Protest of Public Citizen, Inc.

Nearly 90 years ago, Congress established “that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest,” requiring any public utility transferring control to first secure “an order of the Commission authorizing it to do so,” and only authorizing such acquisitions if the

1 16 USC § 824.
Commission “finds that the proposed transaction will be consistent with the public interest”.\textsuperscript{2}

The Commission must determine that the activist investors Elliott Management and Bluescape Energy Partners are affiliated with NRG Energy per 18 CFR § 35.36(a)(9), as the funds coordinated on an investment strategy that resulted in economic control over NRG exceeding 10%.

Activist investors like Elliott Management flourish with a business model explicitly designed to circumvent regulatory compliance, deploying complex financial engineering to engage in hostile upheaval of reluctant public utilities without ever triggering the Commission’s oversight.

On April 4, 2023 Elliott Management registered the repowernrg.com domain as part of a campaign to force significant management and investment changes at NRG Energy.\textsuperscript{3}

In a May 15, 2023 letter to NRG Energy’s board of directors posted to its repoweringnrg.com site, Elliott Management disclosed that it had “an investment of approximately $1.0 billion representing a more than 13% economic interest in NRG Energy, Inc.” and, using that “economic interest” as an explicit negotiating tactic, issued a number of demands, including a request for NRG to consider five of its recommended names for the board of directors.\textsuperscript{4}

That letter was followed by a second one on June 27, 2023, insisting on the termination of NRG’s CEO, among other ultimatums, stating that the “CEO has lost the confidence of the core investor base, and the Board lacks the will to make the right decision for the Company.”\textsuperscript{5}

Elliott Management ultimately succeeded in forcing its requested changes upon NRG’s CEO and board of directors. On November 20, NRG Energy entered into a Cooperation Agreement with Elliott Management, resulting in the resignation of NRG’s

\textsuperscript{2} 16 USC § 824b(a).
\textsuperscript{3} www.godaddy.com/whois/results.aspx?domain=repowernrg.com
\textsuperscript{5} www.prnewswire.com/news-releases/elliott-calls-for-new-ceo-and-strategic-review-at-nrg-energy-301864470.html
CEO and the appointment of four new members to NRG’s board of directors.\(^6\) This boardroom coup d’état demonstrates that Elliott’s use of cash-settled derivatives to obtain control of more than 13% of NRG’s economic interest constitutes affiliation and control under the Commission’s regulations.\(^7\) Elliott Management also concealed from the Commission its coordination with Bluescape Energy Partners in its efforts to control NRG.

Elliott Management was able to remove NRG’s CEO and secure the appointment of four new members of the board through its use of cash settled swaps that conveyed control of more than 10% of NRG’s economic interest. The U.S. Securities and Exchange Commission is so alarmed at the ability of activist investors to utilize such derivatives to control target companies that it proposed a rulemaking last year stipulating that using cash settled swaps in this manner replicates control over voting securities.\(^8\) The Commission must determine whether Elliott Management’s use of derivatives to acquire more than 10% of the economic interest of NRG Energy requires it to be deemed an affiliate of NRG Energy, per 18 CFR § 35.36(a)(9).

**Elliott Conceals Its Coordination With Bluescape Energy Partners**

Elliott Management has concealed from the Commission its coordination with Bluescape Energy Partners as part of its effort to influence and control NRG Energy.

Bluescape Energy Partners reported to the U.S. Securities and Exchange Commission that it owns 4,858,000 voting shares of NRG Energy, Inc.\(^9\) According to Bluescape Energy Partners’ “investment highlights” website, the purpose of the investment in NRG Energy is “restructuring”, with a start date of May 2023\(^10\)—coinciding with Elliott Management’s May 15 letter to NRG’s board of directors announcing its campaign to influence and control the utility. Public Citizen has previously documented the history of extensive

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\(^6\) [www.sec.gov/ix?doc=/Archives/edgar/data/1013871/000110465923119741/tm2331129d1_8k.htm](www.sec.gov/ix?doc=/Archives/edgar/data/1013871/000110465923119741/tm2331129d1_8k.htm)

\(^7\) 18 CFR § 35.36(a)(9).


\(^9\) [www.sec.gov/Archives/edgar/data/1629283/00017266123003847/xslForm13F_X02/infotable.xml](www.sec.gov/Archives/edgar/data/1629283/00017266123003847/xslForm13F_X02/infotable.xml)

\(^10\) [https://bluescapegroup.com/portfolio/](https://bluescapegroup.com/portfolio/)
collaboration between Elliott Management and Bluescape Energy Partners to influence and control public utilities.\textsuperscript{11}

Respectfully submitted,

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Filed November 27, 2023