UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 28, 2023

CBCA 7548-FEMA

In the Matter of SAWNEE ELECTRIC MEMBERSHIP CORPORATION

M. Anne Kaufold-Wiggins of Balch & Bingham LLP, Atlanta, GA, counsel for Applicant.

James C. Stallings, Director, Valerie Grooms, Deputy Director of Recovery, and LaTashae Walker, Public Assistance Department Manager, Georgia Emergency Management and Homeland Security Agency, Atlanta, GA, appearing for Grantee.

Brock Pierson 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**, **ZISCHKAU**, and **O'ROURKE**.

O'ROURKE, Board Judge, writing for the panel.

The applicant, Sawnee Electric Membership Corporation (Sawnee), sought $2.3 million in public assistance funding to repair damage to the electrical infrastructure and power supply caused by Tropical Storm Zeta in October 2020. Sawnee had seven counties in its territory, but the disaster declaration only covered five of them. FEMA denied the application after determining that Sawnee's cost allocation method used estimates and averages and included costs that were outside of the disaster area.

Sawnee appealed the denial, contending that its cost allocation method was reasonable since it only reflected actual direct costs incurred and that the claimed costs were for repairing damages within the declared disaster area. FEMA denied the appeal as untimely. Sawnee requested arbitration of FEMA's determinations regarding timeliness and Sawnee's

method of allocating costs. We conclude that the appeal is timely under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5207 (2018). We also conclude that the cost allocation method is permissible and reasonable under the regulations. However, because FEMA did not review the merits of the costs, we return the application to FEMA to conduct that review.

Background

On October 29, 2020, Tropical Storm Zeta tore through multiple counties in Georgia. Heavy rain and high-velocity winds toppled trees and power lines, causing widespread power outages in the impacted areas. Sawnee provides power to more than 190,000 customers across seven counties in Georgia: Cherokee, Dawson, Forsyth, Fulton, Gwinnett, Hall, and Lumpkin, all of which sustained damage as a result of the storm.

Sawnee mobilized trucks and crews to repair the damage caused by the storm, which included broken utility poles, damaged power lines, blown transformers, oil spills, and extensive power outages. As with past storm-related restoration efforts, Sawnee instructed crews to use a single work order number to track all costs directly related to Tropical Storm Zeta. This accounting method enabled Sawnee easily to distinguish storm-related work from other costs but did not provide physical addresses where the work was carried out. Most of the repairs were completed within three days of the storm's impact.

On January 12, 2021, more than two months after Tropical Storm Zeta hit Georgia, the President issued a major disaster declaration with an incident period retroactive to October 29, 2020. The declaration included five of the seven counties that Sawnee serviced: Cherokee, Dawson, Forsyth, Hall, and Lumpkin. Fulton and Gwinnett counties were not included in the disaster declaration. Sawnee was not new to this process and understood that even though it performed work in all seven of its member counties, it could not recover costs for work performed outside of the declared disaster area. Sawnee had to exclude orders for storm-related work in Fulton County and Gwinnett County, but since the individual work orders did not reflect addresses, it was not possible to go back through the orders and simply remove the ones pertaining to those counties. Instead, Sawnee used a cost allocation method to identify eligible costs based on the number of outages per county. Sawnee used the same cost allocation method in two of its previous applications for public assistance, and in both cases, FEMA approved the outages-per-county cost allocation method.

The first step in allocating costs by this method required Sawnee to calculate the *total actual direct costs* that it incurred due to Tropical Storm Zeta across all seven counties. That amount came to $3,254,176.35, with the individual cost items as follows:

Cost Type	Amount
Force Account Labor (Standard Time)	$ 189,357.75
Force Account Labor (Overtime)	$ 364,337.16
Force Account Equipment	$ 204,756.93
Materials	$ 260,023.99
Contracts	$ 2,213,953.70
Mutual Aid	$ 21,746.82
Total Actual Direct Costs	$ 3,254,176.35

Next, using GPS coordinates, Sawnee identified the number of storm-related power outages in each county and totaled them. Altogether, Sawnee responded to 75,658 storm-related power outages. Sawnee then assigned each county a percentage share of power outages by dividing the number of outages in the county by the total number of outages across Sawnee's service territory:

County Served by Sawnee	Number of Outages	Percent of Total Outages
Cherokee*	12,399	16.39%
Dawson*	4,266	5.64%
Forsythe*	32,564	43.03%
Fulton	17,970	23.75%
Gwinnett	3,161	4.18%
Hall*	4,129	5.46%
Lumpkin*	1,169	1.55%
Total	75,658	100%

* denotes inclusion in the declared disaster area

Finally, Sawnee multiplied the percentages for Fulton County and Gwinnett County (23.75% and 4.18%) by the total actual direct costs of $3,254,176.35 to determine repair costs in the excluded counties. The repair costs attributable to outages in Fulton County and Gwinnett County were then subtracted from the total actual direct costs, resulting in a final application amount of $2,345,296.90. This was the same step-by-step process that Sawnee

followed in its prior grant applications.[1] Sawnee anticipated it would be approved for this disaster, too, but on February 1, 2022, FEMA denied Sawnee's application for public assistance based on a lack of adequate documentation. More specifically, FEMA had determined that the costs were ineligible because they were based on estimates and they included costs outside the declared disaster area.

Sawnee appealed the denial on March 31, 2022, fifty-eight days after it was initially denied, submitting its appeal notice to the "recipient," the Georgia Emergency Management Agency (GEMA), as required by 44 CFR 206.206(a) & (c). GEMA then forwarded the appeal and its recommendation in support of the application to FEMA on June 1, 2022. This date was 120 days after the initial denial but sixty-two days after GEMA received the appeal from Sawnee. On August 26, 2022, FEMA denied the first appeal as untimely based on the deadlines set forth in FEMA's regulations, Subpart G, Public Assistance Project Administration. *See* 44 CFR 206.206(c)(2) (2020).

Sawnee filed a request for arbitration with the Board on October 21, 2022, disputing FEMA's position as to timeliness and seeking approval of its application costs. FEMA responded to Sawnee's request for arbitration (RFA) on November 21, 2022, arguing that the Board did not have jurisdiction to consider an untimely appeal. The panel held an arbitration hearing on January 31, 2023, to receive testimony and additional evidence relevant to the dispute.

Discussion

I. The Board Has the Authority to Hear This Dispute

Applicants whose first appeal is denied by FEMA may file a second appeal with FEMA or request arbitration before this Board:

> Notwithstanding this section, an applicant for assistance under this subchapter may request arbitration to dispute the eligibility for assistance or repayment of assistance provided for a dispute of more than $500,000 for any disaster that

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[1] In 2017, Hurricane Irma caused $2,124,254 in wind damage across all seven counties in Sawnee's territory, but only five of those counties were included in the President's disaster declaration. Sawnee's application to FEMA was reduced to $1,708,832, which represented 80.44% of the total actual direct costs incurred by Sawnee based on an outages-per-county cost allocation method, which FEMA approved and paid. In 2015, a severe winter storm (Disaster 4215) caused state-wide damage in Georgia, including across Sawnee's seven-county service territory. The total actual direct cost incurred by Sawnee for Disaster 4215 was $3,271,868, but since only four of Sawnee's seven counties were included in the declaration, Sawnee's FEMA application requested reimbursement in the amount of $2,721,526, or 83.18% of its total costs based on an outages-per-county method.

> occurred after January 1, 2016. Such arbitration shall be conducted by the Civilian Board of Contract Appeals and the decision of such Board shall be binding.

42 U.S.C. § 5189a(d)(1).

Here, the amount in dispute exceeds $500,000, the application seeks funds to repair damages caused by a disaster that occurred in 2020, and Sawnee's first appeal was denied. FEMA argues that the Board does not have jurisdiction over this dispute because Sawnee's first appeal was untimely and the Stafford Act does not authorize the Board to consider timeliness under its arbitration authority. In its response to the RFA, FEMA stated:

> [T]his proceeding arises exclusively out of the Grantee's failure to submit its administrative appeal timely as required by regulation and policy. . . . [T]his proceeding is not a dispute regarding "the eligibility for assistance or repayment of assistance," but instead relate[s] to FEMA's discretionary grants administration authority. . . . The merits of the First Appeal are not at issue; thus this dispute is not within the CBCA's arbitration authority to resolve.

In an arbitration addressing the same FEMA regulation governing the timeliness of appeals (44 CFR 206.206(c)), the panel declined to treat FEMA's additional sixty-day time limit as a jurisdictional bar to further consideration, finding instead that the time limit was an administrative deadline that FEMA had the authority to extend or to waive. "[W]e do not find jurisdictional attributes in the Stafford Act language. Treating the first appeal deadlines for FEMA determinations as rigid jurisdictional bars would clash with the remedial and non-adversarial scheme of the Stafford Act for providing public assistance benefits." *City of Beaumont, Texas*, CBCA 7222-FEMA, 22-1 BCA ¶ 38,018, at184,632.

Another Board arbitration panel cited a 2019 United States Supreme Court case as further support that time limits prescribed by the Stafford Act are not jurisdictional since the Act did not specifically prescribe the sixty-day appeal time frame as such. "[In] *Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843 (2019), [the Court] explained the distinction between jurisdictional and nonjurisdictional time limits: . . . '[i]f the Legislature clearly states that a [prescription] count[s] as jurisdictional, then courts and litigants will be duly instructed . . . [b]ut when Congress does not rank a [prescription] as jurisdictional, courts should treat the restriction as nonjurisdictional in character.'" *Larimer County, Colorado*, CBCA 7450-FEMA, 23-1 BCA ¶ 38,256, at 185,785. Claim-processing rules, such as filing deadlines, promote the orderly and procedural process of litigation but are not jurisdictional. *Id.* (citing *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). Like the aforementioned panels, this panel views the statutory deadline as a "classic claim-processing rule" and as such, finds no jurisdictional bar to the Board's consideration of the issue of timeliness. *Id.*; *see City of Beaumont*, 22-1 BCA at184,632.

To the extent that FEMA argues that the Act itself, through its plain language, excludes the issue of timeliness from the Board's arbitration authority, there is no support for that argument. The Stafford Act limits our arbitration authority to "disputes of eligibility for assistance or repayment of assistance of more than $500,000 for any disaster that occurred after January 1, 2016." FEMA argues that timeliness is not a matter of eligibility, so the Board lacks the authority to consider it.[2] We disagree. The panel in *City of Beaumont* analyzed this issue in detail and cited multiple cases to support the conclusion that timeliness is an appropriate matter for an arbitration panel to consider.[3] This panel fully agrees with the decision and reasoning articulated in *City of Beaumont* on the Board's authority to consider the issue of timeliness in FEMA arbitrations.

II. Sawnee Timely Appealed FEMA's Denial

The Board has also rejected FEMA's contention that a *recipient's* failure to forward an application to FEMA within sixty days of receiving it from the applicant results in an untimely appeal, regardless of when the applicant appealed FEMA's determination. *Larimer County*, 23-1 BCA at 185,785. Under the Stafford Act, an appeal is timely if it is made within sixty days after an applicant is notified that its application was denied. 42 U.S.C. § 5189a(a). Here, Sawnee submitted its appeal within sixty days after receiving notice of FEMA's denial. This is the only time limit prescribed by the Act for appeals. When an applicant satisfies that provision, its appeal is timely. The statute's plain language does not contemplate that once an applicant files a timely appeal, as Sawnee did here, if the recipient then fails to send the appeal to FEMA within sixty days of receipt from the applicant, that failure by the recipient can retroactively render the appeal untimely. Again, we agree with and follow the panels' reasoning in *Larimer County* and *City of Beaumont*. FEMA's regulation improperly "changes the statutory mechanism for the appeal process by injecting the recipient into the process, leaving the applicant with no control over the recipient's action to forward the appeal to FEMA." *City of Beaumont*, 22-1 BCA at 184,632. "[T]he County's

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[2] In an effort to demonstrate the Board's fidelity to FEMA's timeliness regulations, FEMA's response to the RFA identifies multiple cases in which the Board focused on the issue of timeliness. FEMA did not object to the Board's consideration of timeliness on those occasions where the Board's position aligned with FEMA.

[3] The *City of Beaumont* panel cited the Federal Arbitration Act, 9 U.S.C. §§ 1–16, as support for the position that an arbitrator's role includes deciding procedural issues that arise out of an arbitrable dispute, including timeliness. *City of Beaumont*, 22-1 BCA at 184,631; *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (finding that procedural arbitrability prerequisites, "such as time limits," are matters "presumptively for the arbitrator"); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir. 2004) ("Gateway arbitrability issues," like timeliness, "are generally for the arbitrators themselves to resolve.").

first appeal was timely, notwithstanding [the recipient's] delay in forwarding the appeal to FEMA." *Larimer County*, 23-1 BCA at 185,785.

FEMA argues that the decision in *City of Beaumont* "does not comport with other CBCA decisions and reasoning on timeliness." In its response to the RFA, FEMA identified ten cases where the CBCA "followed FEMA regulations and policies without changing or inserting new policy." FEMA contends that, unlike in those cases, the panel in *City of Beaumont* interjected into the decision "new terminology not within the Stafford Act, regulation, or FEMA policy," and thereby replaced a longstanding policy and bright-line rule with an interpretation that is vulnerable to "favoritism and back door deals."

We disagree. Here, just like in *City of Beaumont* and *Larimer County*, the panel is interpreting the plain language of the Stafford Act, which unambiguously states the time frame for appeals. Under the statute, it is the *applicant* that perfects the appeal, not the recipient (unless it is a recipient-initiated appeal), and not both. When an applicant appeals within sixty days of receiving notice of FEMA's denial, the appeal cannot be regarded as untimely. A regulatory scheme that enables such a result is in direct conflict with the statute. The additional sixty-day period was added by FEMA's regulation. The decision to deny an appeal that was timely made by the applicant, but untimely forwarded by the recipient, is a policy that FEMA created. Our position does not prohibit a recipient from participating in the appeal process. It simply means that FEMA, through it regulations, cannot empower the recipient to do that which Congress reserved for the applicant. The Stafford Act vests the right of appeal with the applicant. Denying an applicant's appeal based on the recipient's tardiness cannot be reconciled with the plain terms of the Act. Where FEMA's regulations are faithful to the Act, this panel will uphold them. Where the regulations diverge, we will defer to the statute.

Finally, our position does not bend to hypothetical scenarios or long-standing policies. An interpretation that is faithful to the plain meaning of the statute will not be deterred by speculation or innuendo about how future regulators or applicants might behave. Because Sawnee appealed within sixty days of receiving notification of FEMA's denial, we conclude that Sawnee's appeal is timely. We further determine that the recipient's failure to comply with FEMA's then-effective regulation had no impact on the timeliness of the applicant's appeal.[4]

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[4] We note that, under an amended version of 44 CFR 206.206 that became effective January 1, 2022, *see* 86 Fed. Reg. 45660 (Aug. 16, 2021), GEMA's actions in this matter—where it submitted the applicant's appeal to FEMA on the 120th day, after the applicant had filed its appeal early (two days before its sixty-day deadline)—would be indisputably timely. *See* 44 CFR 206.206(b)(1)(ii)(A) (2022) (Even if the applicant files its appeal earlier than sixty days after issuance of FEMA's decision, the recipient's act of forwarding it to FEMA will be timely if done "within 120 calendar days from the date of the

III. Sawnee's Cost Allocation Method Is Permissible and Reasonable

FEMA does not state that use of a cost allocation method is prohibited. Rather, FEMA determined that Sawnee's costs were ineligible because they were based on an estimated scope of work and a cost average per county. Our review of the application shows that Sawnee used actual direct cost data, not estimates or averages, in arriving at the application costs. We also reviewed 44 CFR 206.228, the regulation that governs allowability of costs for FEMA public assistance grants. That provision references policies and cost principles that guide and determine the eligibility of an applicant's costs, including 2 CFR 200.405, which permits a cost to be allocated to a federal award if, among other requirements, the cost "can be distributed in proportions that may be approximated using reasonable methods." 2 CFR 200.405(a)(2). We conclude that Sawnee's cost allocation method, for calculating the disaster-caused damage for the five declared counties, was reasonable as evidenced by the fact that FEMA approved the use of this method by Sawnee in two previous disasters. FEMA also approved the use of this method *in this case* for Sawnee's "Category B costs."[5] In its application, Sawnee seeks Category F costs. We see no reason why this allocation method can be used for one category of costs but not the other. Lastly, FEMA itself suggests using a cost allocation method ("the cost-per-pole" method) that uses an *average* repair cost for each utility pole in Sawnee's territory and multiplies the average cost by the total number of poles in the claim.[6]

Lastly, FEMA urges the panel to deny the costs due to a lack of documentation. FEMA's initial determination memorandum notes that Sawnee failed to provide adequate documentation of the "who, what, when, where, why, and how much" for each eligible cost. Sawnee responded that the documents for this disaster application are similar in nature and quantity to its submissions in previous disaster applications, which were approved, and that there has been no change in the policies or regulations. Sawnee argues that FEMA's change in position does not stem from a change in its regulations but rather from a change in FEMA's interpretation of its regulations. Sawnee contends that a change in interpretation

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FEMA determination."). As we understand it, the new FEMA regulations are not retroactive and do not apply to the October 2020 disaster at issue here.

[5] Category B costs are those costs dedicated to emergency protective measures, whereas Category F costs are for public utilities. The arbitration before this panel involves only Category F costs.

[6] Sawnee pointed out that the pole tracker cost allocation method "is an inaccurate allocator of actual direct costs" and results in additional application costs of $608,175. While we recognize the cost-per-pole method as another method for the allocation of costs, we make no determination as to its accuracy. It is simply mentioned here to show that cost allocation methods that use "average costs" are not universally rejected by FEMA.

is improper because FEMA failed to notify Sawnee of the change and "[FEMA's] previous interpretations engendered Sawnee's . . . serious reliance" on the same, citing *Prohibition Juice Co. v. Food & Drug Administration*, 45 F.4th 8, 21 (D.C. Cir. 2022) ("Agencies must explain changes in position, particularly once a prior position has engendered regulated parties' reliance."). For all of these reasons, we determine Sawnee's cost allocation method to be permissible and reasonable.

IV. Cost Eligibility

Sawnee provided GEMA, FEMA, and the panel with substantial documentary and testimonial evidence in support of its application. The documentary record consists of approximately 5000 pages of payroll records, purchase orders, service contracts, equipment inventories, invoices, and check stubs (as evidence of ordering equipment and services, and performance of the same), and receipts and cleared checks as proof of payment for the services and equipment. Also included were hundreds of photographs of damaged transformers, utility poles, and power lines, as well as fallen trees and other debris blocking roads and trapping power lines and other equipment. The applicant also provided multiple maps showing the outages across all counties as well as outages that occurred within the declared disaster area.

FEMA did not conduct a detailed review of the supporting documentation to determine cost eligibility because it denied the initial application based on Sawnee's cost allocation method. Sawnee appealed that determination, which FEMA also denied, but based on a lack of timeliness. As explained above, the panel rejects FEMA's decision as to the cost allocation method and the timeliness of Sawnee's first appeal. The remaining issue before the panel is whether the requested costs are eligible for reimbursement. In its brief and closing argument, FEMA asked the panel to return the application to FEMA for a determination on the merits of Sawnee's application in the event the panel determines the first appeal was timely.

The panel reviewed the documentation, photos, and maps, and considered the testimony of Sawnee's chief financial officer and a representative from GEMA. Although we conclude that Sawnee submitted a large amount of supporting documentation, the witnesses only provided conclusory statements regarding the probative value of that evidence. FEMA has not tested those conclusions with its own review. The panel gave FEMA additional time before the hearing to conduct its analysis of the evidence, but FEMA maintained that it was short-staffed due to additional on-going disasters and was not able to complete its review. The panel desires the benefit of FEMA's expertise in reviewing the underlying cost data. Accordingly, the panel returns the application to FEMA to conduct that review.

FEMA shall have ninety days to review the information. Since we determined that the first appeal was timely and the cost allocation is permissible, FEMA need only review the documentation provided in the record, especially Exhibits P and R, to determine the eligibility of the applicant's costs and the adequacy of the applicant's support for those costs, including force account labor (standard and overtime), force account equipment, materials, contracts, and mutual aid. In the event that FEMA is able to resolve the application with the applicant as a result of its review, FEMA and the applicant may submit a joint statement to that effect and the panel will not conduct any further analysis. If the parties are not able to reach an agreement on costs, FEMA shall provide the results of its analysis to the panel for a final determination on Sawnee's application.

Decision

Sawnee's application is timely and the cost allocation method is approved. We return the application to FEMA for a determination on cost eligibility consistent with the above limitations.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge