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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 MOTION TO COMPEL

Summary

This ruling denies the motion by the Consumer Protection and Safety Division (CPSD) to compel the production of "storm registers" that were prepared by Arthur Peralta, an employee of Southern California Edison Company (SCE). Although the motion is denied, CPSD may discover Peralta's expert opinion regarding the failure of utility poles in Malibu Canyon on October 21, 2007, and the bases for Peralta's opinion.

Background

On October 21, 2007, strong winds in Malibu Canyon broke three utility poles located next to a public road, resulting in a fire that burned 3,836 acres and destroyed 14 structures and 36 vehicles. In January 2009, the Commission

instituted this proceeding to formally investigate whether SCE, NextG Networks, Inc., AT&T Mobility LLC, Verizon Wireless, and Sprint Telephony PCS, L.P. (collectively, "the Respondents") violated any provisions of the Public Utilities Code, Commission general orders or decisions, or other rules with respect to their facilities involved in the ignition of the Malibu Canyon Fire.

On the day of the fire, Frederick McCollum, a senior investigator in SCE's Claim's Department, was dispatched to the accident site. The following day, McCollum instructed Peralta, a wood products specialist, to inspect the accident site, which Peralta completed by October 23, 2007. After inspecting the site, Peralta returned to his office and performed wind-load calculations for the three failed poles. Sometime later, Peralta created "storm registers" that included his opinion regarding the causes of the pole failures. Peralta then sent all of his work to McCollum, including his field notes, wind-load calculations, and the storm registers. McCollum eventually forwarded this information to an outside attorney retained by SCE.

On March 26, 2010, CPSD filed a motion to compel SCE to produce all observations, measurements, and wind-load calculations performed by Peralta regarding the failed poles. CPSD also requested that the other Respondents with access to such information be required to produce it.

Each of the Respondents filed a response opposing CPSD's motion. CPSD filed a reply on April 15, 2010. The parties filed supplemental pleadings on February 11, 2011, and replies on February 18, 2011.

On February 10, 2011, CPSD and SCE reached a stipulation whereby SCE agreed to provide Peralta's field notes and wind-load calculations for the failed poles, but not the storm registers. The only remaining issue with respect to

CPSD's motion to compel is whether SCE can withhold the storm registers based on attorney-client privilege and/or attorney work-product privilege.

CPSD's Motion to Compel

CPSD asserts that SCE is required by Pub. Util. Code §§ 315 and 581, Rule 19 of General Order 95, and Decision (D.) 06-04-055, D.98-07-097, and D.96-09-045 to provide the Commission with all relevant information regarding the cause of the pole failures and the resulting Malibu Canyon Fire. CPSD believes the storm registers fit squarely within this requirement.[1]

If the Commission determines the storm registers are protected by attorney-client privilege and/or attorney work-product privilege, CPSD submits that SCE has waived these privileges. First, SCE failed to preserve certain facilities that were attached to the failed poles and which are relevant to determining the cause of the pole failures. CPSD argues the storm registers are needed to fill the evidentiary void created by SCE's actions, and that a severe injustice would occur if SCE continues to withhold the storm registers.

Second, CPSD alleges that the Accident Report for the Malibu Canyon Fire that SCE submitted pursuant to Pub. Util. Code § 315 did not include information about the cause of the fire that the author of the report, McCollum, had obtained from Peralta. CPSD submits that by disclosing some information in the Accident Report about the Malibu Canyon Fire, SCE waived attorney-client privilege with respect to all other information in its possession regarding the cause of the fire. CPSD makes a similar argument regarding McCollum's deposition testimony on the Accident Report.

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[1] For the sake of brevity, the numerous court cases cited by CPSD, SCE, and the other Respondents are not included in the summary of the parties' positions.

Finally, CPSD argues that SCE forfeited any privilege objection to the storm registers by failing to object to Questions 3 and 35 of CPSD's data request dated June 4, 2009, which asked for all wind-load calculations and analyses for the failed poles. (Code Civ. Proc. § 2031.300, and Evid. Code § 912(a).)

SCE's Response to the Motion to Compel

SCE asserts that the storm registers are protected by attorney-client privilege because they were created by Peralta at the request of counsel and communicated only to SCE's Law Department.

SCE also claims that the storm registers are protected by attorney work-product privilege. The Commission may order disclosure of attorney work products only if denial would result in an unfair prejudice or injustice. That is not the situation here, according to SCE, because CPSD now has all the data and calculations that Peralta used to form his opinions reflected in the storm registers. The storm registers contain no additional facts about the failed poles.

SCE disputes CPSD's assertion that SCE was obligated to disclose Peralta's opinions in the Accident Report that SCE filed pursuant to Pub. Util. Code § 315. The Accident Report stated in relevant part: "Initial reports indicated that wind gusts exceed 100 mph at the time the circuit relayed." This is all that SCE knew for sure at the time, and was based entirely on information that McCollum obtained from sources other than Peralta, including McCollum's own visit to the accident site on the day of the fire.

SCE admits that McCollum was aware of Peralta's wind-load calculations at the time of the Accident Report. However, SCE states that McCollum did not disclose any privileged information in the Accident Report, and that Pub. Util. Code § 315 cannot be read as eliminating the privileges that have been recognized by the Commission and the courts.

SCE disputes CPSD's argument that SCE failed to raise a timely privilege objection in response to CPSD's data request. SCE states that CPSD's data request did not seek the storm registers, so there was no need for an objection.

Finally, SCE admits that some equipment was discarded after the Malibu Canyon Fire, but this does not justify the release of the privileged storm registers to CPSD. SCE states that CPSD can verify the inputs to Peralta's wind-load calculations by visiting the accident site to observe facilities that are identical to the discarded equipment, or by reviewing Peralta's field notes that have been provided to CPSD.

Respondents Other than SCE

The Respondents other than SCE represent that they never had access to the storm registers or any of the information contained therein.

Discussion

It is a well-settled principle that attorney-client privilege applies to Commission proceedings. (*Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 39, 50.) The criteria for determining if the storm registers are privileged attorney-client communications are set forth in *D. I. Chadbourne, Inc. v. Superior Court* ((1964) 60 Cal.2d 723, 737-738.) 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.
- If the employer has more than one purpose in directing the employee to prepare a report, the dominant purpose will control,

unless the secondary use is such that confidentiality has been waived.

- In all employer-employee situations, it is the intent of the person from whom the information emanates that originally 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.

The declaration of McCollum dated April 5, 2010, states in Paragraph 2 that he was instructed by his supervisor to open a confidential investigation at the request of SCE's in-house attorney, and to report all information collected during the investigation to SCE's counsel for use in litigation arising from the Malibu Canyon Fire. Paragraph 3 states that McCollum instructed Peralta "that, at the request of Edison's attorneys, [Peralta] was to observe the poles involved in the Malibu fire . . . [and] to take notes of his thoughts, observations, impressions and analysis [for inclusion] in the investigation file." Paragraph 5 states that McCollum received Peralta's handwritten notes and hardcopies of his analyses and placed these documents into the investigation file.[2] Paragraph 6 states that McCollum forwarded the investigation file to SCE's external counsel. Paragraph 7 states that no one outside of SCE's Law Department and SCE's external counsel has reviewed the investigation file.

These facts are sufficient to establish under *Chadbourne* that the storm registers are privileged attorney-client communications. The privilege is absolute. Disclosure of the storm registers may not be ordered, regardless of relevance, necessity, or circumstances peculiar to the case. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732, 736.) There is nothing in the

provisions of the Public Utilities Code, General Order 95, or the Commission decisions cited by CPSD that creates an exception to attorney-client privilege.

CPSD argues that attorney-client privilege for the storm registers may be waived because of SCE's failure to preserve certain physical evidence that is relevant to determining the cause of the pole failures. CPSD's proposed remedy is inapposite. The appropriate remedy is to draw an evidentiary inference that the discarded material is unfavorable to SCE. (*Cedars-Sinai Medical Center v.* Superior *Court* (1998) 18 Cal.4th 1, 11 - 12.) The scope and significance of the evidentiary inference will be determined after the forthcoming evidentiary hearings and briefs.[3]

CPSD also argues that attorney-client privilege was waived because of Peralta's communications with McCollum. However, SCE denies that McCollum disclosed any privileged communications in the Accident Report or elsewhere, and CPSD has not shown otherwise.[4] Thus, there was no waiver of attorney-client privilege.

CPSD assertion that SCE waived attorney-client privilege by failing to raise privilege objections to Questions 3 and 35 of CPSD's data request dated

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[2] The Declaration of Arthur Peralta dated February 18, 2011, states in Paragraph 7 that the documents sent by Peralta to McCollum included the storm registers.

[3] As discussed below, the fact that SCE discarded evidence is relevant to the question of whether CPSD may discover Peralta's expert opinion regarding the cause of the pole failures, as distinguished from his attorney-client communications.

[4] The Declaration of Frederick McCollum dated February 18, 2011, states that he has been an employee of SCE's Law Department since 2000. Although McCollum had access to the storm registers due to his status as SCE's lead investigator for the Malibu Canyon Fire, a "communication does not lose its privilege merely because it was obtained, with the knowledge and consent of the employer, by an agent of the employer acting under such agency." (*Chadbourne* at 737.)

June 4, 2009, is not persuasive. Question 3 asked for "wind-load safety calculations," and Question 35 asked for "wind-load calculations or analyses." SCE has since provided Peralta's wind-load calculations to CPSD. The storm registers contain Peralta's opinion regarding the cause of the pole failures, which is different from the wind-load calculations or analyses sought by CPSD's data request. Consequently, there was no need for SCE's response to Questions 3 and 35 to raise privilege objections with respect to the storm registers, as these questions did not ask for the storm registers.

For the previous reasons, CPSD's motion to compel the production of the storm registers is denied because they are privileged attorney-client communications. However, attorney-client privilege must be strictly construed in the interest of bringing to light relevant facts. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d. 355, 396.) Knowledge which is not otherwise privileged does not become so merely by being communicated to an attorney. (*Grand Lake Drive In v. Superior Court* (1960) 179 Cal. App.2d 122, 127.)

SCE dispatched Peralta to the accident site to obtain his expert opinion regarding the cause of the pole failures.[5] Peralta's expert opinion, as distinguished from the storm registers, is not protected by attorney-client privilege for the reasons set forth in *People ex re. Dept. of Public Works v. Donovan* ((1962) 57 Cal.2d 346, 354 – 355, 357). There, the Court addressed a situation where a property appraiser had prepared a written appraisal for counsel in anticipation of litigation. The Court held that while the written report was a privileged communication, the appraiser's opinion on the fair market value of

[5] Declaration of Arthur Peralta dated February 18, 2011.

the property at issue was not privileged, stating: "the appraiser's subjective knowledge, as distinguished from his disclosures [to counsel] . . . in and of itself, is not privileged, nor does it acquire a privileged status merely because it may have been communicated to the attorney." (*Id.* at 355.)

A similar result was reached in *Grand Lake Drive In*. There, the Court addressed an engineer's report regarding the slipperiness of a sidewalk that was prepared at the request of counsel. The Court held that while the engineer's report was a privileged communication, the engineer's observations and conclusions about the sidewalk were not protected by attorney-client privilege. (*Id*. at 124, 126 - 128.)

In both *Dept. of Public Works* and *Grand Lake Drive In*, the Court determined that the expert's opinion was not protected by attorney-client privilege because "the items made subject to the experts' examination were open premises, readily visible to anyone. In such circumstances the matters disclosed between attorney and expert [are] not confidential in nature." (*Dept. of Public Works* at 356, citing *Grand Lake Drive In*.) The same circumstances exist here. Peralta's knowledge was obtained by examining failed poles that were located "in open premises, readily visible to anyone."

We next consider the issue of whether Peralta's expert opinion is shielded from discovery by attorney work-product privilege. The applicable law is contained in Code Civ. Proc. § 2018.030, which provides that an attorney's impressions, conclusions, opinions, legal research, and legal theories are not discoverable under any circumstances. All other attorney work product may be discovered if the court determines that denial of discovery will unfairly prejudice the party seeking discovery or result in an injustice.

Peralta was dispatched to Malibu Canyon to observe the failed poles and to take notes of his thoughts, observations, impressions, and analysis. Based on this information, Peralta reached "personal and preliminary opinions regarding possible causes of the pole failures.[6]" Therefore, Peralta's expert opinion is based on his own work, and does not reflect an attorney's impressions, conclusions, opinions, legal research, or theories. Accordingly, Peralta's expert opinion does not qualify for absolute protection under Code Civ. Proc. § 2018.030, but may be discovered if denial of discovery will cause unfair prejudice to CPSD's case or result in an injustice.

In *National Steel Products Co. v. Superior Court* ((1985) 164 Cal.App.3d 476, 491 - 492.), the Court held that an expert's opinion that is also an attorney work product may be discovered when the expert has examined a relevant object and the object is no longer available to the adversary for examination. (*Ibid*. citing *Grand Lake Drive In* at 127, and *Ruth E. Petterson v. Superior Court* (1974) 39 Cal.App.3d 267, 271.)[7] The guidance provided by *National Steel Products Co.* is relevant here. Some of the facilities that were attached to the failed poles and observed by Peralta were discarded by SCE before CPSD could conduct its own examination.[8] Consistent with *National Steel Products Co.*, this ruling finds that CPSD would suffer an unfair prejudice under Code Civ. Proc. § 2018.030, if SCE were allowed to withhold Peralta's expert opinion from CPSD.

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[6] Declaration of Arthur Peralta dated February 18, 2011, at Paragraphs 3 and 6.

[7] It also appears that the Court in *Dept. of Public Works* determined that an expert's opinion which is protected by attorney-client privilege may be discovered upon a showing of "good cause." (*Id*. at 350, 356 – 357, citing *Grand Lake Dive In.)*

[8] CPSD *Supplemental Brief* filed on February 11, 2011, at 6 – 7.

SCE contends that CPSD has a reasonable substitute for the discarded facilities in the form of Peralta's field notes and wind-load calculations, as well as other facilities that are identical to the discarded facilities. SCE's argument is not persuasive. As the Court found in *Grand Lake Drive In* at 131, "[i]t is clear that if the object inspected and tested by the expert is no longer available and has not been examined or tested by the opponent's experts, good cause to interrogate the expert exists."

For the reasons stated previously, this ruling finds that Peralta's expert opinion regarding the pole failures is not shielded by attorney-client privilege or attorney work-product privilege. CPSD has not been accorded an adequate opportunity to develop an expert opinion on the pole failures, given the discarded facilities, under the same conditions Peralta found when he examined the poles. Consequently, CPSD may discover Peralta's expert opinion regarding the pole failures and the bases for his opinion.

Therefore, **IT IS RULED** that:

1. CPSD's motion to compel the production of the storm registers is denied.
2. CPSD may discover Peralta's expert opinion regarding the pole failures in Malibu Canyon on October 21, 2007, and the basis for his opinion.

Dated March 24, 2011, at San Francisco, California.

/s/ JACQUELINE A. REED
Jacqueline A. Reed
Assistant Chief
Administrative Law Judge

/s/ JACQUELINE A. REED for
Timothy Kenney
Administrative Law Judge