November 15, 1946

Nos. 4, 5, American Power & Light v. SEC

Dear Frank:

I have now gone through your opinion and, on the whole, you have done an excellent job. I am substantially ready to concur, but wish to submit the following suggestions for your consideration, some minor, but one at least of possibly considerable importance.

(1) The last sentence of the second full paragraph on page 9 is very broad, unless qualified in some way to indicate there is a reserved zone of state power. A reference to the reservation in North American Co. v. SEC concerning a case where the SEC fails to exempt "some truly local holding company" would be sufficient.

(2) On page 11, in your discussion of delegation, you cite Yakus ("See") and Bowles v. Willingham (without the "see"). I gravely doubt that you and I should acquiesce in the tendency, now inevitable, to cite these war power cases generally in support of commerce power and other non-war power cases. The danger will be more and more for the Court thus to bring over those broad war power rulings into the body of law not depending at all on the war power. It may be the scope of delegation permissible in legislation founded on war power is no greater than that allowable under other powers. But I doubt you and I would have sustained all the delegation in Yakus (Roberts didn't anyhow), if the statute had rested solely on peacetime commerce power.

There is plenty of authority in nonwar cases to sustain your page 11 statements without dragging in Yakus and Willingham. I would much prefer to rest on that authority, not what you have used for this case.

(3) Again on page 11, at the end of line 3 in the second full paragraph, I would insert "of a civil character." We do not need to imply that the SEC could fashion criminal penalties. Your language is broad enough, without the qualification, to include them.

(4) On page 13, 8 lines from the end of the first paragraph, I have some considerable doubt whether you can say security holders have no direct interest "in the measures necessary to ensure compliance." Do not these include substituting other securities for those held in the dissolved (ordered to be) corporations and do not their shareholders have a very direct--and individual--interest in what is to be substituted for their holdings? It seems to me you have to face here the fact that they must be represented by the management on the order for the dissolution and also that they are (or should be) entitled to be heard on what they are to get for (in place of) their holdings when the dissolution takes place.

Also at the end of the same paragraph you say the management is "best equipped to comprehend the relevant factors." Maybe so. But in earlier portions of your opinion (e. g., page 8 circa) you have spent much effort in showing how faithless the managements have been and often are.

In this phase of the opinion I would rely more strongly on the necessity for the Commission to make necessary rules for intervention and use discretion in allowing it, by security holders on phases affecting their individual, as distinguished from the strictly corporate, interests and rights. It might be indicated that fair provision for notice and hearing on those phases might be required before giving final effect to the order for dissolution.

(5) On page 18, second paragraph, at end of line 9, I would change "wisdom" to "knowledge."

(6) On page 21, line 4 "with" obviously should be "within."

My major difficulty is with the concluding part of your opinion, dealing with relation of § 11 (e) procedure to that under § 11 (b) (2). Your treatment seems to be to permit the companies to pass up the § 11 (e) procedure in the first place; then to contest with the Commission in its § 11 (b) (2) proceeding; and after they have lost in that, then to file plans under the § 11 (e) procedure and force the Commission to consider them (along with the § 11 (b) (2) order) on notice and hearing.

If so, § 11 (e) will become a dead letter for any use until after the Commission has gone through with its § 11 (b) (2) hearings and order. Companies will always wait to see if the SEC will invoke § 11 (b) (2) and what it may do; then they will come in with their § 11 (e) proposals and string the thing out another five or ten years.

I doubt the statute contemplates this. I think rather it intended the companies to have first chance to submit their own plans; and on their failure to do so, the SEC was to move under § 11 (b) (2), and without being forced after doing so to go back and consider the belated § 11 (e) submissions.

I would not foreclose the Commission from doing this as a matter of discretion and wise administration. But I do not think we should rule or indicate that it has to do so, once the companies have passed up their chance to make § 11 (e) submissions on the gamble that the Commission might not go ahead under §11 (b) (2) or that, if it should do so, they could come in later under § 11 (e) as a matter of right.

Sorry to write so much. But the last point seems important, and the others possibly worth making.

Mr. Justice Murphy