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DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

In the Matter of NorthWestern Energy’s Application For:)
(1) Approval of Deferred Cost Account Balances for)
Electricity Supply, CU4 Variable Costs/Credits, and) Docket No. D2012.5.49
DGGs Variable Costs/Credits; and (2) Projected)
Electricity Supply Cost Rates, CU4 Variable Rates,)
and DGGs Variable Rates)

**NorthWestern Energy’s Objections to Data Requests
Issued by the Montana Public Service Commission**

NorthWestern Energy (“NorthWestern”), by and through its undersigned counsel, hereby submits to the Montana Public Service Commission (“Commission”) its objections to Data Requests PSC-035, PSC-036(b), PSC-037(b) and (d), PSC-038(b), PSC-039, PSC-040, and PSC-042(b) (collectively “Natural Gas Discovery”) on the grounds that they request information that is not relevant to this docket and its objections to Data Requests PSC-050(b) and (e) and PSC-

051(b) and (d) (“SBW Communications”) on the grounds that they request documents or tangible things that are protected by the Work Product Doctrine.

I. BACKGROUND

On February 22, 2013, the Commission issued Data Requests PSC-034 through PSC-091. Modified Procedural Order No. 7219e (“Order 7219e”) provided, “A party may object to written discovery no later than the applicable deadline for responses by filing an objection with the Commission and serving it on all parties.” Order 7219, ¶ 19. The deadline for responses to Data Requests PSC-034 through PSC-091 is March 8, 2013. Order 7219e, ¶ 12e

II. OBJECTIONS

A. Natural Gas Discovery - Relevance

Each of the data requests included in the Natural Gas Discovery asks for information about natural gas DSM programs.¹ NorthWestern objects to the Natural Gas Discovery because it is not relevant to and is beyond the scope of this docket. This docket is an electricity supply docket. All issues in this docket relate to electricity supply. There are no issues related to natural gas that are properly before the Commission in this docket.

Rule 26(b)² of the Montana Rules of Civil Procedure (“M.R. Civ. P”) provides, in part:

Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know or any discoverable matter. The information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

¹ Data Requests PSC-039 and PSC-040 ask about both electric and natural gas DSM programs. NorthWestern objects to these data requests only to the extent that they request information or opinions about natural gas DSM.

² The Commission has adopted Rule 26 by reference in its administrative rules. See ARM 38.2.3301.

The Supreme Court has ruled that the proper inquiry is whether the specific information sought is relevant to the claims made in the matter before the tribunal. *See In re Estate of Lande*, 1999 MT 162, ¶ 24, 295 Mont. 160, 983 P.2d 308 (“Thus the proper inquiry is whether Dorothea’s probate file was relevant to the Contestant’s claims that Cubby lacked testamentary capacity or was unduly influenced.”) While relevancy under the discovery rules is broader than the test for relevancy under the rules of evidence, it is not infinite. If the information sought will not reasonably lead to the discovery of admissible evidence it is not relevant.

In this docket, NorthWestern has not asserted any claims relative to its natural gas Demand Side Management (“DSM”) programs. No other party has raised any issue with respect to natural gas DSM. This is even more clear cut than the *Lande* case. Furthermore, information about natural gas DSM is not reasonably calculated to lead to admissible evidence relative to the issues regarding electricity supply in this docket. The Natural Gas Discovery is plainly not relevant to this docket, and the information requested is not discoverable.

B. SBW Communications – Work Product

Each of the data requests identified as SBW Communications seeks documents that are protected from discovery under the Work Product Doctrine.

The Work Product Doctrine was originally recognized by the United States’ Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947). Subsequently, the *Hickman* decision was superseded by rules: F.R. Civ. P. 26(b)(3) at the federal level and Rule 26(b)(3), M.R. Civ. P. in Montana. However, courts still refer to the *Hickman* decision in analyzing the scope of the subsequent rules. *See, e.g., Kuiper v. District Court of Eighth Judicial Dist. of State of Mont.*, 193 Mont. 452, 463-64, 632 P.2d 694, 700 (1981). The Montana Work Product Doctrine, Rule 26(b)(3)(A), M.R. Civ. P., provides, in part:

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules the scope of discovery is as follows:

(3) *Trial Preparation: Materials*

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).

The Work Product Doctrine applies to documents prepared in anticipation of an administrative proceeding such as this one. *C.f. Sprague v. Director, Office of Worker's Compensation Programs, U. S. Dept. of Labor*, 688 F.2d 862, 869-870 (1st Cir. 1982). The considerations that lead to the Work Product Doctrine apply equally to contested cases before administrative agencies. The Commission has specifically recognized the applicability of the Work Product Doctrine to proceedings before it by adopting Rule 26, M.R. Civ. P., as an administrative rule of the Commission. ARM 38.2.3301.

The Montana Supreme Court has held that

[i]n order to come within the qualified immunity from discovery pursuant to Rule 26(b)(3), M.R.Civ.P., it must be determined whether, in light of the nature of the document and factual situation in a particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

Clark v. Norris, 226 Mont. 43, 49-50, 734 P.2d 182, 186 (1987). The SBW Communications are documents and tangible things that were prepared to support NorthWestern's requests for recovery of DSM expenses and related lost revenues. Authorization of such could only result from a contested case before the Commission.

In an analogous situation, a court found that documents prepared far in advance of an anticipated proceeding before a public service commission were protected by the Work Product Doctrine. Five utilities joined to develop a nuclear power plant. During the process of developing the plant, the utilities, their consultant, and their attorney began developing

documents to demonstrate the prudence of the costs of the plant. This activity began over two years before any proceeding before the applicable public service commission was initiated. The Court held that the documents were protected by the Work Product Doctrine. *Niagara Mohawk Power Co. v. Stone & Webster Engineering Co.*, 125 F.R.D. 578, 587 (N.D.N.Y. 1989).

The SBW Communications are documents that were prepared in anticipation of litigation before the Commission regarding recovery of DSM expenses and any adjustment of the DSM Lost Revenues. Montana's Work Product Doctrine protects the SBW Communications from discovery.

III. CONCLUSION

For all of the above reasons, NorthWestern requests the Commission sustain NorthWestern's objections to the Natural Gas Discovery and the SBW Communications.

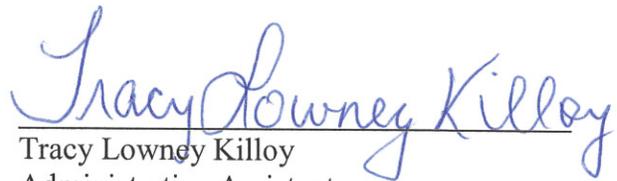
RESPECTFULLY SUBMITTED this 8th day of March 2012.

By:  _____
Al Brogan
Attorney for NorthWestern Energy

CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's ("NWE") Objections to Data Requests Issued by the Montana Public Service Commission ("PSC") on February 22, 2013 in Docket No. D2012.5.49 has been hand delivered to the Montana Public Service Commission ("PSC") and has been e-filed electronically on the PSC website. It will also be hand delivered to The Montana Consumer Counsel ("MCC") and has been served by mailing a copy thereof by first class mail, postage prepaid to the service list in this Docket.

Date: March 8, 2013



Tracy Lowney Killoy
Administrative Assistant
Regulatory Affairs

**Docket No. D2012.5.49
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