

Transcript of the Testimony of **Lawrence S. Eiben**

Date: September 23, 2010

Case: In The Matter Of: PJM UP-TO CONGESTION TRANSACTIONS

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1 Deposition of LAWRENCE S. EIBEN, called for
2 examination pursuant to agreement of counsel, on
3 Thursday, September 23, 2010, in Washington, D.C.,
4 at the Federal Energy Regulatory Commission, 888
5 First Street Northeast, Room 3M-4B, at 2:20 p.m.,
6 before SARA A. WICK, RPR, CRR, a Notary Public
7 within and for the District of Columbia, when were
8 present on behalf of the respective parties:

9

10 W. BLAIR HOPKIN, ESQ.
11 ERIK C. BAPTIST, ESQ.
12 STEVEN TABACKMAN, ESQ.
13 Division of Investigations
14 Office of Enforcement
15 888 First Street Northeast
16 Washington, D.C. 20426
17 212-502-6038
18 blair.hopkin@ferc.gov
19 erik.baptist@ferc.gov
20 steven.tabackman@ferc.gov
21 On behalf of the FERC

22

23

24

-- continued --

25

1 APPEARANCES (continued):

2

3 DANIEL A. HAGAN, ESQ.

4 EARLE H. O'DONNELL, ESQ.

5 White & Case LLP

6 701 13th Street Northwest

7 Washington, D.C. 20005

8 202-626-3582

9 dhagan@whitecase.com

10 eodonnell@whitecase.com

11 On behalf of the Witness

12

13 Also Present: Bikash Thapliya

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1 P R O C E E D I N G S

2 Whereupon,

3 LAWRENCE S. EIBEN

4 was called as a witness and, having first been duly
5 sworn, was examined and testified as follows:

6 EXAMINATION

7 BY MR. BAPTIST:

8 Q Please state and spell your full name.

9 A Lawrence Scott Eiben, E-i-b-e-n.

10 Q My name is Erik Baptist. Thank you for
11 appearing here today. I'm here with my colleagues,
12 Blair Hopkin, Steve Tabackman, and Bikash Thapliya.
13 We're officers of the Federal Energy Regulatory
14 Commission.

15 Are you represented here today by counsel?

16 MR. HAGAN: Mr. Baptist, before we begin,
17 I just wanted to establish sort of the ground rules
18 and that we're reserving all objections except to
19 form and privilege. Is that your understanding?

20 MR. BAPTIST: Yes.

21 MR. HAGAN: Okay, great. Just wanted to
22 make sure we got that out of the way at the
23 beginning.

24 BY MR. BAPTIST:

25 Q Let me ask you again. Are you represented

1 today by counsel?

2 A Yes.

3 Q Please identify your counsel.

4 A White & Case here, Dan Hagan.

5 MR. BAPTIST: Mr. Hagan, are you
6 representing Mr. Eiben in his individual capacity?

7 MR. HAGAN: Yes.

8 MR. BAPTIST: Do you represent any person
9 or entity other than Mr. Eiben in this matter,
10 including other witnesses?

11 MR. HAGAN: Yes.

12 MR. BAPTIST: Can you please identify them
13 now?

14 MR. HAGAN: Sure. Mr. Kevin Gates,
15 Powhatan Energy Fund, TFS Capital, and LSE Capital
16 Management.

17 MR. BAPTIST: I'm going to introduce
18 Exhibit Number 1.

19 (Exhibit Eiben 1 identified.)

20 MR. BAPTIST: Let the record also reflect
21 that Earle O'Donnell from White & Case is also here
22 representing the witness.

23 MR. O'DONNELL: That's correct.

24 BY MR. BAPTIST:

25 Q Mr. Eiben, I've handed you Exhibit Number

1 1, 18 CFR Section 1b.16. I want to direct your
2 attention to 1b.16, subsection (b).

3 Can you, please, read over it.

4 A Okay.

5 MR. BAPTIST: In accordance with Section
6 1b.16, Counsel, can you state on the record whether
7 you have explained your potential conflict of
8 interest to both Powhatan and to Mr. Eiben?

9 MR. HAGAN: Yes.

10 BY MR. BAPTIST:

11 Q Mr. Eiben, would you like to take a break
12 to consider your representation or to confer with
13 counsel?

14 A No.

15 Q I'm taking your deposition today in a
16 proceeding being conducted pursuant to the Federal
17 Energy Regulatory Commission's regulations. I don't
18 have authority to grant you immunity, nor do I
19 intend to grant you immunity.

20 Do you understand?

21 A Yes.

22 Q For purposes of this deposition, I am an
23 officer of the United States, and so are Mr. Hopkin,
24 Mr. Tabackman, and Mr. Thapliya.

25 Do you understand we are here in our

1 official capacity for the United States government?

2 A Yes.

3 Q Whoever knowingly or willfully states or
4 subscribes under oath to any material matter that he
5 or she does not believe to be true to an officer of
6 the United States is guilty of perjury and may be
7 fined or imprisoned or both.

8 Do you understand?

9 A Yes.

10 Q Have you ever been deposed before?

11 A Yes.

12 Q We're going to go through some general
13 instructions that will apply throughout the
14 deposition.

15 A Okay.

16 Q If you do not understand the question,
17 please let me know, and I will try to make it more
18 clear. If you answer the question, we will assume
19 and the record will reflect that you understood the
20 question.

21 Do you understand?

22 A Yes.

23 Q I'm conducting this deposition and will be
24 the primary person asking you questions, but
25 Mr. Tabackman, Mr. Hopkin, and Mr. Thapliya will

1 also be asking you questions at some point during
2 this deposition. You are directed to answer each
3 question fully and truthfully. If your counsel
4 objects to a question, the objection will be noted
5 for the record, but you will still be asked to
6 answer the question.

7 Okay?

8 A Okay.

9 Q You may refuse to answer any question or
10 give evidence that may incriminate you or subject
11 you to a fine, penalty, or forfeiture. That is your
12 right under the Fifth Amendment of the United States
13 Constitution. If you refuse to answer a question,
14 you must explain why you refuse. If you assert a
15 privilege not to answer, such as the grounds of
16 self-incrimination, you must assert the privilege
17 personally.

18 Do you understand these rights?

19 A Yes.

20 Q After you finish answering a question or
21 before I ask my next question, if you need to take a
22 break or need a pause, just let us know and we will
23 take a break. But you must answer the pending
24 question before we take that break.

25 Okay?

1 A Okay.

2 Q You also must audibly answer my questions.
3 You can't make a head nod or hand gesture, because
4 the court reporter cannot put those head nods or
5 gestures into the record.

6 Do you understand?

7 A Yes.

8 Q Please try not to speak while I'm asking
9 you a question and I will try to do the same for you
10 because it's difficult for the court reporter to
11 record both conversations at the same time.

12 Do you understand?

13 A Yes.

14 Q Are you taking any medication or suffering
15 from any physical or mental condition or illness
16 that would prevent you from testifying today?

17 A No.

18 Q Are you aware of any reason today that you
19 cannot give full and complete answers to my
20 questions to the best of your ability?

21 A No.

22 Q If you think of anything in the course of
23 this deposition that would help explain a point
24 you've made earlier, please let us know, and we will
25 let you have that time to explain further.

1 A Okay.

2 Q Do you have any questions about these
3 procedures?

4 A No.

5 Q Are you appearing here today voluntarily?

6 A Per your request, but yes.

7 Q I will also be handing out exhibits during
8 the course of today. Please don't mark on them if
9 you don't want us to see your notes because we will
10 be collecting them at the end of the day.

11 A Sure.

12 Q You said you were deposed before. Can you
13 state the matter in which you were deposed?

14 A Sure. In my employment with TFS Capital,
15 TFS Capital had employed a CPA firm to do tax work
16 for it. TFS was asserting that the CPA did not
17 submit the necessary tax filings for TFS, and there
18 was a tax bill from the state of Pennsylvania that
19 could have been avoided. And it was that matter
20 that led to the deposition.

21 Q Do you know the name of the proceeding?

22 A I don't.

23 Q Do you know who the parties were in that
24 proceeding?

25 A The CPA was David Robinson. He was a sole

1 proprietor. So I think that may also be his
2 business name, David Robinson, CPA, and it should
3 have been TFS Capital.

4 Q Do you know what court or jurisdiction
5 this took place in?

6 A I do not.

7 Q Where was your deposition taken?

8 A We were in -- I'm not 100 percent certain
9 on that. I'm sorry. I don't recall.

10 Q I'm going to ask you a series of questions
11 about how you prepared today for today's deposition.
12 Aside from your attorneys, whom did you talk to in
13 preparation for this deposition?

14 A They're the only ones.

15 Q So you did not speak with anyone else at
16 Powhatan about today's deposition?

17 A No.

18 Q Did you take any steps to educate yourself
19 today in preparation for this deposition?

20 A I had begun to prepare a time line to help
21 remember the course of events, but abandoned that
22 effort and opted to not bring the time line.

23 Q Did you complete the time line?

24 A Yes.

25 Q Do you have a general sense of what the

1 time line included?

2 A Sure.

3 Q Did you review any documents in
4 preparation for today's deposition?

5 A No.

6 Q Did you review any news articles or trade
7 press articles in preparation for this deposition?

8 A No.

9 Q Did you review any materials related to
10 the tariff proceeding at ER10-2280-000?

11 A No.

12 Q I want to make sure. You said you did not
13 speak with anyone today outside of your attorneys in
14 preparation for today's deposition?

15 A Correct.

16 Q Have you had any conversations or
17 communications with anybody other than your lawyers
18 about this investigation?

19 A Yes.

20 Q Who have you had conversations with?

21 A Kevin Gates and Alan Chen.

22 Q When did you speak to Mr. Gates?

23 A Multiple occasions. I don't know the
24 specifics.

25 Q When you say "multiple occasions," do you

1 have an estimate of how many days?

2 A Maybe four to five times we've spoken.

3 Q Do you recall the substance of those
4 conversations?

5 A Generally.

6 Q Can you, please, explain what the
7 substance was that you discussed with Mr. Gates?

8 A Sure. The main focus of the discussions
9 had to do with selection of counsel. He was talking
10 to multiple law firms and bringing me up to speed on
11 who he had spoken with, and also just making plans
12 to engage -- formally engage a law firm to assist us
13 in the matter, and also periodically asked him his
14 thoughts on the situation itself and did he see
15 any -- what were his thoughts on the potential
16 outcome, did he feel that we, in effect, had
17 something to worry about or not.

18 Q Without revealing any communications
19 you've had with your attorneys, can you discuss what
20 his thoughts were on the potential outcome?

21 A Sure. Kevin mentioned that he was
22 somewhat shocked that we were in this situation. He
23 did not fully understand what, if anything, we had
24 done wrong. His take was just that he was kind of
25 shocked by the whole thing.

1 Q Did he share anything else?

2 A On occasion, he would mention that to Alan
3 and generally kept me focused, not on the substance
4 of that conversation or those conversations, but
5 just that he had had maybe had a conversation with
6 him.

7 Q Did he ever tell you about the substance
8 of his conversations with Mr. -- Dr. Chen?

9 A I can't recall any discussion of any of
10 those conversations.

11 Q Can you recall anything else Mr. Gates had
12 said to you substantively about this investigation?

13 A No.

14 Q Let's talk about your conversations with
15 Dr. Chen. Can you tell me how many times you've
16 spoken with him?

17 A Since the beginning of the proceeding or
18 since I first met Mr. Chen.

19 Q Let's start with the beginning of this
20 proceeding.

21 A I can only remember one conversation,
22 which was a conference call where we were discussing
23 lawyers and whether or not we should seek joint
24 counsel or whether or not we should possibly each
25 have our own representation.

1 Q Have you spoken to him any other time
2 since the beginning of this investigation?

3 A Not that I can recall.

4 Q Let's go back now. When was the first
5 time you've spoken with Dr. Chen?

6 A I don't know the exact date, but it's been
7 two to three years since I first was introduced to
8 Dr. Chen.

9 Q How were you first introduced to him?

10 A I called him.

11 Q Why did you call him?

12 A Kevin and I were researching energy
13 trading. Kevin had obtained a list of traders who,
14 I believe, were permitted to trade at PJM. And I
15 had some extra time, so I was calling some traders
16 to see if they were interested in managing an
17 account on our behalf. So it was an effort to begin
18 to explore energy trading, and we were looking for
19 some potential traders. We had heard that it was
20 potentially very profitable, and so I was making
21 some initial phone calls.

22 Q You said you were looking for someone to
23 manage your account on your behalf. Whose behalf
24 are you specifically talking about?

25 A At the time that I was making the calls,

1 it would have been a fund by the name of Hunterized
2 Energy Fund. Or possibly Hunterized Fund of Funds,
3 which were two private funds that we had proprietary
4 capital in that employed a number of different
5 investing strategies.

6 Q How many other energy traders did you
7 speak to before choosing Dr. Chen?

8 A I should back up and say I didn't actually
9 choose him on that call. Typically, the way the
10 process would work is that if I spoke to a trader
11 that might be interested in performing work for us,
12 I would generally pass that person off to Kevin to
13 vet the individual and to determine if there might
14 be a fit.

15 So I think between the time I talked to
16 him and that he actually performed services for us,
17 there was a decent gap there. So he wasn't, in
18 effect, chosen at that time. I probably -- I don't
19 have the specifics. I don't know the exact numbers.
20 The list was several hundred long. At best, I got
21 through a quarter to a half of that list.

22 Q You said there was a decent time between
23 your first call to Dr. Chen and the time he was
24 retained for his services.

25 Can you give me an estimate of what that

1 amount of time was?

2 A I would say a good six months or so.

3 Q During those approximate six months, did
4 you have any conversations with Dr. Chen?

5 A No.

6 Q When was your next conversation or
7 communication with Dr. Chen?

8 A I don't recall specifically when.

9 Q Since May of 2010, have you had any
10 conversations with Dr. Chen outside of the one you
11 identified post the onset of this investigation?

12 A No conversations over the phone. On
13 occasion, I've been in on an e-mail or two with
14 Dr. Chen.

15 Q Do you recall the substance of those
16 e-mails?

17 A Most commonly it was a bill. I would
18 disperse the wire payment for services from
19 Powhatan. So after Kevin looked at the bill and
20 determined it to be appropriate, calculated
21 correctly, it would be forwarded to me for
22 implementation.

23 Q Did any of those e-mails discuss anything
24 besides bills?

25 A On occasion, there would be the

1 application that we put in for PJM. I recall Alan
2 commenting about the application, something to do
3 with needing to check certain boxes or fill in
4 certain items in order to permit him to trade the
5 way he needed to trade. So there was some feedback
6 from him on the application that was submitted.

7 Q Anything else?

8 A I can't recall anything else.

9 Q Are you aware of any individuals or
10 companies being investigated in this investigation?

11 A Obviously, Kevin was here, Kevin Gates. I
12 know that Alan Chen, you're going to speak with him
13 as well. That's all that I know.

14 Q Why do you think that we are going to
15 speak to Alan Chen?

16 A When you sent the letter or the e-mail --
17 maybe it was the hard copy -- to Alan, he reached
18 out to us and asked if we had received a similar
19 letter. Or I should say, he reached out to Kevin to
20 see if we received a similar letter. Kevin asked
21 me. And so it was at that time that I became aware
22 of the letter in the request.

23 Q What did you tell Mr. Gates when he asked
24 you?

25 A I told him I didn't know, but I would

1 check. And then I checked, and I believe I
2 forwarded him the e-mail that had been received.

3 Q Let's now turn to your employment history.
4 Where do you currently work?

5 A I work at TFS Capital.

6 Q And what is your position with TFS
7 Capital?

8 A I'm the -- well, there are several titles:
9 Chief operating officer, chief compliance officer,
10 co-portfolio manager.

11 Q Who is your fellow co-portfolio manager?

12 A There are several: Kevin Gates, Rich
13 Gates, Chao Chen, Eric Newman, and Yan Liu.

14 Q When did you begin working for TFS
15 Capital?

16 A In 1997.

17 Q Where were you before TFS Capital?

18 A Capital One Financial Corporation.

19 Q How long were you at Capital One?

20 A I was at Capital One for five years. The
21 roles overlapped for a period there. TFS was formed
22 in 1997. I left Capital One in 1999.

23 Q What was your position with Capital One?

24 A I was an analyst.

25 Q What did you analyze?

1 A Credit card solicitation results.

2 Q Do you have any experience in power
3 trading?

4 A No direct experience myself in trading in
5 power or energy.

6 Q Do you have any experience in trading in
7 general?

8 A My only exposure to power trading is
9 through entities that hired third-party advisors to
10 trade power on our behalf, and at one point, TFS
11 also employed an individual who did some power
12 trading or energy trading.

13 Q Who was this individual?

14 A Krishna Sinha.

15 Q Can you spell that, please?

16 A I think so. K-r-i-s-h-n-a, S-i-n-h-a.

17 MR. BAPTIST: I'm going to mark Exhibit
18 Number 2.

19 (Exhibit Eiben 2 identified.)

20 BY MR. BAPTIST:

21 Q Exhibit Number 2 is a letter dated August
22 25th, 2010. It is a letter signed by Earle
23 O'Donnell of White & Case. The attachment appears
24 to be a response to a data request dated August 18,
25 2010.

1 Mr. Eiben, have you seen this document
2 before?

3 A Yes.

4 Q I direct your attention to the last page
5 of this document. Is that your signature above the
6 name "Lawrence Eiben"?

7 A Yes.

8 Q Did you review this document before it was
9 sent to the Office of Enforcement?

10 A Yes.

11 Q Please take your time and review this
12 document, and let me know if there are any errors or
13 changes that you would like to suggest?

14 A I don't have any.

15 Q I would like to direct your attention to
16 request number 1. It states that LSE Capital
17 Management, LLC, is the managing member of Powhatan
18 Energy Fund, LLC.

19 Is that correct?

20 A Yes.

21 Q Are there any other members of Powhatan
22 Energy Fund, LLC?

23 A Yes.

24 Q Who are they?

25 A Kevin Gates, Rich Gates, Chao Chen, Eric

1 Newman, Mike Frederick, Sam Harris, Greg Sekelsky.

2 I think I got them all.

3 Q What is LSE Capital Management, LLC?

4 A It is a single member LLC that serves as
5 managing member to two private investment funds.

6 Q And the sole member of LSE Capital
7 Management, LLC is you; correct?

8 A That's correct.

9 Q The officers listed in data request
10 response number 1, are they still correct today?

11 A Yes.

12 Q Who is Greg Sekelsky?

13 A You mean what is my working relationship
14 with him?

15 Q That's a good start, yes.

16 A Greg was first introduced to me as a
17 employee of the CPA firm that did work for TFS
18 Capital. He subsequently joined TFS Capital as
19 chief financial officer. And in his capacity with
20 Powhatan, he does some bookkeeping work. He strikes
21 the monthly NAV and assists with processing
22 subscriptions or redemptions from the fund.

23 Q Sorry. You said he keeps the monthly NAV?

24 A Sorry. Net asset value. So the value of
25 the fund each month -- the fund is valued each

1 month. So it has monthly liquidity. And he also
2 maintains the ownership percentages as money comes
3 or leaves from one of the members.

4 Q What is Mr. Kevin Gates's responsibilities
5 with Powhatan?

6 A Kevin is tasked with finding third-party
7 advisors to manage assets on behalf of the fund. So
8 if any of us are introduced to a potential
9 third-party advisor, we would pass the name to
10 Kevin, and he would vet the individual to determine
11 if he thought they were a suitable service provider
12 for the entity.

13 Q Does he have any other responsibilities
14 for Powhatan or any other entity?

15 A Yes. And I should mention that Kevin's
16 responsibilities from -- we refer to it as Powhatan,
17 but either works, but Powhatan come through a
18 resolution from LSE. So I view Kevin as working on
19 behalf of LSE in his duties for Powhatan, but he
20 also does other things related to third-party
21 providers, the creation of contracts, negotiation of
22 contracts. He does some due diligence related to
23 those advisors. He sanity checks the fee
24 calculations that are sent back to us.

25 Q Anything else?

1 A Nothing jumps out at the present.

2 Q What is a "sanity check"?

3 A In regard to a fee calculation, Kevin may
4 take the same inputs of the fee calculation and
5 reperform the fee calculation to see if he gets the
6 same answer as the advisor, verify the request for
7 fees accuracy.

8 Q What about Richard Gates? What are his
9 responsibilities in relation to Powhatan?

10 A Presently and historically, Rich has done
11 nothing for the entity. He was included on the
12 resolution and added as a vice president, but to my
13 knowledge, he has not done anything for the entity.

14 Q Does he have a role with TFS Capital?

15 A Yes. Rich is a co-portfolio manager at
16 TFS Capital.

17 Q And what are his responsibilities as
18 co-portfolio manager?

19 A He -- well, as a co-portfolio manager of
20 the funds, he's partly responsible for the
21 implementation of the strategies employed by the
22 various investment funds. But Rich's particular
23 niche within TFS is the trading department. So he
24 manages trade execution.

25 Q By managing trade execution, what does

1 that entail?

2 A Sure. He -- we use a quantitative trading
3 strategy. We at TFS use a quantitative trading
4 strategy. We have a number of quantitative models
5 that dictate what trades will be implemented. So
6 Rich is responsible for -- once those trades have
7 been queued up, Rich is responsible for getting them
8 executed. He has various ways to do that. He also
9 has two or three traders to assist him in putting
10 those orders in.

11 Q Also in response to data request number 1,
12 there's an address of 12916 Holmbank Lane in
13 Henrico, Virginia 23233.

14 Is that the business address of Powhatan
15 Energy?

16 A Yes.

17 Q If I went to that address, what would I
18 find at that location?

19 A My wife cooking dinner.

20 Q Is that your residence?

21 A It is a residence.

22 Q And that is your residence, I assume?

23 A Yes.

24 Q You can put that exhibit away now.

25 A Sure.

1 Q Are you affiliated with any other business
2 entities other than Powhatan Energy Fund and LSE
3 Capital Management, LLC?

4 A Yes.

5 Q Do you know which entities those are?

6 A Yes.

7 Q Could you list them for me, please. To
8 the best of your ability.

9 A Let's see if I can get them all here. TFS
10 Capital; the TFS Capital Investment Trust, which is
11 the parent to the various mutual funds managed by
12 TFS; the TFS Market Neutral Fund; TFS Small Cap
13 Fund; Hunterized Global Partners, LLC -- or I'm
14 sorry, Ltd; Hunterized Capital Partners, LLC;
15 Oakstone Partners, LLC; Hunterized Energy Fund, LLC;
16 Hunterized Fund of Funds, LLC; Tuckahoe Energy Fund,
17 LLC.

18 And the two you mentioned were Powhatan
19 and LSE Capital Management.

20 Q Correct.

21 A I think that's all of them.

22 Q Are you affiliated with Aztec Management
23 Services?

24 A That -- I was. That business is no longer
25 living, no longer around.

1 Q What was that business?

2 A Aztec -- I don't even remember, to be
3 honest.

4 Q Can you tell me how Powhatan got started,
5 the entity itself?

6 A Sure. In terms of logistically how it was
7 created? I started with a certificate of formation
8 with Delaware, created an operating agreement,
9 obtained an employer identification number.

10 Q And whose idea was it to start Powhatan?

11 A It was really a discussion between Kevin
12 and I. So I guess a joint effort to make that
13 decision.

14 Q Why did you decide to create it?

15 A Kevin and I, through various investment
16 entities, had gained some exposure to energy
17 trading, and we had been working with Alan Chen for
18 a few years, and Alan was doing very well. And so
19 we had a desire to separate him from some of the
20 other traders that were being used and also ramp up
21 our exposure to him. I did some investigation into
22 what was the most logical structure to do that in,
23 and that's what led to the creation of it. So the
24 idea was that it would be a new entity for Alan to
25 perform trading for at a much -- at a higher level

1 with a greater degree of exposure than he had been
2 doing for us in the past.

3 Q Do you know how much capital Powhatan is
4 responsible for in managing or trading?

5 A Well, I wouldn't say that Powhatan is
6 responsible for trading any capital necessarily. I
7 would view Alan as being responsible for trading the
8 assets of the entity.

9 Q And how much assets does Dr. Chen have to
10 trade on behalf of Powhatan?

11 A Are you referring to now?

12 Q I will give you the time frame of May 2010
13 through early August 2010.

14 A Okay. It varied. I know that. I don't
15 know specifically what he could or couldn't do. I
16 don't understand the collateral requirements and
17 what -- how much he could trade or couldn't trade.
18 I generally know the assets, the value of the entity
19 itself, but that's about where my understanding
20 ends.

21 Q What was the value of the entity itself?

22 A Oh, it started out at about a million to a
23 million and a half. At times, I believe it was as
24 high as maybe 2 to 4 million.

25 Q What is the value of the entity now?

1 A I don't know. I don't know specifically,
2 but I could certainly take a guess on an estimate.

3 Q Just a ballpark guess, what would it be?

4 A I would say a million to a million and a
5 half.

6 Q Do you know how Powhatan -- do you know
7 whether it's traded in PJM?

8 A Yes, it has. Well, again, I should say
9 Powhatan, again, I don't view as doing the trading.
10 Alan is trading in PJM on behalf of Powhatan.
11 Sorry.

12 Q Do you know what an up-to congestion
13 transaction is?

14 A I do not.

15 BY MR. HOPKIN:

16 Q Have you ever heard of an up-to congestion
17 transaction before?

18 A I've heard that expression many times. In
19 fact, it's in this document as well, as I just
20 noticed. But I've heard the expression.

21 Q When did you first hear of it?

22 A I don't know specifically, but it's been a
23 while.

24 Q Years or months? Can you just give me an
25 idea?

1 A I would say at least a year ago, I heard
2 the expression.

3 Q So would you agree, then, that you've at
4 least heard the term "up-to congestion transactions"
5 prior to FERC having contacted yourself and
6 Powhatan?

7 A Yes.

8 BY MR. BAPTIST:

9 Q Did you hear the term "up-to congestion
10 transaction" in your decision to start Powhatan?

11 A I don't remember.

12 Q Did you hear the term at all in May or
13 June of 2010?

14 A I don't remember.

15 Q Bringing your attention back to Exhibit
16 Number 2, if you look at your response to data
17 request number 2, it states that the "Trading and
18 scheduling of power on behalf of Powhatan was
19 conducted by an unaffiliated third party, HEEP Fund
20 Inc., pursuant to an agreement between Powhatan and
21 HEEP."

22 What do you know about that agreement?

23 A The agreement was between HEEP and
24 Powhatan. There were terms that defined how HEEP
25 would be compensated. There was a section, I

1 recall, that placed some limitations or parameters
2 on what Alan or HEEP could or could not do in terms
3 of the types of trades, I guess. Beyond that, I
4 recall it just being a few pages long with a bunch
5 of general contract-type terms.

6 Q Were you involved with the negotiation of
7 this agreement?

8 A I reviewed it. Kevin sent it to me at
9 some point and said hey, could you review it. I
10 gave it a quick review, but that was the extent of
11 my involvement.

12 Q Do you remember the terms of the
13 agreement?

14 A I don't.

15 Q Do you remember the limitations that were
16 identified under the agreement?

17 A I don't.

18 Q Do you specifically remember how HEEP is
19 compensated under the agreement?

20 A I think that it's performance-based, but I
21 don't know what the terms are.

22 Q Did you ever monitor the performance of
23 HEEP's trading on behalf of Powhatan?

24 A No.

25 Q Who was responsible for that?

1 A Monitor -- could you define what you mean
2 by "monitor" the trading?

3 Q Profits and losses, positions, just
4 monitoring how the trades are being done and whether
5 they're being profitable.

6 A That would have been Kevin Gates.

7 Q Is it fair to say Kevin Gates is the one
8 who managed the relationship with HEEP?

9 A That's right.

10 Q Did anyone at Powhatan manage that
11 relationship?

12 A No.

13 Q Do you know if PJM contacted Powhatan at
14 all about the up-to congestion transactions from May
15 2010 through August 2010?

16 A They did not contact me, and Kevin did not
17 inform me that they contacted him.

18 BY MR. HOPKIN:

19 Q Do you know if the independent market
20 monitor for PJM contacted anyone at Powhatan?

21 A They didn't contact me, and also, I never
22 heard from Kevin that he was contacted by that
23 person.

24 Q Going back to when we first started the
25 deposition, you indicated that Mr. Baptist was

1 asking you a series of questions about who you spoke
2 with in preparation for the deposition.

3 Did you speak to the person we deposed
4 this morning after his deposition this morning?

5 A Yes.

6 Q And what was the substance of that
7 conversation?

8 A We shook hands, and he complemented me on
9 my tie. That was about it.

10 Q So am I correct, then, that you did not
11 discuss the substance of his testimony?

12 A That's correct.

13 Q And did he discuss with you what the
14 substance or anything relating to the substance of
15 what your testimony would be this afternoon?

16 A No.

17 Q Do you recall indicating that you had
18 started to make or, in fact, did make a time line of
19 events related to this investigation?

20 A Yes.

21 Q Okay. And you completed that time line?

22 A Yes. I could always add more detail, but
23 yeah, it was sufficiently complete for --

24 Q Okay. Did you construct that time line at
25 the direction of your counsel?

1 A Their -- yes. It was mentioned that that
2 is sometimes helpful to keep the order of events --
3 it would make the process go better for all of us.

4 Q Have you retained a copy of that time
5 line?

6 A Yes.

7 Q Are you aware of whether or not the
8 trading that Mr. Chen conducted on Powhatan's behalf
9 was, in fact, actually done or executed in
10 Powhatan's name?

11 A I'm sorry. Could you repeat the question?

12 Q Sure. Let me try rephrasing it.

13 When -- Mr. Chen executed trades on
14 Powhatan's behalf; correct?

15 A Yes.

16 Q Okay. Now, when Mr. Chen did that, do you
17 know how those transactions were put into the PJM
18 system? In other words, were they put in such that
19 they reflected that they were being done for
20 Powhatan's behalf or that they were being done for
21 some other company?

22 A I don't know for sure. I know -- I sent
23 wires to the collateral account there. So my
24 assumption is that the account was earmarked for
25 Powhatan and that the trades -- that he was

1 functioning as a third-party trader with
2 discretionary control, which is similar to a
3 relationship I'm familiar with from TFS Capital and
4 the way it may serve as a third-party advisor.

5 Q When you say "collateral accounts there,"
6 are you referring to Powhatan's collateral accounts
7 at PJM or to something else?

8 A To PJM. I think it goes to a Blackrock --
9 a Blackrock account, which is, I guess, the entity
10 that they used to -- custody collateral accounts.

11 Q When you say "they," you mean PJM?

12 A PJM.

13 Q You indicated earlier you had a joint
14 conference call with Mr. Chen and that, during that
15 conference call, you were discussing whether or not
16 you should be represented jointly or separately.

17 Do you recall that?

18 A Yes.

19 Q Was an attorney on that call with you?

20 A Yes.

21 Q Who was that?

22 A I can't even recall the name of the
23 individual. The firm was Skadden, Arps. I can't
24 remember the fellow's name.

25 Q I may come back and ask you questions

1 about that later, but for now I'm going to ask you
2 something else.

3 Other than the trading that Powhatan has
4 delegated to Mr. Chen, does Powhatan engage in any
5 other trading in its own name?

6 A No.

7 Q So am I correct, then, that the only
8 trading that's being done on Powhatan's behalf is
9 Mr. Chen's trading?

10 A Yes.

11 Q Is it fair to say, then, that -- well,
12 strike that.

13 Can you describe for me what the purpose
14 of creating Powhatan was?

15 A Sure.

16 Q Okay.

17 A The -- Kevin and I had been working with
18 Alan Chen for a period of time and an entity called
19 Hunterized Energy Fund, and he had been doing very
20 well in that entity, and we desired to ramp up our
21 exposure to him and also isolate him from the other
22 energy traders. So the decision was made to start a
23 new entity that would be, at least at the outset,
24 dedicated to his trading and that we could ramp up
25 exposure within is really what led to that decision.

1 Q And that still remains the case, that
2 Powhatan, its existence is dedicated to facilitating
3 a trading relationship with Mr. Chen?

4 A It is. It certainly has the flexibility
5 to utilize other traders per the operating
6 agreement, but at present, he's the only one who has
7 performed services for that entity.

8 MR. HOPKIN: Thank you.

9 BY MR. BAPTIST:

10 Q When you created that time line, did you
11 have to research information from other sources, or
12 was this information that you had internally
13 already?

14 A It was largely prepared by Greg Sekelsky.
15 The time line had to do with when entities were
16 formed, when terminated, when we began -- or the
17 various entities began working with certain
18 third-party advisors, when relationships were
19 terminated with those various third-party advisors.
20 And that information is more at Greg's fingerprints
21 than mine. So I leveraged his help in putting that
22 together.

23 BY MR. TABACKMAN:

24 Q Mr. Eiben, again, my name is Steve
25 Tabackman, and I'm also an attorney with FERC.

1 When you were speaking with -- to follow
2 up on a question from Mr. Hopkin, when you were
3 speaking with Dr. Chen about joint counsel, were
4 you -- the gentleman from Skadden, do you know if
5 the name was Estes? Does that name ring a bell?

6 A I can't say.

7 Q Were you seeking legal advice from Skadden
8 at the time? Is that the reason they were on the
9 phone?

10 A At the time Kevin and I were attempting to
11 figure out which counsel we wanted to retain, and at
12 the same time, Kevin had received advice that it
13 would make sense to potentially have joint -- have a
14 single counsel for both parties. It was really a
15 brief discussion about do we want to go that route
16 or not.

17 MR. TABACKMAN: I don't want to go into
18 any attorney-client conversations. I'm trying to
19 figure out --

20 MR. HAGAN: We're at a fine line of did
21 conversations occur versus substance.

22 MR. TABACKMAN: Exactly.

23 BY MR. TABACKMAN:

24 Q Prior to that conversation where there was
25 a person from Skadden on the line, had you and

1 Mr. Gates and Dr. Chen had conversations without an
2 attorney about the possibility of joint
3 representation?

4 A I don't recall any conversations, but the
5 majority of conversation between Alan and Powhatan
6 would have been done through Kevin. So Kevin could
7 have attested to any conversations that occurred and
8 if they jumped on the line with any lawyers, I
9 wasn't aware of.

10 Q You said Mr. Gates had received advice
11 about the possibility of joint representation. Do
12 you know, did that advice come from a lawyer or some
13 other source? Just yes or no.

14 A I don't know definitively.

15 Q I take it a decision was reached not to
16 have joint representation?

17 A Yes.

18 Q What is your understanding of why it might
19 have been a good idea to have joint understanding?

20 MR. O'DONNELL: To the extent his
21 understanding is based upon advice rendered by
22 counsel, that would be privileged, and I don't want
23 to --

24 MR. TABACKMAN: Fair enough.

25 BY MR. TABACKMAN:

1 Q Different subject. Go back to the
2 discussion of Dr. Chen as investment advisor -- I
3 believe that was the title used -- for Powhatan. I
4 believe you said you had made phone calls to a
5 substantial number of other potential investment
6 advisors?

7 A Yes.

8 Q And considered those?

9 A It was a very preliminary stage. So I had
10 an open afternoon and a list, and my goal was to
11 make some contact with potential advisors and hand
12 them off really to Kevin for additional evaluation.

13 Q And in your phone call, what was your
14 purpose in doing that? Did you have conversations
15 with these advisors, with these potential advisors?

16 A I did. The purpose was to explore their
17 interest in potentially serving in a third-party
18 advisor-type relationship with, I believe, at the
19 time, was Hunterized Energy Fund.

20 Q This is well before the formation of
21 Powhatan?

22 A Yes.

23 Q And what was it that caused you to choose
24 Dr. Chen? When I say "you," I mean your entity,
25 Hunterized.

1 A You know, I don't know specifically. That
2 really would have been Kevin's domain more than me.
3 He would be able to give a much better answer on
4 that.

5 Q Did you have conversations with Mr. Gates
6 about that?

7 A I don't even know. I can't recall even if
8 we did or did not.

9 Q So you don't know today, then, why
10 Dr. Chen was selected, if I understand your
11 testimony?

12 A I can only make assumptions about it based
13 on my knowledge of how Kevin makes -- has
14 historically made those type of decisions. But
15 yes -- no, I can't. The short answer, no, I can't.

16 Q You don't need to testify to your
17 assumptions or guesses.

18 You testified earlier about that when you
19 were filling out the form for trading at PJM, that
20 you received some feedback from Dr. Chen. I believe
21 you testified that about -- so that he could do the
22 kinds of trades the way he needed to.

23 What do you recall about that feedback
24 that you got from him?

25 A Nothing more than what I said. I remember

1 him making a suggestion. I believe it was Kevin
2 that inquired for his feedback. He had a comment on
3 one section of the document. I believe we made the
4 change. But I didn't ask any questions or inquire
5 further about the --

6 Q So that he could trade the way he needed
7 to, what do you recall about that, the way he needed
8 to trade, if there's anything that stands out in
9 your mind?

10 A That's really the extent of it. It's a --
11 I remember it having something to do with the
12 trading, but not more than that.

13 Q Okay. You mentioned -- you testified
14 earlier that after Dr. Chen had received a letter
15 from FERC, that he -- or I believe you said it was
16 from FERC, that there was a discussion, he had
17 called Kevin Gates.

18 Do you recall that testimony?

19 A Yes. I'm not sure if he called him or
20 e-mailed him, but he contacted him.

21 Q There was a communication of some form?

22 A Yes.

23 Q And then Kevin Gates had asked you to
24 speak to Dr. Chen or to communicate with him in some
25 form? Did I understand that correctly?

1 A No, I don't think so. What happened was
2 Alan had reached out to Kevin. Kevin had reached
3 out to me, did we get a communication as well. I
4 checked and found that we did. I forwarded it on to
5 Kevin and said here it is.

6 Q But you didn't speak with Dr. Chen, then,
7 at that point or any subsequent point --

8 A No.

9 Q -- other than this conversation about
10 joint counsel, which I don't want to get in to?

11 A Right.

12 Q Just one other thing. Do you personally
13 have experience in trading?

14 A Power trading or energy trading?

15 Q Any trading.

16 A With TFS Capital, we trade individual
17 equities, and then personally, I've traded
18 individual equities, exchange traded funds, mutual
19 funds, equity options.

20 Q And do you have a particular area of
21 trading that you concentrate in personally?

22 A It really would be equities for TFS and
23 for my personal accounts.

24 Q And within the area of equities, any
25 particular industries that you have particular focus

1 on?

2 A No.

3 Q How about capital size of the equities
4 that you trade?

5 A TFS has historically focused on the small
6 cap space, though branching out in the last year to
7 be more mid cap and large cap as well.

8 Q One last area. In terms of the formation
9 of the -- the motivation for the formation of
10 Powhatan, there had been some trading -- Dr. Chen
11 had been doing some investment advising in the
12 energy area before the formation of Powhatan; that's
13 correct?

14 A Yes.

15 Q And you indicated that he had been doing
16 very well, so that's what led to your wanting to, my
17 word, isolate him, or maybe your word also, and
18 essentially set up a vehicle for him to trade in; is
19 that correct?

20 A Yes. He had been doing very well. We had
21 a number of third-party advisors in Hunterized
22 Energy Fund. We still felt -- Kevin and I felt that
23 we did not completely understand all the risks
24 involved in power trading. It seemed like a very
25 high-risk proposition, but still seemed at the time

1 worth the risk.

2 So the idea was to begin to separate the
3 traders into separate entities, partly for
4 operational purposes in order to more easily track
5 them, separate them. It helps in that regard. But
6 then also, from a risk standpoint, if one of the
7 traders performs horribly and bankrupts the entity,
8 it allows for some risk protection so that it
9 doesn't potentially take down other traders and
10 other capital.

11 You also, obviously, have greater
12 flexibility to invest in one fund and not another,
13 if you like one trader but not another.

14 Q And when he was doing very well, do you
15 know what kinds of trades he was doing?

16 A I don't.

17 Q And when you say he was doing very well,
18 could you further define that? What did you mean?
19 In terms of, I take it, the rate of return you were
20 getting relative to the risks you were incurring?

21 A I would define it less about the -- well,
22 yes, the fund -- Hunterized Energy Fund appreciated
23 considerably, the portion of it that he was
24 effectively controlling, appreciated considerably,
25 and it was a very attractive -- it appeared to be a

1 very attractive investment.

2 Q And what distinguished his trading -- was
3 his trading in a different area or different
4 marketplace or a different type of transaction than
5 the other traders were doing?

6 A I don't know.

7 Q How did you become aware that he was doing
8 very well?

9 A A couple of ways. And just to backtrack
10 one second on your prior question. I do know that
11 we had traders that were set up. I'm referring to
12 the investors there in Hunterized Energy Fund, the
13 third-party advisors, for example, on other
14 exchanges, is a term I'm used to, so the Midwest or
15 the New York, or the New England.

16 So certainly, I could see some of that
17 separation, but I don't know in terms of the tactics
18 of the strategies or the investment vehicles within.
19 So I want to clarify that point.

20 I'm sorry. Could you repeat your
21 question?

22 Q The last question was, how did you become
23 aware of it? Were you looking at reports of some
24 sort?

25 A Two ways. One would be Greg Sekelsky

1 would distribute the monthly net asset value of the
2 fund. So I could see that the fund itself was
3 appreciating. And Kevin would occasionally send
4 e-mails to me saying hey, Alan had a really good
5 month or really bad month. So I would get updates
6 from Kevin as to how things were progressing.

7 Q And finally, do you know what markets or
8 what exchanges, rather, Dr. Chen was trading in at
9 that time? This is pre-Powhatan.

10 A I don't know.

11 MR. TABACKMAN: Thanks.

12 MR. BAPTIST: I think we will take a five
13 to 10-minute break and come back. We will go off
14 the record.

15 (Recess.)

16 MR. BAPTIST: We will go back on the
17 record.

18 BY MR. HOPKIN:

19 Q I just had a few brief questions, and I
20 just want to use some hypothetical numbers just
21 because it will help illustrate -- it will help our
22 dialogue and help facilitate the questioning.

23 Let's assume that Dr. Chen earns \$100
24 trading on Powhatan's behalf, and under your
25 compensation agreement, he keeps 20, Powhatan gets

1 80.

2 What happens to the money after that? The
3 \$80 that Powhatan would have in that example, does
4 it stay in Powhatan, or does it get kicked elsewhere
5 in your -- in the corporate structure in which
6 Powhatan's involved?

7 A It could do either. It really would
8 depend on largely Kevin's recommendation and his
9 discussions with Alan, I guess, about the
10 requirements for collateral. So if the entity
11 needed money, either for collateral purposes or
12 because we wanted to further increase exposure to
13 the trading, it would stay in. If there was not a
14 need for additional collateral or to increase
15 exposure, then it would be distributed.

16 Q And when you refer to "the entity" in that
17 answer, were you referring to Powhatan?

18 A Powhatan.

19 Q All right. Can you describe for me the
20 relative ownership interests in Powhatan?

21 A The percentage interests of Powhatan --

22 Q Yes, sir.

23 A -- by the members? There are the seven or
24 eight that I described. Kevin Gates, Rich Gates,
25 and myself own the largest portions. We don't own

1 identical portions, but together, I guess it's on
2 the order of 60 to 70 percent or so.

3 Q And among the three of you, Kevin and Rich
4 Gates and yourself, who has the largest?

5 A I don't know for sure.

6 Q If I wanted to trace money that Dr. Chen
7 earned on Powhatan's behalf back through your
8 organization, how would you recommend I go about
9 doing that?

10 A Just ask me to provide it. That's easy.

11 Q Are there any particular documents you
12 would refer to in the course of doing that?

13 A There's the -- I guess in terms of
14 tracking the cash flows throughout, there's the
15 wires that are dispersed. So there's a checking
16 account that would show inflows and outflows, and
17 then there is a set of records that Greg Sekelsky
18 keeps that would describe when the disbursements go
19 out, who they're going to or if money is coming in,
20 who it's coming from, that type of thing.

21 BY MR. TABACKMAN:

22 Q When you say the money is kicked out of
23 Powhatan, the money's not kept in for collateral
24 purposes or whatever, is that typically distributed
25 to individuals or to other corporate entities in the

1 larger corporate family?

2 A Distributions from Powhatan?

3 Q Yes.

4 A That would go back out to the members. So
5 members have the ability to request a redemption
6 monthly, and if they submit the withdrawal
7 paperwork, then Greg and I would implement the
8 distribution and record it. So the money that is
9 dispersed out of Powhatan for the purposes of
10 redemptions would go back to the investors or the
11 members.

12 Q And the investors are individuals or
13 corporations or both?

14 A Individuals, other than the managing
15 member, LSE Capital Management, LLC.

16 MR. TABACKMAN: Thanks. That's all I had.
17 Thank you.

18 MR. BAPTIST: Counsel, do you have any
19 questions for the witness? Would you like to take a
20 break?

21 MR. HAGAN: Could we take a break for five
22 minutes.

23 (Recess.)

24 MR. BAPTIST: We can go back on the
25 record. Counsel, do you have any questions for your

1 witness?

2 MR. HAGAN: I do not have any questions.

3 One request, that Mr. Eiben be able to
4 review the deposition and that we get a copy of the
5 deposition.

6 MR. BAPTIST: We will take that under
7 advisement.

8 MR. HOPKIN: I explained to your
9 co-counsel, and I can explain again. It's governed
10 by 18 CFR 1b.12. Because of the posture of the
11 investigation that it's a formal, nonpublic
12 investigation, we actually have the discretion to
13 not give it. I believe I know what the office's
14 answer will be, but I'm not in a position to give it
15 to you at this time, the answer that is, and the
16 transcript. But we will be in touch.

17 MR. HAGAN: Okay. Thank you.

18 MR. BAPTIST: We will go off the record.

19 (Whereupon, at 3:53 p.m., the deposition
20 was concluded.)

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24

25

1 C O N T E N T S

2

3 WITNESS EXAMINATION

4 LAWRENCE S. EIBEN

5 by FERC Counsel 4

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11 E X H I B I T S

12 EXHIBIT NUMBER IDENTIFIED

13 Exhibit Eiben 1 5

14 Exhibit Eiben 2 20

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