UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES, INC., *et al.*,

Plaintiffs,

and

BNSF RAILWAY COMPANY,

Plaintiff-Intervenor,

v.

JAY INSLEE, *et al.*,

Defendants,

and

WASHINGTON ENVIRONMENTAL COUNCIL, *et al.*,

Defendant-Intervenors.

No. 3:18-cv-05005-RJB

REPLY IN SUPPORT OF PROTECTIVE ORDER

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INTRODUCTION

Lighthouse Resources' opposition to WEC's motion for a protective order reveals a desperate plaintiff struggling to rescue a floundering lawsuit. Lighthouse has yet to cite to any case, from any jurisdiction, finding that a permit denial constituted a violation of the dormant Commerce Clause. It has yet to cite a case, from any jurisdiction, in which a Court authorized sweeping discovery of an advocacy group *intervenor* to prove unlawful intent by a government agency *defendant*. Lighthouse's opposition backpedals away from the plain language of its own discovery requests, repeatedly references non-existent collusion between WEC and defendants, and baldly mischaracterizes both the facts and the law governing its sweeping effort to gain access to WEC's internal strategies and communications. This effort should be rejected. Plaintiffs' attempt to discover WEC's files is not designed to produce relevant evidence in support of its strained and unsupportable theory. It is designed to intimidate and punish public interest organizations who have been successful in highlighting the problems with Lighthouse's proposed coal terminal. This Court should grant the motion for a protective order.

ARGUMENT

I. THE REQUESTED MATERIAL IS NOT RELEVANT

The premise of plaintiffs' lawsuit is that the state defendants harbored a secret animus towards Lighthouse's terminal project and coordinated to block the export of coal, in violation of the U.S. Constitution and other federal laws. Plaintiffs argue that the agency decisions denying the project, based in part on a multi-year analysis that revealed serious adverse environmental and human health impacts, were simply "pretexts" intended to cover defendants' true, unlawful intent. ECF 123-5. Intervenors come into the picture, plaintiffs continue, because they covertly coordinated with state officials to achieve this nefarious outcome. Response in Opposition to

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Motion for a Protective Order (ECF 124) ("Response"), at 7. Intervenors' *internal* strategies and communications are relevant to this case, Lighthouse concludes, because only they will reveal that defendants' permit decisions were a sham intended to cover up the state's true purposes.

This wild, speculative scenario is irretrievably flawed and does not provide a basis for the burdensome and intrusive discovery at issue here. First, while Lighthouse cites to cases noting that a discriminatory "intent" can be relevant in establishing a violation of the commerce clause, it sidesteps the fundamental problem that there is no conceivable "discrimination" at issue in the first place.[1] Response at 5; *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) (discrimination is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."). There is no domestic coal industry in Washington, or even any in-state coal export business, that will benefit from the denial of the Millennium project. State agencies denied permits for the terminal to protect the environment, and the health and welfare of its citizens, not to advantage domestic industry. Accordingly, a claim of "discrimination" is simply not viable in this case. Plaintiffs' evident goal then is to show that the burden imposed on interstate commerce "is clearly excessive in relation to its putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). WEC cannot fathom, and Lighthouse does not explain, how its "pretext" theory would fit into the *Pike* balancing analysis.

Second, Lighthouse hints at intrigue, complaining of "behind-closed-doors" lobbying and claiming to have "strong evidence" of coordination to circumvent the law.[2] The claim is absurd.

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[1] In every case cited by plaintiffs, courts examined the intent of legislators who enacted statutes that had been challenged as violating the dormant Commerce Clause. Response at 5. Lighthouse has not cited any case involving a permit decision for a single project.

[2] For example, Lighthouse asserts that defendants "took pains to discuss sensitive topics offline." Response at 13. But the evidence they offer is an innocuous email conversation about Ecology

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The first putatively damning piece of evidence they cite is an email thanking the governor's staff for coordinating a meeting with WEC on various issues, one of which was Lighthouse's project. *See* ECF 123-5. Other documents reflect garden-variety advocacy to administrative agencies, and don't come close to supporting plaintiffs' theory that WEC colluded with defendants on a pretext to circumvent the law. Response at 6.[3] Notably, the project's backers also met and communicated with the defendants to support their views, many times. So did many others. There is nothing wrong with or unusual about that. The "strong evidence" reveals only what everyone has known all along: WEC advocated to multiple agencies, elected officials, and others against this project. Ultimately, some decisionmakers concluded that the project didn't meet regulatory criteria, and denied permits. That does not result in a constitutional violation.

Finally, if plaintiffs seek evidence about whether state agencies "acted on" Intervenors' suggestions, "and what they said to each other behind closed doors," they will have access to all of that evidence without WEC's *internal* strategies and communications. WEC will soon be providing Lighthouse with the dates and attendees of all meetings with defendants, and all written communications of any sort with the defendants. Lighthouse will also have the opportunity to depose agency officials about the nature of their communications with outside advocacy groups, and may ask them about the extent to which their administrative decisions were pretexts for other motives. WEC itself has no knowledge of any effort to develop a "pretext" for permit denial. *See* Kearns Decl. ¶ 11. Lighthouse's evident belief that defendants

Director Bellon attending a barbeque *hosted by Millennium itself*. The exchange only shows that plaintiffs had as much, if not better, access to defendants to advocate their views as WEC.

[3] Even more strained is plaintiffs' invocation of a 2015 scandal involving the fiancée of the Governor of Oregon. The Governor's resignation had nothing to do with intervenors' advocacy on other coal projects in Oregon, nor is there even a theoretical argument that intervenors did anything inappropriate.

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will perjure themselves does not entitle them to rummage through Intervenors' internal strategy documents based on the baseless assumption that it will reveal something different. *See United States v. Claiborne*, 765 F.2d 784, 804 (9th Cir. 1985); *Cornell v. Jim Hawk Truck Trailer, Inc.*, 297 F.R.D. 598, 598 (N.D. Iowa 2013) ("courts will not assume that a witness will testify untruthfully absent some specific demonstration of fact pointing to that risk")

II. THE CONTESTED DISCOVERY IS UNDULY BURDENSOME

WEC's motion explained the extraordinary burden that would be imposed if WEC needed to collect and review all of its internal communications and documents. Motion at 5-6. As already explained, WEC's advocacy with respect to this project spans close to a decade, involved hundreds of organizations, and dozens of staff people. *Id.* For example, one of the intervenor organizations recently collected archived emails from its staff people related to this project. Declaration of David Stevens, at ¶ 3. This initial search yielded approximately 180,000 emails. To review all of these emails to determine their relevance and any applicable privileges, even at a rate of 10 seconds per email, would take 500 hours. And that is for *one* of the five intervenors.

Lighthouse has little to say about this problem except to complain that it is "premature" and to offer a vague promise that it would work to reduce undue burden. But it was Lighthouse that propounded this sweeping and overbroad discovery. *Compare* ESI Agreement, ¶ A.2, Exhibit 5 to Jones Decl. (ECF 125-1) (requests for production should be "reasonably targeted, clear, and as specific as possible") *with* Lighthouse Discovery (ECF 123-3) (seeking "all" documents that relate to intervenor "strategies, campaigns, plans or policies" including communications with *any* agency or other organization). Lighthouse also mischaracterizes its own request. It states that its request excludes the "back-and-forth" between campaign staffers, Response at 8, when the request asks for *exactly* that material. *See* RFP #1 (asking for communications between each intervenor and other

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organizations). Later, it again seeks to recharacterize its discovery as seeking "**factual** recollections of meetings with the Defendants, **application** of the Intervenors' strategies and messages, and the **fruits** of their strategy and messaging efforts." Response at 12. Whatever this means, this is not what they asked for. And even if their requests were thus limited, WEC and its counsel would need to review countless emails and other documents in order to determine which documents fell into these ill-defined categories. Accordingly, the requests are unduly burdensome, especially in relation to their tenuous connection to the merits of this case.

III. THE REQUESTED MATERIAL IS PRIVILEGED

Lighthouse concedes that the law sets a high bar for discovery relating to the communications and strategies of advocacy groups. Response at 9; *Perry v. Schwarzenegger*, 591 F.3d 1126, 1145 (9th Cir. 2009). Nor does it dispute that it expressly sought information related to intervenor "strategies, campaigns, plans or policies" in the contested discovery. Its effort to distinguish this case from *Perry* and other cases involving similar facts is unpersuasive.

WEC has satisfied the threshold showing that the discovery would chill its members' associational rights—the first step of the *Perry* analysis. Lighthouse denigrates the declaration of Cesia Kearns as "unsubstantiated opinion," but it is in fact unrebutted, sworn factual testimony from the *director* of the Power Past Coal campaign—someone with clear authority to speak to the impact of being forced to disclose campaign strategies and communications to the target of the campaign. Ms. Kearns explains in detail how coalitions such as this one require regular and open discussions, and how being forced to share all of this information would severely inhibit these organizations' ability to function. Kearns Decl. ¶ 8. Just as in *Perry*, and in contrast to *National Org. for Marriage v McKee,* 723 F. Supp.2d 236 (D. Me. 2010), relied on by plaintiffs, Ms. Kearns speaks about how disclosure would affect her and the campaign she directed from the basis of personal

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knowledge, not speculation. Indeed, it is not clear what other evidence that WEC could submit that could make this point more directly.[4]

Further, Lighthouse doesn't deny that once such a *prima facie* showing has been made, it must establish that the contested information is "crucial" to its case, and that a party cannot rely on simple "speculation" that there may be relevant material. Motion at 9-10. But speculation is all that Lighthouse has to offer. Lighthouse hopes to find information about *defendants'* supposed illicit intent to circumvent the law by digging through *intervenors'* internal strategies and communications. It has offered no basis to suspect that there is any such evidence in existence, and, indeed, it does not exist. Kearns Decl. ¶ 11. Lighthouse also cannot show that the information is unobtainable through other means, because—as discussed above—it can seek, and already and has sought, discovery regarding intent from defendants' themselves.

Lighthouse's description of cases in which "groups like Intervenors turned over their documents to their opponents," is badly misleading. Unlike every case cited by Lighthouse, WEC is neither a plaintiff nor a defendant in this case. It intervened to support a decision that WEC believes was made lawfully. Plaintiffs' burden of proof on its theories does not turn on evidence that is in WEC's possession. While Lighthouse evidently hopes that it can rescue its long-shot lawsuit by finding something damning in WEC's files, its unfounded speculation is insufficient to overcome the protection that the First Amendment affords, nor does the strained relevance of these nonexistent materials overcome the significant burden the discovery imposes.

CONCLUSION

WEC respectfully asks this Court to GRANT its motion for a protective order.

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[4] Lighthouse's repeated invocation of a potential protective order completely misses the point. Response at 10. The issue here is not disclosure of these materials to the public, but disclosure *to the plaintiffs*—WEC's adversary in this advocacy effort. Kearns Decl. ¶ 8.

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2 Respectfully submitted this 19th day of July 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

Dated this 19th of July, 2018.

s/ Jan E. Hasselman
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