

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CASE NO.: _____

MARLBORO ELECTRIC
COOPERATIVE, INC.,

Plaintiff,

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vs.

COMPLAINT

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CENTRAL ELECTRIC POWER
COOPERATIVE, INC.,

Defendant.

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Plaintiff, Marlboro Electric Cooperative, Inc. (hereafter referred to as “Plaintiff”) complaining of Defendant, Central Electric Power Cooperative, Inc. (hereafter referred to as “Defendant” or “Central”) avers as follows:

BACKGROUND AVERMENTS

1. Plaintiff is a non-profit corporation organized and existing by virtue of the laws of the State of South Carolina and governed by the South Carolina Non-Profit Corporation Act, § 33-31-101 et. seq., South Carolina Code of Laws Ann.

2. Defendant is a non-profit corporation organized and existing by virtue of the laws of the State of South Carolina and governed by the South Carolina Non-Profit Corporation Act.

3. This action is brought pursuant to §15-53-10, et seq. South Carolina Code of Laws, to obtain a declaration of Plaintiff’s right to withdraw from membership in Defendant and of the obligations owed, if any, by Plaintiff arising out of Plaintiff’s withdrawal from membership in

Defendant and the termination of the long term contractual relationship existing between Plaintiff and Defendant.

4. Plaintiff is an electric cooperative (an “Electric Cooperative”). The cooperative model began as a British endeavor founded upon seven key principles, such as promoting an “open and voluntary membership”, “abiding by democratic principles” and encouraging “autonomy and independence.” The attraction to those considering a cooperative association is the ability to achieve mutual benefits through a common pursuit. President Roosevelt sought to employ the cooperative model in the 1930s to bring rural communities the advantages of electricity. Plaintiff’s existence as an Electric Cooperative, along with that of many hundreds established across the nation, is owing to a recognition by the Federal Government that electric power was not readily available to residents and businesses in rural America, and their establishment was made possible by the Rural Electrification Act of 1936. Under the cooperative model, members wear two hats. First, a member is as a “shareholder” or “stakeholder.” Governance is by the one-member, one-vote principle. Thus, members are directly involved in electing the board of trustees of their cooperative. Second, members are purchasers of services from their respective cooperative. In this case, Plaintiff purchases electric power from Defendant pursuant to a long-term contract. In nearly all cases, the purchases of services by the member from the cooperative is a prerequisite to membership. Plaintiff was established through its original charter in 1939 as a non-profit cooperative. Initially, Plaintiff, like many of its South Carolina counterparts, purchased its members’ electricity needs directly from regional electric generators, such as “Santee Cooper”, also a beneficiary of the New Deal era legislation. The power purchased from electric generators, such as Santee Cooper, is then transmitted to an Electric Cooperative’s system and distributed to the end use consumers. Along the way, the similarly situated electric distribution cooperatives

began to form alliances, and recognized the need and the associated benefits of forming a member-owned generation entity, commonly referred to a “G&T”, to act on their behalf. Central is a G&T. For many years, due to the homogeneous nature of the G&T’s membership, the “Central” model worked well. However, as the Defendant moves forward towards its eighth decade of aggregating the electric needs of its members, the recent evolutions within the industry, including more plentiful and low-priced natural gas, smart metering, and energy efficiency initiatives, has dramatically increased customer awareness and involvement in their prospective power needs. These developments, along with the exponential growth of renewable energy, offers distribution cooperatives far greater autonomy in meeting their members’ requirements than simply purchasing electric power from aggregated suppliers, and requires increased interaction with its retail membership. Technology continues to evolve rapidly and the supply of electricity has become far more robust. The necessity, efficiency, and convenience tied to the centralized cooperative model has begun to wane for certain distribution cooperatives throughout the country. In certain instances, the initial pursuit of mutual benefits has turned into subsidization, dependency, and inefficiency. The one-size-fits-all approach of the past decades no longer works in all situations, and as the industry rapidly evolves, power supply contracts of fifty years or more between G&Ts and their distribution cooperatives are no longer sustainable because distribution cooperatives have to be more nimble to meet the needs of their members often driven by rapidly evolving technology, and the development of new generation resources. In other words it is no longer prudent and economical to focus on monolithic nuclear and coal facilities which require longer contract terms to obtain financing.

5. Plaintiff serves over 5,500 members throughout Marlboro and Dillon Counties. Plaintiff provides electricity service to residential, commercial and industrial retail consumers and

serves the City of Bennettsville as a wholesale customer pursuant to power supply contract. Plaintiff's industrial load represents 95% of its total electric service, which makes the Plaintiff the most concentrated industrial electric cooperative in the United States. While electricity utility rates are important to all rate payers, rates are particularly important to industrial customers with high energy use facilities or operations. Plaintiff's retention of existing industrial customers who can easily move locations in today's global economy, along with the Plaintiff's wholesale service to the City of Bennettsville, which maintains the capability to "shop" its load to other suppliers upon the expiration of each contract term, and the ability to attract new industrial members to the area are paramount to not only the Plaintiff's future success, but the community at large. Plaintiff's industrial members provide jobs and opportunities to its members that if lost would significantly stunt the economic growth community leaders within the Plaintiff's service territory seek to maintain and expand .

AVERMENTS DEALING WITH PLAINTIFF'S ASSOCIATION WITH DEFENDANT

6. Plaintiff is a member of Defendant, itself an electric cooperative. Defendant is a wholesale generation and transmission electric service provider to South Carolina's twenty distribution cooperatives. Each South Carolina distribution cooperative is a member of Defendant and has two seats on Defendant's Board of Trustees. The Defendant is known in the electric utility industry as a "paper" G&T, as it owns no material electric generating resources. The Defendant contracts with regional electric generation suppliers in order to meet the electric requirements of its members, acting essentially as a middle man.

7. Defendant serves as Plaintiff's transmission provider, whereby electric power purchased from Santee Cooper is delivered to Plaintiff's substations via Santee Cooper's bulk

transmission system and Defendant owned radial transmission lines. From the Plaintiff's substation electricity is transmitted either directly to the Plaintiff's member's facilities, as is the case with large industrial loads and wholesale served municipalities, or through the Plaintiff's own distribution lines and then to Plaintiff's members' properties. As the transmission provider and system administrator, Defendant is also responsible, among other transmission related obligations, for sharing, in a timely manner, all pertinent information with its twenty member distribution cooperatives that may affect the continuity of service, such as periods of unusually high congestion or system threats due to severe weather.

8. In 2013, Defendant entered into an amended power purchase agreement, known as the "Coordination Agreement", with Santee Cooper. Coincident with the execution of the 2013 amendment to the Coordination Agreement between Defendant and Santee Cooper, Defendant entered into a restated and amended power supply agreement ("Member Agreement") with each of its twenty distribution cooperative members. Plaintiff's Member Agreement with Defendant is dated May 20, 2013 and has a term which is stated to expire December 31, 2058. The Member Agreement is an all-requirements agreement, requiring each member to purchase virtually all of its electricity from the Defendant through the year 2058. The initial term of the Member Agreement is coterminous with the initial term of the Coordination Agreement. Each of these agreements, the Coordination and the Member Agreements, were executed prior to the failure of the V.C. Summer Nuclear Units 2&3 project. The failure of the V.C. Summer nuclear project has left the status of Santee Cooper's future in question. These well publicized developments regarding Santee Cooper's future are not limited to, but are predominated by, political matters such as legislative enactments and regulatory promulgations, but also the transformation of the electric industry. Since Defendant's distribution members purchase approximately sixty percent of the

electric power generated and sold by Santee Cooper through their Member Agreements keeping abreast of these developments is critical to members of the Defendant, particularly if there is a sale of Santee Cooper to a third party or a restructuring of its operations. This criticality is further highlighted by the fact that power supply costs represent two-thirds or in some cases three-fourths of the annual operational budgets of distribution cooperatives. Toward that end, Defendant has hired lobbyists and consultants and other third parties to monitor the ongoing legislative process regarding Santee Cooper's future and to evaluate potential offers from third parties to purchase Santee Cooper or strategies to restructure its operations. Additionally, a smaller portion of Defendant's energy supply was secured in 2009 when Defendant entered into a new power purchase agreement with Duke Energy Carolinas, LLC, in which commencement of service began in 2013.

9. In 2018, Plaintiff withdrew its membership in the Electric Cooperative of South Carolina ("ECSC"), a trade association organized to provide training, lobbying and government affairs support to South Carolina's distribution cooperatives. Shortly after Plaintiff's withdrawal from ECSC, Defendant (at the direction of its Board Trustees) ceded certain service and support obligations that it traditionally had provided to its twenty distribution cooperative members to ECSC. Also independent organizations such as the longstanding Managers' and Trustee Associations were transferred to ECSC, which effectively served as a constructive dismissal of Plaintiff's Manager/CEO and Trustee from these respective associations since Plaintiff is no longer a member of ECSC. While the Plaintiff's withdrawal from ECSC was not unprecedented among Defendant's members, the retaliatory response, at the behest of certain Defendant's Board members, was exceptional. These associations serve as vital forums for communication and collective association among South Carolina's electric cooperatives. More recently, Defendant

permitted ECSC to coordinate several calls with regard to transmission service during South Carolina's most recent storm, Hurricane Dorian (Sept. 2019). The calls and information provided were made available to all members of ECSC, but not the Plaintiff. This omission by Defendant constituted a complete breach of its legal duty and clear breach of its contractual obligation to the Plaintiff. As the transmission provider and administrator to all twenty of its distribution members, it is imperative that all members of the Defendant are afforded the same right to participate in all aspects of business related to the Defendant, especially in matters related to the core function of the Defendant and, even more importantly, matters which may have significant impacts on the welfare of the Plaintiff's membership. Additionally, Defendant has permitted ECSC to conduct meetings, again in the Plaintiff's absence, related to, the status of Santee Cooper, its potential sale and/or restructuring and has had substantive discussions with government officials regarding same, including the status of Defendant's Coordination Agreement with Santee Cooper. All internal and external meetings related to Santee Cooper's future directly relate to Defendant's core business purpose. Assigning its obligations overtly or passively to entities such as ECSC does not relieve Defendant of its obligations to any of its members, including the Plaintiff.

10. Notwithstanding the important information ECSC has obtained, Plaintiff has been excluded from certain meaningful collective interaction regarding critical matters pertaining to Defendant's operations and the administration of the Coordination Agreement as well as Santee Cooper's future. These exclusionary tactics have left the Plaintiff in jeopardy of not being able to fulfill its obligations to its approximately 5,500 members.

AVERMENTS WITH RESPECT TO RECENT DEVELOPMENTS

11. As stated in “4.” Above Plaintiff’s relationship with Defendant is two-fold. First as a “shareholder” or “stakeholder” and secondly as a purchaser of electric power. Recent market developments such as declining demand for electric power, technological developments with renewable energy sources, historically low interest and inflation rates, stable, plentiful and low cost pricing for fuel such as natural gas, and excess generating capacity have resulted in historically low cost energy in the wholesale energy market. Such market priced energy could provide significant benefit to Plaintiff’s members in the form of lower power costs. Procuring market priced energy available on the wholesale electric market which is obtainable at rates far below those charged Plaintiff by Defendant under the Member Agreement. Access to market priced energy is particularly critical to Plaintiff given its high concentration of industrial customers. Since Defendant’s exclusionary actions have resulted in Plaintiff seeking to withdraw from membership in Defendant, it follows that Plaintiff is also seeking to terminate its commercial relationship with Defendant which is represented by the Member Agreement. In requesting an early termination of the Member Agreement, Plaintiff seeks a fair and equitable settlement of its financial obligations so that the other nineteen members of Defendant will not be economically harmed.

PLAINTIFF’S RECENT WITHDRAW REQUESTS

12. As a result of the above described developments, Plaintiff requested to withdraw from membership in Defendant by letter dated May 6, 2019.

13. Defendant responded to the request on May 10, 2019.

14. In responding, the Executive Committee of Defendant considered Plaintiff’s request, but refused to act on the withdrawal request based on Section 15 of Plaintiff’s Member

Agreement with Defendant which set the term of the contract as ending not before 2058. It also relied on a provision in Defendant's By-Laws which provides:

“A member may withdraw from membership upon compliance with such equitable terms and conditions as the Board may prescribe, provided however, that no member shall be permitted to withdraw until such member has met all contractual obligations to the Corporation (the Defendant).” (emphasis added).

15. Defendant's position that Plaintiff may not withdraw from it except upon terms deemed equitable in nature imposed by Defendant, presumably unlimited in its discretion in determining what constitutes “equitable terms and conditions” is contrary to law. A member of a non-profit corporation such as Defendant Plaintiff may withdraw without equitable conditions and terms being placed upon it as a price for withdrawing. The statutory law is clear: a member may withdraw at any time.

The South Carolina Non-Profit Corporation Act provides:

§ 33-31-620, S.C. Code

- a. A member may resign at any time.
- b. The resignation of a member does not relieve the member from an obligation the member may have to the corporation as a result of obligations incurred or commitments made before resignation.

16. Irrespective of the actions of the Defendant's Executive Committee, Plaintiff's representatives have sought to continue a dialogue with Defendant's representatives to present ideas on the development of a process to facilitate Plaintiff's withdrawal from membership and a methodology to determine a fair and equitable settlement of Plaintiff's contractual obligations resulting from an early termination of the Member Agreement. This constructive dialogue continued until October 8, 2019, when Defendant's Executive Committee unilaterally determined to end such dialogue by refusing to provide any assurances to Plaintiff on the timing of its

withdrawal request nor continued engagement in the determination of a financial settlement of Plaintiff's contractual obligations under the Member Agreement. In its most recent communication to Plaintiff on October 10, 2019, Defendant takes even a more extreme position, stating, "the process and timetable for withdraw lies solely with the Board (not Central's management). The process and timetable for determining those terms and conditions, and even whether those terms and conditions would provide for a financial settlement to terminate the member's contractual obligations early as opposed to the member meeting its contractual obligations as called for in the bylaws, is uniquely a Board decision within its reasonable business judgement." These statements clearly present the Defendant's position to frustrate Plaintiff's attempt to withdraw from membership and obtain a financial settlement of its contractual obligations. As stated above, withdrawal from membership and early termination of the Membership Agreement are inextricably linked as Plaintiff cannot purchase power from Defendant under the Member Agreement unless it is in fact a member of Defendant as set forth in Section 1(c) of Defendant's By-Laws.

FOR A FIRST CAUSE OF ACTION

17. The averments of Paragraphs 1 through 16 are incorporated herein.
18. Defendant has wrongfully attempted to preclude Plaintiff from withdrawing from its membership in Defendant and is in violation of law in doing so.
19. Plaintiff has repeatedly attempted to withdraw and provided Defendant with formal notice of its intention to withdrawal on May 6, 2019. Plaintiff cannot unilaterally withdraw from Defendant; and Defendant has repeatedly ignored and attempted to frustrate Plaintiff's attempts to withdraw from membership in Defendant.

20. Plaintiff is entitled to a declaration that it is entitled to withdraw from Defendant in accord with the South Carolina Non-Profit Corporation Act.

WHEREFORE, Plaintiff prays for a declaration from the Court that it is entitled to withdrawal from membership in Defendant as provided by the Non-Profit Corporation Act and that the By-Law provision relied upon by Defendant to place conditions on withdrawal are ineffective and void, as inconsistent with the Non-Profit Corporation Act. Plaintiff also prays for attorney's fees and such other relief as the Court deems appropriate.

FOR A SECOND CAUSE OF ACTION

21. The averments of Paragraphs 1 through 20 are incorporated by reference.

22. The South Carolina Non-Profit Corporation Act allows for a member to withdraw "at any time" but provides that withdrawal does not relieve the member of obligations to the corporation made before resignation.

23. Plaintiff seeks a financial settlement of its contractual obligation under the Member Agreement in accordance with the Non-Profit Corporation Act.

24. As Plaintiff may withdraw at any time without condition, Plaintiff requests the Court to determine what, if any, sums Plaintiff owes Defendant on account of its early termination of the Member Agreement with such termination coinciding with its withdrawal from membership, in accordance with the South Carolina Non-Profit Corporation Act which recognizes that upon withdrawal a member is not excused from obligations to Defendant.

WHEREFORE, Plaintiff prays for a declaration from the Court that if Plaintiff owes valid enforceable payment obligations to Defendant under the Member Agreement and if the Court decides obligations are owed that the obligations be determined by the Court and capitalized to a sum certain. Plaintiff also prays for attorney's fees and for such other relief as is deemed appropriate.

BY: Marvin D. Infinger, Esq.
M. Dawes Cooke, Jr. (SC Bar No. 1376)
Marvin D. Infinger (SC Bar No. 2880)
BARNWELL WHALEY PATTERSON &
HELMS, LLC
288 Meeting Street, Suite 200
P.O. Drawer H
Charleston, SC 29401
mdc@barnwell-whaley.com
minfinger@barnwell-whaley.com
(843) 577-7700 (telephone)

Attorneys for Marlboro Electric Cooperative, Inc.

October 11, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
MARLBORO ELECTRIC)	CASE ACTION NO.: _____
COOPERATIVE, INC.,)	
)	
Plaintiff,)	
)	
-vs-)	SUMMONS
)	
CENTRAL ELECTRIC POWER)	
COOPERATIVE, INC.,)	
)	
Defendant.)	

TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at his offices at 288 Meeting Street, Ste. 200, Post Office Drawer H, Charleston, South Carolina, 29402, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you.

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: /s/ Marvin D. Infinger _____
Marvin D. Infinger, Esq.
M. Dawes Cooke, Jr., Esq.
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700
minfinger@Barnwell-Whaley.com
mdc@Barnwell-Whaley.com
Attorneys for Plaintiffs

October 11, 2019
Charleston, South Carolina