



whether the trades were manipulative and whether Defendants had fair notice that their trades would be considered manipulative.”

Defendants do not need to depose Dr. Bowring to obtain his expert opinion on “whether the trades were manipulative.” The Market Monitor continues to stand by the determinations included in the 2011 referral submitted to the FERC Office of Enforcement.

Defendants assert that Dr. Bowring and Mr. Dadourian are “likely to have relevant information ... about whether notice was provided to PJM market participants that UTC trades like those at issue in this case would be deemed manipulative,” and “the rules for UTC trades during the summer of 2010.” Defendants had and have access to any public communications and private communications to Defendants from the Market Monitor on those topics. Such communications received from the Market Monitor are the only communications upon which Defendants can assert reliance. Defendants note (at 2) that Dr. Bowring “was the first person to contact the Defendants to express concerns about their trading.” By the time of such contact, the market behavior subject to the show cause order had already occurred.

The Market Monitor has provided information concerning communications to the FERC and to the Defendants concerning the referral, in its voluntary document production. Documents withheld concerning confidential communications between the Market Monitor and third parties could not have influenced Defendants’ evaluation of their behavior and have no relevance to Defendants’ behavior or whether Defendants had fair notice that such behavior was manipulative.

Defendants (at 4) provide one alleged “concrete example of the relevance of the information Defendants seek through the requested depositions.” Defendants claim (at 4) that Dr. Bowring and Mr. Dadourian told another trader that trades of the same type as Defendants’

trades did not violate the rules. Both the Defendants' and the other trader's market behavior are included in the Market Monitor's referral and are subject to enforcement actions by FERC. The Market Monitor does not allege that any of the transactions subject to its referral violated the PJM market rules. The referral explains evidence of market manipulation through a manipulative scheme involving trades that did not violate PJM market rules for UTC trades. Violation of the rule prohibiting market manipulation depends upon the intent of the trader and whether its trades are part of a manipulative scheme. Defendants' primary example of a line of inquiry that they seek to pursue is based on a false premise, does not concern a matter in dispute in this case, and is irrelevant to this case.

Even if the Market Monitor had, in a confidential communication with another trader, indicated that the Market Monitor had no concerns that its trades were manipulative, and those trades were similar to Defendants' trades, such communications would not be relevant to Defendants' claims. Information communicated to another trader but not to Defendants is not relevant to Defendants' fair notice claim. If Defendants engaged in trading based on representations of the Market Monitor's views made to Defendants by another trader, then Defendants should direct discovery to that source, and not to the Market Monitor.

Defendants further allege (at 4 n.1), "Dr. Bowring indicated to Dr. Chen that he would not refer the matter to FERC and told another UTC trader that he would not take further action as long as they stopped engaging in certain UTC transactions—even though the Market Monitor is obligated to report suspected manipulation to FERC." Defendants' claim (*id.*) that Dr. Bowring told them to stop the transactions (and that Defendants' stopped the transactions) is consistent with the view that such transactions are manipulative.

The Market Monitor does not agree with Defendants' assertion that Dr. Bowring told them that the Market Monitor would not submit a referral, but the assertion is beside the point. The Market Monitor did submit a referral to the FERC. In that referral, the Market Monitor explains its position that Defendants' transactions are manipulative.

Defendants also have the timing backwards. Most or all of the transactions occurred before the communications identified by Defendants. Such communications could not have influenced Defendants behavior. Nothing asserted by Defendants about the lines of inquiry they would pursue has relevance to this case.

Cases cited by Defendants (at 6–7) do not support denial of the Market Monitor's motions. Defendants cite the *E.E.O.C. v. Freeman* case (No. RWT-09-2573, 2012 WL 3536752, at \*5 (D. Md. Aug. 14, 2012)), which concerned Plaintiff's motion to quash depositions. That case evaluated the appropriate burden placed on the party initiating the case. The motion was granted in part, finding one line of inquiry irrelevant. The motion was denied in part because the Court found potential relevance comparing E.E.O.C. practices to the defendant's practices. That finding is irrelevant to this case. The Market Monitor does not engage in UTC trades.

Defendants cite the *Lawson v. Spirit AeroSystems, Inc.*, case (No. 18-1100-EFM-ADM, 2020 WL 2101251 (D. Kan. Apr. 30, 2020)), which explains, "A nonparty objecting to a subpoena has the burden to show that compliance would cause undue burden." The Market Monitor has explained the specific burden imposed on the Market Monitor and the market monitoring function if Defendants can force the disclosure of confidential communications with market participants and PJM Member information that is protected from disclosure under the PJM tariff. Forcing disclosure will have a chilling effect on communications between the Market Monitor and market participants. In *Lawson*, the Court found that the subpoena in that case

“seeks relevant, non-cumulative, and non-duplicative information that is proportional to the needs of the case.” Defendants have made no such showing for the subpoena issued to the Market Monitor in this case.

**B. The Burden Imposed on NonParty Market Monitor Exceeds Any Demonstrated Benefit.**

Defendants indicate (at 4, 8–10) their intent to pursue inappropriate, burdensome and irrelevant lines of inquiry about the Market Monitor’s confidential communications with other PJM members. One apparent and improper purpose is to create confusion. Another apparent and improper purpose is to manufacture conflicting statements by deposing both Dr. Bowring and Mr. Dadourian.<sup>2</sup> Defendants provide no examples of actual conflicting statements or internal disagreement, or any communication suggesting that such statements or disagreement would be revealed through further inquiry. Defendants instead show similar statements by Dr. Bowring (at 4 n.1) and Mr. Dadourian (at 10) that no PJM market rules violation is involved, and then misrepresent those statements to suggest that Defendants’ behavior raised no concerns.<sup>3</sup> Defendants misrepresent the communications of both Dr. Bowring and Mr. Dadourian, but, even as misrepresented, there is no evidence of disagreement.

Even if Defendants could show a conflict or internal disagreement, they would still need to show awareness and reliance on it when engaging in the behavior subject to the referral. Information upon which Defendants could not have relied is irrelevant to this case.

Defendants claim (at 7) that the Market Monitor “is not an ordinary disinterested non-party.” Defendants cite to a statement of Dr. Bowring (*id.*) that appearing at a deposition is “part of [his] job.” The Market Monitor’s discharged its core duties in this matter ten years ago. FERC

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<sup>2</sup> See Defendants’ Response at 10.

<sup>3</sup> See *id.*

has the responsibility to enforce its show cause order. Neither Dr. Bowring nor the Market Monitor receive any additional compensation in connection with participation in enforcement proceedings, which is what Dr. Bowring meant when he explained that this is part of his job. Time and effort spent by the Market Monitor on this matter comes at the expense of attention to other matters that are also part of the job.

**C. The Market Monitor Has Provided Defendants Reasonable Opportunity for Discovery.**

The Market Monitor has provided Defendants with documents concerning communications with FERC and the Defendants and in connection with the preparation of the referral. The Market Monitor has agreed to make Dr. Bowring available for one seven hour deposition in this proceeding as is contemplated by Rule 30(d)(1). Defendants do not explain why this is inadequate for any valid purpose. Defendants make arguments referring to the approach taken in the *Coaltrain* case (at 5).<sup>4</sup> The Market Monitor's experience in the discovery in the *Coaltrain* proceeding showed that a single deposition provides more than enough time to fully explore relevant lines of inquiry. The same experience showed the Defendants can expect ample time to ask questions with no unreasonable or inappropriate restriction as to their scope. There is no reason why Defendants and FERC cannot come to an advance agreement allocating the time available between them.

Defendants' objections (at 12) to the Market Monitor's preferred order of the scheduling of multiple noticed depositions show that multiple depositions pose a hardship even for Defendants' counsel to coordinate with their own schedules. The solution is to limit deposition of the Market Monitor to Dr. Bowring, and to a single seven hour day.

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<sup>4</sup> See FERC v. Coaltrain Energy, L.P., No. 2:16-cv-00732-MHW-KAJ (S.D. Ohio filed July 2, 2016) ("*Coaltrain*").

**D. Defendants' Response Demonstrates Why a Protective Order Is Needed.**

Defendants' examples of the lines of inquiry they seek to pursue reveal an intent to explore matters that could not have influenced Defendants' market behavior. Defendants should not be allowed to burden the Market Monitor with inquiries into confidential communications with participants that are protected from disclosure by the PJM rules. The ability to engage in confidential communications is necessary for an effective market monitoring program. A protective order foreclosing inappropriate, irrelevant and burdensome lines of inquiry should be approved.

Respectfully submitted,



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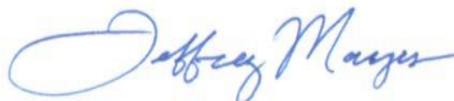
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Dated: July 2, 2021

**CERTIFICATE OF SERVICE**

I hereby certify that on July 2, 2021, I filed the foregoing pleading with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to counsel of record in this matter.

Respectfully submitted,



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