

150 FERC ¶ 61,233  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Ohio, Inc.

Docket Nos. EL14-100-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued March 27, 2015)

1. On September 11, 2014, Duke Energy Ohio, Inc. (Duke Ohio) filed, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,<sup>1</sup> a petition for declaratory order (Petition). In the Petition, Duke Ohio requests that the Commission declare that section 305(a) of the Federal Power Act (FPA)<sup>2</sup> is not a bar to the internal corporate reorganization described in the Petition, which will result in the upstream distribution of ownership interests in Duke Energy SAM, LLC (Duke SAM) from Duke Ohio to Cinergy Corporation (Cinergy) (Proposed Reorganization). As discussed below, we grant the Petition.

**I. Background**

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

**1. Duke Ohio**

2. Duke Ohio states that it is an Ohio corporation, an indirect, wholly-owned subsidiary of Duke Energy Corporation (Duke Energy), and a direct, wholly-owned subsidiary of Cinergy. Duke Ohio explains that it is a combination electric and gas public utility company that provides service in the southwestern part of Ohio, and that its indirect subsidiaries generate, transmit, distribute and sell electricity at retail and wholesale. Duke Ohio notes that it and its indirect subsidiaries own generating and

---

<sup>1</sup> 18 C.F.R. § 385.207 (2014).

<sup>2</sup> 16 U.S.C. § 825d(a) (2012).

transmission facilities within Duke Ohio's territory, and that Duke Ohio is a transmission-owning member of PJM Interconnection, L.L.C. (PJM). Duke Ohio notes further that it distributes and sells natural gas at retail, and that its retail electric operations are regulated by the Public Utilities Commission of Ohio (Ohio Commission) and subject to Ohio's electric utility restructuring statute, which initiated retail electric competition in Ohio starting in 2001.<sup>3</sup>

## **2. Duke Energy Commercial Asset Management, LLC**

3. Duke Ohio states that Duke Energy Commercial Asset Management, LLC (DECAM) is a power marketer authorized to make wholesale sales of electric capacity, energy, and certain ancillary services at market-based rates. All of the membership interests of DECAM are owned by Duke SAM, and all of the membership interests of Duke SAM are owned by Duke Ohio. Accordingly, DECAM and Duke SAM are indirectly wholly owned by Duke Energy.

4. Duke Ohio explains that DECAM does not directly own any generation or transmission facilities, but that DECAM's subsidiaries, referred to as 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)<sup>4</sup> and DECAM Gas Gen FinCo, LLC (DECAM Gas).<sup>5</sup> DECAM Generation HoldCo, LLC (DECAM HoldCo) owns all of the membership interests of DECAM Coal and DECAM Gas, and DECAM owns all of the membership interests in DECAM HoldCo.

### **B. Description of the Proposed Reorganization**

5. Duke Ohio states that, at the conclusion of the Proposed Reorganization, Duke Ohio's ownership interests in Duke SAM, and, consequently, Duke Ohio's indirect interests in the Project Companies, will be distributed to Cinergy. Duke Ohio explains that the Proposed Reorganization will occur shortly before a related transaction that is the

---

<sup>3</sup> Petition at 2.

<sup>4</sup> Duke Ohio states that DECAM Coal owns all of the membership interests in Project Companies that, in turn, own interests in coal- and oil-fired generation facilities. *Id.* at 3-4.

<sup>5</sup> Duke Ohio states that DECAM Gas owns all of the membership interests in Project Companies that, in turn, own interests in natural gas-fired generation facilities. *Id.* at 4-5.

subject of an application under FPA section 203<sup>6</sup> filed concurrently with the Petition.<sup>7</sup> According to Duke Ohio, the related transaction would result in the acquisition by Dynege Resource I, LLC of all of the membership interests of DECAM from Duke SAM, and all of the membership interests of Duke Energy Retail Sales, LLC (Duke Retail) from Duke Energy Commercial Enterprises, Inc. (Duke-Dynege Transaction). Duke Ohio states that, upon consummation of the Duke-Dynege Transaction, Duke Retail, DECAM and the Project Companies will be indirect, wholly-owned subsidiaries of Dynege, Inc., and Duke SAM will remain a subsidiary of Cinergy.

## **II. Notices of Filing and Responsive Pleadings**

6. Notice of the Petition was published in the *Federal Register*, 79 Fed. Reg. 56,356 (2014), with interventions and protests due on or before October 14, 2014. None was filed.

## **III. Discussion**

### **A. The Petition**

7. Duke Ohio requests that the Commission confirm that FPA section 305(a) does not bar the Proposed Reorganization.<sup>8</sup> According to Duke Ohio, the Commission has established a three-part analysis to determine when a proposed transaction implicates the

---

<sup>6</sup> 16 U.S.C. § 824b (2012).

<sup>7</sup> See Joint Application for Authorization under Section 203 of the Federal Power Act, Docket No. EC14-141-000 (Sept. 11, 2014), as amended February 6, 2015, by Response to Request for Additional Information and Request for Shortened Comment Period, Docket Nos. EC14-140-000, EC14-141-000 (Feb. 6, 2015) and Supplemental Filing Regarding Settlement with the Independent Market Monitor for PJM Interconnection, L.L.C. at 1-2, Docket Nos. EC14-140-000, EC14-141-000 (Feb. 6, 2015). The Commission is issuing concurrently with this order an order approving that application. *Dynege Resource I, LLC, et al.*, 150 FERC ¶ 61,232 (2015).

<sup>8</sup> Duke Ohio notes that the Commission recently issued a policy statement providing guidance that FPA section 305(a) should be interpreted as not prohibiting the payment of dividends from funds included in capital account by any public utility that: (1) has a market-based rate tariff on file with the Commission; (2) does not have captive customers; and (3) does not provide transmission or local distribution services. Petition at n.2 (citing *Payment of Dividends from Funds Included in Capital Account*, 148 FERC ¶ 61,020, at P 25 (2014)). Duke Ohio notes that because it, the entity making the

(continued...)

concerns underlying FPA section 305(a).<sup>9</sup> Specifically, Duke Ohio states that the Commission has found that a proposed transaction does not implicate the concerns underlying FPA section 305(a) 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 the shareholders' interests.<sup>10</sup> Duke Ohio notes, that in applying this test, the Commission has found that cases involving spin-offs of utility assets to a newly-formed affiliate, in which shareholders received the stock of the spun-off company, are not barred by FPA section 305(a).<sup>11</sup> Duke Ohio further notes that the Commission has found permissible under FPA section 305(a) transactions involving an internal corporate reorganization with a one-time distribution of property.<sup>12</sup>

8. Duke Ohio asserts that applying the three-part test to the Proposed Reorganization demonstrates that it does not implicate the concerns underlying FPA section 305(a). First, Duke Ohio claims that the source of the distribution is clearly identified: the Duke SAM interests that will be distributed to Cinergy are currently held by Duke Ohio.

9. Second, Duke Ohio asserts that the distribution will not involve any excessive dividends resulting from corporate officials raiding the corporate coffers for their personal benefit. Rather, Duke Ohio explains that the distribution represents the value of Duke Ohio's interest in Duke SAM. In addition, noting that the Commission has based previous decisions granting relief from FPA section 305(a) on certain commitments, Duke Ohio commits to maintaining a minimum level of common equity as a percentage of total capitalization. Specifically, Duke Ohio commits: (1) to limit the amount of dividends from paid-in capital so that common equity is maintained at a minimum level

---

distribution as part of the Proposed Reorganization, provides transmission and local distribution service, it does not meet the criteria established in the policy statement. *Id.*

<sup>9</sup> *Id.* at 8 (citing *Citizens Utils. Co.*, 84 FERC ¶ 61,158, at 61,865 (1998) (*Citizens*)).

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

<sup>11</sup> *Id.* (citing *Citizens*, 84 FERC ¶ 61,158 at 61,864, *ALLETE, Inc.*, 107 FERC ¶ 61,041, at PP 9-12 (2004) (*ALLETE*)).

<sup>12</sup> *Id.* (citing *Upper Peninsula Power Co.*, 148 FERC ¶ 61,133, at P 53 (2014) (*Upper Peninsula*); *Ameren Corp.*, 131 FERC ¶ 61,240, at P 36 (2010) (*Ameren*)).

of total capitalization (30 percent); and (2) to retain an amount of debt that will result in no adverse credit rating action associated with the Proposed Reorganization.<sup>13</sup>

10. Third, Duke Ohio asserts that the Proposed Reorganization will not have an adverse effect on the value of shareholders' interests because the reorganization will not reach the shareholder level. Duke Energy's shareholders will continue to own the same assets and they will have the same ownership interests after the Proposed Reorganization as prior to it.<sup>14</sup>

11. According to Duke Ohio, the Proposed Reorganization resembles the transaction authorized in *Upper Peninsula*, where the Commission found that cases involving the distribution of corporate interests in a restructuring context are less like a payment of dividends than a corporate restructuring with a one-time distribution of property.<sup>15</sup> Duke Ohio asserts that, in effect, Duke SAM and its underlying subsidiaries are part of the contributed capital of Duke Ohio from Cinergy, and the proposed internal reorganization "is in substance the return of that capital from Duke Ohio to Cinergy."<sup>16</sup>

#### **B. Commission Determination**

12. We will grant the Petition because the concerns underlying FPA section 305(a) are not present under the limitations and circumstances described in the Petition. FPA 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

---

<sup>13</sup> *Id.* at 10 (citing *Nat'l Grid plc*, 117 FERC ¶ 61,080, at P 83 (2006), *reh'g denied*, 122 FERC ¶ 61,096 (2008); *Cincinnati Gas & Elec. Co.*, 115 FERC ¶ 61,250, at P 13 (2006)).

<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.* at 9-10 (citing *Upper Peninsula*, 148 FERC ¶ 61,133 at P 53, *ALLETE*, 107 FERC ¶ 61,041 at P 11).

<sup>16</sup> *Id.* at 10.

paying of any dividends of such public utility from any funds properly included in capital account.<sup>17</sup>

13. As the Commission has noted, the concerns underlying the enactment of FPA 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>18</sup>

14. The concerns underlying FPA section 305(a) are not present here given the circumstances described in, and the limitations offered in, the Petition. Specifically, the Commission finds that the source of Duke Ohio’s proposed distribution has been clearly identified, and nothing indicates that the distribution will be excessive or preferential. In addition, we find that the proposed distribution is more of a corporate restructuring of Duke Energy’s interests in Duke SAM with a one-time payment distribution by Duke Ohio than a more typical payment of dividends by Duke Ohio. As Duke Ohio notes, the Commission has held that FPA section 305(a) is not a bar to the distribution of proceeds from a capital account in a number of other cases similar to this case, in which the “distribution is less like a distribution of dividends than it is a corporate restructuring with a one-time distribution” within a corporate family.<sup>19</sup> Further, the Proposed Reorganization will not have an adverse effect on the value of Duke Energy’s shareholders’ interests because shareholders will continue to own the same assets and will continue to have the same ownership interests after the Proposed Reorganization. We also accept Duke Ohio’s commitments to limit the amount of dividends from paid-in capital so that common equity is maintained at a minimum level of total capitalization (30 percent), and to retain an amount of debt that will result in no adverse credit rating action associated with the Proposed Reorganization. For these reasons, we find that FPA section 305(a) is not a bar to the Proposed Reorganization.

---

<sup>17</sup> 16 U.S.C. § 825d(a) (2012).

<sup>18</sup> *Citizens*, 84 FERC ¶ 61,158 at 61,865 (footnotes omitted); *see also Entergy Louisiana Inc.*, 114 FERC ¶ 61,060, at P 12 (2006); *Exelon Corp.*, 109 FERC ¶ 61,172, at P 8 (2004); *ALLETE*, 107 FERC ¶ 61,041 at P 10.

<sup>19</sup> *See, e.g., Ameren*, 131 FERC ¶ 61,240 at P 36; *Cinergy Corp.*, 126 FERC ¶ 61,146, at PP 64, 67-68 (2009); *Great Plains Energy Inc.*, 121 FERC ¶ 61,069, at P 72 (2007).

The Commission orders:

The Petition is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.