

**IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA**

EDGAR “BO” POUNDS, individually and on behalf of the estate of Mary Jean Pounds, JOSEPH THOMPSON, FRANKLIN SMITH, EAGLE EYE FORENSICS, LLC, DIANNE BRACKIN, and WILLIAM SHARP, Derivatively On Behalf of COBB ELECTRIC MEMBERSHIP CORPORATION,

Plaintiffs,

Civil Action No. 07-1-9408-48

vs.

DWIGHT BROWN, DON BARNETT, DAVID MCGINNIS, KAY ANDERSON, AL FORTNEY, JR., FRANK BOONE, SARAH BROWN, LARRY CHADWICK, HENRY BALKCOM III, COBB ENERGY MANAGEMENT CORPORATION, and DOES 1-15, inclusive,

Defendants.

- and -

COBB ELECTRIC MEMBERSHIP CORPORATION, a Georgia Corporation,

Nominal Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

Plaintiffs file this Memorandum of Law in support of their Motion for Partial Summary Judgment on the following two purely legal issues:

1. Whether the creation and continuation of Cobb Energy Management Corporation (“CEMC” or “Cobb Energy”) violates applicable law; and

2. Whether the retirement, health insurance and other compensation paid to Cobb EMC directors above and beyond per diem fees and reimbursement of expenses necessarily incurred in performance of their duties violates Article III, Section 5 of the Cobb EMC bylaws.

Purely as a matter of law, the creation and ongoing operation of Cobb Energy directly violated, and continues to directly violate, the Georgia Electric Membership Corporation Act, O.C.G.A. § 46-3-170 et. seq. (“GEMCA”) and Georgia Supreme Court case law because an electric cooperative is not authorized to engage, directly or indirectly, in non-electric unregulated ventures other than the sale and distribution of propane gas. This issue is ripe for adjudication at summary judgment. Indeed, as discussed herein, numerous state supreme courts around the country have addressed the issue of whether an EMC may create a for-profit entity to engage in non-electric, unregulated business activities and have ruled such unlawful by summary judgment.

Similarly, the directors of Cobb EMC have and continue to be paid tens of thousands of dollars in retirement, life insurance and health care benefits, all of which directly violate Article III, Section 5 of the Cobb EMC bylaws, which expressly restricts director compensation to per diem fees and reimbursement of expenses necessarily incurred in the performance of their duties. Per diem fees are for serving as a director. “Retirement benefits received...are for retirement; the additional \$100 per diem, plus expenses, is for serving...no valid reason has been offered why the two benefits cannot be separated in law as they are in fact.” State v. McMillan, 253 Ga. 154 (1984).

Put simply, Plaintiffs are entitled to summary judgment as a matter of law because there is no genuine issue of material fact as to whether the creation and continued operation of Cobb

Energy violates the GEMCA and whether the payment of retirement and other benefits to the EMC directors violates Article III, Section 5 of the EMC bylaws.

FACTUAL BACKGROUND

1. On September 6, 1997 Cobb EMC's board of directors passed a resolution to create Cobb Energy. During Cobb Energy's organizational meeting on October 9, 1997, share subscription agreements were executed between Cobb Energy and Cobb EMC providing 200,000 shares of Class A common stock to the EMC for \$10,000 and 1,000 shares of Class B common stock to Cobb EMC for \$1,000. Cobb Energy had no other stock issued or outstanding at that time and thus, Cobb Energy was a 100% *owned* subsidiary of Cobb EMC.

2. Subsequent to this time, the *voting* rights of Cobb EMC in Cobb Energy were reduced to below fifty-one percent (51%).

3. Cobb Energy, a for-profit entity, commenced business on January 1, 1998.

4. All the employees of the EMC were transferred to Cobb Energy effective December 29, 1997. Cobb Energy Financial Statement ¶1 (Jan. 31, 1999)(Exhibits 3-5 to Plaintiffs' Memo of Law in Opposition to Cobb EMC's Third Motion to Stay "Third Stay Memo").

5. On July 28, 1998 Cobb EMC's meters were transferred to Cobb Energy for a book value of \$9,696,967.00 as opposed to the appraised fair market value.

6. Article IX of the EMC bylaws provides in part:

The Cooperative may not sell, mortgage, lease or otherwise dispose of, or encumber, any of its property other than:

A. property which, in the judgment of the Board of Directors, neither is, nor will be, necessary or useful in operating and maintaining the Cooperative's system and facilities, provided, however, that all sales of such property shall not in any one (1) year exceed in value ten per centum (10%) of the value of all of the property of the Cooperative;

B. services of all kinds, including electric energy; and

C. personal property acquired for resale,

unless such sale or disposition is first recommended by the Board of Directors and then, after written and published notice, is submitted to the members and such sale or disposition is authorized by the affirmative vote of two thirds of the members of the electric membership corporation, voted thereon at a meeting in person, or by proxy, and the notice of such public sale or disposition was contained in notice of the meeting; and provided such sale or disposition is approved by the Board of Directors in accordance with the Enabling Act as passed by the Georgia Assembly of the State of Georgia.

7. The meters were transferred to Cobb Energy by Resolution of the EMC Board of Directors and without a vote by the members on the issue.

8. A forty-year contract was entered into between Cobb EMC and Cobb Energy on December 29, 1997 and effective that day. The contract provides, among other things, that Cobb Energy would charge back to Cobb EMC “the combined salary and fringe benefits” of the employees plus 2%. Cobb EMC/Cobb Energy Contract (Dec. 29, 1997) ¶ 12 (Third Stay Memo Ex. 8). In addition to the contract fee on the employees, Cobb Energy charged Cobb EMC a contract fee for marketing services and also charged a meter reading fee of approximately 3.2%, which commenced at least as of fiscal 1999. Cobb Energy Financial Statement, Note 7 (Jan. 31, 1999)(Third Stay Memo Ex. 3).

9. The “First Amendment to First Amended and Restated Operating Agreement.” was effective April 1, 2000 and increased the Paragraph 12.01 contract fee to 6%. (Third Stay Memo Ex. 11).

10. The Fourth Amendment, effective February 2005, increased the contract fee to 11%. (Third Stay Memo Ex. 14).

11. Since 1998 Dwight Brown has been the CEO and President of Cobb EMC and

simultaneously the Chairman of the Board of Directors, CEO and President of Cobb Energy.

12. Since 1998 Defendants Frank Boone and David McGinnis have served as directors of Cobb EMC and simultaneously as directors of Cobb Energy.

13. Defendant Dwight Brown and his wife, Mary Ellen Brown, own approximately \$3,000,000.00 of Cobb Energy preferred stock that pays a dividend of 8.85% annually, or approximately \$265,500 per year on Mr. and Mrs. Brown's stock.

14. Other officers and directors of Cobb EMC and Cobb Energy, their family members and former counsel for Cobb EMC own or owned Cobb Energy preferred stock in approximately the following amounts:

Larry Chadwick, Cobb EMC Board Chairman -	\$ 100,000.00
Frank Boone, EMC Director	\$ 100,000.00
Carl Hames, Former EMC Director	\$ 25,000.00
Lonnie Hale, Cobb EMC Executive Vice President	\$ 175,000.00
Steve Paolucci - Cobb EMC Accountant	\$ 35,000.00
Robert Schoonover - Cobb EMC Accountant	\$ 47,500.00
David Johnson, Vice President	\$ 9,500.00
Dean Alford - Former Cobb Energy Director and President of Allied Utility (Cobb Energy affiliate)	\$ 750,000.00
Lee McKinstry, Cobb Energy Director	\$ 50,000.00
Bonnie Wilson - Attorney with Brock Clay	\$ 50,000.00
Anis Serali, President of ECG (Cobb Energy affiliate)	\$1,335,000.00

15. Page 2 of the Cobb EMC 1999 Annual Report represents, "The many products and services available through Cobb Energy Management are offered on a for-profit basis and Cobb Electric Membership Corporation will benefit from those profits, through its stock ownership *and dividends.*"

16. Cobb Energy's Board of Directors, including Dwight Brown, Frank Boone and David McGinnis, had and has the authority to issue dividends on the Cobb Energy common stock owned by Cobb EMC, but has never done so. Cobb Energy Articles of Incorporation § 5.2.1; Cobb Energy First Amended and Restated Articles of Incorporation § 5.6.1.2.

17. Cobb Energy's Board of Directors, which includes Mr. Brown, has always paid a dividend to the preferred shareholders, including Mr. Brown and his wife, no matter what the performance of Cobb Energy.

18. At the time of the creation of Cobb Energy, it was intended for Cobb Energy to provide non-electric services to EMC customers and others including tree trimming, insurance, entertainment and other domestic products and services. Cobb EMC 1997 and 1998 Annual Reports (Exs. 164 and 165 to Depo. Dwight Brown).

19. As of the time of the filing of the Complaint, Cobb Energy continued to engage in non-electric businesses including, among others, tree trimming, pest control (Alamo Pest Control), insurance business (Cooperative Benefits & Financial Services) and mortgage services (Cobb Energy Mortgage Services).

20. All of these non-electric business affiliates have accumulated losses. Depo. Dwight Brown 293:22 – 297:10; Depo. Robert Schoonover 62:1 – 63:14 (May 20, 2008)(“all the affiliates of Cobb Energy show accumulated losses except ProCore.”).

21. Cobb EMC has paid EMC directors tens of thousands of dollars in retirement benefits and health insurance. Several recent directors have been provided lump sum retirement benefits in excess of \$100,000 within their first two years of service on the EMC board. Plaintiffs Exhibit 273, provided by Defendants, evidences the dates and amounts of these benefits. Additionally, Steven Paolucci, Associate Vice President of Accounting for Cobb EMC, testified:

14 [H]ave you ever
15 looked into the legality of an EMC board
16 member receiving insurance and retirement
17 benefits?
18 A. I have not.
19 Q. Has anybody at the company that you

20 know of?

21 A. Not that I know of.

22 Q. Other than these payments, do they
23 receive any other type of compensation?

24 A. No, this is their compensation.

25 Q. Let me ask you, go over to

1 Mr. Balkcom, which is the third column from
2 the right side.

3 A. Yes.

4 Q. And he's got, looks like when he came
5 on he has 123,000 and change in the Mint plan
6 for 2005. Do you see that?

7 A. Yes, I do.

8 Q. Would you have an explanation for the
9 magnitude of that number?

10 A. That was a lump sum payment.

11 Q. And why would he get a lump sum
12 payment?

13 A. Well, he doesn't receive this payment,
14 it's put into the fund, it's paid into an
15 outside fund, and it's the same as the earlier
16 ones but where they made a payment a year over
17 a number of -- the company made a payment each
18 year over a number of years, this was a
19 onetime payment into that fund. So he won't
20 receive anything on this until he's retired,
21 just like the other board members.

22 Q. But why not just -- why wouldn't it be
23 just like the monthly contribution for the
24 others of -- I'm sorry, the annual
25 contribution of the others for eight or nine

1 thousand dollars a year? I'm not
2 understanding why he gets \$123,000.

3 A. I can't answer that, I didn't make the
4 decision to do that. I know the company
5 changed from going to multiple payments to one
6 annual payment.

7 Q. Okay. Let me have that back. It
8 looks like Anderson had 107,000 when she came
9 on and Gresham 130,000; would the explanation
10 be the same?

11 A. Yes, sir, it would.

ARGUMENT AND CITATION TO AUTHORITY

"To prevail at summary judgment under OCGA § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law." Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991). "The movant has the original burden of making this showing. Once the movant has made a prima facie showing that it is entitled to judgment as a matter of law, the burden shifts to the respondent to come forward with rebuttal evidence." Kelly v. Pierce Roofing Co., 220 Ga. App. 391, 392- 393, 469 S.E.2d 469 (1996). "In rebutting this prima facie case, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in O.C.G.A. § 9-11-56 must set forth specific facts showing that there is a genuine issue for trial." Entertainment Sales Co. v. SNK, Inc., 232 Ga. App. 669-670, 502 S.E.2d 263 (1998).

- 1. The formation and continued operation of Cobb Energy directly violates the Georgia Electric Membership Corporation Act, O.C.G.A. § 46-3-170 et seq., because electric cooperatives are not authorized to engage, directly or indirectly, in non-electric, unregulated ventures other than the sale and distribution of propane gas.**

A corporation can pursue only the purposes set forth in its incorporating documents. Those incorporating documents, however, may only extend to the scope and purpose authorized by their enabling statute. Baldwin County Electric Membership Corp. v. Lee, 804 So.2d 1087, 1090 (Ala. Sup. Ct. 2001) quoting FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §3635 at 226 (1990); Lawson v. Household Finance Corp., 152 A. 723, 726 (Del. Sup. Ct. 1930). Here, the enabling statute of the GEMCA only authorizes electric cooperatives to provide those goods and services necessary to accomplish its historic mission of rural electrification, with one express statutory exception – the sale and distribution of propane

gas.

More specifically, O.C.G.A. § 46-3-200 prescribes the authorized purposes of an EMC in

Georgia:

An electric membership corporation may serve any one or more of the following purposes:

- (1) To furnish electrical energy and service;
- (2) To assist members in the efficient and economical use of energy;
- (3) To engage in research and to promote and develop energy conservation and sources and methods of conserving, producing, converting, and delivering energy; and
- (4) To engage in any lawful act or activity necessary or convenient to effect the foregoing purposes.

Additionally and significantly, Georgia law follows the application of the *expressio unius est exclusio alterius* canon of statutory construction which dictates that the enumeration of particular things (i.e. electrical energy) excludes things not mentioned (i.e. home mortgages, pest control, tree trimming); Allen v. Wright, 282 Ga. 9 (2007) (“The express mention of one thing implies the exclusion of another, the list of actions in a statute is presumed to exclude actions not specifically listed, and the omission of additional actions from the statute is regarded by the courts as deliberate”).

Furthermore, subsections 1 through 4 of O.C.G.A. § 46-3-200 were explained by the Georgia Supreme Court in Flint v Barrow, 271 Ga. 636 (1999). In Flint, Flint EMC formed a subsidiary corporation, FlintErgy, Inc., in 1997. Flint EMC owned all of FlintErgy’s stock, and a majority of FlintErgy’s directors were either directors or officers of Flint. Flint then announced its intention to sell propane gas to its members, either directly, or indirectly, through FlintErgy. A declaratory judgment action was brought to keep Flint EMC out of the propane gas business.

The Flint court held that Flint EMC could not sell propane indirectly through FlintErgy:

The trial court's finding that FlintErgy is the alter ego of Flint is supported by the evidence. After all, FlintErgy is wholly owned by Flint; and a majority of FlintErgy's directors are officers or directors of Flint. **More importantly, FlintErgy was incorporated by Flint just to enable Flint to do indirectly what it could not do directly – enter the propane gas market.** In sum, Flint created FlintErgy as a shell and solely for its own convenience and benefit. It follows that the trial court correctly ruled that Flint cannot engage in the sale of propane gas indirectly through FlintErgy.

Id. at 638 (emphasis added).¹

Here, exactly as in Flint, Cobb Energy was formed by Cobb EMC in the same year, 1997, and was likewise formed as wholly-owned subsidiary of Cobb EMC. Defendants subsequently manipulated the stock ownership of Cobb Energy through issuance of additional shares so that over time Cobb Energy became less than a wholly-owned subsidiary. This was done in an effort to manipulate reporting requirements and has no effect on whether the creation and continuation of Cobb Energy violates the GEMCA. Ultimately, and for the exact same reason the Flint court ruled that FlintErgy was an unlawful attempt to do indirectly what Flint could not do directly, here, Cobb Energy was formed by Cobb EMC to enable Cobb EMC to do indirectly what it could not do directly, provide non-electric goods and services to Cobb EMC customers and others. There can be no doubt that Cobb EMC and Cobb Energy are on all practical levels one and the same and that Cobb Energy was formed to attempt to allow Cobb EMC to do indirectly what it could not do directly. In fact, even more conjoined than the entities in Flint, all of the original directors of Cobb Energy, to wit, Dwight Brown, Frank Boone and David McGinnis, were directors or officers of Cobb EMC. Furthermore, and among many other conjoined aspects of Cobb Energy and Cobb EMC: (i) the entities share common office space and principal headquarters; (ii) Cobb EMC has no labor force because all employees were transferred to Cobb Energy in 1999 and thus, Cobb Energy employees run Cobb EMC; (iii) Cobb Energy owns all of

¹ The Legislature subsequently amended the statutory framework and authorized an exception for electric cooperatives to sell and distribute propane gas.

Cobb EMC's meters, the life line to the EMC's customers; and (iv) Cobb EMC's CEO and President is also the CEO, President and Chairman of the Board of Cobb Energy.

In Flint, the Georgia Supreme Court additionally found:

As its name applies, the original GEMCA was enacted to encourage 'rural electrification.' Ga. L. 1937, p. 644. It was not aimed at other forms of energy. The amended act, O.C.G.A. § 46-3-170 et seq. (Ga. L. 1981, p. 1587), does not alter the original aim. Even if it can be said that subsections (2), (3) and (4) of O.C.G.A. § 46-3-200 authorize an EMC to assist its members in the use of another energy source, promote its development, or engage in lawful activities to effect such a purpose, nothing in the GEMCA authorizes an EMC to *furnish* or *sell* another form of energy. In fact, O.C.G.A. §46-3-201 makes it clear that, while an EMC is empowered to 'assist its members...in the efficient and economical use of energy,' O.C.G.A. § 46-3-201(b)(8), it can only furnish or sell 'electricity.'

Id. at 637.²

Indeed, far beyond the situation in Flint where the court prohibited Flint EMC from venturing into another *energy* business because it was non-electric, here, most of Cobb Energy's businesses have absolutely nothing to do with energy, let alone electric energy. More specifically, the Cobb Energy entities include a pest control business, tree trimming business, mortgage business, insurance business, and others that have absolutely nothing to do with energy or electric energy.³

Electric cooperatives are expressly charged by statute to provide electricity. It not only defies the law, but also logic and common sense, to say that electric cooperatives are additionally authorized to directly or indirectly sell home mortgages, pest control services, tree trimming services, insurance and the like. Yet, Defendants take this unlawful and irrational position.

² See also, Municipal Elec. Auth. of Ga. v. Ga. Pub. Serv. Comm'n. et al., 241 Ga. App. 237 (1999) citing Flint, "We similarly reject MEAG's argument that its enabling statute, which provides that it can do whatever is necessary to accomplish its objectives – developing and selling electric power – authorizes it to sell its excess telecommunications capacity to the public for hire."

³ The fact that all of these mentioned business ventures have been abysmal failures and have lost millions of Cobb EMC's money only highlights the determination by the legislature and the Georgia Supreme Court that EMCs not venture outside regulated electric or other specifically-authorized businesses. Depo. Robert Schoonover 62:1 – 63:14 (May 20, 2008)("all the affiliates of Cobb Energy show accumulated losses except ProCore.")

Defendants' argument throughout this case thus far may be stated simply: electric cooperatives were authorized to indirectly engage in the sale of any good or service they choose. Defendants' use of an elaborate structure of affiliate and shell entities to indirectly engage in non-electric unregulated ventures squarely contradicts the strict limitations of the GEMCA. No reasonable interpretation of the law suggests that the General Assembly and Georgia Supreme Court sanctioned and encourages the use of affiliates and shell entities for an EMC to indirectly engage in non-electric, unregulated ventures not authorized by statute.

This is an all or nothing case. Electric cooperatives are either statutorily authorized to directly or indirectly engage in any and all non-electric unregulated ventures or they are confined to engaging only in regulated electric or other ventures expressly authorized by statute. There is no middle ground.

As a matter of law, the creation and continued operation of Cobb Energy and its non-electric businesses violates O.C.G.A. § 46-3-170 et seq. and the Georgia Supreme Court's holdings in Flint and thus, Plaintiffs are entitled to summary judgment.

2. **State supreme courts around the country that have addressed the issue of whether an EMC may create a for-profit entity to indirectly engage in non-electric, unregulated businesses not authorized by statute have ruled such unlawful on summary judgment or in response to motions for declaratory judgment and injunctions.**⁴

a. Jackson Energy Coop. Case – Appeal to Supreme Court of Kentucky from entry of summary judgment.

Even more closely resembling the Cobb Energy scheme than Flint was the situation in Lewis v. Jackson Energy Coop. Corp., 189 S.W.3d 87 (Sup. Ct. Ky. 2005) whereby the Jackson

⁴ There is one court of appeals case from Colorado, Bontrager v. La Plata Elec. Assn., Inc., 68 P.3d 555 (Colo. App. 2003) where it was determined that the EMC there could sell propane gas. The statute at issue in that case, however, empowered cooperatives in Colorado "to engage in any lawful business, except banking." Furthermore, the La Plata court found that Georgia's EMC statute was "much more limiting than the Colorado statutes before us." Id. at 561. Thus, by that court's own determination, the La Plata is wholly inapplicable here.

Energy Cooperative Corporation (“Jackson Energy”) formed Jackson Service Plus, Inc., a for-profit corporation, to provide services to its members and non-members, including tree trimming, home monitoring and propane gas distribution. Jackson Service Plus, Inc. was a wholly-owned subsidiary of Jackson Energy and the two entities had identical boards and shared employees and office space. Jackson Energy also formed another for-profit corporation, Jackson Energy Services, Inc. (“Jackson Services”) to sell propane gas to members and the general public. Jackson Energy owned 75% of Jackson Services and thus, Jackson Services was less than a wholly-owned subsidiary.

Randolph Lewis, a customer, member and propane gas dealer filed suit to block the sale of propane gas and both parties moved for summary judgment. Lewis argued that by statute the only purpose of a rural electric cooperative was to provide electric energy and electric services. Jackson Energy argued, among other things, that propane is a form of energy that may be provided by cooperatives, that the distribution of propane was a service requested by members and desirable to the operation of a utility and that statutory interpretation favored a broad definition of energy. *Id.* at 90.

In ruling against Jackson Energy’s arguments the Kentucky Supreme Court explained:⁵

Use of the word “electric” limits the cooperative and prevents the organization of any other type of cooperative under the statute. If the legislature had intended to convert ‘electric cooperatives’ into “energy cooperatives,” it would have deleted the word “electric” from the statute altogether. That was not done...It was plain error for both the circuit court and the Court of Appeals to construe *KRS 279.020* [Kentucky Elec. Mem. Corp. Act] as permitting rural electric cooperatives to engage in non-electric ventures. If the rationale of the circuit court were followed to its logical conclusion, it would in effect destroy the distinction between a special purpose electrical cooperative and a general purpose corporation... **If ownership of a [for profit business corporation] is not necessary or incidental to the purpose authorized in KRS 279.020, then ownership of such non-electric subsidiaries and affiliates is prohibited...**what the

⁵ The Supreme Court of Kentucky’s ruling in 2005 was seven years after the formation of Jackson Services in 1998.

utility is forbidden to do directly, it may not accomplish by indirection by way of resort to any device or subterfuge leading to the same result...**It is the decision of this Court that Jackson Energy, as a rural electric cooperative, cannot provide propane gas or other non-electric services to its members and other customers as such would be a violation of KRS Chapter 279.**

Id. at 95.

The fact that Jackson Energy owned only 75% of Jackson Services and thus, Jackson Services was less than a wholly-owned subsidiary, had no effect in the Kentucky Supreme Court's ruling. Likewise here, the fact that Defendants, in an effort to manipulate Cobb EMC's voting rights in Cobb Energy, issued preferred shares and additional common shares subsequent to the formation of Cobb Energy, has no implications for the instant motion. Defendants' contention that the situation here is lawful because Cobb EMC has less than 51% voting control of Cobb Energy is without merit. There is not a single case in the entire country holding that an EMC can indirectly engage in non-electric business ventures not authorized by statute through a subsidiary so long as the EMC has less than 51% voting control of the subsidiary. Indeed, Defendants' former counsel testified: "Q: Are you aware of any case statute or regulation that says that by reducing it to 49 percent, that makes it legal? A: There have not been any cases to my knowledge analyzing that issue." Depo. Bonnie Wilson, pg. 83 (June 11, 2008)

Just as the Supreme Court of Kentucky found in Jackson Energy, here, the creation and ongoing operations of Cobb Energy directly exceed and violate the relevant statutory authority. Thus, as a matter of law, Plaintiffs are entitled to summary judgment.

b. *Tallahatchie Valley Electric Power Case – appeal to Mississippi Supreme Court from entry of declaratory judgment and permanent injunction.*

In Tallahatchie Valley Electric Power Assn. v. Miss. Propane Gas Assn., Inc., 812 So.2d 912 (Miss. Sup. Ct. 2002), the Tallahatchie Valley Electric Power Association ("TVEPA")

formed a subsidiary, ServicePlus Energy Corp. in 1997 to engage in for-profit activities including, among other things, the sale and distribution of propane gas. ServicePlus then acquired Desoto Gas Company, a propane distributor. In ruling that the TVEPA exceeded its statutory authority by acquiring “an interest” in Desoto Gas Company, the Supreme Court of Mississippi explained:

TVEPA argues that because [the Mississippi EMC Act] requires TVEPA to provide electricity at the lowest cost possible means, it must make prudent business decisions for the benefit of the company. TVEPA further contends that the ability to make these business decisions is sanctioned by Miss. Code Ann. § 77-5-229 and 77-5-231, which read in conjunction with each other and § 77-5-251, mandate that TVEPA has broad power to make business decisions. Thus, the express language embodied in the Miss. Elec. Act, TVEPA submits, allows the formation and ownership of ServicePlus in order to ‘lower the cost of electricity to TVEPA’s members, improve TVEPA’s financial strength, and thereby help TVEPA make electric energy available to its member owners at the lowest cost possible.’ This Court refuses to adopt such a strained interpretation of the relevant statutes when our statutory scheme expressly provides otherwise...Even a liberal interpretation of the applicable statutes results in the conclusion that TVEPA is limited to the acquisition of electric energy assets.

Id. at 917-18.

Significantly, the Mississippi Supreme Court went on to explain:

The language of the above statutes is clear that TVEPA is empowered to provide electricity. Nothing in the statutory scheme authorizes TVEPA to distribute another form of energy. Though TVEPA is granted powers necessary and convenient for carrying out the purposes of its organization and is authorized to acquire property to carry out those purposes, it can hardly be argued that it is ‘necessary or convenient’ for TVEPA to sell propane gas to accomplish its purposes. Though the language ‘necessary or convenient’ arguably broadens the powers granted to TVEPA, it does not enable TVEPA to engage in businesses which exceed its statutory or corporate purpose solely for the aim of increasing its bottom line under the guise of ‘prudent business decisions.’

Id. at 919.

Also of importance, the Mississippi Supreme Court examined and discussed at length the

Georgia EMC Act provisions in relation to Mississippi EMC Act provisions:

The Georgia Supreme Court decided a case nearly identical to that at hand in *Flint Elec. Membership Corp. v. Barrow*...The Georgia Supreme Court held that the rural electric association could not operate a propane gas company through a subsidiary...TVEPA argues that this Court's interpretation of the Miss. Elec. Act should be broader than that espoused by the Georgia Supreme Court in interpreting the Georgia Act. TVEPA apparently relies on the fact that the Georgia statute lacks the liberal construction language. *See* Miss. Code. Ann. 77-5-231. **Even a liberal interpretation of our statutes** requires the conclusion that TVEPA is limited to the acquisition of electric energy assets. This Court cannot, in the name of liberal interpretation, expand the clear and express language of these statutes to affect an alteration more appropriately sought through legislative means.

Tallahatchie Valley, 812 So. 2d at 919-920.

Just as the Supreme Court of Mississippi found in Tallahatchie, here, the creation and ongoing operations of Cobb Energy directly exceed and violate the relevant statutory authority.

Thus, as a matter of law, Plaintiffs are entitled to summary judgment.

c. Hilco Electric Coop. Case – appeal to Texas Supreme Court from entry of summary judgment.

In Hilco Electric Cooperative et al., v. Midlothian Butane Gas Co., Inc. 111 S.W.3d 75 (Tex Sup. Ct. 2003), the Texas Supreme Court addressed the issue of “whether the Electric Cooperative Corporation Act (‘ECCA’) allows a nonprofit electric cooperative to create and own a for-profit subsidiary propane business.” *Id.* at 77 (citations omitted). The Texas Supreme Court explained:

If as HILCO companies contend, the Legislature’s objective was to allow electric cooperatives to engage in “any lawful purpose,” the Legislature could have easily said so in H.B. 3203, Section 4 itself. Because it did not do so, we reject HILCO companies’ contention that section 2.01(A)’s reference to ‘any lawful purpose’ established the Legislature’s intent to expand indefinitely the purposes for which electric cooperatives can be organized...This interpretation is consistent with the language of H.B. 3203. We find no indication that the Legislature intended to expand the purposes for which a corporation may be organized under the ECCA from ‘rural

electrification’ to ‘any lawful purpose’ that fertile minds can fathom.

Just as the Supreme Court of Texas found in Hilco, here, the creation and ongoing operations of Cobb Energy directly exceed and violate the GEMCA. Thus, as a matter of law, Plaintiffs are entitled to summary judgment.

3. The payment of health insurance retirement and other benefits to Cobb EMC directors in excess of per diem fees and expenses necessarily incurred in the performance of their duties directly violates Article III, Section 5 of Cobb EMC’s bylaws, and thus is unlawful as a matter of law.

O.C.G.A. § 46-3-290(d) restricts compensation of EMC directors in Georgia to a per diem compensation for their service and reimbursement of expenses actually and necessarily incurred in the performance of their duties. More specifically, it provides in relevant part:

The compensation, if any, of directors for their services as such shall be on a per diem basis and, unless otherwise provided in the bylaws, shall be fixed by the board of directors. Directors also shall be entitled to reimbursement of expenses actually and necessarily incurred by them in the performance of their duties.

Although O.C.G.A. § 46-3-201(b)(23) empowers an EMC to “pay pensions and establish and carry out pension, savings, thrift, and other retirement, incentive, and benefit plans, trusts, and provisions for any or all of its directors, officers, and employees,” Cobb EMC has not amended its bylaws to authorize any additional compensation or benefits other than “per diem” compensation. More specifically, Cobb EMC’s bylaws, Article III, Section 5 provides:

The Directors **shall fix** the compensation for **their services** on a per diem basis and shall be entitled to reimbursement of expenses actually and necessarily incurred by them in the performance of their duties.

Per diem compensation *for services* are separate and distinct from retirement and health benefits. As the Georgia Supreme Court explained in State v. McMillan, 253 Ga. 154 (1984):

First, a senior judge who serves as a superior court judge is paid \$100 per day, plus expenses, for such service over and above his or her retirement

pay. A senior judge can draw retirement pay and never again serve as a superior court judge. **Therefore, the retirement benefits received by a senior judge are for retirement;** the additional \$100 per diem, plus expenses, **is for serving as a superior court judge.** No valid reason has been offered why the two benefits cannot be separated in law as they are in fact.

(emphasis added). Indeed, as Plaintiffs' Exhibit 273 (Exhibit 1 hereto) evidences, even Defendants own records separate the "per diem" pay from retirement and insurance compensation. There is simply no reasonable argument that the \$123,061.44 paid in retirement benefits for Director Balkcom in his *first year of service on the board*, or the \$130,247.09 lump sum payment of retirement benefits for Director Gresham in his *second year of service on the board* are per diem fees for *service performed*.

While it is possible that the EMC bylaws could be amended to provide for reasonable retirement and other benefits, that was never done. Instead, the EMC circumvented the process of amending its bylaws by inserting provisions in the EMC Policy Manual purporting to authorize such payments. Because the EMC members at large are not provided a copy of the EMC Policy Manual, the effort to bury their purported authorization for such additional compensation in the Policy Manual appears to be an attempt by EMC management to conceal these significant outlays of cash from EMC members. Fortunate for the EMC members, provisions in the Policy Manual cannot, as a matter of law, override the bylaws which are a binding contract between the EMC members, management and the EMC:

The patrons of the Cooperative, by dealing with the Cooperative, acknowledge that the terms and provisions of the Articles of Incorporation and bylaws shall constitute, and be a contract between, the Cooperative and each patron, and both the Cooperative and the patrons are bound by such contract, as fully as though each patron had individually signed a separate instrument containing such terms and provisions.

EMC Bylaws, Art. VII, Section II. Furthermore, as the Georgia Supreme Court has explained:

The members of a corporation are as a general rule conclusively presumed to have knowledge of its bylaws and cannot escape a liability arising thereunder, or otherwise avoid their operation, on a plea of ignorance of them. This is also true of directors and other officers of the corporation... **the bylaws of a corporation are binding on the parties who enact them as contracts, and must be construed according to the principles of the law of contracts.**

Gwin v. Thunderbird Motor Hotels, 216 Ga. 652 (1961)(emphasis added); Rushing v. Gold Kist, 256 Ga. App. 115 (2002).

Therefore, as a pure matter of contract law, the EMC Directors have violated the EMC bylaws by authorizing and continuing to *pay themselves* hundreds of thousands of dollars in retirement, health insurance and other benefits in direct violation of the restrictions of Cobb EMC's bylaws. Until such time as the bylaws are amended to authorize such expenditures pursuant to the EMC Act, these payments will remain illegal as a matter of law.

Consequently, as a matter of law, Plaintiffs are entitled to summary judgment on this issue.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request the Court enter summary judgment declaring that the creation and continuation of Cobb Energy violates the GEMCA and declaring the payment of retirement and other benefits to Cobb EMC directors in excess of per diem fees and expenses unlawful under the EMC bylaws.

Respectfully submitted this 25th day of August, 2008.

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SUPERIOR COURT OF THE STATE OF GEORGIA
COUNTY OF COBB

**EDGAR “BO” POUNDS, individually and)
on behalf of the estate of Mary Jean Pounds,)
JOSEPH THOMPSON, FRANKLIN)
SMITH, EAGLE EYE FORENSICS, LLC,)
DIANNE BRACKIN, and WILLIAM)
SHARP, Derivatively On Behalf of COBB)
ELECTRIC MEMBERSHIP)
CORPORATION.)**

Plaintiffs,)

vs.)

Civil Action File No. 07-1-9408-48

**DWIGHT BROWN, DON BARNETT,)
DAVID MCGINNIS, KAY ANDERSON,)
AL FORTNEY, JR., FRANK BOONE,)
SARAH BROWN, LARRY CHADWICK,)
HENRY BALKCOM III, COBB ENERGY)
MANAGEMENT CORPORATION and)
DOES 1-15, inclusive,)**

Defendants,)

-and-)

**COBB ELECTRIC MEMBERSHIP)
CORPORATION, a Georgia Corporation,)**

Nominal Defendant.)

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of Plaintiffs’ Motion for Partial Summary Judgment, Memorandum of Law in Support of Plaintiffs’ Motion for Partial Summary Judgment and Plaintiffs’ Uniform Superior Court Rule 6.5 Statement of Theories of Recovery and Material Facts to which there is no Genuine Issues to be Tried upon opposing counsel in this matter by first class mail addressed as follows:

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This 25th day of August, 2008.

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