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November 29, 2011

**Via Email**

Steven C. Tabackman  
Federal Energy Regulatory Commission  
Office of Enforcement, Division of Investigations  
888 First Street, N.E.  
Room 51-69  
Washington, D.C. 20426

**Re: Third Data Request to Powhatan Energy Fund LLC in *In Re PJM Up-to Congestion Transactions*, Docket No. IN10-5-000**

Dear Mr. Tabackman:

This letter is in response to your November 16, 2011 correspondence, which expresses your dissatisfaction with Powhatan's November 14, 2011 response to FERC's third data request to Powhatan. You contend that Powhatan's response is "nonresponsive and unsatisfactory." I disagree. Powhatan answered your requests and tried, in good faith, to make the response as practical and helpful as possible – even offering to provide Dr. Tabors for an in-person meeting to further discuss the relevant trading data, which, as we explained, has been in your possession now for nearly a year. Such a meeting would be at Powhatan's sole expense.

Because you are dissatisfied with the response, however, let me try again. I have learned from Mr. Estes that the data provided to you on December 13, 2010 (that was later provided to Dr. Tabors on September 30, 2011) was not individually bates-labeled because it was produced in Excel format. Just so there is no confusion, this data, which is a series of spreadsheets, is located on the CD entitled "Response to Staff Second Data Request 2." The specific Excel documents that were sent to Dr. Tabors are titled on that CD as "Trades\_201005.xls," "Trades\_201006.xls," "Trades\_201007.xls," and "Trades\_201008.xls."

To the extent that you require a more specific response, it is our position that all of the above-referenced data at least "implicitly" supports the statements that you list in requests 14-16 of the third data request. With one caveat, however: it is not fair to say that this data "advised" Powhatan of anything during the time period that you specified for the requests (June 1, 2007-August 1, 2010). This is because Dr. Tabors did not receive this data until September 30, 2011 and, for that matter, no person involved with Powhatan's business operations has ever seen the referenced data. As Powhatan has repeatedly explained, it was not privy to the details of Dr. Chen's "spread trading" strategy at the time of the trades at issue in the summer of 2010. If you are interested in

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Dr. Chen's mental impressions at that time and his evaluation of the benefits and risks of the strategy, such questions are better directed to him than to Powhatan.

I take it you are satisfied with our answers to requests 18-20, which provided the details that Powhatan is aware of regarding "statistical analysis" and conversations between Dr. Tabors and Dr. Chen. Again, the best way to answer any remaining questions that you might have about the third data request – or about anything else – would be a face-to-face meeting. We are an open book.

In fact, Powhatan has been an open book and has fully cooperated with FERC from the beginning of this investigation. Accordingly, we have willingly, and timely, provided you with or pointed you to all the information that you have requested – including information to which FERC is not even entitled, such as much of the information requested in the third data request, which is protected attorney work product. *E.g., In the Matter of Grand Jury Subpoenas Dated October 22, 1991 and November 1, 1991*, 959 F.2d 1158, 1167 (2d Cir. 1992) (“[W]here a request is made for documents already in the possession of the requesting party, with the precise goal of learning what the opposing attorney’s thinking or strategy may be, even third-party documents may be protected” by the attorney work product doctrine); *SEC v. Strauss*, No. 09 Civ. 4150, 2009 WL 3459204, at \*9 (S.D.N.Y. Oct. 28, 2009) (“The Second Circuit has [also] recognized that the selection and compilation of documents may fall within the protection accorded to attorney work product, despite the general availability of documents from both parties and non-parties during discovery.”). And, of course, we have also provided you with a 35-page position statement, supported by two expert affidavits, and copies of all the sources that we cited in the position statement.

Before we provided you with that position statement, we requested an in-person meeting to discuss your reaction to the statement. You agreed to hold that meeting. More than a month has now passed since we submitted the position statement and I have not heard from you about that meeting. I think our time would be better spent having an in-person substantive exchange of ideas instead of squabbling over data requests involving documents that were produced to you nearly a year ago. If you have your mind made up and are not interested in providing Powhatan with an opportunity to be heard, please just say so.

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I have again enclosed affidavits from Dr. Tabors and Kevin Gates, attesting to the accuracy of the contents of this supplemental response. I will look forward to hearing from you.

Sincerely yours,



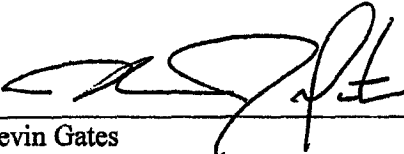
William M. McSwain

Enclosures


cc: Thomas Olson, Esq. (via email, w/ encls.)  
Dr. Richard D. Tabors (via email, w/ encls.)  
John N. Estes III, Esq. (via email, w/ encls.)  
Earle H. O'Donnell, Esq. (via email, w/ encls.)

**AFFIDAVIT**

KEVIN GATES, being duly sworn, deposes and states under penalty of perjury that the response to FERC Office of Enforcement's letter dated November 16, 2011 has been prepared under his supervision and control and constitutes a true, complete and accurate response to the best of his knowledge, information, and belief.

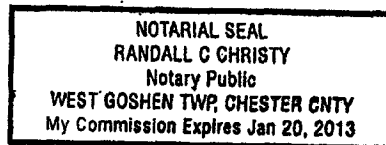
  
Kevin Gates

Subscribed and sworn to before me this 29 day of November, 2011:

  
Notary Public

Printed Name: Randall C. Christy

My Commission Expires: Jan. 20, 2013

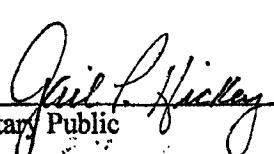


**AFFIDAVIT**

RICHARD D. TABORS, being duly sworn, deposes and states under penalty of perjury that the response to FERC Office of Enforcement's letter dated November 16, 2011 constitutes a true, complete and accurate response to the best of his knowledge, information, and belief.

  
Richard D. Tabors

Subscribed and sworn to before me this 29<sup>th</sup> day of November, 2011:

  
Notary Public

Printed Name: Gail P. Hickey

My Commission Expires: July 22, 2016

