

Edgar Filing: SOUTHERN CO - Form POS AMC

SOUTHERN CO
Form POS AMC
July 24, 2003

File No. 70-9701

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Amendment No. 7
(Post-Effective Amendment No. 2)
to
FORM U-1

APPLICATION OR DECLARATION
under
The Public Utility Holding Company Act of 1935

THE SOUTHERN COMPANY
270 Peachtree Street, N.W.
Atlanta, Georgia 30303

SOUTHERN POWER COMPANY
270 Peachtree Street, N.W.
Atlanta, Georgia 30303

(Name of company or companies filing this statement
and addresses of principal executive offices)

THE SOUTHERN COMPANY

(Name of top registered holding company parent of each applicant or declarant)

Tommy Chisholm, Corporate Secretary and Assistant Treasurer
The Southern Company
270 Peachtree Street, N.W.
Atlanta, Georgia 30303

(Names and address of agents for service)

This Commission is requested to mail signed copies of all orders,
notices and communications to:

Thomas A. Fanning
Executive Vice President, Chief
Financial Officer and Treasurer
The Southern Company
270 Peachtree Street, N.W.
Atlanta, Georgia 30303

Cliff S. Thrasher
Senior Vice President and
Chief Financial Officer
Southern Power Company
270 Peachtree Street, N.W.
Atlanta, Georgia 30303

Walter M. Beale, Esq.
Balch & Bingham LLP
1901 Sixth Avenue North
Suite 2600
Birmingham, Alabama 35203-2628

John D. McLanahan, Esq.
Troutman Sanders LLP
600 Peachtree Street, N.E.
Suite 5200
Atlanta, Georgia 30308-2216

Edgar Filing: SOUTHERN CO - Form POS AMC

INFORMATION REQUIRED

Item 1. Description of Proposed Transactions.

The Southern Company ("Southern") is a registered holding company under the Public Utility Holding Company Act of 1935, as amended (the "Act"). Southern Power Company ("Southern Power") is a public utility company subsidiary of Southern.

By order dated December 27, 2000 (the "2000 Order"), the Securities and Exchange Commission (the "Commission") authorized Southern to form NewCo,¹ a new subsidiary, and approved certain financing authority for NewCo. In the application/declaration, as amended, NewCo requested the authority for it and its subsidiaries to pay dividends to Southern out of capital or unearned surplus to the extent permitted by the applicable law and without impairing the rights of the holders of existing securities. Under the 2000 Order, the Commission reserved jurisdiction over the payment by NewCo of dividends out of capital or unearned surplus pending completion of the record. The Commission also reserved jurisdiction over transactions that would cause the common equity component of NewCo's consolidated capitalization to fall below 30%.

Since December 27, 2000, Southern Power has commenced operations as contemplated by the 2000 Order, has acquired and/or constructed several generating plants in the Southeastern United States, and is currently selling power from a number of these plants, predominantly under long-term power purchase agreements ("PPAs") with creditworthy counterparties. Under the terms of Southern Power's credit facility with a number of banks, borrowed funds for the construction of generating plants are unavailable until such time as all regulatory approval of the PPAs applicable to such plants have been obtained. Accordingly, during the period between commencement of construction and the obtaining of all requisite regulatory approval of a PPA under which power from a plant will be sold, the generating plant

1 NewCo is presently known as Southern Power Company, a Delaware corporation.

1

must be financed totally with equity from Southern. This has resulted in Southern Power having \$921.4 million of capital surplus at March 31, 2003, and a ratio of common equity to total capitalization of 47.4%.

Since June, 2002, Southern Power has issued two series of senior notes in the aggregate amount of \$1.15 billion, thus providing funds to repay indebtedness under the bank credit facility and permitting return of capital to Southern. However, the most practical manner of returning this capital to Southern, while at the same time maintaining an appropriate level of retained earnings and an otherwise strong balance sheet, is to declare dividends out of capital or unearned surplus.

Under its bank credit facility, Southern Power's ratio of common equity to total capitalization must be maintained at a level of 35% or higher. Moreover, certain of the offering documents for Southern Power's senior notes contemplate an equity ratio at such level. The senior notes, the bank facility and Southern Power, as issuer, are all rated BBB+ by Standard & Poors Ratings Service and Baal by Moody's Investors Services. These ratings reflect the recognition that a common equity ratio of 35% is both acceptable and traditional

Edgar Filing: SOUTHERN CO - Form POS AMC

for a credit worthy utility, and is the appropriate ratio for Southern Power.

Therefore, Southern Power now requests that the Commission release jurisdiction over the payment of dividends by Southern Power out of capital or unearned surplus so long as the payment of such dividends would not cause the common equity component of Southern Power's consolidated capitalization to fall below 35%.

Item 2. Fees, Commissions and Expenses.

The fees, commissions and expenses to be incurred in connection herewith are estimated to be approximately \$20,000.

Item 3. Applicable Statutory Provisions.

Southern Power considers that Section 12 of the Act and Rule 46 under the Act may be applicable to the proposed transactions.

2

To the extent that other sections of the Act or the rules thereunder are deemed to be applicable to the transactions described herein, such sections and rules should be considered to be set forth in this Item 3.

Rule 54 Analysis: The proposed transaction is also subject to Rule 54, which provides that, in determining whether to approve an application which does not relate to any "exempt wholesale generator" ("EWG") or "foreign utility company" ("FUCO"), the Commission shall not consider the effect of the capitalization or earnings of any such EWG or FUCO which is a subsidiary of a registered holding company if the requirements of Rule 53(a), (b) and (c) are satisfied.

Southern currently meets all of the conditions of Rule 53(a). At March 31, 2003, Southern's "aggregate investment," as defined in Rule 53(a)(1), in EWGs and FUCOs was approximately \$275.9 million, or 5.71% of Southern's "consolidated retained earnings," also as defined in Rule 53(a)(1), as of March 31, 2003 (\$4.835 billion).²

In addition, Southern has complied and will continue to comply with the record-keeping requirements of Rule 53(a)(2), the limitation under Rule 53(a)(3) on the use of operating company personnel to render services to EWGs and FUCOs, and the requirements of Rule 53(a)(4) concerning the submission of copies of certain filings under the Act to retail rate regulatory commissions. Further, none of the circumstances described in Rule 53(b) has occurred.

2 As discussed in Southern's Application on Form U-1 (File No. 70-9727) relating to the spin-off of Mirant Corporation ("Mirant"), Southern and Mirant reorganized certain energy-related and FUCO activities and Mirant completed a tax-free distribution to Southern of these activities on March 5, 2001 (the "Mini-Spin"). On April 2, 2001, Southern completed the spin-off of its remaining ownership interest in Mirant to Southern's shareholders. Therefore, the four indirect subsidiaries (EPZ Lease, Inc., Dutch Gas Lease, Inc., GAMOG Lease, Inc. and NUON Lease, Inc.) obtained through the Mini-Spin are the only remaining FUCO investments held by Southern. Although Southern now owns all of the equity in these companies as a result of the Mini-Spin, Southern has no direct or indirect investment or any aggregate investment within the meaning of Rule 53 in these FUCOs, including any direct or indirect guarantees or credit positions related

Edgar Filing: SOUTHERN CO - Form POS AMC

to any capital or financing leases. Southern has executed limited keep-well commitments whereby Southern would be required to make capital contributions to Southern Energy Finance Capital Corp. II, Southern Energy Finance Capital Corp. or to Southern Energy Finance Company, Inc. in the event of a shortfall in the scheduled debt service resulting from certain changes in the payments due from Southern under the Southern Company Income Tax Allocation Agreement. The maximum potential capital contribution required under these commitments is the unamortized balance of the related loans, which totaled approximately \$422 million as of March 31, 2003.

3

Item 4. Regulatory Approval.

No state or federal regulatory agency, other than the Commission, has jurisdiction over the proposed transactions.

Item 5. Procedure.

Southern Power hereby requests that the Commission's order be issued as soon as the rules allow. Southern Power hereby waives a recommended decision by a hearing officer or other responsible officer of the Commission, consents that the Division of Investment Management may assist in the preparation of the Commission's decision and/or order in this matter, unless such Division opposes the transactions proposed herein, and requests that there be no 30-day waiting period between the issuance of the Commission's order and the date on which it is to become effective.

Item 7. Information as to Environmental Effects.

(a) The issuance of an order by the Commission with respect to the proposed transactions will not constitute a major federal action significantly affecting the quality of the human environment.

(b) No other federal agency has prepared or is preparing an environmental impact statement with regard to the proposed transactions.

4

SIGNATURES

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, the undersigned company has duly caused this amendment to be signed on its behalf by the undersigned hereunto duly authorized.

Date: July 24, 2003

THE SOUTHERN COMPANY

By: /s/Tommy Chisholm

Tommy Chisholm
Corporate Secretary and

Edgar Filing: SOUTHERN CO - Form POS AMC

Assistant Treasurer

SOUTHERN POWER COMPANY

By: /s/Tommy Chisholm

Tommy Chisholm

Secretary