



declaring that the internal corporate reorganization discussed herein meets these requirements and is not barred by FPA Section 305(a).<sup>2</sup>

## **I. BACKGROUND**

### **A. Description of Duke Ohio and its Subsidiaries**

Duke Ohio, an Ohio corporation and an indirect wholly owned subsidiary of Duke Energy Corporation (“Duke Energy”) and direct wholly owned subsidiary of Cinergy, is a combination electric and gas public utility company that provides service in the southwestern portion of Ohio. Duke Ohio and its indirect subsidiaries generate, transmit, distribute and sell electricity at retail and wholesale, and Duke Ohio distributes and sells natural gas at retail. Duke Ohio’s retail electric operations are regulated by the Public Utilities Commission of Ohio (“Ohio Commission”), and are subject to Ohio’s electric utility restructuring statute, which initiated retail electric competition in Ohio starting in 2001. Duke Ohio and its indirect subsidiaries own generating and transmission facilities within Duke Ohio’s territory. Duke Ohio is also a transmission owning member of PJM.

Duke Energy Commercial Asset Management, LLC (“DECAM”) is a power marketer authorized to make wholesale sales of electric capacity, energy, and certain

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<sup>2</sup> In a recently-issued Policy Statement, the Commission clarified that FPA Section 305(a) does not prohibit 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 service. *See Payment of Dividends from Funds Included in Capital Account*, 148 FERC ¶ 61,020 at P 25 (2014) (“*Policy Statement*”). The Commission determined that, in these cases, such dividend payments do not appear to implicate the concerns underlying the enactment of FPA Section 305(a), and concluded that it is no longer necessary for a utility that meets the criteria established in the *Policy Statement* to petition for declaratory order that dividends paid from capital account are not prohibited by FPA Section 305(a). *See id.* Because Duke Ohio, the entity making the distribution under this reorganization, provides transmission and local distribution service, it does not meet the criteria established in the *Policy Statement*, and so is filing a petition for a declaratory order that the internal corporate reorganization described here is not barred by FPA Section 305(a).

ancillary services at market-based rates.<sup>3</sup> DECAM is an Ohio limited liability company, all of the membership interests of which are owned by Duke SAM. All of the membership interests of Duke SAM are currently held by Duke Ohio. DECAM and Duke SAM are indirectly wholly owned by Duke Energy.

DECAM does not directly own any generation or transmission facilities; DECAM's subsidiaries ("the Project Companies") own generating facilities. DECAM owns all of the membership interests in the Project Companies through DECAM Coal Gen FinCo, LLC ("DECAM Coal") and DECAM Gas Gen FinCo, LLC ("DECAM Gas"). All of the membership interests of DECAM Coal and DECAM Gas are owned by DECAM Generation HoldCo, LLC ("DECAM HoldCo"). All of the membership interests of DECAM Holdco are owned by DECAM.

DECAM Coal owns all of the membership interests of the following Project Companies:

- Duke Energy Conesville, LLC ("Duke Conesville"), an Exempt Wholesale Generator ("EWG") that owns a 40 percent undivided interest in Unit 4 at the Conesville Station, an approximately 780 MW (summer rating) coal-fired generating facility in Conesville, Ohio;<sup>4</sup>
- Duke Energy Killen, LLC ("Duke Killen"), an EWG that owns a 33 percent undivided interest in the Killen Station, an approximately 618 MW (summer rating) coal-fired facility in Wrightsville, Ohio;<sup>5</sup>
- Duke Energy Miami Fort, LLC ("Duke Miami Fort"), an EWG that owns:

<sup>3</sup> See *Cinergy Serv., Inc.*, 98 FERC ¶ 61,306 (2002) (granting market-based rate authority to DECAM).

<sup>4</sup> See Self-Certification of Exempt Wholesale Generator Status, Docket No. EG14-40-000 (filed Apr. 14, 2014); *CSOLAR IV WEST, LLC*, Notice of Effectiveness of Exempt Wholesale Generator or Foreign Utility Company Status, Docket Nos. EG14-36-000, *et al.* (Aug. 4, 2014) (unreported) ("*CSOLAR*"); *Duke Energy Beckjord, LLC*, Docket Nos. ER12-1946-000, *et al.* (Sept. 19, 2012) (unreported) ("*Duke Beckjord*") (granting market-based rate authority).

<sup>5</sup> See Self-Certification of Exempt Wholesale Generator Status, Docket No. EG14-43-000 (filed Apr. 14, 2014); *CSOLAR*, Docket Nos. EG14-36-000, *et al.* (notice of effectiveness of EWG status); *Duke Beckjord*, Docket Nos. ER12-1946-000, *et al.* (granting market-based rate authority).

- A 64 percent undivided interest in Units 7 and 8 at the Miami Fort Station, coal-fired units with a combined generating capacity of approximately 1,020 MW (summer rating) in North Bend, Ohio, and
- the Miami Fort CT Station, an approximately 57 MW (summer rating) oil-fired generating facility in North Bend, Ohio;<sup>6</sup>
- Duke Energy Stuart, LLC (“Duke Stuart”), an EWG that owns a 39 percent undivided interest in the Stuart Station, an approximately 2,317 MW (summer rating) coal-fired facility in Aberdeen, Ohio;<sup>7</sup> and
- Duke Energy Zimmer, LLC (“Duke Zimmer”), an EWG that owns a 46.5 percent undivided interest in the W. H. Zimmer Generating Station, an approximately 1,300 MW (summer rating) coal-fired facility in Moscow, Ohio.<sup>8</sup>

DECAM Gas owns all of the membership interests of the following Project Companies:

- Duke Energy Dicks Creek, LLC (“Duke Dicks Creek”), an EWG that owns and operates an approximately 136 MW (summer rating) natural gas-fired facility in Middletown, Ohio;<sup>9</sup>
- Duke Energy Fayette II, LLC (“Duke Fayette”), an EWG that owns and operates an approximately 628 MW (summer rating) natural gas-fired facility in Masontown, Pennsylvania;<sup>10</sup>

<sup>6</sup> See Self-Certification of Exempt Wholesale Generator Status, Docket No. EG14-38-000 (filed Apr. 15, 2014); CSOLAR, Docket Nos. EG14-36-000, *et al.* (notice of effectiveness of EWG status); *Duke Beckjord*, Docket Nos. ER12-1946-000, *et al.* (granting market-based rate authority).

<sup>7</sup> See Self-Certification of Exempt Wholesale Generator Status, Docket No. EG14-39-000 (filed Apr. 14, 2014); CSOLAR, Docket Nos. EG14-36-000, *et al.* (notice of effectiveness of EWG status); *Duke Beckjord*, Docket Nos. ER12-1946-000, *et al.* (granting market-based rate authority).

<sup>8</sup> See Self-Certification of Exempt Wholesale Generator Status, Docket No. EG14-42-000 (filed Apr. 15 2014); CSOLAR, Docket Nos. EG14-36-000, *et al.* (notice of effectiveness of EWG status); *Duke Beckjord*, Docket Nos. ER12-1946-000, *et al.* (granting market-based rate authority).

<sup>9</sup> See Self-Certification of Exempt Wholesale Generator Status, Docket No. EG14-41-000 (filed Apr. 15, 2014); CSOLAR, Docket Nos. EG14-36-000, *et al.* (notice of effectiveness of EWG status); *Duke Beckjord*, Docket Nos. ER12-1946-000, *et al.* (granting market-based rate authority).

<sup>10</sup> See Notice of Self-Certification as an Exempt Wholesale Generator, Docket No. EG11-24-000 (filed Nov. 15, 2010); *Cedar Creek II, LLC*, Notice of Effectiveness of Exempt Wholesale Generator Status, Docket No. EG11-8-000, *et al.* (Feb. 14, 2011) (unreported) (“*Cedar Creek*”); *Duke Energy Vermillion II, LLC*, Docket Nos. ER11-2063-000, *et al.* (Jan. 6, 2011) (unreported) (“*Duke Vermillion*”) (granting market-based rate authority).

- Duke Energy Hanging Rock II, LLC (“Duke Hanging Rock”), an EWG that owns and operates an approximately 1,252 MW (summer rating) natural gas-fired facility in Irontown, Ohio;<sup>11</sup>
- Duke Energy Lee II, LLC (“Duke Lee”), an EWG that owns and operates an approximately 568 MW (summer rating) natural gas-fired facility in Dixon, Illinois;<sup>12</sup> and
- Duke Energy Washington II, LLC (“Duke Washington”), an EWG that owns and operates an approximately 626 MW (summer rating) natural gas-fired facility in Beverly, Ohio.<sup>13</sup>

## **B. Description of the Internal Corporate Reorganization and Related Transaction**

As a result of the internal reorganization that is the subject of this petition, Duke Ohio’s ownership interests in Duke SAM (and therefore Duke Ohio’s indirect interests in the Project Companies) will be distributed up to Cinergy. Charts showing the relevant corporate structure before and after the internal corporate reorganization are attached as Exhibit A.

The internal corporate reorganization that is the subject of this petition will occur shortly before a related transaction, which we describe here for context. The related transaction is the subject of a concurrent application, which is being filed under Section 203(a) of the FPA by DECAM and the Project Companies, together with Duke Energy Retail Sales, LLC (“Duke Retail”), and Dynegy Resource I, LLC (“Dynegy Resource I”). That related transaction will result in the acquisition by Dynegy Resource I of all of the

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<sup>11</sup> See Notice of Self-Certification as an Exempt Wholesale Generator, Docket No. EG11-25-000 (filed Nov. 15, 2010); *Cedar Creek*, Docket No. EG11-8-000, *et al.* (notice of effectiveness of EWG status); *Duke Vermillion*, Docket Nos. ER11-2063-000, *et al.* (granting market-based rate authority).

<sup>12</sup> See Notice of Self-Certification as an Exempt Wholesale Generator, Docket No. EG11-26-000 (filed Nov. 15, 2010); *Cedar Creek*, Docket No. EG11-8-000, *et al.* (notice of effectiveness of EWG status); *Duke Vermillion*, Docket Nos. ER11-2063-000, *et al.* (granting market-based rate authority).

<sup>13</sup> See Notice of Self-Certification as an Exempt Wholesale Generator, Docket No. EG11-28-000 (filed Nov. 15, 2010); *Cedar Creek*, Docket No. EG11-8-000, *et al.* (notice of effectiveness of EWG status); *Duke Vermillion*, Docket Nos. ER11-2063-000, *et al.* (granting market-based rate authority).

membership interests of DECAM from Duke SAM and all of the membership interests of Duke Retail from Duke Energy Commercial Enterprises, Inc. (the “Related Transaction”). Upon consummation of the Related Transaction, Duke Retail, DECAM and the Project Companies will be indirect wholly owned subsidiaries of Dynegy Inc., while Duke SAM will remain a subsidiary of Cinergy. For comparison purposes, the post-reorganization chart included in Exhibit A of this petition is the same as the pre-transaction organizational chart included with the Section 203 application for the Related Transaction, except that the charts attached to this pleading show Duke Ohio, while the charts attached to the Section 203 application does not, because Duke Ohio is not relevant to the Related Transaction.

As stated above, DECAM indirectly owns generation facilities through the Project Companies. These assets were acquired by the Project Companies as a result of two prior transactions, previously approved by the Commission, which between them divested most of the generating assets of Duke Ohio. Duke Ohio’s divestitures of its generating assets to the Project Companies were, in turn, the result of two separate settlements in state proceedings and consequent orders of the Ohio Commission approving the divestitures.<sup>14</sup> This Commission approved both transactions upon finding

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<sup>14</sup> See *In the Matter of Duke Energy Ohio for Approval of an Elec. Sec. Plan*, Case No. 08-920-EL-SSO *et al.*, Opinion and Order at 43 (Oct. 27, 2008), *Entry on Rehearing* (Feb. 11, 2009); *In the Matter of Duke Energy Ohio for Approval of an Elec. Sec. Plan*, Case No. 08-920-EL-SSO *et al.*, Stipulation and Recommendation at P 26 (Oct. 27, 2008); *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elect. Sec. Plan, Accounting Modifications, and Tariffs for Generation Serv.*, Case No. 11-3549-ELSSO, *et al.*, Opinion and Order at 51 (Nov. 22, 2011), *Entry on Rehearing* (Feb. 23, 2012); *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elect. Sec. Plan, Accounting Modifications, and Tariffs for Generation Serv.*, Case No. 11-3549-ELSSO, *et al.*, Stipulation and Recommendation at 25-28 (Oct. 24, 2011).

that each met the usual requirements, including lack of adverse effect on ratepayers and absence of cross-subsidization.<sup>15</sup>

In distributing the ownership interests in Duke SAM up to Cinergy, Duke Ohio will be indirectly distributing the ownership interests in the Project Companies, including the generation assets acquired by the Project Companies in the divestitures previously approved by the Commission, up to Cinergy. This will occur shortly before the Related Transaction. We provide the discussion regarding the Related Transaction simply to ensure that the Commission fully understands the context for the petition.

The application for authorization of the Related Transaction under FPA Section 203(a) seeks Commission approval of the Related Transaction on or before November 10, 2014. As the internal corporate organization addressed by this petition is planned to occur shortly before the Related Transaction, Duke Ohio requests that the Commission issue a declaratory order as discussed herein by November 10, 2014.

## **II. DISCUSSION**

With this petition, Duke Ohio requests Commission confirmation of its interpretation that FPA Section 305(a) does not bar the internal corporate reorganization. Section 305(a) of the FPA provides in pertinent part that “[i]t 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>16</sup> The Commission has held with regard to this prohibition that:

the concerns underlying the enactment of section 305(a) of the FPA included “that sources from which cash dividends were paid were not clearly identified and

<sup>15</sup> See *Cinergy Corp.*, 126 FERC ¶ 61,146, order granting clarification, 128 FERC ¶ 61,102 (2009) (“*Cinergy*”); *Cinergy Corp.*, 140 FERC ¶ 61,180 (2012).

<sup>16</sup> 16 U.S.C. § 825d(a) (2012).

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>17</sup>

A transaction is nonetheless permissible under Section 305(a) where “none of these problems [that had been identified in the legislative history of Section 305(a) of the FPA] is evident.”<sup>18</sup> Specifically, in *Citizens*, the Commission established a three-part analysis to determine when a proposed transaction does not implicate the concerns underlying FPA Section 305(a), such that the transaction is not barred 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.<sup>19</sup> In applying this analysis, the Commission has found that cases involving spin-offs of utility assets to a newly formed affiliate, in which shareholders received a second set of stock for the spun-off company, are not barred by Section 305(a).<sup>20</sup> Similarly, the Commission has found permissible under FPA Section 305(a) those cases involving an internal corporate reorganization with a one-time distribution of property.<sup>21</sup>

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<sup>17</sup> *Upper Peninsula Power Co.*, 148 FERC ¶ 61,133 at P 52 (2014) (“UPPC”) (quoting *Citizens*, 84 FERC at 61,865); see also *Delmarva Power & Light Co.*, 91 FERC ¶ 61,043 at 61,158 (2000) (“*Delmarva*”) (same). See also *Niagara Mohawk Holdings, Inc.*, 95 FERC ¶ 61,381 at 62,416, order denying reh’g, 96 FERC ¶ 61,144 (2001) (“*Niagara Mohawk*”) (“a primary concern underlying Section 305(a) of the FPA is to preclude exploitation of a utility by its directors [and] officers”).

<sup>18</sup> *Citizens*, 84 FERC at 61,865.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*; *ALLETE, Inc.*, 107 FERC ¶ 61,041 at PP 9-12 (2004) (“*ALLETE*”). Other cases similarly recognize that corporate restructurings, or transparent one-time distributions of property or proceeds from the sale of property, do not involve the payment of dividends that are precluded by Section 305(a) of the FPA. See, e.g., *Entergy La., Inc.*, 114 FERC ¶ 61,060 at P 13 (2006); *Exelon Corp.*, 109 FERC ¶ 61,172 at P 9 (2004); *Delmarva*, 91 FERC at 61,158-61,159.

<sup>21</sup> See *UPPC* at P 53 (holding that internal corporate reorganization of electric transmission assets within corporate family is not barred by Section 305(a)); see also *Ameren Corp.*, 131 FERC ¶ 61,240 at P 36 (2010) (holding that internal corporate reorganization of generating assets within Ameren corporate family is not barred by Section 305(a)) (“*Ameren*”); *Cinergy* at P 69 (concluding that reorganization involving a proposed distribution of generating stations by Duke Ohio to Cinergy was not barred by



Application of the three-part analysis in this case shows that the proposed transaction does not implicate the concerns underlying FPA Section 305(a). First, the source of the distribution described is clearly identified—the Duke SAM interests being distributed to Cinergy are currently held by Duke Ohio. Second, the distribution will not involve any “excessive dividends” resulting from corporate officials raiding corporate coffers for their personal financial benefit;<sup>22</sup> rather it simply represents the value of Duke Ohio’s interest in Duke SAM. Furthermore, upon completion of the reorganization, and as further described below, Duke Ohio commits to maintaining a minimum level of common equity as a percentage of total capitalization. Third, the proposed transaction will not have an adverse effect on the value of shareholders’ interests because this reorganization will never reach the shareholder level – Duke Energy’s shareholders will continue to own the same assets – and it “will have no adverse effect on the value of shareholders’ interests” because “[s]hareholders will have the same ownership interests after” the reorganization “as before.”<sup>23</sup> Explained differently, assets will simply be moved within the same corporate family, and shareholders’ ownership interests will remain unaffected by the distribution.<sup>24</sup>

In other words, this case is like the *UPPC* case, because both involve an internal corporate reorganization with a one-time distribution of property. As in cases involving the distribution of corporate interests in a restructuring context, this case is “less like a

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Section 305(a); although the distribution was authorized, and involved some of the same assets, it did not occur).

<sup>22</sup> *Citizens*, 84 FERC at 61,865; *UPPC* at P 52.

<sup>23</sup> *Citizens*, 84 FERC at 61,865.

<sup>24</sup> As discussed above, the Commission is being asked to separately evaluate, under FPA Section 203, the Related Transaction that would involve the transfer of DECAM, which is currently a direct subsidiary of Duke SAM and an indirect subsidiary of Duke Ohio, and DECAM’s subsidiaries (the Project Companies), as well as Duke Retail, to Dynegy Resource I.

payment of dividends than it is a corporate restructuring with a one-time distribution of property.”<sup>25</sup> In effect, Duke SAM and its underlying subsidiaries are part of the contributed capital of Duke Ohio from Cinergy. The reorganization transaction contemplated herein is in substance the return of that capital from Duke Ohio to Cinergy. As a corporate reorganization that is far removed from the sort of payment of cash dividends that are of concern under Section 305(a), the upstream distribution of the Duke SAM interests should be deemed permissible.

Finally, Duke Ohio notes that, in certain orders granting relief from FPA Section 305(a), the Commission has also based its determination on commitments made by the applicants to (1) limit the amount of dividends from paid-in capital so that common equity is maintained at a minimum level, often 30 percent, of total capitalization,<sup>26</sup> and (2) retain an amount of debt that will result in no adverse credit rating action associated with the internal corporate reorganization described herein.<sup>27</sup> Duke Ohio hereby makes these commitments as well.

### III. CONCLUSION

Based on the foregoing, Duke Ohio respectfully requests that the Commission issue an order, by November 10, 2014, declaring that the internal corporate reorganization described herein is not barred by Section 305(a) of the FPA.

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<sup>25</sup> *ALLETE* at P 11; *see also UPPC* at P 53.

<sup>26</sup> *See, e.g., Nat'l Grid*, 117 FERC ¶ 61,080 at P 83 (2006) (requiring that the approved payment of dividends out of capital must cease if the equity of the public utility subsidiaries, as a percentage of total capital, would fall below thirty percent), *reh'g denied*, 122 FERC ¶ 61,096 (2008); *Cincinnati Gas & Elec. Co.*, 115 FERC ¶ 61,250 at P 13 (2006) (requiring the affected public utilities to maintain a minimum equity balance equal to 30 percent of total capital) (*citing Niagara Mohawk*, 95 FERC at 62,416 (same)).

<sup>27</sup> *See Ameren* at P 36; *Cinergy* at P 69.

Respectfully submitted,

/s/ Sheri H. May

Sheri H. May  
Associate General Counsel  
Duke Energy Corporation  
139 E. Fourth Street, 1212M  
Cincinnati, OH 45202  
(513) 287-4340  
[sherimay@duke-energy.com](mailto:sherimay@duke-energy.com)

/s/ Noel Symons

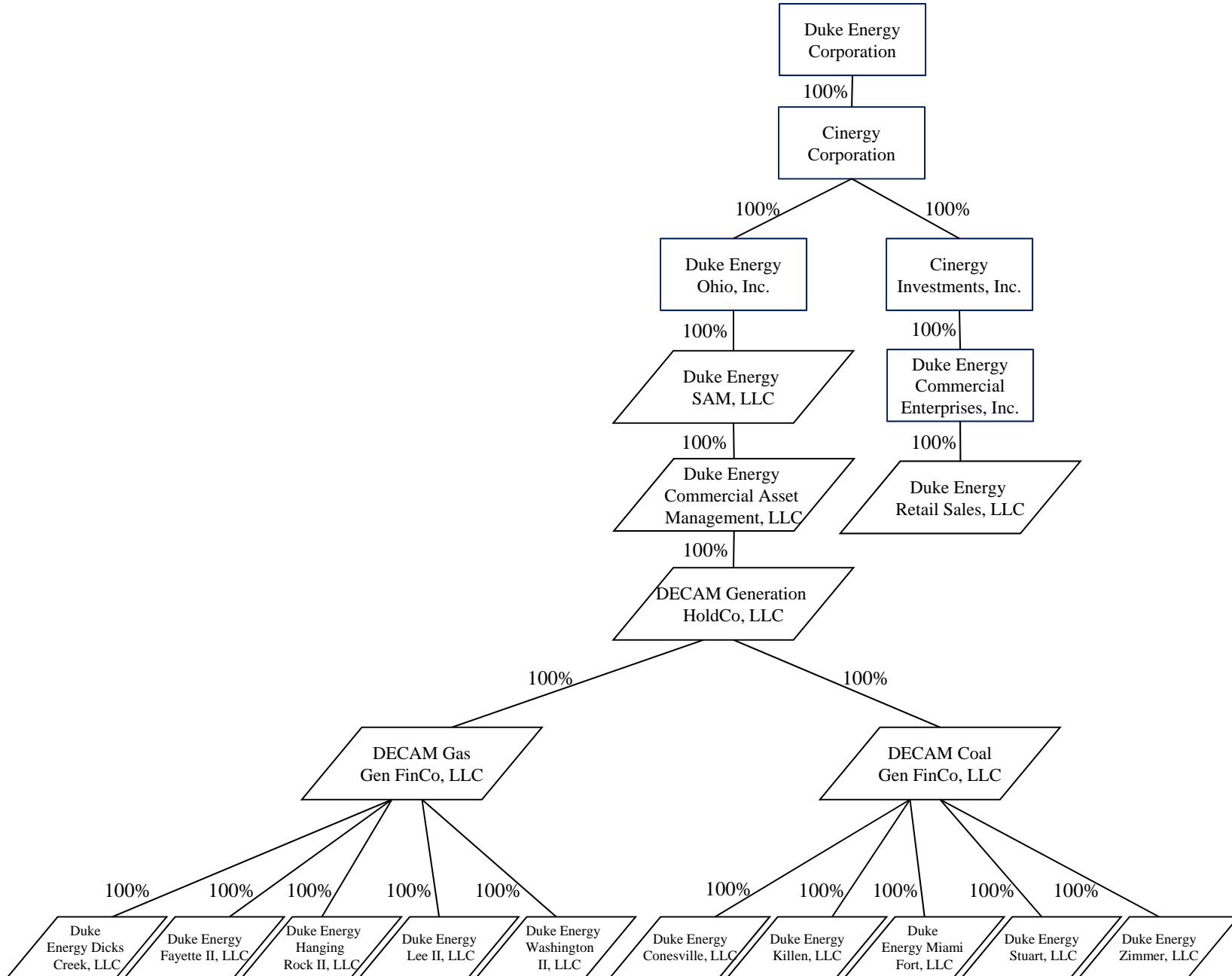
Noel Symons  
Andrea R. Kells  
McGuireWoods LLP  
2001 K St. NW, Suite 400  
Washington, DC 20006  
(202) 857-2929  
[nsymons@mcguirewoods.com](mailto:nsymons@mcguirewoods.com)

*Attorneys for Duke Energy  
Ohio, Inc.*

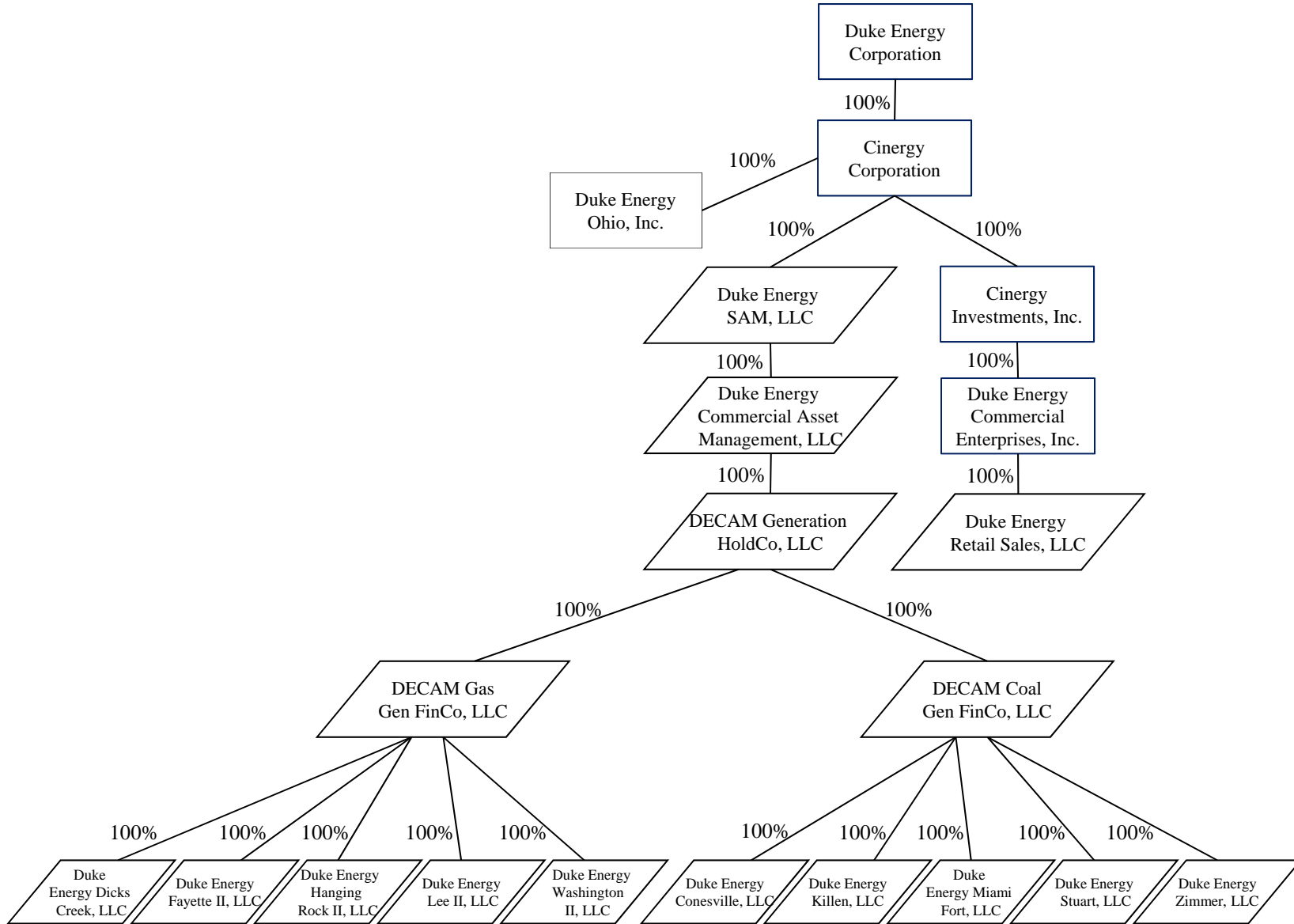
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**EXHIBIT A**  
**CORPORATE STRUCTURE CHARTS**

## Pre-Reorganization Corporate Structure Chart



# Post-Reorganization Corporate Structure Chart



Document Content(s)

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