

130 FERC ¶ 61,269  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Allegheny Generating Company

Docket No. EL10-37-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued March 31, 2010)

1. On January 19, 2010, Allegheny Generating Company (Allegheny) filed a petition for declaratory order under section 305(a) of the Federal Power Act (FPA)<sup>1</sup> relating to the payment of dividends to its shareholders. As discussed below, Allegheny proposes to pay dividends out of other paid-in capital to its shareholders in order to reduce equity as a percentage of total capitalization,<sup>2</sup> and thereafter to pay dividends out of other paid-in capital in order to maintain equity as a percentage of total capitalization at not less than 45 percent. In this order, as discussed below, we grant the petition for declaratory order.

**Background**

2. Allegheny is a Virginia corporation that owns a 40 percent undivided interest in a pumped-storage hydroelectric station in Bath County, Virginia and its connecting transmission facilities. Allegheny states that it is a directly owned subsidiary of Monongahela Power Company (Monongahela) and Allegheny Energy Supply Company, LLC (AE Supply). Monongahela and AE Supply are wholly-owned subsidiaries of Allegheny Energy, Inc. The station is operated by the 60 percent owner, Virginia Electric Power Company, a nonaffiliated utility.

3. In its request for declaratory order, Allegheny notes that its shareholders' equity ratio as of September 30, 2009 was 64.98 percent. Pursuant to a 1985 settlement

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<sup>1</sup> 16 U.S.C. § 825d(a) (2006).

<sup>2</sup> The payment of dividends will be funded by the issuance of debt conditionally approved in a delegated letter order issued on March 19, 2010. *Allegheny Generating Co.*, 130 FERC ¶ 62,230 (2010) (Allegheny Letter Order).

agreement approved by the Commission,<sup>3</sup> for purposes of calculating the Revenue Requirement, Allegheny indicates that its proportion of equity to total capitalization is not permitted to exceed 45 percent. Allegheny notes that due to the nature of being a single asset company with declining capital needs, it experiences a capital buildup approximately equal to its share of the annual depreciation of the pumped-storage station. Allegheny states that it has previously sought and received authorization from the Securities and Exchange Commission (SEC) to pay common dividends from time to time out of capital or unearned surplus to maintain its 45 percent equity position. Allegheny states that through 2001, it was able to pay dividends from retained earnings and other paid-in capital, so that capitalization was systematically reduced each year as the asset depreciated. Allegheny notes in the application that it recently has not been able to pay dividends in excess of current earnings, i.e., out of other paid-in capital, which has resulted in an accumulation of capital.

4. Allegheny proposes to issue dividends out of capital or unearned surplus (i.e. other paid-in capital) to its shareholders to reduce their equity ratio to approximate Allegheny's authorized equity capitalization (i.e., 45 percent).<sup>4</sup> Allegheny further proposes to issue dividends out of other paid-in capital on an ongoing basis to avoid the annual buildup of the capital account from accumulated depreciation.

5. Allegheny argues that the payment of dividends it proposes is not inconsistent with the requirements of section 305(a) of the FPA. Allegheny notes that the Commission has previously granted declaratory orders under section 305(a) in similar circumstances, where the utility committed to maintain equity equal to at least 30 percent of total capitalization.<sup>5</sup> Allegheny further notes that the proposed issuance of dividends will have no effect on its ownership, since both shareholders are wholly-owned subsidiaries of Allegheny Energy, Inc. Allegheny proposes that its equity to total capital ratio will approximate its authorized equity capitalization of 45 percent following the dividends, which is well above the 30 percent that the Commission has found acceptable in other cases.

6. Allegheny requests Commission action no later than March 31, 2010. Notice of Allegheny's filing was published in the *Federal Register*, 75 Fed. Reg. 5310, with

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<sup>3</sup> *Allegheny Generating Company*, 32 FERC ¶ 61,160 (1985).

<sup>4</sup> In Docket No. ES10-25-000, Allegheny sought authorization to borrow up to \$160 million in long-term debt, \$60 million of which would be for the dividends proposed herein. Authorization was conditionally granted by delegated letter order on March 19, 2010. Allegheny Letter Order, 130 FERC ¶ 62,230 at 3.

<sup>5</sup> See, e.g., *Entergy Gulf States, Inc.*, 118 FERC ¶ 61,271 (2007).

comments, protests, and interventions due on or before February 9, 2010. No comments, protests or interventions were filed.

### **Discussion**

7. We will grant Allegheny's petition because the concerns underlying section 305(a) are not present in this transaction. Section 305(a) states:

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>6</sup>

8. 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."<sup>7</sup> A central concern thus "was corporate officials raiding corporate coffers for their personal financial benefit."<sup>8</sup>

9. These concerns are not present in the transactions at issue here. Allegheny has clearly identified the source from which its dividends will be paid, i.e., other paid-in capital. We also find that the proposed dividends are not excessive based on the facts as presented in Allegheny's application. As Allegheny explained, due to the nature of being a single asset company with declining capital needs, it experiences a capital buildup approximately equal to its share of the annual depreciation of its pumped-storage station. The dividends Allegheny proposes to pay will be used to return such excess equity so that the ratio of equity to total capitalization will approximate the level set by a settlement approved by the Commission (and will not be less than 45 percent). Moreover, based on Allegheny's representations, the proposed dividends will have no adverse effect on the

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<sup>6</sup> 16 U.S.C. § 825d(a) (2006).

<sup>7</sup> *Citizens Utilities Co.*, 84 FERC ¶ 61,158, at 61,865 (1998); *see also Allete, Inc.*, 107 FERC ¶ 61,041 (2004); *Delmarva Power & Light Co., et al.*, 91 FERC ¶ 61,043, at 61,158-59 (2000); *PPL Electric Utilities Corp.*, 99 FERC ¶ 61,317, at 62,356-57 (2002).

<sup>8</sup> *Citizens Utilities Co.*, 84 FERC ¶ 61,158 at 61,865.

value of the shareholders' interests, since the shareholders will be the sole recipients of the dividends.

The Commission orders:

The petition for declaratory order is hereby granted, as discussed in the body of the order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.