

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 not 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).<sup>1</sup>

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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<sup>1</sup> "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

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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  
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*Counsel for Dr. Houlian (Alan) Chen, Heep Fund Inc. and CU Fund Inc.*

cc: Samuel G. Backfield (via email)  
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