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 DEFENDANTS

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 Defendants Powhatan Energy Fund, LLC, Houlian "Alan" Chen, HEEP Fund, Inc., and CU Fund, Inc. (collectively, "Defendants") hereby submit this Joint Statement regarding the dispute referenced in Plaintiff's June 8, 2021 Notice of Objection (ECF No. 186). 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,

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Dated: June 22, 2021

Discovery Dispute Chart

Requests for Production/Interrogatory	Plaintiff's Objection / Answer	Defendants' Response to Objection	The Court's Ruling
Subject to Federal Rule of Civil Procedure 30(b)(6), Defendants' have requested FERC furnish a witness to testify regarding certain topics. Because FERC also objects to each of the topics individually, the parties have listed those topics separately below.	**Answer:** Regulatory agencies engaged in civil enforcement actions are, generally, not required to provide 30(b)(6) witnesses. FERC requests the court grant a protective order barring Defendants' request for such a deposition. <u>*Rules*</u>*:* • Fed. R. Civ. P. 26(c)(1) ("A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken."); • Fed. R. Civ. P. 30(b)(6) (party seeking 30(b)(6) deposition "must describe with reasonable particularity the matters for examination"). <u>*Cases*</u>*:* • *EEOC v. McCormick & Schmick's Seafood Rests., Inc.*, No. 08-CV-984, 2010 WL 2572809, at *4 (D. Md. June 22, 2010) ("[n]umerous other	**Response**: FERC is incorrect that there exists any rule prohibiting or disfavoring the 30(b)(6) deposition of a governmental agency. To the contrary, such depositions are explicitly called for in the Federal Rules and any hypothetical concerns regarding privilege can be resolved through objections during the deposition rather than through the wholesale prohibition of such crucial discovery. <u>*Rules*</u>: • FRCP 30(b)(6) states that "a party may name as the deponent a public or private corporation, a partnership, an association, *a governmental agency*, or other entity and must describe with reasonable particularity the matters for examination." (emphasis added.) <u>*Cases*</u>: • "Like any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action."	

	federal courts have similarly concluded that 30(b)(6) deposition notices directed to a law enforcement agency … were, in effect, notices to depose opposing counsel of record and would not be permitted[.]"); • *FTC. v. U.S. Grant Res., LLC*, No. CIV.A. 04-596, 2004 WL 1444951, at *11 (E.D. La. June 25, 2004) (holding that party seeking 30(b)(6) of agency in civil enforcement matter was required to make a showing sufficient to discover attorney's work product – "compelling need and the inability to discover the substantial equivalent by other means."); • *EEOC. v. Evans Fruit Co.*, No. CV-10-3033-LRS, 2012 WL 442025, at *1 (E.D. Wash. Feb. 10, 2012) ("It is appropriate to make this ruling [barring a 30(b)(6) deposition] now rather than allowing the deposition to proceed with EEOC reserving the right to object to questions on the basis of privilege. There is little doubt the EEOC would be lodging numerous such objections which would require eventual resolution either during the deposition or	*SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009). • FERC has been required to provide a 30(b)(6) witness in other Federal Penalty Act civil penalty actions subject to *de novo* review, including *FERC v. Coaltrain Energy, L.P., et al.*, No. 2:16-cv-00732 (S.D. Ohio) and in *FERC v. Silkman et al*, No. 1:13-cv-13054 (D. Mass.). • Many courts have rejected sweeping denials of 30(b)(6) depositions of governmental agencies: • *United States v. Health Alliance of Greater Cincinnati,* No. 1:03–cv–167, 2009 WL 5227661 (S.D. Ohio Nov. 20, 2009) (granting defendant's motion to compel and noting that the Government is not exempt from the 30(b)(6) discovery tool, which expressly applies to agencies); • *EEOC v. Sterling Jewelers,* No. 08–CV–00706(A)(M), 2010 WL 2803017 (W.D.N.Y. July 15, 2010) (denying federal agency's motion for a protective order to prohibit the 30(b)(6) deposition because the motion was premature and abstract to the extent that, with no questions having actually been asked, the Court could not "at this	

	subsequent thereto. This would be an inefficient use of the parties' time and the court's time."). *Facts*: • As discussed in more detail below in connection with Defendants' specifically noticed topics, FERC is not a fact witness to Defendants' manipulative conduct. It has no factual knowledge of the events underlying its complaint other than those learned during its investigation or discovery. As a result, a FERC 30(b)(6) deposition would necessarily become a deposition into the mental impressions of FERC's investigative and trial attorneys. • Defendants have not stated a compelling need for a 30(b)(6) deposition of a FERC representative, instead the information sought by Defendants is available from alternate sources. For example, FERC has produced its entire investigative record to Defendants twice (once during the Order to Show Cause proceeding and again during this litigation). Defendants have also sought and received thousands of pages of documents from PJM and the PJM Market Monitor,	stage ... conclude that there are no permissible areas of questioning"); • *EEOC v. LifeCare Mgmt. Servs., LLC,* No. 02:08–cv–1358, 2009 WL 772834 (W.D. Pa. Mar. 17, 2009) (denying the EEOC's motion for protective order after rejecting the argument that the 30(b)(6) questions would invade the deliberative process privilege, deeming "without merit"); • *FTC v. Cyberspy Software, LLC,* 6:08–cv–1872, slip op. (M.D. Fla. May 26, 2009) (denying the FTC's motion for protective order concerning a 30(b)(6) notice and rejecting the argument that the FTC would either have to produce its trial counsel or have its trial counsel prepare the designee, noting that a party is required to disclose the facts underlying its claims and that facts "are always discoverable regardless if they have been conveyed to an attorney," observing that "[i]t is the FTC's prerogative to designate which person(s) will testify" and concluding that "defendants are entitled to discovery of the facts supporting the FTC's claims"). • "The concern that a 30(b)(6) deposition would risk disclosure of privileged information is not unique to cases involving the Government. To the contrary, private litigants routinely confront	

	and have six depositions scheduled with PJM and Market Monitor staff. • Defendants' specifically noticed topics, either implicitly or explicitly, seek information protected as attorney work product or by the attorney-client, deliberative process, or law enforcement privileges. • FERC's agreement to provide a 30(b)(6) witness in the Coaltrain litigation is neither binding nor relevant here. In that case, as a voluntary accommodation to the defendants, FERC agreed to a narrowly-limited 30(b)(6) deposition focused on two false statements made by the defendants, as to which they incorrectly claimed that FERC needed to prove reliance. For example, Coaltrain argued that FERC needed to make an affirmative factual showing FERC was deceived by Coaltrain's failure to provide certain documents during the investigation. (The court in that case ultimately agreed with FERC that no such showing of deception was required. *See FERC v. Coaltrain Energy, L.P.*, 501 F. Supp. 3d 503, 525 (S.D. Ohio 2020) ("this Court finds that intent is not required for a	identical hazards and raise similar objections (in motions for protective orders, motions to quash or objections to motions to compel). To be sure, under certain circumstances the Government may be able to assert privileges unavailable to private litigants, but the fundamental concern that a 30(b)(6) witness might reveal privileged information is present in private litigation as well as cases involving a government agency." *S.E.C. v. Merkin*, 283 F.R.D. 689, 696 (S.D. Fla.), *objections overruled*, 283 F.R.D. 699 (S.D. Fla. 2012). • FERC is under no obligation to designate an attorney as its 30(b)(6) witness. *See S.E.C. v. Merkin*, 283 F.R.D. 689, 694 (S.D. Fla.), objections overruled, 283 F.R.D. 699 (S.D. Fla. 2012) (citing another case for the proposition that the SEC, as a governmental agency, "was under no obligation to designate its counsel as its 30(b)(6) witness" and concluding that "[l]itigants (and their counsel) served with a 30(b)(6) notice decide which witnesses to designate and those witnesses need not be (and generally are not) attorneys)."). • *Marti v. Schreiber/Cohen*, LLC, No. 4:18-cv-40164-TSH, 2020 WL 3412748, at *2 (D. Mass. Mar. 17,	

	§ 35.41(b) violation")). No similar issue is present here. • The court should not adopt the magistrate judge's determination from *FERC v. Silkman, et al.*, No. 1:16-cv-00205, at ¶ 8 (D. Me. Sep. 8, 2017). There, the magistrate judge (without entertaining briefing) ordered a 30(b)(6) deposition of a FERC representative in a civil enforcement case could proceed on a date when the magistrate judge would be available telephonically because of the number of disputes he anticipated. The view that 30(b)(6) depositions against agencies engaged in civil enforcement actions can proceed, but with caution, is the view of a minority of courts, because it is an inefficient use of the parties' and court's resources. Neither the parties nor the court should be burdened with the number of disputes that are likely to arise given Defendants' noticed topics. • Defendants' citations to the contrary are unavailing: • The referenced language from *SEC v. Collins & Aikman Corp* concerns the agency's document production, not a 30(b)(6) deposition. In fact, the court	2020) ("Generally, witness depositions are not considered duplicative of prior written discovery. *See Doe v. Trump*, 329 F.R.D. 262, 274 (W.D. Wash. 2018) ('Parties are ordinarily entitled to test interrogatory responses and document production through depositions.')."). • *Crawford v. Newport News Indus. Corp.*, No. 4:14-cv-130, 2016 WL 11673839, at *2 (E.D. Va. Jan. 21, 2016) ("[I]nterrogatories, while factually helpful, do not provide the same opportunity to probe and cross-examine the claimants on their claims, which a deposition affords them the leeway to do…. Moreover, written interrogatories, where the answers are often drafted, edited and revised with the extensive participation of counsel, simply do not serve the same function as a deposition.") (internal quotations and citation omitted). <u>*Facts*</u>: • Rule 30(b)(6), by its text, explicitly permits the deposition of a governmental agency. • The topics covered by the Defendants' revised 30(b)(6) topics include areas that are relevant to the Defendants'	

	cites favorably to *SEC v. Morelli* for the proposition prohibiting "deposition of SEC attorney based on the work product doctrine where defendant's Rule 30(b)(6) notice was intended to ascertain how the SEC intends to marshall the facts, [discover the] documents and testimony in [the SEC's] possession, and to discover the inferences that [the SEC] believes properly can be drawn from the evidence it has accumulated." *SEC. v. Collins & Aikman Corp.,* 256 F.R.D. 403, 409 fn. 26 (S.D.N.Y. 2009); • The courts in both *EEOC v. Sterling Jewelers* and *EEOC v. LifeCare Mgmt. Servs.* expressed reluctance to rule before being confronted with the defendants' specific questions. They did not express a blanket approval of all possible areas of inquiry. • While the FTC was required to provide 30(b)(6) testimony in *FTC v. Cyberspy Software*, it was not required to provide testimony regarding topics materially similar to those noticed by Defendants. *See FTC v. CyberSpy Software, LLC*, No. 608-CV-1872, 2009 WL 2386137, at *3 (M.D. Fla. July 31, 2009) (agency properly objected to deposition questions regarding the "factual basis"	asserted defenses and which include clearly non-privileged information such as communications with third parties. • Any concerns by FERC can be raised through proper objections rather than a wholesale prohibition on the deposition. • FERC has produced a mere 367 documents and the discovery sought is not available through any other means. • Defendants do not seek any information from FERC regarding its internal processes, prosecutorial discretion, or the legal basis for its claims against Defendants; rather, Defendants merely seek to explore *factual* topics such as FERC's statements to third parties and factual background regarding trading at issue in this case and in related FERC enforcement actions. • Defendants have the right to seek discovery beyond interrogatory responses. • FERC's quotation of a sarcastic tweet by Powhatan does not obscure the fact that FERC is trying to cut off Defendants' rights to take legitimate, necessary, and perfectly appropriate discovery.	

	underlying alleged violation because a "request for such justification is explicitly a request for the 'mental impressions, conclusions, opinions or legal theories of a party's attorney'"); *see also id.* at *4 ("According to the FTC, the Defendants are in possession of all the discoverable material—such as interrogatory responses, affidavits, and deposition transcripts—containing the facts supporting these contentions. Assuming this to be true, the Defendants have received all of the facts they are entitled to discover. The Defendants are not entitled to explore opposing counsel's thought processes as to *which* facts support these contentions (and which do not), or what inferences can be drawn from the evidence that has been assembled so far. And the agency is not required to produce a witness who has memorized all of the facts that have been uncovered to date.")(citation and footnote omitted). • Defendants assert that the information sought is "relevant to the Defendants' asserted defenses," without making a clear link between the information sought and a cognizable affirmative defense.		

	Mere possible relevance is not sufficient in light of Defendants' desire to, effectively, depose opposing counsel. • Defendant Powhatan has acknowledged that it seeks these depositions more for sport than need, stating "Powhatan may not go for slam dunks early on (eg due process, statute of limitations) just to end it. Instead, we may step back and rain threes (eg take depositions, do discovery) and try to run up the score. We have waited 5 yrs for our turn, so we might as well have fun!" (@PowhatanFundLLC, Twitter (June 4, 2015)(subsequently deleted). Defendants already moved to dismiss based on several of their affirmative defenses, and at no point suggested that discovery on those defenses was necessary. • A protective order is appropriate now. If the court waits to be confronted with Defendants' specific questions, it will be forced to take a piecemeal approach that is not efficient use of the parties or the court's resources.		

Topic 1[1] The types of trading contemplated in and permitted by FERC's orders in the Black Oak Proceeding.	**Answer:** The court should grant a protective order barring Defendants from seeking 30(b)(6) testimony on topics seeking FERC's legal analysis. This topic, in addition to Topics 2, 3, 5, and 11, seeks FERC's legal interpretation or analysis regarding FERC Orders, district court orders, or legal questions presented by this litigation. These topics are, effectively, Defendants' legal contentions dressed up as deposition topics. FERC is neither required to provide its legal analysis nor respond to Defendants' legal contentions via 30(b)(6) testimony. *Rules*: • Fed. R. Civ. P. 26(c)(1) ("A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken."); • Fed. R. Civ. P. 30(b)(6) (party seeking 30(b)(6) deposition	**Response:** This topic is directly relevant to the claims and defenses in this case. *Rules*: • Fed. R. Civ. P. 26(b)(1) *Cases*: • *Francisco v. Verizon S.*, Inc., No. 3:09CV-737, 2010 WL 2990159, at *7 (E.D. Va. July 29, 2010) (Lauck, J.) (this Court has recognized in context of pleading affirmative defenses a "preference for the parties to develop the legal merits of defenses through discovery"). • *Triangle Residential Designs, Inc. v. Ashley Turner Enterprises, Inc.*, No. 5:05-CV-412-F(3), 2006 WL 8438737, at *2 (E.D.N.C. Jan. 10, 2006) (stating that a party "should not be allowed to 'prevail' on affirmative defenses by refusing discovery ... when ... the merits of the defenses have not been ruled upon" and that "[d]iscovery should be conducted on these issues until they are resolved"). • *Spendlove v. RapidCourt, LLC*, No. 3:18-CV-856, 2019 WL 7143664, at *5 (E.D. Va. Dec. 23, 2019) ("Relevancy is broadly	

[1] As a result of the parties' meet and confer process, Defendants limited their topics on June 14, 2021. This chart addresses those limited topics, not the topics noticed upon FERC on May 28, 2021. Despite this limitation, FERC continues to object to the topics for the reasons indicated in the attached chart.

	"must describe with reasonable particularity the matters for examination"); • Fed. R. Evid. 401(b) (evidence must be of "consequence in determining the action" to be relevant); • Fed. R. Evid. 403 (barring the admission of "needlessly … cumulative evidence."); • 18 CFR § 1b.9 ("All information and documents obtained during the course of an investigation, whether or not obtained pursuant to subpoena, and all investigative proceedings shall be treated as nonpublic by the Commission and its staff. . . ."). *Cases*: • *SEC v. Buntrock*, 217 F.R.D. 441, 444-45 (N.D. Ill. 2003) (granting protective order because "Buntrock is unconvincing in his argument that there is no other means to obtain the information he seeks. Given the staggering amount of evidence the SEC has already turned over, the court finds this hard to believe, and Buntrock offers little in the way of explanation."), *see also id*. at 446 (granting protective order barring 30(b)(6) topic not	construed to include any information if there is 'any possibility' it may be relevant to any claim or defense."). • *Westmoreland v. Regents of the Univ. of California*, No. 2:17-cv-01922-TLN-AC, 2019 WL 932220, at *7 (E.D. Cal. Feb. 26, 2019) ("[A] 30(b)(6) topic is not objectionable to the extent that it may be reasonably construed to seek relevant information capable of being addressed in a deposition.") (internal quotations and citation omitted). • *Marti v. Schreiber/Cohen*, LLC, No. 4:18-cv-40164-TSH, 2020 WL 3412748, at *2 (D. Mass. Mar. 17, 2020) ("Generally, witness depositions are not considered duplicative of prior written discovery. *See Doe v. Trump*, 329 F.R.D. 262, 274 (W.D. Wash. 2018) ('Parties are ordinarily entitled to test interrogatory responses and document production through depositions.')."). • *Crawford v. Newport News Indus. Corp.*, No. 4:14-cv-130, 2016 WL 11673839, at *2 (E.D. Va. Jan. 21, 2016) ("[I]nterrogatories, while factually helpful, do not provide the same opportunity to probe and cross-examine the claimants on their claims, which a deposition affords them the leeway to do….	

	genuinely seeking facts but instead the agency's "theories as to the underlying facts, how it intends to marshal those facts, and its belief as to the inferences that may be drawn from those facts"); • *Russo v. Aerojet Rocketdyne, Inc.*, No. CV 18-3024, 2020 WL 4530703, at *8 (E.D. Pa. Aug. 6, 2020) (denying party's request for 30(b)(6) testimony, in part, on the basis that information sought was publicly available); • *Trustees of Bos. Univ. v. Everlight Elecs. Co.*, No. 12-CV-11935-PBS, 2014 WL 5786492, at *3 (D. Mass. Sept. 24, 2014) (denying motion to compel 30(b)(6) testimony based on overly broad and vague topics because "[i]f the noticing party does not describe the topics with sufficient particularity or if the topics are overly broad, the responding party is subject to an impossible task. . . . if the noticed party cannot identify the outer limits of the topics noticed, compliant designation is not feasible")(internal citation omitted), *see also id*. at *4 (granting protective order barring 30(b)(6) topic that was effectively a contention	Moreover, written interrogatories, where the answers are often drafted, edited and revised with the extensive participation of counsel, simply do not serve the same function as a deposition.") (internal quotations and citation omitted). <u>*Facts*</u>: • The *Black Oak* Proceeding involved a complaint by financial market participants regarding PJM's methodology for distributing the marginal loss surplus allocation ("MLSA"). The proceeding led PJM to begin distributing MLSA to certain Up-To Congestion ("UTC") traders. More recent orders in the *Black Oak* Proceeding have confirmed that it was reasonable for PJM market participants to take MLSA payments into account when deciding whether to engage in transactions. • The *Black Oak* Proceeding thus is relevant to FERC's claim that Defendants engaged in market manipulation by engaging in trades "for the purpose of capturing MLSA payments." First Amended Complaint at ¶ 85 (ECF No. 93) ("Complaint"). • The *Black Oak* Proceeding is also directly relevant to several of Defendants' defenses, including	

	interrogatory because "[a] Rule 30(b)(6) deposition is an overbroad, inefficient, and unreasonable means of discovering an opponent's factual and legal basis for its claims"); • *SEC v. SBM Inv. Certificates, Inc.*, No. CIV.A.2006-0866, 2007 WL 609888, at *25 (D. Md. Feb. 23, 2007) (granting protective order because agency had "no independent knowledge of Defendants' [trading]. Therefore, only the results of the [agency's] investigation could be inquired into in a Rule 30(b)(6) deposition, and such inquiry would inevitably and improperly invade the work product of [agency's] investigating attorneys. . . ."); • *SEC v. Nacchio*, 614 F. Supp. 2d 1164, 1177 (D. Colo. 2009) (granting motion to quash 30(b)(6) notice that would require "untold weeks if not months" to prepare a deponent because it would be "inefficient in the extreme" to require the deponent to "recite by rote all of the facts in excruciating detail for the allegations in paragraph 132 or 147 or whatever number.");	those regarding fair notice, whether the trades at issue were manipulative (including whether they fall within the safe harbor in FERC Order No. 670 as transactions explicitly contemplated in Commission-approved rules or regulations), the filed rate doctrine, and whether the purported injury or harm alleged was the legal fault of others. • Rule 26 permits broad discovery relating to any standing affirmative defense, and as FERC has not defeated Defendants' defenses upon a dispositive motion, Defendants are entitled to this discovery, which plainly relates to those defenses. • Defendants will not repeat their fulsome arguments from similar issues related to other discovery disputes, but discovery on this topic is proper and well-supported in the law. For instance, with respect to fair notice, the Supreme Court has explained that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair	

	• *FTC v. CyberSpy Software, LLC*, No. 608-CV-1872, 2009 WL 2386137, at *4 (M.D. Fla. July 31, 2009) ("According to the FTC, the Defendants are in possession of all the discoverable material—such as interrogatory responses, affidavits, and deposition transcripts—containing the facts supporting these contentions. Assuming this to be true, the Defendants have received all the facts they are entitled to discover.")(internal citation omitted); • *SEC v. Rosenfeld*, No. 97.CIV.1467, 1997 WL 576021, at *3 (S.D.N.Y. Sept. 16, 1997) (granting protective order barring 30(b)(6) deposition when "It would also implicate the SEC's law enforcement privilege since it might reveal the SEC's techniques and procedures and how it develops relationships with informants, and strategies for eliciting information from individuals who provide it with information.")(internal citation omitted). *Facts*: • The intent of this topic is clear on the face of the notice and because the genuinely factual	notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."). The assessment of a fair notice defense involves "a fact-sensitive inquiry." *U.S. v. Ancient Coin Collectors Guild*, 899 F.3d 295, 322 (4th Cir. 2018). • This topic does not relate to FERC's legal interpretation or analysis or its prosecutorial discretion; it relates only to the facts pertaining to FERC's orders in the *Black Oak* Proceeding.The fact that FERC may have responded to written discovery requests on this topic does not serve as a substitute for a 30(b)(6) deposition, particularly in light of the inadequacy of FERC's document productions to date. • While FERC attempts to exaggerate the burden of preparing a 30(b)(6) witness by emphasizing the duration and total number of filings in the *Black Oak* Proceeding, there were only 13 Commission orders issued in the proceeding.	

	information implicated by this request is publicly available. The *Black Oak* orders are complete documents that speak for themselves. • Defendants' word choice displays a clear intent to attempt to invade upon FERC's privileged and protected information. Words like "contemplated," "implications," and "consideration" show that Defendants are not merely attempting to seek a rote recitation of the facts contained in the various orders implicated by these topics, but, instead, seek FERC's analysis and interpretation of various FERC Orders, which is privileged and protected. • The factual information implicated by these topics is publicly available. The *Black Oak* proceeding, for example, was a docketed proceeding before the Commission. As a result, all of the filings and Orders generated during that proceeding are publicly available on the Commission's E-Library site. But, FERC is not required to provide a 30(b)(6) witness to explain its legal theories.		

	• These topics are little more than Defendants legal contentions masquerading as deposition topics. For example, FERC counsel understands Topic 1 to relate to Defendants' contention the orders in the *Black Oak* proceeding did not provide fair notice regarding the illegality of their conduct. Similarly, Topic 11 is explicitly a legal contention—namely, that the materials at issue met the legal definition of "exculpatory" and that FERC failed to timely comply with its Policy Statement on Disclosure of Exculpatory Materials. 30(b)(6) testimony is not intended to provide Defendants a forum for debate regarding their legal contentions. • There can be no compelling need to depose opposing counsel when the information sought is publicly available and Defendants have sought it via other means, such as interrogatories. • These topics are also deficient on several other grounds. • First, several of the topics are too broad and vague to allow FERC to properly prepare a 30(b)(6) witness. The *Black*		

	Oak proceeding, for example, was an over decade long docketed proceeding before the Commission. It involved approximately 175 filings and orders in the primary FERC docket alone. • Second, to the extent the topics seek information regarding other market participants, they are unduly broad and burdensome. This case is about Dr. Chen and Powhatan, who acted without any involvement from other market participants. For reasons discussed in more detail below, the alleged conduct of other market participants is, therefore, irrelevant here. • Third, to the extent these topics seek information regarding investigations that have not led to a public disposition, they implicate the law enforcement privilege and FERC's prohibition on disclosing information regarding non-public investigations. As to the former, FERC's investigative techniques are privileged and protected information, and testimony regarding non-public investigations involving other market participants has the potential to jeopardize FERC's		

	ability to maintain the confidentiality of those techniques. As to the latter, subjects of FERC investigations have a legitimate privacy interest in the existence and details of an investigation not being made public. Defendants' desire to conduct a "fishing expedition" into the investigative records of other market participants would substantially undermine this interest. • Fourth, some of the information sought by these topics is duplicative of Defendants' interrogatories, meaning less burdensome means were available for seeking the information. For example, Defendants' Interrogatory 23 also sought FERC's contentions regarding the *Black Oak* proceeding, along with requesting citations to the various filings and orders FERC contends support its litigation position. Defendants have offered no reason why that response was deficient or what factual testimony is necessary to supplement that response. Defendants citations allegedly to the contrary on this point are unavailing. None involve the		

	deposition of opposing counsel or a civil enforcement action such as this. • Defendants vaguely state that the information sought connects to their affirmative defenses, without linking specific facts and defenses. For example, Defendants do not articulate how the particular facts of unrelated investigations involving unrelated market participants could possibly support an argument that FERC's Anti-Manipulation Rule is "void for vagueness." Nor can they. • Notably, Defendants already moved to dismiss this case based on many of the cited affirmative defenses. At no point did they suggest they needed discovery to support those arguments. That is because defenses such as "fair notice" and "void for vagueness" typically do not require any discovery, let alone broad discovery from unrelated matters. • Defendants' citation to *Tucker v. Ohtsu Tire & Rubber* displays the fallacy of their argument regarding discovery from other investigations. That case stands for the simple proposition that a party cannot		

	cite to factual evidence from another case, in that case a deposition transcript, without producing it. Defendants attempt to twist this holding to argue that because FERC has cited to a court's legal holding in another matter, that FERC is obligated to produce all discovery from that matter. *Tucker* makes no such finding.		

Topic 2 The incentives created by the payment of MLSA to PJM market participants, including FERC's consideration of such incentives.	**Answer:** This Topic impermissibly seeks FERC's legal analysis on this issue, particularly to the extent it goes to one of the central legal issues presented by this case. FERC incorporates by reference its response to Topic 1.[2]	**Response:** This topic is directly relevant to the claims and defenses in this case. *Rules*: • Fed. R. Civ. P. 26(b)(1) *Cases*: • See cases cited in Defendants' Response Regarding Topic 1. *Facts*: • The incentives created by the payment of MLSA to PJM market participants, including FERC's consideration of such incentives, are relevant to FERC's claim that Defendants engaged in market manipulation by engaging in trades "for the purpose of capturing MLSA payments." Complaint at ¶ 85. They are also relevant to several of Defendants' defenses, including those regarding whether the trades at issue were manipulative and whether the purported injury or harm alleged was the legal fault of others. • Rule 26 permits broad discovery relating to any standing affirmative defense, and as FERC has not defeated Defendants' defenses upon a dispositive motion,	

[2] In the interest of not belaboring the court with an overly lengthy chart, the parties have agreed to, where possible, incorporate by reference their responses to topics they believe implicate the same or similar issues rather than provide duplicative entries for each noticed topic.

		Defendants are entitled to this discovery, which plainly relates to those defenses. • FERC's consideration of these incentives is directly relevant to Defendants' affirmative defenses, including whether the trading at issue falls within the safe harbor in FERC Order No. 670 for transactions explicitly contemplated in Commission-approved rules or regulations. • The fact that FERC may have responded to written discovery requests on this topic does not serve as a substitute for a 30(b)(6) deposition, particularly in light of the inadequacy of FERC's document productions to date.	

Topic 3 Notice provided to market participants about whether and how MLSA payments could be taken into consideration when deciding whether to engage in UTC trades or other transactions in PJM markets during the Relevant Period.	**Answer:** This Topic impermissibly seeks FERC's legal analysis on this issue, particularly to the extent it goes to one of the central legal issues presented by this case. FERC incorporates by reference its response to Topic 1.	**Response:** This topic is directly relevant to the defenses in this case. *Rules*: • Fed. R. Civ. P. 26(b)(1) *Cases*: • See cases cited in Defendants' Response Regarding Topic 1. *Facts*: • Rule 26 permits broad discovery relating to any standing affirmative defense, and as FERC has not defeated Defendants' defenses upon a dispositive motion, Defendants are entitled to this discovery, which plainly relates to those defenses. • The topic is directly relevant to several of Defendants' defenses, including those related to void-for-vagueness, fair notice and selective enforcement, due process, whether the trades were manipulative, scienter, waiver, and the seriousness of the alleged violation. • Defendants will not repeat their fulsome arguments from similar issues related to other discovery disputes, but discovery on this topic is proper and well-supported in the law. For instance, with respect to fair notice, the Supreme Court has explained that "laws	•

		which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."). The assessment of a fair notice defense involves "a fact-sensitive inquiry." *U.S. v. Ancient Coin Collectors Guild*, 899 F.3d 295, 322 (4th Cir. 2018). Communications involving FERC officials may be relevant to that inquiry. *See Consol Buchanan Mining Co., LLC v. Sec'y of Labor*, 841 F.3d 642, 650 (4th Cir. 2016) ("We agree that an affirmative statement from a regulatory body empowered to implement and enforce a particular regulatory scheme may be sufficient to deprive regulated parties of clear notice of a later, conflicting interpretation."); *Rollins Envtl. Servs. (NJ) Inc. v. U.S. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) ("When the agency itself is uncertain of the meaning of its regulation, when agency		

		personnel give conflicting advice to private parties about how to comply with it, and when the agency's chief legal officer finds the regulatory language equally supportive of one of two possible constructions, it is arbitrary to find the regulation 'clear.'"). • This topic clearly does not relate to FERC's legal interpretation or analysis or its prosecutorial discretion; because it relates to notice provided to PJM market participants, it plainly focuses on communications with third parties. • The fact that FERC may have responded to written discovery requests on this topic does not serve as a substitute for a 30(b)(6) deposition, particularly in light of the inadequacy of FERC's document productions to date.		

Topic 4: Communications between (1) FERC Commissioners or FERC staff and (2) third parties about whether and how MLSA payments could be taken into consideration when deciding whether to engage in UTC trades or other transactions in PJM markets.	**Answer:** The court should grant a protective order barring Defendants from seeking 30(b)(6) testimony on this topic, along with Topics 9 and 10, that generally seek information regarding FERC's investigation. These topics necessarily seek the deposition of either FERC's investigative or trial counsel. Yet, Defendants are unable to show the compelling need for such a deposition, particularly when there are less burdensome means available. Additionally, to the extent these topics seek evidence regarding the legal allegations underlying FERC's investigation, they improperly seek evidence protected as attorney work product or by the attorney-client privilege or deliberative process privilege. *Rules*: • Fed. R. Civ. P. 26(c)(1) ("A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken."); • Fed. R. Civ. P. 30(b)(6) (party seeking 30(b)(6) deposition "must describe with reasonable	**Response:** This topic is directly relevant to the claims and defenses in this case. *Rules*: • Fed. R. Civ. P. 26(b)(1) *Cases*: • See cases cited in Defendants' Response Regarding Topic 1. *Facts*: • Communications involving FERC officials about whether and how MLSA payments could be taken into consideration when deciding whether to engage in UTC trades or other transactions in PJM markets relevant are relevant to FERC's claim that Defendants engaged in market manipulation by engaging in trades "for the purpose of capturing MLSA payments." Complaint at ¶ 85. Such communications are also relevant to several of Defendants' defenses, including those regarding fair notice, whether the trades at issue were manipulative (including whether they fall within the safe harbor in FERC Order No. 670 as transactions explicitly contemplated in Commission-approved rules or regulations), the filed rate doctrine, and whether the purported injury or harm alleged was the legal fault of others.		

	particularity the matters for examination"); • Fed. R. Evid. 403 (barring the admission of "needlessly … cumulative evidence"). <u>Cases</u>: • *SEC. v. SBM Inv. Certificates, Inc.*, No. CIV A DKC 2006-0866, 2007 WL 609888, at *21 (D. Md. Feb. 23, 2007) (granting protective order barring 30(b)(6) testimony regarding "[t]he factual bases, if any, for the allegations made against Westbury in the SEC's Complaint in the case" because it "directly seek[s] the results of the SEC's present investigation, and would require disclosure of the opinions, strategy, and would inevitably tend to disclose the investigating attorneys' preliminary positions and legal theories concerning the suspected conduct of defendant . . . and those factual areas which were of particular interest to the SEC investigators.") (internal citation and quotation omitted); *see also id*. at *25 (granting protective order because the agency had "no independent knowledge of Defendants' [trading]. Therefore, only the results of the [agency's] investigation could be	• Rule 26 permits broad discovery relating to any standing affirmative defense, and as FERC has not defeated Defendants' defenses upon a dispositive motion, Defendants are entitled to this discovery, which plainly relates to those defenses. • Defendants will not repeat their fulsome arguments from similar issues related to other discovery disputes, but discovery on this topic is proper and well-supported in the law. For instance, with respect to fair notice, the Supreme Court has explained that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."). The assessment of a fair notice defense involves "a fact-sensitive inquiry." *U.S. v. Ancient Coin Collectors Guild*, 899 F.3d 295, 322 (4th Cir. 2018). Communications involving FERC officials may be relevant to that		

	inquired into in a Rule 30(b)(6) deposition, and such inquiry would inevitably and improperly invade the work product of [agency's] investigating attorneys…."); • *EEOC v. Source One Staffing, Inc.*, No. 11 C 6754, 2013 WL 25033, at *7 (N.D. Ill. Jan. 2, 2013) (granting protective order for 30(b)(6) topics concerning allegations contained in agency's complaint because "[t]he noticed topics for the deposition are so broad that they necessarily seek attorney work product and attorney-client privileged information"); • *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y.1992) ("Given [the agency's] sworn, uncontroverted statement that all relevant, non-privileged evidence has been disclosed to the defendants, the Court is drawn inexorably to the conclusion that [Defendant's] Notice of Deposition is intended to ascertain how the [agency] intends to marshall [sic] the facts, documents and testimony in its possession, and to discover the inferences that plaintiff believes properly can be drawn from the evidence it has accumulated."); • *FTC v. CyberSpy Software, LLC*, No. 608-CV-1872-ORL31GJK,	inquiry. *See Consol Buchanan Mining Co., LLC v. Sec'y of Labor*, 841 F.3d 642, 650 (4th Cir. 2016) ("We agree that an affirmative statement from a regulatory body empowered to implement and enforce a particular regulatory scheme may be sufficient to deprive regulated parties of clear notice of a later, conflicting interpretation."); *Rollins Envtl. Servs. (NJ) Inc. v. U.S. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) ("When the agency itself is uncertain of the meaning of its regulation, when agency personnel give conflicting advice to private parties about how to comply with it, and when the agency's chief legal officer finds the regulatory language equally supportive of one of two possible constructions, it is arbitrary to find the regulation 'clear.'"). • This topic clearly does not relate to FERC's legal interpretation or analysis or its prosecutorial discretion – it focuses on communications with third parties. • The fact that FERC may have responded to written discovery requests on this topic does not serve as a substitute for a 30(b)(6) deposition, particularly in light of the inadequacy of FERC's document productions to date.		

	2009 WL 2386137, at *3 (M.D. Fla. July 31, 2009)(FTC 30(b)(6) witness not required to testify to "factual basis" underlying agency's legal allegation because "a request for such justification is explicitly a request for the mental impressions, conclusions, opinions or legal theories of a party's attorney. . . .") (internal quotation omitted), *see also id*. at *4 ("According to the FTC, the Defendants are in possession of all the discoverable material—such as interrogatory responses, affidavits, and deposition transcripts—containing the facts supporting these contentions. Assuming this to be true, the Defendants have received all the facts they are entitled to discover. The Defendants are not entitled to explore opposing counsel's thought processes as to *which* facts support these contentions (and which do not), or what inferences can be drawn from the evidence that has been assembled so far. And the agency is not required to produce a witness who has memorized all of the facts that have been uncovered to date")(internal citation and footnote omitted); • *EEOC v. Am. Int'l Grp., Inc., , No. 93-CIV-6390, 1994 WL 376052 at *2-3 (S.D.N.Y. July*			

	18, 1994) (in case where agency produced its entire investigative file, "the defendants do not have a legitimate need to inquire into facts contained in the file"); • *SEC v. Nacchio*, 614 F. Supp. 2d 1164, 1177 (D. Colo. 2009) (granting motion to quash 30(b)(6) notice regarding allegations in complaint because it would be "inefficient in the extreme" to require the deponent to "recite by rote all of the facts in excruciating detail for the allegations in paragraph 132 or 147 or whatever number."). *Facts*: • FERC has fully produced the factual evidence underlying its Complaint to Defendants by reproducing all materials collected during the investigation to Defendants twice (once during the Order to Show Cause proceeding and again during this litigation). Furthermore, FERC's Order Assessing Penalties and Complaint provide ample elucidation regarding this factual evidence. It is unduly burdensome to require FERC to prepare a deponent to provide a rote recitation of the factual material gathered during its investigation when			

	all of those materials are already in Defendants' possession. • This topic, in particular, is unduly burdensome and vague to the extent it seeks alleged communications between over 1,500 FERC employees and an unspecified number of third-parties. It would be impossible for a FERC deponent to educate themselves regarding whether each individual FERC employee had conversations with a third-party on this topic and what was and was not said in that conversation. • Along these lines, this particular topic is not a proper 30(b)(6) topic because it does not seek FERC's knowledge, but instead the individual knowledge of 1,500 FERC employees. • These topics are unduly duplicative of Defendants' requests for production, which sought the same categories of information. Defendants are unable to make a showing of compelling need to depose FERC's counsel when they, for example, already have FERC's written communications with Dr. Bowring and the ability to take Dr. Bowring's deposition.			

	• Similarly, there are less burdensome means for seeking information on these topics than seeking the deposition of opposing counsel available to Defendants. For example, Defendants are free to ask Ms. Huggee for her recollection rather than asking for opposing counsel's recollection of the alleged conversations in Topic 9. • This request, in particular, seeks information that was the subject of a request for production objected to by FERC. That objection is currently pending. • FERC should not be required to provide 30(b)(6) testimony regarding its legal analysis regarding any of the topics. Any questioning regarding FERC's legal analysis of facts gathered during its investigation is tantamount to requesting FERC's legal strategy in this case, which is unequivocally protected as attorney work product and by the attorney-client and deliberative process privileges. • To the extent Defendants argue that the information implicated by these topics is necessary for their affirmative defenses,			

	FERC incorporates by reference its arguments on this score from its response to Topic 1.			

Topic 5: Notice provided to market participants regarding the "sole or primary purpose" test set forth in the FERC v. Coaltrain Energy, L.P., et al., No. 2:16-cv-00732 (S.D. Ohio) ("Coaltrain") litigation.	**Answer:** This Topic impermissibly seeks FERC's legal analysis on this issue, particularly to the extent it goes to one of the central legal issues presented by this case. FERC incorporates by reference its response to Topic 1.	**Response:** This topic is directly relevant to the claims and defenses in this case. *Rules*: • Fed. R. Civ. P. 26(b)(1) • Advisory Committee's Note to 2000 Amendments to Fed. R. Civ. P. 26(b)(1) (explaining that information about "other incidents of the same type" may be relevant to a party's claims or defenses and thus "properly discoverable") *Cases*: • See cases cited in Defendants' Response Regarding Topic 1. • *Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-CV-02200-HSG (KAW), 2017 WL 1101799, at *4 (N.D. Cal. Mar. 24, 2017) (discovery about related matters is appropriate where there is "significant factual and legal overlap") • *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 497 (D. Md. 2000) (rejecting relevance-based objection discovery request concerning a related case where one of the parties had already "made reference during this litigation" to material from the related case). *Facts*:		

		• The "sole or primary purpose" test set forth in *Coaltrain* is relevant to FERC's claim that Defendants engaged in market manipulation by engaging in trades "for the purpose of capturing MLSA payments." Complaint at ¶ 85. Indeed, FERC's own objections and responses to Defendants' interrogatories include ten references to *Coaltrain* and characterized the allegation "that Defendants schemed to trade for the sole or primary purpose of collecting MLSA" as "a central contention in the case." • Notice to market participants regarding sole or primary purpose" test set forth in *Coaltrain* is relevant to several of Defendants' affirmative defenses, including those related to void-for vagueness, fair notice and selective enforcement, due process, whether the trades were manipulative, scienter, waiver, and the seriousness of the alleged violations. • Rule 26 permits broad discovery relating to any standing affirmative defense, and as FERC has not defeated Defendants' defenses upon a dispositive motion, Defendants are entitled to this discovery, which plainly relates to those defenses.		

		• Defendants will not repeat their fulsome arguments from similar issues related to other discovery disputes, but discovery on this topic is proper and well-supported in the law. For instance, with respect to fair notice, the Supreme Court has explained that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."). The assessment of a fair notice defense involves "a fact-sensitive inquiry." *U.S. v. Ancient Coin Collectors Guild*, 899 F.3d 295, 322 (4th Cir. 2018). Communications involving FERC officials may be relevant to that inquiry. *See Consol Buchanan Mining Co., LLC v. Sec'y of Labor*, 841 F.3d 642, 650 (4th Cir. 2016) ("We agree that an affirmative statement from a regulatory body empowered to implement and enforce a particular regulatory scheme may be sufficient to		

		deprive regulated parties of clear notice of a later, conflicting interpretation."); *Rollins Envtl. Servs. (NJ) Inc. v. U.S. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) ("When the agency itself is uncertain of the meaning of its regulation, when agency personnel give conflicting advice to private parties about how to comply with it, and when the agency's chief legal officer finds the regulatory language equally supportive of one of two possible constructions, it is arbitrary to find the regulation 'clear.'"). • This topic clearly does not relate to FERC's legal interpretation or analysis or its prosecutorial discretion; because it relates to notice provided to PJM market participants, it plainly focuses on communications with third parties. • The fact that FERC may have responded to written discovery requests on this topic does not serve as a substitute for a 30(b)(6) deposition, particularly in light of the inadequacy of FERC's document productions to date.		

Topic 6 Defendants' Correlated Pairs Trades, including FERC's position on such trades and the inclusion of the Correlated Pairs Trades in FERC Enforcement's Preliminary Findings.	**Answer:** The court should grant a protective order barring Defendants from seeking 30(b)(6) testimony on these topics. These topics, either implicitly or explicitly, seek to discover unequivocally privileged information— namely, FERC's exercise of prosecutorial discretion in selecting which conduct to penalize and how to penalize that conduct. Additionally, these topics are duplicative of Defendants' interrogatories, meaning they were able to seek this information through less burdensome means. Lastly, to the extent the topics concern FERC's investigation of other market participants, they have the possibility of implicating the law enforcement privilege and FERC's prohibition on disclosing information regarding non-public investigations. *Rules*: • Fed. R. Civ. P. 26(c)(1) ("A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the	**Response:** This topic is directly relevant to the claims and defenses in this case. *Rules*: • Fed. R. Civ. P. 26(b)(1) • Advisory Committee's Note to 2000 Amendments to Fed. R. Civ. P. 26(b)(1) (explaining that information about "other incidents of the same type" may be relevant to a party's claims or defenses and thus "properly discoverable") *Cases*: • See cases cited in Defendants' Response Regarding Topic 1. *Facts*: • While FERC initially alleged in its August 9, 2013 preliminary findings that certain of Defendants trades executed before June 1, 2010 (referred to as "Correlated Pairs Trades") were part of Defendants alleged manipulative scheme, FERC has since dropped that allegation and is not seeking civil penalties or disgorgement for the Correlated Pairs Trades. FERC's position with respect to the Correlated Pairs Trades is relevant to FERC's claim that the trades that remain at issue were manipulative. It is also relevant to several of Defendants' affirmative		

	district where the deposition will be taken."); • Fed. R. Evid. 401 (evidence must be of "consequence in determining the action" to be relevant); • 18 CFR § 1b.9 ("All information and documents obtained during the course of an investigation, whether or not obtained pursuant to subpoena, and all investigative proceedings shall be treated as nonpublic by the Commission and its staff. . . ."). <u>*Cases*</u>*:* • *EEOC v. Evans Fruit Co.*, No. CV-10-3033-LRS, 2012 WL 442025, at *1 (E.D. Wash. Feb. 10, 2012) (granting protective order barring 30(b)(6) topics "seek[ing] information as to how and why [the agency] determined it should proceed with this case. As such, they impermissibly seek attorney work product and/or information which is subject to the government's deliberative process privilege"); • *SEC v. Buntrock*, 217 F.R.D. 441, 446 (N.D. Ill. 2003) (granting protective order barring 30(b)(6) topic not genuinely seeking facts but	defenses, including those related to void-for vagueness, fair notice and selective enforcement, due process, whether the trades were manipulative, scienter, waiver, and the seriousness of the alleged violations. • Rule 26 permits broad discovery relating to any standing affirmative defense, and as FERC has not defeated Defendants' defenses upon a dispositive motion, Defendants are entitled to this discovery, which plainly relates to those defenses. • Defendants should be permitted to ask FERC to support its claim that certain of the Defendants' trades violated FERC's rules and to ask why such trades allegedly violate those rules but other trades that were originally considered part of the same alleged manipulative scheme do not, with citation to specific conduct. This would permit Defendants to assess factual issues including discriminatory enforcement, whether the trades were manipulative in light of other market activity, whether a reasonable participant would have notice that the trades would be considered manipulative, and other affirmative defenses. In the alternative, Defendants should certainly have the ability to ask FERC about factual distinctions		

	instead the agency's "theories as to the underlying facts, how it intends to marshal those facts, and its belief as to the inferences that may be drawn from those facts"); • *SEC v. SBM Inv. Certificates, Inc.*, No. CIV.A.2006-0866, 2007 WL 609888, at *25 (D. Md. Feb. 23, 2007) (granting protective order because agency had "no independent knowledge of Defendants' [trading]. Therefore, only the results of the [agency's] investigation could be inquired into in a Rule 30(b)(6) deposition, and such inquiry would inevitably and improperly invade the work product of [agency's] investigating attorneys") • *Trustees of Bos. Univ. v. Everlight Elecs. Co.*, No. 12-CV-11935-PBS, 2014 WL 5786492, at *4 (D. Mass. Sept. 24, 2014) (granting protective order barring 30(b)(6) topic that was effectively a contention interrogatory because "[a] Rule 30(b)(6) deposition is an overbroad, inefficient, and unreasonable means of discovering an opponent's factual and legal basis for its claims")(internal citation omitted);	between the Correlated Pairs Trades and the trading presently at issue. • Defendants will not repeat their fulsome arguments from similar issues related to other discovery disputes, but discovery on this topic is proper and well-supported in the law. For instance, with respect to fair notice, the Supreme Court has explained that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."). The assessment of a fair notice defense involves "a fact-sensitive inquiry." *U.S. v. Ancient Coin Collectors Guild*, 899 F.3d 295, 322 (4th Cir. 2018). Assessments by FERC officials regarding the legality of certain allegedly similar trades may be relevant to that inquiry. *See Consol Buchanan Mining Co., LLC v. Sec'y of Labor*, 841 F.3d 642, 650 (4th Cir. 2016) ("We agree that an affirmative		

	• *FTC v. CyberSpy Software, LLC*, No. 608-CV-1872, 2009 WL 2386137, at *4 (M.D. Fla. July 31, 2009) ("The Defendants are not entitled to explore opposing counsel's thought processes as to *which* facts support these contentions (and which do not), or what inferences can be drawn from the evidence that has been assembled so far.")(footnote omitted); • *FTC v. U.S. Grant Res., LLC*, No. CIV.A. 04-596, 2004 WL 1444951, at *3 (E.D. La. June 25, 2004) (granting protective order seeking 30(b)(6) testimony regarding agency's "explanation of the actual damages and/or restitution" the agency contested were at issue, the agency's calculation of those damages, and "[t]he formula and/or calculation for any additional damages and/or restitution and/or equitable relief the FTC claims on behalf of consumers and an explanation of the basis of the formula and/or calculation."); • *SEC v. Buntrock*, 217 F.R.D. 441, 444-45 (N.D. Ill. 2003) (granting protective order because "Buntrock is unconvincing in his argument that there is no other means to	statement from a regulatory body empowered to implement and enforce a particular regulatory scheme may be sufficient to deprive regulated parties of clear notice of a later, conflicting interpretation."); *Rollins Envtl. Servs. (NJ) Inc. v. U.S. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) ("When the agency itself is uncertain of the meaning of its regulation, when agency personnel give conflicting advice to private parties about how to comply with it, and when the agency's chief legal officer finds the regulatory language equally supportive of one of two possible constructions, it is arbitrary to find the regulation 'clear.'"). • The fact that FERC may have responded to written discovery requests on this topic does not serve as a substitute for a 30(b)(6) deposition, particularly in light of the inadequacy of FERC's document productions to date.	

	obtain the information he seeks. Given the staggering amount of evidence the SEC has already turned over, the court finds this hard to believe, and Buntrock offers little in the way of explanation."), *see also id*. at 446 (granting protective order barring 30(b)(6) topic not genuinely seeking facts but instead the agency's "theories as to the underlying facts, how it intends to marshal those facts, and its belief as to the inferences that may be drawn from those facts"); • *SEC v. Rosenfeld*, No. 97.CIV.1467, 1997 WL 576021, at *3 (S.D.N.Y. Sept. 16, 1997) (granting protective order barring 30(b)(6) deposition when "It would also implicate the SEC's law enforcement privilege since it might reveal the SEC's techniques and procedures and how it develops relationships with informants, and strategies for eliciting information from individuals who provide it with information."); • *Fed. Election Comm'n v. Friends of Evans*, No. 04-cv-4003, 2005 WL 8163039, at *2 (C.D. Ill. Feb. 8, 2005) (granting motion for protective order prohibiting agency			

	deposition under the rationale that, "[a]bsent definitive evidence of prohibited motive, discovery that focuses on the state of mind and/or the discretion of the prosecutor (or, as here, the agency charged with enforcement of the Act), is not permitted."); • *United States v. Hendrickson*, 664 F. Supp. 2d 793, 798 (E.D. Mich. 2009) ("Moreover, because a defendant's discovery efforts in aid of a claim of selective prosecution threaten to impinge upon prosecutorial discretion and reveal prosecutorial strategies, such discovery will be permitted only if the defendant produces some evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent.")(internal citation and quotation omitted); • *G-69 v. Degnan*, 130 F.R.D. 339, 348 (D.N.J. 1990) ("the files would contain indications of prosecutorial discretion in the criminal justice process, which is presumptively beyond discovery."); • *Baltimore Gas & Electric Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) (FERC exercises prosecutorial discretion when			

	determining which conduct to penalize and how to penalize it). *Facts*: • FERC exercises prosecutorial discretion when pursuing an enforcement investigation and deciding whether and how to penalize alleged conduct. FERC's analysis and reasoning in this regard is unequivocally attorney work product and subject to the attorney-client and deliberative process privileges. Absent circumstances not present here, agencies are not required to explain their exercise of prosecutorial discretion. There is no reasonable interpretation of these topics as seeking purely factual information. • Additionally, these topics are duplicative of Defendants' interrogatories, meaning there were less burdensome means for seeking this information. Interrogatory 9, for example, asked "With respect to Defendants' correlated pairs trades, explain in detail why the Commission determined these trades should not be subject to sanctions, identifying all supporting evidence and explaining in detail any changes in Enforcement's position with			

	regard to the permissibility of these trades." Similarly, Interrogatory 25, asked "Explain step-by-step FERC's calculation of the civil penalty and disgorgement amounts sought against Defendants in the Complaint. For calculations of civil penalty amounts, link each step to the steps set forth in FERC's Penalty Guidelines issued in Docket No. PL10-4 on September 17, 2010, as applicable, and including the section references from the guidelines or, if the guidelines were not employed in establishing the civil penalty, explain why and describe in detail the alternate process used to calculate the civil penalty sought in the Complaint." It would be unduly burdensome to require FERC to prepare a 30(b)(6) witness on these duplicative topics. • To the extent several of the topics focus on the conduct or alleged conduct of other market participants, the topics are objectionable for seeking information that is neither relevant nor likely to lead to the discovery of relevant evidence. Dr. Chen and Powhatan acted alone, without assistance from or knowledge of other market			

	participants. For reasons outlined in more detail below, information regarding other market participants is, therefore, irrelevant and not a proper subject of 30(b)(6) deposition testimony. • To the extent these topics seek information regarding investigations that have not led to a public disposition, they implicate the law enforcement privilege and FERC's prohibition on disclosing information regarding non-public investigations. As to the former, FERC's investigative techniques are privileged and protected information, and testimony regarding non-public investigations involving other market participants has the potential to jeopardize FERC's ability to maintain the confidentiality of those techniques. As to the latter, subjects of FERC investigations have a legitimate privacy interest in the existence and details of an investigation not being made public. Defendants' desire to conduct a "fishing expedition" into the investigative records of other market participants would substantially undermine this interest.			

	• To the extent Defendants argue that the information implicated by these topics is necessary for their affirmative defenses, FERC incorporates by reference its arguments on this score from its response to Topic 1. • Lastly, Defendants argue, with no citation, that they are entitled to "ask why such trades allegedly violate those rules but other trades that were originally considered part of the same alleged manipulative scheme do not . . . . Defendants should certainly have the ability to ask FERC about factual distinctions between the Correlated Pairs Trades and the trading presently at issue." As to the former argument, FERC is not required to provide its legal analysis regarding why some conduct was penalized and some was not. Such analysis is at the heart of prosecutorial discretion and protected from disclosure, except in circumstances not present here. As to the latter argument, surely Defendants cannot be heard to need FERC to identify the "factual distinctions" between Defendants' own conduct, particularly when Defendants' counsel has had no problem providing a definition of that			

	conduct. Instead, Defendants appear to seek FERC's interpretation of what facts FERC views as being legally distinct between the two types of trading, which necessarily seeks FERC's protected legal analysis.			

Topic 7: UTC trading by other market participants identified in PJM's August 16, 2010 referral and/or the IMM's January 6, 2011 referral and how such trading compares to Defendants' UTC trading.	**Answer:** The court should grant a protective order barring Defendants from seeking 30(b)(6) testimony on these topics. As FERC has maintained throughout this litigation, the conduct of other market participants is irrelevant because neither its claims nor Defendants' defenses are based upon the actions of third parties. More fundamentally, these topics are too broad and too vague to allow a FERC representative to adequately prepare for a 30(b)(6) deposition, particularly where FERC enforcement actions are publicly available docketed proceedings. Lastly, these topics potentially implicate the law enforcement privilege and FERC's prohibition on disclosure of non-public investigations. *Rules*: • Fed. R. Civ. P. 26(c)(1) ("A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken."); • Fed. R. Civ. P. 30(b)(6) (party seeking 30(b)(6) deposition	**Response:** This topic is directly relevant to the claims and defenses in this case. *Rules*: • Fed. R. Civ. P. 26(b)(1) • Advisory Committee's Note to 2000 Amendments to Fed. R. Civ. P. 26(b)(1) (explaining that information about "other incidents of the same type" may be relevant to a party's claims or defenses and thus "properly discoverable") *Cases*: • See cases cited in Defendants' Response Regarding Topic 1. • *Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-CV-02200-HSG (KAW), 2017 WL 1101799, at *4 (N.D. Cal. Mar. 24, 2017) (discovery about related matters is appropriate where there is "significant factual and legal overlap") • *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 497 (D. Md. 2000) (rejecting relevance-based objection discovery request concerning a related case where one of the parties had already "made reference during this litigation" to material from the related case). *Facts*:		

	"must describe with reasonable particularity the matters for examination"); • Fed. R. Evid. 401 (evidence must be of "consequence in determining the action" to be relevant). *Cases:* • *SEC v. SBM Inv. Certificates, Inc.*, No. CIV A DKC 2006-0866, 2007 WL 609888, at *23 (D. Md. Feb. 23, 2007) (granting protective order barring 30(b)(6) topics that "involved inquiry into the law enforcement investigation conducted by the SEC's legal staff"); • *FTC v. U.S. Grant Res., LLC*, No. CIV.A. 04-596, 2004 WL 1444951, at *11 (E.D. La. June 25, 2004) (granting protective order barring 30(b)(6) topics that sought evidence regarding agency's investigation and investigative procedures); • *SEC v. Buntrock*, 217 F.R.D. 441, 444-45 (N.D. Ill. 2003) (granting protective order because "Buntrock is unconvincing in his argument that there is no other means to obtain the information he seeks. Given the staggering amount of evidence the SEC has already	• PJM and the IMM's referrals included allegations pertaining to Defendants as well as other market participants who engaged in allegedly similar UTC transactions. Several of these other market participants have not been subject to civil penalties or disgorgement from FERC. FERC's treatment of such market participants is relevant to its claim that Defendants' allegedly similar trades were manipulative. It is also relevant to several of Defendants' affirmative defenses, including those related to void-for vagueness, fair notice and selective enforcement, due process, whether the trades were manipulative, scienter, waiver, and the seriousness of the alleged violations. • Rule 26 permits broad discovery relating to any standing affirmative defense, and as FERC has not defeated Defendants' defenses upon a dispositive motion, Defendants are entitled to this discovery, which plainly relates to those defenses. • Defendants should be permitted to ask FERC to support its claim that certain of the Defendants' trades violated FERC's rules and to ask why such trades violate those rules but other allegedly similar trades do not, with citation to specific		

	turned over, the court finds this hard to believe, and Buntrock offers little in the way of explanation."), *see also id*. at 446 (granting protective order barring 30(b)(6) topic not genuinely seeking facts but instead the agency's "theories as to the underlying facts, how it intends to marshal those facts, and its belief as to the inferences that may be drawn from those facts"); • *Trustees of Bos. Univ. v. Everlight Elecs. Co.*, No. 12-CV-11935-PBS, 2014 WL 5786492, at *3 (D. Mass. Sept. 24, 2014) (denying motion to compel 30(b)(6) testimony based on overly broad and vague topics because "[i]f the noticing party does not describe the topics with sufficient particularity or if the topics are overly broad, the responding party is subject to an impossible task. . . . if the noticed party cannot identify the outer limits of the topics noticed, compliant designation is not feasible")(internal citation omitted); • *SEC v. Nacchio*, 614 F. Supp. 2d 1164, 1177 (D. Colo. 2009) (granting motion to quash 30(b)(6) notice that would	conduct. This would permit Defendants to assess factual issues including discriminatory enforcement, whether the trades were manipulative in light of other market activity, whether a reasonable participant would have notice that the trades would be considered manipulative, and other affirmative defenses. • This topic clearly does not relate to FERC's legal interpretation or analysis or its prosecutorial discretion – it covers facts regarding trading by other market participants identified in particular referrals to FERC from PJM and the IMM and factual distinctions between that trading and the trading at issue here. Further, FERC does not claim privilege between itself and PJM or the IMM. • This topic is not as broad as FERC complains – it is limited in scope to "UTC trading by other market participants" identified in PJM and the IMM's referrals and does not seek information about the *Coaltrain* case as a whole. • Defendants will not repeat their fulsome arguments from similar issues related to other discovery disputes, but discovery on this topic is proper and well-supported in the law. *See* Joint Statement Concerning Defendants' Discovery		

	require "untold weeks if not months" to prepare a deponent); • *SEC v. Rosenfeld*, No. 97.CIV.1467, 1997 WL 576021, at *3 (S.D.N.Y. Sept. 16, 1997) (granting protective order barring 30(b)(6) deposition when "It would also implicate the SEC's law enforcement privilege since it might reveal the SEC's techniques and procedures and how it develops relationships with informants, and strategies for eliciting information from individuals who provide it with information."). *Facts*: • None of the parties' claims or defenses implicate third-parties. There is no allegation that Dr. Chen and Powhatan worked in concert with other market participants. They did not consult with a third-party regarding their trading. They did not act in concert with a third-party regarding their trading. They do not even appear to have been contemporaneously aware of third-parties also carrying out their own schemes to improperly capture MLSA during the relevant time period. Investigations involving other	Requests to Plaintiff, Defendants' Response to Dispute No. 2 (ECF No. 179). For instance, with respect to fair notice, the Supreme Court has explained that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."). The assessment of a fair notice defense involves "a fact-sensitive inquiry." *U.S. v. Ancient Coin Collectors Guild*, 899 F.3d 295, 322 (4th Cir. 2018). Assessments by FERC officials regarding the legality of allegedly similar trades may be relevant to that inquiry. *See Consol Buchanan Mining Co., LLC v. Sec'y of Labor*, 841 F.3d 642, 650 (4th Cir. 2016) ("We agree that an affirmative statement from a regulatory body empowered to implement and enforce a particular regulatory scheme may be sufficient to deprive regulated parties of clear notice of a later, conflicting interpretation.");		

	market participants are, therefore, of no possible relevance to this case. • The same arguments listed above regarding FERC's lack of independent factual knowledge regarding Defendants' conduct are equally true of *Coaltrain* and any other matters implicated by these topics. FERC has no independent factual knowledge of the market manipulation that occurred in those cases. Any factual information regarding Coaltrain's or any other market participant's conduct was gathered as a part of FERC's attorneys' investigations, meaning Defendants request, in effect, a deposition of FERC's attorneys in those cases. Defendants are unable to make the extraordinary showing of compelling need and no less burdensome means necessary to warrant such a deposition. There can be no compelling need for a deposition of FERC's counsel in those cases when the evidence sought is of no import to this matter. • The topic is overly broad and vague. *Coaltrain* alone involves a 5-year investigation	*Rollins Envtl. Servs. (NJ) Inc. v. U.S. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) ("When the agency itself is uncertain of the meaning of its regulation, when agency personnel give conflicting advice to private parties about how to comply with it, and when the agency's chief legal officer finds the regulatory language equally supportive of one of two possible constructions, it is arbitrary to find the regulation 'clear.'"). • Any confidentiality or privacy concerns that may be implicated by this topic are addressed by the Consent Protective Order entered by the Court on March 22, 2021 (ECF No. 170).		

	that has resulted in 6-years of federal district court litigation. • The noticed topics necessarily seek FERC's legal analysis and interpretation to the extent they request a potential FERC deponent testify to "how such trading [in other cases] compares to Defendants' UTC trading." FERC's counsel's view as to the import (or lack thereof) of various facts relating to various trading schemes is attorney work product also protected by the attorney-client and deliberative process privileges. As discussed in more detail above, such judgments involve matters of prosecutorial discretion, which is inarguably not a proper subject for a 30(b)(6) deposition based on the facts here. • To the extent any investigation regarding the payment of MLSA to a UTC trader led to a formal enforcement action, all of those materials are publicly available as part of the Commission's docketed proceeding on the issue. There is no reason to require a FERC representative to testify regarding that publicly available information, which further supports FERC's			

	argument that Defendants have noticed these topics in an attempt to seek privileged and protected information. • To the extent these topics seek information regarding investigations that have not led to a public disposition, they implicate the law enforcement privilege and FERC's prohibition on disclosing information regarding non-public investigations. As to the former, FERC's investigative techniques are privileged and protected information, and testimony regarding non-public investigations involving other market participants has the potential to jeopardize FERC's ability to maintain the confidentiality of those techniques. As to the latter, subjects of FERC investigations have a legitimate privacy interest in the existence and details of an investigation not being made public. Defendants' desire to conduct an irrelevant "fishing expedition" into the investigative records of other market participants does not vitiate this interest. • To the extent Defendants argue that the information implicated by these topics is necessary for their affirmative defenses,			

	FERC incorporates by reference its arguments on this score from its response to Topic 1.			

Topic 8: Reasons why other market participants identified in PJM's August 16, 2010 referral and/or the IMM's January 6, 2011 referral were not subject to civil penalties and/or disgorgement.	**Answer:** This topic impermissibly seeks privileged and protected information regarding FERC's exercise of prosecutorial discretion—namely, which conduct it did and did not decide to penalize. FERC incorporates by reference its response to Topic 6.	**Response:** This topic is directly relevant to the claims and defenses in this case. *Rules*: • Fed. R. Civ. P. 26(b)(1) • Advisory Committee's Note to 2000 Amendments to Fed. R. Civ. P. 26(b)(1) (explaining that information about "other incidents of the same type" may be relevant to a party's claims or defenses and thus "properly discoverable") *Cases*: • See cases cited in Defendants' Response Regarding Topic 1. • *Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-CV-02200-HSG (KAW), 2017 WL 1101799, at *4 (N.D. Cal. Mar. 24, 2017) (discovery about related matters is appropriate where there is "significant factual and legal overlap") • *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 497 (D. Md. 2000) (rejecting relevance-based objection discovery request concerning a related case where one of the parties had already "made reference during this		

		litigation" to material from the related case). *Facts*: • PJM and the IMM's referrals included allegations pertaining to Defendants as well as other market participants who engaged in allegedly similar UTC transactions. Several of these other market participants have not been subject to civil penalties or disgorgement from FERC. FERC's treatment of such market participants is relevant to its claim that Defendants' allegedly similar trades were manipulative. It is also relevant to several of Defendants' affirmative defenses, including those related to void-for vagueness, fair notice and selective enforcement, due process, whether the trades were manipulative, scienter, waiver, and the seriousness of the alleged violations. • Rule 26 permits broad discovery relating to any standing affirmative defense, and as FERC has not defeated Defendants' defenses upon a dispositive motion, Defendants are entitled to this		

		discovery, which plainly relates to those defenses. • Defendants should be permitted to ask FERC to support its claim that certain of the Defendants' trades violated FERC's rules and to ask why such trades allegedly violate those rules but other allegedly similar trades do not, with citation to specific conduct. This would permit Defendants to assess factual issues including discriminatory enforcement, whether the trades were manipulative in light of other market activity, whether a reasonable participant would have notice that the trades manipulative would be considered manipulative, and other affirmative defenses. In the alternative, Defendants should certainly have the ability to ask FERC about factual distinctions as covered in Topic 7. • Defendants will not repeat their fulsome arguments from similar issues related to other discovery disputes, but discovery on this topic is proper and well-supported in the law. *See* Joint Statement Concerning Defendants' Discovery Requests to		

		Plaintiff, Defendants' Response to Dispute No. 2 (ECF No. 179). For instance, with respect to fair notice, the Supreme Court has explained that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."). The assessment of a fair notice defense involves "a fact-sensitive inquiry." *U.S. v. Ancient Coin Collectors Guild*, 899 F.3d 295, 322 (4th Cir. 2018). Assessments by FERC officials regarding the legality of allegedly similar trades may be relevant to that inquiry. *See Consol Buchanan Mining Co., LLC v. Sec'y of Labor*, 841 F.3d 642, 650 (4th Cir. 2016) ("We agree that an affirmative		

		statement from a regulatory body empowered to implement and enforce a particular regulatory scheme may be sufficient to deprive regulated parties of clear notice of a later, conflicting interpretation."); *Rollins Envtl. Servs. (NJ) Inc. v. U.S. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) ("When the agency itself is uncertain of the meaning of its regulation, when agency personnel give conflicting advice to private parties about how to comply with it, and when the agency's chief legal officer finds the regulatory language equally supportive of one of two possible constructions, it is arbitrary to find the regulation 'clear.'"). • Any confidentiality or privacy concerns that may be implicated by this topic are addressed by the Consent Protective Order entered by the Court on March 22, 2021 (ECF No. 170).		

Topic 9: Communications on or about June 20, 2019 between FERC staff and Jacqulynn Hugee of PJM regarding the implications of the June 20, 2019 order in the Black Oak proceeding for the Coaltrain litigation and this Civil Action.	**Answer:** This topic seeks information regarding FERC's investigation and litigation, and therefore necessarily seeks the deposition of FERC's counsel. FERC incorporates by reference its response to Topic 4.	**Response:** This topic is directly relevant to the claims and defenses in this case. *Rules*: • Fed. R. Civ. P. 26(b)(1) *Cases*: • See cases cited in Defendants' Response Regarding Topic 1. *Facts*: • In June 2019, FERC issued an order in the *Black Oak* Proceeding that confirmed that it was reasonable for PJM market participants to take MLSA payments into account when deciding whether to engage in transactions. Communications about this order and its implications for this Civil Action and the *Coaltrain* case are relevant to FERC's claim that Defendants engaged in market manipulation by engaging in trades "for the purpose of capturing MLSA payments." Complaint at ¶ 85. Such communications are also relevant to several of Defendants' affirmative defenses, including those related to void-for vagueness, fair notice and selective enforcement, due process, whether the trades were manipulative, scienter, waiver, and the		

		seriousness of the alleged violations. • Rule 26 permits broad discovery relating to any standing affirmative defense, and as FERC has not defeated Defendants' defenses upon a dispositive motion, Defendants are entitled to this discovery which plainly relates to those defenses. • This topic clearly does not relate to FERC's legal interpretation or analysis or its prosecutorial discretion – it covers communications with third parties. Notably, FERC has not articulated any privilege between itself and PJM or the IMM. • Defendants will not repeat their fulsome arguments from similar issues related to other discovery disputes, but discovery on this topic is proper and well-supported in the law. For instance, with respect to fair notice, the Supreme Court has explained that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is		

		so standardless that it authorizes or encourages seriously discriminatory enforcement."). The assessment of a fair notice defense involves "a fact-sensitive inquiry." *U.S. v. Ancient Coin Collectors Guild*, 899 F.3d 295, 322 (4th Cir. 2018). Communications involving FERC and PJM officials may be relevant to that inquiry. *See Consol Buchanan Mining Co., LLC v. Sec'y of Labor*, 841 F.3d 642, 650 (4th Cir. 2016) ("We agree that an affirmative statement from a regulatory body empowered to implement and enforce a particular regulatory scheme may be sufficient to deprive regulated parties of clear notice of a later, conflicting interpretation."); *Rollins Envtl. Servs. (NJ) Inc. v. U.S. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) ("When the agency itself is uncertain of the meaning of its regulation, when agency personnel give conflicting advice to private parties about how to comply with it, and when the agency's chief legal officer finds the regulatory language equally supportive of one of two possible constructions, it is arbitrary to find the regulation 'clear.'"). • FERC has not articulated why it would be less burdensome to depose Ms. Hugee on this topic		

		given that she served as counsel to PJM and no longer works for PJM.		

Topic 10: FERC Enforcement's meetings and communications with PJM and IMM officials, including but not limited to (1) the November 4, 2010 meeting with Joseph Bowring and (2) the August 28, 2015 meeting with PJM officials.	**Answer:** This topic seeks information regarding FERC's investigation and litigation, and therefore necessarily seeks the deposition of FERC's counsel. FERC incorporates by reference its response to Topic 4.	**Response:** This topic is directly relevant to the claims and defenses in this case. *Rules*: • Fed. R. Civ. P. 26(b)(1) *Cases*: • See cases cited in Defendants' Response Regarding Topic 1 *Facts*: • The limited written discovery that Defendants have been able to obtain to date indicates that FERC Enforcement staff worked with third-parties PJM and the IMM in developing the claims at issue in this Civil Action. Defendants have reason to believe that such communications may be relevant to FERC's claims and the relief sought as well as several of Defendants' affirmative defenses, including those related to void-for vagueness, fair notice and selective enforcement, due process, whether the trades were manipulative, scienter, the filed rate doctrine, waiver, whether the purported injury or harm alleged was the legal fault of others, the speculative nature of the purported unjust profits and harms, and the seriousness of the alleged violations.		

		• Rule 26 permits broad discovery relating to any standing affirmative defense, and as FERC has not defeated Defendants' defenses upon a dispositive motion, Defendants are entitled to this discovery, which plainly relates to those defenses. • This topic clearly does not relate to FERC's legal interpretation or analysis or its prosecutorial discretion – it covers communications with third parties. Notably, FERC has not articulated any privilege between itself and PJM or the IMM. • FERC's claim that it would be less burdensome to depose non-parties on this topic is unavailing. There is no single non-party witness able to testify about all potentially relevant meetings and communications. Additionally, FERC's suggestion that Defendants' rely on Dr. Bowring's testimony is particularly problematic given that the IMM has moved to quash Defendants' deposition of Dr. Bowring.		

Topic 11: FERC's failure to timely produce exculpatory materials in accordance with the Commission's Policy Statement on Disclosure of Exculpatory Materials. Enforcement of Statues, Regulations & Orders, 129 FERC ¶ 61,248 (2009).	**Answer:** This Topic impermissibly seeks FERC's legal analysis on this issue, as it is explicitly a legal contention. FERC incorporates by reference its response to Topic 1.	**Response:** This topic is directly relevant to the defenses in this case. *Rules*: • Fed. R. Civ. P. 26(b)(1) *Cases*: • See cases cited in Defendants' Response Regarding Topic 1 *Facts*: • The limited written discovery that Defendants have been able to obtain to date indicates that FERC failed to timely produce exculpatory materials in accordance with the Commission's Policy Statement on Disclosure of Exculpatory Materials. • This topic is relevant to Defendants' affirmative defense that FERC's claims are barred because of inequitable conduct and unclean hands. • Rule 26 permits broad discovery relating to any standing affirmative defense, and as FERC has not defeated Defendants' defenses upon a dispositive motion, Defendants are entitled to this discovery, which plainly relates to such a defense.		

CERTIFICATE OF SERVICE

I certify that on June 22, 2021, I filed the foregoing notice using the CM/ECF system, which will send a notification of such filing to counsel of record in this matter.

/s/ *Lisa Owings*
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