

Service Date: December 14, 2016

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 Interim and Final Approval of)
Revised Tariff No. QF-1, Qualifying Facility) DOCKET NO. D2016.5.39
Power Purchase) ORDER NO. 7500b

**ORDER ON NORTHWESTERN'S MOTION TO COMPEL
AND VOTE SOLAR'S MOTION TO STRIKE**

Procedural History

1. On May 3, 2016, NorthWestern Corporation, doing business as NorthWestern Energy (NorthWestern or NWE) filed an Application for Approval of Avoided Cost Tariff Schedule QF-1 (Application) with the Montana Public Service Commission (Commission). On May 13, 2016, the Commission issued a Notice of Application and Intervention Deadline setting June 10, 2016, as the deadline for intervention. On June 17, 2016, the Commission issued a Notice of Staff Action Granting Intervention to New Colony Wind, LLC, Vote Solar and the Montana Environmental Information Center (Vote Solar), FLS Energy Inc., Cypress Creek Renewables, LLC, and the Montana Consumer Counsel. On September 2, 2016, the Commission issued Procedural Order 7500a setting deadlines and a date for hearing.

2. On October 28, 2016, NorthWestern issued its first set of data requests to Vote Solar in NWE-001 through NWE-012. On November 11, 2016, Vote Solar provided data responses to NWE-001 through NWE-012, but provided objections to NWE-006, NWE-007, and NWE-008. On November 23, 2016, NorthWestern filed a Motion to Compel responses to NWE-006, NWE-007, and NWE-008. On December 2, 2016, Vote Solar provided updated responses to Data Request NWE-006 and NWE-007; on the same date, Vote Solar also filed a Motion to Strike, and in the Alternative, Response to NorthWestern Energy's Motion to Compel.

Discussion, Findings of Fact, and Conclusions of Law

3. NWE-006 requested that Vote Solar provide the following information:

NWE-006 Subject: Rejection of position

Identify by state and item, as shown in Mr. Beach's Exhibit RTB-1, the proceedings in which Mr. Beach's advocacy on behalf of solar energy or solar projects, was rejected, in whole or in part.

Vote Solar objected to this data request "on the grounds that vague, ambiguous and unduly burdensome." Data Response (DR) NWE-006 (Nov. 11, 2016). In its Motion to Compel, NorthWestern argues that Mr. Beach should have a reasonable understanding of the meaning of reject given the context of the request and NorthWestern limited its request to instances occurring in the last three years. NWE Mot. to Compel, 2-3 (Nov. 23, 2016). In its updated response to NWE-006, Vote Solar provided a CD-ROM of "commission orders for the proceedings involving solar projects identified in Mr. Beach's Exhibit RTB-1 in which Mr. Beach testified regarding utility avoided costs in the past three years." Updated DR NWE-006 (Dec. 2, 2016). Vote Solar states that counsel for NorthWestern will be left to "ascertain whether, in counsel's view, Mr. Beach's advocacy was 'rejected, in whole or in part.'" *Id.* Counsel for NorthWestern has indicated it finds this response sufficient and therefore, the Commission does not require any additional response to NWE-006 from Vote Solar.

4. NWE-007 requested the following information:

NWE-007 Subject: Retention Agreement

Provide a complete copy of the contract or similar agreement under which Mr. Beach was retained to provide testimony in this docket.

Vote Solar objected to this data request on the basis that "Mr. Beach's expert agreement was prepared in anticipation of litigation and contains information other than 'facts known and opinions held' by him, it is not subject to disclosure" under Rule 26(b)(3) of the Montana Rules of Civil Procedure. DR NWE-007. NorthWestern argued that past witnesses for MEIC and the Sierra Club have disclosed their engagement agreements. NWE Mot. to Compel at 3. NorthWestern states that these agreements often dictate the "opinions that an expert will express" and if this "indicates the expert is going to testifying in a certain way without first knowing the underlying facts," then this is "a serious flaw in terms of witness credibility." *Id.* In its updated response to NWE-007, Vote Solar provided Mr. Beach's expert agreement in an attached CD-ROM. Counsel for NorthWestern has indicated it finds this response sufficient and

therefore, the Commission does not require any additional response to NWE-007 from Vote Solar.

5. NWE-008 requests the following information:

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.

Vote Solar objected to producing this information “because it is not reasonably calculated to lead to admissible evidence, is overbroad, and seeks privileged information.” DR NWE-008. In its Motion to Compel, NorthWestern makes several arguments as to why this information should be provided. First, NorthWestern asserts that Vote Solar has failed to provide a privilege log in conjunction with this assertion of privilege. NWE Mot. to Compel at 5. Second, NorthWestern argues Vote Solar purported to “intervene in this proceeding to represent the interest of NorthWestern customers interested in clean energy and its cost.” *Id.* (quoting Vote Solar/MEIC Pet. for Intervention, 2 (Jun. 6, 2016)). NorthWestern argues that the other parties identified in NWE-008 have an interest in promoting “high avoided costs rates for standard rate contracts.” *Id.* NorthWestern states that customers have an interest in lower avoided cost standard rates. *Id.* As a result of these potentially divergent interests in this proceeding, NorthWestern argues it is “entitled to explore through discovery whether MEIC/Vote Solar’s real interests are NorthWestern’s customers . . . or the financial interest of Cypress Creek Renewables, FLS, and Pacific NorthWest Solar.” *Id.* Third, NorthWestern argues that communication between Vote Solar and the other three parties identified in NWE-008 is not subject to the common interest doctrine and should not be considered privileged. *Id.* at 6–7.

6. Vote Solar did not provide an updated data response to NWE-008. Instead, Vote Solar reiterates its objection and argues that “NorthWestern advances no theory to suggest that such discovery into communications between co-litigants is ‘relevant to any party’s claim or defense’ and ‘appears reasonably calculated to lead to the discovery of admissible evidence.’” Vote Solar Mot. to Strike and Resp. Br., 7 (Dec. 1, 2016) (quoting Mont. R. Civ. P. 26(b)(1)). Vote Solar also argues that the common interest doctrine does apply because, among other

things, the parties have signed a Common Interest and Confidentiality Agreement Regarding Montana Solar Energy Defense (Agreement) effective September 7, 2016.

7. The Commission finds these communications, for the purposes of clarifying the motivation for intervention, to be relevant for discovery purposes. Information is relevant if it “appears reasonably calculated to lead to the discovery of admissible evidence.” Mont. R. Civ. P. 26(a)(1). The purpose of this proceeding is to establish a standard rate based on the avoided costs of the utility. Mont. Admin. R. 38.5.1901(2)(j). Federal law requires that this avoided cost: (1) “be just and reasonable to the electric consumers of the electric utility and in the public interest” and (2) “shall not discriminate against qualifying cogenerators or qualifying small power producers.” 16 U.S.C § 824(b)(1)–(2). Given that this requirement often requires a balancing of these two standards, the Commission and the parties have interest in understanding the purpose and motivation of evidence offered by a particular party. Mont. Code Ann. § 2-4-612 (The Commission may use its “experience, technical competence, and specialized knowledge” to evaluate evidence). The Commission also has the ability to weigh evidence based on the credibility of source offering testimony. *See, e.g. In re Mont. Power Co.*, 180 Mont. 385, 400, 590 P.2d 1140, 1149 (1979) (Since “the primary source of information about utility operation is the utility itself,” “[t]he Commission, of course, is always free to weigh any such information against any information to the contrary presented by other agencies or its own staff”).

8. To the extent NorthWestern is concerned about Vote Solar’s interest in this proceeding, the Agreement provided by Vote Solar should be sufficient to make that interest clear. Furthermore, this agreement, along with the conduct of the parties, establishes a common interest among Earthjustice (Vote Solar’s legal counsel), FLS Energy, Inc. (FLS), and Cypress Creek Renewables (Cypress Creek). “[F]or the common interest doctrine to apply, the parties must share a common legal interest, rather than a commercial or a financial interest.” *Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Court*, 2012 MT 61, ¶ 17, 364 Mont. 299, 280 P.3d 240 (quoting *FSP Stallion 1, LLC v. Luce*, 2010 U.S. Dist. LEXIS 110617, *58 (D. Nev. 2010)). Section one of the Agreement provides the various legal interest shared by Vote Solar, FLS, and Cypress Creek. Therefore, the Commission finds that these communications are privileged and not subject to production, but relevant. Vote Solar indicated that it would provide a privilege log if the Commission were to make this finding. Vote Solar Mot. to Strike and Resp. Br. at 9; *see also* Procedural Order 7500a, ¶ 10 (Sep. 10, 2016) (“If a party objects based on

privilege, it must file a privilege log by the deadline to respond with enough information for the Commission to determine whether the privilege applies”). Accordingly, Vote Solar is required to provide a privilege log for its communications with FLS Energy, Inc. and Cypress Creek Renewables.

9. This Agreement does not include Pacific Northwest Solar, LLC as a signatory. Data request NWE-008 sought communications with the “following three solar developers in Montana (including their agents and attorneys): Cypress Creek Renewables, FLS, and *Pacific Northwest Solar*.” DR NWE-008 (emphasis added). In its Response Brief to NorthWestern’s Motion to Compel, Vote Solar does not indicate that the common interest doctrine applies to its “conduct or situation” with Pacific Northwest Solar. Vote Solar Mot. to Strike and Resp. Br. at 7–9 (citing *United States v. Gonzalez*, 669 F.3d 974, 979 (9th Cir. 2012)). Vote Solar does not provide an independent or specific objection to providing communications between it and Pacific Northwest. DR NWE-008; *see also* Procedural Order 7500a ¶ 10 (“Objections must be sufficiently specific for the Commission to adequately rule on whether to sustain or object”). Therefore, Vote Solar must provide its communications with Pacific Northwest Solar, LLC.

10. To the extent that Vote Solar expresses concern that it was not contacted by NorthWestern in advance of NorthWestern filing its Motion to Compel, the Commission generally agrees that parties should endeavor to resolve discovery issues before appealing to the Commission. Vote Solar Mot. to Strike and Resp. Br. at 2–4. The Commission does note that Commission contested case proceedings often have a short 14-day periods to file a motion to compel an answer. *See, e.g.* Procedural Order 7500a at ¶ 13. Despite this, proceedings become even more delayed and compressed when the Commission is required to issue orders on discovery, which could have been avoided through communication between the parties. Given that the vast majority of NorthWestern’s concerns were resolved through updated data responses by Vote Solar, the Commission declines to grant Vote Solar’s request to “strike or dismiss NorthWestern’s non-compliant discovery motion.” Vote Solar Mot. to Strike and Resp. Br. at 4.

ORDER

Based on the foregoing,

IT IS HEREBY ORDERED THAT:

11. NorthWestern's Motion to Compel is GRANTED in part and DENIED in part. Vote Solar must file a privilege log representing its privileged communications with Cypress Creek Renewables and FLS. Vote Solar must provide its communications with Pacific Northwest Solar. The remainder of NorthWestern's Motion is either denied or mooted by Vote Solar's updated data responses to NWE-006 and NWE-007.

12. Vote Solar's Motion to Strike NorthWestern's Motion to Compel is DENIED.

DONE AND DATED this 14th day of December, 2016.


Jeremiah Langston
Examiner

ATTEST:



Sandy Scherer

Administrative Assistant

(SEAL)