

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Exelon Corporation

Docket No. EL04-120-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued November 19, 2004)

1. Exelon Corporation, on behalf of its subsidiary Commonwealth Edison Company (ComEd) and ComEd's wholly-owned subsidiary Commonwealth Edison Company of Indiana (ComEd of Indiana) (collectively, Applicants), filed a petition for a declaratory order, requesting that the Commission find that ComEd of Indiana may pay a dividend of \$30 million to ComEd without violating section 305 of the Federal Power Act (FPA).¹ For the reasons stated below, we will grant Exelon's petition for a declaratory order. This order benefits customers by enabling the petitioner to utilize its assets.

Background

2. ComEd, a public utility that provides transmission and distribution electric service in the state of Illinois, created ComEd of Indiana to own a generating station and related assets in Indiana. Due to divestiture of the generating capacity, ComEd of Indiana currently owns only a switchyard and transmission lines. ComEd of Indiana has no employees and pays ComEd for maintaining and operating its assets.

3. Exelon, on behalf of ComEd, requests a declaratory order finding that ComEd of Indiana may pay to ComEd a \$30 million dividend from accounts designated as capital accounts without violating section 305(a) of the FPA. Section 305(a) prohibits public utilities from paying dividends from funds in the company's capital account. Exelon states that the \$30 million is from two sources. Approximately \$9.7 million was in ComEd of Indiana accounts designated as retained earnings but was redesignated as paid-

¹ 16 U.S.C. § 825d(a) (2000).

in capital as a result of push-down accounting in connection with the merger of ComEd with PECO Energy that formed Exelon in 2000. The other \$20.3 million is excess revenue that ComEd of Indiana has earned but not paid to ComEd in fees for maintaining and operating its assets.

4. Applicants state that the Securities and Exchange Commission (SEC) has approved the transaction. As part of that approval, the SEC required that ComEd of Indiana's common equity ratio not fall below 30 percent during the authorization period.

Notice of Filings and Responsive Pleadings

5. Notice of Exelon's filing was published in the *Federal Register*, 69 Fed. Reg. 45,700 (2004) with interventions or protests due on or before July 30, 2004. None was filed.

6. In response to a Commission Staff request, Exelon filed additional information in a letter dated September 20, 2004.

Discussion

7. We will grant Exelon's petition because the concerns underlying section 305(a) of the FPA are not present in the circumstances of this transaction. Section 305(a) of the FPA states 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.²

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."³ A central concern thus "was corporate officials raiding corporate coffers

² *Id.*

³ *E.g.*, *ALLETE, Inc.*, 107 FERC ¶ 61,041 at P 10 (2004); *Citizens Utilities Co.*, 84 FERC ¶ 61,158 at 61,865 (1998).

for their personal financial benefit.”⁴ Therefore, the Commission reviews certain liquidity and financial matters when considering the potential impact of a transaction on an applicant’s financial condition.⁵

9. In this proposed transaction, none of these problems is evident. Exelon has clearly identified the source from which payment will be made. There is also nothing to indicate that any dividends paid will be excessive. In addition, there is no adverse effect on shareholder interests as ComEd, the only shareholder of ComEd of Indiana, will own the same assets both before and after the issuance of the dividends. Further, under the SEC order, Applicants are required to maintain a minimum common equity balance of 30 percent of total capital, so the dividend payment is not expected to affect the company’s liquidity or financial integrity. For these reasons, and under the circumstances of this case, we will grant the petition and find that section 305(a) is not a bar to the payment of dividends out of paid-in capital in this instance.

The Commission orders:

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

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

⁴ *Id.*

⁵ See *Niagara Mohawk Holdings, Inc.*, 99 FERC ¶ 61,323 at P 4 (2002).