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February 19, 2015

***Via Electronic Filing***

Chairman Cheryl A. LaFleur
Commissioner Philip D. Moeller
Commissioner Tony Clark
Commissioner Colette D. Honorable
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

*Re:* *Houlian Chen, et al.*, Docket No. IN15-3-000

Dear Chairman and Commissioners:

We write to highlight two issues in our case that arise with respect to the Commission's *ex parte* rules for post-show-cause-order enforcement proceedings.

*First*, we note that in a notice issued on December 17, 2014, the Commission designated nine individuals from the Office of Enforcement to function in an advisory role in this case, with the rest of Enforcement designated as non-decisional. That appears to be a record number of Enforcement advisory designees. While we do not know what role they are playing, or will play, it seems like that team probably was sent to the advisory side to work on a penalty assessment order in this case.

If so, that is a very different process than the Commission originally used when it first implemented its *ex parte* enforcement approach to address perceptions of unfairness related to the Commission being both prosecutor and judge in a case. At that point, back in the 2007-08 time frame, the Commission walled Enforcement off from any advisory role in the *Energy Transfer Partners* and *Amaranth/Brian Hunter* cases, the first two cases to which the *ex parte* approach applied. At that point, the group sent to the advisory side was made up of five very senior supervisors—the Director of Enforcement and the Directors of the four Divisions within the Office of Enforcement—along with a couple of lawyers and/or analysts. *See Energy Transfer Partners, L.P.*, Supplemental Notice of Designation of

Commission Staff (March 3, 2008); *Amaranth Advisors L.L.C.*, Supplemental Notice of Designation of Commission Staff (May 6, 2008). Given the seniority of that team, it appears that any substantive Commission order addressing those cases would have been drafted largely by OGC and OEMR (OEPI did not yet exist).

We respectfully suggest that this original structure has merit. Individuals from Enforcement can move to an advisory role with the best of intentions. But they still will have spent years discussing the case with the prosecutorial team. And that team is made up of their colleagues. (The same dynamics could arise, for example, if a team of Trial Staff lawyers was sent to work on Commission review of an ALJ decision litigated by their colleagues.) Given this, we think it goes without saying that the independent views of OGC, OEMR, and OEPI have value in the enforcement context. And given the issues raised in our case—including the enforcement implications of market design features (or flaws) and incentives known to the Commission when it adopted certain market rules—those views are even more important here. OGC, OEMR, and OEPI consistently approve and regulate organized market structures and rules, including the ones at issue here, and have thought—and continue to think—about the incentives created by them.

For these reasons, we hope that OGC, OEMR, and OEPI will be deeply involved in the Commission's deliberations regarding whether to issue a penalty assessment order in this case, and, if so, what order to issue, as opposed to that process being driven mostly or entirely by the advisory designees from Enforcement. That outcome is, in our view, consistent with the spirit of the *ex parte* rules.

*Second*, the *ex parte* wall in our case exists in an unusual setting that, in our view, raises questions about its effectiveness. There is one other publicly-announced up-to congestion trading case that lags behind ours, having not reached the show cause order stage. There thus is no wall in that case. And there may be an additional case or cases that lag farther behind, having not yet become public. There thus would not be a wall in any such other cases either.

Given the substantial overlap between our case, where there is a wall, and other less-developed cases, where there is not, it is not clear to us that the wall in our case has much effect. We hope that due attention is being given to respecting the element of fairness that the *ex parte* rule is intended to create *in our case*.

*Finally*, we note that both of these *ex parte* concerns could be at least somewhat mitigated if the Commission were to grant our request for oral argument. That would allow the Chairman, the Commissioners, and the advisory staff to interact directly with us on the substance of this case. That should help more

thoroughly integrate OGC, OEMR, and OEPI into the Commission's resolution of the case. And it would blunt the odd situation of the trial team in our case continuing to interact with the Commission and advisory staff on other substantially related cases, including discussions of potentially identical legal or policy issues that span all of these cases, notwithstanding the wall in our case.

To be sure, our choice, granted by statute, to adjudicate this case in federal district court also should mitigate these concerns. But the Enforcement trial teams in the cases now in federal court have argued that such cases can and should be dealt with summarily, without adjudication in court, because, in their view, the Commission's show-cause-order process allegedly constitutes an adjudication at the agency level. We strongly disagree with that view for many reasons. We respectfully suggest, however, that Enforcement's contention that the show-cause phase of an enforcement case somehow trumps the statutorily-granted choice of adjudication in court cannot be squared with a process in which the very same Enforcement Office that prosecuted the case sends a team over the wall to draft an order adopting their own colleagues' views of the case.

Thank you in advance for your consideration of these issues.

Respectfully,

/s/

John N. Estes III
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