

The Southern Company  
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August 17, 2009

**VIA EMAIL AND U.S. MAIL**

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: File No. S7-10-09

Dear Ms. Murphy:

The Southern Company ("Southern Company") is pleased to have the opportunity to offer comments in response to the proposed rules – *Facilitating Shareholder Director Nominations* – released by the Securities and Exchange Commission (the "Commission") under File Number S7-10-09 and published in the Federal Register on June 18, 2009 (the "Proposing Release").

Southern Company is one of the largest public utility holding companies, with four state-regulated electric utility subsidiaries – Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company. In addition, Southern Company owns a competitive generation subsidiary, Southern Power Company, as well as certain non-energy related businesses. Southern Company is a well known seasoned issuer with a market capitalization of approximately \$25 billion. Southern Company's common stock is widely held, with nearly 170,000 registered holders. Southern Company also has a long-term shareholder base. Over half of Southern Company's registered owners have owned its stock for at least 15 years and 20,000 have owned for at least 30 years.

Southern Company appreciates the Commission's efforts to enhance shareholder participation in the nomination and election of boards of directors. Southern Company is supportive of rules that will allow each public company to develop procedures for proxy access that are beneficial to the majority of its shareholders. In that regard, Southern Company believes that the recently-adopted amendments to the Delaware General Corporation Law (the "DGCL"), along with the Commission's proposed amendments to Rule 14a-8 to allow shareholders to propose proxy access bylaw provisions, are more effective mechanisms for a company and its shareholders to determine whether proxy access is in the best interests of a company and, if so, the appropriate procedures for shareholder use of company proxy materials. Conversely, Southern Company believes that proposed Rule 14a-11, which would mandate uniform standards

for proxy access applicable to all companies, regardless of individual circumstances, should not be adopted. In the event the Commission chooses to adopt proposed Rule 14a-11, Southern Company believes a number of significant changes are necessary.

### **1. Proxy Access Should be Implemented Through Corporate Bylaw Provisions Approved by a Majority of Shareholders**

As stated above, Southern Company is supportive of rules that allow for the development of proxy access provisions that are in the best interests of shareholders. Accordingly, Southern Company is in favor of rules that would allow a majority of shareholders to determine whether shareholder nominees should be included in company proxy materials. In addition, such rules should allow each public company and its shareholders to establish procedures and conditions for proxy access that are appropriate taking into account the company's particular circumstances. Southern Company believes the recently-adopted state corporate law provisions described below, together with amendments to Rule 14a-8 which would allow shareholders to propose proxy access bylaw provisions, provide the most effective mechanism for establishing proxy access that is in the best interests of shareholders.

As described in the Proposing Release, the State of Delaware recently adopted amendments to the DGCL which became effective on August 1, 2009. Under new Section 112 of the DGCL, shareholders are permitted to adopt bylaw provisions that would require a company to include in its proxy solicitation materials, in addition to individuals nominated by the board of directors, one or more individuals nominated by shareholders for election as directors. Section 112 permits the bylaws to include any of the following procedures or conditions: (1) a minimum level of share ownership (including consideration of options or other rights); (2) a minimum duration of ownership; (3) submission of background information; (4) restrictions on the number of directors nominated by shareholders; (5) restrictions on the proportion of directors nominated by shareholders; (6) restrictions on the acquisition of voting power by the nominating shareholder or its affiliates; (7) undertakings by the shareholder to indemnify the company for any losses resulting from false or misleading information submitted by the shareholder; and (8) any other lawful condition. Section 112 of the DGCL does not mandate inclusion of any one or more of these conditions or the particular details of such conditions or restrictions. Instead, Section 112 allows each company and a majority of its shareholders to determine whether proxy access should be available and the details of any restrictions or conditions that would be appropriate.

Outside of Delaware, the Committee on Corporate Laws of the American Bar Association recently approved proposed amendments to the Model Business Corporation Act that would similarly allow shareholders to approve bylaw provisions providing proxy access which could include appropriate conditions or restrictions.

Under the proposed amendments to Rule 14a-8 and applicable state law, shareholders would have the ability to submit proposed proxy access bylaw provisions for consideration at a meeting of shareholders. This would allow a majority of shareholders at each public company to determine whether proxy access provisions are beneficial to the company and its shareholders.

For example, a majority of shareholders may conclude that the additional costs that will be incurred and the distraction to management outweigh the potential benefits of a proxy access bylaw provision, particularly where existing beneficial voting features are in place (such as cumulative voting at Southern Company or majority voting). Similarly, shareholders of a company with majority voting may conclude that the loss of the benefits of majority voting that would result from use of proxy access (for example, a special interest shareholder may submit a nominee with no real hope of success and the resulting contested election would cause plurality voting to apply) outweighs the benefits of proxy access. Conversely, a majority of shareholders at another public company may determine proxy access is in the best interests of shareholders given the company's particular circumstances.

In addition, a majority of shareholders should approve the particular conditions and restrictions that would apply if proxy access is implemented. Southern Company believes the conditions and restrictions appropriate are highly dependent on the individual characteristics of a company and its shareholder base. For example, given the exceptionally long-term nature of Southern Company's shareholder base as described above, Southern Company would anticipate that a more lengthy duration of ownership requirement would be necessary to have a standard that is representative of its shareholder base.

## **2. Proxy Access Should Not be Implemented Through Rigid Requirements that Cannot Be Revised or Replaced by a Majority of Shareholders**

Through proposed Rule 14a-11, the Commission would mandate that proxy access would be applicable at every public company. In addition, Rule 14a-11 would establish the particular conditions and restrictions that would be applicable to every public company, regardless of individual circumstances. Further, while amended Rule 14a-8 would allow shareholders to submit proxy access bylaw provisions for shareholder approval, shareholders could not submit or approve proxy access bylaw provisions that impose conditions more restrictive than those specified in proposed Rule 14a-11.

For many different reasons, including those described above, a majority of shareholders at a company may conclude that proxy access is not in the best interests of the company and its shareholders. Under the Commission's rule proposal, this majority of shareholders would have no ability to take action to eliminate proxy access. In addition, a majority of shareholders may conclude that a particular restriction set forth in proposed Rule 14a-11 is not sufficiently protective of the company and its shareholders. For example, a majority of shareholders may conclude that a longer ownership duration threshold would be more representative of the company's shareholder base and thus would be in the best interests of the company and its shareholders. Again, under the Commission's rule proposal, this majority of shareholders would have no ability to take this beneficial action. For these reasons, Southern Company does not believe proposed Rule 14a-11 should be adopted by the Commission. Instead, as described above, the Commission should adopt proposed amendments to Rule 14a-8 to allow proxy access bylaw proposals that would give shareholders of a company the opportunity to determine whether proxy access, and the conditions of that access, are in the best interests of a particular

company and its shareholders.

In the event the Commission chooses to adopt proposed Rule 14a-11, Southern Company believes it is essential that the Commission preserve the right of a majority of shareholders to decide if more restrictive conditions on proxy access or the elimination of proxy access is appropriate for a particular company. If proposed Rule 14a-11 is adopted, the proposed amendment to Rule 14a-8 should be expanded to allow not only for shareholder proposals that lessen the conditions and restrictions set forth in proposed Rule 14a-11, but also shareholder proposals that would strengthen the conditions or restrictions set forth in proposed Rule 14a-11 or eliminate proxy access altogether. This would preserve the ability of shareholders to take actions that are in the best interests of a majority of shareholders.

### **3. Additional Suggested Changes to Rule 14a-11**

#### ***a. Amount/Duration of Ownership Requirements***

As proposed by the Commission, any shareholder or shareholder group with beneficial ownership of 1% or more of the outstanding voting securities of a company is entitled to include director nominees in the company's proxy materials if ownership is maintained for a period of one year. As noted above, Southern Company strongly believes that each company should develop proxy access standards that are suitable to its particular circumstances, including requirements relating to the amount and duration of beneficial ownership. However, in the event that Rule 14a-11 is adopted by the Commission and establishes the most restrictive conditions that will be permissible, Southern Company believes significant changes should be made to these thresholds.

As described earlier, Southern Company strongly believes that a one-year holding requirement is not representative of long-term ownership, particularly with respect to Southern Company, and should not be established as the most restrictive permissible durational ownership requirement. A holding period of even two years, as has been suggested in other comment letters, would be more appropriate (although still not close to representative of Southern Company's long-term shareholder base).

In addition, Southern Company believes that a beneficial ownership level of 1% should not be the most restrictive permissible standard for large accelerated filers. As has been estimated in other comment letters submitted to the Commission, the use of proxy access by a shareholder is likely to result in substantial additional costs to a company. Southern Company believes a higher threshold should be permissible to further ensure that the interests of the proposing shareholder are aligned with those of all shareholders and that the costs to be incurred from proxy access are appropriately justified. Southern Company notes that the rules proposed by the Commission in 2003 would have included a 5% ownership threshold.

Southern Company agrees with other commenters who have noted that beneficial ownership for purposes of Rule 14a-11 should include a consideration of a shareholder's net long position,

including a consideration of derivatives and other securities that have the effect of separating the economic and voting interests of the shareholder. As currently drafted, the proposed rules would not even require disclosure of transactions that have the effect of separating the economic and voting interests of the shareholder.

In addition, Southern Company agrees with other commenters who have noted that a shareholder should be permitted to participate in only one shareholder group and with the model proxy access bylaw of the American Bar Association Task Force on Shareholder Proposals which would limit the size of shareholder groups.

***b. Order of Filing of Schedule 14N Should Not Be Determinative of Eligibility***

Under the Commission's proposed rules, if multiple shareholders or shareholder groups submit nominees for inclusion in a company's proxy materials, the first shareholder or shareholder group to file a statement on Schedule 14N would be permitted to include its nominees in the company's proxy materials. As emphasized above, Southern Company believes that each company and its shareholders should individually determine the appropriate mechanism for handling this situation through an appropriate proxy access bylaw provision. However, if Rule 14a-11 is adopted and a particular standard is imposed on all companies, Southern Company strongly suggests that the Commission consider an alternative mechanism.

Southern Company agrees with the concerns of other commenters who have noted that such a procedure is likely to lead to a race to file each year and is not likely to result in the submission of shareholder nominees that are in the best interests of all shareholders. Southern Company agrees with suggestions of a window period for filings of no earlier than 150 days and no later than 120 days prior to the mailing date of proxy materials. In addition, Southern Company believes that size of beneficial ownership and duration of ownership are much more beneficial standards for determining eligibility. Finally, Southern Company believes that an individual shareholder or shareholder group should not be permitted to submit more than one director nominee.

***c. Resubmission Requirements***

Southern Company believes that Rule 14a-11, if adopted, should include a provision that prohibits repeat nominations that do not receive substantial support. For example, the Society of Corporate Secretaries and Governance Professionals has suggested that Rule 14a-11 provide that if a shareholder nominee fails to receive at least 25% of the vote, the nominating shareholder would be prohibited from submitting another nominee for a period of two years. Southern Company agrees that this threshold vote for a shareholder nominee should be significantly higher than the threshold vote under similar requirements for shareholder proposals, given the substantially higher costs that a company will incur in connection with a shareholder nomination.

***d. Nominees Must Satisfy Company Established Objective Independence Standards***

Under the Commission's proposed rules, a shareholder nominee is only required to satisfy the objective independence standards of the applicable national securities exchange. As is made clear by the rules of the New York Stock Exchange, the objective independence standards of the New York Stock Exchange are baseline requirements and companies are encouraged to adopt objective independence requirements that fit their particular circumstances. Southern Company strongly believes that if a company has adopted a more stringent objective independence standard that is applicable to all non-employee director nominees, such an objective independence standard should be applied to nominees submitted by shareholders as well.

***e. Nominee Independence from Nominating Shareholder***

Southern Company believes that proposed Rule 14a-11, if adopted, should be revised to require that each nominee submitted for inclusion by a shareholder must be independent of the shareholder. As was addressed in the Commission's 2003 proposal for proxy access, Southern Company is concerned that the absence of an independence requirement will encourage special interest or single issue shareholders to submit nominees with the purpose of benefiting their individual interests over the interests of all shareholders. Given the considerable costs that will result from a contested election, and given the significant use of the shareholder proposal process by special interest groups, Southern Company believes an independence requirement is a very important and necessary protection for shareholders. In the absence of this requirement, substantial additional disclosures should be required by the nominee, such as how the nominee will maintain the confidentiality of information received in his or her capacity as a director and how the nominee will otherwise manage conflicts of interest.

***f. No Company Liability for Shareholder Statements***

Southern Company believes the liability provisions of Rule 14a-11(e) and 14a-19 should be consistent with the existing liability provisions for shareholder proposals under Rule 14a-8(l). Under Rule 14a-8(l), a company is not liable for statements included in a shareholder proposal or supporting statement. Under the Commission's rule proposal, a company would be held liable for misstatements or omissions if the company "knows or has reason to know" that the information submitted by a shareholder is false or misleading. In this similar circumstance where a company is required to provide a shareholder with access to its proxy materials, Southern Company does not believe that an additional due diligence requirement should be imposed. Further, certain shareholder support statements may reflect statements of intention or other matters for which no particular due diligence may be practical. Given that a company may have little or no ability under Rule 14a-11 to exclude a shareholder statement even if it actually believes the statement is misleading, it is unreasonable to impose liability on companies for such information.

***g. Companies Should be Able to Clearly Distinguish Nominees on Proxy Card***

Consistent with the proposed proxy access bylaw of the American Bar Association Task Force on Shareholder Proposals, Southern Company believes that Rule 14a-11 should be revised to clarify that the proxy card can clearly distinguish between the nominees of the Board of Directors and the nominees of shareholders. Southern Company believes this change would allow companies to prepare a proxy card that provides greater clarity to shareholders.

***h. Shareholder Nominations Should Count Against Limitation on Shareholder Proposals***

Rule 14a-8 limits shareholders to a single shareholder proposal for any meeting of shareholders. Given the 500-word supporting statement that will be permitted as part of a director nomination, groups who may not be acting in the best interests of all shareholders may use Rule 14a-11 as a mechanism for avoiding the single proposal requirements of Rule 14a-8. Southern Company believes that a shareholder nomination under Rule 14a-11 should count as a shareholder proposal for purposes of the single proposal requirements of Rule 14a-8.

***i. Should Not Be Applicable to Controlled Companies or Companies without Publicly-Traded Common Equity***

Under the Commission's rule proposal, it appears that the provisions of Rule 14a-11 would be applicable to companies that do not solicit proxies for annual meetings of shareholders but instead file information statements under Schedule 14C. This would include not only companies that have publicly-traded common stock (with a large controlling shareholder), but also companies that have no publicly-traded common stock (debt and preferred stock issuers).

Alabama Power Company, Georgia Power Company and Mississippi Power Company each file information statements on Schedule 14C with respect to annual meetings of shareholders. Southern Company owns all of the outstanding common stock of these subsidiaries. Each of these subsidiaries has outstanding classes of publicly-traded preferred stock that are entitled to vote together with the common stock in the election of directors. Through its ownership of all of the outstanding common stock of these subsidiaries, Southern Company controls the outcome of all elections of directors.

Given that companies that file information statements do not solicit proxies because a controlling shareholder can dictate the outcome of all matters considered at an annual meeting, Southern Company does not believe there is any benefit to making Rule 14a-11 applicable to controlled companies. At a minimum, Southern Company believes the provisions of Rule 14a-11 should not be applicable to companies that do not have any publicly-traded common stock (i.e., issuers of only non-convertible debt and non-convertible preferred and preference stock). Southern Company notes that the New York Stock Exchange takes a similar approach, exempting debt and preferred stock issuers from nearly all of the corporate governance requirements of Rule 303A.

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In conclusion, Southern Company appreciates the efforts of the Commission to enhance shareholder participation in the nomination and election of boards of directors. Southern Company believes this is best accomplished through the amendments to Rule 14a-8 to allow proxy access bylaw proposals, rather than through proposed Rule 14a-11. If the Commission has any questions regarding this letter, please contact the undersigned at (404) 506-5000.

Very truly yours,

A handwritten signature in black ink that reads "Melissa K. Caen". The signature is written in a cursive style with a long horizontal flourish at the end.

Melissa K. Caen  
Assistant Secretary