

Attachment B

Correspondence Regarding Potential Redactions to the Administrative Record

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



November 18, 2015

William M. McSwain, Esq.
Drinker Biddle & Reath LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996
william.mcswain@dbr.com

John N. Estes III, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005
john.estes@skadden.com

BY UPS AND COURIER

Re: Administrative Record, *Houlian Chen, Powhatan Energy Fund, LLC, HEEP Fund, Inc., CU Fund, Inc.*, Docket No. IN15-3-000

Dear Mr. Estes and Mr. McSwain:

We are forwarding to you in advance of our filing with the District Court in Civil Case No. 3:15-CV-00452 (the District Court Proceeding) a flash drive containing the administrative record compiled in FERC Docket No. IN15-3-000 (the "FERC Proceeding"). It contains material that was placed before the Commission in the FERC Proceeding. To the extent it is not already publicly available, all of this material has either been provided to, or was produced by, your clients.

We are also enclosing a copy of the index of that administrative record which we intend to file in the District Court Proceeding.

The local and federal rules call for the public filing of administrative records. *See* L.R. 7(C)(1) (redactions governed by Fed. R. Civ. P. 5.2) and Fed. R. Civ. P. 5.2(b)(2) (redactions to administrative records not required). To comply with this directive, we intend to file a complete copy of the administrative record with the court on a public basis – including those materials that were filed on a non-public basis in the FERC Proceeding. Because we will be filing this material publicly, we wanted you to have an opportunity to review the materials produced by your respective clients in connection with our investigation. In our view, the local and Federal rules permit the redaction of four types of information: 1) social security numbers, 2) dates of birth, 3) the names of minors, and 4) financial account numbers. *See* L.R. 7(C)(1) and Fed. R. Civ. P. 5.2(a).

Please identify by name the file in which the material is found and the folder(s) in which that file is located. To ensure that we accurately identify the material to which you refer, please send a copy of the file to the undersigned by email with the proposed redaction marked. Please let us know if you wish to propose redactions of potentially confidential information not within the four identified categories. With respect to such proposed redactions, please provide an explanation of why such material may nonetheless be redacted under the rules. We will review any such proposals, and consider whether we agree that such redactions are appropriate.

Please provide proposed redactions and explanations (if any) within two weeks (14 days) of this letter.

Sincerely,

/s/

Samuel G. Backfield
Steven C. Tabackman
Daniel T. Lloyd
Division of Investigations
Office of Enforcement
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-8932
samuel.backfield@ferc.gov

cc: David Applebaum, Esq.
John S. Davis, V, Esq. (without enclosures)

Enclosures

Samuel Backfield

From: Samuel Backfield
Sent: Friday, November 20, 2015 3:37 PM
To: john.estes@skadden.com; 'William.McSwain@dbr.com'
Cc: 'Davis, John S'; Steven Tabackman; Daniel Lloyd; Nooshin Sherkat
Subject: RE: Correspondence re Administrative Record

Importance: High

It has come to my attention that the documents you received on the flash drives yesterday may contain material that should not have been included with it. Please return the flash drives you received as soon as possible, and destroy all copies. Please confirm by email when you have done so.

We will provide replacement flash drives soon.

Thank you.

SGB

Samuel G. Backfield, Esq.
Office of Enforcement
Federal Energy Regulatory Commission
888 First Street N.E.
Washington, DC 20426
Tel. 202.502.8932
Fax 202.208.0057

From: Samuel Backfield
Sent: Wednesday, November 18, 2015 5:23 PM
To: john.estes@skadden.com; William.McSwain@dbr.com
Cc: 'Davis, John S'; Steven Tabackman; Daniel Lloyd; Nooshin Sherkat; David Applebaum
Subject: Correspondence re Administrative Record

Dear Mr. Estes and Mr. McSwain,

Please see the attached correspondence. Hard copies accompanying flash drives containing the Administrative Record are being sent to you by UPS for delivery Thursday.

Sincerely,

Samuel G. Backfield, Esq.
Office of Enforcement
Federal Energy Regulatory Commission
888 First Street N.E.
Washington, DC 20426
Tel. 202.502.8932
Fax 202.208.0057

<< File: 20151118 Final AR Cvr Ltr 1714.pdf >> << File: 20151118 AR Index 1657.pdf >>

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



November 24, 2015

William M. McSwain, Esq.
Drinker Biddle & Reath LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996
william.mcswain@dbr.com

John N. Estes III, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005
john.estes@skadden.com

Re: Administrative Record, Houlian Chen, Powhatan Energy Fund, LLC, HEEP Fund, Inc., CU Fund, Inc., Docket No. IN15-3-000

Dear Mr. Estes and Mr. McSwain:

Enclosed please find a flash drive containing the corrected administrative record compiled in FERC Docket No. IN15-3-000.

Consistent with our letter of November 18, 2015, we agree to redact the following categories of information from the corrected administrative record: 1) social security numbers, 2) dates of birth, 3) the names of minors, and 4) financial account numbers. *See* L.R. 7(C)(1) and Fed. R. Civ. P. 5.2(a).

To the extent you believe additional types or categories of information

should also be redacted, please identify by name the file in which the material is found and the folder(s) in which that file is located. To ensure that we accurately identify the material to which you refer, please send a copy of the file to the undersigned by email with the proposed redaction marked.

Since the administrative record is made up primarily of documents collected from your clients and since the corrected version is largely the same as the version transmitted to you on November 18, please provide proposed redactions and draft joint motion (if any) within two weeks (14 days) of that letter (on or before December 2, 2015).

Sincerely,

/s/

Samuel G. Backfield
Steven C. Tabackman
Daniel T. Lloyd
Division of Investigations
Office of Enforcement
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-8932
samuel.backfield@ferc.gov

cc: John S. Davis, V, Esq. (without enclosures)
Nooshin Sherkat

Enclosures

Samuel Backfield

From: Samuel Backfield
Sent: Tuesday, December 08, 2015 12:19 PM
To: Daniel Lloyd; McSwain, William M.; john.estes@skadden.com
Cc: Davis, John S; Steven Tabackman; Nooshin Sherkat
Subject: RE: Correspondence re Administrative Record

Gentlemen:

We have not received any proposed redactions from either of you. Please advise whether you intend to send any. If you do, please let us know how you intend to deliver them (e.g., by email, by courier). We want to make sure that we receive them in time to implement them.

Also, Mr. McSwain, please confirm the method you used to send us back the original flash drive that we requested be returned. We have still not received it.

Thanks,
SGB

Samuel G. Backfield, Esq.
Office of Enforcement
Federal Energy Regulatory Commission
888 First Street N.E.
Washington, DC 20426
Tel. 202.502.8932
Fax 202.208.0057

From: Daniel Lloyd
Sent: Wednesday, November 25, 2015 10:53 AM
To: McSwain, William M.; Samuel Backfield
Cc: Davis, John S; Steven Tabackman; Nooshin Sherkat; john.estes@skadden.com
Subject: RE: Correspondence re Administrative Record

Bill,

We are happy to receive proposed redactions as late as December 8, 2015. But, in light of the Court's order of earlier this morning, it is likely in all of the parties' interests to complete the redaction of the Administrative Record as soon as practicable. So, please feel free to send us any proposed redactions at your earliest convenience, but no later than December 8th.

Thanks,

Daniel

From: McSwain, William M. [<mailto:William.McSwain@dbr.com>]
Sent: Tuesday, November 24, 2015 2:39 PM
To: Daniel Lloyd; Samuel Backfield
Cc: Davis, John S; Steven Tabackman; Nooshin Sherkat; john.estes@skadden.com
Subject: RE: Correspondence re Administrative Record

Daniel:

I write on behalf of all defendants. We cooperated with your request to return the flashdrives and not examine the materials, so it makes no sense that the original deadline to review the materials would apply. The defendants cannot have their time to review the materials reduced just because FERC made a mistake. Your second letter (unlike the first) also assumes that defendants have the responsibility to provide a draft joint motion, which is not our responsibility to provide. We will go through the materials, identify proposed redactions and let you know what they are.

Please confirm that the defendants will have until December 8th to get back to you regarding what you have designated as the record.

Thanks,
Bill

William M. McSwain
Drinker Biddle & Reath LLP
One Logan Square, Ste. 2000
Philadelphia, PA 19103-6996
(215) 988-2775 office
(215) 988-2757 fax
William.McSwain@dbr.com
www.drinkerbiddle.com

From: Daniel Lloyd [<mailto:Daniel.Lloyd@ferc.gov>]
Sent: Tuesday, November 24, 2015 1:57 PM
To: Samuel Backfield; john.estes@skadden.com; McSwain, William M.
Cc: Davis, John S; Steven Tabackman; Nooshin Sherkat
Subject: RE: Correspondence re Administrative Record

Dear Mr. Estes and Mr. McSwain,

Please see the attached correspondence. Hard copies and flash drives containing the corrected Administrative Record have been sent to you for delivery by tomorrow.

Sincerely,

Daniel T. Lloyd

Attorney-Advisor | Office of Enforcement | Division of Investigations
Federal Energy Regulatory Commission | 888 1st Street NE | Washington, DC 20426
Phone: (202) 502-6514 | Fax: (202) 208-6514 | Email: Daniel.Lloyd@ferc.gov

From: Samuel Backfield
Sent: Wednesday, November 18, 2015 5:23 PM
To: john.estes@skadden.com; William.McSwain@dbr.com
Cc: Davis, John S; Steven Tabackman; Daniel Lloyd; Nooshin Sherkat; David Applebaum
Subject: Correspondence re Administrative Record

Dear Mr. Estes and Mr. McSwain,

Please see the attached correspondence. Hard copies accompanying flash drives containing the Administrative Record are being sent to you by UPS for delivery Thursday.

Sincerely,

Samuel G. Backfield, Esq.
Office of Enforcement
Federal Energy Regulatory Commission
888 First Street N.E.
Washington, DC 20426
Tel. 202.502.8932
Fax 202.208.0057

<< File: 20151118 Final AR Cvr Ltr 1714.pdf >> << File: 20151118 AR Index 1657.pdf >>

Drinker Biddle & Reath LLP is a Delaware limited liability partnership. The partner responsible for the firm's Princeton office is Jonathan I. Epstein, and the partner responsible for the firm's Florham Park office is Andrew B. Joseph.

This message contains information which may be confidential and privileged. Unless you are the intended addressee (or authorized to receive for the intended addressee), you may not use, copy or disclose to anyone the message or any information contained in the message. If you have received the message in error, please advise the sender at Drinker Biddle & Reath LLP by reply e-mail and delete the message. Thank you very much.



William M. McSwain
215-988-2775 Direct
215-988-2757 Fax
william.mcswain@dbr.com

Law Offices

One Logan Square, Ste. 2000
Philadelphia, PA
19103-6996
215-988-2700 phone
215-988-2757 fax
www.drinkerbiddle.com

CALIFORNIA
DELAWARE
ILLINOIS
NEW JERSEY
NEW YORK
PENNSYLVANIA
WASHINGTON DC
WISCONSIN

December 8, 2015

Via Email

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

Re: Federal Energy Regulatory Commission v. Powhatan Energy Fund LLC, et al., No. 3:15-cv-00452-MHL (E.D. Va.)

Dear Gentlemen:

In light of the Court’s Order of November 25, 2015, Powhatan objects to your filing of any supposed administrative record at this time. The parties obviously have a disagreement about whether such a record even exists – you think it does (and claim that there has already been an “adversarial adjudicative proceeding,” Compl. ¶ 8) and the defendants think it does not (because there was never any adjudicative proceeding, nor any hearing of any kind, given that defendants chose *de novo* review in District Court).

The Order establishes a mechanism for resolving this dispute. The parties are to brief the procedures mandated by 16 U.S.C. § 823b(d)(3)(B) – which would necessarily include addressing whether there is any supposed administrative record – at least seven business days before the pretrial conference, then meet and confer and come to the conference with a joint statement as to disagreements that continue to exist. Thus, it makes no sense for you to pre-empt this process by filing a so-called administrative record before the Court decides whether such a record exists.

Moreover, even if it were appropriate to file such a record, the parties would first have to negotiate and present to the Court a proposed protective order before you filed any record, given the confidential nature of much of the material that you want to file. This goes far beyond just personal identifiers or financial account numbers, and includes confidential and proprietary business information. Such a protective order would allow the parties to designate certain materials as confidential (and thus to be filed only under seal), with appropriate mechanisms in place for the parties to challenge any such designations and for the Court to rule on them. The parties have not even begun that process. Instead, in your November 18, 2015 letter to defense counsel, you suggested that if the defendants wish to designate any materials as confidential, the defendants owe

Established 1849

DrinkerBiddle&Reath
L L P

Samuel G. Backfield, Steven C. Tabackman and Daniel T. Lloyd
December 8, 2015
Page 2

you an explanation as to why, and then you would unilaterally decide what is confidential and what is not. That is not the way this process should work.

Finally, especially given your blunder in the handling of the first flash drive you sent to the defendants that was supposed to contain what you considered to be the administrative record, Powhatan has concerns about the proper handling of confidential materials in this case. This highlights the importance of your taking proper, careful steps before rushing forward to publicly file a wave of documents that might not need to be filed at all. Should you plow forward with your plan to file your version of the so-called record without giving the Court a chance to rule on the matter and without proper protections in place, Powhatan and its principals will vigorously enforce their rights to address any resulting damage to their businesses or reputations.

Sincerely yours,



William M. McSwain

WMM/mb

cc: John N. Estes III (via email)
Donna M. Byrne (via email)
John Staige Davis, V (via email)



William M. McSwain
215-988-2775 Direct
215-988-2757 Fax
william.mcswain@dbr.com

Law Offices

One Logan Square, Ste. 2000
Philadelphia, PA
19103-6996
215-988-2700 phone
215-988-2757 fax
www.drinkerbiddle.com

CALIFORNIA
DELAWARE
ILLINOIS
NEW JERSEY
NEW YORK
PENNSYLVANIA
WASHINGTON DC
WISCONSIN

December 8, 2015

Via Email

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

Re: Federal Energy Regulatory Commission v. Powhatan Energy Fund LLC, et al., No. 3:15-cv-00452-MHL (E.D. Va.)

Dear Gentlemen:

In light of the Court’s Order of November 25, 2015, Powhatan objects to your filing of any supposed administrative record at this time. The parties obviously have a disagreement about whether such a record even exists – you think it does (and claim that there has already been an “adversarial adjudicative proceeding,” Compl. ¶ 8) and the defendants think it does not (because there was never any adjudicative proceeding, nor any hearing of any kind, given that defendants chose *de novo* review in District Court).

The Order establishes a mechanism for resolving this dispute. The parties are to brief the procedures mandated by 16 U.S.C. § 823b(d)(3)(B) – which would necessarily include addressing whether there is any supposed administrative record – at least seven business days before the pretrial conference, then meet and confer and come to the conference with a joint statement as to disagreements that continue to exist. Thus, it makes no sense for you to pre-empt this process by filing a so-called administrative record before the Court decides whether such a record exists.

Moreover, even if it were appropriate to file such a record, the parties would first have to negotiate and present to the Court a proposed protective order before you filed any record, given the confidential nature of much of the material that you want to file. This goes far beyond just personal identifiers or financial account numbers, and includes confidential and proprietary business information. Such a protective order would allow the parties to designate certain materials as confidential (and thus to be filed only under seal), with appropriate mechanisms in place for the parties to challenge any such designations and for the Court to rule on them. The parties have not even begun that process. Instead, in your November 18, 2015 letter to defense counsel, you suggested that if the defendants wish to designate any materials as confidential, the defendants owe

Established 1849

DrinkerBiddle&Reath
L L P

Samuel G. Backfield, Steven C. Tabackman and Daniel T. Lloyd
December 8, 2015
Page 2

you an explanation as to why, and then you would unilaterally decide what is confidential and what is not. That is not the way this process should work.

Finally, especially given your blunder in the handling of the first flash drive you sent to the defendants that was supposed to contain what you considered to be the administrative record, Powhatan has concerns about the proper handling of confidential materials in this case. This highlights the importance of your taking proper, careful steps before rushing forward to publicly file a wave of documents that might not need to be filed at all. Should you plow forward with your plan to file your version of the so-called record without giving the Court a chance to rule on the matter and without proper protections in place, Powhatan and its principals will vigorously enforce their rights to address any resulting damage to their businesses or reputations.

Sincerely yours,



William M. McSwain

WMM/mb

cc: John N. Estes III (via email)
Donna M. Byrne (via email)
John Staige Davis, V (via email)

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



December 9, 2015

William M. McSwain, Esq.
Drinker Biddle & Reath LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996
william.mcswain@dbr.com

Re: Your Letter of 4:59pm, December 8, 2015

Dear Mr. McSwain:

We have received your letter of December 8, 2015 regarding the Administrative Record.

Although you have declined the opportunity to identify any materials you believe should be redacted from the Administrative Record, we have nonetheless endeavored to redact sensitive information, consistent with our letters of November 18 and 24, 2015. Our decision to apply redactions in no way alters our position that redactions are not required under the applicable rules.

We respectfully disagree with virtually the entire substance of your letter, but in particular your contention that filing the Administrative Record at this point is improper. Filing the Administrative Record at this time is fully consistent with the substance of the November 19, 2015 teleconference at which the Court's clerk expressed the expectation that the Administrative Record would be filed in three weeks and we expressed our intention to do so. We see no basis in the Court's November 25, 2015 order to conclude that the Court is no longer expecting the Administrative Record to be filed this week.

We intend to file the Administrative Record on December 10, 2015, consistent with our representation to you, your co-counsel, and the Court's clerk during the November 19, 2015 teleconference.

You will receive an electronic copy of the Administrative Record after it has been filed.

Sincerely,

/s/

Samuel G. Backfield
Steven C. Tabackman
Daniel T. Lloyd
Division of Investigations
Office of Enforcement
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-8932
samuel.backfield@ferc.gov

cc: John S. Davis, V, Esq.
John N. Estes, III, Esq.

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



December 9, 2015

John N. Estes, Esq.
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005
john.estes@skadden.com

Re: Your Email of 5:02 pm, December 8, 2015

Dear Mr. Estes:

We are in receipt of your letter of December 8, 2015, in which you specifically point out the need to “redact all documents that [Mr. Chen] produced to you in response to [Enforcement’s] subpoena dated December 6, 2013.” The Commission has redacted all personally identifying information listed in Federal Rule of Civil Procedure 5.2 from the documents referenced in your letter. As a courtesy to Respondents, the Commission has made similar redactions to the remainder of the Administrative Record.

With respect to the points raised by Mr. McSwain in his letter of December 8, 2015, to which you have noted your agreement, we have responded to him by separate letter this date, a copy of which is attached.

Sincerely,

/s/

Samuel G. Backfield
Steven C. Tabackman
Daniel T. Lloyd
Division of Investigations
Office of Enforcement
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-8932
samuel.backfield@ferc.gov

cc: William M. McSwain, Esq.