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

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

NORTHWESTERN ENERGY'S RESPONSE TO THE MONTANA CONSUMER COUNSEL'S OBJECTION TO DATA REQUESTS

On March 28, 2014, the Montana Consumer Counsel ("MCC") submitted the prefiled testimonies of Dr. John Wilson and Albert E. Clark in this docket. On April 11, 2014, NorthWestern Energy ("NorthWestern) submitted 10 data requests to the MCC. On April 21, 2014, the MCC verbally requested that NorthWestern withdraw data requests NWE-005 and NWE-010. After carefully considering the matter, on April 22, NorthWestern informed the MCC that it would not withdraw the two data requests. On April 22, 2014, the MCC filed its 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 ("MCC Objection"). By this document, NorthWestern responds to the MCC Objection and requests that the Commission overrule the objection to NWE-005 and NWE-010, deny the MCC's motion for a protective order, and order the MCC to respond to NWE-005 and NWE-010 (including producing a privilege log for any materials withheld).

The MCC argues that attorney work product is not discoverable. Subject to certain limitations, NorthWestern agrees that ordinary work product is not discoverable absent a showing of substantial need and inability to obtain equivalent materials by other means. *See In the Matter of PSC Investigation of Qwest Corporation,* Docket No. 2008.1.6, Order No. 6889g. ¶42 (Sept. 12, 2008) (quoting M. R. Civ. P. 26(b)). NorthWestern agrees that opinion work product must receive greater protection. "This Rule [M. R. Civ. P. 26(b)(3)] does not absolutely preclude discovery of opinion work product, rather it mandates that Montana courts and agencies provide greater protection for opinion work product than for ordinary work product." *Id.*, ¶ 43. NorthWestern does not expect to receive communications that it can confirm are protected work product, unless NorthWestern makes a showing of substantial need for the information. Of

course, NorthWestern cannot evaluate the need for protected communications without a description of them in a privilege log.

However, to invoke the protection of the work product doctrine, the MCC must demonstrate, not merely assert, that the requested documents are work product.

> "When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: . . . (ii) describe the nature of the documents, communications, or other things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."

M. R. Civ. P. 26(b)(6).

This rule requires a privilege log. *See Peterson v. The Doctors' Co.*, No. DV-02-491, 2003 WL 25771929 (Mont. Dist. December 15, 2003) ("The only way for Plaintiffs to meet their burden is to provide a privilege log setting forth the claimed privileged documents with enough specificity for the Court and Defendant to assess the alleged privilege."). Procedural Order No. 7323b ("Procedural Order"), which governs this docket, provides, "If a party objects based on privilege, it must file a privilege log by the deadline to respond with sufficient information for the Commission to determine whether the privilege applies." Procedural Order, ¶ 9.

The MCC has not met this requirement, apparently does not intend to comply with the Procedural Order, and improperly requests the Commission to relieve it of that burden. For the Commission and NorthWestern to assess the MCC's claim, the MCC must provide at least the date, subject matter, author, and recipients of each communication. Rather than providing this information, the MCC makes unsupported conclusory statements such as:

- "The material sought by these two data requests is attorney work product."
- "It is inconceivable that 'all communications' between or among the MCC and its testifying experts . . . could be anything other than work product."

- "The materials described by these requests initially appear to encompass approximately 650 electronic mails."[1]

None of these conclusory statements provides information that allows the Commission or NorthWestern to assess the MCC's claim. The Commission should overrule the MCC's objection and require the MCC to respond to NWE-005 and NWE-010 by producing communications which are not work product and by producing a privilege log setting forth each of the documents withheld. If the Commission does not overrule the MCC's objection, then the MCC would not be required to provide communications even if subsequent review of the privilege log reveals that they are not work product.

Not only does the MCC assert that all communications are work product, it also wants the Commission to relieve it of the obligation to provide 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 data requests.

The MCC supports its request with the conclusory statement:

> 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.

Neither the bare request, nor the conclusory statement, justifies depriving NorthWestern, other parties, and the Commission of their right and ability to assess the MCC's claim of protection. Even if every communication is work product, an unlikely possibility, the discovery is

[1] These electronic emails may be documents of a public body (the MCC) that are subject to the public's right to know under Article II, § 9 of the Montana Constitution. *See Becky v. Butte-Silver Bow School Dist. No. 1*, 247 Mont 131, 138, 906 P.2d 193, 197 (1995) (Documents generated or maintained by a public body which are somehow related to the function and duties of the body are documents of public body.); § 2-6-101(3)(d), MCA (2013) (Public writings include public records, kept in this state, of private writings, including electronic mail.).

permissible. The discovery leads to a privilege log. The privilege log may result in the discovery of admissible evidence. The Commission should deny the MCC's request for a protective order relieving it of the requirement to produce a privilege log.

Finally, the MCC asks for a 10-day extension of time in which to provide a privilege log. NorthWestern is sympathetic to the time required to review documents, respond to a request for communications, and produce a privilege log. NorthWestern is also familiar with how long it can take to review and produce documents and privilege logs. In response to data requests from the MCC and the Commission, NorthWestern reviewed over 150,000 documents, including over 25,000 for privilege, and produced multiple privilege logs.

Moreover, it is well worth pointing out that in its discovery to NorthWestern, the MCC asked for all of NorthWestern's internal communications and documents. These data requests obviously include communications from and to attorneys. In response, NorthWestern produced emails and communications from both internal and outside counsel, underscoring the fact that not all communications from an attorney qualify as work product.

NorthWestern does not support an extension of the deadline to produce a privilege log by 10 days to May 5, 2014. When the MCC received NWE-005 and NWE-010 on April 11, it knew or should have known that it would need to produce a privilege log on April 25, ten business days after receipt of the data requests. The MCC's represents that the process of producing the information required for a privilege log has been underway since April 16. The MCC has not explained its delay in starting the process.

NorthWestern is required to file any rebuttal testimony by May 9, 2014. Even if the Commission grants the MCC an extension, NorthWestern will adhere to the current Procedural Order deadline for rebuttal testimony and requests that the Commission not change any of the

subsequent deadlines in the Procedural Order. NorthWestern is committed to commencing the hearing on July 8, 2014.

For the reasons stated above, NorthWestern respectfully requests that the Commission overrule the MCC's Objection; deny the MCC's motion for a protective order; order the MCC to respond to NWE-005 and NWE010, including the production of a privilege log.

Respectfully submitted this 25th day of April 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's Response to the Montana Consumer Counsel's Objection to Data Requests in Docket No. D2013.12.85 has been hand delivered to The Montana Public Service Commission and The Montana Consumer Counsel. A copy has been e-filed on the MPSC website. This will be mailed to the most recent service list in this Docket by first class mail. This will also be emailed to the counsel of record.

Date: April 25, 2014

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Docket No D2013.12.85
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