

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

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

**MEMORANDUM IN SUPPORT OF NON PARTY
MOTION TO QUASH AND FOR A PROTECTIVE ORDER**

Pursuant to Rule 45(c)(3) of the Federal Rules of Civil Procedure and the Initial Pretrial Order issued December 12, 2021 (ECF No. 160), nonparty Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM ("Market Monitor") submitted a motion to quash the subpoena noticing a deposition under Rule 45 issued to Dr. Joseph Bowring ("Bowring Subpoena") and the subpoena noticing a deposition under Rule 45 issued to John Dadourian ("Dadourian Subpoena"), both dated May 28, 2021. The Market Monitor also submitted a motion for a protective order for any deposition of Dr. Bowring or Mr. Dadourian. The memorandum provides legal support for the relief requested in those motions.

BACKGROUND

1. On December 7, 2020, Defendants issued a subpoena for documents under Rule 45 to non-party Market Monitor.

2. On December 20, 2020, the Market Monitor objected to the discovery requests on grounds of relevance, burden, privilege and the availability of relevant information from other better situated and more appropriate sources.
3. On March 23, 2021, the Market Monitor, without waiving objections, produced documents on a voluntary basis.
4. On May 4, 2021, consistent with Section 21(c) of the Initial Pretrial Order, the Defendants and the Market Monitor filed with the Court a joint statement and discovery dispute chart that framed for resolution by the Court each of the issues in dispute.
5. In an effort to resolve the instant dispute regarding the deposition subpoenas, the Market Monitor and Defendants convened a conference call on Monday, June 7, 2021, and the Market Monitor, Defendants and Plaintiff convened a call on Thursday, July 10, 2021, to meet and confer. The Market Monitor files these motions out of abundance of caution and to ensure a timely filing. The Market Monitor remains available to meet and confer with Defendants and work to reach a resolution of this dispute.
6. Defendants, Plaintiff and the Market Monitor have agreed that, in event that the Bowring Subpoena is not quashed, and the depositions of Dr. Bowring are limited to single day, a deposition of Dr. Bowring combining the Bowring Subpoena and the FERC Bowring Subpoena shall occur by remote means, and shall occur on Friday, July 23, 2021. If the Bowring Subpoena is not quashed, and the Court requires Dr. Bowring to be deposed twice in this proceeding, the deposition pursuant to the Bowring Subpoena shall occur on Monday, July 19, 2021 (Defendants' position) or Thursday, July 22, 2021 (Market Monitor's position), and the deposition pursuant to the FERC Bowring Subpoena shall occur on July 23, 2021. If the Dadourian Subpoena is not quashed, the deposition of Mr.

Dadourian shall occur on Monday, July 19, 2021 (Market Monitor's position) or Thursday, July 22, 2021 (Defendants' position). Plaintiff and the Market Monitor have agreed that, in event that the Bowring Subpoena (i) is quashed or (ii) is not quashed but the Court limits depositions of Dr. Bowring to a single day, such deposition shall occur by remote means, and shall occur on Friday, July 23, 2021.

7. Plaintiff has not issued any subpoena to the Market Monitor requesting documents. The Market Monitor did not object to the FERC Bowring Subpoena.

ARGUMENT

I. THE BURDEN TO NON PARTY MOVANT OUTWEIGHS ANY LIMITED NEED FOR DEPOSITION AND THE SUBPOENAS SHOULD BE QUASHED.

The Market Monitor requests that this Court quash the Bowring Subpoena because:

1. Defendants have not supported the need for a deposition under the standard set forth under Rule 26(b)(1), and have not met the higher standard applicable to subpoenas issued to a non party.

Rule 26(b)(1) provides that discovery of relevant information that must be proportional to the needs of the case. *Va. Dep of Corr. v. Jordan*, 921 F.3d 180, 188 (4th Cir. 2019). The Court must consider whether the burden or expense of the proposed discovery outweighs its likely benefit. A heightened standard applies to discovery directed at nonparty, as is the case here. *Jordan*, 921 F.3d at 189 (“When discovery is sought from nonparties, ... its scope must be limited even more. Nonparties are strangers to the litigation... Bystanders should not be drawn into the parties’ dispute without some good reason, even if they have information that falls within the scope of party discovery... A more demanding variant of the proportionality analysis ... applies when determining whether, under Rule 45, a

subpoena issued against a nonparty ‘subjects a person to undue burden’ and must be quashed or modified,” citing Rule 45(d)(3)(A)(iv)).

The Market Monitor has provided a significant voluntary production of documents and will, even if the Bowring Subpoena is quashed, be available for questions from Defendants pursuant to the FERC Bowring Subpoena. Defendants have not justified imposing a second or third day of deposing Market Monitor staff. The Market Monitor is not a party to this proceeding and should not be subject to imposition of an extraordinary burden.

2. Defendants have alternative sources for information and have not shown a need to burden nonparty Market Monitor.

Rule 45(d)(3)(A) provides that the Court “should quash or modify a subpoena that ... subjects a person to undue burden.” *See Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004) (“To determine whether the subpoena presents an undue burden, we consider the following factors: (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed. Further, if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party. A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”)

Dr. Bowring cannot be expected to provide information relevant to this case that Defendants have not already obtained from the Market Monitor’s voluntary production of documents, or have obtained or could be obtained from a better situated and more

appropriate source. The burden imposed under the Bowring Subpoena is high relative to the potential that anything relevant or useful can be obtained at deposition. The recollection of a witness of events from more than ten years ago cannot be expected to be more helpful than the report itself and contemporary written communications.

3. Defendants' insistence on seeking confidential and privileged information, particularly confidential information concerning third parties that the Market Monitor has a duty to protect, and information that should not be provided in order to protect the market monitoring function and the public interest, substantially increases the burden imposed on the Market Monitor.

Rule 45(c)(3)(A)(iii) provides: "On timely motion, the court for the district where compliance is required must quash or modify a subpoena that: ... iii. requires disclosure of privileged or other protected matter, if no exception or waiver applies." There are no exceptions or waivers that apply, and Defendant has not shown a substantial need, undue hardship, or inability to obtain this information from another source. *See Jordan*, 921 F.3d at 190 ("[I]f a subpoena seeks information from a business about its customers, it may implicate the business's interest in protecting competitively sensitive information, as well as the customers' interest in protecting their privacy Another type of burden arises when a subpoena is overbroad—that is, when it seeks information beyond what the requesting party reasonably requires. ... A nonparty should not have to do the work of tailoring a subpoena to what the requesting party needs; the requesting party should have done that before serving it.") (citations omitted).

4. Defendants have not provided a reason to subject Dr. Bowring to a deposition lasting longer than the limits stated in the Rules.

Rule 30(d)(1) provides that Dr. Bowring should not be subject to deposition in this case for more than “one day of seven hours.” Defendants will have ample opportunity to ask questions relevant to the case in a deposition of Dr. Bowring pursuant to the FERC Bowring Subpoena or a deposition combining the Bowring Subpoena and the FERC Bowring Subpoena. It is an undue burden for Market Monitor to produce Dr. Bowring for two days of depositions.

The Market Monitor requests that this Court quash the Dadourian Subpoena for same reasons provided for quashing the Bowring Subpoena, and, in addition, because:

1. John Dadourian’s work related to this matter occurred entirely within the close supervision of Dr. Bowring. Relevant questions that would be directed to John Dadourian are better directed to Dr. Bowring.

Courts have limited depositions to a single deponent based on a party’s representation that a particular deponent is best situated to respond to inquiries. *See W.W. McDonald Land, Co. v. EQT Prod. Co.*, 2013 U.S. Dist. LEXIS 69547 at 8 (USDC S. D. W. Va.) (“Defendants represent to Plaintiffs and the Court that EQT Production Company alone is responsible for the deductions taken from the royalties and, therefore, is the Defendant with knowledge of the issues surrounding the deductions.”)

John Dadourian was not authorized to determine the scope, content, applicable standards, or any other determination concerning whether or how to submit the referral of Defendants and others dated January 6, 2011. John Dadourian cannot be expected to provide information relevant to a valid defense or information that Dr. Bowring cannot provide.

2. Issuance of the Dadourian Subpoena appears to be for the impermissible purposes of annoyance or embarrassment, rather than to obtain useful information.

Rule 30(d)(3)(A) provides “At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.”

Quashing the Dadourian Subpoena will protect the Market Monitor from being subject to deposition for impermissible purposes without compromising the ability of the Defendants to obtain relevant information.

3. Multiple depositions of Market Monitor staff impose an unreasonable burden on the Market Monitor. The burden is particularly unreasonable relative to the potential to obtain relevant information.

If the Dadourian is not quashed, the deposition should be scheduled for July 19, 2021, rather than July 22, 2021, as noticed. The Defendants, Plaintiff and the Market Monitor are agreed that the three noticed depositions, if none are quashed or consolidated, should occur on three days: July 19, 22 and 23, 2021. Adopting the Market Monitor’s schedule will reduce the burden on the Market Monitor by allowing Dr. Bowring to prepare once for depositions potentially occurring over two days (i.e., July 22–23).

III. TO THE EXTENT A DEPOSITION IS PERMITTED, IT SHOULD BE LIMITED IN SCOPE.

The Market Monitor moves for a protective order that would apply to any and all depositions that occur under the Bowring Subpoena, the Dadourian Subpoena or the FERC Bowring Subpoena. The protective order is necessary and appropriate to limit the scope of permissible questions to matters relevant to Defendants’ defenses.

In the subpoena for document production issued December 7, 2020, Defendants have sought privileged and confidential information, including private communications between the Market Monitor and PJM Members. Such communications are irrelevant to this case and inquiry into such communications should be barred. Questions at deposition should be limited to matters concerning (i) the referral of Defendants to the FERC Office of Enforcement and related communications with the Office of Enforcement and (ii) the Market Monitor's communications to the public and potentially communicated to Defendants or private communications to Defendants concerning Defendants' market behavior that is the basis for referral of Defendants.

The Market Monitor requests that the Court, as it resolves the issues in the joint discovery dispute chart, also resolve the scope of permissible questions at deposition and issue a protective order.

Rule 26(c) provides that the Court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: ... (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." The Market Monitor requests that any of its deponents be protected from such inquiry.

Rule 26(c) provides that the Court may approve a protective order for "any person from whom discovery is sought," provided that the "the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." The Market Monitor has attempted to work with Defendants to resolve the dispute and is at an impasse. A joint discovery dispute chart is pending before the Court that explains the dispute about the scope of permissible inquiry in greater detail. The Market Monitor believes that

the chart sufficiently frames the dispute to allow the Court to grant its motion for a protective order.

CONCLUSION

For the reasons set forth herein, this Court should (i) quash the Bowring Subpoena, (ii) quash the Dadourian Subpoena, and (iii) and adopt a protective order for any deposition in the proceeding of either Dr. Bowring or Mr. Dadourian.

Respectfully submitted,

MONITORING ANALYTICS, LLC

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General Counsel

Monitoring Analytics, LLC

Dated: June 11, 2021

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2021, I filed the foregoing with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to counsel of record in this matter.

Respectfully submitted,

/s/ Anne G. Bibeau

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