

occasioned by an inadvertent typographical error that was not noticed until after the deadline for filing the Joint Statement had passed. When this error was noticed, Defendants and the Market Monitor worked in good faith to promptly alert the Court and file this motion for leave to amend.

Respectfully Submitted,

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Dated: May 3, 2021

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2021, I filed the foregoing motion for leave to amend with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to counsel of record in this matter.

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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

FEDERAL ENERGY REGULATORY)	
COMMISSION,)	
)	
Plaintiff,)	Civil Action No. 3:15-cv-00452 (MHL)
v.)	
)	
POWHATAN ENERGY FUND, LLC,)	
HOULIAN “ALAN” CHEN,)	
HEEP FUND, INC., and)	
CU FUND, INC.)	
)	
Defendants.)	
)	

**JOINT STATEMENT OF
DEFENDANTS AND THE INDEPENDENT MARKET MONITOR FOR PJM**

Pursuant to Paragraph 21 of the Court’s December 21, 2020 Initial Pretrial Order (ECF No. 160) and Section 20 of the Consent Protective Order entered by the Court on March 22, 2021 (ECF No. 170), Defendants Powhatan Energy Fund, LLC, Houlian “Alan” Chen, HEEP Fund, Inc., and CU Fund, Inc. (collectively, “Defendants”) and non-party Monitoring Analytics, LLC (“Market Monitor”), acting in its capacity as the Independent Market Monitor for PJM Interconnection, L.L.C. (“PJM”), hereby submit this Joint Statement regarding the discovery dispute referenced in Defendants’ April 16, 2021 Notice of Objection Regarding Monitoring Analytics, LLC’s Withholding of Documents Responsive to Defendants’ Subpoena (ECF No. 174).

In accordance with Paragraph 21(c) of the Initial Pretrial Order, a summary of the discovery dispute using the Discovery Dispute Chart that the Court provided to the parties at the Initial Pretrial Conference is included herewith. Because this dispute concerns an objection to the production of documents on the grounds of privilege or protection, Defendants’ understanding is that the Market Monitor should serve a privilege log on Defendants and provide a copy to the

Court, in accordance with Paragraph 21(f) of the Initial Pretrial Order. As discussed in the chart below as General Dispute No. 4, the Market Monitor requests that the Court exercise its discretion under Paragraph 21(f) of the Initial Pretrial Order and excuse the Market Monitor from any requirement to provide a privilege log.

Defendants and the Market Monitor have had multiple conversations regarding these issues and have exchanged and discussed the chart below as a part of an attempt to resolve the dispute without the Court's intervention. In accordance with Paragraph 21(g) of the Initial Pretrial Order, counsel for Defendants and the Market Monitor certify that they have met and conferred in good faith to attempt to resolve this dispute.

Respectfully Submitted,

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Dated: April 30, 2021
(as amended May 3, 2021)

Discovery Dispute Chart

Discovery Disputes	Market Monitor's Objection / Answer	Defendants' Response to Objection	The Court's Ruling
<p>General Dispute No. 1: Although the Market Monitor produced certain documents to Defendants on March 23, 2021, the Market Monitor has not provided documents potentially responsive to all 17 of Defendants' Requests on the grounds of relevance.</p> <p>Attached as Appendix A is a copy of the subpoena Requests (as revised following an initial meet and confer session).</p>	<p>The requests seek irrelevant information for the reasons explained in the Market Monitor's letter dated December 21, 2020 ("Objection Letter"). Because FERC alone made the determination on market manipulation in the order that it seeks to enforce, information held by the Market Monitor that FERC did not have is irrelevant. The Market Monitor does not agree that "fair notice" is a valid defense, but to the extent it matters, information that the Market Monitor has that Defendants do not have is irrelevant to notice to Defendants. Defendants should seek to obtain information from FERC, who is a party, and refrain from burdening a non party.</p> <p>The Market Monitor objects to requests nos. 1–17 because they are overly broad and/or seek irrelevant information. The greatest imposition of burden on</p>	<p>Response: Defendants' Requests seek information relevant to the claims and defense in and proportional to the needs of this case.</p> <p><u>Relevance of Documents and Communications Not Within FERC's Control</u></p> <p><u>Rules:</u></p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 26(b)(1) • 16 U.S.C. § 823b(d)(3)(B) ("The court shall have authority to review de novo the law and the facts involved....") <p><u>Cases:</u></p> <ul style="list-style-type: none"> • <i>Spendlove v. RapidCourt, LLC</i>, No. 3:18-CV-856, 2019 WL 7143664, at *5 (E.D. Va. Dec. 23, 2019) ("Relevancy is broadly construed to include any information if there is 'any possibility' it may be relevant to any claim or defense.") • December 28, 2017 Memorandum Opinion (ECF No. 89) 	

	<p>the Market Monitor resulting from these requests concerns information about third parties that is not relevant to the case. Information related to investigations of third parties by the Market Monitor is not relevant to the investigation of Defendants by FERC that is the basis for this case. <i>See Acosta v. Team Env'tl.</i>, 2017 U.S. Dist. LEXIS 231785 at 16-17 (S.D. W. Va., Dec. 20, 2016) (“Information related to other Wage and Hour investigations and the Secretary's legal proceedings involving other oil and gas companies have no bearing on the active steps Defendant took to comply with the FLSA or on what the Defendant believed or had reason to believe as to its compliance with the FLSA. Such information is irrelevant and not subject to discovery pursuant to Fed. R. Civ. P. 26(b)... To the extent Defendant seeks this information to establish a theory it has been singled out or "unfairly" targeted by the Secretary, this theory is not a valid defense to the</p>	<p><u>Facts:</u></p> <ul style="list-style-type: none"> • Under the Federal Power Act, this case involves <i>de novo</i> review of the law and the facts involved; it is not a limited judicial review of FERC's investigation or analysis. 16 U.S.C. § 823b(d)(3)(B). A court's review in cases like this is not limited to the so-called “administrative record” and defendants in such cases have the right to conduct their own discovery. <i>See</i> December 28, 2017 Memorandum Opinion (ECF No. 89). Defendants are not required to rely on or limit the scope of their discovery based on FERC's investigation, show-cause order process, or penalty assessment order. • The Requests in Defendants' subpoena directly relate to central issues in the case, including whether Defendants' trades were manipulative and whether Defendants had fair notice that their trades would be considered manipulative. The fact that the information sought may not be within FERC's possession is not determinative of its relevance. 	
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	<p>Defendant's failure to comply with the FLSA.”).</p> <p>In another similar case, also arising out of the Referral for Potential Violations, the Court granted FERC’s motion for summary judgment and rejected reliance on a selective enforcement defense. <i>FERC v. Coaltrain Energy, L.P., et al.</i>, Opinion and Order, Case No. 2:16-cv-00732-MHW-KAJ (S.D. Ohio) at 73–76 (“Summary Judgement Order re Coaltrain”). The court did so even when examining the non movants’ arguments in the most favorable light. Whether FERC should have investigated or assessed penalties on others is not relevant to this case. The Market Monitor did not determine FERC’s decisions in FERC’s investigation or advise FERC in its subsequent determinations. Whether the Market Monitor should have selected others for investigation or referral is even further removed from relevance to this case.</p>	<p><u>Relevance of Information About Other Market Participants</u></p> <p><u>Rules:</u></p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 26(b)(1) • Advisory Committee’s Note to 2000 Amendments to Fed. R. Civ. P. 26(b)(1) (explaining that information about “other incidents of the same type” may be relevant to a party’s claims or defenses and thus “properly discoverable”) <p><u>Cases:</u></p> <ul style="list-style-type: none"> • <i>Schneider v. Chipotle Mexican Grill, Inc.</i>, No. 16-cv-02200-HSG (KAW), 2017 WL 1101799, at *4 (N.D. Cal. Mar. 24, 2017) (discovery about related matters is appropriate where there is “significant factual and legal overlap”) • <i>Spendlove v. RapidCourt, LLC</i>, No. 3:18-CV-856, 2019 WL 7143664, at *5 (E.D. Va. Dec. 23, 2019) (“Relevancy is broadly construed to include any information if there is ‘any possibility’ it may be relevant to any claim or defense.”) <p><u>Facts</u></p>	
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	<p>By email dated April 12, 2021, the Market Monitor explained that certain documents set aside from a significant voluntary production of documents by a non party are not provided on grounds of relevance. The Market Monitor provided a referral and limited assistance to the FERC in understanding the referral. The Market Monitor played no further role in FERC’s investigation. The order that FERC seeks to enforce is solely the result of FERC’s investigation. Information in the possession of the Market Monitor that is not in FERC’s possession did not affect the order and is not relevant to this case. Any relevant information in the possession of the Market Monitor is also in the possession of FERC.</p> <p>An example of information best obtained from FERC is information relating to communications between the Market Monitor and Coaltrain Energy on July 27, 2010. The Market Monitor received from FERC in the context of</p>	<ul style="list-style-type: none"> • Certain of Defendants’ Requests seek information about other PJM market participants who allegedly engaged in up-to congestion (“UTC”) transactions in 2010 in order to obtain marginal loss surplus allocation (“MLSA”) payments. This information is likely to be relevant to several of Defendants’ defenses, including those related to void-for-vagueness, fair notice and selective enforcement, whether the trades were manipulative, scienter, waiver, and the seriousness of the alleged violations. • The Market Monitor is tasked with identifying suspected market violations is required to refer suspected market violations to FERC’s Office of Enforcement. Thus the Market Monitor’s views and actions with respect to other market participants who engaged in the same type of trading as Defendants and received the same type of payments during the same period may be relevant in assessing the legality of the trading at issue in this case, whether Defendants had fair notice that such trading would 	
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	<p>confidential discovery in the <i>Coaltrain</i> case information created by Coaltrain in connection with such communications. The information was created by Coaltrain illegally. The information, if the Court finds it relevant, could be obtained from Coaltrain, who created it illegally, or from FERC, who is a party to this case.</p> <p>The purpose of the call was to provide Coaltrain an opportunity to explain Coaltrain’s trading behavior that the Market Monitor was concerned constituted market manipulation. The Market Monitor did not in this case and does not generally call participants to inform them that it has no concerns about their market behavior.</p> <p>The Market Monitor does not agree that Defendants have correctly framed the core issue in this case. Coaltrain is not accused of violating the rules in PJM’s market tariff. Coaltrain, like the Defendants, is accused of engaging in market manipulation.</p>	<p>be considered manipulative, and other of Defendants’ defenses.</p> <ul style="list-style-type: none"> • For instance, with respect to fair notice, “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required... A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” <i>F.C.C. v. Fox Television Stations, Inc.</i>, 567 U.S. 239, 253 (2012) (internal quotations and citation omitted). Defendants have reason to believe that communications involving the Market Monitor related to UTC trading by other market participants in 2010 may indicate that the Market Monitor, PJM, and other market participants had no contemporaneous notice that FERC would consider UTC trading that took MLSA payments into consideration to be manipulative. Such communications would 	
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	<p>The statement Defendants claim to need does not assert that Coaltrain Energy did not engage in market manipulation. Even if, contrary to the facts, the Market Monitor had stated any opinion on market manipulation, any such opinion would have been preliminary with respect to Coaltrain, and any such opinion would not have concerned the Defendants or been known to the Defendants.</p> <p>The Market Monitor has provided in its voluntary document production any information concerning its communications to Defendants about Defendants’ activities.</p> <p>Whether Defendants had “fair notice” concerning how others would view their activities is not an element for showing prohibited market manipulation. Defendants would have had to disclose all information relevant to their activities and about their intent in order to obtain a third party opinion with a reasonable basis.</p>	<p>support Defendants’ fair notice and void-for-vagueness defenses.</p> <ul style="list-style-type: none"> • The investigations of Defendants and other market participants who received MLSA payments based on UTC trades were closely linked from the outset. The Market Monitor’s own referral to FERC covered allegations against Defendants as well as other UTC traders, indicating that such investigations were likely handled on a coordinated basis. • The limited information we do have about communications regarding other UTC traders who received MLSA payments in 2010 demonstrates why such communications are likely to be relevant to this case. For instance, after Defendants publicly requested it, FERC Enforcement staff provided a transcript of a July 27, 2010 call between Dr. Joseph Bowering, President of PJM’s independent market monitor, and representatives of another trading firm whose UTC transactions from summer 2010 garnered MLSA payments and have since been alleged to be manipulative by FERC. <i>See Chen</i>, Docket No. 	
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	<p>The Market Monitor has not disclosed confidential communications with other participants. Such communications potentially pertain to the information on the Market Monitor’s views available to other participants. Communications not provided by the Market Monitor include third parties’ providing to the Market Monitor their opinions on and observations of market activities. Such communications are irrelevant to Defendants fair notice defense.</p> <p>Defendants reliance on <i>Spendlove</i> is misplaced. The discovery at issue was sought from the Defendant in that case. In this case, the Market Monitor is a non party. In addition, the court in <i>Spendlove</i> was concerned that the Defendant failed to explain why the request was not relevant. The court explained (at 11–12): “For a relevance objection to be adequate, it must be ‘plain enough and specific enough so</p>	<p>IN15-3-000, Answer in Opposition to Expedited Motion for Two-Week Extension of Time, Attachment B-1 (filed Jan. 29, 2015). Dr. Bowring told these traders that they were “not violating the rules” by engaging in UTC transactions at issue, acknowledged that the then-existing market rules were “incenting this behavior,” and stated that—notwithstanding the market monitor’s duty to refer potential violations of FERC’s anti-manipulation rule to the FERC Office of Enforcement—he was “not going to take any further action” against the traders after they stated they would discontinue the transactions at issue. This call indicates that the Market Monitor did not contemporaneously view UTC trading to obtain MLSA payments as prohibited or manipulative conduct, which seriously undercuts FERC’s claims in this case and supports several of Defendants’ defenses. Thus there is good reason to believe that highly relevant information may contained in communications related to other UTC traders who received MLSA payments.</p>	
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	<p>that the court can understand in what way the interrogatories [or document requests] are alleged to be objectionable,” citing <i>Panola Land Buyers Ass'n v. Shuman</i>, 762 F.2d 1550, 1559 (11th Cir. 1985). The Market Monitor’s explanation of why the requests are irrelevant meets the plain and specific test.</p>	<ul style="list-style-type: none"> • The language the Market Monitor quotes from <i>Acosta v. Team Environmental</i>, 2017 U.S. Dist. LEXIS 231785 at 16-17 (S.D. W. Va., Dec. 20, 2016), is from the response of the plaintiff in that case to certain requests for production; it does not reflect the opinion of the court. • The fact that the <i>Coaltrain</i> defendants did not prevail on the issue of selective enforcement does not alter the analysis in any way. The <i>Coaltrain</i> decision is not controlling in this case and was only issued <i>after</i> the parties had the opportunity to conduct discovery. There is no indication that the <i>Coaltrain</i> court imposed the types of limits on discovery that the Market Monitor now seeks in this case. • The Market Monitor’s assertions regarding the availability of potentially relevant information from FERC or other sources is not pertinent to the question of relevance. It is addressed below in the response to General Dispute No. 3. 	
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<p>General Dispute No. 2: Although the Market Monitor produced certain documents to Defendants on March 23, 2021, the Market Monitor has not provided documents potentially responsive to Request Nos. 1–3, 7, 9–10, 13 on the grounds that the documents include confidential PJM member information.</p> <p>Attached as Appendix A is a copy of the subpoena Requests (as revised following an initial meet and confer session).</p>	<p>The Market Monitor objects, and objects on behalf of PJM Members, to the extent that the request seeks documents, data or responses containing or concerning confidential commercial, business, financial, proprietary or competitively sensitive information, trade secrets or documents or information concerning Member documents that are subject to nondisclosure agreements or confidentiality undertakings.</p> <p>The Market Monitor objects, and objects on behalf of PJM Members, to the extent that any request, specifically including requests nos. 1–3, 7, 9–10, 13 and 14 seeks documents, data or responses containing or concerning confidential commercial, business, financial, proprietary or competitively sensitive information, trade secrets or documents or information concerning Member documents that are subject to nondisclosure agreements or confidentiality undertakings. The Market Monitor provided notice to Members on December 9,</p>	<p>Response: The Market Monitor has no valid grounds for withholding documents based on confidentiality concerns, particularly in light of the Consent Protective Order entered by the Court on March 22, 2021 (ECF No. 170).</p> <p><u>Rules:</u></p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 26(b)(1) • Fed. R. Civ. P. 45 • 16 U.S.C. § 823b(d)(3)(B) (“The court shall have authority to review de novo the law and the facts involved....”) <p><u>Cases:</u></p> <ul style="list-style-type: none"> • <i>MDK, Inc. v. Mike’s Train House, Inc.</i>, 27 F.3d 116, 120 (4th Cir. 1994) (“[T]rade secrets have widely been held to be discoverable upon appropriate findings and with an appropriate protective order.”) • <i>McKellips v. Kumho Tire Co.</i>, 305 F.R.D. 655, 661 (D. Kan. 2015) (“W]hile a confidentiality objection may be appropriate when a party seeks a protective order limiting the parties’ use or disclosure of confidential information, it generally is not a valid objection for withholding discovery altogether.”) 	
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	<p>2020, as required under Section I.B of Attachment M to the OATT. Members have raised concerns and objections about the scope of the requests and have indicated support for the Market Monitor’s submitting these objections.</p> <p>Rules 26 and 45 provide for the protection of such information from disclosure.</p> <p>In addition, the Market Monitor has a special status in its relationship with the Federal Energy Regulatory Commission (FERC) and Members of PJM. The Market Monitor is an organization among those relatively recently created by FERC, along with Regional Transmission Organizations (“RTOs”), in the Federal Rules. <i>See</i> 18 CFR § 35.28 & 35.34. RTOs, including the RTO relevant to this case, PJM Interconnection, L.L.C. (“PJM”), operate the wholesale energy and the bulk electric power grid to facilitate the sale and delivery of wholesale power at prices regulated through competition.</p>	<ul style="list-style-type: none"> • <i>Fresenius Med. Care Holding Inc. v. Baxter Int’l, Inc.</i>, 224 F.R.D. 644, 654 n.3 (N.D. Cal. 2004) (“Baxter is, of course, free to designate this information as confidential and restrict access under the Protective Order governing this litigation. Baxter may not, however, withhold these documents under a claim of privilege merely because they are confidential business documents.”) • December 28, 2017 Memorandum Opinion, slip op. at 29-30 n.28 (ECF No. 89) (“[D]enying the Respondents access to a truly adversarial proceeding, including the use of compulsory process and the ability to subpoena information and witnesses, would likely violate due process.”) <p><u>Facts:</u></p> <ul style="list-style-type: none"> • Any concerns the Market Monitor may have regarding the production of confidential information were addressed when the Court entered the Consent Protective Order on March 22, 2021 (ECF No. 170). • The parties spent more than two months drafting and negotiating a protective order and involved both the Market Monitor and PJM in 	
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	<p>This regulatory approach means that PJM and Market Monitor documents and data are market sensitive information that cannot be revealed without harm to federal regulation and to the public interest. Also, PJM Members subject to regulatory oversight by FERC and to monitoring by the Market Monitor are required to reveal to the Market Monitor commercially and competitively sensitive information. <i>See</i> PJM OATT Attachment M & Attachment M–Appendix. FERC has required that RTOs include for themselves and for Market Monitors rules protecting the confidentiality of such information. <i>See</i>, PJM OA § 18.17; PJM OATT Attachment M–Appendix § I.</p> <p>A core function of the Market Monitor is to “[i]dentify and notify the Commission's Office of Enforcement staff of instances in which a market participant's or the Commission-approved independent system operator's or regional transmission organization's behavior may</p>	<p>those negotiations in order to address concerns regarding confidential PJM member information. An initial draft of the Consent Protective Order was sent to the Market Monitor on January 11, 2021.</p> <ul style="list-style-type: none"> • The Market Monitor provided proposed edits to the Consent Protective Order on March 9, 2021. While the parties incorporated certain of the Market Monitor’s proposed edits, both Defendants and FERC agreed that many of the proposed edits were unworkable and would not allow the parties to effectively prepare and litigate the case. • The Market Monitor did not object to the Consent Protective Order when it was filed. The Market Monitor also has not proposed adjustments to the Protective Order that would address its concerns while preserving the ability of the parties to effectively litigate this case. • The PJM tariff does not provide absolute protection for member confidential information submitted to the Market Monitor. Instead, it envisions the use of protective 	
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	<p>require investigation, including, but not limited to, suspected Market Violations.” 18 CFR § 35.28(g)(3)(ii)(C). The Market Monitor is required to refer matters to the FERC Office of Enforcement when there is sufficient credible evidence of a market violation. PJM OATT Attachment M § IV.I.1; 18 CFR § 35.28(g)(3)(iv). The Market Monitor operates within the jurisdiction of a federal agency. Accordingly, the Market Monitor asserts a privileged status for its communications with the FERC about its investigations. Information about investigations has, in addition to revealing commercially sensitive information, potential to inflict reputational harm. The burden of discovery on Market Monitor information is high, and the potential for conflict with federal energy regulatory law and policy is high, so the asserted privilege should factor into a court’s need relative to burden analysis. If every penalty enforcement action means highly sensitive PJM and PJM Member information must be disclosed, even on a limited</p>	<p>measures—like the Consent Protective Order in place in this case—to address confidentiality considerations. PJM Open Access Transmission Tariff, Attachment M - Appendix § I.B.1 (“[I]f the Market Monitoring Unit is required by applicable law, order, or in the course of administrative or judicial proceedings, to disclose to third parties, information that is otherwise required to be maintained in confidence pursuant to the PJM Tariff, PJM Operating Agreement, Tariff, Attachment M or this Appendix, the Market Monitoring Unit may make disclosure of such information.... The Market Monitoring Unit shall cooperate with the affected Members to obtain proprietary or confidential treatment of such information by the person to whom such information is disclosed prior to any such disclosure.”).</p> <ul style="list-style-type: none"> • This Court and others have ruled that defendants in Federal Power Act civil penalty actions subject to <i>de novo</i> review have a right to discovery in order to protect their due process rights. The exercise of that right is part and parcel of—and 	
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	<p>basis, processes that are relied upon to protect the integrity of PJM markets and to ensure that regulation through competition serves the public interest will be harmed.</p> <p>Despite its objection, the Market Monitor provided communications with FERC in its voluntary production. The Market Monitor did so even though such communications are also obtainable from FERC, who is a party.</p> <p>By email dated April 12, 2021, the Market Monitor confirmed Defendants that there are 581 email communications that were identified as potentially responsive but not provided because such communications include confidential PJM Member information, include confidential communications between the Market Monitor and PJM Members, or reference confidential communications between the Market Monitor and PJM Members.</p>	<p>does not conflict with or harm—“federal energy regulatory law and policy.”</p> <ul style="list-style-type: none"> • Defendants understand that the Market Monitor is not standing on and has waived any claims of privilege regarding communications with FERC. • As explained in response to General Dispute Nos. 1 and 3, the information requested is relevant to the claims and defenses in this case and cannot be obtained from another party or non-party. 	
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	<p>The parties included the Market Monitor in discussions concerning the Protective Order effective in the proceeding. The Protective Order does not prevent the disclosure of confidential information. No party asserted otherwise. The Market Monitor suggested changes that would prevent disclosure. The suggested changes were rejected. The Market Monitor is a non party and does not object to the Protective Order insofar as it applies to parties who agreed to it. The Market Monitor believes that the Protective Order is sufficient to protect information provided in its voluntary production. The Market Monitor does not agree that the Protective Order is sufficient to protect confidential information that the Market Monitor did not include in its voluntary production because the Market Monitor is concerned that such information could still be publicly disclosed under the Protective Order.</p>		
<p>General Dispute No. 3: Although the Market Monitor</p>	<p>Including for the reasons explained in the Objection Letter,</p>	<p>Response: The Requests are both directly relevant to the claims and</p>	

<p>produced certain documents to Defendants on March 23, 2021, the Market Monitor has not provided documents potentially responsive to Request Nos. 1–4, 7, 9–14 and 17 on the grounds of unreasonable burden.</p> <p>Attached as Appendix A is a copy of the subpoena Requests (as revised following an initial meet and confer session).</p>	<p>the Market Monitor objects that request nos.1–4, 7, 9–14 and 17 impose an undue burden and undue expense on the Market Monitor.</p> <p>A person issuing a subpoena must "take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." FRCP 45(c)(1). A court "shall quash or modify" a subpoena that subjects a person to "undue burden." FRCP 45(c)(3)(A). A subpoena cannot be enforced if it seeks irrelevant information. <i>Misc. Docket Matter #1 v. Misc. Docket Matter #2</i>, 197 F.3d 922, 925 (8th Cir. 1999).</p> <p>Even if a subpoena seeks relevant information, discovery will be not permitted if no need is shown, compliance would be unduly burdensome, or the harm to the person from whom discovery is sought outweighs the need of the person seeking discovery. <i>Id.</i>; <i>Roberts v. Shawnee Mission Ford, Inc.</i>, 352 F.3d 358, 361 (8th Cir. 2003) (holding that a district court has</p>	<p>defenses in the case (as explained in response to General Dispute No. 1) and proportional to the needs of the case.</p> <p><u>Rules:</u></p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 26(b)(1) • Fed. R. Civ. P. 45 <p><u>Cases:</u></p> <ul style="list-style-type: none"> • <i>In re Subpoena Duces Tecum to AOL, LLC</i>, 550 F. Supp. 2d 606, 612 (E.D. Va. 2008) (“When a non-party claims that a subpoena is burdensome and oppressive, the non-party must support its claim by showing how production would be burdensome.”) • <i>Gray v. Town of Easton</i>, No. 3:12CV166 RNC, 2013 WL 2358599, at *2 (D. Conn. May 29, 2013) (rejecting motion to quash subpoena where non-parties made “no showing as to the nature and extent of the actual burden they would face in responding to the plaintiffs’ requests”) <p><u>Facts:</u></p> <ul style="list-style-type: none"> • The Market Monitor has failed to articulate a single specific reason why the Requests would be 	
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	<p>discretion to limit discovery when its burden or expense outweighs its likely benefit). In balancing competing needs, the unwanted burden of discovery on non-parties is entitled to special weight. <i>Misc. Docket Matter #1</i>, 197 F.3d at 927. For the reasons explained above, the burden on the Market Monitor significantly increases when confidential information is within the scope of the request, particularly PJM Member Confidential information.</p> <p>Defendants have not articulated any need to obtain documents from any non party to the lawsuit. Vague reference to the Market Monitor’s “responsibilities with respect to the PJM market” do not mean that every participant accused of market manipulation has a right to access the Market Monitor’s highly confidential and market sensitive files. On the contrary, those responsibilities are a reason to protect the Market Monitor’s files from disclosure, particularly when there is no showing of relevance. The Subpoena</p>	<p>burdensome or to approximate the effort involved to respond to the Requests.</p> <ul style="list-style-type: none"> • Defendants’ Requests are narrowly tailored and the benefits of the requested discovery far outweigh the alleged burdens. The Requests directly relate to central issues in the case, including whether Defendants’ trades were manipulative and whether Defendants had fair notice that their trades would be considered manipulative; roughly \$34.5 million is in controversy; this is Defendants’ first opportunity to obtain discovery; Defendants have no other way to obtain the requested materials, which include documents and communications within the possession, custody, or control of the Market Monitor that are unlikely to be available from FERC or PJM; and Defendants expect that the requested information is likely to be highly important in resolving the case for reasons explained in response to General Dispute No. 1. • While the Market Monitor is not a party to this action, the Market Monitor—by its own admission— 	
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	<p>requests various documents also available from FERC, which is a party. Documents may have already been obtained from FERC through prior discovery.</p> <p>To the extent the FERC objects to a discovery request, and the Court sustains the objection, the Market Monitor should not be required to provide such information. To the extent that the Court overrules the objection, and FERC does provide the information, there is no reason to require the Market Monitor to provide the same information.</p> <p>Other documents may be available from PJM, a significantly larger organization with greater resources to comply with discovery requests. Documents may already have been obtained from PJM through prior discovery, and may be obtained in the course of concurrent discovery.</p> <p>"An evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the</p>	<p>worked with FERC on investigating the Defendants and other UTC traders who received MLSA payments. In its initial objections to Defendants' Requests, the Market Monitor even claimed that its relationship with FERC was so close that its communications with FERC about investigations should be considered privileged. Additionally, the Market Monitor's annual budget exceeds \$14 million and the Market Monitor's responsibilities include "address[ing] market topics and enforcement issues in proceedings in federal and state courts." <i>See</i> PJM Finance Committee Recommendations (Sept. 16, 2020), https://www.pjm.com/-/media/committees-groups/committees/fc/postings/finance-committee-2021-budget-recommendation-letter.ashx; Monitoring Analytics, <i>Activities of the Market Monitoring Unit 2019</i> at 15 (Dec. 14, 2020), http://www.monitoringanalytics.com/Reports/Reports/2020/IMM_Activities_Report_2019.pdf.</p> <ul style="list-style-type: none"> • While Defendants repeatedly invited the Market Monitor to identify ways in which the Requests 	
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	<p>information to the serving party." <i>Travelers Indem. Co. v. Metropolitan Life Ins. Co.</i>, 228 F.R.D. 111, 113 (D. Conn. 2005) (Whether a subpoena imposes an undue burden depends upon "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.").</p> <p>The concern to avoid undue burden is heightened, where, as in the case of the Market Monitor, the burden is imposed on a non party. 2017 U.S. Dist. LEXIS 183014 (E.D. Va.); <i>Cusumano v. Microsoft Corp.</i>, 162 F.3d 708, 717 (1st Cir. 1998) ("Concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.").</p> <p>The Market Monitor estimates that it would require significant information technology staff time and analytical staff time to search</p>	<p>could be limited to alleviate any undue burden, the Market Monitor refused to do so.</p> <ul style="list-style-type: none"> Defendants made their own efforts to further limit the scope of the already narrowly tailored Requests, including by revising certain Requests on January 11, 2021 in response to the Market Monitor's initial objections and by proposing specific search strings and narrower date ranges on January 27, 2021. Defendants also offered to negotiate limits on which databases would be searched and included in the Consent Protective Order a "claw-back" provision to alleviate concerns about inadvertent productions of privileged materials. The Market Monitor provided no feedback on these proposals and no substantiation for the claim that the Requests remain unduly burdensome. The Market Monitor has provided no support for its claim that the materials sought—documents and communications in the Market Monitor's possession, custody, or control, including materials that were not shared with FERC or PJM—can be obtained from other 	
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	<p>for and identify responsive documents given the open ended time frames specified. Significant analytical staff time would be necessary to ensure no responsive files exist outside of central data bases. Significant executive and legal staff time would be necessary to review and evaluate documents identified as potentially responsive, not including the potentially significant legal staff time that could be necessary to specifically identify responsive but privileged documents.</p> <p>Under Section I.B of Attachment M–Appendix to the OATT, when information is requested under subpoena that is Member Confidential information, the Market Monitor must follow a process to notify members that such information is requested and cooperate “to the maximum extent practicable to minimize the disclosure of the information consistent with applicable law.” Following the process imposes special burdens on the Market Monitor, and such burdens are significantly increased if the</p>	<p>sources. While certain specific communications could be obtained from FERC or other non-parties, seeking discovery from the Market Monitor is reasonable and justified given its responsibilities with respect to the PJM market and the likelihood that it will have relevant materials not within FERC’s possession. The fact that such materials may not have been shared with FERC does not mean they are not relevant to the claims and defenses in this action, for reasons explained in response to General Dispute No. 1.</p> <ul style="list-style-type: none"> • The fact that the Market Monitor could simply designate the allegedly confidential material as such under the Court’s Consent Protective Order should allay most of the burden alleged, which largely appears to center on review of potentially confidential material. As explained in response to General Dispute No. 2, the Market Monitor has provided no explanation for why the Court’s Consent Protective Order does not address its concerns relating to confidential information. 	
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	<p>Defendants are unwilling to exclude Member confidential information from the scope of the request.</p> <p>To respond to this Subpoena, the Market Monitor would be forced to devote substantial time and resources to review and identify and copy the requested documents. The potential for inadvertent release of Member Confidential Information and the need to take care to avoid such release increases the burden on the Market Monitor.</p> <p>The Market Monitor understands that a considerable amount of the data and documents sought in the Subpoena have already been obtained or may be obtained from the FERC. Under these circumstances the documents and data sought from the Market Monitor are purely duplicative, and Defendants can point to no legitimate need for the same information from the Market Monitor. Information in the possession of the Market Monitor but not in possession of the FERC would not have been</p>		
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	<p>relied upon by the FERC when FERC made decisions about how to proceed with its own investigation and analysis.</p> <p>The Market Monitor's investigation of a matter for potential referral to FERC occurs within the scope of market monitoring rules required by and approved by FERC, but does not directly involve FERC's Office of Enforcement. Once a matter is referred, continued involvement by the Market Monitor is solely at FERC's discretion and direction. In this case, the Market Monitor's involvement post referral was limited to explaining the data and related market operations. FERC is not required to explain to the Market Monitor its action or inaction on a referral. The Market Monitor was not involved in FERC's investigation of Defendants, and it was not involved in the determination to issue its order to show cause. Accordingly, non public information that the Market Monitor has but FERC does not have is not relevant to</p>		
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	<p>FERC’s order that FERC seeks to enforce in this case.</p> <p>The harm to Market Monitor far outweighs any need that Defendants may have for the documents. <i>Roberts</i>, 352 F.3d at 360.</p>		
<p>General Dispute No. 4: Defendants and the Market Monitor disagree as to whether, prior to the Court’s review of this matter and potential grant of its request for relief, the Market Monitor is required to provide a privilege log, in accordance with Paragraph 21(f) of the Court’s Initial Pretrial Order.</p>	<p>The Market Monitor requests that the Court exercise its discretion under Rule 21(f) and excuse the Market Monitor from any requirement to provide a privilege log.</p> <p>The Market Monitor’s objection based on relevance is categorical and does not require an evaluation of individual documents. The issue of the Market Monitor’s claim of privilege based on the nature and purpose of the market monitoring function should be resolved prior to an evaluation of individual documents.</p> <p>Rule 21(f) by its terms applies to parties to this proceeding. The Market Monitor lacks the resources available to the parties</p>	<p>Response: If General Dispute No. 2 is not resolved in Defendants’ favor outright, the court should require the IMM to produce a privilege log to allow for full evaluation of the IMM’s claims for protection.</p> <p><u>Rules:</u></p> <ul style="list-style-type: none"> • Paragraph 21(f) of the Court’s Initial Pretrial Order (ECF No. 160) • Section 20 of the Consent Protective Order (ECF No. 170) (making Paragraph 21 applicable to third parties who are requested or required to produce evidence) • Fed. R. Civ. P. 45(e)(2)(A) (“A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: (i) expressly make the claim; and (ii) describe the nature of the 	

	<p>and would be required to divert resources from performing its function in order to prepare a privilege log.</p>	<p>withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim”)</p> <p><u>Cases:</u></p> <ul style="list-style-type: none"> • <i>Moore v. Shapiro & Burson, LLP</i>, No. 3: 14CV832 DJN, 2015 WL 6674709, at *1 (E.D. Va. Oct. 29, 2015) (explaining that the third party “failed to provide a privilege log or functional equivalent, thereby failing to comply with Rule 45(e)(2)(A) of the Federal Rules of Civil Procedure.”) • <i>Acosta v. Med. Staffing of Am., LLC</i>, No. 2:18CV226, 2019 WL 6122016, at *2–3 (E.D. Va. Mar. 15, 2019) (“A party can sustain this burden [under Rule 45(e)(2)(A)] through a properly prepared privilege log that identifies each document withheld, and contains information regarding the nature of the privilege/protection claimed, the name of the person making/receiving the communication, the date and place of the communication, and the 	
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		<p>document’s general subject matter.”)</p> <p><i>Facts:</i></p> <ul style="list-style-type: none"> • There is no reason to believe that requiring a privilege log would be unduly burdensome here. • The Market Monitor has represented that it is withholding 581 email communications. • Contrary to the Market Monitor’s claims about limited resources, the Market Monitor’s annual budget exceeds \$14 million and the Market Monitor’s responsibilities include “address[ing] market topics and enforcement issues in proceedings in federal and state courts.” <i>See</i> PJM Finance Committee Recommendations (Sept. 16, 2020), https://www.pjm.com/-/media/committees-groups/committees/fc/postings/finance-committee-2021-budget-recommendation-letter.ashx; Monitoring Analytics, <i>Activities of the Market Monitoring Unit 2019</i> at 15 (Dec. 14, 2020), http://www.monitoringanalytics.com/Reports/Reports/2020/IMM_Activities_Report_2019.pdf. 	
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		<ul style="list-style-type: none"> Given the relatively limited set of documents, the Market Monitor's resources, and the fact that this activity is within the scope of the Market Monitor's responsibilities, there is no basis for waiving the requirement for a privilege log. 	
<p>General Dispute No. 5: Although the IMM produced certain documents to Defendants on March 23, 2021, for each of Defendants' 17 Requests the IMM reviewed and produced only documents from April 1, 2010 to January 31, 2011.</p> <p>Attached as Appendix A is a copy of the subpoena Requests (as revised following an initial meet and confer session). Attached as Appendix B is a chart showing the Requests, date ranges proposed by the IMM in its December 21, 2020 Objections, and date ranges proposed by Defendants on January 27, 2021.</p>	<p>In its voluntary production, the Market Monitor searched for documents within the following time frame: April 1, 2010 to January 31, 2011. The Market Monitor believes responsive documents would come within this time frame. Due to system limitations in the software used to store Market Monitor documents from ten years ago, it is difficult to reduce the number of false positives to a reasonable and manageable level. Slight truncation of the time frame reduced the burden on the Market Monitor without compromising the effectiveness of the search.</p> <p>Reducing the date range reduces the burden of responding because it avoids significant work by IT personnel to access documents maintained in an obsolete and</p>	<p>Response: The Requests are both directly relevant to the claims and defenses in the case and proportional to the needs of the case, particularly in light of the narrower time frames proposed by Defendants on January 27, 2021.</p> <p><u>Rules:</u></p> <ul style="list-style-type: none"> Fed. R. Civ. P. 26(b)(1) Fed. R. Civ. P. 45 <p><u>Cases:</u></p> <ul style="list-style-type: none"> <i>In re Subpoena Duces Tecum to AOL, LLC</i>, 550 F. Supp. 2d 606, 612 (E.D. Va. 2008) ("When a non-party claims that a subpoena is burdensome and oppressive, the non-party must support its claim by showing how production would be burdensome.") <i>Gray v. Town of Easton</i>, No. 3:12CV166 RNC, 2013 WL 2358599, at *2 (D. Conn. May 29, 	

	<p>cumbersome format and reduces the number of non responsive documents that must be reviewed.</p>	<p>2013) (rejecting motion to quash subpoena where non-parties made “no showing as to the nature and extent of the actual burden they would face in responding to the plaintiffs’ requests”)</p> <p><i>Facts:</i></p> <ul style="list-style-type: none"> • Following an initial meet and confer session, Defendants January 27, 2021 informed the Market Monitor that they would be willing to limit the date ranges for several of their Requests. As shown in Appendix B, the proposed date ranges were specifically tailored to alleviate burdens on the Market Monitor while providing Defendants with information most likely to be relevant to the claims and defenses in this case. • Although Defendants solicited feedback from the Market Monitor on multiple occasions, the Market Monitor provided no response to Defendants’ proposed date ranges and has not explained why narrower date ranges are necessary or appropriate. • The Market Monitor has failed to articulate a single specific reason why using Defendants’ proposed 	
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		<p>date ranges would be burdensome or to approximate the effort involved to respond to the Requests using Defendants' proposed date ranges.</p> <ul style="list-style-type: none">• The Market Monitor's December 21, 2020 Objections proposed narrowing the date ranges for Request Nos. 4, 6, 7, 12, and 14, as shown in Appendix B. On April 29, 2021, the Market Monitor explained for the first time that it had in fact imposed an even narrower date range for its document review and production: April 1, 2010 to January 31, 2011.• In addition to being inconsistent with the date ranges the Market Monitor itself had proposed, the extremely narrow date range used by the Market Monitor excludes the period in which market participants pushed for PJM to change its tariff to provide for MLSA payments to UTC traders and in which PJM made such changes. Materials from this period commenting on the proposed changes could be relevant to the claims and defenses in this action, such as by illuminating the Market Monitor's contemporaneous understanding of whether it was	
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		<p>lawful for market participants to take MLSA payments into account when engaging in UTC trades.</p> <ul style="list-style-type: none"> • The date range used by the Market Monitor also excludes most of FERC’s investigations of Defendants and other UTC traders who received MLSA payment in summer 2010. Materials from this period would likely be relevant to the claims and defenses in this action, including by shedding light on why FERC did not pursue claims against other UTC traders covered by the Market Monitor’s January 6, 2011 referral who engaged in trading allegedly similar to Defendants’ trading, which could be relevant to several of Defendants’ defenses, including those related to fair notice, selective enforcement, void-for-vagueness, and due process. 	
<p>Request No. 5: Provide all documents and communications relating to the changes to PJM’s tariff proposed and accepted in FERC Docket No. ER10-2280, including all documents and communications relating to the purpose of and impetus for</p>	<p>In addition to the objections raised in General Dispute Nos. 1–5, the Market Monitor objects to this request because it filed publicly available comments in Docket No. ER10-2280 explaining its views. As explained in Section I, information sought in this request</p>	<p>Response: The Requests are both directly relevant to the claims and defenses in the case and proportional to the needs of the case.</p> <p><i>Rules:</i></p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 26(b)(1) • Fed. R. Civ. P. 45 	

<p>those changes and all documents and communications relating to potential alternative rule changes you considered in response to the trades within the scope of your Referral of Potential Violations.</p>	<p>is irrelevant to the defense in this case.</p> <p>This case does not concern compliance with the PJM tariff. The Market Monitor did not refer Defendants for failure to comply with the PJM tariff. The information sought is irrelevant because FERC seeks to enforce, in this case, its finding that Defendants engaged in market manipulation without regard to whether or not Defendants complied with the PJM tariff. The point of prohibiting market manipulation is to address situations where participants engage in anticompetitive behavior contrary to the purpose of the tariff rules but without violating the tariff rules.</p> <p>For the same reason, neither the filed rate doctrine nor the rule against retroactive ratemaking have relevance to this case. This case concerns the Commission’s rule against market manipulation, which was effective well before the market behavior at issue in this case.</p>	<p><u>Facts:</u></p> <ul style="list-style-type: none"> • For the reasons explained in response to General Dispute No. 1, Defendants’ Requests seek relevant and properly discoverable information. • This Request seeks materials related to changes to PJM’s tariff that eliminated the payment of MLSA to UTC traders. According to public filings, these changes were made in response to certain market participants submitting large quantities of UTC transactions that garnered MLSA payments. • Non-public documents and communications from the Market Monitor regarding the tariff changes the impetus for those changes are relevant to several claims and defenses in this case, including the central issues of the legality of Defendants’ trades under the then-existing market rules and whether Defendants had fair notice that their trades would be considered manipulative. For instance, a communication from the Market Monitor stating that PJM’s tariff should be changed because Defendants’ trades or similar UTC 	
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		<p>trades by other market participants were lawful under the then-existing rules would seriously undercut FERC’s claim that the trades were unlawful.</p> <ul style="list-style-type: none"> • Communications regarding these tariff changes may also be relevant to Defendants’ defense that FERC’s claims are barred by the filed rate doctrine and the associated rule against retroactive ratemaking. 	
<p>Request No. 7: Provide all documents and communications from any time relating to the requirements and rules for UTC transactions during the Relevant Period, including any requirements or rules relating to (a) the amount or type(s) of risk to which a UTC trade must be exposed and (b) acceptable and unacceptable purposes for undertaking UTC trades.</p>	<p>Subject to the resolution of General Disputes Nos. 1–5, including relevance, the Market Monitor is willing to respond to the request (i) as it relates to the Defendants and (ii) within a defined reasonable time frame.</p> <p>If required to respond to the request, the Market Monitor requests the following revisions:</p> <p>Provide all documents and communications <u>with Defendants and public documents and communications to Stakeholders from April 1, 2010 from any time to September 17, 2010</u>, relating to the requirements and rules for</p>	<p>Response: The Requests are both directly relevant to the claims and defenses in the case and proportional to the needs of the case.</p> <p><i>Rules:</i></p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 26(b)(1) • Fed. R. Civ. P. 45 <p><i>Facts:</i></p> <ul style="list-style-type: none"> • The Market Monitor has not explained why it would be necessary or appropriate to limit this Request to “documents and communications with Defendants and public documents and communications to Stakeholders.” To the extent this proposed revision relates to relevance, confidentiality, or burden, those considerations are 	

	<p>UTC transactions during the Relevant Period, including any requirements or rules relating to (a) the amount or type(s) of risk to which a UTC trade must be exposed and (b) acceptable and unacceptable purposes for undertaking UTC trades.</p>	<p>addressed above in response to General Dispute Nos. 1 to 3.</p> <ul style="list-style-type: none"> • Issues related to the date range for this and other Requests are discussed in response to General Dispute No. 5. 	
<p>Request No. 8: Provide all documents and communications relating to how well the market for the UTC product was functioning during the Relevant Period.</p>	<p>Subject to the resolution of General Disputes Nos. 1–5, including relevance, if required to respond to the request, the Market Monitor is willing to respond to this request, with modifications.</p> <p>Provide all <u>public</u> documents and communications relating to how well the market for the UTC product was functioning during the Relevant Period.</p>	<p>Response: The Requests are both directly relevant to the claims and defenses in the case and proportional to the needs of the case.</p> <p><u>Rules:</u></p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 26(b)(1) • Fed. R. Civ. P. 45 <p><u>Facts:</u></p> <ul style="list-style-type: none"> • The Market Monitor has not explained why it would be necessary or appropriate to limit this Request to “public” documents and communications. To the extent this proposed revision relates to relevance, confidentiality, or burden, those considerations are addressed above in response to General Dispute Nos. 1 to 3. • The materials sought in this request are relevant to FERC’s claim that Defendants’ conduct “impaired, 	

		obstructed, or defeated a well-functioning market.” First Amended Complaint at ¶ 86 (ECF No. 93).	
<p>Request No. 11: Provide all documents and communications relating to the <i>Black Oak</i> proceeding, including all documents and communications relating to the incentives created by the FERC orders in that proceeding and all documents and communications relating to the implications of the orders in that proceeding for any inquiries, investigations, administrative processes or proceedings, or civil penalty actions relating to the payment of MLSA to UTC traders.</p>	<p>In addition to objections raised in General Disputes Nos. 1–5, including relevance, the Market Monitor objects to this request because the irrelevance of the <i>Black Oak</i> proceeding to this case has been confirmed by an order granting summary judgment to the FERC in a similar case also arising from the Referral of Potential Violations. Summary Judgement Order re Coaltrain Energy at 49–51. The Court did not find “that the <i>Black Oak</i> decisions in any way impact the standard here.” <i>Id.</i> at 51. The Court relied in part the FERC’s determination that the <i>Black Oak</i> decisions did not alter its findings concerning this case. <i>Id.</i> at 50, citing <i>Black Oak Energy, L.L.C.</i>, 169 FERC ¶ 61, 075 at P 22 & nn.45–47 (2019).</p>	<p>Response: The Requests are both directly relevant to the claims and defenses in the case and proportional to the needs of the case.</p> <p><u>Rules:</u></p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 26(b)(1) • Fed. R. Civ. P. 45 <p><u>Facts:</u></p> <ul style="list-style-type: none"> • The <i>Black Oak</i> proceeding involved a complaint by a financial market participants regarding PJM’s MLSA distribution methodology. The proceeding led PJM to begin allocating MLSA to certain UTC trades. As the proceeding that led to the establishment of the financial incentives at issue in this case, the <i>Black Oak</i> proceeding is directly relevant, including with respect to Defendants’ defenses regarding fair notice and whether the trades were manipulative (including whether they fall within the safe harbor in FERC Order No. 670 as transactions explicitly contemplated 	

		<p>in Commission-approved rules or regulations).</p> <ul style="list-style-type: none"> • More recent decisions in the <i>Black Oak</i> proceeding have confirmed that it was reasonable for PJM market participants to take MLSA payments into account when deciding whether to engage in transactions. • Documents and communications from the Market Monitor regarding the <i>Black Oak</i> proceeding are likely to be relevant to the claims and defenses in this case. For instance, a communication from the Market Monitor stating that FERC’s orders in the <i>Black Oak</i> proceeding would allow or encourage market participants to place UTC transactions in order to obtain MLSA payments would undercut FERC’s manipulation claim in this case. • The <i>Coaltrain</i> decision is not controlling in this case and does not determine whether the requested material is relevant to the claims and defenses in this case. Additionally, the cited portion of the <i>Coaltrain</i> decision focuses on the relevance of the June 2019 order in the <i>Black Oak</i> proceeding; 	
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		<p>this Request is not limited to documents and communications about that order.</p>	
<p>Request No. 14: Provide all documents and communications relating to any or all Defendants and any of their current or former representatives.</p>	<p>In addition to the objections raised in General Disputes Nos. 1–5, the Market Monitor objects because the question is framed too broadly, encompassing a request for irrelevant information and unduly broad time period. The request is not sufficiently specific. The request is unnecessary and unreasonable because information relevant to this case would be within the scope of other requests.</p> <p>The request is unreasonable because Defendants already have or should have communications from the Market Monitor to Defendants. Any such communications identified by the Market Monitor was, in addition, provided in the Market Monitor’s voluntary production.</p> <p>If required to respond to the request, the Market Monitor requests the following revisions:</p>	<p>Response: The Requests are both directly relevant to the claims and defenses in the case and proportional to the needs of the case.</p> <p><u>Rules:</u></p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 26(b)(1) • Fed. R. Civ. P. 45 <p><u>Facts:</u></p> <ul style="list-style-type: none"> • For the reasons explained in Defendants’ responses to General Dispute Nos. 1 and 3, Defendants’ Requests seek relevant information and are proportional to the needs of the case. • Given the Market Monitor’s role and responsibilities, any document or communication within the Market Monitor’s possession that mentions Defendants would likely be relevant to assessing the legality of their UTC trading. • This Request may cover materials not covered by other Requests, particularly in light of the search strings Defendants proposed on January 27, 2021 to narrow the 	

	<p>Provide all documents and communications <u>during the Relevant Period</u> relating to any or all Defendants.</p>	<p>scope of the Market Monitor’s review of potentially responsive documents.</p> <ul style="list-style-type: none"> • There is no basis for the Market Monitor’s assertion that “Defendants already have or should have such communications” and the Market Monitor has provided no support for this claim. • Issues related to the date range for this and other Requests are discussed in response to General Dispute No. 5. 	
<p>Request No. 15: Provide all preservation, retention, or destruction policies applicable to the documents, communications, and other materials requested herein at any point in time.</p>	<p>The request is not relevant to this case for the reasons indicated in the General Dispute No. 1. Any information in the possession of the Market Monitor, a non party, and not in the possession of FERC, is not relevant to the enforcement by FERC of an order issued by FERC.</p> <p>Defendants’ reliance on <i>Sitton v. LVMPD</i> is misplaced. In that case plaintiff sought a records retention policy from Naphcare, a defendant and a party to the case. Plaintiff sought discovery to support his allegation that Naphcare had a standard practice of delaying and denying medical</p>	<p>Response: The Requests are both relevant to the claims and defenses in the case and proportional to the needs of the case.</p> <p><u>Rules:</u></p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 26(b)(1) • Fed. R. Civ. P. 45 <p><u>Case:</u></p> <ul style="list-style-type: none"> • <i>Sitton v. LVMPD</i>, No. 2:17-cv-00111-JCM-VCF, 2020 WL 1916171, at *5 (D. Nev. Apr. 20, 2020), <i>aff’d</i>, No. 2:17-cv-111-JCM-VCF, 2020 WL 3893243 (D. Nev. July 10, 2020) (“The Court finds that the records retention policy is potentially relevant because it may 	

	<p>care to inmates. The Market Monitor is not a party to this case, is not being sued, is not the best source for the information sought, and is not responsible for enforcement of FERC’s order.</p>	<p>inform Sitton’s review of the discovery documents he receives from Naphcare.”).</p> <p><i>Facts:</i></p> <ul style="list-style-type: none"> • Given the significant amount of time that has passed since the trading at issue, it is important for Defendants to understand whether relevant information may have been lost or destroyed in the intervening years. • Defendants on January 27, 2021 offered that the Market Monitor could respond to this Request by providing “a written attestation summarizing any preservation, retention, or distribution policies in effect from June 1, 2007 to present.” • The relevance of documents and communications not within FERC’s possession is addressed in response to General Dispute No. 1. 	
<p>Request No. 16: Provide all documents or communications relating to any breach, violation, or departure from any preservation, retention, or destruction policy that may have impacted the preservation</p>	<p>The request is not relevant to this case for the reasons indicated in General Dispute No. 1. Any information in the possession of the Market Monitor, a non party, and not in the possession of FERC, is not relevant to the</p>	<p>Response: The Requests are both relevant to the claims and defenses in the case and proportional to the needs of the case.</p> <p><i>Rules:</i></p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 26(b)(1) 	

<p>or retention of any of the documents, communications, and other material requested herein at any point in time.</p>	<p>enforcement by FERC of an order issued by FERC.</p> <p>Defendants’ reliance on <i>Sitton v. LVMPD</i> is misplaced. In that case plaintiff sought a records retention policy from Naphcare, a defendant and a party to the case. Plaintiff sought discovery to support his allegation that Naphcare had a standard practice of delaying and denying medical care to inmates. The Market Monitor is not a party to this case, is not being sued, is not the best source for the information sought, and is not responsible for enforcement of FERC’s order.</p>	<ul style="list-style-type: none"> • Fed. R. Civ. P. 45 <p><u>Case:</u></p> <ul style="list-style-type: none"> • <i>Sitton v. LVMPD</i>, No. 2:17-cv-00111-JCM-VCF, 2020 WL 1916171, at *5 (D. Nev. Apr. 20, 2020), <i>aff’d</i>, No. 2:17-cv-111-JCM-VCF, 2020 WL 3893243 (D. Nev. July 10, 2020) (“The Court finds that the records retention policy is potentially relevant because it may inform Sitton’s review of the discovery documents he receives from Naphcare.”). <p><u>Facts:</u></p> <ul style="list-style-type: none"> • Given the significant amount of time that has passed since the trading at issue, it is important for Defendants to understand whether relevant information may have been lost or destroyed in the intervening years. • Defendants on January 27, 2021 offered that the Market Monitor could respond to this Request by providing “a written attestation summarizing any breaches, violations, or departures from any preservation, retention, or distribution policies in effect from June 1, 2007 to present.” 	
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		<ul style="list-style-type: none">• The relevance of documents and communications not within FERC's possession is addressed in response to General Dispute No. 1.	
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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, I filed the foregoing joint statement and discovery dispute chart with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to counsel of record in this matter.

/s/ Robert W. Warnement
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and CU Fund, Inc.*

Appendix A

Defendants' Requests to the Market Monitor (as Revised January 11, 2021)

SCHEDULE A

DEFINITIONS FOR SUBPOENA REQUESTS

1. Unless otherwise stated, the language set forth in Rule 34(a)(1) of the Federal Rules of Civil Procedure are adopted and incorporated herein.

2. “All,” “any,” and “each” individually shall each be construed as encompassing all, any, and each, collectively.

3. “And” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these requests for documents (“Requests”) all responses that might otherwise be construed to be outside of their scope.

4. “*Black Oak* proceeding” means the proceeding in FERC Docket No. EL08-14.

5. “Civil action” means the above-captioned action, which began when FERC filed its Petition for an Order Affirming the Federal Energy Regulatory Commission’s May 29, 2015 Order Assessing Civil Penalties Against Powhatan Energy Fund, LLC, HEEP Fund, Inc., Houlian “Alan” Chen, and CU Fund, Inc. in the United States District Court for the Eastern District of Virginia on July 31, 2015.

6. “Clear” or “cleared” refer to a bid being accepted by PJM.

7. “Commission,” “FERC,” and “Plaintiff” mean (a) Plaintiff Federal Energy Regulatory Commission and all of its offices, committees, divisions, or units and (b) all of its current or former representatives.

8. “Communication(s)” includes any transmission of information (in the form of facts, ideas, inquiries, or otherwise) between or among two or more persons, whether orally or in writing or by any means or media, including telephone calls, in-person conversations, electronic mail and other electronic communications, correspondence, instant messages, text messages, and all

documents (whether in the form of writings, video recordings, audio recordings, or otherwise) memorializing or reflecting the communication.

9. “Consider” or “consideration” are used in their customary and broadest sense, and mean in whole or in part to analyze, assess, consider, contemplate, evaluate, examine, review, scrutinize, study, or take into account in any way.

10. “Court” means the United States District Court for the Eastern District of Virginia.

11. “Defendants” means, inclusively, any combination of the defendants in this civil action (Powhatan Energy Fund, LLC, Houlian “Alan” Chen, HEEP Fund, Inc., and CU Fund, Inc.), including any single defendant and, regardless of the plurality or singularity of the term’s use in any Request, shall not be construed to limit any Request to a single defendant or combination of defendants.

12. “Document(s)” refer to all writings and recordings of every type in your possession, control, or custody, including but not limited to Electronically Stored Information, paper, memoranda, correspondence, letters, written communications, email, instant messages, text messages, computer screenshot images, testimony and exhibits, reports (including drafts, preliminary, intermediate, and final reports), surveys, analyses, studies (including economic and market studies), summaries, compilations, comparisons, tabulations, charts, books, pamphlets, photograph forms (including microfilm, microfiche, prints, slides, negatives, videotapes, motion pictures, and photocopies), drawings, sketches, maps, sheets, ledgers, transcripts, vouchers, accounting statements, budgets, work papers, engineering diagrams, graphs, blueprints, manuals, instructions, legal pleadings, calendars, diaries, travel records, records of oral communications, notes, agendas, meeting minutes, videotapes, audiotapes, films and sound reproductions, slides, transparencies, diskettes, computer memory, agreements, stored recordings, and all other records,

written, electronic (including information on electronic or magnetic storage devices), mechanical, or otherwise, and drafts, attachments or appendices of any of the above. “Documents” includes every copy of a document that contains handwritten or other notations or that otherwise does not duplicate the original.

13. “Electronically Stored Information” or “ESI” means (a) information that is generated, received, processed, or recorded by computers or other electronic devices; (b) internal or external web sites; (c) output resulting from the use of any software program, including word processing documents, spreadsheets, database files, charts, graphs and outlines, electronic mail, AOL Instant MessengerTM (or similar instant messaging program) or bulletin board programs, operating systems, source code, PRF files, PRC files, batch files, ASCII files, and all miscellaneous media on which they reside; (d) activity listings of electronic mail receipts and/or transmittals; and (e) any and all items stored on computer memories, hard disks, floppy disks, CD-ROM, magnetic tape, microfiche, or in any other vehicle for digital data storage or transmittal, such as, without limitation, a personal digital assistant, e.g., Palm Pilot, Blackberry, or similar device, and file folder tabs, or containers and labels appended to, or relating to, any physical storage device associated with each original or copy of all Documents requested herein.

14. “IMM” means (a) Monitoring Analytics, LLC, PJM’s independent market monitor, and all of its offices, committees, divisions, or units and (b) all of its current or former representatives.

15. “Includes” (or “including”) means “includes” (or “including”) without limitation.

16. “Leg” refers to UTC bid(s) in a single direction between two pricing points. In a paired trade between pricing points A and B, the UTC bid(s) from pricing point A to pricing point

B would be the first leg and the UTC bid(s) from pricing point B to pricing point A would be the second leg.

17. “MLSA” means marginal loss surplus allocation.

18. “Paired trade” means a trade in which a PJM market participant submits matched volumes of UTC bids in opposite directions between the same two pricing points.

19. “Person” means any natural person, corporation, partnership, professional corporation, limited liability company, proprietorship, joint venture, trust, company, association, group, governmental agency in whatever form, and any other form of legal entity, and their agents, representatives, successors, assigns, parents, branch offices, subsidiaries, employees, and related persons or entities.

20. “PJM” means (a) PJM Interconnection, L.L.C. and all of its offices, committees, divisions, or units and (b) all of its current or former representatives.

21. “Refer to,” “referring to,” “relate to,” “relating to,” “reflect,” or “reflecting” are used in their customary and broadest sense, and mean in whole or in part alluding to, analyzing, concerning, constituting, containing, dealing with, embodying, describing, discussing, identifying, memorializing, mentioning, noting, pertaining to, recording, referring to, reflecting, stating, studying, tending to support, tending to discredit, or being probative of in any way.

22. “Referral of Potential Violations” means your January 6, 2011 referral of potential violations to FERC’s Office of Enforcement, entitled *PJM Marginal Loss Surplus Allocation and Market Participant Transaction Activity: May 15, 2010 through September 17, 2010*.

23. “Relevant Period” means June 1, 2010 through August 3, 2010.

24. “Representative” or “representatives” means, both collectively and individually any person, agent, director, officer, employee, partner, owner, member, attorney, corporate parent, subsidiary, or affiliated entity, acting or purporting to act on behalf of another person.

25. “Tariff” refers to PJM’s Open Access Transmission Tariff, Operating Agreement, and Reliability Assurance Agreement.

26. “UTC” means the up-to congestion product in PJM.

27. “You” and “your” refer to the IMM.

INSTRUCTIONS

1. These Requests shall be deemed continuing and any document requested herein that is presently unavailable, but which becomes available to you up to the conclusion of the civil action, must be produced in a supplemental document production pursuant to Federal Rule of Civil Procedure 26(e).

2. These Requests apply to all documents in your possession, custody, or control, regardless of the location of such documents, and includes documents within the possession, custody, or control of your officers, agents, employees, experts, consultants, attorneys, and representatives, wherever located.

3. The documents requested herein are to be produced as they are kept in the usual course of business or organized and labeled to correspond to the numbered paragraphs and/or categories of a particular requests. If there are no documents responsive to a particular numbered paragraph and/or category, so state in writing.

4. Unless otherwise stated herein, all documents produced in response to these Requests shall be produced in accordance with the Electronically Stored Information Production Protocols, attached hereto as Exhibit 1.

5. If any document responsive to these Requests is withheld under a claim of privilege or upon any other ground, provide a log identifying as to each document or communication the privilege being asserted and provide the following information in sufficient detail to permit the Court to rule on your claim:

- (a) the nature of the privilege (including work product) that is being claimed and, if applicable, the rule or law governing such claim;

- (b) the date, author(s) and their title(s) or position(s), primary addressee(s) and their title(s) or position(s), and secondary addressee(s) or person(s) copied and their title(s) or position(s), and the relationship of those person(s) to the author(s) of the document or communication;
- (c) a brief description sufficient to identify the type, subject matter, and purpose of the document or communication;
- (d) all persons to whom the contents of the document or communication have been disclosed;
- (e) the party who is asserting the privilege;
- (f) a detailed, specific explanation as to why the document or communication (or portion thereof) is privileged or otherwise immune from discovery, including a presentation of all factual grounds and legal analyses in a non-conclusory fashion; and
- (g) the number of pages in the document or communication.

NOTE: If you claim the attorney-client privilege, the log shall also indicate whether the communication claimed to be privileged was made by the attorney or the client, and whether the communication or document has been communicated to any person other than the attorney and client involved. If the communication claimed to be privileged has been so communicated, identify such third person(s) by name and relationship to the client and the attorney, and indicate the date of such communication. Please produce the non-privileged portion(s) of the document or information, if the privileged portion of the document or information is capable of being excised, so that the remainder is no longer privileged.

6. If any document responsive to these Requests has been destroyed, discarded, or lost, each such document shall be identified by stating in detail: (a) the document type; (b) a specific description of the subject matter of the document; (c) the date of the document; (d) all authors and addressees; (e) the date of the document's destruction or discard; (f) the name of the document's custodian on the date of destruction or discard; (g) the identity of each person having knowledge or who had knowledge of the contents thereof; and (h) whether any copies of the documents (or parts thereof) presently exist, and, if so, the name of the custodian(s) of each copy.

7. All documents produced in response to these Requests shall be provided in their entirety, notwithstanding the fact that portions thereof may contain information not requested. All interim as well as final versions of the document shall be produced, and all versions or copies that are not identical to the original or other produced copy of the document, by reason of any alterations, marginal notes, comments, or material contained therein or attached thereto, or otherwise, shall be produced separately.

8. If any Request herein cannot be complied with in full, it shall be complied with to the extent possible with an explanation as to why full compliance is not possible.

9. To the extent that you possess or control materials that are responsive to any of the Requests because the materials were produced to you by the Defendants, you need not produce those materials. If you contend that any of the other responsive materials that you possess or control are already in the possession or control of the Defendants, please contact counsel for the Defendants for a meet and confer to discuss whether production is necessary.

10. If a Document is responsive to more than one Request, it is sufficient to produce it in response to the first Request to which it is responsive.

11. In construing these Requests, “and” and “or” are not intended as words of limitation. The terms “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

12. The use of the singular form of any word includes the plural and plural includes the singular; the masculine includes the feminine and the feminine includes the masculine; and any verbs in the present tense should be read to include the past, future, and imperfect tenses.

13. “All,” “each,” and “any” shall individually be construed as all, each, and any, collectively.

14. Unless otherwise stated, each Requests relates to the period from January 1, 2007 through present.

DOCUMENT REQUESTS

1. Provide all documents and communications relating to your Referral of Potential Violations, including an unredacted version of your Referral of Potential Violations, all documents and communications relating to whether you would refer specific market participants to FERC's Office of Enforcement, all documents and communications relating to the transactions discussed in your Referral of Potential Violations, and all documents and communications relating to the allegations in your Referrals of Potential Violations.

2. Provide all documents and communications relating to any inquiries, investigations, administrative processes or proceedings, or civil penalty actions relating to the payment of MLSA to UTC traders by (a) PJM, (b) the IMM, or (c) FERC, including all documents and communications relating to any meetings, interviews, or discussions between you and PJM or FERC in connection with inquiries, investigations, administrative processes or proceedings, or civil penalty actions relating to the payment of MLSA to UTC traders.

3. Provide all documents and communications relating to any complaint or inquiry made to the IMM relating to the payment of MLSA to UTC traders, including information sufficient to determine the identity of the complainant or inquirer; the nature or subject matter of the complaint or inquiry (including the identity of any person whose conduct was the subject of the complaint or inquiry); and the resolution, if any, of the complaint or inquiry.

4. Provide all documents and communications from June 1, 2000 to present relating to your and PJM's efforts to craft an MLSA distribution mechanism, including all documents and communications relating to your consideration of the incentives created by such a distribution mechanism.

5. Provide all documents and communications relating to the changes to PJM's tariff proposed and accepted in FERC Docket No. ER10-2280, including all documents and communications relating to the purpose of and impetus for those changes and all documents and communications relating to potential alternative rule changes you considered in response to the trades within the scope of your Referral of Potential Violations.

6. Provide all documents and communications relating to the possibility that a single leg of a paired trade in a UTC in the PJM market might not clear.

7. Provide all documents and communications from any time relating to the requirements and rules for UTC transactions during the Relevant Period, including any requirements or rules relating to (a) the amount or type(s) of risk to which a UTC trade must be exposed and (b) acceptable and unacceptable purposes for undertaking UTC trades.

8. Provide all documents and communications relating to how well the market for the UTC product was functioning during the Relevant Period.

9. Provide all documents and communications from any time prior to the end of the Relevant Period that provided PJM market participants with public notice that PJM, the IMM, or FERC considered the trades within the scope of your Referral of Potential Violations to be manipulative.

10. Provide all documents and communications from any time relating to the propriety or impropriety of PJM market participants taking MLSA payments into consideration when deciding whether to engage in UTC trades or other transactions in PJM markets, including all documents and communications relating to how much weight a PJM market participant could appropriately give to MLSA payments in deciding whether to engage in a UTC trade or other transactions in PJM markets.

11. Provide all documents and communications relating to the *Black Oak* proceeding, including all documents and communications relating to the incentives created by the FERC orders in that proceeding and all documents and communications relating to the implications of the orders in that proceeding for any inquiries, investigations, administrative processes or proceedings, or civil penalty actions relating to the payment of MLSA to UTC traders

12. Provide all documents and communications relating to UTC trading by any Defendant at any time, including all documents and communications relating to the reservation of transmission by any Defendant or MLSA payments to any Defendant based on its UTC trading.

13. Provide all documents and communications relating to UTC bids and executed UTC transactions between December 1, 2007 and November 30, 2010, including all documents and communications relating to the reservation of transmission in connection with those bids or transactions and MLSA payments associated with those bids and transactions.

14. Provide all documents and communications relating to any or all Defendants and any of their current or former representatives.

15. Provide all preservation, retention, or destruction policies applicable to the documents, communications, and other materials requested herein at any point in time.

16. Provide all documents or communications relating to any breach, violation, or departure from any preservation, retention, or destruction policy that may have impacted the preservation or retention of any of the documents, communications, and other material requested herein at any point in time.

17. For any data you produce, provide documents (such as a legend or key) sufficient to explain or describe the data produced. For example, if you produce data in a spreadsheet format, produce documents sufficient to explain or describe the contents of each column or row.

Appendix B

Chart of Date Ranges Proposed and Used

Date Range Chart

Requests for Production	Date Range Proposed by Market Monitor in December 21, 2020 Objections ¹	Date Range Proposed by Defendants on January 27, 2021 ²	Date Range Applied by Market Monitor for March 23, 2021 Production
<p>No. 1: Provide all documents and communications relating to your Referral of Potential Violations, including an unredacted version of your Referral of Potential Violations, all documents and communications relating to whether you would refer specific market participants to FERC's Office of Enforcement, all documents and communications relating to the transactions discussed in your Referral of Potential Violations, and all documents and communications relating to the allegations in your Referrals of Potential Violations.</p>	<p>The Market Monitor raised objections to the request, including based on relevance.</p>	<p>January 1, 2010 to December 17, 2014 <i>(covering the period leading up to Defendants' transactions subject to investigation through FERC's issuance of a show-cause order)</i></p>	<p>April 1, 2010 to January 31, 2011</p>
<p>No. 2: Provide all documents and communications relating to any inquiries, investigations, administrative processes or proceedings, or civil penalty actions relating to the payment of MLSA to UTC traders by (a) PJM, (b) the IMM, or (c) FERC, including all documents and communications relating to any meetings, interviews, or discussions between you and</p>	<p>The Market Monitor raised objections to the request, including based on relevance.</p>	<p>January 1, 2010 to December 17, 2014 <i>(covering the period leading up to the transactions subject to investigation through</i></p>	<p>April 1, 2010 to January 31, 2011</p>

¹ Where not specified, the Market Monitor did not propose an alternative date range for a given Request.

² For each of these proposed date ranges, Defendants stated that they would be willing to narrow the date ranges "*provided that* Defendants retain the right to extend this date range up to and including the full date range initially requested if materials produced or identified in connection with this this litigation indicate that additional relevant evidence is likely to be found by so extending the range)."

<p>PJM or FERC in connection with inquiries, investigations, administrative processes or proceedings, or civil penalty actions relating to the payment of MLSA to UTC traders.</p>		<p><i>FERC's issuance of a show-cause order)</i></p>	
<p>No. 3: Provide all documents and communications relating to any complaint or inquiry made to the IMM relating to the payment of MLSA to UTC traders, including information sufficient to determine the identity of the complainant or inquirer; the nature or subject matter of the complaint or inquiry (including the identity of any person whose conduct was the subject of the complaint or inquiry); and the resolution, if any, of the complaint or inquiry.</p>	<p>The Market Monitor raised objections to the request, including based on relevance.</p>	<p>June 1, 2007 to September 17, 2010 <i>(covering the period leading up to filing of the complaint in the Black Oak proceeding about PJM's MLSA distribution methodology through FERC's approval of changes to PJM's tariff that eliminated MLSA payments to UTC traders)</i></p>	<p>April 1, 2010 to January 31, 2011</p>
<p>No. 4: Provide all documents and communications from June 1, 2000 to present relating to your and PJM's efforts to craft an MLSA distribution mechanism, including all documents and communications relating to your consideration of the incentives created by such a distribution mechanism.</p>	<p>The Market Monitor raised objections to the request, including based on relevance.</p> <p>In an effort to reach agreement, the Market Monitor offered August 1, 2008 to September 17, 2010</p>	<p>June 1, 2007 to September 17, 2010 <i>(covering the period leading up to filing of the complaint in the Black Oak proceeding about PJM's MLSA distribution methodology through FERC's approval of changes to PJM's tariff that eliminated MLSA payments to UTC traders)</i></p>	<p>April 1, 2010 to January 31, 2011</p>
<p>No. 5: Provide all documents and communications relating to the changes to PJM's tariff proposed and</p>	<p>The Market Monitor raised objections to the</p>	<p>January 1, 2010 to September 17, 2010</p>	<p>April 1, 2010 to January 31, 2011</p>

<p>accepted in FERC Docket No. ER10-2280, including all documents and communications relating to the purpose of and impetus for those changes and all documents and communications relating to potential alternative rule changes you considered in response to the trades within the scope of your Referral of Potential Violations.</p>	<p>request, including based on relevance.</p>	<p><i>(covering the period leading up to Defendants' transactions subject to investigation through FERC's approval of changes to PJM's tariff that eliminated MLSA payments to UTC traders)</i></p>	
<p>No. 6: Provide all documents and communications relating to the possibility that a single leg of a paired trade in a UTC in the PJM market might not clear.</p>	<p>The Market Monitor raised objections to the request, including based on relevance.</p> <p>In an effort to reach agreement, the Market Monitor offered August 8, 2008 to September 17, 2010</p>	<p>January 1, 2010 to December 17, 2014 <i>(covering the period leading up to Defendants' transactions subject to investigation through FERC's issuance of a show-cause order)</i></p>	<p>April 1, 2010 to January 31, 2011</p>
<p>No. 7: Provide all documents and communications from any time relating to the requirements and rules for UTC transactions during the Relevant Period, including any requirements or rules relating to (a) the amount or type(s) of risk to which a UTC trade must be exposed and (b) acceptable and unacceptable purposes for undertaking UTC trades.</p>	<p>The Market Monitor raised objections to the request, including based on relevance.</p> <p>In an effort to reach agreement, the Market Monitor offered August 1, 2008 to September 17, 2010</p>	<p>June 1, 2007 to January 6, 2011 <i>(covering the period leading up to filing of the complaint in the Black Oak proceeding about PJM's MLSA distribution methodology through the Market Monitor's referral of Defendants and other UTC traders to FERC's Office of Enforcement)</i></p>	<p>April 1, 2010 to January 31, 2011</p>

<p>No. 8: Provide all documents and communications relating to how well the market for the UTC product was functioning during the Relevant Period.</p>	<p>The Market Monitor raised objections to the request, including based on relevance.</p>	<p>January 1, 2010 to January 6, 2011 <i>(covering the period leading up to Defendants' transactions subject to investigation through the Market Monitor's referral of Defendants and other UTC traders to FERC's Office of Enforcement)</i></p>	<p>April 1, 2010 to January 31, 2011</p>
<p>No. 9: Provide all documents and communications from any time prior to the end of the Relevant Period that provided PJM market participants with public notice that PJM, the IMM, or FERC considered the trades within the scope of your Referral of Potential Violations to be manipulative.</p>	<p>The Market Monitor raised objections to the request, including based on relevance.</p>	<p>None</p>	<p>April 1, 2010 to January 31, 2011</p>
<p>No. 10: Provide all documents and communications from any time relating to the propriety or impropriety of PJM market participants taking MLSA payments into consideration when deciding whether to engage in UTC trades or other transactions in PJM markets, including all documents and communications relating to how much weight a PJM market participant could appropriately give to MLSA payments in deciding whether to engage in a UTC trade or other transactions in PJM markets.</p>	<p>The Market Monitor raised objections to the request, including based on relevance.</p>	<p>June 1, 2007 to January 6, 2011 <i>(covering the period leading up to filing of the complaint in the Black Oak proceeding about PJM's MLSA distribution methodology through the Market Monitor's referral of Defendants and other UTC traders to FERC's Office of Enforcement)</i></p>	<p>April 1, 2010 to January 31, 2011</p>
<p>No. 11: Provide all documents and communications relating to the <i>Black Oak</i> proceeding, including all</p>	<p>The Market Monitor raised objections to the</p>	<p>November 3, 2007 to November 28, 2019</p>	<p>April 1, 2010 to January 31, 2011</p>

documents and communications relating to the incentives created by the FERC orders in that proceeding and all documents and communications relating to the implications of the orders in that proceeding for any inquiries, investigations, administrative processes or proceedings, or civil penalty actions relating to the payment of MLSA to UTC traders	request, including based on relevance.	<i>(covering the period from one month before the filing of the complaint in the Black Oak proceeding through one month after the final FERC order in the Black Oak proceeding)</i>	
No. 12: Provide all documents and communications relating to UTC trading by any Defendant at any time, including all documents and communications relating to the reservation of transmission by any Defendant or MLSA payments to any Defendant based on its UTC trading.	The Market Monitor raised objections to the request, including based on relevance. In an effort to reach agreement, the Market Monitor offered December 1, 2007 to November 30, 2010	August 1, 2007 to January 6, 2011 <i>(covering HEEP Fund's entry into the PJM market through the Market Monitor's referral of Defendants and other UTC traders to FERC's Office of Enforcement)</i>	April 1, 2010 to January 31, 2011
No. 13: Provide all documents and communications relating to UTC bids and executed UTC transactions between December 1, 2007 and November 30, 2010, including all documents and communications relating to the reservation of transmission in connection with those bids or transactions and MLSA payments associated with those bids and transactions.	The Market Monitor raised objections to the request, including based on relevance.	None	April 1, 2010 to January 31, 2011
No. 14: Provide all documents and communications relating to any or all Defendants and any of their current or former representatives.	The Market Monitor raised objections to the request, including based on relevance.	January 1, 2010 to December 17, 2014 <i>(covering the period leading up to the transactions subject to</i>	April 1, 2010 to January 31, 2011

		<i>investigation through FERC's issuance of a show-cause order)</i>	
No. 15: Provide all preservation, retention, or destruction policies applicable to the documents, communications, and other materials requested herein at any point in time.	The Market Monitor raised objections to the request, including based on relevance.	June 1, 2007 to present <i>(covering the period leading up to filing of the complaint in the Black Oak proceeding about PJM's MLSA distribution methodology through the Market Monitor's responses to Defendants' Requests)</i>	April 1, 2010 to January 31, 2011
No. 16: Provide all documents or communications relating to any breach, violation, or departure from any preservation, retention, or destruction policy that may have impacted the preservation or retention of any of the documents, communications, and other material requested herein at any point in time.	The Market Monitor raised objections to the request, including based on relevance.	June 1, 2007 to present <i>(covering the period leading up to filing of the complaint in the Black Oak proceeding about PJM's MLSA distribution methodology through the Market Monitor's responses to Defendants' Requests)</i>	April 1, 2010 to January 31, 2011
No. 17: For any data you produce, provide documents (such as a legend or key) sufficient to explain or describe the data produced. For example, if you produce data in a spreadsheet format, produce documents sufficient to explain or describe the contents of each column or row.	The Market Monitor raised objections to the request, including based on relevance.	None	April 1, 2010 to January 31, 2011

