

FEDERAL ENERGY REGULATORY COMMISSION  
Office of Enforcement  
Washington, D.C. 20426



September 3, 2014

**By U.S. MAIL & E-MAIL**

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**Re: Joint Request for Disclosure of Brady Material in In Re PJM Up-  
to Congestion Transactions, Docket No. IN10-5-000**

Dear Mr. Estes and Mr. McSwain:

We are in receipt of your letter dated August 27, 2014, in which you jointly request that “Staff disclose all data or information required to be disclosed pursuant to the Commission’s Policy Statement on Disclosure of Exculpatory Materials, 129 FERC ¶ 61,248 (2009) (“*Brady* Policy Statement”) or, in the alternative, confirm that Staff does not possess any such materials.” August 27, 2014 Letter at 1 (“*Brady* Request”). This letter responds to that request.

Much of the material that you list on pages 2-3 of your *Brady* Request and assert that staff must disclose pursuant to the Commission's *Brady* Policy suggests that you misapprehend the scope of that policy. To clarify, the Commission's *Brady* Policy requires staff to disclose only "*exculpatory evidence* 'material to guilt or punishment.'" *Brady* Policy Statement at P 1, quoting *Brady v. Maryland*, 373 U.S. 83, 88 (1963) (emphasis supplied).

To ensure "the efficient resolution of *Brady* issues," the Commission provided "guidance as to what is *not* required of Enforcement staff to fulfill the obligations contained in this policy statement": "Because *Brady* applies only to *evidentiary material rather than opinions*, our adoption of this *Brady* policy does not entitle a respondent to disclosure of Enforcement staff's strategies, legal theories, or evaluations of evidence." *Id.* at P 14. (emphasis added) (footnote omitted).

With respect to the "evidentiary material" that the *Brady* Policy Statement applies to, the Commission further limits disclosure to materials that (i) Enforcement staff received "in discovery or as part of its investigatory activities" "from sources other than the investigative subject(s)"; and that (ii) such materials "are not known to be in the subject's possession" and cannot "be obtained with reasonable diligence" by the investigative subject. *Id.* at PP 3, 9, 11. As the Commission explained, "[t]he rationale underlying *Brady* is not to supply a defendant with all the evidence in the Government's possession which might conceivably assist in the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence known only to the Government." *Id.* at P 3, quoting *United States v. LeRoy*, 687 F.2d 610, 619 (2d Cir. 1983).

Your *Brady* Request, in large part, effectively ignores the Commission's careful delineation of the materials subject to its *Brady* Policy Statement and the limits it imposes on staff's duty to disclose. Cognizant of our obligations as set out in the Commission's *Brady* Policy Statement, staff began diligently reviewing the "evidentiary materials" in our possession well before we received your *Brady* Request. Our review reveals no material required to be disclosed under the Commission's *Brady* Policy Statement. We are not providing a privilege log because no material is being withheld on the basis of privilege.

Consistent with our prior practice, we will be providing to you under separate cover certain materials not subject to the Commission's *Brady* Policy Statement but which appear to pertain to this matter.

Sincerely,

/s/

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cc: David Applebaum, Esq.