UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FEDERAL ENERGY REGULATORY COMMISSION,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 3:15-cv-00452 (MHL)
POWHATAN ENERGY FUND, LLC, et al.,	)	
Defendants.	)	

UNOPPOSED MOTION ON BEHALF OF POWHATAN ENERGY FUND, LLC FOR LEAVE TO FILE SURREPLY

Pursuant to the Court's Order entered on July 28, 2021 (ECF No. 210), the undersigned filed the Notice of Objection to the Motion of Counsel for Leave to Withdraw (ECF No. 213) provided to the undersigned by a representative of Defendant Powhatan Energy Fund, LLC ("the Fund"), on its own behalf. No other party has opposed the Motion to Withdraw. On August 6, 2021, the undersigned filed its Reply Memorandum (ECF No. 214).

A representative of the Fund has requested that counsel seek leave of the Court to file a surreply. Local Civil Rule 7(F)(1) provides that other than a motion's opening brief in support, the opposing party's responsive brief, and the movant's reply brief, "[n]o further briefs or written communications may be filed without first obtaining leave of Court." Allowing a surreply is within the court's discretion. *Adams v. Applied Bus. Servs.*, No. 2:18-cv-559, 2019 WL 7817080, at *1 (E.D. Va. Aug. 30, 2019). Although the undersigned does not advocate for the filing of the Fund's surreply, it does not oppose the submission which is tendered herewith as Exhibit 1.

Respectfully Submitted,

/s/
Patrick R. Hanes (Va. Bar No. 38148)
Gregory A. Crapanzano II (Va. Bar No. 93044)
WILLIAMS MULLEN
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, VA 23219
(804) 420-6000
phanes@williamsmullen.com
gcrapanzano@williamsmullen.com

Counsel for Powhatan Energy Fund, LLC

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record. I also emailed a copy to the representatives of the Fund.

By:/s/ *Patrick. R. Hanes*
Patrick R. Hanes
WILLIAMS MULLEN
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, VA 23219
(804) 420-6455
phanes@williamsmullen.com
Counsel for Powhatan Energy Fund LLC

Powhatan Energy Fund LLC
Reply to the Reply Memorandum in Support of Motion of Counsel for Leave to Withdraw

On August 6, 2021, Williams Mullen PC (the "Firm") filed a Reply Memorandum in Support of Motion of Counsel For Leave to Withdraw (the "Reply") with a Declaration of Patrick R. Hanes (the "Hanes Declaration") requesting to withdraw as counsel. Powhatan Energy Fund LLC ("Powhatan" or the "Fund") submits this Surrreply in response.

By email dated August 11, 2021, the Firm informed Powhatan that it could seek leave for Powhatan to file a Surreply. Powhatan made good faith efforts to comply with the Court's local rules, but this Surreply was prepared without the assistance of Virginia counsel. The Fund will limit its comments to seven specific statements made in the Reply and the Hanes Declaration.

I. "Representatives of the Fund have stated that they will not pay the firm to review the substance of documents produced in the case, to prepare for depositions, or even attend depositions of witness other than the representatives of the Fund…. . Counsel has told the representatives on more than one occasion that he does not believe the firm can meet its obligation to provide zealous representation under such restrictions." (Reply, Page 2, Footnote 1.)

Of course, Powhatan Energy Fund LLC would want a "zealous representation." What defendant wouldn't? The underlying tension is that Powhatan did not want a zealous representation that then ended in a bankruptcy well before the scheduled trial date. This is the *exact* plan the Firm recommended to Powhatan.

Powhatan has great respect for the legal acumen of the attorneys at Williams Mullen; if it were not so resource constrained, Powhatan would like to leverage Williams Mullen's abilities as much as possible. But the Firm and the Fund agree that Powhatan is in a dire financial situation. Powhatan suggested to the Firm that maybe it made sense *not* to have it do this work and inquired if there was an ethical obligation that they *must* do it. Powhatan knew a "zealous

representation" would render the Fund insolvent, perhaps even before discovery was completed. Powhatan was simply attempting to maximize the likelihood it received its day in court.

II. "…[the Fund] enjoyed millions of dollars from the trades at issue in this case. Counsel can only marvel at the cynicism that permits these same individuals to cite the firm's participation in the Government's PPP program—an emergency program designed to ensure that businesses like ours continued to pay our employees when they were unable to work…" (Reply, Page 3, para 2.)

Powhatan *rightfully earned* its trading profits and should have expected to maintain those monies. Regardless, the cost of this case to Kevin and Rich Gates has been immense; it has turned their personal and professional lives upside down. In addition to having the Fund's assets obliterated by legal costs, they have paid many multiples of that amount in others costs, the largest of which include (a) the estimated five thousand unpaid hours they have personally spent in aggregate on this investigation the last 11 years and (b) its impact on ending their 20 year-long employment at TFS Capital LLC, which is where they both worked as a day-job when Alan Chen traded for Powhatan in PJM. Smaller costs that the Gates brothers have endured include, but are not limited to (i) former business partners and customers will not engage them as a result of these allegations (ii) tarnished reputations (iii) their children have been harassed at school because of these allegations and (iv) they have endured immense stress the last decade. As a result of all of this, they have not collected a paycheck in years from Powhatan or any other business. Moreover, they did not directly or indirectly participate in the Government's PPP program.

Through their defense efforts the past decade, the Gates brothers have met many other people and companies that the FERC has accused of "market manipulation." Their stories are

similar to Powhatan's and most did not have the resources or ability to defend themselves. These other lopsided and unfair investigations have led to bankruptcies, divorces and suicides.

Yes, the Gates brothers are cynical. But one should not have to marvel too long to understand why.

III. "The Fund is neither indigent nor is its legal position infused with societal or public purpose." (Reply, Page 4, para 2.)

Powhatan could not believe more strongly that this litigation *is* infused with significant societal *and* public purpose. It is these exact purposes that allow Powhatan to tolerate navigating its way through a meat grinder of a process, without pay, for over *eleven* years.

Our country's energy policy as set by the Federal Energy Regulatory Commission ("FERC") is exceedingly important – it has significant implications as it relates to climate change[1], national security and economic grow. Indeed, energy policy may be one of the most important things facing humanity today.[2] These issues may help explain why this case has received so much attention from the media, academia, Capitol Hill, the industry that FERC regulates and others.

Professor William Hogan, The Raymond Plank Research Professor of Global Energy Policy at the Harvard Kennedy School, and the Director of the Harvard Electricity Group,

[1] This is in part why 450 environmental groups recently called on President Biden to elect a FERC Commissioner with a pro-environment track record and why United States Congressman Sean Casten (D-IL-06) stated on August 31, 2021 that FERC is "one of THE most important federal agencies in our fight against the #ClimateCrisis" See: https://thehill.com/policy/energy-environment/566709-more-than-400-advocacy-groups-ask-biden-to-appoint-environmentalist and https://twitter.com/RepCasten/status/1432839617003155457

[2] The Intergovernmental Panel on Climate Change recently released its Sixth Assessment Report titled 'Climate Change 2021: The Physical Science Basis.' The United Nations called the Report a "code red for humanity." See: https://apnews.com/article/asia-pacific-latin-america-middle-east-africa-europe-1d89d5183583718ad4ad311fa2ee7d83

summarized these issues in a position paper[3] titled "Electricity Market Design Flaws and Market Manipulation" dated February 3, 2014 that was submitted on Powhatan's behalf to the FERC during its Administrative Process. The paper says, in part:

> *The practice of forcing the round peg of undesirable behavior into the square hole of fraud produces a perverse result of constantly redefining or obfuscating the meaning of the words in order to expand the definition of fraud to include whatever "bad" acts that are the subject of immediate attention.* ***There are high costs of continuing down this road****. The practice makes it almost impossible to be clear about the underlying analysis to see if the actions deviated from what is allowed under the market design. It makes it difficult, if not impossible, to describe* market participation standards in plain terms that connect to the market design. In the process, the confusion produces the de facto result that the prohibited behavior is either everything or nothing, depending on the preferences of the person who holds the pen that day. ***This cannot be good governance or good public policy.*** [emphasis added]

A resolution of this case would also provide transparency into the workings of the FERC. This fits nicely with the public interest as expressed by two releases from President Biden's White House issued just this summer.

A. Executive Order on Promoting Competition in the American Economy – July 9, 2021[4]

The Order's Policy described in its opening paragraph states:

A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.

FERC accused Powhatan of defrauding utilities such as Dominion Virginia Power in 2010. (See Petition for an Order filed on July 31, 2015 on page 7, lines 8-11.) Electric Utilities,

[3] http://ferclitigation.com/wp-content/uploads/032751pm-hogan-mlsa-02-03-14.pdf
[4] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

which in the recent past had a state-sponsored monopoly on the production and distribution of power, made total contributions of $20,751,906 to Federal Candidates, Parties and Outside Groups that year.[5] In contrast, Kevin and Rich Gates only contributed $4,400 to political candidates in 2010.[6]

Later on, the Order *specifically mentions* the Federal Energy Regulatory Commission. The Order further says a "whole-of-government approach is necessary" to accomplish its goals, which presumably includes the judiciary.

B. Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest – June 3, 2021[7]

The Memorandum's Policy described in its opening paragraph states:

> *Corruption corrodes public trust; hobbles effective governance; distorts markets and equitable access to services; undercuts development efforts; contributes to national fragility, extremism, and migration; and provides authoritarian leaders a means to undermine democracies worldwide. When leaders steal from their nations' citizens or oligarchs flout the rule of law, economic growth slows, inequality widens, and trust in government plummets.*

Among other things, the rest of this Memorandum calls for increased transparency into the United States' financial systems, states countering corruption is a core United States national security interest, and *specifically mentions* "the Department of Energy", a department in which FERC resides.

While Powhatan is not certain that that is up against a corrupt administrative agency, it does ask the Court to consider how corruption at the FERC would manifest itself in its

[5] https://www.opensecrets.org/industries/contrib.php?ind=E08&Bkdn=DemRep&cycle=2010
[6] http://ferclitigation.com/wp-content/uploads/POLITICO_Pro_Energy-Hedge-fund-takes-aim-at-FERC-nominee-Bay.pdf
[7] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/

prosecutorial pursuits. Would the Defendant (i) want unprecedent transparency [8] or (ii) be able to collect an elite cadre of experts who would publicly go on record stating they believe FERC's case is meritless? [9] Would representatives of the Defendant have a history of being whistleblowers in other business endeavors? [10]

Would the FERC have (i) withheld exculpatory information from the Defendant during the Administrative Proceedings [11] (ii) been fined by the US District Court in Washington DC for inappropriately withholding responsive documents in a related FOIA case (Civil Action No. 15-591 (JDB)) (iii) attempted to create potential "due process violations" [12] and (iv) done everything in its power to delay the adjudication of an actually quite simple case?

IV. "Permitting Williams Mullen to withdraw now should neither pose a material adverse effect on the interests of the Fund nor should it delay or cause disruption of the proceedings herein." (Reply, page 4, para 1)

Powhatan has continued to explore options for outside counsel and simply cannot find attorneys who will represent it. This makes sense, as Powhatan's financial situation is as bad as it has ever been.

V. "Following the lifting of the Stay of this case in October of 2020, the undersigned initiated conversations with representatives of the Fund Regarding our role in the case, including whether lead counsel would be replaced…." (Hanes Declaration, page 3, bullet point 6)

[8] http://ferclitigation.com/
[9] http://ferclitigation.com/team-members/ and http://ferclitigation.com/wp-content/uploads/Ledgerwood-announcement-01-10-14.pdf
[10] https://vista.today/2015/09/rich-gates-will-apply-for-whistleblower-reward-from-sec-for-flash-boys-revelations/
[11] Pages 13-14 at http://ferclitigation.com/wp-content/uploads/Powhatan-response-to-Order-to-Show-Cause.pdf
[12] Case 3:15-cv-00452-MHL Document 89, page 27

Following the lifting of the Stay in this case in October 2020, Powhatan had discussions with the Firm about finding other law firms to represent it. Without divulging any attorney client privileged information, Powhatan's objective at that time was the same as it is today -- it wanted to try to conserve money. Powhatan had no other motivation as certainly the Firm has the experience and expertise to defend this case. The Firm's billing rates are typical of a larger law firm and Powhatan knew the work load was going to ramp-up significantly. Powhatan tried to find either (i) another law firm to work alongside the Firm to do *pro bono* work or (ii) a local law firm with lower rates to replace the Firm. The Fund contacted all of the referrals Williams Mullen provided, and others, but ended-up empty handed. No other law firm would represent Powhatan then.

VI. **"The Fund asserts that it is surprised and unaware of any irreconcilable differences between itself and Williams Mullen."** (Hanes Declaration, page 4, bullet point 11)

Powhatan is only aware of two minor differences. First, the Firm asked Powhatan to voluntarily post a $75,000 retainer earlier this year. Powhatan declined. Secondly, the Firm recommended and encouraged that Powhatan pursue bankruptcy many times this calendar year and Powhatan has continually opted against it.[13] Powhatan does not consider either difference "irreconcilable".

Indeed, Powhatan speaks favorably of the Firm's attorneys. For instance, in its most recent newsletter sent on May 3, 2021 to hundreds of its subscribers, the Fund said "Our attorneys… are good." (See **Exhibit A, highlighted language**)

[13] Recommending bankruptcy is another action that shows Williams Mullen has been acting as the Fund's lead counsel.

VII. "Earlier this year, the Fund owed this firm over $80,000 that had been unpaid for over thirty days after the issuance of two monthly statements, …" (Hanes Declaration, Page 5, bullet point 14)

Powhatan had a clerical error and did not pay the Williams Mullen's invoice for $14,167.70 dated March 8, 2021 in a timely fashion. Like many other small businesses across the country, COVID affected the Fund's operations; paying this invoice simply fell through the cracks. Powhatan was reminded of it when it received Williams Mullen's next monthly invoice dated April 7, 2021 that was for $80,997.70 (the previous month's $14,167.70 plus an additional $66,830.00 for that month's work.) A check was mailed from West Chester, Pennsylvania to the Williams Mullen office in Richmond, Virginia on Monday, May 3, 2021. It cleared Powhatan's checking account on May 10, 2021. Powhatan is not sure when the check was received by Williams Mullen or how long it took the Firm to process it.

While Powhatan has not always been perfect in its six-year relationship with the Firm, it has operated in good faith. Indeed, in April 2021, the Firm complimented the Fund and said it usually pays its invoices "like clockwork." As a further example, the Firm emailed Powhatan an invoice on Tuesday, January 19, 2021 with a note that read, in part:

> *As you may know, Williams Mullen concludes its fiscal year in January. Consequently, we make our very best effort to collect all accounts receivable before the end of the month. We are hoping that you can help us by paying the balances on all outstanding invoices (including the January invoice) by January 22, 2021. I know we are asking for a very quick turnaround, but anything you can do to expedite the process would be most appreciated.*

The invoice amount was for $37,155.50. At that time, most banks were closed as COVID vaccines were not readily available. But Powhatan located a bank in a neighboring town that it rarely, if ever, had used that was able to process the wire transaction. An unvaccinated representative of Powhatan drove to that bank two days later, on Thursday, the 21st and

processed the transaction. Powhatan incurred a $30 wiring fee that was not reimbursed by the Firm. It would have been certainly easier, safer and cheaper to have written and mailed a check from the comfort of our homes, which is what the Fund normally had done during the pandemic to that point.

EXHIBIT A

Powhatan and the FERC: Ten years and counting.

Inbox ×

Kevin Gates <kgpowhatan@gmail.com> May 3, 2021, 12:03 PM

to kevin, bcc: me

Hey. It's been more than two years since I sent an email like this to my Powhatan people --- which is how I warmly think of you. We're still locked in a struggle with the administrators and regulators at the FERC. Here's where we are.

Recap! In 2010, we made trades that considered some transmission loss credits. We were asked to stop, so we stopped. Then FERC said, "Shame on you. Pay $34 million." We said: "Huh? That makes no sense. We'd prefer a trial, please." They were like, "A trial? Ahh, you're naive. That's cute." And we were like, "Whatever. Let's do this." And they were like, "Fine."

This conversation has lasted almost eleven years so far, and we've jauntily documented it all on our website. We've spent the last six of these years winding our way through the US District Court for the Eastern District of Virginia.

News! Several months ago, we finally got the opportunity to ask FERC some questions. So, we asked "Which trades did we do that you think were manipulative?" This is because for the past decade, they hadn't even told us what they believe we did wrong.

In return, they asked us, "Which journalists and government officials have you spoken to?" Apparently, asking about our contacts with the media and policymakers is important to determine if our trades constituted market manipulation.[1]

They also asked "What did we do to make you think your trades were permitted?" We gave them 32 solid examples of things they did to make us think our trades were permitted, because our lawyers and our case are good.[2]

But if you stop to think on it, this question is a charming perversion of justice. We're supposed to have rights, even if they're not specifically enumerated. "What did we do to make you think you're permitted to put mushrooms on pizza?" Nothing, boss. But if we're not allowed to enjoy mushrooms on pizza, you need to say so.

We also got a chance to get a peek into each other's files. In response to their discovery request, we delivered over 25,000 documents. In response to our sweeping request, FERC delivered about 370 documents. 370! This is remarkably low for a matter that has involved teams of regulators at the FERC for more than a decade. They were more professional in their phrasing, but our lawyers' objection was essentially "Come on! Give us the information we asked for, you weasels."

And now, you're current. That's where we are. As of now, our trial is scheduled to begin on August 15, 2022 at 10 AM with a judge and lawyers and opening statements and everything else. We remain optimistic and eager to turn up.

If you want to do us a favor, talk about our situation with your friends and colleagues. Forward this email. Rewatch the videos we made with some expert takes on our case. Hit reply and tell us what you think.

✌ Kevin

---

[1] Or, perhaps they had ulterior motives for asking these questions? Are they trying to intimidate us? Control the narrative? Shut down an open society? Not sure.

[2] Check out interrogatory 12.

Reply Reply all Forward