178 FERC ¶ 61,002
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

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

Docket No. IN18-9-000

ORDER DENYING MOTION

(Issued January 5, 2022)

1. On November 5, 2021, the Commission issued an Order Assessing Penalties against GreenHat Energy, LLC (GreenHat), John Bartholomew, Kevin Ziegenhorn, and Andrew Kittell, represented in this proceeding by Luan Troxel as the Executor for Andrew Kittell's Estate (Kittell Estate or Estate) (collectively, Respondents).[1] In the order, the Commission deferred action on an October 5, 2021 motion filed by the Kittell Estate (October 2021 Motion) pending the outcome of a referral to the Department of Energy's Office of the Inspector General (OIG). As discussed below, we deny the Kittell Estate's October 2021 Motion.

I. Background

2. On October 1, 2021, Office of Enforcement (OE) Staff issued a notice[2] disclosing that an OE litigation attorney, Thomas Olson, had reported to OE management that he had an email exchange with a member of the Commission's decisional staff, Steven Tabackman, which Olson realized may constitute a violation of the Commission's

[1] *GreenHat Energy, LLC*, 177 FERC ¶ 61,073 (2021) (Order Assessing Penalties).

[2] October 1, 2021 Notice Re Communication with Decisional Staff (October 2021 Notice). That same day, the Commission filed an additional notice removing Mr. Tabackman from the decisional staff team on this matter. October 1, 2021 Notice of Designation of Commission Staff as Non-Decisional.

Separation of Functions regulation.[3] Copies of the email exchange were attached to the notice.[4]

3. On October 5, 2021, the Kittell Estate filed the October 2021 Motion citing the October 2021 Notice and requesting that the Commission "drop all enforcement action against the estate of Andrew Kittell, ban Messrs. Tabackman and Olson from any future involvement, and order other offices within the Commission to investigate what happened."[5] On October 6, 2021, OE Staff filed a response opposing the October 2021 Motion. OE Staff stated that OE followed proper procedure by disclosing the emails to the Designated Agency Ethics Official and ensuring that the emails were made public and included in the record of this proceeding.[6]

4. In the Order Assessing Penalties, the Commission explained that the email exchange disclosed in the October 2021 Notice addressed procedural matters that might arise under California probate law in the state probate proceeding on the Kittell Estate. These procedural matters under California probate law *were not an issue pending before the Commission in this proceeding*.[7] Nevertheless, given the circumstances, the Commission referred the matter to the Commission's designated agent in the OIG and shared relevant information regarding the October 2021 Notice and the related October 2021 Motion. As that referral remained outstanding, and to fully respect any subsequent findings by the OIG, the Commission did not rule on the October 2021 Motion in the Order Assessing Penalties. Rather, the Commission stated that it would address the merits of the motion in a subsequent Commission order after the OIG concluded its consideration of the matter.

5. After considering the matter, the OIG declined to take further action and deferred to the Commission to proceed as appropriate. Following the OIG's consideration of the matter, the Commission's Designated Agency Ethics Official and his staff conducted an

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[3] 18 C.F.R. § 385.2202 (2021).

[4] October 2021 Notice at Ex. 1. There were minor redactions in the email chain, included for the sole purpose of preventing publication of the individuals' personal email addresses.

[5] October 2021 Motion at 1. The October 2021 Motion also cites to the Kittel Estate's previous complaints about the investigative process in this case, which the Commission addressed in the Order Assessing Penalties. Order Assessing Penalties, 177 FERC ¶ 61,073 at P 241.

[6] OE Staff October 6, 2021 Opposition at P 1.

[7] Order Assessing Penalties, 177 FERC ¶ 61,073 at P 27.

internal administrative inquiry into whether additional communications occurred in this proceeding and concluded that there were no additional prohibited communications.

II. Discussion

6. We are troubled by the exchange of emails between decisional staff and litigation staff. Commission policy prohibits non-decisional employees from communicating with any member of the Commission or its decisional staff concerning deliberations in the docket; it is one way we ensure that our decisions are unbiased.[8] Thus, compliance with this policy is not optional. The Commission takes seriously any allegation that Commission staff has contravened this policy, but we disagree with the dissent's and movant's claims that the communications at issue here amount to a due process violation when that communication did not go to the merits of the Commission's decision. Moreover, as discussed below, we find that disclosing the emails remedied any potential harm.

7. The Commission expects OE Staff to conduct themselves in accordance with the highest ethical standards and is committed to ensuring that the subjects of investigations receive due process, both in perception and reality.[9] Similar to the procedural requirements for hearings under the Administrative Procedure Act,[10] the Commission's regulations provide that in any proceeding arising from an investigation under section 1b, "no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings."[11] To facilitate compliance with the requirements of that regulation, the

[8] The Commission takes this policy seriously and is committed to ensuring that all Commission staff are aware of and comply with the policy by regularly providing training for all Commission staff and reiterating its importance.

[9] *Enf't of Statutes, Reguls. & Ords.*, Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156, at P 21 (2008) (Revised Policy Statement on Enforcement).

[10] 5 U.S.C. § 554(d) ("An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings."). Section 554 of the APA excludes from the scope of proceedings subject to this requirement ones like the above-captioned proceeding resulting in the Order Assessing Penalties that involve "a matter subject to a subsequent trial of the law and the facts de novo in a court." *Id.* § 554(a)(1).

[11] 18 C.F.R. § 385.2202.

Commission issues a notice designating staff as decisional or non-decisional shortly after issuance of an order to show cause, and that notice states that non-decisional employees are prohibited from communicating with any member of the Commission or its decisional staff concerning deliberations in the docket.[12]

8. We deny the October 2021 Motion, which seeks dismissal of the entire proceeding against the Kittel Estate based upon the October 2021 Notice and the Kittell Estate's "prior complaints about [OE Staff's] conduct."[13] The Commission reviewed the prior allegations regarding the investigative process in this case and found such allegations to be without merit.[14] With regard to the October 2021 Notice, we need not decide here whether the Tabackman-Olson email exchange identified in the notice violated the Commission's regulations because we conclude that the conduct at issue here would not warrant the extraordinary remedy of dismissal.

9. Because the Commission "is charged with safeguarding the integrity of our nation's interstate energy markets,"[15] it is obligated to take necessary and appropriate action when it finds violations of the statutory and regulatory prohibitions on manipulation of those markets.[16] Moreover, numerous courts have recognized that administrative agencies are charged by Congress to enforce laws on behalf of the

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[12] *See, e.g.*, Notice of Designation of Commission Staff as Non-Decisional (May 25, 2021).

[13] October 2021 Motion at 1.

[14] Order Assessing Penalties, 177 FERC ¶ 61,073 at P 241. We disagree with the dissent's unsupported statement that "no matter how poorly Enforcement conducts itself, no matter what rules it breaks, no matter what ethical canons it violates, the Commission will still move ahead and issue a penalty assessment order." Dissent at P 16. To the contrary, the Commission's review of those earlier allegations, lengthy consideration of the present motion, and referral and inquiry into the allegations made therein demonstrate that we consistently hold staff to the highest standard of ethical behavior.

[15] *Powhatan Energy Fund, LLC*, 949 F.3d 891, 894 (4th Cir. 2020).

[16] *See id.* at 904 ("Given the tangible harms visited on consumers by fraudulent conduct in the energy markets, Congress realized that tasking FERC with monitoring those markets 'is not enough—FERC must have the tools to act when markets fail, and it must use those tools to ensure that customers pay only just and reasonable rates.'") (quoting *Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 920 n.5 (9th Cir. 2011); *id.* (citing *Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773 (2016)) (holding that "if FERC sees a violation of [the just and reasonable rates] standard, it *must* take remedial action")).

American people and thus dismissal of an agency enforcement action may run counter to the public interest.[17] Accordingly, absent extreme circumstances such as a violation of Constitutional due process, courts generally will not set aside agency decisions based upon a violation of procedural rules.[18] The court in *PATCO*, for example, held that "[i]n making this determination [to vacate an agency decision], a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to

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[17] *See, e.g., U.S. Commodity Futures Trading Comm'n v. U.S. Bank, N.A.,* No. 13-CV-2041-LRR, 2014 WL 6474183, at *35 (N.D. Iowa Nov. 19, 2014) ("The public has an important interest in the enforcement of federal laws and regulations. Preventing them from being so enforced in the event that an agency fails to execute its duties would essentially absolve potential lawbreakers from liability."); *SEC v. Cuban*, 798 F. Supp. 2d 783, 794 (N.D. Tex. 2011) ("As a matter of principle, except where there is a demonstrable need to deter governmental abuses, enforcement actions should not be subjected to an array of affirmative defenses—defenses that might not at all be relevant were the agency not seeking statutory equitable relief—that could undermine their efficacy as a law enforcement tool."). *Accord Heckler v. Community Health Services, Inc.*, 467 U.S. 51, 60 (1984) ("[I]t is well settled that the Government may not be estopped on the same terms as any other litigant" because "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."); *Pan-Am. Petroleum & Transp. Co. v. U.S.*, 273 U.S. 456, 506 (1927) (holding that laws of equity "will not be applied to frustrate the purpose of [Congress's] laws or to thwart public policy").

[18] *See Pro. Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547 (D.C. Cir. 1982) (*PATCO*) (holding that possibly indiscreet and undesirable contact between litigation staff and decisionmaker, which did not taint the proceeding or unfairly advantage litigation staff in the prosecution of the case, does not void the agency's decision); *Lichoulas v. FERC*, 606 F.3d 769, 778 (D.C. Cir. 2010) ("Even if FERC receives an ex parte communication that violates 18 C.F.R. § 385.2201, the court will not undo FERC's action unless 'the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair.'" (citing *Press Broad. Co. v. FCC*, 59 F.3d 1365, 1369 (D.C. Cir. 1995) (quoting *PATCO*, 685 F.2d at 564 (footnote omitted)); *Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 184 (D.C. Cir. 1997)).

respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose."[19]

10. As noted in the Order Assessing Penalties, the email communication at issue here did *not* address *any* substantive matter or question before the Commission in this proceeding that could have influenced the Commission's ultimate decision on the merits. The email exchange reflected the thoughts of a single member of decisional staff regarding state law procedural issues not relevant to the questions before the Commission in this proceeding. Those questions may or may not arise instead in the Kittell Estate's probate proceeding in California state court at some unknown point in the future.[20]

11. Moreover, we note that OE Staff promptly noticed the email exchange in the docket, thereby providing interested parties with the opportunity to respond. That same day, the Commission issued a revised Notification of Designation of Commission Staff as Non-Decisional, removing Tabackman from the Decisional Team. Moreover, OE Staff promptly disclosed the emails to the Designated Agency Ethics Official. The Commission, out of an abundance of caution, also referred the matter to the OIG for investigation.

12. There is no evidence that the Kittel Estate was harmed by this email exchange.[21] To the degree that there was any harm from the email exchange, OE Staff appropriately remedied that harm by immediately disclosing that exchange, thereby providing

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[19] *PATCO*, 685 F.2d at 564-65.

[20] The facts before us are that a member of decisional staff initiated an email conversation with a member of litigation staff regarding an issue that was not before the Commission. The response from litigation staff was brief and unrelated to the merits of this proceeding. There is no indication that this single exchange was part of a larger course of communication or that litigation staff sought to obtain any improper advantage – indeed, the disclosure of this private exchange and the results of the Commission's internal inquiry suggest just the opposite.

[21] There is "a presumption of honesty and integrity in those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), and neither the Kittell Estate nor the dissent has provided any basis for concluding that there was any questionable conduct beyond this email chain. *See also CTIA-The Wireless Ass'n v. FCC*, 530 F.3d 984, 989 (D.C. Cir. 2008) ("[W]e have long presumed that executive agency officials will discharge their duties in good faith."); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1091 (D.C. Cir. 1992) ("As we have so often said, 'agencies are entitled to a presumption of administrative regularity and good faith' . . . .") (quoting *FTC v. Owens–Corning Fiberglas Corp.,* 626 F.2d 966, 975 (D.C. Cir. 1980).

Respondents with an opportunity to respond,[22] and, as discussed, the Commission both referred the matter to the OIG and tasked the Commission's designated ethics official to conduct an inquiry to assess whether additional prohibited communications occurred to confirm our decisions in this case were reasoned and unbiased. Therefore, we cannot conclude that the communication, even if it violated a Commission regulation, warrants the extraordinary remedy of dismissal: there has been no violation of Constitutional due process, no impact on any substantive order by the Commission, no deprivation of an opportunity to know the substance of the communication or to respond to it, and no other fairness concern that could merit dismissal.[23] Accordingly, we find that dismissing the action would serve no purpose other than to deprive the public of justice in the underlying matter.

[22] *See* 18 C.F.R. § 385.2201(f)(2) (requiring disclosure of prohibited off-the-record communications). The Government in the Sunshine Act defines ex parte contacts as between decisional employees and "interested person[s] outside the agency," 5 U.S.C. § 557(d)(1). In contrast, the Commission's separation of functions rule (Rule 2202) governs communications between the Commission's non-decisional and decisional staff. However, the Commission has explained that its ex parte and separation of functions rules overlap in practice and are similar in purpose, scope, and operation. Notice of Proposed Rulemaking, 123 FERC ¶ 61,158 at PP 2 n.5, 9. *See also Ex Parte Contacts and Separation of Functions*, Order No. 718, 125 FERC ¶ 61,063 (2008) (explaining that Commission's rules on separation of functions and off-the-record communications allow both outside persons and Commission investigative staff to communicate with decisional staff during same time periods). Thus, it is appropriate to provide the same remedy for the communications at issue here that applies to ex parte communications under 18 C.F.R. § 385.2201(f)(2). Specifically, with the actual e-mails placed in the record, interested parties know their content and have the opportunity to respond to them.

[23] Given these facts, and the fact that the Kittell Estate cites no basis on which the Commission could grant such relief, we deny the Kittell Estate's related request that Enforcement's lead counsel be removed from the case.

The Commission orders:

The Kittell Estate's October 2021 Motion is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

GreenHat Energy, LLC, John Bartholomew, Kevin Ziegenhorn, and Luan Troxel, in her capacity as Executor of the Estate of Andrew Kittell	Docket No. IN18-9-000

(Issued January 5, 2022)

DANLY, Commissioner, *dissenting*:

1. I dissent from today's order denying the Expedited Motion to End Enforcement Action Against the Estate of Andrew Kittell, to Ban Steven Tabackman and Thomas Olson from Future Involvement, and for an Investigation by Other Offices Within the Commission (October 5, 2021 Motion) for the reasons discussed below.[1] I would have explicitly found that the email exchange between the decisional and non-decisional staff was inappropriate, ordered the two attorneys barred from all future involvement in this matter, and directed Commission staff to conduct a robust, public investigation with findings to be set forth in a later Commission order.

2. In June of 2018, GreenHat Energy, LLC (GreenHat) defaulted on obligations to pay for Financial Transmission Rights (FTR) that had come due. This was the largest default in the history of PJM's FTR market, and it caused PJM's members to suffer approximately $180 million in losses. As I stated in my concurrence to the Order to Show Cause, PJM was roundly and justly criticized for its failure to oversee its markets and for the deficient collateral requirements that allowed this default to occur.[2] Given the magnitude of the default, the Office of Enforcement (Enforcement) appropriately initiated an investigation of GreenHat and its owners (collectively GreenHat).[3]

3. Following the conclusion of Enforcement's investigation, the Commission issued an Order to Show Cause on May 20, 2021. I supported that order because I believed there was enough *prima facie* evidence to warrant a formal, open proceeding. As I

[1] *See GreenHat Energy, LLC*, 178 FERC ¶ 61,002 (2022).

[2] *GreenHat Energy, LLC*, 175 FERC ¶ 61,138 (2021) (Danly, Comm'r, concurring at P 1) (Order to Show Cause).

[3] GreenHat's owners were John Bartholomew, Kevin Ziegenhorn, and Andrew Kittell. Mr. Kittell is now deceased, the Commission has named his estate as a respondent (Kittel Estate), and has held that the estate is liable for disgorgement of profits from the alleged manipulative scheme.

explained in my concurrence, there were a number of outstanding issues in the case presented by Enforcement that required amplification, clarification and, in certain cases, evidence.[4] I also offered guidance to GreenHat and Enforcement as to the information I would have considered helpful when responding to the Order to Show Cause.[5] GreenHat filed an answer and Enforcement filed a reply. The Kittell Estate filed a request for leave to reply and a reply.

4. On October 1, 2021, Enforcement issued a notice disclosing an email exchange between an Enforcement litigation attorney and a member of the Commission's decisional staff.[6] This email exchange was reported, so we are told, because one of the participants believed that it may have constituted a violation of the Commission's Separation of Functions rule.[7]

5. The Kittell Estate filed the October 5, 2021 Motion requesting that the Commission "drop all enforcement action against the estate of Andrew Kittell, ban Messrs. Tabackman and Olson from any future involvement, and order other offices within the Commission to investigate what happened."[8] On October 6, 2021, Enforcement filed a response opposing the October 5, 2021 Motion, contending that it followed proper procedure by disclosing the emails to the Designated Agency Ethics Official and by ensuring that the emails were made public and placed in the record of this proceeding.[9]

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[4] *See* Order to Show Cause, 175 FERC ¶ 61,138 (Danly, Comm'r, concurring).

[5] *See id.* (Danly, Comm'r, concurring at PP 3-31).

[6] October 1, 2021 Notice Re Communication with Decisional Staff (October 1, 2021 Notice) (copies of the email exchange were attached and redacted individuals' personal email addresses). That same day, the Commission issued another notice removing one of the attorneys in the email exchange from the decisional staff team. October 1, 2021 Notice of Designation of Commission Staff as Non-Decisional.

[7] 18 C.F.R. § 385.2202. The importance of maintaining separation of functions is also embodied in the Administrative Procedure Act, 5 U.S.C. § 554(d).

[8] October 5, 2021 Motion at 1. The October 5, 2021 Motion also reiterated concerns with the investigative process in this case, which the Commission addressed in the Order Assessing Penalties. *See GreenHat Energy, LLC*, 177 FERC ¶ 61,073, at P 241 (2021) (Order Assessing Penalties).

[9] Enforcement October 6, 2021 Opposition at P 1.

6. In the Order Assessing Penalties issued on November 5, 2021,[10] the Commission explained that the email exchange disclosed in the October 1, 2021 Notice addressed procedural matters that might arise under California law in the state probate proceeding for the Kittell Estate, but that those procedural matters under California probate law were not before the Commission.[11]

7. The Commission also stated that it had referred the matter to the Commission's "designated agent" in the Department of Energy's Office of the Inspector General (OIG)[12] and decided to defer ruling on the October 5, 2021 Motion until the conclusion of any investigation instituted by OIG.[13] I, too, reserved judgment on the issues raised in Section III of the Order Assessing Civil Penalties regarding claims of Enforcement misconduct[14] and on the issues raised in IV.D. regarding the fairness of Enforcement's investigation.[15] Apparently, OIG has conducted an investigation, has declined to take further action regarding the claims in the October 5, 2021 Motion, and has deferred to the

[10] Having reviewed GreenHat's answer and Enforcement's reply to the Order to Show Cause, I remained deeply skeptical of GreenHat's explanations. But GreenHat was not required to prove its innocence—Enforcement had to prove its case to a preponderance of the evidence in order to make out a claim of market manipulation and for us to decide, based on that evidentiary showing, whether we should assess a penalty. Based on my review of the parties' submissions, I concluded that Enforcement failed to provide the proof necessary to meet its burden and I therefore dissented in full from the Order Assessing Civil Penalties. *See* Order Assessing Penalties, 177 FERC ¶ 61,073 (Danly, Comm'r, dissenting).

[11] *Id.* P 27.

[12] *Id.*

[13] *Id.* ("Nevertheless, given the circumstances, the Commission referred the matter to the Commission's designated agent in the Department of Energy's Office of the Inspector General (OIG). As that referral remains outstanding, and in order to fully respect any subsequent findings by the OIG, we will not rule on the Kittell Estate motion at this time. Rather, we will address the merits of the [October 5, 2021] [M]otion in a Commission order after the OIG concludes its consideration of this matter.").

[14] *See id.* (Danly, Comm'r, dissenting at P 4 n.5).

[15] *See id.*

Commission, allowing it to conduct any further internal proceedings it deems appropriate.[16]

8. As an initial matter, I have consistently opposed the Kittell Estate's inclusion for reasons wholly unrelated to the October 5, 2021 Motion before us. As I previously stated, the Kittell Estate either should never have been a Respondent or the directed disgorgement should have been limited to amounts traceable to Kittell's alleged unjust enrichment.[17]

9. As to the matter pending before us now, I take issue with the instant order as to two of the issues raised in the October 5, 2021 Motion. First, I find the majority's reasons for denying the requested dismissal to be unconvincing. In response to the October 5, 2021 Motion, the majority concludes that the information in the email exchange was not relevant to the proceeding before it but that it instead related to the Kittell Estate's probate proceeding in California state court.[18] According to the majority, "absent extreme circumstances such as a violation of Constitutional due process, courts generally will not set aside agency decisions based upon a violation of procedural rules."[19]

10. I disagree with the Commission's breezy declaration that Enforcement's alleged prosecutorial misconduct and seeming violation of the Separation of Functions rule is neither a violation of due process nor an extreme circumstance.[20] The majority, while acknowledging that it was "troubled by the exchange of emails between decisional staff and litigation staff,"[21] declined to "conclude that the communication, even if it violated a

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[16] *See GreenHat Energy, LLC*, 178 FERC ¶ 61,002 at P 5.

[17] *See* Order Assessing Civil Penalties, 177 FERC ¶ 61,073 (Danly, Comm'r, dissenting at P 44).

[18] *See GreenHat Energy, LLC*, 178 FERC ¶ 61,002 at P 10.

[19] *Id.* P 9 (citations omitted).

[20] There is a reason why the Separation of Functions rule exists. When it is violated, there is no division between those who investigate suspected wrongdoing, and those who are later called upon to sit in judgment. As James Madison observed: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961).

[21] *GreenHat Energy, LLC*, 178 FERC ¶ 61,002 at P 6.

Commission regulation, warrants the extraordinary remedy of dismissal,"[22] finding that "there has been no violation of Constitutional due process, no impact on any substantive order by the Commission, no deprivation of an opportunity to know the substance of the communication or to respond to it, and no other fairness concern that could merit dismissal."[23] According to the majority, "we need not decide here whether the Tabackman-Olson email exchange identified in the [October 1, 2021] [N]otice violated the Commission's regulations because we conclude that the conduct at issue here would not warrant the extraordinary remedy of dismissal."[24]

11. Perhaps. But as an institutional matter, the Commission is faced with what amounts to a self-evidently impermissible communication between two lawyers on either side of the decisional wall—a wall erected for the very purpose of avoiding violations of due process—and in response, the Commission essentially says, with little justification or explanation, "don't worry, nothing truly important or problematic happened here." But if we pause for a moment to consider what did happen, especially if in doing so we accord Enforcement the same courtesy it affords its targets (drawing the worst possible inference we can from the evidence before us), we see that the events paint a disturbing picture.

12. A series of emails were exchanged on private email accounts between an Original Sender and an Original Recipient.[25] Presumably, this was to ensure that they would not be retained as federal records. They were exchanged between attorneys on either side of the decisional wall.[26] Both lawyers knew that this was not allowed,[27] and we may safely assume that they conducted this exchange in the full knowledge that it was improper. This assumption is bolstered by the repeated inculpatory statements by the Original Sender, such as "you should not mention how you came upon [the cases]" and "you never heard that here."[28] Nevertheless, despite the Original Sender's inculpatory statements making the impropriety of these emails obvious, the Original Recipient continued to engage in the exchange—the back-and-forth saw several further replies and counter-

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[22] *Id.* P 12.

[23] *Id.*

[24] *Id.* P 8.

[25] October 1, 2021 Notice at 1.

[26] *Id.* ("an attorney . . . who serves as decisional staff . . . sent three emails to a[n] . . . attorney who is part of the litigation staff . . . .").

[27] *See, e.g.*, 18 C.F.R. § 385.2202.

[28] October 1, 2021 Notice, Exh. 1 at 2.

replies.[29] We can confidently assume that the Original Recipient continued the exchange in full knowledge that it was improper to do so. Also of note is the speed with which the Original Recipient responded to the emails he received, after work hours, from a private email account.[30] A fair assumption is that such communications, as obviously inappropriate as they are, are a matter of routine among Enforcement attorneys—there appeared to be no surprise on the part of the Original Recipient—and we can safely expect that no production of emails between any two lawyers on an enforcement matter could be considered complete without productions from their private email accounts.

13. We are then told that, at some point, the Original Recipient "realized" that the emails "may constitute a violation of the Commission's Separation of Functions regulation."[31] Whether this "realiz[ation]" was a fit of conscience or perhaps something more cynical,[32] we will likely never know, but anyone could be forgiven for reacting to exculpatory inferences that might be drawn from this self-report with skepticism. Such skepticism is particularly called for when one considers the October 1, 2021 Notice that brought this self-report to the public's attention. In what can only be described as an indefensible lapse of judgment, management in Enforcement allowed[33] the Original Recipient to serve as signatory to the October 1, 2021 Notice—a document which the Original Recipient presumably authored and by which he purports to exonerate himself.[34]

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[29] *See id.* at Exh. 1.

[30] *See id.*

[31] *GreenHat Energy, LLC*, 178 FERC ¶ 61,002 at P 2; *cf.* October 1, 2021 Notice at 1 ("the litigation staff member realized that these emails constituted a violation of the Commission's separation of functions regulation, 18 C.F.R. § 385.2202.").

[32] Qui s'accuse, s'excuse.

[33] Enforcement's chain of command cannot claim ignorance of the fact that the Original Recipient signed the document, their names appear alongside his on the signature block. *See* October 1, 2021 Notice at 1-2.

[34] This self-exoneration, such as it is, is not convincing. The October 1, 2021 Notice states, "[a]fter receiving the third email from the decisional staff attorney, which referred to his work as part of the decisional team, the litigation staff member realized that these emails constituted a violation of the Commission's separation of functions regulation, 18 C.F.R. § 385.2202." *Id.* at 1. Consider how likely this explanation is in light of the Original Sender's repeated inculpatory statements. No Enforcement attorney would *ever* believe such a story if offered by the target of an investigation.

14. When faced with credible allegations—or, as in this case, admissions—of wrongdoing by Enforcement, the Commission should not shy away from making the determinations that it is called upon to make. We have been asked to decide whether this conduct violated Commission regulations and, if it did, to provide relief for the targets. Even if the relief requested is ultimately denied, it should not be denied as the Commission determines that it "need not decide . . . whether" alleged conduct "violated the Commission's regulations." Under these circumstances, the movant and the public deserve an answer. And while I acknowledge that Enforcement and the Commission have taken some action to redress Enforcement's misconduct,[35] our Enforcement program would be better served by issuing a Commission order with a clear-eyed and unflinching response to the misconduct alleged in both the October 5, 2021 Motion and the Respondents' Answer to the Order to Show Cause.[36] For prosecutors to enjoy the public's confidence, their ethics must be above suspicion. We oversee those prosecutors. And for the Commission to do anything less than fully consider and respond to these claims damages our credibility.[37]

15. Second, I disagree with the majority's decision to decline to remove both of the attorneys from future involvement in this enforcement action and its litigation.[38] The only action taken was to remove one of the attorneys from decisional staff.[39] The Commission, however, should have removed both from further involvement in all aspects

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[35] The email exchange was noticed in the docket (albeit *two weeks* after the emails were sent), interested parties were provided with the opportunity to respond, a revised Notice of Designation of Commission Staff as Non-Decisional was issued, the Original Sender was removed from the Decisional Team, the emails were disclosed to the Designated Agency Ethics Official, and the matter was referred to OIG for investigation.

[36] *See, e.g.*, Respondents' Answer to Order to Show Cause at 8 (regarding claim of deleting exculpatory evidence).

[37] Both the Commission and the public need to know whether such communications routinely occur between and among Enforcement attorneys on either side of the decisional wall. This is not a trivial matter. If the Commission does not act to enforce its own rules swiftly, aggressively, and in full view of the public, no target of an Enforcement investigation can ever be confident that its case has been free of impermissible communications between those who investigate and prosecute enforcement cases and those called upon to be impartial adjudicators.

[38] *See GreenHat Energy, LLC*, 178 FERC ¶ 61,002 at P 12 n.23 ("we deny the Kittell Estate's related request that Enforcement's lead counsel be removed from the case").

[39] *See id*. PP 2 n.2, 11.

of this case. This is the minimum relief that ought to be afforded the movant. According to the majority, "[t]o the degree that there was any harm from the email exchange, [Enforcement] Staff appropriately remedied that harm by immediately disclosing that exchange, thereby providing Respondents with an opportunity to respond."[40] The order states that the October 1, 2021 Notice was "promptly" issued.[41] It is unclear from today's order whether that is actually the case. The majority does not identify exactly when it was that the emails were reported other than to say it happened "immediately," glossing over the fact that the notice was issued on October 1, 2021, a full two weeks after the initial email was sent on September 17, 2021.[42]

16. Throughout this proceeding, I have been troubled by the allegations of Enforcement's misconduct raised in both the October 5, 2021 Motion and in the Respondents' Answer to the Order to Show Cause. The majority summarily dismissed claims[43] in the Order Assessing Civil Penalties stating: "Criticisms of the investigative process generally or as to these Respondents specifically are not material to the substance of the Commission's findings here."[44] This is tantamount to saying that no matter how poorly Enforcement conducts itself, no matter what rules it breaks, no matter what ethical canons it violates, the Commission will still move ahead and issue a penalty assessment order.

17. Such a declaration, far from deterring future prosecutorial abuse, condones and encourages it. Today's order only reinforces that message. And, perhaps most gallingly, the Commission today holds Enforcement to a completely different standard than it applies to the Respondents. While the majority held Respondents accountable in the Order Assessing Penalty based on mere inference drawn from circumstantial evidence, the majority here—in the face of *admitted* wrongdoing—takes a completely different tack: it declines to even determine whether a violation occurred.

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[40] *Id.* P 12.

[41] *Id.* P 11.

[42] *Id.* P 12; *see also id*. P 2.

[43] *See, e.g.*, Respondents' Answer to Order to Show Cause at 6-10; Kittell Estate Answer to Order to Show Cause at 7-12. These allegations concern the investigative phase of this proceeding prior to the issuance of the Order to Show Cause and do not involve the subject matter of the October 5, 2021 Motion.

[44] Order Assessing Civil Penalties, 177 FERC ¶ 61,073 at P 241.

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner