convenience, we have attached a letter that received from the SEC staff to the effect set forth above.

II. Request for Interpretive Opinion or No-Action Position

Because the offer and sale of the first mortgage bonds by will not fall within the definition of a "covered security" under Section 18 of the Securities Act of 1933, will need to register (by coordination, qualification or other appropriate means) the offer and sale of the first mortgage bonds in your state or avail itself to an exemption from such registration requirement. In this regard, we believe that the offer and sale of the first mortgage bonds by (or other bonds that it may issue in the future) should fall within the Public Utility Exemption because is a public utility that is regulated in respect of its rates by an agency of the United States (i.e., the Rural Utilities Service). However, given that the rate regulation of by the Rural Utilities Service

differs somewhat from the conventional notion of rate regulation, we request that your office issue an interpretive opinion to the effect that _____ may rely on the Public Utility Exemption in connection with the offer and sale of its bonds, including the first mortgage bonds, in your state. Alternatively, we request assurance that your office would not take enforcement action against _____ if it were to offer and sell its bonds, including the first mortgage bonds, in your state in reliance on the Public Utility Exemption.

The conventional notion of rate regulation is that in which the government or representatives of the government regulate rates charged to consumers in order to:

- protect consumers from excessive or unreasonable rates;
- ensure that basic rates are fixed at low costs to make them accessible for people of low income; and
- prevent collusion or price fixing among companies which charge rates for their services.

Some examples of industries which may be subject to rate regulation include: insurance, electric utilities, and cable companies. In these industries, schedules of rates are subject to review by government representatives who can determine whether or not the rates are fair, or if the rates meet the standards set by the government. Companies which violate rate regulation standards may be fined.

Conversely, rate regulation of _____ by the Rural Utilities Service is directed at ensuring that _____ is able to repay loans made to it by the Rural Utilities Service to fund electricity service projects. This rate regulation is accomplished by the requirement in _____ loan agreement with the Rural Utilities Service that any changes to the wholesale power contracts that _____ has with its members, including the rate schedule contained in the wholesale power contracts, be approved by the Rural Utilities Service. We believe that the form of rate regulation to which _____ is subjected by the Rural Utilities Service is consistent with the investor protection purpose of your state's securities laws. In this regard, the rate schedule set forth in the wholesale power contracts is intended to ensure that _____ collects rates from its members in amounts sufficient for it to, among other things, pay the principal and interest on its indebtedness, including any bonds sold in your state. As a result, rate regulation by the Rural Utilities Service of _____ will inure to the benefit of the purchasers of the bonds, including the first mortgage bonds, sold in your state (as opposed to the more conventional notion of rate regulation which is intended to protect the consumers of the public utility).

In addition, it is important to highlight that the SEC staff has held in a number of no-action letters that the role of the Rural Electrification Administration, which is now known as the Rural Utilities Service, in approving certain lease transactions was sufficient to exempt such

transactions from Rule 7(d)(1)(C) under the Public Utility Holding Company Act of 1935.² In particular, Rule 7(d)(1)(C) provided that “[a] company shall not be deemed to be an electric utility company . . . [p]rovided, [t]hat: . . . [t]he terms of the lease have been expressly authorized or approved by a regulatory authority having jurisdiction over **the rates and service of the public utility company** which leases such facility.” [Emphasis added.] We believe that these SEC no-action letters further support our position that the rate regulation by the Rural Utilities Service, formerly known as the Rural Electrification Administration, of _____ should be sufficient to permit _____ to avail itself to the Public Utility Exemption in connection with the offer and sale of bonds in your state. For your convenience, we have attached the above-referenced SEC no-action letters hereto.

III. Conclusion

Accordingly, for the reasons set forth in this letter, we believe that it is appropriate for your office to issue an interpretive opinion to the effect that _____ may rely on the Public Utility Exemption in connection with the offer and sale by _____ or registered broker-dealers acting on its behalf of _____ bonds, including the first mortgage bonds, in your state. Alternatively, we request assurance that your office would not take enforcement action against _____ or any registered broker-dealer acting on its behalf, in connection with the offer and sale of _____ bonds, including the first mortgage bonds, in your state in reliance on the Public Utility Exemption. For your convenience, we have attached a form of interpretive opinion and no-action letter response hereto.

* * *

In the event that any member of your office desires additional information or has questions concerning this request, he or she should contact the undersigned at _____ or _____ at _____

Sincerely,

² See SEC No-Action Letters Issued to
(May 9, 1983);
(January 27, 1986).

February 14, 1975);
(November 23, 1984); and

July 30, 2010

Mr. Walt Bitner
Securities Analyst
Idaho Department of Finance
800 Park Boulevard
Suite 200
Boise, Idaho 33702

Dear Mr. Bitner:

In response to our telephone conversation on July 28, 2010, please see the following supplemental information.

I. Relationship between Rates and Rate Schedule:

As noted in the initial request letter, rate regulation is accomplished through provisions in its loan contract with the Rural Utilities Service that require to secure approval from the Rural Utilities Service prior to changing its rate schedule. The Rural Utilities Service initially approved formula that determines its rates (i.e., its rate schedule) and must also approve any changes thereto. However, the resulting rates, as determined by the formulary rate schedule, are not subject to approval by the Rural Utilities Service or any other federal or state regulatory authority. Changes to rate schedule would directly impact its rates; however, the distinction between approving the formula by which the rate is determined and the resulting rate is an important distinction, particularly for investors familiar with the utility industry. This distinction is noted in Annual Report on Form 10-K filed with the Securities and Exchange Commission ("SEC"):

Under the indenture and related loan contract with the Rural Utilities Service, adjustments to rates to reflect changes in budgets are generally not subject to Rural Utilities Service approval. Changes to the *rate schedule* under the wholesale power contracts are generally subject to Rural Utilities Service approval. rates

are not subject to the approval of any other federal or state agency or authority, including Georgia Public Service Commission.¹ (emphasis added)

For example, if _____ operating costs unexpectedly increase, the increased cost could be input into _____ rate schedule and the formula would produce a new rate. Rural Utilities Service approval of the rate schedule, rather than the resulting rate, gives _____ the ability to pass through changes in operating expenses without additional approval. This flexibility to recover actual expenses in a timely manner benefits all holders of _____ debt securities, not just the Rural Utilities Service, including the holders of any bonds sold in Idaho. In fact, this distinction between the approval by the Rural Utilities Service of the rate schedule versus more traditional rate regulation is the reason that _____ has sought an interpretive opinion from your office regarding the application of the exemption contained in § 30-14-201(5) of the Idaho Code to it.

As you have noted, the discussion of rate regulation in the investor presentation furnished to the SEC on May 21, 2010² does not include disclosure that changes to the rate schedule are subject to Rural Utilities Service approval. Since the current rate schedule has been approved by the Rural Utilities Service, and since _____ does not currently intend to revise its rate schedule, discussion of the mandatory Rural Utilities Service approval process has generally been outside the scope of investor presentations. However, in order to respond to your concerns and in order to alleviate potential confusion, _____ furnished a revised investor presentation to the SEC on July 13, 2010 that was used in a presentation for institutional investors.³ This presentation included expanded disclosure, consistent with the disclosure provided in _____ Form 10-K, to clarify that changes to its rate schedule are subject to Rural Utilities Service approval. For your reference, the investor presentation is enclosed.

II. Basis for Potential Federal Energy Regulatory Commission Jurisdiction

The Federal Energy Regulatory Commission's "public utility" jurisdiction extends to wholesale sales of electric energy, including _____ sales to its member distribution

¹ _____, Annual Report on Form 10-K for the year ended December 31, 2009 (File No. 000-53908); pp. 4, 41. *See also* p. 5, "Under the loan contract, the Rural Utilities Service has approval rights over certain significant actions and arrangements, including, without limitation, ...changes to the wholesale power contracts and the rate schedule contained in the wholesale power contracts"

² _____, Current Report on Form 8-K, filed on May 21, 2010 (File No. 000-53908); pp. 15, 19.

³ _____ Current Report on Form 8-K, filed on July 13, 2010 (File No. 000-53908); pp. 18, 24. This presentation is also posted on _____ website. See

cooperatives in the absence of an exemption.⁴ is currently exempt from rate regulation by the Federal Energy Regulatory Commission. Specifically, section 201(f) of the Federal Power Act, 16 U.S.C. § 824(f), exempts (among others) electric cooperatives participating in the loan programs administered by the Rural Utilities Service from most of the Federal Energy Regulatory Commission's regulations. Section 201(f) provides two other bases for exemption for electric cooperatives but neither applies to Should terminate its participation in the Rural Utilities Service loan programs, it would no longer qualify for exemption under section 201(f). As a result, would then be regulated as a "public utility" by the Federal Energy Regulatory Commission; such regulation would include rate regulation, contract and tariff filing requirements, transaction reporting requirements, and corporate governance regulation.

III. Conclusion

Accordingly, for the reasons set forth in our initial request letter and based on the clarifications provided herein; notably: (i) the direct relationship between the formulaic rate schedule that determines rates and the resulting rate, (ii) Rural Utilities Service approval of the rate schedule and any changes thereto and (iii) the exemption from Federal Energy Regulatory Commission "public utility" regulation granted to electric cooperatives that are subject to Rural Utilities Service oversight, we believe that it is appropriate for your office to issue the requested interpretive guidance or no-action confirmation.

Should you have any additional questions or concerns, please feel free to contact me at
or at .

Sincerely,

Enclosure

⁴ See, e.g., *Golden Spread Electric Cooperative, Inc.*, 39 FERC ¶ 61,322, *reh'g denied*, 40 FERC ¶ 61,348 (1987) (wholesale sales to member distribution cooperatives by electric cooperative not financed by Rural Electrification Administration (currently known as the Rural Utilities Service) are subject to Federal Energy Regulatory Commission's "public utility" jurisdiction under Federal Power Act).