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January 13, 2012

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: *In Re PJM Up-to Congestion Transactions, Docket No. IN10-5-000*

Dear Mr. Tabackman:

I have your email from December 30, 2011. As an initial matter, I wanted to let you know that White & Case is no longer representing Powhatan Energy Fund LLC, so please do not include that firm on any future correspondence in this investigation. Please direct all correspondence to me.

With that out of the way, I would like to set the record straight on a few matters. First, the contention in your email that Powhatan has refused to cooperate in this investigation is false. Powhatan has fully cooperated from the beginning of the investigation: we have willingly, and timely, provided you with or pointed you to all of the information that you have requested – including providing clear answers to FERC's third data request, concerning documents that have been in your possession for over a year. Your unfair criticism that we have not cooperated is based on nothing more than trivial formatting issues that have nothing to do with the substance of the data requests or our answers. We are confident that any objective observer would agree with our assessment.

Moreover, if anybody's behavior during this investigation is worthy of criticism, it is yours, not Powhatan's. From the beginning, you have exhibited a close-minded, heavy-handed attitude that persists to the present. For example, in the first deposition of Kevin Gates, you literally fell asleep for 15-20 minutes, with your head down and your eyes closed, as you sat across from Mr. Gates while your colleague questioned him. There were multiple witnesses to this conduct. As a further example, prior to the submission of Powhatan's position statement on October 21, 2011, I requested of you via telephone, with Daniel Hagan of White & Case also on the line, a meeting to discuss FERC's reaction to the position statement prior to FERC taking any further action. You agreed to that request. When I followed up after submitting the position statement, you told me that I had not previously requested a meeting, nor had you agreed to one for any purpose.

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While you have since backtracked and offered a meeting (no doubt in response to your colleagues pointing out that it was unwise for you to appear so obviously close-minded), your proposed circumstances for the meeting are unacceptable. I wrote you on December 16th and suggested two possible dates in late January. You waited until December 30th to respond and said your "strong preference" was to have a meeting no later than next week. Given the difficulty of coordinating everyone's schedules – including three experts – your response is inconsiderate and unrealistic.

Furthermore, you rejected, without explanation, my request that senior staff of the Division of Investigations and the Office of Enforcement be available for the meeting, which you describe as an opportunity for FERC to "listen to any presentation you wish to make." Powhatan has already made a presentation – in the form of a 35-page position statement, with two expert affidavits. (Dr. Chen has also already made a presentation – in the form of a 38-page position statement, with an additional expert affidavit.). It's not time for Powhatan to make another presentation – it's time for FERC to offer some meaningful feedback. That is the purpose of the meeting. You may have your mind made up and are unwilling to fairly consider Powhatan's arguments, but others within FERC may feel differently. We renew our request that senior staff of the Division of Investigations and the Office of Enforcement attend a joint meeting with Powhatan and Dr. Chen.

As our position statement explained, we believe that you have no case. There was a legitimate economic purpose for the trades at issue, and there was no scienter. We are not aware of any case, in any court in any jurisdiction in the country, that supports your position. Moreover, no charges against Powhatan would ever comport with due process. FERC may not like (or may even be embarrassed by) the trades at issue, but that does not make them wrong or illegal, and certainly does not make them fraudulent. If FERC disagrees with our analysis, we would like to hear why, we would like to hear what authority you have to support your position, and we would like to engage with senior staff in person. Only by better understanding FERC's position can we have a meaningful dialog. We will not be bullied into settlement.

Please let me know if you will grant the meeting that Powhatan has requested. I will look forward to hearing from you.

Sincerely yours,



William M. McSwain

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cc: Thomas Olson (via email)
Lauren Rosenblatt (via email)
Cathleen Colbert (via email)
Janel Burdick (via email)
John N. Estes III (via email)