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ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA GAS COMPANY to revise its rate under the Consolidated Adjustment Mechanism.	)))))	Application 86-09-030 (Filed September 19, 1986)

O P I N I O N

Summary

In this decision, we determine that Southern California Gas Company's (SoCal) request for recovery of a payment it made to terminate a contract for purchases of gas created an implied waiver of the lawyer-client privilege. We conclude that the legal analyses underlying the decision to make the payment are so central to SoCal's application that fundamental fairness requires the disclosure of information that would otherwise be privileged. Because of the importance and sensitivity of this issue, we discuss in detail the arguments presented by the parties and our reaction to them.

Background

On June 8, 1987, Southern California Gas Company (SoCal) moved for the Commission to review a ruling of the Administrative Law Judge (ALJ) assigned to this proceeding. The ruling concerned application of the lawyer-client and attorney's work product privileges in proceedings before the Commission. SoCal's motion was the latest in a series of filings on this topic.

The events that gave rise to these filings grew out of a contract that SoCal entered into with Getty Synthetic Fuels Energy, Inc. (Getty), governing the terms of SoCal's purchases of gas from Getty's facilities at a Monterey Park landfill. The terms of the contract would have required SoCal to pay extremely high prices after 1983, so SoCal eventually negotiated a termination of the

contract in 1986. As part of the termination agreement, SoCal paid Getty a $7.4 million lump sum payment.

SoCal sought recovery in rates of the $7.4 million in the application that initiated this proceeding. As part of its discovery in preparation for hearings, Public Staff Division (PSD) submitted a data request asking for "any legal analyses, prepared prior to execution of the settlement agreement, which discuss, refer or relate to early termination of the agreement of SoCal's liability to [Getty] in the event of breach or termination of the contract by SoCal." SoCal refused to answer PSD's request on grounds of the lawyer-client and attorney's work product privilege.

After some exchanges of correspondence, PSD on April 2, 1987, filed a motion to compel the production of the requested materials. SoCal filed its response on April 10 and resisted PSD's motion. PSD replied to SoCal's response on April 15.

On May 22, 1987, the ALJ issued a ruling directing SoCal to submit the disputed documents for in camera inspection. SoCal requested a stay of the ALJ's ruling on May 29, and the ALJ issued a ruling granting the stay on June 3 to the extent that SoCal's claims were based on the lawyer-client privilege. Since in camera inspection is permissible for documents that are protected only by the attorney's work product privilege, the ruling instructed SoCal to comply with the earlier ruling and produce for in camera inspection any documents not claimed to be lawyer-client communications. SoCal subsequently submitted one of the 15 documents for in camera inspection, and partial disclosure was ordered for that document.

On June 8, SoCal filed a motion for review by the Commission of the ALJ's ruling. PSD filed its opposition to this motion on August 3. Oral argument of SoCal's motion was held on August 10, and arguments were presented by SoCal, PSD, and Toward Utility Rate Normalization (TURN).

In the context of this case, the issue for our resolution is whether a utility may lawfully be directed, against its will, to disclose documents for in camera inspection when the utility has claimed the lawyer-client privilege protects those documents. This issue is now ripe for our decision.

Although SoCal has also appealed the portion of the ALJ's ruling that discussed the attorney's work product privilege, we conclude that the work product privilege is not at issue at this time. The ALJ's ruling directed SoCal to produce documents claimed to be protected by the work product privilege for in camera inspection. Even if the documents are privileged work product, as SoCal asserts, the in camera inspection directed by the order is appropriate. (Fellows v Superior Court (1980) 108 Cal. App. 3d 55; see, American Mutual Liability Insurance Co. v Superior Court (1974) 38 Cal. App. 3d 579.) Thus, the claimed work product privilege does not raise the troublesome questions that the lawyer-client privilege does, and the remainder of this decision will address only the lawyer-client privilege.

The Privilege

In California, the lawyer client privilege has been codified as Evidence Code Section 954. As pertinent to this case, Section 954 states: "The client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." One of the crucial terms of this privilege, the "confidential communication between client and lawyer," is defined in Evidence Code Section 952 to mean:

> "information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the

> purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

Another pertinent provision is Evidence Code Section 915(a), which states, "the presiding officer may not require disclosure of information claimed to be privileged...in order to rule on the claim of privilege."

SoCal's Arguments

SoCal, in its various filings, advances several arguments in support of its position.

1. The Privilege Applies in PUC Proceedings

First, SoCal argues that the privilege clearly applies in proceedings before the Commission. SoCal believes the Legislature's intent is clearly stated in Evidence Code Section 910:

> "Except as otherwise provided by statute, the provisions of this division [including Evidence Code Section 954] apply in all proceedings. The provisions of any statute making rules of evidence inapplicable in particular proceedings, or limiting the applicability of rules of evidence in particular proceedings, do not make this division inapplicable to such proceedings."

SoCal continues this argument by noting the definition of "proceeding" in Evidence Code Section 901:

> "'Proceeding' means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given."

In SoCal's opinion, these statutes make it clear that the lawyer-client privilege applies in Commission proceedings. Even though Public Utilities Code Section 1701 states that "the technical rules of evidence need not be applied" in PUC

proceedings, the second sentence of Evidence Code Section 910 requires application of the lawyer-client privilege. Section 910 requires a specific statutory exception to render the lawyer-client privilege inapplicable, according to SoCal, and no such provision exists in the Public Utilities Code.

SoCal completes its argument by pointing out that it is settled law that this privilege covers a corporate client as fully as an individual.

2. The Privilege Serves an Important Purpose

SoCal believes that the strength that the lawyer-client privilege has maintained over the years reflects a recognition that it serves a very important purpose. SoCal thinks that the interests of the utility's ratepayers are best served when the utility gets full, fair, and frank advice from its lawyers. Any erosion of the lawyer-client privilege for utilities will undercut the ability of utilities to receive such frank advice, in SoCal's opinion. The inevitable tendency will be for utilities to obtain legal advice through oral communications, with a consequent loss of the precision that is more easily expressed in writing and which is often crucial in legal communications. Moreover, SoCal argues, in the absence of a strong privilege, any written legal advice will tend to be self-serving and to be written with an eye to how it will later be viewed by the Commission and parties like PSD.

3. The Privilege Applies Even to Relevant Communications

SoCal's opposition to PSD's request for the privileged documents is not based on a contention that the materials are irrelevant to this proceeding. But even if the materials are extremely relevant, which SoCal does not presently concede, the privilege applies. The protections established by the privilege are not outweighed by considerations of relevance, according to SoCal. In support of its position, SoCal quotes from a Law Revision Commission report:

> "[Privileges] are intended to provide protection in circumstances where the courts or the

> Legislature have [sic] determined from time to time that it is so important to keep information confidential that the needs of justice may be sacrificed in a given case to protect that needed secrecy." (6 Calif. Law Revision Comm'n 309 (1964).)

Thus, SoCal apparently urges the Commission not to consider the need for the requested materials in its deliberation on this issue.

4. SoCal Has Not Waived the Privilege

It is not disputed that a party may waive its privilege by taking certain actions. SoCal asserts that it has done nothing to waive its privilege.

The statutory provisions on waiver are set forth in Evidence Code Section 912:

> "Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege)...is waived with respect to a communication protected by such a privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure....A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege),...when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer...was consulted, is not a waiver of the privilege."

SoCal points out that it has not revealed a significant part of the communication and thus has not waived the privilege. In its application and prepared testimony on the issue of the termination payment, SoCal has made no mention of legal advice being rendered, of communications with its lawyers, or of the contents of the legal memoranda requested by PSD.

SoCal reacts to PSD's assertion that the requested information is essential to SoCal's case by repeating that relevance or necessity is not a ground for ignoring the privilege, as discussed above. SoCal also cites several cases for the proposition that the mere fact that a party has raised an issue to which the privileged communication is relevant does not amount to a waiver of the privilege.

5. **In Camera Inspection Is Not Permitted When the Privilege Is Claimed**

SoCal relies on a portion of Evidence Code Section 915:

> "[T]he presiding officer may not require disclosure of information claimed to be privileged...in order to rule on the claim of privilege."

SoCal also quotes cases which have held that the presiding officer may not review materials in camera to separate privileged from unprivileged materials. SoCal also argues that none of the several statutory exceptions to this general rule apply to the circumstances of this case.

6. **No Inferences May Be Drawn from the Assertion of the Privilege**

SoCal argues that the Commission may not lawfully draw any inferences about the content of the communications from SoCal's assertion of the privilege and its refusal to produce the requested materials, no matter how much the assertion of the privilege may inconvenience the Commission. In short, the Commission should not infer that SoCal is asserting the privilege because it has something to hide or because the requested materials contain information damaging to SoCal's positions in this case. SoCal cites Evidence Code Section 913:

> "If in the instant proceeding or on a prior occasion a privilege is or was exercised...to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no

> presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom...as to any matter at issue in the proceeding."

This rule of no inference, SoCal argues, is entirely consistent with the strong protections that have been incorporated in the lawyer-client privilege, which in turn reflect the strong policy supporting full and frank communications between the lawyer and the client.

7. The PUC Can Resolve This Case Without Deciding This Issue

Finally, SoCal suggests that it is unnecessary for the Commission to decide the important question of the application of the lawyer-client privilege in order to resolve this particular case. SoCal is willing to place its contract with Getty in evidence, and it will supply the economic analyses it relied on in arriving at the decision to make the termination payment. This evidence will be supported by appropriate witnesses, and SoCal believes that this evidence will be sufficient to meet its burden of proving that the termination payment was reasonable and prudent. If PSD has a legal theory that the contract was not binding, and thus the payment was unnecessary, it may do its own research and argue its point in its brief. SoCal argues that information on the state of mind of its managers at the time they made the decision to make the termination payment is simply not relevant to this case nor necessary for SoCal to prove its case.

SoCal acknowledges that it bears the risk that the Commission may find that it has failed to meet its burden of proof under its suggested approach, and the Commission may accordingly not allow the $7.4 million payment to be recovered in rates. SoCal believes that it should have the choice of how it proceeds to present its case and meet its burden. Since SoCal has not placed the lawyer-client communications in issue in its request for recovery of the $7.4 million, PSD should not be allowed to

transform the way that SoCal has chosen to frame the issues, especially in light of the privileges protecting the requested materials.

PSD's Position

In its various filings, PSD justifies its discovery request from several perspectives.

1. The Commission's Constitutional Authority

First, PSD points out that the California Constitution grants the Commission broad powers to regulate public utilities. Among these powers is the power to examine the records of all public utilities subject to the Commission's jurisdiction, as stated in Article XII, Section 6. To accept SoCal's arguments, PSD asserts, one must accept that the Evidence Code somehow limits the constitutional authority of the Commission. PSD views it a a basic principle of law that the Constitution must prevail over conflicting legislative enactments.

Second, PSD points out that the Commission has special status as a constitutionally created agency, and that part of the motivation for its constitutional origin was a desire to remove it from the control of the Legislature. Article XII, Section 5, for example, grants the Legislature authority to grant additional authority and jurisdiction to the Commission, consistent with the authority provided in the constitution. PSD reads this section to indicate that the Legislature has no authority to limit the Commission's authority and jurisdiction or otherwise to constrain the Commission in the exercise of its constitutional authority.

Therefore, PSD argues, even if we accept SoCal's argument that the Legislature intended when it enacted the Evidence Code to restrict the Commission's review of the utilities' records, it could not have lawfully done so, since such a restriction would have conflicted with the Constitution. PSD finds support for its position in a formal opinion of the Attorney General that held that a statute that imposed a waiting period on appointments to the

Commission "may not infringe upon the Governor's constitutionally granted power to make immediate appointments when vacancies occur in the [Commission]." (59 Op. Att'y Gen. 273, 276 (1976).)

PSD concludes that legislative statutes cannot limit the Commission's constitutional powers to examine the utilities' records, even if we assume that the Legislature intended such a limitation.

2. The Legislature Has Confirmed the Commission's Broad Discovery Powers

PSD also argues that the broad discovery provisions that the Legislature has enacted as part of the Public Utilities Code create a statutory exception to the lawyer-client privilege. Evidence Code Section 910 applies the privilege "except as otherwise provided by statute." PSD finds several sources for its asserted statutory exception.

Public Utilities Code Section 314(a) provides:

> "The commission, each commissioner, and each officer and person employed by the commission may, at any time, inspect the accounts, books, papers, and documents of any public utility."

Section 314(b) extends this right of inspection to records of the utility's affiliates, subsidiaries, and parent corporations with regard to transactions with the utility. Section 313 authorizes the Commission to require the utility to produce records it maintains outside of California. Furthermore, Public Utilities Code Section 582 states:

> "Whenever required by the commission, every public utility shall deliver to the commission copies of any or all maps, profiles, contracts, agreements, franchises, reports, books, accounts, papers, and records in its possession or in any way relating to its property or affecting its business."

PSD believes that the extensive powers given to the Commission under these sections amounts to a statutory exception to the privilege of the Evidence Code.

PSD counters SoCal's position that such exceptions require an explicit reference to the particular privilege in question by pointing out that several provisions of the Labor Code act as statutory exceptions to the physician-patient privilege (Evidence Code Section 994), even though the Labor Code sections contain no specific reference to the privilege.

Thus, according to PSD, even if we accept SoCal's contention that the Evidence Code somehow limits the constitutional powers of the Commission, there is ample evidence that the Legislature has empowered the Commission to require the production of documents that would otherwise be protected by the lawyer-client privilege.

3. The Law Places Special Burdens on Monopoly Utilities

PSD also notes that monopoly utilities' rights are, by law, not coextensive with the rights of corporations in competitive industries or of individual citizens. In exchange for the economic monopoly the government grants public utilities, the utilities must accept certain special burdens.

PSD cites several United States Supreme Court decisions which establish that closely regulated industries may lawfully be subject to warrantless searches. For other businesses and individuals, such warrantless searches would clearly violate the 4th Amendment. The Court has applied a different standard to closely regulated businesses, however, because it has concluded that such businesses have no reasonable expectation of privacy. The Court has stated that "the businessman in a regulated industry in effect consents to the restrictions placed upon him." (Marshall v Barlow's, Inc. (1977) 436 U.S. 307, 313.)

PSD finds an analogous restriction reflected in the broad powers the Commission possesses to inspect the records and documents of public utilities. The economic benefits of monopoly status are accompanied by an "obligation to provide the Commission with all of the information in its possession which affects its business whether or not that information happens to involve the communication flow between the utility and its attorneys," according to PSD.

4. SoCal Has Waived the Privilege

PSD's argument that SoCal has waived the privilege has two components. First, PSD argues that SoCal has expressly waived the privilege by disclosing a significant portion of the communication. Second, PSD believes that by requesting recovery in rates of the $7.4 million termination payment, SoCal has impliedly waived the privilege.

PSD finds the express waiver occurred during a meeting between SoCal and some members of PSD. During this meeting of August 23, 1984, SoCal discussed the possibility of negotiating with Getty for a one-time buyout of the Monterey Park landfill contract. In response to a question from one of the PSD participants in the meeting about why SoCal could not just walk away from the contract, one of SoCal's representatives explained that "our attorneys had gone over the contract several times. There is no way we could legally cancel the contract and we would be subject to a law suit," according to SoCal's notes of the meeting.

PSD observes that Evidence Code Section 912 and several supporting cases state that the lawyer-client privilege is waived when the holder of the privilege has disclosed "a significant portion of the communication." In this instance, PSD contends that the disclosure of the fact that SoCal's attorneys had reviewed the document with an eye to avoiding the termination payment and had concluded that SoCal could not abandon the contract without

breaching it and being liable for damages is a disclosure of a significant portion of the communications that PSD had requested.

PSD finds an implied waiver in the fact that SoCal has placed the validity of the contract at issue by requesting recovery in rates in its application to the Commission. PSD points out that the courts have concluded that fundamental fairness requires a finding of an implied waiver of the privilege in a variety of circumstances. Typically waiver is found when the assertion of the privilege is inconsistent with the purpose of a party's position in the case. For example, when a plaintiff was charged with arson after suing his insurance company under a fire policy, the court concluded that his right against self-incrimination had been waived because of the nature of his suit. In another case, the court concluded that the lawyer-client privilege is waived when a defendant in an antitrust action raises a defense of reliance on advice of counsel.

In the context of this case, PSD believes that waiver has occurred because SoCal's request for recovery of the termination payment is premised on the assertion that the settlement was reasonable which, in turn, is premised on the assertion that the underlying contract was valid and binding. When SoCal filed its application, it knew that the Commission would grant the request only if it was satisfied that the termination payment was prudent. But the payment could be found prudent only if SoCal demonstrated that the contract was binding: If SoCal could have lawfully escaped from this onerous contract without making a payment, then the payment could not be found reasonable.

According to PSD, SoCal also knew that the Commission would apply its traditional test of prudence: Was the action prudent according to what the utility knew or should have known at the time that the action was taken? PSD believes that the information that the utility should have considered when it decided to make the payment obviously included a legal analysis of SoCal's

options under the contract. According to PSD, deciding the prudence of the termination payment required examination of four questions. First, did SoCal undertake a legal analysis of its options under the contract? Second, was that analysis competent and complete? Third, was the analysis considered by management when it made the decision? And fourth, did management act prudently in accordance with that the information conveyed in that analysis?

PSD believes that these questions are so central to SoCal's request for recovery of the termination payment that fundamental fairness requires a conclusion that SoCal has waived its lawyer-client privilege with regard to the communications concerning the termination payment and the supporting legal analyses.

TURN's Position

TURN's position was presented at the oral argument of August 10.

According to TURN, the assertion that SoCal's contract with Getty was valid and binding is an essential element of SoCal's request for recovery of the termination payment. The issue of SoCal's legal obligations is thus inherent in SoCal's claim. When the issue is framed this way, it is obvious to TURN that SoCal must either provide the background materials for all elements of its request, including the legal elements, or withdraw its claim for recovery of the termination payment. In TURN's view, the choice is SoCal's, but SoCal cannot in fairness request recovery of the termination payment yet refuse to provide relevant background materials. TURN believes that SoCal's current attempt to have the best of both worlds amounts to a failure of proof.

Discussion

This issue presents a conflict between two strong and important interests. On the one hand is the lawyer-client privilege, one of the most powerful and rigidly enforced privileges

recognized by law. On the other hand is the public's interest in efficient, effective, and fair regulation of California's public utilities, an activity that touches the daily lives of nearly all California residents and businesses. The strength of this interest is demonstrated in the constitutional origin of this agency and in the broad powers the Legislature has granted the Commission in the areas of its jurisdiction.

The acknowledged powers of the Commission are reflected in the surprising fact that, as far as our research reveals, the question of the application of the lawyer-client privilege in the Commission's proceedings has never before been posed as directly as it has in this case. For decades, this Commission and its predecessor have functioned with the consistent, if sometimes reluctant, cooperation of the regulated entities. Perhaps because of the undisputed powers of the Commission, no utility has previously asserted the lawyer-client privilege as plainly and persistently as SoCal has in this case.

It is clear to us that recognizing the lawyer-client privilege to the extent urged by SoCal would slow down our proceedings and make the task of gathering information, which is crucial to our analyses, much more difficult. Many of our cases have some bearing on legal issues, and during both discovery and hearing many otherwise privileged documents are typically freely disclosed. Recognition of the full privilege would undoubtedly slow the pace of many of our proceedings and would bring several of our most pressing and important cases to a standstill.

Nevertheless, if SoCal's position is correct, it is our duty to uphold the privilege. Administrative inconvenience is not a proper ground for constraining the application of such a strong privilege. If we are to deny SoCal's motion, we must solidly base our ruling on logic and law.

With these responsibilities and considerations in mind, we will carefully examine the points raised by the parties.

1. The Constitution v the Evidence Code

SoCal's basic position is that the Commission's proceedings are governed by the Legislature's enactment of the lawyer-client privilege, Evidence Code Section 954. One of PSD's responses is that the powers granted to the Commission by the Constitution cannot be limited by legislative enactments. PSD believes that the constitutional power to examine records applies in this case and cannot be limited by the lawyer-client privilege.

The general principle PSD asserts is beyond dispute. The Constitution is the organic law of California, and the enactments of the Legislature, itself a creation of the Constitution, cannot restrict or modify constitutional provisions unless the power to make such restrictions or modifications is authorized by the Constitution. However, the specific proposition PSD advances requires a closer consideration of both PSD's arguments and the pertinent constitutional provisions.

The Commission is among a mere handful of administrative agencies created or empowered by the Constitution. Even among these few constitutional agencies, the extent of the constitutional enumeration of the Commission's powers and authority is extraordinary. Resolution of the issue raised by PSD thus requires scrutiny of the Constitution's intended relationship between the Commission and the Legislature.

PSD's position is grounded in Article XII, Section 6, which authorizes the Commission to "fix rates, establish rules examine records,...take testimony...for all public utilities subject to its jurisdiction." This section acknowledges no role for the Legislature in the Commission's affairs, but other sections in Article XII define the Legislature's powers with regard to the Commission. Section 5, for example, states:

> "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission."

PSD argues that this section gives the Legislature the power only to expand and not to contract or limit the Commission's jurisdiction as established in Article XII. Thus, PSD sees no inconsistency between this section and Section 6.

A section of Article XII not addressed by PSD or any other party is Section 2: "Subject to statute and due process, the commission may establish its own procedures." This provision is illuminating because it makes clear that, at least in the area of procedure, the Constitution authorizes the Legislature to enact statutes that limit the Commission's powers, contrary to PSD's general position. Section 2 provides further illumination to this issue when we examine the scope of the statutory authority created by this sections and consider whether "procedures," as used in Section 2, includes evidentiary privileges.

In considering the intended scope of the reference to statute in Section 2, we note that Section 2 also subjects the Commission's proceedings to the requirements of due process. One of the primary purposes served by the due process provisions of the United States and California Constitutions is the guarantee of fundamental fairness and even-handed procedures before courts and, by extension, before administrative agencies. Because of the reference to due process in Section 2, we feel very confident that, at a minimum, the Constitution authorizes the Legislature to enact provisions that assure fundamental fairness and due process in proceedings before the Commission. We are also convinced that the establishment of evidentiary privileges falls within the general category of procedures and thus within the area where, according to the Constitution, the ability of the Commission to act is limited by legislative enactments.

We conclude that the Commission's ability to establish its own procedures is limited under Section 2 by both constitutional requirements of due process and legislation aimed at assuring fundamental fairness. Thus, contrary to PSD's position,

the Constitution itself has given the Legislature authority to enact statues that may limit the Commission's power to set its own procedures.

It is not immediately obvious how to reconcile the limitations on the Commission's authority contained in Section 2 with the unfettered authority granted in Section 6, the provision relied on by PSD. For the purposes of this case, however, we find it unnecessary completely to resolve any apparent conflict. It is enough for our present purposes to say that we find insufficient support in the constitutional provisions of Article XII to conclude that our proceedings are exempt from the lawyer-client privilege as enacted by the Legislature.

2. The Public Utilities Code v the Evidence Code

It is beyond dispute that the Legislature, as creator of the statutory lawyer-client privilege, may also provide for limits or exceptions to that privilege. Exceptions may certainly be established by an explicit statutory reference, and the Evidence Code contains many such explicit exceptions (e.g., Evidence Code Sections 956-962). What is less clear, and what gives rise to the issue we discuss in this section, is whether an exception may be found in statutes that do not specifically refer to Evidence Code Section 954. PSD says it may, SoCal says it may not.

Evidence Code Section 954 begins, "Subject to Section 912 and except as provided by this article...." Section 912 concerns waiver, which will be discussed in a later portion of this decision. The remaining language, "except as provided by this article," refers to Article 3 of Division 8 of the Evidence Code and would seem to limit any exceptions to the explicit provisions of Sections 956-962. However, Division 8, which contains the Evidence Code's provisions on privileges, also includes Section 910, which governs the applicability of Division 8. That section states:

> "Except as otherwise provided by statute, the provisions of this division apply in all

> proceedings. The provisions of any statute making rules of evidence inapplicable in particular proceedings or limiting the applicability of rules of evidence in particular proceedings, do not make this division inapplicable to such proceedings."

Thus, Section 910 seems to allow for statutory exceptions outside of those contained in Article 3 of the Evidence Code. PSD relies on this section in arguing that certain provisions of the Public Utilities Code create exceptions to the lawyer-client privilege.

At the outset we note that we read the second sentence of Section 910 to make clear that no exception to the privilege is created by Public Utilities Code Section 1701, which states that "the technical rules of evidence need not be applied" in the Commission's proceedings.

PSD finds its asserted exception in Public Utilities Code Sections 313 and 314, which empowers the Commission and its employees to inspect "the accounts, books, papers, and documents of any public utility," even if these records are maintained outside of California. PSD also refers to Section 582, which requires utilities to provide contracts, agreements, papers, and records "whenever required by the Commission."

PSD supports its finding of an exception in these sections by pointing out that several sections of the Labor Code have been held to be exceptions to the statutory physician-patient privilege even though they contain no specific reference to the Evidence Code.

The Labor Code sections PSD refers to seem to refute SoCal's contention that a specific reference to the Evidence Code's provisions is needed to create an exception to the statutory privileges. From this conclusion, it follows that our task is to determine whether any of the references in the Public Utilities Code are sufficient to support an exception to Evidence Code Section 954. With this we enter a grey, uncharted wilderness of

statutory interpretation, where courts have yet to tread. Little case law exists to guide us in our explorations, so we must proceed by referring to the few recognizable landmarks that we can discern. These landmarks primarily take the form of other statutes.

One of the Labor Code sections referred to by PSD, Section 4055, requires a physician who makes certain examinations related to a workers' compensation proceeding to testify about that examination, even though parts of the examination would otherwise be protected by the physician-patient privilege (Evidence Code Section 994). Labor Code Section 6409 (the amended and renumbered version of one of PSD's references) requires physicians who treat an occupational injury or illness to prepare a report that is eventually filed with the Department of Industrial Relations. Under Labor Code Section 6412, these physicians' reports are admissible as evidence in proceedings before the Workers' Compensation Appeals Board, even though the reports may contain materials that otherwise would be privileged.

PSD argues that these Labor Code provisions "are examples of situations where the need of a state agency for information outweighs the public policy which is served by protecting the confidentiality of certain information," and to some extent we agree. However, it appears to us that these statutes may also be viewed as codifications of existing law on waiver, since they apply in cases where the injured employee is likely to place the extent of his injuries at issue. To the extent that these statutes are convenient reaffirmations of existing law, they provide little guidance for our deliberations in this case. However, these sections demonstrate that the Legislature can draft and has drafted statutes that have the effect of overruling a privilege without specific reference to the Evidence Code.

Another pertinent provision is Public Utilities Code Section 463(b), which states in part:

> "Whenever an electrical or gas corporation fails to prepare of maintain records sufficient to

> enable the commission to completely evaluate any relevant or potentially relevant issue related to the reasonableness and prudence of any expense relating to the planning, construction, or operation of the corporation's plant, the commission shall disallow that expense for purposes of establishing rates for the corporation."

This section has several, somewhat conflicting, implications. First, the Legislature has recognized the necessity that the utility should bear the burden of supplying documents sufficient to allow us to be able to evaluate any relevant or potentially relevant issue relating to the prudence and reasonableness of expenditures for the construction and operation of the utility's plant. Second, there is no logical reason to lessen that burden for fuel-related expenses, such as the ones involved in this case. Third, the Legislature has nevertheless not enacted a similar statute for fuel-related expenses. Fourth, we are uncertain whether even a relatively specific statute such as Section 463(b) is sufficiently clear to justify finding an exemption from the statutory privileges.

Our review of these relevant statutes leaves us with two lingering questions. First, what significance should be read into the fact that the Legislature has failed to enact a specific exemption from the lawyer-client privilege for proceedings before the Commission? We are very reluctant to read much significance into this omission without some evidence that enacting such an exemption had ever been considered by the Legislature. We are equally reluctant to ignore this omission and to presume that we are free to read such an exemption into more broadly worded statutes.

Second, how are we to determine whether a statute that makes no reference to the Evidence Code is sufficiently definite to justify finding an exemption from the privileges of the Evidence Code? We are confident that PSD has accurately concluded that the

cited Labor Code sections create an exemption to the physician-patient privilege. We become much less certain that even a statute as definite as Public Utilities Code Section 463(b) justifies an exemption, and the even more general language of Public Utilities Code Sections 314 and 582 increases our uncertainty.

In short, we remain unconvinced that the references to conflicting statutes and exemptions favor either SoCal's or PSD's position on this issue. It is possible that other parties in future proceedings may persuade us otherwise, but because of the presently dispelled uncertainty on this issue, we will decline to base our decision on a finding that an implied statutory exemption from the lawyer-client privilege exists in proceedings before the Commission.

3. The Policy Underlying the Lawyer-Client Privilege v the Policy Behind Public Utility Regulation

PSD has argued that this case presents an instance when the admittedly strong public policy underlying the lawyer-client privilege must yield to an even stronger public policy, which is expressed in the extraordinary powers that the Constitution, the Legislature, and the courts have given the Commission over the operations of regulated utilities.

There is no question that the lawyer-client privilege is one of the strongest privileges in the Evidence Code and one that has consistently been upheld against many competing interests. One state appellate justice went so far as to describe the privilege as "sacred" (People v Kor (1954) 129 Cal. App. 2d 436 at 447). The California Supreme Court has been only slightly less enthusiastic about the privilege:

> "While it is perhaps somewhat of a hyperpole to refer to the attorney-client privilege as

> 'sacred,' it is clearly one which our judicial system has carefully safeguarded with only a few specific exceptions." (Mitchell v Superior Court (1984) 37 Cal. 3d 591, 599-600.)

The strength of this privilege reflects the importance of the policies it promotes. Open discussions between the client and attorney on the facts and tactics surrounding a legal matter are viewed as crucial to effective advocacy of the client's interest. Thus, the privilege promotes the general public purpose of assuring that the judicial process gives fair and full consideration to the client's claims. The privilege also promotes the efficient and effective administration of justice.

Nevertheless, exceptions to the privilege have been created by the Legislature and by the courts. Presumably, these exceptions occur when other considerations of public policy, such as fairness, are judged to outweigh the interests protected by the privilege. The question raised by PSD's argument is whether the public's interest in the regulation of monopoly utilities can, at least at times, outweigh the policies promoted by the lawyer-client privilege.

The Commission has clearly been given extraordinary power over public utilities by the Constitution and the Legislature. Public Utilities Code Section 701 is perhaps the broadest statement of these powers:

> "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

PSD argues that this and other sections of the Public Utilities Code reflect a public policy that, when applied to the facts in this case, compel a conclusion that the Commission's need for information on topics within its jurisdiction overwhelms the privileges that might otherwise apply. PSD finds support for this

We are reluctant to rely on these cases, however, for several reasons. First, the cases PSD cites refer to the liquor and firearms industries, and the decisions contain some indications that the Court distinguished these industries on the basis of their long history of federal control or the enormous health and safety problems they pose. (Donovan v Dewey (1980) 452 U.S. 594, 606.) Second, the cases do not refer directly to evidentiary privileges. Third, although the U.S. Supreme Court has concluded that certain rights, such as the right to privacy and the right to remain silent, do not apply to corporations, recent cases involving public utilities' First Amendment rights have found that the special status of public utilities does not limit some of their other rights, such as the right to free speech. (E.g., Pacific Gas & Electric Co. v Public Utilities Commission (1986) ___ U.S. ___, 89 L. Ed. 2d 1; Consolidated Edison Co. v Public Service Commission (1980) 447 U.S. 530.) Fourth, courts have held that the lawyer-client privilege applies fully to corporations in general. We have found no case that suggests that the special status of public utilities limits their right to assert this privilege before courts or other administrative agencies.

Once again, we have found little guidance on how to resolve the apparent conflict between the public policies underlying the privilege and those supporting public utility regulation. Both are strong principles serving important public purposes. Again we conclude that we should not base our decision on considerations of public policy when the decision would necessarily be clouded by uncertainty.

whether he intended that result or not." (143 Cal. App. 3d at 445.) On the facts of that case, the court found that the disclosures in question were preliminary, foundational, and quite vague.

After considering this precedent, we believe that SoCal's disclosure of the fact of its attorneys' review of the Getty agreement and the conclusions arrived at by its attorneys to members of PSD is an express waiver of the lawyer-client privilege. The disclosure was much broader and substantive than the communication under review in Travelers. Here, the client revealed the subject matter of its discussion with counsel, the purpose of that consultation, and the conclusion that it could not escape its contract obligations without facing a suit for breach of contract. Under Wigmore's test, our sense of fairness compels us to find a waiver. Although the specific facts of this case establish an express waiver, they are not the sole basis of this ruling. The parties should be guided by our discussion of implied waiver of the attorney client privilege as well.

5. Implied Waiver

PSD has also urged that the nature of SoCal's application and its request to recover the settlement payment in rates is an implied waiver of the privilege. We also perceive TURN's arguments to be grounded in this notion.

Courts have found an implied waiver, not based in statute, in several California cases when fundamental fairness requires disclosure of otherwise privileged information because a plaintiff has placed in issue a communication which goes to the heart of the claim in controversy. (See, Mitchell v Superior

Court, supra, at 893.) To determine if an implied waiver applies in this case, then, we must consider whether SoCal, in requesting recovery in rates of the $7.4 million termination payment, has placed in issue its attorneys' communications on the validity of the contract with Getty and whether those communications go to the heart of SoCal's application. The case law on implied waiver is discussed extensively in Mitchell, the leading California Supreme Court decision on this topic, and consideration of several of these cases is helpful in resolving this issue. Our discussion closely follows the Supreme Court's analysis.

Several cases support PSD's position that an implied waiver should be found in this case. Two of these cases stand for the logical proposition that waiver may be implied when the otherwise privileged communication is an obvious and direct part of the claim. For example, when an accountant is sued for negligent tax advice, the privilege protecting tax returns for relevant years is deemed waived (Miller v Superior Court (1980) 111 Cal. App. 3d 390). When a plaintiff claims emotional distress, waiver of the psychotherapist-patient privilege (Evidence Code Section 1014) has been recognized by statute (Evidence Code Section 1016), so that finding an implied waiver is not necessary (In re Lifschutz (1970) 2 Cal. 3d 415).

A more subtle case is Fremont Indemnity Co. v Superior Court (1982) 137 Cal. App. 3d 554. In that case, the plaintiff sued his insurance company under a fire insurance policy. During the discovery phase of this civil action, the plaintiff was indicted for arson for the same fire. Plaintiff then refused to give his deposition in the civil action, claiming the constitutional privilege against self-incrimination. As summarized in Mitchell:

> "The Fremont court ordered plaintiff to answer or abandon his claim, noting [that] 'the gravamen of his lawsuit is so inconsistent with the continued assertion of a privilege as to compel the conclusion that the privilege has in

CORRECTION

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4. Express Waiver

PSD argues that SoCal's notes of a meeting with PSD members on August 23, 1984, show that SoCal had voluntarily revealed enough information about the documents PSD requested to constitute an express waiver of the privilege for those documents.

This argument is grounded in the provisions of Evidence Code Section 912, which states that waiver occurs when the holder of the privilege voluntarily discloses "a significant part of the communication." PSD argues that waiver arose from SoCal's disclosure of the facts that SoCal's attorneys had reviewed the Getty contract with an eye to the possibility and the consequences of terminating the contract and that the attorneys had concluded that SoCal could not escape its obligations under the contract without facing a suit for breach of contract.

This question, like so many others in this case, falls between the bounds clearly established in the case law. It is clear that merely revealing the fact that a privileged communication occurred does not waive the privilege. (Mitchell, supra, at 603.) It is also clear that revealing a significant part of the content of the communication is a waiver. (Julrik Productions, Inc. v Chester (1974) 38 Cal. App. 3d 807, 811.) What is not clear is whether revealing the fact and the conclusions of a communication is sufficient to qualify as a waiver of the privilege.

In Travelers Ins. Companies v Superior Court (1983) 143 Cal. App. 3d 436, the court reviewed a similar question concerning the extent of disclosure needed to find a waiver. The court defined the question as whether the disclosure was "wide enough in scope and deep enough in substance to constitute a 'significant part of the communication.'" (143 Cal. App. 3d at 444.) The court also referred to the test stated in Wigmore on Evidence: whether the disclosures had reached that "certain point of disclosure at which fairness requires that [the client's] privilege shall cease

whether he intended that result or not." (143 Cal. App. 3d at 445.) On the facts of that case, the court found that the disclosures in question were preliminary, foundational, and quite vague.

After considering this precedent, we believe that SoCal's disclosure of the fact of its attorneys' review of the Getty agreement and the conclusions arrived at by its attorneys to members of PSD is an express waiver of the lawyer-client privilege. The disclosure was much broader and substantive than the communication under review in Travelers. Here, the client revealed the subject matter of its discussion with counsel, the purpose of that consultation, and the conclusion that it could not escape its contract obligations without facing a suit for breach of contract. Under Wigmore's test, our sense of fairness compels us to find a waiver. Although the specific facts of this case establish an express waiver, they are not the sole basis of this ruling. The parties should be guided by our discussion of implied waiver of the attorney client privilege as well.

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> "The Fremont court ordered plaintiff to answer or abandon his claim, noting [that] 'the gravamen of his lawsuit is so inconsistent with the continued assertion of a privilege as to compel the conclusion that the privilege has in

> fact been waived.' In Fremont, the court correctly characterized the sought after testimony as 'vitally relevant' to an issue (arson) which was necessarily raised by plaintiff's claim. Discovery of this information was clearly essential to a fair resolution of the case, since a finding of arson would have provided a complete defense for defendant insurers." (Mitchell, supra, at 605, citations omitted.)

Implied waiver was also found in Merritt v Superior Court (1970) 9 Cal. App. 3d 721. The suit alleged a bad faith refusal to settle an insurance claim and further alleged that the defendant insurer's attorney had so confused plaintiff's attorney as to disable the plaintiff from settling the claim within the limits of the insurance policy. As summarized in Mitchell at 605:

> "The Merritt court upheld disclosure on the ground that plaintiff had placed in issue the decisions, conclusions and mental state of his then attorney by alleging that this attorney's confusion led to the failure to settle. Since plaintiff was necessarily forced to prove his case by reference to the mental state of his counsel, the defendant was entitled to inquire into communications relating to that state."

Several cases involving slightly different facts have found no implied waiver of the lawyer-client privilege "where the substance of the protected communication is not itself tendered in issue, but instead simply represents one of several forms of indirect evidence in the matter." (Mitchell, supra, at 606.)

For example, in Miller v Superior Court, supra, plaintiff brought a malpractice action against her former attorney. The defendant raised a defense that the statute of limitations had run. Since under the statute the limitations period begins when the plaintiff first had knowledge of the facts underlying her claim, defendant sought discovery of communications with the seven attorneys she had consulted since the alleged malpractice had occurred. The court denied discovery of the communications,

reasoning that it was the state of mind of the plaintiff, and not the state of mind of the seven attorneys, that was placed at issue in the case.

Schlumberger, Ltd. v Superior Court (1981) 115 Cal. App. 3d 386, was another legal malpractice action. The defendant former attorney sought discovery of communications with plaintiff's current attorney, on the ground that the later attorney had given advice that caused the damages that the suit attributed to the former attorney's advice. Discovery of these communications was again denied. The court apparently ruled that plaintiff's request for damages arising from the alleged malpractice did not permit a finding of an implied waiver when the relevance of the privileged communications was created by defendant's theory of the case.

Mitchell itself presents facts that relate to this case. The plaintiff brought an action against manufacturers and distributers of the chemical DBCP, which she contended had polluted her drinking water. Among the causes of action was a claim based on intentional infliction of emotional distress. During discovery, plaintiff disclosed that she had received warnings about the health effects of DBCP from her attorneys. Defendants sought to discover the details of these warnings as part of their investigation of the sources of the information that led to the claimed emotional distress. Defendants' position was that plaintiff, by tendering a cause of action for emotional distress, had rendered the source and substance of all information she had received about DBCP subject to discovery. The Supreme Court denied discovery, agreeing with plaintiff's assertion that her various claims had not put into issue her attorneys' state of mind. According to the Court, the real issues were the plaintiff's knowledge and state of mind, evidence of which may be directly ascertained from her without an examination of the confidential communications. The Court also noted that plaintiff had never claimed that the information supplied by her attorneys had caused the emotional distress.

The particular nature of the claim for emotional distress may have determined the Court's decision:

> "The principal measure of reasonableness is whether her fears square with scientifically proven or suspected effects of DBCP, a relatively objective test which can be applied by a trier of fact without delving into all her sources of information or misinformation." (Mitchell, supra, at 608.)

The Court concluded its discussion of implied waiver by saying:

> "In sum, we do not find that plaintiff has put the information gained through otherwise privileged communications with her attorneys directly at issue, nor do we find that disclosure of such communications will be necessary to a fair adjudication of her claim for emotional distress." (Mitchell, supra, at 609.)

Based on the guidance available from these cases, we find the following questions helpful to our deliberations: Has SoCal put the privileged communications directly in issue? Is the information contained in the otherwise privileged communications between SoCal and its attorneys so essential to its request for recovery that disclosure of the communications is essential for a fair adjudication of its request? Is the gist of SoCal's request so inconsistent with its claim of privilege to compel the conclusion that the privilege is waived? Is the privileged information vitally relevant to an issue necessarily raised by SoCal's application? Is the substance of the privileged communication not itself tendered in issue but instead simply one of several forms of indirect evidence?

In attempting to answer these questions, we first find that we are disadvantaged because applications before the Commission are not required to state certain specified elements of a cause of action, as complaints in courts are required to do. Thus, SoCal's application, as relevant to this case, merely

requests the Commission to issue and order "finding applicant's gas supply purchase, sequences, and storage operations for the recorded period July 1, 1985 through June 30, 1986 to have been reasonable." The only references to the termination payment are contained an attachment to the application, in five pages of an approximately 100-page report on SoCal's operations during this period. Thus, the application in itself doesn't alert us to the necessary elements of SoCal's proof.

However, the mere fact that the Commission allows general pleadings does not mean that issues in our proceedings will never be sufficiently defined to justify a finding of an implied waiver; it means that we must more closely consider precisely what SoCal must prove, and thus what it places in issue, when it requests recovery in rates of certain of its expenses.

As a general statement, SoCal must demonstrate, by clear and convincing evidence, that its decision to terminate the contract and pay the termination payment was reasonable and prudent. In cases like this one, the Commission has applied the following test of prudence: In light of all the information that the utility's decision makers knew or should have known at the time, was the decision a reasonable one? This question more accurately states the necessary elements of SoCal's proof, and focuses the present inquiry more clearly.

SoCal has stated that it intended to meet its burden of proof in this case by presenting the economic analyses that were considered at the time of the decision to terminate and the Getty contract itself. SoCal argues that the validity of the contract may be contested in briefs or determined through the Commission's own legal interpretations of the words of the contract.

From SoCal's framing of its intended proof and other materials filed in this case, we deduce that SoCal must make a persuasive showing of two general points to prevail in this case. First, SoCal must show that according to its economic analyses and

forecasts available to its managers at the time of the decision to terminate, it would be less costly to terminate the contract and make the termination payment (and to purchase necessary gas elsewhere) than to continue to buy gas at the prices set in the contract. Second, SoCal must demonstrate, according to the information that its managers knew or should have known at the time, that termination was the best legal option under the contract, that there was no reasonable possibility of invalidating the contract short of outright termination, and that making the termination payment was preferable to paying damages under the contract.

The argument on implied waiver turns on this second point of proof. SoCal has essentially argued that the Commission may determine for itself what legal information SoCal's managers should have had to make the decision, but SoCal believes that what legal information the managers actually had is unavailable to the Commission because of the lawyer-client privilege.

Thus, the issue for our decision is whether the legal information that SoCal's managers actually reviewed and presumably relied on in deciding to make the termination payment to Getty is so essential to SoCal's claim, so "vitally relevant" to its request for recovery, that an implied waiver should be found.

We conclude that an implied waiver of the lawyer-client privilege arose from SoCal's request for recovery of the termination payment under the specific facts of this case. Our legitimate concern as the agency charged with oversight and economic regulation of the monopoly utilities is not merely with the outcomes of the utilities' decisions; we are also concerned with the process employed to arrive at a particular decision. We would be derelict in our duty to the public, for example, if we approved without comment or reprimand a decision that ignored available contemporaneous information and was based on a coin flip, no matter how economically beneficial the decision may fortuitously

turn out to be. Conversely, we have in the past approved for recovery expenses that in hindsight appeared to be poor bargains if the utility was able to demonstrate the soundness of the process and analyses that led to the decision to incure the expense. Our test of reasonableness and prudence in such cases is not "a relatively objective test which can be applied...without delving into all [the managers'] sources of information or misinformation" (Mitchell, supra, at 608). What the managers actually considered, what they knew or should have known is a central and essential element of the utility's proof in these cases, and not merely indirect evidence of the reasonableness of the decision.

We thus conclude that the legal analyses that SoCal's managers actually considered in arriving at the decision to make the termination payment are so central to SoCal's application that fundamental fairness requires disclosure of otherwise privileged information. To paraphrase the decision in Fremont Indemnity Co., the gist of SoCal's request for recovery of the termination payment is so inconsistent with the continued assertion of the lawyer-client privilege as to compel the conclusion that the privilege has been waived.

Therefore, we believe that either SoCal must be deemed to have waived the lawyer-client privilege by tendering the issue of the termination payment, or it must withdraw this element of its application. It would be inconsistent for SoCal to proceed with its claim without providing some basis for its conclusion that the contract was valid and that the termination payment was preferable to its other legal options under the contract.

SoCal has argued that the knowledge that it might have to disclose its legal analyses in future proceedings before the Commission would tend to inhibit the frankness and completeness of its attorneys' advice and could even lead to reliance on imprecise oral communications. We think that this fear is overblown. The purpose of our review of the documents in this case is not to

assure that the analyses overwhelmingly supported SoCal's eventual decision. We believe that the analyses should have considered all aspects--good and bad--of SoCal's decision. The analyses should have fairly alerted the utility's decision makers of the pros and cons of certain courses of action and should have discussed and explored various options under the contract. The purpose of our review in these cases is to assure ourselves that a reasonably competent effort was made to present the utility's decision makers with the best information available when they made the decision. This should also have been SoCal's purpose as it prepared to make the decision, and this should continue to be SoCal's goal in making future decisions. Any threat that is presented by the possibility of later review in a Commission proceeding should act as an incentive for even greater thoroughness in the legal analyses, which we regard as a benefit to, not a damaging restriction on, SoCal's decision making process.

SoCal seems to fear that if its legal analyses are not protected, PSD or other parties may quote the analyses out of context to distort the actual analyses to suit their positions. That may happen, since advocates tend to stress points that favor their positions. But SoCal should keep in mind that it is the Commission, not PSD or any other party, that makes the decisions affecting SoCal's rates and operations. Under the circumstances feared by SoCal, it will always have an opportunity to make sure that the record fairly reflects the actual analyses and not just one party's excerpts from them. If SoCal fears that the Commission itself will misuse the materials, then a fair hearing record will provide the basis for a corrective review by the Court.

In addition, we do not see how SoCal thinks its interests will in any way be served by the type of analytical distortion that SoCal believes its attorneys will engage in without the absolute protection of the privilege. We are at a loss to understand how SoCal's managers will benefit from imprecise oral presentations, or

how remembered oral communications, which could also be subject to a waiver of the privilege, will make SoCal's proof in our proceedings more compelling. And if SoCal's attorneys slant their memos to suit SoCal's ultimate decision, SoCal runs a substantial risk that advocates of opposing views will seize on that incompleteness to show the inadequacy of SoCal's decision making processes and the flaws in the eventual decision. Thus, we fail to see how slanted memos will either help SoCal's managers make decisions or buttress SoCal's positions in proceedings before the Commission.

Nevertheless, we are very sensitive to the strength of the lawyer-client privilege and the delicate issues that may be discussed in a utility's legal memos. Therefore, we will attempt to limit the scope of the implied waiver as much as possible. We believe that this is best accomplished by submitting the material subject to the implied waiver (and thus not falling under Evidence Code Section 915(b)) for an in camera inspection by an ALJ. To further insure the objectivity of that review and the impartiality of the ALJ presiding over the case, we will establish procedures that will require that the in camera inspection is performed by an ALJ other than the one assigned to hear the case, unless the party producing the otherwise privileged materials agrees that review should be conducted by the assigned ALJ. This approach is similar to practice before our federal counterpart, the Federal Energy Regulatory Commission.

As we mentioned, our intent is to limit the disclosure as much as possible. We have already stated that only communications that are within the scope of the implied waiver need be reviewed. Furthermore, the reviewing ALJ should disclose only those communications that are closely relevant to the issues stated by the party requesting disclosure. The disclosed communications should be held in confidence unless and until a party determines that it will make use of the communication in the evidentiary

hearing. All documents that are not used in the hearing shall be returned to the party supplying the documents.

Although this procedure may be cumbersome, we believe it is a fair way to examine the necessary elements of a utility's application and to maintain as much as possible the purposes of the lawyer-client privilege.

Our determination that the documents requested by PSD fall within an implied waiver of the privilege depends very much on the particular facts of this case. We cannot foresee all circumstances that would give rise to such an implied waiver, and each such case must be reviewed on its own particular facts to determine if all the elements of an implied waiver are present.

Finally, consistent with our foregoing discussion, SoCal has the option of withdrawing its request for recovery of the $7.4 million termination payment to avoid the consequences of our conclusion that placing this payment in issue gives rise to an implied waiver.

Findings of Fact

1. In the application initiating this proceeding, SoCal requested recovery of a $7.4 million payment it had made to terminate a contract for purchases of gas from Getty's facilities at a Monterey Park landfill.

2. PSD submitted a data request to SoCal asking for SoCal's legal analyses relating to the termination of the contract with Getty. SoCal resisted PSD's request and asserted the lawyer-client and attorney's work product privileges.

3. On April 2, 1987, PSD filed a motion to compel the production of the requested documents. On May 22, the ALJ issued a ruling which directed SoCal to produce the documents for an in camera inspection. On June 8, SoCal filed a motion for review by the Commission of the ALJ's ruling.

4. The lawyer-client privilege is one of the strongest and most carefully safeguarded privileges recognized by law.

establish its own procedures is limited by the Constitution, and the Constitution does not empower the Commission to establish procedures that supercede statutory privileges.

3. A specific statutory reference to the Evidence Code's provisions is not required to create an exception to the statutory privileges.

4. SoCal's disclosures to PSD in the meeting of August 23, 1984, amounted to an express waiver of the lawyer-client privilege.

5. An implied waiver of the lawyer-client privilege arose from SoCal's request for recovery of the termination payment under the specific facts of this case.

6. Because of the importance of the lawyer-client privilege, the scope of SoCal's implied waiver should be limited as much as possible. The requested documents should be reviewed in camera by an ALJ other than the one assigned to the hearing of this case before any portions of the documents are disclosed to PSD.

O R D E R

IT IS ORDERED that:

1. Southern California Gas Company (SoCal) shall produce the fifteen documents identified in response to Public Staff Division's (PSD) Data Request No. 11, dated October 9, 1986, and not already produced, for in camera inspection by an Administrative Law Judge (ALJ) other than the ALJ assigned to the hearing of this application. The Chief ALJ shall designate the ALJ to review the documents and shall inform SoCal within 15 days of the effective date of this order.

2. As an alternative to paragraph 1, SoCal may withdraw its request for recovery of the $7.4 million paid to Getty Synthetic Fuels Energy, Inc.

This order becomes effective 30 days from today.

Dated DEC 9 - 1987, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I will file a written dissent.

FREDERICK R. DUDA
Commissioner

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director

4-4

FREDERICK R. DUDA, Commissioner, dissenting.

I believe that it was both unnecessary and unwise for the majority to find that an implied waiver of the lawyer-client privilege arose from SoCal's request for recovery of the payment it made to terminate the Monterey Park landfill gas contract.

The fundamental issue in this case is whether SoCal's decision to terminate the contract through a negotiated settlement was a reasonable one in light of all the information that the utility's decision makers had or should have had at the time the decision was made. The evidence needed to determine the reasonableness of SoCal's actions can be obtained through direct questioning of SoCal's decision makers to establish what was actually known and through direct evidence presented by PSD to show what SoCal should have known at the time it terminated the landfill gas contract. The information contained in the documents SoCal seeks to protect is not essential to the resolution of this issue since our determination of reasonableness will depend on a review of SoCal's actions in light of the information its decision makers had or should have had when making the decision, and not on any evidence concerning the knowledge or opinions of SoCal's attorneys.

The majority correctly notes that California courts may find an implied waiver of the attorney-client privilege when fundamental fairness requires disclosure of otherwise privileged information because a plaintiff has placed in issue a communication which goes to the heart of the claim in controversy, but are unlikely to do so where the substance of the protected communication is not itself tendered in issue but instead simply represents one of several forms of indirect evidence in the matter. (See, Mitchell v. Superior Court, (1984) 37 Cal. 3d 591, at 604, 606.) Where the majority errs is in its determination as to which of these circumstances is present in the SoCal case.

The conceptual thread that ties together the California cases which found implied waivers is the common sense notion that

a plaintiff should not be permitted to make a claim that is centrally dependent on or would be absolutely barred by evidence available only in privileged documents which the plaintiff refuses to make available to his or her opponent. For example, when accountants were sued for negligent tax advice, the privilege protecting tax returns for relevant years was appropriately deemed waived since the tax consequences that would have been revealed by the tax returns were at the very heart of plaintiff's claim that she had been damaged by defendants' bad advice. Indeed, plaintiff could not establish all essential elements of her case without proof of statements and computations in her tax returns. To permit plaintiff to produce evidence of the contents of those returns while successfully resisting their disclosure on grounds of privilege would have been manifestly unfair to defendants. (Wilson v. Superior Court, (1976) 63 Cal. App. 3d 825 (referenced in Miller v. Superior Court, (1980) 111 Cal. App. 3d 390, cited by majority.)

Similarly, in Fremont Indemnity Co. v. Superior Court, (1982) 137 Cal. App. 3d 554, where a fire insurance claimant was indicted for arson during the discovery phase of his civil litigation, it was appropriate for the court to order plaintiff to either submit to deposition or abandon his claim since the basis of his lawsuit was so inconsistent with the continued assertion of a privilege (against self-incrimination) as to compel the conclusion that privilege had in fact been waived. The Fremont court characterized the sought after testimony as "vitally relevant," to an issue (arson) that was necessarily raised by plaintiff's claim. Discovery of this information was clearly essential to a fair resolution of the case, since a finding of arson would have provided a complete defense for defendant insurers.

And in Merritt v. Superior Court, (1970) 9 Cal. App. 3d 721, the court properly upheld disclosure of attorney-client communications on the ground that plaintiff had placed in issue the decisions, conclusions, and mental state of his then attorney by alleging that the defendant insurer's attorney had so confused

plaintiff's attorney as to prevent the plaintiff from settling the claim within the limits of the insurance policy. As the California Supreme Court in Mitchell, supra, at 605, points out in its summary of the Merritt case: "Since plaintiff was necessarily forced to prove his case by reference to the mental state of his counsel, the defendant was entitled to inquire into communications relating to that state."

The tie that binds cases finding no implied waiver is the equally common sense notion that where a party has not placed either the contents of the privileged communications or the mental state of its attorney directly in issue, the important public policy behind the attorney-client privilege outweighs its opponent's need for any indirect evidence that might be provided by the privileged communications. Thus, for example, in a legal malpractice action the defendant could not overcome plaintiff's attorney-client privilege in order to get access to her communications with subsequent attorneys even though those communications might have revealed facts regarding the date she became aware of the facts necessary to support her malpractice action which would bolster defendant's statute of limitations defense. (Miller v. Superior Court, supra .) The Miller court distinguished Merritt, supra, on the ground that there plaintiff had placed his attorney's state of mind directly in issue, whereas Miller placed only her own state of mind in issue. (Id., at 394-395). The court noted that while plaintiff's state of mind was clearly in issue and could be proven by any competent evidence available to the parties, the mere fact that her state of mind was in issue did not cause a waiver of her privilege concerning confidential communications between her and attorneys she consulted after the alleged malpractice. (Id.)

Mitchell v. Superior Court, supra, the leading California Supreme Court case on the subject of implied waiver, provides a second good example of a situation where implied waiver was not found because the privileged communications sought were not directly in issue. The plaintiff sued manufacturers and distributors of the chemical DBCP, which she contended had

contaminated her drinking water and caused grievous personal injury and severe emotional distress. During the course of discovery, the plaintiff disclosed that she had discussed warnings about DBCP with her attorneys. Strongly suggesting that her discussions with her attorneys were themselves the cause of much of plaintiff's emotional distress, defendants sought to compel her to reveal the details of these discussions. Defendants argued that by alleging emotional distress plaintiff had rendered discoverable the source and substance of all information she had received about DBCP, and contended that such discovery was necessary in order to determine the geniuneness of plaintiff's claim for emotional distress. Citing Miller, supra, with approval, the court found that while plaintiff's knowledge about the health hazards of DBCP was both relevant and discoverable, her cause of action for emotional distress had not put into issue her attorneys' state of mind; the real issues were her knowledge and state of mind, which could be determined by direct questioning without examination of the information transmitted by her attorneys (Mitchell, supra, at 606-607.)

The Mitchell court made it clear that even if the communications in question were relevant, the attorney-client privilege would still act to exclude them. Having quoted Schlumberger Limited v. Superior Court, (1981) 115 Cal. App. 3d 386, at 393, to the effect that: "Privileged communications do not become discoverable because they are related to issues raised in the litigation....If tendering the issue of damages in a malpractice action waived the privilege, there would be no privilege.... ", the court noted that "courts and legislatures have long recognized that the privilege will at times shield from view otherwise relevant evidence. This court has no intention of abandoning that principle here." (Mitchell, supra, at 607, 608.)

A final useful example is provided by Transamerica Title Insurance Co. v. Superior Court, (1987) 188 Cal. App. 3d 1047, where the court found that an insurer does not waive the attorney-client privilege where it is not defending a "bad faith" lawsuit on the basis of the affirmative defense of "advice of

counsel." After acknowledging plaintiff's contention that it needed the documents to verify the degree to which Transamerica relied on and was continuing to rely on the advice of its counsel, the court noted that "the privilege is not to be set aside when one party seeks verification of the authenticity of its adversary's position" (Id., at 1053), and concluded that:

> "In view of Transamerica's stipulation that it will limit its use of the advice of counsel defense, the issue about whether Transamerica continues to decline to pay the claim and is maintaining the litigation in bad faith is a question only about the state of mind of Transamerica's corporate decision makers....Consequently, the sought for communications bear only an indirect relevance to the lawsuit, and their disclosure would significantly burden the privilege accorded to Transamerica and its attorneys." (Id., at 1054.)

Although the majority seeks to characterize the SoCal situation in a way that makes it fit within the line of cases which found an implied waiver of confidentiality privileges, its efforts fall short of the mark. The case before us does not involve a plaintiff who is making a claim critically based on information which it will not reveal and which is not available from another source. The information in SoCal's privileged documents is neither critical nor unavailable. A brief description of the evidence the majority considers critical is necessary to make my point.

SoCal has stated that it intends to meet its burden of proof in this case by presenting the economic analyses that were considered at the time of the decision to negotiate termination of the contract and the contract itself. SoCal contends that the validity of the contract can be contested in briefs or determined through the Commission's own legal interpretation of the contract. The majority concludes that in order to make a persuasive case SoCal must 1) show that according to economic analyses available to its decision makers at the time of the decision to terminate the contract, it would be less costly to terminate the contract and make the termination payment (and to

purchase necessary gas elsewhere) than to continue taking gas at the contract price; and 2) demonstrate that according to the information that its managers knew or should have known at the time, termination was the best legal option under the contract, there was no reasonable possibility of invalidating the contract short of termination, and the termination payment was preferable to paying damages under the contract.

The majority's implied waiver argument is essentially as follows. SoCal contends that the Commission may determine for itself what information SoCal's managers should have had to make the decision, but believes that the information the managers actually had is unavailable to the Commission because of the attorney-client privilege. This is unfair, and provides the Commission with an inadequate record to determine the reasonableness of SoCal's actions. Our concern as regulators "is not merely with the outcomes of the utilities' decisions; we are also concerned with the process employed to arrive at a particular decision." (D.87-12-039, Slip Opinion at 32.) "The purpose of our review of the documents in this case is not to assure that the analyses overwhelmingly supported SoCal's eventual decision," since the analyses "should have considered all aspects--good and bad--of SoCal's decision....should have fairly alerted the utility's decision makers of the pros and cons of certain courses of action and should have discussed and explored various options under the contract." (Id., at 33-34.) "The purpose of our review in these cases is to assure ourselves that a reasonably competent effort was made to present the utility's decision makers with the best information available when they made the decision." (Id., at 34.)

First, I must state that I am in basic agreement with the majority's description of SoCal's burden of proof. The reasonableness of any termination payment is inextricably linked to the legal question whether SoCal had some other option to terminate the contract at no cost. For example, if the gas supplied to SoCal was contaminated with chemicals that made it hazardous or otherwise unmarketable, or if the gas did not meet

the BTU requirements specified in the contract, then perhaps SoCal's termination payment was unreasonable.

Where I part company with the majority is in my analysis of the effect this way of framing SoCal's burden of proof has on the issue of implied waiver. The majority concludes that the legal analyses that SoCal's managers actually considered in arriving at the decision to make the termination payment are so central to SoCal's application that fundamental fairness requires disclosure of otherwise privileged information. I disagree. In my mind, the majority has gotten lost in the trees of process where it should have kept its eyes on the forest of substance. To me, the critical issue is whether the decision was a reasonable one in light of the information SoCal's decision makers had, or should have had. I am not concerned about what SoCal's lawyers knew, since we are reviewing the reasonableness of the decision makers' decisions in light of what they knew or should have known, not the reasonableness of the lawyers' decisions or analyses. I do not agree that any concern we might have over the process by which SoCal actually arrived at its decision is essential to our reasonableness review. I prefer to emphasize what SoCal should have known over what it actually knew, since I assume that what it actually knew would be but one element of what it should have known.

I agree that SoCal's privileged communications are relevant, but I do not believe they are essential. As SoCal points out, PSD is perfectly capable of reading the contract at issue, questioning SoCal's decision makers, analyzing the performance of the parties to the contract, and drawing its own conclusions as to the knowledge and understanding the utility's decision makers should have had when making their decision to negotiate termination of the contract. PSD's recent comprehensive report on the reasonableness of SoCal's gas supply operations gives us great confidence that it can competently ferret out the facts needed to determine whether SoCal's decision was a reasonable one. Since our reasonableness review will consider not only what SoCal's says its decision makers knew, but

also what PSD believes they should have known, I think PSD over-emphasizes the importance of the portion of SoCal's actual knowledge that is represented by its attorneys' confidential opinions.

Furthermore, while the opinions of SoCal's lawyers regarding the utility's contractual options are part of the information its decision makers must have considered at they decided to negotiate a termination settlement, and may indeed be highly relevant to a thorough understanding of SoCal's decision making process, these facts alone do not render this privileged information subject to discovery. There is no client-litigant exception to the attorney-client privilege (People v. Lines, (1975) 13 Cal. 3d 500), and privileged communications do not become discoverable because they are related to issues raised in litigation. (Schlumberger Limited v. Superior Court, supra, at 393; Mitchell v. Superior Court, supra, at 607.)[1]

I simply do not believe that SoCal has placed in issue communications which go to the heart of the claim in controversy. SoCal's privileged communications are not directly at issue here; our real concern is not the content of the attorneys' opinions or the state of the attorneys' minds but rather the reasonableness of the decision makers' conduct in light of the knowledge they had or should have had. Nor could the privileged communications act as an absolute defense to SoCal's claim for recovery of the termination payment. Furthermore, the essential elements of SoCal's burden of proof can be addressed without reference to the

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1 This does not mean, however, that relevant facts can be hidden within attorney-client communications. In Upjohn Co. v. United States, (1981) 449 U.S. 383, at 395, the United States Supreme Court noted that the privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney. Thus, while a client cannot be compelled to answer the question, "What did you say or write to the attorney?," the client may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication with his attorney. (Id., at 395-396.)

privileged communications. In these circumstances, I cannot believe that fundamental fairness requires SoCal to disclose otherwise privileged communications.

The present case is much more akin to Mitchell, Miller, Transamerica, Schlumberger, and the other cases in which California courts have upheld the attorney-client privilege against implied waiver arguments on the ground that the evidence sought was not truly essential and could at best indirectly support the seeker's position. For this reason, I would decide this issue in favor of SoCal. The attorney-client privilege is simply too important a legal principle to find waived except under certain egregious circumstances not present here.

In the spirit of compromise, I offered an alternate decision which would have ordered SoCal to make its key decision makers available for deposition by PSD, and deferred the attorney-client privilege issue until we had a chance to see whether PSD could be satisfied by evidence obtained through less drastic means. I still believe this would have been a preferable way to resolve this troublesome issue, and am sorry my colleagues did not agree. I hope they feel differently after reading my dissenting opinion.

Frederick R. Duda, Commissioner

December 9, 1987
San Francisco, California

cited Labor Code sections create an exemption to the physician-patient privilege. We become much less certain that even a statute as definite as Public Utilities Code Section 463(b) justifies an exemption, and the even more general language of Public Utilities Code Sections 314 and 582 increases our uncertainty.

In short, we remain unconvinced that the references to conflicting statutes and exemptions favor either SoCal's or PSD's position on this issue. Moreover, despite our quasi-judicial powers, we are uncomfortable entering a field of statutory interpretation that extends beyond our special jurisdiction. Reconciling these statutory conflicts is more appropriately performed by the courts, and we would prefer to defer to their expertise in these matters.

Because of the undispelled uncertainty on this issue, we will decline to base our decision on a finding that an implied statutory exemption from the lawyer-client privilege exists in proceedings before the Commission.

3. The Policy Underlying the Lawyer-Client Privilege v the Policy Behind Public Utility Regulation

PSD has argued that this case presents an instance when the admittedly strong public policy underlying the lawyer-client privilege must yield to an even stronger public policy, which is expressed in the extraordinary powers that the Constitution, the Legislature, and the courts have given the Commission over the operations of regulated utilities.

There is no question that the lawyer-client privilege is one of the strongest privileges in the Evidence Code and one that has consistently been upheld against many competing interests. One state appellate justice went so far as to describe the privilege as "sacred" (People v Kor (1954) 129 Cal. App. 2d 436 at 447). The California Supreme Court has been only slightly less enthusiastic about the privilege:

> "While it is perhaps somewhat of a hyperpole to refer to the attorney-client privilege as

principle in a series of U.S. Supreme Court cases holding that closely regulated businesses have no reasonable expectation of privacy and are subject to warrantless searches, which would otherwise be prohibited by the Fourth Amendment.

We are reluctant to rely on these cases, however, for several reasons. First, the cases PSD cites refer to the liquor and firearms industries, and the decisions contain some indications that the Court distinguished these industries on the basis of their long history of federal control or the enormous health and safety problems they pose. (Donovan v Dewey (1980) 452 U.S. 594, 606.) Second, the cases do not refer directly to evidentiary privileges. Third, although the U.S. Supreme Court has concluded that certain rights, such as the right to privacy and the right to remain silent, do not apply to corporations, recent cases involving public utilities' First Amendment rights have found that the special status of public utilities does not limit some of their other rights, such as the right to free speech. (E.g., Pacific Gas & Electric Co. v Public Utilities Commission (1986) ___ U.S. ___, 89 L. Ed. 2d 1; Consolidated Edison Co. v Public Service Commission (1980) 447 U.S. 530.) Fourth, courts have held that the lawyer-client privilege applies fully to corporations in general. We have found no case that suggests that the special status of public utilities limits their right to assert this privilege before courts or other administrative agencies.

Once again, we have found little guidance on how to resolve the apparent conflict between the public policies underlying the privilege and those supporting public utility regulation. Both are strong principles serving important public purposes. Ideally, this weighing of competing policies should be performed by the Legislature or the courts, because of their more general jurisdiction and outlook. Again we feel reluctant to perform this weighing when the considerations on one side of the scale--the interests served by the privilege--are not matters

within our special jurisdiction or competence. Again we conclude that we should not base our decision on considerations of public policy when the decision would necessarily be clouded by uncertainty.

4. Express Waiver

PSD argues that SoCal's notes of a meeting with PSD members on August 23, 1984, show that SoCal had voluntarily revealed enough information about the documents PSD requested to constitute an express waiver of the privilege for those documents.

This argument is grounded in the provisions of Evidence Code Section 912, which states that waiver occurs when the holder of the privilege voluntarily discloses "a significant part of the communication." PSD argues that waiver arose from SoCal's disclosure of the facts that SoCal's attorneys had reviewed the Getty contract with an eye to the possibility and the consequences of terminating the contract and that the attorneys had concluded that SoCal could not escape its obligations under the contract without facing a suit for breach of contract.

This question, like so many others in this case, falls between the bounds clearly established in the case law. It is clear that merely revealing the fact that a privileged communication occurred does not waive the privilege. (Mitchell, supra, at 603.) It is also clear that revealing a significant part of the content of the communication is a waiver. (Julrik Productions, Inc. v Chester (1974) 38 Cal. App. 3d 807, 811.) What is not clear is whether revealing the fact and the conclusions of a communication is sufficient to qualify as a waiver of the privilege.

In Travelers Ins. Companies v Superior Court (1983) 143 Cal. App. 3d 436, the court reviewed a similar question concerning the extent of disclosure needed to find a waiver. The court defined the question as whether the disclosure was "wide enough in scope and deep enough in substance to constitute a 'significant

part of the communication.'" (143 Cal. App. 3d at 444.) The court also referred to the test stated in Wigmore on Evidence: whether the disclosures had reached that "certain point of disclosure at which fairness requires that [the client's] privilege shall cease whether he intended that result or not." (143 Cal. App. 3d at 445.) On the facts of that case, the court found that the disclosures in question were preliminary, foundational, and quite vague.

After considering this precedent, we believe that SoCal's disclosure of the fact of its attorneys' review of the Getty agreement and the conclusion of that review to certain members of PSD is not an express waiver of the lawyer-client privilege. Applying the test of Travelers, the disclosure seems neither particularly wide in scope nor deep in substance. Under Wigmore's test, our sense of fairness does not compel us to find a waiver. As a practical matter, we also wish to encourage our utilities to continue informal discussions with our staff. These discussions would doubtless be inhibited by a strict application of the waiver exception to these conversations. If we are too eager to find an express waiver, our staff will soon encounter repeated claims of privilege any time their conversations with the utilities' representatives touch on legal questions. This would not be a desirable state of affairs.

5. Implied Waiver

PSD has also urged that the nature of SoCal's application and its request to recover the settlement payment in rates is an implied waiver of the privilege. We also perceive TURN's arguments to be grounded in this notion.

Courts have found an implied waiver, not based in statute, in several California cases when fundamental fairness requires disclosure of otherwise privileged information because a plaintiff has placed in issue a communication which goes to the heart of the claim in controversy. (See, Mitchell v Superior

5. There is a strong public interest in efficient, effective, and fair regulation of California's public utilities.

6. The Legislature has failed to enact a specific exemption from the lawyer-client privilege for proceedings before the Commission.

7. Exceptions to the Evidence Code's privileges have been created by both the Legislature and the courts.

8. The Constitution and the Legislature have given the Commission extraordinary powers over public utilities.

9. At a meeting with members of PSD on August 23, 1984, SoCal voluntarily revealed that its attorneys had reviewed the Getty contract with an eye to the possibilities and consequences of termination and that the attorneys had concluded that SoCal could not escape its contract obligations without facing a suit for breach of contract.

10. In an application for recovery of fuel-related expenses, SoCal must demonstrate, by clear and convincing evidence, that the expense was reasonably and prudently incurred. The test of prudence in such cases is: In light of all the information that the utility's decision makers knew or should have known at the time, was the decision reasonable?

11. As the constitutional agency charged with oversight and economic regulation of the state's monopoly utilities, the Commission's concern is not merely with the outcomes of the utility's decisions; we are also concerned with the process employed to arrive at a particular decision.

Conclusions of Law

1. In camera review is a proper procedure for evaluating documents claimed to be protected by the attorney's work product privilege.

2. The Constitution authorizes the Legislature to enact provisions that assure fundamental fairness and due process in proceedings before the Commission. The Commission's ability to

establish its own procedures is limited by the Constitution, and the Constitution does not empower the Commission to establish procedures that supercede statutory privileges.

3. A specific statutory reference to the Evidence Code's provisions is not required to create an exception to the statutory privileges.

4. SoCal's disclosures to PSD in the meeting of August 23, 1984, did not amount to an express waiver of the lawyer-client privilege.

5. An implied waiver of the lawyer-client privilege arose from SoCal's request for recovery of the termination payment under the specific facts of this case.

6. Because of the importance of the lawyer-client privilege, the scope of SoCal's implied waiver should be limited as much as possible. The requested documents should be reviewed in camera by an ALJ other than the one assigned to the hearing of this case before any portions of the documents are disclosed to PSD.

O R D E R

IT IS ORDERED that:

1. Southern California Gas Company (SoCal) shall produce the fifteen documents identified in response to Public Staff Division's (PSD) Data Request No. 11, dated October 9, 1986, and not already produced, for in camera inspection by an Administrative Law Judge (ALJ) other than the ALJ assigned to the hearing of this application. The Chief ALJ shall designate the ALJ to review the documents and shall inform SoCal within 15 days of the effective date of this order.