# EXHIBIT G

## LIGHTSEY MOTION TO COMPEL AND EXHIBITS

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF HAMPTON | ) | CASE NO.: 2017-CP-25-335 |
| Richard Lightsey, LeBrian Cleckley, Phillip Cooper, et al., on behalf of themselves and all others similarly situated, | ) | |
| Plaintiffs, | ) | |
| v. | ) | |
| South Carolina Electric & Gas Company, a Wholly Owned Subsidiary of SCANA, SCANA Corporation, and the State of South Carolina, | ) | |
| Defendants | ) | |

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPEL AND/OR FOR *IN CAMERA* REVIEW OF THE DOCUMENTS LISTED IN THE SCANA DEFENDANTS' PRIVILEGE LOG RELATED TO CARLETTE WALKER**

Plaintiffs respectfully submit this Memorandum in support of their Motion to Compel and/or to review the documents listed in the privilege log submitted by the Defendants SCE&G and SCANA (collectively "SCANA" or "the SCANA Defendants") on May 4, 2018. *See* Exhibit 1. The privilege log at issue for this motion concerns documents and communications related to Carlette Walker, a member of SCANA's finance management during a significant portion of the nuclear project at the center of this case. In response to Plaintiffs' notice of deposition and request for documents, SCANA Defendants produced upwards of 25, 000 pages worth of documents, and then provided a 146-page privilege log related to Carlette Walker, listing all information redacted

and withheld based on the following privileges: attorney-client privilege, work product doctrine, and joint defense of a common legal interest.

There are two "sets" of documents at issue in this Motion: (1) those documents the SCANA Defendants have produced subject to partial redaction; and (2) those documents the SCANA Defendants have withheld entirely. A review of the first set of documents demonstrates that SCANA is abusing claims of privilege by redacting information that is clearly not privileged. With respect to the second set, the information provided in the privilege log is either insufficient for the Plaintiffs to "assess the applicability of the privilege or protection" or involves information that is not entitled to be withheld from production.

As to the "redacted" documents, Plaintiffs can point to numerous examples where SCANA produced a communication twice: once in redacted form and once unredacted. Comparing the redacted communication to its unredacted form establishes that SCANA is abusing the privilege log and undermines all confidence in SCANA's claims of privilege.

For the second set, the "withheld" documents, the SCANA Defendants have not adequately described the communications and documents withheld to enable a proper analysis of the claimed privilege. However, it is abundantly clear from the privilege log that the SCANA Defendants have taken an unreasonably broad view of the scope of the attorney client privilege and work product doctrine. For example, the SCANA Defendants' privilege log appears to take the position that any document sent to or from any lawyer, whether in-house counsel or outside counsel, is automatically privileged in its entirety. As discussed below, such a blanket withholding is not proper. Additionally, given the allegations contained in the Complaint and the obvious nature of some of the documents withheld, the crime/fraud exception to the attorney-client privilege will apply in this case. Finally, the SCANA Defendants have shared with other entities a number of



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documents for which it claims a production privilege still exists. South Carolina law does not support such a contention.

## FACTUAL AND PROCEDURAL BACKGROUND

In 2007, South Carolina's legislature enacted the BLRA to allow for the advancement of construction costs associated with new nuclear power plants. The statute was key to SCE&G and Santee Cooper's decision to begin construction of two nuclear units at V.C. Summer. Pursuant to the BLRA, on May 30, 2008, SCE&G filed a combined application seeking a certificate of environmental compatibility and public convenience and necessity to build two nuclear units at V.C. Summer and for a base load review order to allow for construction costs to be paid in advance by SCE&G customers. *See* Complaint ¶¶ 14-22. In ruling on the combined application, the Public Service Commission approved the building of the two units and entered a "final and binding determination" under the BLRA that the plant was used and useful for utility purposes, as long as construction was within the parameters of the approved plan. Additionally, the PSC set the construction schedule and forecasted capital costs for the two units.

In August of 2017, three class action lawsuits were filed across South Carolina on behalf of the customers of the SCANA Defendants. Among other causes of action, these three lawsuits, *Lightsey*, *Cleckley*, and *Goodman*, respectively, alleged that the SCANA Defendants breached their contracts with the Plaintiff customers by charging customers an advance premium attributable solely to financing the construction of VC Summer Units 2 and 3, and then failing to provide the reactors in exchange for the Plaintiff customers' valuable consideration.

Immediately upon commencing suit, the Plaintiff customers attempted to engage in discovery with the SCANA Defendants, serving interrogatories and requests to produce. However, the SCANA Defendants declined to participate in the discovery process, moving to dismiss the

claims of the Plaintiff customers, and asking this Court to first decide the question of subject matter jurisdiction before requiring the SCANA Defendants to actively respond to discovery requests. Following a January 8th hearing in Columbia, South Carolina, this Court denied the SCANA Defendants' motions to dismiss, and affirmatively found that subject matter jurisdiction over the Plaintiff Customers' claims was vested in the circuit court. After this ruling, the Plaintiff Customers once again attempted to engage in the discovery process. At this point, more than ten (10) months had elapsed since commencement of the initial suit against the SCANA Defendants related to the failed nuclear construction project.

Despite the Court's ruling on behalf of the Plaintiff Customers, the SCANA Defendants once again refused to participate in discovery, and sought an interlocutory appeal of the circuit court's order denying the SCANA Defendants motions to dismiss, and requesting a stay of discovery during the pendency of the appellate process. The Court of Appeals declined SCANA's appeal, and on May 24, 2018, the Supreme Court issued a remittitur of the case back to the lower court. In the interim, this Court had determined that even if the SCANA Defendants' appeal proceeded forward, the appeal was not sufficient to limit discovery as to every issue in the Plaintiff Customers' complaint.

Throughout this timeframe, and despite the SCANA Defendants' repeated efforts to prevent discovery from proceeding, the Plaintiffs and SCANA Defendants arranged for the deposition of Carlette Walker, the former head of nuclear finance for the SCANA Defendants. Importantly, Ms. Walker was the voice behind the publicly released voicemail to Santee Cooper executive Marion Cherry, informing Mr. Cherry that she had important information about top SCANA Officials Kevin Marsh, Stephen Byrne and Jimmy Addison related to the nuclear construction project. Prior to Ms. Walker's deposition, the Plaintiffs provided a list of relevant



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search terms to the SCANA Defendants, who had agreed to release a small initial production solely for the purpose of Ms. Walker's deposition.

In addition to production of over 25,000 pages of documents, the SCANA Defendants also produced a 146-page privilege log. Pursuant to that log, the SCANA Defendants claimed that a substantial number of responsive documents were exempt from production based upon the attorney-client privilege, work-product doctrine, and joint defense and/or common interest agreements. However, absent from the log were specific descriptions of these documents that would enable Plaintiffs to ascertain whether the claimed exemptions applied, or whether some exception existed that would require disclosure of the documents.

## STANDARD OF REVIEW

For purposes of this motion, the SCANA Defendants bear the burden of showing every document on the 146-page privilege log is privileged. *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980) ("In general, the burden of establishing the privilege rests upon the party asserting it."). The determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances. *Love,* 275 S.C. at 59, 271 S.E.3d at 112 (1980). In general, the following guiding principles apply when reviewing a claim of privilege:

(a) underlying facts are never privileged,

(b) communications made to an attorney by a client seeking business advice are not privileged;

(c) merely copying a lawyer on an e-mail does not, by itself, make the e-mail privileged,

(d) merely attaching something to a privileged document does not, by itself, make the attachment privileged,



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(e) the party arguing that a document is privileged has the burden of establishing privilege with respect to each and every document; and

(f) claims of attorney-client privilege must be asserted on a document by document basis. *See Human Tissue Prods. Liability Litig.,* 255 F.R.D. 151, 164 (D.N.J 2008).

## ARGUMENT

### I. Comparing Redacted and Unredacted Versions of the Same Document Shows the SCANA Defendants are Abusing the Privilege Log

The SCANA Defendants produced over 25,000 documents in advance of the Carlette Walker deposition. Many of these documents were duplicative. Additionally, many documents were chains of email communications where a single email communication was produced multiple times. Where the same document was produced multiple times, the SCANA Defendants were repeatedly inconsistent in their redactions. To the extent SCANA produced the same document multiple times, once in redacted form and once unredacted, the SCANA Defendants have withheld information that is patently not privileged. SCANA's repeated use of this same method is plainly an abuse of the discovery process, and this abuse undermines all confidence that the SCANA Defendants are complying with their discovery obligations for the second set of entirely "withheld" documents discussed below.

By way of example:

**SCANA_RP0025450 and SCANA_RP0027447, Exhibit 2**

SCANA RP0025450 was redacted by SCANA based upon a claim of "Confidential communications by SCANA management and sent to SCANA management reflecting a request for counsel's legal advice regarding the project." SCANA also produced SCANA_RP0027447 which is the same email in unredacted form.



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To: WICKER, SHERI L[SWICKER@SCANA.COM]; KOCHEMS, KEVIN R[KKOCHEMS@scana.com]; STOCKMAN, SHERRY[SSTOCKMAN2@scana.com]; SMITH, ABNEY A JR[SASMITH@scana.com]
Cc: ADDISON, JIMMY E[JADDISON@scana.com]
From: CWALKER@scana.com
Sent: Mon 12/28/2015 9:56:18 PM
Subject: Re: Approval of Invoice likely needed for Bechtel final invoice: VC Summer- Final Invoice (26052)

.....
Thanks Sheri! I will be attending a CPE training class tomorrow so I will be able to watch for the email easily.

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: WALKER, CARLETTE L(/O=SCANA/OU=COLUMBIA/CN=RECIPIENTS/CN=CWALKER99)
To: WICKER, SHERI L; KOCHEMS, KEVIN R; STOCKMAN, SHERRY; SMITH, ABNEY A JR
CC: ADDISON, JIMMY E
BCC:
Subject: Re: Approval of Invoice likely needed for Bechtel final invoice: VC Summer- Final Invoice (26052)
Sent: 12/28/2015 02:00:00 AM -0500 (EST)
Attachments:

Thanks Sheri! I will be attending a CPE training class tomorrow [Redacted – Work-Product Protection]

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

For SCANA RP0025450, the Defendant claims "attorney client privilege" prevents disclosure of the statement "so I will be able to watch for the email easily." Neither the author nor any of the recipients are attorneys. Plaintiffs' counsel can think of no circumstances in which one non-attorney employee informing several other non-attorney employees that she will be able to "watch for the email easily" is a privileged attorney client communication related to legal advice.

**SCANA_RP0025419 and SCANA_RP0025371, Exhibit 3**

SCANA_RP0025371 was redacted based upon a claim that it contained "Confidential Communications Prepared in Anticipation of Litigation by SCANA Management and Sent to



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SCANA Management Containing Counsel's Legal Advice Regarding Regulatory Response".

From: WALKER, CARLETTE L
Sent: Sunday, July 19, 2015 5:32 PM
To: FOX, ALICE A
Subject: Fw: Study Guide

Hey Alice, could you print this Monday morning? I will come by your office sometime after 9:30 [Redacted – Attorney-Client Privilege & Work-Product Protection]
[Redacted – Attorney-Client Privilege & Work-Product Protect]
Thanks
Carlette

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: WALKER, CARLETTE L(/O=SCANA/OU=COLUMBIA/CN=RECIPIENTS/CN=CWALKER99)
To: FOX, ALICE A
CC:
BCC:
Subject: Fw: Study Guide
Sent: 07/19/2015 02:00:00 AM -0400 (EDT)
Attachments:Study Guide (7-17-15).docx;

Hey Alice, could you print this Monday morning? [Redacted – Attorney-Client Privilege & Work-Product Protection]
[Redacted – Attorney-Client Privilege & Work-Product Protection]
Thanks
Carlette

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

SCANA claims that Mrs. Walker (a non-lawyer) informing Ms. Fox (also a non-lawyer) that she "will come by your office sometime after 9:30" is a protected attorney client communication. In contradiction to SCANA's description, this information is not the conveyance of any legal advice.

**SCANA_RP0025194 and SCANA_RP0024881, Exhibit 4**

SCANA_RP0025194 was redacted on a claim that it involved "Confidential Communications Prepared in Anticipation of Litigation by SCANA Management and Sent to SCANA Management Containing Counsel's Legal Advice Regarding the Project."



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From: WALKER, CARLETTE L
Sent: Monday, December 28, 2015 7:02 PM
To: SMITH, ABNEY A JR; WICKER, SHERI L; KOCHEMS, KEVIN R; STOCKMAN, SHERRY; BYNUM, ALVIS J JR
Cc: ADDISON, JIMMY E
Subject: Re: Approval of Invoice likely needed for Bechtel final invoice: VC Summer- Final Invoice (26052)

That's great! Redacted – Work-Product Protection Al Redacted – Work-Product Protection
Redacted – Thanks "my good buddy"!!! I don't know how I would have survived without YOU, pls don't leave me now.
Wishing everyone a Happy New year!
Carlette

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: WALKER, CARLETTE L
Sent: Monday, December 28, 2015 7:02 PM
To: SMITH, ABNEY A JR; WICKER, SHERI L; KOCHEMS, KEVIN R; STOCKMAN, SHERRY; BYNUM, ALVIS J JR
Cc: ADDISON, JIMMY E
Subject: Re: Approval of Invoice likely needed for Bechtel final invoice: VC Summer- Final Invoice (26052)

Redacted – Attorney-Client Privilege & Work-Product Protection

Wishing everyone a Happy New year!
Carlette

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

SCANA claims that Mrs. Walker's statements: "That's great!..Thanks "my good buddy"!!! I don't know how I would have survived without YOU, pls don't leave me now" are protected from disclosure by both the attorney client and work product protection privileges. The communication includes no attorneys and makes no reference to any legal advice.

**SCANA_RP0025127 and SCANA_RP0025443, Exhibit 5**

SCANA_RP0025127 was redacted based upon a claim of "Confidential Communications by SCANA Management and sent to SCANA Management Reflecting Counsel's Legal Advice Regarding Regulatory Response." SCANA also produced SCANA_RP0025443 which is the same document in unredacted form.



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**From:** LANIER, CYNTHIA B
**Sent:** Tuesday, October 27, 2015 2:57 PM
**To:** WALKER, CARLETTE L
**Subject:** RE: Hey!

Good to hear! For now, we're all good. We're snacking on the cheese popcorn, especially Joey. We'll have to limit him. The ORS was in today for onsite meetings. All went well. Allyn Powell is back at the ORS and will be on the NND project. The Draft BLRA report was issued yesterday. Belton [Redacted – Attorney-Client Privilege]
Take care. Let your family and babies (3?) love on you!
C

**From:** LANIER, CYNTHIA B(/O=SCANA/OU=COLUMBIA/CN=RECIPIENTS/CN=CLANIER)
**To:** WALKER, CARLETTE L
**CC:**
**BCC:**
**Subject:** RE: Hey!
**Sent:** 10/27/2015 02:00:00 AM -0400 (EDT)
**Attachments:**

Good to hear! For now, we're all good. We're snacking on the cheese popcorn, especially Joey. We'll have to limit him. The ORS was in today for onsite meetings. All went well. Allyn Powell is back at the ORS and will be on the NND project. The [Redacted – Attorney-Client Privilege] Belton [Redacted – Attorney-Client Privilege]
Take care. Let your family and babies (3?) love on you!
C

SCANA claims the fact that a "Draft BLRA report was issued yesterday" is an attorney client communication protected from production. The communication does not involve any attorneys or convey any legal advice.

**<u>SCANA_RP0024890 and SCANA_RP0025413, Exhibit 6</u>**

SCANA redacted SCANA_RP0024890 claiming it was "Confidential Communications Prepared in Anticipation of Litigation Between SCANA Management Reflecting a Request for Legal Advice Regarding the Project".



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**From:** KOCHEMS, KEVIN R(/O=SCANA/OU=COLUMBIA/CN=RECIPIENTS/CN=KKOCHEMS)
**To:** SMITH, ABNEY A JR; WALKER, CARLETTE L
**CC:**
**BCC:**
**Subject:** RE: P&C Editorial Today
**Sent:** 06/18/2015 02:00:00 AM -0400 (EDT)
**Attachments:**

I spoke with William and he and Byron want to talk about this later today. I told him project review was today and our commercial meeting wouldn't be complete until 3:30 or 4:00.
So we can call them after that.
Kevin

**From:** KOCHEMS, KEVIN R(/O=SCANA/OU=COLUMBIA/CN=RECIPIENTS/CN=KKOCHEMS)
**To:** WALKER, CARLETTE L;SMITH, ABNEY A JR
**CC:**
**BCC:**
**Subject:** RE: P&C Editorial Today
**Sent:** 06/18/2015 02:00:00 AM -0400 (EDT)
**Attachments:**

Redacted – Attorney-Client Privilege & Work-Product Protection

Kevin

None of the SCANA employees on the email are attorneys. The "William" and "Byron" referenced in the email are also SCANA employees, neither one an attorney. There is no "legal advice" reflected anywhere in the body of the redacted email. Also, no request for legal advice is reflected anywhere in the email. The email communication is solely between non-lawyers discussing a newspaper editorial critical of the nuclear project.

**SCANA_RP0025149 and SCANA_RP0024869, Exhibit 7**

SCANA_RP0024869 was redacted based upon a claim that it contained "Confidential Communications by SCANA Management and Sent to SCANA In-House Counsel and SCANA Requesting Counsel's Legal Advice and Reflecting a Request for Counsel's Legal Advice Regarding the Project."

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**From:** KOCHEMS, KEVIN R
**Sent:** Monday, November 9, 2015 11:01 AM
**To:** WALKER, CARLETTE L; SMITH, ABNEY A JR
**Cc:** WICKER, SHERI L; JOHNSON, SHIRLEY S
**Subject:** Sales Tax

Carlette & Skip,

I spoke with Skeeter about the sales tax implications of the WEC purchase, and I now have even more questions. The bottom line is that the way they structure the S&W purchase and their accounting going forward could have a significant sales tax impact, which I'm sure WEC would want to push to us. Therefore, I suggest we send JoAnne and email or letter asking to be involved with this decision and/or telling her that any sales tax liability fallout of this purchase would be borne by WEC.

The issue is mainly with the equipment on site. As a general rule, we pay a usage tax each month based on CB&I Co#1 leasing (through a JV) a piece of equipment to CB&I Co#2. If WEC purchases the equipment onsite, that maybe a taxable transaction. Then, if WEC Co#1 continues to lease the equipment to WEC Co#2 (through JV), we would also pay a use tax. As a side note, even as the project moves to a fixed price, our Tax group would continue to need the information/reports they are currently getting. To my surprise, the data coming from CB&I is timely, but the data from WEC typically is not (DOR has started pushing interest fees because they cannot get the information they need timely).

Kevin

**From:** KOCHEMS, KEVIN R
**Sent:** Monday, November 9, 2015 11:01 AM
**To:** WALKER, CARLETTE L; SMITH, ABNEY A JR
**Cc:** WICKER, SHERI L; JOHNSON, SHIRLEY S
**Subject:** Sales Tax

Carlette & Skip,

Redacted – Attorney-Client Privilege

Neither the sender nor any of the recipients of the redacted email are attorneys. Despite the description, none of the recipients of this email are "in-house counsel". "Skeeter" referenced in the email is not identified as an attorney and appears to have provided accounting, not litigation advice. The redacted email in SCANA_RP 0024869 ***was subsequently*** forwarded as a "cc" to Alvis Bynum, SCANA's in-house counsel. As discussed below, merely cc'ing an attorney on an email does not morph the prior non-protected communication into an attorney client communication. Likewise, subsequently forwarding an email containing non-protected

communication among non-lawyers to a lawyer does not transform a prior non-protected communication into an attorney client communication.

**SCANA_RP0007835 and SCANA_RP24932, Exhibit 8**

SCANA_RP0024932 was redacted based upon the claim of "Confidential Communications Prepared in Anticipation of Litigation by SCANA Management and Sent to SCANA In-House Counsel and SCANA Management Requesting Counsel's Legal Advice and Providing Information to Facilitate the Rendition of Legal Advice Regarding the Consortium."

To: JOHNSON, SHIRLEY S[SWJOHNSON@scana.com]; SMITH, ABNEY A JR[SASMITH@scana.com]
Cc: YOUNG, KYLE MATTHEW[KYLE.YOUNG@scana.com]; TORRES, ALAN D[ATORRES@scana.com]; STEPHENS, MICHELE L[MICHELE.STEPHENS@scana.com]; WALKER, CARLETTE L[CWALKER@scana.com]; KOCHEMS, KEVIN R[KKOCHEMS@scana.com]; WICKER, SHERI L[SWICKER@SCANA.COM]
From: BROWNE, KENNETH JEROME
Sent: Tue 4/21/2015 11:11:18 AM
Subject: Recommended Response to VSP_VSG_003391 - Westinghouse Monthly Progress Paymenst Associated With CO #16
VSP_VSG_003391_2.pdf

This letter is similar in some respects, and very different in others, compared to the previous letter from CB&I regarding Shield Building Material payments. It is similar because the payments are contained in proposed CO #16. It is very different, because the proposed WEC payments are PROGRESS payments and not MILESTONE payments. WEC has also issued this as a NOTICE, with no response required. The payments are based on a schedule that is not accurate and should not followed for the proposed progress payments. I recommend a letter to WEC, informing them that the payments will not be made prior to the execution of CO#16 and that the progress payment dates must be adjusted to reflect the changes made in the project schedule between the time of the Settlement Agreement (June 2012) and the current schedule.

Ken Browne, P.E.
Senior Engineer
Business and Financial Services
New Nuclear Deployment, SCE&G
(803)941-9817



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**From:** BROWNE, KENNETH JEROME
**Sent:** Tuesday, April 21, 2015 11:11 AM
**To:** JOHNSON, SHIRLEY S; SMITH, ABNEY A JR
**Cc:** YOUNG, KYLE MATTHEW; TORRES, ALAN D; STEPHENS, MICHELE L; WALKER, CARLETTE L; KOCHEMS, KEVIN R; WICKER, SHERI L
**Subject:** Recommended Response to VSP_VSG_003391 - Westinghouse Monthly Progress Paymenst Associated With CO #16

Redacted -- Work-Product Protection

Ken Browne, P.E.
Senior Engineer
Business and Financial Services
New Nuclear Deployment, SCE&G
(803)941-9817

The author of the email is an engineer, not an attorney. None of the SCANA employees who received this email are attorneys from whom the engineer could be requesting legal advice. As with several other examples, this email ***was subsequently*** forwarded in an email chain to SCANA's in-house counsel, but such action does not transform this clearly non-privileged communication into material protected from production.

**SCANA_RP0022503 and SCANA_RP0025404, Exhibit 9**

SCANA_RP0025404 was redacted based on the claim of "Confidential Communications Prepared in Anticipation of Litigation by SCANA Management Providing Information to Facilitate the Rendition of Legal Advice Regarding the Project."



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**From:** ARCHIE, JEFFREY B
**Sent:** Monday, June 08, 2015 8:46 AM
**To:** CHERRY, WILLIAM
**Cc:** 'Crosby, Michael'
**Subject:** FW: Highlights from Friday's consortium / owners meeting

Marion, I have updated this since last night. Updates are adds that Ron Jones provided and are highlighted in Red.

Steve the following still needs some work.

When I get with Marion tomorrow he and I will finalize the notes from our meeting with the consortium on last Friday but here are a few items that were noteworthy:

**Noteworthy items and associated actions:**

Kelly has implied that SMCI is having significant financial issues and are challenged to the point that " bankruptcy " potentially may be an option for them. When challenged on the facts of his claim he backed off some but the message I took from it is that the potential for moving all SMCI work to Lake Charles from SMCI is real. Current SMCI scope is as follows: (To date, decision has been to move VCS Unit 3 CA03 to Lake Charles)

**From:** ARCHIE, JEFFREY B
**Sent:** Monday, June 08, 2015 8:46 AM
**To:** CHERRY, WILLIAM
**Cc:** 'Crosby, Michael'
**Subject:** FW: Highlights from Friday's consortium / owners meeting

Redacted – Work-Product Protection

SCANA_RP0022503 contains a chain of emails including this one from one SCANA employee to another SCANA employee with ***an employee of Santee Cooper*** copied. None of the employees are attorneys and it does not discuss litigation. Despite these facts, SCANA has asserted work product protection for the same email in SCANA_RP0025404.

**<u>SCANA_RP0024881 and SCANA_RP0025194, Exhibit 10</u>**

SCANA redacted SCANA_RP025194 with a claim of "Confidential Communications Prepared in Anticipation of Litigation by SCANA Management and Sent to SCANA Management Containing Counsel's Legal Advice Regarding the Project."

**From:** SMITH, ABNEY A JR
**Sent:** Tuesday, December 29, 2015 9:05 AM
**To:** WALKER, CARLETTE L
**Subject:** Re: Approval of Invoice likely needed for Bechtel final invoice: VC Summer- Final Invoice (26052)

Got your back Carlette. Looks like Jeff's approval will do it but i'll keep eye on my BlackBerry in case I need to do anything. Hope you're having some good time off although I wouldn't consider CPA training a holiday pleasure. The last of our family is heading back home today. We had a great family Christmas and are heading to Pawleys Island tomorrow with friends for a few days. Take care.

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

**From:** SMITH, ABNEY A JR
**Sent:** Tuesday, December 29, 2015 9:05 AM
**To:** WALKER, CARLETTE L
**Subject:** Re: Approval of Invoice likely needed for Bechtel final invoice: VC Summer- Final Invoice (26052)

Got your back Carlette. Redacted – Work-Product Protection
Redacted – Work-Pr Hope you're having some good time off although I wouldn't consider CPA training a holiday pleasure. The last of our family is heading back home today. We had a great family Christmas and are heading to Pawleys Island tomorrow with friends for a few days. Take care.

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

SCANA redacted the statement "Looks like Jeff's approval will do it but I'll keep eye on my BlackBerry in case I need to do anything." The "Jeff" in the email appears to be Jeff Archie, a non-attorney who is also a SCANA employee. This statement is from one SCANA employee to another SCANA employee and does not contain any legal advice, in contradiction to the statement SCANA put on the privilege log.

The emails referenced above are but a few examples of documents produced in both redacted and unredacted form. However, in just these few examples, it is obvious that SCANA's privilege log descriptions are inaccurate. In every instance where a document was produced in both redacted and non-redacted form, the privilege claim by SCANA on the log was clearly erroneous either in substance or merit. These demonstrable errors undermine any confidence the



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Plaintiffs or this court may have in the other entries on the privilege log for which a comparison cannot be made.

## II. The Claims of Privilege for the Withheld Documents are Improper and Overbroad

Plaintiffs cannot perform a similar comparison for the "withheld" documents as was done for the "redacted" documents because it is impossible for Plaintiffs to see what information was withheld. However, for the withheld documents, the SCANA Defendants have clearly taken an unreasonably broad view of the attorney-client privilege and work-product doctrine that exceeds the bounds of the legal requirements to assert such privileges. For example, the SCANA Defendants improperly assert all materials, including all email attachments, sent to or from any lawyer are automatically privileged. Further, throughout the log, SCANA routinely claims attorney-client privilege for communications that do not include any attorneys at all, were shared with Santee Cooper employees, or were clearly not related to the procurement of legal advice.

### A) Defendants' Claims Exceed the Scope of the Attorney/Client Privilege.

It is axiomatic that not every communication within the attorney/client relationship is privileged from production. The public policy of protecting confidential communications must be balanced against the strong public interest in the proper administration of justice. *State v. Doster*, 276 S.C. 647, 651 (S.C. 1981). South Carolina courts have established 8 requirements Defendant must establish for every withheld communication:

> Where (1) legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

*Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 293, 692 S.E.2d 526, 531 (2010). Requirement 1 necessitates that the client is seeking legal advice. It is well established that merely copying an



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attorney on an email where no legal advice is sought does not establish that the communication is privileged. *See Lewis v. Wells Fargo Co.*, 266 F.R.D. 433, 435 (N.D. Cal. 2010); *see also ABB Kent-Taylor, Inc. v. Stallings and Co., Inc.*, 172 F.R.D. 53, 57 (W.D. N.Y. 1996) ("Counsel were copied on many of the emails, **but it is well settled that merely copying an attorney on an email does not establish that the communication is privileged**.")(emphasis added).

On the privilege log provided by the SCANA Defendants, many items labeled "AC" for "attorney-client communication" clearly cannot relate to legal advice or the procurement of legal advice. Therefore, these documents cannot satisfy the required elements to assert the privilege. Many emails listed on the privilege log contain communications among SCANA employees, and do not include any in-house or outside counsel. Many other items on the privilege log marked "AC" are emails from one SCANA employee to another with counsel merely cc'd. In some instances, these conversations were even redacted to eliminate communications between non-attorney individuals based simply on the premise that the communication was later connected to an attorney's email elsewhere in the chain. In order to conceal a communication on the ground of attorney-client privilege, it must appear that the attorney was acting, at the time, as a legal advisor. *Marshall v. Marshall*, 282 S.C. 534, 539 (S.C. Ct. App. 1984). Many of these communications deal with proposed budgets and other business decisions, and bear no relationship to the provision of legal advice by an attorney.

As an example, one such document withheld by the Defendant is described as "Confidential communications between SCANA management reflecting a request for information to facilitate the rendition of legal advice regarding the project." *See* Exhibit 1, *SCANA_RP-P-0000233* pg. 5 of 146. Defendant's description does not indicate any of this communication was directed to counsel, or that the communication was in anticipation of litigation. However,



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Defendant claims attorney-client privilege based on this inadequate and vague description. Such a broad claim of privilege does not comport with South Carolina law. As a result, Plaintiffs' Motion to Compel should be granted.

**B) Defendants' Claims Do Not Meet the Requirements of the Attorney Work Product Privilege**

The attorney work product privilege is distinct from the attorney/client privilege. "The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party." *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010); *see* Rule 26(b)(3), SCRCP ( "[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means"). In general, "determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared because of the prospect of litigation." *Tobaccoville*, 387 S.C. at 294, 692 S.E.2d at 530

**1. Defendant asserts work-product and attorney-client privilege for attachments and emails concerning submissions to the Public Service Commission (PSC).**

Communications dealing with regulatory submissions to the PSC are not "prepared in anticipation of litigation" but rather are prepared in the ordinary course of business for the purpose of regulatory requirements. *See Nat'l Union fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.,* 967 F.2d 980, 984 (4th Cir. 1992) (work product documents "must be prepared because



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of the prospect of litigation when the preparer faces an actual claim or a potential claim," as contrasted to "materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes.").

The SCANA Defendants' appearance before the PSC is not litigation for which the work-product privilege was created. It involves regulatory requirements for the business operation of the company. Communications about such work do not fall under the work-product exception to the public policy favoring disclosure of relevant and probative materials. Some of the legal advice concerning edits to employee testimony may be privileged as attorney/client communications, but they do not qualify as attorney work-product for the purpose of protection from disclosure.

**2. Defendant improperly asserts the work-product privilege for all communications and documents related to Bechtel's work.**

The SCANA Defendants have maintained elsewhere that the Bechtel Company was retained in anticipation of litigation. This claim is directly undermined by Defendants' own communications with Santee Cooper. "Assessment is not ...(and has never been...intended to position Owners for litigation...") *See* Exhibit 11. These communications between the SCANA Defendants and Santee Cooper make clear that Bechtel was brought on for the ordinary business purpose of assessing the ongoing project, and not in preparation for litigation. The SCANA Defendants only attempted to transform Bechtel into a "litigation consultant" after the highly critical results of their 2015 review showed how poorly the project had been managed.

**3. Defendant improperly asserts Attorney-Client Privilege despite sharing the purportedly "privileged" material with 3rd parties.**

As an initial matter, SCANA has not produced any joint defense agreement that would potentially address a claim of a "joint defense of a common legal interest." South Carolina state courts have never directly addressed joint defense agreements. However, just like the "common



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interest privilege" doctrine, a joint defense agreement can only work to keep confidential information that already qualifies as attorney-client or work product privileged material. *See B.E. Meyers & Co. v. United States*, 41 Fed. Cl. 729, 732 (Fed. Cl. 1998) ("The joint-defense doctrine is an extension of the attorney-client privilege."). "[T]he joint defense privilege assumes the existence of a valid underlying privilege." *Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 435 (Bankr. S.D.N.Y. 1997). As set forth above, the SCANA Defendants have withheld a number of documents that cannot qualify as attorney-client or work product, and a subsequent joint defense agreement does not cure this defect.

Additionally, the South Carolina Supreme Court has adopted the "Common Interest Privilege" in only one very specific and extremely limited instance:

> We now adopt the common interest doctrine for the narrow factual scenario where several states are parties to a settlement agreement, the state laws that regulate and enforce that settlement all have the same provisions, the attorneys general of those settling states are involved in coordinating regulation and enforcement, and the settling states have executed a common interest agreement.

*Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 295, 692 S.E.2d 526, 531 (2010). First, the SCANA Defendants are not the state. In addition, the SCANA Defendants have failed to meet the remaining criteria set forth in *Tobaccoville*. By asserting a common interest privilege, the SCANA Defendants are asking this court to broaden the doctrine beyond what our Supreme Court has legally recognized.

Finally, like a written joint defense agreement, the common legal interest privilege is not specifically a "privilege", but rather an exception to the waiver of an underlying privilege. "The doctrine 'protects the transmission of data to which the attorney-client privilege or work product protection has attached' when it is shared between parties with a common interest in a legal matter." *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526, 531 (2010) (citing



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John Freeman, The Common Interest Rule, 6 S.C. Law. 12 (May/June 1995). As such, when the underlying claims of attorney-client and work product fail, even if this Court wanted to expand the common interest privilege beyond precedent, it would not be applicable in this case.

The Defendant has claimed attorney-client privilege on many emails that include employees of Santee Cooper as recipients with no attorneys from either entity included. *See e.g,* Exhibit 12, SCANA_RP0024907 (William Cherry is a Santee Cooper employee). The SCANA Defendants further claim that similar emails fall under the joint defense/common legal interest privilege. Because the emails do not include legal counsel from either entity, such communications obviously deal with business decisions related to the project as opposed to procuring legal advice.

**4. The Crime Fraud Exception applies to all advice about submissions to PSC under the BLRA provisions.**

Both attorney-client and work product privileges may be lost when a client gives information to an attorney for the purpose of committing or furthering a crime or fraud. *See In re Grand Jury Subpoena (U.S. v. Under Seal),* 884 F.2d 124, 127 (4th Cir. 1989). The party invoking the crime-fraud exception must make a *prima facie* showing that: (1) the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme, and (2) the documents containing the privileged materials bear a close relationship to the client's existing or future scheme to commit a crime or fraud. *See Chaudry v. Gallerizzo,* 174 F.3d. 394, 403 (4th Cir. 1999).

Prong one of this test is satisfied by a *prima facie* showing of evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed. *See In re Grand Jury Investigation,* 842 F.2d 1223, 1226 (11th Cir. 1987). Prong two may be satisfied with a showing of a close relationship between the attorney-client



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communications and the possible criminal or fraudulent activity. *Chaudhry,* 174 F.3d at 403. For the exception to apply to attorney-client privilege, the attorney need not be aware of the illegality involved. *In re Grand Jury Proceedings (U.S. v. Under Seal),* 102 F.3d 748, 751 (4th Cir. 1996).

Due to the nature of the allegations, and the information known by the SCANA Defendants' management, any submissions to the PSC or ORS following the SCANA Defendants' receipt of the Bechtel report must be disclosed pursuant to the the crime-fraud exception to the attorney-client privilege and/or work product doctrine. The SCANA Defendants' executives submitted budgets, schedules, and other information related to the nuclear project to the PSC with clear knowledge that the information was false and misleading, all in an effort to further the SCANA Defendants' successful attempt to continue increasing the Plaintiffs' financing costs, and to inflate the value of the company stock.

**Conclusion**

Comparing the "redacted" documents to the same communications in non-redacted form establishes that the SCANA Defendants have clearly abused claims of privilege with respect to the Carlette Walker documents. This abuse undermines any faith the Plaintiffs or the Court could have in the documents, which the SCANA Defendants have withheld from production under claims of privilege or work-product. Additionally, for these "withheld" documents, the SCANA Defendants have not provided an adequate description of the claimed privileged documents to allow for a meaningful analysis of all the withheld information. As set forth above, the SCANA Defendants' privilege log shows that many of the withheld materials should be produced in their entirety or at a minimum in a redacted format to remove only those portions that are truly privileged. These materials ought to be produced. However, one alternative to production is an *in camera* review of the withheld materials by the Court. *See e.g., Stokes-Craven Holding Corp.,*



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*v. Robinson*, 416 S.C. 517, 537 (2016). The standard for showing that such material should be reviewed *in camera* is not a stringent one. *See United States v. Zolin*, 491 U.S. 554, 574-75, 109 S.Ct. 2619, 2632, 105 L.Ed.2d 469 (1989). In fact, a lesser evidentiary showing is needed to trigger *in camera* review than is required to ultimately overcome the privilege. *See id.*

If the Court does not grant the Motion to Compel the materials, Plaintiff requests the Court undertake an independent review of the withheld materials.

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