149 FERC ¶ 61,160
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Trans-Allegheny Interstate Line Company | Docket No. EL15-4-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued November 24, 2014)

1. On October 7, 2014, as supplemented on November 7, 2014, Trans-Allegheny Interstate Line Company (TrAILCo) filed a petition for declaratory order with the Commission. TrAILCo requests that the Commission find that the periodic payment of dividends out of paid-in capital to its parent company will not violate section 305(a) of the Federal Power Act (FPA).[1] As discussed below, we grant the petition for declaratory order.

I. Background

2. TrAILCo, a wholly-owned subsidiary of FirstEnergy Transmission, LLC (FirstEnergy Transmission),[2] is engaged in the interstate transmission of electricity in Pennsylvania, Virginia and West Virginia. TrAILCo states that it was organized to finance, construct, own, operate, and maintain the Trans-Allegheny Interstate Line Project and other transmission facilities approved under PJM Interconnection, L.L.C.'s amended and restated operating agreement in order to improve reliability in the region.[3]

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[1] 16 U.S.C. § 825d(a) (2012).

[2] TrAILCo states that it is a wholly-owned subsidiary of FirstEnergy Transmission, which, in turn, is a wholly-owned subsidiary of FirstEnergy Corp., a holding company under the Public Utility Holding Company Act of 2005. 42 U.S.C. §§ 16451-63 (2012).

[3] October 7 Filing at 2.

3. TrAILCo explains that it is required under section 1.f.(i) of its Formula Rate Implementation Protocols to base its annual update for the rate year on the FERC Form No. 1 data for the most recent calendar year. In its most recent annual update filed on May 15, 2014, TrAILCo reported an equity ratio of 59.42 percent in its capital structure.[4] In order to maintain a balanced capital structure within the range of capital structures approved by the Commission, TrAILCo proposes to make periodic dividend payments out of paid-in capital to FirstEnergy Transmission, as necessary. TrAILCo states that it will only pay dividends out of paid-in capital to maintain its equity at a level that is no lower than 45 percent of total capital.[5] It further clarifies that it intends to maintain its capital structure with an equity ratio within the range of 45 percent to 60 percent.[6]

4. In addition, TrAILCo states that, in 2012, FirstEnergy Corp. announced its "Energizing the Future" initiative to construct new or rebuild transmission facilities across its service territories in Ohio, Pennsylvania, West Virginia, New Jersey, and Maryland.[7] TrAILCo explains that FirstEnergy Corp. anticipates spending approximately $4.2 billion through at least 2017 to implement this significant transmission expansion initiative, which will be focused primarily on TrAILCo and its transmission affiliate American Transmission Systems, Inc., and eventually extend east over the remainder of FirstEnergy Corp.'s footprint. TrAILCo states that this petition for declaratory order is intended, among other things, to mitigate the potential impact of FirstEnergy Corp.'s current transmission expansion initiative on TrAILCo's equity ratio.[8]

5. TrAILCo argues that its proposed payment of dividends out of paid-in capital is permissible under the Commission's established interpretation of FPA section 305(a).[9]

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[4] October 7 Filing at 2 n.6, citing Trans-Allegheny Interstate Line Co., Electronic Informational Filing of 2014 Formula Rate Annual Update, Att. 4, Docket Nos. ER07-562-000, *et al*. (filed May 15, 2014).

[5] October 7 Filing at 2-3.

[6] November 7 Supplement at 1.

[7] *Id.* at 1-2. *See* https://www.firstenergycorp.com/content/fecorp/newsroom/news_releases/firstenergy-announces--2-8-billion-expansion-of--energizing-the-.html.

[8] *Id.* at 2.

[9] On December 29, 2011, pursuant to section 305(a), the Commission granted a prior petition for declaratory order filed by TrAILCo, finding that TrAILCo's payment of dividends from paid-in capital to reduce the percentage of equity in TrAILCo's capital structure to not less than 50 percent would not violate section 305(a) of the FPA. *Trans-Allegheny Interstate Line Co.*, 137 FERC ¶ 61,242 (2011). The 2011 Petition was

According to TrAILCo, the source of the dividends will be retained earnings and Account 211 (Miscellaneous Paid-in Capital), as identified on its books and records as "other paid-in capital" that exceeds its needs for equity capital.[10] As TrAILCo states that it will only pay dividends out of paid-in capital to maintain equity at a level that is no lower than 45 percent of total capital, it contends that these proposed payments would not be excessive and would not adversely affect TrAILCo's ability to obtain additional funds when needed to support system operations and future expansion. Last, TrAILCo states that FirstEnergy Transmission, the parent and sole shareholder of TrAILCo, will be the sole recipient of the dividends. Therefore, it argues that the payment of dividends will have no adverse effect on the value of shareholder's interests.[11]

II. <u>Notice of Filing</u>

6. Notice of the October 7 Filing was published in the *Federal Register*, 79 Fed. Reg. 62,135 (2014), with protests and interventions due on or before November 6, 2014. On October 10, 2014, the Commission issued an errata notice shortening the comment due date to October 28, 2014. Notice of the November 7 Supplement was published in the *Federal Register*, 79 Fed. Reg. 68,682 (2014), with protests and interventions due on or before November 17, 2014. No interventions or protests were filed.

III. <u>Discussion</u>

7. 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

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specifically intended to address unique circumstances arising from TrAILCo's transition from a hypothetical to an actual capital structure in 2011, by providing for a one-time dividend payment to reduce equity and thereby protect transmission customers from any resulting rate shock from the change in capital structure. The petition for declaratory order in this proceeding is unrelated to the 2011 Petition.

[10] November 7 Supplement at 1.

[11] October 7 Filing at 4-5.

> paying of any dividends of such public utility from any funds properly included in capital account.[12]

8. As discussed below, we will grant TrAILCo's petition because the concerns underlying section 305(a) are not present in this transaction. The concerns underlying the enactment of section 305(a) included the possibility "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."[13]

9. TrAILCo's proposal to make periodic payments of dividends to its parent, FirstEnergy Transmission, out of paid-in capital does not raise these concerns. TrAILCo has identified the source from which the dividends will be paid: paid-in capital, as identified on the books and records of TrAILCo as "[o]ther paid-in capital," that exceeds its needs for equity capital. We also find that the proposed dividends, which will reduce the equity in the total capitalization to a level no less than 45 percent, and mitigate the potential impact of FirstEnergy Corp.'s "Energizing the Future" transmission expansion initiative on TrAILCo's equity ratio, do not appear to be excessive and should not jeopardize TrAILCo's financial condition given the record before us in this proceeding;[14] the Commission has previously found that dividends would not be excessive provided that a company maintains a minimum equity balance equal to 30 percent of capital.[15] Accordingly, the payment of dividends out of paid-in capital proposed by TrAILCo would neither be excessive nor should it adversely affect TrAILCo's ability to obtain additional funds when needed to support system operations and future expansion.

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[12] 16 U.S.C. § 825d(a) (2012).

[13] *E.g.*, *Citizens Utilities Co.*, 84 FERC ¶ 61,158, at 61,865 (1998); *accord Allete, Inc.*, 107 FERC ¶ 61,041, at P 10 (2004); *Delmarva Power & Light Co.*, 91 FERC ¶ 61,043, at 61,158-59 (2000); *PPL Electric Utilities Corp.*, 99 FERC ¶ 61,137, at 62,356-57 (2002).

[14] *See Exelon Corp.*, 109 FERC ¶ 61,172, at PP 8-9 (2004).

[15] *Entergy Gulf States, Inc.*, 118 FERC ¶ 61,271, at P 12 (2007); *Cincinnati Gas and Elec.* Co., 115 FERC ¶ 61,250, at P 13 (2006); *Entergy Louisiana Inc.*, 114 FERC ¶ 61,060, at P 13 (2006).

10. Finally, TrAILCo's payment of dividends will not harm the value of shareholders' interests. FirstEnergy Transmission is the parent and sole shareholder of TrAILCo and thus will be the sole recipient of the dividends.[16]

11. For the reasons stated above, we will grant TrAILCo's petition; section 305(a) of the FPA does not bar TrAILCo's proposed payment of dividends to its parent company, FirstEnergy Transmission.

12. As previously noted, TrAILCo is proposing to make periodic dividend payments to FirstEnergy Transmission up through and including the end of the calendar year of 2017 in order to mitigate the potential impacts of FirstEnergy Corp.'s transmission expansion initiative. Since the record now before us does not contain information that would justify the grant of TrAILCo's petition for declaratory order for any period after 2017, TrAILCo may not rely upon this order to pay any dividends from paid-in capital after 2017.[17]

The Commission orders:

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[16] October 7 Filing at 5 (citing *Exelon Corp.*, 109 FERC ¶ 61,172 at P 9 (stating that dividends have no adverse effect on the value of shareholder interests where the operating company is wholly-owned by a single shareholder)).

[17] Our grant of TrAILCo's pending petition subject to this limitation is without prejudice to TrAILCo's filing of a later petition under section 305(a), if circumstances warrant.