

THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY

Docket No. DE 17-075

MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT

Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”) hereby moves, pursuant to Puc 201.06, 201.07, 203.08 and RSA Chapter 91-A, the New Hampshire Public Utilities Commission (“Commission”) to grant protective treatment to certain confidential information in this docket. Specifically, Eversource seeks confidential treatment of the information contained within the response to Data Request Technical Session 1-001. The confidential treatment sought is to retain portions of an opinion of counsel provided to Eversource as confidential from the Commission Staff and the Office of Consumer Advocate (“OCA”), and to keep the entirety of the same opinion from public disclosure. In support of this motion, Eversource states as follows:

1. In the testimony of Frederick White in the instant docket, Eversource identified that its reconciliation filing contained costs relating to a settlement and release reached in late 2016 between Eversource and one of its coal shippers for unused coal cargoes. The testimony described the 2007 transportation contract with the shipper, the efforts Eversource made to fulfill the contract over a period of years, the costs of the 2016 settlement as compared to the costs of attempting to fulfill the contract, and the efforts of Eversource to mitigate the costs in reaching the settlement and release. In conducting discovery relating to this issue, Eversource was asked, in Technical Session question 1-001, to provide any “opinion of counsel” or similar document

relating to the contract and Eversource's potential costs or likelihood of success in litigating the underlying contract.

2. In response to the above question, Eversource provided a redacted opinion from its outside counsel obtained in 2010. The opinion of counsel was specifically noted as being privileged and confidential attorney work product, and it addressed both the shipping contract asked about, as well as a different matter which has since been resolved. In the redacted version provided to the Commission Staff and the OCA, material relating to this separate matter was redacted. The Commission Staff and the OCA have now requested an entirely unredacted version of the opinion of counsel. For the reasons stated below, Eversource is requesting an order that the unredacted version of the document not be provided to the Staff and OCA, as well as an order that no version of the document be made public.

3. With respect to disclosure of the unredacted document to Staff and the OCA, pursuant to the Commission's rules, Puc 203.23(e), "The commission shall give effect to the rules of privilege recognized by law." This rule aligns with the language in RSA 541-A:33, II, which provides, in relevant part, that "Agencies shall give effect to the rules of privilege recognized by law." The attorney-client privilege, as described in New Hampshire Rule of Evidence 502, is a rule of privilege recognized by law and which serves to prevent disclosure of the material here to the Staff or OCA.

4. The Commission has previously upheld the application of the privilege in relation to documents produced by the Commission's general counsel for the benefit of its staff member. In *Re Small Energy Producers and Cogenerators*, 74 N.H. P.U.C. 234, 238-39, Order No. 19,465 (July 11, 1989), the Commission stated:

Under RSA 541-A (18) [now codified as RSA 541-A:33], agencies must give effect to the rules of privilege. We find that two privileges, both the attorney/client privilege and the attorney work product privilege, existed in this case.

Rule 502 of the New Hampshire Rules of Evidence creates a lawyer-client privilege. Under Rule 502(b)

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client . . . and the client's lawyer.

Under Rule 502(c) the privilege may be claimed by the client or the personal representative of an organization.” The reporter's notes under Rule 502 state that The definition of ‘client’ in paragraph (1) includes every conceivable public or private individual or entity that might seek or obtain legal services. While no New Hampshire decisions could be found, the extension of the definition to public entities finds support in *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 273 (1966). This broad scope is in accord with authority and seems essential if the lawyer is to be able to fulfill his professional responsibilities of advising and representation of all comers. See Federal Advisory Committee Notes to proposed Federal Rule 503; McCormick Evidence 178 (2d ed. 1972). Where the client is an organization, the privilege extends to communications between attorneys and all agents or employees who are authorized to act or speak for the organization concerning the subject matter of the communication. *Mead Data Central v. U.S. Dept. of Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977).

The sources of the rules of privilege are limited to the federal and state constitutions, federal and state statutes, the N.H. Rules of Evidence and other rules of court. However, the rules do not effect the inherent power of the Supreme Court to develop new rules of privilege based on common-law principles. Rule 501, Reporter's Notes. Attorney-client privilege is not limited to communications made in anticipation of litigation. *Coastal States Gas Corp. v. Department of Energy* at 862.

While there is no specific privilege under the New Hampshire Rules of Evidence for attorney work product, the “. . . Rule is not intended to abrogate any immunity from interrogation as to mental processes involved in making a decision which is extended to judicial, quasi-judicial, and administrative officials by decisional law such as *Merriam v. Salem*, 112 N.H. 267 (1972).” *Id.* This is the same language used to describe the exemption 5 of the Freedom of Information Act (5 USCS § 552(b)(5)) which makes inter-agency and intra-agency memorandums or letters unavailable by law to a party. In *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150 and 154 (1975), the Supreme Court held that exemption 5 exempts those

documents privileged from discovery in civil suits, the privileges being the governmental privilege for intra-agency advisory opinions, discovery of which would interfere with the consultative functions of government and the attorney/client and attorney work product privilege. In addition, we conclude that the attorney work product doctrine is consistent with Rule 501, and current case law interpreting the Right-to-Know law.

Accordingly, the Commission has recognized, applied, and upheld the attorney-client and attorney work product privileges and prevented disclosure of information to the extent the client has not waived the privilege. In this case, as to the redacted information, the opinion of counsel was specifically requested by Eversource for the purpose of obtaining confidential legal services from its outside attorneys on a matter unrelated to the issue under review. Eversource has not waived, and does not intend to waive, any privilege relative to the redacted information and does not intend to disclose that information to the Staff, the OCA, or anyone else. Eversource is entitled to an order protecting the redacted information from disclosure to the Staff and the OCA.

5. With respect to the disclosure of any part of the document publicly, Eversource is likewise entitled to an order preventing disclosure of the entire document on the basis of privilege. The New Hampshire Supreme Court has stated:

Under RSA 91–A:5, IV, “confidential information” is exempt from the general disclosure requirement. . . . Communications protected under the attorney-client privilege fall within the exemption for confidential information. . . . New Hampshire Rule of Evidence 502 embodies that rule, providing that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.” *N.H. R. Ev.* 502(b); *accord N.H. R. Prof. Conduct* 1.6(a) (prohibiting lawyers from revealing information “relating to the representation of a client”).

A communication is “confidential” if it is “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *State v. Stickney*, 148 N.H. 232, 235, 808 A.2d 546 (2002); *N.H.R. Ev.* 502(a)(5). If the communicating person “reasonably believes that no one will learn the contents of the communication

except a privileged person,” then the communication will be protected from disclosure. *Restatement (Third) of the Law Governing Lawyers* § 71, at 543 (2000).

Professional Fire Fighters of New Hampshire v. Local Government Center, 163 N.H. 613, 614-15 (2012).

As stated by the Court, when considering a claim of confidentiality under privilege, there is no balancing test – the privilege belongs to the client and is held or waived at the client’s decision. In this case, the communication was, even in its redacted form, disclosed only to privileged persons at the Commission Staff and the OCA as persons reasonably necessary to receive it to further the provision of legal services relating to the underlying settlement. In making even that limited disclosure, Eversource reasonably believed such communication would not be shared further beyond those privileged persons as evidenced by the claim of confidentiality made by Eversource at the time the redacted document was provided. As made clear by the Court, given the nature of this document, Eversource has a privilege to refuse to disclose, *and* to prevent others from disclosing, such information, and such documents are exempt from the disclosure requirements of RSA 91-A:5. Therefore, the document, in any form, is exempt from disclosure under RSA 91-A:5, and should be protected from public disclosure.

WHEREFORE, Eversource respectfully requests that the Commission:

- A. Grant this Motion and issue an appropriate protective order; and
- B. Order such further relief as may be just and reasonable.

Respectfully submitted,

**Public Service Company of New Hampshire d/b/a
Eversource Energy**

November 8, 2017

Date

By: 

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

November 8, 2017

Date


Matthew J. Fossum