

Service Date: August 24, 2007

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

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IN THE MATTER OF QWEST	)	UTILITY DIVISION
CORPORATION,	)	
Public Service Commission	)	DOCKET NO. D2005.6.105
Investigation and Direction on Use of	)	
Federal Service Funds	)	

**MONTANA TELECOMMUNICATIONS ASSOCIATION  
RESPONSE TO PSC ADVOCACY STAFF’S RESPONSE TO DISCOVERY;  
REQUEST FOR IDENTIFICATION OF PROCEDURE**

COMES NOW the Montana Telecommunications Association (“MTA”) and submits this response to the PSC Advocacy Staff’s Response to Discovery. The MTA further requests formal identification of the procedure to apply in this proceeding, along with formal identification of advocacy staff.

**I. RESPONSE TO PSC ADVOCACY STAFF’S RESPONSE TO DISCOVERY**

On August 13, 2007 the “PSC Advocacy Staff,” an entity yet to be identified in this proceeding, filed a response to the MTA’s discovery responses. The MTA responds as follows.

**A. Timeliness**

The MTA’s objections were timely. When any act required to be done under the Montana Rules of Civil Procedure allows less than eleven days,

weekends are not counted. Rule 6(a). In addition, three days are added for mailing. M.R.Civ.Pro. 6(e). The PSC's discovery request to the MTA was served on July 30, 2007 and received on July 31, 2007. Excluding weekends and adding three days for mailing, the MTA's response on August 9, 2007 was timely.

## **B. Attorney-Client Privilege**

The "PSC Advocacy Staff" claims that the attorney-client privilege is "complicated" when a corporation is involved. In *Inter-Fluve v. Montana Eighteenth Judicial Dist. Court*, 2005 MT 103, 327 Mont. 14, 112 P.3d 258, 264 the Court analyzed a situation where one of three corporate directors terminated employment with the corporation and instituted litigation against the corporation. The corporation was not entitled to assert a claim of attorney-client privilege as against a former director of the corporation. *Id.*, 2005 MT 103 at ¶ 35. That is not the issue here.

MTA, the client with respect to the attorney-client communications at issue here, is entitled to the protections of the attorney client privilege. As the Court noted, this "privilege is the oldest of the privileges for confidential communications known to the common law." *Id.* at ¶ 22, citing *State ex rel. United States Fid. and Guar. Co. v. Mont. Second Judicial Dist. Ct.* (1989), 240 Mont. 5, 10, 783 P.2d 911, 914. The privilege protects clients from "disclosing confidential information, thus encouraging them to be open and forthright with their attorneys." *Id.*

It is absolutely fallacious to suggest, as the "Advocacy Staff" has, that the attorney client privilege is somehow watered down or "complicated" when a

corporation is the client asserting the privilege. That is not the law. The MTA is asserting the attorney client privilege here with respect to documents that were sent to and received by its attorney. The privilege applies; it has been asserted; and it must be enforced.

The request for a privilege log should be rejected. The “Advocacy Staff” has identified no authority under which a privilege log can be compelled. No Montana law requires the production of a privilege log where documents are withheld under a claim of privilege. Courts have declined to require a privilege log when making a determination as to whether a general categorical privilege is applicable. See, e.g., *United States v. Austin*, 416 F.3d 1016, 1020 (holding that a privilege log was not necessary to determine whether the general category of inmate communications fell within the penumbra of attorney client protection). Having failed to identify any authority that would obligate the production of a privilege log, the request must be denied.

The PSC “Advocacy Staff,” whoever they are, are not entitled to privileged attorney-client communications of the MTA. The MTA should not be compelled to produce a privilege log. Moreover, it is unclear who will be viewing the log; to what end the log will be put; and whether or not the log itself will be subject to protection under a claim of confidentiality or protection. If a privilege log is produced, at a minimum the MTA is entitled to know the identity of those individuals viewing the log, and how the log will be maintained and returned. The shadowy process now in place in this proceeding is simply inadequate to ensure any fairness for the parties producing privileged documents, or logs describing

such documents, to the Commission.

### **C. Work Product**

The “PSC Advocacy Staff” claims that MTA’s assertion of the work product privilege should be rejected, and that MTA should be required to produce the privileged documents so the “Advocacy Staff” can make a showing of substantial need for the documents. The Staff’s tautology must be rejected. It is indefensible to require MTA to produce privileged documents so that the party seeking them may make a showing of need for the documents.

Montana Rule 26(b)(3) reads in its entirety:

(3) Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) **only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and** that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of **an attorney or other representative** of a party concerning the litigation.

The “Advocacy Staff” erroneously limits the scope of the work product privilege to a party’s attorney. Response page 3. The Staff further implies that work product is discoverable, which turns Rule 26(b)(3) on its head. Work product material is presumptively not discoverable. In addition, the privilege of Rule 26(b)(3) applies to the party’s attorney or other representative, and protects from disclosure work performed concerning litigation that involves the mental

impressions, conclusions, opinions or legal theories of that representative.

Therefore, all work product communications created by MTA's attorney **and its representatives** are privileged, not discoverable, and may not be compelled by the Commission.

#### **D. Relevance**

The "Advocacy Staff" makes one unsupported statement that the MTA's claim of relevance is "in error." Montana Rule of Evidence 401 reads:

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

Not all evidence is relevant. Evidence that is not probative of a material proposition is irrelevant. To be relevant, evidence must tend to establish a material proposition. *State v. Stevens*, 2002 MT 181 ¶ 70, 311 Mont. 52, 53 P.3d 356. There must be a logical relationship between the proposed evidence and the fact to be established.

The material facts that the "PSC Advocacy Staff" must establish in this docket, which relates to Qwest's use of its universal service funds, are not logically related to privileged communications between the MTA and its attorney, and the mental impressions of the MTA during the course of this litigation. The PSC Advocacy Staff's claim of relevance should be rejected.

#### **E. Public Policy Ramifications**

If the Commission were to grant "Advocacy Staff's" request, it would have a chilling effect on essential and confidential communications between MTA and

its attorneys and members in particular and on association communications with members in general. One of the essential “products” that MTA—and virtually any other association—provides to its members is the communication of information that is of value to its members. Such information includes perspective, analysis, mental impressions, opinions, conclusions, theories and other intellectual property. **This information is provided with the expectation of confidentiality.** Should such communications be deemed discoverable, MTA—and any association—would be forced to cease providing such information. Without the ability to provide such intelligence freely and in confidence to its members and attorneys, much of the value of the association would be eviscerated. Moreover, a Commission decision in favor of “Advocacy Staff’s” motions not only would negatively affect the ability of MTA to provide value to its members and thereby threaten MTA’s existence; but the precedential nature of such a Commission decision would have a similarly chilling effect on all associations.

The Commission itself benefits from the active participation of MTA, MITS and other associations in its proceedings. It is in the public interest of the Commission to encourage such participation, since it allows for full development of issues, and affords the commission with experience, opinions, and information that helps the Commission reach more reasoned decisions. Additionally, associations represent a number of members—and potential parties before the Commission. To discourage association participation in Commission proceedings would effectively encourage inefficiency. Rather than using an

association to represent common interests of a number of potential parties, individual members would feel compelled to file as separate parties. Contested cases would become more complex as more parties intervene. Commission resources would be burdened with additional obligations.

In short, the internal communications made between associations and their members and attorneys are confidential and privileged. To threaten such communications with discovery and/or disclosure would likely lead to the cessation of such communications altogether, denying the value of association membership, and association participation in public proceedings.

## **II. REQUEST FOR IDENTIFICATION OF PROCEDURE**

The MTA requests the Commission to identify its “Advocacy Staff” in this proceeding and the procedures and mechanisms that have been put in place to ensure compliance with all rules of procedure and Montana law. To date, the “Advocacy Staff” is an unknown entity. The parties to this proceeding, who are now being asked to produce confidential information, are entitled to know exactly what process is in place to ensure that “advocacy staff” is fully and completely segregated from other commission staff advocacy activities and that it complies with all obligations incumbent on any other party arguing a case before the Commission. Frankly, MTA does not see any evidence in the current docket that provides such assurance. It is unclear how the Utility Division Administrator will fulfill job duties as a division head, with responsibility over all dockets in the Division, and at the same time comply with confidential disclosure requirements.

It is also unclear how staff will adhere to ex parte rules, and how compliance will be demonstrated. It is unclear whether “Advocacy Staff” will be subject to cross examination and be subject to the same discovery process all other parties are engaged in. “Advocacy Staff” in this proceeding is virtually the same advisory staff in every other docket before the Commission. No procedures have been put in place and made a part of this proceeding to explain and document the Commission’s compliance with rules applying to parties practicing before the Commission. At a minimum, the MTA is entitled to know those processes before being required to produce confidential information to a public agency.

### **III. CONCLUSION**

MTA has complied in good faith with the Commission’s discovery request. MTA took the time to search its files reaching back to 2005 to identify and produce the information requested. The MTA’s objections to the PSC “Advocacy Staff’s” discovery was timely. Material that has not been produced is privileged, is not subject to disclosure under Montana law, and is not relevant to the issues to be decided here. Requiring disclosure of such information would have negative ramifications on commission proceedings and would not be in the public interest.

The MTA requests formal identification of the procedure to apply in this proceeding, along with formal identification of advocacy staff, and identification on the record of what procedures will be implemented to ensure due process is afforded to all parties to this proceeding.

Submitted this 24<sup>TH</sup> day of August, 2007.

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