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.	)	**Portion of Document Filed Under Seal Pursuant to Consent Protective Order**
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO
THE MARKET MONITOR'S MOTION TO QUASH AND FOR PROTECTIVE ORDER

Pursuant to Local Civil Rule 7(F)(1), Defendants Powhatan Energy Fund, LLC, Houlian "Alan" Chen, HEEP Fund, Inc., and CU Fund, Inc. (collectively, "Defendants") urge the Court to deny the June 11, 2021 motion to quash and for protective order of Monitoring Analytics, LLC ("Market Monitor") (ECF No. 187).

I. Background

In this action, the Federal Energy Regulatory Commission ("FERC") is seeking roughly $34.5 million in civil penalties and disgorgement from Defendants based on certain up-to congestion ("UTC") trades placed during the summer of 2010 in the market operated by the PJM Interconnection, L.L.C. ("PJM"). Monitoring Analytics, LLC acted as the independent market monitor for PJM during the relevant period and continues to serve in that role. The Market Monitor is "responsible for monitoring compliance with the rules, standards, procedures, and practices of PJM markets" and "observe[s] and comment[s] on actual and potential design flaws in market rules, standards, and procedures, and identif[ies] structural problems in PJM markets that may

inhibit robust and competitive markets." *About Us*, Monitoring Analytics, https://www.monitoringanalytics.com/company/about.shtml (last visited June 24, 2021). The Market Monitor has been involved in this and other FERC enforcement actions regarding UTC trading during the summer of 2010: Dr. Joseph Bowring, the Market Monitor's President, was the first person to contact the Defendants to express concerns about their trading and the Market Monitor prepared a detailed referral to FERC's Office of Enforcement regarding trading by Defendants and other UTC market participants who received marginal loss surplus allocation ("MLSA") payments. [redacted] The Market Monitor has also been engaged in the process of developing, analyzing, and refining rules for PJM's UTC market and the distribution of MLSA to PJM market participants.

Defendants subpoenaed documents from the Market Monitor on December 7, 2020. While the Market Monitor provided some documents in response to this subpoena, it also refused to produce other responsive documents on the grounds of relevance, confidentiality, and unreasonable burden. A joint statement and discovery dispute chart regarding the Market Monitor's response to Defendants' subpoena for documents was filed on April 30, 2021 (ECF No. 180), with an amended version filed on May 4, 2021 (ECF No. 183) ("Discovery Dispute Chart").

On May 28, 2021, Defendants served the Market Monitor with two subpoenas for depositions of Market Monitor personnel, Dr. Bowring and John Dadourian. FERC has also noticed a deposition of Dr. Bowring. Defendants agreed to accommodations to reduce the burdens on the Market Monitor, including by agreeing to hold the depositions by remote means and by agreeing to change the date for Defendants' deposition of Dr. Bowring. Despite these accommodations, counsel for the Market Monitor informed Defendants that the Market Monitor would seek to quash Defendants' deposition subpoenas, but would not oppose FERC's request to

depose Dr. Bowring. On June 11, 2021, the Market Monitor filed a motion to quash and for a protective order (ECF No. 187) ("Motion") and a supporting memorandum (ECF No. 188) ("Memorandum").

II. The Requested Depositions Are Relevant to the Parties' Claims and Defenses, Proportional to the Needs of the Case, and Not Unduly Burdensome

The Federal Rules of Civil Procedure provide:

> 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, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1); *see also Intelligent Verification Sys., LLC v. Microsoft Corp.*, No. 2:12-cv-525, 2014 WL 12544827, at *2 (E.D. Va. Jan. 9, 2014) ("[T]he scope of discovery allowed under a subpoena is the same as the scope of discovery allowed under Rule 26.") (alteration in original, internal quotations and citation omitted). Given the broad discovery provided for in the Federal Rules, courts have recognized that " ' '[i]t is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.' ' " *Big Ernie's, Inc. v. United States*, No. 1:09-cv-00122(LO/IDD), 2009 WL 3166839, at *1 (E.D. Va. Aug. 13, 2009) (alteration in original) (quoting *SEC v. Dowdell*, No. 3:01-cv-00116, 2002 U.S. Dist. LEXIS 15877, at *10–11 (W.D. Va. Aug. 21, 2002) (quoting *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979))). As such, "the party seeking a protective order bears the weighty burden of showing the existence of good cause for the issuance of a protective order." *Id*. The Market Monitor falls far short this standard.

A. Defendants Seek Information Directly Relevant to the Claims and Defenses in This Action

In seeking to depose Dr. Bowring and Mr. Dadourian, Defendants seek information directly relevant to the claims and defenses in this action, including the central issues of whether the trades in question were manipulative and whether Defendants had fair notice that their trades would be considered manipulative. Among other topics, Dr. Bowring and Mr. Dadourian are likely to have relevant information that is not available from other sources about whether notice was provided to PJM market participants that UTC trades like those at issue in this case would be deemed manipulative; the rules for UTC trades during the summer of 2010, the incentives created by such rules, and the Market Monitor's concerns about such rules and incentives; the Market Monitor's procedures for detecting potentially manipulative trading and why the trades at issue do not appear to have been identified through such procedures; the delay between when the Market Monitor appears to have been alerted to the trades at issue and when the Market Monitor contacted Defendants; conversations between Dr. Bowring or Mr. Dadourian on the one hand and Dr. Chen or other UTC traders on the other hand about the trades at issue in this case and other allegedly similar trades;[1] and the Market Monitor's referral to FERC's Office of Enforcement regarding

[1] To provide a specific, concrete example of the relevance of the information Defendants seek through the requested depositions, [redacted] *See* "Administrative Record" (ECF No. 37), Tab 024A, attach. B-1 & B-4. Additionally, 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 market manipulation to FERC. *See Chen*, Docket No. IN15-3-000, Answer in Opposition to Expedited Motion for Two-Week Extension of Time, attach. B-1 (filed Jan. 29, 2015). These conversations thus undercut FERC's claim that the trades at issue were manipulative and support several of Defendants' affirmative defenses, including the defense that they lacked fair notice that their trades would be considered manipulative. Defendants should have the opportunity to question Dr. Bowring and Mr. Dadourian about these conversations in order to support their defenses in this action.

Defendants and numerous other UTC traders, many of whom were *not* ultimately subjected to FERC enforcement actions. The depositions of Dr. Bowring in another FERC enforcement case concerning UTC traders who received MLSA payments, *FERC v. Coaltrain Energy, L.P.*, No. 2:16-cv-00732-MHW-KAJ (S.D. Ohio filed July 2, 2016) ("*Coaltrain*"), contained significant amounts of relevant testimony, further supporting the relevance of and need for the depositions of Dr. Bowring and Mr. Dadourian that have been requested in this case.[2]

B. The Requested Depositions Are Proportional to the Needs of the Case

In addition to being relevant to the parties' claims and defenses, the requested depositions are proportional to the needs of the case. The factors identified in Federal Rule of Civil Procedure 26(b)(1) weigh in Defendants' favor: the information Defendants seek is highly important to the central issues in this case, including whether Defendants' trades were manipulative and whether Defendants had fair notice that their trades would be considered manipulative; a large amount—roughly $34.5 million—is in controversy; this is Defendants' first opportunity to obtain discovery and the Market Monitor and FERC have provided only limited information in response to Defendants' written discovery requests; Defendants have no other way to obtain the information sought, which implicates the personal knowledge of Dr. Bowring and Mr. Dadourian and is not contained in the limited documents Defendants have received from the Market Monitor to date; and Defendants expect that the information sought is likely to be highly important in resolving the case for the reasons explained above.[3] Contrary to the Market Monitor's suggestion,

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[2] The depositions of Dr. Bowring in connection with *Coaltrain* did not cover all of the issues about which Defendants intend to seek information from Dr. Bowring and Mr. Dadourian and thus do not obviate the need for the requested depositions. Additionally, FERC has not agreed to treat Dr. Bowring's depositions from the *Coaltrain* case as admissible in this proceeding.

[3] The Market Monitor suggests that the depositions are unlikely to yield relevant information because the case involves "events from more than ten years ago." Memorandum at 5. While Defendants agree that it is unfair that they had to wait more than ten years before they had the

Memorandum at 4-5, the fact that the Market Monitor has produced a limited number of documents to Defendants is not an adequate substitute for depositions of witnesses. *See, e.g.*, *Marti v. Schreiber/Cohen, LLC*, No. 4:18-cv-40164-TSH, 2020 WL 3412748, at *2 (D. Mass. Mar. 17, 2020) ("Generally, witness depositions are not considered duplicative of prior written discovery. *See Doe v. Trump*, 329 F.R.D. 262, 274 (W.D. Wash. 2018) ('Parties are ordinarily entitled to test interrogatory responses and document production through depositions.').").

The likely benefit of the requested depositions thus greatly outweighs the associated burden or expense, particularly given that Defendants agreed to conduct the depositions by remote means and agreed to change the date for Dr. Bowring's deposition at the Market Monitor's request. Indeed, the Market Monitor provides no substantiation for its assertion that the burden of the requested depositions is "high." Memorandum at 5. The Motion should be denied on that ground alone. *See, e.g.*, *Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100-EFM-ADM, 2020 WL 2101251, at *10 (D. Kan. Apr. 30, 2020) ("A nonparty objecting to a subpoena has the burden to show that compliance would cause undue burden, typically by presenting an affidavit or other evidentiary proof of the time and expense involved in responding to the subpoena.") (internal quotations and citation omitted); *E.E.O.C. v. Freeman*, No. RWT-09-2573, 2012 WL 3536752, at *5 (D. Md. Aug. 14, 2012) ("When a party claim[s] that a discovery request is unduly burdensome, that party must allege specific facts that indicate the nature and extent of the burden, usually by affidavits or

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first opportunity to obtain discovery, this delay was largely due to the time FERC took in investigating the trades at issue and filing suit. It would be unjust to compound this unfairness by using this lengthy delay as grounds for denying Defendants their right to discovery. Moreover, if it turns out that Dr. Bowring and Mr. Dadourian have limited recollections about the relevant events due to the passage of time, that itself could support Defendants' affirmative defenses regarding the statute of limitations, laches, and undue delay.

other reliable evidence. A conclusory assertion of burden and expense is not enough.") (alteration in original, internal quotations and citation omitted).

Additionally, while the Market Monitor is not a party to this action, it also is not an ordinary disinterested non-party. [redacted] The Market Monitor also describes its responsibilities as including "address[ing] market topics and enforcement issues in proceedings in federal and state courts." Monitoring Analytics, *Activities of the Market Monitoring Unit 2019*, at 15 (Dec. 14, 2020), http://www.monitoringanalytics.com/Reports/Reports/2020/IMM_Activities_Report_2019.pdf. Accordingly, when Dr. Bowring was deposed in connection with the *Coaltrain* case, he characterized his appearance at the deposition as "part of [his] job." Videotaped Deposition of Joseph Bowring, Pd.D. at 22:20 (Aug. 29, 2019), *FERC v. Coaltrain Energy, L.P.*, No. 2:16-cv-00732-MHW-KAJ (S.D. Ohio Jan. 31, 2020), ECF No. 75-4.

C. The Arguments in Support of the Market Monitor's Motion to Quash Are Spurious

The Market Monitor baselessly argues that Defendants' rights will be protected because Dr. Bowring will be available for questioning in connection with FERC's subpoena. Memorandum at 4, 6. The fact that Defendants will have an extremely limited amount of time to cross-examine Dr. Bowring on the topics on which *the opposing party* chooses to depose him obviously does not adequately protect Defendants' right to discovery, which includes the right to take their own depositions. And as this Court and others have noted, the right of defendants to obtain discovery is essential to ensure due process in Federal Power Act civil penalty actions. *See, e.g.*, *FERC v. Powhatan Energy Fund, LLC*, 286 F. Supp. 3d 751, 770 n.28 (E.D. Va. 2017) (Lauck, J.) ("[D]enying the Respondents access to a truly adversarial proceeding, including the

use of compulsory process and the ability to subpoena information and witnesses, would likely violate due process."). Indeed, the fact that the Market Monitor is making Dr. Bowring available for a deposition by FERC only underscores the disingenuous and obstructionist nature of the Market Monitor's claim that the depositions requested by Defendants would be unduly burdensome.

Similarly, the Market Monitor's claim that the requested depositions are unduly burdensome because they seek "confidential information concerning third parties that the Market Monitor has a duty to protect," Memorandum at 5, is unavailing. For the reasons explained in the discovery dispute chart regarding the Market Monitor's response to Defendants' subpoena for documents, the Market Monitor has no valid grounds for denying Defendants their right to discovery based on speculative confidentiality concerns, particularly in light of the Consent Protective Order entered by the Court on March 22, 2021 (ECF No. 170) ("Consent Protective Order"). *See* Discovery Dispute Chart, Defendants' Response to General Dispute No. 2 (ECF No. 183). The Consent Protective Order addresses concerns about the disclosure of confidential information, including by allowing for the designation of portions of deposition transcripts as "Confidential" or "Attorney's Eyes Only." Consent Protective Order § 6. And while the Market Monitor claims to be acting to protect the interests of third parties, the Market Monitor has not identified any specific market participants who object to the requested depositions based on confidentiality concerns. Additionally, the information Defendants seek through the requested depositions is not limited to information about other market participants. [redacted]

[redacted]

[redacted][4]

The Market Monitor also errs in arguing that Dr. Bowring cannot be deposed for more than seven hours in total. *See* Memorandum at 5-6. The Federal Rules provide that "[u]nless otherwise stipulated or ordered by the court, *a deposition* is limited to one day of 7 hours." Fed. R. Civ. P. 30(d)(1) (emphasis added). Where both sides have requested to depose the same individual, *each deposition* should be subject to an independent seven-hour limit. *See Syncora Guarantee Inc. v. EMC Mortg. Corp.*, No. MC 13-80037 SI, 2013 WL 1208936, at *1 (N.D. Cal. Mar. 25, 2013) ("[D]efendant and plaintiff separately subpoenaed Ms. Gibin for a deposition on the same day, and could not agree on how to apportion time for the deposition. This Court ordered that the parties each be allotted seven hours over two days to depose Ms. Gibin."); *cf. Dynetix Design Sols. Inc. v. Synopsys Inc.*, No. CV 11-05973 PSG, 2012 WL 5943105, at *2 (N.D. Cal. Nov. 27, 2012) ("[I]ndividuals noticed as an individual witness under Rule 30(b)(1) and also as the corporate representative under 30(b)(6) are presumptively subject to independent seven-hour time limits.") (internal quotations and citation omitted). If the Court does decide to limit the total amount of time for depositions of Dr. Bowring to less than seven hours per side, however, precedence should be given to Defendants' deposition given that (1) FERC's Office of Enforcement had subpoena authority and could have taken Dr. Bowring's testimony during its investigation and (2) FERC has

[4] Additionally, the Market Monitor provides no support for its apparent suggestion that information regarding other PJM market participants is the type of "privileged or other protected matter" covered by Federal Rule of Civil Procedure 45(d)(3)(A)(iii). *Compare* Fed. R. Civ. P. 45(d)(3)(A)(iii) (requiring a court to quash or modify a subpoena requiring disclosure of "privileged or other protected matter, if no exception or waiver applies"), *with* Fed. R. Civ. P. 45(d)(3)(B)(i) (stating that a court *may* quash or modify a subpoena requiring disclosure of "a trade secret or other confidential research, development, or commercial information").

already deposed Dr. Bowring in connection with the related *Coaltrain* case. At the very least, the time should be split evenly between FERC and Defendants; allowing FERC to conduct a full seven-hour deposition of Dr. Bowring while quashing Defendants' subpoena would be plainly inequitable.

D. Defendants Should Be Permitted To Depose Mr. Dadourian

The Market Monitor wrongly argues that Defendants should not be permitted to depose Mr. Dadourian and that Defendants' subpoena concerning Mr. Dadourian "appears to be for the impermissible purpose of annoyance or embarrassment, rather than to obtain useful information." Memorandum at 6-7. Defendants have good reason to depose Mr. Dadourian in addition to deposing Dr. Bowring.

The limited documents Defendants have obtained to date show that Mr. Dadourian was party to several relevant communications that did not include Dr. Bowring. Such communications include [redacted] *See* IMM-000250; "Administrative Record" (ECF No. 37), Tab 024A, attach. B-4; UTC Litig19-029034. Defendants have the right to question Mr. Dadourian about these and other communications in which he participated. Documents further show that Mr. Dadourian [redacted] IMM-000421; "Administrative Record" (ECF No. 37), Tab 024A, attach. B-4 at 9-10. Defendants should be able to question Mr. Dadourian about these topics and other relevant topics about which he has unique personal knowledge.

Additionally, the Market Monitor's own Memorandum suggests that the witnesses' recollections may be limited because the relevant events occurred "more than ten years ago." Memorandum at 5. Given that, by the Market Monitor's own admission, there may be gaps in Dr. Bowring's memory due to the passage of time, it is reasonable for Defendants to seek testimony from another Market Monitor official with personal knowledge of the relevant events.

III. No Protective Order Is Warranted

The Market Monitor also has not met its burden of justifying its alternative request for a protective order limiting the scope of the requested depositions. *See Macias v. Monterrey Concrete LLC*, No. 3:19-cv-830, 2020 WL 6386861, at *2 (E.D. Va. Oct. 30, 2020) ("The moving party bears the burden of establishing good cause by demonstrating that specific prejudice or harm will result if no protective order is granted…. The moving party cannot rely on merely conclusory or speculative statements.") (internal quotations and citation omitted); *Big Ernie's, Inc. v. United States*, No. 1:09-cv-00122 (LO/IDD), 2009 WL 3166839, at *1 (E.D. Va. Aug. 13, 2009) ("A protective order pursuant to Rule 26(c), however, should be sparingly used and cautiously granted…. Accordingly, the party seeking a protective order bears the weighty burden of showing the existence of good cause for the issuance of a protective order.") (internal quotations and citations omitted). As explained above, Defendants intend to depose Dr. Bowring and Mr. Dadourian about matters relevant to the claims and defenses in this action, in accordance with the scope of discovery allowed under Federal Rule of Civil Procedure 26(b)(1). There is no basis for limiting the scope of these depositions based on conclusory statements about speculative confidentiality concerns, particularly in light of the Consent Protective Order. *See* Discovery Dispute Chart, Defendants' Response to General Dispute No. 2 (ECF No. 183).

IV. Scheduling Considerations

The scheduling concerns raised by the Market Monitor may be circumvented if the Court grants Defendants' June 15, 2021 Motion to Extend the Deadline for Depositions (ECF No. 190). Nonetheless, Defendants will address the concerns the Market Monitor has raised regarding the current schedule for Dr. Bowring's depositions. *See* Memorandum at 7.

Originally, Defendants noticed their deposition of Dr. Bowring for July 6, 2021, and noticed their deposition of Mr. Dadourian for July 22, 2021, while FERC noticed its deposition of Dr. Bowring for July 19, 2021. During a June 7, 2021 call, counsel for the Market Monitor requested that Defendants change the date for their deposition of Dr. Bowring to July 23, 2021. Defendants agreed to this request.

However, during a June 10, 2021 call, the Market Monitor sought further changes to the deposition schedule. The Market Monitor requested that the dates for Defendants' deposition of Mr. Dadourian and FERC's deposition of Dr. Bowring be swapped and that the parties aim to condense Dr. Bowring's depositions into a single day, such that—assuming Defendants' subpoenas are not quashed—Defendants would depose Mr. Dadourian on July 19 and Dr. Bowring would be deposed on July 22, with depositions of Dr. Bowring stretching into July 23 if necessary. Defendants are unable to agree to this further modification to the deposition schedule because an attorney who will be involved in deposing and cross-examining Dr. Bowring has a pre-existing commitment on July 22 that cannot be rescheduled. Given that Defendants have agreed to depose Dr. Bowring virtually, the fact that the depositions of Dr. Bowring will not be held on consecutive days does not impose additional burdens on the Market Monitor.

V. Conclusion

For the reasons stated herein, the Market Monitor's Motion should be denied.

Respectfully Submitted,

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Dated: June 25, 2021

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2021, I filed the foregoing motion 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.

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