

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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In the Matter of the Application of San Diego
Gas & Electric Company (U 902-E) for a
Certificate of Public Convenience and Necessity
for the Sunrise Powerlink Transmission Project

Application No. 06-08-010
(Filed August 4, 2006)

**RESPONSE OF SAN DIEGO GAS & ELECTRIC COMPANY TO CPSD's
MOTION TO STRIKE**

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September 17, 2008

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MOTION TO STRIKE**

Pursuant to Commission Rule 11.1(e), San Diego Gas & Electric Company ("SDG&E") hereby responds to the Consumer Protection and Safety Division's ("CPSD") motion to strike ("Motion")¹ submitted in the above-captioned matter. The Motion seeks to strike all references (and to bar future reference) to an executed declaration filed in support of the Assigned Commissioner's Order to Show Cause,² which was subsequently replaced. The Motion states that the subject declaration was inadvertently produced, and argues that it contains material protected by the attorney-client and work product privileges. SDG&E has no desire to dwell on a mere ministerial error. And SDG&E agrees with the general principle relied on by CPSD, that inadvertently-disclosed privileged matter may be retrieved and protected. And in this case it is important to properly apply this principle, because the Motion goes beyond seeking to protect one document – the Motion seeks to foreclose all inquiry into the process by which the subject

¹ *The Consumer Protection and Safety Division's Opposition to SDG&E's Motion to Dismiss; Motion to Strike* (filed September 2, 2008). SDG&E does not reply herein to the CPSD's opposition; we respond only to the motion to strike portion of the subject filing. Under Rule 11.1(e), SDG&E may respond timely to the Motion without prior permission of the Commission or of the presiding judge.

² *Assigned Commissioner's Revised Scoping Memo and Ruling Regarding Possible Rule 1.1. and Rule 8.3 Violations; Order to Show Cause* (August 1, 2008) ("Order to Show Cause" or "Order"). The subject declaration (and its replacement) is attributed to Ms. Billie Blanchard, and is Attachment 4 to the Order to Show Cause.

declaration was obtained and filed under penalty of perjury. As demonstrated in SDG&E's Answer to the Order to Show Cause,³ there are multiple inconsistencies and discrepancies within and among the Order and its supporting declarations which must be addressed to justly resolve this matter. In such circumstances, the original declaration may be relevant to the process through which all of the Order's supporting declarations were obtained, and to the accuracy of the Order's allegations.

SDG&E's – and, we believe, the Commission's – objective in this case is to fully explore the allegations set forth in the Order. The Motion, under the guise of protecting information in a single document, seeks an outcome completely contrary to this objective without offering any factual or legal justification. Even if CPSD eventually establishes that the original declaration is privileged, the Motion seeks relief that is overbroad, and unnecessary to protect any privilege. Accordingly, the Motion should be dismissed.

I. THE MOTION OFFERS NO SUPPORT FOR ITS PREMISES

The Motion asserts (at 6) that the original declaration was a draft inadvertently attached to the order. In addition, it asserts that the draft contains communications with and the mental impressions of “Commission Staff Counsel.” But the document itself does not appear to support these assertions.

The original Blanchard declaration is devoid of markings suggesting that it is confidential or contains privileged information. Nothing else on or in the document suggests that it contains a lawyer's confidential communications or mental impressions or is otherwise privileged. The Motion does not identify the material in the declaration it claims is privileged, and the

³ SDG&E's *Answer and Motion to Dismiss ... in Response to Order to Show Cause* (“SDG&E's Answer”) (August 19, 2008).

parenthetical questions in the original declaration and removed from its replacement involve facts, not advice, and do not appear to be confidential. And it is not self-evident that the substantive differences between the two declarations reflect privileged attorney communications or mental impressions. On its face, the subject declaration was executed by declarant under penalty of perjury, and there is no basis for believing that such a published declaration is privileged, even when subsequently replaced without explanation.⁴ While the declaration (filed August 1) was replaced on August 3, no effort was made to identify it as privileged in (1) the August 3 transmittal letter notifying the Sunrise service list of the replacement declaration,⁵ (2) CPSD's August 25 Notice of Intervention or (3) in any other communication until CPSD's September 2 Motion. Given the lack of indicia on the face of the original declaration and in the circumstances of its publication, and the delay in asserting a privilege, more must be shown to establish privilege than a mere unsupported assertion. For example, what in the document is privileged, and why is it privileged?

⁴ The authority cited by the Motion (at 6), *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807 (2007) pertains to a lawyer's duty on receipt of material inadvertently disclosed in discovery that appears to be privileged. This authority does not support the CPSD's position in this case, which involves a document published to a broad service list in support of a Commission order, and which, on its face, appears to be an executed declaration containing no hint of privilege. Indeed, *Rico* explicitly relies on a decision confirming that the Motion's showing does not support the relief sought. This decision found that, for a recipient to have a duty to protect inadvertently released material, it must be obvious that the material is privileged, and the claimant of the privilege must prove that the release was inadvertent. *See State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644 (Cal. App. 2d Dist. 1999) (documents were in fact inadvertently released and "designed to make clear to even the casual observer that they were intended to be confidential attorney-client communications"). *Id.* at 653.

⁵ The Sunrise service list was notified of the filing including the original declaration on August 1, and of the declaration's replacement on August 3, by e-mail with a link to the Order and supporting attachments on the Commission's website. Both the original and the replacement recite they were executed on July 31. The August 3 e-mail transmittal did not specifically point out that the declaration had been replaced, but only that "... [d]ue to technical problems, the internet link on the initial courtesy e-mail did not produce the correct documents." The Motion does not explain whether or how such "technical problems" relate to its claim that the original declaration contains inadvertently-disclosed privileged material.

Moreover, it could be important in this context to identify the lawyer involved. For the attorney-client privilege to apply, the lawyer involved must have an attorney-client relationship with the declarant. The Motion states that the communications and mental impressions are those of “Commission Staff Counsel.” This term could apply to any lawyer employed by the Commission,⁶ some who are classified under the Commission’s rules as decisionmakers or Commissioners' personal advisors,⁷ or who otherwise may not have a protected attorney-client relationship with the declarant. In sum, more information and explanation are needed to substantiate the privilege claim.

II. THE ORIGINAL DECLARATION MAY BEAR ON THE ACCURACY OF THE RULE 1 ALLEGATIONS

The Motion (at 6) argues that the original declaration is “irrelevant” and that “[t]ime and resources will be wasted by arguing over the minor differences between the draft declaration and the final signed version.” SDG&E has no desire to waste time on trivia or to dwell on a ministerial correction. But it is not clear at this time whether any differences between the two declarations are merely ministerial – such differences could have implications for the accuracy of the Order’s allegations, and thus exploration of the any correction’s genesis with reference to the declaration could be important to SDG&E’s defense.

⁶ It is not clear from the context whether CPSD is “Commission Staff Counsel.” Given that CPSD noticed its intervention in this proceeding nearly a month after the Order issued (and after the subject declarations were executed), one cannot assume that a CPSD lawyer was involved in drafting the declarations based on the documents and representations supplied to date.

⁷ For example, Commission Rule 8.5 treats Commissioners' personal advisors the same as “decisionmakers” (Rule 8.1(b)) for purposes of the Commission’s *ex parte* rules.

Specifically, although SDG&E does not dispute any material portions of Ms. Blanchard's declaration,⁸ the fact that a declaration identified as executed under oath was filed and replaced could indicate some process flaw common to all of the declarations filed in support of the Order. There is a basis for this concern in all of the Order's supporting declarations. For example, the Commissioner advisors' declarations contradict one another. The declarations of Ms. Ryan⁹ and Mr. Schwartz¹⁰ (¶ 3.a. of their respective declarations), and of Mr. Kinosian¹¹ (¶ 2.a.) refer to SDG&E's "Enhanced Northern Route" and the Environmentally Superior Southern Route, and then state that "SDG&E did not discuss any other routes during the meeting." But Ms. Brown's declaration directly contradicts this (at ¶ 6), with a detailed discussion of the "SDG&E Modified Southern Route." There are other material contradictions and discrepancies within and among the advisor declarations, and with how the declarations are characterized in the Order itself.¹² In such circumstances, discovery directed to the original Blanchard declaration, including reference to the declaration during depositions of all declarants supporting the Order, could lead to admissible evidence showing how these inconsistencies occurred, and to other evidence relevant to the reliability of the declarations and to the truth of Order's allegations. In sum, contrary to

⁸ SDG&E does disagree with the terminology used in the declaration referring to SDG&E's Modified Southern Route. See SDG&E's *Answer* at 10 n.16.

⁹ Order Attachment 11.

¹⁰ Order, Attachment 12.

¹¹ Order, Attachment 10.

¹² For example, ¶ 5.a. in each of the advisor declarations represents that "the only southern route to the project being considered and that is realistic is the [ESSR]..." But this statement contradicted by the handouts referenced in the advisor declarations (Ryan and Schwartz at ¶ 3.c.2; Kinosian and Brown at ¶ 3.c.). See SDG&E's *Answer* at 20-22, 27-28 and n.39 for a full discussion of the material discrepancies among the advisor declarations. In addition, the Order to Show Cause (at 6, n.23) supports its allegations with references two declarations from Commissioner advisors "A. [Andrew] Campbell" and "R. [Robert] Mason", but such declarations were not attached to the Order, not posted on the Commission website, or otherwise served on SDG&E.

the Motion's assertion, reference to the original Blanchard declaration could lead to discovery of relevant and admissible evidence.¹³

III. CPSD'S REQUESTED RELIEF IS OVERBROAD

As discussed in the prior section, discovery into the process for procuring and submitting executed declarations – including the replaced Blanchard declaration - could lead to admissible evidence. But the Motion seeks to bar *any reference* to the original declaration. Even if the original declaration is found to contain privileged material, the relief requested is overbroad. There is nothing privileged about the *fact* that an apparently-executed declaration pertaining to the Order's Rule 1 allegations was submitted and replaced. Nor does reference to the document in the context of discovery as to the process for procuring and filing the declaration require disclosure of the contents of the document.¹⁴ The Motion cites no support for the breadth of relief that it seeks, nor is SDG&E aware of any authority that supports the Motion in this regard. Even if the privilege is established (which it is *not* by the Motion's conclusory assertion), any protective order should bar only references to privileged and confidential material in the document itself – not to the document's existence or to its development.

IV. CONCLUSION

SDG&E's aim in this case is to get at the truth and to show that it did not mislead the Commission. But the Motion seeks to substantially circumscribe inquiry into the material

¹³ The Motion wrongly suggests that the standard here is whether the original Blanchard declaration is "irrelevant." Under Rule 10.1, the appropriate standard at this stage of the proceeding is whether use of the document "is reasonably calculated to lead to the discovery of admissible evidence."

¹⁴ For example, showing the document to the declarant on deposition to refresh her recollection could be done in a way that would not compromise any privileges or involve disclosure beyond the witness and counsel.

discrepancies and inconsistencies within and among the Order and its supporting declarations. SDG&E does not dispute CPSD's premise that inadvertently produced privileged material may be retrieved and protected. But the CPSD has not offered sufficient information to show that the declaration is in fact privileged. And the declaration in question could be important to illuminating the process by which the declarations supporting the Order were procured and the reliability of the declarations themselves. Because the entire Sunrise service list has had access to the document in question, there is no urgency here to protect confidential matter. For these reasons, the Motion should be dismissed. In the alternative, any relief granted should not bar all reference to the document, but should permit inquiry into its genesis and filing.

Respectfully submitted,

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September 17, 2008

VERIFICATION

I, Debra L. Reed, am President and Chief Executive Officer – San Diego Gas & Electric Company (“SDG&E”), and am authorized to make this verification on its behalf. I have reviewed the foregoing Response to CPSD’s Motion to Strike. The statements in this response are true of my own knowledge, except as to matters upon which are therein stated on information or belief, or about which I have been informed, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17 day of September 2008, at San Diego, California.



Debra L. Reed
President and Chief Executive Officer
SAN DIEGO GAS & ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **RESPONSE OF SAN DIEGO GAS & ELECTRIC COMPANY TO CPSD's MOTION TO STRIKE** on all parties identified in Docket No. A.06-08-010 by U.S. mail and electronic mail.

Dated at San Diego, California, this 17th day of September, 2008.

/s/ JOEL DELLOSA

Joel Dellosa



California Public
Utilities Commission

CPUC Home

CALIFORNIA PUBLIC UTILITIES COMMISSION

Service Lists

**PROCEEDING: A0608010 - SDG&E - CPCN FOR THE
FILER: SAN DIEGO GAS & ELECTRIC COMPANY (U902E)
LIST NAME: LIST
LAST CHANGED: SEPTEMBER 16, 2008**

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