

## JUDICIAL REVIEW OF VOLUNTARY REORGANIZATION PLANS UNDER SECTION 11(e) OF THE PUBLIC UTILITY HOLDING COMPANY ACT\*

PUBLIC utilities, when ordered to reorganize under the Public Utility Holding Company Act,<sup>1</sup> may submit voluntary reorganization plans to the SEC.<sup>2</sup> Under Section 11(e), a voluntary plan, if accepted by the SEC,<sup>3</sup> is reviewable and enforceable at the company's request by a federal district court in a district where the company resides or does business.<sup>4</sup> To insure orderly review of the entire plan in a single forum, the SEC frequently

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\* *Leventritt v. SEC*, 178 F. 2d 336 (2d Cir. 1949).

1. 49 STAT. 803-38 (1935), 15 U.S.C. § 79 (1946), hereafter cited as 15 U.S.C. § 79. For a discussion of the entire Act, especially the various subsections of Section 11, see Meer, *Reorganizations under the Bankruptcy and Holding Company Acts*, 27 TEX. L. REV. 14 (1948); Note, *The Public Utility Holding Company Act of 1935*, 30 ILL. L. REV. 509 (1935); *id.* at 648.

2. Section 11(e) of the Act provides that, subject to the rules promulgated by the SEC, "any registered holding company or any subsidiary company of a registered holding company may . . . submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company . . . for the purpose of enabling such company or any subsidiary thereof to comply with the provisions of subsection (b). . . ." 15 U.S.C. § 79k(e). For SEC regulations governing the submission of voluntary plans, see SECURITIES AND EXCHANGE COMMISSION, GENERAL RULES AND REGULATIONS UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 (1946); SECURITIES AND EXCHANGE RULES OF PRACTICE (1946).

3. Section 11(e) provides that "if, after notice and opportunity for hearing, the Commission shall find such plan as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan. . . ." 15 U.S.C. § 79k(e).

If the 11(e) plan is disapproved by the SEC, a party aggrieved thereby may obtain a review of the Commission's action in a United States Court of Appeals under Section 24(a) and, by certiorari, in the Supreme Court. 15 U.S.C. § 79k(a); 62 STAT. 869, 928 (1948), 28 U.S.C. § 1254 (1948). *E.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), *rehearing denied*, 332 U.S. 747 (1947) (SEC order disapproving company plan reviewed by Court of Appeals under 24(a) and later by the Supreme Court).

4. Section 11(e) does not confer power to review on any particular court. 15 U.S.C. § 79k(e). But Section 18(f) provides that the SEC shall bring an action in the "proper district court of the United States" to enforce an order issued under the Act. 15 U.S.C. § 79r(f). And Section 25 gives district courts jurisdiction over SEC orders promulgated under the Act and over the necessary parties, and also provides that such proceedings may be brought "in the district wherein the defendant is an inhabitant or transacts business. . . ." 15 U.S.C. § 79y. Sections 18(f) and 25, when used in conjunction with 11(e), have been held sufficient to give a district court the power to review a voluntary reorganization plan. *In re Community Light & Power Co.*, 33 F. Supp. 901, 905-6 (S.D.N.Y. 1940). And under Section 25, district court action under 11(e) may be appealed to a court of appeals and reviewed by the Supreme Court on certiorari. 15 U.S.C. § 79y; 62 STAT. 869, 929, 928, 28 U.S.C. §§ 1291, 1254 (1948).

conditions its acceptance orders on district court approval, thereby forcing companies to request 11(e) review.<sup>5</sup>

In apparent conflict with 11(e) is the broad review section of the Act—Section 24(a).<sup>6</sup> Under 24(a), a party aggrieved by an SEC order may obtain direct court of appeals review of all or part of the order in a circuit where he resides or maintains his principal place of business. Section 11(e) review of voluntary reorganization plans has been threatened with disruption by attempts to secure 24(a) review of acceptance orders conditioned on district court approval.<sup>7</sup>

The SEC successfully thwarted such an attempt in *Leventritt v. SEC*.<sup>8</sup> Ordered by the SEC to reorganize, the Niagara Hudson Power Corporation submitted a voluntary plan which was accepted by a Commission order conditioned on district court approval.<sup>9</sup> In compliance with the order Niagara requested 11(e) review.<sup>10</sup> After 11(e) proceedings were begun, Leventritt, a dissenter from the plan, petitioned the Court of Appeals for the Second Circuit for 24(a) review of the order.<sup>11</sup> The Commission

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5. The SEC conditions acceptance orders on district court approval in order to stress the interlocutory nature of the orders. Interlocutory orders are desired because they will preclude judicial review other than the district court review contemplated by the SEC. See notes 14 and 15 *infra*. Approval conditions will also prevent company management from taking steps under the plan which might become futile should a court later disapprove the plan. Communication to the YALE LAW JOURNAL from Rodger S. Foster, General Counsel, Securities and Exchange Commission, dated March 14, 1950, in Yale Law Library.

Some acceptance orders are also conditioned on district court enforcement. This means that if the company wants to execute the plan, it can do so only in a district court. Such an order becomes final upon completion of the district court enforcement. But an order conditioned on district court approval must merely be approved by a district court before becoming final. Approval and enforcement conditions differ also in the reasons for which they are imposed. In the absence of district court enforcement, the company must resort to state reorganization procedures. When state reorganization procedures are inadequate or unfair, the SEC will condition acceptance orders on district court enforcement. *Ibid*.

Either type of condition compels a company desirous of complying with the original reorganization order to request an 11(e) district court proceeding. Conditional orders enable the Commission to select a proper district court for the 11(e) proceeding, limited only by the number of districts in which the company does business and the doctrine of *forum non conveniens*. See note 36 *infra*.

6. 15 U.S.C. § 79x(a).

7. Such attempts have been unsuccessful thus far. *E.g.*, *Okin v. SEC*, 145 F.2d 206 (2d Cir. 1944), *remanded on other grounds*, 325 U.S. 840 (1945), hereafter cited as 145 F.2d 206 (2d Cir. 1944).

8. 178 F.2d 336-7 (2d Cir. 1949).

9. SEC Holding Company Releases No. 9270, August 17, 1949, and No. 9295, August 26, 1949. See also note 5 *supra*.

10. *In re Niagara Hudson Power Corp.*, 86 F. Supp. 697 (N.D.N.Y. 1949). This case was subsequently reversed in part on the plan's merits. *SEC v. Leventritt*, 179 F.2d 615 (2d Cir. 1950).

11. Petition for Review by M. Victor Leventritt in the United States Court of Ap-

moved to dismiss on the authority of *Okin v. SEC*,<sup>12</sup> a square precedent decided by the same court.<sup>13</sup> There the Second Circuit, recognizing that the removal condition made the order interlocutory,<sup>14</sup> had invoked the federal court policy against interlocutory appeals<sup>15</sup> and denied review.<sup>16</sup>

Leventritt contended, however, that the Supreme Court had since rejected the *Okin* rule.<sup>17</sup> In *SEC v. Central-Illinois Securities Corporation*<sup>18</sup> the Supreme Court had decided that in reviewing orders under 11(e), as in reviewing under 24(a), courts can not alter administrative findings of fact based on substantial evidence.<sup>19</sup> The Court stated that equal scope of review under both sections was desirable because 11(e) and 24(a) might sometimes offer alternative avenues for review of SEC acceptance orders.<sup>20</sup> Inter-

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peals for the Second Circuit, p. 4, *Leventritt v. S.E.C.*, 178 F.2d 336-7 (2d Cir. 1949). Leventritt had previously opposed the approval of the plan at the SEC hearings. *Id.* at 3.

12. 145 F.2d 206 (2d Cir. 1944).

13. District Court review had been commenced before the 24(a) petition was filed. Prior initiation of district court review is not the ground for denial of 24(a) review. The presence of an approval condition is. *Lounsbury v. SEC*, 151 F.2d 217 (3d Cir. 1945), *cert. denied*, 326 U.S. 782 (1946) (24(a) petition dismissed though district court review of acceptance order conditioned on district court approval had not been commenced).

14. The attached condition indicated that the Commission considered the acceptance order incomplete until district court review and approval had been obtained. Memorandum of Securities and Exchange Commission in Support of Motion to Dismiss, p. 10, *Okin v. SEC*, 145 F.2d 206 (2d Cir. 1944). See also note 5 *supra*.

15. The Administrative Procedure Act contains the standard approach to final and interlocutory orders. "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. . . ." 60 STAT. 237, 243 (1946), 5 U.S.C. § 1009(c). See Note, *Direct Judicial Review of Administrative Action under Section 10(c) of the Administrative Procedure Act*, 62 HARV. L. REV. 1216, 1219 (1949). See, e.g., *Eastern Utilities Associates v. SEC*, 162 F.2d 385, 386 (1st Cir. 1947) (" . . . [U]nder 24(a) of the Holding Company Act, and other similar language providing for judicial review in other statutes, administrative orders of a merely preliminary or procedural character are not directly and immediately reviewable in the circuit court of appeals. . . ."); *Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938).

16. Another reason for denial of the 24(a) petition was the absence of any provision for such review in 11(e). The court contrasted this with the specific provision in 11(b) for 24(a) review. 15 U.S.C. § 79k(b)2. *Okin v. SEC*, 145 F.2d 206, 207-208 (2d Cir. 1944).

17. SEC Memorandum in Support of Motion to Dismiss, p. 1, *Leventritt v. SEC*, 178 F.2d 336 (2d Cir. 1949).

18. 338 U.S. 96, 113 (1949).

19. *Id.* at 113-127. No. 24(a) petition was involved in this case. Reference was made to that section only to determine the scope of review of a district court under Section 11(e). *Ibid.*

20. In referring to 11(e) and 24(a), the Court said, "Conceivably the same plan might be brought under review by both routes. Indeed, in one instance the District Court for Delaware [, Application of SEC, 50 F. Supp. 965 (D. Del. 1943)] . . . held that its de-

preting this statement as a suggestion that 11(e) and 24(a) should *always* be treated as alternative review provisions, Leventritt argued that *Central-Illinois* effectively torpedoed the *Okin* rule.<sup>21</sup>

The Second Circuit avoided this argument, asserting that the *Central-Illinois* language on which it rested was dicta.<sup>22</sup> Judge Frank, dissenting, was persuaded that Leventritt's reasoning was strong enough to control.<sup>23</sup>

Leventritt's argument, however, deserved rejection on its merits. The Supreme Court correctly assumed in *Central-Illinois* that 11(e) and 24(a) might on occasion provide alternative avenues of review. SEC acceptance orders not conditioned on district court approval are final. Section 24(a) insures right of review to dissenting stockholders.<sup>24</sup> But the company is free to request 11(e) review before a 24(a) petition is filed.<sup>25</sup> Thus, 11(e) and 24(a) offer alternative opportunities for review of unconditioned acceptance orders.

But 11(e) and 24(a) should not be alternatives for acceptance orders expressly conditioned on district court approval. Such orders are not final for the purpose of invoking court of appeals review under 24(a). The only reason for calling an order final is to insure its judicial review.<sup>26</sup> This reason disappears when district court approval is specifically required by the order.<sup>27</sup>

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termination of the issue in a § 11 (e) proceeding was precluded by a prior affirmation of the same order by a Court of Appeals in a 24(a) review proceeding [, *Marquis & Co. v. SEC*, 134 F.2d 822 (3d Cir. 1943)]. Presumably, under the view now taken by the District Court and the Court of Appeals, if district court review under § 11(e) could be had first that determination likewise would be conclusive as against contrary views held by the Commission and a Court of Appeals in a later 24(a) proceeding. . . ." 338 U.S. 96, 123. See also 43 ILL. L. REV. 882 (1949) (*Central-Illinois* in the lower court); 35 CORNELL L. Q. 406 (1950) (*Central-Illinois* in the Supreme Court).

21. SEC Memorandum in Support of Motion to Dismiss, pp. 3-8, *Leventritt v. SEC*, 178 F. 2d 336-7 (2d Cir. 1949).

22. 178 F.2d 336, 337 (2d Cir. 1949).

23. *Ibid.*

24. *E.g.*, *Phillips v. SEC*, 153 F.2d 27 (2d Cir. 1946), *cert. denied*, 328 U.S. 860 (1946); *Phillips v. SEC*, 156 F.2d 606 (2d Cir. 1946) (24(a) review of an unconditioned acceptance order).

25. If district court review is commenced before the 24(a) petition is filed, 24(a) review will probably be unavailable. See *Phillips v. SEC*, 153 F.2d 27, 29 (2d Cir. 1946), *cert. denied*, 328 U.S. 860 (1946). See also note 21 *supra*.

26. See note 15, *supra*.

27. *E.g.*, *Lounsbury v. SEC*, 151 F.2d 217 (3d Cir. 1945), *cert. denied*, 326 U.S. 782 (1946). But if the SEC does not condition its acceptance order, it must bear the risk of prior commencement of 24(a) review and preclusion of district court review over that portion of the plan reviewed by the court of appeals under 24(a). *E.g.*, *Marquis & Co. v. SEC*, 134 F.2d 822 (3d Cir. 1943); *Application of SEC*, 50 F. Supp. 965 (D. Del. 1943). Needless duplication is thus avoided in allowing only one review of a plan.

Finally, when district court approval of a conditioned acceptance order is obtained under 11(e), no subsequent 24(a) review is allowed. Dissenters have been given the opportunity to appear in the district court and appeal to the circuit court. See note 4 *supra*. *E.g.*, *Blatchley v. SEC*, 157 F.2d 898 (1st Cir. 1946); *Goldfine v. SEC*, 157 F.2d 899 (1st Cir. 1946).

Furthermore, 24(a) review would defeat the SEC's purpose in conditioning acceptance orders on district court approval. The Commission wants qualified district judges to review company plans in their entirety.<sup>28</sup> It fears that dissenters will use 24(a) to prevent or interrupt 11(e) review, since court of appeals jurisdiction, once assumed, is exclusive. Moreover, application of 24(a) makes possible jurisdictional disputes. Parties might disagree on what extent review under 24(a) by one court of appeals precludes 24(a) review by another, or 11(e) review by a district court.<sup>29</sup> Finally, disruption of 11(e) review might result in inconvenience and expense to company management,<sup>30</sup> and to dissenters who may have failed to exercise their own rights under 24(a) in reliance on the opportunity to be heard at the 11(e) proceedings.<sup>31</sup>

Opponents of exclusive 11(e) review claim that denial of 24(a) review in a dissenter's own circuit unduly inconveniences dissenters who reside far from the district court in which the 11(e) proceedings are conducted.<sup>32</sup> But the cost of dissenting in a distant forum need not be high. Proxies may be utilized to secure a united front and to share litigation expense.<sup>33</sup> More-

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28. The same district judge will be able to carry the review through all of the phases dictated by Section 11(e). A judge's careful scrutiny of all the ramifications of the entire plan will be possible. To this task, he will bring experience acquired in past similar reorganizations. It would seem difficult, however, for circuit judges to afford the time necessary for the acquisition of such expertness. The outstanding example of an expert district judge is Judge Leahy of Delaware, who has reviewed 42% of all 11(e) plans submitted for district court approval. *In re Engineers Public Service Corp.*, 168 F.2d 722, 739 n.20 (1948), *rev'd on other grounds*, 338 U.S. 96, 119 (1949). And his decisions on acceptability of plans have been highly respected by both appellate courts and the SEC. *Ibid.* See also Meers, *Reorganizations under the Bankruptcy and Holding Company Acts*, 27 TEX. L. REV. 14, 40 n.102 (1948).

29. See SEC Memorandum in Support of Motion to Dismiss, pp. 9-10, *Okin v. SEC*, 145 F.2d 206-209 (2d Cir. 1944).

30. Expenses incurred by both the SEC and management in the interrupted district court proceeding would be wasted by the assumption of exclusive review jurisdiction by a court of appeals. SEC and management would have to travel to the court of appeals to present their arguments. After this junket, the parties would still be compelled to return to the district court for execution of the plan. Such piece-meal enforcement would hinder management's desire to comply with the Act as rapidly as possible.

31. See Brief for the Respondent in Opposition on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, pp. 10-11, *Okin v. SEC*, 325 U.S. 840 (1945).

32. See *Okin v. SEC*, 145 F.2d 206, 208 (2d Cir. 1944).

33. See Sections 11(g) and 12(e), 15 U.S.C. §§ 79k(g) and 79l(e), for the proxy provisions of the Public Utility Holding Company Act. See also Note, *Proxy Solicitation During Corporate Dissolution*, 59 YALE L. J. 367 (1950).

A united endeavor by all dissenters would probably enable them to exert a greater influence at the SEC hearings on the plan and in the subsequent district court enforcement. And if each dissenter shared the total litigation expense, the individual share would probably be less than if the dissenter had waged the fight against the plan alone. Nor would there be any need of travel by a dissenter if the central dissenting body were to present his objections for him.

over, such litigation would take place in only one district under 11(e), whereas appeals under 24(a) attacking different parts of a reorganization plan could be made in several circuits.

Fear has also been expressed that the Commission might abuse its discretion under 11(e) by deliberately choosing a forum far from a dissenter's residence.<sup>34</sup> Past performance discloses no evidence of such a practice.<sup>35</sup> And if the SEC abuses its discretion, the dissenter could have the suit transferred to a more convenient forum.<sup>36</sup>

There is no sound reason, therefore, for interfering with the policy which the *Okin* rule protects—unified judicial control over voluntary reorganization plans.

34. See, e.g., Judge Frank's dissent in the *Leventritt* case. 178 F.2d 336 (2d Cir. 1949).

35. See Communication to the YALE LAW JOURNAL from Rodger S. Foster, *supra* note 5. Moreover, all acceptance orders are not conditioned on district court approval or enforcement. E.g., *Phillips v. SEC*, 153 F.2d 27 (2d Cir. 1946), *cert. denied*, 338 U.S. 860 (1946); *Phillips v. SEC*, 156 F.2d 606 (2d Cir. 1946). See also Communication to the YALE LAW JOURNAL from Rodger S. Foster, *supra* note 5.

36. The dissenter in this situation should be able to invoke Section 1404(a) of the New Judicial Code which provides that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 62 STAT. 869, 937, 28 U.S.C. § 1404(a) (1948). The doctrine of *forum non conveniens* does not relieve mere inconvenience. Unwarranted hardship must be shown. E.g., *Naughton v. Penna. Ry.*, 85 F. Supp. 761, 763 (E.D. Pa. 1949). Section 1404(a) codified the doctrine of *forum non conveniens* and modified it by providing for transfer from an inconvenient forum instead of dismissal of the action. See *Reviser's Notes*, H.R. Rep. No. 308, 80th Cong., 1st Sess., A132 (1947), reprinted in CONG. SERV. (*Special Pamphlet on 28 U.S. Code, Judiciary and Judicial Procedure*) 1853 (West 1948).

Before the advent of 1404(a), *forum non conveniens* was considered inapplicable to special venue statutes like Section 25 of the Public Utilities Holding Company Act. *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941). But 1404(a) has made *forum non conveniens* applicable to special venue statutes. E.g., *Kilpatrick v. Texas & Pacific Ry.*, 337 U.S. 75 (1949) (1404(a) applied to FELA action); *United States v. National City Lines Inc.*, 337 U.S. 78 (1949) (antitrust proceeding covered by 1404(a), dissent stating that the majority decision would make 1404(a) applicable to Section 25 of the PUHCA, *see id.* at 85); *Ex parte Collett*, 337 U.S. 55 (1949) (FELA action).

For discussions of classic *forum non conveniens* and its modern developments, see Blair, *The Doctrine of Forum Non Conveniens*, 29 COL. L. REV. 1 (1929); Note, *The Doctrine of Forum Non Conveniens*, 34 VA. L. REV. 811 (1948); Note, *New Judicial Code and Forum Non Conveniens*, 1 STAN. L. REV. 497 (1949).