UNITES STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS, ET AL
v.
THE UNITED CORPORATION, ET AL

Civil Action
No. 40-497

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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18th and Locust Streets
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July, 1947

PRELIMINARY STATEMENT

Pursuant to permission granted by the Court, the Commission presents its views amicus curiae on certain questions involving the construction of the Public Utility Holding Company Act of 1935. A brief statement of the issues and of the positions taken in this memorandum follows:

1. We express no view as to whether a cause of action founded on diversity of citizenship has been properly pleaded, or whether, assuming such a cause of action to have been spelled out, jurisdiction thereof should be declined on the ground of forum non conveniens. Nor do we take any position on the question whether as a matter of procedure a determination that no Federal action is pleaded should lead to dismissal on the merits or dismissal for lack of jurisdiction of the subject matter. 1/

2. It is our position that a private investor may sue for an injunction on the basis of an alleged violation of the Commission's proxy rules.

3. To the extent that the complaint concerns the validity of the vote for directors, it is our view that no claim is stated upon which relief can be granted, since there is no showing of violation of the Commission's Rule U-65, dealing with expenditures for proxy solicitation.

4. With respect to the vote of the plan of future operations, we believe that no claim is stated upon which relief can be granted. It is not contended that a vote on the plan of future operations is required by state law. A vote could have legal significance only for its bearing on future administrative action. To the extent that Commission findings as to the vote would support such action they would be reviewable insofar as that action itself is reviewable. Under this view it is unnecessary of course to determine whether there has been a violation of the Commission rules in respect of the vote on the plan of future operations.

5. Jurisdiction with respect to the Holding Company Act counts should not be declined on the ground of forum non conveniens.

6. We take no position as to whether the consideration of the merits of the alleged Rule U-65 violation entailed in the ruling under (3) may be had upon the present motion.

STATEMENT OF FACTS

The United Corporation, which is subject to the jurisdiction of the Commission under the Public Utility Holding Company Act of 1935, was ordered by the Commission in 1943 to recapitalize on a one-stock basis and to cease to be a holding company. In discussing United's suggestion that, instead of being required to dissolve, it be permitted to transform its business to that of an investment company, the Commission said that no such program could be fair unless entered into after majority approval by the stockholders. In the intervening years United has taken various steps to bring its capital structure into conformity with the requirements of the Act.

On January 9, 1947, United asked the Commission to amend its 1943 opinion to dispense with the requirement that the proposed change of operations be approved by the preferred as well as the common stockholders. United indicated that it intended to complete the retirement of its preferred stock prior to entering upon the program of operations as an investment company, but that in anticipation of such program it wished to solicit authorizations from its common stockholders in connection with the 1947 annual meeting. The Commission ruled that no amendment to its earlier opinion was required because that opinion did not contemplate an unnecessary poll of preferred stockholders who were not to participate in the new enterprise. As to the suggestion that a vote be had now, the Commission said that until the solicitation material was submitted to it for approval, as required by the Holding Company Act and the rules thereunder, it would not be in a position to judge whether the facts and issues involved in the management's proposal could be adequately and fairly presented to the security holders at this stage of United's compliance program. The Commission further declared that –

". . . if a vote is taken at this time, we expressly reserve full authority to require another vote if conditions materially change before Untied ceases to be a public utility holding company and, as a result of such changed conditions, it appears to us that fairness requires another vote of stockholders at that time."

See Holding Company Act Release No. 7191 (February 10, 1947), a copy of which is attached hereto.

Shortly thereafter, in connection with the 1947 annual meeting of its stockholders, the management submitted to the Commission proxy-soliciting material covering not only the election of directors but also the proposed plan of operations. After the management corrected certain deficiencies in this material upon suggestions of the Commission's staff, the Commission, acting by minute, permitted the solicitation application to become effective and the soliciting material was mailed out to the stockholders shortly thereafter.

Plaintiff sought unsuccessfully to block such solicitation through the filing of a petition with the Circuit Court of Appeals for the Second Circuit for review of the Commission action in question. The principal objection raised in the petition was that the solicitation was in respect of a plan within the scope of Section 11 (g). At the same time plaintiff made a motion for a stay pending review. At the argument on the motion for a stay, United challenged the jurisdiction of the Circuit Court of Appeals on the ground that the action taken by the Commission was not reviewable under Section 24 (a) of the Holding Company Act. The Commission indicated doubts as to the Court's jurisdiction but did not take a definitive position on that point. Both United and the Commission argued that there was no merit in plaintiff's objection that the proposed solicitation would be in violation of Section 11 (g) of the Holding Company Act. On March 3, 1947, the Circuit Court of Appeals, without opinion, denied the motion for a stay.

Thereafter plaintiff sought to have this Court restrain the mailing of solicitation material by United on the basis of an alleged violation of Section 11 (g). Argument was submitted on behalf of the Commission that the solicitation was not in violation of 11 (g), but no opinion was expressed on behalf of the Commission concerning the Court's jurisdiction. In response to questions from the bench, counsel for the Commission expressed the view that if the action of the Commission should be deemed an order reviewable in the Circuit Court of Appeals under Section 24 (a), then, of course, that Court's review jurisdiction being exclusive, plaintiff could not obtain relief in this Court predicated upon the same contention which was the basis for the review proceeding.

On March 4, 1947, this Court refused to restrain the mailing of United's solicitation material. Plaintiff has never withdrawn the contentions with respect to the alleged violation of Section 11 (g). However, in view of the consideration which the Court gave to this point at the earlier hearing the present memorandum on behalf of the Commission does not discuss any issues under Section 11 (g). Other contentions made by plaintiff relate primarily to events happening since the original mailing and appear to us to be outside the scope of any contentions raised in the petition for review filed in the Circuit Court of Appeals.

During the period up to April 9, 1947, the date set for the 1947 annual stockholders' meeting, the management sent out four mailings, three of which were cleared with the Commission in advance pursuant to Rule U-62. The fourth was a follow-up notice which, under the Rule, was not required to be submitted to the Commission. The cost of

these mailings is said by the management to have been some $50,000. 2/ On April 9, 1947, the meeting was convened, but was recessed until April 30 by the president of the company for the stated purpose of permitting the election officers to determine the existence of a quorum. It appears that the management knew at the time that it had received proxies for some 7,500,000 votes, although it was not known how many had been revoked. 3/ During the recess the management sent out two more mailings, the first being a solicitation which was cleared with the Commission, and the second being a follow-up notice. The additional cost of these mailings is said by the management to have been about $14,000. 4/

We understand that the balloting, tabulated in accordance with the stipulation reached at the April 24th hearing before this Court, shows that (1) the management's directorial slate had a clear plurality as of April 9th; (2) the plan of future operations, which the Commission had ruled required approval by a majority of the common stockholders, had been approved by about 45 percent as of April 9th; 5/ and (3) that the plan of future operations had been approved by approximately 54 percent of the stockholders as of April 30th.

The new contentions of the plaintiff are as follows:

(1) The management slate was not lawfully elected because the management incurred soliciting expenditures in excess of the amount permitted by the Commission's U-65.

(2) The vote on the proposed plan of operations was improper because (a) the proxy-soliciting material was materially false and misleading in violation of the Commission's rules in that it did not disclose the management's alleged design unlawfully to recess the meeting so as to permit it to engage in further solicitation; (b) because the plan was carried by votes obtained during the allegedly unlawful recess; and (c) presumably because of alleged excessive expenditures in violation of Rule U-65.

Plaintiff seeks an order decreeing the election of the management slate to be void and decreeing the minority slates to have been elected. He also asks that the vote on the plan of operations be set aside and that the management be enjoined from taking steps inconsistent therewith. The proceeding is currently before the Court upon an order to show cause why a temporary injunction should not be granted restraining the management from committing the company to any corporate acts requiring approval of the Board of Directors, and from taking any steps inconsistent therewith (including the expenditure of funds) looking towards the transformation of United into an investment company.

The management has made a cross-motion for dismissal of the complaint on the ground that the Court lacks jurisdiction over the subject matter, that even if jurisdiction exists the Court should decline to exercise it, and that in any event the complaint fails to state a claim upon which relief can be granted. We understand that the present submission of briefs is on the issues raised by the management's dismissal motion.

STATUTES AND RULES INVOLVED

The amended complaint invokes the jurisdiction of the Court under the Public Utility Holding Company Act of 1935 and the Securities Exchange Act of 1934.

Section 25 of the Holding Company Act provides in pertinent part as follows:

"The District Courts of the United States . . . shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability of duty created by, or to enjoin any violation of, this title or the rules, regulations or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found."

Section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, which is the cognate section of that Act, contains virtually identical language.

Under Section 14 (a) of the Securities Exchange Act, 15 U.S.C. § 78n (a), applicable to solicitations in respect of securities listed on national securities exchanges, the Commission has promulgated a set of proxy rules entitled Regulation X-14. 6/ The securities of United are listed on the New York Stock Exchange.

Section 12 (e) of the Holding Company Act grants authority to the Commission to make rules governing solicitations in respect of the securities of public utility holding companies and their subsidiaries. Pursuant to Section 12 (e) the Commission has declared, in its rule U-61, that the proxy rules adopted under the Securities Exchange Act shall be applicable to solicitations with respect to any security of a registered holding company or subsidiary, except where the solicitation is in connection with a reorganization or other transaction specifically required to be approved by the Commission (the request for such approval being variously called under the Act an application or declaration). The procedure applicable to solicitations in the excepted category are governed by Rule U-62, which provides in general that the soliciting material (together with certain information) be filed with the Commission and that it not be used until the lapse of a specified period of time or until the Commission otherwise permits. 7/

The management's proposal with regard to the vote on the plan of future operations was filed with the Commission as a declaration under Rule U-62, and the Commission so treated it. We do not understand any of the parties to urge that U-62 was not applicable.

The solicitation regarding the election of directors was governed by the proxy rules adopted by the Commission under the Securities Exchange Act of 1934. It is unnecessary for present purposes to determine whether those rules were effective by virtue of the independent and direct application of the Securities Exchange Act, or whether the provisions of the Holding Company Act, and of Section 12 (e) thereof in particular, constitute an overriding policy that makes the Securities Exchange Act rules applicable only by virtue of the express reference thereto in Rule U-61. 8/ For from the jurisdictional standpoint we think the effect would be the same, at least under the circumstances of this case. Thus the jurisdictional language embodied in Section 25 of the Holding Company Act has, as we have seen, an almost identical counterpart in Section 27 of the Securities Exchange Act, and the policy considerations and legislative history discussed below are, we think, equally relevant in either context. Accordingly, our discussion of jurisdictional problems under the Holding Company Act should be deemed equally applicable to similar problems under the Securities Exchange Act.

Rule U-65, promulgated under the Holding Company Act, provides that a holding company may not expend money for solicitations without the consent of the Commission, except in the case of

"(1) Ordinary expenditures in connection with preparing, assembling, and mailing proxies, proxy statements, and accompanying data; or

"(2) Other expenditures not in excess of $1,000 during any one calendar year."

ARGUMENT

1. A PRIVATE INVESTOR HAS A QUALIFIED RIGHT TO MAINTAIN AN ACTION FOR ENFORCEMENT OF THE COMMISSION'S PROXY RULES.

We are of the opinion that a private investor has a qualified right to maintain an action for enforcement of the Commission's proxy rules. Discussion of this jurisdictional point, as to which the management has taken a contrary position, requires examination of the rules themselves and of the responsibilities of the Commission and the courts in their enforcement. Accordingly, this discussion is, we think, also relevant in large part to problems as to the sufficiency of the complaint and the problem of whether the Court should decline to exercise jurisdiction pending further action by the Commission.

It is a familiar rule that members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach and that the common law will supply a remedy if the statute gives none. 9/ Thus, actions by private investors for damages and incidental relief have been upheld in cases arising under the Holding Company Act 10/ and the Securities Exchange Act, 11/ even though suit was brought under sections of those Acts not specifically according a private right of action. We do not understand this rule to be questioned by the management. The contention is made, however, that where enforcement of a statutory duty by injunction is involved, the Commission, with its power to seek injunctions in the district courts under Section 18 (f),

has the exclusive right to invoke the aid of the courts. That the statute expressly confers such a right of action on the Commission and is silent as to a possible similar right by private persons is apparently not of itself an obstacle to the resent suit. Thus, in a recent case the Supreme Court upheld the right of the O. P. A. to obtain restitution for tenants as incidental relief in an injunction action, notwithstanding the fact that the statute was silent as to possible restitution proceedings by the Government but expressly gave the tenants a cause of action for treble damages. Porter v. Warner Holding Co., 66 S. Ct. 1086 (June 3, 1946).

The question, of course, cannot be considered apart from the proxy rules and the statutory purposes they are intended to serve. In the premises we think that a private right of action is indicated, and precedents in this Court appear to support this right.

The purpose of the proxy rules adopted by the Commission under the several statutes it administers is to give effect to the Congressional purpose of ensuring that investors solicited for their proxies will be fully informed concerning the matters to be acted upon pursuant to their proxies, and, in general, to ensure "fair corporate suffrage." 12/ The administrative procedure adopted for those purposes, so far as here relevant, is to require that proxy-soliciting material conform to certain minimum informational requirements and that it be submitted to the Commission in advance of mailing.

Examination of the solicitation material is necessarily a summary, ex parte procedure. In the instances where the Commission has sued to enjoin violation of the proxy rules, it has attempted to seek relief prior to the meeting at which the proxy might be authorized. The Relief obtained has included a prohibition on mailing out improper soliciting material, 12a/ a prohibition on the use of proxies improperly obtained, 12b/ a requirement that a corrective statement be sent to the stockholders, 12c/ and a requirement for resolicitation in conformity with the proxy rules. 12d/ One reason why prompt application for equitable relief is desirable, if not essential, is that the Commission does not regard proxies obtained in violation of the rules as ipso fact invalid. While it would, of course, be possible for the Court to order a new election upon a finding of violation of the proxy rules in connection with an election already held, it would seem generally desirable to enable the Court as far as possible to order corrective action prior to the meeting; and in the exceptional case where it is not possible to seek injunctive relief prior to the meeting, it would in any event be desirable that suit be brought as soon thereafter as the Commission may be advised that basis for suit exists.

In view of the scope of the Commission's rules and the time factor discussed above, there is usually no occasion for an exhaustive administrative determination of the merits of a complaint made to the Commission concerning an alleged violation of its rules. 13/ Nor, of course, can there be review in a circuit court of appeals under Section 24 (a) of the Act (applicable to "orders") of the Commission's determination not to take action with respect to an alleged violation.

Persons advised by the Commission that their soliciting material does not conform to the requirements of the rules may, by proceeding in disregard of such advice, put the

Commission to the burden of instituting an action for injunctive relief, and may thus as a practical matter secure a judicial test of the Commission's determination. Such are the cases cited at page 25 of United's brief of June 27, 1947. 14/ But persons claiming a violation of the rules by their adversaries could have no assurance of a judicial determination of their charges unless they could themselves institute suit. They can and do voice objections before the Commission regarding the soliciting material of their opponents, and the Commission carefully considers such objections. However, to deny such persons access to the courts after the Commission has refused to bring suit would in effect make the Commission the final arbiter as to whether its rules have been violated.

Acceptance of jurisdiction in such a case would be in harmony with the basic purpose of the statute in protecting investors from improper proxy practices, and would not, as the management appears to suggest, result in usurpation of the functions of the Commission by investors or by the courts. In view of the weight to be given to an agency's construction of its own rules, 15/ the Court would not upset the agency's determination unless the rules are invalid or unless the particular determination under the rules is plainly erroneous. Even if the Court should permit the use of its process for a wider exploration of the factual issues than the agency thought desirable or appropriate, with the result that the problem is presented in a new factual setting, the agency's construction of its own rules, however evidenced, would be accorded its due weight. 16/ On the other hand, the doctrine of exhaustion of administrative remedy would require a complaining investor to take his grievance first to the Commission, wherever feasible. As a corollary to this doctrine, and in the light of the Commission's undoubted primary responsibility for enforcement of its statutes and the rules promulgated thereunder, we think that any litigation initiated by the Commission, whether before or after suit by the private investor, would be entitled to precedence. So viewed, acceptance of jurisdiction in injunction suits by private investors is in harmony with the remedial purposes of the statute, is in accord with the general tendency to accord some kind of judicial review with respect to final agency action affecting vested rights, 17/ and at the same time preserves the balance between judicial and administrative functions.

A case in this Court illustrating a number of these points, and parallel in numerous respects with the case at bar, is Doyle v. Milton, _____ F. Supp. _____, C.C.H. Fed. Sec. Law. Serv., Paragraph 90, 374 (S.D.N.Y., April 15, 1947). In this case, involving the proxy rules promulgated by the Commission under the securities Exchange Act, a corporate management had mailed out soliciting material after complying with certain suggestions made by the Commission's staff with respect to the contents of the proxy statement. Thereafter, a minority group complained to the Commission that the proxy material was false and misleading and asked the Commission to take steps to prevent the use of the proxies so obtained. After an informal hearing, the Commission concluded that the charges had not been supported, and declined to take action. The complaining stockholders then instituted in this Court an action to restrain the use of the proxies and for other relief. The Commission filed a memorandum at the request of the Court, stating its view that, on the basis of information available to it, the proxy rules had not been violated. Upon a motion for summary judgment, Judge Rifkind dismissed three causes of action and retained a fourth charging waste of corporate funds. The Court did not discuss

the jurisdictional question but clearly assumed jurisdiction. The Court moreover accorded the Commission "great deference" in the construction of its rules; and with regard to one point, which the Court did not find explicitly discussed in the Commission's memorandum, the Court declared that the absence of a specific disclosure requirement in the proxy rules was itself evidence of an administrative view that was entitled to weight.

In Tate v. Sonotone Corporation, et al. (Civ. No. 41-139, S.D.N.Y), an action by a minority stockholder group seeking a postponement of the annual meeting on the basis of an alleged violation of the proxy rules under the Securities Exchange Act by the management, Judge Bright ordered a one-week postponement despite objection by the defendants that a private right of action founded on violation of the proxy rules was unavailable. The Commission indicated its view to Judge Bright that such an action would lie. The decision was announced from the bench at the conclusion of argument on April 15, 1947, and so far as we know no opinion was rendered.

For the reasons stated above it is our view that the present case should not be dismissed on the sole ground that the proceeding has been instituted by a private person rather than by the Commission. We believe, however, that plaintiff's case is vulnerable on other grounds. 18/

II. PLAINTIFF'S CONTENTIONS WITH RESPECT TO THE ELECTION OF DIRECTORS DO NOT CONSTITUTE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

As we understand the amended complaint, the invalidation of the election of the management slate is sought solely on the ground that the solicitation expenses of the management were in excess of the amount permitted by Rule U-65, which prohibits holding companies from spending in connection with proxy solicitation in any one year without the approval of the Commission the sum of more than $1,000 for other than "ordinary expenditures in connection with preparing, assembling, and mailing proxies . . ." 19/

We understand this Court to have ruled in the context of the six mailings that already had occurred at the time of the earlier hearing on April 24, 1947, and which constitute all the management mailings in this case, that expenditures incident to mailing such as preparation of the material, assembly and postage do not constitute the "other expenditures" referred to in Rule U-65 (b) (2). Se Transcript of the April 24th meeting, at pp. 86-87, 89, 95, 105. That ruling, as the Court has stated, was only for the purpose of disposing of the motion for preliminary relief. On the other hand, nothing new has been added except that the company has disclosed the amounts actually expended for these purposes, and as we construe the statements made by the Court at the earlier hearing such data would not, absent other circumstances, influence his reasoning or the result.

We are authorized to advise the Court that on the basis of information contained in papers filed with the Court, and certain additional information supplied to the Commission at its

request by the company, it is the opinion of the Commission that Rule U-65 has not been violated by the management. 20/

Even if the Court should find that Rule U-65 has been violated, it is our view that the relief asked for – unseating the management slate and installing the minority slate – would be inappropriate. As the Court noted at the April 24th hearing, this would represent disenfranchisement of the stockholder majority who voted for the management candidates. The only appropriate remedy under such circumstances, it seems to us, would be the holding of a new election. This remedy is not sought by plaintiff, except as it may be encompassed within his demand for general relief.

III. PLAINTIFF'S CONTENTIONS WITH RESPECT TO THE VOTE ON THE PLAN OF FUTURE OPERATIONS DO NOT CONSTITUTE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Even if all of plaintiff's contentions with respect to the vote on the plan of future operations are taken as true, we do not think he can show legal injury, and accordingly we believe that these contentions do not constitute a claim upon which relief can be granted.

A stockholders' vote on the proposed transformation of United into an investment company is not claimed to be required by state law, or even by the terms of the Holding Company Act except as the Commission in its discretion may require. United is the subject of an order to cease to be a holding company. As to United's proposal that instead of being required to dissolve it be permitted to become an investment company, the Commission has said that no such program could be fair unless conditioned upon approval by a majority of the stockholders. 21/ In permitting the vote to be taken now, the Commission, as previously noted, reserved "full authority to require another vote if conditions materially change before United ceases to be a public utility holding company, and, as a result of such changed conditions, it appears to us that fairness requires another vote of stockholders at that time."

It is unnecessary for the Court to decide what significance the vote may have in connection with future administrative action by the Commission. If the assumption of jurisdiction implicit in the Commission's reservation is valid, then the vote represents no more than an advisory poll serving to supply data as an aid to the Commission in the exercise of a future statutory discretion. The Commission may order a new vote, or conceivably in the light of changed circumstances impose new terms and conditions in which the present vote would not play a part. If, in future administrative action affecting United, conclusions of the Commission as to the recent vote should serve in whole or in part as a basis for findings supporting the administrative action, the validity of such findings will be subject to review to the extent that the administrative action is subject to review. Until then, we cannot see how the vote can import any legal consequences to the economic interest of the plaintiff.

If it be assumed on the other hand that the Commission will have only a narrow jurisdiction or no jurisdiction at all over the progress of United from a public utility holding company to an investment company, 22/ the fact is that plaintiff does not dispute the company's contention that state law does not require a vote on the plan of future operations.

If the vote were to affect legal rights of the plaintiff under state law, then it is our opinion that this Court could afford redress with respect to violations of federal law which impair state-created rights. 23/ If, however, on any view the effect of the vote is no more than advisory, and we so believe, a justiciable controversy is not presented by this cause of action. 24/

We understand that plaintiff claims the validity of the vote to be of present significance because the management has indicated that it might incur expenditures (or incur obligations) in preparation for the transformation into an investment company in the event of a favorable vote of the stockholders. It seems to us that the significance which the management may attach to the vote as indicative of the views of their stockholders, or perhaps as enabling them to forecast future action or non-action by the Commission, does not present a justiciable question – at least in the absence of a showing that the expenditures involved are so large and unreasonable as to amount to waste – and even in that event the claim for relief would not seem to be predicated on provisions of the Holding Company Act. 25/

IV. FORUM NON CONVENIENS IS NOT A PROPER BASIS FOR DECLINING JURISDICION OF THE CAUSES OF ACTION FOUNDED ON ALLEGED VIOLATIONS OF THE HOLDING COMPANY ACT AND THE RULES THEREUNDER.

As previously noted, we take no position as to whether a cause of action founded on diversity of citizenship has been properly alleged, or on whether, assuming such a cause of action to have been spelled out, the Court should nevertheless decline jurisdiction thereof on the ground of forum non conveniens. As to the causes of action founded on alleged violations of federal law, it seems to us that forum non conveniens is clearly not a basis to contend otherwise. Its treatment of this point seems to be premised on the assumption that the federal question alleged in the complaint is merely the assumption that the federal question alleged in the complaint is merely colorable and that the only real issue is the adjudication of state-created rights. 26/ The limits of the argument are not wholly clear, however, and we venture some brief remarks in support of our view.

The doctrine of forum non conveniens, as articulated in recent decisions of the Supreme Court, represents a judicial policy of declining to exercise an unquestionably valid jurisdiction in the interest of the convenience of the parties and in the interest of effective administration of judicial relief. Williams v. Green Bay & Western R.R. Co., 326 U. S. 549 (1946); Gulf Oil Corporation v. Gilbert, 91 L. Ed. (Adv. Op.) 755 (1947); Koster v. Lumberman's Mut. Cas. Co., 91 L. Ed. (Adv. Op.) 764 (1947). Thus, in the Williams case (326 U. S. at pp. 555-557), the Court said

"The relief sought against a foreign corporation may be so extensive or call for such detailed and continuing supervision that the matter could be more efficiently handled nearer home. The limited territorial jurisdiction of the federal court might indeed make it difficult for it to make its decree effective. But where in this type of litigation only a money judgment is sought, the case normally is different. The fact that the claim involves complicated affairs of a foreign corporation is not alone a sufficient reason for a federal court to decline to decide it. The same may be true even where an injunction is sought." (Emphasis supplied.)

It appears to us that the rationale of the Williams case refutes any suggestion that the doctrine of forum non conveniens should be applied to the Holding Company act counts. Moreover Congress has indicated a positive intention that jurisdiction shall not be declined under the circumstances of this case.

Section 25 of the Holding Company Act states that actions to enforce liabilities or duties created by the Act or the Commission's rules thereunder may be brought in any district where a transaction constituting the violation occurred, or in the district where defendant is an inhabitant or transacts business. It also contains the unusual provision that process in such cases may be served wherever the defendant may be found. These provisions with respect to jurisdiction, venue, and service stem from an appreciation of the essentially interstate character of the interests subject to the regulatory scheme of the Act and of necessity of a procedure under which these interests could be dealt with by a single court, having, like the Commission, a nation-wide jurisdiction over persons and subject matter. See S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 4, 55-58. The procedural provisions we have described are designed to effectuate not only the rights of private persons to seek redress but also the enforcement functions of this Commission.

It seems to us that the present case is a particularly appropriate one for according the statutory language its plain meaning. The principal place of business of United is New York, and we understand that the proxies and follow-up material were mailed from New York. We understand, too, that most of the real parties in interest reside in New York and its vicinity. But the paramount consideration is that the Court, by virtue of the nation-wide (if not international) reach of its process, can effectively grant any relief that a Delaware court might grant. Even if questions of the construction of State Law were involved that would be an irrelevant consideration, as the Williams case makes clear. But questions of State law are not even involved in the cause of action founded on the Holding Company Act, as we understand it. Moreover, to compel the real parties in interest to travel from New York to Delaware for the purposes of this litigation would apparently be contrary to one of the principal tenets of the forum non conveniens doctrine. Koster v. Lumberman's Mut. Cas. Co., supra. For these reasons we think a Federal Court sitting in New York should not decline jurisdiction with respect to the Holding Company Act counts.

Respectfully submitted,

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July, 1947

1/ See Bell v. Hood, 327 U. S. 678 (1946); Mosher v. City of Phoenix, 287 U. S. 29 (1932); also see note, Federal Question – The Jurisdictional Enigma of the Insufficient Complaint (1947) 56 Yale L. J. 880.

2/ Luckett affidavit of June 16, 1947. The affidavit also states that approximately $8,000 of additional expenditures could not be broken down to show whether made for solicitations prior or subsequent to April 9.

3/ Transcript of April 24th hearing, pp. 59-60.

4/ See note 2, supra.

5/ According to the tabulation of the inspectors of election this includes proxies dated April 9 or before, but received after April 9.

6/ Printed copies of the rules of the Commission under the Securities Exchange Act and under the Holding Company Act are being filed with the Court together with this brief.

7/ Under the Securities Exchange Act rules, copies of soliciting material must be filed with the Commission at least ten days before they are sent to the securities holders. Rule X-14A-4.

8/ So far as the plan of future operations is concerned, the provisions of the Holding Company Act and of Rule U-62 thereunder clearly represent an overriding policy.

9/ Texas & Pacific Ry Co. v. Rigby, 241 U. S. 33 (1916); 11 Restatement of the Law of Torts § 286. Cf. Porter v. Warner Holding Co., 66 S. Ct. 1086 (June 3, 1946).

10/ Goldstein v. Groesbeck, 142 F. 2d 422 (C. C. A. 2, 1944), cert. denied, 323 U. S. 737 (1944). An apparent indication to the contrary in Downing v. Howard, 68 F. Supp. 6 (D. Del. 1946), was rejected on appeal, the Circuit Court of Appeals expressly recognizing the general availability of a private right of action but finding the complaint before it vulnerable of other grounds. Downing v. Howard, _____f. 2d _____(C. C. A. 3, June 24, 1947); a copy of the opinion last cited is being filed with the Court.

11/ Baird v. Franklin, 141 F. 2d 238 (C. C. A. 2, 1944 – the holding on this point is articulated in the dissenting opinion of Judge Clark), cert. denied, 323 U. S. 737 (1944); Kardon v. National Gypsum Company, 69 F. Supp. 512 (E. D. Pa., 1946); Speed v. Transamerica Corp., 71 F. Supp. 457, (D. Del., 1947); Fifth-Third Union Trust Co. v. Block, Civil Action No. 1507 (S. D. Ohio, Dec. 11, 1946); Slavin v. Germantown Fire Insurance Co., Civil Action No. 6564, (E. D. Pa., Dec. 5 1946); and Fry v. Schumaker, _____F. Supp. _____, C. C. H. Fed. Sec. Law Serv. Para. 90, 366 (E. D. Pa., Jan. 10, 1947). A similar view of the Securities Act of 1933 has been expressed by way of dictum in Corporation Trust Co. v. Logan, 52 F. Supp. 999, note 17 (D. Del. 1943).

12/ See S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 35; H. Rep. No. 1383, 73rd Cong., 2nd Sess. (1934) 13-14. The quoted language is from the latter report, dealing with the Securities Exchange Act.

12a/ Securities and Exchange Commission v. Okin, 51 F. Supp. 1167 (S.D.N.Y. 1943), modified, 139 F. 2d 87 (C.C.A. 2, 1943); Securities and Exchange Commission v. McQuistion (Civ. No. 41-47, S.D.N.Y. 1947).

12b/ Securities and Exchange Commission v. O'Hara Re-election (or Proxy) Committee, 28 F. Supp. 523 (D. Mass. 1939); Securities and Exchange Commission v. Okin, 58 F. Supp. 20 (S.D.N.Y. 1944).

12c/ Securities and Exchange Commission v. Okin, 48 F. Supp. 928, modified, 137 F. 2d 862 (C.C.A. 2, 1943).

12d/ Transamerica Corporation v. Securities and Exchange Commission, 67 F. Supp. 326 (D. Del. 1946), appeal pending.

13/ Under the Holding Company Act rules the Commission may in its discretion hold a hearing, but such a hearing may be narrow in scope, and in no event is it more than an aid to what is essentially an internal administrative process. Thus, in the case at bar, a limited number of issues, such as Phillips' request for stockholders' lists, were the subject of oral argument before the Commission.

14/ There are no precedents involving attempts by such persons to initiate judicial proceedings themselves through prayers for injunctive or declaratory relief directed against the Commission.

15/ An agency's construction of its own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Co., 325 U. S. 410, 413 (1945). That mixed questions of law and fact may be involved does not minimize the weight to be given to the agency interpretation. Dobson v. Commissioner of Internal Revenue, 320 U. S. 489 (1943).

16/ Cf. Skidmore v. Swift & Co., 323 U. S. 134 (1944).

17/ Columbia Broadcasting System v. U. S., 316 U. S. 407 (1942); Shields v. Utah Idaho C.R.R. Co., 305 U. S. 177 (1938).

18/ Conceivably the complaint may be subject to attack on the ground that exhaustion of administrative remedy, in the sense of making appropriate demand upon the Commission, has not been properly pleaded. We think, however, that in fact, as distinct from pleading, plaintiff has satisfied this requirement. Since such inadequacy, if it exists, could readily be cured by amendment to the complaint, and since we believe that in any event no claim has been stated upon which relief can be granted, we have not thought this point of particular relevance.

19/ The alleged improper ruling of United's President, as presiding officer at the stockholder's meeting, recessing the meeting to ascertain the existence of a quorum, does not appear to have any bearing upon the election of directors. The contention that the proxy material was misleading for failure to disclose intentions of the management with respect to such a recess seems similarly remote. The Commission takes no position upon the factual issue as to whether the recess was taken in good faith, nor, of course, as to issues of compliance with state law.

20/ This supplemental information is contained in a letter from the company to the Commission, a copy of which is attached hereto as Appendix A. We would respectfully suggest, however, that the Court leave open, or at least not foreclose, the question as to whether a number of mailings might become so disproportionate in relation to the subject matter and the interests involved as to come within the "other expenditures" clause of Rule U-65. In this connection it may be noted that while the release issued by the Commission at the time of the promulgation of Rule U-65 disclosed, as the Court properly surmised, a primary concern with the retainer of professional solicitors (Holding Company Act Release No. 2681 (1941), a copy of which is attached hereto), expenditures in connection with a possibly excessive number of mailings might well be taken as other than "ordinary expenditures," and thus would come within the express language of Rule U-65 (b) (2). And we may note further that one of the considerations that might appropriately be weighed in estimating the reasonableness of a particular number of mailings could be whether a majority of a quorum or an absolute majority were needed for the business on hand.

21/ Section 5 (d) of the Holding Company Act provides in pertinent part: "Whenever the Commission, upon application, finds that a registered holding company has ceased to be a holding company, it shall so declare by order and upon the taking effect of such order the registration of such company shall, upon such terms and conditions as the Commission finds and in such order prescribes as necessary for the protection of investors, cease to be in effect."

22/ On April 24, 1947, counsel for United told the Court: "And I want to clear up one point, your Honor: this plan will not be submitted to the Commission for its approval because it is a plan for the operation of the corporation after the corporation has ceased to be a holding company. The steps which the corporation is required to take to comply

with Section 11 have already been outlined by the Commission, and the management is in the process of complying with those steps. This is a plan which becomes operative only when, as and if the corporation secures an order from the Securities and Exchange Commission that it no longer is subject to the Public Utility Holding Company Act." (Transcript, pp. 54-55.)

23/ The purpose of the proxy provisions of the statute and the rules thereunder imposing disclosure and other requirements on persons soliciting proxies is of course in large part the protection or practical realization of rights accorded to stockholders by the law of the state of incorporation.

24/ On the other hand, if the Commission, solely as an aid to its government function, sought advisory data of this kind, and sought the aid of a court for the reason that without judicial sanctions it was impossible in the opinion of the Commission to obtain a fair vote, the court would have jurisdiction. Violation of a Commission order or subpoena or rule may serve as the basis of an injunction or mandamus action by the Commission under the express terms of the Act. See Sections 18 (d), (f) and (g).

25/ No question appears to be presented, nor is any opinion expressed, as to how far the Commission might have discretion under the Holding Company Act to issue orders or institute proceedings, if it believed that the management of United were engaged in activities amounting to such waste.

26/ Brief of June 27, 1947 pp. 29-31.

APPENDIX A

THE UNITED CORPORATION
37 Wall Street
New York 5, New York

July 1, 1947

W. R. Nowlin, Esq.
Public Utilities Division
Securities and Exchange Commission
18th and Locust Streets
Philadelphia 3, Pennsylvania

Dear Mr. Nowlin:

In accordance with our telephone conversation yesterday, I submit herewith information with respect to expenditures incidental to the conduct of the 1947 Annual Meeting of Stockholders of The United Corporation. This information supplements that contained in

my affidavit of June 16, 1947, which was prepared pursuant to the request of Judge V. L. Leibell in connection with Phillips v. The United Corporation et al. (U.S.D.C., S.D.N.Y.), a copy of which was furnished to Mr. Roger S. Foster under date of June 16, 1947

The information set forth in my affidavit of June 16th was limited, in accordance with Judge Leibell's request, to expenditures for printing, handling, and postage for the Management's solicitation material in connection with the recent meeting. In addition to those expenditures, the Corporation incurred the following expenses in connection with the meeting:

Legal Fees

Messrs. Whitman, Ransom, Coulson & Goetz $19,000.00

Professional services in connection with matters to be acted upon at the 1947 Annual Meeting, including advice on development of Plan for Future Operations, proceedings before the Securities and Exchange Commission on clarification of proposal for stockholder vote on Plan, reviewing Annual Report, work on original and supplemental proxy statements, conferences thereon with S.E.C., examination of Phillips' proxy statements, drafting protests thereon to S.E.C., proceedings thereon before S.E.C., examination of law on sundry questions, work with Delaware counsel on procedure for meeting, numerous conferences with officials of Corporation and sundry services and disbursements. (The above amount does not include fees for services in connection with Phillips v. The United Corporation et al. (U.S.D.C., S.D.N.Y.).

Delaware Counsel $5,300.00

Professional services in connection with 1947 Annual Meeting. (The above amount does not include fees for services in connection with Phillips v. S.E.C. (U.S.C.C.A., 2nd.) and Phillips v. The United Corporation et al. (U.S.D.C., S.D.N.Y.).

Messrs. Burns, Blake & Rich $2,000.00

Professional services in connection with 1947 Annual Meeting.

Judges of Election $4,000.00

Arthur Young & Company $1,500.00

Accounting services in connection with the 1947 Annual Meeting. (The above amount does not include the cost of the annual audit of the Corporation's books or the cost of services in connection with preparation of the Annual Report.)

The Corporation Trust Company $23,915.00

Checking and tabulating proxies and related matters in connection with 1847 Annual Meeting (March 7, 1947 to April 9, 1947, and May 19, 1947 to May 27, 1947) $10,340.00

Checking and tabulating proxies and related matters (April 10, 1947 to May 17, 1947), including regrouping and retabulating proxies in accordance with stipulation of counsel in Phillips v. The United Corporation et al. (U.S.D.C., S.D.N.Y.). $13,575.00

Stenographic Transcript of Annual Meeting $183.00

The above fees for legal and accounting services are based upon estimates which have been furnished to the Corporation. Not included in the above amounts for the reason that they cannot be accurately determined are certain additional minor charges for traveling expenses for attendance at the Annual Meeting and at proceedings before the Securities and Exchange Commission, and for telephone calls to members of the staff of the Securities and Exchange Commission, The Corporation Trust Company and the Corporation's printer.

My affidavit of June 16, 1947 showed an expenditure of $786.94 for telephone charges and other incidental expenses of the Corporation's officers or staff in connection with the solicitation of proxies for the recent meeting. Since June 16th the Corporation has received additional similar charges in the amount of $29.66.

Very truly yours,
E.H. Luckett
Edward H. Luckett
Vice President