BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Southern California Edison Company (U338E); Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should not Impose Fines and Sanctions for the September 30, 2013 Incident at a Huntington Beach Underground Vault	**I.15-11-006** (Filed November 5, 2015)

RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO THE PRELIMINARY SCOPING MEMO

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I. INTRODUCTION

Pursuant to Ordering Paragraph 8 of the California Public Utilities Commission's (Commission or CPUC) Order Instituting Investigation (OII) in the above-captioned matter, Southern California Edison Company (SCE or Company) hereby responds to the Preliminary Scoping Memo portion (Section IV) of the OII. At SCE's request and with the agreement of counsel for the Safety and Enforcement Division (SED), CPUC Executive Director Tim Sullivan approved an extension of time for this response to November 23, 2015. Executive Director Sullivan also extended the time for all parties to file replies to such responses to December 7, 2015.

This OII concerns an incident in which an employee of a subcontractor to SCE's contractor, PAR Electrical Contractors, Inc. (PAR), was electrocuted while working in an underground vault in Huntington Beach on September 30, 2013. Any fatality associated with SCE's facilities is of the utmost concern to the Company. Indeed, since the date of the incident,

SCE has significantly overhauled its safety procedures applied to contractors. The Contractor Safety Management Standard was published in March 2015. SCE advised SED of the development of this new standard and other safety procedures applicable to underground structures in a submission dated March 14, 2014. As this OII proceeds, it will be important to recognize that SCE's approach to safety oversight of its contractors has already changed since the date of this incident.

II. CATEGORIZATION OF PROCEEDING AND NEED FOR HEARING

SCE agrees with the categorization of this proceeding as adjudicatory and that a hearing will be required unless a settlement can be reached.

III. SCHEDULE

The Preliminary Scoping Memo does not state a date for the first pre-hearing conference (PHC). Because of schedule conflicts for its counsel, SCE respectfully requests that the PHC not be scheduled during the following time periods: December 20-27, 2015 and January 11-20, 2016.

IV. ISSUES TO BE INCLUDED

SCE has no objection to the OII including the following "areas and issues" as listed in Section A of the Preliminary Scoping Memo portion of the OII:

a. SCE's role in the incident;

b. SCE's compliance with law and with the Commission's general orders, regulations and rules[1];

[1] The Preliminary Scoping Memo references compliance with three statutes: sections 451, 314 and 582 of the Public Utilities Code. SCE does not object to an inquiry concerning SCE's compliance with Public Utilities Code section 451 insofar as that statute imposes on a utility the duty to furnish and maintain facilities as necessary to promote the safety of patrons, employees and the public. Sections 314 and 582 are apparently included because the Commission intends to determine if SCE can be compelled to release to SED the utility's Investigation Report of the incident and to provide a list of all documents SCE reviewed in the course of preparing that report. *See, e.g.*, OII at 1-2, 5 and 7. As explained below, SCE objects to the inclusion of this subject on the grounds that the law is clear that neither the Commission nor its staff are entitled to material covered by the attorney-client privilege or the work product doctrine.

c. Whether SCE's acts or omissions contributed to the cause of the incident;

d. Actions SCE has taken or should take to prevent a similar incident;

e. Whether any of those actions should be area-specific or system-wide; and

f. Whether fines or penalties should be imposed on SCE for any violations proven in the course of the OII.

Outside the Preliminary Scoping Memo (Section IV), the OII does contain some commentary on these "areas and issues" with which SCE does not agree. For example, the OII wishes to determine if SCE violated laws or regulations by "[u]nlawfully delegating its duty to maintain a safe system to a third party contractor." OII at 1. If the OII is suggesting that all utility use of contractors or subcontractors is an unlawful delegation, SCE disagrees. But SCE has no objection to consideration in this OII of the broader topic of how to improve safe operations by utility contractors and subcontractors.

V. SCE OBJECTS TO INCLUSION OF THE ISSUE OF DISCLOSURE OF PRIVILEGED MATERIAL IN THIS INVESTIGATION

A. The CPUC Has No Authority To Order Disclosure Of Privileged Material.

The Commission does not have authority to order the disclosure of materials and communications protected by the attorney-client privilege and work product doctrine. *Southern Cal. Gas Co. v. Pub. Utilities Com.*, 50 Cal. 3d 31, 38-39 (1990) ("*So. Cal. Gas*") ("Although the commission is granted broad powers under the Constitution, no provision exempts it from complying with the statutory attorney-client privilege. We conclude that the commission's powers pursuant to the state constitution in this context are subject to the statutory limitation of the attorney-client privilege."). The Public Utilities Code, the Commission's General Orders and its Rules of Practice and Procedure all conform to the *So. Cal. Gas* holding, explicitly

recognizing that the attorney-client privilege and work product doctrine apply in CPUC proceedings.

Section 316 (b)(5) applies the holding in *So. Cal. Gas* to accident investigations such as this one. It states that in any "major accident or reportable incident," the Commission staff shall have access to "[a]ny and all documents under the electrical corporation's control that are related to the incident *and are not subject to attorney-client privilege or attorney work product doctrine*" (emphasis added).[2]

Rule 18(a) of the Commission's General Order 128, covering exactly the situation at issue in the OII -- CPUC entitlement to utility documents during the course of an accident investigation concerning underground facilities -- provides in relevant part:

> Each owner or operator of supply lines shall establish procedures for the Investigation of major accidents and failures for the purpose of determining the causes and minimizing the possibility of recurrence. *Nothing in this rule is intended to extend, waive, or limit any claim of attorney client privilege and/or attorney work product privilege* (emphasis added).[3]

Similarly, Rule 10.1 of the Commission's Rules of Practice and Procedure makes clear that any party to a Commission proceeding "may obtain discovery from any other party regarding any matter" so long as the information sought is "*not privileged*" (emphasis added).

B. SCE's Confidential Investigation Report Is Protected From Disclosure By The Attorney-Client Privilege And Attorney Work-Product Doctrine.

SCE's Investigation Report is a classic attorney-client privileged communication. The criteria for determining whether the Investigation Report is an attorney-client privileged

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[2] Section 316 by its terms applies to overhead electric facilities, but there is no reason a different rule could or should apply to incidents involving underground facilities.

[3] General Order 95, dealing with above-ground electrical facilities, has a similar provision, acknowledging that in accident investigations, CPUC staff is entitled to all documents under utility control and related to the incident that are "not subject to the attorney-client privilege or the attorney work product doctrine." G.O. 95, Rule 19.

communication are set forth in *Chadbourne Inc. v. Super. Ct*. 60 Cal. 2d 723, 737-38 (1964). The attorney-client privilege is an absolute privilege, and disclosure of documents subject to the privilege may not be ordered, regardless of relevance, necessity, or circumstances peculiar to the case. *Costco Wholesale Corp. v. Superior Ct.*, 47 Cal. 4th 724, 732, 736.

Here, the Investigation Report sought by the SED is an absolutely privileged attorney-client communication. It was prepared by the SCE Claims Department at the request of SCE lawyers, and in anticipation of litigation. The authors of the Investigation Report were not independent witnesses of the incident. They were instructed by SCE counsel to open a confidential investigation of the incident, and the report has remained accessible only to SCE counsel and those acting at their direction. Under *Chadbourne*, these facts are sufficient to establish that the Investigation Report is an absolutely privileged attorney-client communication. *See Scripps Health v. Superior Court*, 109 Cal. App. 4th 529, 534-535 (2003) (confidential occurrence reports prepared by employees under risk management plan, pursuant to directive of legal department, are attorney-client privileged).

In addition to qualifying for absolute protection under the attorney-client privilege, the Investigation Report is protected by the attorney work-product doctrine because it was compiled at the direction of SCE counsel. Cal. Civ. Proc. Code §2018.030; *Order Instituting Rulemaking to Revise and Clarify Commission Regulations Relating to the Safety of Electric Utility and Communications Infrastructure Provider Facilities*, D.09-08-029, 2009 Cal. PUC LEXIS 433 at *37-39 (CPUC August 25, 2009) (recognizing the attorney work product doctrine in Commission proceedings). Disclosure of attorney work-product can be compelled only if failure to do so would "unfairly prejudice" the "party seeking discovery in preparing that party's claim or defense, or will result in an injustice." Cal. Civ. Proc. Code §2018.030(b). Since the

opinions, judgment and analysis contained in the Investigation Report are absolutely protected from disclosure (Cal. Civ. Proc. Code §2018.030(a)), the only portion of the Investigation Report where disclosure might conceivably be compelled would be *statements of fact*. But SED has not shown – and cannot show – resulting injustice because as Commission staff, it is free to ask SCE any factual questions it wishes. Indeed, SED has already posed dozens of data requests to which SCE has responded; SCE has produced to SED over a thousand pages of documents; and SED has interviewed SCE's Claims Department investigators regarding the facts of this incident.

SED first requested a copy of SCE's Investigation Report on July 8, 2015, as part of a broader request for information. SCE provided a written response to SED's request for information on July 20, 2015. In its written response, SCE advised the SED that it declined to produce the Investigation Report based on the attorney-client communication and attorney work-product privileges. Since that time, SCE has consistently maintained its position that the Investigation Report is privileged, and has not waived the privilege. Notably, the SED has never disputed SCE's position that the Investigation Report is privileged. In past accident investigations, SED and its predecessors have often requested copies of SCE's investigation reports and files, and SCE has consistently refused. What is different here is SED's insistence that this issue be made a part of the OII.

C. "A List Of All Documents SCE Has Reviewed In Its Investigation Of This Incident" Does Not Exist, And Any Versions Of Such A List Would Be Protected From Disclosure By The Attorney Work-Product Doctrine.

In the same July 8, 2015 request for information, SED also requested that SCE provide it with a "list of all documents SCE has reviewed in its investigation of this incident." In its response to SED on July 20, 2015, SCE stated that it does not maintain "a list of all documents [it] has reviewed in its investigation of th[e] incident." Moreover, SCE conducted its internal investigation of the incident at the direction of SCE legal counsel, and in anticipation of

litigation. Therefore, such a list, if one existed, would be protected from disclosure by the attorney work-product doctrine. *See* Cal. Civ. Proc. Code §2018.030(b). Such a list would represent the impressions, thoughts and judgments of those working at the direction of counsel and therefore be absolutely protected from disclosure. Cal. Civ. Proc. Code §2018.030(a). Furthermore, because SCE has not refused to provide SED with all non-privileged documents it has requested in relation to the incident, SED cannot successfully argue that it would be "unfairly prejudiced" unless such a list were provided.

VI. PRESERVING THESE PRIVILEGES DOES NOT INTERFERE WITH SED'S INVESTIGATORY RESPONSIBILITIES

The OII makes the claim that SCE is using "the guise of the attorney client privilege" and a "blanket assertion of the attorney client privilege" to hinder SED's investigation. OII at 7. These statements are incorrect. SCE has not refused to provide all the information and documents requested by SED except for the Investigation Report and SED's request for a list of all documents reviewed. As shown above, the attorney-client privilege and work product doctrine clearly apply to these materials. In addition, SED can inquire into corrective actions taken by SCE after the incident. By asserting specific objections to the production of privileged material while allowing Commission access to other discoverable information, SCE is clearly not making a "blanket assertion" of privilege.

Furthermore, given SED's broad investigative powers, the claim of "hindering" its investigation is not credible. It is instructive to note that the U.S. Department of Justice, charged with investigating and prosecuting violations of federal criminal law, has told U.S. Attorneys that they should not ask for privilege waivers from enforcement targets because that information is not essential for fact-finding or prosecution:

> The Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized

> components of the American legal system. What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver [sic] of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review. U.S. Attorney Manual 9-28.710 (Aug. 2008).

If the U.S. Justice Department does not need access to privileged documents to do its job, then neither does SED.

VII. CONCLUSION

For the reasons stated above, SCE has no objections to the Preliminary Scoping Memo as set forth in the OII except that the Final Scoping Memo issued in this proceeding should not include any inquiry into SCE's refusal to provide SED access to material covered by the attorney-client privilege or the work product doctrine.

Dated: November 23, 2015

Respectfully submitted,

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