

136 FERC ¶ 61,084
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Cobb Customer Requesters

v.

Docket No. EL11-38-000

Cobb Electric Membership Corporation
Cobb Energy Management Corporation
Cooperative Energy Incorporated
Power4Georgians, LLC
Dwight T. Brown
W.T. Nelson III

ORDER ON COMPLAINT REQUESTING INVESTIGATION

(Issued August 4, 2011)

1. On April 26, 2011, Cobb Customer Requesters (Customers) filed a complaint requesting an investigation under 18 C.F.R. § 1b.8 (2011) into alleged failures to comply with the Federal Power Act (FPA)¹ and Commission regulations concerning market-based rates, affiliate abuse, market manipulation and interlocking directorates by the following affiliated entities: Cobb Electric Membership Corporation (Cobb Electric); Cobb Energy Management Corporation (Cobb Management); Cooperative Energy Incorporated (CEI); Power4Georgians, LLC (Power4Georgians); Mr. Dwight T. Brown (Mr. Brown) and Mr. W.T. Nelson, III (Mr. Nelson) (collectively, Respondents). As explained below, the Commission finds that Customers have not shown how Respondents' filings, statements, actions or alleged misstatements or omissions violated the FPA or its implementing regulations, and the request for investigation is denied.

¹ 16 U.S.C. §§ 791 *et seq.* (2006).

I. Background

2. On April 26, 2011, Customers, i.e., two individual retail electric service customers of Cobb Electric, Daniel W. Davis and Mark A. Hackett, filed a complaint with the Commission seeking an investigation into alleged misstatements, omissions and inaccurate filings with the Commission regarding the market-based rate authorizations of affiliates Cobb Electric and CEI, and interlocking directorates held by officials of both Cobb Electric and CEI. Customers also assert that Cobb Electric appears to have violated the Commission's rules prohibiting cross-subsidization and other affiliate abuses through its pattern of dealing with its affiliated cooperative, Cobb Management. Customers state that a pattern of self-dealing appears to continue with Power4Georgians' plans to construct two new generation facilities that will each cost around two billion dollars. Customers claim that the new plants will likely have an adverse consumer rate impact because, according to Customers, Cobb Electric and Power4Georgians have already committed more than \$37 million dollars to the initial plant development.²

A. Respondents

3. This proceeding involves four affiliated entities serving customers in Georgia, Cobb Electric, Cobb Management, CEI, and a cooperative-owned consortium of cooperatives, Power4Georgians. It also involves two of their corporate officers, Mr. Brown and Mr. Nelson.

4. **Cobb Electric**: Cobb Electric is a Georgia electric cooperative that was granted market-based rate authorization by the Commission in 2001.³ Cobb Electric "sells power at wholesale to non-members at market-based rates and facilitates wholesale power

² Complaint at 3-4. Customers state that the State of Georgia does not regulate cooperatives' rates or services, including distribution services. Complaint at 5 & n.9 (citing Cobb Electric Membership Corp.'s Application for Market-Based Rates, Docket No. ER01-1860-000, at 4 (filed Apr. 24, 2001) (MBR Application) and Ga. Code Ann. § 46-3-177 (2006)).

³ Complaint at 6 & n.14 (citing *Cobb Electric Membership Corp.*, Docket No. ER01-1860 (June 22, 2001) (delegated letter order) (accepting market-based rates via delegated letter order) (MBR Order)); see Respondents' May 16, 2011 Answer, Docket No. EL11-38-000, at 25 (May 16 Answer). In accordance with the Commission's triennial market-based rate review requirements, Cobb Electric submitted its updated market-power analyses first in 2004 and again in 2009, which the Commission accepted. See *Cobb Electric Membership Corp.*, Docket No. ER01-1860-001 (June 5, 2005) (delegated letter order); *Cobb Electric Membership Corp.*, Docket No. ER01-1860-002 (July 14, 2009) (delegated letter order).

transactions between unaffiliated buyers and sellers as a marketer” and also “engages in other non-jurisdictional activities to facilitate efficient trade in the bulk power market.”⁴ Cobb Electric was initially incorporated in 1938 as Cobb Rural Electric Membership Corporation under the Georgia Electric Membership Corporation Act. Customers state that in 1996, Cobb Electric repaid about \$100 million in loans to the Rural Utilities Service (RUS), which made it a public utility subject to the Commission’s jurisdiction under section 201(e) of the FPA.⁵ As noted above, Georgia does not regulate the rates, terms or conditions of the services that Cobb Electric provides, including distribution services.

5. **Cobb Management:** Customers state that Cobb Management was incorporated in 1997 and provides services for Cobb Electric.⁶ Cobb Management owns no generation or transmission facilities and has no power supply agreements.⁷ Cobb Management has been a wholly-owned subsidiary of Cobb Electric since 2008.⁸

6. **CEI:** Customers state that CEI is a non-profit Georgia electric membership corporation that is owned by Cobb Electric and other Georgia electric membership corporations. CEI provides full requirements energy and capacity to its owner-members by scheduling their existing contract resources and acquiring new supply sources as required to meet their power supply needs.⁹ On December 21, 2007, CEI sought Commission authority to sell power at market-based rates¹⁰ in anticipation that CEI would exceed the FPA statutory volumetric sales threshold for regulation of cooperatives as jurisdictional utilities and, therefore, become a public utility subject to Commission regulation.¹¹ The Commission granted CEI market-based rate authority on

⁴ Complaint at 2 & n.4 (citing Cobb Electric Membership Corp. Application, Docket No. ER01-1860-001, at 3 (filed July 12, 2004)).

⁵ 16 U.S.C. § 824(e) (2006); *see* Complaint at 5 & n.8 (citing MBR Order).

⁶ Complaint at 5.

⁷ May 16 Answer at 7.

⁸ Complaint at 5.

⁹ *Id.* at 6.

¹⁰ Cobb Energy Inc. Petition to Sell Power at Market-Based Rates, Docket No. ER08-371-000 (filed Dec. 21, 2007).

¹¹ Under section 201(f) of the FPA, a cooperative that sells four million megawatt hours (MWh) or more of electricity per year and that is not RUS-financed is subject to Commission regulation under the FPA. 16 U.S.C. § 824(f) (2006).

February 28, 2008.¹² CEI surpassed that FERC-jurisdictional threshold on June 22, 2008.¹³

7. **Power4Georgians:** Power4Georgians is an affiliate of both Cobb Electric and CEI. It is a consortium of five electric membership corporations and cooperatives. According to Customers, Mr. Brown organized Power4Georgians on January 15, 2008, for the purpose of developing the following proposed power plants: Plant Washington, an 850 megawatts (MW) coal-fired power plant in Washington, Georgia, with estimated costs of \$2.1 billion; and Plant Ben Hill, an 850 MW coal-fired plant in Ben Hill County, Georgia, with estimated costs of \$2 billion. Customers state that Cobb Electric has a 42.56 percent interest in the development phase of Plant Washington and a 40.399 percent interest in the development phase of Plant Ben Hill.¹⁴

8. **Mr. Brown:** Customers state that Mr. Brown was the President and Chief Executive Officer (CEO) of Cobb Electric from 1993 until February 28, 2011, which is the effective date of his resignation from these positions pursuant to a court-approved settlement discussed below. As of May 2008, Mr. Brown was Secretary/Treasurer and Director of CEI, as well as President and CEO of Cobb Electric. According to Respondents, two days after CEI became a public utility subject to the Commission's jurisdiction on June 22, 2008, Mr. Brown reported to the Board of Directors of Cobb Electric that he had resigned his positions at CEI.¹⁵

9. **Mr. Nelson:** Customers state that on May 27, 2008, Mr. Nelson filed an application under FPA section 305(b),¹⁶ seeking Commission authorization to hold interlocking positions as Senior Vice President and alternate director of CEI, as well as Chief Operating Officer (COO) of Cobb Electric.¹⁷ Mr. Nelson filed this application to hold interlocking positions, anticipating that CEI would soon become a public utility subject to the Commission's jurisdiction. The Commission authorized the interlocking

¹² *Cooperative Energy, Inc.*, Docket Nos. ER08-371-000 and 001 (Feb. 26, 2008).

¹³ Complaint at 6.

¹⁴ *Id.*

¹⁵ May 16 Answer at 19.

¹⁶ 16 U.S.C. § 825d(b) (2006).

¹⁷ Complaint at 5, 15-16; Application of W.T. Nelson, III for Authority to Hold Interlocking Positions, Docket No. ID No. 5727-000 (filed May 27, 2008) (Nelson Application).

positions on June 12, 2008.¹⁸ As of March 1, 2011, Mr. Nelson also became the CEO and President of Cobb Electric.

B. State Court Proceedings

10. **Settlement:** Customers state that on October 22, 2007, a group of Cobb Electric members/customers filed suit in Cobb County Superior Court against Mr. Brown, Cobb Management, Cobb Electric and members of the Cobb Electric Board of Directors. They state that the 2007 litigation involved allegations of “breaches of fiduciary duties, abuse of control, gross mismanagement, waste of corporate assets, [and] unjust enrichment.”¹⁹ Customers explain that the suit resulted in a court-approved settlement of that litigation in December 2008 (Settlement). Among other things, the Settlement required Cobb Electric to purchase all shares of Cobb Management that it did not previously own (approximately 70 percent), at a cost of \$12 million, thereby making Cobb Electric the sole owner of Cobb Management.²⁰ The Settlement also provided for the mandated retirement of Mr. Brown by February 28, 2011.

11. **Indictment:** Customers add that on January 6, 2011, the Cobb County District Attorney announced a 31-count indictment against Mr. Brown, stating that for over 10 years (January 1, 1997 to October 31, 2009), Mr. Brown had engaged in a pattern of racketeering activity involving Cobb that included theft from Cobb Electric and its members; Customers state that the indictment was dismissed on the sole basis that it was handed down in a courtroom allegedly not open to the public because the new courthouse did not open until January 10, 2010.²¹

II. Cobb Complaint

12. Customers essentially raise four categories of alleged violations of Commission regulations as the basis of their request for investigation and appropriate relief: (1) alleged failures to report certain information in triennial market power updates and/or notices of change in status; (2) alleged violations of rules prohibiting cross-subsidization

¹⁸ *W.T. Nelson, III*, 123 FERC ¶ 62,216 (2008) (delegated letter order) (June 12 Order).

¹⁹ Complaint at 7.

²⁰ *Id.*

²¹ *Id.* We take administrative notice that a Cobb County grand jury subsequently indicted Mr. Brown on 35 felony criminal counts on July 7, 2011. *See Georgia v. Dwight T. Brown*, Indictment No. [to be assigned] (Ga. Super. July 7, 2011).

of affiliates; (3) alleged violations concerning interlocking directorate positions; and (4) a claim that Cobb Electric was required to file with the Commission an agreement through which it sells the output of its power supply contracts to CEI, which then sells Cobb Electric its requirements for power at cost. Customers also allege market manipulation.

13. In addition, Customers originally asserted that Respondents violated market-based rate reporting requirements under section 205(a) of the FPA.²² However, they later withdrew that claim.²³

14. Customers ask the Commission to investigate whether the “web of apparent conflicts of interests” among affiliated cooperatives and two corporate officers are the type of concentrations of power to exploit consumers that the FPA was designed to prevent.²⁴ They contend that strong remedies are appropriate to deter others if the Commission finds improper self-dealing, abuse and violations of Commission policies and regulations. In particular, Customers argue that the Commission should revoke market-based rate and interlocking position authorizations if it finds there were misstatements of material fact in filings or failure to supplement those filings with material facts that arose later. In addition, Customers urge the Commission to “follow the money” and investigate affiliate mark-ups and one affiliate’s usurpation of a business opportunity at the expense of another.²⁵

III. Notice of Filing and Responsive Pleadings

15. Notice of the complaint was published in the *Federal Register*, 76 Fed. Reg. 27,311 (2011), with interventions and protests due on or before May 16, 2011.

16. On May 16, 2011, Delon W. Barfuss (Mr. Barfuss) attempted to file a motion to intervene, but inadvertently attached another document. One day later, on May 17, 2011, Milton Aitken (Mr. Aitken) filed a motion to intervene. On the same day, Nicholas J. Krohne (Mr. Krohne) also attempted to file a motion to intervene out-of-time, but inadvertently attached a different document. Mr. Barfuss and Mr. Krohne subsequently attempted to file motions to intervene out-of-time, and on June 6, 2011, both Mr. Barfuss and Mr. Krohne successfully filed motions to intervene out-of-time.

²² 16 U.S.C. § 824d(a) (2006); Complaint at 2.

²³ Customers’ May 11 Letter Requesting Withdrawal of Claim, Docket No. EL10-38-000, at 1 (May 11 Letter).

²⁴ Complaint at 18.

²⁵ *Id.* at 17 (quotations in original).

A. May 16 Answer to Complaint

17. On May 16, 2011, Respondents timely filed their answer to the Complaint. Respondents deny Customers' allegations and claim the filing is an attempt to involve the Commission in a dispute that has nothing to do with the regulation of the electricity industry or Respondents under the FPA.²⁶ They contend that Customers have gone to extreme lengths to manufacture a basis for Commission jurisdiction over matters they assert fall far outside the appropriate sphere of Commission regulation and its expertise.²⁷ They argue that the request for investigation is based on "misleading innuendos" and fails to draw a nexus between the facts and alleged violations of Commission regulations.²⁸ Respondents assert that most of the Complaint is a rehash of allegations made in the suit originally filed by another group of Cobb Electric members/customers in September 2007, which resulted in the December 2008 Settlement. While thirteen members/customers opposed the Settlement at a fairness hearing, it was nevertheless approved by the Superior Court of Cobb County,²⁹ and it contains a provision waiving the rights to future claims related to the Settlement. Respondents argue that Customers did not appear at the fairness hearing and should not be allowed to repeat these allegations now as if they are established facts in an attempt to shoehorn the allegations into "something within the Commission's jurisdiction."³⁰

18. Furthermore, Respondents argue that Power4Georgians, which is seeking permits and rights to develop two coal-fired power plants, should be dismissed from the proceeding because the claim does not raise a matter within Commission jurisdiction, since state law governs the permitting and building of a power plant.

19. As noted above, at the time the Complaint was filed, Customers stated that they could not locate CEI's quarterly reports, which entities with market-based rate authority must file with the Commission. However, Customers subsequently located CEI's quarterly reports, and withdrew this claim.³¹ Respondents assert that there are no

²⁶ May 16 Answer at 2.

²⁷ *Id.*

²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ *Id.* at 4.

³¹ May 11 Letter at 1.

remaining allegations in the Complaint against CEI, so the Commission should dismiss CEI from this proceeding.³²

20. In addition, Respondents address the merits of Customers' allegations, as described in detail below.

B. Customers' May 31 Reply

21. On May 31, 2011, Customers filed a reply to the answer filed by Respondents on May 16, 2011 (Customers' May 31 Reply), insisting that Customers demonstrated good cause for a Commission investigation. Customers emphasize their view that the Commission is the *only* proper forum and only the Commission has the expertise to adjudicate issues regarding Customers' market-based rate claims and market manipulation claims.³³ Customers also raise allegations of market manipulation they claim lie exclusively within the Commission's purview.³⁴

C. Respondents' June 14 Response

22. On June 14, 2011, Respondents filed an answer to Customers' May 31 Reply (June 14 Response). First, on procedural grounds, Respondents argue that the Commission should decline to accept Customers' May 31 Reply because it "fails to provide useful and relevant information that would lead to a more complete and accurate record and provides no assistance to the Commission in resolving the issues."³⁵ Respondents add that, in their view, Customers' May 31 Reply confuses the issues. They contend that Customers had ample opportunity to present their case in the initial pleading, and now should not be allowed "a second bite at the apple."³⁶ Respondents also claim Customers implicitly acknowledge that the present proceeding is a publicity stunt.

23. Next, Respondents argue that Customers obfuscate the fact that, to fall within the scope of the Commission's jurisdiction, Customers must raise matters related to the wholesale sale, purchase or transmission of electricity or natural gas. They cite sections 1c.1 and 1c.2 of the Commission's regulations,³⁷ pointing out that the anti-manipulation

³² May 16 Answer at 5.

³³ Customers' May 31 Reply at 3 (emphasis in original).

³⁴ Complaint at 9.

³⁵ June 14 Response at 1.

³⁶ *Id.* at 2.

³⁷ 18 C.F.R. §§ 1c.1, 1c.2 (2011).

rule that Customers invoke as a premise for the Complaint requires a connection with the purchase or sale of electricity or natural gas or the transmission of electricity or transportation of gas. Respondents state that Customers have not alleged conduct that bears any relation to the wholesale sale or transmission of electricity or gas, nor any other jurisdictional claim.

24. Respondents argue that, while Customers state that their request for investigation of alleged market manipulation is consistent with Commission precedent, the cases cited declare there must be a nexus between the alleged manipulative conduct and Commission-jurisdictional transactions.³⁸

25. Respondents add that, insofar as Customers make allegations of fraud under state law, the Commission has declared that it is not the proper forum to adjudicate the dispute where no Commission jurisdictional transaction is involved.³⁹

IV. Commission Determination

A. Procedural Matters

26. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,⁴⁰ the Commission will grant the late-filed motions to intervene of Mr. Aitkin, Mr. Barfuss and Mr. Krohne, given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁴¹ prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Customers' May 31 Reply and Respondents' June 14 Response because they have provided information that assisted us in our decision-making process.

³⁸ June 14 Response at 4 (citing *Brian Hunter*, 135 FERC ¶ 61,054, at P 118 (2011)); *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at P 21-22 (violating section 1c requires the alleged conduct to have been in connection with a jurisdictional purchase or sale or jurisdictional transportation or transmission), *reh'g denied*, Order No. 670-A, 114 FERC ¶ 61,300 (2006).

³⁹ June 14 Response at 4 & n.10 (citing Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 22).

⁴⁰ 18 C.F.R. § 385.214(d) (2011). We further note that Mr. Barfuss and Mr. Kroehne made good faith attempts to file timely motions to intervene.

⁴¹ *Id.* § 385.213(a)(2) (2011).

B. Substantive Matters

1. Overview

27. The only authority the Commission has is what is provided in the statutes passed by Congress.⁴² As explained below, Customers have not demonstrated that there is a nexus between the issues they raise and the Commission's jurisdiction. Absent that nexus, no Commission investigation is warranted. A potential for affiliate abuse in the market-based rate context is of concern to the Commission where captive customers subsidize affiliates of their power supplier. We have explained that "affiliate abuse takes place when the affiliated public utility and the affiliated power marketer transact in ways that result in a transfer of benefits from the affiliated public utility (and its ratepayers) to the affiliated power marketer (and its shareholders)."⁴³ Cobb Electric, Cobb Management, and CEI, however, are affiliated cooperatives, and cooperative members are both ratepayers and shareholders. We have previously determined that because cooperative members are both the ratepayers and the shareholders, there is no potential danger of shifting benefits from the ratepayers to the shareholders.⁴⁴ They have no incentive to treat themselves unfairly.⁴⁵

⁴² *E.g., Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007) (Commission has no authority beyond that authorized by Congress; in the absence of statute conferring authority on Commission, Commission has none); *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398-99 (D.C. Cir. 2004) (same); *Carl Blumstein v. Cal. Power Exchange Corp.*, 107 FERC ¶ 61,262, at P 20 (2004) (Commission's authority is generally limited to matters related to rates, terms and conditions of interstate transmission and wholesale sales).

⁴³ *Market-Based Rates For Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 526 & n.539 ((quoting *Heartland Energy Servs., Inc.*, 68 FERC ¶ 61,223, at 62,062 (1994)), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *order on reh'g*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

⁴⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 526 & n.41 (citing *Old Dominion Elec. Coop.*, 81 FERC ¶ 61,044, at 61,236 (1997)); Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 204. For the reasons stated in paragraph 27 above, the Commission has found that electric cooperatives are not subject to the affiliate restrictions codified in sections 35.39 and 35.44. *Id.* P 213 (reaffirming finding that electric cooperatives are not subject to the affiliate restrictions codified in section 35.39 of the Commission's regulations because "there is no danger of affiliate abuse through

(continued...)

Additionally, as explained below, Customers have not shown that Mr. Brown or Mr. Nelson violated the interlocking directorate regulations. Nor do we find any alleged omissions or misstatements in any market-based rate filings or interlocking directorate filings, or that any required contract was not on file with the Commission.

28. To persuade the Commission to initiate an investigation, Customers need to explain how Respondents' alleged actions or inactions violated applicable statutory standards or regulatory requirements.⁴⁶ Because Customers have not shown how Respondents' filings, statements, actions or alleged misstatements or omissions may have violated the FPA or its implementing regulations, or engaged in fraud in connection with a jurisdictional transaction, we do not find good cause to initiate an investigation under section 1b.8.⁴⁷ Consequently, we deny the request for an investigation.⁴⁸

2. Anti-Manipulation Regulations and Reporting Requirements; Material Facts in Market-Based Rate Applications

a. Complaint

29. Customers assert that Cobb Electric appears to have violated Commission regulations concerning prohibition of energy market manipulation, market behavior rules and market-based rate regulations involving change in status reporting requirements, as well as its tariff. Customers claim these violations result from Respondents' failure to include certain material facts in market-based rate filings in 2001, 2004, and 2008, as well as failure to inform the Commission of certain material facts arising subsequent to those filings.⁴⁹ Customers claim that through these omissions, Respondents violated sections 1c.1 and 1c.2 of the Commission's anti-manipulation regulations, as well as 18 C.F.R. sections 35.41(b) and 35.42(a).

self-dealing"); *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, at P 49 (clarifying that the Commission will continue to treat electric cooperatives as not subject to the Commission's affiliate abuse restrictions), *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008).

⁴⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 526.

⁴⁶ 18 C.F.R. § 385.206(a)(2) (2011).

⁴⁷ *Id.* § 1b.8.

⁴⁸ Because the Commission declines to initiate an investigation and denies the request for investigation, there is no need to separately dismiss Power4Georgians or CEI.

⁴⁹ Complaint at 9.

30. Specifically, Customers assert that Respondents should have disclosed to the Commission the following information: (1) by April 30, 2008, Cobb Electric had increased its ownership interest in Cobb Management from 29.43 percent to 31.25 percent; (2) Cobb Electric transferred employees to Cobb Management in 1997 and agreed to pay Cobb Management an “adder fee” (which Respondents call a management fee) on Cobb Management employees’ salaries and benefits, which increased over time to 11 percent of combined weekly salary and fringe benefits; (3) in 2000, Cobb Management established an affiliated call center, ProCore Solutions, LLC (ProCore) and Cobb Management allegedly marked up the pay of ProCore employees by approximately 50 percent, and passed the underlying pay and mark-up on to Cobb Electric; (4) the value of Cobb Electric’s investment in Cobb Management allegedly grew at 0.1 percent per year, with no dividends paid to Cobb Electric, while Cobb Management preferred stock owners were paid \$5,130,000; (5) Cobb Electric and Cobb Management allegedly forgave loans of \$3,000,000 to Mr. Brown and his wife, which they used to purchase Cobb Management preferred stock;⁵⁰ (6) Cobb Electric should have disclosed the October 30, 2008 Settlement of state litigation, which, according to Customers, involved multiple allegations of affiliate abuse by Mr. Brown and Cobb Electric regarding its minority share affiliate, Cobb Management, as well as other matters; (7) Cobb Electric failed to disclose natural gas market manipulation, which occurred when Cobb Electric provided customer information to SCANA Energy Marketing (SCANA), thereby allegedly giving away a business opportunity; and (8) Cobb Electric should have disclosed losses incurred by subsidiaries of Cobb Management.⁵¹

b. May 16 Answer

31. Respondents argue that none of the transactions Customers bring to the Commission’s attention fall within the scope of the anti-manipulation rule because they do not relate directly or indirectly to the purchase or sale of electricity or transmission services.⁵² Respondents add that Cobb Electric’s sales to its members are retail transactions that fall outside the scope of the Commission’s jurisdiction.

32. Next, while Respondents acknowledge that wholesale sales from Cobb Electric to CEI are subject to Commission jurisdiction, they insist that no transactions involve market manipulation. Respondents explain that, when Cobb Electric sells electricity to

⁵⁰ *Id.* at 10-11, 14.

⁵¹ *Id.* at 12. Customers allege that between 2002 and 2007, Cobb Management lost more than \$11 million on the operations of three subsidiaries, Allied Utility Network, Allied Energy Service and Cobb Energy Mortgage. *Id.* at 12-13.

⁵² Answer at 9.

CEI, CEI only pays the cost of fuel and any related cost of dispatching electricity. When Cobb Electric sells electricity to non-members, it sells at a market price set by external forces over which Cobb Electric has no control or ability to exert control. Cobb Electric has no long-term contracts with non-members and does not set the market price, which is indifferent to Cobb Electric's actual costs. In addition, Respondents highlight the fact that Cobb Electric has market-based rate authorization, which they claim indicates that Cobb Electric lacks market power. Furthermore, they point out that, since Cobb Electric operates within Southern Company's region, it is doubtful Cobb Electric could exercise market power within the "vast" Southern Company system.⁵³ Thus, Respondents argue, the claim that Cobb Electric has or can manipulate energy markets is "wholly illusory."⁵⁴

33. Respondents flatly reject the allegation that Cobb Electric engaged in or failed to disclose manipulation of the natural gas market. The basis for the Customers' manipulation claim is that Cobb Electric customer information was given to SCANA, which paid Cobb Electric millions of dollars for the right to market and sell natural gas to Cobb Electric customers. Respondents explain that SCANA participated in Georgia's retail choice program for natural gas customers in certain service areas, and Cobb Management provided SCANA marketing services, billing services and call centers. Respondents emphasize that Cobb Management's contract with SCANA was negotiated at arms' length, and there is "no reason to believe" it was higher than market.⁵⁵ Cobb Electric never owned, purchased for resale or sold any natural gas to any customers, not even SCANA's retail choice customers, nor was it authorized to do so.

34. Next, Respondents assert that losses incurred by subsidiaries of Cobb Management that are not engaged in Commission-regulated activities have "nothing to do" with Commission regulations or Cobb Electric.⁵⁶ They assert that it is "ridiculous" to suggest that these losses would have prompted the Commission to deny market-based rate authority to Cobb Electric.⁵⁷

35. Respondents further assert that Cobb Electric did not violate any Commission reporting requirements and Customers' claim that Cobb violated the reporting requirements of 18 C.F.R. § 35.41(b) and 18 C.F.R. § 35.42(a) misses the mark.

⁵³ *Id.* at 10.

⁵⁴ *Id.*

⁵⁵ *Id.* at 11.

⁵⁶ *Id.*

⁵⁷ *Id.* at 12.

Respondents point out that section 35.42(a) requires a seller that has been granted market-based rate authority to timely report to the Commission any change in status that would reflect a change from the characteristics the Commission relied on in granting market-based rate authority. Respondents point out that the Commission's main concern here is the ability to exercise market power and none of the transactions that Customers bring up bear any relation to market power. Therefore, Respondents assert that they had no duty to disclose them in market-based rate reports or in triennial updates.

36. For all the above-described reasons, Respondents assert that the Commission should dismiss the allegations that Cobb Electric violated the Commission's anti-manipulation rules by failing to report information to the Commission in triennial market power updates or notices of change in status.

c. Customers' May 31 Reply

37. In Customers' May 31 Reply, they assert that Respondents' contention that Cobb Electric had no duty to disclose Customers' concerns in Cobb Electric's market-based rate filings ignores Customers' argument that Respondents actually made material misrepresentations.⁵⁸ Customers point out that Cobb Electric declared expressly in its market-based rate filing that it "raises no concerns with affiliate abuse."⁵⁹ Customers assert, however, that had the Commission known about the transfer of employees to an affiliate and the charging of a mark-up for services previously provided, and the gift to Cobb Electric's CEO of \$3,000,000 in forgiven loans and "guaranteed dividends" from the preferred stock of the minority-owned affiliate, Cobb Management, the Commission "may have found that the filing does indeed raise a concern with affiliate abuse."⁶⁰

38. Customers also challenge Cobb Electric's representation in its 2004 market-based rate application that there is no danger of affiliate abuse. They state that via Appendix I of Cobb Electric's tariff, which was included in their market-based rate application, Cobb Electric committed to comply with the Market Behavior Rules, including the prohibition on actions or transactions that "lack legitimate business purposes and that are intended to or foreseeably could manipulate market prices, market conditions or market rules for electric energy."⁶¹ Customers reiterate that new mark-ups on old services, which they

⁵⁸ Customers' May 31 Reply at 6.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 7.

allege shifted millions of dollars to the minority-owned Cobb Management, provides sufficient basis to prompt a Commission investigation.

39. Customers further argue that Respondents do not address the contention that Cobb Electric should have disclosed in its December 31, 2008 market-based rate triennial update filing the 2008 Settlement of the civil litigation involving allegations of abuse by Mr. Brown, Cobb Electric and its Board of Directors.⁶²

40. Customers further contend that Respondents gave short shrift to their claim that Cobb Electric was required to disclose material facts that show the financial losses of Cobb Management's affiliates. Customers reiterate that their concern is that the \$11 million dollars in losses over five years by Cobb Management's subsidiaries is simply another indication of apparent affiliate abuse. The crux of Customers' argument is that, if the Commission had known these facts when evaluating the market-based rate applications, it could have inquired whether the apparent creation of a "daisy-chain" of mark-ups and employee salaries by Cobb Management subsidiaries contributed to a "siphoning off" of Cobb Electric's funds. Customers assert that these facts indicate affiliate abuse concerns that run contrary to granting market-based rate authority.⁶³

d. Commission Determination

41. As discussed below, we find that Customers have not persuaded us that Respondents violated regulatory requirements or anti-manipulation prohibitions, or that it is necessary to initiate an investigation to further explore these allegations.

42. Customers claim that Respondents omitted or provided misleading facts in their market-based rate filings, and therefore appear to have violated sections 35.41(b) and 35.42(a) of the Commission's regulations. We disagree. Section 35.41(b) only applies if there is "false or misleading information" or if the applicant "omits material information."⁶⁴ Guided by securities law precedent, a fact is considered material if there is "a substantial likelihood that a reasonable market participant would consider it in making its decision to transact because the material fact significantly altered the total mix

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 18 C.F.R. § 35.41(b) (2011).

of information available.”⁶⁵ Customers raise a litany of potential violations of this provision, described in paragraph 30 above. However, none of these allegations is germane to the factors the Commission considers when evaluating market-based rate applications, which are, among other things, whether the applicant has market power in generation or transmission and, if so, whether the applicant has adequately mitigated these market power concerns.⁶⁶ The allegations that Customers make are not material to the Commission’s assessment of Cobb Electric’s and CEI’s market-based rate applications and triennial updates, or proof that the applications contained false or misleading information.⁶⁷ Thus, we do not find that Respondents have violated section 35.41(b) of the Commission’s regulations.

43. Similarly, section 35.42(a) of the Commission’s regulations only applies “if there is a change in status from the characteristics the Commission relied on in granting market-based rate authority.”⁶⁸ The subsections of that regulation list examples of characteristics that concern the Commission and that require disclosure. Section 35.42(a)(1) discusses ownership or control of generation capacity that results in net increases of 100 MW or more, or of inputs to electric power production, or ownership, operation or control of transmission. None of Customers’ allegations pertain to these characteristics. Section 35.42(a)(2) concerns “affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation facilities or inputs to electric power production, affiliation with any entity not disclosed in the application for market-based rate authority that owns, operates or controls transmission facilities or is affiliated with any entity that has a franchised service area.”⁶⁹ None of

⁶⁵ *Prohibition of Energy Market Manipulation*, RM06-3-001, Order No. 670-A, 114 FERC ¶ 61,300 at P 51 & n.104 (citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) (establishing the “total mix” or “substantial likelihood” test of materiality)); *accord Basic, Inc. v. Levinson*, 485 U.S. 224, 231-2 (1988).

⁶⁶ *See, e.g.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 2.

⁶⁷ *E.g.*, *Moussa I. Kourouma d/b/a Quntum Energy LLC*, 135 FERC ¶ 61,245, at P 24, 35-36 (2011) (finding violation of section 35.41(b) because seller’s ownership structure is a critical component of a market-base rate application and representing that certain people hold management roles within a company when they have no role in the company constitutes “false or misleading” communication).

⁶⁸ 18 C.F.R. § 35.42(a)(2) (2011).

⁶⁹ *Id.*

Customers' allegations meet this subsection either.⁷⁰ Section 35.42(a) expressly does not limit the Commission to considering only these two examples of characteristics in determining whether there has been a change of status that must be reported. Nevertheless, Customers have not explained how their proffered changes are characteristics the Commission would appropriately consider in deciding whether to continue to authorize market-based rates.

44. Customers' allegations of fraud and energy market manipulation are similarly without merit. In Order No. 670, the Commission stated that it will act in cases where an entity:

(1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission.⁷¹

Here, Customers allege fraudulent conduct amounting to violations involving both natural gas (subject to 18 C.F.R. § 1c.1) and electric energy (18 C.F.R. § 1c.2). But in neither instance do Customers' allegations indicate that Respondents' alleged fraudulent actions are "in connection with a jurisdictional purchase or sale or jurisdictional transportation or transmission."⁷² Absent that connection to a Commission-jurisdictional

⁷⁰ Section 35.42(c) requires an appendix of assets. Customers did not raise any related concerns. Section 35.42(d) requires reporting of sites for new generation and ownership of land. Customers also did not specifically allege that Respondents failed to report the sites of Plant Ben Hill or Plant Washington. Rather, their concerns are with the potential cost of these plants for ratepayers.

⁷¹ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49; *see also Richard Blumenthal v. ISO New England Inc.*, 135 FERC ¶ 61,117 at P 39 (2011).

⁷² Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 41 & n.83.

transaction, there is no violation of the Commission's prohibition against energy market manipulation.⁷³

45. With respect to section 1c.1, Customers allege that natural gas manipulation occurred because Cobb Electric customer information was given to SCANA, which paid Cobb Electric for the right to market and sell natural gas at retail to Cobb Electric customers. Customers assert the presence of SCANA's later retail natural gas sales to those customers establishes the alleged fraud as jurisdictional. But SCANA's retail sales of natural gas are not within the Commission's jurisdiction. Moreover, Cobb Electric never owned, purchased for resale or sold any natural gas to any customers, and there is no allegation of any Respondent having an intent to affect any Commission-jurisdictional natural gas transaction. We find this allegation of natural gas market manipulation is not in connection with a Commission-jurisdictional natural gas transaction, and thus the conduct concerned does not meet the criteria for a violation of section 1c.1.

46. With respect to section 1c.2, Customers allege that the affiliated wholesale sales between Cobb Electric and CEI somehow evidence electric market manipulation. But Customers do not show any effect on any Commission-jurisdictional transaction apart from the fact that there were affiliated sales between Cobb Electric and CEI, all of which were made at mutually agreed upon terms and conditions consistent with the requirements of Cobb Electric's and CEI's market-based rate tariffs. Respondents state that, when Cobb Electric sells electricity to CEI, CEI only pays the cost of fuel and dispatch. Customers have not alleged that Respondents have manipulated these fuel and dispatch prices, nor have Customers shown that Respondents intended to affect or had the ability to manipulate wholesale electric market prices through either these bilateral transactions or CEI's subsequent sales to non-members at prevailing market prices. Likewise, Customers do not allege that a fraud or misrepresentation occurred in connection with Cobb Electric's and CEI's affiliated dealings. Accordingly, we find this allegation of electric market manipulation does not meet the criteria for a violation of section 1c.2.

⁷³ As the Commission explained in Order No. 670:

. . .energy markets are made up of both jurisdictional and non-jurisdictional transactions. We do not intend to construe the Final Rule so broadly as to convert every common-law fraud that happens to touch a jurisdictional transaction into a violation of the Final Rule. Rather, in committing fraud, the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction.

Id. P 22.

47. Moreover, insofar as Customers' claims can be considered state law fraud claims, without ostensible nexus to a Commission-jurisdictional transaction, the Commission is not the appropriate forum to adjudicate such claims.⁷⁴

3. Prohibited Affiliate Cross-Subsidization

a. Complaint

48. Customers assert that Cobb Electric also appears to have violated 18 C.F.R. § 35.44(b)(2), which provides that, unless permitted by the Commission, "a franchised public utility with captive customers may not purchase or receive non-power goods and services from . . . a non-utility affiliate at a price above market."⁷⁵ They state that Cobb Management "was no more than approximately 30 percent owned by Cobb Electric from 1997 until late 2008, with the rest owned by Mr. Brown and perhaps others."⁷⁶ Customers allege that Cobb Management provided services at above-market costs – a two to 50 percent mark-up of actual costs – to Cobb Electric. According to Customers, this cross-subsidization diverted millions of dollars from Cobb Electric and its members to Cobb Management and its officers, some of whom drew salaries from both companies.

49. Customers also reiterate their allegation that Cobb Management improperly sold Cobb Electric assets (customer lists) to SCANA, thereby usurping what should have been Cobb Electric's profits. Customers reason that, as a result, other shareholders of Cobb Management appear to have benefited from these transactions.

50. Customers claim that this appears to be part of an ongoing pattern of self-dealing that has potentially adverse customer rate impacts. To bolster their argument that Respondents' actions "will increase already high electricity costs,"⁷⁷ Customers point out that Cobb Electric, CEI and Power4Georgians plan to construct two new 850 MW coal-fired power plants. They further assert that Cobb Electric, CEI and Power4Georgians have already committed over \$37 million to developing these

⁷⁴ Cf. *San Diego Gas & Elec. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,183, at P 30 (2011) (not allowing hearing to address a good faith obligation under California law because it would require the Commission to interpret and apply state contract law).

⁷⁵ Complaint at 3.

⁷⁶ *Id.*

⁷⁷ *Id.* at 4.

projects.⁷⁸ Customers also complain that Cobb Electric omitted important information in its 2008 Annual Report, including the mark-ups above cost of its deals with affiliates such as Cobb Management, the fact that Mr. Brown and his wife were loaned \$3 million which was then forgiven, and the fact that Cobb Management paid almost \$2 million in dividends to Mr. Brown and his wife.⁷⁹

b. May 16 Answer

51. In their May 16 Answer, Respondents point out that Customers' main concern is alleged affiliate abuse between Cobb Electric and its affiliate, Cobb Management. They assert that other claims, such as reporting violations and market manipulation, flow from Customers' allegations of prohibited cross-subsidization. Respondents contend, however, that the regulations Customers assert were violated are inapplicable, and the alleged offending transactions do not trigger the concerns addressed by those regulations.⁸⁰ In particular, Respondents argue that the Commission's regulations restricting the sale of non-power goods and services do not apply to Cobb Electric. First, they point out that the alleged offenses pre-date the effective date of section 35.44(b)(2), which prohibits franchised utilities with captive customers from purchasing or receiving non-power goods and services from an affiliate at above market prices. Next, they argue that the affiliate abuse regulations do not apply to Cobb Electric because its members are not served under cost-based regulation.

52. As Respondents explain, Georgia has determined that the customers of non-profit electric cooperatives do not need the protection of cost-based regulation. Accordingly, in Georgia, elected boards of directors of cooperatives establish rates according to their business judgment, and these rates are not subject to any rate regulation or regulatory review by any state or local authority, and the boards are not required to set cost-based rates. As a result, Respondents assert, Cobb Electric's customers are not "captive customers" as defined in section 35.43(2) of the Commission's regulations.⁸¹ Respondents contend that this result is consistent with Order No. 697, which established new rules for market-based rate authorization, and added section 35.39, concerning affiliate sales restrictions. Significantly, Respondents highlight the fact that, in Order No. 697, the Commission reaffirmed established precedent holding that affiliate abuse

⁷⁸ *Id.*

⁷⁹ *Id.* at 14.

⁸⁰ May 16 Answer at 14.

⁸¹ *Id.* at 16.

rules otherwise applicable to all public utilities with market-based rates were unnecessary for electric cooperatives.⁸²

53. Respondents add that in Order No. 707, which implemented section 35.44 of the Commission's regulations, the Commission declared its intent to adhere to Order No. 697's definition of captive customers and restrictions on cross-subsidization. With respect to cooperatives, Respondents note that the Commission clarified that "consistent with [Order No. 697], we will continue to treat electric cooperatives as not subject to the Commission's affiliate abuse restrictions."⁸³

c. Customers' May 31 Reply

54. Customers state that Respondents present a red herring, saying that Order No. 697 held that FERC's affiliate abuse regulations do not apply to cooperatives and should be rejected.⁸⁴ Customers argue that ratepayers and shareholders are not the same here because Cobb Electric had an ownership interest in its affiliate, Cobb Management, ranging from 29 to 31 percent. Customers state that Mr. Brown and others owned the remaining interest; thus, there is the "potential danger of shifting benefits from ratepayers to shareholders."⁸⁵

d. Commission Determination

55. Cobb Energy and CEI are Commission-jurisdictional public utilities. However, Customers' claims are related to cross-subsidization and affiliate abuse. Affiliate abuse restrictions do not apply to electric cooperatives because "where a cooperative is involved, the cooperative's members are both the ratepayers and the shareholders."⁸⁶

⁸² See *id.* at 17 & n.31 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 526).

⁸³ *Id.* at 18 & n.38 (citing Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 49).

⁸⁴ Customers' May 31 Reply at 10-11.

⁸⁵ *Id.* at 11.

⁸⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 526. Customers argue that the affiliate abuse rules nevertheless should apply to these particular cooperatives because Cobb Electric only had a minority interest in Cobb Management until 2008, so not all members of the cooperatives are also owners of the cooperatives. However, the 2008 Settlement required Cobb Electric to become sole owner of Cobb Management, *see* Complaint at 17, so the owners of Cobb Management are now also Cobb Electric's ratepayers, and the rationale behind Order No. 697 applies full force. Cobb Management

(continued...)

Consequently, these ratepayers/owners do not have an incentive to treat themselves unfairly. Even though the allegations Customers raise may be troublesome in another forum, the Commission must act within the jurisdictional limitations of the FPA.⁸⁷ Because Customers have failed to draw a nexus between the alleged affiliate abuses and violation of the FPA, and the allegations involve cooperatives, where the ratepayers and shareholders are one and the same, the Commission is not the proper forum to investigate these allegations.

4. Sales of Power to Affiliate Under an Unfiled Agreement

a. Complaint

56. Customers allege that in 2008, Cobb Electric entered into an agency agreement with its affiliated public utility, CEI, which provided that Cobb Electric would sell to CEI all capacity and energy rights under its power supply agreements, and CEI would sell Cobb Electric's required power. Customers assert that it appears Cobb Electric never filed this agreement with the Commission, and urge the Commission to investigate whether Cobb Electric has authority under section 205 of the FPA to make sales for resale to CEI, another public utility.⁸⁸

b. May 16 Answer

57. Respondents state that, because Cobb Electric has market-based rate authority, it is not required to file agreements with the Commission under which it sells energy or capacity. Respondents assert that, for this reason, the fact that Cobb Electric did not file such agreements with the Commission raises no concern under the Commission's regulations.

c. Commission Determination

58. The Commission finds that Cobb Electric did not violate section 205 of the FPA. As Respondents point out, since Cobb Electric was granted market-based rate authority, it

would not have an incentive or be able to abuse its affiliated cooperative owner, Cobb Electric (nor would Cobb Electric have an incentive to take advantage of Cobb Management, since this would affect the bottom line of Cobb Electric's ratepayers/shareholders), so the 2008 Settlement effectively moots the issue of affiliate abuse among these affiliated cooperatives.

⁸⁷ *E.g., Cal. Indep. Sys. Op. Corp. v. FERC*, 372 F.3d 395 at 398; *TANC v. FERC*, 495 F.3d 663 at 673.

⁸⁸ Complaint at 15.

was not required to file with the Commission the agreement under which it sold to CEI the output of its power supply contracts.⁸⁹

5. Bar on Interlocking Positions that Harm the Public Interest

a. Complaint

59. Customers assert that Mr. Nelson appears to have violated section 305(b) of the FPA, 18 C.F.R. Part 45, and section 1c.2 by failing to provide material information at the time of his filing or to supplement the filing after such material facts became apparent. Customers contend that, to enforce the prohibition on interlocking directorates that harm the public interest, the Commission should investigate whether the authorization given Mr. Nelson should be revoked, and whether Mr. Brown should have filed for permission to hold interlocking positions.⁹⁰

60. Customers state that, on May 27, 2008, Mr. Nelson filed an application seeking authorization to hold interlocking positions as COO of Cobb Electric and an officer and alternate director of CEI. The Commission granted Mr. Nelson's application on June 12, 2008.⁹¹ Customers note that in granting authorization, the Commission "reserves the right to require further showing that neither public nor private interests will be adversely affected by the continued holding of the interlocking positions."⁹² Customers request that the Commission investigate whether it should at least require a showing that public and/or private interests are not adversely affected and revoke Mr. Nelson's authorization if the burden of proof is not met, particularly in light of the apparent abuses detailed in the Complaint.

61. Specifically, Customers argue that, given his positions, Mr. Nelson should have known, but did not disclose in his application certain arrangements with Cobb Management, such as alleged usurpation of benefits and transfer of millions of dollars in payments by SCANA to Cobb Management for Cobb Electric assets, to the harm of Cobb Electric and its members/consumers. Customers also claim that Mr. Nelson's statement

⁸⁹ 18 C.F.R. § 35.1(g) (2011) (conforming service agreements under market-based rate tariff need not be filed); *accord* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 969 (stating that the Commission's regulations have provided since 2002 that long-term market-based rate power sales service agreements are not to be filed with the Commission, regardless whether or not they are with affiliates).

⁹⁰ Complaint at 4, 16-17.

⁹¹ June 12 Order, 123 FERC ¶ 62,216.

⁹² Complaint at 15 (quoting June 12 Order).

in his application that Cobb Electric is a non-profit cooperative is factually incorrect because Cobb Electric lost its tax exempt status for 12 months ending on April 30, 2008 – and had the Commission known that one of the interlocking companies was for-profit, and therefore had incentive to shift costs to the non-profit interlocking company, it might have reached a different conclusion. In addition, Customers note that Mr. Nelson requested in his application waiver of the requirement to provide information on his compensation on the ground that such information is not necessary since the companies are non-profit, member-owned and member-directed cooperatives. Customers complain, however, that Mr. Nelson did not disclose that Cobb Electric had a minority interest in the for-profit Cobb Management, which billed Cobb Electric millions per year, to the benefit of Cobb Management’s majority owners. They point out that the June 12 Order is silent on Mr. Nelson’s requested waiver of the requirement to provide information on compensation, but that the Commission should now investigate whether to require Mr. Nelson to disclose his current and past compensation arrangements with Cobb Electric and its affiliates.

62. Customers argue that Mr. Nelson failed to comply with the June 12 Order’s requirement to give notice of material or substantial change because he did not inform the Commission of a civil suit settled in October 2008 that involved alleged breach of fiduciary duty, affiliate abuse, etc. on the part of Mr. Brown, Cobb Electric and others. Customers acknowledge that Mr. Nelson’s application disclosed that members of the CEI Board included Mr. Brown, but never mentioned the civil suit.

63. Customers also argue that whereas Mr. Nelson’s application indicated that Mr. Brown held the interlocking directorate positions of Secretary/Treasurer of CEI and President and CEO of Cobb Electric, Mr. Brown never requested Commission approval to hold these interlocking positions. Instead, ten days after CEI passed the volumetric threshold and became a public utility under FPA section 201(f),⁹³ CEI informed the Commission that Mr. Brown had resigned from his position at CEI. Pointing out that the regulations provide that late-filed applications will be denied, Customers insist that the Commission should investigate whether there was an overlap in time when Mr. Brown held interlocking positions, and if so, he should be held responsible for violating section 305(b) of the FPA and implementing regulations. They assert that, had he sought authorization at the same time that Mr. Nelson did, Mr. Brown would have had to disclose Cobb Electric members’ lawsuit against him, which they believe would have made it difficult for him to sustain the burden that holding interlocking positions does not harm the public interest.⁹⁴

⁹³ Complaint at 17; 16 U.S.C. § 824(f) (2006).

⁹⁴ Complaint at 17.

64. Customers highlight the fact that one of the evils Congress sought to eliminate through section 305(b) was the “employment of dummy directors designated solely for the purpose of executing the orders of those in control, and nominal directors who have little time and attention to the affairs of companies.”⁹⁵ They assert that section 45.3(a) of the Commission’s regulations anticipates that situation because it defines “holding” interlocking positions in an active manner. Customers assert that the ongoing relationship among the affiliates Cobb Electric, Cobb Management, CEI and Power4Georgians begs the question what, if any, effect Mr. Brown’s resignation really had on CEI.⁹⁶ They further assert that Cobb Electric’s Board of Directors is using Mr. Brown as a consultant and is attempting to have Mr. Brown reinstated on the Board.

b. May 16 Answer

65. Respondents argue that there is no evidence that Mr. Brown sought to hold or did hold interlocking positions. They explain that CEI, which has six distribution electric cooperatives as members, became a public utility subject to Commission jurisdiction on June 22, 2008, by virtue of sales in excess of four million MWh of electricity during calendar year 2008.⁹⁷ Respondents assert that Mr. Brown immediately resigned and ceased acting as director of CEI upon learning that it had become a public utility.⁹⁸ On June 24, 2008, at a Cobb Electric Board of Directors meeting, Mr. Brown reported to the Board that he had resigned as director of CEI, and the Board then appointed Mr. Nelson director of CEI. Earlier, on May 27, 2008, Mr. Nelson, an officer of Cobb Electric, in anticipation of CEI becoming a public utility subject to the Commission’s jurisdiction, filed an application under FPA section 305(b) for Commission approval to hold interlocking positions as director of CEI and COO of Cobb Electric, which the Commission authorized on June 12, 2008.⁹⁹

66. Respondents argue that Customers did not provide any support for their allegation that Mr. Nelson is a “dummy director” impliedly controlled by Mr. Brown. They point out that Mr. Nelson had been elected Secretary/Treasurer of the Board of Directors of CEI, Senior Vice President for Power Supply for CEI and played a key role

⁹⁵ *Id*

⁹⁶ *Id.*

⁹⁷ May 16 Answer at 19 (citing 16 U.S.C. § 201(f) (2006)).

⁹⁸ *Id.* (stating that two days later, on June 24, 2008, Mr. Brown reported to the Board of Directors of Cobb Electric that he had resigned his positions at CEI).

⁹⁹ June 12 Order, 123 FERC ¶ 62,216.

in the company. Respondents state that Mr. Nelson has been a long-time member of senior management of Cobb Electric and the COO of Cobb Electric since 2004.¹⁰⁰

67. Respondents argue that neither the FPA nor applicable Commission regulations required Mr. Nelson to disclose shareholder derivative litigation involving Mr. Brown and others in his interlocking directorate application because Mr. Nelson was not a named defendant in any of the pleadings in the litigation involving Cobb Electric and Mr. Brown and certain other directors of Cobb Electric and Cobb Management; nor was Mr. Nelson's name ever mentioned in any of the pleadings in the litigation. Respondents quote the applicable regulation, section 45.8(c)(9), which provides, in pertinent part, that an applicant for approval disclose "any suit against the officers or directors thereof for alleged waste, mismanagement or violation of duty *to which suit applicant was a party defendant.*"¹⁰¹

68. Respondents also object to Customers' assertion that Mr. Nelson's application is "factually incorrect" in claiming that Cobb Electric is a non-profit cooperative.¹⁰² Respondents state that both Cobb Electric and CEI are non-profit electric cooperatives formed under the Georgia Electric Membership Corporation Act, which requires them to operate on a non-profit, cooperative basis.¹⁰³

c. Customers' May 31 Reply

69. Customers state that they did not know that Mr. Brown had resigned at the June 24, 2008 Board meeting because they do not have access to minutes of the Board as a matter of right. They nevertheless ask that the Commission request copies of these minutes, as well as related documents, to confirm that Mr. Brown had in fact resigned as director of CEI and when such resignation took place. They also contend that, even assuming Mr. Brown's resignation was timely, it appears that the reason he resigned was

¹⁰⁰ May 16 Answer at 19-20.

¹⁰¹ *Id.* at 20 (emphasis added by Respondents).

¹⁰² *Id.* at 21.

¹⁰³ Respondents explain that, under the Internal Revenue Code, Cobb Electric is taxed as a "common law cooperative" for federal income tax purposes, often shortened to "taxable cooperative." A taxable cooperative does not mean that a cooperative is a for-profit entity, however. Rather, the term "taxable cooperative" distinguishes it from a "tax exempt cooperative," which refers to an electric cooperative that is taxable under section 501(c)(12) of the Internal Revenue Code. The difference, Respondents explain, is whether non-member income is taxable or tax exempt.

to avoid disclosure of the affiliate abuse claims against Cobb Electric and himself in the civil litigation.¹⁰⁴

70. Customers claim that they never contended that Mr. Nelson was a “dummy director,” but rather simply suggested that Mr. Brown’s resignation from the Board may not mean that his role in CEI has terminated. They advocate that, given the relationship among the cooperatives, the Commission should investigate whether Mr. Brown has acted as a *de facto* member of the Board without Commission authorization.¹⁰⁵

71. Customers also complain that Respondents proffer a mere technical defense that Mr. Nelson was not required to disclose litigation because he was not sued in 2007, as were Cobb Electric and its Board of Directors, including Mr. Brown. They claim that Respondents avoid the broader contention, namely that it appears Mr. Nelson knew or should have known of the affiliate abuse involving Cobb Management and should have disclosed that information.¹⁰⁶

d. Commission Determination

(i) Mr. Brown

72. The Commission does not find good cause to investigate Mr. Brown. Respondents explain that Mr. Brown resigned from his positions at CEI once he knew that CEI had become a jurisdictional public utility under section 201(e) of the FPA.¹⁰⁷ Specifically, Respondents state that, at a Cobb Electric Board meeting held two days after CEI became subject to the Commission’s jurisdiction, Mr. Brown informed the Cobb Electric Board that he had resigned as a director of CEI, and Mr. Nelson was elected to take over as the director. While the FPA requires Commission authorization *before* holding interlocking directorates,¹⁰⁸ Mr. Brown resigned his position within two days, and therefore cured any

¹⁰⁴ May 31 Reply at 16.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 17.

¹⁰⁷ May 16 Answer at 19.

¹⁰⁸ 16 U.S.C. § 825d(b)(1) (2006) (“it shall be unlawful for any person to hold the position of officer or director of more than one public utility . . . unless the holding of such positions shall have been authorized by order of the Commission . . .”); 18 C.F.R. § 45.3(a) (holding of interlocking directorates “shall be unlawful unless the holding shall have been authorized by order of the Commission”); *see also Commission Authorization to Hold Interlocking Positions*, Order No. 664, FERC Stats. & Regs.

(continued...)

violation. In addition, the Commission sees no need to investigate further the facts surrounding Mr. Brown's employment with Cobb Electric or his resignation from CEI; the Commission's authority goes to those who would hold otherwise proscribed interlocking directorates, and so there is no need to examine a resignation. Mr. Nelson also signed a sworn affidavit attesting to these facts in the May 16 Answer,¹⁰⁹ and, further, CEI filed a letter with the Commission at the time, informing the Commission that Mr. Brown had resigned.¹¹⁰ This letter was never contested. The Commission notes that Customers, as complainants, bear the burden of proof, but they have not presented any evidence to the contrary.¹¹¹ In addition, Customers' suggestion that Mr. Brown resigned to avoid disclosure of the affiliate abuse claims is speculative, as is their claim that Mr. Brown may be acting as a *de facto* member of the Board.¹¹² More than bare allegations are required for the Commission to find good cause to commence an

¶ 31,194, at P 16 (2005) (requiring that "individuals apply for and receive authorization to hold interlocking positions *before* holding the positions will make the Commission's regulations consistent with the statute") (emphasis added), *denying reh'g and stay*, Order No. 664-A, 114 FERC ¶ 61,142, at P 9 (2006) ("Under the statute and regulations, *all* public utility officers and directors are subject to the requirement that they need prior Commission authorization to hold otherwise proscribed interlocking positions.") (emphasis added).

¹⁰⁹ See May 16 Answer at 19; Appendix 1: W.T. Nelson, III Affidavit.

¹¹⁰ CEI's July 2, 2008 Letter, Docket Nos. ER08-371-000 and ER08-371-002 (notifying the Commission that CEI's sales of electricity exceeded the four million MWh threshold on July 22, 2008, and that Mr. Brown resigned from his positions as Director and Secretary/Treasurer of CEI) (July 2008 Letter).

¹¹¹ 5 U.S.C. § 556(d) (2006); *cf. Midwest Indep. Trans. Sys. Op., Inc.*, 134 FERC ¶ 61,264, at P 2 (2011); 16 U.S.C. § 824e(b) ("[i]n any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant.").

¹¹² We take administrative notice of the fact that, subsequent to the pleadings before us, Mr. Brown's consulting relationship with Cobb Electric has been the subject of a state court proceeding in which the Cobb Superior Court rejected the Board of Directors' attempts to rehire Mr. Brown. Kim Isaza, *Schuster Rejects [Cobb Electric's] Effort to Rehire Brown*, Marietta Daily Journal, mdjonline.com (June 24, 2011) (quoting Cobb County Superior Court judge as stating that Mr. Brown's tenure "at Cobb Electric and its subsidiaries ended February 20, 2011" and "cannot be renewed, revived or repackaged.").

investigation.¹¹³ Furthermore, as courts have pointed out on numerous occasions, the Commission can only act within the scope of authority granted by Congress.¹¹⁴ While the charges in the state court indictment against Mr. Brown are serious, and Customers' concerns are understandable, the Commission is not the proper forum to address them.

73. In sum, the Commission does not find good cause to further investigate whether Mr. Brown should have filed for, but did not file for, authorization to hold jurisdictional interlocking directorates.

(ii) **Mr. Nelson**

74. The Commission likewise does not find good cause to further investigate whether to revoke the interlocking directorate authorization it granted Mr. Nelson. First, Customers allege that, in his interlocking directorate application, Mr. Nelson misrepresented Cobb Electric as a non-profit.¹¹⁵ However, Respondents state, and Customers do not refute the fact, that Cobb Electric is a non-profit electric cooperative formed under the Georgia Electric Membership Corporation Act, which requires electric membership corporations (cooperatives) to operate on a non-profit, cooperative basis.¹¹⁶ The fact that Cobb Electric may also be a taxable cooperative under the Internal Revenue Code does not change its status under Georgia law. Moreover, even if Cobb Electric were for-profit, the interlocking directorate regulations do not require disclosure of such information, i.e., its profit or non-profit status,¹¹⁷ so these facts are not relevant to Mr. Nelson's holding of interlocking positions. Therefore, the Commission finds that Mr. Nelson did not misrepresent Cobb Electric's non-profit status in his interlocking directorate application.

75. Next, Customers complain that Mr. Nelson failed to disclose to the Commission either in his application or subsequently, as facts later came to light, alleged multiple

¹¹³ *Cf., e.g., Mississippi Canyon Gas Pipeline, LLC*, 89 FERC ¶ 61,318, at 61,983 (1999) (not finding good cause to institute a section 5 [of the Natural Gas Act] investigation into Mississippi Canyon's existing rates based solely on speculative projections of what the pipeline's incremental revenues may be as a result of the pipeline's offering incremental expansions between rate cases.).

¹¹⁴ *See, e.g., Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395 at 401-02.

¹¹⁵ Complaint at 16.

¹¹⁶ May 16 Answer at 21; Ga. Code Ann. § 46-3-177 (2006).

¹¹⁷ 18 C.F.R. § 45.8 (2011).

affiliate abuses among the cooperatives. Specifically, they allege that Mr. Nelson should have disclosed the following: certain arrangements with Cobb Management, such as the alleged usurpation of benefits and transfer of millions of dollars in payments by SCANA to Cobb Management for Cobb Electric assets; the fact that Cobb Electric had a minority interest in Cobb Management, which billed Cobb Electric billions annually, allegedly to the benefit of Cobb Management's majority owners; and the litigation against Cobb Electric and Mr. Brown and others that resulted in the 2008 Settlement.¹¹⁸

76. However, Mr. Nelson is only obligated to disclose to the Commission the information required by its interlocking directorate regulations, which do not encompass the type of information Customers claim Mr. Nelson had a duty to disclose.¹¹⁹ Specifically, the interlocking directorate regulations focus on the applicant and his relationship with the companies in which he seeks to hold interlocking directorates, such as a description of his duties;¹²⁰ all of his other professional, contractual or business relationships with the public utility;¹²¹ the extent of his direct or indirect ownership or control of or beneficial interest in the public utility or its securities;¹²² his indebtedness to the public utility;¹²³ and all money or property the applicant has received from the public utility.¹²⁴ In contrast, Customers' allegations involve the relationship among the affiliated cooperatives, and the interlocking directorate regulations do not address that relationship.¹²⁵ Therefore, the Commission finds that Mr. Nelson did not violate the statute or interlocking directorate regulations by not disclosing the alleged affiliate abuses that Customers complain about.

77. As for the allegation that Mr. Nelson violated section 45.8(c)(9) by not disclosing shareholder derivative litigation against Cobb Electric, Mr. Brown, and certain other directors of Cobb Electric and Cobb Management, we disagree. Section 45.8(c)(9)

¹¹⁸ Complaint at 16.

¹¹⁹ See 18 C.F.R. § 45.8 (2011).

¹²⁰ 18 C.F.R. § 45.8(c)(4).

¹²¹ *Id.* § 45.8(c)(5).

¹²² *Id.* § 45.8(c)(6).

¹²³ *Id.* § 45.8(c)(7).

¹²⁴ *Id.* § 45.8(c)(8).

¹²⁵ *Id.* § 45.8(c).

requires disclosure of a suit to which the applicant is a “party defendant.”¹²⁶ Mr. Nelson was not a named party in the litigation. Accordingly, we find that Mr. Nelson’s not including in his application information pertaining to the shareholder derivative litigation against Cobb Electric, Mr. Brown, and certain others did not violate that regulation.

78. Finally, as to compensation, we note that, while he did not disclose the specifics of his compensation in his application, Mr. Nelson did request waiver of disclosure of his compensation on the basis that the companies are non-profit, member-owned and member-directed cooperatives.¹²⁷ Mr. Nelson was granted authorization to hold the requested interlocking directorates, notwithstanding that the dollar amount of his compensation was not disclosed, because his application nevertheless substantially complied with the Commission’s filing requirements.¹²⁸ Customers urge the Commission to consider now whether to require Mr. Nelson to disclose his current and past compensation arrangements with Cobb Electric and its affiliates. We do not consider this necessary. First, the Commission, in its Form No. 561, already annually collects information on those holding jurisdictional interlocking directorates, and compensation information is not among the information the Commission requires to be reported in its Form No. 561 for persons holding interlocking directorates.¹²⁹ In addition, given that the affiliated companies are affiliated cooperatives, whose ratepayers are its shareholders, Customers have not explained how disclosure of compensation information could prove their allegation that public and/or private interests are harmed by his holding interlocking positions in this scenario. Therefore, we decline to initiate an investigation against Mr. Nelson or require Mr. Nelson to submit past and current compensation information.

¹²⁶ *Id.* § 45.8(c)(9).

¹²⁷ Nelson Application at 13.

¹²⁸ *See, e.g., Northern States Power Co.*, 53 FERC ¶ 61,027, at 61,106-07 (Commission acted on rate filing, rather than reject it, because filing substantially complied with filing requirements), *reh’g denied*, 53 FERC ¶ 61,306 (1990). While Mr. Nelson asked not to disclose the dollar amount of his salary in his application, he provided responsive information that his compensation was not based on the volume or value of transactions between the two utilities, and did not include any compensation beyond his salary (which he explained was commensurate with what other executives similarly situated receive), participation in a pension plan, and health insurance coverage under a plan offered to all employees. And, in seeking the waiver, he highlighted that the utilities were member-owned and directed cooperatives. Nelson Application at 13.

¹²⁹ *See* 18 C.F.R. § 46.6 (2011).

79. In sum, the Commission does not find good cause to further investigate whether to revoke Mr. Nelson's interlocking directorate authorization.

V. Conclusion

80. As discussed above, the Commission finds that Customers have not shown how Respondents' filings, statements, actions or alleged misstatements or omissions may have violated the FPA or its implementing regulations. Nor do we find any indication of a potential violation of the Commission's anti-market manipulation regulations. Accordingly, the Commission does not find good cause to institute an investigation, and the Complaint is denied.¹³⁰

The Commission orders:

The Commission does not find good cause to commence an investigation under 18 C.F.R. § 1b.8 and denies Customers' complaint, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹³⁰ While the Commission finds that it is not the appropriate forum to address Customers' concerns, we note that they may be raised elsewhere, and, in fact, are being pursued before the Cobb County Superior Court. *See* Kim Isaza, *Schuster Rejects [Cobb Electric's] Effort to Rehire Brown*, Marietta Daily Journal, mdjonline.com (June 24, 2011) (stating the Superior Court Judge required all 10 Cobb Electric directors to appear in his courtroom August 12, 2011 for a compliance hearing on the 2008 Settlement).