

181 FERC ¶ 61,044  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
James P. Danly, Allison Clements,  
Mark C. Christie, and Willie L. Phillips.

Evergy Kansas Central, Inc.	Docket Nos. ER20-67-001
Evergy Missouri West, Inc.	ER20-113-001
Evergy Metro, Inc.	ER20-116-001

ORDER ON NOTICE OF CHANGE IN STATUS

(Issued October 20, 2022)

1. On September 28, 2020, as amended on October 22, 2021, pursuant to section 35.42(a) of the Commission's regulations,<sup>1</sup> Evergy Kansas Central, Inc., Evergy Missouri West, Inc., and Evergy Metro, Inc. (collectively, Evergy Sellers) filed a notice of change in status on their upstream ownership. As discussed below, we find that Evergy Sellers and Evergy, Inc. (Evergy) are affiliates of Bluescape Energy Partners, LLC (Bluescape) and therefore direct Evergy Sellers to submit additional information in order for the Commission to process the notice of change in status.

**I. Notice of Change in Status Filing**

2. Evergy Sellers explain that, as of July 31, 2020, The Vanguard Group, Inc. and its affiliates (Vanguard) reported being the beneficial owner of 12.42% of the publicly traded securities of Evergy. Evergy Sellers represent that, although they are not aware of the percentage of Evergy's publicly traded securities owned by Vanguard as of the date of the September 28, 2020 change in status filing, Evergy Sellers assume that the ownership remains above 10%. Evergy Sellers explain that they are submitting the change in status while the issue of reporting affiliation with institutional investors is being considered by the Commission.<sup>2</sup>

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<sup>1</sup> 18 C.F.R. § 35.42(a) (2021).

<sup>2</sup> Evergy Sellers September 28, 2020 Filing at 1, 5 (Notice of Change in Status Filing). The Commission subsequently addressed, in a separate proceeding, issues regarding affiliation of passive investors and investors acting under blanket authority.

## II. Notice of Filings and Responsive Pleadings

3. Notice of the Notice of Change in Status Filing was published in the *Federal Register*<sup>3</sup> with interventions and protests due on or before October 19, 2020. On October 9, 2020, Public Citizen, Inc. (Public Citizen) filed a motion to intervene. On October 19, 2020, Public Citizen filed a protest (First Protest). On October 29, 2020, Evergy Sellers filed an answer to the First Protest (Answer to the First Protest). On November 27, 2020, Public Citizen filed an answer to Evergy Sellers' answer (Answer to the Evergy Sellers Answer).

4. On May 10, 2021, Commission staff issued a data request requesting that Evergy Sellers submit additional information into the record regarding Evergy Sellers' upstream ownership. On May 28, 2021, Evergy Sellers filed their response to the data request (First Response). On June 16, 2021, Public Citizen filed comments on the First Response (First Comments).

5. On September 22, 2021, Commission staff issued a second data request requesting that Evergy Sellers submit further information into the record regarding Evergy Sellers' upstream ownership. On October 22, 2021, Evergy Sellers filed their response to the second data request (Second Response). Notice of the Second Response was published in the *Federal Register*<sup>4</sup> with interventions and protests due on or before November 12, 2021. On October 26, 2021, Evergy Sellers updated the Second Response. On November 9, 2021, The Communication Workers of America (CWA) filed a motion to intervene. On November 12, 2021, Public Citizen and CWA filed a joint protest (Second Protest). On January 28, 2022, Public Citizen filed further comments (Second Comments).

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*See NextEra Energy, Inc.*, 174 FERC ¶ 61,213, *order on reh'g and granting clarification*, 175 FERC ¶ 61,214 (2021).

<sup>3</sup> 85 Fed. Reg. 62,723 (Oct. 5, 2020).

<sup>4</sup> 86 Fed. Reg. 60,027 (Oct. 29, 2021).

### **III. Discussion**

#### **A. Procedural Matters**

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>5</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>6</sup> prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

#### **B. Substantive Matters**

8. We address the issues raised by Public Citizen and CWA and provide clarification on certain affiliation issues below. As a consequence of our decision here, we direct Evergy Sellers to submit additional information in order for the Commission to process the notice of change in status, within 30 days of the date of this order.

##### **a. First Protest and Answer**

9. In the First Protest, Public Citizen argues that Evergy Sellers have failed to notify the Commission under section 35.42 that Elliott Management Corp. (Elliott) and its affiliates have obtained control over Evergy, in part, through the terms of a non-public confidentiality agreement. Public Citizen asserts that the Commission has procedures to address affiliation for unique circumstances, such as in Elliott's case, where an entity has the ability to control another without owning 10%, under section 35.36(a)(9)(iii) of the Commission's regulations.<sup>7</sup>

10. According to Public Citizen, beginning in October 2019, Elliott initiated non-public negotiations with Evergy's management and board of directors (Evergy Board) regarding management changes sought by Elliott. Public Citizen asserts that, in January 2020, Elliott published a letter addressed to the Evergy Board in which it indicated support for updating Evergy's long-term capital plan and operating strategy. Public Citizen alleges that, one month later, "Evergy entered into an Agreement with Elliott Investment Management L.P., Elliott Associates, L.P., and Elliott International, L.P., [all wholly

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<sup>5</sup> 18 C.F.R. § 385.214 (2021).

<sup>6</sup> 18 C.F.R. § 385.213(a)(2) (2021).

<sup>7</sup> Public Citizen First Protest at 2.

owned affiliates of Elliott Management Corp.], to install two of Elliott’s preferred new board members” and form a new Strategic Review and Operations Committee (Committee) of the Evergy Board.<sup>8</sup> Public Citizen asserts that both of Elliott’s board members were placed on the Committee, with one as co-chair. Public Citizen adds that Evergy filed a form 8-K with the U.S. Securities and Exchange Commission (SEC), noting that Elliott had agreed to vote its and its controlled affiliates’ shares of Evergy common stock in favor of various Evergy initiatives, and that Evergy filed a cooperation agreement with the SEC allowing Elliott to receive certain confidential information from the Committee.

11. Public Citizen contends that the cooperation agreement between Evergy and Elliott’s affiliates grants rights for Elliott to replace one of the two Evergy Board members named by Elliott if one or both of them depart during the cooperation agreement’s duration. Public Citizen asserts that, in August 2020, Evergy announced the Committee’s management recommendations, which included an \$8.9 billion capital investment initiative, and shortly thereafter, Evergy’s Chief Executive Officer announced his retirement.<sup>9</sup> Public Citizen contends that, as a result of the appointment of two of Elliott’s preferred directors and the cooperation agreement, Elliott must be classified as an affiliate of Evergy and Evergy Sellers.<sup>10</sup>

12. In their Answer to the First Protest, Evergy Sellers argue that, as a threshold matter, the First Protest is not relevant to this proceeding because Public Citizen raises no concerns regarding Vanguard’s ownership of Evergy and it does not claim that Vanguard is an affiliate of Evergy Sellers.<sup>11</sup> Evergy Sellers nonetheless address the First Protest and assert that Elliott is not an affiliate of Evergy Sellers. Evergy Sellers contend that Elliott Management owns less than 5% of Evergy’s stock and thus Evergy Sellers can rely on the rebuttable presumption of lack of control under section 35.36(a)(9)(v) of the Commission’s regulations.<sup>12</sup> Evergy Sellers contend that sworn statements in an Elliott pleading made before the Kansas Corporation Commission confirm that Elliott has no

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<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 2-4.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> Evergy Sellers Answer to the First Protest at 2.

<sup>12</sup> *Id.* at 3; *see also* 18 C.F.R. § 35.36(a)(9)(v) (2021) (“For purposes of paragraph (a)(9), owning, controlling or holding with power to vote, less than 10[%] of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.”).

control or substantial influence over Evergy's policies and actions.<sup>13</sup> Evergy Sellers claim that, as a result, the Commission should disregard the First Protest.

13. In the Answer to the Evergy Sellers Answer, Public Citizen argues that the facts demonstrate that Elliott is an activist investor that acquires a company's voting shares for the purpose of influencing management and investment decisions of the companies it targets, despite the fact that Elliott rarely acquires voting shares close to 10%. Public Citizen contends that Elliott issued a statement urging Evergy to consent to an acquisition by NextEra.<sup>14</sup>

14. Public Citizen further adds that Elliott owns approximately 30% of Peabody Energy, a coal fuel supplier, and that three of Evergy's coal-fired generation facilities have fuel supply contracts with Peabody Energy. Public Citizen contends that determining affiliation will ensure that Evergy's fuel supply transactions are conducted at arm's length from Elliott.<sup>15</sup>

15. Public Citizen also asserts that Elliott has pushed for management and investment changes in at least three utilities.<sup>16</sup> Lastly, Public Citizen notes that Elliott's affiliation with Evergy has never been addressed in a Commission proceeding and that Evergy has not provided its non-public confidentiality agreement to the Commission.<sup>17</sup>

**b. First Data Request, Response, and Comments**

16. In the May 10, 2021 data request, Commission staff noted that in a recent order, the Commission clarified that, "[u]nder 18 C.F.R. § 35.36(a)(9)(i), institutional investors that own 10% or more of the outstanding voting securities of the utility pursuant to a section 203(a)(2) blanket authorization order are affiliates of those utilities through ownership of voting securities."<sup>18</sup> Commission staff requested that Evergy Sellers trace

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<sup>13</sup> Evergy Sellers Answer to First Protest at 3-4 (citing Objection to Motion to Join Elliott Management as a Required Party, at 4, Kansas Corporation Commission, Docket No. 21-EKME-88-GIE).

<sup>14</sup> Public Citizen Answer to the Evergy Sellers Answer at 1-2.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 2-3.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *NextEra Energy, Inc.*, 174 FERC ¶ 61,213 at P 42.

all ownership until all upstream owners are identified, including The Vanguard Group, Inc.<sup>19</sup>

17. In its First Response, Evergy Sellers state that they are directly and wholly (100%) owned by Evergy, which is a publicly-traded company, and that only The Vanguard Group, Inc. is an owner of more than 10% of Evergy's voting securities. Evergy Sellers also provide organizational charts. Evergy Sellers further represent that, The Vanguard Group, Inc. is part of a mutual fund complex that is wholly and jointly owned by 37 "Investment Companies," which are registered under the Investment Company Act of 1940, as amended, and have no other shareholders.<sup>20</sup> Evergy Sellers state that they have no additional information about The Vanguard Group, Inc.'s upstream owners or its affiliates beyond the information provided by The Vanguard Group, Inc. to the Commission.

18. In its First Comments, Public Citizen argues that Evergy Sellers' response is deficient because they fail to also list Elliott and Bluescape as upstream owners. Public Citizen asserts that Elliott and Bluescape are activist hedge funds that exert clear control over Evergy, despite the fact that, combined, the hedge funds own only about 6% of Evergy's shares.<sup>21</sup>

19. Public Citizen alleges that in an agreement coordinated directly with Elliott, Bluescape secured ownership of Evergy in a non-arms' length transaction on February 25, 2021, that resulted in Bluescape's Executive Chairman, C. John Wilder, obtaining a voting seat on Evergy's Board. Public Citizen reiterates its arguments from the First Protest regarding how Elliott has similarly been able to appoint members on Evergy's Board.

20. Public Citizen states that the Material Definitive Agreement between Evergy and Bluescape allowed Bluescape to purchase Evergy stock priced at a 7.11% discount from the daily closing stock price on February 25, 2021; it argues that this sale constitutes a private sale of Evergy's securities at a discount to an adversarial hedge fund.<sup>22</sup> Public Citizen states that in exchange for Bluescape's cash, Evergy agreed to install two of Bluescape's preferred selections for the Evergy Board, Bluescape's Executive

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<sup>19</sup> May 10, 2021 Data Request at 2.

<sup>20</sup> Evergy Sellers First Response at 2.

<sup>21</sup> Public Citizen First Comments at 1. Public Citizen identifies Elliott and Bluescape's ownership as Evergy shares, but does not specify whether they are voting shares.

<sup>22</sup> Public Citizen First Comments at 2.

Chairman Mr. Wilder and former Democratic U.S. Senator Mary L. Landrieu. Further, Public Citizen states that Mr. Wilder was appointed as chair of the Evergy Board's Finance Committee, and Public Citizen argues that Bluescape's Executive Chairman having voting rights on Evergy's Board conveys control to Bluescape.

21. Public Citizen argues further that both Elliott and Bluescape have access to material non-public business information of Evergy. Arguing that because access to material, non-public information bestows leverage and power for a party, Public Citizen requests that the Commission designate both Elliot and Bluescape as affiliates of Evergy.

22. Finally, Public Citizen argues that Elliott's simultaneous access to material non-public business information from Evergy and Elliott's agreement and access to information with a competing utility with market-based rate authority, CenterPoint Energy, Inc. (CenterPoint Energy), is a threat to competition and just and reasonable rates.<sup>23</sup>

**c. Second Data Request, Response, and Comments**

23. In the second data request, Commission staff asked for further information on the Evergy Board; Elliott's and Bluescape's recommendation, selection, or negotiation of the placement of members to the Evergy Board; the selection process for members of the Evergy Board and any consultation with outside parties, including Elliott and Bluescape; the duties, rights, and responsibilities of Evergy Board members; Evergy Board compensation; the relationship between Evergy, Elliott, and Bluescape, including shared employees and control over day-to-day operations; and the impact of finding Elliott and/or Bluescape to be an affiliate of Evergy Sellers on Evergy Sellers' horizontal or vertical market power.

24. In their Second Response, as to information on the Evergy Board, Evergy Sellers explain that Evergy's Amended and Restated By-Laws (Bylaws) provide that the Evergy Board shall consist of not less than seven nor more than 17 directors and that the exact number is set occasionally by a resolution adopted by the affirmative vote of the majority of the whole Evergy Board. Evergy Sellers state that, effective May 4, 2021, the size of the Evergy Board was set at 13 directors and remains at 13 as of the date of the response. Evergy Sellers explain that, pursuant to an agreement by and between Bluescape and Evergy (2021 Bluescape Agreement), Evergy has agreed that, from the conclusion of the 2021 Evergy annual meeting of shareholders until the 2023 Evergy

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<sup>23</sup> *Id.* at 4.

annual meeting of shareholders, the size of the Evergy Board will be no greater than 14 directors.<sup>24</sup>

25. With respect to Elliott's recommendation, selection, or negotiation of the placement of members to the Evergy Board, Evergy Sellers state that, in February 2020, Evergy entered into an agreement with Elliott Investment Management, L.P., Elliott Associates, L.P., and Elliott International, L.P. (2020 Elliott Agreement) pursuant to which, among other things, the Evergy Board: (1) increased the size of the Evergy Board by two directors to 17 directors and (2) appointed two individuals, Mr. Paul Keglevic and Mr. Kirkland Andrews, neither of whom are Elliott employees, to the Evergy Board.<sup>25</sup>

26. Regarding Bluescape's recommendation, selection, or negotiation of the placement of members to the Evergy Board, Evergy Sellers explain that, pursuant to the 2021 Bluescape Agreement, the Evergy Board appointed Mr. Wilder and Senator Landrieu to the Evergy Board, effective March 1, 2021. Evergy Sellers add that Evergy agreed that the Evergy Board would recommend to Evergy shareholders that they vote to elect Mr. Wilder and Senator Landrieu as directors to the Evergy Board at both the 2021 Evergy annual meeting of shareholders and the 2022 Evergy annual meeting of shareholders, in each case with a term expiring at the succeeding Evergy annual meeting of shareholders, and to use reasonable best efforts to obtain such elections. Evergy Sellers state that, although Mr. Wilder and Senator Landrieu were appointed to the Evergy Board in connection with a negotiated agreement, both Mr. Wilder and Senator Landrieu are independent under New York Stock Exchange rules; are governed by the same protections and obligations regarding confidentiality, conflicts of interests, related party transactions, fiduciary duties, codes of conduct, trading and disclosure policies, director resignation policies and other governance guidelines and policies of Evergy as other directors of Evergy; and have the same duties, rights, and responsibilities as every other member of the Evergy Board.<sup>26</sup>

27. As to the selection process for members of the Evergy Board, Evergy Sellers state that the Bylaws provide that, except regarding filling vacancies that occur occasionally and a contested election, as defined in the Bylaws, "a nominee to serve as a director is elected to the Evergy Board by the vote of a majority of the votes cast by shareholders

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<sup>24</sup> Evergy Sellers Second Response at 2.

<sup>25</sup> *Id.* at 4. Evergy Sellers state that Mr. Andrews no longer serves as a director of the Board as he vacated such position upon his appointment as Executive Vice President and Chief Financial Officer of Evergy, effective February 22, 2021. Evergy Sellers note that this appointment was made independent of any agreement with Elliott. *Id.*

<sup>26</sup> *Id.* at 2-3.



with respect to that director's election at any meeting of shareholders for the election of directors."<sup>27</sup> Evergy Sellers explain that the Nominating Committee is responsible for evaluating and recommending to the Evergy Board qualified candidates to become members of the Evergy Board and that the Nominating Committee does not have a formalized process for how potential nominees for the Evergy Board are identified and selected. In addition, Evergy Sellers state that shareholders have several options to identify candidates to be presented to shareholders for election to the Evergy Board, including recommending a candidate directly to the Nominating Committee and, subject to certain requirements in the Bylaws, nominating an individual for election at an Evergy annual shareholder meeting.<sup>28</sup>

28. According to Evergy Sellers, Evergy is not required to consult with or otherwise involve any outside party in connection with identifying director nominees. Evergy Sellers explain that, notwithstanding the foregoing, pursuant to the 2021 Bluescape Agreement described above, Evergy has agreed to director replacement in coordination with Bluescape if certain conditions are met. In addition, Evergy Sellers state that, pursuant to the 2020 Elliott Agreement, Evergy agreed to consider any views privately communicated by affiliates of Elliott to the Evergy Board with respect to Evergy Board composition, including directors to retire and to remain with the Evergy Board following each of the 2020 Evergy annual meeting of shareholders and the 2021 Evergy annual meeting of shareholders.<sup>29</sup>

29. Regarding the duties, rights, and responsibilities of members of the Evergy Board, Evergy Sellers explain that members of the Evergy Board have the duties, rights, and responsibilities set forth in the General Business and Corporation Law of Missouri. Evergy Sellers also state that Evergy's Corporate Governance Guidelines contain additional guidance and provide that members of the Evergy Board, among other things, are required to fulfill their responsibilities consistent with their fiduciary duties and in compliance with all applicable laws and regulations.<sup>30</sup> Evergy Sellers explain that the responsibilities of a Chair of a committee of the Evergy Board are set forth in the charter for that committee, which is subject to Evergy Board approval. Evergy Sellers state that, in general, committee Chairs, which are appointed by the Evergy Board, are responsible for leadership of the applicable committee, including overseeing the agenda, presiding over meetings, and reporting to the Evergy Board. Evergy Sellers represent that, with respect to the Finance Committee, of which Mr. Wilder is Chair, the role of the

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<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.*

Finance Committee is limited to reviewing various financial matters and, where applicable, making recommendations to the full Evergy Board.<sup>31</sup>

30. With respect to director compensation, Evergy Sellers explain that, as established in Evergy's Corporate Governance Guidelines, non-employee members of the Evergy Board are entitled to receive reasonable compensation for their services as determined by the Evergy Board upon recommendation by the Nominating Committee. Evergy Sellers state that compensation paid to non-employee members of the Evergy Board for service on the Evergy Board is paid by Evergy. Evergy Sellers explain that, with respect to Mr. Wilder and Senator Landrieu, the 2021 Bluescape Agreement provides that neither Bluescape nor any of its affiliates, as defined in the 2021 Bluescape Agreement, will pay any compensation to either Mr. Wilder or Senator Landrieu for their service on the Evergy Board or any committee thereof.<sup>32</sup>

31. As to the relationship between Evergy, Elliott, and Bluescape, including shared employees and control over day-to-day operations, Evergy Sellers state that affiliates of Elliott report owning approximately 4.597% of Evergy's outstanding shares of common stock as of July 30, 2021. Evergy Sellers explain that an affiliate of Bluescape reports owning approximately 1.1% of Evergy's outstanding shares of common stock as of July 30, 2021. Evergy Sellers represent that Mr. Wilder is an independent member of the Evergy Board and serves as: (1) the Chair of the Finance Committee and (2) a member of the Power Delivery and Safety Committee.<sup>33</sup> According to Evergy Sellers, no person who is employed by Evergy or any of its subsidiaries is, to Evergy's knowledge, employed by Elliott or Bluescape or their respective affiliates. Evergy Sellers represent that Evergy's Code of Ethics provides additional prohibitions on secondary employment and outside compensation.<sup>34</sup> Regarding control over day-to-day operations, Evergy Sellers represent that neither Elliott nor Bluescape have control over Evergy or Evergy Sellers. Evergy Sellers argue that, for purposes of finding affiliation, Evergy is entitled to the presumption of lack of control in section 35.36(a)(9)(v) of the Commission's regulations because the 10% threshold has not been crossed. Evergy Sellers also point to *Public Citizen, Inc. v. CenterPoint Energy, Inc.* in support of this argument, asserting that the presumption was not rebutted when CenterPoint Energy

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<sup>31</sup> *Id.* at 7.

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 9.

agreed to appoint two new directors to the board at Elliott's behest where those new directors were independent of and not compensated by Elliott.<sup>35</sup>

32. With respect to the impact of finding Elliott and/or Bluescape to be an affiliate of Evergy Sellers on Evergy Sellers' horizontal or vertical market power, according to Evergy Sellers, if after the notice and hearing opportunity under section 35.36(a)(9)(iii) of the Commission's regulations either company were deemed an affiliate of Evergy Sellers, the impact on Evergy Sellers' market power presumably would be none. Evergy Sellers represent that neither Elliott nor Bluescape has submitted any documents with the Commission that provide a basis for Evergy Sellers to believe that either are public utilities or affiliates of a public utility or public utility holding company. Evergy Sellers represent that the absence of any other known affiliations with public utilities indicates that an affiliation with Evergy would result in no horizontal market power impacts at all and no vertical impacts, as it relates to ownership of electric transmission. Evergy Sellers add that Evergy has no basis to know whether either Elliott or Bluescape or their affiliates control other assets, such as coal supplies or intrastate pipelines, that the Commission takes into consideration in vertical market power analysis.<sup>36</sup>

33. In their Second Protest, Public Citizen and CWA (jointly, Protestors) argue that the Commission must compel Evergy to provide additional information regarding absence of arms' length bargaining with Elliott and Bluescape. Protestors argue that there is substantial evidence that Elliott and Bluescape exert a controlling influence over Evergy. Protestors argue that the Evergy Board members that Elliott and Bluescape were able to place, including on the Evergy Board's Finance Committee, demonstrate control.

34. Protestors also assert that the Finance Committee's makeup, which is all four of the Bluescape and Elliott board members with Bluescape's Mr. Wilder as the chairman, indicates that the Elliott and Bluescape board members have control over the "primary driver of management and investment decision making for the utility."<sup>37</sup> Protestors argue that, based on the Finance Committee charter, it and the Finance Committee board members have authority to govern nearly all of Evergy's business operations.

35. Protestors further contend that Evergy Sellers' Second Response fails to document the history of collaboration between Elliott and Bluescape and omits documentation of contractual agreements between Elliott and Bluescape. Protestors purport to provide evidence of Elliott and Bluescape's collaborating to influence Commission-jurisdictional

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<sup>35</sup> *Id.* at 9-10 (citing, 174 FERC ¶ 61,101 (2021) (*CenterPoint*)).

<sup>36</sup> *Id.* at 10-11.

<sup>37</sup> Public Citizen & CWA Second Protest at 2.

utilities such as NRG Energy, FirstEnergy, Sempra Energy, and CenterPoint Energy Inc.<sup>38</sup> Protestors cite to CWA's research into the outcomes of Elliott Management's investments, in particular that "Evergy's ratepayers were likely to pay higher electricity rates" because Elliott demanded selective rate base investment.<sup>39</sup> According to CWA's research, selective rate base investments generate higher valuations, but can include unnecessarily higher electricity costs because the rate based investments are not driven by consumer demand and system maintenance requirements.<sup>40</sup> Protestors state that CWA's research shows that energy and utility companies targeted by Elliott 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.<sup>41</sup>

36. Protestors argue that hedge funds like Elliott and Bluescape that have been working together frequently will have formal working agreements, and Protestors request that the Commission compel Evergy to turn over all formal written agreements between Elliott and Bluescape related to their mutual investment in Commission-jurisdictional utilities. In the event that those written agreements do not exist, Protestors request that the Commission require sworn statements from Mr. Wilder and Elliott's Paul Elliott Singer and their staff detailing all arrangements between the two hedge funds with regard to Evergy. Protestors also repeat the request from the First Protest that the cooperation agreement between Elliott and Evergy be provided as part of this proceeding.<sup>42</sup>

37. Protestors argue that Elliott's access to the material non-public information of Evergy's market-based rate competitors poses a threat to competition; they also point to Bluescape and Elliott's investments in CenterPoint Energy, and Elliott's investment in DTE Energy and discussions with Duke Energy as further examples that raise concerns. Protestors also argue that Elliott's investment in Peabody Energy means that coal sales to Evergy from an Elliott-invested company indicate a potential threat to competition and rates.<sup>43</sup>

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<sup>38</sup> *Id.* at 3-4.

<sup>39</sup> *Id.* at 4 (citing Sierra Club Comments and Exhibits, Kansas Corporation Commission, Ex. A. at 12).

<sup>40</sup> Public Citizen & CWA Second Protest at 4.

<sup>41</sup> *Id.* at 5.

<sup>42</sup> *Id.* at 9.

<sup>43</sup> *Id.* at 7.

38. Protestors also argue that it would be useful for the Commission to compel Elliott and Bluescape to disclose whether they use financial instruments such as derivative holdings, total return swaps, or other sophisticated financial strategies involving Evergy.<sup>44</sup>

39. In its Second Comments, Public Citizen states that Elliott Management has invested in NiSource, Inc. (NiSource) and NiSource agreed to make Elliott's recommended management changes, including replacing NiSource's CEO and two of its board members. Public Citizen states that a wholly owned subsidiary of NiSource, Northern Indiana Public Service Company LLC, has received market-based rate authority. Public Citizen argues that Elliott's access to material non-public information, which now includes NiSource, and Elliott's affiliation with coal fuel supplier Peabody Energy continues to pose a threat to competition in Commission jurisdictional markets.<sup>45</sup>

**d. Commission Determination**

40. For the reasons discussed below, we find that Elliott should not be deemed to be an affiliate of Evergy and Evergy Sellers under the Commission's regulations. However, we find that Bluescape is individually an affiliate of Evergy and Evergy Sellers under section 35.36(a)(9)(v) and direct Evergy Sellers to submit additional information in order for the Commission to process the notice of change in status.

41. The Commission's regulations specify several bases upon which entities may be deemed to be affiliates. Specifically, sections 35.36(a)(9)(i) and (ii) of the Commission's regulations include within the definition of "affiliate" (i) "any person that directly or indirectly owns, controls, or holds with power to vote, 10[%] or more of the outstanding voting securities of the specified company" and (ii) "any company 10[%] or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company."<sup>46</sup> Section 35.36(a)(9)(iii) provides that an affiliate of a specified company may also be:

[a]ny person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the

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<sup>44</sup> *Id.* at 8.

<sup>45</sup> Public Citizen Second Comments at 1.

<sup>46</sup> 18 C.F.R. § 35.36(a)(9)(i), (ii) (2021).

protection of investors or consumers that the person be treated as an affiliate . . . .<sup>47</sup>

In addition, section 35.36(a)(9)(iv) specifies that “any person that is under common control with the specified company” is an affiliate of the specified company. Finally, section 35.36(a)(9)(v) specifies that “[f]or purposes of paragraph (a)(9), owning, controlling or holding with power to vote, less than 10[%] of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.”<sup>48</sup>

42. First, we find that Elliott should not be deemed to be an affiliate of Evergy and Evergy Sellers under the Commission’s regulations. Because the record indicates that Elliott owns less than 10% of the outstanding voting securities in Evergy, under section 35.36(a)(9)(v) of the Commission’s regulations, it is entitled to a rebuttable presumption that it does not control Evergy. We find that Elliott’s investment in and agreement with Evergy to appoint members to the Evergy Board is substantially similar to Elliott’s investment at issue in *CenterPoint*,<sup>49</sup> where the Commission concluded that Public Citizen did not present evidence to rebut the presumption of lack of control under section 35.36(a)(9)(v).<sup>50</sup> Here, Public Citizen identifies various agreements it argues demonstrate that Elliott negotiated to place members on the Evergy Board and that those members themselves have control over Evergy. However, the record evidence does not show how these agreements and the placement of members on the Evergy Board rebut the presumption of lack of control, and Public Citizen makes no arguments to this effect.

43. As to whether there is a lack of arm’s-length bargaining between Elliott and Evergy such that there should be notice and comment procedures to determine affiliation under section 35.36(a)(9)(iii), we find that record evidence is insufficient to institute such procedures. As noted above, Elliott’s investment in and agreements with Evergy are substantially similar to those at issue in *CenterPoint*, where the Commission concluded that Public Citizen did not meet its burden to establish affiliation. In addition, as in

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<sup>47</sup> *Id.* § 35.36(a)(9)(iii).

<sup>48</sup> *Id.* § 35.36(a)(9)(v).

<sup>49</sup> *CenterPoint* was a complaint proceeding under FPA section 206. Accordingly, Public Citizen, the complainant, held the burden of proof to demonstrate that Commission regulations required the market-based rate seller to submit a change in status regarding the transaction involving Elliott or that there may be a lack of arm’s-length bargaining between *CenterPoint Energy*, the market-based rate seller’s upstream affiliate, and Elliott, that would warrant a finding of affiliation under section 35.36(a)(9)(iii). *CenterPoint*, 174 FERC ¶ 61,101 at P 27.

<sup>50</sup> *CenterPoint*, 174 FERC ¶ 61,101 at P 30.

*CenterPoint*, the director appointed to the Evergy Board at Elliott's request is independent of, and not compensated by, Elliott. Therefore, consistent with our finding in *CenterPoint*, we decline to find that Elliott is an affiliate of Evergy and Evergy Sellers.

44. Second, we find that Bluescape is individually an affiliate of Evergy and Evergy Sellers, for the reasons discussed below. Although Bluescape's investment arrangements in Evergy are the same as Elliott's in many respects, we find that Bluescape's investment arrangements in Evergy differ from Elliott's in one key respect. Specifically, Evergy has appointed one of Bluescape's own directors, its Executive Chairman, to the Evergy Board. In *CenterPoint*, the Commission expressed its "concern with structures where the investor itself would be represented on the board through the appointment of the investor's own officers or directors, or other appointee accountable to the investor, in order to support a finding of control."<sup>51</sup> We find that the appointment of a non-independent director from Bluescape to the Evergy Board presents the concern expressed by the Commission in *CenterPoint*.

45. Board membership confers rights, privileges, and access to non-public information, including information on commercial strategy and operations. Where an investor's own officer or director, or other appointee accountable to the investor, is appointed to the board of a public utility or holding company that owns public utilities, the investor itself will have those rights, privileges, and access, and thus the authority to influence significant decisions involving the public utility or public utility holding company. Accordingly, we find that, where an investor's non-independent director, such as its own officer or director, or other appointee accountable to the investor, is appointed to the board of a public utility or public utility holding company, that appointment functions to rebut the presumption of lack of control under section 35.36(a)(9)(v). We will therefore treat that investor as an affiliate of the public utility or public utility holding company to which a non-independent director has been appointed. As a result, we find that the appointment of a non-independent director from Bluescape to the Evergy Board rebuts the presumption of lack of control under section 35.36(a)(9)(v) and that Bluescape is deemed to be an affiliate of Evergy and Evergy Sellers. Because we reach this finding of affiliation under section 35.36(a)(9)(v), we need not address arguments as to Bluescape's affiliation with Evergy under section 35.36(a)(9)(iii).

46. Finally, we decline to find that Elliott is affiliated with Evergy or Evergy Sellers by virtue of any joint activities with Bluescape. Protestors have not provided evidence that Elliott and Bluescape are acting in concert or other similar evidence to support a finding of affiliation here.

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<sup>51</sup> *Id.* P 33.

47. Based on our finding that Bluescape is an affiliate of Evergy and Evergy Sellers, we direct Evergy Sellers to submit additional information within 30 days of the date of this order in order for the Commission to process the notice of change in status. To the extent that Evergy Sellers and their affiliates have any pending market-based rate filings that do not include the required affiliate information, such as a market power analysis or any other market-based rate filing with an asset appendix, Evergy Sellers and their affiliates should amend those filings to comply with the findings in this order.<sup>52</sup>

48. In addition, we direct Evergy Sellers to update their asset appendix to include all of Bluescape's energy affiliates and their associated assets as described in 18 C.F.R. pt. 35, subpt. H, app. B (2021). Further, Evergy Sellers must update their horizontal and vertical market power analysis with their affiliates' generation and transmission assets, and inputs to electric power production,<sup>53</sup> according to the requirements under section 35.37 of the Commission's regulations. Evergy Sellers must also identify their upstream owners, update the Ultimate Upstream Affiliate information in the relational database,<sup>54</sup> and include the updated asset appendix serial number in the transmittal letter.<sup>55</sup>

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<sup>52</sup> Under the Commission's regulations, the requirement to timely report any change in status is to "reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority." 18 C.F.R. § 35.42(a). Such requirement is ongoing from the date that a seller receives market-based rate authority, and the requirement to inform the Commission whether a seller is affiliated with an entity that may meet the definition of an ultimate upstream affiliate remains an ongoing requirement as well.

<sup>53</sup> See 18 C.F.R. § 35.36(a)(4) (defining inputs to electric power production to mean intrastate natural gas transportation, intrastate natural gas storage or distribution facilities, physical coal supply sources and ownership of or control over who may access transportation of coal supplies).

<sup>54</sup> *Data Collection for Analytics & Surveillance & Mkt.-Based Rate Purposes*, Order No. 860, 168 FERC ¶ 61,039, at PP 56, 121 (2019), *order on reh'g*, Order No. 860-A, 170 FERC ¶ 61,129 (2020).

<sup>55</sup> *Id.* P 56.



The Commission orders:

Applicants are hereby directed to submit additional information within 30 days of the date of this order so the Commission may process the notice of change in status, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.