

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)

**REPLY OF MONTANA CONSUMER COUNSEL
IN SUPPORT OF OBJECTION AND REQUESTS FOR RELIEF
CONCERNING DATA REQUESTS NWE-005 AND NWE-010**

Montana Consumer Counsel ("MCC") submits this Reply in Support of its Objection and Requests for Relief Concerning Data Requests NWE-005 and -010. For the following reasons, the April 25, 2014, Response of NorthWestern Energy ("NWE") to Consumer Counsel's Objection to Data Requests is without merit, and the Commission should uphold MCC's objection and grant appropriate relief. Alternatively, and at a minimum, to the extent that the Commission determines that a privilege log must be prepared in order to support this particular objection to discovery, MCC renews its request for an extension of ten calendar days – through and including May 5, 2014 – in order to complete its preparation of such a privilege log.

At its base, NWE's Response relies (at pp. 3-5) on a false equivalence between its position in this proceeding as an applicant for a Commission order under Section 69-8-421, MCA, approving a business transaction, and MCC's statutory responsibility to represent the interests of Montana's utility consumers in regulatory proceedings in accordance with Sections 69-2-201 through 69-2-204, MCA. NWE assails MCC for requesting that the Commission

relieve it from an undue burden in being compelled to produce a privilege log for over 650 e-mails (most with multiple attachments) constituting communications between MCC **and its expert witnesses** in this proceeding, at any time since NWE's announcement of its proposed purchase of PPL Montana's hydroelectric facilities, "regarding any aspect of NorthWestern's evaluation of, purchase of, or Application for Approval of the Hydros." Key here is that these materials are effectively defined by the underlying data request **itself** as work product, in that there is no other reason for MCC to discuss these subjects with its expert witnesses other than preparation of MCC's case in response to NWE's application.¹ Therefore, the exercise of wading through hundreds of communications in order to develop an itemization of why each document should be withheld is essentially an exercise in squandering the scarce resources available to MCC for representation of the interest of the consuming public.

NWE suggests (Response at 5) that MCC's objection and motion is somehow unreasonable because "in response to data requests from the MCC and the Commission, NorthWestern had to review over 150,000 documents, including over 25,000 for privilege, and produced multiple privilege logs" and that "in its discovery to NorthWestern, the MCC asked for all of NorthWestern's internal communications and documents."² NWE is seeking Commission authorization for a \$900 million asset purchase, and it is reasonable to expect that some level of economic analysis preceded the decision to move forward with that purchase. MCC's discovery

¹ It is likely for this reason that this is believed to be the first instance of such a discovery request ever being made of MCC.

² This description is misleading and inaccurate. It was not MCC's requests that prompted this review, but rather NWE's own recognition that this material was likely of interest in connection with its application. See NWE's Brief Regarding Discovery Issues, Feb. 12, 2014, at p. 3, explaining that NWE began preparation of this material two months before its filing, contracting with a firm that had up to 50 people working on the project. In fact, MCC served only two data requests requesting communications, one of which was later substantially limited, and one of which was entirely withdrawn. See fn. 3, *infra*.

has been appropriately directed toward NWE's business evaluation, analysis and negotiation of that transaction. Although MCC has statutory authority to "inspect the business and corporate records of any regulated company in accordance with the law to aid in the exercise of the consumer counsel's duties" (Section 69-2-203(2), MCA), MCC has expressly disclaimed any request for any privileged communications. MCC Response to Objections, Feb. 3, 2014. When requested to do so, MCC has further limited its discovery requests to accommodate NWE.³ NWE regrettably declined the opportunity to reciprocate, offering instead the assertion that ". . . the discovery is permissible" because "the discovery leads to a privilege log" and "the privilege log may result in the discovery of admissible evidence" (NWE Response at 4-5). Under the circumstances described above, this theoretical speculation is an insufficient justification for the intrusion NWE seeks to undertake that is directed to MCC's theories, strategies and mental impressions, and into litigation resources that are intended to be dedicated to protecting the interests of the consuming public.

In contrast to NWE, MCC does not seek any Commission approval in this proceeding. Instead, MCC is participating in this case under the statutory responsibility to "appear at public hearings conducted by the commission, *as the representative of the consuming public*, on all matters which come before the commission which in any way affect the consuming public" (Section 69-2-201, MCA (emphasis supplied)). Given the unique statutory charge under which it operates, there is simply no basis other than for preparation of its case to be presented in this

³ MCC agreed to limit the scope of MCC-009 (requesting copies of communications between NWE and PPL, not NWE witnesses) to the individuals suggested by NWE.

MCC agreed to entirely withdraw MCC-011 (requesting copies of all communications concerning properties other than hydroelectric facilities).

MCC Response to Objections, Feb. 3, 2014. These are the only MCC Data Requests that requested records of communications. Both of these requests were designed to explore specific perceived issues in the filing.

proceeding for MCC to have engaged in the communications that are the subject of NWE's data requests. The Commission must consider MCC's statutory role in Commission proceedings in evaluating whether the burden imposed by having to create a privilege log to respond to NWE's requests is undue for purposes of Mont. R. Civ. P. 26(c).⁴

Prior to forcing MCC to undertake the compilation of a privilege log, the Commission should first determine whether NWE has met its burden of showing that the mental impressions of the MCC are directly at issue in this proceeding, and that NWE's asserted need for the material is compelling. See *Peterson v. Doctor's Co.*, 2007 MT 264 ¶ 44 fn 2. To meet the compelling need requirement, NWE must show that public policy considerations and the administration of justice outweigh the need to protect the mental impressions of MCC's attorneys. NWE argues only that the privilege log must be created and produced so that MCC's assertion of privilege may be challenged. This presumes that NWE has satisfied the other threshold showings it must make: that MCC's mental impressions and theories are actually at issue in this proceeding, and that NWE's need for the material is compelling. NWE has not made and cannot make either threshold showing. MCC's request to sequence the decision in order to protect resources is reasonable. The Commission should determine whether NWE has in fact met its burden prior to forcing the MCC to spend its time and effort in logging and categorizing material that cannot be discoverable.

⁴ NWE speculates (Response at 4 n. 1) that MCC's e-mail communications with its expert witnesses "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." It is unnecessary to burden the Commission's decision on MCC's objection and motion with this speculation. NWE is seeking production of those communications under ARM § 38.2.3301 and the provisions of the Montana Rules of Civil Procedure referenced therein. These provisions, under which this discovery dispute is to be determined, furnish ample support for MCC's position that it should not be required to produce the requested materials, nor to provide an itemization of those materials to permit NWE to test the applicability of the work product immunity on a document-by-document basis.

Finally, NWE criticizes MCC (Response at 5) for “delay in starting the process” of a document-by-document privilege log from its receipt at close of business on Friday, April 11, of NWE’s data requests to April 16. The criticism is misplaced. MCC acted reasonably in evaluating the requests, its options for responding, the universe of potentially responsive documents and other considerations in determining the appropriate course for managing the undue burden that NWE is attempting to impose with these unprecedented requests. The ten-day extension requested by MCC is the minimum necessary to enable MCC to comply, should the Commission determine that a privilege log must be prepared in this instance.

NWE attempts to create and foster the impression that what is unusual here is MCC’s request to avoid preparation of a privilege log to respond to NWE’s data requests. What is actually unusual, however, is NWE’s unprecedented and objectionable attempt to directly request privileged work product and communications. The Commission should carefully evaluate the effect of allowing the use of this kind of foreseeably inappropriate discovery to deplete the resources available in this proceeding for the representation of the interests of the consuming public, and should grant the relief requested by MCC.

Respectfully submitted April, 29, 2014.

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