

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

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|---------------------------------------|---|--------------------------------|
| FEDERAL ENERGY REGULATORY COMMISSION, |) | |
| |) | |
| Petitioner, |) | Civil Action No. 3:15-CV-00452 |
| v. |) | |
| |) | |
| POWHATAN ENERGY FUND, LLC, |) | |
| HOULIAN "ALAN" CHEN, |) | |
| HEEP FUND, INC., and |) | Hon. M. Hannah Lauck |
| CU FUND, INC. |) | |
| |) | |
| Respondents. |) | |

**NOTICE OF FILING OF ADMINISTRATIVE RECORD BY
PETITIONER FEDERAL ENERGY REGULATORY COMMISSION**

The Petitioner, Federal Energy Regulatory Commission ("FERC," "Commission"), pursuant to the Clerk's instructions, and per the Commission's prior notice to Respondents, hereby files the Administrative Record in this case.¹ The Administrative Record consists of the full record before the Commission when it issued the Order Assessing Civil Penalties that it has petitioned this Court to affirm. The background and contents of the Administrative Record are discussed below.

Background

In this matter, Petitioner asks this Court to affirm an order imposing penalties. ECF 1 at ¶ 1 and Ex. 1 (Order Assessing Penalties), AR Tab 40. The Commission issued the Order Assessing Penalties on May 29, 2015, concluding an adversarial proceeding (the "Show Cause

¹ Petitioner acknowledges that Respondents dispute the correctness of the term "Administrative Record" to describe the materials filed today.

Proceeding” or “Proceeding”) in Docket No. IN15-3-000, commenced by the Commission’s issuance of an order to show cause on December 17, 2014.² ECF 1, ¶ 3 (Petition) and Ex. 2 (Order to Show Cause), AR Tabs 14, 16. The Show Cause Order directed Respondents “to show cause why they should not be found to have violated section 1c.2 of the Commission’s regulations and section 222 of the Federal Power Act (FPA) by engaging in fraudulent Up To Congestion (UTC) transactions in PJM Interconnection L.L.C.’s energy markets.” ECF 1, Ex. 2 at P 1, AR_000393. During the Show Cause Proceeding, as required by Commission rules, the Enforcement staff who investigated Respondents did not participate in the Commission’s deliberations. ECF 1, ¶ 57, *and see* AR Tab 15 (designating decisional staff).

The Commission initiated the Show Cause Proceeding following a multiyear investigation by its Enforcement staff (under FERC Docket No. IN10-5-000) into certain trading practices in the PJM regional wholesale electricity market during the summer of 2010. ECF 1 at ¶ 3, AR Tab 1 (order initiating formal investigation). The investigation examined the conduct both of Respondents and of certain other market participants.

During the investigation, the Commission’s Enforcement staff requested and received large amounts of data, documents, and interrogatory responses; Enforcement staff also took sworn testimony from Chen and from principals of Powhatan, as well as from third parties. *See* AR Tabs 56-85 (data requests and responses), AR Tabs 43-55 (investigative testimony). In the course of the investigation, Respondents also made several submissions defending their conduct.³ *See* AR Tabs 2, 3, 4, 5, 8, 9, 12, and 13 (Respondents’ investigative submissions). All

² The Order to Show Cause was revised on December 18, 2014 to make explicit that Respondents were being called upon to disgorge unjust profits with interest. AR Tab 16.

³ The Commission’s Rules Relating to Investigations provide that, “[a]ny person may, at any time during the course of an investigation, submit documents, statements of fact or memoranda

of these materials together (“Investigative Materials”) were provided to Respondents and filed with the Commission in the Show Cause Proceeding.

In the Show Cause Proceeding, Respondents were directed to “file an answer . . . showing cause why their alleged violation should not warrant the assessment of civil penalties in the amounts described in Paragraph 1 of this order . . .,” and instructed that the answer “should address any matter, legal, factual or procedural, that they would urge in the Commission’s consideration of this matter.” Order to Show Cause Ordering Paragraphs (B) and (C), AR_000396. Respondents made numerous filings in the Show Cause Proceeding. *See* AR Tabs 17, 21, 22, 25, 28, 29, 31, 32, 36, 38, and 39.

As discussed in greater detail below, the Administrative Record being filed today consists of the materials filed by the Commission’s Enforcement litigation staff and by Respondents in the Show Cause Proceeding as well as the Commission’s orders issued in that proceeding. During that Proceeding, Enforcement staff filed the Investigative Materials received from Respondents and that portion of materials received from third parties pertaining to Respondents’ conduct.⁴ AR Tabs 20, 35. The Investigative Materials were filed with the Commission on a non-public basis and were provided to Respondents.

Organization and Contents

The Administrative Record is being filed both in electronic form and (to the extent practicable) in hard copy. Except for certain voluminous data which would not be useful in hard copy format and that are, in any event, contained in the electronic copy of the Administrative

of law for the purpose of explaining said person’s position or furnishing evidence which said person considers relevant regarding the matters under investigation.” 18 C.F.R. § 1b.18.

⁴ Investigative Materials received from third parties not pertaining to Respondents’ conduct were not filed with the Commission, and in some instances, information pertaining only to the trading of other market participants was redacted from the materials filed with the Commission.

Record,⁵ the hard copy materials (which are Bates numbered with an “AR” prefix), include all materials cited by the Commission in its Order Assessing Penalties. The electronically-filed materials include all materials filed in the Show Cause Proceeding, regardless of whether or not they were cited or relied upon by any party. Both formats are discussed further below.

The materials being provided in hard copy include (1) orders issued and filings made in the Show Cause Proceeding (Docket No. IN15-3-000),⁶ and (2) other materials relied on by the parties⁷ in their pleadings and submissions before the Commission or by the Commission in its Orders. For example, all parties and the Commission cited publicly-available PJM pricing data, but no party filed those public data in the Show Cause Proceeding. For the Court’s convenience, we include those data as part of the Administrative Record (at AR Tabs 241-242).

The basic organization of the Administrative Record, described in greater detail in the attached Administrative Index (Attachment A), is as follows:

- (1) The Show Cause Proceeding, Docket No. IN15-3-000 (AR Tabs 1 to 42): This category of materials includes all filings made by the parties, regardless of

⁵ The exceptions are PJM LMP pricing data (discussed further below) and Respondents’ transactional records. Respondents’ transactional records can be found electronically at AR Tab 035C, Att. A in the enclosed flash drive. They were provided to Respondents on December 18, 2014, but due to a technical error, were omitted from the January 2, 2015 filing of the investigative record. They were filed in a supplement to that record on March 3, 2015. *See* AR Tab 35.

⁶ This includes attachments to filings with the exception of (a) the voluminous non-public submissions of investigative materials and (b) voice recordings, both of which are being submitted electronically. In addition, unofficial transcripts of the voice recordings are being filed in hard copy.

⁷ Respondents and Enforcement staff are referred to here for convenience as “the parties.” The Commission does not use the term “parties” to refer to participants in enforcement actions such as show cause proceedings, however, to underscore the fact that interventions are not generally permitted in such actions. *See Houlian Chen et al.*, 153 FERC ¶ 61,090 at P 5 & n.14 (2015) (AR_002509), *citing Ex Parte Contacts and Separation of Functions*, Order No. 718, 125 FERC ¶ 61,063 (2008).

whether or not they were accepted by the Commission, as well as all orders issued by the Commission.⁸ Enforcement staff filed Investigative Materials as non-public attachments to filings made on January 2, 2015, and supplemented March 3, 2015. These voluminous formerly non-public Investigative Materials are being filed in electronic format only; otherwise, all attachments to filings are provided in hard copy as well as electronically.

- (2) Investigative Testimony (AR Tabs 43 to 55): This sworn testimony by the Respondents and third parties was gathered during the investigation and filed with the Commission in the Show Cause Proceeding as part of the Investigative Materials. Since all parties (and the Commission in its Order Assessing Penalties) cited to this testimony, for the convenience of the Court, the entire transcripts of testimony cited are being filed in hard copy as part of this Administrative Record.
- (3) Data Requests and Responses (AR Tabs 56 to 85): As with the testimony, this material (narrative responses, document productions, and trading data from the Respondents and third parties as submitted to Enforcement staff) was included among the Investigative Materials filed with the Commission in the Show Cause proceeding. The narrative requests and responses are provided both electronically and in hard copy. Documents produced in response to such requests are provided electronically; hard copies are provided only to the extent that they were cited by the parties or by the Commission.

⁸ In the Order Assessing Penalties, AR Tab 40, the Commission rejected two of Chen's filings. *See* Order Assessing Penalties at P 33 & n.72. These rejected filings are nonetheless included in the Administrative Record. *See* AR Tabs 36 and 39.

(4) Cited Materials (AR Tabs 86 to 242): This category includes materials produced by the parties as well as publicly-available materials, such as FERC Orders, case law, and online public materials.⁹ To the extent that the parties or the Commission cited specific documents in their filings or orders in the Show Cause Proceeding, those documents are included here for the Court's convenience, though they are also available elsewhere in the Administrative Record.

Redactions and Formatting

Federal and Local Rules exempt records of administrative proceedings from the redaction requirements that apply in other cases. *See* L.R. 7(C)(1) (redactions governed by Fed. R. Civ. P. 5.2) and Fed. R. Civ. P. 5.2(b)(2) (“[t]he redaction requirement does not apply to . . . the record of an administrative or agency proceeding”). As a courtesy to Respondents, however, we have redacted certain materials in this Administrative Record. Specifically, we have diligently sought to redact the following categories of materials: (1) Social Security Numbers (other than the last four digits), (2) Taxpayer ID numbers (other than the last four digits), (3) financial account numbers (other than the last four digits), (4) names of minor children, and (5) dates of birth (other than the year).

Some documents had to be re-formatted because the redactions could not be implemented in the documents' “native” formats (e.g., Microsoft Word documents could not be redacted without substantively altering them, so they were converted to a format that allowed redaction).¹⁰

⁹ To reduce the volume of the Administrative Record, materials that are readily publicly available (e.g., reported case law) were not indexed, nor has a copy been provided in the filed Administrative Record. Less readily available, but nonetheless public, materials have been indexed, and a copy provided, for the convenience of the Court and the parties.

¹⁰ Similarly, when a document appeared in the Investigative Materials in more than one format (e.g., Microsoft Word format and Tagged Image Format) and only one format was susceptible to redaction, we removed the duplicate “native version”.

Other than the redactions, the re-formatted documents are identical to the documents in native format. The Commission stands ready to provide the Court, upon request, with unredacted documents in their original format.

Although Respondents have had the material in the Administrative Record since the Show Cause Proceeding (and much of it before then), the Commission provided them with an electronic version of the Administrative Record on or about November 18, 2015. The November 18, 2015 cover letter explained the Commission's view of the proper scope of redactions; asked Respondents to identify material subject to such redaction; and invited Respondents to propose additional categories of material for potential redaction. Respondent Powhatan declined to do so. *See* Attachment B (correspondence among the parties regarding redactions to the Administrative Record). Respondent Chen stated generally that materials provided in response to a December 6, 2013 subpoena "contain confidential personal financial information that should not be publicly disclosed." *See* Attachment B.

Petitioner has diligently endeavored to implement redactions of the four categories of sensitive material described above, not only to the materials referenced in Chen's letter, but to all the materials in the Administrative Record. As mentioned above, the Commission's implementation of the requested redactions is a voluntary accommodation to Respondents, since the Rules do not require redactions of the record of an agency proceeding. *See* discussion above. Nevertheless, should Respondents identify sensitive personal information that has inadvertently not been redacted, Petitioner will seek leave to file corrected versions of the materials.

Respectfully submitted,

FEDERAL ENERGY REGULATORY
COMMISSION

Larry R. Parkinson

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2015, I filed the foregoing with the Clerk of Court, using the CM/ECF system, which will send a notification of such filing to counsel of record. I further certify that I have provided an electronic copy of the Administrative Record, as filed in hard copy with the Clerk's office, to the respondents, via United Parcel Service, to the addresses of record.

/s/

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