

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

December 14, 2021

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

12 APPEARANCES:

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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: Case Number 3:15 CV 452, *Federal*  
6 *Energy Regulatory Commission v. Powhatan Energy Fund, LLC.*

7 The petitioner is represented by Kevin Dinan and  
8 Daniel Lloyd.

9 The respondent, Powhatan Energy Fund, LLC, is  
10 represented by Christopher Perkins and Charles Zdebski.

11 Are counsel ready to proceed?

12 MR. LLOYD: Yes, Your Honor.

13 MR. ZDEBSKI: Yes, we are.

14 THE COURT: Good morning, Mr. Lloyd.

15 MR. LLOYD: Good morning.

16 THE COURT: We are here this morning on FERC's  
17 motion for a protective order regarding the potential  
18 30(b)(6) deposition of a FERC designee.

19 We have been before the Court on this several  
20 months ago in advance of counsel's appearance in this  
21 case.

22 But, Mr. Lloyd, this is FERC's motion. So why  
23 don't you come to the podium. And we have some maybe  
24 initial questions for you, and then I'd love to hear from  
25 you on this.

1 MR. LLOYD: Absolutely, Your Honor.

2 Am I okay to remove my mask?

3 THE COURT: Of course.

4 MR. LLOYD: Thank you.

5 Your Honor, I'm happy to take your questions or  
6 to go into argument at your --

7 THE COURT: Well, let's get some preliminary  
8 matters out of the way, Mr. Lloyd.

9 I've reviewed the submissions of the parties.  
10 I've reviewed the transcript from Judge Nachmanoff's  
11 hearing. I've reviewed cases from Florida and other  
12 jurisdictions in New York. And I want to get some very  
13 basic principles out of the way which I think maybe the  
14 parties agree upon.

15 But for the purposes of the record, does FERC  
16 agree that Rule 30(b)(6), by its very terms, apply to  
17 governmental agencies -- or entities?

18 MR. LLOYD: Yes, Your Honor. For perfect  
19 clarity, FERC's position here is very narrow. We are not  
20 seeking a broad ruling that FERC is somehow per se immune  
21 to Rule 30(b)(6). That's contrary to the rule itself, and  
22 that's contrary to even the cases we cite.

23 We are focused in on a very narrow exception  
24 based on the very particular circumstances of this case,  
25 which is when an agency is acting in a civil enforcement

1 capacity.

2 THE COURT: Okay. So for -- just so we're all  
3 on the same page, FERC agrees that there are no expressed  
4 or implied exceptions to Rule 30(b)(6) for a governmental  
5 entity?

6 MR. LLOYD: Correct, Your Honor. But as -- as  
7 numerous courts have noted, and we've cited those in our  
8 papers, both courts -- the majority of courts nationwide,  
9 all of the district courts that I'm aware of within the  
10 Fourth Circuit, and Magistrate Judge Nachmanoff in the  
11 Eastern District in Alexandria have all held that this  
12 particular circumstance, given the way these types of  
13 cases come about, this is effectively a deposition of  
14 opposing counsel, which creates a large evidentiary burden  
15 for the party requesting the deposition. And that's the  
16 exception that we're talking about here.

17 THE COURT: Well, we're talking about an  
18 exception, but we're also talking a motion for a  
19 protective order under Rule 26(c). And a motion for a  
20 protective order under 26(c), at least pursuant to the  
21 terms of the rule, allow a court to issue an order to  
22 protect a party, or person, from annoyance, embarrassment,  
23 oppression, undue burden, or expense.

24 So what exactly -- which one of those categories  
25 is FERC proceeding under here today?

1 MR. LLOYD: I would argue, Your Honor, it's  
2 undue burden.

3 THE COURT: Under undue burden. Okay.

4 And as part of Rule 26(c), has FERC complied --  
5 is FERC in compliance with Rule 26(c) in certifying that  
6 they have, in good faith, conferred or attempted to confer  
7 with Powhatan to resolve this motion for a protective  
8 order without court action?

9 MR. LLOYD: Yes, Your Honor. We have had  
10 multiple meet and confers with Powhatan on this subject,  
11 including the session with Your Honor on this topic. We  
12 just have been unable to reach terms on it.

13 Powhatan has given us four separate lists of  
14 topics, and we just have not been able to settle on topics  
15 that FERC is amenable to providing a 30(b)(6) witness on  
16 because of the various work product and privilege  
17 implications of the topics.

18 THE COURT: Okay. Well, we may -- I guess my  
19 view of Judge Nachmanoff's ruling -- and I'm going to hear  
20 from both sides on this -- it didn't appear to me that he  
21 closed the door on a 30(b)(6) in that case at all.

22 In fact, Judge Nachmanoff said, "I'm going to  
23 grant the motion, but this is without prejudice for the  
24 defendant coming back and asking the Court to reassess  
25 this if they came back with different categories or

1 different -- different topics."

2 Do you agree with that?

3 MR. LLOYD: I do agree. That is the terms of  
4 Judge Nachmanoff's ruling.

5 THE COURT: And you'd further agree that at  
6 least at some point you represented to opposing counsel --  
7 different opposing counsel and the Court that FERC would  
8 make a 30(b)(6) designee available?

9 MR. LLOYD: Your Honor, FERC has always  
10 represented, and I believe the e-mails cited both in our  
11 papers and Powhatan's papers, that it would be subject to  
12 agreement on the topics.

13 And specifically, during the mediation on this  
14 issue with Your Honor, there was a substantial amount of  
15 discussion about the need for defendants to revise their  
16 list and put additional meat on the bone as to the types  
17 of questions they were seeking. And Powhatan, quite  
18 simply, hasn't done that. We've got four lists of topics  
19 that are essentially the same list with slight tweaks to  
20 the language rather than anything resembling a  
21 substantially different or materially different topic.

22 THE COURT: Okay. Well, if FERC, at some point,  
23 though, conceded that a 30(b)(6) deponent would be  
24 appropriate, subject to appropriate topics, what topics  
25 would be appropriate for a FERC 30(b)(6) designee?

1 MR. LLOYD: Sure, Your Honor. I would point to  
2 the *Coaltrain* litigation as an example. In that case,  
3 FERC agreed to provide a 30(b)(6) witness because in that  
4 case there was a specific legal claim that turned on facts  
5 uniquely within FERC's knowledge. So in that case, FERC  
6 has alleged that the Commission itself was defrauded by  
7 the defendants because the defendants lied to the  
8 Commission staff during the investigation. And FERC  
9 agreed to provide a 30(b)(6) witness on that specific  
10 topic because those were facts uniquely within FERC's  
11 possession.

12 I'm not aware of any facts that are uniquely  
13 within FERC's possession here. And Powhatan, to date,  
14 hasn't cited me to a topic, despite multiple bites at the  
15 apple, where we're talking about facts that are uniquely  
16 within FERC's possession. Instead, we have a list of  
17 topics that are asking for things like FERC's  
18 understanding and views of facts that are already within  
19 Powhatan's possession.

20 THE COURT: And that leads me to my next  
21 question. Because I think that's where, really, the crux  
22 of this turns. If I'm going to telegraph punches today, I  
23 think that's where this really turns is if the Court were  
24 to follow Judge Nachmanoff's reasoning is that have we  
25 fully explored whether this information is available

1 elsewhere. And I understand that we had depositions  
2 scheduled, multiple depositions scheduled for the Market  
3 Monitor, correct?

4 MR. LLOYD: There have been two depositions of  
5 Market Monitor staff.

6 THE COURT: So four more?

7 MR. LLOYD: There are -- there is one deposition  
8 remaining. It's a 30(b)(6) of PJM. I don't know if it is  
9 also a deposition of that person in their individual  
10 capacity. I'm sure Mr. Zdebski clarify that.

11 There's also been another deposition of PJM  
12 staff. And Powhatan has canceled two depositions of PJM  
13 staff that -- the 30(b)(6) of PJM is the only deposition  
14 outstanding, Your Honor, besides the one that's currently  
15 before the Court.

16 THE COURT: And how about the other obvious  
17 source of information, especially when it goes towards the  
18 issue of intent --

19 MR. LLOYD: Dr. Chen has been deposed.

20 THE COURT: It is Dr. Chen?

21 MR. LLOYD: Yes, Your Honor.

22 THE COURT: Okay. And is FERC prepared to make  
23 the same representation that the SEC made before  
24 Judge Nachmanoff that the entire investigative file has  
25 been produced?



1 MR. LLOYD: Absolutely, Your Honor.

2 THE COURT: I understand in that case there was  
3 a pretty extensive privilege log. Do we have -- do the  
4 defendants have the benefit -- does Powhatan have the  
5 benefit of an extensive and detailed privilege log in this  
6 case?

7 MR. LLOYD: We have not provided a privilege log  
8 in this case to date.

9 THE COURT: Then what assurance do they have  
10 that they have everything and that they're not -- to quote  
11 Judge Nachmanoff -- going to getting sandbagged? Because  
12 that's the concern they had, right?

13 MR. LLOYD: So, Your Honor, as I would  
14 understand it, the only area where there would be a  
15 potential privilege log would be -- in terms of questions  
16 that Powhatan has asked would be internal FERC  
17 communications. And FERC's position, as stated in its  
18 objection to Powhatan's discovery request and that is  
19 consistent with case law from across the country, is that  
20 an agency's internal communications are not relevant to  
21 the case at issue since the individual thoughts and  
22 determinations of staff are ultimately not at issue. The  
23 agency's order is at issue. And particularly in a case  
24 like this where we are doing a de novo proceeding where  
25 Powhatan is getting a full-from-scratch trial about their

1 potential liability, I would argue the Commission's order  
2 is even less at issue than as is normal in a review of an  
3 agency order case.

4           So I don't know how the underlying internal  
5 communications would be sufficiently relevant to warrant a  
6 privilege log.

7           THE COURT: So just so everybody -- because I  
8 think in terms of having a dialogue about this this  
9 morning and argument, you know, I want everyone to kind of  
10 be on the same page. The Court is of the opinion that --  
11 and if this directs maybe where this argument goes this  
12 morning and with what Powhatan is prepared to argue before  
13 the Court, the Court is prepared to rule today. The Court  
14 is prepared to hold that a governmental entity is like any  
15 other group, subject to a 30(b)(6) deposition.

16           However, Rule 30(b)(6) does not exist in  
17 isolation. It does not exist in a vacuum, and other  
18 factors must be taken into account. And as the case law  
19 of the Fourth Circuit makes readily apparent, the Court  
20 must be concerned about invading the province of work  
21 product and attorney-client. And that's really kind of  
22 the crux of the issue here.

23           And how do we make sure that this is an open  
24 exchange of information so that Powhatan can properly  
25 prepare its defense while at the same time protecting what

1 is essentially a prosecutorial privilege, I guess, is --  
2 and I think both sides would be in agreement with that.  
3 You know, this would -- you know, the Court has concerns  
4 about Powhatan asking questions about, you know, other  
5 investigations and why, you know, certain defendants were  
6 pursued in other investigations and why others maybe were  
7 not pursued. And I don't think that's going to fly. I  
8 don't think you're going to have the opportunity to really  
9 explore that because, quite frankly, I don't think the  
10 case really turns on that.

11           The case is going to turn on -- and, again, this  
12 is just me kind of putting it out there and you guys tell  
13 me where we disagree. But the factual issues to me are  
14 readily apparent and known to all. And I don't know why a  
15 lot of this cannot be established by stipulation or maybe  
16 deposition upon written question, which I think may be an  
17 appropriate remedy here.

18           But the fact that these trades occurred, when  
19 they occurred, the details surrounding the trades, to  
20 me -- does anyone contend that that is factually disputed?

21           MR. LLOYD: FERC certainly does not contend  
22 that's factually disputed.

23           THE COURT: Let me just turn over to Powhatan.  
24 Does Powhatan have any -- is there any factual dispute  
25 that these trades actually occurred, when they occurred?

1 MR. ZDEBSKI: No, Your Honor, there's no factual  
2 dispute as to those things.

3 THE COURT: So really, the issue is the intent  
4 in making those trades, correct?

5 MR. ZDEBSKI: Yes. And there is a factual  
6 dispute as to questions about intent and what FERC knows  
7 and how it knew. But I don't want to intrude on  
8 Mr. Lloyd's time, Judge.

9 THE COURT: Yeah. I mean, we can -- we -- I  
10 will tell you both, if we roll up our sleeves on this, we  
11 may be going issue by issue on this 1 through 9. So if  
12 you guys want to proceed at counsel table, if you want to  
13 proceed at the podium, whatever you're more comfortable  
14 with. But this may require a little bit of a  
15 back-and-forth. But let me hear from Powhatan.

16 You seem to agree that the real issue is -- at  
17 the end of the day, it's going to come down to intent.  
18 And really, isn't that going to be seeking the legal  
19 impressions of FERC and their counsel as to what they  
20 believe the trades show? Because it's all going to be  
21 done by circumstantial evidence.

22 MR. ZDEBSKI: Judge Colombell, may I remove my  
23 mask?

24 THE COURT: Yes. Absolutely.

25 MR. ZDEBSKI: It's a lot easier. Nice to meet

1 you in person, Your Honor.

2 THE COURT: Likewise.

3 MR. ZDEBSKI: Mr. Charlie Zdebski for defendant  
4 Powhatan.

5 Yes, Your Honor, I think intent is important.

6 But if I may, I'd like to read from what's the  
7 second amended complaint that FERC filed after 11 years in  
8 this case on the last day of discovery.

9 Paragraph 99 says, "Powhatan acted with  
10 scienter. The contemporaneous evidence demonstrates that  
11 it knew of Alan Chen's round-trip trading scheme,  
12 understood the implications of that scheme, knowingly  
13 supported the implementation of that scheme, and  
14 deliberately sought to maximize the profits it derived  
15 from that scheme."

16 Paragraph 100, "Respondents understood exactly  
17 what they were doing."

18 About a month earlier, FERC approved a  
19 settlement by order between Mr. Chen and FERC. In that  
20 settlement, they stipulated to certain facts.

21 In paragraph 4 of the stipulation and consent  
22 agreement -- and this is -- this is, Your Honor, 177 FERC,  
23 paragraph 61 of 76. And in the stipulation and consent  
24 agreement -- this is cited in our brief -- paragraph 4  
25 states, "Dr. Chen had two profit opportunities in mind for

1 the UTC trading strategy. One of those opportunities  
2 targeted MLSA. Dr. Chen recalls telling Powhatan that  
3 targeting MLSA was the profit opportunity of his UTC  
4 trading strategy before or after -- before or during the  
5 alleged manipulation period. To the best of his belief  
6 and recollection, targeting MLSA was the profit  
7 opportunity Dr. Chen discussed. To the best of his belief  
8 and recollection, before or during the alleged  
9 manipulation period, Dr. Chen did not communicate to  
10 Powhatan, did not suggest to Dr. Chen -- nor did Powhatan  
11 suggest to Dr. Chen any other profit opportunity aside  
12 from targeting MLSA. To the best of his belief and  
13 recollection, at no time before or during the alleged  
14 manipulation period did Dr. Chen tell Powhatan that having  
15 a leg break or a portion of a paired MLSA trade not clear  
16 was a desirable outcome or a purpose of the traded issue."

17           So, Your Honor, I don't know what it is. I  
18 don't know whether it's Powhatan knew everything that  
19 Dr. Chen was doing because of whatever facts are alleged  
20 in the second amendment complaint or pursuant to this  
21 stipulation, Mr. Chen didn't tell Powhatan everything.

22           And now, I think that Powhatan is entitled to  
23 get to the bottom of what FERC knows, how it knows it, and  
24 to make sure that FERC has disclosed everything that it  
25 knows.

1 THE COURT: I think you're correct. But the  
2 question is how do we get there, right, and whether that  
3 needs to be by 30(b)(6) or whether that can be done by  
4 stipulation. Because right now -- I agree with you. When  
5 I read Dr. Chen's stipulation, whether that fact is  
6 binding upon FERC is going to be an interesting question  
7 for Judge Lauck, and I anticipate it will probably be  
8 Powhatan's Exhibit A when we get to trial to prove -- if  
9 FERC needs to essentially prove a mens rea, so to speak,  
10 as to the intent of Powhatan.

11 But really, if we take a step back, gentlemen,  
12 is FERC prepared to make a representation about what  
13 witnesses it intends to call to establish intent? And if  
14 it's going to be Dr. Chen and it's going to be to the  
15 folks at Powhatan and nobody from FERC, then all that  
16 information is either derived from those depositions of --  
17 of Dr. Chen or the Gates brothers or other folks at  
18 Powhatan or FERC will say, "We're relying on documents X,  
19 Y, and Z."

20 But if no one from FERC is going to come forward  
21 to establish intent, don't you agree then otherwise what  
22 you're asking for is, "Tell me the theory of your case"?

23 MR. ZDEBSKI: Your Honor, I think it's possible  
24 that we could ask those questions. But those aren't the  
25 questions we intend to ask.

1           We would like to know the basis for the  
2 allegation in paragraph 100, "Respondents understood  
3 exactly what they were doing." Where does FERC get that  
4 from, and how does that compare with what they said in the  
5 stipulation with Mr. Chen?

6           The deposition topics. It's interesting because  
7 FERC suggests that Powhatan tried multiple times and  
8 couldn't get it right. We proposed 44 different topics.  
9 Yes, we went through this four times. Not one of those  
10 topics was acceptable to FERC.

11           And, Your Honor, I don't believe Mr. Lloyd  
12 answered your question. You asked him what topics would  
13 FERC agree to have testimony on, and he basically said,  
14 well, in *Coaltrain*, there was an allegation that there was  
15 a lie to FERC. So is the answer that only if we lied to  
16 FERC, then we could depose a FERC witness?

17           I think we may have to go --

18           THE COURT: What I took his answer --

19           MR. ZDEBSKI: -- issue by issue.

20           THE COURT: And I don't mean to interrupt you,  
21 but what I took his answer as is when FERC is in  
22 possession of factual knowledge. And maybe I'll have him  
23 clarify that, when they have a witness who's in possession  
24 of factual knowledge.

25           But what that's suggesting to me is FERC is not



1 in possession of a witness with factual knowledge as to  
2 the intent of Powhatan or Chen and they would have to rely  
3 on the testimony of Chen, Dr. Chen or Powhatan or  
4 documents.

5           Like -- like I said, you know, when we got a  
6 case of manipulation or intent, obviously what is --  
7 Powhatan is clearly not coming forward and saying it was  
8 our intent to manipulate the market, and Dr. Chen has now  
9 stipulated that -- has not admitted liability in this case  
10 and has now settled.

11           So really, I think where FERC -- and I'll hear  
12 back from Mr. Lloyd -- where FERC is going to have to  
13 prove its case is in the documents and in the trades  
14 themselves and ask the jury to draw conclusion from  
15 circumstantial evidence, meaning, you know -- I've been  
16 involved in this case long enough where they're going -- I  
17 know FERC's position is essentially they bet both sides,  
18 right, and, you know, it was a no-lose proposition for  
19 Dr. Chen, who was trading on behalf of Powhatan, and how  
20 he did this.

21           And essentially, that's all argument, is it not?

22           MR. ZDEBSKI: I think that's right, Your Honor.

23 I agree.

24           THE COURT: Mr. Lloyd, would you agree with  
25 that?

1 MR. LLOYD: Yes, Your Honor. I think my concern  
2 with Mr. Zdebski's statement as to why a deposition might  
3 be needed on this topic is that -- all I heard was  
4 potential arguments Powhatan might like to make about  
5 alleged inconsistencies between the stipulation and the  
6 complaint.

7 But the purpose of a 30(b)(6) deposition,  
8 regardless of what we may or may not think about it, it's  
9 a fact deposition. It's not a vehicle for counsel to  
10 engage in debate with opposing counsel about what  
11 inferences should or should not be drawn, what allegations  
12 are or are not appropriate based on facts.

13 It's about seeking facts and particularly as to  
14 the stipulation. Powhatan deposed Dr. Chen, who is the  
15 person who made the stipulation. They asked about the  
16 stipulation. If they want to ask Dr. Chen about it,  
17 great, go ahead. FERC is not the right party for it.

18 THE COURT: Let me ask you this question. In  
19 this case, we have a jury trial, correct?

20 MR. LLOYD: Correct.

21 THE COURT: And the jury is the fact finder in  
22 this case?

23 MR. LLOYD: Correct, Your Honor.

24 THE COURT: And the jury, therefore, will  
25 determine intent?

1 MR. LLOYD: Correct, Your Honor.

2 THE COURT: Not the Court.

3 MR. LLOYD: Correct, Your Honor.

4 THE COURT: So intent is a factual issue?

5 MR. LLOYD: Correct, Your Honor.

6 THE COURT: So if FERC has made an allegation  
7 about intent, it's a factual allegation?

8 MR. LLOYD: Correct, Your Honor. The allegation  
9 as to -- as to the fact that there was intent is a fact.

10 What legal conclusions and inferences can be  
11 drawn from that are certainly not. What FERC's view and  
12 understanding of the -- of the intent is is not.

13 THE COURT: Correct. But FERC -- I don't want  
14 to say correct. I understand what you're saying. But  
15 FERC has made the factual allegation that Powhatan  
16 intended to manipulate the market.

17 MR. LLOYD: Correct. Well --

18 THE COURT: And if that's a factual allegation,  
19 are they not permitted to explore the basis for FERC's  
20 factual allegation?

21 MR. LLOYD: Yeah. Your Honor, I do want to  
22 clarify. An allegation is not a fact.

23 THE COURT: It's a factual allegation.

24 MR. LLOYD: An allegation is how FERC intends  
25 to -- a fact that FERC intends to prove. It's not a fact

1 in and of itself.

2           And there's multiple cases Judge Nachmanoff  
3 included and multiple cases he cited to and both FERC has  
4 cited to that the factual basis underlying an allegation  
5 are -- requests for that in a 30(b)(6) context are  
6 requests for -- that implicate attorney work product,  
7 deliver a process privilege or attorney-client privilege.

8           It's essentially asking -- if Your Honor will  
9 indulge me with a childish analogy. It's essentially the  
10 difference between saying, "Here is a box of LEGOs"  
11 versus, "Here, please put the LEGOs together for me and  
12 show me what you would make out of the LEGOs."

13           And I would argue that we have -- we have met  
14 our burden here. We have given all the facts that we have  
15 that are in our possession to Powhatan. If Powhatan wants  
16 to make an argument that those facts are insufficient,  
17 it's permitted to. What it should not be permitted to do  
18 is to, under the guise of a 30(b)(6), engage in an  
19 eight-hour-long argument with a FERC deponent about  
20 whether the facts are sufficient or the inferences are  
21 proper.

22           THE COURT: Well, I think the issue becomes --  
23 and we're splitting fine hairs here when we talk about  
24 facts and factual allegations. But when counsel make  
25 factual allegations in a complaint pursuant to the rules

1 of the Court, they certify, do they not, that there's a  
2 basis in fact for making those factual allegations and a  
3 reasonable investigation has been conducted to make those  
4 factual allegations?

5           And what counsel has pointed out is that an  
6 amended complaint comes down the pike a month after  
7 Dr. Chen, who was the -- the actual individual conducting  
8 the trades, stipulated with FERC that Powhatan had no  
9 knowledge that these were -- I don't want to misquote the  
10 stipulation. But what he's suggesting is that the factual  
11 allegation in the amended complaint is completely  
12 inconsistent with the stipulation entered into by FERC a  
13 month prior.

14           And what he wants to explore is when you make  
15 this factual allegation in the complaint, FERC, and you  
16 know that Dr. Chen is going to testify because he  
17 stipulated a month earlier what his role was in this and  
18 what his knowledge of Powhatan's involvement was, then if  
19 it's not from Dr. Chen, where is it from? And maybe  
20 that's the question.

21           MR. LLOYD: Your Honor, I think preliminarily, I  
22 don't know that I agree that they're inconsistent. I view  
23 the two statements as being consistent with one another.

24           I also think we're running into an issue here,  
25 particularly if we're talking about work product and

1 privilege concerns, we're talking about -- we're also  
2 implicating Federal Rule of Evidence 408 to the extent  
3 we're talking about wanting to get under the hood, if you  
4 will, of why FERC made a stipulation with Dr. Chen on  
5 various issues and what factors were considered or how it  
6 views that stipulation as consistent with the facts of the  
7 case. I, again, think we're getting into -- once we're  
8 getting beyond the facts, once you take that one step  
9 beyond, you're starting to venture into areas that are  
10 work product, areas that are deliberative, areas that are  
11 attorney-client privilege.

12 THE COURT: I'm not sure I necessarily agree.  
13 Because Dr. Chen is going to be a witness in this case, is  
14 he not?

15 MR. LLOYD: It is certainly possible. I would  
16 imagine one of the parties intends to call him.

17 THE COURT: Okay. Well, staying on track here,  
18 because I -- it is a very interesting discussion. It's  
19 not one that the Court addresses every single day.

20 I know counsel was not privy to the first time  
21 we came in on a discovery dispute and we had 10 or 12  
22 binders on separate discovery disputes. And instead of  
23 ruling on each one, we sat around a conference table for  
24 about four hours and we hashed through it one by one.

25 I'm prepared to do that again if the parties

1 believe that that is the better approach to resolving  
2 this. Because ultimately, the purpose of the Federal  
3 Rules of Civil Procedure is to make sure everybody has all  
4 the information and an open exchange of information so  
5 that a full and fair trial can happen when this matter --  
6 and this matter will proceed on to trial, from what the  
7 parties are indicating to me. I've worked -- worn two  
8 hats in this case, and right now, we're in the umpire hat  
9 for discovery purposes. But this case seems to be heading  
10 in the direction of trial based on the submissions of the  
11 parties and where things are headed.

12           And let me hear maybe from Powhatan's counsel  
13 about -- because the topics -- there are topics that I  
14 believe are rather broad. And I also believe there are  
15 topics identified that really don't lead us to the  
16 discovery of what the Court would consider evidence that  
17 may be relevant at trial, including, you know, for  
18 example -- and I'm not saying this is the only indication,  
19 but, you know -- I forgot which number it is. "All  
20 communication among FERC personnel regarding whether or  
21 not defendants' trading was lawful." Really, that doesn't  
22 matter, right? Really, at trial -- you know, if  
23 internally someone says, "Why are we going after these  
24 folks" or "why them and not them," I don't foresee -- and  
25 you can tell me why I'm wrong. I don't foresee where

1 that's going to turn into admissible evidence. I don't  
2 see where Judge Lauck is going to open up a can of worms  
3 and allow Powhatan to go into, well, you know, companies  
4 A, B and C were pursued for market manipulation, but  
5 companies X, Y and Z were not, and why was Powhatan  
6 singled out?

7 I don't see it going down that track either. I  
8 really see this as a much more simple case, which is these  
9 actions were taken and these trades were made by Dr. Chen  
10 on behalf of Dr. Chen. In order for it to be market  
11 manipulation, FERC needs to establish what they need to  
12 establish to show the proper intent.

13 Is the case more complicated than that?

14 MR. ZDEBSKI: It's not more complicated than  
15 that, Your Honor. But there are cases, including a  
16 decision in -- I think it was the *City Power* case where  
17 the Court looked to the understanding of third parties,  
18 such as PJM, as to whether the trades were manipulative or  
19 not.

20 I could see this as a highly technical matter if  
21 the Court said, well, that's -- it's ultimately up to the  
22 judge to determine whether these trades were lawful or  
23 not. But perhaps it's a mixed question of fact and  
24 opinion. If you're looking to somebody who has expertise  
25 in these things, if they say, "Well, we weren't sure. We



1 hesitated. It took us months to report this. We weren't  
2 sure what was happening." So I think it's possible -- I  
3 think I do agree with the Court that there are some of  
4 these topics that are a little broader and maybe less  
5 focused than others.

6 I -- I appreciated the formulation of the issue.  
7 We cited quite a few cases where 30(b)(6) depositions of  
8 agencies were allowed to go forward. And although FERC  
9 said there were a hundred decisions from this division,  
10 none of them were cited in their brief except for  
11 Judge Nachmanoff's.

12 But in the formulation from the District Court  
13 of Kansas in *SEC v. Kovzan*, it said that "a protective  
14 order requires the movant to bear the burden of showing  
15 specific factual demonstration as opposed to stereotyping  
16 and general conclusory standards."

17 So I think ultimately, it's FERC's burden to  
18 show, as to each particular issue, a specific factual  
19 problem with going forward on that topic. We would  
20 welcome the opportunity -- and as much as I don't want to  
21 make work for the Court, we would welcome the opportunity  
22 to sit and go through this topic.

23 THE COURT: That ship has sailed. So -- work  
24 has been made. I'm highly invested in this case and  
25 helping counsel navigate this case either through

1 discovery or through settlement.

2 MR. ZDEBSKI: And I'll just add one thing,  
3 Your Honor. There's the issue of discovery being  
4 asymmetric here. We're sort of in a one-sided boxing  
5 match. FERC is the 800-pound gorilla. We've got a small  
6 company. They have deposed our clients multiple times. I  
7 think Kevin Gates was deposed twice during the  
8 administrative process, once during the litigation.  
9 Mr. Chen was deposed twice during the administrative  
10 process, once during litigation. Larry Eiben was deposed  
11 a couple of times.

12 THE COURT: You're stealing a line, I think,  
13 from the Florida case on the one-sided boxing match. I  
14 remember reading that last night.

15 MR. ZDEBSKI: Your Honor has done its reading.  
16 I did steal that line, and I didn't provide a footnote.

17 But we haven't once gotten to depose FERC. And  
18 I didn't hear Mr. Lloyd bite at the idea that there was  
19 going to be no FERC witness on any of these things.

20 So knowing what FERC knows, how it knows it.  
21 And there's not just one purpose to a 30(b)(6) deposition.  
22 There's determining what the facts are, there's making  
23 sure we know the universe of facts, and then there's  
24 binding the entity to the position that they're taking.

25 THE COURT: Well, one way to pursue this is for

1 FERC to stipulate that the impression -- you have deposed  
2 the Market Monitor, for lack of a better term, the  
3 whistle-blower, or the folks that monitor and report,  
4 right?

5 MR. ZDEBSKI: Yes, Your Honor.

6 THE COURT: And Mr. Lloyd has made the  
7 suggestion that they are essentially an extension of FERC,  
8 that they are -- is that correct, Mr. Lloyd? You're  
9 saying that they're essentially an agent in terms of  
10 reporting back to FERC, at some point in your brief or in  
11 your reply briefly.

12 MR. LLOYD: Your Honor, the Market Monitor is a  
13 separate legal entity.

14 THE COURT: By its very term, Independent Market  
15 Monitor.

16 MR. LLOYD: Independent of both PJM and of FERC.  
17 I mean, the Market Monitor's opinion is obviously highly  
18 valued by FERC and we work hand-in-hand with them, but  
19 they are a separate legal entity.

20 THE COURT: Well, I'm trying to think, then,  
21 where I read in your -- I thought it was in your reply  
22 brief where you suggested that these protections could  
23 extend to FERC, its agents. And I think it might have  
24 been the SEC had someone reporting to them. It might have  
25 been --

1 MR. LLOYD: Your Honor, I believe you might be  
2 thinking of -- there's a reference in the reply brief to  
3 an SEC case involving KPMG, who was acting as a -- I would  
4 take it to be a consulting expert to the SEC in that case.  
5 And specifically, we were raising it to refute the  
6 argument made by Powhatan that there is some possibility  
7 that if FERC had its in-house economist, for example, work  
8 on this case, that that somehow loses its work product  
9 protection. It was not meant to be in connection with the  
10 Market Monitor.

11 I will say, though, in regard to some of the  
12 topics, there's topics related to FERC's communications  
13 with the Market Monitor. And while the communications  
14 themselves obviously are not privileged, the Market  
15 Monitor is a third party. The FERC portion of the  
16 conversation, what FERC's attorneys recall about the  
17 conversation, what importance they attach to the  
18 conversation, that would be work product as well. So I  
19 just want to make it clear what our specific argument as  
20 to the Market Monitor would be.

21 THE COURT: Okay. Well, yeah. Here's what I'm  
22 relying on, because I highlighted it in your reply brief.  
23 On page 7, FERC states that, "Powhatan contends that  
24 testimony can be properly sought regarding facts related  
25 to FERC's communications with third parties like PJM and

1 IMM (which cannot be protected by privilege). This  
2 misstates the plain text of the attorney work product  
3 privilege, which, by its term, extends to work product of  
4 attorneys or other representative such as consultants or  
5 agents."

6 So based on that representation, I took it to  
7 mean that FERC views PJM and IMM as consultant or agents.

8 MR. LLOYD: Yeah. Your Honor, I want to make  
9 the point abundantly clear because this is a very  
10 fine-point issue. FERC's position is that to the extent  
11 its attorneys shared work product with a nonadverse party  
12 whose interests are aligned in PJM or the IMM, that the  
13 work product protections are not necessarily waived.

14 THE COURT: You're saying if they share  
15 information with a third party who is not an agent,  
16 someone outside that protected sphere, that you believe  
17 they can maintain a privilege claim?

18 MR. LLOYD: I do not -- they are not subject to  
19 the attorney-client privilege, Your Honor. But I do not  
20 believe they necessarily waive attorney work product  
21 protection.

22 MR. ZDEBSKI: I thought that was one of our more  
23 straightforward requests, Your Honor, communications with  
24 the third parties like the PJM and the IMM.

25 THE COURT: Well, kind of while we're on the

1 topic of maybe exploring other means of obtaining  
2 information just to make -- because the role here is to  
3 make sure Powhatan has all the information that it's  
4 entitled to to present a defense and so that there's a  
5 fair and full trial.

6 Has any attorney here actually ever proceeded  
7 under a deposition upon written questions? Because I must  
8 confess, in my years of private practice, I never employed  
9 the rule.

10 Anyone on this side? Powhatan?

11 MR. ZDEBSKI: No, Judge Colombell.

12 THE COURT: Anyone on FERC's side?

13 MR. LLOYD: Mr. Dinan. I have not in federal  
14 district court litigation.

15 THE COURT: Any luck? Was it effective?

16 MR. DINAN: Your Honor, it can be a valuable  
17 tool. And it's set out in the Federal Rules of Civil  
18 Procedure as one of the possibilities for conducting  
19 discovery.

20 So it is something that can be used in certain  
21 circumstances, and it avoids some of the issues like  
22 privilege when you're in a deposition and somebody starts  
23 to veer off from what are the underlying facts to what are  
24 your impressions or what was your analysis of the facts  
25 because you're laying out the questions beforehand. You

1 give them to the other side. The other side then has the  
2 opportunity to object to the questions or to provide  
3 answers. So it is -- it can be a very useful litigation  
4 tool.

5 THE COURT: Let me hear Powhatan's view  
6 regarding depositions upon written questions. And I know  
7 what your initial response is going to be is every  
8 attorney likes the ability to ask a question and ask a  
9 follow-up question. But when we're balancing these issues  
10 of privilege, is that potentially an appropriate route?

11 MR. ZDEBSKI: Your Honor, it is potentially an  
12 appropriate route, to answer the Court's question. I have  
13 no experience with it. Mr. Perkins doesn't either.

14 My concern is that it's sort of stilted and  
15 limited. You get to send some written questions. You  
16 can't ask follow-up questions. We can't sort of, on the  
17 spot, try and figure out what to do.

18 There's been discussion of what it is that  
19 Powhatan wants to ask. Powhatan doesn't want to know the  
20 mental impressions and the deliberative process of FERC.  
21 Powhatan wants to know the facts that FERC knows to make  
22 sure it has the universe of those facts and whether there  
23 are any facts that haven't been disclosed.

24 THE COURT: So my next proposal, then, would be  
25 how can -- how can we get that accomplished through

1 stipulation, because I feel like we can get that  
2 accomplished through stipulation? Because one of the  
3 concerns is, you know, obviously, Powhatan doesn't want  
4 FERC coming into court and holding up a document or  
5 calling a witness that, you know, Powhatan was not given  
6 notice of, especially a witness from FERC.

7           And, you know, I think one of the things we're  
8 going to need to address -- and I'm not going to revise  
9 Judge Lauck's scheduling order. I would never, in a  
10 million years, overstep my bounds. But if FERC -- in  
11 these discussions and what I anticipate where things are  
12 going today, may be discussions in the coming days, and we  
13 may be coming back to get an update from the parties. But  
14 if FERC has made a determination that we are going to call  
15 someone to testify at trial -- and I don't know whether  
16 that decision has been made.

17           Would you agree, Mr. Lloyd, that they should  
18 have the opportunity to depose that person?

19           MR. LLOYD: Can I have one moment, Your Honor?

20           THE COURT: Of course.

21           MR. LLOYD: Your Honor, I think it's highly  
22 unlikely that we would, at trial, have a FERC  
23 representative witness.

24           And I would agree that if we were to do so, if  
25 we were to designate a person, that would be entirely



1 appropriate to depose that person. But at the moment, I  
2 don't believe that we are going to do that.

3 My view of this is that there are four primary  
4 sources of facts here. There's facts from Powhatan, facts  
5 from Dr. Chen, facts from the Market Monitor, and facts  
6 from PJM. FERC is not a -- as Judge Nachmanoff put it,  
7 the agent, in this type of case, isn't a fact witness to  
8 the case. Certainly no one at FERC is going to stand up  
9 in court and say, "I was in the room when Powhatan pressed  
10 the button to make the trade happen."

11 So that's the best answer I can give you this  
12 morning on that.

13 THE COURT: I appreciate that. And I also  
14 recognize that -- I'm not trying to put you to the burden  
15 of identifying, you know, witnesses at trial in advance of  
16 the deadlines set by Judge Lauck.

17 I'll tell both sides -- and we can either go  
18 through the topics one by one -- or continue to go through  
19 them or I can tell you kind of what my thoughts are. My  
20 thoughts are to keep the parties on a very tight leash.  
21 And if there is some appetite for the parties exploring  
22 some combination of stipulations or depositions upon  
23 written questions and reporting back to the Court and the  
24 Court essentially making the following findings today in  
25 an order: That the Court finds that there's no blanket

1 prohibition on taking the 30(b)(6) deposition of a  
2 governmental entity, but there are obviously concerns  
3 regarding the protection of attorney-client and work  
4 product especially in an enforcement action like this.  
5 And I recognize that. And I think what I just said -- I  
6 think both sides can agree -- is essentially  
7 Judge Nachmanoff's ruling. Would you agree, Mr. Lloyd?

8 MR. LLOYD: I agree, Your Honor.

9 THE COURT: Would you agree?

10 MR. ZDEBSKI: I agree, Your Honor.

11 THE COURT: Yeah. And further consistent with  
12 Judge Nachmanoff's ruling was his admonishment to the  
13 parties that they should give every effort to explore the  
14 exchange of this information, if possible, outside a  
15 30(b)(6) deposition.

16 So, you know, if that can be done by  
17 stipulation, if they can be done by some combination of  
18 stipulation and written questions, great. If it can't be  
19 and Powhatan comes back to me and says, "No, we need to  
20 take a deposition," then the Court will be prepared to  
21 rule topic by topic by topic on this.

22 But what I would -- I'll hear from the parties.  
23 What I'm inclined to do essentially is take the motion  
24 under advisement for a period of two weeks, if that is a  
25 long enough time, for the parties -- again, I can't stress

1 enough, tight leash, because I'm constantly reminded every  
2 time I pull this case up that there is a 15 sitting on  
3 this case, meaning that this case has been on the Court's  
4 docket for almost -- will be seven years, as the calendar  
5 turns here.

6           So is that something -- and I'm also happy to  
7 offer my services to help the parties facilitate those  
8 discussions or navigate those waters in terms of thoughts  
9 on questions, thoughts on objectionable questions, things  
10 like that. I will offer up my services.

11           But I think this is -- and, again, consistent  
12 with Judge Nachmanoff and consistent, I think, with almost  
13 every case, regardless of whether they permitted a  
14 30(b)(6) or not, it's a case-by-case, topic-by-topic  
15 analysis. Would you agree, Mr. Lloyd?

16           MR. LLOYD: Yes, Your Honor.

17           THE COURT: And would Powhatan agree?

18           MR. ZDEBSKI: Judge Colombell, I actually think  
19 that it's highly possible that if we got into a  
20 deposition, we might be reaching out to your chambers  
21 during the deposition because --

22           THE COURT: I kind of think that might happen  
23 too.

24           MR. ZDEBSKI: Right. I think it could be a sort  
25 of labor-intensive effort as to what's privileged and

1 what's not privileged.

2 THE COURT: I -- I understand that. And I  
3 certainly understand what I may be signing up for. If --  
4 if the deposition were to proceed in any form or fashion,  
5 that's -- I tell folks when they come before me, I am a  
6 big proponent of an efficient use of time.

7 I don't -- that Southern District of Florida  
8 case, there was some dispute between the parties about  
9 whether the deposition was completely fruitless or not and  
10 whether it turned into eight questions, yes or no.

11 I don't think that would be the case here  
12 because I have counsel on both sides that know how to take  
13 a deposition and know how to defend a deposition and know  
14 how to make proper objections. So I don't anticipate I  
15 would be receiving calls every two minutes ruling on  
16 privilege issues.

17 But I do want to explore the possibility,  
18 especially since Powhatan's counsel is, in the grand  
19 scheme of things, considering how long this case has been  
20 pending, are really new to the case and don't have the  
21 benefit of the years and years of information exchange  
22 that previous counsel had. I want to explore other  
23 avenues this information can -- I want to exhaust  
24 essentially all avenues before a deposition that results  
25 in phone calls to chambers every five minutes.

1 MR. ZDEBSKI: Your Honor, Powhatan -- counsel  
2 for Powhatan has a good working relationship with counsel  
3 of FERC. I think we've managed to work through discovery  
4 issues. When we got involved in this case, there were  
5 thoughts about taking nine or ten depositions. We windled  
6 it down to fewer than that. We agreed on some other  
7 issues and worked out things.

8 So the suggestion of taking the matter under  
9 advisement and allowing us two weeks to work out the  
10 possibility of stipulations and deposition upon written  
11 questions is -- is appealing to Powhatan. I think we can  
12 make that effort.

13 THE COURT: And, you know -- and, again, I'm not  
14 trying to force FERC's hand here, because if FERC makes  
15 the decision in the next two weeks that they're not  
16 calling a fact witness at trial, a FERC representative,  
17 doesn't that clean a lot of this up? Because then  
18 Powhatan need only concern itself with the IMM and Dr.  
19 Chen and, quite frankly, themselves if the Gates brothers  
20 decide to testify or some other member of Powhatan decides  
21 to testify. I don't know what other third party would  
22 have information about these trades.

23 MR. ZDEBSKI: I think, Your Honor, it will be  
24 expert testimony.

25 THE COURT: And the experts.

1 MR. ZDEBSKI: And the expert disclosures are  
2 coming up soon.

3 THE COURT: But the experts, I mean, they have  
4 been deposed, right?

5 MR. ZDEBSKI: No. I think FERC's disclosure is  
6 due on Friday.

7 MR. LLOYD: On Friday.

8 MR. ZDEBSKI: And then our disclosure is due a  
9 month after, and then we'll have depositions of the  
10 experts.

11 THE COURT: Well, you know -- and I still want  
12 to keep everybody on that tight leash of two weeks. But I  
13 also think potentially revisiting this issue after the  
14 deposition of the experts -- because FERC is going to be  
15 bound by essentially what their expert testifies to.  
16 Powhatan, likewise, if they have experts, are going to be  
17 bound by what they say. And also, we have the completion  
18 of the Market Monitor depositions, which may provide  
19 another avenue for exploring the information identified in  
20 these topics.

21 So when I say "two weeks," I mean two weeks. Of  
22 course, that puts us at December the -- what is that, the  
23 28th?

24 MR. ZDEBSKI: Yes.

25 THE COURT: So certainly not trying to cut into

1 counsels' holiday plans, but I'm duty judge that week so  
2 I'll be here. So the -- right now, where I see things is  
3 entering that order, taking the motion under advisement  
4 for two weeks to allow the parties -- in my order, you're  
5 going to see a lot of language borrowed by  
6 Judge Nachmanoff specifically about the parties exploring  
7 alternative methods. Because that was my takeaway from  
8 Judge Nachmanoff's ruling was that he had a lot of concern  
9 about the deposition just turning into questions about the  
10 mental impressions of counsel and/or a 30(b)(6) who is not  
11 an attorney just coming and then being asked about the  
12 mental impressions -- or legal opinions about the case.

13           And I don't want that. But I do want to provide  
14 Powhatan the opportunity to explore facts because I think  
15 they're entitled to do that under the Federal Rules of  
16 Civil Procedure.

17           So if everybody is in agreement, the order will  
18 require the parties to schedule a hearing on or before  
19 December 28th with chambers for a status update on factual  
20 stipulations, deposition upon written questions, and quite  
21 frankly, any other avenues that counsel come up with that  
22 they believe would facilitate the exchange of information  
23 short of a 30(b)(6).

24           MR. ZDEBSKI: Judge Colombell, may I have a  
25 moment to consult with Mr. Perkins?

1 THE COURT: Of course.

2 MR. ZDEBSKI: Your Honor, Powhatan can -- well,  
3 we'll work with what the Court has suggested. And the  
4 time is not a problem for us.

5 THE COURT: Well -- and I certainly understand  
6 that if we get to December 28th and counsel represents to  
7 the Court we're really making progress with these  
8 stipulations or we're making progress with narrowing  
9 questions or identifying questions, then obviously we can  
10 extend that deadline past the depositions of the experts,  
11 past the depositions of the IMM or PJM or whomever  
12 depositions are left. But it's on my radar and it's going  
13 to -- this issue is on my radar and is going to remain on  
14 my radar until the completion of discovery. So we will --  
15 we will get this taken care of.

16 Is there anything unclear about the Court's  
17 direction on this?

18 MR. LLOYD: Not from FERC's side, Your Honor.

19 THE COURT: Thank you, Mr. Lloyd.

20 MR. ZDEBSKI: No. It's clear.

21 THE COURT: Okay. All right.

22 Well, I do appreciate the papers, which frame  
23 the issue, which, quite frankly, is a very interesting  
24 issue. And it's kind of one of those when it pops up,  
25 you're shocked at how little authority really there -- how



1 often this -- or how infrequent this issue actually comes  
2 up.

3           Maybe Mr. Lloyd -- I don't want to open up a can  
4 of worms. Mr. Lloyd is going to jump in and say, you  
5 know, that that supports his position. But we're not  
6 going to go there today. I think we have a roadmap  
7 between now and December 28th where the burden is on the  
8 parties and counsel to explore other avenues to make sure  
9 that Powhatan is provided and has been provided.

10           Mr. Lloyd, before we conclude today, I do think  
11 you previously made this representation on the record.  
12 But consistent with the *Clark* case, FERC is representing  
13 on the record to Powhatan that it has produced everything  
14 in its investigative file that it intends to rely upon at  
15 trial; is that correct?

16           MR. LLOYD: Multiple times, in fact, Your Honor.

17           THE COURT: Okay. Well, that should provide  
18 Powhatan some comfort. As Judge Nachmanoff stated, that  
19 should provide the defense some comfort that everything a  
20 part of their investigative file has been produced. And  
21 whether there are allegations in the complaint consistent  
22 with that may be a -- something that Powhatan gets to  
23 explore. But we will -- we will take that up. And I look  
24 forward to hearing back from the parties on December 28th.  
25 Okay?

1 MR. LLOYD: Thank you, Your Honor.

2 MR. ZDEBSKI: Thank you, Your Honor. Merry  
3 Christmas and happy holidays to everyone.

4 THE COURT: Likewise. Happy holidays to  
5 everyone. And the Court will issue an order this  
6 afternoon consistent with its ruling.

7 (The proceeding concluded at 10:29 a.m.)

8 REPORTER'S CERTIFICATE

9 I, Tracy J. Stroh, OCR, RPR, Notary Public in and for  
10 the Commonwealth of Virginia at large, and whose  
11 commission expires September 30, 2023, Notary Registration  
12 Number 7108255, do hereby certify that the pages contained  
13 herein accurately reflect the stenographic notes taken by  
14 me, to the best of my ability, in the above-styled action.

15 Given under my hand this 15th day of December 2021.

16 \_\_\_\_\_  
17 /s/

18 Tracy J. Stroh, RPR  
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