

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Elliott Associates L.P.
Elliott International L.P.
The Liverpool Limited Partnership

Docket No. EC23-112

Motion to Answer and Answer of Public Citizen

Pursuant to 18 CFR § 385.213, Public Citizen answers Elliott Management’s September 15 answer.

This is a proceeding of first impressions for the Commission, and therefore requires careful consideration as it will likely establish precedents for both hostile takeovers of public utilities and affiliation treatment of cash settled swaps. It appears this is the only example of a Section 203 application explicitly utilized as part of an inimical coup d’état of a public utility. Applications under Section 203 are routinely filed jointly, but in this instance “NRG declined Applicants’ invitation to join the Application”.¹ Indeed, the *Financial Times* reports that NRG Energy and its board of directors are unenthusiastic about Elliott Management’s efforts to direct the company and are fighting back.²

This is also a case of first impression because it is the lone instance of an investor utilizing cash-settled swaps to obtain indirect control of more than 10% of a FERC-jurisdictional public utility. The public interest requires the Commission to compel the disclosure of the derivative contracts—and public identification of their counterparties—to allow the Commission and intervenors the opportunity to independently verify the nature of these derivative contracts to determine affiliation.

Elliott Management’s September 15 answer claims that its “cash-settled swaps (and options to acquire cash-settled swaps) possessed by certain of the Elliott Applicants confer solely passive, economic interests—not the power to vote. Evidence demonstrates that the Elliott Applicants possess no power to vote any NRG stock

¹ NRG August 11 Limited Comments, at footnote 5.

² Myles McCormick, *NRG stands up to Elliott Management’s attack on ‘single worst deal’ in power sector*, August 7, 2023, www.ft.com/content/163f00cb-402a-4670-a2b0-f859c701c386

through their derivative instruments” and that “Public Citizen has no response to this sworn testimony.”³

Not only do we have a response, but so too does the U.S. Securities and Exchange Commission. The SEC’s proposed rulemaking excerpted in our September 5 additional protest describes how activist funds like Elliott Management use cash-settled swaps to gain indirect control over voting shares as an explicit tactic to direct target companies and influence their management and operations:

*Holders of cash-settled derivatives also may have incentives to influence or control outcomes at the issuer of the reference security just as they would if they directly owned the reference security outright. Although holders of derivatives settled exclusively in cash ordinarily would lack the express legal power under the terms of such instruments to direct the voting or disposition of a covered class, such holders may possess economic power that can be used to produce desired outcomes through engagement with a counterparty or the issuer of the reference security . . . Cash-settled derivatives imitate the economic performance of a direct investment in an issuer’s equity securities and, in turn, may economically empower the holders of such derivatives to influence the issuer or the price of its securities . . . Given such person’s potential to influence or change control of the issuer, we are proposing an amendment that would, in specified circumstances, deem the holder of a cash-settled derivative security to be the beneficial owner of the reference security [emphasis added]*⁴

Elliott Management emphasized its “investment of approximately \$1.0 billion representing a more than 13% economic interest in NRG Energy” utilizing cash settled swaps as the centerpiece of its activist effort to fire NRG’s CEO and force other management changes at the utility.⁵ The Commission’s rules are explicit: an entity is deemed an affiliate when it “indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company”.⁶ Cash-settled derivatives, as painstakingly described by the SEC, clearly convey indirect control over a target company’s voting shares, buoyed by Elliott’s relationship with its counterparties. The Commission has access to neither the actual derivative contracts nor Elliott’s counterparties. Absent those data points, the Commission is unable to determine whether Elliott Management has already violated Section 203 of the Federal

³ At page 7.

⁴ *Modernization of Beneficial Ownership Reporting*, pages 52-56, www.sec.gov/files/rules/proposed/2022/33-11030.pdf

⁵ <https://repowernrg.com/letter-to-the-board-of-directors-5-15-23/>

⁶ 18 CFR § 35.36(a)(9)(i), emphasis added.

Power Act. Warren Buffett famously declared that “derivatives are financial weapons of mass destruction”,⁷ which is apt here. Elliott Management is pinning its hopes that the Commission does not and cannot understand how its use of derivatives fosters chaos in the management of targeted public utilities. But the Commission’s duty to enforce the Federal Power Act requires it to exhibit curiosity about Elliott’s deployment of derivatives.

We were admittedly amused by Elliott Management’s insincere remonstrance that placing Elliott Management executives on NRG Energy’s board of directors somehow constitutes “a purely hypothetical scenario”, and that the Commission lacks the Section 203 “enforcement powers” to impose conditions on applicants. The Commission routinely issues conditional approvals under Section 203 that involve enforcement of future actions. *Of course* Elliott Management will seek to install its executives on NRG Energy’s board of directors should the Commission unconditionally approve this application: NRG has a January 2024 deadline to consider new candidates for its board of directors, and Elliott Management’s plan is to force its executives on the board to, among many other things, fire NRG’s CEO.⁸ The Commission has authority to impose whatever conditions it deems will ensure the proposed transaction will be consistent with the public interest.⁹ Allowing Elliott Management to feature any of its agents serving simultaneously on the boards of Peabody and NRG will violate federal law¹⁰ and, therefore, the public interest.

Respectfully submitted,

Tyson Slocum

Tyson Slocum, Energy Program Director
Public Citizen, Inc.
215 Pennsylvania Ave SE
Washington, DC 20003
(202) 454-5191
tslocum@citizen.org

⁷ Berkshire Hathaway 2002 Annual Report, at page 15, www.berkshirehathaway.com/letters/2002pdf.pdf

⁸ <https://repowernrg.com/letter-to-the-board-of-directors-6-27-23/>

⁹ 16 USC § 824b(a)(4).

¹⁰ 15 USC § 19(a).