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Decision 88 06 029 JUN 8 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA GAS COMPANY to revise its rates under the Consolidated Adjustment Mechanism.	Application No. 86-09-030 (Filed September 19, 1986)

ORDER DENYING REHEARING
AND MODIFYING DECISION 87-12-071

SOUTHERN CALIFORNIA GAS COMPANY (SoCal) has filed an application for rehearing of Decision (D.) 87-12-071. SAN DIEGO GAS AND ELECTRIC COMPANY (SDG&E) has filed a response in support of SoCal's application for rehearing (SDG&E's response). SoCal's application for rehearing suspended the ordering paragraphs of D.87-12-071. Because we required additional time to consider the matter, we extended the suspension on March 9, 1988 in D.88-03-040, and again on April 27, 1988. The suspension expires with the issuance of this order.

The application for rehearing and SDG&E's response contain a multitude of allegations of error, of varying merit. We have considered all the allegations and are of the opinion that good cause for rehearing has not been shown. Neither the application for rehearing nor SDG&E's response raises any question of legal error which would benefit from the taking of additional evidence or the hearing of further arguments.

However, the application and SDG&E's response have alerted us to several problems with D.87-12-071. Although we are not persuaded by any of the grounds advanced, or by the arguments presented in their support (at least as they are stated in the application and response), we have determined that our reasoning should be better articulated. Accordingly, and bearing in mind the importance of the issues it dealt with, we have reconsidered D.87-12-071 thoroughly. We now modify that decision.

1. The Constitutional Conclusion.

Neither SoCal nor SDG&E has objected to our finding that the attorney-client privilege applies to us, and we do not mean to change the essence of that finding here. However, in reviewing D.87-12-071, we fear that our discussion of the constitutional aspects of our decision may have found too much.

In the oral arguments and briefs on which D.87-12-071 was based, PSD argued that article XII § 6 of the California constitution gives us authority to examine records of all public utilities within its jurisdiction. SoCal advanced no arguments against this proposition. However, we also considered article XII, § 2 of the constitution, which provides that "Subject to statute and due process, the Commission may establish its own procedure." Noting that evidentiary rules are procedural, we decided that the attorney-client privilege provisions of the Evidence Code, being statutory, must apply to Commission proceedings.

We now believe that our reasoning was expressed too broadly. If article XII, § 2 is read to mean that any procedural statute will override our rules of procedure, then the entire Evidence Code and Code of Civil Procedure, not just the sections on privileges, must be applied to our proceedings, and the first sentence of article XII, § 2 is therefore meaningless. A fundamental principle of statutory construction is that statutes, or, as in this case, constitutional provisions, must be read so as to be meaningful insofar as possible. Therefore, the "Subject to statute" language of article XII, § 2 could not have been meant to subject us to all the procedural rules enacted by statute for the courts of the state.

Another fundamental principle of statutory construction is that when two statutes (or a statute and a constitutional provision) appear to be in conflict, they should be read, if possible, so as not to conflict. Article XII, § 2 says that the Commission may make its own procedural rules, but the statutory

language indicates that the attorney-client privilege in the Evidence Code is intended to apply to us. It is reasonable to conclude that, where the legislature enacts a statute which it specifically intends to apply to us, the statute is one of those referred to in the words "Subject to statute" in article XII, § 2. The wording of Evidence Code § 910 and the Comments of the Assembly Committee on the Judiciary to § 914 show that privileges were intended specifically to apply to our proceedings. Therefore, the Evidence Code's attorney-client privilege must apply in at least some of the Commission's regulatory activities.

However, if the privilege is to be applied to us in any and every proceeding before us, the Evidence Code again comes into apparent conflict with the constitution. Article XII, § 6 gives us power to examine records of the utilities we regulate; Public Utilities Code §§ 314, 463 (b), 581 and 582 (among others) reinforce the extremely broad nature of this authority, and do not exclude privileged documents from the scope of our authority to review documents. We are also fully cognizant of the compelling public policy in favor of ensuring the Commission has access to all relevant utility documents. Without such access, the Commission's ability to regulate effectively is severely circumscribed. Accordingly, we are not inclined to interpret the applicable authorities so as to limit our investigatory powers.

Unless the Legislature chooses to clarify its intent, we may at some point have to define precisely those situations in which the privilege is meant to apply to us and those in which it is not. Because there is little guidance for us in statute and caselaw, we hesitate to make such a definition when it is not strictly necessary. In the case before us, there is ample evidence for a finding of implied waiver even if the privilege does exist. Therefore, we decline to make a finding at this time as to the scope of the application of the privilege to us in the performance of our duties, and modify our previous decision accordingly.

2. Express Waiver.

In reconsidering D.87-12-071, we have taken another look at our conclusions in the question of express waiver. We concluded there that the disclosure, made in the "Note to File" by SoCal staff, dated August 23, 1984, Attachment C to PSD's August 3, 1987 Opposition to SoCal's Motion for Review of ALJ Ruling (Note to File), of the decisions and conclusions of SoCal's attorneys, was not of sufficient scope to constitute express waiver of the privilege. We are not convinced that this conclusion is compelled by the factual situation, nor are we convinced of the opposite. Upon reexamination, we see the question in this instance as an extremely close one. Given the clearer grounds on which to resolve the issues in this case, we believe that it is wiser to decline a conclusion as to express waiver at this time.

3. Implied Waiver.

SoCal's application for rehearing made six allegations of legal error in D.87-12-071, and SDG&E's response made five, with little duplication, all surrounding our finding that implied waiver has occurred under the specific facts of this case. SoCal's application for rehearing alleges legal error on the following grounds: (1) D.87-12-071 cites no analogous case finding an implied waiver of the attorney-client privilege; (2) the contents of the memos have not been put at issue within the meaning of "implied waiver;" (3) conditioning recovery of costs on waiver of the attorney-client privilege violates SoCal's due process rights; (4) D.87-12-071 errs in overbroad interpretation of "implied waiver" so as to conflict with Evidence Code §§ 901 and 910; (5) even if other elements of implied waiver are present, SoCal's revelation of the conclusions of the memos was not voluntary because reasonableness review is not voluntary; and (6) in

camera inspection is meaningless and fails to make the decision lawful.

SDG&E's response alleges the following legal errors: (1) D.87-12-071 violates the prohibition of Ev. Code § 912 against coercion; (2) the decision misinterprets caselaw; (3) the implied waiver doctrine violates the equal protection clause of the United States Constitution; (4) the implied waiver doctrine violates due process rights; (5) the Commission has an interest in preserving the attorney-client privilege; and (6) the attorney-client privilege does not interfere with full disclosure.

We have thoroughly considered each of the allegations contained in either SoCal's Application for Rehearing and SDG&E's Response in support of it, and none of them has convinced us that there is good cause to disturb our finding of implied waiver in this case or our order that the subject documents be submitted for in camera review in order to limit the resulting disclosure. Neither have we seen good cause for a rehearing of these matters, or for a stay of our decision. However, some of the allegations have convinced us that D.87-12-071, as it stands, could be misread. Therefore we now modify our earlier decision to clarify our reasoning and conclusions.

Therefore,

IT IS ORDERED THAT:

1. Rehearing of D.87-12-071 is hereby denied.
2. D.87-12-071 is hereby modified as follows:

a) In the second full paragraph of page 1 of the decision, the second sentence is modified as follows:

> "We conclude that the legal analyses underlying the decision to buy out the contract have been placed at issue by the application and that fundamental fairness requires the disclosure of information that would otherwise be privileged."

b) In the second full paragraph of page 1 of the decision, following the second sentence, the following language is inserted:

> "In addition, we find that (1) Article XII, § 6 of the California constitution gives the Commission power to examine records of utilities, (2) that Article 3 of Chapter 4 of Division 8 of the Evidence Code (attorney-client privilege) applies before this Commission in certain instances which require further analysis to define, and (3) that in the present case, even assuming that the privilege does apply, an implied waiver of the privilege has occurred."

c) Before the last sentence of the first partial paragraph on page 2, the following language is inserted:

> "On August 23, 1984, a conference call was arranged for several representatives of SoCal and of the Public Utilities Commission to discuss resolution of the contract problem. SoCal's spokesperson, William Owens, gave reasons why the contract was undesirable, and "'requested permission' from the CPUC to negotiate with Getty in an effort to develop a one-time buyout charge to escape from the contract. ...
>
> "Bill Stalder [of the Commission] asked why we couldn't just 'walk away' from the contract. Owens explained to him 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." (SoCal's "Note to File" on the conference call, produced at the request of PSD and attached as part of Attachment C to PSD's August 3, 1987 brief (Note to File).)
>
> The Commission's representative then agreed that negotiation would be a reasonable procedure, and SoCal proceeded to negotiate a buyout."

d) Before the first full paragraph on page 2, the following language is inserted:

> "On June 9, 1986, staff sent a data request to SoCal. The utility had submitted an advice letter on March 21, 1986, asking the Commission's approval of the buyout agreement, saying that SoCal had consulted staff before negotiating and that "Staff indicated its concurrence with the plan." The June 9 data request asked for identities of the staff members consulted, the places and attendance of any meetings, the manner and subject matter of staff's concurrence, and copies of all notes or memoranda taken or prepared by SoCal summarizing the meetings. On July 3, 1986, staff received SoCal's response, which included the Note to File.
>
> "SoCal has submitted a report in this proceeding, in which it argues that the termination of the contract was reasonable and prudent. However, it has not given any reason for its choice of a negotiated $7.4 million buyout over other methods of terminating the contract, in that report or elsewhere in this proceeding. The only affirmative justification for that choice which we have seen in the record is the August 23, 1984 representation that the decision was made on the advice of counsel."

e) In the second full sentence on page 9, the words "Since SoCal" are deleted and the words "According to SoCal, since it" are substituted.

f) The first two sentences of the third full paragraph of page 12 are deleted and the following language is substituted:

> "PSD argues that the express waiver occurred during the August 23, 1984 conference described above, in which SoCal justified the choice of the buyout, rather than other options for terminating the contract, entirely on the basis of advice of counsel (Note to File)."

g) In the last sentence of the first full paragraph of page 15, the words "Legislature has" are deleted and the words "constitution and Legislature have" are substituted.

h) All of page 17 beginning with the first full paragraph, and page 18 through and including the second full paragraph, are deleted, and the following language is substituted:

> "Given these two sections alone, we might well conclude that the Legislature has no authority to limit our discovery power by any statutory privilege. However, article XII, section 2 provides that: "Subject to statute and due process, the commission may establish its own procedure." Obviously, not all procedural statutes passed by the Legislature will apply to our proceedings; otherwise the second part of this sentence would be meaningless. Equally obviously, there must be some statutes which do apply to our proceedings, or the first part of the sentence would have no meaning.
>
> "Many sections of the Public Utilities Code prescribe standards and procedures for us to follow; obviously, these are within the contemplation of article XII, section 2. Evidence Code § 910 provides that the privileges of Division 8 of that code are to be applied to agencies like ours, where the rules of evidence are inapplicable by statute. By contrast, other divisions of the Evidence Code, and the Code of Civil Procedure, do not contain such provisions. It is clear to us that the privileges of the Evidence Code are meant to apply to the Commission to some extent.
>
> "However, it is equally clear from article XII, § 6 and from legislation (e.g., Public Utilities Code §§ 314, 463, 581 and 582) that the privilege is not meant to apply to all of our activities in the furtherance of our duties. We find little or no guidance in statute and caselaw for establishing a bright line between activities to which the privilege must apply and those to which it must not. In the present case, as we discuss below, there is ample basis on which to decide the question on other grounds. Therefore we decline to draw any lines

defining the scope of the privilege at this time."

i) On page 25, the first full sentence is deleted and the following sentence is substituted:

"Again we conclude that we should not base our decision on an uncertain balancing of public policy considerations when a far more concrete basis for decision exists. Accordingly, we shall decline at this time to define the precise limits of the attorney-client privilege in proceedings before the Commission."

j) The first full paragraph of page 26 is deleted and the following language is substituted:

"There is no guidance in caselaw to indicate whether a disclosure of the decisions and conclusions of an attorney are sufficient, under either the test of Travelers' or that of Wigmore, to constitute an express waiver of the attorney-client privilege. We think that it would be sufficient as a waiver of the work product privilege, where the privilege is absolute as to the decisions and conclusions of an attorney (Code of Civil Procedure § 2018, subd. (c)), and the disclosure of those decisions and conclusions would abrogate the privilege. But, as we have said, we are addressing only the lawyer-client privilege here, and the breadth and depth of the disclosure under discussion are neither clearly sufficient nor clearly insufficient to us to require a finding one way or the other. We find the question of express waiver as presented in this case to be an extremely close one.

"Because we have other and clearer grounds for finding an implied waiver, we decline to resolve the question of express waiver at this time."

k) In the last full paragraph of page 26, the words "in this notion" are deleted and the following language inserted:

> "not on the application itself, but on the essential elements which SoCal bears the burden of showing."

l) In the third sentence of the first full paragraph of page 27, , the words "Wilson v. Superior Court (1976) 63 Cal. App.3d 825, cited in" are inserted immediately following the first opening parenthesis; the words "at 393" are inserted immediately before the last closing parenthesis.

m) In the first line of page 31, the word "and" is deleted and the word "an" substituted.

n) In the fourth line of page 31, the word "in" is inserted before the word "an" at the end of the line.

o) In the penultimate sentence of the first partial paragraph of page 31, after the words "during this period," the following language is inserted:

> "and in the 'Note to File' attached to PSD's August 3, 1987 filing. Three pages of SoCal's report deal with the buyout in question. These pages present reasons which support termination of the contract, but do not make any reference at all to the choice of a buyout over other options for terminating it."

p) In the last sentence of the first partial paragraph of page 31, after the words "SoCal's proof," the following language is inserted:

> "and the only justification so far advanced for the choice of the buyout is the advice of counsel assertion of SoCal management on August 23, 1984 as recorded in the Note to File."

q) In the first sentence of the second full paragraph of page 31, the words "and pay the termination payment" are deleted and the words "by the method chosen" are substituted.

r) In the last sentence of the last full paragraph of page 31, the words "SoCal argues" are deleted and the following language is substituted:

> "However, SoCal declines to make any affirmative showing that the choice of buyout itself was reasonable and prudent, arguing"

s) Following the phrase "preferable to" in the last sentence of the first partial paragraph of page 32, the remainder of the sentence is deleted and replaced with the following language:

> "the risk of damages due to breach of the contract."

t) At the end of the first partial paragraph on page 33, the following language is inserted:

> "PSD does not bear the burden of proving that the buyout decision was unreasonable and imprudent, nor is it up to us to make the parties' arguments for them; rather, SoCal must make an affirmative showing that all essential elements of the buyout decision were reasonable and prudent. No reason for the buyout decision has been advanced other than the advice of counsel, and that only indirectly in the Note to File. We cannot see how SoCal can expect us to make a determination ratifying the decision without providing us with any affirmative showing that it was reasonable and prudent."

u) In the first sentence of the first full paragraph of page 33, after the words, "SoCal's application that," the following language is inserted:

> "we cannot do what SoCal requests without being presented with some affirmative showing of the prudence of SoCal's actions. If SoCal's sole justification for choosing the

buyout over other methods of contract termination is advice of counsel,"

v) After the first full paragraph of page 33, the following language is inserted:

"A similar situation was presented in Handgards, Inc. v. Johnson & Johnson (N.D.Cal. 1976) 413 F.Supp. 926, where defendants against charges of attempted monopolization by bad-faith lawsuits proferred advice of counsel as an affirmative defense, and claimed attorney-client privilege when plaintiffs sought discovery of the relevant case files. The Court found that this affirmative defense constituted an implied waiver of the attorney-client privilege, saying:

> The deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice. [Citations.]
>
> An important consideration in assessing the issue of waiver is fairness. Bierman v. Marcus, 122 F.Supp. 250 (D.N.J. 1954). Thus, a party may not insist on the protection of the attorney-client privilege for damaging communications while disclosing other selected communications because they are self-serving. ...
>
> By putting their lawyers on the witness stand in order to demonstrate that the prior lawsuits were pursued on the basis of competent legal advice and were, therefore, brought in good faith, defendants will waive the attorney-client privilege as to communications relating to the issue of the good-faith prosecution of the patent actions.

413 F.Supp. 926, 929.

"It is true that the situation in Handgards was slightly different from that in the present case, in that the defendants in Handgards were prepared to substantiate their

claim of good faith based on advice of counsel, by putting their lawyers on the witness stand. SoCal, if we understand it, is not prepared to back its claim of reasonableness and prudence beyond its assertion of advice of counsel. This does not, however, make Handgards inapplicable to the present case; rather, it adds an obstacle -- failure of an affirmative showing -- to our making a finding in SoCal's favor here.

"Further, we believe that, without a sufficient affirmative showing of the reasonableness and prudence of all the essential elements of SoCal's decision, we do not have discretion to grant SoCal's request. It is clear from Public Utilities Code § 463 (b), quoted above at page 21, that the Legislature intended that we make no finding of reasonableness and prudence in the absence of complete documentary information from and affirmative showings by the utility whose operations are under review. While the statute does not deal with information deliberately withheld, we think it likely that that possibility did not occur to the Legislature in view of our authority under article XII, § 6 and §§ 314, 581 and 582 of our Code. We believe that the import of the statute is to forbid us to make any finding of reasonableness and prudence without full evidentiary support by the utility for its position."

w) After the second sentence of the last partial paragraph on page 33, the following language is inserted:

"It is not SoCal's application alone that waives the privilege here; it is the fact that we see no basis for finding SoCal's choice of buyout reasonable, other than advice of counsel. And, as we have pointed out elsewhere, the advice of counsel is so central to the inquiry about the most reasonable means of terminating a contract that it would be difficult for SoCal to convince us that its decision was prudent without depending on such advice. For, if advice of counsel played no part in SoCal's decision of termination method, we must certainly ask why before we make a finding that

the expenditure of this $7.4 million is rightfully to be borne by the ratepayers.

"Accordingly, a finding of a waiver ought to encourage, rather than discourage, SoCal's attorneys to make full and competent analyses when called upon, especially when they know that the subject of analysis will be a central element in proving that decisions based on the analyses are reasonable and prudent. It is in SoCal's interest under such circumstances to obtain the best, frankest, and most thorough legal advice possible, and to act on it with the utmost prudence."

x) In the last partial sentence on page 33, the words "this case" are deleted and the words "such cases" are substituted.

y) In the first partial sentence of page 34, the words "supported SoCal's" and "decision" are deleted and the words "support the utilities'" and "decisions" are substituted; the following two sentences are deleted.

z) Finding of fact 9a is added, as follows:

"SoCal has not advanced any reason for its choice of buyout of the Getty contract, rather than any other method of termination, other than in the conference of August 23, 1984, when it explained its decision entirely by reference to the advice of counsel."

aa) Finding of fact 10a is added, as follows:

"In a request for a finding by the Commission that a decision to terminate a contract by a buyout was reasonable and prudent, SoCal has the burden of making an affirmative showing by clear and convincing evidence, not only that the choice to terminate the contract was reasonable and prudent, but also that its choice of method of termination was reasonable and prudent."

bb) Conclusion of Law No. 2 is deleted and the following language is substituted:

> "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 thus somewhat limited by the constitution. However, there is little guidance in statute and caselaw by which we can determine to which of our proceedings or activities the privilege is meant to apply and to which of them it is not."

cc) Conclusion of Law No. 4 is deleted.

dd) The following language is added to the end of Conclusion of law No. 6:

> "The ALJ shall review the documents for the purpose of limiting disclosure of the documents to information closely relevant to the issues defined by the party requesting disclosure."

ee) In ordering paragraph No. 1, after the words "for in camera inspection," the words "for the purpose of limiting disclosure as discussed herein" are inserted.

3. SoCal's request for a continuation of the stay until the matter is no longer subject to review by the Supreme Court is denied.

This order is effective today.

Dated JUN 8 1988, at Carson, California.

I will file a written dissent.

FREDERICK R. DUDA
Commissioner

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

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

Victor Wolser, Executive Director

A.86-09-030
D.88-06-029

FREDERICK R. DUDA, Commissioner, dissenting:

I must dissent from this Order Denying Rehearing and Modifying Decision 87-12-071 for the same reasons I dissented from the Commission's original decision in this proceeding.

While I am glad that the majority now seems to recognize that a finding of implied waiver of SoCals attorney-client privilege depends on whether SoCal rests its case for recovery of its landfill gas contract termination payment on the advice of its counsel, I continue to disagree with the majority's application of this principle to the facts of the case before us.

SoCal asserts that its $7 million termination payment was reasonable and prudent because the payment was less than it would have ended up paying had it continued to take gas under the contract. SoCal makes no arguments based on the advice of its counsel as to whether the contract offered SoCal an opportunity to terminate its obligations under the contract without a negotiated buyout.

The majority's assumption that advice of counsel is the foundation for SoCal's claims that the termination payment was reasonable is not based on any assertion by SoCal in this proceeding, but rather is based on an inference drawn from a conversation between SoCal and PUC staff in 1984, before the negotiated buyout took place. I believe that this is an improper basis for finding an implied waiver of the attorney-client

privilege. A waiver of the attorney-client privilege can in certain circumstances be implied, true, but it should be implied only from the actions of a party during the course of the proceeding. It is simply wrong to base a finding of implied waiver on something never asserted in any pleading or testimony.

This is not to say that the majority is wrong in noting the importance of SoCal's decision to terminate the Montery Park Landfill contract through a negotiated buyout rather than through some other means. The reasonableness of any termination payment is clearly linked to the question whether SoCal had the option to terminate the agreement 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 <u>any</u> termination payment was unreasonable. This issue must be explored further in this proceeding before the Commission can make a determination of the reasonableness of the termination payment.

If SoCal fails to convince us that there was no legal, cost-free, way out of its landfill gas obligation or that some other legitimate business reason justified the payment, then we should find that SoCal has failed to meet its burden of proving the reasonableness of its termination payment and not allow SoCal to recover this money from ratepayers.

As I noted in my earlier dissent, the fundamental issue in this case is whether SoCal's decision to terminate the contract through a negotiated buyout 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 to show what SoCal should have known at the time it terminated the landfill gas contract.

SoCal's privileged communications are relevant, but not essential. 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 conclusions as to the knowledge and understanding SoCal should have had when making its decision to negotiate termination of the contract. Since our reasonableness review will consider not only what SoCal says its decision makers knew, but also what PSD believes they should have known, I think PSD overemphasizes the importance of the portion of SoCal's actual knowledge that is represented by its attorneys' confidential opinions.

My objection to finding of an implied waiver is, of course, based on the conduct of the parties to this proceeding to date. If, during the future course of this proceeding, SoCal ever states that it made the termination payment in reliance on its lawyers' opinion that it could not otherwise escape from its contractual obligations, then it may well be appropriate for us to find that SoCal's reliance on the advice of its counsel constitutes an implied waiver of its attorney-client privilege. We should not, however, pre-empt SoCal's right to argue its case as it sees fit by finding an implied waiver now. A party cannot fairly be found to have waived a privilege simply because of an opponent's characterization of its legal position.

To sum up, it is not fair for the majority to take away SoCal's attorney-client privilege on the ground that SoCal is resting its case for recovery of the landfill gas contract termination payment on the advice of counsel that there were no legal alternatives, when the only arguable evidence of this is an inference drawn from a conversation between SoCal and commission staff long preceding the filing of the application leading to this decision. An implied waiver of the attorney-client privilege must be based only on the actions of a party during the course of the proceeding. The majority errs in basing its decision on an alleged SoCal argument never actually asserted in any pleading or testimony.

Given the high probability that SoCal will appeal today's decision, I believe that the Commission should stay its order that SoCal produce certain documents until SoCal has filed its appeal or the statutory period for the filing of such an appeal has elapsed.

Frederick R. Duda

Frederick R. Duda, Commissioner

June 8, 1988
Carson, California

k) In the last full paragraph of page 26, the words "in this notion" are deleted and the following language inserted:

> "not on the application itself, but on the essential elements which SoCal bears the burden of showing."

l) In the third sentence of the first full paragraph of page 27, , the words "Wilson v. Superior Court (1976) 63 Cal. App.3d 825, cited in" are inserted immediately following the first opening parenthesis; the words "at 393" are inserted immediately before the last closing parenthesis.

m) In the first line of page 31, the word "and" is deleted and the word "an" substituted.

n) In the fourth line of page 31, the word "in" is inserted before the word "an" at the end of the line.

o) In the penultimate sentence of the first partial paragraph of page 31, after the words "during this period," the following language is inserted:

> "and in the 'Note to File' attached to PSD's August 3, 1987 filing. Three pages of SoCal's report deal with the buyout in question. These pages present reasons which support termination of the contract, but do not make any reference at all to the choice of a buyout over other options for terminating it."

p) In the last sentence of the first partial paragraph of page 31, after the words "SoCal's proof," the following language is inserted:

> "and the only justification so far advanced for the choice of the buyout is the advice of counsel assertion of SoCal management on August 23, 1984 as recorded in the Note to File."

q) In the first sentence of the second full paragraph of page 31, the words "and pay the termination payment" are deleted and the words "by the method chosen" are substituted.

r) In the last sentence of the last full paragraph of page 31, the words "SoCal argues" are deleted and the following language is substituted:

> "However, SoCal declines to make any affirmative showing that the choice of buyout itself was reasonable and prudent, arguing"

s) Following the phrase "preferable to" in the last sentence of the first partial paragraph of page 32, the remainder of the sentence is deleted and replaced with the following language:

> "the risk of damages due to breach of the contract."

t) At the end of the first partial paragraph on page 32, the following language is inserted:

> "PSD does not bear the burden of proving that the buyout decision was unreasonable and imprudent, nor is it up to us to make the parties' arguments for them; rather, SoCal must make an affirmative showing that all essential elements of the buyout decision were reasonable and prudent. No reason for the buyout decision has been advanced other than the advice of counsel, and that only indirectly in the Note to File. We cannot see how SoCal can expect us to make a determination ratifying the decision without providing us with any affirmative showing that it was reasonable and prudent."

u) In the first sentence of the first full paragraph of page 33, after the words, "SoCal's application that," the following language is inserted:

> "we cannot do what SoCal requests without being presented with some affirmative showing of the prudence of SoCal's actions. If SoCal's sole justification for choosing the

buyout over other methods of contract termination is advice of counsel,"

v) After the first full paragraph of page 33, the following language is inserted:

> "A similar situation was presented in Handgards, Inc. v. Johnson & Johnson (N.D.Cal. 1976) 413 F.Supp. 926, where defendants against charges of attempted monopolization by bad-faith lawsuits proferred advice of counsel as an affirmative defense, and claimed attorney-client privilege when plaintiffs sought discovery of the relevant case files. The Court found that this affirmative defense constituted an implied waiver of the attorney-client privilege, saying:
>
> > The deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice. [Citations.]
> >
> > An important consideration in assessing the issue of waiver is fairness. Bierman v. Marcus, 122 F.Supp. 250 (D.N.J. 1954). Thus, a party may not insist on the protection of the attorney-client privilege for damaging communications while disclosing other selected communications because they are self-serving. ...
> >
> > By putting their lawyers on the witness stand in order to demonstrate that the prior lawsuits were pursued on the basis of competent legal advice and were, therefore, brought in good faith, defendants will waive the attorney-client privilege as to communications relating to the issue of the good-faith prosecution of the patent actions.
>
> 413 F.Supp. 926, 929.
>
> "It is true that the situation in Handgards was slightly different from that in the present case, in that the defendants in Handgards were prepared to substantiate their

claim of good faith based on advice of counsel, by putting their lawyers on the witness stand. SoCal, if we understand it, is not prepared to back its claim of reasonableness and prudence beyond its assertion of advice of counsel. This does not, however, make Handgards inapplicable to the present case; rather, it adds an obstacle -- failure of an affirmative showing -- to our making a finding in SoCal's favor here.

"Further, we believe that, without a sufficient affirmative showing of the reasonableness and prudence of all the essential elements of SoCal's decision, we do not have discretion to grant SoCal's request. It is clear from Public Utilities Code § 463 (b), quoted above at page 21, that the Legislature intended that we make no finding of reasonableness and prudence in the absence of complete documentary information from and affirmative showings by the utility whose operations are under review. While the statute does not deal with information deliberately withheld, we think it likely that that possibility did not occur to the Legislature in view of our authority under article XII, § 6 and §§ 314, 581 and 582 of our Code. We believe that the import of the statute is to forbid us to make any finding of reasonableness and prudence without full evidentiary support by the utility for its position."

w) After the second sentence of the last partial paragraph on page 33, the following language is inserted:

"It is not SoCal's application alone that waives the privilege here; it is the fact that we see no basis for finding SoCal's choice of buyout reasonable, other than advice of counsel. And, as we have pointed out elsewhere, the advice of counsel is so central to the inquiry about the most reasonable means of terminating a contract that it would be difficult for SoCal to convince us that its decision was prudent without depending on such advice. For, if advice of counsel played no part in SoCal's decision of termination method, we must certainly ask why before we make a finding that

the expenditure of this $7.4 million is rightfully to be borne by the ratepayers.

"Accordingly, a finding of a waiver ought to encourage, rather than discourage, SoCal's attorneys to make full and competent analyses when called upon, especially when they know that the subject of analysis will be a central element in proving that decisions based on the analyses are reasonable and prudent. It is in SoCal's interest under such circumstances to obtain the best, frankest, and most thorough legal advice possible, and to act on it with the utmost prudence."

x) In the last partial sentence on page 33, the words "this case" are deleted and the words "such cases" are substituted.

y) In the first partial sentence of page 34, the words "supported SoCal's" and "decision" are deleted and the words "support the utilities'" and "decisions" are substituted; the following two sentences are deleted.

z) Finding of fact 9a is added, as follows:

"SoCal has not advanced any reason for its choice of buyout of the Getty contract, rather than any other method of termination, other than in the conference of August 23, 1984, when it explained its decision entirely by reference to the advice of counsel."

aa) Finding of fact 10a is added, as follows:

"In a request for a finding by the Commission that a decision to terminate a contract by a buyout was reasonable and prudent, SoCal has the burden of making an affirmative showing by clear and convincing evidence, not only that the choice to terminate the contract was reasonable and prudent, but also that its choice of method of termination was reasonable and prudent."

bb) Conclusion of Law No. 2 is deleted and the following language is substituted:

> "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 thus somewhat limited by the constitution. However, there is little guidance in statute and caselaw by which we can determine to which of our proceedings or activities the privilege is meant to apply and to which of them it is not."

cc) Conclusion of Law No. 4 is deleted.

dd) The following language is added to the end of Conclusion of law No. 6:

> "The ALJ shall review the documents for the purpose of limiting disclosure of the documents to information closely relevant to the issues defined by the party requesting disclosure."

ee) In ordering paragraph No. 1, after the words "for in camera inspection," the words "for the purpose of limiting disclosure as discussed herein" are inserted.

3. SoCal's request for a continuation of the stay until the matter is no longer subject to review by the Supreme Court is denied.

This order is effective today.

Dated JUN 8 1988, at San Francisco, California.

I will file a written dissent.

FREDERICK R. DUDA
Commissioner

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

A.86-09-030
D.88-06-029

FREDERICK R. DUDA, Commissioner, dissenting:

I must dissent from this Order Denying Rehearing and Modifying Decision 87-12-071 for the same reasons I dissented from the Commission's original decision in this proceeding.

While I am glad that the majority now seems to recognize that a finding of implied waiver of SoCals attorney-client privilege depends on whether SoCal rests its case for recovery of its landfill gas contract termination payment on the advice of its counsel, I continue to disagree with the majority's application of this principle to the facts of the case before us.

SoCal asserts that its $7 million termination payment was reasonable and prudent because the payment was less than it would have ended up paying had it continued to take gas under the contract. SoCal makes no arguments based on the advice of its counsel as to whether the contract offered SoCal an opportunity to terminate its obligations under the contract without a negotiated buyout.

The majority's assumption that advice of counsel is the foundation for SoCal's claims that the termination payment was reasonable is not based on any assertion by SoCal in this proceeding, but rather is based on an inference drawn from a conversation between SoCal and PUC staff in 1984, before the negotiated buyout took place. I believe that this is an improper basis for finding an implied waiver of the attorney-client

privilege. A waiver of the attorney-client privilege can in certain circumstances be implied, true, but it should be implied only from the actions of a party during the course of the proceeding. It is simply wrong to base a finding of implied waiver on something never asserted in any pleading or testimony.

This is not to say that the majority is wrong in noting the importance of SoCal's decision to terminate the Montery Park Landfill contract through a negotiated buyout rather than through some other means. The reasonableness of any termination payment is clearly linked to the question whether SoCal had the option to terminate the agreement 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 any termination payment was unreasonable. This issue must be explored further in this proceeding before the Commission can make a determination of the reasonableness of the termination payment.

If SoCal fails to convince us that there was no legal, cost-free, way out of its landfill gas obligation or that some other legitimate business reason justified the payment, then we should find that SoCal has failed to meet its burden of proving the reasonableness of its termination payment and not allow SoCal to recover this money from ratepayers.

As I noted in my earlier dissent, the fundamental issue in this case is whether SoCal's decision to terminate the contract through a negotiated buyout 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 to show what SoCal should have known at the time it terminated the landfill gas contract.

SoCal's privileged communications are relevant, but not essential. 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 conclusions as to the knowledge and understanding SoCal should have had when making its decision to negotiate termination of the contract. Since our reasonableness review will consider not only what SoCal says its decision makers knew, but also what PSD believes they should have known, I think PSD overemphasizes the importance of the portion of SoCal's actual knowledge that is represented by its attorneys' confidential opinions.

My objection to finding of an implied waiver is, of course, based on the conduct of the parties to this proceeding to date. If, during the future course of this proceeding, SoCal ever states that it made the termination payment in reliance on its lawyers' opinion that it could not otherwise escape from its contractual obligations, then it may well be appropriate for us to find that SoCal's reliance on the advice of its counsel constitutes an implied waiver of its attorney-client privilege. We should not, however, pre-empt SoCal's right to argue its case as it sees fit by finding an implied waiver now. A party cannot fairly be found to have waived a privilege simply because of an opponent's characterization of its legal position.

To sum up, it is not fair for the majority to take away SoCal's attorney-client privilege on the ground that SoCal is resting its case for recovery of the landfill gas contract termination payment on the advice of counsel that there were no legal alternatives, when the only arguable evidence of this is an inference drawn from a conversation between SoCal and commission staff long preceding the filing of the application leading to this decision. An implied waiver of the attorney-client privilege must be based only on the actions of a party during the course of the proceeding. The majority errs in basing its decision on an alleged SoCal argument never actually asserted in any pleading or testimony.

Given the high probability that SoCal will appeal today's decision, I believe that the Commission should stay its order that SoCal produce certain documents until SoCal has filed its appeal or the statutory period for the filing of such an appeal has elapsed.

Frederick R. Duda

Frederick R. Duda, Commissioner

June 8, 1988
Carson, California

L/CAD:lkw

Decision 88 06 029 JUN 8 1988

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 rates under the Consolidated Adjustment Mechanism.	Application No. 86-09-030 (Filed September 19, 1986)

ORDER DENYING REHEARING
AND MODIFYING DECISION 87-12-071

SOUTHERN CALIFORNIA GAS COMPANY (SoCal) has filed an application for rehearing of Decision (D.) 87-12-071. SAN DIEGO GAS AND ELECTRIC COMPANY (SDG&E) has filed a response in support of SoCal's application for rehearing (SDG&E's response). SoCal's application for rehearing suspended the ordering paragraphs of D.87-12-071. Because we required additional time to consider the matter, we extended the suspension on March 9, 1988 in D.88-03-040, and again on April 27, 1988. The suspension expires with the issuance of this order.

The application for rehearing and SDG&E's response contain a multitude of allegations of error, of varying merit. We have considered all the allegations and are of the opinion that good cause for rehearing has not been shown. Neither the application for rehearing nor SDG&E's response raises any question of legal error which would benefit from the taking of additional evidence or the hearing of further arguments.

However, the application and SDG&E's response have alerted us to several problems with D.87-12-071. Although we are not persuaded by any of the grounds advanced, or by the arguments presented in their support (at least as they are stated in the application and response), we have determined that our reasoning should be better articulated. Accordingly, and bearing in mind the importance of the issues it dealt with, we have reconsidered D.87-12-071 thoroughly. We now modify that decision.

1. **The Constitutional Conclusion.**

Neither SoCal nor SDG&E has objected to our finding that the attorney-client privilege applies to us, and we do not mean to change the essence of that finding here. However, in reviewing D.87-12-071, we fear that our discussion of the constitutional aspects of our decision may have found too much.

In the oral arguments and briefs on which D.87-12-071 was based, PSD argued that article XII § 6 of the California constitution gives us authority to examine records of all public utilities within its jurisdiction. SoCal advanced no arguments against this proposition. However, we also considered article XII, § 2 of the constitution, which provides that "Subject to statute and due process, the Commission may establish its own procedure." Noting that evidentiary rules are procedural, we decided that the attorney-client privilege provisions of the Evidence Code, being statutory, must apply to Commission proceedings.

We now believe that our reasoning was expressed too broadly. If article XII, § 2 is read to mean that any procedural statute will override our rules of procedure, then the entire Evidence Code and Code of Civil Procedure, not just the sections on privileges, must be applied to our proceedings, and the first sentence of article XII, § 2 is therefore meaningless. A fundamental principle of statutory construction is that statutes, or, as in this case, constitutional provisions, must be read so as to be meaningful insofar as possible. Therefore, the "Subject to statute" language of article XII, § 2 could not have been meant to subject us to all the procedural rules enacted by statute for the courts of the state.

Another fundamental principle of statutory construction is that when two statutes (or a statute and a constitutional provision) appear to be in conflict, they should be read, if possible, so as not to conflict. Article XII, § 2 says that the Commission may make its own procedural rules, but the statutory

language indicates that the attorney-client privilege in the Evidence Code is intended to apply to us. It is reasonable to conclude that, where the legislature enacts a statute which it specifically intends to apply to us, the statute is one of those referred to in the words "Subject to statute" in article XII, § 2. The wording of Evidence Code § 910 and the Comments of the Assembly Committee on the Judiciary to § 914 show that privileges were intended specifically to apply to our proceedings. Therefore, the Evidence Code's attorney-client privilege must apply in at least some of the Commission's regulatory activities.

However, if the privilege is to be applied to us in any and every proceeding before us, the Evidence Code again comes into apparent conflict with the constitution. Article XII, § 6 gives us power to examine records of the utilities we regulate; Public Utilities Code §§ 314, 463 (b), 581 and 582 (among others) reinforce the extremely broad nature of this authority, and do not exclude privileged documents from the scope of our authority to review documents. We are also fully cognizant of the compelling public policy in favor of ensuring the Commission has access to all relevant utility documents. Without such access, the Commission's ability to regulate effectively is severely circumscribed. Accordingly, we are not inclined to interpret the applicable authorities so as to limit our investigatory powers.

Unless the Legislature chooses to clarify its intent, we may at some point have to define precisely those situations in which the privilege is meant to apply to us and those in which it is not. Because there is little guidance for us in statute and caselaw, we hesitate to make such a definition when it is not strictly necessary. In the case before us, there is ample evidence for a finding of implied waiver even if the privilege does exist. Therefore, we decline to make a finding at this time as to the scope of the application of the privilege to us in the performance of our duties, and modify our previous decision accordingly.

2. Express Waiver.

In reconsidering D.87-12-071, we have taken another look at our conclusions in the question of express waiver. We concluded there that the disclosure, made in the "Note to File" by SoCal staff, dated August 23, 1984, Attachment C to PSD's August 3, 1987 Opposition to SoCal's Motion for Review of ALJ Ruling (Note to File), of the decisions and conclusions of SoCal's attorneys, was not of sufficient scope to constitute express waiver of the privilege. We are not convinced that this conclusion is compelled by the factual situation, nor are we convinced of the opposite. Upon reexamination, we see the question in this instance as an extremely close one. Given the clearer grounds on which to resolve the issues in this case, we believe that it is wiser to decline a conclusion as to express waiver at this time.

3. Implied Waiver.

SoCal's application for rehearing made six allegations of legal error in D.87-12-071, and SDG&E's response made five, with little duplication, all surrounding our finding that implied waiver has occurred under the specific facts of this case. SoCal's application for rehearing alleges legal error on the following grounds: (1) D.87-12-071 cites no analogous case finding an implied waiver of the attorney-client privilege; (2) the contents of the memos have not been put at issue within the meaning of "implied waiver;" (3) conditioning recovery of costs on waiver of the attorney-client privilege violates SoCal's due process rights; (4) D.87-12-071 errs in overbroad interpretation of "implied waiver" so as to conflict with Evidence Code §§ 901 and 910; (5) even if other elements of implied waiver are present, SoCal's revelation of the conclusions of the memos was not voluntary because reasonableness review is not voluntary; and (6) in

camera inspection is meaningless and fails to make the decision lawful.

SDG&E's response alleges the following legal errors: (1) D.87-12-071 violates the prohibition of Ev. Code § 912 against coercion; (2) the decision misinterprets caselaw; (3) the implied waiver doctrine violates the equal protection clause of the United States Constitution; (4) the implied waiver doctrine violates due process rights; (5) the Commission has an interest in preserving the attorney-client privilege; and (6) the attorney-client privilege does not interfere with full disclosure.

We have thoroughly considered each of the allegations contained in either SoCal's Application for Rehearing and SDG&E's Response in support of it, and none of them has convinced us that there is good cause to disturb our finding of implied waiver in this case or our order that the subject documents be submitted for in camera review in order to limit the resulting disclosure. Neither have we seen good cause for a rehearing of these matters, or for a stay of our decision. However, some of the allegations have convinced us that D.87-12-071, as it stands, could be misread. Therefore we now modify our earlier decision to clarify our reasoning and conclusions.

Therefore,

IT IS ORDERED THAT:

1. Rehearing of D.87-12-071 is hereby denied.

2. D.87-12-071 is hereby modified as follows:

a) In the second full paragraph of page 1 of the decision, the second sentence is modified as follows:

> "We conclude that the legal analyses underlying the decision to buy out the contract have been placed at issue by the application and that fundamental fairness requires the disclosure of information that would otherwise be privileged."

b) In the second full paragraph of page 1 of the decision, following the second sentence, the following language is inserted:

> "In addition, we find that (1) Article XII, § 6 of the California constitution gives the Commission power to examine records of utilities, (2) that Article 3 of Chapter 4 of Division 8 of the Evidence Code (attorney-client privilege) applies before this Commission in certain instances which require further analysis to define, and (3) that in the present case, even assuming that the privilege does apply, an implied waiver of the privilege has occurred."

c) Before the last sentence of the first partial paragraph on page 2, the following language is inserted:

> "On August 23, 1984, a conference call was arranged for several representatives of SoCal and of the Public Utilities Commission to discuss resolution of the contract problem. SoCal's spokesperson, William Owens, gave reasons why the contract was undesirable, and "'requested permission' from the CPUC to negotiate with Getty in an effort to develop a one-time buyout charge to escape from the contract. ...
>
> "Bill Stalder [of the Commission] asked why we couldn't just 'walk away' from the contract. Owens explained to him 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." (SoCal's "Note to File" on the conference call, produced at the request of PSD and attached as part of Attachment C to PSD's August 3, 1987 brief (Note to File).)
>
> The Commission's representative then agreed that negotiation would be a reasonable procedure, and SoCal proceeded to negotiate a buyout."

d) Before the first full paragraph on page 2, the following language is inserted:

> "On June 9, 1986, staff sent a data request to SoCal. The utility had submitted an advice letter on March 21, 1986, asking the Commission's approval of the buyout agreement, saying that SoCal had consulted staff before negotiating and that "Staff indicated its concurrence with the plan." The June 9 data request asked for identities of the staff members consulted, the places and attendance of any meetings, the manner and subject matter of staff's concurrence, and copies of all notes or memoranda taken or prepared by SoCal summarizing the meetings. On July 3, 1986, staff received SoCal's response, which included the Note to File.
>
> "SoCal has submitted a report in this proceeding, in which it argues that the termination of the contract was reasonable and prudent. However, it has not given any reason for its choice of a negotiated $7.4 million buyout over other methods of terminating the contract, in that report or elsewhere in this proceeding. The only affirmative justification for that choice which we have seen in the record is the August 23, 1984 representation that the decision was made on the advice of counsel."

e) In the second full sentence on page 9, the words "Since SoCal" are deleted and the words "According to SoCal, since it" are substituted.

f) The first two sentences of the third full paragraph of page 12 are deleted and the following language is substituted:

> "PSD argues that the express waiver occurred during the August 23, 1984 conference described above, in which SoCal justified the choice of the buyout, rather than other options for terminating the contract, entirely on the basis of advice of counsel (Note to File)."

g) In the last sentence of the first full paragraph of page 15, the words "Legislature has" are deleted and the words "constitution and Legislature have" are substituted.

h) All of page 17 beginning with the first full paragraph, and page 18 through and including the second full paragraph, are deleted, and the following language is substituted:

> "Given these two sections alone, we might well conclude that the Legislature has no authority to limit our discovery power by any statutory privilege. However, article XII, section 2 provides that: "Subject to statute and due process, the commission may establish its own procedure." Obviously, not all procedural statutes passed by the Legislature will apply to our proceedings; otherwise the second part of this sentence would be meaningless. Equally obviously, there must be some statutes which do apply to our proceedings, or the first part of the sentence would have no meaning.
>
> "Many sections of the Public Utilities Code prescribe standards and procedures for us to follow; obviously, these are within the contemplation of article XII, section 2. Evidence Code § 910 provides that the privileges of Division 8 of that code are to be applied to agencies like ours, where the rules of evidence are inapplicable by statute. By contrast, other divisions of the Evidence Code, and the Code of Civil Procedure, do not contain such provisions. It is clear to us that the privileges of the Evidence Code are meant to apply to the Commission to some extent.
>
> "However, it is equally clear from article XII, § 6 and from legislation (e.g., Public Utilities Code §§ 314, 463, 581 and 582) that the privilege is not meant to apply to all of our activities in the furtherance of our duties. We find little or no guidance in statute and caselaw for establishing a bright line between activities to which the privilege must apply and those to which it must not. In the present case, as we discuss below, there is ample basis on which to decide the question on other grounds. Therefore we decline to draw any lines

defining the scope of the privilege at this time."

i) On page 25, the first full sentence is deleted and the following sentence is substituted:

"Again we conclude that we should not base our decision on an uncertain balancing of public policy considerations when a far more concrete basis for decision exists. Accordingly, we shall decline at this time to define the precise limits of the attorney-client privilege in proceedings before the Commission."

j) The first full paragraph of page 26 is deleted and the following language is substituted:

"There is no guidance in caselaw to indicate whether a disclosure of the decisions and conclusions of an attorney are sufficient, under either the test of Travelers' or that of Wigmore, to constitute an express waiver of the attorney-client privilege. We think that it would be sufficient as a waiver of the work product privilege, where the privilege is absolute as to the decisions and conclusions of an attorney (Code of Civil Procedure § 2018, subd. (c)), and the disclosure of those decisions and conclusions would abrogate the privilege. But, as we have said, we are addressing only the lawyer-client privilege here, and the breadth and depth of the disclosure under discussion are neither clearly sufficient nor clearly insufficient to us to require a finding one way or the other. We find the question of express waiver as presented in this case to be an extremely close one.

"Because we have other and clearer grounds for finding an implied waiver, we decline to resolve the question of express waiver at this time."