146 FERC ¶ 61,108
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 2 and 35

Docket No. PL14-1-000

PAYMENT OF DIVIDENDS FROM FUNDS INCLUDED IN CAPITAL ACCOUNTS

(Issued February 20, 2014)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Proposed policy statement.

SUMMARY: The Commission proposes, as a statement of policy, that section 305(a) of the Federal Power Act (FPA) should be interpreted as not prohibiting the payment of dividends from funds included in capital accounts by any public utility that has a market-based rate tariff on file with the Commission, does not have captive customers, and does not provide transmission or local distribution services. Because the payment of dividends from funds included in capital accounts by such public utilities does not appear to implicate the concerns underlying the enactment of FPA section 305(a), the Commission proposes this policy in order to eliminate a regulatory burden otherwise applicable under FPA section 305(a) to such public utilities.

DATES: Comments on the proposed policy statement are due within [Insert Date 60 days after publication in the *Federal Register*].

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SUPPLEMENTARY INFORMATION:

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Payment of Dividends from Funds Included in Capital Accounts — Docket No. PL14-1-000

PROPOSED POLICY STATEMENT

(Issued February 20, 2014)

1. The Commission proposes, as a statement of policy, that section 305(a) of the Federal Power Act (FPA)[1] should be interpreted as not prohibiting the payment of dividends from funds included in capital accounts by any public utility that has a market-based rate tariff on file with the Commission, does not have captive customers, and does not provide transmission or local distribution services. Because the payment of dividends from capital accounts by such public utilities does not appear to implicate the concerns underlying the enactment of FPA section 305(a), the Commission proposes this policy in order to eliminate a regulatory burden otherwise applicable under FPA section 305(a) to such public utilities.

[1] 16 U.S.C. 825d(a) (2012).

I. Background

A. FPA Section 305(a) and Its Underlying Concerns

2. FPA section 305(a) provides that:

> It shall be unlawful for any officer or director of any public utility … to participate in the making or paying of any dividends of such public utility from any funds properly included in capital account.[2]

3. In *Citizens Utils. Co.*, the Commission noted that, at that time, this part of FPA section 305(a) had not yet been interpreted by the Commission or the courts, and that there was no explicit statement in the legislative history discussing the intent behind this provision.[3] The Commission went on to explain, however, that Congress' intent could be gleaned from the practices that led to the passage of the legislation,[4] providing as an example: "that sources from which cash dividends were paid were not clearly identified and that holding companies had been paying out excessive dividends on the securities of their operating companies. A key concern, thus, was corporate officials raiding corporate coffers for their personal financial benefit."[5] Indeed, as the Commission has stated, "a primary concern underlying section 305(a) of the FPA is to preclude exploitation of a

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[2] *Id.*

[3] *Citizens Utils. Co.*, 84 FERC ¶ 61,158, at 61,864 (1998) (*Citizens*).

[4] *Id.* at 61,864-65.

[5] *Id.* at 61,865 (footnotes omitted); *see also Entergy Louisiana Inc.*, 114 FERC ¶ 61,060, at P 12 (2006); *Exelon Corp.*, 109 FERC ¶ 61,172, at P 8 (2004); *ALLETE, Inc.*, 107 FERC ¶ 61,041, at P 10 (2004).

utility by its directors or officers."[6] Therefore, the Commission also has stated that it reviews "certain liquidity and financial matters when considering the potential impact of a transaction on an applicant's financial condition."[7]

B. Petitions for Declaratory Order Requesting Relief

4. In cases in which a dividend (cash or otherwise) will be accounted for as a charge to stated, additional, or miscellaneous paid-in capital of a public utility,[8] jurisdictional utilities have developed a practice of filing petitions for declaratory orders in which the petitioner requests the Commission's concurrence that, based upon the facts and circumstances presented, as well as commitments made, the making or paying of a proposed dividend will not implicate the concerns underlying the enactment of FPA section 305(a) and will not violate the prohibition in FPA section 305(a). The majority of these petitions have been filed because of concerns that have arisen in three situations: (1) in cases involving utility mergers or acquisitions in which, due to the application of purchase accounting to the transaction, the retained earnings (i.e., the traditional source of dividends) of the acquired public utility is reclassified for balance sheet purposes as

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[6] *Niagara Mohawk Holdings, Inc.*, 95 FERC ¶ 61,381, at 62,416, *order denying reh'g*, 96 FERC ¶ 61,144 (2001).

[7] *Exelon Corp.*, 109 FERC ¶ 61,172 at P 8 (footnote omitted) (citing *Niagara Mohawk Holdings, Inc.*, 99 FERC ¶ 61,323, at P 4 (2002)).

[8] *See, e.g.*, Account 201, Common stock issued, and Account 211, Miscellaneous paid-in capital, Part 101 Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act. 18 CFR pt. 101 (2013).

additional paid-in capital, without having any effect on cash otherwise available for paying future dividends;[9] (2) in cases involving the spin-off of a subsidiary or subsidiaries of a public utility, as the result of which, again for balance sheet purposes, the retained earnings of the public utility may be substantially reduced or eliminated, without having any effect on cash otherwise available for paying future dividends;[10] and (3) in cases involving single-asset generating companies with declining capital needs that have experienced a build-up in their equity balances as their assets have been depreciated.[11]

5. In response to petitions for declaratory orders concerning these three situations, and in other situations, the Commission has found that FPA section 305(a) would not be violated when there were adequate protections to address the concerns underlying FPA section 305(a), and it has allowed the public utility to make or pay dividends from funds included in capital accounts.

[9] *See, e.g., National Grid plc*, 117 FERC ¶ 61,080, at P 83 (2006), *order denying reh'g*, 122 FERC ¶ 61,096 (2008); *Ameren Corp.*, 131 FERC ¶ 61,240 (2010); *Duke Energy Ohio, Inc.*, 137 FERC ¶ 61,137 (2011).

[10] *See, e.g., Citizens*, 84 FERC ¶ 61,158 (1998); *ITC Holdings Corp.*, 143 FERC ¶ 61,256 (2013).

[11] *See, e.g., Allegheny Generating Co.*, 130 FERC ¶ 61,269 (2010); *System Energy Resources, Inc.*, 140 FERC ¶ 61,184 (2012).

6. The Commission has used a three-factor analysis, derived from *Citizens*, to determine that a proposed transaction does not implicate the concerns underlying FPA section 305(a), including that: (1) the utility clearly identifies the sources from which the dividends will be paid; (2) the dividends will not be excessive; and (3) the proposed transaction will not have an adverse effect on the value of shareholders' interests.[12] In certain orders granting relief from FPA section 305(a), issued subsequent to *Citizens*, the Commission's determination also was based on commitments by petitioners either to a specific dollar cap on dividends or a limitation on the amount of the payment of dividends equal to the pre-merger retained earnings balance of the acquired utility, and/or a commitment by the public utility to limit the amount of dividends from paid-in capital so that common equity, as a percentage of total capitalization, is maintained at a minimum level (frequently, a minimum of 30 percent common equity as a percentage of total capitalization).[13]

7. Historically, these petitions for declaratory orders concerning FPA section 305(a) have largely involved requests by utilities that have captive customers.[14] We have found

[12] *Citizens*, 84 FERC at 61,865.

[13] *See, e.g., Duke Energy Ohio, Inc.*, 137 FERC ¶ 61,137, at P 7 (2011); *National Grid plc*, 117 FERC ¶ 61,080, at P 83 (2006). The Commission also has accepted alternative protections. *See, e.g., Niagara Mohawk Holdings, Inc.*, 99 FERC ¶ 61,323, at PP 12-13 (2002).

[14] The Commission's regulations define "captive customers" to mean "any wholesale or retail electric energy customers served by a franchised public utility under

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that a proposed transaction would not violate FPA section 305(a) where we have been assured that no exploitation or threat to the financial integrity of the utilities would result from the payment of dividends from capital accounts.[15]

C. May 16, 2013 Petition for Declaratory Order

8. This proposed policy statement is the outgrowth of a May 16, 2013 petition for declaratory order (May 16 Petition)[16] by Exelon Generation Company, LLC (Exelon Generation) and five of its direct and indirect subsidiaries (the Acquired Subsidiaries)[17] (collectively Applicants) requesting that the Commission confirm that FPA section 305(a) was not a bar to the payment of dividends from capital accounts under the limitations and circumstances described in the petition.[18] The relative novelty in this

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cost-based regulation." 18 CFR 35.36(a)(6) (2013). Our use of the term "captive customers" in this Proposed Policy Statement is based on this definition.

[15] *See, e.g., National Grid plc,* 117 FERC ¶ 61,080 (2006), *order denying reh'g,* 122 FERC ¶ 61,096 (2008).

[16] While the May 16 Petition arose from a merger transaction and related accounting issues (s*ee infra* note 18), our Proposed Policy Statement here is not limited in its applicability to transactions involving mergers and their related accounting issues.

[17] The five direct and indirect subsidiaries of Exelon Generation included CER Generation II, LLC, Constellation Mystic Power, LLC, Constellation NewEnergy, Inc., Constellation Power Source Generation, Inc. and Criterion Power Partners, LLC.

[18] The May 16 Petition arose from a merger transaction, and involved factual circumstances familiar to the Commission in the context of FPA section 305(a). Specifically, Applicants explained that the merger between Exelon Corporation (Exelon) and Constellation Energy Group, Inc. (Constellation) was recorded by Exelon under the purchase method of accounting and that Exelon applied "push-down" accounting to the Legacy Constellation Subsidiaries (i.e., all of the subsidiaries of Constellation that

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May 16 Petition was that it did not involve utilities that have captive customers.[19] Rather, Applicants stated that Exelon Generation and the Acquired Subsidiaries did not have captive customers; did not provide transmission or local distribution service nor serve as a designated provider of last resort (POLR) for any class of customers; and had electric market-based rate authorizations from the Commission, with the standard waivers and exemptions, including waivers of FPA section 204(a) (with respect to securities

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became direct and indirect subsidiaries of Exelon Generation), including the Acquired Subsidiaries. "Push-down" accounting is a method of accounting in which the financial statements of a subsidiary are presented to reflect the costs incurred by the parent company to buy the subsidiary, instead of the subsidiary's historical costs. Accordingly, the purchase costs of the parent company are shown in the subsidiary's statements. As a result of the "push-down" accounting adjustments to the Legacy Constellation Subsidiaries at the time of the merger closing, the pre-merger retained earnings balances of the Legacy Constellation Subsidiaries were "reset to zero" and reestablished on their books as miscellaneous paid-in capital. In effect, the traditional source of dividends - retained earnings - was eliminated, without, however, having any impact on cash actually available for paying dividends. The purpose of the May 16 Petition was to obtain a Commission determination that FPA section 305(a) does not prohibit: (1) the Acquired Subsidiaries from paying dividends to their parent company, Exelon Generation, from their respective capital accounts in equal measure to the funds that were recorded as retained earnings at the close of the merger; and (2) Exelon Generation from, in turn, paying dividends to its parent company, Exelon Ventures LLC, from its capital accounts to the extent that Exelon Generation has received dividends from any of the Legacy Constellation Subsidiaries paid out of funds recorded as miscellaneous paid-in capital.

[19] However, we note that, in Docket No. EL06-15-000, Exelon Generation and an affiliate previously filed a petition for declaratory order requesting a declaration that FPA section 305(a) was not a bar to the payment of dividends from capital accounts under the limitations and circumstances described in that petition. *Exelon Generation Company, LLC*, 114 FERC ¶ 61,317 (2006).

issuances)[20] and waiver of the requirement to maintain their books and records in accordance with the Uniform System of Accounts (USofA).[21]

9. In the May 16 Petition, Applicants presented the Commission with two alternative requests:

(1) the Commission could declare that FPA section 305(a) is not a bar to the proposed payment of dividends by the Applicants, and this determination could be based on the traditional *Citizens* three-part analysis, namely, that: (1) the source of the dividends will be clearly identified; (2) the dividends will not be excessive; and (3) the issuance of such dividends will not harm shareholders;[22] or, alternatively,

(2) the Commission could declare that FPA section 305(a) is not a bar to the payment of dividends by the Applicants and all current and future public utility subsidiaries of Exelon on new grounds that all of these entities have market-based rate authority, do not have captive customers, do not provide transmission or local distribution service, and do not provide POLR for any class of customers, rather than on the basis of the application of the traditional *Citizens* three-factor analysis.

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[20] 16 U.S.C. 824c(a) (2012).

[21] 18 CFR pt. 101 (2013).

[22] *See supra* P 6.

In support of its latter alternative, Applicants argued that the capital concerns relating to traditional public utilities, which FPA section 305(a) was meant to address, are not present for these kinds of non-traditional public utilities.

10. In response to the May 16 Petition, the Electric Power Supply Association (EPSA)[23] filed comments generally supporting both alternative declarations requested by Applicants, but it also advocated that the Commission grant an even broader FPA section 305(a) determination.[24] EPSA posited that the factors that made the Applicants' petition compelling are broadly applicable to certain classes of public utilities, such as merchant generators and power marketers, which have market-based rate tariffs on file with the Commission, do not have captive customers, and do not provide transmission or local distribution services.[25] EPSA added that, although Applicants proposed that the entities eligible for Applicants' alternative broadly construed declaration include a limitation that they would not serve as a designated POLR, such condition is not necessary where a designated POLR would meet the other three criteria, i.e, would have market-based rate tariffs on file with the Commission, would not have captive customers, and would not provide transmission or local distribution services.[26] Therefore, EPSA

[23] EPSA is the national trade association for competitive power suppliers, including merchant generators and power marketers.

[24] EPSA June 17, 2013 Comments at 1-2.

[25] *Id.* at 2-4.

[26] *Id.* at 2 n.3.

urged the Commission to omit the POLR limitation proposed by Applicants in granting the broader relief requested under section 305(a).[27]

11. In support of its request for a broader FPA section 305(a) determination, EPSA argued that, in the case of entities that have market-based rate authority, do not have captive customers, do not provide transmission or local distribution services, the concerns underlying section 305(a) are not present.[28] In such cases, according to EPSA, the distribution of dividends would not have any adverse effect on the financial integrity of any traditional public utility, its customers, or the ability of state commissions to protect public utility customers.[29]

12. In sum, because of the broad applicability of these principles to the competitive power industry as a whole, and in the interest of judicial economy, EPSA requested that the Commission issue a blanket declaratory order finding that FPA section 305(a) does not act as a bar to the payment of dividends from capital accounts by any public utility that has market-based rate authority, does not have captive customers, and does not provide transmission or local distribution services.[30]

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[27] *Id.*

[28] *Id.* at 5-6.

[29] *Id.* at 5.

[30] *Id.* at 2-4.

13. In their answer, Applicants supported EPSA's request for a broader FPA section 305(a) determination and, therefore, noted their agreement with EPSA's proposal to drop the POLR limitation.[31] As an additional basis for dropping the POLR limitation, Applicants observed that POLR service is a retail electric service and, thus, within the regulatory framework of state utility commissions.[32] Applicants also stated that those public utilities that provide transmission and local distribution services and also serve as a POLR would not be eligible for the alternative broad declaration sought in Applicants' petition in any event because of the limiting condition that such utilities are providing transmission and local distribution services.[33] Further, Applicants asserted that eliminating the POLR limitation would have positive public policy implications because, in such case, non-traditional public utilities would not be discouraged from participating in POLR service due to the FPA section 305(a) limits on the payment of dividends.[34] Accordingly, Applicants stated that they would not object to the Commission's issuance of a blanket declaratory order based on EPSA's proposal.

[31] Applicants' June 20, 2013 Answer at 3. Applicants note that POLR, or default, service is also known by other terms, such as Standard Offer Service or Basic Generation Service. *Id.* at 2 n.3.

[32] *Id.* at 3.

[33] *Id.*

[34] *Id.*

14. In its September 3, 2013 order[35] on the May 16 Petition, the Commission granted Applicants' primary request for relief, based on the Commission's traditional *Citizens* grounds, since the Commission agreed that the concerns underlying FPA section 305(a) were not present under the limitations and circumstances described in the petition.[36] While it declined to grant the broader relief requested in that proceeding, the Commission also stated that it believed that Applicants and EPSA had made a strong case for a close examination of whether FPA section 305(a) should be interpreted as not prohibiting the payment of dividends from capital accounts by any public utility that has a market-based rate tariff on file with the Commission, does not have captive customers, and does not provide transmission or local distribution services.[37] Accordingly, the Commission stated its intent to open a generic proceeding to consider the broader request for relief, which would provide public notice and an opportunity for a broader range of interested parties to comment.[38]

II. Discussion

15. In this proposed policy statement, we undertake that generic proceeding to consider whether FPA section 305(a) should be interpreted as not prohibiting the

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[35] *Exelon Generation Company, LLC*, 144 FERC ¶ 61,181 (2013).

[36] *Id.* PP 20-21.

[37] *Id.* P 22.

[38] *Id.*

payment of dividends from capital accounts by any public utility that has a market-based rate tariff on file with the Commission, does not have captive customers,[39] and does not provide transmission or local distribution services.[40] Because we believe that the payment of dividends from capital accounts by such public utilities does not appear to create the concerns underlying the enactment of FPA section 305(a), we propose this policy in order to eliminate this regulatory burden under FPA section 305(a) for such public utilities.

16. As previously noted, we believe that Applicants and EPSA made a strong case for a close examination of whether FPA section 305(a) should be interpreted as not prohibiting the payment of dividends from capital accounts by any public utility that has a market-based rate tariff on file with the Commission, does not have captive customers, and does not provide transmission or local distribution services. In particular, Applicants argued that, in Order No. 697, the Commission concluded that it was appropriate to apply a different standard of oversight to public utilities that do not have captive customers and do not sell electricity at cost-based rates.[41] In Order No. 697, the Commission found that it was reasonable to continue to grant entities that do not have captive customers

[39] *See supra* note 14.

[40] We propose that a public utility that does not provide transmission or local distribution service is a public utility that does not own transmission or local distribution facilities providing these services.

[41] Applicants' May 16, 2013 Petition at 14.

and do not sell electricity at cost-based rates: (1) blanket authorizations under FPA section 204(a) to issue securities; and (2) waivers from the requirement to maintain their books in accordance with the USofA.[42] In essence, Applicants argued that it would be unusual for the Commission to grant a non-traditional public utility (i.e., merchant generators and power marketers) with market-based rate authorization a blanket authorization under FPA section 204(a) to issue securities, as well as a waiver from the requirement to maintain their books in accordance with the USofA, while, at the same time, under FPA section 305(a), limiting the accounts from which that public utility may pay dividends.[43]

17. Under the conditions advocated by Applicants and EPSA, we observe that the eligible public utility: (1) will have satisfied the Commission's market power analysis to obtain market-based rate authority for its wholesale power sales; (2) will have no

[42] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at PP 984, 999, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), cert. denied, 133 S. Ct 26 (2012).

[43] Applicants' May 16, 2013 Petition at 15. Specifically, Applicants asserted that it would be anomalous for the Commission to have previously concluded that it did not need to be concerned about the character and quality of securities by a non-traditional public utility (under FPA section 204(a)) or the manner in which a non-traditional public utility keeps its accounts (under the USofA), and to now conclude that the Commission is concerned about how a non-traditional public utility accounts for dividends paid on its securities (under FPA section 305(a)). *Id.*

captive customers that require protection by the Commission or the state commissions; and (3) will not provide transmission or local distribution services, which are traditional monopoly services subject to Commission and state commission oversight, to customers. Similar to our finding in Order No. 697, it may be appropriate to now apply a different approach to our FPA section 305(a) oversight for those public utilities that meet these three conditions. We note, in this regard, that FPA section 305(a) was promulgated in an era of traditional, vertically-integrated utilities providing monopoly services to captive customers, and Congress wanted to ensure that the distribution of dividends would not have any adverse effect on the financial integrity (and thus the ability to serve) of any such public utility or its customers. Since that time, the electric industry has evolved, and here we propose to oversee differently the payment of dividends by non-traditional utilities, such as merchant generators and power marketers, who have market-based rate authority, do not have captive customers, and do not provide transmission and local distribution services, which, as noted, are monopoly services.

18. For these reasons, we request comment as to whether the Commission should adopt a statement of policy that FPA section 305(a) should be interpreted as not prohibiting the payment of dividends from funds in capital accounts by any public utility that has a market-based rate tariff on file with the Commission, does not have captive customers, and does not provide transmission or local distribution services, because such payment of dividends does not appear to implicate the concerns underlying the enactment

of FPA section 305(a) and it is thus appropriate to eliminate this regulatory burden otherwise applicable under FPA section 305(a) to such public utilities.

III. Comment Procedures

19. The Commission invites comments on this proposed policy statement within [Insert Date 60 days after publication in the *Federal Register*].

IV. Document Availability

20. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington, DC 20426.

21. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

22. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.referenceroom@ferc.gov.

By the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.