



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA

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Investigation on the Commission's Own Motion into the Operations and Practices of Southern California Edison Company (U338-E), Cellco Partnership LLC d/b/a Verizon Wireless, Sprint Communications Company LP, NextG Networks of California Inc. and Pacific Bell Telephone Company d/b/a AT&T California and AT&T Mobility LLC Regarding the Utility Facilities and the Canyon Fire in Malibu of October 2007.

I.09.01.018

(Filed January 29, 2009)

**SUPPLEMENTAL PLEADING OF SOUTHERN CALIFORNIA EDISON COMPANY  
REGARDING CPSD'S MOTION TO COMPEL PRODUCTION OF WIND LOAD DATA  
REGARDING THE THREE POLES THAT FAILED IN MALIBU CANYON  
IN CONNECTION WITH THE MALIBU FIRE**

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February 11, 2011

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## I. INTRODUCTION

Pursuant to the Administrative Law Judges' February 2, 2011 Ruling Authorizing Parties to File Supplemental Pleadings Regarding the Pending Motion to Compel, Southern California Edison Company ("SCE") files this Supplemental Response to the Consumer Protection and Safety Division's ("CPSD's") Motion to Compel Production of Wind Load Data Regarding the Three Poles that Failed in Malibu Canyon in Connection with the Malibu Fire ("Motion to Compel").

CPSD's Motion to Compel seeks wind-load data created by SCE employee Arthur Peralta in the days immediately following the Malibu Canyon fire. Pursuant to a stipulation signed yesterday by SCE and CPSD, and subject to the confidentiality provisions of section 583 of the Public Utilities Code and General Order 66-C, SCE has made available to CPSD in unredacted form all of the field observations of Mr. Peralta and all of the wind loading calculations for Pole Numbers 1169252E, 1169253E and 2279212E ("subject poles") prepared by Mr. Peralta on or around October 22 and 23, 2007. As part of this stipulation, CPSD has agreed to withdraw its allegation that SCE's discovery responses regarding SCE's wind loading analyses violated Rule 1.1. This stipulation leaves outstanding the status of the only other documents prepared by Mr. Peralta as part of his work for counsel with regard to the subject poles in the days following the fire. These are the "Storm Registers" Mr. Peralta prepared for each of the subject poles. While SCE believes that its production pursuant to the stipulation is fully responsive to CPSD's Motion to Compel (and more than CPSD would have been entitled to under California law had SCE chosen to continue to litigate this issue), CPSD continues to allege that it is entitled to the opinions and mental impressions of Mr. Peralta regarding the subject poles and as reflected in the Storm Registers.

These Storm Registers are both attorney-client privileged and protected by the work product doctrine. They were created by Mr. Peralta at the instruction of counsel, communicated only to SCE's Legal Department, and contain opinions of Mr. Peralta who is not a witness in this proceeding. Because the attorney-client privilege is absolute, disclosure may not be ordered. Moreover, the documents are subject to work product protection, and even if such protection were qualified, the Commission may order disclosure only if denial would result in "unfair prejudice" or "injustice." Given that CPSD now has the same data and results on which Mr. Peralta formed the opinions reflected on the Storm Registers (in addition to CPSD having access to the failed poles themselves), there is simply no argument that CPSD will be unfairly prejudiced or that injustice will occur without the production. The Commission should deny CPSD's attempt to compel the Storm Registers.

## **II. FACTUAL BACKGROUND**

### **A. Peralta's Wind-Load Analysis and CPSD's Motion to Compel**

Immediately after the Malibu Canyon fire, SCE employee and wood products specialist Arthur Peralta was instructed by counsel to conduct a forensic or after-the-fact analysis of the poles that failed in the fire. Mr. Peralta took three pages of notes related to the subject poles. While in the field, he advised Rick McCollum from the SCE Claims group (a part of SCE's Law Department) as to his preliminary findings regarding loadings on the subject poles prior to the fire. He then returned to his office and obtained a wind loading calculation for each of the subject poles using SCE's then current software. (It is these field observations and computer calculations that SCE has provided to CPSD pursuant to yesterday's stipulation). Sometime later, Mr. Peralta created Storm Registers for each pole which included his initial judgment and opinions regarding possible causes of the pole failures. Mr. Peralta sent to SCE's Law Department all of his work and communications: the field data sheets, the wind loading

calculations, and the Storm Registers. When Mr. Peralta was deposed on March 5, 2010, SCE's counsel allowed him to testify as to his recollection of the facts, but not his communications to the Law Department.

On March 26, 2010, CPSD moved to compel the following documents created by Mr.

Peralta:

The wind load data to be produced includes: the wind load results generated by Mr. Peralta and SCE's wind load computer program as to the poles at issue in this investigation, any and all data inputs into SCE's wind load computer program regarding the facilities at issue (including any and all computational assumptions and parameters within SCE's wind load computer program), any and all data outputs of SCE's wind load computer program regarding the facilities at issue, any and all observations, measurements and calculations gathered and/or utilized by Mr. Peralta regarding the Malibu Poles, and any and all numeric, categorical, and/or descriptive specifications (including diagrams and graphic representations) gathered and/or utilized by Mr. Peralta regarding the Malibu Poles (collectively "Wind Load Data").

CPSD Motion, Attachment 1, at 1-2. SCE opposed CPSD's motion arguing that the documents created by Mr. Peralta and sent to the Law Department are entirely covered by attorney-client privilege and the attorney work product doctrine. *See* SCE Response to CPSD's Motion to Compel (April 5, 2010). CPSD filed a reply on April 15, 2010.

SCE maintains that all of the documents created by Mr. Peralta are privileged and protected by the work product doctrine. However, SCE has long believed that the issues can and should be resolved by discussion, mediation, and compromise rather than the all or nothing alternatives posed by CPSD's motion. Several times during the pendency of this motion, SCE offered CPSD access to the facts that Mr. Peralta may have observed or compiled – even though he acquired knowledge of those facts as a result of work he did at the request of counsel and incorporated those facts in his privileged communications to counsel. It was only within the past several weeks that counsel for SCE and CPSD entered into actual negotiations that resulted in yesterday's compromise and stipulation.

**B. Stipulation of CPSD and SCE**

On February 10, 2011, SCE and CPSD formalized an agreement to resolve certain disputes regarding Peralta wind load information. *See* Stipulation of CPSD and SCE Resolving Certain Disputes Regarding Wind Load Information (“Stipulation”) (attached hereto as Ex.A). SCE agreed to produce to CPSD all of the documents comprising the “Peralta wind-load data” for the subject poles. SCE’s stipulated production to CPSD includes all of the field observations and notes of Mr. Peralta, all of the data inputs that Mr. Peralta input into SCE’s wind load program, and all of the resulting wind loading calculations. The specific documents that SCE is producing for each of the subject poles are the unredacted Wind Loading Worksheets (referred to in the stipulation as “Field Worksheets”) for each of the subject poles that Mr. Peralta prepared, and the unredacted Detailed Assessment Results which are the wind loading results from SCE’s software program.

SCE has advised CPSD that the inputs Mr. Peralta used were preliminary, subject to refinement, correction, and more accurate information or assumptions. SCE expects CPSD to cover these issues during the deposition of Mr. Peralta. Of course, SCE did not attempt to prepare and present testimony as to what it would consider a definitive and fully reliable forensic wind loading in response to CPSD’s opening testimony because CPSD chose to go an entirely different way in its testimony by offering Mr. Tong’s minimum design wind speed concept. It was that testimony SCE responded to which had nothing to do with calculating whether or not any of these poles was actually overloaded, much less whether such overloading was a cause of the failure given that the winds at the time were well in excess of 100 MPH.

While SCE has now provided the facts of Mr. Peralta’s wind loading work in the form acceptable to CPSD, it continues to assert the work product and attorney-client privileges for the Storm Register sheets which Mr. Peralta prepared for each subject pole. CPSD continues to

dispute SCE's assertions. The Storm Registers contain no new facts about the subject poles. They are documents created by an SCE employee at the instruction of counsel and communicated only to SCE's Law Department that contain expert opinions. The law is clear: to the extent CPSD's motion can even be stretched to include the Storm Registers, it should be denied.

### III. ARGUMENT

#### A. **The Attorney-Client Privilege and Work Product Doctrine Preclude Discovery of the Storm Register Documents Created by Mr. Peralta**

SCE maintains that *all* of the documents created by Mr. Peralata at the instruction of counsel and communicated to the Law Department are attorney-client privileged and protected by the work product doctrine. However, in a good faith effort to move this proceeding forward, SCE agreed to produce exactly what the CPSD requested in its motion – all of the unredacted field observations of Mr. Peralta, all of the unredacted data inputs that Mr. Peralta input into SCE's wind load program, and all of the unredacted resulting wind loading calculations for the subject poles prepared by Mr. Peralta on or around October 22 and 23, 2007. The recent stipulation by CPSD and SCE and the production of these documents should resolve CPSD's Motion. Nevertheless, CPSD asserts that it is entitled to production of the Storm Registers created by Mr. Peralta – documents which reflect his expert opinions and mental impressions communicated to counsel, and which are classic examples of documents protected by the attorney client privilege and work product doctrine.<sup>1</sup> CPSD is no longer seeking "facts" but now is clearly going after what is incontestably the communication to counsel of opinion.

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<sup>1</sup> Because SCE has agreed to produce the Field Worksheets and Detailed Assessment Results, this section addresses attorney client privilege and work product doctrine only as they apply to the Storm Registers created by Mr. Peralta. SCE in no way concedes that the same protections are inapplicable to the other documents created by Mr. Peralta at the instruction of counsel. *See* SCE Response to CPSD's Motion to Compel Production of Wind Load Data Regarding the Three Poles that Failed in Malibu Canyon in connection with the Malibu Fire.

California law is clear that confidential communications between attorneys and clients are *absolutely* privileged – no matter what the nature of the underlying material. Cal. Evid. Code §§ 950-962; *Costco Wholesale Corp. v. Sup. Court*, 478 Cal. 4th 725, 736 (Cal. 2009) (“when the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged.”). As recently articulated by the California Supreme Court:

The attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication irrespective of whether it includes unprivileged material...it is the actual fact of the transmission which merits protection, since discovery of the transmission of specific public documents might very well reveal the transmitter’s intended strategy. Neither the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between ‘factual’ and ‘legal’ information.

...

The privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.

*Costco*, 478 Cal. 4th at 734, 732 (internal citation omitted) (attorney opinion letter was entirely covered by attorney-client privilege). There is simply no question that Mr. Peralta created the Storm Registers at the direction of the SCE Law Department, that he sent these documents to the Law Department, and that he did not communicate his observations to anyone else. Accordingly, the documents are absolutely privileged.

Moreover, the Storm Registers are protected by attorney work product doctrine. Cal. Civ. Proc. Code § 2018.030; *see* SCE Response to CPSD’s Motion to Compel Production of Wind Load Data Regarding the Three Poles that Failed in Malibu Canyon in connection with the Malibu Fire. Even if the Storm Registers were entitled to qualified protection, the Commission could order disclosure only if denial would “unfairly prejudice” the CPSD or otherwise result in an “injustice.” Cal. Civ. Proc. Code § 2018.030. Such disclosure can be ordered only under exceptional circumstances – none of which are applicable here. The production made pursuant

to the Stipulation provides CPSD with all of the information requested in its motion to compel. And SCE has agreed that CPSD has the right to depose SCE witnesses including Mr. Peralta regarding the newly disclosed documents. Moreover, the subject poles still exist and are in storage where they have been available for inspection by CPSD since the time of the Malibu Canyon Fire. CPSD has everything it needs to draw its own conclusions as to what may have caused them to fail. Nothing about the protection of the Storm Registers would unfairly prejudice CPSD or otherwise result in an injustice.

The fact that this is a Commission proceeding rather than civil litigation does not change the privileges and protections available to SCE for the Storm Registers. Both the attorney-client privilege and the work product doctrine are well-recognized by the California Public Utilities Commission and apply to its proceedings. *So. Cal. Gas Co. v. Pub. Util. Comm'n*, 50 Cal. 3d 31, 37-39 (1990) (applying attorney-client privilege in Commission proceedings); D. 09-08-029 at 25-26 (recognizing attorney work product doctrine in Commission proceedings). Rule 19 of General Order 95 specifically exempts a utility from providing documents “subject to the attorney-client privilege or attorney work product doctrine.” *See* GO 95, Rule 19; *see also Order Instituting Rulemaking to Revise and Clarify Commission Regulations Relating to the Safety of Electric Utility and Communications Infrastructure Provider Facilities*, D.09-08-029, 2009 Cal. PUC LEXIS 433 (CPUC Aug. 25, 2009) (adopting General Order 95, Rule 19).<sup>2</sup> The Commission has acknowledged that in an adjudicatory proceeding it sits as a court of law and bears the same responsibilities as a civil court: “When this Commission sits as a court of law in an adjudicatory proceeding, it bears the same responsibility of any civil court in this country.”

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<sup>2</sup> Rule 17 of General Order 95 in effect in October 2007 imposed an obligation to “establish procedures for the investigation of major accidents and failures for the purpose of determining the causes and minimizing the possibility of recurrence. Nothing in this rule is intended to extend, waive, or limit any claim of attorney client privilege and/or attorney work product privilege.”

*Investigation on the Commission's Own Motion Into the Fitness of the Officers, Directors, Owners and Affiliates of Clear World Communications*, Investigation 04-06-008, D.05-06-033 at 30 (CPUC June 16, 2005). At a minimum, this responsibility should include respecting privileges.

Finally, there has been no waiver of SCE's privilege because of the stipulation between SCE and CPSD regarding the Peralta documents. It states:

CPSD agrees that it will not use this stipulation and disclosure as an argument that SCE has waived its rights of attorney-client or work product privilege with regard to the Storm Register documents or any other claim of privilege that SCE has made or may make in the future. All parties agree that this stipulation does not limit any party's right to raise waiver arguments that are not derived from this stipulation.

Stipulation at ¶ 6. Any suggestion that SCE has otherwise waived privileges applicable to the Storm Registers is simply wrong. SCE has *never* used the privileged information in any of its testimony in this OII. *See So. Cal. Gas Co. v. Pub. Util. Comm'n.*, 50 Cal. 3d 31 (1990).

Given the importance of this issue, SCE continues to respectfully request oral argument on the issue of possible disclosure of the Storm Registers.

## **B. Proposed Discovery Schedule**

The ALJ's ruling authorizing the filing of supplemental pleadings asks the parties to provide: "a proposed schedule for CPSD to review the material obtained in response to its motion and to conduct related discovery, and for the parties to submit supplemental testimony regarding the new material." Given the Commission's recent ruling granting CPSD's motion for a continuance, SCE proposes that CPSD conduct discovery and incorporate the new material into its reply testimony due on April 11, 2011. SCE is willing at any time to meet and confer with joint respondents and CPSD regarding an appropriate schedule for discovery after CPSD files its testimony on April 11, 2011 followed by responding testimony by SCE and all other Respondents. At least two months for Respondents' discovery of CPSD and preparing their

testimony would seem appropriate given that CPSD will have a similar amount of time to assess the Peralta documents.

#### **IV. CONCLUSION**

For the foregoing reasons and those in SCE's Response to CPSD's Motion to Compel, SCE respectfully requests that the Commission deny CPSD's motion. SCE has provided to CPSD all of the data inputs and outputs requested. CPSD's only remaining claim relates to the Storm Registers – documents prepared by Mr. Peralta at the instruction of counsel and communicated only to counsel, and that include the mental impressions of Mr. Peralta; as such, they are covered by both the attorney client privilege and work product doctrine and are not discoverable.

Dated: February 11, 2011

Respectfully submitted,

/s/ Charles C. Read

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LAI-3122365v3

**CERTIFICATE OF SERVICE**

I, Alejandra Arzola, certify that I have on this 14th day of February, 2011 caused a copy of the foregoing petition

**Supplemental Pleading Of Southern California Edison Company Regarding Cpsd's Motion To Compel Production Of Wind Load Data Regarding The Three Poles That Failed In Malibu Canyon In Connection With The Malibu Fire**

to be served on all known parties to matter I.09-01-018, as listed on the most recently updated service list available on the California Public Utilities Commission Web site. This document was transmitted via E-mail to those listed with E-mail and via U.S. Mail to those without listed E-mail addresses (William Kuchler). I also caused courtesy copies to be mailed to:

Commissioner Timothy Alan Simon  
California Public Utilities Commission  
505 Van Ness Avenue, Room 5213  
San Francisco, CA 94102

ALJ John S. Wong  
California Public Utilities Commission  
505 Van Ness Avenue, Room 5019  
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14<sup>TH</sup> day of February 2011 in Rosemead, California.

/s/ Alejandra Arzola

2244 Walnut Grove Avenue  
Rosemead, California 91770

# EXHIBIT A

**STIPULATION OF CPSD AND SCE RESOLVING CERTAIN DISCOVERY  
DISPUTES REGARDING PERALTA WIND LOAD INFORMATION**

**1. Production of Field Observations, Data Inputs and Pole Loading Calculations:**

SCE shall produce to CPSD all of the material comprising the “Peralta wind-load data”, excluding the “Storm Register” portion, for each pole at issue in this proceeding (Pole Numbers 1169252E, 1169253E and 2279212E, which shall be referred to as the “subject poles”). SCE’s production to CPSD includes all of the field observations and notes of Arthur Peralta, all of the data inputs that Arthur Peralta input into SCE’s wind load program, and all of the resulting pole loading calculations. The specific documents that SCE shall produce includes the un-redacted wind load work sheets (“Field Worksheets”) and notes for each of the subject poles that Arthur Peralta utilized, and the un-redacted “Detailed Assessment Results” and notes for the subject poles. SCE represents that these documents were generated on or around October 22-23, 2007 by Arthur Peralta. SCE continues to assert the work product and attorney-client privileges for the Storm Register sheets which Mr. Peralta prepared for each subject pole. CPSD continues to dispute SCE’s assertions. SCE represents that the Field Worksheets, Detailed Assessment Results and Storm Registers prepared regarding the subject poles are the responsive documents to CPSD’s pending Motion to Compel Production of Wind Load Data Regarding the Three Poles that Failed in Malibu Canyon In Connection with the Malibu Fire, filed on March 26, 2010 (“Motion to Compel”) and occasionally described in this proceeding as the “Peralta wind-load data.” The Field Worksheets and Detailed Assessment Results for the subject poles are hereafter referred to as “the Disclosed Peralta Documents.” SCE represents to CPSD that the Disclosed Peralta Documents reflect all of the unredacted field observations of Arthur Peralta, all of the unredacted data inputs that Arthur Peralta input into SCE’s wind load program, and all of the unredacted resulting pole loading calculations for the subject poles prepared by Mr. Peralta on or around October 22-23, 2007.

**2. Specific Rule 1.1 Allegation Withdrawal:** CPSD continues to believe that SCE is in violation of Rule 1.1, on several grounds, including what was described in CPSD’s testimony. SCE continues to believe that it is not in violation of Rule 1.1, on any grounds, including what was described in CPSD’s testimony. In order to expeditiously receive the critical Peralta calculations, CPSD shall withdraw its specific allegation (and supporting testimony) that SCE violated Rule 1.1 premised on SCE’s discovery responses to Data Requests #3 and #35 (dated June 4, 2009) that did not disclose the existence of the Peralta wind-load data. CPSD preserves its right to use the facts underlying that specific allegation as part of a waiver argument as applied to the “Storm Registers”, or in any other way that it sees fit. The documents and information that SCE is providing pursuant to this stipulation will not be used as a part of any such waiver argument.

3. **Preservation of Rule 1.1 and Spoliation Issues in this Proceeding:** CPSD reserves its right to make Rule 1.1 allegations in this proceeding other than the Rule 1.1 allegation referred to in Paragraph 2 above. For example, this stipulation will not affect CPSD's right to pursue its allegation that SCE violated Rule 1.1 based on the information contained in and/or excluded from its October 25, 2007 report to the Commission regarding the cause of the Malibu Canyon fire. Further, this stipulation will not affect CPSD's right to pursue claims of spoliation of evidence, as related to Rule 1.1 or any other statute, order, rule or requirement. CPSD is not waiving its rights to allege Rule 1.1 violations premised on any acts other than SCE's responses to Data Requests 3 and 35.
4. **Preservation of CPSD's Right to Move to Compel Production of the "Storm Register" Documents in this Proceeding:** CPSD explicitly reserves its right to update its March 26, 2010 Motion to Compel on February 11, 2011 (or a later date), to seek the "Storm Register" documents as to which SCE continues to assert work product and attorney-client privilege and that SCE is not producing as part of this stipulation. SCE may file a response to any such update of CPSD's Motion to Compel.
5. **Withdrawal of SCE-5 and Portions of Chapter 6 of CPSD Opening Testimony:** SCE shall withdraw the testimony of Brian Cardoza, designated as SCE-5. The deposition of Brian Cardoza, premised on SCE-5, is cancelled. CPSD shall withdraw the following portions of Chapter 6 of its Opening Testimony: p. 6-1, line 26 through p. 6-2, line 17.
6. **Partial Waiver not Established by this Stipulation:** CPSD agrees that it will not use this stipulation and disclosure as an argument that SCE has waived its rights of attorney-client or work product privilege with regard to the Storm Register documents or any other claim of privilege that SCE has made or may make in the future. All parties agree that this stipulation does not limit any party's right to raise waiver arguments that are not derived from this stipulation.
7. **Section 583 and GO 66-C Confidentiality:** SCE is producing all of the Disclosed Peralta Documents to CPSD under Section 583/GO 66-C. Consistent with statutory requirements, CPSD shall maintain that confidentiality, unless the Commission orders otherwise. If a law enforcement agency requests the Disclosed Peralta Documents, CPSD shall provide the Disclosed Peralta Documents to that agency under a confidentiality agreement, consistent with Resolution No. L-258A.
8. **Depositions to be held in San Francisco:** SCE agrees that CPSD has the right to depose SCE witnesses (including Mr. McCollum, Mr. Van Beyeren and Mr. Peralta) regarding the Disclosed Peralta Documents. Those depositions shall be

held at the CPUC Offices in San Francisco, at CPSD's option. If CPSD believes that an ALJ should preside at any of these depositions, SCE will not object.

9. **Subsequent Discovery and Testimony:** If CPSD elects to utilize the Disclosed Peralta Documents in its upcoming testimony, CPSD and Respondents, consistent with the ALJ Ruling, dated February 2, 2011, shall meet and discuss a schedule for discovery and subsequent testimony by all parties on this subject.
10. **Effective Date:** Upon receipt of the Disclosed Peralta Documents, CPSD shall provide notice to all parties that the deposition of Brian Cardoza is canceled.

Edward Moldovsky  
Date: 2/10/11  
For: Consumer Protection and  
Safety Division

Charles C. Read  
Date: 2/10/11  
For: Southern California Edison  
Company



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## CALIFORNIA PUBLIC UTILITIES COMMISSION

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