



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 16, 2024

CBCA 7914-FEMA

In the Matter of
BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION

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Before the Arbitration Panel consisting of Board Judges **LESTER**, **VERGILIO**, and **KULLBERG**.

LESTER, Board Judge, writing for the Panel.

This arbitration is the third that applicant, Baldwin County Electric Membership Corporation (BEMC), has initiated under 42 U.S.C. § 5189a(d) (2018) involving costs that BEMC incurred after Hurricane Sally caused widespread power outages and damage in BEMC's electric power service area. Although BEMC initially submitted a single consolidated request to the Federal Emergency Management Agency (FEMA) seeking public assistance (PA) funding for all of the Hurricane Sally costs that it believed were reimbursable, FEMA required that BEMC split that consolidated request into three separate project worksheets (PWs), each to be resolved separately and on independent tracks. Under the first PW, FEMA authorized partial PA funding for base camps that BEMC established to assist in Hurricane Sally recovery efforts, and, through arbitration, the Board granted

further relief. *Baldwin County Electric Membership Corp.*, CBCA 7955-FEMA, 24-1 BCA ¶ 38,558. Under the second PW, FEMA authorized partial PA funding for costs that BEMC incurred to remove vegetative debris from power line rights-of-way (ROWs), and the Board again granted additional relief in arbitration. *Baldwin County Electric Membership Corp.*, CBCA 7811-FEMA, 24-1 BCA ¶ 38,511.

Under the PW that is the subject of this arbitration, BEMC seeks PA funding for costs associated with its Hurricane Sally call center, as well as hotel costs (unrelated to the call center) that BEMC asserts it had no choice but to incur. FEMA initially authorized PA funding for the call center power generator, security support, and associated material costs, but it denied all of the remaining costs in the PW, which are now at issue here, because, in FEMA's view, they represented increased operating costs, which FEMA asserts are not recoverable. In its arbitration brief to the Board, however, FEMA raised a new basis for denying the costs at issue here, through an argument not previously mentioned in the base camp cost arbitration, the ROW cost arbitration, or the process leading to the filing of this arbitration. FEMA's lead argument here is that, under the applicable Public Assistance Program and Policy Guide (PAPPG) (June 2020), a private non-profit (PNP) electric cooperative like BEMC is not eligible for PA funding unless a state, local, tribal, or territorial (SLTT) government requested that the PNP provide emergency services in response to a disaster. Even then, FEMA alleges, PA funding is available only to the SLTT government, which would be responsible for reimbursing the PNP for work that the PNP performed at the SLTT government's request. Even though BEMC, rather than any SLTT government office, has primary responsibility for providing electric power to the affected area, FEMA argues that BEMC cannot obtain PA funding because it did not perform its emergency electric power restoration work at the request of a SLTT government office.

Reviewing FEMA's new argument, it is clear that FEMA is misapplying the PAPPG, attempting to convert language indicating that FEMA "usually" and "generally" does not fund PNPs into an absolute preclusion on PA funding for PNPs. Even if the PAPPG grants FEMA some discretion in determining the circumstances in which it will provide direct funding to a PNP, the record in this matter establishes that FEMA routinely provides PA funding to rural electric cooperatives responding to hurricane disasters without requiring evidence of a request for assistance from a SLTT government office. In fact, before raising its new argument to us, FEMA consistently provided PA funding directly to BEMC for Hurricane Sally costs, as well as earlier hurricane disaster costs, without SLTT government involvement. Because FEMA's new position is inconsistent with its past treatment of rural electric cooperatives, and because there is no written indication of a change in policy, we find that BEMC's ability to obtain PA funding is not affected by the absence of a SLTT government office request for assistance.

On the merits, because BEMC has adequately supported its request for call center force account labor (FAL) overtime costs, we grant PA funding for those costs. We deny BEMC's request for call center cleaning costs, as well as its claim for meals for call center employees and mutual aid workers, but we grant its request for hotel lodging for mutual aid workers.

Statement of Facts

I. BEMC's Response to Hurricane Sally

BEMC is a PNP electric cooperative serving Baldwin and Monroe Counties in southwest Alabama. It is the single largest source of electric power within its service area. Applicant's Exhibits 4 at 4, 5 at 2. As part of its regular operations, BEMC maintains a call center staffed by ten employees who work during regular business hours. Their primary role is to take service-based calls from customers. If there is an outage as a result of an isolated event, the call center receives the outage call, and the call center staff logs it into the system. Typically, however, only about 1.17% of calls to the call center are related to any form of outage. Applicant's Exhibit 5 at 4 ¶ 10. In normal circumstances, the call center's primary focus is billing, addressing new service requests, canceling existing service requests, and answering general customer service questions. *Id.* at 3 ¶ 8.

Between September 14 and 16, 2020, Hurricane Sally impacted southern counties in Alabama, including Baldwin and Monroe Counties, with severe winds, rain, and flooding. The President declared the event a major disaster (FEMA-4563-AL) on September 20, 2020.

The disaster caused the loss of power for approximately 97% of BEMC's service locations. Within hours after the storm passed, BEMC determined that 78,146 of BEMC's service locations were experiencing outages. Applicant's Exhibit 4 at 5. Over the course of the first twelve days after the hurricane made landfall, BEMC mobilized between 1400 and 1500 line construction and electrical workers, in addition to its internal 100 workers, to restore electricity to all homes and facilities that could safely receive power. *Id.* at 4.

BEMC utilized its call center as part of its response effort but in modified form, consistent with its Long-Term Power Outage Communication Plan as set forth in the BEMC Disaster Plan. During a disaster event such as Hurricane Sally, BEMC curtails its call center's regular focus on customer service operations and instead uses the call center to obtain and convey critical information about outages and safety hazards that affect both its customers and its line workers in the field, allowing line construction crews to coordinate their work safely. For Hurricane Sally, BEMC added fourteen additional employees to staff the call center and expanded its hours from regular business hours to twenty-four hours a day, as BEMC's Vice President of Finance and Accounting explained:

During a disaster event such as Hurricane Sally, . . . [t]he Call Center transforms to play a primary role in the utility response and recovery process—becoming like a 911 dispatcher but for utility response rather than medical response. The normal communication network used to communicate with meters and other down-line equipment was damaged; therefore, there was not an accurate method to “detect” outages. The Call Center serves a primary role in the assessment of distribution damage following an event. The principal way BEMC determines its outages and where power is still needed was through the Call Center during Hurricane Sally. Moreover, in addition to the normal assigned ten employees working business hours, 14 additional employees are reassigned to the Call Center and the hours are increased to 24 hour operations. For Hurricane Sally, the schedule ensured 24 hour coverage in order to support the emergency operations.

Included in this disaster specific mission, the Call Center also provides lifesaving information to the general public and is a vital component of the safety of the linemen. Daily reports are generated for the Call Center workers to have lifesaving information to provide to the disaster survivors calling in. Additionally, it is imperative to provide information on generators and how to prevent the electrocution of the line workers to disaster survivors who have stayed in their homes in the disaster area.

Applicant’s Exhibit 5, Affidavit of Alan Schott (Oct. 19, 2023) (Schott Affidavit) ¶¶ 8-9.

The data gathered by the call center was “a major component of the BEMC Control Center,” Schott Affidavit ¶ 6, which BEMC explains as follows:

The Control Center is essentially BEMC’s Emergency Operations Center (“EOC”) and is responsible for command and control of the entire restoration effort. The Control Center directs utility crews, dispatches workers, and controls the entire restoration event. The Call Center is the primary connection between what is happening in the field and the operations team that coordinates outage restoration. Without the coordination of the Call Center and the Control Center, outage restoration would be delayed by many days.

Id. ¶ 6.

The expanded call center was active from September 15 through 27, 2022, ending when power was substantially restored to BEMC’s service locations. Schott Affidavit ¶ 10. BEMC asserts that, during that period, the call center “took a record 23,452 number

calls—an increase of an estimated 370% from normal daily operations.” *Id.* Ninety-eight percent of those calls related to outages. *Id.*

In addition to the call and control centers, BEMC established base camps in Foley and Bay Minette, Alabama, to provide services for workers engaged in emergency electrical restoration services. The Foley camp operated from September 17 through 26, 2020, and the Bay Minette camp operated from September 17 through 24, 2020. Further, because high winds during the storm had left vegetative debris throughout BEMC’s power line ROW, BEMC hired nine contractors and received assistance through two mutual aid agreements to clear out that debris.

II. BEMC’s Project Worksheet Submissions

BEMC submitted a PW requesting PA funding for the various emergency protective measures that it undertook in response to Hurricane Sally, including its costs associated with the base camps, the call center, the power line ROW and mutual aid clearance work, the provision of meals and lodging for workers, and other emergency activities.¹ FEMA had BEMC split that PW into three separate projects, to which FEMA assigned three separate PW numbers: one for the base camp costs (PW 162236); one for ROW costs, inclusive of some meal costs (PW 186285); and one for all remaining activities, including the call center costs (PW 186287).

Under PW 162236, FEMA issued a determination memorandum authorizing PA funding for construction, security, temporary housing, mass feeding, and fuel operations at BEMC’s base camps from September 16 to 25, 2020, but rejected freight and meal costs that FEMA viewed as unreasonable. BEMC sought arbitration before the Board on the disallowed costs, and the Board, by decision dated April 12, 2024, granted in part BEMC’s request for some additional meal costs but otherwise denied BEMC’s request. *Baldwin County Electric Membership Corp.*, CBCA 7955-FEMA, 24-1 BCA at 187,405. BEMC’s claim for base camp costs is fully resolved and is not before us here.

Under PW 186285, FEMA determined that the ROW debris cleaning costs were generally eligible for reimbursement. It authorized payment for the costs of eight of the nine contractors that BEMC hired, as well as the costs of the two mutual aid agreements, but denied costs for the ninth contractor after finding the per-hour rates unreasonable. BEMC sought arbitration before the Board regarding FEMA’s denial of the costs of the ninth

¹ BEMC also submitted some other PWs involving Hurricane Sally that are not a part of this arbitration, including PW 162238 (initial utility restoration) and PW 162240 (permanent utility restoration).

contractor, and, by decision dated February 5, 2024, the Board found the claimed costs to be reasonable and reimbursable. *Baldwin County Electric Membership Corp.*, CBCA 7811-FEMA, 24-1 BCA at 187,188. BEMC’s claim for ROW costs is fully resolved and is not before us here.

With regard to the call center and other costs assigned to PW 186287 (the matter before us here), FEMA issued a determination memorandum dated March 25, 2022, finding \$67,745.84 of the \$400,488.72 in claimed costs eligible for PA funding but denying the remainder (\$332,742.88). Applicant’s Exhibit 3 at 1-2. FEMA found that the call center work identified in the PW “appears to be the normal, routine operations of the BEMC” and that increased labor and cleaning costs, like those that BEMC was claiming, are not eligible for PA funding. *Id.* at 4. Because call center labor was not an eligible cost, the cost of meals for call center staff was also found not to be eligible. *Id.* at 5. FEMA also denied recovery for lodging costs that were unrelated to the call center, indicating that BEMC “gratuitous[ly]” provided lodging for state law enforcement officers and that such costs were not recoverable. *Id.* at 6. The \$67,745.84 in PA funding that FEMA authorized covered the cost of generators used to provide power to the call center, the cost of associated materials, and the costs of security support for disaster operations provided to BEMC through a mutual aid agreement with the city of Hanceville, Alabama. *See* Applicant’s Exhibits 1, 3, 9.

III. BEMC’s First Appeal for PW 186287

BEMC submitted a first appeal for PW 186287 to the Alabama Emergency Management Agency (AEMA) on May 26, 2022, which AEMA forwarded to FEMA on June 13, 2022.

On August 21, 2023, the Acting Regional Administrator for FEMA Region IV issued a decision denying the first appeal, finding that BEMC “has not demonstrated that its claimed costs were tied to the performance of eligible emergency protective measures” and instead “represent ineligible increased operating costs.” Applicant’s Exhibit 1 at 1. In the first appeal analysis accompanying that decision, FEMA rejected BEMC’s position that FEMA had misunderstood the scope and breadth of the call center and that the call center, as established, directly supported emergency utility operations by lessening immediate threats to public health and safety, finding as follows:

In accordance with FEMA policy, applicants may incur increased costs related to operating a facility or providing a service as a result of an incident because of the increased demand for the services the facility provides. Such costs may be eligible if the services are specifically related to eligible emergency actions to save lives or protect public health and safety or improved property; are for a limited time based on the exigency of the circumstances, and the applicant

tracks and documents the additional costs. Moreover, for PNPs, emergency services are generally limited to activities associated with preventing damage to a facility and its contents.

The Applicant did not provide activity logs for each employee, only job titles. In its RFI, FEMA specifically sought explanations of the work in support of emergency protective measures and how that work differed from the employees' day-to-day duties. Consequently, the Applicant did not substantiate how these expanded Call Center operations or other activities represented emergency protective measures eligible for PA funding. Instead, these represent increased operating costs.

Id. at 4-5 (footnotes omitted). As for the extra cleaning cost for the call center, FEMA found that “it simply represents the increased cost of operating the Call Center in a COVID-19 environment.” *Id.* at 6. FEMA also rejected BEMC’s request for reimbursement of the cost of meals for call center employees and found BEMC’s request for lodging costs, which FEMA recognized involved power line workers rather than (as it had previously believed) law enforcement officers, unsubstantiated. *Id.* at 5.

IV. Arbitration Proceedings Before the Board for PW 186287

On October 20, 2023, BEMC timely filed a request for arbitration (RFA) with the Board for the costs in PW 186287, identifying an amount in dispute of \$301,977.10 (later reduced to \$291,486.62, *see* Hearing Transcript at 8, 20), which, it alleged, satisfies the \$100,000 dollar threshold for arbitration under 42 U.S.C. § 5189a(d) involving applicants like BEMC from rural areas.

In its November 20, 2023, response to the request for arbitration, FEMA did not challenge BEMC’s rural area status. FEMA’s lead defense to BEMC’s claim was one that it had never previously raised, either in its initial determination memorandum, its first appeal decision, or elsewhere. Citing to the PAPPG, FEMA argued that, “to be eligible for . . . PA funding, FEMA policy requires that BEMC, a PNP, needs to document that any [emergency protective measures (EPMs)] conducted were at the request of, and certified by, a legally responsible government entity.” FEMA’s Response Brief at 14 (citing PAPPG at 112). FEMA alleged that “[e]mergency services are usually the responsibility of SLTT governments” and that, because “PNPs are generally not legally responsible for those services,” FEMA “does not provide PA funding to PNPs for the costs associated with providing those services.” *Id.*

BEMC replied to FEMA’s response on December 8, 2023, expressing surprise at its new argument, which it characterized as “a perversion of FEMA policy and precedent” since

“FEMA regularly funds emergency protective measures for electric cooperatives.” Applicant’s Reply at 9-10. BEMC indicated that “[e]mergency power restoration requires immediate action, and electric utilities immediately send crews out to restore power.” *Id.* at 10. “Power is specifically defined in the Stafford Act as a ‘critical’ service,” it argued, *id.* (citing 42 U.S.C. § 5172(a)(3)(B)), since, “where power is not delivered,” it “directly affect[s] critical facilities and systems such as hospitals, communication systems, sewage and drinking water systems, businesses, and traffic lights.” *Id.*

The parties requested oral argument in lieu of a hearing, which the Board conducted on February 21, 2024. Subsequently, at the Board’s request, the parties filed supplemental briefing addressing FEMA’s argument that PNPs are not eligible for PA funding absent certification from a SLTT government that it requested emergency services and that, even then, payment must be made to the SLTT government upon behalf of the PNP. With its response, BEMC provided the Board with evidence of numerous rural electric cooperative PNPs (including itself) that have received direct PA funding in just the past four years for EOCs, control centers, and call centers used in responding to declared disasters.

Discussion

I. PA Funding for PNPs Absent SLTT Government Requests for Assistance

FEMA’s lead argument is that the PAPPG precludes any funding for emergency services provided by a PNP unless a SLTT government requested that the PNP provide the services and that, even then, any recovery goes to the SLTT entity that requested the services.

FEMA has overstated the scope of the PAPPG’s limitations on PA funding to PNPs. Under the heading “Emergency Protective Measures Conducted by Private Nonprofit Organizations,” the PAPPG indicates that emergency services are “usually” and “generally” the responsibility of SLTT governments, such that PNPs providing emergency services are “generally” not eligible for PA funding unless the SLTT government has requested the PNP’s assistance:

For PNPs, eligible emergency protective measures are generally limited to activities associated with preventing damage to an eligible facility and its contents.

Emergency services are *usually* the responsibility of SLTT governments. Therefore, PNPs are *generally* not legally responsible for those services and FEMA does not provide PA funding to PNPs for the costs associated with providing those services. When a PNP provides emergency services at the

request of, and certified by, the legally responsible government entity, FEMA provides PA funding through that government entity as the eligible Applicant.

PAPPG at 112-13 (emphasis added). The PAPPG further provides, however, that, “[i]n limited circumstances, FEMA may also reimburse a PNP *directly* when essential components of a facility are urgently needed to save lives or protect health and safety, such as an emergency room of a PNP hospital or a PNP sewage or water treatment plant.” *Id.* at 113 (emphasis added). The record does not suggest that the power services at issue were the responsibility of SLTT governments. Accordingly, the record does not support the notion that the expressed limitations for PNP eligibility are applicable here.

Another section of the PAPPG, titled “Expenses Related to Operating a Facility or Providing a Service,” indicates that an applicant “may incur increased costs related to operating a facility or providing a service as a result of the incident because of an increased demand for the services the facility provides.” PAPPG at 113. Such costs are eligible for reimbursement if (1) they are for services “specifically related to eligible emergency actions to save lives or protect the public health and safety or improved property; [(2)] [t]he costs are for a limited timeframe based on the emergency or exigency of the circumstances; and [(3)] [t]he Applicant tracks and documents the additional costs.” *Id.* “For PNPs, operating costs are *generally* ineligible even if the services are emergency services, unless the PNP performs an emergency service at the request of and certified by the legally responsible government entity,” and, in such a case, “FEMA provides PA funding through that government entity as the eligible Applicant.” *Id.* at 114 (emphasis added).

Nothing in this PAPPG language creates the absolute bar to PA funding for PNPs upon which FEMA is insisting here. It says only that PNPs “generally” and “usually” are not directly funded, which does not create an absolute bar. In fact, the evidence of record makes clear that FEMA does not view rural electric cooperatives such as BEMC as ineligible for PA funding absent SLTT government involvement. In its post-hearing briefing, BEMC identified numerous instances in just the last four years in which FEMA provided PA funding directly to rural electric cooperative PNPs to cover the costs of EOCs, control centers, and/or call centers that PNPs had maintained in response to a declared disaster, without any request for services or certification by a SLTT government.² Further, the Board has considered, and

² In its post-hearing briefing, FEMA did not challenge or question any of BEMC’s citations or documentation regarding PNPs that had obtained direct PA funding despite the absence of a request for services from a SLTT government: *Twin County Electric Power Ass’n*, DR-4697 (Feb. 5, 2024) (Applicant’s Exhibit 41); *Washington–St. Tammany Electric Cooperative, Inc.*, DR-4611 (Oct. 6, 2023) (Applicant’s Exhibit 27); *Southern Pine Electric Power Ass’n*, DR-4598 (Nov. 24, 2022) (Applicant’s Exhibit 36); *South Louisiana*

ordered PA funding in, arbitrations involving electric cooperatives and similar PNP in which FEMA never raised any argument that PNPs, because of their PNP status, were ineligible for direct PA funding under the PAPPG. *See, e.g., Carroll Electric Membership Cooperative*, CBCA 7968-FEMA, 24-1 BCA ¶ 38,594; *Mattamuskeet Ass'n*, CBCA 7100, 21-1 BCA ¶ 37,931; *Florida Keys Electric Cooperative*, CBCA 6822-FEMA, 20-1 BCA ¶ 37,747. In fact, BEMC itself previously received PA funding, authorized by FEMA, for costs that it incurred in October 2017 in maintaining an emergency call center in response to Hurricane Nate, *see* Applicant's Exhibit 23, despite the absence of a request for services or certification from a SLTT government.³ BEMC even received direct Hurricane Sally PA funding under the two BEMC PWs that were already the subject of arbitration before the Board, without any argument from FEMA there that, as a PNP, BEMC was barred from such funding. FEMA's new demand that BEMC act at a SLTT government's behest in providing emergency power restoration services in response to a disaster before it can obtain PA funding (which it would then obtain only through the SLTT government, which would repay

Electric Cooperative Ass'n, DR-4611 (Sept. 16, 2022) (Applicant's Exhibit 26); *Coast Electric Power Ass'n*, DR-4626 (Apr. 12, 2022) (Applicant's Exhibit 37); *Southwest Mississippi Electric Power Ass'n*, DR-4626 (Apr. 12, 2022) (Applicant's Exhibit 40); *Magnolia Electric Power Ass'n*, DR-4626 (Apr. 11, 2022) (Applicant's Exhibit 38); *Southern Pine Electric Power Ass'n*, DR-4626 (Jan. 6, 2022) (Applicant's Exhibit 39); *Choctawhatchee Electric Cooperative*, DR-4564 (Mar. 24, 2021) (Applicant's Exhibit 24); *Southern Pine Electric Power Ass'n*, DR-4536 (Dec. 14, 2020) (Applicant's Exhibit 33); *Southern Pine Electric Power Ass'n*, DR-4551 (Nov. 27, 2020) (Applicant's Exhibit 35); *Dixie Electric Power Ass'n*, DR-4551 (Oct. 19, 2020) (Applicant's Exhibit 34); *Dixie Electric Power Ass'n*, DR-4536 (Oct. 5, 2020) (Applicant's Exhibit 32); *Southern Pine Electric Power Ass'n*, DR-4470 (June 25, 2020) (Applicant's Exhibit 30); *Alcorn County Electric Power*, DR-4470 (May 2, 2020) (Applicant's Exhibit 29); and *Tombigbee Electric Power Ass'n*, DR-4470 (Apr. 2, 2020) (Applicant's Exhibit 31).

³ During oral argument in this matter, counsel for FEMA represented that, although old versions of its reimbursement policy might not have been clear that PNPs are barred from direct PA funding and that only SLTT governments may recover for emergency work that PNPs perform at the SLTT government's request, the recent versions of the PAPPG clearly mandate these limitations. FEMA also represented that it was unaware of any recent FEMA approvals of PNP funding for emergency services. Yet, the relevant PAPPG language regarding the usual and general necessity of a request for services to a PNP from a SLTT government was essentially the same in 2017 as it is today. The evidence that BEMC has presented, including its own recovery from FEMA of call center costs incurred in response to Hurricane Nate in 2017 and of PA funding in the two earlier BEMC Hurricane Sally arbitrations, evidence that FEMA has overstated its restrictive reading of the present PAPPG.

BEMC after obtaining FEMA money) is inconsistent with FEMA's application of its current PAPPG policy.

We reject FEMA's attempt to rely on a litigation argument here that conflicts with consistent FEMA practice, specifically under the present PAPPG and BEMC's other PWs for Hurricane Sally, when no written guidance dictates that PA funding is inappropriate.

II. BEMC's Call Center FAL Overtime Costs (\$223,918.54)

"Increased costs of operating a facility or providing a service are generally ineligible, even when directly related to [an] incident." PAPPG at 96. Nevertheless, if an applicant incurs additional costs related to operating a facility because an incident causes an increased demand for services that the facility provides, those additional costs may be eligible for PA funding if (1) the services are specifically related to eligible emergency actions to save lives or protect public health and safety or improved property; (2) the costs are for a limited period of time based on the exigency of the circumstances; and (3) the applicant tracks and documents the additional costs. FEMA's Response Brief at 7-8 (citing PAPPG at 113).

FEMA denied BEMC's call center FAL overtime costs as merely reflecting an increase in normal operating costs. FEMA represented that it found no difference in the work performed at the call center during and directly after Hurricane Sally than that which was required in the normal course of business. Yet, BEMC presented substantial evidence to the Board (some of which BEMC had not previously presented to FEMA during the first appeal) that, in addition to converting its call center from one operating only during regular business hours to one operating twenty-four hours a day, the focus of the call center's work changed dramatically for the short duration of time at issue here. Normally, only about 1.17% of calls to the call center are related to calls about outages, with the bulk of the call center's primary mission being billing, addressing new and cancelling old service requests, and answering general customer service questions. For the period of time at issue here, 98% of the calls dealt with outages, and BEMC has presented evidence about how its call center tracked outages, provided lifesaving information to the public, and provided critical information to the control center that was relayed to crews to prevent injuries through electrocution.

Recently, in its second appeal decision in *Nashville Electric Service*, FEMA-4601-TN-DR, GMP 187087 (Dec. 12, 2023) (available at <https://www.fema.gov/appeal/immediate-threat-increased-operating-costs-0#> (last visited July 10, 2024)), FEMA applied the same test that it agrees applies here to another storm disaster that caused the applicant there to rely upon its existing call center to support the applicant's emergency response. Specifically, as here, FEMA acknowledged that, although "[i]ncreased costs of operating a facility or providing a service are generally not eligible,

even when directly related to the incident, . . . short-term increased costs directly related to accomplishing specific emergency health and safety tasks as part of emergency protective measures may be eligible . . . if: (1) the services are specifically related to eligible emergency actions to save lives or protect public health and safety or improved property; (2) the costs are for a limited timeframe based on the emergency or exigency of the circumstances; and (3) the applicant tracks and documents the additional costs.” The applicant in *Nashville Electric* provided FEMA with a “Trouble Report” listing 340 calls that its call center staff had received in the days following storms that the President had declared a disaster with “remarks indicating the purpose of each call.” *Id.* FEMA recognized that “[m]any call entries describe customer reports of fallen trees affecting power lines, downed power lines across roads or residences, and other damage (e.g., broken utility poles) and hazardous conditions,” while other calls were “received from the local Office of Emergency Management (OEM), an [EOC], and the local fire department, reporting similar damages.” *Id.* FEMA further recognized that “one of the purposes for the call center was ‘the coordination of communications with residents and emergency crews to protect first responders from dangerous conditions’ and to respond to ‘requests to cut power when needed for emergency response activities,’” meaning that “call center employees thus assisted with the coordination of the local emergency response to the disaster.” *Id.* In such circumstances, FEMA found that the applicant had established that its FAL call center costs were eligible for PA funding:

[W]ith the [call log], Applicant has shown that call center services during the period in question were specifically related to emergency actions to protect public health and safety resulting from the disaster. Moreover, the Applicant only claims costs incurred over a limited time frame, based on the circumstances of the disaster, and submits documentation tracking the overtime costs. Therefore, the Applicant has met the three criteria required for increased costs related to operating a facility or providing a service to be eligible under FEMA policy. As a result, the claimed overtime force account labor costs are eligible for PA funding.

Id.

The evidence that BEMC has provided meets the *Nashville Electric* standard. BEMC has produced detailed descriptions of the work that each employee in the call center was performing (Applicant’s Exhibit 18), the public assistance and safety information announcements that the call center issued in the days following Hurricane Sally (Applicant’s Exhibit 8), and evidence regarding the change in the nature and scope of the work that the call center employees were performing, in the types of calls that the call center was receiving in the aftermath of the hurricane, and in the purpose of its work. That evidence establishes that the call center services at issue were specifically related to eligible emergency actions

to save lives or protect public health and safety or improved property. BEMC has adequately documented its claimed costs, and it operated the modified and expanded version of its call center for only a limited twelve-day period. In these circumstances, consistent with FEMA's second appeal decision in *Nashville Electric*, BEMC is to receive PA funding for FAL overtime.

III. BEMC's Call Center Cleaning Costs (\$13,588)

BEMC claims \$13,588 in call center cleaning costs during the twelve-day period of expanded call center work.⁴ BEMC tells us that, to account for risks resulting from the COVID-19 pandemic, it had to increase its cleaning services while its expanded in-person call center was operating. BEMC does not tell us what cleaning costs it would have incurred at the call center absent Hurricane Sally. The record on this issue is sparse. To the extent that BEMC might have verbally suggested at one point during a conference with the Board that BEMC might barely have incurred any cleaning costs at all absent Hurricane Sally because individuals were primarily working remotely, there is nothing in the record to support that argument. Based upon the record before us, we cannot view BEMC's claim for call center cleaning costs as anything other than increased costs of operating its call center that, under the PAPPG, are not reimbursable. *See* PAPPG at 96.

IV. Meals (\$25,761.70)

BEMC seeks \$25,761.70 in PA funding for meals provided to call center and/or power restoration workers, although we have had difficulty matching the total amount that BEMC says that it is claiming with the breakdown of meal costs in its list of claimed costs. As best as we can decipher from the cost summary that BEMC submitted to the Board, BEMC is seeking reimbursement for (1) \$3770.97 in purchases from Sam's Club to provide food to call center workers between September 11 and 15, 2020; (2) \$16,500 for meals for its responders provided by the Stagecoach Café on the initial day of BEMC's response to Hurricane Sally (before BEMC's base camp had opened); and (3) at least \$1253.33 in food charges for mutual aid providers who needed to stop for food at establishments such as Pizza Hut, Chick-Fil-A, Moe's Original BBQ, Walmart, and Lickin Good Donuts.

Under the PAPPG, meals that an applicant provides its emergency workers may be eligible for PA funding in the following circumstances:

⁴ The cleaning costs requested here do not include waste management costs, which BEMC reports FEMA moved to and addressed as part of another PW. *See* RFA at 21 n.53.

Provision of meals, including beverages and meal supplies, for employees and volunteers engaged in eligible Emergency Work, including those at EOCs, is eligible provided the individuals are not receiving per diem and one of the following circumstances apply:

- Meals are required based on a labor policy or written agreement that meets the requirements of Chapter 6. Cost Eligibility;
- Conditions constitute a level of severity that requires employees to work abnormal, extended work hours without a reasonable amount of time to provide for their own meals; or
- Food or water is not reasonably available for employees to purchase.

FEMA only reimburses the cost of meals that are brought to the work location and purchased in a cost-effective and reasonable manner, such as bulk meals. FEMA does not reimburse costs related to group outings at restaurants or individual meals.

PAPPG at 117.

BEMC's largest meal cost is a \$16,500 charge for food from the Stagecoach Café, which BEMC asserts it brought to mutual aid workers on the initial day of their response to Hurricane Sally as "the only available food source that day for all the workers of BEMC." RFA at 24. It might be possible to find that this charge might fit within the PAPPG's allowable meal costs, assuming (which the record does not tell us) that the mutual aid workers were not receiving per diem. We need not delve into that issue, though, because BEMC's failure to provide any documentary support for its \$16,500 claim is fatal to its request for reimbursement. This rather large meal cost is listed as an entry on a spreadsheet that BEMC submitted to the Board titled "FEMA Project 186287 Analysis Force Account Materials Invoice Summary Review," see Applicant's Exhibit 9, but it lacks any supporting invoices or receipts. Under the PAPPG, "[t]o be eligible, costs must be . . . [a]dequately documented" in accordance with 2 CFR 200.403(g) (section 200.403(g)). PAPPG at 65. Although neither section 200.403(g) nor the PAPPG defines what constitutes adequate documentation, federal courts have viewed charts of expenses, without any accompanying receipts or invoices, as not constituting "adequate documentation" for an award of costs or damages. See, e.g., *Brumfield v. IBG LLC*, No. 10-C-715, 2022 WL 972277, at *4 (N.D. Ill. Mar. 31, 2022); *Stultz v. Virginia*, No. 7:13-CV-589, 2019 WL 4741315, at *27 (W.D. Va. Aug. 15, 2019) (citing *Trimper v. City of Norfolk, Virginia*, 58 F.3d 68, 77 (4th Cir. 1995)); *Feltzin v. Union Mall LLC*, 393 F. Supp. 3d 204, 218-19 (E.D.N.Y. 2019). BEMC's failure to submit any invoice, receipt, or other documentary support for its \$16,500 claim—beyond listing it in a summary chart—is insufficient to satisfy the PAPPG requirements for reimbursement.

BEMC's request for reimbursement of payments to Sam's Club for meals that it brought its call center workers suffers the same defect. Although BEMC lists \$3770.97 in Sam's Club food expenses in its summary chart, it provides no invoices or receipts for the claimed costs. The absence of adequate documentation to support them precludes reimbursement.

As for food charges from restaurants like Pizza Hut and Chick-Fil-A, at which BEMC asserts "crews needed to stop for food because they were either too far from the basecamp" or were "working on streetlight repair after the basecamp closed," RFA at 25, the PAPPG clearly provides that the cost of meals is reimbursable only if the meals "are brought to the work location" and that "FEMA does not reimburse costs related to group outings at restaurants or individual meals." PAPPG at 117. These costs, which also are unsupported by receipts, are not reimbursable.

V. Hotel Costs (\$28,218.38)

BEMC's claim for \$28,218.38 in lodging costs is unrelated to its call center claim, even though this claim was placed in the call center PW. Specifically, BEMC seeks (1) \$1286.55 for hotel rooms on September 23, 2020, for mutual aid providers who became infected with COVID-19 while performing emergency work and could not stay with other workers at the then-operating base camp, and (2) \$26,931.83 for rooms for mutual aid providers working on power restoration and streetlight repair work from September 26 through October 2, 2020, after the base camp had closed.

FEMA rejected the \$1286.55 charge, which is supported by receipts, based upon BEMC's alleged failure to justify the need for hotel rooms when its base camp, for which FEMA has authorized PA funding under a separate PW, was open and available to emergency workers. BEMC later explained that the rooms were necessary to house a crew that tested positive for COVID-19 before being dispatched the next day back to their home locations. BEMC has reasonably justified the need for this additional temporary housing for mutual aid workers, and it is reimbursable for the same reasons that FEMA funded the base camp housing.

Similarly, the hotel charges from September 26 to October 2, 2020, are reimbursable for the same reasons that FEMA justified funding the base camp. These rooms were for mutual aid workers who were continuing to provide emergency services in the days after the base camp closed. In its briefing to the Board, FEMA initially justified the denial of these costs by incorrectly assuming that they were costs for call center employees, which they were not, and it later asserted only that BEMC had not adequately supported the costs. Given that BEMC has supported its claim with hotel receipts identifying by name each individual who

stayed in the hotel and has provided a justification for the expenses, *see* Applicant's Exhibits 5, 10, they are reimbursable.

Decision

For the foregoing reasons, we grant BEMC's request for PA funding for its call center FAL overtime costs and its hotel costs. We deny its request for PA funding for its call center cleaning costs and for meals.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge

Joseph A. Vergilio

JOSEPH A. VERGILIO

Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge