UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Houlian Chen, Powhatan Energy Fund, LLC, HEEP Fund, LLC, and CU Fund, Inc.	))	Docket No. IN15-3-000

EXPEDITED MOTION FOR A TWO-WEEK EXTENSION OF TIME

The above-captioned respondents hereby move for a two-week extension of time because of Enforcement's failure to produce material that should have been provided under the Commission's *Brady* policy.[1] We called Enforcement Staff around mid-day on Friday to explore their failure to produce the material discussed below, and to determine whether they would oppose this motion. We finally heard back around 5 p.m. yesterday, and understand that they will oppose this motion because we refuse to toll the statute of limitations in exchange for their non-opposition. We explain the fatal flaws in their position below. Since our response to the Show Cause Order currently is due in six days, we ask that Enforcement answer this motion today, January 27, and that, if possible, the Commission act on it by the next day, January 28.

Three grounds support this motion. *First*, on information and belief, Enforcement possesses a voice tape, produced to it in another investigation, in which Dr. Joe Bowring of Monitoring Analytics (the PJM Independent Market Monitor) talks to traders at another company that engaged in transactions similar to the ones Enforcement challenges here. On that tape, Dr. Bowring says that the trades did not violate the rules, that he understands why the traders engaged in them, and that the rules need to be changed to remove the incentives that drove the trading. He also says that he would not refer the trading conduct to Enforcement if the traders stopped the trading in question.

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[1] *Policy Statement on Disclosure of Exculpatory Materials*, 129 FERC ¶ 61,248 (2009) (*Brady* Policy).

That last point is key because the PJM tariff *requires* Dr. Bowring to refer trading that he thinks might be market manipulation. The PJM OATT, Attachment M, Section IV.I.1, requires Dr. Bowring to "immediately" inform Enforcement if he has identified a "potential Market Violation," including a potential violation of the Commission's anti-manipulation rule, and follow up with a more detailed "referral." Therefore, any statement that he would not refer the traders if they stopped the trades at issue suggests that Dr. Bowring must have thought, at that time, that the trading at issue was *not* market manipulation. Dr. Bowring made the same "will not refer" promise to Dr. Chen, but we do not have that conversation on tape.

The Bowring tape plainly falls within the Commission's *Brady* policy, which requires Enforcement to disclose all evidence that is "favorable to an accused" or "would tend to exculpate him or reduce the penalty." *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963). The U.S. Supreme Court has interpreted *Brady* to apply to evidence that is "material" to such matters, *see Moore v. Illinois*, 408 U.S. 786, 794-95 (1972), and found that materiality is an "imprecise standard" and "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete," *United States v. Agurs*, 427 U.S. 97, 108 (1976). Accordingly, questions of materiality should be resolved in favor of disclosure of *Brady* material. *Id*.

When we requested the production of *Brady* material in August 2014, we expressly sought, among other things, any "[t]ape recordings between PJM and/or its IMM and any market participant regarding up-to congestion transactions." Attachment 1 at 2. In response, Enforcement claimed that the various categories of material we sought were not, in fact, *Brady* material. *See* Attachment 2. We do not see how that possibly could be the case.

Enforcement's obligation to produce the Bowring tape is all the more pointed here because Enforcement has chosen to stress its interpretation of what another trader, Bob Steele,

allegedly thought about the trading at issue. *See Show Cause Order* App. A at 32. We do not understand how Enforcement could have concluded that it was relevant to focus the Commission on the alleged perspective of a single random trader, but *not* relevant to tell the Commission—or us—about Dr. Bowring's contemporaneous perspective, preserved on tape. Even if Enforcement does not agree that the Bowring tape is exculpatory, the Commission's policy covers "exculpatory or *potentially exculpatory* evidence that is '*material* to guilt or punishment.'" *Brady* Policy at P 3 (emphasis added). Fundamental fairness and the Commission's *Brady* Policy require Enforcement to immediately produce this tape to us, along with any similar material, and that we receive a modest two-week extension to assess it and use it in our response.

Second, we also asked in our *Brady* request for evidence of (among other things) other PJM market participants engaging in up-to-congestion transactions influenced by transmission loss credits. In its report to the Commission, Enforcement relies on an August 20, 2010 email from an energy trader. *See Show Cause Order* App. A at 31-32, n.182. The email states an "understanding" that a "market participant," thought "perhaps" to be Dr. Chen, had engaged in certain transactions, and that "[b]ased on the transparency that exists," certain other traders were able to "figure[] out" and replicate the transactions. If Enforcement possesses other materials, beyond the Bowring tape, related to interactions by the PJM market monitor (or FERC Enforcement) with other market participants engaged in transactions similar to those at issue in this proceeding, those materials are relevant to (among other things) demonstrating that the transactions executed by Alan Chen were not deceitful or manipulative. They therefore fall squarely within the Commission's *Brady* Policy and should have been produced.

Third, on January 23, PJM issued a market notice (reproduced as Attachment 3), indicating that on January 20 it provided "confidential member information" to Enforcement. As

PJM explained, on January 6, Enforcement asked it to "simulate" a reallocation of transmission loss credits, removing certain specific trades "transacted by an individual trader in specified accounts." As PJM further explained, on January 22, it received notice from Enforcement that Enforcement planned to share the resulting simulations with "certain third parties."

Based on the information available to us, it appears that Enforcement has asked for PJM to perform these simulations for purposes of addressing alleged market harm related to the trades at issue. That request could have been made years ago. Instead it was made *after* the Show Cause Order issued, while we were preparing our response. We understand from Enforcement that one pacing item for potential production of this information is PJM's need to give a five-day notice period to its members, a period that started last Friday. Because our extension is fully justified based solely on Enforcement's failure to turn over the Bowring tape, there should be ample time for the five-day period to run. Without seeing the material, it is difficult for us to say whether it falls within the four corners of the Commission's *Brady* Policy. But given that the other materials discussed above plainly do, it seems efficient to deal with it at the same time.

Enforcement opposition will be unavailing. The short delay we seek is driven solely by Enforcement's own strategic choices. Enforcement chose not to produce the Bowring tape to us, even though we directly asked for any such tapes in August 2014.

In sum, for these reasons, we respectfully request that the Commission grant a two-week extension of time, making our answers due February 16, 2015. We base that date on the assumption that Enforcement will promptly produce the Bowring tape, at a minimum. If they fail to do so, and/or fail to produce the other material we seek, we reserve the right to seek further relief.

Respectfully submitted,

/s/
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/s/
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Counsel for Alan Chen, HEEP Fund and CU Fund

January 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing motion has been served upon counsel for FERC Enforcement in the above-referenced proceeding.

Dated at Washington, D.C., on this 27th day of January, 2015.

/s/

Amber Thornhill
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Meagher & Flom LLP
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ATTACHMENT 1

August 27, 2014

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

Dear Mr. Tabackman:

This letter is in connection with the Office of Enforcement's investigation ("Investigation") of Powhatan Energy Fund LLC ("Powhatan") and Dr. Houlian (Alan) Chen, Heep Fund Inc. and CU Fund Inc. ("Dr. Chen") in *In Re PJM Up-to Congestion Transactions*, Docket No. IN10-5-000. Powhatan and Dr. Chen 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") or, in the alternative, confirm that Staff does not possess any such materials.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court held that the Due Process Clause obligates government prosecutors to disclose all evidence that is "favorable to an accused" or that "would tend to exculpate him or reduce the penalty." Id. at 87-88. *Brady* therefore governs both information that bears on guilt or innocence and information relevant to punishment (sentencing). *See id*. at 85-86 (remanding the case for a new trial on whether the defendant should receive the death penalty or life imprisonment). The Court has interpreted *Brady* to apply to evidence that is "material" to such matters, *see Moore v. Illinois*, 408 U.S. 786, 794-95 (1972), and has explained that materiality is an "imprecise standard" and "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete," *United States v. Agurs*, 427 U.S. 97, 108 (1976). Accordingly, questions of materiality must be resolved in favor of disclosure. *Id.*

Although *Brady* was a criminal case, the Commission has confirmed that *Brady* and its progeny apply to Section 1b investigations and administrative enforcement actions under Part 385 of the Commission's regulations. 129 FERC ¶ 61,248 at P 7. In describing the disclosure process, the Commission has explained that "Staff will scrutinize materials it receives from sources other than the investigative subject(s) for material that would be required to be disclosed under *Brady*. Any such materials or information that are not known to be in the subject's possession *shall be provided to the subject*." *Id.* at P 9 (emphasis added). The Commission further confirmed that legal privileges – including, but not limited to claims of attorney-client, work-product, and deliberative process – do no preclude the disclosure of materials otherwise subject to *Brady*:

> Exculpatory materials or information may be contained in documents subject to Commission privilege or immunity . . . . [T]he privileged status of exculpatory material or information will not preclude the disclosure of such material or information.

Id. at P 13 (emphasis added).[1]

To date, neither Powhatan nor Dr. Chen has been provided with any data or information pursuant to the Commission's *Brady* Policy ("*Brady* material") in connection with Staff's Investigation. We believe, however, that Staff may already possess *Brady* material, including but not limited to:

- Evidence of other PJM market participants engaging in up-to congestion transactions that were influenced by transmission loss credits;
- Documents received from PJM and/or its IMM related to up-to congestion transactions and/or the Investigation, including, but not limited to, documents associated with internal deliberations within PJM and/or with its IMM as it relates to their decision to pay Powhatan in full for all of Dr. Chen's trading activities for the months of June, July and August in 2010;
- Tape recordings between PJM and/or its IMM and any PJM market participant regarding up-to congestion transactions;
- Any records related to closed Commission meetings related to up-to congestion transactions;
- Internal agency memoranda of any kind, including memoranda to the Commission or senior Staff, related to up-to congestion transactions;
- Memoranda of Commissioners related to up-to congestion transactions;

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[1] "Because *Brady* disclosure in criminal proceedings is required under the Due Process Clause, legal privileges against discovery like attorney-client, work-product, or deliberative process do not allow the government in criminal proceedings to avoid disclosure on these grounds." 129 FERC ¶ 61,248 at P 5. The Commission has stated, however, that its "*Brady* policy does not entitle respondent to disclosure of Enforcement staff's strategies, legal theories, or evaluations of evidence." *Id.* at P 14. The determination of whether "factual information, as distinct from opinion, contained in documents subject to discovery privileges or immunities constitute exculpatory material" is made by the Commission for purposes of a 1b investigation. *Id.* at PP 13-14.

- Internal agency documents prepared by the FERC's staff analyzing the issues addressed by the FERC in its March 6, 2008 Order Denying Complaint in *Black Oak Energy LLC, et al. v. PJM Interconnection LLC*, 122 FERC ¶ 61,208 ("Black Oak Order I") and September 17, 2009 Order Accepting Compliance Filing in *Black Oak Energy LLC, et al. v. PJM Interconnection LLC*, 128 FERC ¶ 61,262 ("Black Oak Order II");

- Documents prepared by the FERC's Office of Energy Market Regulation ("OEMR") or other FERC department or staff, analyzing or discussing the concept found in paragraph 51 of the Black Oak Order I that paying excess loss charges to arbitrageurs may result in arbitrageurs making "trades that would not be profitable based solely on price differentials alone." See Black Oak Order I, 122 FERC ¶ 61,208 at P 51.

- Documents prepared by the FERC's OEMR, or other FERC departments or staff, analyzing or discussing the FERC's decision to reverse Black Oak Order I and hold that PJM is required to pay arbitrageurs a proportionate share of line loss surpluses related to virtual trading;

- Documents prepared by the FERC's OEMR, or other FERC departments or staff, in preparation of issuing Black Oak Order II that analyze or discuss the FERC's conclusion in paragraph 51 of Black Oak Order I that paying excess loss charges may influence arbitrageurs virtual trades, and the ultimate effect of the FERC's decision in Black Oak Order II on that concept;

- Materials from the investigative file for Staff's investigation of Powhatan and Dr. Chen, including but not limited to:

    - Draft witness statements;

    - Staff notes of witness interviews;

    - E-mails between Staff;

    - Internal agency memoranda, including memoranda to the Commission;

    - Tape recordings and/or minutes of Commission meetings;

    - Memoranda of Commissioners.

The fact that some of these documents may not be admissible in court does not relieve the Commission and Staff of its obligation to produce them. *Brady* requires the government to produce exculpatory material – even if it is inadmissible – because it "could illuminate a path of investigation leading to admissible evidence" and "may provide information that might lead to facts that can be inquired into on cross-examination." *In re Matter of Bilello*, No. 93-5, 1997

CFTC LEXIS 244, at *33 (Oct. 10, 1997). Indeed, as the Commission has stated, its *Brady* Policy includes all evidentiary material, other than opinions, and encompasses materials that may otherwise be subject to privileges and immunities. *Id*. at P 13. Thus, any non-opinion work product produced or compiled by Staff that otherwise qualifies as *Brady* material, or can be redacted to mask opinion work-product, must be disclosed.

The examples above are illustrative and not intended to limit the scope of this request for all *Brady* material Staff may possess. Because we do not know the nature of all of the materials related to this matter that Staff may have generated or compiled, we do not know what other types of materials may be subject to *Brady* disclosure. Indeed, that is why the Commission has explained that "*Brady* is a rule of disclosure, not of discovery." *Brady* Policy at P 3, and placed an affirmative obligation on Staff to review and disclose all *Brady* materials. *Id*. at P 9.

Accordingly, for all of the foregoing reasons, we request that Staff immediately disclose all *Brady* material – *i.e.,* material that tends to exculpate or reduce any penalty assessed to Powhatan or Dr. Chen. If Staff contends that no such materials exist, or that it is not required to make a *Brady* disclosure at this time for any reason, we request that you explain this position in light of the discussion set forth above. If Staff intends to withhold any materials based on a claim of privilege, we request that you provide a description of the materials being withheld that is sufficient to permit Powhatan and Dr. Chen to evaluate the claims of privilege. This should include a basic description of the document in question (date created, type of document, author, recipient(s), subject matter), the type of privilege being claimed (attorney-client, work-product, etc.), and the basis for the claim.

We look forward to your cooperation with this request.

Very truly yours,

/s William M. McSwain
William M. McSwain
Counsel for Powhatan Energy Fund LLC

/s John N. Estes III
John N. Estes III
Counsel for Dr. Houlian (Alan) Chen, Heep Fund Inc. and CU Fund Inc.

cc: Samuel G. Backfield (via email)
James Owens (via email)
Lauren Rosenblatt (via email)

ATTACHMENT 2

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.

ATTACHMENT 3

From: David.Anders@pjm.com
Date: January 23, 2015 at 10:32:30 AM EST
To: PJM-MC@LISTSERV.PJM.COM
Subject: [PJM-MC] Notice to Stakeholders Regarding Confidential Information
Reply-To: David.Anders@pjm.com

Dear Members,

On January 20, 2015, PJM provided confidential member information to the Federal Energy Regulatory Commission's Office of Enforcement ("FERC") pursuant to section 18.17.3 of the Operating Agreement and FERC's request received on January 6, 2015. In November 2014, FERC requested PJM to simulate the re-allocation of Transmission Loss Credits for certain months in 2010 based on the removal of specific hourly day-ahead Up-to-Congestion ("UTC") Transactions transacted by an individual trader in specified accounts. On January 6, 2015, FERC Enforcement requested that PJM create spreadsheets summarizing the simulations performed by PJM ("Summary Spreadsheets"). In response to FERC's request, PJM provided documents containing confidential information to FERC on January 20, 2015 pursuant to section 18.17.3 of the Operating Agreement. On January 22, 2015, PJM received written notice from FERC that they intend to share this confidential information with certain third parties. In accordance with section 18.17.3 of the Operating Agreement, PJM is notifying Members of this pending third-party disclosure.

Should you have any questions, please contact Steven Shparber at steven.shparber@pjm.com.

Best Regards,
David Anders, PE
Director, Stakeholder Affairs, Market Services
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