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

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

DEFENDANT POWHATAN ENERGY FUND, LLC'S OPPOSITION TO THE FEDERAL ENERGY REGULATORY COMMISSION'S MOTION FOR A PROTECTIVE ORDER

COMES NOW, Defendant Powhatan Energy Fund, LLC ("Powhatan"), by counsel, and opposes the Federal Energy Regulatory Commission's ("FERC") Motion for a Protective Order ("Motion") (ECF No. 251) and Memorandum in Support ("Mem.") (ECF No. 251-1), and states as follows.

I. INTRODUCTION

Despite that FERC told this Court as recently as October 1st that it had agreed to provide a 30(b)(6) witness subject to agreement on topics,[1] and despite that FERC is bound by the Federal Rules of Civil Procedure, FERC now seeks a protective order to prevent a Rule 30(b)(6) deposition

[1] Email from Daniel Lloyd of FERC (October 2, 2021 10:20 EST) (on file with author): "The parties met and conferred regarding ECF 191 on Thursday afternoon. By way of background, that discovery dispute related to a potential Fed. R. Civ. P. 30(b)(6) deposition of FERC. Consistent with Judge Colombell's instruction during our conference on discovery issues, FERC has agreed that it will provide a 30(b)(6) witness, subject to agreement with Defendants regarding the topics and scope of the deposition."

based on a purported blanket privilege objection to all possible questions. FERC's argument reneges on its agreement with Powhatan and representation to this Court, is circular, fails to show the requisite good cause under Rule 26(c) to obtain a protective order and is without authority in the Fourth Circuit. Its Motion should be denied.

II. ARGUMENT

A. FERC is Subject to Rule 30(b)(6) and Cannot Avoid the Rule with a Blanket Privilege Argument

As noted by Judge Michael S. Nachmanoff, on whose decision FERC relies, and by a multitude of jurisprudence, government agencies are bound by the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 30(b)(6). *See* May 14, 2021 Hr'g Tr., *S.E.C. v. Clark*, 1:20-cv-1529-CMH-MSN (E.D. Va.) ("*Clark*") 14:9-12; 23:5-8 ("I'll tell you right now there is no categorical prohibition on the SEC being subject to a deposition. The case law is clear, the rules apply to the SEC just as they apply to everyone else … I do find that there is no categorical prohibition on the taking of a 30(b)(6) deposition, that the SEC is a government agency and government agencies are covered by 30(b)(6)." *See Yousuf v. Samantar*, 451 F.3d 248, 255 (D.C. Cir. 2006) ("Rule 30(b)(6) is express that a party may 'in a subpoena name as the deponent a … governmental agency.'") (quoting Rule 30(b)(6)). "Rule 30(b)(6) expressly applies to a government agency and provides neither an exemption from Rule 30(b)(6), nor special consideration concerning the scope of discovery, especially when [the agency] voluntarily initiates an action." *S.E.C. v. McCabe*, No. 2:13-CV-00161-TS-PMW, 2015 WL 2452937, at *3 (D. Utah May 22, 2015) (citations and internal quotation marks omitted). "Ultimately, it is up to the SEC to designate someone who is not conflicted either by status or privilege issues." *Id.* at *4; *see also Fed. Energy Regul. Comm'n v. City Power Mktg., LLC*, 199 F. Supp. 3d 218, 230 (D.D.C. 2016)

(Notwithstanding the significant proceedings that occurred at the agency level, the Court will treat this as a standard civil action, governed by the Federal Rules of Civil Procedure.").

FERC seeks to improperly avoid Rule 30(b)(6) by asserting a blanket privilege. FERC understands it is bound by the federal rules, but asserts it is not bound by Rule 30(b)(6) because ***any*** such deposition–and apparently **any** deposition question– would intrude on privilege. FERC cannot simply wave away Rule 30(b)(6). As a recent decision from a Federal District Court in Utah succinctly stated, "[a]t the July 12 hearing, the SEC acknowledged it is not categorically immune from Rule 30(b)(6) depositions. Yet, granting its motion would effectively bestow this immunity … [i]n effect, that is what the SEC advances: a blanket claim of privilege as to all facts sought regarding its allegations. By arguing Putnam Defendants' deposition notice necessarily calls for the disclosure of attorney work product and mental impressions, the SEC asks for a finding of privilege without establishing with any particularity what documents or information it believes are privileged or why any such privilege applies. This fails to meet the SEC's burden … [f]acts 'are always discoverable regardless if they have been conveyed to an attorney.'"). *Sec. & Exch. Comm'n v. Putnam*, No. 220CV00301DBBDAO, 2021 WL 3710129, at *2 (D. Utah Aug. 20, 2021) (quoting *Sec. & Exch. Comm'n v. Merkin*, 283 F.R.D. 689, 696 (S.D. Fla. 2012)); *id.* at n.2 ("the federal agency, 'like all other litigants, should object to actual questions which it believes invade any applicable privilege during the deposition and cannot be granted unwarranted or overly broad protections prior to any questions being asked of the deponent.'") (quoting *EEOC v. LifeCare Mgmt. Servs., LLC*, No. 02:08–cv–1358, 2009 WL 772834 (W.D. Pa. Mar. 17, 2009)). *See N. River Ins. Co. v. Stefanou*, 831 F.2d 484, 487 (4th Cir. 1987) ("A party wishing in good faith to assert the privilege must do so with respect to particular [allegations], thereby allowing the trial judge to determine the propriety of each refusal … The privilege also may be asserted and

preserved in the course of discovery proceedings, Fed. R. Civ. P. 26(c), but in specifics sufficient to provide the court with a record upon which to decide whether the privilege has been properly asserted as to each question.") (internal citations and quotation marks omitted); *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) ("Permitting the Commission in this instance to assert a blanket claim of privilege in response to a Rule 30(b)(6) notice creates an unworkable circumstance in which a defendant loses a primary means of discovery without a meaningful review of his opponent's claim of privilege.").

Just like in *Clark*, FERC categorically refuses to present any witness for deposition. Thus, FERC (and previously the SEC) argue they are not bound by Rule 30(b)(6) because production of any witness or witnesses would be an undue burden and invade on privilege concerns. This is not the law, and the Motion for a Protective Order should be denied.

B. FERC Cannot Avoid Rule 30(b)(6) By Turning Over Documents

Just because the *Merkin* deposition was not fruitful does not mean the same result will occur here. As argued below, this case has unique factual allegations that Powhatan should be allowed to probe at deposition. The case law is in accord. "Providing its investigative file simply does not relieve the EEOC of its obligation under Rule 30(b)(6) to provide a witness to answer questions about those documents for purposes of clarification and interpretation." *LifeCare Mgmt. Servs., LLC*, 2009 WL 772834, at *2 (citing *Tri–State Hosp. Supply Corp. v. United States of Am.*, 226 F.R.D. 118, 125–26 (D.D.C. 2005)). *See Little v. Auburn University*, 2010 WL 582083, *2 (M.D. Ala. 2010) ("The fact that the EEOC has turned over its complete administrative file does not relieve the Agency of its obligation under Fed. R. Civ. P. 30(b)(6) to provide a witness to answer questions about the documents for purposes of clarification and interpretation.") (quoting *Equal Emp. Opportunity Comm'n v. Sterling Jewelers Inc.*, No. 08-CV-00706(A)(M), 2010 WL

2803017, at *3 (W.D.N.Y. July 15, 2010)). If a party could assert it has provided all of its facts via interrogatories answers or the production of documents, there would never be any Rule 30(b)(6) depositions.

C. *Clark* is Distinguishable

Despite its October 1st commitment to this Court, FERC now relies on the May 14, 2021 decision of Judge Nachmanoff of the Alexandria Division in *Clark*. Even if FERC may now renege on its commitment, *Clark* is inapposite. *Clark* concerns allegations of insider trading and such cases are typically built on circumstantial evidence.[2] This case is different and thus warrants a 30(b)(6) deposition. FERC obtained information on Alan Chen's trades from PJM, the Independent Market Monitor ("IMM") and from the defendants themselves. There is nothing circumstantial about the facts of the trades at issue: the day, the time, the nodes, and the Marginal Loss Surplus Allocation (MLSA) received. The positions Alan Chen took are not circumstantial but facts received by FERC from third-parties and/or the defendants. *See, e.g.*, First Am. Compl. ¶ 67 and n.11 (noting FERC received an oral and written referral from PJM's Internal Market

[2] *See* RECENT DEVELOPMENTS IN INSIDER TRADING, 41 No. 19 The Lawyer's Brief NL 2 (2011). ("Direct evidence of insider trading is, indeed, rare; and the SEC is entitled to prove its case through circumstantial evidence. *See, e.g.*, *Michaels v. Michaels*, 767 F.2d 1185, 1199 (7th Cir. 1985) (stating that scienter can be inferred from circumstantial evidence in an insider-trading case); *SEC v. Sargent*, 229 F.3d 68, 75 (1st Cir. 2000) ("[A] plaintiff is not required to produce direct evidence; 'circumstantial evidence, if it meets all the other criteria of admissibility, is just as appropriate as direct evidence and is entitled to be given whatever weight the jury deems it should be given under the circumstances within which it unfolds.'"); *SEC v. Roszak*, 495 F.Supp.2d 875, 886-87 (N.D. Ill. 2007) (Roszak) ("Courts in this district and elsewhere have held that the SEC is entitled to prove its case through circumstantial evidence.") (citations omitted); *SEC v. Van Wagner*, No. 97 C 6826, 1999 WL 691836, at *3-4 (N.D.Ill. Aug.25, 1999) (Van Wagner) ("[C]ircumstantial evidence is sufficient to prove insider trading without a direct confession from either the tippee or tipper.").")

Monitor). FERC used these facts as the foundation for its investigation and ultimately its penalty and this lawsuit. Powhatan has a right to investigate how, where, when, and why FERC received these facts and the bounds of FERC's factual knowledge. *See Clark* H'rg Tr. 11:24-12:1 "[s]o you have every right to the results of their investigation, to test what they've collected, how they're going to present it…".

For example, in its recent settlement with Alan Chen, which included neither an admission of wrongdoing nor a civil penalty, FERC stipulated with Mr. Chen as to certain facts regarding his trading motives and regarding what he did and did not tell Powhatan. *See* HOULIAN CHEN POWHATAN ENERGY FUND, LLC HEEP FUND, INC. CU FUND, INC., 177 FERC ¶ 61076 at ¶ 4 (2021) ("During the Alleged Manipulation Period (June 1, 2010 - August 3, 2010), Dr. Chen traded the Up To Congestion (UTC) product in the markets operated by the PJM Interconnection LLC (PJM) on behalf of HEEP, CU, and Powhatan Energy Fund LLC (Powhatan)."). Surely, Powhatan should have the opportunity to test the factual bases for FERC's stipulation with Mr. Chen.

In addition, the testimony sought in the deposition seeks to explore the facts that make the trades at issue allegedly illegal market manipulation and facts related to FERC's communications with third-parties like PJM and IMM (which cannot be protected by privilege). FERC writes, "[i]nstead, those cases reason that regardless of the title or the position of the deponent, in cases such as this where any factual information was gathered via an investigation by FERC's attorneys, the only source of information is the attorneys litigating the case. As a result, the 30(b)(6) deposition is necessarily a deposition of opposing counsel, whether directly or by proxy." Mem. at 4. But that is an overreach and another reason *Clark* is distinguishable. FERC has approximately 1,500 employees. Mem. at 13. It employs analysts, economists and ostensibly former energy traders, former PJM officials, and former IMM officials on staff. For example, the

Director of Enforcement is not an attorney. "Janel Burdick first joined the Commission's Office of Enforcement (OE) in July 2009 as an Energy Industry Analyst. She served as a Technical Advisor to former Chairman Norman Bay from September 2014 to August 2015. In June 2016, she was named Director, Division of Energy Market Oversight, within OE, and in July 2019 was elevated to the position of Deputy Director, OE. Burdick has been serving as Acting Director, OE since February 2021. Prior to joining FERC, she served as a Commodities Product Controller and Commodities Settlement Analyst for Barclays Capital and was a Commissioned Officer in the U.S. Navy. Burdick holds a Bachelor of Science in Quantitative Economics from the U.S. Naval Academy and a Master of Public Administration from Columbia University." JANEL BURDICK, DIRECTOR, OF THE OFFICE OF ENFORCEMENT, https://www.ferc.gov/janel-burdick-director-office-enforcement (last visited November 18, 2021). And such an individual or individuals could answer the question of "which facts show that these trades constitute market manipulation" without intruding into privilege.

A FERC employee with credentials similar to Dr. Chen could testify. *See* First Am. Compl. ¶ 47 ("Chen, who has a doctoral degree in power engineering and worked for years as an analyst in energy market modeling, first became familiar with the UTC product while working as an analyst at Merrill Lynch. In September 2007, Chen left Merrill Lynch to establish HEEP Fund for the sole purpose of making UTC trades.") (citation omitted). Unlike *Clark*, the 30(b)(6) notice does not require attorney testimony about the investigation. Rather, it seeks testimony on the facts FERC gathered from third-parties, FERC's experts' understanding of the market manipulation rule, and communications with third-parties. *See Putnam*, 2021 WL 3710129, at *2 ("And Rule 30(b)(6) contains no requirement that Putnam Defendants first seek the facts covered by the deposition topics by more efficient means. Putnam Defendants pointed to specific information

they seek which is not unreasonably duplicative and might best be obtained through a Rule 30(b)(6) deposition."); *In re Grand Jury Subpoena*, 870 F.3d 312, 321 (4th Cir. 2017) ("We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment.... ***Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation***. To that end, either party may compel the other to disgorge whatever facts he has in his possession.") (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (emphasis in original)).

Indeed, there is an additional basis for exploring the details of FERC's communications about this matter. Two months ago, two FERC employees, Thomas Olson and Stephen Tabackman, both of whom have worked on this case, were discovered to have unlawfully communicated about a similar case, providing written legal advice and stating, in part, "[b]ut you never heard it here". **Exhibit A**, GREENHAT ENERGY, LLC, JOHN BARTHOLOMEW, KEVIN ZIEGENHORN, & LUAN TROXEL, IN HER CAPACITY AS EX'R OF THE EST. OF ANDREW KITTELL, Notice of Communication with Decisional Staff, Docket No. IN 18-9-000 (October 1, 2021). Interestingly, Mr. Olson apparently has numerous emails with third parties referring to this case in his personal email account.

D. The Nine 30(b)(6) Topics are Relevant, Discoverable, do not Seek Mental Impressions of Counsel, and do not Create an Undue Burden on FERC

Powhatan propounded a 30(b)(6) deposition notice to FERC identifying nine specific topics. Powhatan's nine topics are described with sufficient particularly as required under the Rule and are not overly broad, making *Trustees of Bos. Univ. v. Everlight Elecs. Co.*, No. 12-CV-11935-PBS, 2014 WL 5786492, at *3 (D. Mass. Sept. 24, 2014) inapposite. *See S.E.C. v. Kovzan*, No. 11-2017-JWL, 2013 WL 653611, at *1 (D. Kan. Feb. 21, 2013) ("Despite this substantial latitude, a protective order is only warranted when the movant demonstrates that protection is necessary under a specific category set out in Rule 26(c). The party seeking a protective order bears the

burden of establishing good cause for it. (D.Kan.2010). To do this, the movant must make a particular and specific demonstration of fact, as distinguished from stereotyped and conculsory statements.) (internal quotation marks and footnotes omitted). FERC has not met this burden. *Id.* at *4 ("Finally, the SEC has noted that several of the deposition topics overlap with previous discovery requests. Again, this alone does not demonstrate that the deposition would result in an undue burden. It is not uncommon for counsel to question deponents about documents produced through discovery. In fact, "[b]y its very nature, the discovery process entails asking witnesses questions about matters that have been the subject of other discovery." For these reasons, the court denies the SEC's motion for a protective order.) (footnotes omitted). Powhatan believes the Court should evaluate each topic on its merits.

E. Specific Deposition Topics

1. Topic 1 - The Factual Allegations in FERC's Complaint.

Contrary to FERC's Memorandum, Powhatan does not seek testimony regarding "FERC's attorneys' selection of which facts to include (or not include) in a complaint, and those facts' significance to its case, represent counsel's privileged mental impressions and strategy regarding the case." Mem. at 10. Rather, it seeks the bases, support and parameters of the factual allegations. For example, FERC alleges "Defendant Chen placed manipulative round-trip trades on behalf of Defendant CU Fund every day from July 17, 2010 through July 31, 2010 (inclusive) and August 3, 2010. He placed such round-trip trades on behalf of Defendants HEEP Fund and Powhatan every day from June 1, 2010 through August 3, 2010 (inclusive)." First Am. Compl. ¶ 64. Powhatan seeks testimony for the basis that the trades were "manipulative" and "round-trip." Whether or not the trades constituted market manipulation is a crucial question in this case and Powhatan has a right to probe this factual allegation to defend itself. Similarly, Powhatan has a right to question basis the factual assertion that Dr. Chen made trades "on behalf" of Powhatan.

These questions do not request privileged information or attorney mental impressions but ask the basis for the factual allegation.

Similarly, Powhatan has a right to ask questions about allegations such as "[o]ver the course of the Manipulation Period, Defendants executed approximately 16.6 million MWh of round-trip UTC trades. This amounted to approximately 10% of all reservations to flow electricity across PJM during that time." *Id.* at ¶ 65; *id.* at ¶ 93 "Powhatan acted with scienter. The contemporaneous evidence demonstrates that it knew of Chen's round-trip trading scheme; understood the implications of that scheme; knowingly supported the implementation of that scheme; and deliberately sought to maximize the profits it derived from that scheme."; id. at ¶ 94 "Defendants understood exactly what they were doing. The Commission found that Defendants' "communications and testimony show that Respondents understood that their round-trip UTC trades had little price risk by design, were not undertaken to arbitrage price spreads, were certain themselves to lose money, and were placed only to create the illusion of volume trading to obtain transmission and thereby earn MLSA payments that otherwise would have gone to other market participants." These allegations, of course, contradict the stipulations in FERC's settlement with Mr. Chen, which state Powhatan *did not know* many facts about the trades. *Supra*. The Court should not grant a protective order to preclude questions on such factual allegations.

2. Topic 2 - FERC's Factual Understanding of Defendants' Trading that was Investigated by its Office of Enforcement, Including any Facts Indicating that Trading was Manipulative and/or Uneconomic.

An example of a permissible question under Topic 2 could be, "what is FERC's factual basis that Powhatan's trading was uneconomic?" Economics is not a legal "understanding" or legal "view" but rather it is a mathematical discipline. And math is derived from facts, which are not privileged. "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney…". *Upjohn Co.*

v. United States, 449 U.S. 383, 395 (1981). For example, if a FERC employee analyzed the trades at issue and concluded they were "wash trades" that did not have an economic benefit, those facts are not protected by privilege nor are they "mental impressions" or "legal theories" of counsel. *See E.E.O.C. v. Evans Fruit Co.*, No. CV-10-3033-LRS, 2012 WL 442025, at *1 (E.D. Wash. Feb. 10, 2012) ("Defendant should be able to clarify ambiguities related to the factual aspects of the material.").

3. **Topic 3 - All communications among FERC personnel regarding whether or not Defendants' trading was lawful.**

FERC's assertion that "whether a secretary in FERC's Portland office talked to an IT staffer about her thoughts on Powhatan's trading is of no possible import here" is hyperbolic and of no use in the analysis of its Motion. Mem. at 13. What Powhatan seeks in this Topic is plain. For example, if there is an email from person X to person Y discussing Powhatan's trading, questions on that email that would be appropriate. Powhatan's counsel will not ask inappropriate questions requiring the witness to identify every oral communication regarding Powhatan's trading. Again, given the *Greenhat* misconduct, this topic is even more important.

4. **Topic 4 - All Facts Indicating that Defendants' Trading Constituted Market Manipulation.**

While "market manipulation" is a defined term in both the United States Code and Code of Federal Regulations, that fact does not preclude a non-attorney testifying regarding the conduct Powhatan is alleged to have engaged in and why that conduct manipulated the market. FERC cannot hide behind defined terms of art and state it is impossible for a non-lawyer to testify about such issues. As noted above, someone with credentials like Jane Burdick could testify about (1) the allegations and (2) how and why the allegations manipulated the market. A non-attorney can testify whether or not the trades had "economic risk", or if trading A → B, and B → A were

offsetting trades of the same product. Topic 4 does not request privileged information, it is not an undue burden, and FERC should be required to present a witness on these questions.

5. **Topic 5 - The Origin and Evolution of Up-to-Congestion Trading, Marginal Loss Surplus Allocation, and the Interplay Between the Two in PJM. This Would Include FERC's Understanding and Consideration of the Incentives Created by the Payment of MLSA to PJM Market Participants.**

FERC alleges Powhatan was responsible for Alan Chen's Up-to-Congestion trading to improperly obtain only Marginal Loss Surplus Allocation. Powhatan has a right to understand the details of these allegations and why what it did led to a penalty and a civil lawsuit. It is no response that Powhatan intends to take depositions of PJM staff. The Rules do not provide that because FERC turned over documents and Powhatan is taking other depositions, Powhatan is precluded from taking the deposition of the other party directly adverse to it. Again, if this was the Rule, there would never be any 30(b)(6) depositions. FERC admits as much, writing "any facts in FERC's possession were gathered from third parties and have been produced to Powhatan on multiple occasions." That may be true, but that does not mean FERC is allowed to dodge deposition questions such as how did you gather these facts from third-parties? *See Little*, 2010 WL 582083, *2 ("The fact that the EEOC has turned over its complete administrative file does not relieve the Agency of its obligation under Fed. R. Civ. P. 30(b)(6) to provide a witness to answer questions about the documents for purposes of clarification and interpretation.") (quoting *Sterling Jewelers Inc.*, 2010 WL 2803017, at *3).

6. **Topic 6 - 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.**

As to basis to avoid testimony on this topic, FERC advances that it "is an agency of 1,500 employees, and there would be no way for a 30(b)(6) deponent to interview and accurately recall

and recite the non-written communications of even a fraction of those employees."[3] Mem. at 17. Counsel for Powhatan would never ask such a question because it is illogical. However, what Powhatan would like to do is make sure it knows the universe of such communications to be used in this litigation and to show documents to a witness and ask about those communications. Such questions are relevant, discoverable, and not an undue burden. Such questions are also not privileged as they seek information regarding communications with third-parties. FERC's assertion that "[n]o non-privileged factual information exists that is proper testimony for a FERC 30(b)(6) deponent beyond what is contained in the produced communications themselves" defies common sense. *Id.* As a simple example, the question "why did you request this information from PJM" is not privileged and is beyond the produced communications but relevant, discoverable, and an appropriate deposition question.

7. **Topic 7 - FERC's Understanding and View of the Extent to which Market Participants may and/or do take MLSA into Account when Making Trading Decisions and Concomitant Notice Provided to Market Participants, including Notice Provided to Market Participants Regarding the "Sole or Primary Purpose" Standard Articulated in the *FERC v. Coaltrain Energy, L.P., et al.*, No. 2:16-cv-00732 (S.D. Ohio) ("*Coaltrain*") litigation.**

As noted above, FERC has approximately 1,500 employees, and they are not all lawyers. FERC can put forward an analyst or economist to testify regarding MLSA and trading activity without intruding on privilege issues. The question does not ask for counsel's "mental impressions and strategy decisions" or "why the lawyers put together the case the way they put it [together] and why they're relying on [certain facts]"). Rather, it asks for a basic understanding of FERC's position regarding how traders can make trades and any notice they may have received regarding the legality of their trades. It does not ask how FERC's counsel put this case together.

[3] It is difficult to believe that 1,500 FERC employees worked on this matter and again this is hyperbolic.

8. **Topic 8 - How UTC Trading by other Market Participants Identified in PJM's August 16, 2010 Referral and/or the IMM's January 6, 2011 Referral Compares to Defendants' UTC trading, and FERC's Understanding and View of the Propriety or Impropriety of that other UTC trading.**

Again, FERC assets a blanket privilege objection which is not the required "good cause" to grant a protective order. Powhatan can ask about two specific documents; it is not an undue burden to prepare a witness on two documents. Comparing another company's trading to Powhatan's trading does not on its face intrude into privilege issues or prosecutorial discretion. FERC's Motion makes it clear where its concerns lie and counsel for Powhatan can heed those concerns and not venture into questionable territory. In addition, there were dozens of energy market participants that engaged in trading similar to that at issue in this case during the same time frame. FERC only investigated and pursued a handful of those participants. Powhatan is entitled to deposition testimony relevant to these factual issues.

9. **Topic 9 - FERC Staff's Meetings and Communications with PJM and IMM officials, Including but not Limited to (1) the November 4, 2010 Meeting with Joseph Bowring, (2) the August 28, 2015 Meeting with PJM officials, and 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.**

FERC again attempts to hide behind the auspices of privilege but its argument is unavailing. For example, the attendees at the two meetings in question are not privileged material; they are simply facts. FERC argues throughout its Motion that it has produced documents and therefore any deposition would be duplicative. But in response to this Topic, it notes there may be documents that have not been produced (or ostensibly placed on a privilege log). This is why FERC cannot hide behind a blank assertion of privilege; each document or question must be assessed independently to see if a privilege applies. And it does not here, as the presence of third-parties destroys any privilege beyond attorney notes. For example, PowerPoint slide shows, excel

charts, or other documents regarding this Civil Action cannot be privileged due to the presence of PJM and IMM employees.

III. CONCLUSION

FERC has not provided the requisite "good cause" for a protective order under Rule 26(c). This case is different than *Clark*, and Powhatan should be allowed to probe the facts FERC obtained from PJM and IMM and third-party communications.

WHEREFORE, Defendant Powhatan Energy Fund, LLC respectfully requests this Court deny FERC's Motion for a Protective Order, and grant such further relief as may be just and proper.

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Dated: November 19, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2021, I filed the foregoing with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to counsel of record in this matter.

/s/ Jeffrey Brundage
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EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

GreenHat Energy, LLC, John Bartholomew, Kevin Ziegenhorn, and Luan Troxel, in her capacity as Executor of the Estate of Andrew Kittell

Docket No. IN18-9-000

NOTICE RE COMMUNICATION WITH DECISIONAL STAFF

On Friday evening, September 17, 2021, and Saturday morning, September 18, 2021, an attorney with the Division of Investigations of the Office of Enforcement (DOI), who serves as decisional staff in the *GreenHat* proceeding, sent three emails to a DOI attorney who is part of the litigation staff in the proceeding. After receiving the third email from the decisional staff attorney, which referred to his work as part of the decisional team, the litigation staff member realized that these emails constituted a violation of the Commission's separation of functions regulation, 18 C.F.R. § 385.2202. The litigation staff member did not respond further, and he reported the email exchange to management of the Office of Enforcement. The emails are disclosed with partial redaction of personal email addresses and are attached hereto as Exhibit 1.

Respectfully submitted,

JANEL BURDICK
Director
Office of Enforcement

GEO. F. HOBDAY, JR.
Director
Division of Investigations

JEREMY MEDOVOY
Deputy Director
Division of Investigations

KATHERINE WALSH
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DATED: October 1, 2021

Gmail

Are you familiar with this

5 messages

Steven Tabackman <[redacted]@gmail.com> Fri, Sep 17, 2021 at 6:17 PM
To: Thomas Olson <[redacted]@gmail.com>

2 attachments

US v Summerlin.doc
252K

Marshall v Marshall.rtf
3674K

Thomas Olson <[redacted]@gmail.com> Fri, Sep 17, 2021 at 6:37 PM
To: Steven Tabackman <[redacted]@gmail.com>

no...thanks for the cases. Are you thinking about GreenHat, or something else?also,

how are you?!

On Fri, Sep 17, 2021 at 6:17 PM Steven Tabackman <[redacted]@gmail.com> wrote:

Steven Tabackman <[redacted]@gmail.com> Fri, Sep 17, 2021 at 10:39 PM
To: Thomas Olson <[redacted]@gmail.com>

I am fine. Feeling swamped. Wishing I were smarter/quicker. Hope you are well
I had thought you didn't know about Sumerlin because the SOL analysis I have seen (in the Staff Report and in what Janel filed the other day did not reflect awareness of Sumerlin.
And then I thought maybe you were thinking that the "probate exception" to federal jurisdiction might get in the way of giving time to file. But Marshall takes care of that.

Yes- you should be familiar with them -- though you should not mention how you came upon them. Sumerlin says that ewhere federal rights are involved, the federal statute of limitations controls, not the state. Full stop.
And Marshall simply says that the "probate exception" to federal court jurisdiction doesn't mean that the federal court can't decide a dispute between a federal entity's claim to money in probate -- all it means is that you have the federal claim litigated in federal court and then you take your judgment (if you win, of course) and the probate court has to honor the federal judgment.
The more important point is the Sumerlin one -- and its significance is that it means that so long as you have an OAP by 60 days before January 6, they have nothing to argue about on timing because you will have met the 1 year CA statute and the 60 days they get under the FPA. But actually you actually have longer than that -- because when the amount of the claim is undetermined when you first file it, because it is a federal claim, the clock doesn't start until the amount being claimed is determined , i.e., when the OAP is issued -- at which time, you have 5 years to file.
But in any event, so long as you have an OAP by 60 days before the "1-yr from death" CA SOL, you've met the CA statute as well.
But you never heard that here
[Quoted text hidden]

Thomas Olson <[redacted]@gmail.com> Fri, Sep 17, 2021 at 10:44 PM
To: Steven Tabackman <[redacted]@gmail.com>

got it....very helpful.

it's actually pretty easy for us to satisfy the CA SOL so we will probably not need to litigate this....but glad to know we have this backstop
[Quoted text hidden]

Steven Tabackman <[redacted]@gmail.com> Sat, Sep 18, 2021 at 10:11 AM
To: Thomas Olson <[redacted]@gmail.com>

Yes. I learned all this when there was greater concern about the fire drill on getting the OAP
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Steve Tabackman

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