

February 22, 2012

VIA HAND DELIVERY & ELECTRONIC MAIL

Luly E. Massaro, Commission Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

RE: Docket 4308 - Tariff Advice Filing for Approval of Long-Term Contracting For Renewable Energy Recovery Provision and to Amend R.I.P.U.C. No. 2036, Transmission Service Cost Adjustment Provision; and Application for Approval of Long-Term Contracting for Renewable Energy Recovery Factor
Objection to Division's Motion to Compel

Dear Ms. Massaro:

Enclosed are one original and ten (10) copies of National Grid's¹ Objection to the Division's Motion to Compel in the above-captioned proceeding.

Thank you for your attention to this matter. If you have any questions regarding this filing, please feel free to contact me at (401) 784-7288.

Very truly yours,



Jennifer Brooks Hutchinson

Enclosures

Cc: Docket 4308 Service List
Steve Scialabba, Division
Jon Hagopian, Esq.

¹ The Narragansett Electric Company d/b/a National Grid ("National Grid" or the "Company").

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION

**In Re: Tariff Advice Filing For
Approval of Long-Term Contracting
For Renewable Energy Recovery
Provision and To Amend
R.I.P.U.C. No. 2036, Transmission
Service Cost Adjustment Provision; And
Application for Approval of Long-Term
Contracting For Renewable Energy
Recovery Factor**

Docket No. 4308

**THE NARRAGANSETT ELECTRIC COMPANY D/B/A NATIONAL GRID'S
OBJECTION TO THE DIVISION OF PUBLIC UTILITIES AND CARRIERS' MOTION
TO COMPEL**

The Narragansett Electric Company d/b/a National Grid (the "Company") objects to the Division of Public Utilities and Carrier's (the "Division") Motion to Compel More Responsive Answers to Division Data Requests 1-5, 1-6, 1-7, and 1-9. These requests each sought copies of legal bills associated with legal expenses the Company seeks to recover in this docket. The Company invoked the protection of the attorney-client privilege and the work product doctrine in its response and provided charts indentifying the names of the firms providing the legal services, the dates of the invoices and the amount of each invoice. The Division seeks production of the invoices and contends that they are not protected by privilege. The Division is incorrect.¹

¹ The Division argues that "there was no timely objection interposed to the data requests at issue in accordance with Rule 1.18 of the Public Utilities Commission's Rules of Practice and Procedure." See Motion to Compel at pp. 3-4, 7, 8, 10-11. This argument is unavailing. Rule 1.18(c)(3) does not provide that any objections to data requests not made within 10 days of a data request are waived. In any event, the Division has been on notice that the Company asserts privilege protection with respect to these invoices. If necessary, the Company requests that the Commission consider this objection a motion for objection to data requests 1-5, 1-6, 1-7, and 1-9 pursuant to Commission Rule 1.18(c)(3). The sacrosanct protection of the attorney-client privilege should not be deemed waived because the Company did not formally invoke the privilege within an artificial time limitation, especially when such delay has no prejudicial effect on the Division. See *Mortgage Guar. & Title Co. v Cunha*, 745 A.2d 156, 160 (R.I. 2000) ("the

The attorney-client privilege insulates from discovery any document that reveals the substance of a communication between an attorney and his client regarding the provision of legal advice. *Llubes v. Uncommon Prods., LLC*, 663 F.3d 6, *44-*46 (1st Cir. 2011). The work product doctrine protects against the disclosure of an attorney's thought processes providing services to a client in anticipation of litigation. *Henderson v. Newport County Reg'l YMCA*, 966 A.2d 1242, 1247 (R.I. 2009). A request to recover fees does not waive protection of privileged attorney-client communications. *Mortgage Guar. & Title Co. v. Cunha*, 745 A.2d 156, 160 (R.I. 2000).

The invoices for legal services supplied by attorneys to their clients often contain detailed descriptions of the work performed by the attorneys. *See Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs. Inc.*, 870 N.E.2d 1105, 1114 (Mass. 2007) (“details in billing statements may reveal confidential communications between client and attorney or the attorney’s mental impressions or legal theories, that is, his work product, which is protected and generally not open to discovery”). The attorney-client privilege protects invoices containing such detailed descriptions from disclosure in discovery. *Wells Fargo Bank, N.A. v. LaSalle Bank National Association*, 2010 U.S. Dist. LEXIS 61612, *10 (W.D. Okla. June 22, 2010) (finding that attorney-client privilege applied to billing invoices when party asserted that invoices contained “highly-detailed descriptions of the work performed by counsel in representing Plaintiff”). The attorney-client privilege protects information in legal bills that reveals “the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law[.]” *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir. 1992). For example, the attorney-client privilege protects legal bills that

attorney client privilege ‘should not be whittled away by fine distinctions.’”) (quoting *Williams v. Rhode Island Hospital Trust. Co.*, 143 A.2d 324, 337 (R.I. 1958)).

reveal “the identity of the federal statutes researched” because such “records would divulge confidential information regarding legal advice[.]” *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402-03 (4th Cir. 1999). Legal bills may be privileged even in cases in which the party asked to produce the legal bills is seeking recovery of attorneys’ fees. *Eli Lilly and Company v. Valeant Pharmaceuticals Int’l*, 2011 U.S. Dist. LEXIS 15246, *3-*4 (Feb. 15, 2011) (the defendant sought unredacted invoices from the plaintiff in connection with its defense of the plaintiff’s request for attorneys’ fees, and the court permitted the plaintiff’s redactions of the invoices).

In *Kiepler v. Nyman*, 1999 U.S. Dist. LEXIS 11207, *2 (D.R.I. March 8, 1999), the plaintiff’s moved for a protective order to prevent discovery of the time records and bills of their attorneys on the basis of attorney client privilege. The court determined that the privilege protected “any information . . . which would assist in or contribute to identifying the nature of the legal services provided” including “the names of persons . . . to whom or from whom telephone calls or letters were directed or received.” *Id.* at *5. The court reasoned that such information could “enable [defendants] to deduce the privileged substance of the notations.” *Id.* Ultimately, the court concluded that only “the names of the attorneys providing the services, the charges for the services and limited generic descriptions of the services” were discoverable. *Id.* at *6.

The invoices provided to the Company by its attorneys contain, in part, detailed descriptions of the legal advice provided by those attorneys and the mental impressions of those attorneys in anticipation of and during litigation. Consequently, the Company need not disclose any portion of the invoices sought by the Division that contains such description. The Company is providing, contemporaneously with this objection, redacted copies of the invoices sought by the Division. These redacted copies serve the dual purpose of providing the Division with the

information it needs to assess the validity of the requested legal fees and of protecting the privileged and protected information of the Company. *See Crowe Countryside Realty Assocs. Co., LLC v. Novare Eng'Rs, Inc.*, 891 A.2d 838, 847-48 (R.I. 2006) (“redaction sometimes will be necessary” to ensure protection of privileged information). The redacted versions provided by the Company contain precisely the type of information that the court in *Kiepler* determined was discoverable, and redact precisely the type of information that court concluded should be redacted.

The Company’s legal invoices contain descriptions that, if disclosed, would reveal information protected by the attorney-client privilege and the work-product doctrine. The Company can not be compelled to disclose that information in response to a Division data request. Accordingly, the Commission should deny the Motion to Compel and allow the Company to produce only the redacted copies of the invoices. The redacted invoices still present a robust description of the work performed and will provide the Division with adequate information to conduct its review.

WHEREFORE, the Company respectfully requests that the Commission deny the Motion to Compel and allow the Company to produce only the redacted copies of the invoices as stated herein.

Respectfully submitted,

NATIONAL GRID

By its attorney,



Jennifer Brooks Hutchinson (RI Bar #6176)
National Grid
280 Melrose Street
Providence, RI 02907

Dated: February 22, 2012