

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

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IN THE MATTER OF NorthWestern Energy's)	REGULATORY DIVISION
Application for Approval to Purchase and)	
Operate PPL Montana's Hydroelectric Facilities,)	DOCKET NO. D2013.12.85
for Approval of Inclusion of Generation Asset)	
Cost of Service in Electricity Supply Rates, for)	
Approval of Issuance of Securities to Complete)	
the Purchase, and for Related Relief)	

**MONTANA CONSUMER COUNSEL'S OBJECTION
TO DATA REQUESTS NWE-005 AND NWE-010,
MOTION FOR PROTECTIVE ORDER AND ALTERNATIVE MOTION FOR
EXTENSION OF TIME FOR PREPARATION OF LISTING OF
MATERIALS WITHHELD BASED ON CLAIM OF PRIVILEGE**

I. OBJECTION

Montana Consumer Counsel (MCC) objects to Data Requests NWE-005 and NWE-010, received April 11, 2014, from NorthWestern Energy (NWE) in the above-captioned docket. NWE has propounded two discovery requests that seek the production of an estimated 650 communications between or among MCC, its staff, its two testifying expert witnesses in this proceeding. Many of those communications involve attachments or multiple attachments, which are in the nature of analysis, drafts of testimony and other materials concerning the "the mental impressions, conclusions, opinions, or legal theories" of MCC or its staff in connection with this proceeding. The material sought by these two requests is attorney work product. It is inconceivable that "all communications" between or among MCC and its testifying experts "between September 26, 2013 [the date of NWE's press release announcing the proposed acquisition of the hydroelectric facilities from PPL Montana] and the present regarding any

aspect of NorthWestern’s evaluation of, purchase of, or Application for Approval of the Hydros” – the object of both requests – could be anything other than work product. Indeed, much of the material sought is opinion work product, which the Montana Supreme Court has held “enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.” *Kuiper v. Dist. Ct. of the Eighth Jud. Dist.* (1981), 193 Mont. 452, 466, 632 P.2d 694, quoting *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977). The Commission has expressed comparable views as to the scope of work product protection from discovery. *In the Matter of Qwest Corp.*, Order No. 6889g, 2008 Mont. PUC LEXIS 78 at ¶¶ 42-43 (2008), citing *Palmer by Diacon v. Farmers Ins. Exch.* (1993), 261 Mont. 91, 861 P.2d 895.

To say that NWE’s discovery requests intrude on work product (and particularly opinion work product) immunity from discovery would be polite understatement.

NWE-005 states as follows:

Please provide copies of all communications; emails; and notes, records of conversations and meetings, or calls (and any attachments or documents related thereto) between J.W. Wilson & Associates (or representative, employee, principal, or agent thereof) and the Montana Consumer Counsel (or any representative, agent, employee, or consultant thereof) between September 26, 2013 and the present regarding any aspect of NorthWestern’s evaluation of, purchase of, or Application for Approval of the Hydros.

NWE-010 similarly states as follows:

Please provide copies of all communications; emails; and notes, records of conversations and meetings, or calls (and any attachments or documents related thereto) between you (or representative, employee, principal, or agent thereof) and the Montana Consumer Counsel (or any representative, agent, employee, or consultant thereof) between September 26, 2013 and the present regarding any aspect of NorthWestern’s evaluation of, purchase of, or Application for Approval of the Hydros.

The materials described by these requests initially appear to encompass approximately 650 electronic mails, in most cases with attachments or multiple attachments. Ordinarily,

Commission practice and the Procedural Order in this proceeding (Order No. 7323b at ¶ 9) would require the preparation of a privilege log. Due to the sheer volume of the material encompassed within two NWE data requests quoted above, the nature of the requests, and the limited time available for response, MCC requests that the Commission enter a protective order pursuant to A.R.M. § 38.2.3301 and the provisions of M.R.Civ.P. 26(c) thereby made applicable, establishing that MCC need not respond to these two requests. Alternatively, to the extent that the Commission determines to enforce the requirement of Order No. 7323b at ¶ 9 and require MCC to produce a privilege log identifying all materials withheld based on work product immunity notwithstanding the extraordinary volume of material required to be reviewed to prepare such a log, MCC seeks an extension of ten calendar days – through and including May 5, 2014 – in which to submit a privilege log in support of its objection to these requests.

II. ARGUMENT

MCC objects to the foregoing requests (NWE-005 and NWE-010) because they seek disclosure of MCC's work product, including mental impressions, conclusions, opinions, or legal theories. The requests fail to show with respect to any facts contained in the materials they seek that NorthWestern has "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." M.R.Civ.P. 26(b)(3). The requests further fail entirely to show, as to opinion work product they seek to have produced, that the mental impressions of MCC or its representatives are at issue in this proceeding and that there is some compelling need to require disclosure. Absent such a showing, there is no legitimate basis for seeking Consumer Counsel's work product.

A. NWE-005 and -010 Seek Opinion Work Product

The Montana PSC's regulations (A.R.M. § 38.2.3301) provide that discovery in proceedings before it is governed in all respects relevant to this discovery issue by the Montana Rules of Civil Procedure.^{1/} M.R.Civ.P. 26(b)(3) codifies the immunity of work product from discovery under Montana law in the following terms:

(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). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

^{1/} A.R.M. § 38.2.3301(a) provides that:

Techniques of prehearing discovery permitted in state civil actions may be employed in commission contested cases, and for this purpose the commission adopts rules 26, 28 through 37 (excepting rule 37(b) (1) and 37(b) (2) (d) of the Montana rules of civil procedure in effect on the date of the adoption of this rule, and any subsequent amendments thereto. In applying the rules of civil procedure to commission proceedings, all references to "court" shall be considered to refer to the commission; references to the subpoena power shall be considered references to ARM 38.2.3302 through 38.2.3305; references to 'trial' shall be considered references to hearing; references to 'plaintiff' shall be considered references to a party; and references to 'clerk of court' shall be considered references to the staff member designated to keep the official record in commission contested cases.

In *Kuiper v. Eighth Judicial Dist. Ct.* (1981), 193 Mont. 452, 462, 632 P.2d 694, the Court applied the work product rule even to terminated litigation, determining that the rule should be given a liberal interpretation. The court noted that work product may only be discoverable if the requester has substantial need of the materials and is unable without undue hardship to obtain them through other means. Opinion work product, it found, is entitled to substantially greater protection, enjoying “a nearly absolute immunity.” *Id.* at 466, quoting *In re Murphy* (8th Cir. 1977), 560 F.2d 326, 337.

In *Palmer v. Farmers Ins. Exch.* (1993), 261 Mont. 91, 861 P.2d 895, the Court construed M.R.Civ.P. 26(b)(3) to recognize two types of work product. First, “a party can discover ordinary work product ‘prepared in anticipation of litigation or for trial or for another party or by or for that other party’s representative . . . *only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.*’” 261 Mont. at 115-116 (emphasis supplied). Of greater relevance here, the second type of work product is known as “opinion” work product, which involves “disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation” (*id.* at 116, quoting M.R.Civ.P. 26(b)(3)). *Palmer* holds that “opinion work product is discoverable when the mental impression is *directly at issue* in the case and the need for the material is compelling” (*id.* at 117). The classic example of the circumstance in which Montana courts have found opinion work product to be discoverable is “bad faith” insurance cases, where proof of liability on the part of the insurer under Montana’s Unfair Trade Practices Act (§33-18-201, MCA) turns on whether the insurer had a reasonable

justification for refusing payment. *See Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288, 292-293 (D. Mont. 1998).

The Montana Supreme Court has consistently reaffirmed *Palmer's* explanation of the work product doctrine, particularly regarding the elevated level of protection from discovery afforded to opinion work product. *See, e.g., Peterson v. Doctor's Co.* (2007), 2007 MT 264 at ¶ 44, 339 Mont. 354, 367 (“To meet the “compelling need” requirement, the party seeking discovery must demonstrate that weighty considerations of public policy and the administration of justice outweigh the need to protect the mental impressions of the opposing party's attorneys or its representatives”), *quoting Palmer, supra*, 261 Mont. at 117. Even in the exceptional context of “bad faith” claims over refusal to honor insurance coverage, the Montana Supreme Court has recognized that protection of work product immunity requires that “fishing expeditions” of the type NWE’s two requests undertake must be prohibited. The Court has held that “requests must be narrowly tailored to lead to discoverable information, and the district courts may well need to prohibit discovery requests which are too broad, given the particular claims and defenses of each case.” *Peterson, supra*, 339 Mont. at 467.

Under this construction of the work product doctrine, drafts of expert reports or testimony or correspondence between counsel and experts are generally not discoverable. Both are opinion work product and enjoy virtually absolute immunity from discovery. *Estate of Moore v. R. J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 662 (S.D. Iowa 2000).

The requirement that a communication for which work product immunity is sought must have been made “in anticipation of litigation” does not require that a proceeding actually have been initiated. Where the ultimate eventuality of litigation is clear, “such protection should be afforded even though litigation is not in progress.” *Kuiper, supra*, 193 Mont. at 462. It is only

necessary that “the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *Clark v. Norris* (1987), 226 Mont. 43, 50, 734 P.2d 182 (citations omitted).

NorthWestern’s data requests cover a period from September 26, 2013 (which is the date of NorthWestern’s press release announcing its intention to purchase the hydro units from PPL Montana). It was sufficiently clear at that point, given Consumer Counsel’s responsibility to Montana’s retail consumers, that a proceeding before the PSC could arise involving the hydro units to trigger the applicability of the attorney work product doctrine.

B. Motion for Protective Order and Alternative Motion for Extension of Time

The foregoing discussion demonstrates that NorthWestern designed its data requests NWE-005 and NWE-010 to reach MCC’s work product, and particularly opinion work product, and that this is not a proper use of discovery permitted under A.R.M. § 38.2.3301. In light of the decidedly limited prospects of these requests actually leading to the discovery of relevant evidence, and the burden on MCC of separately evaluating approximately 650 e-mails (plus attachments and multiple attachments), MCC requests that the Commission enter a protective order under M.R.Civ.P. 26(c), stating that MCC is not required to respond to these two requests.

M.R.Civ.P. 26(c) provides in relevant part that a tribunal “may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including *inter alia* “forbidding the discovery.” Here, MCC believes that a protective order is warranted because of the burden and expense involved in the preparation of a privilege log, where the inevitable outcome of that exercise, once completed, is that the discovery sought by NWE-005 and NWE-010 will be found impermissible under Montana’s work product doctrine.

Alternatively, to the extent that the Commission determines to enforce literally the requirement of Order No. 7323b ¶ 9 that a privilege log be prepared in order to support this particular objection to discovery, MCC requests an extension of ten calendar days – through and including May 5, 2014 – in which to complete an effort to review the requested materials and prepare a privilege log covering potentially 650 separate communications, many with multiple attachments. MCC has requested the assistance of outside counsel to review the potentially responsive materials and to prepare the privilege log. MCC understands that the process of converting Microsoft Outlook® .pst files and their attachments into an auditable format, identifying and reviewing the potentially responsive documents and producing the information required for a privilege log has been underway since April 16, but that the process is necessarily slow given the volume of material and the information customarily provided in a privilege log. MCC’s best estimate of the availability of a privilege log is therefore May 5, 2014. The burden and expense of this process is not justified and should be avoided due to the directly objectionable nature of these data requests.

CONCLUSION

As noted earlier in MCC’s response to NWE objections in this proceeding, MCC has not sought privileged material, recognizing that Montana law provides strong protection for attorney work product, particularly opinion work product. That protection should be invoked here.

Respectfully submitted April 22, 2014.

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