



Non-Admissible Settlement Communication Without Prejudice

June 24, 2021

VIA ELECTRONIC MAIL AND UNITED STATES POSTAL SERVICE

The Honorable Richard Glick, Chairman
The Honorable James Danly, Commissioner
The Honorable Neil Chatterjee, Commissioner
The Honorable Allison Clements, Commissioner
The Honorable Mark Christie, Commissioner
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: **SETTLEMENT OFFER – FERC v. Powhatan Energy Fund, LLC, et al., No. 3:15-cv-00452 (MHL) (E.D. Va.)**

Dear Chairman and Commissioners:

As chronicled at ferclitigation.com, Powhatan Energy Fund LLC (“Powhatan” or “Fund”) has vigorously defended itself for almost eleven years. Powhatan never believed it did anything wrong and has continually been surprised by Enforcement Staff’s interest in its business. But its ordeal will be coming to an end because the Fund is running out of money. It seems Powhatan will never get its day in court.

Powhatan has tried to engage Enforcement Staff (“Staff”) in meaningful dialogue over the decades, but these efforts have been unsuccessful. Because of the Fund’s dire financial condition that resulted from this extended communication, it initiated settlement talks with Staff in December 2020.¹ At the time, the cash and investments held by the Fund approximated \$683,000. The Fund offered to settle with FERC for \$383,613.10 which would have allowed the residual money to be used for related legal expenses and other obligations.² Presumably, FERC could have used this money to support its *raison d’être*.

¹ In December 2020, Enforcement Staff had not even told Powhatan the specific trades that were made on its behalf in the summer of 2010 that were alleged to be fraudulent or how Staff calculated the disgorgement and penalty amounts. This lack of information made these settlement discussions difficult.

² This offer did not include an admission of wrongdoing since Powhatan believes Staff’s allegations are meritless.

Enforcement Staff rejected this offer. In return, on January 7, 2021, Staff demanded Powhatan pay \$13,465,108 total for disgorgement and penalty and that the Fund's principals be banned from FERC regulated markets for a period of time.

The financial component of Staff's "counteroffer" far exceeded the available assets in the Fund and was, therefore, not productive or pragmatic. First, the Fund is a Delaware limited liability company that is managed by a separate and distinct Delaware limited liability company. A core component of this structure under Delaware law is that members and managers are not personally liable for the limited liability company's debts or obligations.³ Second, Staff's action against Powhatan is limited to Powhatan; it did not include any individual owner or principal of the Fund as a named party. This will make collection efforts beyond the Fund's current assets impossible. Indeed, the Fund has recently engaged Delaware bankruptcy counsel. Without disclosing any attorney-client communications, Powhatan remains confident that a Delaware bankruptcy court would not allow Staff to collect money in excess of what, if anything, remained in the Fund.

While many things have happened the last eleven years that the Fund does not understand, Enforcement Staff's rejection of its settlement offer was nonetheless unanticipated. Powhatan speculates its inability to find common ground with Staff even at the end of the Fund's existence may be because Enforcement Staff seeks retribution for Powhatan maintaining ferclitigation.com.

Since the unfruitful settlement discussions that began last December, the Fund's assets have been decimated even further with over \$216,000 spent on legal expenses. The balance of the Fund's assets will probably be fully depleted by the end of the calendar year because of its expected legal costs.

Of course, Powhatan's legal expenses are dictated by FERC. In 2021, the federal court proceedings have focused on discovery which is extremely cost-intensive. Significantly, subsequent to the December settlement discussions, Enforcement Staff finally produced information on the trades that occurred in 2010 that Staff alleges to be fraudulent. It also provided information on how FERC calculated disgorgement and penalties. In other words, Powhatan had to wait over a decade, and spend millions of dollars, to learn what it had supposedly done wrong. Another example of forced legal spend is the extent of discovery materials produced by each side. Powhatan paid its lawyers to review and produce over 25,000 documents in response to FERC's discovery request. This was an expensive, time-consuming endeavor. In contrast, FERC produced only 370 documents. Powhatan is now forced to spend more money to argue about the lack of FERC's production to the Court. Another example is the time and money spent to respond to Staff's discovery requests requiring Powhatan to identify government officials and all media outlets with which it communicated.

This continued waste and inefficiency benefit neither FERC nor the Fund. As such, Powhatan wants to reengage the Commission in settlement discussions. Perhaps the slightly different composition of the Commission and the passage of time may allow for a more enlightened exchange.

Similar to its prior offer, Powhatan would settle by giving up the balance of the cash and investments that remain in the Fund after paying all outstanding litigation expenses and other obligations. On the other hand, if it is important that FERC Office of Enforcement obtain headlines with a higher monetary amount than what is left in the Fund, Powhatan could pursue a bankruptcy option. Of course, this alternative approach would require the

³ 6 Del. Code Ann. § 18-303(a).

Fund to spend additional money on bankruptcy attorneys. FERC would then be an unsecured creditor in a Chapter 7 bankruptcy action that would result in a lower and probably *de minimis* recovery from the Fund.

Finally, Powhatan has co-defendants in this case – Dr. Alan Chen and two funds he manages. Powhatan is aware he has recently submitted a similar settlement offer to the Commission. Powhatan's settlement offer is not contingent on anything related to those discussions.

Thank you for your time and consideration.

Respectfully submitted,



Kevin J. Gates
VICE PRESIDENT OF THE MANAGING MEMBER
POWHATAN ENERGY FUND LLC
kgpowhatan@gmail.com



Richard J. Gates
VICE PRESIDENT OF THE MANAGING MEMBER
POWHATAN ENERGY FUND LLC
powenergy2013@gmail.com

cc: *VIA ELECTRONIC MAIL AND UNITED STATES POSTAL SERVICE*

Matt Christiansen, General Counsel
David L. Morenoff, Deputy General Counsel
Martin Kirkwood
Janel Burdick, Acting Director, Office of Enforcement
Geof Hobday, Director, Division of Investigations, Office of Enforcement
Lisa Owings, Chief, Investigations Branch 1, Office of Enforcement
Joshua Ferrentino
Daniel Lloyd
Paul A. Mussenden
Damon Taaffe
Steven Tabackman
Nooshin Sherkat

cc: *VIA ELECTRONIC MAIL ONLY*

Patrick Hanes
Gregory Crapanzano