

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Mankato Energy Center, LLC
Mankato Energy Center II, LLC

Docket No. EL21-36

Reply Brief of Public Citizen, Inc.

The facts conclusively demonstrate that IIF and its various shell holding companies functionally operate as affiliates of JP Morgan Chase & Co. for the purposes of the Federal Power Act and the Commission's regulations.

IIF's argument that it is unaffiliated with JP Morgan Chase & Co. relies heavily upon the purported independence of the IIF GP "owners". But the powers allegedly possessed by the "owners" are mere fiction, as they are ghosts who have delegated all authorities to their managers at JP Morgan. Their powers are in name only, as all available evidence demonstrates that JP Morgan executives make all decisions regarding IIF's operations.

IIF repeatedly claims that they can simply walk away from JP Morgan, "at any time for any reason or no reason."¹ But this is false. There are significant barriers preventing the IIF GP "owners" from replacing JP Morgan as their Investment Advisor. For starters, IIF has no employees independent from JP Morgan Chase & Co. That's because JP Morgan dedicates an entire division of executives just to run IIF. The IIF GP "owners" have no ability to independently operate without JP Morgan's staff.

But the clearest example is that the IIF GP "owners" do not own anything [REDACTED]

[REDACTED] The Amended and Restated Agreement of Limited Partnership of IIF US Holding 2 LP, included as non-public Exhibit 3 in the February 22 Initial Brief, states in Section 2.02 on page 11:

[REDACTED]

¹ See, for example, *Initial Brief*, Executive Summary, at page 2.

[REDACTED]

The fact that Public Citizen must redact this for the public filing is an absurd abuse of proprietary treatment.

The IIF GP “owners” do not own their own equity. Rather, the three IIF GP “owners” babysit the \$10,000 Capital Contribution for owners that succeed them after their term limits expire. Instead of being invested in IIF’s operations due to the contribution of their own equity (as is the case with normal owners), they are instead paid a (very likely) insanely generous fee by the pension funds and other Limited Partners to delegate all of their authorities to their Investment Manager, JP Morgan Chase & Co. Again, as Public Citizen noted more than a year ago, the IIF GP “owners” are pure fiction, and have been designated the title “owner” not because they own anything, but rather to conceal from regulators the nature of their relationship with IIF’s Investment Manager, JP Morgan Chase & Co. The three owners are paid to delegate all decision-making authorities to JP Morgan Chase & Co. The three owners are ghosts, with their names or evidence of any of their decision-making appearing no where in any of these documents filed at FERC.

It is not inconsequential that JP Morgan Chase & Co. conceived, designed and incorporated the IIF shell company structures in 2006. Once one views all of these absurd legal contraptions that define IIF as an original creation of JP Morgan Chase & Co, then the purpose of the obscurification becomes clear: mislead regulators into thinking that IIF somehow operates independently from JP Morgan Chase & Co.

IIF claims that “the fiduciary duty that J.P. Morgan Investment owes IIF US Holding 2 provides ‘numerous protections and prohibitions which meet or exceed those that would otherwise apply to an arm’s-length bargaining between two adverse parties.’”² But JP Morgan Chase & Co has a sordid history violating its fiduciary duty:

- On November 24, 2020, the Office of the Comptroller of the Currency assessed a \$250 million civil penalty against JP Morgan Chase & Co for

² Initial Brief, at page 3.

- maintaining “a weak management and control framework for its fiduciary activities” and “insufficient framework for avoiding conflicts of interest”³.
- The U.S. Securities and Exchange Commission forced JP Morgan Chase & Co to pay \$267 million for rampant violations of the bank’s fiduciary duties to its clients.⁴
 - JP Morgan Chase & Co entered into a deferred prosecution agreement with the U.S. Department of Justice to settle criminal violations of the bank’s fiduciary duties in relation to Bernie Madoff’s ponzi scheme, forcing the bank to pay \$2 billion to settle the charges.⁵

While the affidavit of Diane C. Blizzard (Exhibit 1 to the Initial Brief) provides an interesting little overview of the various laws and rules regarding JP Morgan’s fiduciary duties to IIF, the affidavit is completely silent on JP Morgan’s history of non-compliance with these fiduciary duties. The Blizzard Affidavit is therefore irrelevant to the Commission’s investigation. The Commission cannot rely on non-Federal Power Act statutes to ensure an arm’s length relationship with IIF given JP Morgan’s long track record of repeated, egregious violations of its fiduciary duties.

IIF fails to provide the documentation necessary regarding any ability of its Manager, JP Morgan, to hire and fire the “independent” members of the new Onward Energy board. As Public Citizen has previously pointed out (see page 3 of our Exhibit A), corporate documents of other IIF companies demonstrate that JP Morgan, acting as IIF’s manager, has the authority to remove any board member without cause or notice.

The Initial Brief states that “The [IIF] companies are governed by their respective limited liability company operating agreements” but does not provide them for the record. The Initial Brief describes how “MEC Holdings has exercised its delegation rights under the LLC Agreements by appointing officers with the authority to act on behalf of MEC Holdings” but does not provide these actual agreements for the record.⁶

³ At page 2, www.occ.gov/static/enforcement-actions/ea2020-067.pdf

⁴ www.sec.gov/news/pressrelease/2015-283.html

⁵ www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-fbi-assistant-director-charge-announce-filing-criminal

⁶ At page 24.

The Initial Brief states that “J.P. Morgan Investment is authorized under an execution procedure to execute a shareholder consent” but fails to provide documents that detail these execution procedures.⁷

Section VI.h of the Initial Brief (at page 34-5), IIF claims that “Neither J.P. Morgan Investment nor [JP Morgan’s Infrastructure Investments Group] IIG has the discretion to remove any directors from the boards of the IIF US Holding 2 subsidiaries.” But as Public Citizen has previously noted (and included at page 3 of our Exhibit A), IIF has delegated authorities to JP Morgan executives to hire and fire “independent” members of the board of the various IIF subsidiary companies.

The non-public *Investment Advisory Agreement between IIF US Holding 2 LP and J.P. Morgan Investment Management Inc.*—Exhibit 2 of the Initial Brief—contains several provisions that suggest JP Morgan operates as an affiliate of IIF. Section 9(b) (beginning on page 5) states [REDACTED]

[REDACTED]

Section 13(c) of the Agreement (at page 9) permits JP Morgan to [REDACTED]

[REDACTED]

Confidential Exhibit 3, the *Amended and Restated Agreement of Limited Partnership of IIF US Holding 2*, also contains numerous provisions demonstrating that JP Morgan and IIF should be treated as affiliates. [REDACTED]

[REDACTED]

⁷ At page 26.

[REDACTED]

Finally, IIF largely ignored most of the evidence of affiliation Public Citizen raised in our December 3, 2020 Protest in Docket Nos. ER20-2705-001 and ER20-2706-001. We include that as Exhibit A.

Respectfully submitted,

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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Mankato Energy Center, LLC
Mankato Energy Center II, LLC

Docket No. ER20-2705-001
ER20-2706-001

Protest of Public Citizen, Inc.

The confidential attachments that Mankato filed on November 12 confirm that the Commission must deem JP Morgan Chase & Co. to be affiliated with IIF, and therefore with Mankato Energy Center. IIF was created by JP Morgan, and its inherent structure, combined with specific delegated rights granted to JP Morgan, render IIF incapable of operating independently from JP Morgan.

Confidential Attachments 2, 3, 17, 26, 27 and 29 provide various detail on the extent of JP Morgan's influence and control over IIF.

It is clear that IIF functionally operates as an affiliate of JP Morgan for the purposes of the Federal Power Act and the Commission's regulations.

The Contractual Structure of IIF Inhibits The Ability Of IIF to Detach Itself From JP Morgan's Control And Influence

[REDACTED]

¹ Amended and Restated Agreement of Limited Partnership of IIF US Holding LP, Article 2, Section 2.02, at pages 10-11.

A second structural obstacle is that JP Morgan provides the entirety of the IIF's staffing and management needs. IIF cannot presently function without JP Morgan serving as its investment advisor and manager, and so severing ties with JP Morgan would mean IIF would have significant challenges to continue operations.

A similar management agreement between Fortress Transportation & Infrastructure Investors and its manager FIG LLC cautions investors that "our independent directors may refrain from terminating our Manager because doing so could result in the loss of key personnel."² If IIF offered public shares subject to regulation under the Securities Exchange Act, it would be required to provide a similar warning given IIF's complete dependence upon JP Morgan for "key personnel". This utter dependence upon JP Morgan renders IIF functionally dependent upon JP Morgan, and therefore highly susceptible to its influence and control.

Confidential Attachment 29

Attachment 29 is the *Investment Advisory Agreement* between IIF and JP Morgan. [REDACTED]

² www.sec.gov/ix?doc=/Archives/edgar/data/1590364/000159036420000002/ftai-20191231.htm

[REDACTED]

Confidential Attachment 26

Attachment 26 is the *Amended and Restated Agreement of Limited Partnership of IIF US Holding LP.* [REDACTED]

[REDACTED]

⁶ At page 3.
⁷ At page 4.
⁸ At pages 28-29.
⁹ At pages 5-6.

JP Morgan Was Just Sanctioned For Violating Its Fiduciary Responsibilities

The Mankato Answer claims that JP Morgan “owes fiduciary duties to IIF US Holding in accordance with the Investment Advisers Act” in an effort to demonstrate that JP Morgan’s management of IIF will be done in the best interest of IIF, and not of JP Morgan.¹⁰

But on November 24, 2020, the Office of the Comptroller of the Currency assessed a \$250 million civil penalty against JP Morgan Chase for maintaining “a weak management and control framework for its fiduciary activities” and “insufficient framework for avoiding conflicts of interest”¹¹. This suggests that JP Morgan actually has weak controls regarding its fiduciary responsibilities to IIF.

Respectfully submitted,

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¹⁰ Response to Question 1, at page 5.

¹¹ At page 2, www.occ.gov/static/enforcement-actions/ea2020-067.pdf