

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FEDERAL ENERGY REGULATORY
COMMISSION,
Plaintiff,

v.

Civil No. 3:15-cv-00452 (MHL)

POWHATAN ENERGY FUND, LLC, *et al.*,
Defendants.

ORDER

The Federal Energy Regulatory Commission (“FERC”), has moved for entry of a protective order (the “Motion for Protective Order”) (ECF No. 268) in response to Powhatan Energy Fund LLC’s (“Powhatan’s”) third-party subpoena (the “Subpoena”) issued to Google, LLC. The Subpoena seeks the disclosure of metadata for communications contained in the personal non-work email accounts of two FERC attorneys: (1) Steven Tabackman (“Mr. Tabackman”); and (2) Thomas Olson (“Mr. Olson”).

The alleged basis for the Subpoena stems from Mr. Tabackman’s conduct in a wholly unrelated matter, *GreenHat Energy, LLC, et al.*, 177 FERC ¶ 61,073 Dkt. IN18-9-000 at 11, 11 n.52 (Nov. 5, 2021) (“*GreenHat*”). In *GreenHat*, Mr. Tabackman appeared to violate FERC’s Separation of Functions Regulation (the “Regulation”), which prohibits non-decisional Commission staff from advising or participating in the Commission’s decisional process. More specifically, Mr. Tabackman, who was a member of the decisional staff, used his personal, non-work email account to send three emails to Mr. Olson, who was a member of the non-decisional staff, about the *GreenHat* matter. Mr. Olson ceased the communication and reported the exchange. FERC’s Office of Enforcement then filed a public notice disclosing the improper communications.

In the present matter, the Regulation does not appear to apply to Mr. Tabackman and Mr. Olson since these attorneys were serving on the same side of the separation-of-functions “wall.” Mr. Olson worked on this matter at the inception of the investigation. Mr. Tabackman also worked on this matter during the investigative stage and served as counsel of record for FERC until October 7, 2021. Despite this, Powhatan has still sought discovery related to the personal email accounts of Mr. Tabackman and Mr. Olson.

This discovery dispute is governed, in part, by Rule 26 of the Federal Rules of Civil Procedure, which provides that unless otherwise limited by court order, parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case. Fed. R. Civ. P. 26(b). Further, for good cause shown, the Court may issue an order to protect a party from annoyance, embarrassment, oppression, or undue burden. Fed. R. Civ. P. 26(c).

The Court heard oral argument on January 31, 2022 at 9:30 a.m. with counsel for the parties present. In support of the Motion for Protective Order, FERC contends that the Subpoena: (1) is for harassment purposes; (2) is unduly burdensome; and (3) attempts to invade privileged and protected communications. (Pl.’s Mem. Supp. Mot. Protect. Order (“Pl.’s Mem.”) at 9-15). In support of the Motion for Protective Order, FERC attached social media posts by Powhatan which, among other things: (1) request photographs and information about FERC attorneys and staff; (2) accuse FERC staff of prosecutorial misconduct; (3) reference a family member of the former Chairman of FERC; and (4) reference Mr. Tabackman’s gmail account with a poll entitled “How many bad emails do you think Tabackman sent?” *See* Pl.’s Mem. Ex. A, at 1-40.

In response, Powhatan contends that the Subpoena is not for purposes of harassment but “seeks to obtain further detail regarding the scope and nature of FERC’s staff’s personal emails about this case.” (Def.’s Br. Opp. (“Def.’s Br.”) at 10). Powhatan contends that: (1) its “Twitter posts are immaterial to whether or not the subpoena seeks relevant information”; and (2) the

information sought is relevant to its affirmative defenses of unclean hands and inequitable conduct. (Def.'s Br. at 10 n.7, 11 n.8). However, at the hearing, Powhatan: (1) appeared to concede that the affirmative defense of unclean hands may not be invoked against a governmental agency acting in the public interest; and (2) clarified that it is not accusing FERC of prosecutorial misconduct.

After reviewing the pleadings and considering the arguments of counsel, the Court finds that: (1) the information sought in the Subpoena may relate to privileged matter and is not relevant to any party's claims or defenses; and (2) good cause has been established for the issuance of a protective order. As a result, the Motion for Protective Order (ECF No. 268) is GRANTED.

Based on the representations of counsel for Powhatan at the hearing regarding its affirmative defenses of unclean hands and inequitable conduct, the Court, *sua sponte*, ORDERS that Powhatan file a brief position statement with the Court addressing whether the appropriate legal and factual basis exists that would permit Powhatan to maintain the affirmative defenses of unclean hands and inequitable conduct or whether these affirmative defenses should be withdrawn by Powhatan or stricken by the Court pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Powhatan's position statement, which should not exceed five pages, shall be filed on or before February 8, 2022. FERC may, but is not required to, file a response to Powhatan's position statement on or before February 11, 2022. FERC's response, if any, shall not exceed three pages.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

/s/ MRC
Mark R. Colombell
United States Magistrate Judge

Richmond, Virginia
Date: Feb. 1, 2022