UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-7989

NEIL HERRING, et al.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the
Securities and Exchange Commission

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

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I N D E X

CASES

Statutes and Rules (cont.): Page

MISCELLANEOUS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2443

NEIL HERRING, et al.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the
Securities and Exchange Commission

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Before the Securities and Exchange Commission permits a public utility holding company to sell its common stock, must the Commission, under provisions of the federal securities laws contained in the Public Utility Holding Company Act of 1935, hold an evidentiary hearing to determine whether the construction programs of the holding company's operating subsidiaries are excessive and improvident in light of anticipated consumer demand for electric power?

2. Before the Commission permits a public utility holding company to sell its common stock, must the Commission prepare an environmental impact statement pursuant to the National Environmental Policy Act of 1969?

COUNTERSTATEMENT OF THE CASE

A. The Order Under Review

Neil Herring, Phillip H. Hoffman and Stephanie Coffin have petitioned this Court, pursuant to Section 24(a) of the Public Utility Holding Company Act of 1935 ("Holding Company Act" or "Act"), 15 U.S.C. 79x(a), for review of an order of the Commission dated October 29, 1980, which approved an application filed by the Southern Company ("Southern") to issue and sell up to 17,000,000 shares of its common stock in a public offering. Southern is a public utility holding company registered with the Commission under Section 5 of the Act, 15 U.S.C. 79e. Section 6(a) of the Act, 15 U.S.C. 79f(a), makes it unlawful for a registered holding company to sell its securities except in accordance with an application (referred to in the Act as a "declaration") filed under Section 7 of the Act, 15 U.S.C. 79g, and with an order of the Commission permitting such declaration to become effective. If the requirements of Section 7 are satisfied, the Commission must permit the declaration to become effective.

Petitioners are common stockholders of Southern and residential customers of one of Southern's operating subsidiaries, Georgia Power Company. Petitioners filed objections to Southern's proposed financing and requested that a Commission hearing be held before any authorization to sell stock was granted. Petitioners' principal contentions were: (1) that the Southern system construction program to increase the electrical generating capacity of the system is excessive and improvident in light of the anticipated decline in demand for electrical power through the end of this century; (2) that the Commission was required, before acting on Southern's application, to prepare an environmental impact statement pursuant to the National Environ-

Southern, if they wish, simply by buying additional Southern stock on the open market.

B. The Facts

1. Southern's Application to Sell Common Stock

On June 5, 1980, Southern filed its declaration with the Commission which, as subsequently amended, sought authority to issue and sell up to 17,000,000 shares of its common stock or $200,000,000 of estimated cash proceeds, whichever is less (R. 1-5, 166-167). 2/ Southern proposed to make the offering in two steps. The initial offering, which Southern proposed to make in November 1980, was to involve a maximum of 11,000,000 shares estimated to yield cash proceeds of $132,000,000. The remaining shares were to be offered on or before February 28, 1981 (R. 66, 68-69, 94, 166). 3/

Southern is a pure holding company. It owns all of the common stock of its four operating subsidiaries (Georgia Power Company, Alabama Power Company, Mississippi Power Company, and Gulf Power Company) and a service company (R. 99). Southern's income consists of dividend payments received from these companies. Southern also issues its own common stock to the public to permit it to make capital contributions to its subsidiaries. Southern conducts no other business (R. 2, 6, 99, 102-104, 134).

2/ "R. __" refers to the record before the Commission. "Br. __" refers to petitioners' brief.

Petitioners have not prepared an appendix to the briefs or sought leave to file a deferred appendix pursuant to Rule 30 of the Federal Rules of Appellate Procedure. Accordingly, references in this brief are to the record before the Commission.

3/ The 11,000,000 shares were in fact sold on November 12, 1980. Southern did not offer the remaining 6,000,000 shares and their authorization has expired. See "Certificate of Notification" filed by Southern on December 1, 1980, pursuant to Holding Company Act Rule 24, 17 CFR 250.24.

application disclosed that it proposes to make capital contributions to its subsidiaries in certain fixed amounts (R. 168). It does not attempt, however, to apply any fixed amount to any particular construction project. Capital contributions to the operating subsidiary are used to pay its maturing obligations; they are not earmarked for, and generally are not traceable to, any particular construction project.

2. The Notice of Proposed Issuance of Common Stock and Request for Hearing

On September 4, 1980, the Commission issued a Notice of Proposed Issuance and Sale of Common Stock at Competitive Bidding (R. 68-69), briefly describing Southern's proposed common stock offering. The Notice stated that any interested person could, by October 6, 1980, submit to the Commission a written request for a hearing on Southern's declaration, accompanied by a statement as to the nature of his interest, the reasons for his request, and the issues of fact or law controverted by him. The Notice further stated that the declaration could become effective at any time after that date (R. 69).

Petitioners filed their notice of intervention and motion for a hearing on October 6, 1980 (R. 158-165). 4/ Petitioners set forth therein their contentions that Southern's construction program is excessive, that NEPA requires the Commission to prepare an environmental impact statement, and that the proposed sale of Southern stock at less than book value would dilute the book value of existing shares unless preemptive rights were offered. Petitioners requested that an evidentiary hearing be held (R. 158). Southern

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4/ Under Section 7 of the Act, a hearing is not required prior to permitting a declaration to become effective. Rule 23, 17 CFR 250.23, promulgated by the Commission under the Act, provides that the Commission will publish notice of the filing of a declaration, that interested persons may request a hearing, and that a hearing will be held "[i]f the Commission deems that a hearing is appropriate in the public interest or the interest of investors or consumers * * *." Id. 250.23(d).

The Commission rejected petitioners' first contention, that Southern's construction program was excessive, on the ground that the Commission lacked authority under the Holding Company Act to decide upon the wisdom or lack thereof of a public utility's construction program. The Commission made clear in Southern I that the provisions of the Act governing Southern's application "deal with the investment character and cost of the financing" and do not confer on the Commission "general jurisdiction over the conduct of the utility business of the operating subisiaries in the registered system." 20 SEC Docket at 801, 802. The Commission there emphasized that "[a] utility does not require our permission to build facilities to carry on its utility business * * *." Id. at 802. Thus even if the Commission disapproved Southern's application, it could not require Southern to abandon any particular construction project, "much less * * * order it to apply its own resources to programs satisfactory to us." Id. at 803. The Commission noted, moreover, that the proceeds of Southern's financing would be funneled into the operating subsidiaries as capital contributions to pay their maturing obligations, not to fund any specific capital improvement. Id.

With respect to petitioners' contention concerning the necessity for an environmental impact statement, the Commission held in Southern I that its "authorization of the issue and sale of the common stock is not a major federal action significantly affecting the quality of the human environment." Id. at 803. The Commission emphasized the limited nature of its role in authorizing the sale of stock, stating:

> "We do not certify, license, or otherwise regulate any aspect of the construction of utility facilities. We do not grant or authorize the grant of Federal funds, property or privileges for that purpose." Id.

SUMMARY OF ARGUMENT

Petitioners are seeking in this proceeding to use the federal securities laws to accomplish purposes for which those laws were never designed. Petitioners have no securities laws complaints as such. Rather their complaint is that the operating subsidiaries of Southern are building too many generating facilities, and petitioners have impermissibly sought to deal with this matter by attempting to require the Commission, under the Holding Company Act, to cut off all sources of financing for Southern and its operating subsidiaries. 5/

Petitioners' contentions are without merit. The Commission has no authority under the Holding Company Act to comply with petitioners' request that the Commission "determine if the demand for electrical energy in the area serviced by Southern's operating companies is in balance with the proposed additional construction" (Br. 12). Congress enacted the Holding Company Act to eliminate the kinds of financial abuses which had occurred in the misuse of the holding company device prior to the Act's passage in 1935. The Commission is not authorized to regulate the operations of a public utility or, more particularly, to license, plan or approve electric generating plants or their construction and siting. Indeed, even the Federal Power Commission, which Congress did entrust with certain regulatory responsibilities for electric utility operations, was not given the kind of authority, to approve a utility's construction program, which petitioners

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5/ Petitioners' consistent pattern since mid-1980 has been to attack Southern system financing proposals before the Commission, and then institute judicial proceedings against the Commission when petitioners' contentions are rejected. This explains why there are now two Herring, et al. v. SEC cases pending in this Court, and one in the Fifth Circuit, all raising virtually identical issues.

Petitioners further contend that the National Environmental Policy Act of 1969 ("NEPA") requires the Commission to prepare an environmental impact statement before permitting a Section 7 financing declaration to become effective. Petitioners, however, lack standing to challenge the Commission's order because they do not comply with the Supreme Court's basic guidelines for determining when a person is "aggrieved" for purposes of standing to challenge agency action. Specifically, petitioners nowhere allege "injury in fact." Further, they nowhere allege (much less demonstrate) that any environmental interest of theirs has been injured by the Commission's order; petitioners claim economic injury as shareholders and ratepayers of Southern and one of its operating subsidiaries, but the law is clear that pecuniary harm is not within the "zone of interests" NEPA was designed to protect. Moreover, petitioners are unable to establish any "causation-in-fact" between the Commission's action in permitting Southern's declaration to become effective and any specific environmental injury to anyone. The Commission authorized Southern to sell stock; it did not authorize Southern's subsidiaries to build power plants.

Even apart from standing, NEPA is inapplicable because the Commission's order is not a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(c). Under regulations of the Counsel on Environmental Quality ("CEQ Regulations"), the Commission's order is not even an "action" for NEPA purposes because the generating facilities in issue are wholly private endeavors which are neither "entirely or partly financed" by the Commission, nor "assisted, conducted, regulated, or approved" by the Commission. 40 CFR 1508.18(a).

Moreover, even if the Commission's order were held to be an "action," such action is not "major" within the meaning of NEPA. Under the CEQ Regula-

to a year to prepare, and in complex cases may take several years. In circumstances such as this, the Supreme Court has ruled that the requirement for an impact statement is abrogated. Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma, 426 U.S. 776 (1976).

Finally, the Commission correctly ruled that Southern's application did not have to be denied even though its new offering of common stock would be sold to the public at a price lower than the book value of existing shares. While such a sale results in a dilution of the book value of existing shares, petitioners and other existing shareholders will suffer no real harm since publicly traded stock sells at "market" value, not "book" value. Indeed, since public utility common stocks have generally sold below book value for the past decade, Southern and virtually all other utility holding companies would have been precluded throughout that period from making any public common stock offerings if the Commission had adhered to the rule which petitions espouse and insisted that new common stock issues be sold only if the market value of publicly traded shares equals or exceeds book value.

As a matter of policy, the Commission does not require preemptive rights to be extended to utility company shareholders where, as here, holding company stock is sold to underwriters for resale to the public and where, as here, existing shareholders are free to buy as much additional stock as they wish on the open market to maintain, or actually increase, their proportionate ownership interest in the holding company. The position for which petitioners contend would actually harm existing Southern shareholders by causing unnecessary and protracted delays in essential equity financing without which the holding company's utility subsidiaries cannot operate.

A. Congress Was Concerned in the Holding Company Act With Unsound Financial Practices of Utility Holding Companies, Not With the Soundness of Management Decisions on How Best to Produce Electrical Energy.

The enactment of the Holding Company Act was prompted by the unrestrained misuse of the holding company device during the 1920's and early 1930's. To deal with the abuses found, Congress enacted the Public Utility Act of 1935, 49 Stat. 803, and divided that Act into two titles. Title I, the Holding Company Act, was directed to elimination of the kinds of financial abuses which Congress had found, including such abuses which impaired the effectiveness of local regulation. 6/ The Holding Company Act conferred jurisdiction upon the Securities and Exchange Commission for its administration. Congress also found that there were several operational areas affecting rates and services of electric utility companies which required federal regulation. 7/ Accordingly, Congress enacted the Federal Power Act, 16 U.S.C. 824 et seq., as Title II of the Public Utility Act and conferred responsibility for its administration upon a commission (the Federal Power Commission) which specialized in operational matters.

The Holding Company Act includes no provisions for regulating the operations of a utility company and, more particularly, confers no jurisdiction upon the Commission to license, plan or approve electric plants

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6/ Such financial abuses are described in Section 1(b) of the Act, 15 U.S.C. 79a(b). They include issuance of securities upon the basis of fictitious or unsound asset values; issuance by an operating subsidiary of securities where the subsidiary would be burdened with an overcapitalized structure; subjecting subsidiary companies to excessive charges; exerting control over subsidiary companies through disproportionately small investments; and permitting holding companies to grow out of all proportion to the economy of management of the operating subsidiaries.

7/ Federal Power Act: interconnection and coordination of facilities (§ 202), 16 U.S.C. 824a; consolidations (§ 203), 16 U.S.C. 824b; wholesale rates (§§ 205 and 206), 16 U.S.C. 824d, 824e; adequacy of service (§ 207), 16 U.S.C. 824f; maintenance of accounts and records (§§ 209 and 301), 16 U.S.C. 825.

set of standards: First, under Section 7(c), 15 U.S.C. 79g(c), the Commission may not permit a declaration to become effective unless it finds affirmatively (i) that the security is a common stock or a bond with certain characteristics, or (ii) that the security is to be issued and sold solely for certain specified purposes. Second, if the requirements of Sections 7(c) and (g) 9/ are met, Section 7(d) requires that the Commission "shall permit a declaration * * * to become effective unless the Commission finds that --

> "(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding company system;
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> "(2) the security is not reasonably adapted to the earning power of the declarant;
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> "(3) financing by the issue and sale of the particular security is not necessary or approporiate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;
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> "(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;
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> "(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or
>
> "(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers."

It is apparent that none of the foregoing provisions expressly confer upon the Commission the power to disapprove a financing declaration on the basis that the proceeds of such financing will be used to fund a construction program which the Commission concludes is too large in light of

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9/ Section 7(g), 15 U.S.C. 79g(g), prohibits a declaration from becoming effective if the Commission has been informed by a State commission having jurisdiction over a company's issuance of securities that State laws applicable thereto have not been complied with.

It would be absurd, in fact, to try to regulate the growth of an operating subsidiary's generating capacity through the Commission's authority to approve or disapprove sales of securities by the holding company. As noted, an operating subsidiary does not have to obtain the Commission's approval before contracting to build or expand a generating facility. It seeks financing, either directly or through its parent, only when its maturing obligations exceed its cash flow. Management decisions respecting the scope of a construction program or the need for a particular facility long precede the requirement to obtain financing to help pay for such programs and facilities. As the Commission emphasized in Southern I, "capital needs follow rather than precede construction." 20 SEC Docket at 802.

Major construction projects, such as the generating plants in issue in this case, take years to complete. The initial expenditures on these projects are relatively minor. Heavy payments, and therefore heavy financing requirements, generally develop long after the project has been commenced and therefore long after contracts to construct plants and to purchase equipment have been made. Id. Under these circumstances, if Congress had intended the scope of such construction projects to come under Commission scrutiny, it would not have selected a method, i.e., approval action on financing requests, which necessarily does not even come into play until a facility has already been commenced and, perhaps, even substantially built. 10/

It must further be recognized that, while the bills paid by an operating subsidiary are related to a specific construction project, the capital contribution which the subsidiary receives from its parent is used to pay off the

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10/ Appendix B to this brief demonstrates that, of the 13 Southern facilities about which petitioners complain, one is 100% complete, two more are more than 90% complete, and an additional four are more than 30% complete.

recognized that the Federal Power Commission was specially qualified to deal with the technology of energy generation and transmission. In like manner, Congress knew that the Securities and Exchange Commission was well equipped to cope with the financial aspects of utility holding companies and their subsidiaries. Indeed, that is precisely why Congress created separate Acts, conferring separate responsibilities on separate agencies, even though the companies to be regulated under the Congressional scheme were the same.

Even the Federal Power Commission, however, was not given the kind of authority to regulate the operations of electric utilities which petitioners contend the Securities and Exchange Commission should exercise in this case. While the Federal Power Act conferred limited federal jurisdiction over such operational matters as rates, sales and interconnections, it did not extend federal authority to approval of an electric utility's construction program. On the contrary, Section 201(b) of the Federal Power Act expressly states that "[t]he [Federal Power] Commission shall have jurisdiction over all facilities for * * * transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided [herein], over facilities used for the generation of electric energy * * *." 16 U.S.C. 824(b).

In short, nothing in the Federal Power Act gives the Federal Power Commission authority to control the size of a public utility's construction program or otherwise regulate the output of its generating facilities. 12/

12/ Section 202(b) of the Federal Power Act authorizes the Federal Power Commission to direct a public utility to establish physical connection of its transmission facility with the facilities of others, but expressly provides that "the Commission shall have no authority to compel the enlargement of generating facilities for such purposes * * *." 16 U.S.C. 824a(b). Similarly, Section 207 of the Federal Power Act provides that, upon complaint of a State commission that the interstate service of a public utility is inadequate or insufficient, the Federal Power Commission shall determine the proper, adequate, or sufficient service to be furnished. 16 U.S.C. 824f. Section 207 makes clear, however, that "the Commission shall have no authority to compel the enlargement of generating facilities for such purposes * * *."

Power Act, 16 U.S.C. 791, 15/ which was passed in 1920 (and which, therefore, was available as a model when Congress enacted the Public Utility Act in 1935), expressly empowers the Federal Power Commission to issue licenses for the construction, operation and maintenance of hydroelectric power plants. That Act, moreover, does not express Congress' intent in a cryptic phrase but instead contains a panoply of provisions respecting the terms and conditions under which licenses for hydroelectric projects may be issued. 16/ In like manner, the Atomic Energy Act of 1954, 42 U.S.C. 2011 et seq., and implementing regulations, 10 CFR Part 50, establish a pervasive scheme for licensing the construction and operation of nuclear powered generators. Congress did not simply leave the matter of nuclear generator construction and operation to chance by implanting a few out-of-context phrases in a statute directed to other purposes -- the regulatory approach which petitioners erroneously attribute to Congress in the case of the Holding Company Act.

C. The Legislative History of Section 7 of the Holding Company Act As Well As the Commission's Consistent Practice in Acting upon Financing Applications under that Section Fully Confirm the Correctness of the Commission's Decision.

The legislative history of Section 7 fully confirms that that Section was designed to deal with the financial, not the operational, practices of public utilities. The Senate Report on S. 2796, the bill which became the Holding Company Act, emphasized that it was "unsound financial practices

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15/ The Federal Water Power Act of June 10, 1920, c. 285, § 30, 41 Stat. 1077, was redesignated the Federal Power Act, 16 U.S.C. 791a et seq., by the Act of August 26, 1935, c. 687, Title II, § 213, 49 Stat. 863.

16/ Licenses for hydroelectric power projects are subject to detailed statutory criteria governing duration, revocation, preferences and transfers (16 U.S.C. 797a-802). The licenses are also subject to a number of substantive statutory conditions governing, inter alia, alterations, repairs and maintenance (id. § 803-811).

The Commission's approach in considering applications to issue securities under Section 7 has been fully consistent with this legislative history, as well as with the structure and purpose of Section 7, discussed above. Not long after the Act's passage, the Commission, in Consumers Power Company, 6 SEC 444 (1939), construed Section 7(d)(3) as requiring it to consider whether the particular security which was proposed to be issued was the appropriate method to finance the applicant's construction program. The applicant proposed to issue bonds the proceeds of which would be used, in part, to pay for certain property additions to its construction program. The Commission denied the applicant's request to issue bonds for that purpose because the applicant's capitalization was already debt-heavy and the issuance of additional debt could impair the applicant's continued efficient operation. The Commission concluded that the applicant could readily obtain the necessary financing for its construction program through the sale of common stock and therefore that the proposed issuance of additional bonds -- i.e., "financing by the issue and sale of the particular security," 15 U.S.C. 79g(d)(3) (emphasis supplied) — was not "necessary or appropriate to the economical and efficient operation" of the applicant's business. 6 SEC at 474. The Commission made no judgments as to the underlying merits of the applicant's ongoing construction program.

Both before and after Consumers Power, the Commission, in considering applications to issue securities under Section 7, has consistently focused on the necessity and appropriateness of the particular security proposed, not the wisdom of the underlying program that would be funded by the issuance of that security. The Commission has thus considered whether the requested level of short-term borrowing was excessive; 18/ whether the issuance of short-

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18/ Ohio Power Co., Holding Company Act Release No. 19502, 9 SEC Docket 515 (April 27, 1976).

was debt-heavy, and that, under the circumstances, short-term debt financing was especially undesirable. The Commission found that the short-term financing proposal and debt/equity ratio were appropriate and accordingly determined to authorize the securities offering. In a footnote, however, the Commission offered the following caveat (id. at 612 n.5):

> "If the record showed that the portion of Georgia's overall construction relevent to this short-term financing proposal was clearly excessive or grossly improvident, we would be constrained to disapprove or to insist on a reduction in the amount to be borrowed."

Petitioners would like to read this footnote as saying that the Commission will consider whether a construction program is "clearly excessive or grossly improvident" in light of limited consumer demand for electricity, as they contend here. That, however, was clearly not what the Commission meant in Georgia Power. The Commission was referring to the contention in that case that Georgia Power's construction program was "too big," not in relation to consumer demand, but in light of the alleged fact that Georgia Power "has too much debt and too little equity," that "[s]hort-term debt has become a fixture in Southern's capital structure," and that, accordingly, Georgia's construction program should be financed by "long-term securities in amounts large enough to cover all its needs." Id. at 611-12. In short, the Commission simply was not referring to the wisdom of Georgia's construction program, but merely to the method of financing the program, which, of course, the Commission does have authority, under Section 7(d)(3), to consider. While the Commission rejected intervenor's contentions on the facts before it, the Commission indicated in the quoted footnote that it would insist upon a reduction of short-term borrowing if the portion of Georgia's construction related

> "Nowhere in the Act is there a provision granting to the SEC the sort of regulatory power attributed to it by the petitioner. Indeed, the congressional choice of that Commission to administer the Act is, in itself, the strongest sort of proof that the general purpose of the Act was to regulate the issuance of securities which could not be reached by state commissions." 122 U.S. App. D.C. at 369; 353 F.2d at 907.

The same point was repeated in City of Lafayette where this Court held:

> "[T]he general doctrine requiring an agency to take account of antitrust considerations does not extend to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and projected) and the agency, here the SEC, has not been given any regulatory jurisdiction over operations of the company. The SEC has no jurisdiction over operations and stands in a different posture from the FPC which, as we have already noted, has regulatory jurisdiction over operations * * *." 147 U.S. App. D.C. at 112; 454 F.2d at 955.

The Commission's decision in the present case is thus in full accord with the conclusions which this Court itself has reached, namely, that the Commission has no authority under the Holding Company Act to regulate the operations of a public utility and, therefore, has no authority to determine whether or not the generating capacity of the Southern system is excessive in light of anticipated consumer demand for electricity through the end of this century. 24/

24/ In view of this lack of Commission authority, the Commission properly denied petitioners' request for an evidentiary hearing to inquire into the propriety of Southern's construction program. The Commission's determination with respect to petitioners' claim of excessive construction "turned not on determination of facts but * * * [on] legal conclusions * * *" based on uncontroverted facts. Anti-Defamation League of B'nai B'rith, Pac. S.W.R.O. v. FCC, 131 U. S. App. D.C. 146, 403 F. 2d 169, 171 (D.C. Cir. 1968), cert. denied, 394 U.S. 930 (1969(. This determination that it lacks the authority to make the type of inquiry petitioners request could not have been "enhanced or assisted by the receipt of evidence." City of Lafayette, supra, 454 F.2d at 953. In such instances, as this Court has repeatedly held, "an agency is not required to hold an evidentiary hearing when it can serve no purpose." Independent Bankers Ass'n of Georgia v. Board of Governors of the Federal Reserve System, 170 U.S. App. D.C. 278, 516 F.2d 1206, 1220 (1975). Accord, Citizens for Allegan County, Inc. v. FPC, 134 U.S. App. D.C. 229, 232, 414 F.2d 1125, 1128 (1969).

has provided guidance for determining when a person is "aggrieved" for purposes of standing to challenge agency action. 25/

First, in order to comply with the "case" or "controversy" requirement of Article III of the Constitution, petitioners must establish that the Commission's action caused them "injury in fact." Second, petitioners must show that their alleged injuries, if any, are within the "zone of interests" protected by the statute allegedly violated. United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton (Mineral King), 405 U.S. 727 (1972); Data Processing Service v. Camp, 397 U.S. 150 (1970). Finally, petitioners must allege an "injury that fairly can be traced to the challenged action of the [agency], and not injury that results from an independent action of some third party not before the court." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976).

Petitioners have satisfied none of these criteria.

1. Injury in fact

In order to comply with the Supreme Court's "injury in fact" test, "[p]etitioners must allege and show that they personally have been injured" by the Commission action which they challenge. Warth v. Selden, 422 U.S. 490, 502 (1975) (emphasis supplied). The party who seeks review of agency action must "be himself among the injured." Sierra Club v. Morton (Mineral King), supra, 405 U.S. at 735 (emphasis supplied). He must "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Selden, supra, 422 U.S.

25/ These decisions are relevant in construing the word "aggrieved" in Section 24(a) of the Holding Company Act. Cf. Northwestern Public Service Co. v. Federal Power Commission, 172 U. S. App. D.C. 54, 520 F.2d 454 (1975).

throughout the 100,000 square mile Southern service area. Absent is any allegation that any of the various construction projects will cause a "distinct and palpable injury" to petitioners themselves. No facts are adduced by the petitioners as to where the various construction projects are to be located; what the adverse impacts are, if any, of those projects on the surrounding environment; and how far those impacts may extend geographically. 26/

In short, while petitioners have demonstrated that they are upset in principle with Southern's construction program, they have failed to allege any environmental interests that give them "a direct stake in the controversy" with interests more concrete than those of "concerned bystanders." United States v. SCRAP, supra, 412 U.S. at 687. Petitioners are essentially in no different position than the petitioner in Martin-Trigona, supra, who vaguely alleged injury but without concrete facts to support the allegation. This Court there held:

> "The only allegations of injury in fact are some conclusory statements in petitioner's brief in this Court which are clearly not sufficient to obtain standing before the Board and are not, we hold, sufficient to obtain standing in this Court." 166 U.S. App. D.C. at 134, 509 F.2d at 367 (footnote omitted).

2. Zone of interests

While petitioners fail to allege injury to any specific environmental interest personal to them, they do claim that they have been individually harmed as shareholders of Southern and as ratepayers of Georgia Power. Petitioners assert, in particular, that the issuance of Southern common stock

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26/ Appendix B hereto demonstrates that petitioners, all residents of Atlanta, live nowhere close to any of the construction projects about which they complain. The closest projects are approximately 52 miles from Atlanta and are all coal-fired. Two of the three nuclear facilities are 152 miles each from Atlanta and the third nuclear facility is 207 miles from Atlanta.

contemplated by NEPA for purposes of standing." Realty Income Trust v. Eckerd, 183 U.S. App. D.C. 426, 564 F.2d 447 (1977); Gifford-Hill & Co., Inc. v. F.T.C., 173 U.S. App. D.C. 135, 523 F.2d 730 (1975). 28/

3. Causation-in-fact

Even if petitioners were able to demonstrate a palpable injury to some personal environmental interest of theirs, they still would be required to "establish that, in fact, the asserted injury was the consequence of the defendant's actions, or that prospective relief will remove the harm." Warth v. Selden, supra, 422 U.S. at 505. See also Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978); Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973); Committee for Auto Responsibility v. Solomon, supra, 195 U.S. App. D.C. at 417, 603 F.2d at 997. Petitioners have not, and cannot, make such a showing.

Petitioners challenge an order of the Commission which does no more than permit Southern's common stock declaration to become effective. Petitioners completely fail to tie that Commission action to any specific environmental injury which petitioners have suffered. While petitioners contend that the construction projects of Southern's subsidiaries "would be partially financed through the proposed sale of common stock" (Br. 9), they make no attempt to demonstrate that any particular portion of the cash proceeds resulting from such sale would be used to fund any particular project, much less one causing injury to petitioners personally. The fact is that such a demonstration cannot be made. The financing proceeds here in issue are not earmarked for any particular capital improvement. They are used by Southern

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28/ But cf. Natural Resources Defense Council, Inc. v. Securities and Exchange Commission, 196 U.S. App. D.C. 124, 606 F.2d 1031 (1979) (NEPA issue not involving environmental impact statement).

By its terms, Section 102(2)(c) of NEPA, the provision requiring impact statements, has no application to state, local or private actions, however environmentally significant such actions may be. See Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission, 599 F.2d 1333, 1344 (5th Cir. 1979); South Dakota v. Andrus, 614 F.2d 1190, 1193 (8th Cir. 1980). The statute speaks only to federal agencies and federal actions. Moreover, not all federal actions are within the ambit of NEPA; only "major Federal actions" which "significantly [affect] the quality of the human environment." The question presented, therefore, is not whether the various construction projects of Southern's operating subsidiaries may have significant environmental impacts. Rather the issue is whether the Commission's order itself is a major federal action that will significantly affect the environment.

In assessing agency action under NEPA standards, a court must first determine whether the agency has undertaken any action at all within the meaning of NEPA. If there is "action," the court must then determine whether such action is major and whether it significantly affects the quality of the human environment. NAACP v. Medical Center, Inc., 584 F.2d 619, 629 (3rd Cir. 1978); South Dakota v. Andrus, supra, 614 F.2d at 1193. With respect to the first of these determinations, under the governing Regulations of the Council on Environmental Quality ("CEQ"), 40 CFR §§ 1500 et seq. (1977), 29/ the Commission's order does not even constitute an "action" within the meaning

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29/ The Supreme Court has held that the CEQ Regulations are entitled to "substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979). Similarly, this Court stated in Sierra Club v. Morton, supra, that "[w]hile CEQ is not strictly charged with administration of NEPA, it is charged with the duty of reviewing and appraising agency compliance with the statute, and so is entitled to deference." 169 U.S. App. D.C. at 38 n.24, 514 F.2d at 874 n.24.

Even if the Commission's order were held to be "action" for purposes of Section 102(2)(C), it cannot reasonably be concluded that such action is "major" within the meaning of NEPA. The CEQ Regulations make clear that not all federal actions are "major," thus requiring the preparation of an EIS. According to the CEQ Regulations:

> "'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 CFR § 1508.18 (emphasis added).

The Commission's actions with respect to Southern are plainly outside the scope of this language because the construction activities of Southern's operating subsidiaries, however "major" they may be as private endeavors, will in no way be "potentially subject to Federal control and responsibility." Id. On the contrary, the Commission has authority under Section 7 of the Act only to make the specific financial determinations called for therein. The Commission has no statutory authority to approve, disapprove or regulate a public utility's construction program. Moreover, the Commission has no authority under the Act, directly or even by implication, to take environmental factors into account in determining whether to permit a declaration to become effective. If the statutory criteria of Section 7 are met, Congress has mandated that the Commission must permit the declaration to become effective. 31/

31/ The Commission has adopted "Regulations Pertaining to the Protection of the Environment," 17 CFR 200.550 et seq. In adopting these regulations, the Commission concluded that actions it takes under the Securities Act, the Securities Exchange Act, the Trust Indenture Act, the Investment Company Act and the Investment Advisers Act were of such a nature that they could be categorically excluded from NEPA impact statement requirements. 41 F.R. 41176. However, because of the wide variety of transactions possible involving holding companies and the greater scope of Commission authority in certain aspects of holding company regulation, the Commission decided that it would not categorically

(footnote continued)

taken a "major" action because of the presence of two critical factors bearing directly on the government's responsibility for the environmental impact of the non-federal action. First, the government's action under the statute was a legal precondition which permitted the non-federal party to proceed with activity which significantly affected the environment. Second, the statute could reasonably be interpreted as giving the government discretion to consider environmental effects in its decision-making processes. These two factors were emphasized by the Third Circuit in NAACP v. Medical Center, supra, when the Court stated:

> "We believe that analysis of these cases reveals that in order to determine if an agency's role constitutes major action under NEPA, a court must focus its inquiry on whether the action of the federal agency demonstrates a federal 'responsibility' for the action. * * * When the agency 'enables' another to impact on the environment, the court must ascertain whether the agency action is a legal requirement for the other party to affect the environment and whether the agency has any discretion to take environmental considerations into account before acting." 584 F.2d at 634 (citations omitted).

1. The legal precondition element

Federal action may be considered "major" if it permits the non-federal party to take action affecting the environment which could not otherwise be lawfully taken without federal approval. In these so-called "enablement" cases, the federal action is a legal precondition to the non-federal action. "In other words, the agency's action under the statute must be a legal precondition which authorizes the other party to proceed with action which will affect the environment." NAACP v. Medical Center, supra, 584 F.2d at 632.

For example, in Davis v. Morton, supra, the Tenth Circuit held that the Secretary of the Interior should have prepared an EIS before approving a 99-year lease of restricted Indian lands entered into between the Pueblo

the Forest Service had authority to "approve locations of timber roads, logging camps and buildings; mark the trees to be cut; and negotiate payment for the timber cut." 498 F.2d at 1322. The private company could not lawfully have engaged in the timber cutting operations in a federal wilderness area without the Forest Service's approval. Id.

In each of the foregoing cases, and others like them, there is a legitimate reason, in terms of federal decision-making, to require the federal agency to prepare an EIS. The agency, by its action, has enabled a non-federal party to engage in activity which has had a significant environmental impact and which could not lawfully have occurred without the federal approval. The federal government, in short, had the authority in these cases to prevent the non-federal endeavor entirely, and therefore, in deciding whether to permit the non-federal activity to occur, could make use of the information that an EIS would disclose. 36/

By contrast, where federal approval is not a legal precondition to the non-federal activity and when, therefore, the non-federal party may lawfully engage in activity which affects the environment irrespective of any approval action by the federal government, "there is no basis for believing that Congress intended the federal agency to file an EIS; NEPA is inapplicable where there is no decision to be made by the relevant federal agency." NAACP v. Medical Center, supra, 584 F.2d at 635 (Higginbotham, J., concurring).

In NAACP v. Medical Center, supra, for example, the Third Circuit held that the Secretary of Health, Education and Welfare did not have to prepare

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36/ See, e.g., Jones v. Lynn, 477 F.2d 885, 889-90 (1st Cir. 1973) ("The purpose of NEPA's * * * impact statement is to guide and advise a federal agency in its decisional process.")

funding; other approvals, more specifically related to a particular project, must be granted. The Court ruled that the federal certification process was not major federal action requiring preparation of an EIS since certification was not a legal precondition to non-federal action. Citing NAACP v. Medical Center, supra, with approval, the Fifth Circuit in Atlanta Coalition stated:

> "§ 1122 approval [in Medical Center] is not a 'legal precondition' to action -- that is, a legally necessary approval required before a private party may act. So too with 3C certification: * * * [the federal government's] certification of the planning process involves no consideration of the substantive aspects of the plans and thus does not take into account environmental factors; * * * and 3C certification is not a legal precondition to action." 599 F.2d at 1345 n.16 (emphasis in original).

In the instant case, as in Medical Center and Atlanta Coalition, Commission approval of a holding company's financing application is not a legal precondition to the actions of the holding company's subsidiaries in building generating facilities which may directly affect the environment. The Commission has no authority under the Holding Company Act to approve or disapprove the building of generating facilities by public utilities. What petitioners are claiming is that Commission approval of financing is major federal action affecting the environment because without such authorization the construction projects would be eliminated or substantially reduced, thereby resulting in little or no effect on the environment. Not only is this incorrect factually, since a utility may be able to carry on its construction through its internally generated funds, but the Commission's authorization for financing does not satisfy the legal precondition requirement. Accordingly, the Commission's action in permitting a declaration to become effective under Section

patent so long as all of the requirements of the mining laws have been met. 614 F.2d at 1193. The Secretary has limited authority to assure that the claimant has complied with applicable statutory requirements, but has no discretion to consider environmental factors in deciding whether or not the mineral patent should issue. The Court stated that since "the primary purpose of the impact statement is to aid agency decisionmaking, courts have indicated that nondiscretionary acts should be exempt from the requirement." Id. (citations omitted).

In like manner, the Holding Company Act gives the Commission no discretion to consider environmental factors in deciding whether to permit a declaration for the sale of securities to become effective. Section 7(d) states that the Commission "shall permit a declaration regarding the issue or sale of a security to become effective" so long as the specific standards set forth in subsections 7(c), 7(d), and 7(g) of the Act have been satisfied. None of these subsections has any language which relates in any way to environmental matters.

It is true that subsection 7(d)(6) of the Act, 15 U.S.C. 79g(d)(6), requires the Commission to consider whether

> "the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers."

The very language of this provision, however, makes clear that it is the "terms and conditions of the issue or sale" which must be "detrimental to the public interest" before the Commission can deny effectiveness to the declaration. Ameliorating the environmental effects that may flow from the use of the financing proceeds is not, by any reasonable construction of subsection 7(d)(6), a term or condition "of the issue or sale of the security."

analyzing the various construction projects of Southern's operating subsidiaries. In circumstances such as this the Supreme Court has ruled that NEPA's EIS requirement is inapplicable. Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma, 426 U.S. 776 (1976).

Section 7(b) of the Holding Company Act provides that a declaration shall become effective "within such reasonable period of time" after the filing thereof as the Commission shall specify by rule 39/ or order. Southern's declaration was filed with the Commission on June 6, 1980, and was ordered effective by the Commission on October 29, 1980. 40/ In that time span (less than five months) the Commission could not have analyzed

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39/ Rule 23(c) under the Act provides:

> "Effective Date. A declaration or application, which complies with the applicable requirement of the Act and the rules and regulations thereunder, will become effective or be granted respectively by an order to issue upon the expiration of the period prescribed in the [Commission's] notice of filing." 17 CFR § 250.23(c).

From 1940 to 1963, the Commission's Rule U-8(c) under the Holding Company Act specified that a declaration would become effective "on the thirtieth day after the filing thereof or the fifteenth day after the filing of the last amendment thereto, whichever is later" (Holding Company Act Release No. 2161, July 10, 1940). On June 3, 1963, the Rule was changed to its present form, supra, and the declaration form, Form U-1, was concurrently amended in Item 5(a) thereof to provide that if the date requested by the declarant "is less than 40 days from the date of the original filing, set forth the reasons for acceleration." 4 Fed. Sec. L. Rep. [CCH] ¶ 40,107. Thus, while the Commission in 1963 abandoned an inflexible 30-day period for effectiveness, it intended that effectiveness would normally occur approximately 40 days from filing, unless accelerated. In Southern I, the Commission thus stated that "[a] period of 40-60 days from filing is standard for Section 7 applications for general financing." 20 SEC Docket at 804 n. 14.

40/ The time between filing of Southern's declaration (June 6) and issuance of the order (October 29) in the present case was atypically long, in substantial part because of the intervention of petitioners and the delays necessarily flowing therefrom.

20 SEC Docket at 804. 42/ The Commission explained why time is of the essence in public utility financings in these terms:

> "Economy and efficiency in financing precludes raising new capital, and paying interest and dividends thereon, until it is needed, a policy embodied * * * in Section 7(d)(3) in the Act * * *. [T]he long term financing governed by Section 7 consists of underwritten public offerings to be used to refund accumulated short term debt or maturing long term obligations. Since the Act deals with large issuers, such offerings are as large as the issuer and underwriters believe the market will absorb. They are designed to fit current market preferences, and are arranged with an eye to the scheduling of other large public offerings.
>
> Accordingly, any significant delay in our order under Section 7 would create a financial crisis for the issuer. The market to which the proposed offering was directed would be missed, and the obligations it was designed to pay would be unsatisfied." Id.

Where circumstances such as these are present, the Supreme Court ruled in Flint Ridge, supra, that the requirement for an EIS is abrogated. The question presented in Flint Ridge was whether the Department of Housing and Urban Development ("HUD") had to prepare an EIS before it could allow a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act ("Disclosure Act") to become effective. The Supreme Court concluded that an EIS did not have to be prepared because it was impossible for HUD to comply with the statutory duty under the Disclosure Act to allow statements to go into effect within 30 days of filing, absent inaccurate or incomplete disclosure, 43/

42/ The construction projects to which the Commission was referring in Southern I are precisely the same construction projects involved here.

43/ Under the Disclosure Act, disclosure statements become effective automatically within 30 days of filing unless the Secretary of HUD determines that the statement is incomplete or inaccurate in any material respect, in which case the effective date is suspended until 30 days after the developer files the information necessary to complete or correct the report. If the statement is complete and accurate on its face, however, it must be permitted to go into effect. The Secretary has no power to evaluate the substance of the developer's proposal. 426 U.S. at 781.

specify a fixed period within which the Commission must act, it is clear, in light of the pressing financing requirements of public utility holding companies and their subsidiaries, that such action must be taken expeditiously to avoid "a financial crisis for the issuer" inherent in "any significant delay." Southern I, 20 SEC Docket at 804. In short, while a "reasonable period of time" may not be as inflexible as the 30-day period established by the Disclosure Act, it also is not so open-ended that it may accommodate many months, if not several years, of delay while impact statements are prepared for the multifarious construction activities of holding companies and their operating subsidiaries.

III. THE COMMISSION CORRECTLY RULED THAT SOUTHERN COMMON STOCK COULD BE SOLD TO THE PUBLIC AT LESS THAN BOOK VALUE AND THAT A PREEMPTIVE RIGHTS OFFERING IN THIS INSTANCE WOULD HAVE BEEN AN UNNECESSARILY COMPLEX AND TIME CONSUMING PROCEDURE NOT NEEDED FOR THE PROTECTION OF SOUTHERN'S SHAREHOLDERS.

In their motion to intervene below (R. 164), petitioners argued that Southern's declaration should be denied until such time as new issues of Southern's common stock could be offered to the public at a price which would not result in a dilution of the book value of petitioners' existing shares, or, alternatively, that existing Southern shareholders should be given preemptive rights to purchase shares sold pursuant to the declaration. Petitioners now contend that the Commission should at least hold a hearing on these issues with a view, presumably, of refusing to permit Southern to make further common stock offerings until the market value of its common stock equals or exceeds book value or, alternatively, ordering that such stock may be sold to the general public only if preemptive rights are first extended to existing Southern shareholders. These alternative contentions will be considered in turn.

this Court, Southern's subsidiaries, and Alabama Power in particular, would have been precluded from selling first mortgage bonds, preferred stock, and short-term notes (R. 182-83), and thereby would be unable to meet their existing debt obligations since maturing obligations for the Southern system exceed internal cash flow. Southern I, 20 SEC Docket at 802. Moreover, as the Commission also found, the decline in the common equity-to-debt ratio for the Southern system to under 30% 46/ could "only be corrected by an offering of new common stock of the magnitude proposed * * *" (R. 248).

As the Commission stated below, new common stock of an actively traded company, such as Southern, must necessarily be sold to the public at the market price of outstanding shares (R. 249). No one will pay book value for newly issued shares if previously issued stock with identical rights can be purchased for less than book value. 47/ Southern must, therefore, either sell its new common stock to the public at market price or not sell it at all. Accordingly, if Southern were to be compelled to avoid any dilution of book value of outstanding shares in the sale of its new common stock to the public, then it could never issue new common stock so long as the market price of the stock was less than its book value.

46/ Based on various provisions of the Act, including section 7(d), 15 U.S.C. 79g(d), the Commission has consistently urged the maintainence of sound capital structures by registered holding companies. While the Commission has not attempted to prescribe optimum or ideal capitalization ratios for such companies, the general working policy of the Commission has been that long-term debt should not exceed 60% of capitalization and that common equity should not be less than 30% of capitalization. See Kentucky Power Co., 41 SEC 29 (1961); Eastern Utilities Associates, 34 SEC 390 (1952); see generally L. Loss. Securities Regulation 383 (2d ed. 1961).

47/ At June 30, 1980, the book value of Southern common stock was $16.69 per share. Southern estimated, based upon the September 19, 1980 closing price for Southern common stock, that its offering price for the new issue proposed by the declaration would be $12 per share (R. 249).

public at less than book value. This determination by the Commission rests

> "squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process."

Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 209 (1947). See E.I. du Pont deNemours & Co. v. Collins, 432 U.S. 46, 53-54 (1977).

Petitioners alternatively contend that even if the Commission was not required to prevent the declaration from becoming effective, it should have insisted, as a condition for the sale, that Southern first grant preemptive rights to existing shareholders to purchase shares sold pursuant to the declaration. 50/ As the Commission noted, however, (R. 249), not only is

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49/ (Continued)

equivalent of book value for their shares. While book value may have some relevance in determining the "value" of a stock, the preferred measure of value for publicly traded stock is market price -- i.e., the price a shareholder could receive at any given time for the shares. See Seaboard World Airlines v. Tiger International, Inc., 600 F.2d 355, 361-62 (5th Cir. 1979) citing Mills v. Electric Auto-Lite Co., 552 F.2d 1239, 1247-48 (7th Cir.), cert. denied, 434 U.S. 922 (1977); Kaufman v. Lawrence, 386 F. Supp. 12, 16 (S.D.N.Y. 1974), aff'd 514 F.2d 283 (2d Cir. 1975).

50/ The traditional justification for preemptive rights, entitling existing stockholders to subscribe to new issues, is said to be to protect their respective participations in assets, earnings, and control. Cf. J. Meck & W. Cary, Regulation of Corporate Finance and Management Under the Public Utility Company Holding Act of 1935, 52 Harv. L. Rev. 216, 229 (1938) ("[T]here is considerable doubt as to whether a stockholder without a preemptive right is in any worse position legally than one with such a right * * *") (footnote omitted).

Nothing in the Holding Company Act dictates a contrary result. The Act is silent on the subject of preemptive rights. 52/ It is true, as petitioners contend (Br. 28-29), that in the very early years of the Act's administration the Commission considered preemptive rights to be an important protection for the stockholders of public utility holding companies and frowned upon their deletion from holding company articles of incorporation. See, e.g., Peoples Light & Power Company, Holding Company Act Release No. 885 (November 16, 1937); National Gas & Electric Corp., Holding Company Act Release No. 768 (August 4, 1937). The Commission soon recognized, however, that preemptive rights were not a necessary protection where, as here, holding company stock was sold to underwriters for resale to the public and where, as here, existing shareholders were free to buy as much additional stock as they wished on the open market either to maintain or to actually increase their proportionate ownership interest in the holding company. 53/ Thus, in the 1947 proceeding which approved the creation of Southern as a registered holding company, the Commission approved the very preemptive rights provision which presently exists in Southern's charter and which

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52/ An earlier House version of the Act and the version originally passed by the Senate specified that the Commission, prior to permitting a declaration to become effective, could impose "such terms and conditions as the Commission may deem necessary and appropriate in the public interest" and that such terms and conditions "may require the granting of a preemptive right to security holders irrespective of a previous waiver of such rights." H.R. 5243, 74th Cong., 1st Sess. §6(h) (1935); S. 2796, 74th Cong., 1st Sess. §7(f) (1935). All such references to the granting of preemptive rights as a condition to permitting declarations to become effective were stricken by the substitute agreed to in conference and enacted as present section 7(f), 15 U.S.C. 79g(f), which provides that the Commission may include in any order "such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section." See H. Rep. No. 1903, 74th Cong., 1st Sess. 67 (Conference Report 1935).

53/ Southern stock is listed on the New York Stock Exchange, and as of June 30, 1980, it had over 150 million shares outstanding (R. 104, 131, 249).

of the reasons given by companies

> "[t]he Commission * * * determined that the staff need no longer insist that companies give reasons (as required by the letter * * * [of policy issued by the Commission in 1953]) in connection with proposals to offer common stock through underwriters, at competitive bidding, rather than through preemptive rights offerings to stockholders." 55/

As the orders cited above clearly demonstrate, this policy has been followed consistently from 1955 to the present and has proven in practice to be fully consistent with the protection of investors under the Holding Company Act. If a holding company's articles of incorporation do not require preemptive rights to be extended where new underwritten issues of common stock are publicly offered, the Commission has not itself imposed such a requirement. Nor has the Commission required management to set forth any justification as to why a public offering is preferable. The position for which petitioners contend could, as the Commision noted below (R. 249), actually harm investors. A preemptive rights offering would cause unnecessary and protracted delays in equity financing for holding companies and their operating subsidiaries that could jeopardize the ability of such companies to maintain an adequate equity base to support their continuous sale of debt instruments. 56/

55/ Minute of the Commission's meeting dated February 7, 1955, attached hereto as Appendix C. The reasons which the holding companies gave for not making rights offerings were "the desire of the company to avoid, during unsettled market conditions, the lengthy delay incident to a 14 to 18 day rights offering to stockholders; the difficulty of providing or insuring any real value to stockholders for subscription rights in a small offering such as a 1 for 15 rights offering; and the printing, mailing, and other expense involved in a rights offering." (Ibid.)

56/ Since petitioners' dilution and preemptive rights claims did not involve material disputes of fact, the Commission properly determined not to hold an evidentiary hearing on those claims. See note 24, supra. The Commission's determination on those claims involved a discretionary judgment made on the basis of undisputed facts.

STATUTORY APPENDIX
(APPENDIX A)

Public Utility Holding Company Act of 1935, Sections 6(a) and (b), 15 U.S.C. 79f(a) and (b).

UNLAWFUL SECURITY TRANSACTIONS BY REGISTERED HOLDING AND SUBSIDIARY COMPANIES

Sec. 6. (a) Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

(b) The provisions of subsection (a) shall not apply to the issue, renewal, or guaranty by a registered holding company or subsidiary company thereof of a note or draft (including the pledge of any security as collateral therefor) if such note or draft (1) is not part of a public offering, (2) matures or is renewed for not more than nine months, exclusive of days of grace, after the date of such issue, renewal, or guaranty thereof, and (3) aggregates (together with all other then outstanding notes and drafts of a maturity of nine months or less, exclusive of days of grace, as to which such company is primarily or secondarily liable) not more than 5 per centum of the principal amount and par value of the other securities of such company then outstanding, or such greater per centum thereof as the Commission upon application may by order authorize as necessary or appropriate in the public interest or for the protection of investors or consumers. In the case of securities having no principal amount or no par value, the value for the purposes of this subsection shall be the fair market value as of the date of issue. The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State commission of the State in which such subsidiary company is organized and doing business, or if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company when such subsidiary company is not a holding company, a public utility company, an investment company, or a fiscal or financing agency of a holding company, a public utility company, or an investment company. The provisions of subsection (a) shall not apply to the issue, by a registered holding company or subsidiary company thereof, of a security issued pursuant to the terms of any security outstanding on January 1, 1935, giving the holder of such outstanding security the right to convert such outstanding security into another security of the same issuer or of another person, or giving the right to subscribe to another security of the same issuer or another issuer. Within ten days after any issue, sale, renewal, or guaranty exempted from the application of subsection (a) by or under authority of this subsection, such holding company or subsidiary company thereof shall file with the Commission a certificate of notification in such form and setting forth such of the information required in a declaration under section 7 as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

Public Utility Holding Company Act of 1935,
Section 7, 15 U.S.C. 79g (continued).

(2) such security is to be issued or sold solely (A) for the purpose of refunding, extending, exchanging, or discharging an outstanding security of the declarant and/or a predecessor company thereof or for the purpose of effecting a merger, consolidation, or other reorganization; (B) for the purpose of financing the business of the declarant as a public-utility company; (C) for the purpose of financing the business of the declarant, when the declarant is neither a holding company nor a public-utility company; and/or (D) for necessary and urgent corporate purposes of the declarant where the requirements of the provisions of paragraph (1) would impose an unreasonable financial burden upon the declarant and are not necessary or appropriate in the public interest or for the protection of investors or consumers; or

(3) such security is one the issuance of which was authorized by the company prior to January 1, 1935, and which the Commission by rules and regulations or order authorizes as necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding company system;

(2) the security is not reasonably adapted to the earning power of the declarant;

(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;

(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or

(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers.

(e) If the requirements of subsection (g) are satisfied, the Commission shall permit a declaration to become effective regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commission finds that such exercise of such privilege or right will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers.

(f) Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section

(g) If a State commission or State securities commission, having jurisdiction over any of the acts enumerated in subsection (a) of section 6, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected.

CURRENT CONSTRUCTION PROGRAM OF SOUTHEPN
COMPANY SUBSIDIARIES
(APPENDIX B)

CURRENT CONSTRUCTION PROGRAM OF SOUTHERN COMPANY SUBSIDIARIES a/

COMPANY	GENERATING UNIT	TYPE OF UNIT	LOCATION b/	ESTIMATED DATE OF COMPLETION	EXPENDITURES (millions) as of 1/1/81	Future	PERCENTAGE OF COMPLETION AS OF 1/1/81 c/	APPROXIMATE DISTANCE FROM ATLANTA, GA. (MILES) d/
Alabama Power	Farley, Unit No. 2	Nuclear	Dothan, Ala.	1981	$ 667	30	96%	207
	Harris Dam, Unit Nos. 1 and 2	Hydro	Wedowee , Ala.	1983	106	73	59%	70
	Miller, Unit No. 2	Coal	Birmingham, Ala.	1985	179	295	38%	150
	Miller, Unit No. 3	Coal	Birmingham, Ala.	1989	60	411	13%	150
Georgia Power	Wallace	Hydro	Eatonton, Ga.	1981	168	-	100%	60
	Scherer, Unit No. 1	Coal	Forsyth, Ga.	1982	80	64	58%	52
	Scherer, Unit No. 2	Coal	Forsyth, Ga.	1984	30	74	30%	52
	Vogtle, Unit No. 1	Nuclear	Augusta, Ga.	1985	433	625	41%	152
	Rocky Mountain	Hydro	Armuchee, Ga.	1987	23	390	6%	55
	Scherer, Unit No. 3	Coal	Forsyth, Ga.	1987	40	1,110	3%	52
	Vogtle, Unit No. 2	Nuclear	Augusta, Ga.	1987	113	538	17%	152
	Scherer, Unit No. 4	Coal	Forsyth, Ga.	1989	40	1,110	3%	52
Gulf Power	Daniel, Unit No. 2	Coal	Pascagoula, Miss.	1981	217	23	90%	370

a/ Information derived from Southern's 1980 Annual Report to shareholders and the rec... (R. 99-101, 117, 162, 183, 194-96) unless noted otherwise.

b/ Based on information obtained from Southern Company.

c/ Calculated by dividing expenditures made as of 1/1/81 by proposed total expenditures.

d/ Estimated by Commission.

MINUTE OF COMMISSION MEETING HELD
FEBRUARY 7, 1955
(APPENDIX C)

MEETING OF THE SECURITIES AND EXCHANGE COMMISSION

Monday - February 7, 1955 - 11:30 A. M.

COMMISSIONERS PRESENT:

Ralph H. Demmler, Chairman
Paul R. Rowen
J. Sinclair Armstrong
A. Jackson Goodwin, Jr.

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Mr. McDowell, Director; Mr. Garrett, Associate Director; Mr. Freedman, Assistant Director; and Mr. McQueeney of the Division of Corporate Regulation were present.

Consideration was given to a memorandum dated February 4, 1955, from the Division of Corporate Regulation, with respect to the following joint application-declaration filed under the Act:

Central and South West Corporation)
Public Service Company of Oklahoma)
Southwestern Gas and Electric Company) (File 70-3338)
Central Power and Light Company)

Joint application-declaration, pursuant to Sections 6, 7, 9, 10, and 12 (f) of the Act, in regard to the following proposals:

(1) Proposed issuance and sale by Central, to or through underwriters or investment bankers who shall have agreed promptly to make a public offering thereof, of 600,000 shares of common stock, $5 par value, at competitive bidding, pursuant to Rule U-50;

(2) Proposed amendment of the Articles of Incorporation of Public Service and Central Power & Light so as to increase the number of shares of their common stocks; and

(3) Proposed issuance and sale by Public Service, Southwestern, and Central Power & Light, from time to time during 1955 as funds are required by such companies for construction, and the proposed acquisition by Central and South West, of, respectively, 300,000, 200,000 and 300,000 shares of common stock.

The memorandum from the Division stated that the staff had no difficulty with any of the proposed transactions. However, the memorandum pointed out that Central and South West did not propose to offer the 600,000 shares to its stockholders on a preemptive rights basis, and, in this connection, the memorandum referred to the following Minutes of the Com-

Secretary's Certificate

I, George A. Fitzsimmons, Secretary to the Securities and Exchange Commission, do hereby certify that the foregoing document is a true and correct copy of the Minute of the Commission meeting held on February 7, 1955.

George A. Fitzsimmons
Secretary