

139 FERC ¶ 61,222
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Randy Mahannah Docket No. ID-6802-000

Darryl Schriver Docket No. ID-6803-000

ORDER GRANTING CONDITIONAL AUTHORIZATION
TO HOLD INTERLOCKING POSITIONS

(Issued June 18, 2012)

1. On March 2 and 6, 2012, as amended on April 19 and 23, 2012, Randy Mahannah and Darryl Schriver (together, Applicants) submitted applications, pursuant to section 305(b) of the Federal Power Act (FPA),¹ for authorization to hold the interlocking positions of Director of Golden Spread Electric Cooperative, Inc. (Golden Spread) and Director of Texas Electric Cooperatives, Inc. (Texas Electric). As discussed below, the Commission will grant Applicants conditional authorization, effective from the date of this order.

I. Background

2. Golden Spread is a public utility for purposes of FPA section 305(b). A non-profit electric generation and transmission cooperative, Golden Spread supplies wholesale electric power and energy to 16 member non-profit distribution cooperatives. Texas Electric, also a cooperative, is an electrical equipment supplier that serves its member distribution cooperatives and its member generation and transmission cooperatives. Specifically, Texas Electric repairs and remanufactures electric system equipment; aggregates and purchases needed supplies, including electric equipment; and produces and supplies utility poles. Golden Spread is one of Texas Electric's member owners.

¹ 16 U.S.C. § 825d(b) (2006).

3. Applicants each state that he is one of the 32 directors that sit on the Board of Directors of Golden Spread and one of the 7 directors that sit on the Board of Directors of Texas Electric.

4. According to Applicants, at the time they were elected as Directors of Texas Electric in August 2010, Texas Electric would not have been an electrical equipment supplier raising interlocking directorate issues under FPA section 305(b) because Golden Spread was not purchasing electrical equipment from Texas Electric at that time. However, following a competitive bid in October 2011, in which Texas Electric was determined to be the lowest cost option, Golden Spread purchased electrical equipment from Texas Electric and paid \$665,826 to Texas Electric. Applicants state that Golden Spread's purchase of electrical equipment could cause Texas Electric to fall within the definition of an electrical equipment supplier under FPA section 305(b) and Part 45 of the Commission's regulations.² Therefore, Applicants filed for authorization to hold interlocking directorate positions in Golden Spread and Texas Electric.

5. Applicants assert, however, that as cooperatives the relationship between Golden Spread and Texas Electric is not the type that section 305(b) of the FPA was intended to regulate; nor does the relationship possess the potential for the kind of abuse that section 305(b) of the FPA was intended to curb. Applicants note that the stated purpose of the regulatory oversight of interlocking directorates is to ensure "arm's length dealings between public utilities and organizations furnishing financial services or electrical equipment."³ Applicants represent that Golden Spread is one of Texas Electric's members, and the members are the owners of Texas Electric. Applicants state that Texas Electric's manufacture of poles and its aggregated purchases of equipment and supplies for its members are service functions that are undertaken at the direction of its members, are subject to the oversight of its members, and are for the sole purpose of cost efficiencies that can be garnered through bulk purchases on behalf of its member cooperatives. According to Applicants, the cost savings associated with acquisition of these services and supplies are passed through to Texas Electric's members and any margins realized are credited back to its members. Applicants further note that there is no need for arm's-length bargaining between Texas Electric and its members since the members own Texas Electric.

² 16 U.S.C. § 825d(b) (2006); 18 C.F.R. Part 45 (2011).

³ Mahannah and Schriver Filings at 6 (citing *Commission Authorization to Hold Interlocking Positions*, Order No. 664, FERC Stats. & Regs. ¶ 31,194, at P 5 (2005); *Paul H. Henson*, 51 FERC ¶ 61,104, at 61,231 (1990); *John Edward Aldred*, 2 FPC 247, 261 (1940)).

6. Applicants also assert that, even if the Commission were to determine that the relationship between Golden Spread and Texas Electric should be governed by section 305(b) of the FPA, interlocking directorates between Golden Spread and Texas Electric will not adversely affect public nor private interests, as according to Applicants there is no profit motivation associated with the relationship between the two entities. Applicants note that the Commission typically approves interlocking positions where the entities involved are a public utility and its affiliate.⁴ Applicants add that there is a common ownership in the sense that Golden Spread is one of the members that owns Texas Electric, and that Texas Electric's involvement in the aggregation, refurbishment and purchase and sale of electrical equipment to its members is undertaken at the direction of its members "for the purpose of taking advantage of economics of scale and sharing the risks of financing, constructing and operating facilities for the joint benefit of" the member cooperatives.⁵ Applicants state that, unlike the situation where the public utility and the electrical equipment supplier are unaffiliated, there is no potential for competition between Golden Spread and Texas Electric and that there is also significant control over the activities of these cooperatives by their owner-member governing boards.

7. Lastly, Applicants argue that the financial relationships between Golden Spread and Texas Electric have been *de minimis*. In October 2011, Golden Spread paid \$665,826 to Texas Electric for the supply of electrical equipment, representing 0.56 percent of Golden Spread's total consolidated purchases of goods (minus fuel and purchased power expenses) in 2011. This amount represents 0.5 percent of Texas Electric's annual revenues from the sale of electrical equipment to all members in 2011.

II. Notice of Filings

8. Notices of Applicants' initial filings were published in the *Federal Register*, 77 Fed. Reg. 14,515 and 77 Fed. Reg. 15,096 (2012), with interventions and protests due on or before March 23, 2012 and March 27, 2012. None was filed. Notices of Applicants' amended filings were published in the *Federal Register*, 77 Fed. Reg. 25,162 and 77 Fed. Reg. 25,715 (2012), with interventions and protests due on or before May 11, 2012, and May 14, 2012. None was filed.

⁴ Mahannah's and Schriver's Filings at 8-9 (citing *Paul H. Henson*, 51 FERC at 61,231).

⁵ *Id.* at 10 (citing *Paul H. Henson*, 51 FERC at 61,231).

III. Discussion

9. Section 305(b) of the FPA prohibits persons from concurrently holding positions as officer or director of both a public utility and a company supplying electrical equipment to that public utility, unless the Commission authorizes the interlock upon a finding that neither public nor private interests will be adversely affected.

10. The Commission has explained that as a general principle, the holding of interlocking directorates between public utilities and electrical equipment suppliers are typically prohibited where the electrical equipment supplier is in a position to furnish “an appreciable amount” of the electrical equipment in any category of electrical equipment to that public utility.⁶ If, however, there is only a *de minimis* amount of business between the two (both in terms of the electrical equipment supplier’s sales and the public utility’s purchases), then the Commission’s practice has been to conditionally authorize the interlocking directorate, but typically with an annual informational report of any sales and purchases.⁷

11. As described above, the business relationships between Golden Spread and Texas Electric have been *de minimis*; the \$665,826 paid by Golden Spread to Texas Electric in 2011 for the supply of electrical equipment represents 0.56 percent of Golden Spread’s total consolidated purchases of goods (minus fuel and purchased power expenses) in 2011 and 0.5 percent of Texas Electric’s annual revenues from the sale of electrical equipment to all members in 2011. Further, Golden Spread is a member-owned generator and transmission cooperative, and Texas Electric is likewise a cooperative with Golden Spread being one of the member owners of Texas Electric.

12. In light of the foregoing, we conclude that the holding of the positions identified will not adversely affect public or private interests and we will conditionally grant the authorization. The business relationships between the two are *de minimis*. Moreover, because the customers are the member-owners of a cooperative, there is a reduced potential for the kind of abuse that section 305(b) of the FPA was intended to curb. The Commission has previously determined that, because cooperative member-owners are both the ratepayers and the

⁶ *Dr. Gloria M. Shatto*, 34 FERC ¶ 61,303, at 61,558 (1986).

⁷ In evaluating proposed interlocking positions, the Commission has found amounts from less than one up to almost two percent to be *de minimis*. See, e.g., *Charles T. Fisher, III*, 9 FERC ¶ 61,096, at 61,195 (1979); *Dr. Gloria M. Shatto*, 34 FERC at 61,558; *John E. Bryson*, 56 FERC ¶ 61,026, at 61,100 (1991).

shareholders, there is no potential danger of shifting benefits from the ratepayers to the shareholders.⁸

13. As in prior cases, in order to determine whether the interlock should continue to be held, we will also condition our approval upon the transactions between the two companies not exceeding *de minimis* levels and the filing of an annual report by Messrs. Mahannah and Schriver describing the nature and dollar amount of any purchases by Golden Spread of any electrical equipment supplied or provided by Texas Electric, whether such transactions are made directly or indirectly through wholesale or retail suppliers or any other intermediary. That annual report shall disclose the annual level of payments by Golden Spread to Texas Electric, and shall include the payments as a percentage of Golden Spread's expenditures for materials, excluding fuel and purchase power, and as a percentage of Texas Electric's annual sales revenues.⁹

The Commission orders:

(A) Messrs. Mahannah's and Schriver's applications for authorization to hold the interlocking positions of Director of Golden Spread and Director of Texas Electric are hereby conditionally granted, effective from the date of this order.

(B) Messrs. Mahannah and Schriver are each hereby directed, annually on or before April 30, for each year during which the positions authorized herein are held, to submit a report disclosing the nature and dollar amount of any

⁸ *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, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 204, *clarified*, 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).

⁹ *See, e.g., Barry Lawson Williams*, 134 FERC ¶ 61,183, at P 14 (2011); *Dr. Gloria M. Shatto*, 34 FERC at 61,559; *Charles T. Fisher, III*, 9 FERC at 61,195; *John E. Bryson*, 56 FERC at 61,100. In reporting purchases of Texas Electric electrical equipment, the amounts (and percentages, as discussed in this order) reported by Messrs. Mahannah and Schriver should include both transactions made directly and transactions made indirectly, i.e., should include any electrical equipment produced by or procured from Texas Electric that is incorporated into electrical equipment procured by Golden Spread from a third party supplier.

purchases by Golden Spread of any electrical equipment supplied or provided by Texas Electric, whether such transactions are made directly or indirectly through wholesale or retail suppliers or any other intermediary. That annual report shall disclose the annual level of payments by Golden Spread to Texas Electric, and shall include the payments as a percentage of Golden Spread's expenditures for materials, excluding fuel and purchase power, and as a percentage of Texas Electric's annual sales revenues. If no purchases were made, Messrs. Mahannah and Schriver must each file a report stating that no such purchases were made. Also, sections 45.7 and 385.2005 of the Commission's regulations requires that the report must be dated and signed by the applicant and verified under oath, which may be satisfied by compliance with 28 U.S.C. § 1746 (2006). Failure to comply with these requirements may result in revocation of the applicant's authorization to hold the interlocking positions.

(C) In accordance with section 45.5(b) of the Commission's regulations, 18 C.F.R. § 45.5(b) (2011), if there is any change in the positions Messrs. Mahannah or Schriver holds with the companies covered by this order, or any other material change occurs with regard to the representations made in their applications, each is hereby directed to give notice to the Commission of such change within 30 days. Such a requirement does not replace the annual FERC Form No. 561 that is mandatory under section 305(c)(1) of the FPA, 16 U.S.C. § 825d(c)(1) (2006).

(D) The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by the continued holding of the interlocking positions authorized by this order.

By the Commission. Commissioner Clark is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.