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## Shareholder Activism in the Regulated Utility Sector

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Regulated utilities have historically been more insulated from the scrutiny of activists than companies in other industries. Starting in the late 1970s, however, the regulated utility industry began to restructure in response to political pressure for energy independence following the Arab Oil Embargo and rising environmental concerns. As a consequence, the many smaller companies that each separately produced and sold electricity or natural gas at retail in local markets no longer exist as public companies. First, these companies separated their business into wholesale production and retail distribution divisions, and then they started merging with one another and reconfiguring their business lines. Today, there are fewer and larger, multistate-competitive wholesale electricity producers; fewer and larger, multistate gas pipelines; and a few very large, publicly traded holding companies with multiple single-state electric and gas retail distribution company wholly owned subsidiaries, as well as some smaller, single-state retail utilities. Just as this restructuring is coming to a settling point, new technologies, consumer driven demand for renewable energy and fuel choice and rising inflation are catalyzing more change. These industry changes, together with changes in laws in the mid-2000s, eliminated the types of legal and regulatory restrictions that had previously limited the ability of activists to crash the regulated utilities' private party.

Acquisition of control of a regulated public utility through the acquisition of its publicly traded common stock (in regulatory terms, the "voting securities" conferring upon the holder thereof the right to vote for the election of directors) will almost always require approval from both federal and state utility regulators. The Federal Energy Regulatory Commission ("FERC") presumes "control" to exist at a level substantially below 51% of common stock (or "voting securities"). Thus, FERC approval for "change of control transactions" under the Federal Power Act will be required even if no equivalent shareholder approval under state corporate law is required. Under the Federal Power Act, FERC presumes "control" to exist at ownership of 10% of the voting securities of a public utility, and can be found to exist even absent direct ownership of voting securities.<sup>1</sup> In the 1997 *Enova Corp.* Order, FERC stated that "control" means:

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[T]he possession, directly or indirectly, of the power to direct or cause the direction of management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, associated companies, contract or any other direct or indirect means.<sup>2</sup>

FERC's 2007 Supplemental Policy Statement sought to clarify, without overturning, the standard in *Enova Corp.*, and described a limited safe harbor for smaller acquisitions of voting securities: an acquisition of voting securities under 10% of the total outstanding voting securities of a public utility would be presumed (it is a rebuttable presumption) not to confer control.<sup>3</sup> The 2007 policy statement could have had a role in emboldening activists to take stock positions in public utility companies because, by drawing a formalistic line between what does and does not presumptively constitute "control" under the Federal Power Act, FERC was clarifying that acquisitions of less than 10% of the voting securities of a public utility could proceed without FERC regulatory risk to the activists. Recent examples of activist campaigns targeting public utilities bear out that activist positions rarely surpass the 10% threshold, but under the *Enova Corp.* standard it was not at all clear that under 10% acquisitions by activists and the related pressures that activists sought to bring to bear targeting utilities could proceed without a prior FERC approval. Thus, FERC's adoption of the 2007 policy statement significantly reduced an unquantifiable regulatory risk for activists in their manner of doing business.<sup>4</sup>

Consequently, activists believed they could amass substantial ownership (up to just below 10% of the voting securities) and economic stakes in public utilities without undergoing any FERC or state utility commission regulatory scrutiny,<sup>5</sup> and advocate for changes in corporate policy, governance or strategic direction. A change in corporate policy or the adoption of a new strategic direction or plan should not necessarily trigger FERC or state utility commission regulatory review. After all, companies evaluate, adopt and modify their strategies on an ongoing basis. Utility regulators and stakeholders review and comment on transactions that flow from strategic plans when reviewing rates or when resource plans or specific transactions are presented for approval. However, the smaller the position an activist takes in a public utility and the shorter the time frame over which that position is held, the less incentivized that activist may be to ensure the stability and long-term performance of the utility for the benefit of all stakeholders. This uncomfortable mismatch between influence and incentives, without formal scrutiny from either FERC or state public utility regulators, has more recently caused some regulatory commissions and consumer activists to question the influence of shareholder activists on utility boards and management teams.

There are now a few recent examples of activist campaigns involving regulated utilities in which the activists have had success in having their nominees appointed as directors to the boards of utility holding companies, sometimes accompanied by an announcement that the company is forming a new committee to consider certain strategic options. This recent activity presents an interesting question that is unique to

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public utilities: does an agreement between a regulated utility and a shareholder activist to appoint board directors and/or to form a new committee to consider strategic options or similar arrangements following an activist campaign by that shareholder activist constitute a “change of control” of a regulated utility for which FERC and/or state utility commission regulatory approval is required, or is any other regulatory oversight of such arrangements appropriate?

Highlighted below are recent examples of activism campaigns targeting regulated public utilities by Elliott Management Corporation (together with its managed funds, “Elliott”) and Icahn Capital (“Icahn”), both of which are particularly active in this industry.

***Evergy and Elliott; Evergy and Bluescape:*** In January 2020, Elliott disclosed a significant stake in Evergy (the disclosure described Elliott’s stake in Evergy as an economic interest equivalent to 11.3 million shares equating to approximately \$760 million in then-current market value, presumptively acquired through means that did not require federal or state utility regulatory approval) in a letter that was critical of Evergy’s management and board. Elliott advocated for Evergy to pursue either a stock-for-stock merger or a stand-alone plan with the goal of increasing investment in infrastructure and optimizing operating costs.<sup>6</sup> Shortly thereafter, Evergy announced that it had entered into an agreement with Elliott pursuant to which Evergy agreed to appoint two new independent directors to Evergy’s board (the two new directors were also independent of Elliott) and to form a special committee to explore ways to enhance shareholder value including through a potential strategic combination or a modified, long-term, stand-alone operating plan and strategy.<sup>7</sup> In August 2020, Evergy announced the adoption of its Sustainability Transformation Plan, a new five-year strategic plan to deliver increased value to Evergy shareholders and increased benefits to stakeholders.<sup>8</sup>

Even before announcement of the new strategic plan, Elliott found itself on the receiving end of criticism and requests for transparency. Both the Kansas Corporation Commission (“KCC”), in June 2020, and the Missouri Public Service Commission (“MPSC”), in August 2020, each of which has regulatory jurisdiction over operating subsidiaries of Evergy, expressed skepticism that Elliott’s influence over long-term planning was desirable, and both opened investigations into the circumstances surrounding the development of the strategic plan and Elliott’s influence of the development of the plan.

The KCC investigation was opened in June 2020 at the behest of the KCC staff. The KCC stated that its “Staff is concerned that Elliott’s focus on increasing shareholder value may result in Evergy’s customers paying higher rates or receiving lower quality service, and circumvent the merger conditions agreed to by Evergy. . . .”<sup>9</sup> The investigation specifically will scrutinize both courses of action proposed by the agreement between Evergy and Elliott “to enable the [KCC], stakeholders, and customers to be fully informed of the analysis and rationale behind Evergy’s decision.”<sup>10</sup> The MPSC also opened an investigation into Evergy’s plans, with an eye towards determining whether the agreement will hurt consumers through higher rates or diminished service.<sup>11</sup>

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Events at Evergy continued to unfold when, according to public reports, Evergy rebuffed an approach to be acquired by NextEra in late 2020. Evergy entered into new agreements with Elliott and Bluescape Energy Partners LLC (“Bluescape”) in February 2021 in which Bluescape agreed to invest \$115 million in Evergy, Elliott and Bluescape agreed to customary standstill, voting, and other provisions, and Evergy agreed to appoint two nominees proposed by Bluescape to its board: Bluescape’s executive chairman and utility veteran John Wilder and former U.S. Senator Mary Landrieu.<sup>12</sup>

Evergy has continued to pursue its strategic plan, but focus on Evergy has not abated. On November 23, 2021, the KCC issued a new order in which it stated that it shared the concern expressed by the overwhelming majority of those who had made public comments on Evergy’s strategic plan, specifically, the potential impact of the plan on retail rates. The KCC stated that it was:

not prejudging the prudence of the [strategic plan] or whether its costs should be recovered from Kansas ratepayers. But, the [KCC] remains concerned over Elliott’s role in encouraging and developing the [strategic plan]... [The KCC] has no intention to interfere with Evergy’s investor relationships, nor does it intend to insert itself into decisions by Evergy regarding its Board structure or management discretion. However, given the continued influence of investor groups on Evergy’s utility operations, the [KCC] emphasizes decisions of what constitutes “sufficient and efficient service” should be driven by customer needs and the public interest of the state of Kansas. As a regulated utility, Evergy’s investment decisions, including the timing of investments, should not prioritize shareholder interests to the detriment of ratepayer interests. Upsetting this balance of interests could result in diminished returns to the company and/or the disallowance of certain investments.<sup>13</sup>

Elliott’s investment in Evergy has attracted additional interest in Washington, DC from consumer advocates. Public Citizen (Public Citizen describes itself as a “nonprofit consumer advocacy organization that champions the public interest in the halls of power”) has filed a number of complaints and challenges at FERC against public utilities and financial institutions under the Federal Power Act (including with respect to the arrangements between Evergy, Elliott and Bluescape), seeking to have FERC declare that the activists are “affiliates” of the public utilities in which they hold stock and with which they have agreements (including agreements that allow them to nominate directors). Due to an unrelated ambiguity in certain FERC rules, in September 2020, Evergy affiliates with market-based rate authority from FERC filed what should have been perfunctory change of status reports (essentially compliance filings) as a consequence of affiliates of The Vanguard Group, Inc. reporting that they had acquired more than 10% of the common stock of Evergy.<sup>14</sup> Immediately thereafter, Public Citizen intervened in the market-based rate docket seeking a declaration as to the existence of “affiliate” relationships between Elliott and Evergy, although it was unclear what remedy Public Citizen sought.<sup>15</sup> After multiple filings in which Evergy argued that the Elliott relationship was outside the scope of the market-based rate docket and Public Citizen argued to the contrary, in September 2021, FERC Staff issued a Deficiency Letter in which it requested additional information concerning Evergy’s relationship with Elliott for the purpose of ascertaining: “If [FERC] were to

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find Elliott [*sic*] to be an affiliate of Evergy MBR Sellers, please detail the impact of doing so on the Evergy MBR Sellers' horizontal and vertical market power."<sup>16</sup>

This was the opening that Public Citizen sought. In November 2021, Public Citizen filed a lengthy protest with FERC objecting to Evergy's response to the FERC Staff's Deficiency Letter. Public Citizen's protest contained a lengthy recitation of Elliott's activities in the regulated utility industry and argued that the activities of financial investors are detrimental to ratepayers because financial investors will exert their influence over utilities in a way that will cause energy prices to rise.<sup>17</sup>

On January 28, 2022, Public Citizen made a supplemental filing in the Evergy proceeding at FERC to notify FERC that Elliott had taken a position in NiSource and asserted: "It is likely that, just as is the case with Evergy, Elliott Management obtained access to material, non-public information about NiSource's business operations as part of its ownership stake and "dialogue".<sup>18</sup> Public Citizen further asserted that "Elliott Management's access to material, non-public information of multiple entities with MBR authority, including Evergy and NiSource, pose a threat to competition in FERC jurisdictional markets, as does Elliott's affiliation with a major fuel supplier, Peabody Energy. The Commission must act to determine whether Elliott Management is an affiliate of Evergy."<sup>19</sup> As of the date of this writing, FERC has not yet responded to Public Citizen's protest.

***FirstEnergy and Icahn Capital:*** In March 2021, FirstEnergy and Icahn entered into an agreement pursuant to which FirstEnergy agreed to add two employees of Icahn to its board. The agreement followed public disclosure by Icahn that he was purchasing shares of FirstEnergy, but there was no public back and forth between FirstEnergy and Icahn regarding strategy or company direction prior to the announcement of the agreement. Like the agreements entered into by Elliott and Bluescape with Evergy, the FirstEnergy/Icahn agreement includes provisions regarding voting, standstill restrictions, and other matters. However, the agreement also explicitly states that certain regulatory approvals must be obtained before the two new directors will have voting rights as board members and also provides that Mr. Icahn and his associates will not exercise substantial influence or control over FirstEnergy or any of its subsidiaries.<sup>20</sup> The provisions regarding the need for regulatory approval and the explicit language stating that Mr. Icahn will not exercise substantial influence or control over FirstEnergy or any of its subsidiaries suggest a new sensitivity to regulatory considerations, perhaps in response to the Evergy situation or the fact that the two new directors are employees of Icahn rather than directors who are independent of the activist investor.

FirstEnergy filed its application with FERC for approval of a "change of control" (assuming that the appointment of the two new directors constituted a transaction that was a "change of control") under Section 203 of the Federal Power Act on April 13, 2021, and received its approval from FERC on July 15, 2021. In its approval, FERC explicitly stated: "We are not making a finding on whether the Proposed Transaction is a jurisdictional transfer of control, but as Applicants requested, we assume jurisdiction over the Proposed Transaction for purposes of our analysis." FERC then proceeded to analyze the "Proposed Transaction"

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as it would any other change of control of a public utility under the Federal Power Act and held that the “Proposed Transaction” was “consistent with the public interest” following FERC’s consideration of the “Proposed Transaction” under the established three-factor test: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation, as well as the requirement that the Proposed Transaction not result in inappropriate cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. In so doing, FERC expressly refused to take up the arguments or engage with the protests by Public Citizen and others who called for FERC to find that Icahn Capital was an “affiliate” of FirstEnergy and its subsidiaries and that Icahn Capital was in fact exercising “control” over FirstEnergy and its subsidiaries.<sup>21</sup>

Shortly following the FERC order, on July 26, 2021, in response to a petition from the Maryland Office of People’s Counsel (one of the intervenors in the FERC proceeding), the Maryland Public Service Commission opened an investigation into the future of FirstEnergy’s relationship with its Maryland public utility subsidiary, The Potomac Edison Company. Among the items to be investigated in that proceeding is the extent to which the Icahn-appointed directors may exercise “substantial influence” over FirstEnergy’s Maryland public utility subsidiary.<sup>22</sup> The proceeding is ongoing and no decision has yet been issued.

On November 7, 2021, FirstEnergy announced that it will issue \$1 billion of common equity to Blackstone Infrastructure Partners (“BIP”) and that it will sell a 19.8% interest in FET, the holding company for FirstEnergy’s three regulated transmission subsidiaries, for \$2.4 billion to Brookfield Super-Core Infrastructure Partners.<sup>23</sup> Following the precedent established in its transaction with Icahn, in its filings with the Securities Exchange Commission, FirstEnergy disclosed that the agreement with BIP permitted BIP to nominate a director to FirstEnergy’s board for so long as BIP beneficially owned at least 75% of the original number of shares acquired by it and required FirstEnergy to use “reasonable best efforts” to obtain all “Regulatory Approvals” (as defined in the agreement with BIP) to permit that BIP-nominated director to exercise voting rights on the FirstEnergy board.<sup>24</sup> Prior to obtaining the specified approvals, the BIP-nominated director was prohibited from exercising voting rights. The publicly disclosed agreement with BIP did not list out what approvals were included within “Regulatory Approvals,” and it was, therefore, unclear which approvals the parties intended to seek (or whether they intended to make an informal approach to any specific regulator before making a final determination to seek approval from that regulator).<sup>25</sup> The parties have, however, filed an application for FERC approval in a manner similar to the FERC approval sought by Icahn Capital. That requested approval remains on file.<sup>26</sup> The FET/Brookfield transaction is a disposition that requires approval under Section 203 of the Federal Power Act.

***Duke and Elliott:*** In May 2021, Elliott acquired a stake in Duke Energy Company (“Duke”) and, according to Elliott’s press release, became one of Duke’s ten largest shareholders although, again, Elliott declined to provide details of the nature, manner and precise amount of its shareholding (presumptively at a level below which neither FERC nor state public utility commission regulatory approval was required). Elliott, as

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they had done in past situations, called for a review led by an independent board committee to study whether Duke should separate into three regional utilities, each “benefitting from local management and board-level oversight,” and for the appointment of independent and highly qualified directors to conduct the review.<sup>27</sup> Perhaps because of the more active role being taken by state public utility commissions and consumer advocates in other activist situations such as Evergy and FirstEnergy, or perhaps sensing that Duke’s board and management might not be amenable to Elliott’s overtures, Elliott couched their criticisms of and proposals for Duke’s performance with a view towards gaining broader stakeholder buy-in, including from customers. Elliott argued that Duke had consistently underperformed the market and had focused on “empire-building,” and suffered several public missteps (a cancelled pipeline project, resulting in a \$2.1 billion write-off, and a settlement with the North Carolina Attorney General to remediate coal ash spilled by a Duke power plant into the Dan River, resulting in a \$1.0 billion write-off). Duke resisted Elliott’s overtures while promising to review the activist’s proposals with an eye toward the long-term interest of shareholders and other stakeholders.<sup>28</sup> On July 19, 2021, Elliott wrote again to the Duke Board of Directors, citing an “outpouring of feedback,” including from “current and former industry executives and top industry advisors,” in support of the theory that Duke is undervalued and mismanaged, and continued to advocate for changes to its leadership and operations.<sup>29</sup> Duke again rebuffed Elliott’s advances, and described the utility’s strides towards transitioning to clean energy and the expertise of its current leadership, and accused Elliott of short-termism.<sup>30</sup> The situation seemed to have quieted, then, on November 15, 2021, Duke issued a press release stating that after several months of constructive dialogue, it had entered into a cooperation agreement with Elliott. The agreement provided for two new independent directors to be appointed to Duke’s board. The agreement further provided that Duke would begin a search for an additional independent board member (as part of its customary board refreshment process), mutually agreeable to Duke and Elliott, to be appointed in the first quarter of 2022. Elliott agreed to customary standstill, voting and other provisions for a period of one year.<sup>31</sup>

**Southwest Gas and Icahn Capital:** When Southwest Gas Holdings, Inc. (“Southwest”) agreed to acquire Dominion Energy Questar Pipeline, LLC (“Questar”) from Dominion Energy, Inc. in October 2021, Icahn Capital LP, an investor in Southwest and an affiliate of Icahn Capital, objected.<sup>32</sup> Southwest completed its acquisition of Questar in December 2021,<sup>33</sup> but the dialogue with Icahn Capital was only just starting. Icahn Capital commenced a proxy fight to take control of the Board of Southwest and launched a tender offer for any and all shares of Southwest.<sup>34</sup> The fight for control of Southwest continues.

The Southwest Gas situation is distinguishable from the other examples of shareholder activism discussed above because Icahn Capital acknowledged from the start that it was seeking “control” of Southwest Gas and its operating utilities, and acknowledged that state regulatory approval would be needed. In January 2022, Icahn Capital publicly stated that it would agree to vote only 24.9% of the shares tendered, which it asserted would eliminate the risk that state regulators would deny approval for its acquisition of Southwest. The balance of the tendered shares are proposed to be held in a trust that would vote the shares without

any consultation with Icahn Capital.<sup>35</sup> What is noteworthy is the apparent need to publicize the sensitivity to regulatory considerations as part of the process.

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## CONCLUSION

Public utilities have recently come under the scrutiny of shareholder activists. FERC has historically been reluctant to become involved in corporate transactions of any sort unrelated to FERC's policy goals, *i.e.*, the regulation of public utilities and energy markets under the statutes administered by FERC. Notably, in its decision approving Icahn Capital's arrangement with FirstEnergy, FERC did not forgo its ability to take action to declare what constitutes "control" or "change of control" in the activist context and FERC has not acted upon the similar filing by BIP. It is possible that FERC could examine this question at some point in the future, but the greater threat to the activist community is more likely to come from state regulators.

At the state level, regulators are showing increasing signs of unease over the ability of activist investors to influence companies in ways that could have rate implications for the general public without the type of substantive review that would be required in a full takeover. It is unclear whether state regulators will call for additional regulatory oversight of activist campaigns, or whether they will impose additional regulation. State public utility commissions have broad jurisdictional authority to set rates. If regulators determine that a public utility has adopted a strategy, course of action or plan that is not in the public interest, regulators can set rates that require shareholders to absorb the costs of strategies, actions or plans that are determined to have been imprudently implemented or incurred. Consequently, a board that is confronted with an activist's demands should give due consideration not only to the immediate exigencies of how to respond to an activist issuing a press release but also to the long-term implications for all stakeholders who might intervene in the next rate case.

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## ENDNOTES

- <sup>1</sup> Many state laws regulating public utilities have similar presumptions and requirements, *i.e.*, review of an acquisition of common stock of a utility may be required by a state utility regulator even if the percentage of stock being acquired is less than 50%. New York has a 10% threshold. See N.Y. PUB. SERV. LAW § 70 (McKinney 2019) (effective Dec. 31, 2020). Maryland has a 20% threshold. See MD PUB. UTIL. CODE § 6-105(e)(2) (effective June 1, 2008). California has expressly declined to impose a threshold. See CAL. PUB. UTIL. CODE § 854 (effective Jan. 1, 2021) (listing factors that the Commission shall consider to determine the proposal is in the public interest, rather than a bright-line threshold). Indiana has expressly declined to provide for regulatory review of changes of control of public utilities IND. UTIL. REGULATORY COMM'N, IURC CLARIFIES ITS JURISDICTION OVER MERGERS AND ACQUISITIONS (Sept. 22, 2004), [https://secure.in.gov/iurc/files/merger\\_092204.pdf](https://secure.in.gov/iurc/files/merger_092204.pdf) (clarifying that there is no state approval required in Indiana).
- <sup>2</sup> Enova Corp., Order Asserting Jurisdiction, Denying Motion to Reopen Docket, and Denying Motions for Consolidation, 79 FERC ¶¶ 61,107, 61,492 (Apr. 30, 1997).
- <sup>3</sup> FPA Section 203 Supplemental Policy Statement, 120 FERC ¶ 61,060 (July 20, 2007).
- <sup>4</sup> State laws were not contemporaneously changed with FERC's adoption of the 2007 policy statement. Many state regulatory commissions were not called upon to take a view on the issue and were either willing to take FERC's lead in interpreting what did and did not constitute "control" of a public utility or were able to obtain the assurances they sought over utility rates through rate reviews or through merger and restructuring commitments.
- <sup>5</sup> These acquisitions are subject to other regulatory oversight. Acquisitions of utility company securities may require filings under both antitrust and federal securities laws if they are sufficiently large. Filing and clearance under the Hart-Scott-Rodino Antitrust Improvements Act are required for acquisitions having a value in excess of \$101 million (2022 HSR threshold). See F.T.C. OFFICE OF COMMISSIONER, CONCURRING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER JOINED BY CHAIR LINA M. KHAN: REGARDING THE 2022 REVISED CLAYTON ACT THRESHOLDS (Jan. 24, 2022), [https://www.ftc.gov/system/files/documents/public\\_statements/1600207/p859910hsrthresholdskh\\_anslaughterstatement\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1600207/p859910hsrthresholdskh_anslaughterstatement_0.pdf). A Beneficial Ownership Report on Schedule 13D under the Securities Exchange Act of 1934 and the rules promulgated thereunder is required to be filed with the Securities and Exchange Commission by any person (or group) that directly or indirectly acquires beneficial ownership of more than 5% of any class of any voting equity securities registered under Section 12 of the 1934 Act of a company within ten days after the threshold is met. Securities Exchange Act, 15 U.S.C. § 78m(d) (1934). A proposed rule would shorten the ten-day period to five days. Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. 13846 (proposed Feb. 10, 2022) (to be codified at 17 C.F.R. pts. 232 & 240). Among other informational disclosures, Schedule 13D requires the filer to state its "plans or proposals" with respect to the issuer. 17 C.F.R. § 240.13d-101 (2021). Activists generally do not qualify to file on Schedule 13G, which is available only for Qualified Institutional Investors who are acquiring securities in the ordinary course of their business and who do not intend to exercise control over the issuer. See 17 C.F.R. § 240.13d-102 (2021). As discussed in the examples described below, typically activist investors in utility company securities have avoided discussions of "control" and instead have focused on their suggestions for how a specific utility company might undertake or implement a new strategic plan.
- <sup>6</sup> See *Elliott Management Sends Letter to Board of Directors of Evergy, Inc.*, CISION PR NEWSWIRE, (Jan. 21, 2020, 9:02 AM), <https://www.prnewswire.com/news-releases/elliott-management-sends-letter-to-board-of-directors-of-evergy-inc-300990314.html>.
- <sup>7</sup> See *Evergy Announces Agreement with Elliott Management*, ENERGY (Mar. 2, 2020), <https://www.evergy.com/about-evergy/newsroom/2020/march/evergy-announces-agreement-with-elliott-management>.

## ENDNOTES (CONTINUED)

- <sup>8</sup> See *Evergy Announces ‘Sustainability Transformation Plan’*, EVERGY (Aug. 5, 2020), <https://investors.evergy.com/news-releases/news-release-details/evergy-announces-sustainability-transformation-plan>.
- <sup>9</sup> Order Opening General Investigation, Docket No. 20-EKME-514-GIE at 2 (Kan. Corp. Comm’n June 18, 2020), <https://estar.kcc.ks.gov/estar/ViewFile.aspx/20200618104632.pdf?Id=509dd85d-5964-4d3c-923d-1f2ba1811834>.
- <sup>10</sup> *Id.* at 2-3.
- <sup>11</sup> See Order Opening an Investigation, File No. EO-2021-0032 (Mo. Pub. Serv. Comm’n Aug. 12, 2020), [https://efis.psc.mo.gov/mpsc/commoncomponents/view\\_itemno\\_details.asp?caseno=EO-2021-0032&attach\\_id=2021001764](https://efis.psc.mo.gov/mpsc/commoncomponents/view_itemno_details.asp?caseno=EO-2021-0032&attach_id=2021001764).
- <sup>12</sup> See *Evergy Appoints Utility Industry Veteran C. John Wilder and Former U.S. Senator Mary L. Landrieu to Board of Directors*, BUSINESSWIRE (Feb. 26, 2021, 6:05 AM), <https://www.businesswire.com/news/home/20210226005147/en/Evergy-Appoints-Utility-Industry-Veteran-C.-John-Wilder-and-Former-U.S.-Senator-Mary-L.-Landrieu-to-Board-of-Directors>.
- <sup>13</sup> Order on the Investigation into the Sustainability Transformation Plan of Evergy, Docket No. 21-EKME-088-GIE at 14 (Kan. Corp. Comm’n Nov. 23, 2021), <https://estar.kcc.ks.gov/estar/ViewFile.aspx/20211123103942.pdf?Id=b39d5a81-97bf-4564-b069-d1583ff728ca>.
- <sup>14</sup> See Evergy Metro, Inc., § 205(d) Rate Filing: Notice of Succession. ER20-116-000 (Oct. 15, 2019).
- <sup>15</sup> See Public Citizen, Inc., Motion to Intervene, Docket No. ER20-116, et al. (Oct. 9, 2020).
- <sup>16</sup> FERC, Request for Additional Information, Docket No. ER20-116, et al. at 4 (Sept. 22, 2021).
- <sup>17</sup> See Public Citizen, Inc., Joint Protest of Public Citizen, Inc. and The Communications Workers of America, Docket No. ER20-116, et al. (Nov. 12, 2021).
- <sup>18</sup> Public Citizen, Inc., Comment of Public Citizen, Inc., Docket No. ER20-116, et al. (Jan. 28, 2022).
- <sup>19</sup> *Id.*
- <sup>20</sup> See *FirstEnergy Announces Agreement with Icahn Capital*, FIRSTENERGY (Mar. 16, 2021, 4:20 PM), <https://investors.firstenergycorp.com/investor-materials/news-releases/news-details/2021/FirstEnergy-Announces-Agreement-with-Icahn-Capital/default.aspx>.
- <sup>21</sup> See FirstEnergy Corp., Order Authorizing Disposition of Jurisdictional Facilities, 176 FERC ¶ 61,022 (Jul. 15, 2021).
- <sup>22</sup> See Md. Office of People’s Counsel’s Petition to Investigate the Future of First Energy’s Relationship with Potomac Edison in Light of Recent Events, Case No. 9667 at 4 (Pub. Serv. Comm’n Md. Jul. 26, 2021), <https://www.psc.state.md.us/wp-content/uploads/Order-No.-89888-Case-No.-9667-Order-Granting-in-Part-OPC-Petition-for-First-Energy-Investigation.pdf> (order granting, in part, petition requesting investigation).
- <sup>23</sup> See *FirstEnergy Announces Transformative \$3.4 Billion of Equity Financings, Introduces Long-Term Earnings Growth Rate of 6-8%*, FIRSTENERGY (Nov. 7, 2021), [https://www.firstenergycorp.com/newsroom/news\\_articles/firstenergy-announces-transformative--3-4-billion-of-equity-fina.html](https://www.firstenergycorp.com/newsroom/news_articles/firstenergy-announces-transformative--3-4-billion-of-equity-fina.html).
- <sup>24</sup> See FirstEnergy Corp., Schedule 13D (Dec. 13, 2021); FirstEnergy Corp., Current Report (Form 8-K) (Nov. 6, 2021).
- <sup>25</sup> Common Stock Purchase Agreement among FirstEnergy Corp. and BIP Securities II-B L.P. 25-26 (Nov. 6, 2021) (incorporated by reference into FirstEnergy Corp., Registration Statement (Form S-3) (Dec. 13, 2021)).
- <sup>26</sup> See FirstEnergy Corp., Application for Authorization Under Section 203 of the Federal Power Act and Requests for Confidential Treatment and Waivers, Docket No. EC 22-27-000 (December 22, 2021).

## ENDNOTES (CONTINUED)

- 27 Elliott Investment Management L.P., *Elliott Investment Management Sends Letter to Board of Directors of Duke Energy Corporation*, CISION PR NEWSWIRE (May 17, 2021, 11:59 AM), <https://www.prnewswire.com/news-releases/elliott-investment-management-sends-letter-to-board-of-directors-of-duke-energy-corporation-301292688.html> (citing Jeff Rosenbaum & Jesse Cohn, *Letter to the Board of Directors of Duke Energy Corporation* (May 17, 2021)).
- 28 See *Duke Energy Responds to Elliott Management's Letter*, DUKE ENERGY (May 17, 2021), <https://news.duke-energy.com/releases/duke-energy-responds-to-Elliott-managements-letter>.
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