

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the Gas Market Activities of Southern California Gas Company, San Diego Gas and Electric, Southwest Gas, Pacific Gas and Electric, and Southern California Edison and their impact on the Gas Price Spikes experienced at the California Border from March 2000 through May 2001.

Investigation 02-11-040
(Filed November 21, 2002)

Order Instituting Investigation whether San Diego Gas & Electric Company, Southern California Gas Company and their holding company, Sempra Energy, respondents, have complied with relevant statutes and Commission decisions, pertaining to respondents' holding company systems and affiliate activities.

Investigation 03-02-033
(Filed February 27, 2003)

**ADMINISTRATIVE LAW JUDGE'S RULING
REGARDING DISCOVERY OF COMMITTEE MINUTES**

Southern California Edison (SCE) seeks certain draft minutes from meetings of Southern California Gas Co.'s (SoCalGas) Gas Acquisition Committee. This committee made business decisions about the gas supplies to be acquired by the company. The final minutes for these meetings have already been produced. SoCalGas resists the production of the draft minutes arguing that they are protected by the attorney work product doctrine and the attorney-client privilege. Before these issues are addressed, I first discuss SoCalGas'

argument that Administrative Law Judge (ALJ) Thomas effectively decided this issue in her March 26, 2004, email ruling.

ALJ Thomas previously addressed privilege issues in the context of a “draft year 8 GCIM application,” “draft Harrigan testimony,” and “Hub Review-GCIM Year 8” documents. ALJ Thomas rightfully determined that both the work product doctrine and attorney-client privilege apply to these documents since they were draft legal documents being prepared for litigation purposes (apparently a Commission proceeding) and largely reflected the legal craftsmanship of SoCalGas’s attorney. The present dispute is distinguishable since the draft minutes of the Gas Acquisition Committee were not prepared for litigation and have independent business significance. ALJ Thomas’ earlier ruling does not extend to these facts.

Attorney Work Product Claim

SoCalGas’ attorney work product claim cannot be sustained on the present facts. The attorney work product doctrine is generally considered to be narrower than the attorney-client privilege, usually providing protection for materials being prepared for litigation. J.G. SNIDER & H.A. ELLINS, CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION § 3.02[2] (2004). The draft minutes were prepared for SoCalGas’ going business purposes—not litigation. While the California attorney work product rule has an absolute component (*i.e.*, Cal. Code Civ. Proc. § 2018(c), “[a]ny writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories . . .”), such absolute protection is unavailable in this instance. SoCalGas’ attorney had no role in the creation or writing of the draft minutes sought by SCE. SoCalGas has already provided the final minutes that may reflect some “writing” by the attorney.

Attorney-Client Privilege Claim

The claimant of the attorney-client privilege has the burden to establish all the elements of the privilege. *United States v. Munoz*, 233 F.3d 1117, 1128 (9th Cir. 2000). SoCalGas' claim of attorney-client privilege is not available for three reasons. First, the claim is too generalized. Rather than such a blanket claim for all twelve pages of the document, a particularized claim of privilege must be provided for each document or class or documents. Second, SoCalGas has failed to take sufficient measures to protect its claimed privilege. Through its responses to other discovery requests, some notes concerning these committee meetings have been provided to SCE, thus constituting a waiver of any privilege. Third, the draft and final minutes were prepared for an ongoing business purpose and not as a means to secure legal advice or services from SoCalGas's attorney.

This last reason is the most detrimental to SoCalGas' privilege claim. As Witkin has summarized, the

problem is whether documents which are not just communications to an attorney, but which has some independent character, e.g., contracts or reports, become privileged by *transmission (or "communication") to the attorney*. The answer is now established: if a document has such a independent existence as to be subject to compulsory disclosure while in the client's possession, it remains subject to disclosure despite its physical delivery to the attorney for use in preparing the case.

B.E. WITKIN, 2 CALIFORNIA EVIDENCE § 128 (4th ed. 2000) (emphasis in original).

Nothing has been offered indicating that these committee minutes were being prepared for other than normal ongoing business purposes, *i.e.*, providing a record of business transacted and decisions made. Certainly, if the committee discussions included exchanges between an attorney and committee members

concerning legal advice, these portions of the minutes could be validly protected as attorney-client communications; but the mere presence of an attorney at these meetings and the finalization of the minutes by the attorney do not transform routine corporate business into a privileged attorney-client communication. The apparent, usual purpose of the committee meetings was to make gas acquisition decisions, not to initiate a communication to corporate counsel for legal advice or services. Short of specific showings of attorney-client communications during meetings for legal advice or services, these draft minutes have independent significance, would be discoverable if in the possession of non-legal officers or employees, and cannot be protected by a blanket claim of attorney-client privilege. *See, e.g., Guy v. United Healthcare Corp.*, 154 F.R.D. 172 (D. OH 1993); *In re Adobe Systems Inc.*, 1991 U.S. Dist. LEXIS 15929 (Oct. 23, 1991); *In re Grand Jury Subpoenas*, 561 F. Supp. 1247 (E.D. N.Y. 1982).

This ruling was issued by e-mail to counsel on July 1, 2004; and was effective as of that date. SoCalGas was ordered to produce by noon, Friday, July 2, 2004, or at such time and place as ALJ TerKeurst may direct, the requested draft minutes for the meetings of the SoCalGas Gas Acquisition Committee.

IT IS SO RULED.

Dated July 7, 2004, at San Francisco, California.

/s/ JOHN E. THORSON

John Thorson
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Regarding Discovery of Committee Minutes on all parties of record in this proceeding or their attorneys of record.

Dated July 7, 2004, at San Francisco, California.

/s/ JANET V. ALVIAR

Janet V. Alviar

N O T I C E

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