

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

IN THE MATTER OF NorthWestern Energy's) REGULATORY DIVISION
Application for Approval of Avoided Cost Tariff)
Schedule QF-1) DOCKET NO. D2016.5.39

**UPDATED RESPONSE TO NORTHWESTERN ENERGY'S
DATA REQUEST NWE-008 TO VOTE SOLAR, LLC**

NWE-008 Subject: Communications with Solar Developers in Montana

Provide complete copies of all written communications in the last two years between the Montana Environmental Information Center/Vote Solar (their agents and attorneys, including Mr. Beach), and the following three solar developers in Montana (including their agents and attorneys): Cypress Creek Renewables, FLS, and Pacific Northwest Solar.

Response:

Vote Solar objects to NWE-008 because it is not reasonably calculated to lead to admissible evidence, is overbroad, and seeks privileged information.

Pursuant to Rule 26(b)(1) of the Montana Rules of Civil Procedure, a party may only obtain discovery “relevant to any party’s claim or defense” and that “appears reasonably calculated to lead to the discovery of admissible evidence.” The Commission adopted M. R. Civ. P. 26 in its administrative rules. See ARM 38.2.3301. Discovery is irrelevant if it has “no bearing on [the] legitimate issues” in the docket. Henricksen v. State, 2004 MT 20, ¶ 44, 319 Mont. 307, 84 P.3d 38.

Primarily at issue in this proceeding is the proper calculation of NWE’s avoided costs for purposes of establishing the QF-1 Tariff Rate that applies to certain Qualifying Facilities (“QFs”) that seek to sell electricity to NorthWestern. Under Montana regulations, “[t]he standard rate for purchases from a qualifying facility shall be that rate calculated on the basis of avoided costs to the utility which is determined by the commission to be appropriate for the particular utility after consideration, to the extent practicable, of the avoided cost data submitted to the commission by the utility and other interested persons.” ARM 38.5.1905(4). In addition, the Commission has identified a narrow set of additional issues—all of which pertain to additional terms and conditions in QF-1 contracts—for which the Commission has requested testimony and data request responses from all parties. Parties to this proceeding have conveyed their views on these matters through testimony and data request responses. There is no additional information relevant to this proceeding that NWE might obtain through private communications between co-litigants. Because any communications between Montana Environmental Information Center/Vote Solar and the solar developers have “no bearing on [the] legitimate issues” in the docket, Henricksen, ¶ 44, they are irrelevant and not subject to disclosure under M. R. Civ. P. 26(b)(1).

NorthWestern’s request also is overbroad, as it seeks communications pertaining to any matter whatsoever, and for a period that pre-dated this proceeding.

Furthermore, any such communications are subject to attorney-client privilege by virtue of the “common interest” doctrine. See Am. Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court, 2012 MT 61, ¶ 11, 364 Mont. 299, 280 P.3d 240. Under Montana law, “[a]ttorney-client communications may be protected if disclosed to another party where the parties undertake a joint effort with respect to a common legal interest.” Id. (quotation omitted). Here, Vote Solar and Montana Environmental Information Center share common legal interests in ensuring proper implementation of federal and state laws with respect to NWE’s obligation to purchase electricity from QFs. Accordingly, in addition to being irrelevant to the Commission’s legitimate decision-making, any such communications are privileged.

Updated Response (Dec. 21, 2016)

In accordance with the Commission's Order on NorthWestern's Motion to Compel and Vote Solar's Motion to Strike, Vote Solar produces the following Privilege Log regarding its privileged communications with FLS and Cypress Creek Renewables. Vote Solar also produces all responsive, non-privileged communications with FLS, Cypress Creek Renewables, and Pacific Northwest Solar, which Vote Solar previously objected were not relevant to this proceeding. See supra. These documents are being produced on the accompanying CD-ROM. Service emails in this proceeding have been excluded from the production because NorthWestern is already in possession of those communications. Redactions for privilege are documented on the Privilege Log. All other redactions exclude nonresponsive communications.

Privilege Log

Document Date/ Date Range	Document Type	Email Sender(s)	Email Recipient(s)	Email Chain Subject	Produced with Redaction	Privilege
9/22/2016	eMail	Jenny Harbine	Ethan Case	Accepted: MT Avoided Cost Modeling Call		Common Interest Privilege
10/11/2016	eMail	Jenny Harbine	Ethan Case	Accepted: MT Testimony Coordination		Common Interest Privilege
10/6/2016	eMail	Jenny Harbine	Ethan Case	Call?		Common Interest Privilege
11/29/2016	eMail & Attachments	Jenny Harbine	michaeluda@udalaw.com; Aurora Janke; slevitas@flsenergy.com	Common Interest Agreement		Common Interest Privilege
9/16/2016	eMail	Jenny Harbine; Savey, Michelle	Curlee, Heather ; Snowden, Ben ; Steve Levitas; Michael Uda ; Glass, Todd; Jenny Harbine; Aurora Janke	Common-interest agreement		Common Interest Privilege
11/8/2016	eMail	Jenny Harbine	Mike Uda (muda@mthelena.com); Aurora Janke	Data request objection		Common Interest Privilege
10/7/2016	eMail	Jenny Harbine	slevitas@flsenergy.com; Snowden, Ben (BSnowden@kilpatricktownsen d.com); Curlee, Heather (hcurlee@wsgr.com)	FW: EL16-117 Vote Solar and Montana Environmental Information Center's Response to Motion to Dismiss		Common Interest Privilege
12/1/2016	eMail and Attachment	Michael Uda	Jenny Harbine; Aurora Janke	Fwd: Common Interest and Confidentiality Agrmt (Revised WSGR 09152016) (1).docx		Common Interest Privilege
9/14/2016	eMail	Jenny Harbine	Michael Uda ; Snowden, Ben ; slevitas@flsenergy.com	Montana PURPA expert coordination		Common Interest Privilege
6/10/2016	eMail	Ethan Case	Jenny Harbine	MT "Emergency" QF Relief Call		Common Interest Privilege
9/22/2016	eMail	Ethan Case	Jenny Harbine; Steve Levitas; Chris Norqual; David Bunge; tomb@crossborderenergy.com; Snowden, Ben (BSnowden@kilpatricktownsen d.com)	MT Avoided Cost Modeling Call		Common Interest Privilege
9/28/2016 - 9/30/2016	eMail	Ethan Case; Jenny Harbine	Jenny Harbine; Tom Beach ; Snowden, Ben; Ethan Case; Steve Levitas	Avoided Cost Draft Analysis Timeline		Common Interest Privilege
10/10/2016	eMail	Jenny Harbine; Ethan Case; Tom Beach; Roger Schiffman; Mike Uda	Ethan Case ; Tom Beach; Jenny Harbine; Roger Schiffman; Mike Uda	Call to Coordinate Testimony / Share Avoided Cost Notes		Common Interest Privilege

Privilege Log

Document Date/ Date Range	Document Type	Email Sender(s)	Email Recipient(s)	Email Chain Subject	Produced with Redaction	Privilege
9/19/2016	eMail and Attachments	Steve Levitas; Jenny Harbine	Jenny Harbine; Curlee, Heather; Snowden, Ben; slevitas@flsenerg.com; Aurora Janke	FW: Complaint of Vote Solar and Montana Environmental Information Center for Violations of the Public Utilities Regulatory Policies Act of 1978		Common Interest Privilege
11/29/2016	eMail and Attachment	Jenny Harbine	Michael Uda	RE: Discussion of NWE motion to compel		Common Interest Privilege
10/14/2016	eMail	Jenny Harbine	slevitas@flsenergy.com; Ethan Case ; Snowden, Ben (BSnowden@kilpatricktownsend.com)	FW: Docket No. D2016.5.39 - Vote Solar Prefiled Direct Testimony		Common Interest Privilege
10/14/2016	eMail	Jenny Harbine; Ethan Case	Ethan Case' Jenny Harbine	RE: Docket No. D2016.5.39 - Vote Solar Prefiled Direct Testimony		Common Interest Privilege
7/14/2016	eMail	Ethan Case; Jenny Harbine	Jenny Harbine; Ethan Case; Jill Tauber	Earthjustice National PUPRA Contact?	X	Common Interest Privilege
9/7/2016	eMail	Michael Uda; Jenny Harbine	Jenny Harbine; Michael Uda	FERC Filing		Common Interest Privilege
10/3/2016	eMail	Jenny Harbine; Steve Levitas	Snowden, Ben (BSnowden@kilpatricktownsend.com); slevitas@flsenergy.com; Curlee, Heather (hcurlee@wsgr.com); Jenny Harbine; Aurora Janke; Susan Stevens Miller; Glass, Todd	FERC?		Common Interest Privilege
10/19/2016 - 10/22/2016	eMail	Curlee, Heather; Jenny Harbine; Steve Levitas	Jenny Harbine; Steve Levitas; Snowden, Ben; Curlee, Heather; Glass, Todd; Susan Stevens Miller; Aurora Janke	FLS Complaint to FERC		Common Interest Privilege
9/22/2016 - 9/27/2016	eMail	Jenny Harbine; Ethan Case	Jenny Harbine; Chris Norqual; David Bunge; Steve Levitas; Ethan Case; Snowden, Ben; Tom Beach	Friday conversation re NWE avoided costs		Common Interest Privilege
11/1/2016	eMail	Michael Uda	Jenny Harbine	Re: FW: Common Interest Doctrine		Common Interest Privilege
11/1/2016 - 11/2/2016	eMail	Snowden, Ben; Jenny Harbine; Ethan Case; Michael Uda; Steve Levitas	Ethan Case; Jenny Harbine; Snowden, Ben; Steve Levitas; Michael Uda; Aurora Janke	Mont. PSC -- Discussion of additional issues		Common Interest Privilege

Privilege Log

Document Date/ Date Range	Document Type	Email Sender(s)	Email Recipient(s)	Email Chain Subject	Produced with Redaction	Privilege
9/8/2016 - 9/13/2016	eMail	Jenny Harbine; Snowden, Ben; Curlee, Heather; Steve Levitas	Curlee, Heather ; Steve Levitas; Snowden, Ben; Jenny Harbine; Susan Stevens Miller	Montana - FERC matter		Common Interest Privilege
9/9/2016 - 9/19/2016	eMail and Attachment	Snowden, Ben; Jenny Harbine; Curlee, Heather; Michael Uda	Jenny Harbine; Curlee, Heather; Steve Levitas; Michael Uda; Snowden, Ben; Glass, Todd; Aurora Janke	Montana PURPA Matter		Common Interest Privilege
9/16/2016 - 9/21/2016	eMail	Jenny Harbine; Ethan Case	Ethan Case; Jenny Harbine; Snowden, Ben michaeluda@udalaw.com;	MT Data Dump Analysis		Common Interest Privilege
8/16/2016	eMail	Jenny Harbine	Aurora Janke	PURPA reconsideration motions RE: Received your objection and the draft testimony		Common Interest Privilege
11/8/2016	eMail	Jenny Harbine	Michael Uda	Fwd: Response to Motion to Compel		Common Interest Privilege
12/1/2016	eMail and Attachment	Michael Uda; Jenny Harbine	Jenny Harbine; Aurora Janke; Michael Uda	Uda signature for both FLS and Cypress Creek		Common Interest Privilege
12/1/2016	eMail	Michael Uda; Jenny Harbine	Jenny Harbine; Michael Uda	Update		Common Interest Privilege
6/21/2016	eMail	Ethan Case	Jenny Harbine	RE: Update		Common Interest Privilege
8/19/2016	eMail	Ethan Case; Jenny Harbine	Jenny Harbine; Ethan Case michaeluda@udalaw.com;	Vote Solar DRAFT motion		Common Interest Privilege
8/4/2016	eMail	Jenny Harbine; Michael Uda	Jenny Harbine ethan.case@ccrenew.com;	Your message		Common Interest Privilege
6/10/2016 - 6/15/2016	eMail	Jenny Harbine; Ethan Case	Jenny Harbine; David Bunge	Re: Your message		Common Interest Privilege
8/1/2016	eMail	Jenny Harbine; Ethan Case	Ethan Case; Jenny Harbine	Tom Beach additional issues testimony		Common Interest Privilege
11/8/2016	eMail and Attachments	Jenny Harbine	Mike Uda (muda@mthelena.com); Snowden, Ben (BSnowden@kilpatricktownsen d.com); slevitas@flsenergy.com; Ethan Case; Aurora Janke	Vote Solar comments on FLS petition		Common Interest Privilege
12/9/2016	eMail and Attachment	Jenny Harbine	slevitas@flsenergy.com	Mont. PSC -- Discussion of additional issues		Common Interest Privilege
11/1/2016 - 11/2/2016	eMail and Attachments	Jenny Harbine; Snowden, Ben; Michael Uda; Steve Levitas; Ethan Case	Ethan Case ; slevitas@flsenergy.com; Michael Uda ; Snowden, Ben (BSnowden@kilpatricktownsen d.com); Jenny Harbine; Aurora Janke			Common Interest Privilege

Privilege Log

Document Date/ Date Range	Document Type	Email Sender(s)	Email Recipient(s)	Email Chain Subject	Produced with Redaction	Privilege
6/19/2016	eMail	Ethan Case	adam@votesolar.org; Ed Smeloff; Jenny Harbine	RE: Meet next Thursday?	x	Common Interest Privilege
6/27/2016	eMail	Ethan Case	Ed Smeloff; Adam Browning	RE: Meet next Thursday?	x	Common Interest Privilege
6; 10/23/2016-10/24/2016	eMail	Levitas, Steve; Adam Browning; Ed Smeloff	Levitas, Steve; Ed Smeloff; Adam Browning; Frank Marshall	RE: Introducing VoteSolar to FLS Energy	x	Common Interest Privilege

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2016, I served the foregoing by first-class mail, postage prepaid, and electronic mail on the following:

Will Rosquist
Administrator
Public Service Commission
1701 Prospect Ave.
Helena, MT 59620-2601
(By *Federal Express*)

Michael J. Uda
Uda Law Firm, P.C.
7 West Sixth Avenue
Power Block West, Suite 4H
Helena, MT 59601
michaeluda@udalaw.com

John Alke
NorthWestern Energy
208 N. Montana, Suite 205
Helena, MT 59601
john.alke@northwestern.com

DarAnne Dunning
Luxan & Murfitt, PLLP
P.O. Box 1144
Helena, MT 59624
ddunning@luxanmurfitt.com

Al Brogan
NorthWestern Energy
208 N. Montana, Suite 205
Helena, MT 59601
al.brogan@northwestern.com

Eric Christensen
Cairncross Hempelmann
524 Second Ave., Suite 500
Seattle, WA 98104
echristensen@cairncross.com

Tracy Killoy
NorthWestern Energy
208 N. Montana, Suite 205
Helena, MT 59601
tracy.killoy@northwestern.com

Jeffrey Wagner
Volkswind USA Inc.
205 SE Spokane Street, Ste 306
Portland, OR 97202
Jeffrey.Wagner@volkswind.com

Joe Schwartzenberger
NorthWestern Energy
40 East Broadway
Butte, MT 59701
joe.schwartzenberger@northwestern.com


Steven J. Levitas
FLS Energy, Inc.
130 Roberts Street
Asheville, NC 28801
legal@flsenergy.com

Jason Brown
Montana Consumer Council
111 North Last Chance Gulch, Suite 1B
P.O. Box 201703
Helena, MT 59620-1703
jbrown4@mt.gov

Chris Norqual
Cypress Creek Renewables
3250 Ocean Park Blvd.
Suite 355
Santa Monica, CA 90405
norqual@ccrenew.com

Ryan R. Shaffer
MEYER, SHAFFER & STEPHANS, PLLP
305 S. Fourth St. East, Suite 101
Missoula, MT 59801
ryan@mss-lawfirm.com

Ryan N. Meyer
ElGuindy, Meyer & Koegel, PLLP
2990 Lava Ridge Court, Suite 205
Roseville, CA 95661
ryan.meyer@pacificnorthwestsolar.net



Aurora Janke