

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

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

**JOINT STATEMENT CONCERNING PLAINTIFF'S
DISCOVERY REQUESTS TO DEFENDANT POWHATAN**

In accordance with Paragraph 21 of the Court's December 21, 2020 Initial Pretrial Order (ECF No. 160), Plaintiff Federal Energy Regulatory Commission ("Plaintiff," the "Commission," or "FERC") and Defendant Powhatan Energy Fund, LLC ("Defendant" or "Powhatan") hereby submit this Joint Statement regarding the dispute referenced in Powhatan's June 14, 2021 Notice of Objection (ECF No. 189). In light of the impending termination of the deposition period on July 23, 2021, the parties request expedited consideration of and argument on this dispute.

In accordance with Paragraph 21(c) of the Initial Pretrial Order, included herewith is a summary of the dispute utilizing the Discovery Dispute Chart that the Court provided to the parties at the Initial Pretrial Conference.

In accordance with Paragraph 21(g) of the Initial Pretrial Order, counsel for the parties certify that they have met and conferred in good faith to attempt to resolve this dispute. Counsel conferred on June 8, 2021, but were unable to reach any resolution or accommodation.

Respectfully Submitted,

/s/ Lisa Owings

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

*Attorneys for Federal Energy Regulatory
Commission*

/s/ Patrick Hanes

Patrick R. Hanes
Virginia State Bar No. 38148
WILLIAMS MULLEN
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, VA 23219
(804) 420-6000
(804) 420-6507
phanes@williamsmullen.com

Counsel for Powhatan Energy Fund, LLC

Dated: June 28, 2021

Discovery Dispute Chart

Requests	Defendant's Objection / Answer	Plaintiff's Response to Objection	The Court's Ruling
<p>On May 19, 2021, Plaintiff FERC noticed the depositions of Kevin and Richard Gates. FERC noticed the depositions for in-person attendance.</p>	<p>Objection:</p> <p>Compelling an in-person deposition is inappropriate under the present state of global health affairs and a remote deposition via videoconferencing can satisfy all of FERC's discovery needs without requiring interstate travel and multiple persons sitting in one room for many hours over two days. This is especially true in light of the fact that FERC has previously deposed Rich Gates for approximately 7.5 hours and deposed Kevin Gates for approximately 10 hours.</p> <p>Rules/Statutes</p> <ul style="list-style-type: none"> • Rule 30(b)(4) of the FRCP has always permitted depositions by remote means: "The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means." <p>Cases</p> <ul style="list-style-type: none"> • "[C]ourts generally have held that the moving party must put forward 'a legitimate reason' to conduct the deposition remotely. . . . Once the 	<p>Answer: As a general rule, and especially for party deponents whose testimony and credibility play a central role in the alleged conduct and defenses, the Federal Rules of Civil Procedure contemplate that oral depositions will be conducted in-person. The health pandemic challenges cited as the basis for the Powhatan Defendants' refusal to comply with FERC's in-person deposition notices have largely subsided based on increased vaccination rates, and the corresponding changes in both the Centers for Disease Control and Prevention ("CDC") and relevant local guidance permitting indoor gatherings to resume in the jurisdictions at issue here. For these reasons, the health pandemic no longer necessitates the exclusive use of remote depositions. FERC has offered reasonable accommodations to address any health-related concerns and remains open to further adjusting its in-person deposition precautionary protocols if any specific health -related concerns are identified.</p> <p>Rules:</p> <ul style="list-style-type: none"> • Fed. R. Civ. P. 30 (a)(1) ("A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2)"); 	

moving party makes that threshold showing, ‘the burden then shifts to the opposing party to show how it would be prejudiced if the deposition were taken in that way.’” *Macias v. Monterrey Concrete LLC*, No. 3:19CV830, 2020 WL 6386861, at *2 (E.D. Va. Oct. 30, 2020) (Payne, J.) (internal citations omitted).

- “Where a party opposes a motion requesting that a deposition be conducted by remote means, it must make a ‘particularized showing’ of prejudice.” *Id.* (quoting *Webb v. Green Tree Servicing LLC*, 283 F.R.D. 276, 280 (D. Md. 2012)).
- As to the “legitimate reason” prong, “courts have found that the health risks related to the ongoing COVID-19 pandemic are good cause to conduct depositions remotely.” *Macias v. Monterrey Concrete LLC*, No. 3:19CV830, 2020 WL 6386861, at *3 (E.D. Va. Oct. 30, 2020) (citing *Fouad v. Milton Hershey School & Trust*, No. 1:19-cv-253, 2020 WL 4228278, at *1 (M.D. Pa. July 23, 2020) (collecting cases)).
- One court, as recently as March 23, 2021, stated:

Courts all around the country have “found that the health concerns created by the COVID-19 pandemic are a legitimate reason to take a deposition by remote means.” *Valdivia v. Menard Inc.*,

- Fed. R. Civ. P. 30(b)(4) (“*By Remote Means*. The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means.”)

Cases:

- *DeepGulf, Inc. v. Moszkowski*, 330 F.R.D. 600, 611 (N.D. Fla. 2019) (recognizing that depositions are “extremely important” as a discovery tool in achieving discovery objectives, and that “an in-person deposition is generally superior to [the] alternatives” provided under Fed. R. Civ. P 30(b)(4)); *see also Huddleston v. Bowling Green Inn of Pensacola*, No. 3:19-CV-1545 (MCR/MJF), 2019 WL 7046347, at *4 (N.D. Fla. Dec. 18, 2019) (stating that “[i]f feasible, a [party] generally should be afforded an opportunity to depose [an opposing party] in person”).
- *Petaway v. Osdan*, No. 3:17-CV-00004 (VAB), 2018 WL 1168581, at *3 (D. Conn. Mar. 5, 2018) (weighing factors and finding insufficient grounds to “deviate from the general rule” requiring in-person deposition of a party deponent given the “central role” of the party’s testimony to the allegations, and where “[party’s] credibility as a witness will be crucial”); *see also Webb v. Green Tree Servicing LLC*, 283 F.R.D. 276, 278 (D. Md. 2012) (finding that party deponent whose testimony would involve hotly disputed factual issues that

	<p>No. 19 CV 50336, 2020 WL 4336060, at *1 (N.D. Ill. July 28, 2020); <i>see also Sonrai Sys., LLC v. Romano</i>, No. 16 CV 3371, 2020 WL 3960441, at *3 (N.D. Ill. July 13, 2020) (health concerns created by the COVID-19 pandemic create “good cause” for order requiring remote deposition); <i>United States ex rel. Adams v. Remain at Home Senior Care, LLC</i>, No. 1:17-CV-01493-JMC, 2021 WL 856876, at *2 (D.S.C. Mar. 8, 2021) (“legitimate reasons exist to hold ... deposition remotely”). Indeed, the nation's death toll, which currently exceeds more than five hundred thousand people, evidences the seriousness of the virus and legitimizes the reasons for remote depositions. <i>See In re Broiler Chicken Antitrust Litig.</i>, No. 1:16-CV-08637, 2020 WL 3469166, at *8 (N.D. Ill. June 25, 2020) (noting the death toll was already over 120,000 as of last summer).</p> <ul style="list-style-type: none"> • Courts have found video depositions to not cause sufficient prejudice to an opposing party, <i>even in cases involving document-intensive questioning or necessitating interpreters</i>. <i>See Macias v. Monterrey Concrete LLC</i>, No. 3:19CV830, 2020 WL 6386861, at *5 (E.D. Va. Oct. 30, 2020). 	<p>go to the heart of the parties' claims and defenses to tip the balance in favor of requiring in-person depositions).</p> <ul style="list-style-type: none"> • <i>Nasuti v. Walmart, Inc.</i>, No. 5:20-CV-05023-LLP, 2021 WL 2336935, at *3 (D.S.D. June 8, 2021) (finding deponent’s argument for remote deposition “without merit” in light of availability of vaccines, CDC’s guidance, and counsel’s willingness to make reasonable accommodations). • <i>Austin Air Sys., Ltd. v. Sager Eletrical Supply Co., Inc.</i>, No. 19-CV-562SI(F), 2021 WL 2416837, at *1 (W.D.N.Y. June 14, 2021) (deposition could proceed in-person even though counsel was not vaccinated because “the court has recognized a deposing party has a valid interest in personally assessing the credibility of the deponent during the conduct of an oral deposition as reasonably necessary to the effective conduct of the deposition.”). • <i>Sunstate Equipment Co., LLC. v. EquipmentShare</i>, No. 2:19-cv-784 (HCN), 2020 WL 7401630, at *1 (D. Utah Dec. 17, 2020) (as a matter of fairness, the Court ruled that “[i]f Defendants desire their counsel to be present and in-person for the deposition, then the court finds it is appropriate to have opposing counsel present too, with everyone exercising proper social distancing and any other needed precautions.”). 	
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- Judge Payne’s decision in *Macias* also dismissed alleged concerns about an inability to assess a party’s demeanor through video. *Id.*

Facts

- The present dispute does not require an in-person deposition for Kevin or Rich Gates, which would be conducted either in D.C. or in Pennsylvania.
- Even if FERC intends to use documents during the deposition, the government and law firm attorneys involved in this case can easily coordinate delivery of documents ahead of time or use documents on a screen.
- The recent easing of certain restrictions does not necessitate the need for interstate travel and require at least a half-dozen otherwise-strangers to sit in two separate hours-long depositions over the course of multiple days.
- These depositions should be short and therefore lend themselves even more to efficient remote depositions – this is the case because FERC previously deposed Kevin and Rich Gates in 2010 for approximately 10 and 7.5 hours, respectively. The Gateses are therefore unlikely to have any additional evidence beyond

Facts:

- The Gates’ depositions can be taken in West Chester, Pennsylvania where both reside, in the District of Columbia where the other named Defendant’s (Chen’s) deposition will occur in- person by stipulation, or in Virginia where the Gates’ counsel resides.
- In all these jurisdictions, the vaccination rates are now sufficient to permit indoor gatherings without masks under the revised CDC guidelines as well the revised local guidelines.
- The CDC guidance states that it is safe for vaccinated adults to gather indoors without masks.
- For example, Pennsylvania has lifted the majority of its COVID-related restrictions, including occupancy restrictions and mask requirements for vaccinated adults. Pennsylvania’s mask mandate will be entirely lifted on the earlier of either June 28, 2021 or when 70% of the state’s population is vaccinated. *See Department Of Health: Adult Vaccinations On Track; Mask Order To Be Lifted By June 28*, (May 27, 2021), <https://www.media.pa.gov/pages/health-details.aspx?newsid=1469>.
- West Chester, PA, where Kevin and Richard Gates reside and where FERC has agreed to conduct depositions,

	<p>that which was provided more than ten years ago during thorough testimony on the identical trading involved here. That said, FERC has nonetheless stated that it will not set both deponents on the same day and reserves the right to take full a 7-hours of testimony from each witness.</p>	<p>reportedly has the highest state-wide vaccination rates at 83%, which also ranks among the highest of any jurisdiction nationwide. <i>See Health Department Provides COVID-19 Update</i>, Chester County Government News, (Jun 10, 2021), https://www.chesco.org/CivicAlerts.aspx</p> <ul style="list-style-type: none"> • FERC counsel and any FERC personnel that would be physically present at the deposition on FERC’s behalf are vaccinated. • Defendants have not made any specific health or safety-related requests, though FERC has expressed a continued willingness to consider any reasonable accommodations. • Most courts recognize that in-person depositions are the default under Fed. R. Civ. P 30(a)(1), and when feasible as in the present situation are generally superior to the alternatives under Fed. R. Civ. P. 30(b)(4). This is especially true where, as here, the depositions involve parties and vigorously disputed complex issues where credibility plays a crucial role. 	
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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

/s/ Patrick Hanes
Patrick R. Hanes
Virginia State Bar No. 38148
WILLIAMS MULLEN
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, VA 23219
(804) 420-6000
(804) 420-6507
phanes@williamsmullen.com