

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF VIRGINIA
3 RICHMOND DIVISION

4 FEDERAL ENERGY REGULATORY)
5 COMMISSION)

6 v.)

7 POWHATAN ENERGY FUND, LLC)
8 et al.)

Civil Action No.:
3:15 CV 452

January 31, 2022

9 COMPLETE TRANSCRIPT OF MOTIONS HEARING
10 BEFORE MAGISTRATE JUDGE MARK R. COLOMBELL
11 UNITED STATES MAGISTRATE JUDGE

12 APPEARANCES:

13 Joshua T. Ferrentino, Esquire
14 Kevin M. Dinan, Esquire
15 FEDERAL ENERGY REGULATORY COMMISSION
16 OFFICE OF ENFORCEMENT
17 888 First Street, Northeast
18 Suite 5j-03
19 Washington, DC 20426

Counsel on behalf of the Petitioner

20 Christopher L. Perkins, Esquire
21 ECKERT SEAMANS CHERIN & MELLOTT, LLC
22 919 East Main Street
23 Suite 1300
24 Richmond, Virginia 23219

and

25 Jeffrey P. Brundage, Esquire
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1717 Pennsylvania Avenue NW, 12th Floor
Washington, DC 20006

Counsel on behalf of the Respondent

TRACY J. STROH, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

1 (The proceeding commenced at 9:36 a.m.)

2 THE COURT: Good morning, everyone.

3 Madam clerk, will you please call our next
4 matter?

5 THE CLERK: Yes, sir.

6 In the matter of Civil Case 15 CV 452, *Federal*
7 *Energy Regulatory Commission v. Powhatan Energy Fund, LLC.*

8 The petitioner is represented by Joshua
9 Ferrentino and Kevin Dinan. The respondent is represented
10 by Jeffrey Brundage and Christopher Perkins.

11 Counsel, are you ready to proceed?

12 MR. FERRENTINO: Yes, Your Honor.

13 MR. BRUNDAGE: Yes, Your Honor.

14 THE COURT: Good morning, everyone. We're here
15 on FERC's motion for a protective order stemming from
16 Powhatan's subpoena to Google seeking metadata for
17 personal accounts of Attorneys Steve Tabackman and Thomas
18 Olson.

19 The Court has reviewed the briefing from the
20 parties, including FERC's memorandum in support,
21 Powhatan's response, and then FERC filed a reply brief,
22 and we're here this morning for oral argument.

23 I'd like to hear from both sides, but to frame
24 the issues, really, I think as an initial matter, the
25 Court needs to determine whether the information sought

1 falls under Rule 26(b), of course, which is that parties
2 may obtain discovery regarding any nonprivileged matter
3 that is relevant to any party's claim or defense in
4 proportional to the needs of the case. The focus I
5 believe for the Court today would be whether Powhatan is
6 seeking nonprivileged matter that is relevant to FERC's
7 claims or Powhatan's defenses.

8 Powhatan mentions in its brief -- and I'd like
9 to hear from both sides on this -- that it believes the
10 information sought may be relevant to its affirmative
11 defenses of unclean hands and inequitable conduct. That's
12 where I believe, really, this issue turns on, and also,
13 whether the conduct which has been brought to the Court's
14 attention regarding the exchange of information between
15 Mr. Tabackman and Mr. Olson in an unrelated matter,
16 whether the same conduct exists in the present case where
17 it appears to the Court at least that Mr. Tabackman and
18 Mr. Olson may be on the same side of that separation of
19 wall function. So I'd like to hear from the parties on
20 that issue as well.

21 So let me hear from FERC first this morning
22 after the Court, I believe, has kind of framed the issues
23 for the parties.

24 MR. FERRENTINO: Your Honor, may it please the
25 Court. Joshua Ferrentino for FERC.

1 THE COURT: Good morning, Mr. Ferrentino.

2 MR. FERRENTINO: Good morning.

3 I think Your Honor has focused on the key issues
4 here. The first is, of course, what the relevance of FERC
5 attorneys' personal e-mail could possibly be in a case
6 like this, and according to Powhatan, at least according
7 to Powhatan's Twitter account, they view this as an
8 investigation into prosecutorial misconduct. But the fact
9 of the matter is there's no evidence of prosecutorial
10 misconduct in this case that would allow them to make a
11 threshold showing that they should be allowed discovery
12 into personal e-mails of two FERC attorneys.

13 I think it would be useful to walk through the
14 exhibit that has been attached to FERC's motion as
15 Exhibit D, the e-mails between Mr. Tabackman and
16 Mr. Olson. I have a copy here, Your Honor, if you need
17 it, but it is attached to our papers.

18 THE COURT: I have a copy.

19 MR. FERRENTINO: And, Your Honor, I just want to
20 emphasize, this e-mail exchange between Mr. Tabackman and
21 Mr. Olson has nothing to do with Powhatan's case. It
22 doesn't mention Powhatan's case, not even in passing.
23 This is a totally unrelated case that's pending -- or was
24 pending before the Commission at this time, and it has
25 nothing to do with Powhatan at all. It's 11 years after

1 the alleged conduct in this case. It involves a
2 discussion about a legal issue that has nothing to do with
3 this case.

4 And as I think Your Honor has suggested, this
5 kind of exchange, which is a problematic exchange under
6 Commission rules involving the separation of functions,
7 could not have happened in this case between Mr. Tabackman
8 and Mr. Olson because they were always on the same side of
9 the Commission's ethical wall. That's established under
10 the Commission's regulations. And that rule makes great
11 sense.

12 Mr. Tabackman was on the -- what's called the
13 decisional team in this matter, in the *Greenhat* matter.
14 And under the Commission's rules, members of the
15 decisional team are not permitted to have substantive
16 contact about the case with members of the prosecution
17 team, if you will. And Mr. Tabackman stepped over the
18 line in this case, in the *Greenhat* case, and that matter
19 was -- when it occurred, was disclosed to the Commission
20 and to the litigants in the *Greenhat* case.

21 There is absolutely no evidence that's been
22 advanced here that a similar violation occurred. And
23 indeed, it's impossible to have had a similar problem as
24 between Mr. Tabackman and Mr. Olson in this case because
25 they were always on the prosecution side of the house.

1 THE COURT: Well, let me preface this question
2 with what I believe is being alleged here is -- I guess
3 how do I put this?

4 I believe what is being levied is a very serious
5 accusation, quite frankly. I think it is a very serious
6 accusation to make against two attorneys, who are officers
7 of the court, understanding that we have a situation in an
8 unrelated matter.

9 But that being said, I anticipate Powhatan's
10 response to your comments about there being no evidence or
11 suggestion of misconduct in this case, their response is
12 going to be, "Well, that's easy for FERC to say. They're
13 in possession of all the information and we're simply
14 trying to corroborate it." So that's going to be -- if
15 I'm anticipating where they are going to go, that's going
16 to be their response, right, is that, "Well, we went one
17 direction, which was to attempt to depose these two
18 gentlemen. They searched their e-mails. They themselves
19 made the decisions on what was relevant and they redacted
20 information that they thought was appropriate to redact.
21 How are we supposed to simply rely on that?"

22 So, you know, could you address that?

23 MR. FERRENTINO: Sure.

24 THE COURT: And, again -- and this is directed
25 directly to Powhatan. The Court takes the suggestion of

1 prosecutorial misconduct and attorney misconduct extremely
2 seriously, and I don't think it is something that should
3 be lightly raised, suggesting attorneys -- especially when
4 we have representations on the record already that FERC
5 has produced everything in its investigative file to
6 Powhatan. Everything that it intends to rely on at trial
7 has been produced. So we're wading into, I would say,
8 some very dark waters if Powhatan agrees to go -- it wants
9 to continue to push and go down this route because, again,
10 the Court does not take these allegations lightly.

11 So with that, how is FERC -- what, you know,
12 comfort can Powhatan take that FERC has done everything
13 it's supposed to do here in responding to discovery?

14 MR. FERRENTINO: Your Honor, there are a couple
15 things I want to say. The first is I know that Powhatan
16 has suggested that there's some sort of grand conspiracy
17 between these two gentlemen, and I think Exhibit D, the
18 actual e-mail exchange, which was disclosed to the
19 Commission by Mr. Olson, disproves that idea pretty
20 conclusively.

21 The idea is that Mr. Olson and Mr. Tabackman
22 have been in some sort of ongoing ethical violation
23 conspiracy for many years and then suddenly Mr. Tabackman
24 discloses the conspiracy and comes clean with the
25 Commission. That's ridiculous. I think the fair reading

1 of what happened here is that Mr. Olson realized there was
2 a problem and disclosed it. That's not the kind of
3 context that suggests there's going to be a bigger piece
4 of the iceberg under the water here.

5 Additionally, FERC has done a number of things
6 to do its due diligence to reassure itself and to reassure
7 Powhatan that there's not a deeper problem. In
8 particular, we have -- and I think this is laid out
9 extensively in our brief. It's not true that we simply
10 took the attorneys' words for what happened. There were
11 searches done in the presence of other FERC attorneys to
12 examine the personal e-mails of Mr. Tabackman and
13 Mr. Olson, to review e-mails that were in their personal
14 e-mail that hit on particular search terms that were
15 disclosed to Powhatan.

16 And, of course, Powhatan has been able to view
17 several e-mails that came from Mr. Olson's account that
18 hit on search terms. It's true that they were redacted,
19 but FERC has every confidence that those redactions were
20 appropriate, and I don't think Powhatan is going to be
21 able to stand up and say, "Well, we think there's
22 something in those e-mails that was critical to Powhatan's
23 case or relevant to Powhatan's case in any way that was --
24 that was taken out." These are personal e-mails of
25 Mr. Olson where he may have commented in passing,

1 essentially, on a case that he was involved in, but they
2 are far, far afield from anything that would be considered
3 admissible evidence in a trial in this case, which will
4 not be focused on issues of so-called bias among the
5 prosecutors. They haven't --

6 THE COURT: Well, Rule 26 -- doesn't Rule 26
7 specifically set forth that a document does not need to be
8 admissible in order to be discoverable?

9 MR. FERRENTINO: Your Honor, I fully understand
10 that, and I'm not saying otherwise. But what I'm saying
11 is that it's not at all clear what -- under what theory
12 the information that Powhatan might discover as part of --

13 THE COURT: Well, that's going to segue, I
14 think, right into our next discussion. And I want to get
15 there, but before doing so, I'd like the parties to
16 clarify on the record. Powhatan had represented, in its
17 brief -- or excuse me. FERC has represented in its brief
18 that it has, quote, already shown Powhatan's counsel
19 copies of any e-mails contained in Mr. Olson and
20 Mr. Tabackman's personal, nonwork e-mail accounts, meeting
21 the parties' agreed search criteria. That's on page 12 of
22 FERC's memorandum in support.

23 In response, Powhatan states, "No e-mails from
24 Mr. Tabackman were made available."

25 MR. FERRENTINO: I believe, Your Honor, that's

1 because none hit on the search terms that were agreed.

2 THE COURT: So only Mr. Olson's e-mails hit on
3 the search terms?

4 MR. FERRENTINO: That's my understanding.

5 THE COURT: And they have only been provided --
6 Powhatan has only been provided these redacted versions of
7 Mr. Olson's e-mails; is that correct?

8 MR. FERRENTINO: That's correct, Your Honor.

9 THE COURT: Okay. All right. Well, then let's
10 segue into our next discussion about what information --
11 and this is obviously going to be a question for Powhatan
12 too, what information are they actually seeking?

13 I don't know if we all agree that Mr. Tabackman
14 and Mr. Olson, in this particular matter, are on the same
15 side of the separation of wall function in this particular
16 matter where they're both on the prosecutorial team,
17 basically, but the question I will have for both sides is
18 whether the affirmative defense of unclean hands can be
19 invoked against a governmental agency acting in the public
20 interest.

21 MR. FERRENTINO: And, Your Honor, our answer, of
22 course, is that it cannot. I think the law is clear on
23 that, and I think we cite cases to that effect in our
24 briefing.

25 May I say something else, which is I think the

1 kind of evidence that would be received in response to a
2 Google subpoena would essentially be the metadata from the
3 communications, if any, between Mr. Tabackman and
4 Mr. Olson, and that's essentially the, you know, date,
5 time, to, from, et cetera.

6 It's not clear that that's going to prove
7 anything at all that relates to this case. The fact that
8 they communicated by itself would not necessarily be
9 relevant to any issue. Their communications -- just
10 sitting out there in the ether without any subject matter
11 information, it doesn't -- it doesn't shed light on
12 anything of relevance to this case.

13 THE COURT: So it's FERC's position that the
14 metadata -- or seeking to obtain the metadata is simply
15 just step one in a follow-up attempt to get additional
16 documents. They're going to try and say, "Well, it showed
17 frequency or it showed that they're communicating after
18 hours or, you know, that's" --

19 MR. FERRENTINO: Right. And, Your Honor, I
20 don't think you could presume that any communication
21 between these two gentlemen, who worked in the same office
22 for more than a decade --

23 THE COURT: Is untoward for any reason.

24 MR. FERRENTINO: -- is untoward. Exactly. It
25 would be perfectly appropriate for them to communicate

1 over Gmail.

2 THE COURT: And certainly there's no waiver of
3 privilege just because they --

4 MR. FERRENTINO: Correct.

5 THE COURT: -- communicate using --

6 MR. FERRENTINO: Correct.

7 THE COURT: -- personal accounts or personal
8 devices.

9 MR. FERRENTINO: That's accurate. And, you
10 know, there may be other issues that don't relate to this
11 case about employees using their Gmail to conduct
12 government business, but that's neither here nor there.
13 There's no waiver of privilege, as Your Honor has pointed
14 out.

15 And, of course, if it is a purely personal
16 communication, that has nothing to do with this case. So
17 it's a conundrum for Powhatan to say, "We ought to be able
18 to examine this information" when it's either not relevant
19 or it's privileged.

20 THE COURT: I can't anticipate that whatever
21 communications that happened between Mr. Tabackman and
22 Mr. Olson, in this particular matter, were voluminous. I
23 mean, maybe dozens of e-mails? I'm just --

24 MR. FERRENTINO: Are you referring to e-mails on
25 FERC's servers or --

1 THE COURT: E-mails in general between these two
2 gentlemen related to the Powhatan matter. I just -- what
3 would be FERC's position about an in-camera review?

4 Because obviously, one of the Court's main roles here is
5 to assure due process here to make sure that everybody --

6 MR. FERRENTINO: Sure.

7 THE COURT: And would an in-camera review
8 provide FERC any -- you know, it would provide, obviously,
9 Powhatan some -- some answers as to --

10 MR. FERRENTINO: Your Honor --

11 THE COURT: -- as to whether it's been fully
12 responsive in your meet-and-confer attempt.

13 MR. FERRENTINO: Certainly, Your Honor, we would
14 prefer an in-camera review to allowing the subpoena to
15 proceed or being asked to turn over the information
16 wholesale.

17 I believe that I can represent that there are no
18 communications about this case between Mr. Olson and
19 Mr. Tabackman that we're aware of based on the search of
20 personal e-mails. There are other communications between
21 them.

22 THE COURT: On work e-mail?

23 MR. FERRENTINO: Well --

24 THE COURT: Or just --

25 MR. FERRENTINO: On personal e-mail.

1 THE COURT: Yeah. Like "what are you doing for
2 lunch today" emails?

3 MR. FERRENTINO: Personal e-mails, right.

4 THE COURT: Yeah. Okay.

5 MR. FERRENTINO: And certainly they would have,
6 during the time that they were working together at FERC on
7 this case, communicated on FERC's e-mail.

8 THE COURT: Okay.

9 MR. FERRENTINO: But that's all privileged.

10 THE COURT: And I'm not trying to jump you, but
11 Powhatan would concede that any e-mails on FERC's server
12 on work e-mails are untouchable, correct?

13 MR. BRUNDAGE: Good morning, Your Honor.

14 THE COURT: Good morning. And I'm kind of going
15 back and forth here, but there has been no request for
16 FERC-related e-mails -- or for e-mails on FERC's server on
17 specific work e-mails, and you guys -- and Powhatan would
18 concede that it would be inappropriate to obtain these
19 e-mails, correct?

20 MR. BRUNDAGE: Yes, Your Honor.

21 THE COURT: Okay. Well, again, this may be an
22 oral argument where we kind of maybe go back and forth
23 depending on the issues raised, but let's jump right into
24 it. Does Powhatan have any authority to demonstrate that
25 unclean hands is an affirmative defense that can be raised

1 against a governmental agency in this setting?

2 MR. BRUNDAGE: Your Honor, the phrase unclean
3 hands -- I believe counsel correctly identified -- is not
4 applicable. However, I think inequitable conduct -- and
5 that specifically means bias and vindictiveness -- that
6 could be an argument made to the jury.

7 THE COURT: Okay. But, I mean, bias -- we're
8 talking specifically about affirmative defenses. Bias can
9 be argued in any case to show -- to show motive, but, you
10 know, in terms of an affirmative defense, that puts the
11 burden on Powhatan.

12 What affirmative defenses -- because, again, I'm
13 focusing on 26(b) that you guys can obtain discovery
14 regarding any nonprivileged matter that is relevant to
15 FERC's claims or Powhatan's defenses. Specifically, what
16 defenses is this relevant to?

17 MR. BRUNDAGE: The 15th affirmative defense that
18 the Court has mentioned, the claims by FERC are barred by
19 inequitable conduct.

20 THE COURT: Okay. And so what authority do you
21 have or can you make me aware of that e-mails between two
22 attorneys could bar a governmental investigation in an
23 enforcement action like this?

24 MR. BRUNDAGE: Yes, Your Honor. In the *Greenhat*
25 matter earlier this month, January 5, the decision was

1 made by the Office of the Inspector General, in a 2 to 1
2 vote, with one dissent, to take no further action in the
3 matter. In the dissent, the dissenting commissioner
4 discusses dismissal of the action based on the violation
5 of the CFR provision.

6 So while that was relegated to the separation of
7 walls function, it's analogous. If the misconduct in
8 *Greenhat* can be brought forth in this case -- and I'm
9 talking about separate and apart from the separation of
10 walls -- we will concede that is not an issue here.

11 THE COURT: Then what prosecutorial
12 misconduct -- when Powhatan has representations on the
13 record that FERC has produced everything in its
14 investigative file and that everything that it intends to
15 rely on at trial has been produced to Powhatan, what type
16 of prosecutorial misconduct is Powhatan hinting at?

17 MR. BRUNDAGE: The conduct in *Greenhat*,
18 Your Honor. And --

19 THE COURT: Well, we just established that
20 that's impossible in this case because the conduct in
21 *Greenhat* is a separation of functions misconduct, correct?
22 You had two people, one on the prosecutorial side, one on
23 the other side, having conversations about case law
24 regarding the statute of limitations. That was the issue
25 in *Greenhat*, right?

1 MR. BRUNDAGE: That was one of the issues. But
2 I would submit to the Court there were other issues. One,
3 the cover-up, two-fold. One using personal e-mail. Two,
4 the explicit phrases used in *Greenhat*: Quote, you should
5 not mention how you came upon, closed quote, this case
6 law. Quote, you never heard that here, closed quote.

7 THE COURT: And can't we infer from those
8 statements that this is because of the separation of
9 functions issue in *Greenhat*? But if these two gentlemen
10 are both on the prosecutorial team, can't they e-mail all
11 day long about the case? You know, we're going to the
12 courthouse today. Where are you parking? Did you bring
13 the exhibit binders, you know?

14 And whether they send those on their work e-mail
15 or their personal e-mails, you know, while it may be
16 ill-advised to send those on their personal e-mails, I
17 guess what type of information do you think that you're
18 going to uncover that would rise to the level of a
19 separation of function? Bias? Is that the answer?

20 MR. BRUNDAGE: Can I provide the Court an
21 example?

22 THE COURT: Sure. Of course.

23 MR. BRUNDAGE: Let's assume the subpoena is
24 allowed and Google responds, and these two gentlemen are
25 e-mailing approximately ten times a month. Then they get

1 notice for deposition, and then within 4 or 5 days, they
2 exchange 200 e-mails. That's going to raise some eyebrows
3 and that's going to necessitate a conversation with FERC
4 about what they're doing on their nonwork e-mail after
5 they got notice of a deposition. And there's already a
6 pattern of misconduct, albeit a different form -- the
7 separation of functions -- that quantity and that increase
8 in frequency would necessitate a discussion with FERC.

9 And I'd like, Your Honor, to quote from the
10 dissent in the *Greenhat* decision. And this, again, is
11 earlier this month, January 5. This is the dissenting
12 commissioner. Quote, we can safely expect that no
13 production of e-mails between any two lawyers on an
14 enforcement matter could be considered complete without
15 productions from their private e-mail accounts, closed
16 quote.

17 That commissioner wanted the investigation to go
18 forward, and he was dissenting and upset that the two
19 other commissioners basically brushed aside the conduct
20 and said no harm, no foul, move on.

21 THE COURT: So I guess what I'm struggling with
22 is the wrongful conduct in -- well, I don't want to put
23 anything on the record that suggests -- but the conduct in
24 *Greenhat* was defined. It was a separation of functions
25 issue.

1 What type of conduct, for two people on the
2 prosecutorial team, is Powhatan suggesting occurred here
3 that would be admissible or relevant to a claim or defense
4 here if they're both on the prosecutorial team?

5 Hypothetically speaking -- and I would hate to
6 think this would be the case, but if two prosecutors
7 prosecuting someone exchanged an e-mail that said, "You
8 know, we need to work on this memo over the weekend and
9 boy, you know, the defendant didn't look good today at
10 that hearing or didn't come across well," and they were
11 just kind of giving their impressions, or, you know, "he's
12 really a slimeball," right, that may go to show that, you
13 know, they're exchanging some thoughts about the case, but
14 those are two folks on the prosecutorial team exchanging
15 information about a case they're both working on. That
16 would never be discoverable, correct?

17 MR. BRUNDAGE: I'm not sure that would never be
18 discoverable, Your Honor.

19 THE COURT: Well, why would that be
20 discoverable?

21 MR. BRUNDAGE: Well, it depends how far down
22 that rope you want to go. Slimeball, sure. But you can
23 go real far down that wormhole -- and I don't want to
24 impute or speculate as to what was said between these two
25 gentlemen, but the *Greenhat* situation was serious. There

1 was -- there was an investigation and a report was issued,
2 and the fact that that occurred four months ago and that
3 was right around the time they were noticed for
4 deposition. It's not like this is out of nowhere. I
5 would have never signed that subpoena without that
6 *Greenhat* situation.

7 THE COURT: Well, and I would go so far as to
8 say that if we had the same situation here that we have in
9 *Greenhat* with Mr. Tabackman and Mr. Olson on different
10 sides of the wall, then we may be having a different
11 argument here today, but we have them on the same side of
12 the wall.

13 So I'm trying to figure out what conduct is
14 specifically being alleged that -- and maybe the answer is
15 Powhatan needs to find out or Powhatan doesn't know, but I
16 just don't know what conduct is specifically being
17 alleged. Because Powhatan, in its response, indicates
18 that it -- you know, that the Twitter -- that Powhatan's
19 Twitter feed is irrelevant as to this discovery dispute.
20 Powhatan's Twitter posts are immaterial to whether or not
21 the subpoena seeks relevant information, unquote.

22 But when I have a Twitter feed that has a poll
23 asking how many of Mr. Tabackman's e-mails are going to be
24 bad e-mails, certainly you can understand how FERC
25 believes that -- and I'm looking at it here, "How many bad

1 e-mails do you think Tabackman sent? Just the 2, 3 to 10,
2 11 to 100 or 100 plus?" And that's sent in November of
3 2021. Isn't that not suggesting that the real reason for
4 this discovery is for purposes of harassment or
5 embarrassment?

6 MR. BRUNDAGE: Your Honor, while the Twitter
7 post may be ill-advised, this case has a protective order,
8 and despite all the social media citations from FERC,
9 there's no allegation the protective order has ever been
10 violated by Powhatan. Thus, the production could be
11 labeled confidential and they would never see social
12 media.

13 THE COURT: Well, one of the benefits of the
14 position we're in here is that Judge Lauck will ultimately
15 be trying this case and I will not be making any decisions
16 in this case that are dispositive.

17 What would be Powhatan's position about an
18 in-camera review of the e-mails from Mr. Olson and
19 Mr. Tabackman's Gmail account? I can't imagine they're
20 that voluminous. I would assume most e-mails were on
21 their work server, but what would Powhatan's position be
22 in regards to an in-camera review? Or, you know, I'll
23 hear from the parties about whether they believe the
24 appointment of a special master would be appropriate. But
25 with the appointment of a special master, then essentially

1 the Court is going to require one side or the other to pay
2 for that special master for a review of these records.

3 MR. BRUNDAGE: Your Honor, Powhatan's position
4 is supportive of an in-camera review, and I'd want to add
5 that hopefully the metadata is minimal and this matter can
6 be put to bed.

7 THE COURT: I guess let me clarify. For
8 purposes of an in-camera review, you're talking about
9 in-camera review of the metadata, basically allowing this
10 subpoena to go forward. What -- I was considering an
11 in-camera review of the unredacted e-mails produced by
12 Olson and Tabackman on agreed search terms, correct,
13 between the parties?

14 MR. BRUNDAGE: That's my understanding, yes.

15 One issue, Your Honor, is, yes, the search was
16 done on agreed search terms, but that doesn't necessarily
17 encompass every communication or every possible relevant
18 e-mail that these individuals have exchanged. Search
19 terms are helpful, but they're only so helpful. Like I
20 said a moment ago, hopefully we get the metadata and this
21 issue can be put to bed and we can all move on, but we are
22 entitled to go down that road.

23 THE COURT: What exactly is the metadata going
24 to tell you other than how frequently they communicated?

25 MR. BRUNDAGE: It is limited in its purpose and

1 its usefulness, but again, I go back to the deposition
2 example. If they're e-mailing 10 times a month and they
3 receive word that they have been noticed for deposition
4 and all of a sudden they're e-mailing 250 times, that's
5 going to give pause to Powhatan and that's going to have
6 a -- necessitate a discussion with FERC.

7 THE COURT: Okay. And -- just so I'm clear,
8 what prosecutorial misconduct is Powhatan suggesting
9 happened in this case that would allow it to pursue this
10 information?

11 MR. BRUNDAGE: Your Honor, I took what you said
12 at the beginning of this hearing very seriously. I raised
13 my hand down the street, stood up and took the oath before
14 the Supreme Court when I was sworn in. I took another
15 oath before Judge Brinkema in Alexandria. There is no
16 such allegation. There's no allegation of misconduct, of
17 perjury, of anything of that nature.

18 Powhatan is doing its due diligence and
19 investigating what it can. If we can't get the contents,
20 fine. Let's take a look at the metadata and hopefully
21 that's the last time we have to hear about this issue, but
22 maybe not. Maybe, again, with the deposition example.

23 THE COURT: Well, what is -- I guess what is the
24 can of worms that the Court would be opening up if it
25 permitted the discovery into attorneys' metadata on their

1 personal e-mail account without an allegation of
2 misconduct?

3 MR. BRUNDAGE: I don't think the Court is
4 opening a can of worms.

5 THE COURT: Well, what would prevent every
6 person that FERC investigates or every company from FERC
7 investigating from subpoenaing metadata from the personal
8 e-mail accounts of FERC attorneys without -- without an
9 allegation of misconduct? Couldn't every defendant in a
10 FERC civil enforcement action from this point forward say,
11 "You know, I want to know how often these FERC attorneys
12 are communicating on their Gmail accounts"?

13 MR. BRUNDAGE: I think it's a little different
14 in this case. Your point is well-taken. I think it's
15 different in this case --

16 THE COURT: Why?

17 MR. BRUNDAGE: -- due to the timing of the
18 *Greenhat* communications is right around the time that the
19 individuals were noticed for deposition.

20 Mr. -- and I'm sure counsel will correct me if
21 I'm misspeaking. Mr. Tabackman was counsel of record in
22 this case. Mr. Olson also was involved in the case. And
23 to be clear, this is not an all e-mail metadata-type
24 request. It's just between the two individuals.

25 THE COURT: In your brief, Powhatan states that

1 it's seeking information to obtain further detail
2 regarding the scope and nature of FERC's staff personal
3 e-mails about this case. And that is in Powhatan's brief.
4 That's quoting Powhatan's brief on page 10. Isn't that
5 statement, in itself, the very definition of work product?

6 MR. BRUNDAGE: Not every e-mail between two
7 attorneys is privileged. There's no presumption of
8 privilege, and FERC relies on this blanket assertion
9 argument that every e-mail is covered by deliberative
10 process or work product or attorney-client. That's just
11 simply not the case. And they can't meet their 26(c)(1)
12 good cause standard with sweeping assertions like that.

13 THE COURT: I just -- I'm going back to my years
14 of experience, and I can't think of a situation where I've
15 been asked to produce e-mails between co-counsel and
16 myself on a case. Obviously, the only e-mails you guys
17 would want to see -- you don't care whether Mr. Tabackman
18 and Mr. Olson are meeting for lunch. The e-mails you want
19 to see are relevant to this case.

20 So if the e-mails are relevant to this case and
21 they're between two attorneys who are on the prosecutorial
22 team for this case, how is that not within the scope of
23 work product?

24 MR. BRUNDAGE: I think you're on step two,
25 Your Honor. But step one is the metadata. It's no

1 content. Metadata can't be privileged. I don't see how
2 that's possible.

3 THE COURT: Well, again, I think it's the
4 Court's job and I think it's the attorney's job to
5 recognize that Powhatan's request for the metadata is step
6 one, and if you guys get back metadata that shows that
7 there was a great deal of frequency in the contacts
8 between Mr. Tabackman and Mr. Olson, you're going to
9 attempt to proceed to step two, correct?

10 And I guess I'm just thinking about step two,
11 which is in what situation would any e-mail in which two
12 attorneys on the prosecutorial team are discussing this
13 case discoverable?

14 MR. BRUNDAGE: Well, *Greenhat* is an example of
15 discoverable --

16 THE COURT: That's not an answer to the
17 question. The question is two attorneys on the
18 prosecutorial team. In *Greenhat*, they both were not on
19 the prosecutorial team. In this case, they're both on the
20 prosecutorial team. That's undisputed, correct? I think
21 you mentioned both of them were counsel of record in this
22 case. Mr. Tabackman appeared at the first discovery
23 roundtable we had back in the conference room. So in this
24 case -- and I understand *Greenhat* sent up a red flag for
25 Powhatan. I understand that. And it sounds like the

1 ramifications of that are being felt at FERC and steps are
2 being taken. But in this case, we have two members of the
3 prosecutorial team exchanging e-mails, and what I need to
4 wrap my head around is under what circumstances are any
5 e-mails between those two discoverable and in this
6 setting?

7 MR. BRUNDAGE: The Court's position is that
8 every single e-mail would be privileged?

9 THE COURT: My -- the Court's -- we're kind of
10 flipping this around on the questions. We're talking
11 about relevant e-mails. Every e-mail -- like I said, if
12 they are e-mailing about what are you doing after work
13 today, do you want to grab a beer, do you want to do those
14 things, you guys don't care about that, correct?

15 MR. BRUNDAGE: Correct.

16 THE COURT: The e-mails you care about are
17 e-mails that are relevant to this civil enforcement
18 action, correct?

19 MR. BRUNDAGE: Correct.

20 THE COURT: Okay. So the question is under what
21 circumstances would e-mails between two members -- two
22 attorneys on the prosecutorial team in which the
23 information in those e-mails is relevant to a civil
24 enforcement action, under what circumstances would those
25 be discoverable when they're on the same side of the

1 separation of functions?

2 MR. BRUNDAGE: Just because they are two
3 attorneys e-mailing doesn't necessarily equate to
4 privilege. It's about the content and the substance. And
5 if they're not talking about the content and the substance
6 but they're not talking about lunch, they're talking about
7 something else, maybe something improper, that would be an
8 issue that we might challenge a privilege log in that
9 case.

10 THE COURT: Okay. Well, you would agree with me
11 that if they put -- if they provided you a privilege
12 log -- and I understand there's a dispute about whether
13 there is a privilege log -- the privilege log identified
14 date of the communication, who the e-mail was from, who
15 the e-mail was sent to, and it said status of
16 investigation against Powhatan, it identified the
17 document, it identified the sender, it identified the
18 recipient, and it identified the subject matter of the
19 e-mail, you believe you're going to be able to pierce the
20 privilege log with --

21 MR. BRUNDAGE: What if they carbon copied their
22 friend from softball who's down the street and interested
23 in the case?

24 THE COURT: That's kind of what we're getting
25 into. We're getting into allegations -- now you're

1 suggesting -- you're talking about circumstances where
2 privilege is lost because we have third parties on the
3 e-mails, and we have no suggestion of that happening, do
4 we?

5 MR. BRUNDAGE: The e-mails I reviewed in hard
6 copy and in person, which were Mr. Olson's e-mails, were
7 not between Mr. Olson and Mr. Tabackman. Rather, there
8 were Mr. Olson's e-mails to other individuals regarding
9 the case. It's not an unprecedented situation that other
10 individuals are interested in the case.

11 THE COURT: Folks outside of FERC?

12 MR. BRUNDAGE: Correct.

13 THE COURT: Okay. Well, let me hear from FERC
14 on some of the issues we've raised, including whether
15 third party communications between FERC attorneys are
16 discoverable.

17 MR. BRUNDAGE: Thank you, Your Honor.

18 THE COURT: Thank you.

19 So let's pick up right where we just left off,
20 which is if FERC counsel are communicating with third
21 parties, you would agree that that is not subject to
22 attorney-client or work product privilege, correct?

23 MR. FERRENTINO: Not necessarily. It could be
24 work product, Your Honor.

25 THE COURT: It could be work product if they're

1 communicating with an expert.

2 MR. FERRENTINO: I think the e-mails that
3 Mr. Brundage is referring to, the ones that he's seen
4 personally -- and I was there when he reviewed them --
5 they were in the nature of Mr. Olson forwarding an article
6 in the public press about the Powhatan case, which he used
7 to work on, to them and saying, "Here's something I'm
8 working on."

9 You know, we're certainly happy to make those
10 e-mails available to Your Honor. We have no interest in
11 them being in the public sphere because we think there's
12 an employee privacy issue with that, but, you know,
13 Your Honor would be welcome to review them and confirm
14 that there's really nothing that relates to the substance
15 in this case that would necessitate their discovery in a
16 formal manner.

17 Your Honor mentioned Twitter. I think -- I
18 appreciate Mr. Brundage being unwilling to lodge the
19 allegation of prosecutorial misconduct. I think he's wise
20 not to make it because there really isn't -- is not any
21 evidence of prosecutorial misconduct in this case, despite
22 the Powhatan Twitter feed for years suggesting that there
23 is. There is none. And they have not made the threshold
24 showing that they need to make in this case to tie the
25 e-mails of these two gentlemen on their personal Gmail

1 accounts to -- to the kind of clear and convincing
2 evidence of prosecutorial misconduct that's required to
3 get discovery.

4 THE COURT: How about this -- it seems that
5 Powhatan has stated on the record that the affirmative
6 defense of unclean hands is unavailable to them in this
7 context, which would leave them with the defense of
8 inequitable conduct. No one has really provided me,
9 despite numerous questions, a definition of what type of
10 inequitable conduct would be available here or raised as a
11 defense, considering we have two gentlemen on the same --
12 on the prosecutorial team.

13 MR. FERRENTINO: Sure. And, Your Honor, I'm not
14 sure what inequitable conduct would mean in this
15 situation. In other prosecution contexts that I'm aware
16 of, it's -- as was mentioned, it's things like
17 vindictiveness or racial bias. We have no evidence of
18 that sort of bias. Simply disliking a party that you're
19 prosecuting is not enough. There's no evidence in this
20 case of vindictive conduct. Vindictive conduct, as I
21 understand it, means that decisions were made by the
22 government to punish a litigant for exercising their
23 rights, and there's absolutely no evidence of that here
24 either.

25 As Your Honor pointed out, you know, this is a

1 proceeding that's been conducted on the record for many
2 years, and the Commission has issued orders and heard from
3 the parties at length. It's been well-litigated by able
4 counsel for Powhatan and others. There's just zero
5 evidence of any kind of vindictive conduct by FERC here.

6 THE COURT: Okay.

7 MR. FERRENTINO: And, Your Honor, I would add,
8 it's the opposite, frankly. You know, Powhatan's Twitter
9 feed for years has trashed my colleagues and compared them
10 to sex offenders and compared them to lawyers for sex
11 offenders and said just the worst possible things about
12 them. And that's fine. We live in a free country and
13 they're permitted to do that, if they choose, on their own
14 time. But I think as the Court recognizes, this is a
15 different forum. If you make an allegation like that in
16 this court, you have to have the facts to back it up, and
17 they just don't have it here. So we ask that you grant us
18 the protective order.

19 THE COURT: Thank you.

20 Technically, it's -- it's FERC's motion and they
21 get the last word, but if you would like to just respond
22 to his comments briefly.

23 MR. BRUNDAGE: Your Honor, I'd like to respond
24 to what you said a moment ago. You said you've asked
25 numerous questions but have not been provided an answer.

1 To be clear and explicit, these are not
2 allegations in this case. These are hypotheticals in any
3 case, two hypotheticals. What if these gentlemen e-mailed
4 and said, "We have no case here. We don't have a good
5 basis in law, but we're going to move forward anyway
6 because we don't like them"?

7 Hypothetical two, "We are going to bleed them
8 dry and drag this out even though we don't have a
9 good-faith case."

10 Again, not allegations. Hypotheticals to answer
11 the Court's questions.

12 THE COURT: I appreciate the hypotheticals, but
13 we are eight years into this case. We have been to the
14 Fourth Circuit and back on issues of statute of
15 limitations. We've had briefing on numerous issues. This
16 case -- there is a factual dispute, and it's a hybrid
17 factual legal issue about simply whether Powhatan's
18 actions constituted market manipulation.

19 And it is apparent at least to me -- and again,
20 in full disclosure, as everybody in the courtroom knows,
21 I'm not going to be the ultimate decision-maker in this
22 case and I'm not going to try this case, but it appears to
23 me at a very minimum, that there's at least a factual
24 dispute as to whether there is market manipulation in this
25 case. And that particular hypothetical, you know, I'll --

1 whether that's admissible or not is not what I need to
2 decide here today. I'm not sure that that makes it
3 discoverable because, again, this case has been pending
4 for eight years and I'll defer to the Fourth Circuit and
5 Judge Lauck as to whether there is a triable issue here.

6 But the Court will be prepared to rule on this
7 motion for a protective order and will rule on it
8 promptly. You'll have an answer from the Court before the
9 end of the week.

10 I do want to hear from the parties. If there is
11 an in-camera review, I'm not sure the metadata provides
12 the Court -- one, that's weeks' long delay in actually
13 getting this information from Google. But the actual
14 e-mails -- FERC's position on an in-camera review of
15 unredacted personal e-mails between Mr. Tabackman and
16 Mr. Olson is what? What is FERC's position on that? Not
17 its preference, but it could live with it?

18 MR. FERRENTINO: Yes, Your Honor, I think that's
19 accurate. And I think we offered it as much in our brief.
20 So I think that's fair. And certainly we would be able to
21 show you the e-mails that we showed Mr. Brundage.

22 THE COURT: Thank you.

23 And Powhatan's view of an in-camera review?
24 And, again, it doesn't assuage your concerns about whether
25 everything has been produced. I understand that, but,

1 again, that is, likewise -- this is not, you know, a --
2 just a party to the case who did the search and did these
3 productions. These are two attorneys who did this.

4 But Powhatan's view about an in-camera review
5 about the personal e-mails unredacted that met the search
6 term criteria agreed upon by the parties?

7 MR. BRUNDAGE: Yes, Your Honor, Powhatan is
8 agreeable to that.

9 But I want to be clear. FERC has represented in
10 their papers that there are no e-mails between the two
11 individuals that had the search terms.

12 THE COURT: Okay. Well, there were some -- the
13 e-mails, then, that were produced from Mr. Olson --

14 MR. BRUNDAGE: Correct.

15 THE COURT: -- did not hit on the search terms?

16 MR. BRUNDAGE: Did.

17 MR. FERRENTINO: And, Your Honor, maybe I can
18 clarify. My understanding was that we had a request from
19 Powhatan to review any personal communications from either
20 Mr. Olson's account or Mr. Tabackman's account that hit on
21 agreed search terms, and we agreed to provide the
22 resulting set to Powhatan's counsel, Mr. Brundage, for
23 informal review. We're happy to provide that set to
24 Your Honor as well if you wish.

25 THE COURT: Okay. Thank you, counsel.

1 As indicated, the Court will be prepared to rule
2 before the end of the week.

3 With that, I plan to change hats here real
4 briefly. The parties have been before the Court on a
5 couple different settlement conferences and numerous calls
6 discussing the potential resolution of this case. Prior
7 to counsel leaving today, I wanted to see each side
8 separately in chambers for just a brief update on the
9 status of discussions on whether anything has been going
10 on, just for an update on whether it would be in
11 everybody's best interest to get the parties back in here
12 or not. But we just -- like I said, it should only take a
13 couple minutes each, from each side.

14 So if you guys probably just remain seated, I
15 can have my law clerk -- I'll start with Powhatan, and if
16 FERC counsel could just sit tight, I'll meet with Powhatan
17 counsel. And your clients are certainly invited back.
18 But Ms. Shingleton, my law clerk, will bring you back into
19 chambers for a brief update, and then I'll cut them loose
20 and meet with FERC counsel very briefly. Okay?

21 (The proceeding concluded at 10:22 a.m.)

22 REPORTER'S CERTIFICATE

23 I, Tracy J. Stroh, OCR, RPR, Notary Public in and for
24 the Commonwealth of Virginia at large, and whose
25 commission expires September 30, 2023, Notary Registration

1 Number 7108255, do hereby certify that the pages contained
2 herein accurately reflect the stenographic notes taken by
3 me, to the best of my ability, in the above-styled action.

4 Given under my hand this 4th day of February 2022.

5
6 /s/
_____ Tracy J. Stroh, RPR

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25