

Service Date: March 25, 2013

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

IN THE MATTER OF NorthWestern Energy's) REGULATORY DIVISION
2011-2012 Electricity Supply Tracker) DOCKET NO. D2012.5.49

NOTICE OF COMMISSION ACTION

Procedural History

On June 1, 2012, NorthWestern Corporation d/b/a NorthWestern Energy (NorthWestern) filed its annual Electricity Supply Tracker (Application) with the Montana Public Service Commission (Commission).

The Commission issued a *Notice of Application and Intervention Deadline* on June 15, and granted intervention to the Montana Consumer Counsel, the Human Resource Council, District XI, and the Natural Resources Defense Council on July 11, 2012. On July 27, 2012, the Commission issued *Procedural Order 7219b*, which it suspended on October 1 to allow time for the completion of discovery.

On November 16, 2012, the Commission directed NorthWestern to file supplemental testimony regarding two issues, including the independent evaluation (Program Evaluation) of NorthWestern's demand-side management (DSM) programs performed by SBW Consulting, Inc. (SBW). On November 21, 2012, the Commission issued *Modified Procedural Order 7219e*, setting a deadline of February 22 for written discovery to NorthWestern regarding the supplemental issues.

On February 22, 2013, the Commission issued *Data Requests PSC-034 through PSC-091* to NorthWestern. In Data Requests PSC-050b, PSC-050e, PSC-051b and PSC-051d, the Commission asked NorthWestern to provide: (1) Any comments NorthWestern made to SBW related to any draft of the Program Evaluation; (2) drafts of any portion of the Program Evaluation that SBW sent to NorthWestern; and (3) all correspondence between representatives of NorthWestern and SBW related to methodology, assumptions, inputs, wording or conclusions in the Program Evaluation.

On March 8, 2013, NorthWestern filed timely objections to Data Requests PSC-035, PSC-036b, PSC-037b, PSC-037d, PSC-038b, PSC-039 and PSC-040 to the extent they relate to natural gas, and PSC-042b, all of which the Commission withdrew on March 18, 2013. NorthWestern also objected to Data Requests PSC-050b, PSC-050e, PSC-051b, PSC-051d “on the grounds that they request documents or tangible things that are protected by the work product doctrine.” NorthWestern’s Objections to Data Requests p. 2 (Mar. 8, 2013).

Work Product Doctrine

The primary purpose of the work product privilege is to assure that an attorney is not inhibited in his representation of his client by the fear that his files will be open to scrutiny upon demand of an opposing party. Counsel should be allowed to amass data and commit his opinions and thought processes to writing free of the concern that, at some later date, an opposing party may be entitled to secure any relevant work product documents merely on request and use them against his client.

Kuiper v. Dist. Ct. of Eight Jud. Dist., 193 Mont. 452, 464, 632 P.2d 694, 700 (1981). The work product doctrine has been codified in the Montana Rules of Civil Procedure:

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).

Mont. R. Civ. P. 26(b)(3); Admin. R. Mont. 38.2.3301 (2013) (adopting Mont. R. Civ. P. 26 for purposes of prehearing discovery); *see also* Fed. R. Civ. P. 26(b)(3); *U.S. Fidelity & Guar. Co. v. Rodgers*, 267 Mont. 178, 182, 882 P.2d 1037, 1039 (1994) (where Montana and federal rules are identical, “the interpretation of the federal rules have persuasive application to the interpretation of the state rules.”).

A document is prepared in anticipation of litigation if it “would not have been created in substantially similar form but for the prospect of that litigation” *U.S. v. Torf (In re Grand Jury Subpoena)*, 357 F.3d 900, 908 (9th Cir. 2003). “Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity” of the work product doctrine. Fed. R. Civ. P. 26(b)(3) comm. n.; *see also Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45, 52 (4th Cir. 1963) (required reports not privileged because they were made in the ordinary course of business and did not represent the lawyer's work product).

Documents developed to demonstrate the prudence of a power plant to a state regulatory commission have been protected under the work product doctrine. *Niagara Mohawk Power Co. v. Stone & Webster Engg. Co.*, 125 F.R.D. 578, 587 (N.D.N.Y. 1989). In *Niagara Mohawk*, five utilities created a number of documents and draft reports specifically to “help to demonstrate to the PSC that the facility was properly managed and its costs prudently incurred” as part of “the affirmative assertion of their case before the Commission.” *Id.* at 582-83. The Court held that these documents were prepared “at the direction of the plaintiffs or their attorneys and in anticipation of litigation before the PSC.” *Id.* at 586-87.

SBW Program Evaluation

In this proceeding, NorthWestern asserts work product privilege with respect to communications with SBW and drafts of SBW’s Program Evaluation. NorthWestern argues that these documents “were prepared in anticipation of litigation before the Commission regarding recovery of DSM expenses and any adjustment of the DSM lost revenues.” *Objections to Data Requests* at p. 5.

The Commission ordered the first such program evaluation to be “performed by an independent third party” on December 14, 2005. *Commn. Ord. 6574e* p. 58. In *Order 6574e*, the Commission “authorized NWE to recover estimated DSM related lost revenue on an interim basis subject to true up following a program evaluation and independent savings verification.” *Commn. Ord. 6836c* p. 59 (June 3, 2008).

In NorthWestern’s Application, its Manager of Regulatory Support Services addressed the work of SBW, which he described as “an independent third-party evaluation firm”:

This work will result in a thorough quantitative and qualitative evaluation of the processes used in and the impacts of NorthWestern’s DSM programs and provide recommendations for changes that might improve future results.

Results of the evaluation will be used to refine energy savings estimates for DSM programs and measures and adjust the factors used in the DSM tracking mechanism to determine net energy savings and associated Lost Revenues. An important part of the work is the economic evaluation of individual DSM programs and the overall portfolio of programs using industry-standard cost-effectiveness tests.

Direct Test. William M. Thomas pp. 3, 33 (June 1, 2012). NorthWestern noted that “[a] copy of the voluminous set of materials provided to SBW is available for inspection” at its office in Butte, Montana. *Id.* at p. 34.

Commission Action

At a regularly-scheduled work session on March 19, 2013, Commission staff discussed the difference between the documents in *Niagara Mohawk*, which were “created to assist the utilities . . . in the affirmative assertion of their case,” and SBW’s Program Evaluation, which is required to be “performed by an independent third party” and assembled in the ordinary course of business to improve future results and refine energy savings estimates. *See Niagara Mohawk*, 125 F.R.D. at 582; Ord. 6574e at p. 58; *see also* Ord. 6836c at p. 59.

On March 19, 2013, the Commission voted unanimously to overrule NorthWestern’s objections to Data Requests PSC-050b, PSC-050e, PSC-051b, and PSC-051d because the documents requested therein were not prepared in anticipation of litigation. *See* Mont. R. Civ. P. 26(b)(3).

BY THE MONTANA PUBLIC SERVICE COMMISSION

W. A. (BILL) GALLAGHER, Chairman
BOB LAKE, Vice Chair
TRAVIS KAVULLA, Commissioner
KIRK BUSHMAN, Commissioner
ROGER KOOPMAN, Commissioner