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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 DENYING  
SOUTHERN CALIFORNIA EDISON COMPANY'S  
MOTION TO FILE UNDER SEAL**

**1. Summary**

This ruling denies Southern California Edison Company's (SCE) motion to file under seal another motion titled, *Southern California Edison Company's (U 338-E) Motion For Summary Adjudication Of Rule 1.1 Claim Related to Peralta Documents (Confidential Version)*.

**2. Background**

In October 2007, three utility poles in Malibu Canyon broke and ignited a fire. After the fire, Southern California Edison Company (SCE) sent one of its employees, Arthur Peralta, to conduct a forensic examination of the failed poles. Peralta visited the incident site, took written notes of his field observations, and sent copies of his notes to SCE's Law Department.

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 shielded from disclosure by attorney-client privilege and the attorney work product doctrine. On February 10, 2011, SCE and CPSD signed an agreement that required SCE to provide to CPSD "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."<sup>1</sup> SCE agreed to provide this material to CPSD on a confidential basis pursuant to Pub. Util. Code § 583 and General Order (GO) 66-C, and CPSD agreed to maintain confidentiality unless the Commission ordered otherwise.<sup>2</sup> SCE provided copies of the Peralta documents to CPSD on February 11, 2011. CPSD then deposed Peralta about the contents of these documents and related matters.

Portions of the Peralta documents and deposition transcript are cited in, and appended to, the confidential version of CPSD's testimony that was served on April 29 and August 29, 2011.<sup>3</sup> Among other things, CPSD alleges in its testimony that SCE violated Rule 1.1 of the Commission's Rules of Practice and

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<sup>1</sup> SCE's *Motion for Summary Adjudication of Rule 1.1 Claim Related to Peralta Documents (Redacted Public Version)*, Exhibit E at Paragraph 1.

<sup>2</sup> *Ibid*, at Paragraph 7.

<sup>3</sup> Confidential version of CPSD's testimony served on April 29, 2011, at 1, 5 - 7, 9 - 13, 15, 16, 18, 22, 32 - 35, 43 - 47, 49, 64 - 75, 100 - 103, and 114, and attached Exhibits 003, 024, 027, 029, 033 - 037, 040, 041, 068, 070, 071, and 081; and confidential version of CPSD's testimony served on August 29, 2011, at 12, 14 - 16, 49 - 50, and Attachments 17, 23, and 35.

Procedure (Rule 1.1) by failing to provide to CPSD all of the Peralta documents as CPSD believes SCE was required to do by the February 10, 2011, agreement.<sup>4</sup>

SCE denies the alleged violation of Rule 1.1 in its testimony served on June 29, 2011. Portions of the Peralta documents and deposition transcript are cited in, and appended to, the confidential version of SCE's testimony.<sup>5</sup>

In its prehearing conference statement filed on October 21, 2011, CPSD recommended that the Commission order SCE to pay a fine of \$720,000 for the alleged violation of Rule 1.1. The assigned Commissioner's scoping memo issued on November 23, 2011, determined that the scope of this proceeding includes the alleged violation of Rule 1.1 and CPSD's recommended fine.

On December 5, 2011, SCE filed a motion for summary adjudication of the alleged violation of Rule 1.1. SCE filed both a public version of its motion and a confidential version of its motion. 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.

SCE concurrently filed on December 5, 2011, a motion to file under seal the confidential version of its motion for summary adjudication. There was no response to SCE's motion to file under seal.

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<sup>4</sup> Confidential version of CPSD's testimony served on April 29, 2011, at 114 - 115; and confidential version of CPSD's testimony served on August 29, 2011, at 15 - 16.

<sup>5</sup> Confidential version of the written testimony of SCE witness Robert Ramos, dated June 29, 2011, at 5, 6, 10 - 11, and attached Exhibits 5 and 6.

### **3. Summary of SCE Motion to File Under Seal**

In its motion to file under seal, SCE seeks to prevent public disclosure of those portions of its concurrently served motion for summary adjudication that SCE claims are protected by attorney-client privilege and/or the attorney work product doctrine. SCE states that the protected material was provided confidentially to CPSD pursuant to the February 10, 2011 agreement, Pub. Util. Code § 583, and GO 66-C, and that CPSD agreed to maintain confidentiality. SCE also provided the protected material to other Respondents who agreed to the confidentiality terms of the February 10, 2011 agreement. SCE asserts that it did not waive attorney-client privilege or attorney work-product protection for the material provided to CPSD and other Respondents.

### **4. Discussion**

SCE moves to file under seal certain parts of its motion for summary adjudication of the alleged violation of Rule 1.1 regarding the Peralta documents. The sole reason given by SCE for seeking to file this material under seal is that the material is shielded from public disclosure by attorney-client privilege and/or the attorney work product doctrine. In deciding whether to grant or deny the motion, this ruling will look to Cal. Evid. Code §§ 900-920, which governs both attorney-client privilege and attorney work product; Cal. Evid. Code §§ 900-920, which pertains to attorney-client privilege; and Cal. Code of Civ. Procedure 2018.010 - 2018.080, which pertains to attorney work product.

At its core, SCE's motion is a conclusory assertion that the material it seeks to file under seal is shielded from public disclosure by attorney-client privilege and/or the attorney work product doctrine. SCE provided no factual or legal support for the assertion. As set forth below, this ruling finds that SCE has

manifestly waived attorney-client privilege and attorney work product protection. Therefore, SCE's motion to file under seal is denied.

**a. Waiver of Attorney-Client Privilege**

The attorney-client privilege prevents compulsory disclosure of confidential communications between an attorney and the client. For a communication to be confidential and protected from disclosure by attorney-client privilege, the communication must not, to the knowledge of the client, be seen or heard by a third person except one who is assisting the client or the attorney in the matter. (Evid. Code § 952.) The privilege is waived when the holder of the privilege, without coercion, discloses a significant part of the privileged communication or consents to such disclosure. (Evid. Code § 912(a).)

SCE has waived attorney-client privilege for the material it seeks to file under seal because SCE has repeatedly disclosed this material to third persons outside the attorney-client relationship or consented to such disclosure. The instances where SCE had disclosed, or consented to disclosure, include (1) SCE's formal agreement with CPSD dated February 10, 2011, to provide to CPSD all of Peralta's field notes, data inputs to SCE's wind load program, and pole-loading calculations; (2) CPSD's deposition of Peralta; (3) CPSD's testimony served on April 29, 2011; (4) CPSD's testimony served on August 29, 2011; (5) SCE's testimony served on June 29, 2011; and (6) SCE motion for summary adjudication filed on December 5, 2011. SCE did not disclose privileged communications to CPSD so that CPSD could assist SCE (the client) or SCE's attorney. To the contrary, CPSD has used the disclosed material in ways that are hostile to SCE's interests, including allegations that SCE violated Rule 1.1.

**b. Waiver of Attorney Work Product Protection**

There are two types of protection for attorney work product in civil cases. First, there is absolute protection for an attorney's impressions, conclusions, opinions, and legal research and theories. (Code of Civil Proc. § 2018.030(a).) Absolute protection does not apply to the material that SCE seeks to file under seal, as there is nothing in this material that is an attorney's impressions, conclusions, opinions, legal research or theories. Even if absolute protection did apply, SCE waived this protection when it disclosed the material to CPSD and allowed the material to be used in both CPSD's and SCE's written testimony. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal. App. 3d 1240, 1258-1261.)

Second, there is qualified protection for an attorney's general work product. No discovery is allowed of an attorney's general work product unless denial will (a) unfairly prejudice the party seeking discovery, or (b) result in an injustice. (Code of Civil Proc. § 2018.030(b).) The qualified protection does not apply to the material that SCE seeks to file under seal because SCE has already allowed discovery of this material by giving it to CPSD. Furthermore, the courts have held that the purpose of the attorney work product doctrine is to protect information from opposing parties to encourage effective trial preparation. The protection is waived by a disclosure that is wholly inconsistent with this purpose. (*Meza v. Muehlstein & Co., Inc.* (2009) 176 Cal. App. 4th 969, 981; *Laguna Beach County Water District v. Superior Court* (2004) 124 Cal. App. 4th 1453, 1459; and *OXY Resources California v. Superior Court* (2004) 115 Cal. App. 4th 874, 891.) SCE's disclosure of attorney work product to CPSD was wholly inconsistent with the purpose of the attorney work product doctrine because CPSD has used the

disclosed material in ways that are adverse to SCE's interests. Consequently, SCE has waived the protection offered by the attorney work product doctrine.

Therefore, **IT IS RULED** that:

1. Southern California Edison Company's motion to file under seal is denied.
2. The Commission's Docket Office may place into the publicly accessible formal file for this proceeding *Southern California Edison Company's (U 338-E) Motion For Summary Adjudication Of Rule 1.1 Claim Related to Peralta Documents (Confidential Version)*.

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

/s/ TIMOTHY KENNEY

Timothy Kenney  
Administrative Law Judge