

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

NRG Power Marketing LLC	Docket Nos. ER10-2265-021
Midwest Generation LLC	ER10-2355-011
Astoria Gas Turbine Power LLC	ER10-2784-017
Vienna Power LLC	ER10-2947-016
Indian River Power LLC	ER10-3223-010
Direct Energy Services LLC	ER11-1846-012
Direct Energy Marketing Inc.	ER11-1847-012
Direct Energy Business LLC	ER11-1850-012
Energy Plus Holdings LLC	ER11-2062-029
SGE Energy Sourcing LLC	ER11-2175-007
Stream Energy Pennsylvania LLC	ER11-2176-006
Gateway Energy Services Corporation	ER11-2598-015
Stream Energy Maryland LLC	ER11-3188-007
Xoom Energy LLC	ER11-3418-009
Green Mountain Energy Company	ER11-4307-030
Reliant Energy Northeast LLC	ER11-4308-030
Stream Energy Columbia LLC	ER12-224-008
Energy New Jersey LLC	ER12-225-008
Independence Energy Group LLC	ER12-261-029
Stream Energy New York LLC	ER12-2301-007
Direct Energy Business Marketing LLC	ER13-1192-009
NRG Chalk Point CT LLC	ER16-10-004
Stream Ohio Gas & Electric LLC	ER17-764-007
Stream Energy Illinois LLC	ER17-765-007
Stream Energy Delaware LLC	ER17-767-007
NRG Curtailment Solutions Inc.	ER21-2826-002

Protest of Public Citizen, Inc.

The Commission must deem both the July 21 section 203 application and the June 29 section 205 *Triennial Market Power Analysis* as deficient. Months before either filing, Elliott Management—controlled by billionaire Paul E. Singer¹—initiated an aggressive campaign targeting the management and business activities of NRG Energy, anchored by an acquisition of more than 10% of NRG’s “economic interest” utilizing

¹ Sheelah Kolhatkar, *Paul Singer, Doomsday Investor*, August 20, 2018, www.newyorker.com/magazine/2018/08/27/paul-singer-doomsday-investor

derivatives. These derivatives likely convey indirect voting control to Elliott Management, per 18 CFR § 35.36(a)(9)(i). The Commission must:

- Require Elliott Management to publicly disclose a detailed, narrative description of all derivative contracts it used to acquire NRG Energy’s “economic interest”, including public identification of the names of its counterparties. Elliott Management must also provide, under protective order, copies of the actual derivative contracts. These disclosures are essential to determine whether the derivative contracts resulted in affiliation.
- Prohibit Elliott Management from entering into *cooperation agreements* with public utilities that convey access to material, non-public information; and restrict the hedge fund’s ability to have power over naming seats of boards of directors, while it maintains affiliation with NRG Energy.
- Require Elliott Management to clarify what role, if any, its executives will play on NRG Energy’s board of directors.
- Resolve Elliott Management’s claim in the 203 application that it doesn’t control day to day management of Peabody, as it appears to be contradicted by the fact that two of Elliott’s executives serve on Peabody’s board of directors.
- Set for hearing the harm to competition of Peabody’s coal supply contracts with certain NRG Energy generation units.

Background

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].² So the Commission includes *indirect* ownership and control as part of its affiliation determination, as well as actions outside of ownership (control or hold). The regulations express that the Commission’s review of activities should be broad, as indicated by the explicit inclusion of both *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

² 18 CFR § 35.36(a)(9)(i).

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.

On June 29, 2023, various market-based rate authority affiliates of NRG Energy Inc. filed a *Triennial Market Power Analysis for Northeast Region*, omitting reference to the activist hedge fund Elliott Management holding over 13% of the “economic interest” of the MBR sellers.³

On July 21, 2023, Elliott Management filed an application under Section 203 of the Federal Power Act seeking approval to acquire up to 20% of NRG Energy’s common stock.⁴ In a footnote, Elliott Management claims that in “addition to their [current] ownership of [2.36% of] NRG common stock, the Elliott Applicants also own passive, economic interests in NRG [equaling 10.78%] through their ownership of derivative instruments which do not confer any voting rights with respect to NRG common stock”, for a combined “economic interest” in NRG of 13.14%.⁵ Elliott provides no detail on how its “ownership of derivative instruments” only result in a “passive” economic interest in NRG Energy.

Section 203 only authorizes acquisitions if the Commission “finds that the proposed transaction will be consistent with the public interest”,⁶ with the Commission’s regulations prohibiting “any adverse effect on competition, rates, or regulation”.⁷

On April 4, 2023—months before either the section 203 or section 205 filings—the activist hedge fund Elliott Management registered the *repowernrgrg.com* domain as part of a campaign to force significant management and investment changes at NRG Energy.⁸

In a May 15, 2023 letter to NRG Energy’s board of directors posted to its *repoweringnrgrg.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

³ Docket Nos. ER10-2265-021 et al.

⁴ Docket No. EC23-112.

⁵ July 21 *Application*, at footnote 7.

⁶ 16 USC § 824b(a)(4).

⁷ 18 CFR Part 33.

⁸ www.godaddy.com/whois/results.aspx?domain=repowernrgrg.com

a number of demands, including a request for NRG to consider five of its recommended names for the board of directors.⁹

On June 27, 2023, Elliott Management sent a second letter to NRG’s board, 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.”¹⁰ Elliott’s demands are already influencing management decisions at NRG Energy, per reporting by the *Wall Street Journal*.¹¹

Detailed Disclosure of Elliott’s Derivatives Is Necessary

Elliott Management has a history of using derivatives to amplify its indirect control over a target company, including call options; creating “synthetic long exposure” through the sale of puts; the utilization of swaps; and a variety of other creative financial derivative instruments.¹²

When entering into derivatives contracts with Elliott Management, its counterparties may hold or own NRG Energy securities. Depending on the structure of the derivative contracts or other agreements, counterparties may be contractually bound to Elliott Management on a variety of terms and conditions, including voting rights. Considering how frequently Elliott utilizes such derivatives as a tactic to force changes at companies it targets, Elliott likely has preferred counterparties to execute these derivative contracts. Even if the derivatives contract does not explicitly convey control, the financial incentive of retaining Elliott’s future business may create an implicit agreement by the counterparty to acquiesce to Elliott on matters such as voting rights. As such, Elliott Management’s use of such derivatives to indirectly control voting rights of a public utility appears to meet the Commission’s definition of *affiliate*, per 18 CFR § 35.36(a)(9)(i).

The Commission must require Elliott Management to publicly disclose a detailed, narrative description of all derivative contracts it used to acquire NRG Energy’s

⁹ <https://repowernrg.com/letter-to-the-board-of-directors-5-15-23/>

¹⁰ <https://repowernrg.com/letter-to-the-board-of-directors-6-27-23/>

¹¹ Jinjoo Lee, *Elliott Just Wants NRG to Be a Boring Company*, June 23, 2023, www.wsj.com/articles/elliott-just-wants-nrg-to-be-a-boring-company-44878820

¹² <https://cwa-union.org/news/releases/cwa-alerts-elliott-management-investors-about-hedge-funds-underperformance-divestment>

“economic interest”, including public identification of the names of its counterparties. Elliott Management must also provide, under protective order, copies of the actual derivative contracts and any other contracts that may dictate whether counterparties are required to vote in a manner that is directed by Elliott. The Commission must then use the information about Elliott’s counterparties to request information from them as to whether they are required to vote their shares in a way that is directed by Elliott. These disclosures are essential to determine whether Elliott is an affiliate under the Commission’s rules.

The Commission Must Restrict Elliott Management’s Ability To Enter Into Cooperation Agreements And Disallow It From Appointing Board Members At Other Public Utilities

At least once a year, Elliott Management appears to accumulate direct and indirect economic interest in Commission-jurisdictional public utilities for the purpose of pressuring management to make personnel and investment changes, as evidenced by this non-comprehensive list of recent examples:

- In 2022, Elliott Management disclosed a financial interest in NiSource, Inc. and announced its support for a new CEO and investment changes.¹³ Elliott Management’s most recent 13-f filing with the U.S. Securities and Exchange Commission reveals that the hedge fund retains an active financial investment in NiSource of 1.22 million shares, which does not include any indirect holdings through derivatives.¹⁴
- Suncor Energy Inc. entered into a cooperation agreement with Elliott Management in 2022 that entitles Elliott to name two members of the board.¹⁵
- In 2021, Elliott Management entered into a cooperation agreement with Duke Energy that entitled the hedge fund to choose two board seats and access to material, non-public information, using its direct and indirect economic interests as leverage.¹⁶

¹³ Will Wade, *Activist Elliott Reveals NiSource Stake, Endorses CEO Shift*, January 28, 2022,

www.bloomberg.com/news/articles/2022-01-28/activist-elliott-discloses-nisource-stake-endorses-ceo-shift

¹⁴ www.sec.gov/Archives/edgar/data/1791786/000101359423000490/0001013594-23-000490-index.htm

¹⁵ <https://sustainability-prd-cdn.suncor.com/-/media/project/suncor/files/news-releases/2022/2022-07-18-news-release-su-enters-agreement-elliott-en.pdf>

¹⁶ <https://news.duke-energy.com/releases/duke-energy-enters-into-cooperation-agreement-with-elliott-investment-management>

- On October 27, 2020, Elliott Management announced that it owned “a significant interest in DTE Energy Co.” that it used to privately engage DTE’s CEO for “several months” to spin off its midstream gas operations into a separately listed company.¹⁷
- In 2020 Elliott Management negotiated two cooperation agreements with Evergy that entitled the hedge fund to name two members of the board and provide access to material, non-public information.¹⁸
- In 2020, CenterPoint Energy Inc. announced a \$1.4 billion equity investment from Elliott Management, Bluescape Energy Partners and Fidelity Management.¹⁹
- In 2018, Elliott Management and Bluescape Energy Partners announced a combined \$1.3 billion investment in Sempra Energy.²⁰
- FirstEnergy raised \$2.5 billion from an investor group that included Elliott Management in 2018.
- Elliott Management and Bluescape Partners acquired a combined 9.4% stake in NRG Energy with Bluescape Executive Chairman C. John Wilder joining NRG’s board in 2017.²¹

These cooperation agreements provide Elliott Management access to material, non-public information of the target companies. Allowing Elliott Management to obtain material, non-public information of utilities while de facto serving as an affiliate of NRG Energy present challenges to horizontal competition in FERC’s markets.²²

The commission should require confirmation of how many deals Elliott Management currently has with utilities, and must impose limits on Elliott’s ability to enter into future agreements with utilities that convey access to material, non-public information,

¹⁷ www.prnewswire.com/news-releases/elliott-management-supportive-of-dte-energys-intent-to-spin-off-midstream-business-301160697.html

¹⁸ www.citizen.org/wp-content/uploads/EvergyElliottM.pdf

¹⁹ <https://investors.centerpointenergy.com/news-releases/news-release-details/centerpoint-energy-announces-landmark-actions-significant-equity>

²⁰ www.businesswire.com/news/home/20180611005557/en/Elliott-Management-and-Bluescape-Resources-Send-Letter-and-Presentation-to-the-Board-of-Directors-of-Sempra-Energy

²¹ www.businesswire.com/news/home/20170213005541/en/NRG-Announces-Cooperation-Agreement-with-Elliott-Management-and-Bluescape-Energy-Partners

²² Diana L. Moss, *What Does Expanding Horizontal Control Mean for Antitrust Enforcement? A Look at Mergers, Partial Ownership, and Joint Ventures*, November 4, 2020, www.antitrustinstitute.org/wp-content/uploads/2020/11/Moss_Horizontal-Control_11.4.20.pdf

or any arrangement that gives Elliott any rights to influence members of the board of directors of a public utility as part of any order in these proceedings.

Elliott Management Executives on Peabody Energy’s Board of Directors Conveys Day-to-Day Management Control

Page 23 of Elliott Management’s July 21 section 203 application claims that the “Elliott Applicants are not involved in the day-to-day operations of Peabody.” This claim is false. Two Elliott Management executives—Samantha Algaze and Dave Miller—serve on Peabody Energy’s board of directors.²³ Management is directly accountable to the board, and board members have unfettered access to influence management.

Elliott Management’s role on Peabody’s board raise anti-competitive concerns, as Peabody supplies three of NRG’s four coal fired power plants, including 96% of the coal for the Powerton station located in PJM.²⁴ The Commission must set for hearing the impact on competition of Peabody’s coal supply contracts with NRG Energy.

Respectfully submitted,

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²³ www.peabodyenergy.com/Investor-Info/Corporate-Governance/Board-of-Directors

²⁴ *Application*, at page 22.