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

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

DEFENDANT POWHATAN ENERGY FUND, LLC'S OPPOSITION TO THE FEDERAL ENERGY REGULATORY COMMISSION'S MOTION FOR A PROTECTIVE ORDER

COMES NOW, Defendant Powhatan Energy Fund, LLC ("Powhatan"), by counsel, and opposes the Federal Energy Regulatory Commission's ("FERC") Motion for a Protective Order ("Motion") (ECF No. 268) and Memorandum in Support (ECF No. 269) ("Mem.")[1] and states as follows.

I. INTRODUCTION AND BACKGROUND

Two members of FERC's litigation team in this matter have already shown that they are willing to engage in misconduct to win a case. Powhatan's subpoena seeks to help ensure that those individuals have not engaged in misconduct in this case. FERC's effort to preclude Powhatan's knowledge of these individuals' conduct should be denied. The two individuals in question, Mr. Thomas Olson and Mr. Steven Tabackman, had unlawful communication

[1] FERC's Memorandum in Support begins at page 3 instead of page 1. Powhatan will utilize FERC's page numbers when citing or quoting the Memorandum in Support.

approximately three months ago in a similar enforcement case. Those communications violated federal law because Mr. Olson, a member of FERC's decisional staff in that case, was prohibited by regulation from having substantive discussions regarding the case with Mr. Tabackman, a member of FERC's litigation staff in that case.[2] He did so anyway. The improper conduct required FERC to disclose publicly (1) the communications and (2) the content of the communications. *GreenHat Energy, LLC, et al.*, FERC Docket No. IN18-9-000 ("GreenHat"), ECF No. 269-5 at 4.[3] In the communications, Mr. Olson and Mr. Tabackman discussed litigation case strategy and Mr. Tabackman provided Mr. Olson with case law that would ostensibly defeat a statute of limitations defense. Mr. Tabackman concluded one email with "but you never heard it here." *Id.* *see id.* (Referring to two emailed Court cases and stating "you should not mention how you came upon them"). This improper communication is akin to the judge's chambers feeding the prosecution what it believed to be case law that would help the prosecution's case. FERC removed Mr. Tabackman from this case.

In light of this admitted misconduct, and against the backdrop of these two individuals' involvement in FERC's 11-year, dogged and "one-sided" pursuit of Powhatan, the defendant sought to notice the depositions of Messrs. Olson and Tabackman. FERC agreed to accept service of the subpoenas *duces* tecum, ensure the individuals' appearances for their depositions and coordinate the production of documents. The subpoenas instructed Mr. Olson and Mr. Tabackman

[2] *See* 18 CFR § 385.2202 ("In any proceeding in which a Commission adjudication is made after hearing, or in any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter, 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.").

[3] Exhibit D to the Memorandum in Support did not receive a blue header noting the case number, document number, date when it was filed, or page ID#.

to bring to their depositions "[a]ll documents and communications, including but not limited to emails, texts and social media posts, related in any way to the FERC investigation and/or litigation against Powhatan Energy and all co-defendants." *See* Subpoena, ECF No. 269-4.

FERC then threatened to move for a protective order and requested a meet-and-confer between counsel. As part of that conference, FERC agreed to procure declarations from Mr. Olson and Mr. Tabackman and obtain documents for production. Powhatan agreed to an email, social media, and text message search of the individuals' personal accounts with accompanying declarations. Powhatan also agreed that it would forego the depositions subject to the review of any documents and receipt of ***satisfactory*** declarations. Exhibit E to Mem., ECF No. 269-5 at 2 (emphasis added).

FERC's search and production process for Mr. Olson and Mr. Tabackman's relevant emails was deficient. Mr. Olson and Mr. Tabackman individually searched their own personal email accounts and unilaterally provided what they considered to be relevant to FERC's counsel, all without input from counsel. FERC did not provide any emails from Mr. Tabackman. Mr. Olson unilaterally made redactions to his emails without input from FERC's counsel and FERC produced those documents in hard-copy for a one-time in-person review by Powhatan's counsel. FERC wrongly asserted a blanket "relevancy" objection as the basis for the redactions. Mr. Olson did not produce any email attachments. FERC itself should have conducted the searches and completed any necessary redactions.

Powhatan now seeks to corroborate through third-party discovery from Google FERC's claims that no relevant emails exist between Mr. Olson and Mr. Tabackman. The subpoena should be allowed and the Motion should be denied because the subpoena seeks relevant information and FERC has not made the requisite showing of "good cause" under Fed. R. Civ. P. 26(c) to warrant a protective order. The subpoena is neither harassment nor a fishing expedition because the

subpoena seeks to discover what further communications these individuals did or did not have and does not seek the content of those communications. Any documents produced in response to the subpoena would be subject to the Protective Order in this case.

II. LEGAL STANDARDS

"A 'party claiming that a discovery request is unduly burdensome must allege *specific facts* that indicate the nature and extent of the burden, usually by affidavits or other reliable evidence.' *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 498 (D. Md. 2000) (emphasis added). Where 'assertions of harassment, burden, prejudice, and expense' are 'generalized' or 'non-specific,' they are 'insufficient to prevent ... discovery.'" *Papanicolas v. Project Execution & Control Consulting*, LLC, No. CIV.A. CBD-12-1579, 2015 WL 1242755, at *2 (D. Md. Mar. 17, 2015) (emphasis in original). "The party seeking the court's protection from responding to discovery must make a particularized showing of why discovery should be denied, and conclusory or generalized statements fail to satisfy this burden as a matter of law." *Robinson v. C&B Tax Inc.*, No. 4:21-MC-2-RJ, 2021 WL 5632086, at *3 (E.D.N.C. Nov. 19, 2021) (citing cases) (internal quotation marks omitted). "A blanket assertion of overbreadth and undue burden, without more, does not justify withholding the documents sought." *Hake v. Carroll Cty.*, Md., No. CIV. WDQ-13-1312, 2014 WL 3974173, at *4 (D. Md. Aug. 14, 2014).

"[T]he burden of proof is with the party objecting to the discovery to establish that the challenged production should not be permitted." *Gilmore v. Jones*, 339 F.R.D. 111, 121 (W.D. Va. 2021) (quoting *Jimmy A. Dunn Excavating Co. v. Eagle Pipeline, LLC*, No. 2:16-cv-4409, 2020 WL 1876338, at *2 (S.D. W. Va. Apr. 15, 2020) (quoting *Sherrill v. DIO Transp., Inc.*, 317 F.R.D. 609, 612 (D.S.C. 2016)) (alteration in original)). "The burden of showing that a personal right or privilege exists rests on the party claiming it." *U.S. Equal Emp. Opportunity Comm'n v. Bojangles' Restaurants, Inc.*, No. 5:16-CV-654-BO, 2017 WL 2889493, at *3 (E.D.N.C. July 6,

2017) (citation omitted). "The determination of the reasonableness of a subpoena requires the court to balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it, weighing the benefits and burdens, considering whether the information is necessary and whether it is available from another source." *Pac. All. Corp. v. McCoy Wiggins, PLLC*, No. 5:18-CV-298-BO, 2019 WL 722572, at *1 (E.D.N.C. Feb. 20, 2019) (citations omitted). Here, compliance by Google is simple and routine, there is no burden on FERC, and the metadata information is not available from any other source. The subpoena is proper.

III. ARGUMENT

A. The Subpoena is Not Harassment

FERC asked Mr. Olson and Mr. Tabackman to search their own Google accounts with agreed upon search terms that hit on emails related to this case. No emails from Mr. Tabackman were made available. Mr. Olson's emails were unilaterally redacted by Mr. Olson and made available in hard-copy to counsel for Powhatan for a one-time in-person review. The alleged basis for the redactions was blanket "relevancy". This is improper. *See Williams v. Big Picture Loans, LLC*, No. 3:17-CV-461, 2019 WL 8107922, at *2 (E.D. Va. May 28, 2019) ("Moreover, it appears that the general rule is that redactions based on relevance is a generally disfavored process.") (citations omitted); *Burris v. Versa Prod., Inc.*, No. CIV. 07-3938 JRT/JJK, 2013 WL 608742, at *3 (D. Minn. Feb. 19, 2013) ("The practice of redacting for nonresponsiveness or irrelevance finds no explicit support in the Federal Rules of Civil Procedure, and the only bases for prohibiting a party from seeing a portion of a document in the Rules are claims of privilege or work-product protection.") (citing Fed. R. Civ. P. 26(b)(5)); *Engage Healthcare Commc'ns, LLC v. Intellisphere, LLC*, No. 12CV00787FLWLHG, 2017 WL 3624262, at *3 (D.N.J. Apr. 26, 2017) ("The majority of the cases cited by the parties, as well as those independently located by the Special Master,

clearly state that unilateral redactions based on one party's subjective view of relevancy are improper.") (citing cases), *report and recommendation adopted*, No. CV 12-787 (FLW)(LHG), 2017 WL 3668391 (D.N.J. Aug. 23, 2017).

FERC did not provide further explanation as to how, for example, an email with a subject line regarding this case and an accompanying PDF attachment regarding this case could have irrelevant information in the body of the email that necessitated redaction. This raises the questions of why and what is Mr. Olson trying to avoid? The previous misuse of personal email and required disclosure of same in *GreenHat* negates FERC's argument that "[c]ourts routinely hold that in civil enforcement actions such as this that internal agency communications are not relevant." Mem. at 12, n.9 (citing *SEC v. Ripple Labs, Inc.*, No. 20-CIV-10832-ATSN, 2021 WL 1814771, at *2 (S.D.N.Y. May 6, 2021). In *Ripple*, the Court denied discovery of the personal devices or emails of SEC employees absent evidence such sources contain responsive documents. The fact that search terms hit on Mr. Olson and Mr. Tabackman's emails evidences the presence of responsive documents. For reasons currently known only to Mr. Tabackman and Mr. Olson, they were using the personal email accounts, rather than their official FERC email accounts. That they did the same in *GreenHat* further supports the necessity and relevance of Powhatan's subpoena to Google.

Plainly, Powhatan is required to go to the source, Google, to further understand the scope of communication between these two individuals.[4] Because of *GreenHat*, it cannot be said that subpoena is "solely for harassment." Mem. at 9. Mr. Olson and Mr. Tabackman opened the door

[4] Contrary to FERC's accusation, Powhatan never "reneged" on any agreement. As Powhatan's counsel stated in plain words, Powhatan agreed to "satisfactory" declarations and document review "in lieu of depositions." Exhibit E to Mem., ECF No. 269-6. Not only were the declarations and document review not satisfactory, there was no representation regarding third-party subpoenas.

for the subpoena first with their improper *GreenHat* communications and second by discussing FERC business on personal email accounts. FERC also refused to provide a privilege log or further explanation regarding the redactions. Finally, there is a Protective Order in this case (ECF No. 170), and any documents produced can be labeled "Confidential", if necessary, negating any argument regarding Twitter or other dissemination.

B. <u>The Subpoena is Not Unduly Burdensome</u>

The subpoena is not unduly burdensome because it only seeks metadata, not the content of emails. It is hard to fathom how the routine production of metadata by a corporate monolith like Google could be unduly burdensome or include privileged or personal information. Mem. at 9 (*citing In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 613 (E.D. Va. 2008)). FERC cannot sustain its burden that the subpoena will not uncover information relevant to Powhatan's claims or defenses, particularly under *Tucker* and *Papanicolas, supra*, because it has made sweeping generalizations without the requisite specific facts. *See, e.g.*, Mem. at 11-12 ("FERC is aware of no emails between Mr. Tabackman and Mr. Olson on their personal non-work email accounts regarding this case. Even if such communications were to exist, they would be nothing more than run-of-the-mill messages between co-counsel, which would be protected from disclosure under FERC's attorney-client, deliberative process, and work product privileges.") (footnote omitted). It is difficult to comprehend how "run-of-the-mill messages" could be protected by any privilege.[5] *See* Mem. at 14 ("And, if those communications were about the case, they are privileged or protected regardless of the medium on which they took place."). *GreenHat* makes clear that this unqualified wholesale assertion is false. FERC also asserts that any suggested

[5] FERC asserts "No emails between Mr. Olson and Mr. Tabackman hit on the search terms agreed to by Powhatan." Mem. at 12, n.8. The two declarations do not provide this testimony.

bias or selective prosecution is "entirely speculative". Mem. at 11. *GreenHat* dismisses any notion of speculation because it explicitly evidenced that the individuals in question would and did engage in misconduct via their personal email accounts. FERC now merely engages in rank guesswork because FERC does not know what was not produced, which is why the subpoena is appropriate and required.

Moreover, Google has not made an undue burden objection outside of a form letter. *See Cook v. Howard*, 484 F. App'x 805, 812 n.7 (4th Cir. 2012) (per curiam) (unpublished) ("We further note that Rule 45(c)(3) requires courts to quash a subpoena that 'subjects a person to undue burden' (45(c)(3)(A)(iv)). This ground encompasses situations where the subpoena seeks information irrelevant to the case ***or that would require a non-party to incur excessive expenditure of time or money***.") (emphasis added). The subpoena does not pose an undue burden.

C. The Subpoena is Specific and Clear and Does Not Implicate the Stored Communications Act

As the subpoena explicitly states, it does not seek the content of any email communications, and it cannot because doing so would violate the Stored Communications Act, 18 U.S.C. § 2701 *et seq*. ("SCA"). Rather, the subpoena properly seeks information outside the SCA:

> email header files[], the date and time each such email was sent; the date and time each such email was deleted from Google; the Internet Protocol address(es) from which such email were deleted from Google; the recipient(s) of each such email; the sender of each such email; routing data; the Message-ID of each such email; the DKIM-Signature of each such email; the size of each such email (in bytes); [and] any hash value of each such email and/or other ***noncontent*** value used to uniquely identify each such email.

Mem. Exhibit F, ECF No. 269-7 at 7 (emphasis added). The SCA statutorily allows for this information to be provided. *See* 18 U.S.C. § 2702(c)(6) (an electronic communication service provider "may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications ...) ... to any person other than a

government entity."). And in turn Courts routinely find this information outside of the scope of the SCA and allow such subpoenas. *See, e.g.*, *Xie v. Lai*, No. 19-MC-80287-SVK, 2019 WL 7020340, at *5 (N.D. Cal. Dec. 20, 2019) ("Applicants may, however, seek the to and from lines, as well as the dates associated with the emails."); *Sys. Prod. & Sols., Inc. v. Scramlin*, No. 13-CV-14947, 2014 WL 3894385, at *8 (E.D. Mich. Aug. 8, 2014) ("Metadata associated with electronic communications, however, are not considered to be content protected by the SCA" and ordering disclosure of same) (citing *Chevron Corp. v. Donziger*, Case No. 12–mc–80237 CRB (NC), 2013 WL 4536808, at *6 (N.D. Cal. Aug. 22, 2013)); *Lucas v. Jolin*, No. 1:15-CV-108, 2016 WL 2853576, at *6 (S.D. Ohio May 16, 2016) ("However, non-content related metadata may be disclosed without violating the SCA."); *Chevron Corp*, 2013 WL 4536808, at *6 ("Chevron's subpoenas do not seek the contents of any subscriber's emails. It only seeks identifying information associated with the subscriber as well as the usage information of each account for certain time periods. Google and Yahoo! already maintain such records for their users. The Stored Communications Act allows Google and Yahoo! to reveal such records."); *Optiver Australia Pty. Ltd. & Anor. v. Tibra Trading Pty. Ltd. & Ors.*, No. C 12-80242 EJD PSG, 2013 WL 256771, at *3 (N.D. Cal. Jan. 23, 2013) ("The court struggles to understand how such information would be helpful to [Plaintiff] … [b]ut [Plaintiff] is entitled to such non-content metadata, and such metadata it shall receive.") (citing *Beluga Shipping GMBH & Co. KS BELUGA FANTASTIC v. Suzlon Energy LTD.*, Case No. 10–80034 JW PVT, 2010 WL 3749279 (N.D. Cal. Sept.23, 2010) ("holding that Google, as a service provider, was only required to produce non-content information…")).

FERC asserts "'[a]ll documents' pertaining to Mr. Tabackman's and Mr. Olson's personal non-work email metadata violates the SCA because strict compliance would require disclosing prohibited content data together with permitted metadata." Mem. at 17. This spliced quotation is

a misstatement and "strict" is a meaningless adjective. The subpoena seeks the metadata ***between*** the two email accounts, not the metadata of each individual email account without restriction. And as noted above, the subpoena explicitly states it is not requesting content. FERC's case citations do not apply because the subpoena does not seek "subscriber information".[6] The subpoena does not use those words, and that would be illogical as all parties are aware of the two subscribers. FERC avers "Google could comply based on the broader reading" (Mem. at 15) but speculation on what Google may or may not do is not a basis for a protective order. The subpoena appropriately seeks non-content metadata information in compliance with the SCA.

D. <u>The Subpoena Seeks Relevant Information</u>

FERC generates two strawman arguments as a basis to "block" the subpoena. First, FERC states "[t]his case presents a single question: whether in the summer of 2010 Powhatan violated the Federal Power Act and FERC's Anti-Manipulation Rule…". Mem. at 4. Whether or not this is true is not germane to the propriety of the subpoena, which seeks to obtain further detail regarding the scope and nature of FERC's staff's personal emails about this case.[7] Mr. Olson and Mr. Tabackman could have had numerous other communications they unilaterally chose not to produce to FERC's counsel. It is undisputed they had communications with third-parties about

[6] *Obodai v. Indeed, Inc.*, No. 13-80027-MISC EMC, 2013 WL 1191267, at *3 (N.D. Cal. Mar. 21, 2013); *Leonardo World Corporation v. Pegasus Solutions, Inc.*, 2015 WL 5610019, *3 (N.D. Cal. 2015).

[7] In addition, the subpoena is indeed relevant to two of Powhatan's affirmative defenses: "Fifteenth Defense FERC's claims are barred because of inequitable conduct and unclean hands. . . . DEFENSES RESERVED Defendants reserve the right to amend this Answer to add additional defenses based on legal theories that may or will be divulged through clarification of the Amended Complaint, through discovery, through change or clarification of the governing law, or through further legal analysis of FERC's position in this proceeding." *See* Defendants' Answer and Jury Demand, ECF No. 145 at 29-31.

the case because their emails hit on key words.[8] Second, FERC states "it is impossible for Mr. Tabackman to have had such an improper communication with Mr. Olson regarding Powhatan. That is because, in this case, those attorneys were always on the same side of separation-of-functions 'walls.'" Mem. at 11. As described below, improper communications are not limited to the Separation of Function Regulation.

This is not a "where there's smoke, there's fire" situation. Rather, due to the *GreenHat* communications, Powhatan is attempting to discern how big the fire is and whether it spread into this case. *GreenHat* was a serious ethical violation. It showed prosecutorial bias, misconduct, and an effort to conceal the misconduct—"but you never heard it here" and "you should not mention how you came upon [these cases]"). *See United States v. Cooper*, 617 F. App'x 249, 250 (4th Cir. 2015) (per curiam) (unpublished ("To establish prosecutorial vindictiveness, a defendant must show that the prosecutor acted with genuine animus toward the defendant, and the defendant would not have been prosecuted but for that animus.") (citing *United States v. Wilson*, 262 F.3d 305, 314 (4th Cir. 2001)). "If a defendant cannot produce direct evidence of a vindictive motive, he can establish a rebuttable presumption of vindictiveness by showing that a 'reasonable likelihood of vindictiveness exists.'" *Cooper*, 617 F. App'x at 250 (quoting *United States v. Goodwin*, 457 U.S. 368, 373 (1982)); *see also* John Hollway, *Reining in Prosecutorial Misconduct*, Wall Street Journal, June 5, 2016, available at https://www.wsj.com/articles/reining-in-prosecutorial-misconduct-1467673202 (last visited December 23, 2021) ("Federal prosecutors, who have broad discretion in defining broadly worded financial-crime statutes, have been criticized for seeking criminal sanctions against open and unconcealed financial conduct that is later unilaterally alleged

[8] Powhatan's Twitter posts are immaterial to whether or not the subpoena seeks relevant information.

to be a crime. One example is the questionable ongoing prosecution of the investment partnerships Powhatan Energy Fund and Huntrise Energy Fund by the Federal Energy Regulatory Commission.").

Powhatan has a right to conduct third-party discovery to discern more information about what FERC "produced" (in reality, produced and redacted by Mr. Olson at his sole discretion). It is implausible that having communicated improperly four times in a period of approximately 28 hours in 2021, there are no other improper communications since the inception of this investigation in 2010. In addition, if they communicated often, it establishes a reasonable basis to obtain the substance of those emails, as Powhatan would need to know what they were communicating about that necessitated frequent communications that would be shielded from FERC's knowledge. Powhatan is entitled to ensure that these two individuals did not commit any misdeeds in this case. Powhatan is also entitled to confirm the testimony in the two declarations.

IV. CONCLUSION

FERC has not established the requisite "good cause" for a protective order under Fed. R. Civ. P. 26(c). The subpoena is not harassment, is not unduly burdensome, does not implicate the SCA, and properly seeks relevant information pursuant to Fed. R. Civ. P. 26(b)(1).

WHEREFORE, Defendant Powhatan Energy Fund, LLC respectfully requests this Court deny FERC's Motion for a Protective Order, and grant such further relief as may be just and proper.

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Dated: December 31, 2021

Respectfully Submitted,

/s/ Jeffrey Brundage
Charles A. Zdebski
Va Bar No. 37519
Jeffrey Brundage
Va. Bar No. 80179
Attorney for Powhatan Energy Fund, LLC
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, N.W., 12th Floor
Washington, D.C. 20006
Telephone: (202) 659-6676
Facsimile: (202) 659-6699
czdebski@eckertseamans.com
jbrundage@eckertseamans.com

Christopher Perkins
Va Bar No. 41783
Attorney for Powhatan Energy Fund, LLC
Eckert Seamans Cherin & Mellott, LLC
919 East Main Street
Suite 1300
Richmond, VA 23219
Telephone: (804) 788-9636
Fax: (804) 698-2950
Email: cperkins@eckertseamans.com

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 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.

/s/ Jeffrey Brundage
Jeffrey Brundage
Va. Bar No. 80179
Attorney for Powhatan Energy Fund, LLC
ECKERT, SEAMANS, CHERIN & MELLOT, LLC
1717 Pennsylvania Avenue, N.W., 12th Floor
Washington, D.C. 20006
Telephone: (202) 659-6676
Facsimile: (202) 659-6699
jbrundage@eckertseamans.com