

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Exelon Generation Company, LLC  
Public Service Electric and Gas Company

Docket No. EL06-15-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued March 28, 2006)

1. On October 28, 2005, as amended on November 23, 2005 and February 27, 2006, Exelon Generation Company, LLC (Exelon Generation) and Public Service Electric and Gas Company (PSE&G) (collectively, Applicants) filed a petition for declaratory order, requesting that the Commission find that Applicants may pay dividends from certain specified capital accounts, following the completion of a merger and corporate restructuring of Applicants' parent companies, Exelon Corporation (Exelon) and Public Service Enterprise Group Incorporated (PSEG Holdings), without violating section 305(a) of the Federal Power Act (FPA).<sup>1</sup> For the reasons stated below, we will grant Applicants' petition for declaratory order.

**Background**

2. Exelon formerly was a registered public utility holding company, under the Public Utility Holding Company Act of 1935 (PUHCA 1935).<sup>2</sup> Exelon Generation conducts Exelon's generation business. PSEG Holdings formerly was an exempt public utility holding company, under PUHCA 1935, with four major subsidiaries, including PSE&G. PSEG Holdings' subsidiaries also include PSEG Power LLC (PSEG Power), the parent company of most of PSEG's United States power production business.

3. On February 4, 2005, Exelon and PSEG Holdings filed, under section 203 of the FPA and Part 33 of the Commission's regulations,<sup>3</sup> an application for Commission approval of a transaction that included: (1) Exelon's acquisition of PSEG Holdings and

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<sup>1</sup> 16 U.S.C. § 825d(a) (2000).

<sup>2</sup> 15 U.S.C. §§ 79a *et seq.* (2000). This statute was repealed, effective February 8, 2006, and replaced by the Public Utility Holding Company Act of 2005. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261-77, 119 Stat. 594, 972-78 (2005).

<sup>3</sup> 16 U.S.C. § 824b (2000); 18 C.F.R. Part 33 (2005).

the resulting indirect merger of Exelon's and PSEG Holdings' jurisdictional facilities; and (2) the internal restructuring and consolidation of Exelon's and PSEG Holdings' subsidiaries. On July 1, 2005 the Commission authorized the proposed merger and internal restructuring (subject to Commission acceptance of Applicants' compliance filings).<sup>4</sup>

4. Applicants maintain that the merger will be recorded using the purchase method of accounting and, as a result of this accounting method, the balance in PSE&G's Retained Earnings account (Account No. 216) will be eliminated, and the value of that account will be reflected in PSE&G's Miscellaneous Paid-in Capital account (Account No. 211). Applicants maintain that ordinarily PSE&G would pay dividends to its parent and preferred shareholders out of its Retained Earnings account, however, the balance of its Retained Earnings account now will be eliminated. PSE&G therefore seeks to pay post-merger dividends, up to the amount which will be reflected in its Retained Earnings account on its closing balance sheet on the day of the merger closing, from its Miscellaneous Paid-in Capital account.

5. Similarly, Applicants state that, under the purchase method of accounting, PSEG Power's Retained Earnings account will be eliminated and its value will be reflected in its Miscellaneous Paid-in Capital account. Further, as a result of the corporate restructuring, PSEG Power and its direct subsidiaries will be merged into Exelon Generation, and PSEG Power's Miscellaneous Paid-in Capital account balance will be reflected in Exelon Generation's Membership Interest account (Account No. 201). Applicants maintain that, as a result of the corporate restructuring and the purchase method of accounting, Exelon Generation, as the successor to PSEG Power, may have higher dividend requirements than it had prior to the merger and restructuring but will not have a correspondingly higher balance in its Retained Earnings account.<sup>5</sup> Exelon Generation therefore seeks to pay post-merger dividends from its Membership Interest account, up to the amount which will be reflected in PSEG Power's Retained Earnings account on PSEG Power's closing balance sheet on the day of the merger closing.

6. Applicants maintain that the payments of dividends by PSE&G from its Miscellaneous Paid-in Capital account and by Exelon Generation from its Membership Interest account, subject to the conditions set forth in its petition, detailed below, are consistent with prior Commission precedent and thus permissible under section 305(a) of the FPA.

7. First, Applicants maintain that the source of the dividends will be clearly identified. Applicants state that dividends will be paid from the specified capital accounts up to the amount in the Retained Earnings accounts shown on each company's

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<sup>4</sup> *Exelon Corp.*, 112 FERC ¶ 61,011 (2005) (Merger Order).

<sup>5</sup> Petition at 5.

closing balance sheet on the day of the merger closing, and Applicants commit that the balance of those accounts will be set forth in the final accounting which must be filed within six months of the consummation of the merger pursuant to the Merger Order.<sup>6</sup> Second, Applicants assert that the dividends that will be paid from the capital accounts will not be excessive, stating that “the actual funds that will be used to pay the dividends are no different after the closing of the merger than before. The only difference is the account from which the dividends will be made.”<sup>7</sup>

8. Third, Applicants maintain that shareholders will not be harmed by the proposed issuance of dividends from the capital accounts because they will own the same assets before and after the dividends are issued. Specifically, following the merger, PSE&G’s corporate parent will have the same percentage ownership interest before and after the payment of dividends, and Exelon Generation’s corporate parent will have the same percentage ownership interest before and after the payment of dividends.<sup>8</sup>

9. Applicants commit to a number of safeguards. First, Applicants state that they have identified a date certain (*i.e.*, the closing date of the merger) “on which the limitation on future dividends from capital accounts will be calculated.”<sup>9</sup> Second, Applicants “commit that they will not pay any further dividends from any capital account, beyond those sought in this proceeding, without first requesting Commission approval to the extent such approval is required.”<sup>10</sup> Third, Applicants “commit to notify the Commission within thirty (30) days in the event that a rating agency indicates that it anticipates a downgrade of senior debt rating of Exelon Generation or senior secured debt of PSE&G to below investment grade.”<sup>11</sup> Finally, Applicants state that they will “inform the Commission promptly of any change in circumstances that reflects a material departure from the representations made in [their] petition.”<sup>12</sup>

### **Notice of Filing**

10. Notice of Applicants’ October 28, 2005 filing was published in the Federal Register, 70 Fed. Reg. 72,809 (2005), with interventions or protests due on or before December 13, 2005. None was filed.

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<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 10.

<sup>10</sup> Petition at 10.

<sup>11</sup> Applicants’ February 27, 2006 letter at 6.

<sup>12</sup> Petition at 10.

### Discussion

11. We will grant Applicants' petition because the concerns underlying section 305(a) of the FPA are not present in the circumstances of this transaction.

12. Section 305(a) provides that:

It shall be unlawful for any officer or director of any public utility to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale by such public utility of any security issued or to be issued by such public utility, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of such public utility from any funds properly included in capital account.<sup>13</sup>

13. The concerns underlying the enactment of section 305(a) included "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>14</sup>

14. The concerns underlying section 305(a) are not present in this proceeding. Applicants have clearly identified the source from which payment will be made. There is also nothing to indicate that any dividends paid will be excessive; the dividends to be paid will not exceed the amounts recorded as Retained Earnings prior to the merger's closing. Further, Applicants' commitment to limit the use of capital accounts for the payment of dividends to the specific capital accounts identified in this proceeding, and in the amounts set forth in the final accounting to be filed pursuant to the Merger Order, is sufficient to provide assurance that the payment of dividends will not result in the abuses underlying section 305(a). Finally, the proposed dividends will not have an adverse effect on the value of shareholder interests. The sole member of PSE&G following the merger will have the same percentage ownership interest in PSE&G following the payment of dividends, and the sole member of Exelon Generation will have the same percentage ownership interest in Exelon Generation following the payment of dividends.

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<sup>13</sup> 16 U.S.C. § 825d(a) (2000).

<sup>14</sup> *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).

15. For these reasons, and under the circumstances of this case, we will grant the petition and find that section 305(a) of the FPA is not a bar to the payment of dividends out of the identified capital accounts in the amounts described above.

The Commission orders:

(A) Applicants' petition for declaratory order is hereby granted, as discussed in the body of this order.

(B) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the petition.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.