

148 FERC ¶ 61,020  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 C.F.R. Parts 2 and 35

[Docket No. PL14-1-000]

Payment of Dividends From Funds Included in Capital Account

(Issued July 17, 2014)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Policy Statement.

SUMMARY: The Commission issues this policy statement to provide guidance that the Federal Power Act (FPA) should be interpreted as not prohibiting the payment of dividends from funds included in capital account 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. The Commission has concluded that the payment of dividends from funds included in capital account by such public utilities does not implicate the concerns underlying the enactment of the provision of the FPA that prohibits the payment of dividends from funds included in capital account. Thus, it is unnecessary for any public utility that meets the criteria identified in this policy statement to file a petition for declaratory order in order to seek assurances that dividends paid from capital account are not unlawful under this provision of the FPA.

EFFECTIVE DATE:

This policy will become effective July 17, 2014.

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148 FERC ¶ 61,020  
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 Account

Docket No. PL14-1-000

POLICY STATEMENT

(Issued July 17, 2014)

1. The Commission issues this policy statement to provide guidance that section 305(a) of the Federal Power Act (FPA)<sup>1</sup> should be interpreted as not prohibiting the payment of dividends from funds included in capital account 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 Commission has concluded that the payment of dividends from capital account by such public utilities does not appear to implicate the concerns underlying the enactment of FPA section 305(a). In issuing this policy statement, the Commission eliminates a regulatory burden otherwise applicable under FPA section 305(a) to certain public utilities that pay dividends from funds included in capital account. Thus, it is unnecessary for any public utility that meets the criteria identified in this policy statement to file a petition for

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<sup>1</sup> 16 U.S.C. 825d(a).

declaratory order in order to seek assurances that dividends paid from capital account are not unlawful under FPA section 305(a).

**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.<sup>2</sup>

3. In *Citizens Utils. Co.*, the Commission noted that this provision of FPA section 305(a) had not previously 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.<sup>3</sup> The Commission went on to explain, however, that Congress' intent could be gleaned from the practices that led to the passage of the legislation,<sup>4</sup> 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.<sup>5</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Citizens Utils. Co.*, 84 FERC ¶ 61,158, at 61,864 (1998) (*Citizens*).

<sup>4</sup> *Id.* at 61,864-65.

<sup>5</sup> *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.*,

(continued...)

In later cases, in order to ensure that the dividend pay-outs in question would not impair the liquidity and financial integrity of a public utility, the Commission has also often conditioned its grant of declaratory relief on the utility's commitment to observe specified limitations on the amount of such dividends or on other financial commitments.<sup>6</sup>

**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,<sup>7</sup> public utilities often filed petitions for declaratory orders in which the petitioner requests the Commission's concurrence that, based upon the facts and circumstances presented, the making or paying of a proposed dividend will not implicate the concerns underlying the enactment of FPA section 305(a) and, therefore, will not violate FPA section 305(a). The majority of these petitions arose from three situations: (1) cases involving utility mergers or acquisitions in which, due to the application of purchase accounting to the transaction,

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107 FERC ¶ 61,041, at P 10 (2004); *Niagara Mohawk Holdings, Inc.*, 95 FERC ¶ 61,381, at 62,416, *order denying reh'g*, 96 FERC ¶ 61,144 (2001).

<sup>6</sup> *Niagara Mohawk Holdings, Inc.*, 99 FERC ¶ 61,323, at P 10 (2002) (order on compliance filing accepting petitioner's commitment not to pay dividends out of paid-in capital unless it had an investment grade credit rating for its long-term debt); *Exelon Corp.*, 109 FERC ¶ 61,172 at P 9 (requiring petitioner to maintain a minimum common equity balance of 30 percent of total capital).

<sup>7</sup> *See, e.g.*, 18 C.F.R. pt. 101, Account 201, Common stock issued, and Account 211, Miscellaneous paid-in capital.

the retained earnings, which is the traditional source of dividends, of the acquired public utility is reclassified for balance sheet purposes as additional paid-in capital, without having any effect on cash otherwise available for paying future dividends;<sup>8</sup> (2) cases involving the distribution (or “spin-off”) of the stock 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;<sup>9</sup> and (3) cases involving recapitalizations of public utilities to reduce excessive equity balances with debt, including situations in which single-asset generating companies with declining capital needs have experienced a build-up in their equity balances as their assets have been depreciated.<sup>10</sup>

5. In response to petitions for declaratory orders concerning these three situations, and sometimes in other situations, the Commission has found that FPA section 305(a)

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<sup>8</sup> 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).

<sup>9</sup> See, e.g., *Citizens*, 84 FERC ¶ 61,158 (1998); *Delmarva Power & Light Co.*, 91 FERC ¶ 61,043 (2000); *ALLETE, Inc.*, 107 FERC ¶ 61,041 (2004). In *ALLETE, Inc.*, the Commission observed that the spin-off transaction was less like a payment of cash dividends than it was a corporate restructuring involving a one-time distribution of property, although the accounting issues presented were similar.

<sup>10</sup> See, e.g., *PPL Electric Utilities Corp.*, 99 FERC ¶ 61,317 (2002); *Allegheny Generating Co.*, 130 FERC ¶ 61,269 (2010); *System Energy Resources, Inc.*, 140 FERC ¶ 61,184 (2012).

would not be violated by the payment of dividends, and it has allowed the public utility to make or pay dividends from funds included in capital account.

6. The Commission has used a three-factor analysis, derived from *Citizens*, to determine when a proposed transaction does not implicate the concerns underlying FPA section 305(a), specifically 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.<sup>11</sup> 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 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).<sup>12</sup>

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<sup>11</sup> *Citizens*, 84 FERC at 61,865.

<sup>12</sup> 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).

7. Historically, these petitions for declaratory orders concerning FPA section 305(a) have largely involved requests by public utilities that have captive customers.<sup>13</sup> The Commission has found that a proposed transaction would not violate FPA section 305(a) where the Commission has been assured that no exploitation or threat to the financial integrity of the utilities would result from the payment of dividends from capital account, and therefore would not impair the utility's ability to continue its obligation to serve captive customers.<sup>14</sup>

**C. May 16, 2013 Petition for Declaratory Order**

8. On May 16, 2013 (May 16 Petition),<sup>15</sup> Exelon Generation Company, LLC (Exelon Generation) and five of its direct and indirect subsidiaries (the Acquired Subsidiaries)<sup>16</sup> (collectively Applicants) requesting that the Commission confirm that FPA

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<sup>13</sup> The Commission's regulations define "captive customers" to mean "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation." 18 C.F.R. § 35.36(a)(6) (2013). Our use of the term "captive customers" in this policy statement is based on this definition.

<sup>14</sup> *See, e.g., National Grid plc*, 117 FERC ¶ 61,080 (2006), *order denying reh'g*, 122 FERC ¶ 61,096 (2008).

<sup>15</sup> While the May 16 Petition arose from a merger transaction and related accounting issues (*see infra* note 17), our policy statement in this proceeding is not limited in its applicability to transactions involving mergers and their related accounting issues.

<sup>16</sup> 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.

section 305(a) was not a bar to the payment of dividends from capital account under the limitations and circumstances described in the petition.<sup>17</sup> The relative novelty in this May 16 Petition, as compared with other FPA section 305(a) petitions, was that it did not involve utilities that have captive customers.<sup>18</sup> Rather, Applicants stated that Exelon

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<sup>17</sup> 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 became direct and indirect subsidiaries of Exelon Generation), including the Acquired Subsidiaries, a subset of the Legacy Constellation Subsidiaries, which are public utilities under the FPA. “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) did not prohibit: (1) the Acquired Subsidiaries from paying dividends to their parent company, Exelon Generation, from their respective capital account 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 account 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.

<sup>18</sup> However, the Commission notes that, in Docket No. EL06-15-000, Exelon Generation and an affiliate previously had filed a petition for declaratory order requesting

(continued...)

Generation and the Acquired Subsidiaries did not have captive customers; did not provide transmission or local distribution service or serve as a designated providers 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 issuances)<sup>19</sup> and waiver of the requirement to maintain their books and records in accordance with the Uniform System of Accounts (USofA).<sup>20</sup>

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:
  - (i) the source of the dividends will be clearly identified; (ii) the dividends will not be excessive; and (iii) the issuance of such dividends will not have an adverse effect on the value of shareholders' interests;<sup>21</sup> or, alternatively,

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a determination that FPA section 305(a) was not a bar to the payment of dividends from capital account under the limitations and circumstances described in that petition. *Exelon Generation Company, LLC*, 114 FERC ¶ 61,317 (2006).

<sup>19</sup> 16 U.S.C. § 824c(a).

<sup>20</sup> 18 C.F.R. pt. 101.

<sup>21</sup> *See supra* P 6.

- (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 that have market-based rate authority, do not have captive customers, do not provide transmission or local distribution service, and will not be the POLR for any class of customers, rather than apply the traditional *Citizens* three-factor analysis.

In support of its latter alternative, Applicants argued that the concerns relating to traditional public utilities, which FPA section 305(a) was meant to address, were not present for these kinds of non-traditional public utilities. 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.<sup>22</sup> Applicants explained that, in Order No. 697, the Commission found that it was reasonable to continue to grant (1) blanket authorizations under FPA section 204(a) to issue securities, and (2) waivers from the requirement to maintain books in accordance with the USofA,<sup>23</sup> to those entities that do

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<sup>22</sup> Applicants' May 16, 2013 Petition at 14.

<sup>23</sup> *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 (9<sup>th</sup> Cir. 2011), *cert. denied*, 133 S. Ct 26 (2012).

not have captive customers and do not sell electricity at cost-based rates. In essence, Applicants argued that it would be logically inconsistent 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 its 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.<sup>24</sup>

10. In response to the May 16 Petition, the Electric Power Supply Association (EPSA)<sup>25</sup> filed comments generally supporting both alternative requests for relief by Applicants, but it also advocated that the Commission grant an even broader FPA section 305(a) determination.<sup>26</sup> 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

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<sup>24</sup> Applicants' May 16, 2013 Petition at 15. Specifically, Applicants stated that it "would be anomalous for the Commission to conclude, on the one hand, that it need not be concerned with (a) the quantity or character of securities issued by a public utility [under FPA section 204(a)] or (b) the manner in which it keeps its accounts [under the USofA], and then to conclude that the Commission is concerned about how the entity accounts for dividends paid on its securities [under FPA section 305(a)]." *Id.*

<sup>25</sup> EPSA is the national trade association for competitive power suppliers, including merchant generators and power marketers.

<sup>26</sup> EPSA June 17, 2013 Comments at 1-2.

local distribution services.<sup>27</sup> EPSA added that, although Applicants proposed that the entities eligible for Applicants' alternative broadly construed determination 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.<sup>28</sup> Therefore, EPSA urged the Commission to omit the POLR limitation proposed by Applicants in granting the broader relief requested under section 305(a).<sup>29</sup>

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, and do not provide transmission or local distribution services, the concerns underlying section 305(a) are not present.<sup>30</sup> 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.<sup>31</sup>

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<sup>27</sup> *Id.* at 2-4.

<sup>28</sup> *Id.* at 2 n.3.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 5-6.

<sup>31</sup> *Id.* at 5.

12. In sum, because of the broad applicability of these principles to the competitive power industry as a whole, and in the interest of administrative economy, EPSA requested that the Commission issue a blanket order finding that FPA section 305(a) does not act as a bar to the payment of dividends from capital account by any public utility that has market-based rate authority, does not have captive customers, and does not provide transmission or local distribution services.<sup>32</sup>

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 recommendation that the Commission omit the POLR limitation.<sup>33</sup> 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.<sup>34</sup> Applicants pointed out that those public utilities that provide transmission and local distribution services and also serve as a POLR would not be eligible for the alternative broader determination sought in Applicants' petition by virtue of the limiting condition that such utilities are providing transmission and local distribution services.<sup>35</sup> Further,

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<sup>32</sup> *Id.* at 2-4.

<sup>33</sup> Applicants' June 20, 2013 Answer at 3. Applicants noted 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.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> *Id.*

Applicants asserted that eliminating the POLR limitation would have positive public policy implications because, in such cases, non-traditional public utilities would not be discouraged from participating in POLR markets due to the FPA section 305(a) limits on the payment of dividends.<sup>36</sup> Accordingly, Applicants stated that they would not object to the Commission's issuance of a blanket declaratory order based on EPSA's proposal.

14. In its September 3, 2013 order<sup>37</sup> on the May 16 Petition, the Commission granted Applicants' primary request for relief, based on the Commission's traditional *Citizens* three-factor analysis, since the Commission agreed that the concerns underlying FPA section 305(a) were not present under the limitations and circumstances described in the petition.<sup>38</sup> 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 account 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.<sup>39</sup> Accordingly, the Commission stated its intent to open a generic proceeding to consider the broader request

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<sup>36</sup> *Id.*

<sup>37</sup> *Exelon Generation Company, LLC*, 144 FERC ¶ 61,181 (2013).

<sup>38</sup> *Id.* PP 20-21.

<sup>39</sup> *Id.* P 22.

for relief, which would provide public notice and an opportunity for a broader range of interested parties to comment.<sup>40</sup>

**D. Proposed Policy Statement**

15. In the proposed policy statement,<sup>41</sup> the Commission undertook a generic proceeding to consider whether FPA section 305(a) should be interpreted as not prohibiting the payment of dividends from capital account by any public utility that has a market-based rate tariff on file with the Commission, does not have captive customers,<sup>42</sup> and does not provide transmission or local distribution services.<sup>43</sup> Because the Commission believed that the payment of dividends from capital account by such public utilities does not appear to create the concerns underlying the enactment of FPA section 305(a), the Commission proposed this policy in order to eliminate the regulatory burden of filing unnecessary petitions for declaratory relief under FPA section 305(a) by such public utilities.

16. As previously noted, the Commission in response to the May 16 Petition had expressed its opinion that Applicants and EPSA made a strong case for a close

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<sup>40</sup> *Id.*

<sup>41</sup> Proposed Policy Statement, *Payment of Dividends from Funds Included in Capital Accounts*, 146 FERC ¶ 61,108 (2014).

<sup>42</sup> *See supra* note 13.

<sup>43</sup> The Commission proposed 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.

examination of whether FPA section 305(a) should be interpreted as not prohibiting the payment of dividends from capital account 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.

17. In the proposed policy statement, the Commission observed that an 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 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 the Commission's finding in Order No. 697, the Commission stated that it may be appropriate to now apply a different approach to its FPA section 305(a) oversight for those public utilities that meet the three conditions. The Commission noted, 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 Commission observed that the electric industry has evolved, and, in the proposed policy statement, it proposed 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. The Commission requested 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 account 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.

**E. Commenters**

19. The Commission received comments from Exelon, EPSA, and two individuals, Messrs. Blake Harrison and Daisuke Ikewaza. All commenters supported adoption of the Commission's proposed policy statement. The comments of Exelon and EPSA include arguments similar to those made in support of Exelon Generation's May 16 Petition. Exelon and EPSA assert that the Commission should adopt the proposed policy statement's interpretation of FPA section 305(a) because the payment of dividends by a public utility that meets the three proposed criteria does not appear to implicate the concerns underlying FPA section 305(a), as such dividends would not have any adverse effect on the financial integrity of any traditional public utility, its customers, or the

ability of state utility commissions to protect such public utility customers.<sup>44</sup> In addition, Exelon and EPSA argue that, in routinely granting waivers and exemptions to public utilities that have been granted market-based rate authority, including blanket authorization to issue securities under FPA section 204, the Commission has determined that it is appropriate to apply a different standard of review and oversight to such public utilities.<sup>45</sup> Furthermore, Exelon asserts that by adopting this policy, the Commission would ensure that funds appropriately available for the overall liquidity and financial integrity of a holding company are not stranded at a subsidiary that is a non-traditional utility (i.e., a utility that has market-based rates, does not have captive customers, and does not provide transmission or distribution services).<sup>46</sup> Exelon also states that the policy will eliminate unneeded filings and lessen the burden on the Commission of reviewing those filings.<sup>47</sup>

20. Mr. Harrison asserts that Congress's key concern in passing FPA section 305(a) was grounded in ensuring the financial and, consequently, operational viability of a public utility by preventing a utility's directors or officers from exploiting and

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<sup>44</sup> Exelon's May 1, 2014 Comments at 5; EPSA May 20, 2014 Comments at 4.

<sup>45</sup> Exelon's May 1, 2014 Comments at 4-5; EPSA May 20, 2014 Comments at 5-6.

<sup>46</sup> Exelon's May 1, 2014 Comments at 5-6.

<sup>47</sup> *Id.* at 6.

withdrawing from a utility's capital account.<sup>48</sup> Harrison states that Congress originally passed the FPA at a time when the primary model of a public utility was a monopolistic, all-encompassing energy provider. In this model, Harrison states that ratepayers were forced to deal with the public utility in order to receive energy and that a public utility director's financial improprieties could have a dramatic impact on the ratepayers' energy service given there was no alternative energy option available to the ratepayer. In that model, Harrison argues that it was necessary to install safeguards to protect the public from practices that could harm their access to energy.<sup>49</sup>

21. However, Mr. Harrison argues that the landscape of public utilities has changed since the passage of the FPA toward more retail competition and, in some limited circumstances, does not give rise to the concern that motivated the initial prohibition in FPA section 305(a).<sup>50</sup> Harrison further argues that, if the fundamental concern of FPA section 305(a) involved protecting ratepayers from being negatively impacted by improper dividend conduct where they were beholden only to the public utility for their energy, and if it can be shown that ratepayers are not beholden to a public utility with

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<sup>48</sup> Harrison's April 14, 2014 Comments at 1.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

certain characteristics, then FPA section 305(a) should not be applied to public utilities with those characteristics.<sup>51</sup>

22. Mr. Harrison agrees with the Commission's proposal in the proposed policy statement that a 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 does not lend itself to the concern that motivated Congress to pass FPA section 305(a). Harrison states that, if the public utility has a market-based rate tariff on file with the Commission, it is clear evidence that the public utility is not operating in a regulated, centralized utility environment and it signals that the public utility is not a traditionally-regulated monopoly. Harrison asserts that, although it is possible that such a public utility has market power, which would give rise to the set of concerns that motivated FPA section 305(a), the Commission's next two proposed criteria further distinguish this particular type of public utility and alleviate the concerns motivated by FPA section 305(a).<sup>52</sup> Harrison argues that, if the public utility does not have captive customers, its failure as a result of its financial practices would only harm those ratepayers who could instead elect to purchase their energy from other suppliers.<sup>53</sup> Finally, Harrison argues that, if the public utility does not provide transmission or

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2.

<sup>53</sup> *Id.*

distribution, this characteristic is further evidence that financial failure as a result of improper financial conduct would not unduly disrupt ratepayer service.<sup>54</sup>

23. Mr. Ikewaza also agrees that the Commission's three criteria in the proposed policy statement demonstrate when a public utility does not have market power. Ikewaza explains that public utilities with market power could exploit their capital account and pass on the financial losses to their customers, because their customers have no alternatives in the market and they would be forced to buy electricity even when the price of electricity is higher.<sup>55</sup> Ikewaza adds that the Commission's three-factor analysis in *Citizens*, which the Commission relies on to analyze FPA section 305(a) petitions,<sup>56</sup> is a framework established on the premise that traditional utilities indeed have market power. Ikewaza states that this framework helps ensure the financial integrity of, and investment in, traditional utilities by preventing them from arbitrarily using funds from their capital account.<sup>57</sup> However, Ikewaza argues that the *Citizens* framework is not necessarily

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<sup>54</sup> *Id.*

<sup>55</sup> Ikewaza's April 17, 2014 Comments at 1.

<sup>56</sup> As described above, under the three-factor analysis in *Citizens*, the Commission determines that a proposed transaction does not implicate the concerns underlying FPA section 305(a) if: (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. *See supra* P 6 (discussing *Citizens*, 84 FERC ¶ 61,158 at 61,865).

<sup>57</sup> D. Ikewaza's April 17, 2014 Comments at 1.

suitable for non-traditional utilities because non-traditional utilities usually do not have market power.<sup>58</sup>

24. Mr. Ikewaza states that, under the Commission's first criterion – that the public utility that has a market-based rate tariff on file with the Commission – it should be presumed that such a public utility does not have market power because the Commission would not grant market-based rate authority to a public utility that has market power.<sup>59</sup> Ikewaza explains that if the public utility lacks market power, customers can find and substitute electricity from other competitors.<sup>60</sup> Ikewaza asserts that the Commission's second criterion – that the public utility does not have captive customers – is reasonable because it protects against a situation where, even if customers have alternative sources of electricity from competing suppliers, the alternatives may not be meaningful if the customers cannot switch to alternative suppliers without difficulty and at substantial cost.<sup>61</sup> Ikewaza also states that the Commission's third criterion – that the public utility does not provide transmission or local distribution services – is reasonable. Ikewaza argues that, even where a public utility that meets the first two criteria and thus does not have enough discretion to exploit its capital funds, this third criterion protects against the

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 2.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

situation where a public utility still provides transmission or local distribution services and thus could choose to exploit its capital funds in a way that would have a very significant, negative impact on customers.<sup>62</sup> Therefore, Ikewaza supports the third criteria as part of the Commission's policy statement.

## **II. Policy Statement**

25. Recognizing that the electric industry has evolved, on the record before us, we find, as a matter of policy, that FPA section 305(a) should not be construed as a bar to the payment of dividends from funds included in capital account 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. The payment of dividends from capital account by such public utilities does not appear to implicate the concerns underlying the enactment of FPA section 305(a), and we issue this policy statement in order to eliminate a regulatory burden otherwise applicable under FPA section 305(a) to such public utilities. In light of our interpretation of FPA section 305(a), it is our view that a public utility that meets the three criteria identified above does not need to file a petition for declaratory order under FPA section 305(a) requesting an interpretation from the Commission that FPA section 305(a) does not bar its payment of dividends from capital account.

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<sup>62</sup> *Id.*

### **III. Document Availability**

26. 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.

27. 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.

28. 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](mailto: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](mailto:public.referenceroom@ferc.gov).

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
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