

**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 NON-PARTY PJM INTERCONNECTION, L.L.C.**

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 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 PJM Interconnection, L.L.C.’s Response to Defendants’ Subpoena (ECF No. 175). In accordance with Paragraph 21(c) of the Initial Pretrial Order, a summary of the discovery dispute utilizing the Discovery Dispute Chart that the Court provided to the parties at the Initial Pretrial Conference is included herewith.

In an effort to reach an accommodation concerning the breadth of, and corresponding burden associated with, Defendants’ December 7, 2020 subpoena to non-party PJM, Defendants and PJM agreed that (1) PJM would make an initial production consisting of the materials it

produced in connection with another pending case involving the payment of marginal loss surplus allocation to up-to congestion traders, *Federal Energy Regulatory Commission v. Coaltrain Energy, L.P.*, No.2:16-cv-00732 (S.D. Ohio), and (2) after reviewing that initial production, Defendants would request and PJM would perform supplemental searches for materials not fully covered by the initial production. After PJM made its initial production on March 24, 2021, Defendants requested supplemental searches. While Defendants and PJM have been working together to negotiate mutually agreeable parameters for these searches, they have not yet been able to reach agreement. In accordance with Paragraph 21(g) of the Initial Pretrial Order, counsel for Defendants and PJM 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

Discovery Dispute Chart

Discovery Disputes	PJM's Objection / Answer	Defendants' Response to Objection	The Court's Ruling
<p>Dispute No. 1: Defendants have requested that PJM perform searches for documents and communications from June 1, 2009 to December 17, 2014 that (1) discuss Defendants, their trading, or their personnel or (2) discuss complaints, referrals, or investigations regarding Up-To Congestion ("UTC") trading perceived to be intended to collect or otherwise influenced by Marginal Loss Surplus Allocation ("MLSA") payments.</p>	<p>PJM and Defendants have worked in good faith to meet Defendants' discovery requirements. Following PJM's initial production of the <i>Coaltrain</i> materials, which include PJM's communications and information provided to FERC regarding the investigation of marginal loss surplus allocation issues and the same referral of PJM members that is at issue in this case, Defendants have two follow up requests that implicate broad categories of electronic documents from a period of roughly 11 years ago to about 6 years ago.</p> <p>On PJM's initial searches of its records using search terms provided by Defendants, PJM has located more than 1,000,000 potentially responsive documents in its systems. It will take</p>	<p>Response: Defendants' requests seek information relevant to the claims and defenses in this action and are 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>L-3 Commc 'ns Corp. v. Sparton Corp.</i>, 313 F.R.D. 661, 670 (M.D. Fla. 2015) ("If confronted with a search term they believe is overly burdensome, Defendants have an obligation not just to assert their objection, but explain the grounds for the objection and to point to evidence supporting it. If asked, Defendants must offer specific suggestions for narrowing the offending 	

	<p>significant time to review that body of materials for responsiveness and privilege, and PJM will incur considerable expense to conduct such a review. PJM contacted a vendor for an estimate; based on that estimate, it appears the document review of data within the requests—using the search terms proposed by Defendants—will cost several hundred thousand dollars and take more than a month to complete. In light of PJM’s production of the materials it exchanged with FERC in connection with the underlying referral, which likely contains as much information as PJM has concerning the information Defendants are actually seeking, PJM believes the requests and search terms must be narrowed considerably to avoid imposing burdens on PJM—a non-party entitled to the protections of Rule 45(d)(1)—that are disproportionate to Defendants’ needs in this litigation. PJM is evaluating</p>	<p>search terms in a way that addresses their concerns while still retrieving as many of the relevant documents targeted by the disputed search terms as possible.”)</p> <ul style="list-style-type: none"> • <i>Cahoo v. SAS Inst. Inc.</i>, No. 17-10657, 2019 WL 7971900, at *6 (E.D. Mich. June 25, 2019) (applying same principle to subpoenaed non-party) <p><u>Facts:</u></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 and seek information that is likely to be highly important in resolving the case; 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 	
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	<p>the massive amount of data implicated by Defendants' search terms and is attempting to determine how the search terms may be narrowed. PJM will continue to work with Defendants in good faith to determine whether there is a less onerous and less costly way to address Defendants' discovery requirements that does not impose undue burdens on PJM.</p>	<p>include documents and communications within the possession, custody, or control of PJM that are unlikely to be available from other sources; and PJM is an entity with significant resources, including an annual expense budget that exceeds \$300 million.</p> <ul style="list-style-type: none">• Although Defendants repeatedly invited PJM to identify ways in which the requests could be narrowed to alleviate any undue burden, PJM has not yet done so.• Defendants made their own efforts to further limit the scope of the already narrowly tailored requests, including by limiting the date range for the requests, clarifying that certain topics are not within the scope of the requests, and proposing specific search terms at PJM's request.• The inability to reach agreement on this issue on a timely basis threatens	
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		Defendants' ability to prepare for depositions in accordance with the schedule set forth in the Initial Pretrial Order.	
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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.

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