

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

**Additional Protest of Public Citizen, Inc.**

Public Citizen submits this additional protest per the Commission's August 17 notice establishing a new intervention and comment deadline.<sup>1</sup> Today's protest, therefore, is additive to our August 7 protest.<sup>2</sup>

Public Citizen requests that the Commission:

- Condition any approval under Section 203 a prohibition of Elliott Management executives serving simultaneously on the board of directors of both NRG Energy and Peabody Energy, as it violates federal law and therefore the public interest.
- Determine whether Elliott Management's use of derivatives to acquire more than 10% of the economic interest of NRG Energy as early as May 2023 resulted in Elliott Management being deemed an affiliate of NRG Energy, per 18 CFR § 35.36(a)(9).
- Compel the disclosure of the derivative contracts and identification of counterparties of all derivatives utilized by Elliott Management to obtain economic interest in NRG Energy.

As we noted in our August 7 Protest, Elliott Management spent \$1 billion on derivative contracts to gain a more than 10% economic interest in NRG Energy in direct coordination with an activist campaign—including the development of a website, public relations outreach, and two letters to NRG's board of directors—to force changes at NRG Energy. When these demands failed to gain the traction the activist hedge fund has come to expect so many dozens of times before, Elliott took the unprecedented step of seeking the Commission's approval to acquire up to 20% of NRG's voting securities so Elliott's executives can occupy seats on NRG's board of directors.

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<sup>1</sup> [www.govinfo.gov/content/pkg/FR-2023-08-23/html/2023-18109.htm](http://www.govinfo.gov/content/pkg/FR-2023-08-23/html/2023-18109.htm)

<sup>2</sup> [www.citizen.org/article/elliott-management-nrg-energy-derivatives/](http://www.citizen.org/article/elliott-management-nrg-energy-derivatives/)

Whereas Elliott’s use of derivatives in May and June to indirectly control more than 10% of NRG’s economic interest was central to its initial strategy to control NRG, Elliott’s 203 application is explicitly designed to provide Elliott with control of NRG board seats. Elliott Management’s attempted hostile takeover of a public utility can only be executed if the Commission abandons its Federal Power Act responsibilities. The FPA guards against allowing activist hedge funds to treat public utilities as mere speculative commodities by only authorizing transactions that are “consistent with the public interest”. Elliott Management is not seeking to invest capital in NRG Energy for the purpose of committing long term investments to secure just and reasonable rates or the reliability of the bulk power market; rather, Elliott’s entire strategy is a short term speculative play to move NRG’s stock to a predetermined price and exit the investment once the goal is reached, cashing out and moving on to the next target, unconcerned by whatever collateral damage is left in its wake. Elliott’s entire business model relies upon the Commission deserting its Federal Power Act statutory duties.

**The Commission Cannot Permit Elliott Management Executives To Simultaneously Serve On the Boards of NRG Energy and Peabody Energy Because It Violates Federal Law**

Section 8 of the Clayton Act states, in part: “No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are—(A) engaged in whole or in part in commerce; and (B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws”.<sup>3</sup>

Peabody Energy supplies three of NRG’s four coal fired power plants, including 96% of the coal for the Powerton station located in PJM.<sup>4</sup> Two Elliott Management executives—Samantha Algaze and Dave Miller—serve on Peabody Energy’s board of directors.

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<sup>3</sup> 15 USC § 19(a).

<sup>4</sup> July 21 *Application*, at page 22.

Section 203 only authorizes acquisitions if the Commission “finds that the proposed transaction will be consistent with the public interest”.<sup>5</sup>

The Commission cannot permit Elliott Management executives to simultaneously serve on the boards of both NRG and Peabody, because doing so violates Section 8 of the Clayton Act. Violating federal law would deem the transaction to be inconsistent “with the public interest” and therefore conflict with Section 203 of the Federal Power Act.

**Evidence Continues To Suggest That Elliott’s Use Of Derivatives To Indirectly Control NRG As Part Of An Activist Campaign Constitutes Affiliation**

Our August 7 Protest urged the Commission to compel disclosure of the derivative contracts and counterparties utilized by Elliott to secure NRG Energy’s economic interest, as the use of these derivatives were a central component of the hedge fund’s activist campaign to control NRG’s management.

Instead of disclosing the derivative contracts or the identities of Elliott’s counterparties, Elliott provided a four page affidavit of an Elliott vice-president, Elliott Greenberg, where he describes Elliott’s investments in NRG as “passive, economic derivative instruments” that “do not convey any power to vote any outstanding common stock of NRG.”<sup>6</sup>

The Greenberg affidavit characterization of Elliott’s utilization of derivatives as “passive” is misleading and incomplete, as it fails to explain how Elliott Management routinely utilizes such “passive” derivatives to successfully force target companies—including a long-list of Commission-jurisdictional public utilities—to come to the table to acquiesce to various Elliott Management demands. Elliott’s use of these derivatives is far from passive—they have been central to the hedge fund’s effort to harass and bully NRG’s management and board. Absent additional disclosure of the actual derivative contracts and identification of Elliott’s counterparties, the Commission is robbed of the detail necessary to determine whether the derivatives resulted in Elliott’s affiliation with NRG Energy.

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<sup>5</sup> 16 USC § 824b(a)(4).

<sup>6</sup> August 22 Elliott answer, Exhibit A at ¶ 7.

Indeed, the U.S. Securities and Exchange Commission is so exacerbated by the ability of firms like Elliott to secretly control public companies through the use of these derivatives that the agency has proposed a rulemaking to treat holders of cash-settled derivatives as beneficial owners for reporting purposes, because their use clearly influences corporate control. From the SEC's proposed rulemaking:

*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 and potentially could impact the stock price. An unwinding of agreements governing cash-settled derivatives also could adversely impact the stock price of an issuer, just as if the holder of the cash-settled derivative held the stock directly . . . 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 . . . Persons who acquire and hold cash-settled derivative securities with the purpose or effect of changing or influencing control of the issuer may seek to use their position to influence the voting, acquisition or disposition of any shares the counterparty may have acquired in a hedge, proprietary investment or otherwise. Moreover, the economic realities of the counterparty relationship mean that, even absent an express right to direct the voting, acquisition or disposition of such shares, the holders of cash-settled derivative securities could be well-positioned to pursue a change in control. The derivative holder's counterparty may have a business relationship to develop and protect, and thus may ultimately cast votes in accordance with the preference of the derivative holder. Even if any counterparty shares are not voted, the derivative holder's probability of success in exerting influence or control over the issuer of the reference security may increase given that any voting power the derivative holder held would be magnified by minimizing the number of shares that potentially could be voted against its plans or proposals<sup>7</sup>*

The Commission's affiliation regulations capture a broad range of activities, defining *affiliate* as “[a]ny 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” [emphasis added].<sup>8</sup> The regulations express that the Commission's review of activities should be broad, as indicated by the explicit inclusion of both

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<sup>7</sup> *Modernization of Beneficial Ownership Reporting*, pages 52-56, [www.sec.gov/files/rules/proposed/2022/33-11030.pdf](http://www.sec.gov/files/rules/proposed/2022/33-11030.pdf)

<sup>8</sup> 18 CFR § 35.36(a)(9)(i).

*indirect* and *direct* and the use of three separate words which point to distinct activities: *owns, controls* or *holds*. These expansive actions appear to include Elliott Management's use of derivatives to obtain indirect control of more than 10% of NRG Energy at least as of May 15—prior to the filing of the 203 application. But even if the Commission finds that Elliott Management's use of derivatives fails to meet the affiliation requirements as laid out in 18 CFR § 35.36(a)(9)(i), the Commission should determine whether Elliott's derivatives and associated investor activism meet the definition of affiliation under 18 CFR § 35.36(a)(9)(iii), and as such must set the matter for hearing. Regardless of which affiliation standard the Commission pursues, the Commission must compel the disclosure of the actual derivative contracts and counterparties.

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