U.S. Department of Labor Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210

OPINION NO. 84-34A
Sec. 3, 3(2), 406, 406(a), 407,
407(a), 408, 408(a)

AUG 22, 1984

Mr. Thomas H. Rogers, III
Troutman, Sanders, Lockerman, & Ashmore
Candler Building, Suite 1400
127 Peachtree Street, N.E.
Atlanta, Georgia 30043

Dear Mr. Rogers:

This is in reply to your letter of January 12, 1984, requesting an advisory opinion regarding applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether The Southern Company (Southern) will be deemed to have established an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA with regard to The First National Bank of Atlanta Master Individual Retirement Plan and Custodial Agreement for Investment in the Common Stock of The Southern Company (FNB IRA).

You advise that, in order to promote investment in the common stock of Southern and to raise additional capital for Southern, The First National Bank of Atlanta (FNB) has established the FNB IRA. The FNB IRA will be offered to all Southern shareholders. Contributions to the FNB IRA are cash (or, in the case of rollover contributions, common stock of Southern) and invested in the common stock of Southern in accordance with the terms and conditions of the Southern Company Dividend Reinvestment and Stock Purchase Plan (the Stock Purchase Plan). The Stock Purchase Plan allows shareholders to reinvest dividends by purchasing additional shares of common stock at discount and to purchase, within certain limits, shares of common stock without brokerage commissions or other fees. Fees charged by FNB for administering the FNB IRA will be paid by Southern.

Any eligible individual may adopt the FNB IRA by entering into an adoption agreement provided by FNB. Currently the definition of an "eligible employee" would exclude an employee of Southern or its affiliates. However, you advise that FNB and Southern are considering amending the FNB IRA to include employees of Southern and its affiliates within the definition of "eligible employee." The FNB IRA states that it was established by FNB in order to assist participants in the Stock Purchase Plan. Persons eligible to participate in the Stock Purchase Plan include employees of Southern and its affiliates who are beneficial owners of Southern common stock through participation in the Employee Stock Ownership Plan and/or the Employee Savings Plan.

Section 3(2)(A) of title I of ERISA defines the term "employee pension benefit plan" to include:

> …any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program-
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> (i) provides retirement income to employees, or
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> (ii) results in a deferral of income by employees for periods extending to the termination

> of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

In regulation 29 C.F.R. §2510.3-2, the Department of Labor (the Department) described certain programs it would not consider to be employee pension benefit plans within the meaning of section 3(2) of ERISA. Specifically with regard to Individual Retirement Accounts (IRAs), regulation section 2510.3-2(d) provides:

> (d) Individual Retirement Accounts. (1) For purposes of Title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 (hereinafter "the Code") and an individual retirement bond described in section 409 of the Code, provided that-
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> (i) no contributions are made by the employer or employee association;
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> (ii) participation is completely voluntary for employees or members;
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> (iii) the sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and
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> (iv) the employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

Further, regulation section 2510.3-3(b) provides:

> (b) Plans without employees. For purposes of Title I of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R.10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under Title I. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to Title I.

Accordingly, it is the position of the Department that, if the FNB IRA excludes employees of Southern and its affiliates from participation, the FNB IRA would be a plan without employees. The FNB IRA would not constitute an employee pension benefit plan within the meaning of section 3(2) of ERISA and Southern would not be considered to have established or maintained such a plan with regard to the FNB IRA.

However, if the FNB IRA permits employees of Southern and its affiliates to participate, the FNB IRA would not constitute a plan without employees described in regulation section 2510.3-3(b).

According to the FNB IRA, although Southern does not in its normal course of business sponsor IRA programs offered to the public, Southern is the IRA sponsor (Article 1.21); the funding medium would be

expressly identified to Southern employees (if participation is allowed) as having as its sole purpose the investment in securities of the employer (Southern) (Article 4.2); and all fees charged by the custodian (FNB) for its services in connection with the plan and the accounts created thereunder are paid by the sponsor (Southern) (Article 9.5).

Based on the above, if the FNB IRA permits employees of Southern and its affiliates to participate, the FNB IRA would not constitute an IRA program (described in regulation section 2510.3-2(d)) for Southern employees because Southern would be involved in the FNB IRA beyond the limitations provided in that regulation. Accordingly, Southern would be considered to have established or to maintain for its employees an employee pension benefit plan within the meaning of section 3(2) of ERISA.

In this regard, it should be noted that section 406(a)(1)(A) and (E) of title I of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if the fiduciary knows or should know that such transaction constitutes a direct sale or exchange, or leasing of any property between the plan and a party in interest; or acquisition, on behalf of a plan, of any employer security or employer real property in violation of section 407(a) of ERISA. Section 408(e), however, exempts from the prohibitions of sections 406 and 407 the acquisition or sale by a plan or qualifying employer securities if: (1) the acquisition is for adequate consideration, (2) no commission is charged with respect thereto, and (3) the plan is an eligible individual account plan (as defined in section 407(d)(3)). A determination whether the conditions of the section 408(e) exemption are met is an inherently factual matter upon which the Department ordinarily will not rule (see section 5.01 of ERISA Procedure 76-1).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Morton Klevan
Deputy Administrator