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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations and Practices of Southern California Edison Company, Cellco Partnership LLP 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.

Investigation 09-01-018
(Filed January 29, 2009)

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING IN PART AND DENYING IN PART SOUTHERN CALIFORNIA EDISON COMPANY'S MOTION FOR RECONSIDERATION

1. Summary

This ruling grants in part and denies in part the *Motion for Reconsideration of Ruling Denying Southern California Edison Company's (U 338-E) Motion to File Under Seal*. The motion is granted to the extent it requests authority to file under seal the Peralta Documents. The motion is denied to the extent it requests authority to file under seal the contents of the handwritten notes that were added to the original Peralta Documents after copies of the originals were sent to Southern California Edison Company's legal counsel.

2. Background

In October 2007, three utility poles in Malibu Canyon broke and ignited a fire. Southern California Edison Company (SCE) sent one of its employees,

Arthur Peralta, to conduct a forensic analysis of the failed poles. Peralta visited the incident site and took notes of his observations. Copies of Peralta's field notes and associated analysis were then sent to SCE's legal counsel.

The Commission's Consumer Protection and Safety Division (CPSD) filed a motion to compel SCE to produce the documents that had been prepared by Peralta. SCE opposed CPSD's motion, arguing that the documents were privileged attorney-client communications and protected attorney work product. On February 10, 2011, SCE and CPSD signed an agreement that:

- Required SCE to provide to CPSD all of Peralta's field observations and notes, all of the data that Peralta input to SCE's wind-load program, and all of the resulting pole-loading calculations (hereafter, "the Peralta Documents").
- Allowed SCE to provide the Peralta Documents to CPSD on a confidential basis pursuant to Pub. Util. Code § 583 and General Order (GO) 66-C.
- Required CPSD to maintain the confidentiality of the Peralta Documents.¹

SCE provided a copy of the Peralta Documents to CPSD on February 11, 2011. On March 18, 2011, CPSD inspected the original Peralta Documents and discovered that after copies of the originals had been sent to SCE's legal counsel, Peralta had returned to the incident site and added handwritten notes to the original documents. The copy of the Peralta Documents provided to CPSD on February 11, 2011, did not include the handwritten notes.

CPSD deposed Peralta about the Peralta Documents and the handwritten notes. Portions of the Peralta Documents and deposition transcript are cited in,

¹ The remaining issues raised by CPSD's motion to compel were resolved in a ruling issued by the two assigned Administrative Law Judges (ALJs) on March 24, 2011.

and appended to, the confidential version of CPSD's testimony that was served on April 29 and August 29, 2011. CPSD alleges in its testimony that SCE violated Rule 1.1 of the Commission's Rules of Practice and Procedure (Rule 1.1) by failing to provide Peralta's handwritten notes to CPSD as required by the agreement reached on February 10, 2011.

SCE denies the alleged violation of Rule 1.1 in its testimony served on June 29, 2011. As part of its defense, SCE represents that its Law Department was never informed that Peralta had returned to the incident site and added handwritten notes to the original Peralta Documents in his possession.

On December 5, 2011, SCE filed a motion for summary adjudication of the alleged Rule 1.1 violation ("Motion for Summary Adjudication"). SCE filed both a confidential version of its motion and a public version. The confidential version included the following material that was redacted from the public version: excerpts from the Peralta Documents and the Peralta deposition transcript; and excerpts from CPSD's testimony where the Peralta Documents and transcript are discussed.²

SCE concurrently filed on December 5, 2011, a motion to file under seal the confidential version of SCE's Motion for Summary Adjudication ("Motion to File Under Seal"). SCE claimed in its Motion to File Under Seal that the Peralta Documents and associated deposition transcripts are shielded from public disclosure by attorney-client privilege and attorney work product protection. There was no response to SCE's Motion to File Under Seal.

² SCE's Motion for Summary Adjudication was denied in an ALJ ruling issued on January 13, 2012.

SCE's Motion to File Under Seal was denied in an ALJ ruling issued on January 23, 2012 ("ALJ Ruling Denying SCE's Motion to File Under Seal"). The ALJ found that SCE had waived attorney-client privilege and attorney work product protection by (1) disclosing the material to CPSD, and (2) the repeated use of the disclosed material in CPSD's written testimony, SCE's written testimony, and SCE's Motion for Summary Adjudication.

On February 6, 2012, SCE filed a motion for reconsideration of the ALJ Ruling Denying SCE's Motion to File Under Seal ("Motion for Reconsideration"). CPSD filed a response on February 21, 2012, opposing SCE's Motion for Reconsideration. SCE filed a reply on February 24, 2012.

3. Summary of SCE's Motion for Reconsideration

SCE argues that the Peralta Documents and associated deposition transcripts are (1) privileged attorney-client communications under *Chadbourne v. Superior Court* (1964) 60 Cal. 2d 723, and (2) protected attorney work product under Cal. Civil Procedure Code § 2018.030. SCE asserts that the Commission held in D.02-08-068 that a utility does not waive attorney-client privilege or attorney work product protection when a utility provides documents to the Commission on a confidential basis. SCE further argues that the Court held in *Regents v. Superior Court* (2008) 165 Cal. App. 4th 672, that there is no waiver or attorney-client privilege when a government agency coerces an entity into providing privileged material, which is the case here. Finally, SCE contends that ALJs lack authority under Pub. Util. Code § 583 and GO 66-C to deny an unopposed motion to file under seal.

4. Summary of CPSD's Response to the Motion

CPSD opposes SCE's Motion for Reconsideration. CPSD argues that the information which SCE seeks to file under seal is not subject to attorney-client

privilege or attorney work product protection. CPSD also disputes SCE's position that it was coerced into waiving attorney-client privilege.

5. Discussion

SCE's Motion for Reconsideration provides substantial factual and legal support to file under seal that was absent from SCE's sparse Motion to File Under Seal. For the reasons set forth below, SCE's Motion for Reconsideration is granted to the extent it seeks to file under seal the Peralta Documents. The motion is denied to the extent it seeks to file under seal the contents of the handwritten notes that were added to the original Peralta Documents after copies of the original documents were sent to SCE's legal counsel.

A. ALJ Authority to Rule on Motions to File Under Seal

SCE's assertion that ALJs lack authority under Pub. Util. Code § 583 and GO 66-C to deny an unopposed motion to file under seal lacks merit. Rules 9.1, 11.4, and 11.5 of the Commission's Rules of Practice and Procedure together authorize an ALJ to rule on motions to file under seal.³ This authority includes the ability to deny a motion to file under seal. Moreover, decades of Commission precedent require the party seeking to file documents under seal to prove the documents are confidential. Boilerplate assertions of confidentiality are not sufficient.⁴ An ALJ has authority under Rules 9.1, 11.4, and 11.5 to determine if a party has met its burden and, if not, to deny a motion to file under seal.

³ The Commission's Rules of Practice and Procedure govern the conduct of Commission proceedings pursuant to Pub. Util. Code § 1701.

⁴ See, for example, D.11-01-040 at 11; D.06-06-066, as modified by D.07-05-032, at 2, 23, 24, 78, and 82; D.98-12-066, 83 CPUC 2d 506, 511; and D.92-09-082, 1992 Cal. PUC LEXIS 956 at *6.

B. Attorney-Client Privilege

SCE asserts that the material it seeks to file under seal is shielded from public disclosure by attorney-client privilege and attorney work product protection. The criteria for determining if the Peralta Documents are privileged attorney-client communications are set forth in *Chadbourne*. There, the Court held that a report prepared by an employee for transmittal to the employer's attorney is privileged under the following circumstances:

- The employer requires the employee to prepare a report for confidential transmittal to the employer's attorney, the employee's report is required in the ordinary course of business, the employee is not an independent witness, and the report is that of the employer.
- In all employer-employee situations, it is the intent of the person from whom the information emanates that governs its confidentiality and hence its privilege. If the employer directs an employee to provide a confidential report to the employer's attorney, the intent of the employer controls. (*Chadbourne* (1964) 60 Cal. 2d 723, 737-738.)

Peralta was told by his supervisor to examine and analyze the poles involved in the Malibu Canyon Fire pursuant to a request from SCE's attorneys. The supervisor received Peralta's work, placed it in a confidential investigation file, and forwarded the investigation file to SCE's legal counsel. No one besides SCE's legal counsel has reviewed the investigation file.⁵

With one exception, discussed below, these facts are sufficient to establish under *Chadbourne* that the Peralta Documents are privileged attorney-client communications. The privilege is absolute; disclosure of privileged documents

⁵ SCE Motion for Reconsideration at 4 - 5 and attached Exhibits 1 and 2.

cannot be ordered. (*Costco Wholesale Corp. v. Superior Court*, (2009) 47 Cal. 4th 725, 732, 736.) Having found that the Peralta Documents provided to CPSD are shielded from public disclosure by attorney-client privilege, there is no need to determine if the documents are protected attorney work product.⁶

The one exception concerns the handwritten notes that Peralta added to the original Peralta Documents in his possession after a copy of the originals was placed in the confidential investigation file and sent to SCE's legal counsel. Privileged communications are defined by Cal. Evid. Code § 952 as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence." Thus, a prerequisite for attorney-client privilege is the existence of an attorney-client communication. Peralta's handwritten notes were never communicated to an attorney; SCE's legal counsel learned about these notes when they were discovered by CPSD on March 18, 2011. Therefore, attorney-client privilege does not apply to the handwritten notes.

Protected attorney work product is defined by Cal. Code of Civil Procedure § 2018.030(a) and (b) as follows:

- (a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.
- (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly

⁶ Peralta's expert opinion regarding the cause(s) of the pole failures and the basis for his opinion are subject to discovery for the reasons stated in the ALJ Ruling issued on March 24, 2011. However, the content of the Peralta Documents is protected by attorney-client privilege and is not subject to discovery, including any content regarding Peralta's expert opinion and the basis for his opinion.

prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

Peralta's handwritten notes do not reflect an attorney's "impressions, conclusions, opinions or legal research or theories" (§ 2018.030(a)) or the "work product of an attorney" (§ 2018.030(b)) because Peralta prepared the notes on his own initiative, did not communicate the notes to SCE's legal counsel, and SCE's legal counsel was unaware of the notes. Therefore, Peralta's handwritten notes are not protected attorney work product.

C. No Waiver of Attorney-Client Privilege

The ALJ Ruling Denying SCE's Motion to File Under Seal held that SCE waived attorney-client privilege for the Peralta Documents when SCE disclosed the documents to CPSD. The ALJ ruling relied on Evid. Code § 912(a), which states that attorney-client privilege is waived when the "holder of the privilege, **without coercion**, has disclosed a significant part of the [privileged] communication." (Emphasis added.) However, as SCE observes in its Motion for Reconsideration, the Court held in *Regents* that attorney-client privilege is not waived when the holder of the privilege is coerced into disclosing a privileged document to a government agency:

[I]t is clear that when privileged documents have been disclosed... **in response to the request of a government agency**... no waiver of the privilege will occur if the holder of the privilege has taken reasonable steps under the circumstances to prevent disclosure. The law does not require the holder of the privilege to take "strenuous or Herculean efforts" to resist disclosure. (*Regents* at 683. Quotation in original. Emphasis added.)

SCE provided the Peralta Documents to CPSD only after CPSD filed a motion to compel SCE to produce the documents. SCE vigorously opposed the motion to compel, but eventually agreed to provide the documents to CPSD on a

confidential basis. This is sufficient to meet the definition of “coercion” in Evid. Code § 912(a) and *Regents*. SCE was not required to take further “strenuous or Herculean efforts” to resist disclosure. Therefore, SCE did not waive attorney-client privilege when it provided the Peralta Documents to CPSD.

D. Permission to File Under Seal

The goal of SCE’s Motion for Reconsideration is to obtain permission to file under seal the Peralta Documents and associated deposition transcripts that are attached to, or cited in, the confidential version of SCE’s Motion for Summary Adjudication. Pub. Util. Code § 583 allows utilities to initially submit documents under seal in a Commission proceeding, but the utility must file a motion establishing the legal and factual basis for continued confidential treatment. In determining whether the motion has merit, the Commission does not rely on § 583 because nothing in this statute addresses what types of documents should be treated as confidential. Other statutory provisions and/or policy considerations must be cited for authority to keep documents under seal.⁷

The Commission has a longstanding policy of conducting its proceedings in an open and transparent manner. At the same time, the Commission has recognized the importance of protecting attorney-client privilege for documents provided to the Commission. For example, in D.02-08-068 the Commission held:

⁷ D.06-06-066, as modified at D.07-05-032, at 27 – 29.

[Pacific Gas and Electric Company] contends that disclosure of PG&E's litigation risk analysis could constitute a waiver of PG&E's attorney-client privilege and reveal attorney work product. We acknowledge the importance of confidentiality in matters of litigation, however, utilities are provided with legal options under Public Utilities Code Section 583 and General Order 66-C that maintain confidentiality while providing us with necessary information to determine the reasonableness of an application. In similar utility applications, litigation risk, analysis and costs have been submitted for our examination and review under protective order. (D.02-08-068 at 8.)

Placing the Peralta Documents under seal does not result in significant adverse impact to the public because the confidential material is available to CPSD, the public's representative in this proceeding. Although public policy favors disclosure, in this case the public interest in disclosure is outweighed by SCE's interest in maintaining attorney-client privilege for documents that SCE provided to CPSD for use in this investigation proceeding on a confidential basis.

E. Implementation

For the reasons stated previously in this ruling, SCE's Motion for Reconsideration is granted to the extent it requests authority to file under seal the Peralta Documents and associated deposition transcripts that are attached to, or cited in, SCE's Motion for Summary Adjudication. The Motion for Reconsideration is denied to the extent it requests authority to file under seal the handwritten notes on the Peralta Documents and the portions of the deposition transcripts where the handwritten notes are discussed. However, it does not appear feasible to separate the handwritten notes from the confidential Peralta Documents on which the notes are written. Fortunately, the text of the

handwritten notes is quoted at page 3 of SCE's Motion for Summary Adjudication, which SCE is required to disclose by this ruling, below.

After carefully reviewing the confidential version of SCE's Motion for Summary Adjudication, this ruling finds the following portions of the motion that pertain to the handwritten notes may not be filed under seal:

- All of page 3 of SCE's Motion for Summary Adjudication, except for the image at the bottom of page 3.
- All of Exhibit 9 attached to SCE's Motion for Summary Adjudication.

To implement today's ruling, SCE shall file and serve within 10 days an amended public version of its Motion for Summary Adjudication that does not redact the material identified in the previous two bullets.

Therefore, **IT IS RULED** that:

1. Southern California Edison Company's (SCE) Motion for Reconsideration is denied with respect to the handwritten notes on the Peralta Documents and the Peralta deposition transcripts where the notes are discussed. SCE's Motion for Reconsideration is granted in all other respects.

2. SCE shall file and serve within 10 days from the date of this Ruling an amended public version of *Southern California Edison Company's (U 338-E) Motion for Summary Adjudication of Rule 1.1 Claim Related to Peralta Documents* that does not redact the material identified in the body of this ruling.

3. SCE may file under seal the entire confidential version of *Southern California Edison Company's (U 338-E) Motion for Summary Adjudication of Rule 1.1 Claim Related to Peralta Documents* dated December 5, 2011. This document shall remain under seal for a period of two years from the date of this Ruling. During that period, the document shall not be made accessible or disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge. If SCE believes further protection of the document is needed after two years, SCE may file a motion stating the justification for further withholding the document from

public inspection, or for such other relief as the Commission's Rules may then provide. This motion must be filed at least 30 days before the expiration of this protective order.

Dated March 23, 2012, at San Francisco, California.

/s/ TIMOTHY KENNEY

Timothy Kenney
Administrative Law Judge