

Service Date: February 10, 2014

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

IN THE MATTER OF the Application of ) REGULATORY DIVISION  
NorthWestern Energy for Hydro Assets )  
Purchase ) DOCKET NO. D2013.12.85

**NOTICE OF COMMISSION ACTION**

On December 20, 2013, NorthWestern Corporation, doing business as NorthWestern Energy (NorthWestern or NWE), filed its *Application for Hydro Assets Purchase* with the Montana Public Service Commission (Commission). The Commission granted intervention to Montana Consumer Counsel (MCC) on December 20, 2013.

The Commission issued Data Requests PSC-001 through PSC-035 on December 27, 2013, PSC-036 through PSC-058 on January 2, and PSC-059 through PSC-066 on January 3, 2014. The MCC issued Data Requests MCC-001 through MCC-015 on January 3, 2014.

NorthWestern objected to the following Data Requests on January 24: PSC-001, PSC-008a, PSC-008b, PSC-018a, PSC-023b, PSC-023c, PSC-024b, PSC-024c, PSC-026b, PSC-037, PSC-038, PSC-059d, PSC-060d, MCC-006, MCC-007, MCC-008, MCC-009, and MCC-010. The MCC filed a *Response to Objections and Motion to Compel* on February 3, 2014.

On February 5, 2014, NorthWestern filed a *Request for Oral Reply and Presentation*. On February 6, 2014, the MCC filed a *Response to Request for Oral Argument*.

At an out-of-cycle work session on February 6, 2014, the Commission disposed of certain objections and granted the *Request for Oral Reply and Presentation* as discussed below.

**Objections to Commission Data Requests**

NorthWestern objected to Data Requests PSC-001 and PSC-018a “[i]n the event that the Commission does not grant the protective orders sought by NorthWestern.” The Commission granted protective orders related to these Data Requests on January 24 and January 29, 2014.

*See* Or. 7323c (Jan. 24, 2014); Or. 7323d (Jan. 24, 2014); Or. 7323e (Jan. 29, 2014). As a result, it found these objections moot.

Although NorthWestern objected to Data Requests PSC-008a, PSC-008b, and PSC-026b, it also provided responses. As a result, the Commission also found these objections moot.

Data Requests PSC-023b, PSC-023c, PSC-024b, PSC-024c, PSC-059d, and PSC-060d asked NorthWestern about potential worst case scenarios at the hydroelectric facilities. NorthWestern objected to these Data Requests in part because these they call for speculation. The Commission agreed that as worded, these Data Requests call for speculation and sustained the objections on that basis.

Northwestern objected to Data Request PSC-037 “to the extent that it seeks information or documents that are protected by privilege or work product.” NorthWestern attached a Privilege Log to its response. The Commission sustained the objection to the extent that it applies to information protected by attorney-client privilege or work product, but overruled it to the extent that reports pertaining to litigation and environmental issues exist which are not protected by attorney-client privilege or the work product doctrine.

Northwestern objected to Data Request PSC-038 “to the extent that it seeks information or documents that are protected by privilege or work product.” NorthWestern attached a Privilege Log to its response. The Commission sustained this objection.

### **Objections to MCC Data Requests**

The MCC did not respond to NorthWestern’s objections to Data Requests MCC-002d and MCC-004. Because the MCC did not respond, the Commission sustained these objections.

Data Request MCC-006 asked for “all components of any due diligence analysis that was done by or for NWE regarding the acquisition of [the] hydroelectric properties.” NorthWestern objected to this Data Request in part based on attorney client privilege, the work product doctrine, and “on the grounds that it is vague, ambiguous, over broad, [and] imprecise.” It also objected because it “may contain proprietary or confidential business information.” The MCC pointed out that “[p]rotective orders are available if the material is proprietary,” and responded:

MCC does not seek information that is determined to be privileged. . . . The request is not vague. NWE itself discusses its ‘due diligence’ efforts many times. . . . Again, the due diligence issue is central to this docket and the Commission should require NWE to fully respond to the request. . . .

The Commission overruled NorthWestern's objection to Data Request MCC-006.

Data Request MCC-007 asked NorthWestern to "identify in detail all documents that were reviewed by NWE or its advisors in conjunction with any due diligence analysis of the hydroelectric property acquisition." NorthWestern reiterated the same objections it made to MCC-006, and further objected "on the grounds that it is unnecessary." It also asserted that "the documents have been produced in response to other data requests." The MCC requested that NorthWestern identify those other data requests, and responded:

NWE does not get to determine what is 'necessary' to an intervenor's case. In fact, the requested information is relevant to a central issue in this proceeding, due diligence. . . . The Company should describe and disclose to the Commission and intervenors the materials that were reviewed in its due diligence efforts.

The Commission overruled NorthWestern's objection to Data Request MCC-007.

Data Request MCC-008 asked NorthWestern to "provide copies of any NWE internal documents or advisory documents that criticized or questioned any aspects of the hydroelectric property acquisition." NorthWestern objected to this Data Request

on the grounds that it is overbroad, oppressive, and unduly burdensome. NorthWestern further objects to this data request to the extent that it may seek to compel the production of material protected by the attorney client privilege or the work product doctrine. . . . NorthWestern also objects that the term 'criticized or questioned any aspects' is vague, ambiguous, and subject to multiple interpretations.

The MCC responded, "If the Company received advice critical of the acquisition, it should be ordered to produce this information" because without it, "the Commission will be hampered in its ability to evenhandedly assess the merits of the requested preapproval." The Commission overruled NorthWestern's objection to Data Request MCC-008.

Data Request MCC-009 requested all communications between PPL Montana, LLC (PPLM) and NorthWestern regarding its potential acquisition of the hydroelectric facilities. NorthWestern filed the following objections:

NorthWestern objects to this data request to the extent that it seeks information or documents not relevant to the issues in this docket, which is beyond the permissible scope of discovery. . . . NorthWestern objects to this data request to the extent that it seeks information or documents that are protected by privilege or work product. . . . NorthWestern objects to this data request to the extent that it is overly broad; seeks the production of documents without reference to a time period or with reference to a time period that has no relevance to the matters at issue in this proceeding; calls for the production of documents that are cumulative or contain

duplicative information without a specific determination as to their relevance and the need for them, especially in light of the time and expense required to gather and produce the voluminous requested documents; and imposes on NorthWestern undue expense or unreasonable burden.

NorthWestern nonetheless identified “the core individuals” involved as Brian Bird, Heather Grahame, John Hines, Pat Corcoran, Michael Cashell, and Dan Rausch.” The MCC responded:

[NWE] first objects ‘to the extent’ that the request seeks irrelevant information. This conditional objection is a bit puzzling. Suffice it to say, however, that MCC is not seeking irrelevant information or documents. . . . NWE’s potential acquisition of PPLM’s hydroelectric properties is the central issue in this proceeding.

NWE again objects ‘to the extent’ the request seeks privileged information or documents. MCC does not seek production of material that is, in fact, determined to be privileged.

NWE objects ‘to the extent’ the request is overly broad, is not limited to a specified time period, or is cumulative or duplicative. The request is not overly broad. It is specifically aimed at relevant material that could lead to discovery of admissible evidence, as described above. It is limited to the period in which NWE has considered the acquisition of PPLM’s hydroelectric properties. Further, since all of the requested communications are individual instances, they are not cumulative. A different conclusion would preclude discovery of communications.

Since the MCC was “willing to narrow the request to the individual identified in NWE’s objection,” the Commission sustained NorthWestern’s objection to the extent it applied to representatives of NorthWestern not identified above, but otherwise overruled the objection.

Data Request MCC-010 asked NorthWestern to identify the date and persons involved in all meetings that occurred between NorthWestern and PPLM “regarding any aspect of the potential hydroelectric property acquisition,” and to “provide copies of all notes and other documents related to those meetings.” NorthWestern filed the same objections that it filed in response to Data Request MCC-009, and the MCC reiterated its response to those objections. Additionally, the MCC agreed to “narrow the definition of ‘meetings’ to those involving three or more people.” The Commission sustained NorthWestern’s objection to the extent it applied to meetings involving fewer than three people, but otherwise overruled the objection.

### **MCC’s Motion to Compel**

The MCC asserted that NorthWestern did not provide the documents requested in Data Request MCC-013a related to Exhibit BBB-5. It also sought to compel responses to Data

Request MCC-014, which asked NorthWestern to “provide working electronic copies of all exhibits and work papers with all supporting files and links intact, for . . . AM Exhibit 1 Public [and] Exhibit AO-02 Public.” NorthWestern responded that it could not “require its consultants to provide proprietary models.” The MCC argued in its *Motion to Compel*:

These analyses led to valuations used to support the Company’s preapproval request. . . . MCC requires the backup for these analyses in order to evaluate them. The Commission should be interested in the parties’ ability to conduct such reviews, rather than simply accepting the resulting calculations in outside consultants’ testimonies. Consultants appearing in Commission proceedings have consistently been called upon to explain and produce the support for their recommendations. Failure to compel production of these workpapers and supporting documents would set a new and unfortunate precedent. If the models used by the consultants are truly proprietary, appropriate protective orders may be requested.

On February 6, 2014, the Commission granted the MCC’s *Motion to Compel*.

### **NorthWestern’s Request for Oral Argument**

In addition to the objections discussed above, NorthWestern has objected to at least seventeen other Data Requests. In its *Request for Oral Reply and Presentation*, NorthWestern indicated that it

has objected to 36 data requests (counting subparts). Of those to which NorthWestern objected, 14 are related to coal assets. Additionally, 29 data requests for which the deadline for objections has not passed are related to coal assets. NorthWestern will continue to object to these types of data requests and may seek reconsideration of orders overruling any such objections. . . .

For these reasons, NorthWestern needs the Commission to rule on the relevance of coal as discovery requests are still being propounded which require the production of information relating to the PPL coal assets.

In its *Response to Objections*, the MCC stated:

NWE argues that communications regarding ‘potential transactions that did not come to fruition’ are irrelevant. NWE is wrong in this assertion. It is clear that PPLM was interested in selling all of its Montana resources, not just the hydros. NWE did, in fact, bid on these resources, albeit apparently assigning a negative value to some of them. These were, therefore, resources potentially available to serve ratepayers and the Company is obligated to consider such alternatives in its resource planning. The information requested can lead to evidence concerning how the Company conducted such evaluations, as well as the impact those considerations had on the purchase for which it is now requesting preapproval.

Without ruling on other objections, the Commission granted NorthWestern's *Request for Oral Reply and Presentation*, and requested that short briefs be filed **by noon on February 12, 2014** and oral arguments be made on **February 13, 2014**.

BY THE MONTANA PUBLIC SERVICE COMMISSION

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