UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

Evergy Missouri West, Inc. Docket Nos. ER20-116-001

Evergy Kansas Central, Inc. ER20-67-001

Evergy Metro, Inc. ER20-113-001

**Joint Protest of Public Citizen, Inc. and The Communications Workers of America**

The October 22 response by the Evergy market-based rate sellers to the Commission’s deficiency letter is insufficient to address Evergy’s affiliation with the hedge funds Elliott Management and Bluescape Energy Partners. The Commission must compel Evergy to provide additional information to determine whether there is an absence of arms-length bargaining that makes it necessary for FERC to treat Elliott and Bluescape as affiliates per 18 CFR § 35.36(a)(9).

1. **Bluescape and Elliott Now Effectively Control Evergy’s Finance Committee, Which The Hedge Funds Negotiated To Serve As The Fulcrum Of Operational And Investment Decisions**

There is substantial evidence that the hedge funds exert controlling influence over Evergy. First, at least four of Evergy’s thirteen board members were selected by the hedge funds—C. John Wilder, Bluescape's current Executive Chairman; David A. Campbell, former Bluescape President; Paul M. Keglevic; and former U.S. Senator Mary L. Landrieu.[[1]](#footnote-1) Second and more important is the hedge fund’s changes to, and dominance over, the board’s crucial Finance Committee, which clearly demonstrates the control Elliott and Bluescape have over Evergy.[[2]](#footnote-2)

Mr. Wilder is employed by Bluescape, and Mr. Campbell used to be Wilder’s employee. A fifth individual, Kirkland B. Andrews, was Elliott’s board selection, a position he held until shifting over to become Evergy's Executive Vice President and Chief Financial Officer. [[3]](#footnote-3)

An even more important metric than board composition is the emergence of the Finance Committee—whose charter was amended as part of Bluescape’s February 25, 2021 agreement with Evergy [[4]](#footnote-4)—as the primary driver of management and investment decision making for the utility. There are five members of the Finance Committee, and all four of the Bluescape and Elliott board members serve on the Committee, with Bluescape’s Wilder serving as Chair. The new Finance Committee charter gives broad authority to Bluescape’s Wilder, in that he is “responsible for leadership of the Committee, including overseeing the agenda, presiding over the meetings, and reporting to the Board.” The Finance Committee is charged under its charter with sweeping authorities governing nearly all Evergy’s business operations, including to “[r]eview matters relating to the financial condition, financing plans, and financial strategies of the Company and, as appropriate, make recommendations to the Board regarding the same.”[[5]](#footnote-5)

1. **Evergy failed to “clarify the relationship between Evergy, Elliott Management, and Bluescape” as required by the Commission’s September deficiency letter.**

The Commission’s September 22 deficiency letter required Evergy to “clarify the relationship between Evergy, Elliott Management, and Bluescape.” But Evergy’s October 22 response fails to document the extensive history of collaboration between Elliott and Bluescape and omits any documentation of contractual agreements between the two hedge funds.

Here are just a few recent examples of Elliott and Bluescape collaborating to influence FERC-jurisdictional utilities without ever notifying the Commission (and given the lack of regulatory disclosure requirements for the hedge funds’ intrusions into public companies, it is likely this list is not comprehensive):

* 2017: Elliott Management and Bluescape Partners acquired a combined 9.4%[[6]](#footnote-6) stake in NRG Energy with Bluescape Executive Chairman C. John Wilder joining NRG’s board. [[7]](#footnote-7) This intervention is consistent with the trend of always staying under 10% ownership. Bluescape Partners owned 3.68% of NRG Energy’s outstanding common stock as of October 22, 2021 while it also owned 1.03% of Evergy Inc.’s outstanding common stock.[[8]](#footnote-8)
* 2018: FirstEnergy raised $2.5 billion from an investor group that included Elliott Management and Bluescape,[[9]](#footnote-9) which led to C. John Wilder being appointed to FirstEnergy’s “Restructuring Working Group.”[[10]](#footnote-10)
* 2018: Elliott Management and Bluescape Energy Partners announced a combined $1.3 billion investment, or 4.9% ownership interest, in Sempra Energy.[[11]](#footnote-11) Sempra Energy’s agreement with Elliott and Bluescape prophylactically blocked either fund from nominating paid directors to its corporate board.[[12]](#footnote-12)
* 2020: CenterPoint Energy Inc announced a $1.4 billion equity investment from Elliott Management, Bluescape Energy Partners, and Fidelity Management.[[13]](#footnote-13)
* 2020: In January 2020, Elliott Management sent a letter to Evergy’s Board of Directors demanding governance and operational changes.[[14]](#footnote-14) As of August 16, 2021, Elliott owned approximately 10.5 million shares worth about $637 million.[[15]](#footnote-15) As described in this filing, Elliott, Bluescape, and Evergy announced an agreement in February 2021 that added Bluescape Energy Partners LLC’s executive chairman C. John Wilder and former US Senator Mary Landrieu to Evergy’s Board.[[16]](#footnote-16)

These interventions have consequences for ratepayers. Regarding the Evergy case, research by the Communications Workers of America into the outcomes of Elliott Management’s interventions in the energy and utility sectors showed that Evergy’s ratepayers were likely to pay higher electricity rates.[[17]](#footnote-17) This is because Evergy acquiesced to Elliott’s demand for $8.9 billion in selective rate base investment[[18]](#footnote-18) and CWA’s analysis of other interventions in the energy and utility sectors showed that targeted companies paid higher costs of capital and operating costs. From the investor perspective, increased rate base investment generates higher valuations; yet, these outlays are paid for through higher rates determined by the permissible revenue requirement. The potential consequences of these selective investments and capital costs rates included unnecessarily higher electricity costs because of the rate base investment demanded by Elliott as a condition of its agreement with Evergy, Inc. Rate base investment should be driven by consumer demand for technological improvement and system maintenance requirements rather than an acquiescence to the short-term, profit-oriented demands of select investors, as was the case with Elliott and Bluescape’s intervention in Evergy.

State-regulated utilities are allowed to charge rates that meet their revenue requirements. In Missouri, Evergy Inc.’s home state, the revenue requirement is equal to the permissible rate of return (which is based on the cost of capital) multiplied by rate base investment minus depreciation and plus operating costs.[[19]](#footnote-19) If Evergy’s capital costs follow the trajectory of Elliott’s previous targets, this intervention would increase the overall revenue requirement due to increased rate base investments net of depreciation as demanded by Elliott. This expense is increased by the higher costs of capital paid by Elliott’s targets. (Cost of capital equals the total interest and related expenses such as securing short- and long-term debt divided by the debt in current liabilities, the amount of short-term notes, and the current portion of long-term debt due in one year). CWA’s research showed that energy and utility companies targeted by Elliott Management paid increasing costs of capital while companies in the same sector that were not targeted by Elliott paid decreasing costs over three years post-intervention. The higher revenue requirement translates to increased rates for consumers.

Chart, bar chart

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Clearly, Elliott Management and Bluescape Energy Partners years-long relationship of investing billions of dollars together to gain influence over management of FERC-jurisdictional public utilities has consequences for ratepayers. We expect that hedge funds that are working together with billions of dollars will have formal working agreements that detail the terms of their relationship. Such a contract likely exists here with their combined efforts to influence Evergy. **FERC must compel Evergy to turn over all formal written agreements between Elliott Management and Bluescape Energy Partners related to their mutual investment in FERC-jurisdictional utilities. If no such written agreement exists, then FERC must compel sworn statements from Bluescape’s John Wilder and Elliott Management’s Paul Elliott Singer and their staff detailing all arrangements between the two hedge funds with regards to Evergy.**

1. **Both Bluescape and Elliott have significant holdings and, in some cases, material, non-public agreements with, Evergy’s competitors, threatening market power and competition**

As Public Citizen noted in its October 19, 2020 *Protest* in these dockets, Elliott Management negotiated a February 2020 non-public *Cooperation Agreement* with Evergy that grants the hedge fund sweeping rights to material, non-public information about Evergy’s business operations.[[20]](#footnote-20) **That document remains non-public, and we repeat our request that the Commission must compel Evergy to provide the *Cooperation Agreement* as part of this proceeding.**

We have previously detailed that Elliott Management has active, billion-dollar investments that have resulted in the hedge fund simultaneously influencing and controlling CenterPoint Energy and DTE Energy[[21]](#footnote-21), with Reuters reporting just days ago that Elliott Management and Duke Energy are in “advanced settlement talks” to provide Elliott with a significant role in shaping Duke’s management.[[22]](#footnote-22)

In the case of CenterPoint and Evergy, Elliott Management negotiated agreements providing Elliott with unfettered access to material, non-public business information, simultaneously at competing utilities. As Public Citizen has repeatedly pointed out to the Commission in this proceeding, tolerating such unregulated access to material, non-public information of MBR competitors pose significant risks to competition and market power.[[23]](#footnote-23)

In addition, Bluescape Energy Partners actively controls 5,555,230 shares of CenterPoint Energy, more than 9 million shares of NRG Energy, over 3 million shares of TransAlta Corp[[24]](#footnote-24), and nearly 1 million shares of Entergy.[[25]](#footnote-25) It is unknown whether Bluescape has entered into any agreements providing the activist hedge fund with access to material, non-public information because much of its investment activities are deliberately structured to avoid disclosure and oversight while maximizing influence and control over target companies.

The significant financial investments both hedge funds have in Evergy’s competitors, combined with their established roles as activists seeking management changes present significant threats to competition that necessitates a finding that both hedge funds are affiliates of Evergy.

1. **Elliott Management’s Peabody Energy Affiliate Has Fuel-Supply Contracts With Evergy, Threatening Just and Reasonable Rates**

Elliott Management owns 23% of Peabody Energy’s outstanding common stock.[[26]](#footnote-26) In 2019, the year prior to Elliott’s intervention, Evergy bought 4,191,109 tons of coal from Peabody Coal Sales, according to data from the Energy Information Administration. In 2020, the year of Elliott’s intervention, coal sales from Peabody to Evergy increased to 5,996,647 tons. Between January and August of 2021 (the time period for which data is currently available), Peabody sold 3,118,031 tons of coal to Evergy.[[27]](#footnote-27) It therefore appears as though coal sales to Evergy from Elliott Management’s affiliate have increased since Elliott’s involvement, indicating a potential threat to competition and rates.

Determining affiliation is important for many reasons, including to ensure that Evergy’s fuel supply transactions are conducted at arm’s length from Elliott Management.

1. **The Commission Needs Additional Disclosures From Evergy to Determine Whether The Hedge Funds Utilize Financial Instruments To Convey Additional Ownership**

Sophisticated financial firms like Elliott Management and Bluescape Energy Partners routinely employ the use of complex financial instruments, including various types of derivatives, to amplify their influence in target companies beyond directly owning voting shares. The use of such complex financial products is useful for activist investors because the derivatives are typically unregulated by the U.S. Securities and Exchange Commission for purposes of tracking ownership of public companies.

For example, Carl Icahn recently volunteered that his 4.9% ownership stake of Southwest Gas is actually much higher than that “when including derivatives” contracts.[[28]](#footnote-28) Likewise, in October 2019, Elliott Management reported that its funds “collectively [owned] $3.4 billion in common stock and economic equivalents of AT&T Inc.” Yet in a mid-February 2020 filing with the SEC, Elliott disclosed that it made a relatively small financial outlay upfront as it owned just 5 million shares of AT&T stock, worth around $195 million. The remainder of Elliott’s holdings were in the form of derivatives, including 202,500 call options to purchase AT&T shares and an undisclosed amount of “synthetic long exposure” through the sale of puts, according to Elliott Management sources.[[29]](#footnote-29)

More recently, the March 2021 implosion of Archegos Capital Management that rocked global financial and equity markets was based entirely on the hedge fund’s aggressive use of total return swaps to maximize leverage on single-stock bets[[30]](#footnote-30)—thereby allowing Archegos to simulate being one of the largest stockholders of several publicly-traded companies without technically owning the stocks. But Archeogos’ use of highly leveraged swap instruments meant that his financial trading enabled it to unilaterally influence the share price of the company, and therefore exert significant influence over management if he chose to do so. Archeogos’ sudden collapse took the U.S. Securities and Exchange Commission by total surprise because U.S. regulators do not require disclosure of total return swaps.

The unregulated nature of the market may mean that Elliott Management and Bluescape Energy Partners could be employing similar tactics. It would be useful for the Commission to compel the hedge funds to disclose whether they utilize such financial instruments involving Evergy.

**Conclusion**

The Commission must act to ensure just and reasonable rates by classifying both Elliott Management and Bluescape Energy Partners as affiliates of Evergy. The Commission must compel Evergy to turn over any written agreements between Elliott Management and Bluescape Energy Partners related to their mutual investment in Evergy. If no such written collusion agreement exists, then the Commission must compel sworn statements from Bluescape’s John Wilder and Elliott Management’s Paul Elliott Singer and their staff detailing all arrangements between the two hedge funds with regards to Evergy. In addition, the Commission must prevail upon Evergy to provide the February 2020 *Cooperation Agreement* with Elliott Management as part of this proceeding. Finally, the Commission must require Evergy to detail whether either Elliott Management or Bluescape Energy Partners has utilized any financial instruments, including swaps, to enhance their financial influence over Evergy. Compelling documentation of their shared relationship will provide FERC with necessary information to determine whether these funds should be treated as affiliates.

Respectfully submitted,

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