

Cert. to CA-1
Opposition

Aldrich, Sweeney, & Wyzanski

The Securities & Exchange Commission seeks review of a decision of CA-1 setting aside its order. The SEC had instituted proceedings against the New England Electric System ("NEES"). The question is whether the SEC can compel NEES to divest itself of its gas utility subsidiaries while retaining its electric utility system, pursuant to Section 11(b)(1) of the Public Utility Holding Company Act of 1935, which provides for such divestiture unless the SEC finds that "Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system."

NEES, the SEC found, would not fit within that exception quoted above. It applied what the SG says was a consistent definition given by the SEC, that "loss of substantial economies" means:

"Such additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system."

CA-1 felt that standard was too rigid. It felt that what was required was a "business judgment of what would be a significant loss, not for a finding of total loss of economy or efficiency." The SG notes that CA-D.C. has taken a different position and thus there is a clear conflict among the Circuits. (See Engineers Public Service Co. v. SEC, 138 F.2d 936; Philadelphia Co. v. SEC, 177 F.2d 720). Other Circuits have reached varying results on this question. The SG says it is of considerable importance because several other cases are under consideration at the present. Resp. disputes the importance of this, but it would seem that the SG would not be here with this case if it did not have some importance; thus Resp's suggestion that the Act has been administered for this long without this Court's considering the case need not be given much consideration. Moreover, this Court once granted certiorari to consider this precise question (Louisiana v. SEC, 353 U.S. 368) but decided it on jurisdictional grounds.

Grant

12/6/65

JBF