

45 YEARS



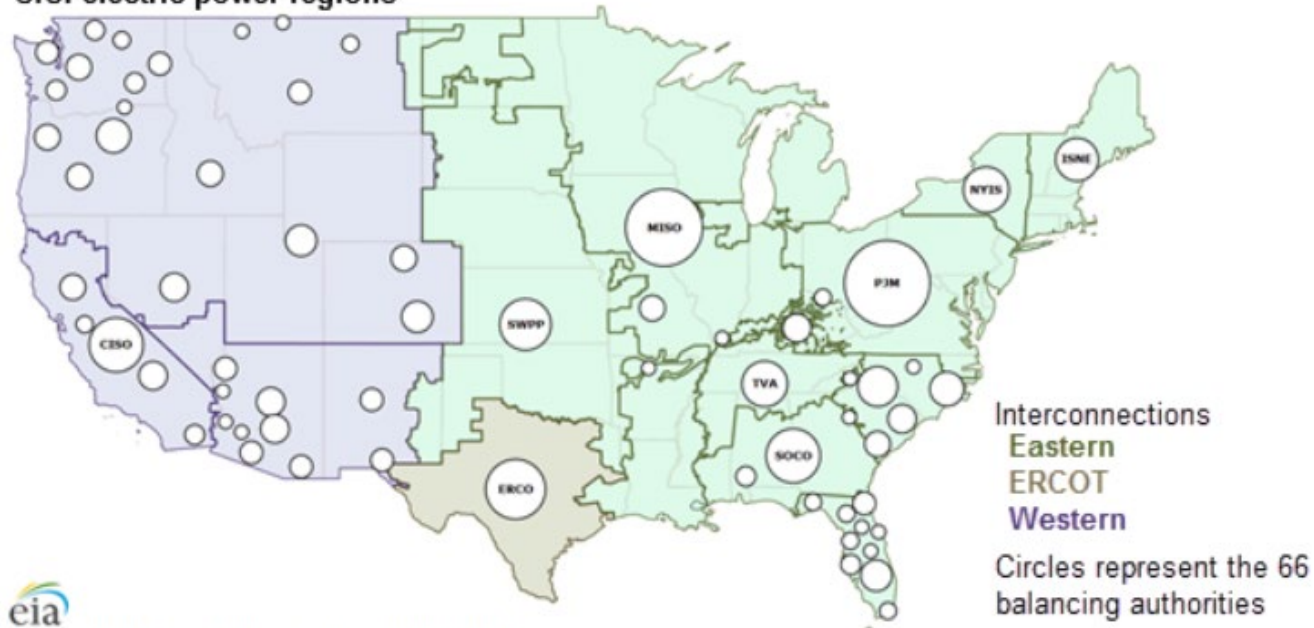
PUBLICCITIZEN

FERC ELECTRIC POWER MARKET JURISDICTION IN TEXAS

4th Annual Public Interest
Environmental Law CLE

U.S. electric system is made up of interconnections and balancing authorities

U.S. electric power regions



Source: U.S. Energy Information Administration

Note: The locations of the electric systems are illustrative and are not geographically accurate. The sizes of the circles are roughly indicative of electric system size.

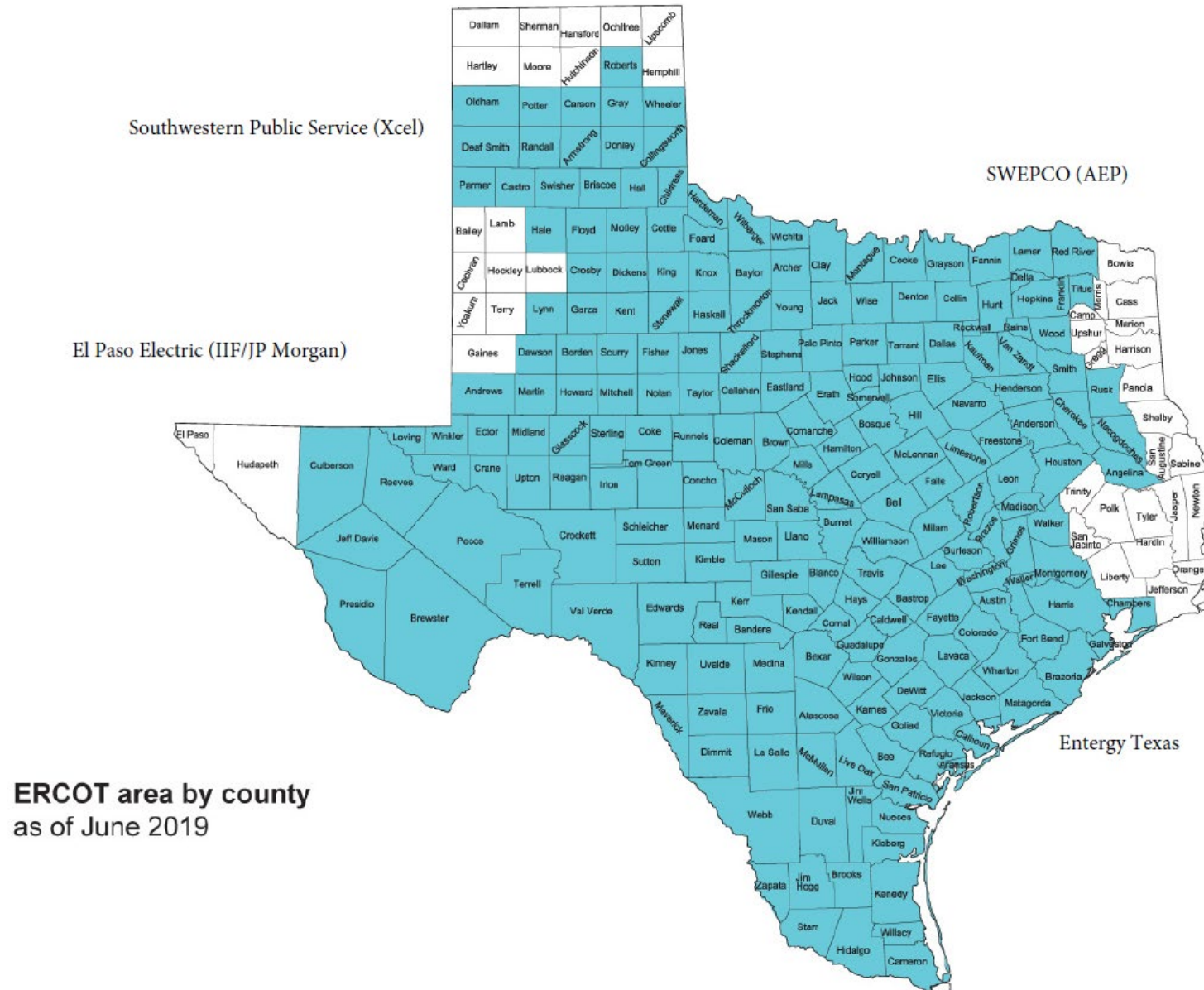
THE U.S. POWER SYSTEM IS COMPRISED OF 3 SEPARATE INTERCONNECTIONS: WEST, EAST & ERCOT

Short History Of Organizational Cooperation Between Texas Utilities

- “On or about August 26, 1935, solely because of the passage of the Federal Power Act, and solely to avoid becoming subject to FPC jurisdiction” a group of Texas utilities formed a cooperation agreement. (*West Texas Utilities Co. v. Texas Electric Service Co.*, 470 F. Supp. 798)
- During World War II, an expanded group of Texas utilities formed the Texas Interconnected System (TIC), a voluntary cooperation agreement.
- The Electric Reliability Council Of Texas (ERCOT) was formed in 1970 as a reliability coordinator when TIC members were joined by other utilities, primarily in response to national reliability efforts following the massive 1965 northeast blackout. ERCOT reported to the voluntary North American Electricity Reliability Corporation.
- In the 1996 state electricity deregulation law, the Texas legislature converted ERCOT into an “Independent System Operator” with jurisdiction over the wholesale power market.

The Federal Power Act Grants FERC Jurisdiction Over Interstate—but not Intrastate— Commerce

- While ERCOT covers roughly 90% of the state's load, 4 investor owned utilities in Texas are outside of ERCOT: El Paso Electric, Entergy Texas, AEP's Southwestern Electric Power Company and Xcel Energy's Southwestern Public Service.
- FERC's website states that “the transmission grid that the ERCOT independent system operator administers is located solely within the state of Texas and is not synchronously interconnected to the rest of the United States.” (www.ferc.gov/industries-data/electric/electric-power-markets/ercot)
- ERCOT is the 3rd largest ISO in the U.S. in terms of peak load: PJM, MISO, ERCOT, SPP, CAISO, NYISO, ISO-NE (www.ferc.gov/sites/default/files/2020-06/energy-primer-2020.pdf)



The First Challenge To ERCOT Independence And the Settlement That Preserved It

- In 1981, Central Southwest Holdings, which had utilities in Texas and Oklahoma, entered into an Offer of Settlement with various parties that included the establishment of two asynchronous direct current interconnections between its electric utilities in ERCOT and SPP in a political compromise to keep federal jurisdiction out of ERCOT. (*17 FERC ¶ 61,078*)

JOURNAL ARTICLE

The Second Battle of the Alamo: The Midnight Connection

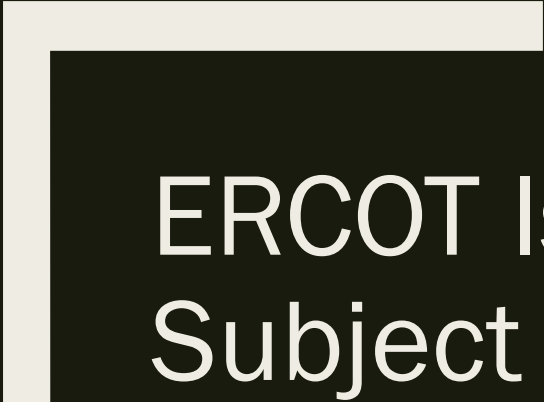
Richard D. Cudahy

Natural Resources & Environment

Vol. 10, No. 1 (Summer 1995), pp. 56-61, 85-87 (9 pages)

Published By: American Bar Association

<https://www.jstor.org/stable/40923434>



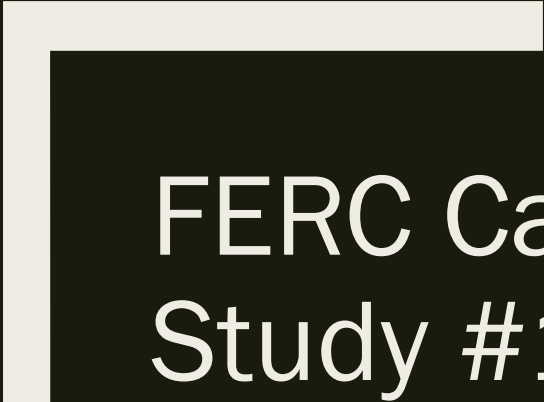
ERCOT Is Subject To FERC Jurisdiction For Reliability Issues

- The Energy Policy Act of 2005 gave FERC jurisdiction over ERCOT only as far as federal reliability standards *16 USC § 824o* . . . The new law preserved ERCOT exemptions from broader FPA jurisdiction, as 16 U.S. Code § 824(b)(2) states that the reliability provisions “shall not make an electric utility or other entity subject to the jurisdiction of the Commission” if it isn’t already so.

Example Of FERC Order Approving Transmission Interconnection With ERCOT While Preserving ERCOT Autonomy

147 FERC ¶ 61,113 (approving Southern Cross Transmission, 2014) at 2:

The ERCOT transmission grid is located solely within the State of Texas and is not synchronously interconnected to the Western or Eastern Interconnections. To date, the only interconnections between ERCOT and facilities in the United States outside of Texas, and the transmission of power over those interconnections, have been made pursuant to Commission orders under sections 210 and 211 of the FPA. Because these interconnections and the associated transmission service were ordered by the Commission pursuant to its authority under sections 210 and 211 of the FPA, the ERCOT entities providing the requested services did not become “public utilities” subject to the Commission’s plenary jurisdiction under Part II of the FPA, and ERCOT’s non-jurisdictional status was preserved. The proposal at issue here, as outlined below, would create an additional interconnection allowing electric power flow between ERCOT and facilities located outside of Texas.”



FERC Case Study #1: El Paso Electric *FERC Docket No. EC19-120*

- El Paso Electric, which has been in operation since 1901, was a publicly traded company when a private equity firm called Infrastructure Investments Fund announced it would take it private for \$4.3 billion on June 3, 2019.
- On August 13, 2019, IIF applied for permission at FERC to acquire El Paso Electric under Section 203 of the Federal Power Act, which governs mergers and acquisitions. Public Citizen was the only intervenor.
- A Section 203 proceeding has very narrow evaluation criteria, only looking the merger's impact on rates, competition and regulation.
- As a private equity firm, IIF features far less detailed corporate disclosure than a publicly traded firm.

Public Citizen's Investigation Found Clear Ties between IIF and JP Morgan

- IIF already controlled U.S. power companies Southwest Generation and Novatus Energy; natural gas distribution company Summit Utilities; and Sugar Land, TX-based SouthWest Water Company, which runs for-profit municipal water utilities across Texas and 4 other states.

Investment fund aiming to buy El Paso Electric owns sprawling portfolio



Author **Ashleigh Cotting, Fotios Tsarouhis**
Theme **Energy**

As its proposed acquisition of El Paso Electric Co. goes before state and federal regulators, the ownership structure and holdings of Infrastructure Investments Fund, a J.P. Morgan Chase & Co.-advised investment vehicle, is coming under heavy scrutiny.

Public Citizen Requested That JP Morgan Be Legally Affiliated With El Paso Electric

- Public Citizen provided evidence that the Wall Street bank J.P. Morgan Chase & Co created IIF, manages and controls daily operations for all the IIF shell companies, and J.P. Morgan executives serve on the Board of Directors of all IIF companies.
- IIF is constructed as a series of shell companies that have no assets and no employees—all operations are run by JP Morgan, staffed entirely by JP Morgan executives, and run out of JP Morgan's Manhattan offices.
- JP Morgan is a Bank Holding Company subject to extensive regulation by the Federal Reserve. The Fed historically places limits on bank holding companies from controlling energy assets.
- JP Morgan created IIF as an off-the-books private equity division in 2006 (originally calling it *JP Morgan IIF*), one year after committing to the Federal Reserve that it would not “acquire or operate” power plants. (*Notice to the Board of Governors of the Federal Reserve System on July 21, 2005*)
- Thus IIF was created for the purpose of evading regulatory scrutiny.

IIF's Capital Comes From Foreign Institutional Investors

- JP Morgan's IIF raises money from institutional investors—an incredibly lucrative client base for the bank. Seventy-nine percent of IIF's equity is raised from foreign institutional investors: 27% from the United Kingdom, 18% Europe (excluding the U.K.), 13% Canada, 8% Japan, 6% the Middle East, 4% Australia, 2% Asia (excluding Japan) and 1% “other”. Only 21% of IIF's equity is from the United States.
- To evade affiliation, JP Morgan installed three people it calls “owners” of IIF.
 - Our investigation found that the three owners did not contribute any money, but rather were selected in part by JP Morgan to serve fixed terms.
 - One of these “owners” is Anne M. Cleary, who was President of Mirant California during the 2000-01 west coast deregulation crisis. During her tenure, Mirant's California and west coast operations were formally sanctioned by numerous government investigations for engaging in widespread illegal misconduct and market manipulation, with Mirant being forced to pay nearly \$1.3 billion in fines and refunds.

Despite Public Citizen's Evidence, FERC Declined To Address JP Morgan's Affiliation With IIF

- In its March 30 *Order Conditionally Authorizing Disposition of Jurisdictional Facilities re El Paso Electric Company*, FERC ruled that “We decline to address herein the arguments related to whether the IIF companies are affiliated with J.P. Morgan and/or J.P. Morgan Investment. Applicants have demonstrated that affiliation would not change the outcome of the Commission’s section 203 analysis of the Proposed Transaction.” (170 FERC ¶ 61,280, at 64).
- After we asked for rehearing, the Commission responded that “while the Commission made no finding in the March 2020 Order as to whether J.P. Morgan Investment is an affiliate of Sun Jupiter, it is possible this issue could be considered in a future proceeding concerning El Paso’s, Sun Jupiter’s, or any affiliates’ thereof, authority to charge market-based rates.” (172 FERC ¶ 61,083, *Order Accepting Proposed Mitigation And Addressing Arguments Raised on Rehearing*, Issued July 22, 2020, at Footnote 21).
- After consummating its acquisition of El Paso Electric, IIF immediately placed two JP Morgan executives—Andrew “Landy” Gilbert and Kathleen Lawler—on El Paso’s board. (<https://ir.epelectric.com/news/news-details/2020/El-Paso-Electric-Announces-Closing-of-Acquisition-by-the-Infrastructure-Investments-Fund/>)

So We Raised The Affiliation Issue With IIF's Market Based Rates

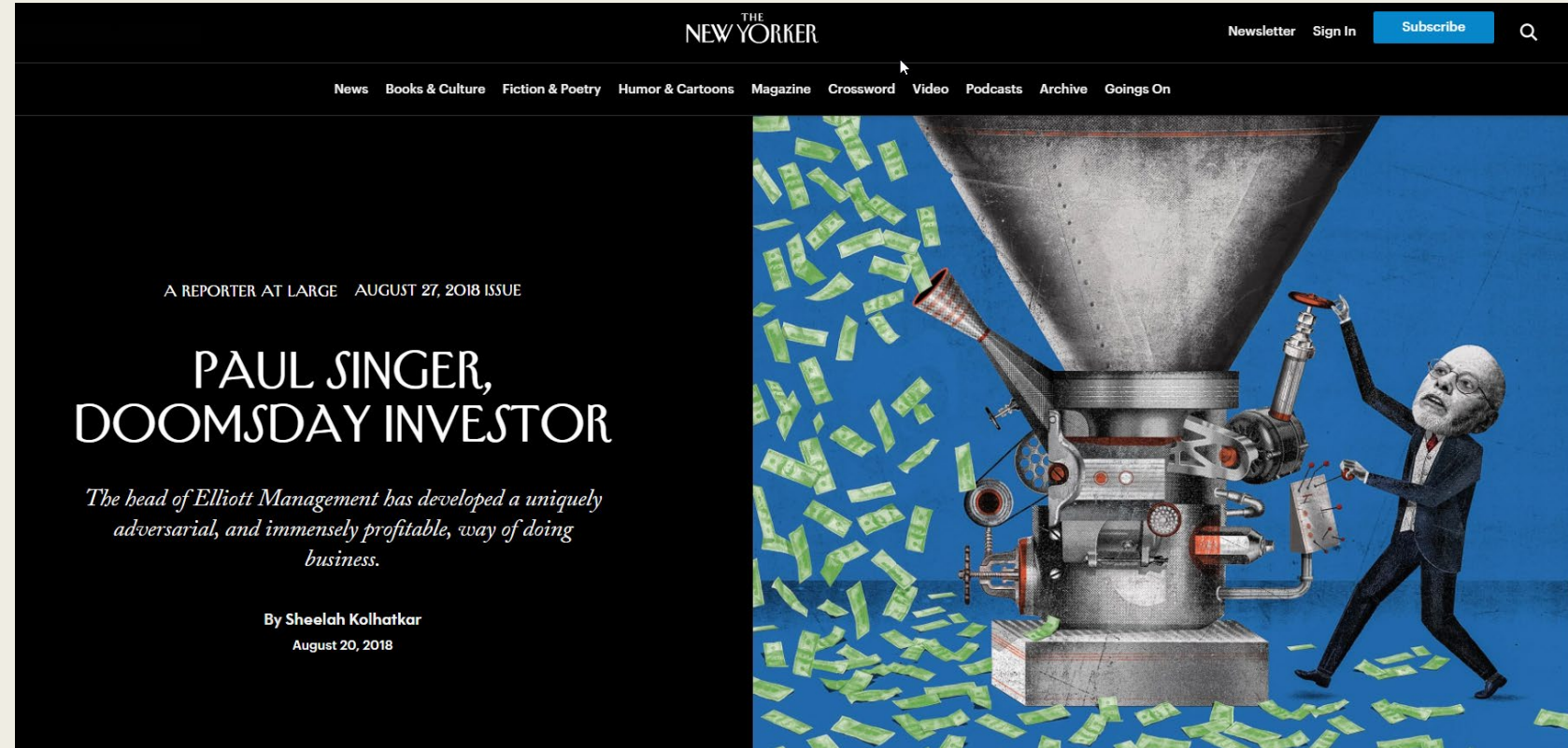
On October 13, we secured a victory when FERC ordered IIF to turn over substantial detail about its relationship with JP Morgan, including the management services agreement between the two. These documents have all previously been non-public, and IIF never before disclosed them to regulators. IIF has 30 days from October 13 to answer. (*Order in Docket Nos. ER20-2705 and ER20-2706*)

Case Study #2: Public Citizen Challenges Hedge Fund That Controls CenterPoint Energy

- CenterPoint Energy Inc. is a public utility holding company based in Houston, TX.
- On April 23, 2018, CenterPoint Energy announced it would acquire Indiana-based Vectren for \$6 billion, and its electric utility Southern Indiana Gas and Electric Company. The acquisition obtained all regulatory approvals (including FERC) and was consummated on February 1, 2019.
- Following CenterPoint's acquisition of Vectren, its stock struggled, falling from \$30.81 on February 1, 2019 to a low of \$12.10 on March 23, 2020. CEO Scott Prochazka left in February 2020, weeks after the company's request to increase rates was rejected by the Public Utility Commission of Texas.

Enter Elliott Management

Elliott Management, founded and led by Paul Elliott Singer, specializes in taking equity stakes of companies and using those investments to demand significant management changes, as its done a dozen or so times.



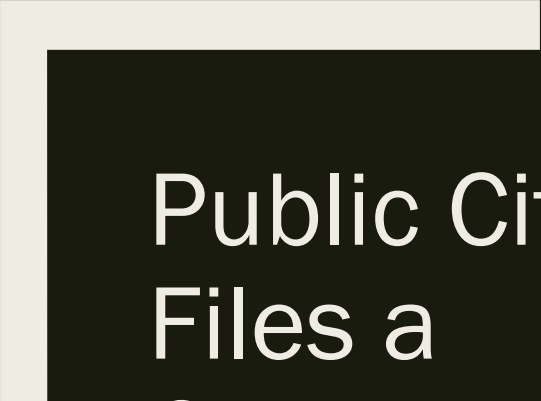
The screenshot shows the top navigation bar of The New Yorker website with the logo and links for Newsletter, Sign In, and a Subscribe button. Below the navigation bar is a menu with categories: News, Books & Culture, Fiction & Poetry, Humor & Cartoons, Magazine, Crossword, Video, Podcasts, Archive, and Goings On. The main content area features an article titled "PAUL SINGER, DOOMSDAY INVESTOR" by Sheelah Kolhatkar, dated August 20, 2018. The article is part of the "A REPORTER AT LARGE" series from the August 27, 2018 issue. A quote from the article reads: "The head of Elliott Management has developed a uniquely adversarial, and immensely profitable, way of doing business." To the right of the text is a large illustration of Paul Singer, a man in a suit and glasses, standing next to a large, complex industrial machine that resembles a funnel or a large-scale printer. The machine is spilling out a large amount of green banknotes, which are falling all around it. The background of the illustration is a solid blue color.

Elliott Management Secures Control Of CenterPoint In Part Through A Non-Public Confidentiality Agreement

- By May 6, 2020, Elliott Management was able to secure a deal with CenterPoint to arrange \$1.35 billion in new equity in exchange for management changes and a business overhaul. At the time, Elliott Management's Jeff Rosenbaum told reporters of the connection between the cash and the revamp: "We believe the transformative balance-sheet and governance enhancements announced today will have a positive impact on CenterPoint Energy's future," and that Elliott Management had "been working with the board over the past several months" on the proposal.
- The May 6 U.S. Securities and Exchange Commission filing mentions negotiated terms subject to a non-public "Confidentiality Agreement, dated March 17, 2020, between the Company [CenterPoint Energy], on the one hand, and Elliott Investment Management L.P. and Elliott Management Corporation, on the other hand." The SEC filing references a second, non-public confidentiality agreement between CenterPoint and Elliott Management dated May 4.
- The agreement installed both of Elliott's preferred selections for CenterPoint's board: David J. Lesar and Barry T. Smitherman. A month later, Mr. Lesar was elevated to CEO of CenterPoint effective July 1, 2020.

Elliott Plays A Role In CenterPoint's Business Overhaul

The May 6 *Governance Arrangement Agreement Among CenterPoint Energy, Inc., Elliot International, L.P., and Elliot Associates, L.P.* requires CenterPoint Energy to establish a Business Review and Evaluation Committee, to which CenterPoint “shall provide to the Investor [Elliot Management] the reasonable opportunity to present and discuss its views” and CenterPoint cannot remove or replace members of this Committee without the “prior written agreement from” Elliot Management. Both Messrs. Lesar and Smitherman are on the Committee, with Lesar serving as Chair—which includes “overseeing the agenda, presiding over meetings and reporting to the Board.” This Committee will make decisions on billions of dollars of capital investments, and on divestiture decisions.



Public Citizen Files a Complaint Under Section 206 at FERC: Docket EL21-2

- On October 5, we filed a complaint under Section 206 of the Federal Power Act, which allows any member of the public to notify the Commission of possible violations. The Commission must notice any such 206 complaint to the public, and the Commission must ultimately respond to the complaint.
- Because of its recent acquisition of Vectren, CenterPoint is now affiliated with a market-based rate seller, Southern Indiana Gas and Electric Company.
- When the facts the Commission relied upon in granting a seller market-based rate authorization change, the seller is required to report the change by filing a Notice of Change in Status consistent with Order No. 652 and 18 CFR § 35.42. Any change in status must be filed no later than 30 days after the change. CenterPoint's MBR affiliate, Southern Indiana Gas and Electric Company, never filed such a Change in Status report.
- The Commission's typical standard to determine affiliation is when "any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company." However, the Commission has procedures to address affiliation for unique circumstances, such as Elliot Management Corp., when an entity has the ability to control without owning 10 percent:
 - *Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate.*

CenterPoint Responds on October 26

- While CenterPoint denies that Elliott Management should be considered a legal affiliate, they did turn over the two non-public confidentiality agreements. This marks the first time that any regulatory agency has seen the documents. While CenterPoint labeled the agreements non-public in the FERC docket, I have obtained them through a non-disclosure agreement. Public Citizen will make a motion in the next two weeks to make these confidentiality agreements freely available to the public.

OCTOBER 19, 2020

Public Citizen Pushes FERC to Classify Elliott Management as an Affiliate of Evergy, Inc.

By Tyson Slocum

Public Citizen filed a protest at FERC that the electric utility Evergy, Inc. failed to notify the Commission as required by 18 CFR § 35.42 that the hedge fund Elliott Management and its affiliates have obtained control over the company, in part through the terms of a non-public confidentiality agreement. In addition, Elliott Management must be classified as an affiliate of Evergy, Inc. Read the filing here: [EvergyElliottM](#)

PUBLIC CITIZEN HAS ALSO CHALLENGED ELLIOTT'S SIMILAR CONTROL OVER EVERGY, AND WILL SHORTLY DO THE SAME FOR DTE