STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of Cassadaga Wind LLC, Baron Winds LLC, IRUS Wind Development LLC, RWE Aktiengesellschaft, and E.ON SE for a Declaratory Ruling That No Further Review of Upstream Ownership Transfers is Required Under Public Service Law Section 70

Case 19-E-_____

JOINT PETITION OF CASSADAGA WIND LLC, BARON WINDS LLC, IRUS WIND DEVELOPMENT LLC, RWE AKTIENGESELLSCHAFT, AND E.ON SE FOR A DECLARATORY RULING THAT NO FURTHER REVIEW OF UPSTREAM OWNERSHIP TRANSFERS IS REQUIRED UNDER PUBLIC SERVICE LAW SECTION 70

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Dated: May 30, 2019

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Through subsidiaries, innogy SE ("innogy") owns Cassadaga Wind LLC ("Cassadaga") and Baron Winds LLC ("Baron Winds"). Cassadaga and Baron Winds are development companies proposing to construct two windfarms in New York sized at 126 megawatts ("MW") and 242 MW, respectively. Cassadaga has received a certificate of environmental compatibility and public need ("CECPN") from the NYS Board on Electric Generation Siting and the Environment pursuant to Article 10 of the Public Service Law ("PSL"). Baron Winds is still in the Article 10 application review process.

RWE Aktiengesellschaft ("RWE") currently holds a 76.8% indirect ownership interest in innogy; the remaining interests are publicly-traded. On March 12, 2018, RWE and E.ON SE ("E.ON") entered into an agreement to undertake a multi-step transaction (the "Transactions"), pursuant to which E.ON will temporarily acquire an indirect majority interest in innogy's renewable energy development projects in the United States, including Cassadaga and Baron

Winds.[1] However, RWE ultimately will re-acquire innogy's renewable energy business such that E.ON's indirect ownership of these wind facilities will be temporary.[2]

Pursuant to Part 8 of the Public Service Commission's rules (16 NYCRR Part 8), Cassadaga, Baron Winds, IRUS Wind Development LLC (Cassadaga and Baron Winds' direct parent), RWE, and E.ON (the "Joint Petitioners") hereby petition for a declaratory ruling finding that no further review is required under PSL § 70 for the temporary transfer in upstream ownership of Cassadaga and Baron Winds. Based on the *Wallkill Order*,[3] the Commission should find that further review is unnecessary because the Cassadaga and Baron Winds projects will operate as competitive wholesale generators and E.ON's temporary ownership of these facilities will raise no vertical or horizontal market power concerns given that E.ON owns no transmission, and only 34.5 MW of generation, in New York. Although E.ON has affiliations with two power marketers, these affiliations do not, as discussed herein, pose any market power concerns. Similarly, the transfer of the Cassadaga and Baron Winds Projects back to RWE will raise no vertical or horizontal market power concerns because RWE's market position with regard to the two projects will revert to the pre-Transaction state and it will only be acquiring generation assets from E.ON with a negligible generation capacity, which will not have any effect on RWE's market power.

Because the transactions pose no threat of market power or risk to captive ratepayers, Joint Petitioners request that the Commission find no further review under PSL § 70 is required.[4]

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[1] E.ON launched a voluntary public takeover of innogy in April 2018.

[2] Baron Winds has not received a CECPN from the Siting Board and, therefore, may not be an electric corporation at the time that E.ON acquires temporary ownership.

[3] Case 91-E-0350: *Wallkill Generating Company, L.P.*, Order Establishing Regulatory Regime (April 11, 1994).

[4] Similarly, the Parties also submitted a pre-merger notification pursuant to the Hart-Scott-Rodino Act of 1976 (the "HSR Act") on May 1, 2019.

I. BACKGROUND

A. The Parties

i. Cassadaga and Baron Winds

Baron Winds was formed in June 2012 to develop, own and operate the Baron Winds Project. The proposed Baron Winds Project is a utility-scale wind project located in Steuben County, New York. The Facility will consist of up to 69 utility-scale wind turbines and have a maximum facility size of 242 MW.

Cassadaga is a development company formed to develop, own and operate the Cassadaga Wind Project. Cassadaga currently owns the development rights and plans necessary to construct the Cassadaga Wind Project as well as the certificate of environmental compatibility and public need issued by the Siting Board. The Cassadaga Wind Project will be capable of producing up to 126 MW of electricity.

Cassadaga and Baron Winds are wholly-owned, direct subsidiaries of IRUS Wind Development LLC.[5] IRUS Wind Development LLC, in turn, is a wholly-owned subsidiary of IRUS Wind Holdings LLC, which is a wholly-owned subsidiary of innogy Renewables US LLC. innogy Renewables US LLC is a wholly-owned subsidiary of innogy.

ii. innogy

innogy was created in 2016 from a carveout of RWE's grid and infrastructure, retail, and renewables units. innogy has been a publicly-listed German company independently managed since its IPO on October 7, 2016 (MDAX ticker: IGY). innogy is a German energy company with

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[5] On July 7, 2018, the Commission approved the transfer of 100% of the upstream ownership interests in Cassadaga from Trireme Energy Development LLC to innogy Renewables US LLC. Case 18-E-0333: *Petition of Cassadaga Wind LLC, Trireme Energy Development LLC, and innogy Renewables US LLC for a Declaratory Ruling That Public Service Law Section 70 Does Not Apply to a Proposed Acquisition or, That No Further Review of the Acquisition is Required*, Declaratory Ruling on Transfer Transactions (July 17, 2018).

annual revenues of around USD 52 billion and more than 40,000 employees. innogy's grid and infrastructure business segment handles the most efficient electricity distribution system in Germany. innogy's retail business segment supplies around 16 million electricity customers and seven million gas customers in eleven European markets.

innogy's renewables business segment focuses on planning, building, and operating onshore and offshore wind and solar power plants. innogy's U.S. renewables business includes various utility-scale wind and solar energy development projects in the United States indirectly owned by innogy Renewables US LLC.

iii. RWE

RWE is a German energy company. Its 2017 revenues were approximately USD 55 billion. RWE's shares are traded on the Frankfurt am Main and Düsseldorf stock exchanges as well as via the electronic platform Xetra. RWE currently has two main operating business units: (i) Conventional Power Generation and (ii) Energy Trading. RWE currently has a 76.8% indirect ownership interest in innogy; the remaining interests are publicly-traded. Neither RWE nor any of its affiliates owns or controls electric generation, transmission or distribution facilities in the United States or inputs to electricity production (such as intrastate natural gas transportation, storage or distribution facilities) in the United States.

iv. E.ON

E.ON is a DAX listed German energy company based in Essen, Germany. It operates in over 30 countries with 2017 revenues of approximately USD 43 billion. Its activities are focused on three main business divisions: (i) electricity generation from renewable energy sources, (ii) energy distribution networks, and (iii) customer solutions (including electricity and gas retail supply).

In the United States, E.ON's activities are primarily carried out through E.ON Climate and Renewables North America, LLC ("ECRNA"). ECRNA will ultimately be wholly acquired by RWE as a result of the Transactions.

ECRNA is a Delaware limited liability company headquartered in Chicago, Illinois, with offices in Austin, Texas, and San Francisco, California. It is primarily in the business of developing or acquiring, through subsidiaries, renewable electric generation facilities in the United States and operating those facilities.

ECRNA indirectly owns one generating facility in New York. Munnsville Wind Farm, LLC ("Munnsville"), an indirect subsidiary of ECRNA, owns and operates the 34.5 MW Munnsville Wind Farm located in the NYCA.[6] All the capacity from Munnsville is fully committed to Consolidated Edison Energy, Inc. under a long-term contract which expires May 31, 2019.[7]

ECRNA also has two indirect subsidiaries that are power marketers that sell electricity but do not own any generating or transmission assets, EC&R Energy Marketing, LLC and EC&R O&M, LLC ("EC&R O&M"). EC&R O&M provides operating services to its affiliate companies that own generating facilities. Under the Transaction, RWE will ultimately hold a 100% indirect ownership interest in these two power marketers. Currently, the only generation in New York that these power marketers are affiliated with is the Munnsville Wind Farm; under the Transactions, they will also become affiliated with the Cassadaga and Baron Winds Projects. These affiliations raise no market power concerns for the reasons discussed below.

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[6] The Munnsville Wind Farm qualifies as an alternate energy production facility under PSL § 2-b.

[7] Upon expiration of its agreement with Con Ed, Munnsville will be eligible to directly sell its output into the wholesale market administered by the NYISO.

Neither ECRNA nor any of its affiliates owns or controls any electric transmission facilities in the United States, except those limited and discrete facilities needed to interconnect generators to the grid. ECRNA is not affiliated with a traditional public utility with captive customers in the United States. Further, neither ECRNA nor any of its affiliates owns or controls, in the United States, inputs to electricity products.

B. The Transactions

Pursuant to the proposed Transactions, RWE and E.ON effectively will exchange a variety of their businesses. The result will be to consolidate with E.ON those businesses related to the operation of energy networks and customer solutions (including electricity and gas retail supply), and with RWE those businesses related to the generation and wholesale supply of electricity via a mix of conventional and renewable sources (allowing RWE to focus on developing renewable energy generation while retaining the conventional power plants necessary to support the fluctuations from renewable sources). RWE will also acquire a 16.67% interest in E.ON.

The Transactions will take place in four steps, all of which are interdependent, although they will not necessarily all take place at the same time:

- **Step 1**: E.ON will acquire a 76.8% shareholding from RWE, and additional shares pursuant to a voluntary public takeover offer launched by E.ON, in RWE's publicly-listed subsidiary innogy;
- **Step 2**: RWE will acquire a 16.67% interest in E.ON;
- **Step 3**: RWE will acquire a 100% interest in substantially all of E.ON's renewable energy business; and
- **Step 4**: RWE will "re-acquire" a 100% interest in innogy's renewable energy business.

As an interim step (Step 1), E.ON temporarily will acquire an indirect majority interest in innogy's renewable energy business in the United States, including Cassadaga and Baron Winds.

That business, including Cassadaga's and Baron Winds' indirect parent company, innogy Renewables US LLC, will be carved-out and sold back to RWE in Step 4. Thus, E.ON's ownership of Cassadaga and Baron Winds will be temporary and, during this time, Cassadaga's and Baron Winds' immediate parent company (IRUS Wind Development LLC) will not change. The applicable longstop dates are December 31, 2019 for Steps 1 and 2 and December 31, 2020 for Steps 3 and 4. Pre- and post-closing organizational charts are attached as Exhibit 1.

II. PETITION

THE COMMISSION SHOULD DETERMINE THAT NO FURTHER REVIEW UNDER PSL SECTION 70 IS REQUIRED BASED ON THE WALLKILL PRESUMPTION

PSL § 70 states that "no electric corporation shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person or corporation . . . without the written consent of the commission."[8] Under the *Wallkill presumption*, however, the Commission has found with respect to competitive wholesale generators that "transactions involving parent entities upstream from the facilities located in New York will be reviewed only if there is the potential for the exercise of market power or other harm to the interests of captive New York ratepayers."[9]

Here, the Transactions do not give rise to the potential for market power or other harm to captive ratepayers. Accordingly, Joint Petitioners respectfully request that the Commission find that no further review under PSL § 70 is required for (1) E.ON's temporary acquisition of a majority ownership interest in innogy's renewable energy business, and indirectly in its

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[8] PSL § 70(1).

[9] Case 18-E-0333: *Petition of Cassadaga Wind LLC, Trireme Energy Development LLC, and innogy Renewables US LLC for a Declaratory Ruling That Public Service Law Section 70 Does Not Apply to a Proposed Acquisition or, That No Further Review of the Acquisition is Required*, Declaratory Ruling on Transfer Transaction (July 17, 2018).

subsidiaries Cassadaga and Baron Winds (Step 1), and (2) the subsequent transfer of innogy's renewables portfolio, including Cassadaga and Baron Winds, back to RWE (Step 4).[10]

The upstream Transactions will not result in the potential for the exercise of horizontal or vertical market power sufficient to override the *Wallkill presumption*. As noted above, E.ON does not own any electric or gas transmission or distribution assets nor does E.ON own entities that can exercise control over the provision of fuels used in generation within the NYCA. With respect to electric generation, E.ON's only asset is the 34.5 MW Munnsville Wind Farm. The Cassadaga and Baron Winds Projects are still in development. Regardless, even if both wind projects were in operation, E.ON would only own 402.5 MW, or approximately 1%, of generation in the NYCA, well below what the Commission has determined to be de minimis.[11]

E.ON is affiliated with two power marketers. However, this affiliation does not create the potential for the exercise of market power. EC&R Energy Marketing, LLC does not engage in any activities within the state of New York. EC&R O&M's in-state activities are limited to providing O&M services to the Munnsville Wind Farm.

There is also no potential for market power or harm to captive ratepayers when innogy's renewable portfolio is carved out and transferred back to RWE. Once Step 4 is complete, RWE will indirectly own the Munnsville Wind Farm in addition to the Cassadaga and Baron Winds Projects. Thus, RWE will indirectly own 402.5 MW of generation in the NYCA which, as

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[10] If RWE acquires additional generation or transmission in the NYCA or becomes affiliated with any other power marketers during E.ON's temporary ownership of Cassadaga and Baron Winds, the parties will make any appropriate filings under PSL § 70.

[11] *See* Case 07-E-1385: *Calpine Corporation and LS Power Development, LLC*, Declaratory Ruling on Review of Stock Transfer and Acquisition Transaction (January 22, 2008) (finding that "7% and lesser levels of market concentration are generally insufficient to cause [market power concern[s]."); *see also*, Case 09-E-0539: *PPL Generation LLC and J-POWER USA Generation, L.P. - Approval of Transfer of Generating Facilities and Financing,* Order Approving Transfer and Financing (November 16, 2009) (finding J-Power's ownership of 300 MW in the NYISO market did not present any horizontal market power concerns).

discussed above, is a de minimis amount in the NYCA that does not create the potential for market power. RWE will also hold a 100% indirect ownership interest in the two power marketers. For the same reasons discussed above, however, RWE's affiliation with the power marketers does not create potential market power issues.

In sum, there is no potential for market power or harm to captive ratepayers and the Commission should determine, based on *Wallkill* principles, that further review of the Transactions is not required under PSL § 70.

III. CONCLUSION

For the reasons set forth herein, Joint Petitioners respectfully request that the Commission find that no further review under PSL § 70 is required for (1) E.ON's temporary acquisition of a majority ownership interest in innogy, and indirectly in its subsidiaries Cassadaga and Baron Winds (Step 1), and (2) the subsequent transfer of innogy's renewable portfolio, including Cassadaga and Baron Winds, back to RWE (Step 4).

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Dated: May 30, 2019

EXHIBIT 1

Simplified E.ON Pre-Transaction Organizational Chart

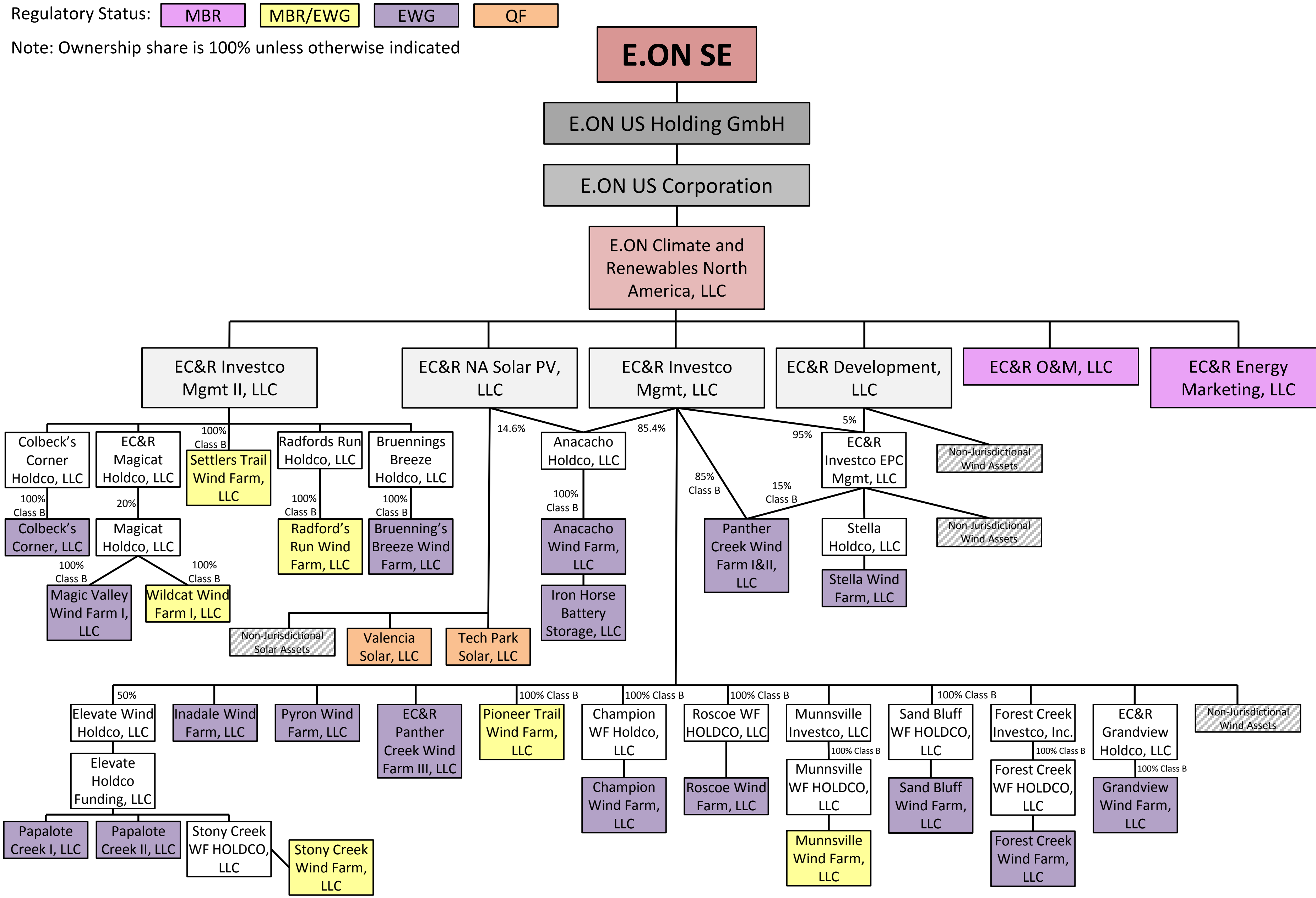


Exhibit 1

Simplified RWE Pre-Transaction Organizational Chart

Regulatory Status: MBR | MBR/EWG | EWG | QF

Note: Ownership share is 100% unless otherwise indicated

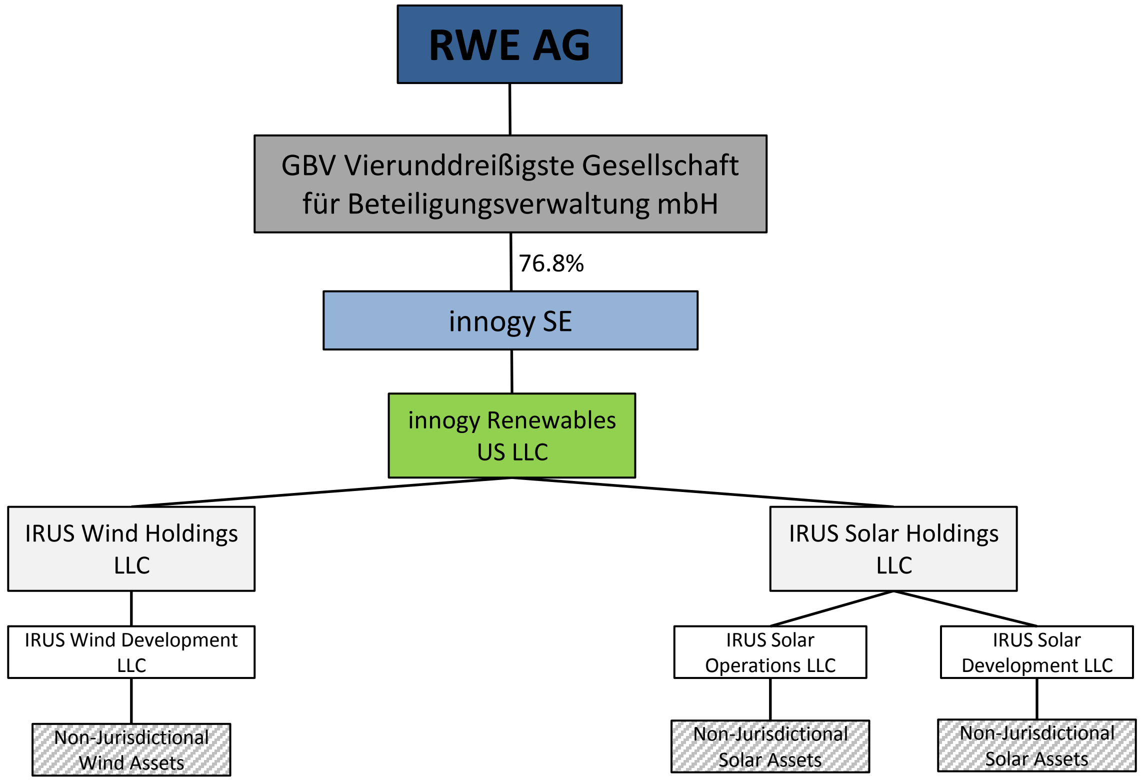
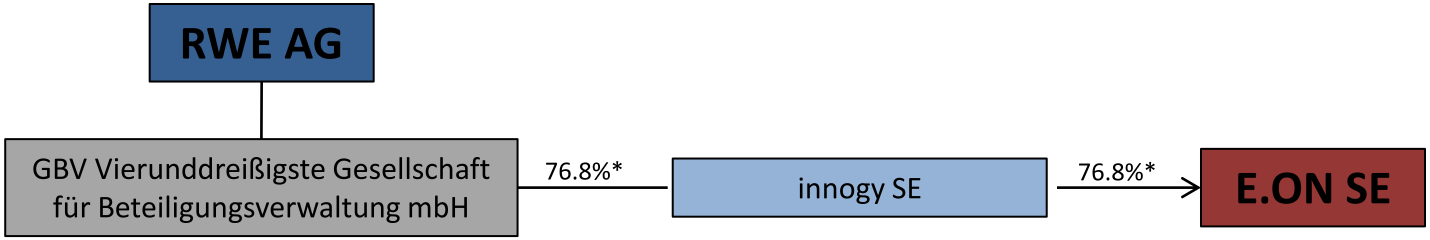
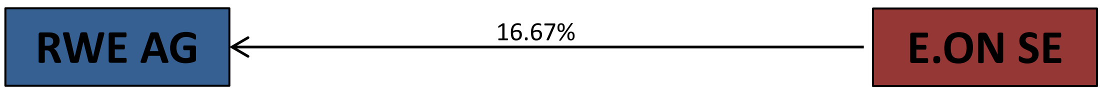


Exhibit 1

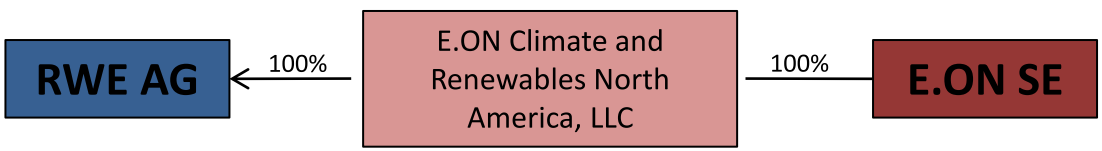
Simplified Intermediate Organizational Chart Step 1



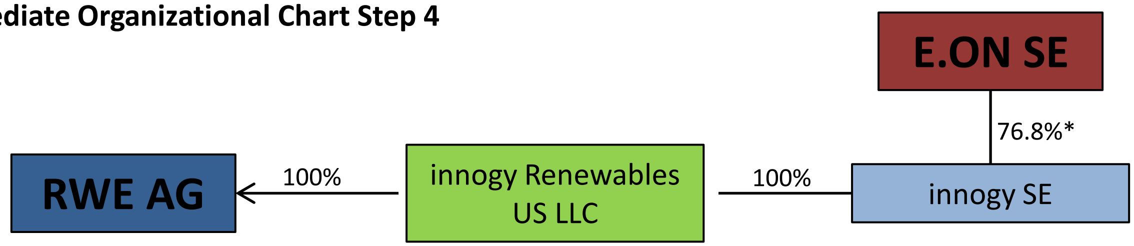
Simplified Intermediate Organizational Chart Step 2



Simplified Intermediate Organizational Chart Step 3



Simplified Intermediate Organizational Chart Step 4



*E.ON will acquire a 76.8% shareholding from RWE, and additional shares pursuant to a voluntary public takeover offer launched by E.ON, in innogy SE.

Exhibit 1

Simplified Post-Transaction Organizational Chart

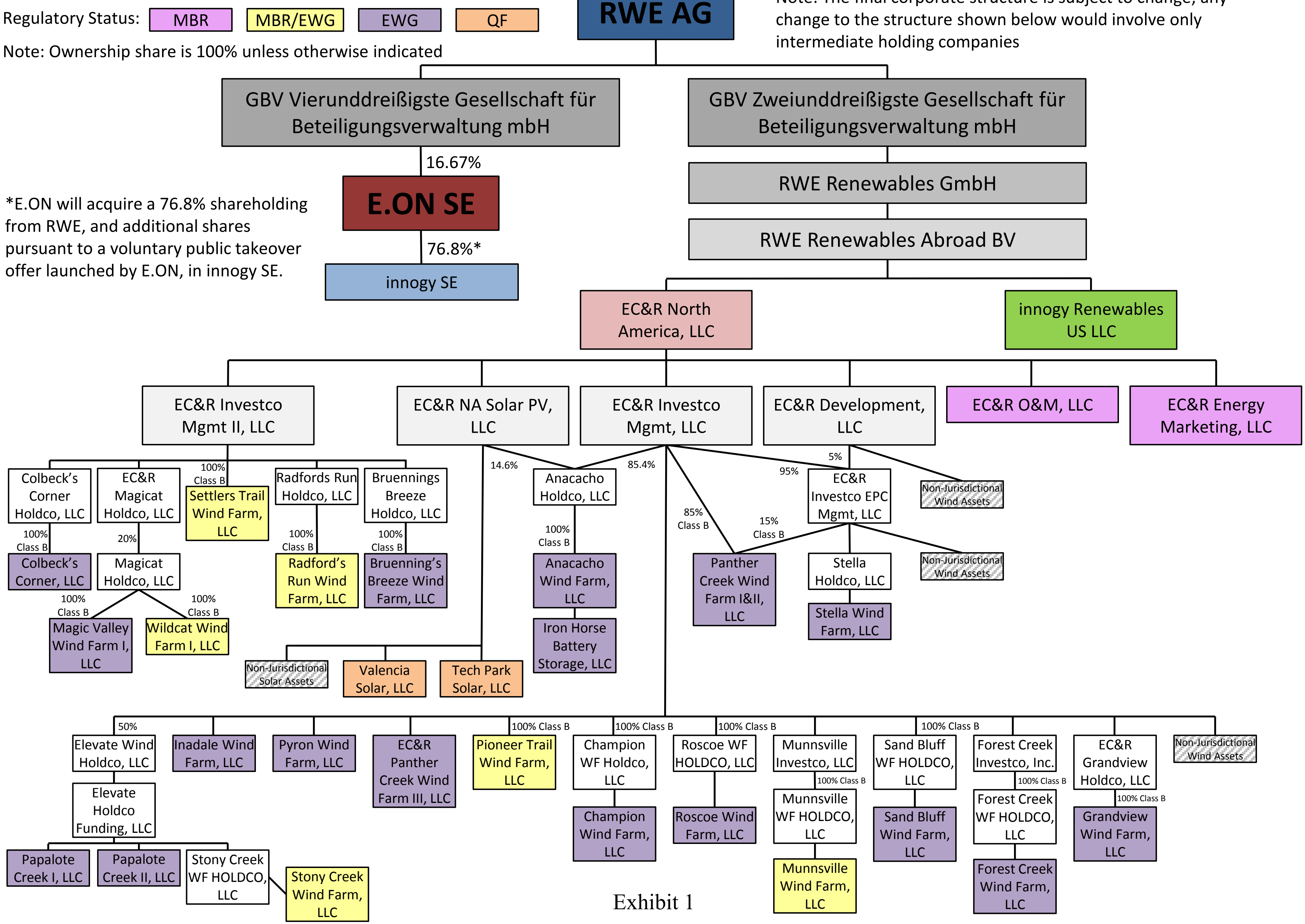


Exhibit 1