



Monitoring Analytics

Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, PA 19403
Phone: 610-271-8050
Fax: 610-271-8057

DATE: February 5, 2021
TO: PJM Members Committee Service List
FROM: Independent Market Monitor for PJM
SUBJECT: Discovery Correspondence re FERC v Powhatan

The Market Monitor received a subpoena from Powhatan Energy Fund, LLC and other defendants (Defendants) in connection with a pending case, FERC v Powhatan Energy Fund, LLC, et al., No. 3:15-cv-00452 (USDC E.D. Va.). The Market Monitor is not a party to that case.

On December 9, 2020, the Market Monitor provided notice of the subpoena to PJM Members. Since that time the Market Monitor has raised objections to the subpoena and the Market Monitor and Defendants have been engaged in correspondence attempting to determine the scope of information that will be provided. For informational purposes, the Market Monitor is providing to the Members the following items:

- Market Monitor objections, dated December 21, 2020
- Defendants' response, dated January 11, 2021
- Market Monitor letter, dated January 19, 2021
- Defendants' 2nd response, dated January 27, 2021



**Monitoring
Analytics**

Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, PA 19403
Phone: 610-271-8050
Fax: 610-271-8057

VIA EMAIL & FEDEX

December 21, 2020

Patrick R. Hanes, Esq.
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, Virginia 23219

Re: FERC v. Powhatan Energy Fund, LLC, et al., Civ. Action No. 3:15-cv-00452 (MHL).

Dear Mr. Hanes:

Pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure ("FRCP") Monitoring Analytics, L.L.C., acting in its capacity as the Independent Market Monitor for PJM Interconnection, L.L.C. ("PJM") ("Market Monitor"), states its objections to the subpoena dated, 2020 ("Subpoena") received from Powhatan Energy Fund, LLC ("Powhatan"), Houlian "Alan" Chen ("Chen"), HEEP Fund, Inc. ("HEEP Fund"), and CU Fund, Inc. ("CU Fund") (collectively, "Defendants") as follows:

I. OBJECTIONS

FRCP Rule 26 provides:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

The Market Monitor objects to requests that do not meet the applicable standard.

Defendants included with the Subpoena certain definitions and instructions. The Market Monitor objects to such definitions or instructions to whatever extent they seek to require the Market Monitor to prepare or provide a response to the requests that exceeds what is strictly

required by law or by the rules of the Court or seek to define a term in a manner that is unreasonable, unusual or unduly broad.

1. The Subpoena requests information irrelevant to the case.

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 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. *See Acosta v. Team Envtl.*, 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 Defendant’s failure to comply with the FLSA.”).

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. *FERC v. Coaltrain Energy, L.P., et al.*, 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.

2. The Subpoena requests protected and privileged confidential information.

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, 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.

Rules 26 and 45 provide for the protection of such information from disclosure.

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. *See* 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. 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. *See* 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. *See*, PJM OA § 18.17; PJM OATT Attachment M–Appendix § I.

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 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 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.

3. The Subpoena fails to reflect "reasonable steps to avoid imposing undue burden or expense" on the Market Monitor.

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.

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. *Misc. Docket Matter #1 v. Misc. Docket Matter #2*, 197 F.3d 922, 925 (8th Cir. 1999).

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. *Id.*; *Roberts v. Shawnee Mission Ford, Inc.*, 352 F.3d 358, 361 (8th Cir. 2003) (holding that a district court has 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. *Misc. Docket Matter #1*, 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.

a. Defendants have no need for discovery on investigations or referrals of third parties, or information on trading activities by third parties, particularly relative to the burden on the Market Monitor.

Defendants have not articulated any need to obtain documents from any non party to the lawsuit. The Subpoena requests various documents also available from FERC, which is a party. Documents may have already been obtained from FERC through prior discovery. 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.

b. The Subpoena requests are unduly burdensome.

"An evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party." *Travelers Indem. Co. v. Metropolitan Life Ins. Co.*, 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.").

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.); *Cusumano v. Microsoft Corp.*, 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.").

The Market Monitor estimates that it would require significant information technology staff time and analytical staff time to search 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.

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 Defendants are unwilling to exclude Member confidential information from the scope of the request.

c. The harm to the Market Monitor outweighs Defendants’ need for the documents.

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.

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 relied upon by the FERC when FERC made decisions about how to proceed with its own investigation and analysis. Such information is not relevant to this case.

The harm to Market Monitor far outweighs any need that Defendants may have for the documents. *Roberts*, 352 F.3d at 360.

d. Reservation to amend, modify, supplement or clarify.

The Market Monitor’s investigation concerning what documents might be responsive to the requests contained in the Subpoena is ongoing. The Market Monitor has limited resources, is not a party to this proceeding, and has legally defined duties with respect to the disclosure or potential disclosure of PJM Member information. The Market Monitor reserves the right to further amend, modify, and/or supplement or clarify the content of these objections at any time. The Market Monitor’s objections reflect only the current state of its knowledge or information regarding the documents and other information requested by the Subpoena. Further investigation may identify additional facts or information that could lead to additions to, and/or changes to, these objections, and such additions or changes could influence the content of any

motions deemed necessary to protect the Market Monitor, PJM Members and/or the public interest.

II SPECIFIC OBJECTIONS

Defendants request production of:

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.*

The Market Monitor objects to this request.

The scope of the request is excessive. As explained in Section I, information sought in this request is irrelevant to the case and impose an undue burden on the Market Monitor.

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.

The Market Monitor requests the following revisions:

- Provide all documents and communications relating to your Referral of Potential Violations by Defendants, including an unredacted version of portions of your Referral of Potential Violations concerning Defendants, all documents and communications relating to whether you would refer Defendants~~specific market participants~~ to FERC's Office of Enforcement, all documents and communications relating to Defendants'~~the~~ transactions discussed in your Referral of Potential Violations, and all documents and communications relating to the allegations concerning Defendants 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.*

The Market Monitor objects to this request.

The scope of the request is excessive. As explained in Section I, information sought in this request is irrelevant to the case and imposes an undue burden on the Market Monitor. This request is better directed to PJM, a larger institution with greater resources, and/or to the FERC, a party to the case and a larger institution with greater resources.

The Market Monitor is willing to respond to the request as it relates to the Defendants.

The Market Monitor requests the following revisions:

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 ~~the Defendants~~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 ~~the Defendants~~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.*

The Market Monitor objects to this request.

The scope of the request is excessive. As explained in Section I, information sought in this request is irrelevant to the case and imposes an undue burden on the Market Monitor.

The requests potentially includes PJM Member Confidential information protest under the PJM OATT Attachment M–Appendix § I. The Market Monitor cannot provide such information without complying with the OATT, which burdens the Market Monitor and affected PJM Members.

The Market Monitor is willing to respond to the request as it relates to the Defendants.

The Market Monitor requests the following revisions:

Provide all documents and communications, other than Member Confidential information, relating to any complaint or inquiry made to the IMM relating to the payment of MLSA to ~~Defendants~~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.*

The Market Monitor objects to this request.

The scope of the request is excessive. As explained in Section I, information sought in this request is irrelevant to the case and imposes an undue burden on the Market Monitor.

The Market Monitor is willing to respond to the request within a reasonable time frame.

The Market Monitor requests the following revisions:

Provide all documents and communications from August 1, 2008~~June 1, 2000~~ to September 17, 2010, ~~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.

Nevertheless, the Market Monitor is willing to provide the requested information.

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.*

The Market Monitor objects to this request.

The Market Monitor filed publicly available comments in Docket No. ER10-2280 explaining its views. As explained in Section I, information sought in this request is irrelevant to the defense in this case.

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

The Market Monitor objects to this request.

The Market Monitor objects that the request is for information that is not relevant to the case and is unduly broad.

Nevertheless, the Market Monitor is willing to respond to this request, with modifications.

The Market Monitor requests the following revisions:

Provide all **non confidential** documents and communications **from August 8, 2008 to September 17, 2010,** relating to the possibility that a single leg of a paired trade **in a UTC in the PJM FTR 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.*

The Market Monitor objects to this request.

The scope of the request is excessive. As explained in Section I, information sought in this request is irrelevant to the case and imposes an undue burden on the Market Monitor.

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.

The Market Monitor requests the following revisions:

Provide all documents and communications **with Defendants and public documents and communications to Stakeholders from August 1, 2008**~~from any time to September 17, 2010,~~ 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.*

The Market Monitor objects to this request.

The Market Monitor objects that the request is for information that is not relevant to the case.

Nevertheless, the Market Monitor is willing to respond to this request, with modifications.

Provide all **public** 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 notice that PJM, the IMM, or FERC considered the trades within the scope of your Referral of Potential Violations to be manipulative.*

The Market Monitor objects to this request.

The scope of the request is excessive. As explained in Section I, information sought in this request is irrelevant to the case and imposes an undue burden on the Market Monitor.

The requests potentially includes PJM Member Confidential information protest under the PJM OATT Attachment M–Appendix § I. The Market Monitor cannot provide such information without complying with the OATT, which burdens the Market Monitor and affected PJM Members.

Nevertheless, Market Monitor is willing to provide public documents and communications. Public information appears to be the intended scope of the request.

The Market Monitor requests the following revisions:

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.*

The Market Monitor objects to this request.

The scope of the request is excessive. As explained in Section I, information sought in this request is irrelevant to the case and imposes an undue burden on the Market Monitor.

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.*

The Market Monitor objects to this request.

The scope of the request is excessive. As explained in Section I, information sought in this request is irrelevant to the case and imposes an undue burden on the Market Monitor.

The irrelevance of the Black Oak 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 Black Oak decisions in any way impact the standard here.” *Id.* at 51. The Court relied in part the FERC’s determination that the Black Oak decisions did not alter its findings concerning this case. *Id.* at 50, citing *Black Oak Energy, L.L.C.*, 169 FERC ¶ 61, 075 at P 22 & nn.45–47 (2019).

The requests potentially includes PJM Member Confidential information protest under the PJM OATT Attachment M–Appendix § I. The Market Monitor cannot provide such information without complying with the OATT, which burdens the Market Monitor and affected PJM Members.

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 objects to this request.

The scope of the request is excessive. As explained in Section I, information sought in this request is irrelevant to the case and imposes an undue burden on the Market Monitor.

The Market Monitor will respond to the request as it relates to the Defendants with reasonable specification of the applicable time period. The time period specified by Defendants in request no. 13 is acceptable.

The Market Monitor requests the following revisions:

Provide all documents and communications relating to UTC trading by any Defendant **between December 1, 2007 and November 30, 2010**~~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.*

The Market Monitor objects to this request.

As explained in Section I, the scope of the request is excessive. Information sought in this request is irrelevant to the case and imposes an undue burden on the Market Monitor.

The Market Monitor will respond to the request as it relates to the Defendants.

The Market Monitor requests the following revisions:

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

The Market Monitor objects to this request.

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. The request is unreasonable because Defendants already have or should have such communications.

Nevertheless, the Market Monitor would consider voluntary compliance with a request that is modified to state:

Provide all documents and communications **during the Relevant Period** relating to any or all Defendants.

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 objects to this request.

The Market Monitor objects to this request. Documents requested under this provision and not within the scope on any of the requests above are not relevant to the case. {Nevertheless the Market Monitor is willing to respond to this request, to the extent necessary for it to provide a complete response to request no. 16.}

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 objects to this request.

Documents requested under this provision and not within the scope on any of the requests above are not relevant to the case. {Nevertheless, the Market Monitor is willing to respond to this request.}

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 objects to this request.

The information sought in this request is irrelevant and imposes an undue burden on the Market Monitor. The Market Monitor is not required to create new documents or reorganize its records. {The Market Monitor will consider on a case-by-case basis requests to assist Defendants understanding of the information provided.}

* * * * *

The Market Monitor first raised with you its general objections in a telephone conference convened December 15, 2020. The Market Monitor remains willing to work with you to appropriately narrow the scope of the Subpoena in a manner consistent with the objections set forth above. Please feel free to contact me by email (jeffrey.mayes@monitoringanalytics.com) by leaving voicemail at (610) 271-8053.

Sincerely,



Jeffrey W. Mayes
General Counsel

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000

FAX: (202) 393-5760

www.skadden.com

DIRECT DIAL
202-371-7950
DIRECT FAX
202-661-8213
EMAIL ADDRESS
JOHN.ESTES@SKADDEN.COM

FIRM/AFFILIATE OFFICES

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEW YORK
PALO ALTO
WILMINGTON

BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SÃO PAULO
SEOUL
SHANGHAI
SINGAPORE
TOKYO
TORONTO

January 11, 2021

BY EMAIL

Jeffrey W. Mayes
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eagleville, PA 19403

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

Dear Mr. Mayes:

We appreciate you taking the time to discuss your objections to the subpoena served on Monitoring Analytics, LLC (the "IMM") on December 7, 2020 in connection with *Federal Energy Regulatory Commission v. Powhatan Energy Fund, LLC, et al.*, No. 3:15-cv-00452 (E.D. Va.) ("Federal District Court Litigation"). As the IMM requested during the January 5, 2021 call, we are writing to memorialize the positions of the defendants in the Federal District Court Litigation with respect to your objections.

For the reasons explained during the January 5, 2021 call, we think that the general objections set forth in your December 21, 2020 response to our subpoena are meritless. We also think that most of your objections to specific requests and proposed revisions to such requests are unjustified.

While we believe that our requests as drafted are reasonably tailored and that the benefits of discovery far outweigh the burdens, we are willing to make certain accommodations to reduce the burdens on the IMM in responding to the subpoena. In order to address any concerns regarding confidential information, we are willing to enter into a reasonable confidentiality agreement or protective order. We are providing herewith a sample protective order (Attachment A). This sample protective order is provided for discussion purposes only and is subject to ongoing review and negotiation with the Federal Energy Regulatory Commission and the PJM Interconnection, L.L.C. We are also willing to work with the IMM to develop lists of relevant databases, custodians, and search terms in order to facilitate your review of potentially responsive materials. Furthermore, we are willing to enter into a reasonable claw-back agreement to mitigate any

concerns about inadvertent disclosure of privileged materials. Finally, we are willing to consider narrowing the time frame for certain requests. However, the very abridged time frames that you have included in your proposed revisions to several specific requests are far too limited. While you may begin reviewing and producing documents within the time frames you proposed, in order to resolve this issue, it would be useful to see data about how many hits there are for key search terms in the months and years surrounding your proposed date ranges. We would be happy to work with you to develop a mutually agreeable search protocol for the purpose of determining reasonable date ranges.

While we disagree with most of your objections to specific requests and proposed revisions to such requests, there are certain proposed revisions that we are willing to accept. With respect to Request No. 6, we are willing to revise the request to specify that it applies to “a paired trade in a UTC in the PJM market”; we do not agree to your other proposed revisions to this request. Additionally, in the specific context of Request No. 9, we are willing to accept your proposal to add the word “public”; however, we note that we are not waiving our objections to your attempts to insert the word “public” or similar terms like “non-confidential” into other requests. Attached hereto is an updated version of Schedule A to our subpoena to the IMM reflecting those changes (Attachment B); because no changes were made to Exhibit 1 to Schedule A, that is not included herewith. In the interest of clarity, we reiterate our belief that your remaining objections to specific requests and proposed revisions to such requests lack merit.

Although we disagree with most of your objections—and nothing in this letter should be construed as waiving that position—in the interest of efficiency, we invite you to begin reviewing and producing on a rolling basis documents responsive to your proposed revised requests as we work together to address your remaining objections. As noted during our call, Judge Lauck on December 21, 2020 issued a scheduling order setting April 23, 2021 as the deadline for written discovery, including a 30-day period at the end for addressing unresolved discovery disputes. Accordingly, we request that you plan to complete your productions by March 24, 2021. The December 21, 2020 scheduling order also provides details on the procedures to be followed if counsel are unable to resolve discovery disputes between themselves. A copy of the December 21, 2020 scheduling order and the chart that Judge Lauck uses to address discovery disputes are attached hereto (Attachments C and D, respectively).

As discussed on the January 5, 2021 call, we look forward to receiving a response, including any revisions to your objections, within one week of your receipt of this letter.

Jeffrey W. Mayes
January 11, 2021
Page 3



Patrick R. Hanes
Gregory A. Crapanzano
WILLIAMS MULLEN
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, VA 23219
Telephone: (804) 420-6455
phanes@williamsmullen.com

*Counsel for Powhatan Energy
Fund, LLC*

Enclosures

Sincerely,



John N. Estes III
Juliana Brint
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7950
john.estes@skadden.com

*Counsel for Houlian "Alan" Chen,
HEEP Fund, Inc., and CU Fund, Inc.*

Attachment A

Sample Protective Order

**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.)	
)	

CONSENT PROTECTIVE ORDER AND FRE 502(d) ORDER

THIS DAY CAME Plaintiff Federal Energy Regulatory Commission (“Plaintiff”) and Defendants Powhatan Energy Fund, LLC, Houlian “Alan” Chen, HEEP Fund, Inc. and CU Fund, Inc. (“Defendants”) (collectively, the “Parties”), upon the previously-filed Consent Motion for Protective Order of Defendants, and

IT APPEARING TO THE COURT, upon the pleadings and the representations of the Parties through their respective counsel, that:

A. The Parties anticipate that documents, testimony, or information containing or reflecting confidential, proprietary, trade secret, commercially sensitive, and/or other proprietary research, development, or commercial information within the meaning of Rule 26(c) of the Federal Rules of Civil Procedure will likely be disclosed or produced during the course of discovery in this litigation, and jointly request that the Court enter this Order (“Consent Protective Order” or “Order”) setting forth conditions for treating, obtaining, and using such information;

B. The Parties agree that this action involves, *inter alia*, (a) ATTORNEY EYES ONLY, competitive financial, technical, proprietary, and trade secret subject matter, and (b) CONFIDENTIAL, highly sensitive and confidential financial and marketing information;

C. The Parties agree that the unrestricted disclosure of such CONFIDENTIAL and ATTORNEY EYES ONLY information would be extremely prejudicial to the Parties and nonparties and compromise their respective competitive positions, and that entry of this Consent Protective Order is necessary and desirable to protect the interests of the Parties and non-parties while allowing the exchange of information relevant to the action; and

D. The Parties, as evidenced by the endorsement of their counsel of this Order, jointly request entry of this Consent Protective Order pursuant to Rule 26(c) in order to prevent unnecessary disclosure or dissemination of such confidential or proprietary information;

THEREFORE, the terms of this Order being agreed to by counsel for the parties, it is hereby STIPULATED, AGREED AND ORDERED that the following restrictions and procedures shall apply to certain information, testimony, documents and excerpts from documents supplied by the parties to each other in response to discovery requests, or by third-parties in response to a subpoena or a subpoena *duces tecum*::

1. Designated Material

In accordance with the terms of this Consent Protective Order, any information recorded in any form or any portion thereof, including any form of evidence or discovery contemplated under Rules 26 through 36 and Rule 45 of the Federal Rules of Civil Procedure, may be designated pursuant to this Consent Protective Order as “CONFIDENTIAL” or “ATTORNEY EYES ONLY” by the person or entity (including a non-party) producing it or by any party to this action (the “Designating Party”). All information and material designated in accordance with this Consent Protective Order as “CONFIDENTIAL” or “ATTORNEY EYES ONLY,” and all information or

material derived from it, constitutes “Designated Material” under this Consent Protective Order. Unless and until otherwise ordered by the Court or agreed to in writing by the Parties and the Designated Party, any and all Designated Material under this Consent Protective Order shall not be used or disclosed by the Party receiving the Designated Material (the “Receiving Party”) except as provided under the terms of this Consent Protective Order. (For purposes of this Consent Protective Order, “disclose” or “disclosed” means to show, furnish, provide or otherwise communicate the contents or existence of the referenced material or document to anyone, except as provided herein).

2. Access

2.1 Materials Designated “CONFIDENTIAL”

Subject to the limitations set forth in this Consent Protective Order, Designated Material may be marked “CONFIDENTIAL” generally for the purpose of protecting non-public information relating to the Designating Party’s trade secrets or other confidential technical, sales, marketing, financial, pricing or other competitive commercial information. Material designated “CONFIDENTIAL” may only be disclosed by the Receiving Party to:

(a) Persons (including, without limitation, deposition or trial witnesses) who appear on the face of the Designated Material marked “CONFIDENTIAL” as an author, addressee or recipient thereof, or who is directly referenced in Designated Material, or in whose files the document or thing was found;

(b) Counsel of record for the Parties to this action, as well as the partners, associates, agents and regularly employed staff and supporting personnel of such counsel to the extent reasonably necessary to render professional services in this litigation;

(c) Subject to Section 3 below, up to three (3) designated officers, directors, in-house counsel or employees of the Receiving Party with responsibility for maintaining, defending or evaluating this litigation.

(d) Any 30(b)(6) deposition witness presented by the Designating Party, or any other deposition witness produced by the Designating Party;

(e) The Court and court personnel (including stenographic reporters) and any necessary law clerk, paralegal, secretarial, clerical, and other lay court personnel;

(f) Subject to Section 3 below, Designated Material marked “CONFIDENTIAL” may also be disclosed to independent experts (and the assistants, secretarial and clerical staffs of such independent experts) who are not employees of the Receiving Party and who are retained by a party or its attorneys of record in this action to assist in the preparation of the case, such as independent economic, accounting or scientific experts or technical advisors, or to furnish technical or expert services in connection with this action, or to give expert testimony with respect to the subject matter thereof for the trial of this action;

(g) Outside document processing service providers, including e-discovery, duplicating, photocopying and document coding/scanning contractors. Notwithstanding any other provision of this protective order, access to CONFIDENTIAL Information shall be permitted to such service providers without need for the completion of Exhibit A.

(h) Such other persons as the Designating Party may, in writing, agree or by order of this Court.

2.2 Materials Designated “ATTORNEY EYES ONLY”

Subject to the limitations set forth in this Consent Protective Order, Designated Material that may be marked “ATTORNEY EYES ONLY” includes, without limitation, proprietary technical data or extraordinarily sensitive competitive commercial information, such as

information tending to reveal the identities of customers and prospective customers whose status as such is not publicly known, non-public competitive financial information, and forward looking forecasts, projections, strategies, plans or the like that are not publicly available. Material designated “ATTORNEY EYES ONLY” may only be disclosed by the Receiving Party to:

(a) Persons (including, without limitation, deposition or trial witnesses) who appear on the face of the Designated Material marked “ATTORNEY EYES ONLY” as an author, addressee or recipient thereof, or who is directly referenced in Designated Material, or in whose files the document or thing was found;

(b) Counsel of record for the Parties and Designating Parties to this action, as well as the partners, associates, agents and regularly employed staff and supporting personnel of such counsel to the extent reasonably necessary to render professional services in this action;

(c) Any 30(b)(6) deposition witness presented by the Designating Party, or any other deposition witness produced by the Designating Party;

(d) The Court and court personnel (including stenographic reporters) and any necessary law clerk, paralegal, secretarial, clerical, and other lay court personnel;

(e) Subject to Section 3 below, Designated Material marked “ATTORNEY EYES ONLY” may also be disclosed to independent experts (and the assistants, secretarial and clerical staffs of such independent experts), who are not employees of the Receiving Party and who are retained by a party or its attorneys of record in this action to assist in the preparation of the case, such as independent economic, accounting or scientific experts or technical advisors, or to furnish technical or expert services in connection with this action, or to give expert testimony with respect to the subject matter thereof for the trial of this action;

(f) Outside document processing service providers, including e-discovery, duplicating, photocopying and document coding/scanning contractors. Notwithstanding any other provision of this Consent Protective Order, access to “ATTORNEY EYES ONLY” Information shall be permitted to such service providers without need for the completion of Exhibit A.

(g) Such other persons as the Designating Party may, in writing, agree or by order of this Court.

3. Certificates Concerning Designated Material

Each person to whom any Designated Material may be disclosed pursuant to the provisions of Sections 2.1(f) or 2.2(e) above or such person’s supervisor, shall, prior to the time such Designated Material is disclosed to him or her, be provided with a copy of this Consent Protective Order and shall certify under penalty of perjury that he or she has carefully read the Consent Protective Order and fully understands and agrees to abide by its terms. This certificate shall be in the form attached to this Order as Exhibit A. Counsel who makes any disclosure of Designated Materials pursuant to Sections 2.1(f) or 2.2(e) above, shall retain each original executed certificate.

4. Use of Designated Material by Designating Party

Nothing in this Consent Protective Order shall limit any Designating Party’s use of its own documents and information nor shall it prevent the Designating Party from disclosing its own confidential information or documents to any person. Such disclosure shall not affect any designations made pursuant to the terms of this Consent Protective Order, so long as the disclosure is made in a manner which is consistent with the designation and reasonably calculated to maintain the confidentiality of the information.

5. Designating Materials

Documents, information, materials, pleadings, legal memoranda, expert statements and discovery responses, in whole or in part, may be designated as “CONFIDENTIAL” or “ATTORNEY EYES ONLY” as follows:

5.1 The producing or responding party shall designate material by placing the legend “CONFIDENTIAL” or “ATTORNEY EYES ONLY” on each page of the materials or on each physical item prior to its production.

5.2 When a party wishes to designate its own “CONFIDENTIAL” or “ATTORNEY EYES ONLY” materials produced by someone other than the Designating Party, such designation shall be made:

(a) Within fourteen (14) business days from the date that the Designating Party receives copies of such materials from the producing or disclosing entity; and

(b) By notice to all Parties to this action and producing or disclosing entity, if it is not a party to this action, identifying the materials to be designated with particularity (either by production numbers or (“Bates numbers”) by providing other adequate identification of the specific material). Such notice shall be sent by email (except insofar as no email address is available) and regular mail.

5.3 Upon notice of designation pursuant to Section 5.2 above, all persons receiving notice of the requested designation of materials shall:

(a) Make no further disclosure of such Designated Material or information contained therein, except as allowed in this Consent Protective Order;

(b) Take reasonable steps to notify any persons known to have possession or access to such Designated Materials of the effect of such designation under this Consent Protective Order; and

(c) Take reasonable steps to reclaim or prevent access to such Designated Material or information in the possession or control of any person not permitted to have access under the terms of this Consent Protective Order.

6. Designating Depositions

6.1 Deposition transcripts or portions thereof may be designated as “CONFIDENTIAL” or “ATTORNEY EYES ONLY” by a party or Designating Party during deposition testimony taken in this action, in which case the portion of the transcript containing Designated Material shall be identified in the transcript by the Court Reporter as “CONFIDENTIAL” or “ATTORNEY EYES ONLY”. The omission of such designation during deposition testimony shall not preclude any party from later designating deposition testimony or exhibits as “CONFIDENTIAL” or “ATTORNEY EYES ONLY” in accordance with Section 6.4 of this Consent Protective Order.

6.2 Where testimony is designated at a deposition, the Designating Party shall have the right to exclude from those portions of the deposition entailing designated testimony all persons not authorized by the terms of this Consent Protective Order to receive such Designated Material.

6.3 Any party may mark Designated Material as a deposition exhibit and examine any witness thereon, provided that the exhibit and related transcript pages receive the same confidentiality designation as the original Designated Material and provided that the person to whom the Designated Materials is to be shown is a person who may have such access under Sections 2, above.

6.4 Any party or Designating Party may, within ten (10) business days after receiving a final deposition transcript, designate pages of the transcript and/or its exhibits as Designated Material. If any party or Designating Party so designates such material, the

Designating Party shall provide written notice of such designation to all Parties within that ten-business-day period. Designated Material within the deposition transcript or the exhibits thereto may be identified by written designation referring to pages and, where applicable, line numbers by highlighting, underlining, or otherwise visibly designating the designated portions and marking such portions “CONFIDENTIAL” or “ATTORNEY EYES ONLY”. Until the expiration of the ten business-day period, any portion of the deposition not previously designated shall be treated as “ATTORNEY EYES ONLY” and subject to protection as provided by this Consent Protective Order.

7. Copies

All complete or partial copies of Designated Material and written materials derived from Designated Materials shall also be deemed subject to the terms of this Consent Protective Order.

8. Court Procedures

8.1 Disclosure of Designated Material to Court Officials

Subject to the provisions of this Section 8, Designated Material may be disclosed to the Court, Court officials or employees involved in this action (including court reporters, persons operating video recording equipment at depositions, and any special master or referee appointed by the Court), the jury in this action, and any interpreters interpreting on behalf of any party or deponent.

8.2 Disclosure of Designated Material to Court Officials

In the event that any Designated Material is included with, or the contents thereof are in any way disclosed in any pleading, motion or other paper filed with the Clerk of this Court, the party filing such pleading, motion or other paper shall contemporaneously move the Court to file the Designated Material under seal pursuant to Local Civil Rule 5.

Notwithstanding the foregoing, Designated Material introduced into evidence at trial shall not be sealed or otherwise treated as confidential by the Court except pursuant to a further order of the Court at the request of either party during pretrial proceedings or at trial.

8.3 Retrieval of Designated Material

The party or Designating Party responsible for filing the Designated Materials shall be responsible for retrieving such Designated Materials from the Court following the final termination of the action (including any appeals thereof), consistent with the direction of the Court and its Clerk in this regard.

8.4 Failure to File Under Seal

If any party or Designating Party fails to request that the Court file Designated Materials under seal, the Designating Party or any party to this action may request, in accordance with the provisions of Local Civil Rule 5, that the Court place the Designated Materials under seal within 30 days of the filing of said Designated Material.

9. Objections

A party may challenge the propriety of any designation under this Consent Protective Order at any time. A challenge may be made by serving all other Parties and the Designating Party with a captioned notice of objection, which shall identify with particularity the Designated Material as to which the designation is challenged and state the basis for each challenge (the “Notice of Objection”).

Following service of a Notice of Objection, the Parties and the Designating Party shall meet and confer in good faith to resolve the challenge. In the event that the Parties and the Designating Party are unable to resolve the challenge informally, the party challenging the designation may file, on or before the thirtieth calendar day after service of a Notice of Objection, a motion to redesignate the challenged material, accompanied by a certification that the Parties

and the Designating Party met and conferred in good faith prior to the filing of the motion. In the event of such a motion, the material at issue may be submitted to the Court for *in camera* inspection. It shall be the burden of the Designating Party under such circumstances to establish that the information so designated is CONFIDENTIAL or ATTORNEY EYES ONLY within the meaning of this Consent Protective Order. The original designations shall remain effective until three (3) business days after entry of an order redesignating the materials and during the pendency of any timely filed appeal or writ petition.

10. Designated Material Subpoenaed or Ordered Produced in Other Litigation

If a Receiving Party who has Designated Material is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as CONFIDENTIAL or ATTORNEY EYES ONLY, that Party must:

(a) promptly notify the Designating Party in writing. Such notification shall include a copy of the subpoena or court order, to the extent permitted by law;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Consent Protective Order. Such notification shall include a copy of this Consent Protective Order; and

(c) cooperate with respect to all reasonable procedures sought by the Designating Party whose Designated Material may be affected, to afford the Designating Party the opportunity to challenge the subpoena or court order or to otherwise resolve disputes concerning the disclosure of such Designated Material.

If a Designating Party timely seeks a protective order, the Party served with the subpoena or court order shall not produce any information designated in this action as CONFIDENTIAL or ATTORNEY EYES ONLY before a determination by the court from which the subpoena or order

issued, unless the Party has obtained the Designating Party's permission or if such production is otherwise required by law. The Designating Party shall bear the burden and expense of seeking protection in that court of its Designated Material, and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

11. Client Communication

Nothing in this Consent Protective Order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course of rendering such advice, relying upon the examination of Designated Material. In rendering such advice and otherwise communicating with the client, however, counsel shall not disclose the contents, substance or source of Designated Material, except as permitted by this Consent Protective Order.

12. No Prejudice

12.1 This Consent Protective Order shall not diminish any existing obligation or right with respect to Designated Material, nor shall it prevent a disclosure to which the Designating Party consents in writing before the disclosure takes place.

12.2 Unless all Parties stipulate otherwise, evidence of the existence or nonexistence of a designation under this Consent Protective Order shall not be admissible for any purpose during any proceeding on the merits of this action.

12.3 If any person required to produce documents inadvertently produces any Designated Material, without marking it with the appropriate legend, the Designating Party may give written notice to the Receiving Party or Parties, including appropriately marked copies of the Designated Material, that the document, thing, or response is deemed Designated Material and should be treated as such in accordance with the provisions of this Consent Protective Order.

12.4 Neither the provisions of this Consent Protective Order, nor the filing of any Designated Material, under seal, shall prevent the use in court, at any hearing, or at trial of this action of any Designated Material that is subject to this Consent Protective Order or filed under seal pursuant to its provisions. Prior to the pretrial conference, the Parties and Designating Parties shall meet and confer concerning appropriate methods for dealing with Designated Material at trial.

13. Privilege, Waiver, and Claw-Back

Federal Rule of Evidence 502 shall apply to this case. The production or disclosure during discovery of an attorney-client privileged, attorney work product, or other protected document or information medium ("Protected Material") shall not be deemed a waiver of the privilege, work product, or other protection or immunity from discovery by the producing party in this or any subsequent state or federal proceeding. If any party becomes aware of the production of Protected Material by any party, the party shall provide written notice of such production. Within three (3) business days of receipt of notice by any party that Protected Material was produced or disclosed, sufficiently identified by Bates number or other method to readily enable its identification, all recipients of the Protected Material shall collect all copies or reproductions thereof and shall delete such material from any medium or, if requested, return them to the producing party. In addition, the recipients shall collect all notes or other work product that summarize, discuss, or quote the contents of such Protected Material, which shall then be segregated and destroyed. Within five (5) business days after sending notice, the producing party will then produce a privilege log with an explanation of how the Protected Material is protected from disclosure by any applicable privilege or the work product doctrine. If the recipient disputes the protected nature of the Protected Material, then the recipient shall so notify the producing party in writing within a reasonable time after receiving the privilege log. If the dispute cannot be resolved after conferring

in good faith with the producing party, the recipient may promptly file a motion with the Court. The producing party shall have the burden of demonstrating the protected nature of the Protected Material. The producing party must retain the information until the motion is resolved.

(a) For any Protected Material clawed-back under the protocol above, the Parties agree that such disclosure is inadvertent and will not argue otherwise. The Parties also agree not to argue that the disclosure of Protected Material in discovery during this litigation was due to the disclosing party's failure to take reasonable steps to prevent disclosure. The Parties further agree that adherence to the protocol in Section 13 of this Consent Protective Order constitutes the taking of prompt, reasonable steps to rectify the error.

14. Privilege Log

The Parties have agreed that should any documents be withheld from production on the basis that they are privileged, the withholding party shall produce a privilege log in accordance with the following conditions:

- (a) Communications with outside counsel after the date the Petition was served in this action may be excluded so long as the communication relates solely to this case or other investigations or prosecutions relating to marginal loss surplus allocation payments to up-to congestion traders;
- (b) Communications with in-house counsel after the date the Petition was served in this action may be excluded so long as the in-house counsel was acting in a legal capacity and the communication relates solely to this case or other investigations or prosecutions relating to marginal loss surplus allocation payments to up-to congestion traders;

- (c) The log must include reasonable descriptive information that supports the privilege asserted to enable the receiving party to make a determination whether to challenge the assertion of privilege; and
 - (d) Where an email chain is at issue, the listing on the log may be limited to the last strand in the email chain if it identifies all respondents on each email in the chain.
- All non-privileged emails in the chain will be produced.

15. Modification and Survival

15.1 Modification

The Parties reserve the right to seek modification of this Consent Protective Order at any time for good cause. The Parties agree to meet and confer prior to seeking to modify this Consent Protective Order for any reason. The restrictions imposed by this Consent Protective Order with respect to any specific protected material may be modified or terminated only by written stipulation of all Parties and Designating Parties or, after the Designating Party has been provided an opportunity to object, by subsequent order of this Court.

15.2 Survival and Return of Designated Material

This Consent Protective Order shall survive termination of this action. Within sixty (60) days after the final termination of the action, including appeals and retrials, all documents designated CONFIDENTIAL or ATTORNEY EYES ONLY and all other documents and things containing Designated Material, including deposition testimony regarding designated exhibits and all copies thereof, shall be destroyed. Counsel of record shall certify their compliance with this provision and shall deliver such certification to counsel for the Designating Party within the sixty (60) day period.

Notwithstanding the provisions for destruction of Designated Material, counsel may retain pleadings, attorney and independent expert work product, and deposition transcripts.

16. The Provisions Hereof Do Not Apply to Information That Becomes Public Knowledge in the Absence of a Violation of This Consent Protective Order

The restrictions set forth in the foregoing paragraphs shall not apply to information which (a) was or became public knowledge, not in violation of this Consent Protective Order, (b) was or is acquired in good faith from a third party, not a party to this action, not in violation of this Consent Protective Order, who or which has the right to disclose such information, (c) was or is discovered independently by the Receiving Party without violating this Consent Protective Order, or (d) was disclosed by the Designating Party to a third party in the absence of any understanding or expectation that the information would be kept confidential. The burden of showing that Designated Material can be treated as non-confidential material pursuant to the provisions of this Section 16 shall rest at all times on the party who seeks to disclose such information or to treat such information as non-confidential. A party that objects to the designation of material as confidential on one of the grounds set forth in this Section 16 shall follow the objections procedures set forth in Section 9 above.

17. Material Disclosed to be Used Only for Purposes of Action

All Designated Material hereunder shall be used by each Receiving Party solely for purposes of this action and for no other purpose. Except as provided below, a Receiving Party may not use any Designated Material it obtains in the course of this action for any business purpose or in any other legal or administrative proceedings. Designated Material produced during the course of this action can be used by a Receiving Party in other legal or administrative proceedings if such use is mutually agreed by the Designating and the Receiving Parties.

18. No Contract

This Consent Protective Order shall not be construed to create a contract between the Parties or between the Parties and their respective counsel.

19. No Waiver

No action taken in accordance with this Consent Protective Order shall be construed as a waiver of any claim or defense in the action or of any position as to discoverability or admissibility of evidence.

20. Court's Retention of Jurisdiction

The Court retains jurisdiction, even after the termination of this action, to make such amendments, modifications, and additions to this Consent Protective Order as it may from time to time deem appropriate.

20. Discovery Disputes with Third Parties

All third parties who sign the Certificate of Adherence to Protective Order in Exhibit A or who are requested or required to produce any form of evidence or discovery contemplated under Rules 26 through 36 and Rule 45 of the Federal Rules of Civil Procedure shall be bound by and participate in the Discovery Dispute mechanism provided by the Court in paragraphs 20 through 23 of the Court's Initial Pretrial Order entered December 21, 2020, as may be amended by the Court.

ENTER:

Date: _____

United States District/Magistrate Judge

WE ASK FOR THIS:

**FEDERAL ENERGY REGULATORY
COMMISSION**

By: _____

Lisa L. Owings (Va. Bar No. 73976)
Mark E. Nagle (Va. Bar No. 19867)
Steven Tabackman (Va. Bar No. 16448)
Daniel T. Lloyd (*Pro Hac Vice*)
888 First Street, N.E.
Washington, DC 20426
Telephone: (202) 502-8100
Facsimile: (202) 502-6449
Email: lisa.owings@ferc.gov

POWHATAN ENERGY FUND, LLC

By: _____

Patrick Risdon Hanes (Va. Bar No. 38148)
Williams Mullen
200 South 10th Street, Suite 1600
Richmond, VA 23219
Telephone: (804) 420-6000
Facsimile: 804-420-6507
Email: phanes@williamsmullen.com

**HOULIAN “ALAN” CHEN, HEEP FUND,
INC., AND CU FUND, INC.**

By: _____

Robert W. Warnement (Va. Bar No. 39146)
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7507
Facsimile: (202) 661-9040
Email: robert.warnement@skadden.com

EXHIBIT A

**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.)	
)	

CERTIFICATION OF ADHERENCE TO PROTECTIVE ORDER

I understand that I or my subordinates may receive CONFIDENTIAL or ATTORNEY EYES ONLY information as defined in the attached Consent Protective Order in Civil Action No. 3:15-cv-452, pending in the United States District Court for the Eastern District of Virginia, and by signing this Certificate of Compliance, I acknowledge and agree that I have read, understand, and am subject to the provisions of the Consent Protective Order and will not disclose such protected information in whole or in part or in any form or the information contained therein to any person, corporation, partnership, firm, governmental agency or association other than those specifically authorized by the Consent Protective Order.

I understand that any violation of the Consent Protective Order may subject me to sanctions by the Court. I shall not copy or use CONFIDENTIAL or ATTORNEY EYES ONLY information, as defined in the attached Consent Protective Order, except for the

purposes of this action and pursuant to the terms of the Consent Protective Order.

No later than 60 days after final termination of this action, I shall destroy or return to the attorney from whom I have received them any documents in my possession designated CONFIDENTIAL or ATTORNEY EYES ONLY, and I shall return or destroy all copies, excerpts, summaries, notes, digests, abstracts, and indices containing CONFIDENTIAL or ATTORNEY EYES ONLY information as defined in the attached Consent Protective Order.

I submit myself to the jurisdiction of the United States District Court for the Eastern District of Virginia for the purpose of enforcing or otherwise providing relief relating to the Consent Protective Order.

Dated: _____

(Signature)

(Name)

(Job Title/Position)

Attachment B

Revised Schedule A to Subpoena to
Monitoring Analytics, LLC

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.

Attachment C

December 21, 2020 Scheduling Order

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

**FEDERAL ENERGY REGULATORY
COMMISSION,**

Petitioner,

v.

Civil Action No. 3:15cv452

**POWHATAN ENERGY
FUND, LLC, *et al.*,**

Respondents.

INITIAL PRETRIAL ORDER

The following shall govern the progress of this action in addition to the provisions of the Federal Rules of Civil Procedure as modified and/or enlarged upon by the Local Rules for this Court.

Trial Date

1. Trial is scheduled with a jury to commence on **AUGUST 15, 2022**, at 10:00 a.m. and continue through **AUGUST 26, 2022**. The parties shall appear at 9:00 a.m. to address any pretrial matters should they arise.

General Instructions

- A. **Conflict with the Local Rules, Federal Rules of Civil Procedure, or Prior Pretrial Orders**
2. This Order shall control if any conflict is perceived between it and either the Federal or Local Rules. This Order shall supersede all prior Pretrial Orders that have been entered in this matter.

3. Parties perceiving a conflict shall raise it by motion, brief it in the manner required by the Local Rules and demonstrate therein why the perceived conflicting provision of a Pretrial Order or Scheduling Order should not control.

B. Filing Deadlines and Calculating Dates

4. All filing deadlines expire at 5:00 p.m. on the applicable date, except as specifically ordered by the Court.

5. If any deadline established herein shall fall on a Saturday, Sunday, or federal holiday, the deadline shall be presumed to have expired at 5:00 p.m. on the nearest preceding business day.

6. One courtesy copy, including exhibits, of each motion and memoranda or brief in support or opposition shall be delivered to Chambers not later than three business days after the filing of the paper. Voluminous filings should be placed in binders and organized with tabs.

7. For the purpose of calculating dates, the date of trial shall not be counted.

C. Settlement

8. Counsel shall notify the Court immediately of any settlement. The Court will place the case on the docket for a status hearing within thirty (30) days of notification.

9. If a fully executed order is received prior to the presentation date, the case will be removed from the docket and counsel need not appear.

10. If such an order is not timely submitted, the action could be dismissed by the Court with prejudice on the basis of the representation that the action has been settled.

Responsive Pleadings

11. Any party that has not filed an Answer shall do so within eleven (11) days from the date of this Initial Pretrial Order. Filing an Answer shall not waive any previously filed

motions or properly presented objections to jurisdiction or service of process. In extraordinary cases, the Court may modify this requirement on a motion of a party.

12. Any motions for joinder of additional parties shall be filed within fifteen (15) days after entry of this Order.

13. Any motions to amend pleadings shall be filed in accordance with Fed. R. Civ. P.

15. Any such motions filed that do not comply with Rule 15 will be entertained only when justice so requires.

Rule 26 Experts

A. Rule 26 Expert Disclosures

14. On or before one hundred twenty (120) days before trial, each party shall identify all persons it expects to call as expert witnesses in its case in chief at trial in support of any complaint, counterclaim, cross-claim, or third-party complaint and shall file the written report complying with the requirements of Fed. R. Civ. P. 26(a)(2)(B) for each such expert witness.

15. On or before ninety (90) days before trial, each defending party shall identify all persons it expects to call as expert witnesses in opposition to any complaint, counterclaim, cross-claim, or third-party complaint and shall file the written report complying with the requirements of Fed. R. Civ. P. 26(a)(2)(B) for each such expert witness.

16. On or before seventy-five (75) days before trial, each appropriate party shall identify all persons expected to be called as expert witnesses solely to contradict or rebut any witness and shall file the written report complying with the requirement of Fed. R. Civ. P. 26(a)(2)(B) for each such expert witness.

17. Only one expert per discipline is permitted, except by order of the Court.

B. Motions Challenging Expert Designation or Testimony

18. Motions challenging the designation of experts or expert testimony based upon *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, shall be filed no later than **February 8, 2022**.

19. Any party desiring a hearing on a motion challenging the designation of experts or expert testimony shall contact Chambers to schedule a hearing when the motion is filed. Such hearing shall take place not later than thirty (30) days before trial.

Discovery and Trial Schedule

Item	Deadline
Complete Substantive Discovery Responses	March 24, 2021
Written Discovery	April 23, 2021
Depositions	July 23, 2021
Expert Reports	Sept. 7, 2021
Rebuttal Expert Reports	Nov. 8, 2021
Expert Depositions	Dec. 8, 2021
Dispositive Motions	Feb. 8, 2022
Responses to Dispositive Motions	Apr. 8, 2022
Replies to Dispositive Motions	May 9, 2022
Final Pretrial Conference	August 1, 2022
Trial (two weeks)	August 15, 2022

C. Discovery Disputes

20. Counsel are expected to resolve discovery disputes without filing pleadings or involving the Court.

21. In the unusual event that, after a good faith effort, counsel are unable to resolve a dispute and the resolution of the dispute requires Court intervention, the parties shall follow the following procedure:

- a. The aggrieved party shall file a Notice of Objection stating the nature of the dispute and citing the rule(s) invoked.
- b. The Notice shall certify that the parties have made a good faith effort to resolve the discovery dispute.
- c. Within fourteen (14) days of filing the Notice, the parties shall file a Joint Statement detailing and itemizing the specific discovery disputes at issue utilizing the Discovery Dispute Chart that the Court provided to the parties at the Initial Pretrial Conference. The Joint Statement shall include each party's respective position with regard to each issue, including the applicable facts, supporting law, the rule involved, and legal analysis.
- d. The parties shall submit the Joint Statement in chart form.
- e. No other briefing will be permitted.
- f. If the discovery dispute concerns the objection to the production of documents on the grounds of attorney-client privilege, the work product doctrine, or any other protection, the objecting party must provide the requesting party with an inventory list of the documents to which objection is made (i.e., a privilege log), together with a brief description of the documents, including the date, the author, identity of each recipient including their job titles at the pertinent time, and the claimed basis for its protection. Unless otherwise ordered by the Court, the objecting party shall serve the privilege log and copies on the requesting party and provide a copy to the Court along with the Joint Statement.

g. The Joint Statement shall include a specific section regarding the efforts made by the parties to resolve the dispute and the certification under Local Rule 37(E) signed by each counsel that they have met and conferred in good faith to resolve the dispute.

22. Along with filing the Joint Statement, the parties shall jointly contact the Court to inform the Court whether a hearing is necessary. Any hearing will be scheduled on an expedited basis, consistent with the demands of the Court's docket.

23. Any discovery-related issues not filed with the Court pursuant to the above procedures and within five days before the discovery cutoff are deemed waived.

D. Filing Discovery Materials with the Clerk

24. No discovery materials shall be filed with the clerk except by order of the Court.

Motions

A. Dispositive Motions

25. All dispositive motions shall be filed no later than **February 8, 2022**. This deadline shall not change, except by order of the Court. Counsel are reminded of the requirements of Local Rule 56(B) which is specifically incorporated herein regarding motions for summary judgment.

B. Non-Dispositive Motions Not Based on *Daubert*

26. All non-dispositive motions, including all motions *in limine*, except those based on *Daubert* and/or challenging the designation of experts or expert testimony, shall be filed in sufficient time, taking into account the time allowed for responses and replies, to be heard no later than ten (10) days prior to trial.

C. Hearings on Motions

27. Any party desiring a hearing on a dispositive motion shall contact Chambers to schedule a hearing when the motion is filed. Such hearing shall take place not later than thirty (30) days prior to trial.

28. Any party desiring a hearing on a motion *in limine* shall contact Chambers simultaneous to the filing of the motion to schedule a hearing. Such hearing shall occur not later than ten (10) days prior to trial. Absent extraordinary circumstances, hearings on motions *in limine* and other non-dispositive motions shall not occur the morning of trial, unless the information or circumstances upon which any motion would be based becomes known or develops at a later date.

Trial Preparation

A. Proposed Witnesses

29. Each plaintiff shall file a list of proposed witnesses not less than forty (40) days prior to trial and each defendant shall designate its witnesses no later than thirty (30) days prior to trial. Plaintiff shall file a list of any rebuttal witnesses not later than twenty-five (25) days prior to trial. Failure to comply with the provisions of this paragraph will, in the absence of exceptional circumstances, result in preclusion of a witness's testimony at trial.

B. Proposed Exhibits

30. Each plaintiff shall file a list of proposed exhibits not less than forty (40) days before trial and they shall provide a copy of all proposed exhibits to all parties on the date filed. Each defendant shall file a list of proposed exhibits and provide a copy of same to every party not less than thirty (30) days before trial. The plaintiff shall file a list of any rebuttal exhibits not less than twenty-five (25) days before trial. Any objection to any exhibit shall be noted by appropriate pleading not later than twenty (20) days before trial and any submission shall include a copy of the subject exhibit(s). Any exhibit to which no objection is made shall be admitted without further action. Any exhibit not listed and timely filed will not be admitted at trial unless used solely for impeachment or rebuttal purposes.

31. Four (4) separate copies, properly identified, of all proposed exhibits shall be submitted to the Court at least seven (7) business days prior to trial. Exhibits shall be arranged in a notebook, with each exhibit marked and individually tabbed. Plaintiff's exhibits shall be numbered and Defendant's exhibits shall be lettered. Each exhibit notebook should contain an index identifying each exhibit by number or letter and a short neutral description.

32. The parties are admonished that no exhibit will be permitted to be published to a jury during the course of trial unless a separate copy of said exhibit is available for each juror or the subject exhibit is of such a size (or enlarged to such a size) as to permit simultaneous examination by the entire jury. If counsel so desires, exhibit notebooks may also be provided for each juror.

33. The courtroom is equipped with screens for the viewing of evidence. Monitors are located on counsel tables, on the bench, and in the jury box. The courtroom has a document viewer that displays documents on the monitors; the parties may use the document viewer. Please visit the following website for complete information on the Court's evidence presentation system and technology: <https://www.vaed.uscourts.gov/evidence-presentation-system>. The courtroom is equipped to allow the parties to use personal laptop computers to aid in displaying evidence at trial. The Court does not provide computers for the use of parties. Before bringing a computer into the courthouse, counsel should deliver to the Court a letter requesting permission to do so; if appropriate, the letter will be marked as approved by the Court, and counsel should present the letter to the court security officers at the courthouse entrance. Counsel should confer with the deputy clerk to conduct a test of the courtroom technology before trial.

C. Discovery To Be Used in Evidence

34. Each plaintiff shall designate by appropriate pleading not less than forty (40) days prior to trial any discovery material which is intended to be offered into evidence and each defendant shall do likewise not less than thirty (30) days prior to trial. The plaintiff shall designate any rebuttal discovery not later than twenty-five (25) days before trial. Any objection to the introduction of any discovery material shall be noted by appropriate pleading which shall be filed no later than twenty (20) days prior trial or the objection shall be deemed waived. This

paragraph does not apply to discovery materials that will be used at trial solely for use in cross examination and/or for impeachment purposes.

D. Written Stipulations

35. No later than forty (40) days before trial, counsel for each party shall meet and confer in a good faith effort to enter into written stipulations of uncontroverted facts. Unless the parties agree otherwise, this conference shall be held at the counsel's office that is closest to the courthouse.

36. Written stipulations shall be signed by each counsel and filed with the Clerk no later than thirty (30) days prior to trial.

E. Jury Instructions

37. If this action is to be tried by a jury, the parties shall jointly file a complete set of proposed jury instructions no later than ten (10) days before trial. Objections to instructions shall be filed in writing seven (7) days before trial. The parties shall file a proposed jury verdict form with their instructions.

38. Instructions shall be filed as a group with a cover page in pleading form and with a certificate of service at the end. Each instruction shall be set forth on a separate page with subtitle (e.g., Breach of Contract) and the original shall bear at its foot a citation of authority supporting the instruction. The parties must identify each requested instruction with plaintiff using numbers and defendant using letters.

39. In addition, Counsel must provide jury instructions to the Court by email in Word and PDF Format.

F. Voir Dire

40. Any proposed jury voir dire to be requested by any party shall be filed at least seven (7) days prior to trial. Parties are encouraged to submit an instruction that succinctly summarizes the position of each party for use by the Court during voir dire.

41. Any objections to voir dire questions shall be filed three (3) days before trial.

Bench Trial

42. If this matter is to be tried without a jury, the parties shall file proposed findings of fact and conclusions of law at least fourteen (14) days prior to trial. The proposed findings of fact and conclusions of law shall be in numbered paragraphs. Conclusions of law shall cite authority. Counsel shall also provide to the Court by email proposed findings of fact and conclusions of law in Word and PDF format.

Final Pre-Trial Conference

43. A Final Pretrial Conference will be held on **AUGUST 1, 2022** at 11:00 a.m.. If a Final Pretrial Conference is not set, but is later deemed necessary, Counsel must contact the Court immediately to schedule one.

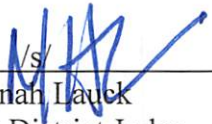
44. Trial counsel shall attend any Final Pretrial Conference. The parties should also appear at any Final Pretrial Conference.

45. Not later than seven (7) days before the Final Pretrial Conference, the parties shall jointly submit a proposed Final Pretrial Order, endorsed by counsel and setting forth all resolved and disputed matters related to trial evidentiary issues. The proposed Final Pretrial Order shall be broken down by the following sections: (1) Stipulated Facts; (2) Legal and Evidentiary Stipulations (including jurisdiction and venue); (3) List of Proposed Witnesses by Each Party; (4) Exhibits (including identification of those exhibits to which there is no objection); (5) Factual Contentions as set forth by each party; and, (6) Triable Issues as set forth by each party.

46. No witness, exhibit, or discovery material not included in the Final Pretrial Order will be permitted to testify or be admitted at trial, except as to non-expert witnesses, exhibits or discovery material offered solely as rebuttal evidence or for impeachment.

47. It shall be the responsibility of counsel for plaintiff(s) to assemble and distribute to all other counsel a draft of the Final Pretrial Order in sufficient time to allow completion before the Final Pretrial Conference. Counsel shall resolve disagreements on the content of the Final Pretrial Order and shall present a clean final version thereof not later than seven (7) days before the Final Pretrial Conference. Failure to comply with the requirements of this paragraph may result in the imposition of sanctions pursuant to Fed. R. Civ. P. 16(f).

48. If no Final Pretrial Conference is to be held, the Final Pretrial Order shall be presented for entry by 5:00 p.m. seven (7) days before the commencement of trial.



M. Hannah Lauck
United States District Judge

Date: 12/21/20
Richmond, Virginia

Attachment D

Judge Lauck's Chart for Discovery Disputes

Sample Chart for Discovery Disputes – MHL
Must Be Jointly Submitted Within 14 Days

Requests for Production/Interrogatory:	Objecting Party's Objection/Answer:	Requesting Party's Response to Objection:	The Court's Ruling
<p>RFP No. 3: “All documents relating in any way to . . .”</p> <p>[Requesting party’s request with brief description, if necessary.]</p>	<p>Objection: “The objecting party objects to the request because, <i>e.g.</i>, work product and/or attorney/client privilege.”</p> <p>Format for Objection: Each item or question subject to the request and objected to must be listed. No boilerplate answers, and no “briefing.” Your chart should mirror what your notes would be for an oral hearing with three bullet points:</p> <ul style="list-style-type: none"> • Rule you are invoking; • Case that speaks to <u>this</u> dispute, not one speaking generally about discovery rules; and, • Facts that support your position. 	<p>Response: “The objecting party’s argument is misguided because”</p> <p>Format for Response: The format for the response is the same as the format for the objection. Respond to each item or question objected to. No boilerplate responses and no “briefing.” Respond in the same three bullet points:</p> <ul style="list-style-type: none"> • Rule you are invoking; • Case that speaks to <u>this</u> dispute, not one speaking generally about discovery rules; and, • Facts that support your position. 	



**Monitoring
Analytics**

Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, PA 19403
Phone: 610-271-8050
Fax: 610-271-8057

VIA EMAIL

January 19, 2021

Patrick R. Hanes, Esq.
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, Virginia 23219

Re: FERC v. Powhatan Energy Fund, LLC, et al., Civ. Action No. 3:15-cv-00452 (MHL).

Dear Mr. Hanes:

We are in receipt of your letter dated January 11, 2021 ("January 11th Letter"), in response to the Market Monitor's objections sent December 21, 2020 ("Objections"), to requests in the subpoena issued by the Defendants dated December 7, 2020 ("Subpoena"), and following up on the discussion in our conference call that occurred on January 5, 2021 ("January 5th Call").

Nothing in this letter changes the Objections raised previously. Nor does this letter address whether the January 11th letter accurately memorializes our earlier discussion.

The Market Monitor believes that the January 5th Call indicated a potential for progress in reducing the scope of disagreement about the information to be provided in response to the Subpoena. The Market Monitor here includes modifications to the requests based on the January 5th Call and further proposed modifications to the information to be provided.

In the January 5th Call, Defendants offered to provide search terms for each request in order to appropriately narrow the scope of the request and improve the efficiency of providing and evaluating a response. The Market Monitor appreciates the confirmation in the January 11th Letter of Defendants' willingness to work to develop specific search terms and continues to have an interest in receiving proposed search terms from Defendants. The Market Monitor provides below some suggested search terms.

The Market Monitor appreciates the draft confidentiality agreement provided and other information on the process moving forward. The Market Monitor requests that Defendants include the Market Monitor in discussions with FERC on the development of the agreement.

The Market Monitor has indicated that PJM Members have raised objections to the scope of the requests in the Subpoena. The Market Monitor provided the Subpoena to PJM Members as required by the PJM OATT. The Market Monitor believes that it would facilitate an efficient process to make correspondence on the discovery requests available to the Members, including the Objections, the January 11th Letter, this letter and future correspondence and other

information related to the Subpoena. If Defendants object to the release of such information, the Market Monitor requests that the Defendants so indicate within two business days.

Revised 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.*

The Market Monitor requests the following revisions:

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

The Market Monitor requests that Defendants confirm whether they have a copy of the unredacted Referral.

The Market Monitor requests further consideration of Defendants' response, including specification of a reasonable date range and of search terms.

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.*

The Market Monitor requests the following revisions:

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 the Defendants~~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 the Defendants~~UTC traders~~.

The Market Monitor now requests the following revisions:

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 the Defendants~~UTC traders~~ by (a) PJM, or (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 the Defendants~~UTC traders~~.

The Market Monitor requests further consideration of Defendants' response, including specification of a reasonable date range and of search terms.

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.*

The Market Monitor requests the following revisions:

Provide all documents and communications, other than Member Confidential information, relating to any complaint or inquiry made to the IMM relating to the payment of MLSA to ~~Defendants~~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.

The Market Monitor now requests the following revisions:

Provide all documents and communications, other than Member Confidential information, relating to any complaint or inquiry made to the IMM relating to the payment of MLSA to ~~Defendants~~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.

The Market Monitor requests further consideration of Defendants' response, including specification of a reasonable date range and of search terms.

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.*

The Market Monitor requests the following revisions:

Provide all documents and communications from August 1, 2008~~June 1, 2000~~ to September 17, 2010, ~~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.

The Market Monitor now requests the following revisions:

Provide all ~~public~~ documents and public communications from August 1, 2008~~June 1, 2000~~ to September 17, 2010, ~~present~~ relating to your ~~and PJM's~~ efforts to craft an MLSA distribution mechanism, including all such documents and communications relating to your consideration of the incentives created by such a distribution mechanism.

The Market Monitor requests further consideration of Defendants' response, including specification of a reasonable date range and of search terms.

The Market Monitor proposes the following search term: "MLSA OR marginal loss surplus allocation AND incentives."

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.*

The Market Monitor is willing to provide its pleadings filed in Docket No. ER10-2280 and documents provided to PJM stakeholders in the stakeholder process that led to PJM's tariff proposal.

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

The Market Monitor requested the following revisions in the Objections:

Provide all non confidential documents and communications from August 8, 2008 to September 17, 2010, relating to the possibility that a single leg of a paired trade in a UTC in the PJM FTR market might not clear.

In the January 11th Letter, Defendants stated (at 2), “we are willing to revise the request to specify that it applies to ‘a paired trade in a UTC in the PJM market.’” The Market Monitor includes the change below and continues to request the following revisions:

Provide all non confidential documents and communications from August 8, 2008 to September 17, 2010, relating to the possibility that a single leg of a paired trade in a UTC in the PJM FTR market might not clear.

The Market Monitor requests further consideration of Defendants’ response, including specification of a reasonable date range and of search terms.

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.*

The Market Monitor requests the following revisions:

Provide all documents and communications with Defendants and public documents and communications to Stakeholders from August 1, 2008~~from any time to September 17, 2010,~~ 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.

The Market Monitor cannot provide Member confidential or market sensitive information. However, the Market Monitor is willing to determine whether any responsive documents exist using the following search term: “acceptable OR unacceptable AND risk AND exposed AND UTC.” The Market Monitor will provide documents responsive to request no. 7 as revised by the Market Monitor that do not include Member confidential or market sensitive information.

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

Nevertheless, the Market Monitor is willing to respond to this request, with modifications.

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

The Market Monitor requests further consideration of Defendants' response, including specification of a reasonable date range and of search terms.

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

The Market Monitor requests the following revisions:

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.

In the January 11th Letter, Defendants stated (at 2), "we are willing to accept your proposal to add the word 'public.'" The Market Monitor includes the change below:

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.

Without waiving its Objections, the Market Monitor is willing to provide the information in request no. 9, as revised.

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.*

The Market Monitor does not propose to provide any information under this request beyond what it is willing to provide in response to other requests, specifically request no. 7.

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.*

The Market Monitor filed publicly available comments in Docket No. ER10-2280 explaining its position. The Market Monitor is willing to provide such comments.

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 requests the following revisions:

Provide all documents and communications relating to UTC trading by any Defendant **between December 1, 2007 and November 30, 2010**~~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 requests further consideration of Defendants' response, including specification of a reasonable date range and of search terms. The Market Monitor proposes using the following search term: "Powhatan AND transmission reservations AND UTCs." The Market Monitor will provide documents responsive to request no. 12 as revised by the Market Monitor that do not include Member confidential or market sensitive information.

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 requests the following revisions:

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

The Market Monitor requests further consideration of Defendants' response, including specification of a reasonable date range and of search terms.

The Market Monitor cannot provide Member confidential or market sensitive information. However, the Market Monitor is willing to determine whether any responsive documents exist using the following search term: "MLSA AND UTC AND transmission reservations." The Market Monitor will provide documents responsive to request no. 13 as revised by the Market Monitor that do not include Member confidential or market sensitive information.

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

The Market Monitor requests the following revisions:

Provide all documents and communications during the Relevant Period relating to any or all Defendants.

The Market Monitor requests further consideration of Defendants' response, including specification of a reasonable date range and of search terms.

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 requests Defendants' reconsideration of whether to pursue this request further.

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 requests Defendants' reconsideration of whether to pursue this request further.

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 requests Defendants' reconsideration of whether to pursue this request further.

* * * * *

The Market Monitor remains willing to work with you to appropriately narrow the scope of the Subpoena and provide information in response.

Sincerely,



Jeffrey W. Mayes
General Counsel

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000

FAX: (202) 393-5760

www.skadden.com

DIRECT DIAL
202-371-7950
DIRECT FAX
202-661-8213
EMAIL ADDRESS
JOHN.ESTES@SKADDEN.COM

FIRM/AFFILIATE OFFICES

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEW YORK
PALO ALTO
WILMINGTON

BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SÃO PAULO
SEOUL
SHANGHAI
SINGAPORE
TOKYO
TORONTO

January 27, 2021

BY EMAIL

Jeffrey W. Mayes
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Eagleville, PA 19403

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

Dear Mr. Mayes:

Thank you for your letter dated January 19, 2021, regarding your objections to the subpoena served on Monitoring Analytics, LLC (the “IMM” or “Market Monitor”) on December 7, 2020, in connection with *Federal Energy Regulatory Commission v. Powhatan Energy Fund, LLC, et al.*, No. 3:15-cv-00452 (E.D. Va.). We appreciate your cooperation in reducing the scope of disagreements regarding the information to be provided in response to the subpoena.

In the attachment to this letter, we provide specific responses to your modified objections, including suggestions for initial date ranges and search terms. Please note that while we are providing the proposed search strings in order to facilitate your review, if you are aware that specific documents or communications are responsive to a given request, we would expect you to produce such documents or communications regardless of whether they include the proposed search terms for that request. In order to narrow the scope of your review, we have presented the proposed search terms in the form of Boolean search strings. We have formatted these search strings (including with use of different font colors) for ease of reading. With respect to these proposed search strings, we have used the exclamation mark to indicate a multiple character wildcard, the /1 symbol to indicate when one term should appear within one word of a second term, and quotation marks to indicate exact phrases. We would be happy to discuss the proposed search strings to the extent any of them are unclear. We also would be happy to continue working with you if these proposed search strings present technical difficulties or other challenges.

With respect to the draft protective order, we have provided FERC with a copy of the version we shared with you and expect to receive proposed modifications from FERC shortly. We

will endeavor to share any such revisions with you and to include you in any discussions with FERC that are focused solely on the draft protective order. Once a final protective order has been negotiated, we hope that it will satisfy your concerns regarding member confidential information. We welcome any conversation about this issue while we finalize the draft protective order so that we may avoid the need for you to raise your objection with Judge Lauck.

We have no objection to you making correspondence regarding the subpoena available to PJM members.

We look forward to continuing to work with you to resolve any outstanding disagreements regarding the subpoena. If it would be useful to schedule a time to discuss any remaining issues, we would be happy to do so.

Sincerely,

/s/ Patrick R. Hanes
Patrick R. Hanes
Gregory A. Crapanzano
WILLIAMS MULLEN
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, VA 23219
Telephone: (804) 420-6455
phanes@williamsmullen.com

*Counsel for Powhatan Energy
Fund, LLC*

/s/ John N. Estes III
John N. Estes III
Juliana Brint
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7950
john.estes@skadden.com

*Counsel for Houlian "Alan" Chen,
HEEP Fund, Inc., and CU Fund, Inc.*

Enclosures

Attachment

Defendants' Responses to Proposed Revised Requests and Modified Objections

Defendants' Responses to Proposed Revised Requests and Modified Objections

Request 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.

Defendants' Position Regarding Request No. 1: For reasons previously explained, Defendants do not agree to the Market Monitor's proposed revisions. Defendants have not been able to locate an unredacted copy of the Referral of Potential Violations. Defendants would be willing to narrow the date range for this Request to the period from January 1, 2010 to December 17, 2014, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

(refer! OR violat! OR manipul! OR game! OR gaming OR (wash /1 trade!) OR commission! OR ferc! OR f.e.r.c.! OR enforcement! OR oe! OR o.e.! OR penalt!)
AND
(((up-to-congestion OR "up-to congestion" OR "up to-congestion" OR "up to congestion" OR utc! OR u.t.c.!) AND ("loss surplus" OR (marginal /1 loss!) OR mlsa! OR m.l.s.a.! OR "transmission loss" OR "loss credit" OR "loss credits" OR tlc! OR t.l.c.!!)) OR (powhat! OR gates! OR chen! OR (HEEP /1 fund!) OR (cu /1 fund!) OR (city /1 power!) OR tsingas! OR coaltrain! OR oceanside! OR (black /1 oak!)))

Request 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 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.

Defendants' Position Regarding Request No. 2: For reasons previously explained, Defendants do not agree to the Market Monitor's proposed revisions. Defendants would be willing to narrow

the date range for this Request to the period from January 1, 2010 to December 17, 2014, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

(inquir! OR investigat! OR proceeding! OR enforcement! OR oe! OR o.e.! OR “show cause” OR show-cause OR complaint! OR penalt! OR commission! OR f.e.r.c.! OR ferc!)

AND

((up-to-congestion OR “up-to congestion” OR “up to-congestion” OR “up to congestion” OR utc! OR u.t.c.!) AND (“loss surplus” OR (marginal /1 loss!) OR mlsa! OR m.l.s.a.! OR “transmission loss” OR “loss credit” OR “loss credits” OR tlc! OR t.l.c.!!) OR (powhat! OR gates! OR chen! OR (HEEP /1 fund!) OR (cu /1 fund!) OR (city /1 power!) OR tsingas! OR coaltrain! OR oceanside! OR (black /1 oak!)))

Request 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.

Defendants’ Position Regarding Request No. 3: For reasons previously explained, Defendants do not agree to the Market Monitor’s proposed revisions. Defendants would be willing to narrow the date range for this Request to the period from June 1, 2007 to September 17, 2010, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following initial search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

(complain! OR inquire! OR ask!)

AND

(up-to-congestion OR “up-to congestion” OR “up to-congestion” OR “up to congestion” OR utc! OR u.t.c.!))

AND

(“loss surplus” OR (marginal /1 loss!) OR mlsa! OR m.l.s.a.! OR “transmission loss” OR “loss credit” OR “loss credits” OR tlc! OR t.l.c.!))

Request 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.

Defendants’ Position Regarding Request No. 4: For reasons previously explained, Defendants do not agree to the Market Monitor’s proposed revisions. Defendants would be willing to narrow the date range for this Request to the period from June 1, 2007 to September 17, 2010, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

(“loss surplus” OR (marginal /1 loss!) OR mlsa! OR m.l.s.a.! OR “transmission loss” OR “loss credit” OR “loss credits” OR tlc! OR t.l.c.!))

AND

(distribut! OR allocat! OR allot! OR apportion! OR dispense! OR share! OR sharing OR incent! OR allure! OR attract! OR cataly! OR drive! OR encourage! OR entice! OR impetus OR incite! OR induce! OR influence! OR inspire! OR motivate! OR provoke! OR spur! OR stimulate! OR tempt!)

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 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.

Defendants’ Position Regarding Request No. 5: For reasons previously explained, Defendants do not agree that the Market Monitor’s proposed production in response to this Request is

adequate. Defendants would be willing to narrow the date range for this Request to the period from January 1, 2010 to September 17, 2011, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

((up-to-congestion OR “up-to congestion” OR “up to-congestion” OR “up to congestion” OR utc! OR u.t.c.!) AND (“loss surplus” OR (marginal /l loss!) OR mlsa! OR m.l.s.a.! OR “transmission loss” OR “loss credit” OR “loss credits” OR tlc! OR t.l.c.!) AND (alter! OR amend! OR chang! OR modif! OR revis! OR ceas! OR discontinu! OR eliminat! OR end! OR stop! OR terminat!))
OR
ER10-2280!

Request 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.

Defendants’ Position Regarding Request No. 6: For reasons previously explained, Defendants do not agree to the Market Monitor’s proposed further revisions. Defendants would be willing to narrow the date range for this Request to the period from January 1, 2010 to December 17, 2014, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

(up-to-congestion OR “up-to congestion” OR “up to-congestion” OR “up to congestion” OR utc! OR u.t.c.!)
AND
(clear! OR uncleared)
AND

(part! OR ((leg! OR side! OR direction! OR path!) AND (single! OR one OR first OR second OR only OR sole!)))

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.

Defendants' Position Regarding Request No. 7: For reasons previously explained, Defendants do not agree to the Market Monitor's proposed revisions. Defendants would be willing to narrow the date range for this Request to the period from June 1, 2007 to January 6, 2011, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

(up-to-congestion OR "up-to congestion" OR "up to-congestion" OR "up to congestion" OR utc! OR u.t.c.!)
AND
(requir! OR rule! OR tariff! OR "operating agreement" OR oatt OR o.a.t.t.)

Request No. 8: Provide all documents and communications relating to how well the market for the UTC product was functioning during the Relevant Period.

Defendants' Position Regarding Request No. 8: For reasons previously explained, Defendants do not agree to the Market Monitor's proposed revisions. Defendants would be willing to narrow the date range for this Request to the period from January 1, 2010 to January 6, 2011, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

(up-to-congestion OR “up-to congestion” OR “up to-congestion” OR “up to congestion” OR utc! OR u.t.c.!))

AND

(market! OR product!)

AND

(function! OR problem! OR design! OR structur! OR flaw! OR issue! OR effective! OR efficien! OR inefficien! OR competi! OR uncompetitive!)

Request 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.

Defendants’ Position Regarding Request No. 9: Defendants appreciate the Market Monitor’s commitment to provide information responsive to this Request (as revised).

Request 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.

Defendants’ Position Regarding Request No. 10: For reasons previously explained, Defendants do not agree with the Market Monitor’s refusal to respond to this Request. Defendants would be willing to narrow the date range for this Request to the period from June 1, 2007 to January 6, 2011, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

(“loss surplus” OR (marginal /1 loss!) OR mlsa! OR m.l.s.a.! OR “transmission loss” OR “loss credit” OR “loss credits” OR tlc! OR t.l.c.!))

AND

(trade! OR trading OR transaction! OR bid! OR offer! OR up-to-congestion OR

“up-to congestion” OR “up to-congestion” OR “up to congestion” OR utc! OR u.t.c.!)

AND

(account! OR adjust! OR analy! OR assess! OR consider! OR contemplat! OR evaluat! OR examin! OR factor! OR review! OR scrutin! OR studie! OR study! OR weigh! OR accept! OR allow! OR permit! OR permissi! OR ban! OR forbid! OR prohibit! OR proscribe! OR restrict! OR unacceptable!)

Request No. 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.

Defendants’ Position Request No. 11: For reasons previously explained, Defendants do not agree that the Market Monitor’s proposed production in response to this Request is adequate. Defendants would be willing to narrow the date range for this Request to the period from November 3, 2007 to November 28, 2019, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

((black /1 oak!) OR (epic /1 merchant!) OR (sesco /1 enterprises!)) **AND**
(complaint! OR proceeding! OR case! OR commission! OR ferc! OR f.e.r.c.! OR ((d.c. OR dc) /1 cir!) OR court! OR appeal!))

OR

EL08-14!

Request 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.

Defendants’ Position Regarding Request No. 12: Defendants would be willing to narrow the date range for this Request to the period from August 1, 2007 to January 6, 2011, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

(powhat! OR gates! OR chen! OR (HEEP /1 fund!) OR (cu /1 fund!))

AND

(up-to-congestion OR “up-to congestion” OR “up to-congestion” OR “up to congestion” OR utc! OR u.t.c.! OR “loss surplus” OR (marginal /1 loss!) OR mlsa! OR m.l.s.a.! OR “transmission loss” OR “loss credit” OR “loss credits” OR tlc! OR t.l.c.! OR reserv!)

Request 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.

Defendants’ Position Regarding Request No. 13: For reasons previously explained, Defendants do not agree to the Market Monitor’s proposed revisions.

Defendants propose the following search string for this Request:

(up-to-congestion OR “up-to congestion” OR “up to-congestion” OR “up to congestion” OR utc! OR u.t.c.!)

AND

(trade! OR trading OR transaction! OR bid! OR offer!)

Request No. 14: Provide all documents and communications relating to any or all Defendants and any of their current or former representatives.

Defendants’ Position Regarding Request No. 14: For reasons previously explained, Defendants do not agree to the Market Monitor’s proposed revisions. Defendants would be willing to narrow the date range for this Request to the period from January 1, 2010 to December 17, 2014, *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 litigation indicate that additional relevant evidence is likely to be found by so extending the date range.

Defendants propose the following search string for this Request, *provided that* additional search terms may need to be added based on materials identified as responsive to this Request:

(powhat! OR gates! OR chen! OR (HEEP /1 fund!) OR (cu /1 fund!)
OR !heepfund.org OR !cufundinc.com)

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.

Defendants' Position Regarding Request No. 15: Defendants request that the Market Monitor provide copies of or a written attestation summarizing any preservation, retention, or distribution policies in effect from June 1, 2007 to present.

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 or retention of any of the documents, communications, and other material requested herein at any point in time.

Defendants' Position Regarding Request No. 16: Defendants request that the Market Monitor provide either (a) all documents or communications relating to any breach, violation, or departure from any preservation, retention, or distribution policies in effect from June 1, 2007 to present or (b) a written attestation summarizing any breaches, violations, or departures from any preservation, retention, or distribution policies in effect from June 1, 2007 to present.

Request 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.

Defendants' Position Regarding Request No. 17: As discussed, Defendants request that, for any data the Market Monitor produces, you also produce any related or associated documents within your possession, custody, or control that explain or describe the data produced. Defendants do not request that the Market Monitor run specific searches in response to this Request.