IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

SOUTHERN CALIFORNIA GAS COMPANY, Petitioner, vs. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Respondent.	Case No. B310811 Commission Resolution ALJ-391 & Decision D.21-03-001

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF REVIEW

AROCLES AGUILAR, SBN 94753
MARY McKENZIE, SBN 99940
CARRIE G. PRATT, SBN 186038
EDWARD MOLDAVSKY, SBN 239267

Attorneys for Respondent
California Public Utilities Commission

505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2742
Email: carrie.pratt@cpuc.ca.gov

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SOUTHERN CALIFORNIA GAS ELECTRIC COMPANY, Petitioner, vs. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Respondent.	Case No. B310811 Commission Resolution ALJ-391 & Decision D.21-03-001

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF REVIEW

TO THE HONORABLE PRESIDING JUSTICE FRANCES ROTHSCHILD AND ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE:

Pursuant to Rule 8.724 of the California Rules of Court, Respondent California Public Utilities Commission (Commission) respectfully submits its answer to the petition for writ of review (writ petition or petition), filed by Southern California Gas Company and denies that said writ should be issued.

I. INTRODUCTION

Southern California Gas Company's (Petitioner or SoCalGas) writ petition is an unprecedented attack on the Commission's

constitutional and statutory authority to regulate utilities within the State of California. The issue presented for the Court's review is whether Commission staff – here, staff from the Public Advocates Office at the Commission (Cal Advocates) – may audit a utility's accounts to investigate potentially unlawful expenditures of ratepayer funds. The Commission's authority to conduct such an audit goes to the core of the responsibilities entrusted to the Commission by both the California Constitution and the California Legislature, through a century and a half of legislation, jurisprudence and case law.

SoCalGas challenges Commission Resolution ALJ-391 (Res. ALJ-391 or Resolution) and Decision (D.) 21-03-001, which collectively determined that SoCalGas failed to establish a *prima facie* case of First Amendment infringement related to Cal Advocates discovery requests.[1] Having failed to establish such infringement before the Commission, the Resolution requires SoCalGas to provide the following information to the Commission staff of Cal Advocates:

(1) Access to SoCalGas' System Applications Products (SAP) accounting system, which will allow Commission staff to audit the utility's accounts to determine whether SoCalGas has improperly expended ratepayer funds to pay for the advocacy costs at issue in this investigation;[2]

(2) Contracts between SoCalGas and its vendors supporting its advocacy efforts, which are

[1] *See* Res. ALJ-391, pp. 29-31, 33.

[2] *See* May 5, 2020 Commission Subpoena, Petitioner's Appendix (PA) Vol. 3, Exh. 13, pp. 627-630; Data Request Cal Advocates-TB-SCG-2020-03, PA Vol. 13, Exh. 3, pp. 635-641.

necessary to inform an audit of advocacy costs;[3] and

(3) The "confidential" versions of the vendor declarations submitted to the Commission on December 2, 2019 in support of SoCalGas' *prima facie* case of First Amendment infringement, which were also produced to this Court under seal in SoCalGas Exhibit Volume 10.[4]

SoCalGas objects to providing this information to the Commission staff of Cal Advocates.[5] It argues that, notwithstanding its status as highly regulated monopoly providing an essential service to a captive customer base, it may conceal information critical to the Commission's constitutional and statutory utility oversight functions. Here, staff of SoCalGas' regulator seek to comply with their statutory duty to protect ratepayer interests by ensuring certain costs are not charged to ratepayer-funded accounts. Perhaps emboldened by SoCalGas' refusal to comply with Commission data requests in this proceeding, *other California gas and electric utilities have recently begun issuing similar refusals*. This creates an untenable situation for a regulator charged by the California Constitution and statute with oversight of California's essential utility services.

The instant dispute relates to Cal Advocates' investigation into SoCalGas' activities to advocate for the use of natural gas, and

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[3] *See* Data Request Cal Advocates-SC-SCG-2019-05, PA Vol. 1, Exh. 2, pp. 128-133.

[4] *See* Res. ALJ-391, p. 1 (PA 1469): "SoCalGas is directed to produce the information and documents requested by Cal Advocates in DR No. CalAdvocates-SC-SCG-2019-05, including the confidential declarations submitted under seal in support of SoCalGas' December 2, 2019 motion for reconsideration/appeal, and in the May 5, 2020 Commission subpoena within 30 days of the effective date of this Resolution."

[5] Petition, pp. 16-22.

specifically how the company has accounted for the costs associated with these activities. The underlying investigation began in May 2019 in the Commission's Building Decarbonization proceeding (Rulemaking (R.) 19-01-011), when Sierra Club filed a motion to deny party status in that proceeding to the non-profit organization Californians for Balanced Energy Solutions (C4BES).[6] The Sierra Club motion explained that SoCalGas had secretly created and funded C4BES as an "astroturfing" group to advocate for the continued use of natural and renewable gas on behalf of the utility. "Astroturfing" refers to "a practice in which corporate sponsors of a message mask their identity by establishing separate organizations to state a position or make it appear as though the movement originates from and has grassroots support." (Res. ALJ-391, p. 2, fn. 1.)

It is a fundamental regulatory principle that utilities cannot include costs in rates that do not benefit ratepayers.[7] The

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[6] *See* Sierra Club *Motion to Deny Party Status to Californians For Balanced Energy Solutions or, in the Alternative, to Grant Motion to Compel Discovery* (May 14, 2019), filed in Commission proceeding R.19-01-011, attached hereto as Commission Exhibit A.

[7] Longstanding precedent recognizes that utility political expenditures should not be treated as presumptively recoverable general operating expenses because a utility's political activities "have a doubtful relationship to rendering utility service," and because "on politically controversial matters, the opinions of management and the rate-payer may differ decidedly." (*See Alabama Power Co., et al.* 24 FPC 278, 286–87 (1960).) In addition, federal law prohibits both gas and electric utilities from recovering "direct or indirect" expenditures for "promotional or political advertising" from "any person other than the shareholders (or other owners)" of the utility. (*See* 15 U.S.C. § 3203(b)(2) (prohibition on gas utilities' recovery of advertising costs); 16 U.S.C. § 2623(b)(5) (prohibition on electric utilities' recovery of advertising costs).) "Promotional advertising" is defined as "any advertising for the purpose of encouraging any person to select or use the service or additional service of a [gas or electric] utility, or the selection or installation of

(*footnote continued on the next page*)

Commission has consistently enforced this principle for over a century and a half as part of its obligation to protect ratepayers from the monopoly power of utilities. Documents obtained by Cal Advocates reflect that SoCalGas booked costs for these astroturfing and advocacy activities to "above the line" operation and maintenance accounts typically charged to ratepayers.[8] While SoCalGas may lobby government entities and officials regarding the state's climate change policies, it is wholly inappropriate for SoCalGas to obscure its role in these lobbying campaigns, to charge the costs for these activities to ratepayer-funded accounts, or to provide false and misleading responses regarding these activities to Commission staff. The Commission simply cannot perform its constitutionally and statutorily-mandated oversight functions when a regulated entity such as SoCalGas refuses to provide relevant information and data. And it is entirely inappropriate and fundamentally untenable for SoCalGas to ask the Commission to basically take it at its word that it is not funding advocacy activities with ratepayer funds. For the

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any appliance or equipment designed to use such utility's service," and "political advertising" is defined as any advertising "for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to any controversial issue of public importance." (*See* 15 U.S.C. § 3204(b) (defining "advertising," "political advertising," and "promotional advertising" for the purposes of the prohibition on gas utilities' recovery of advertising costs from ratepayers); 16 U.S.C. § 2625(h) (defining "advertising," "political advertising," and "promotional advertising" for the purposes of the prohibition on electric utilities' recovery of advertising costs from ratepayers).)

[8] *See* Balanced Energy Work Order Authorization (BE IO), PA Vol. 1, Ex. 3, p. 218; *see also* SoCalGas Response to Question 4 of Data Request CalAdvocates-SK-SCG-2020-01, PA Vol 4, Ex. 14, 831-832 (explaining accounting changes to the BE IO from a presumptive ratepayer account (920) to a presumptive shareholder account (426.4)).

Commission to acquiesce in this proposition would be a complete abdication of its regulatory oversight responsibilities. For these reasons, the Commission respectfully asks the Court to deny the instant petition for writ of review.

II. BACKGROUND

In May 2019, Cal Advocates[9] initiated a discovery inquiry into SoCalGas' funding of anti-decarbonization campaigns using "astroturfing" groups. Cal Advocates initiated this discovery inquiry "outside of a proceeding" pursuant to its statutory authority.[10] Cal Advocates' inquiry focused on the extent to which SoCalGas was using ratepayer funds to support organizations presenting themselves to the Commission as independent grassroots community organizations that also support anti-decarbonization positions held by SoCalGas, such as C4BES and other similar organizations.

Cal Advocates' discovery inquiry was prompted by allegations initially raised in Rulemaking (R.) 19-01-011[11] when C4BES filed a motion for party status on March 13, 2019, and falsely described

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[9] Pub. Util. Code, § 309.5(a) states: "There is within the commission an independent Public Advocate's Office of the Public Utilities Commission to represent and advocate on behalf of the interests of public utility customers and subscribers within the jurisdiction of the commission. The goal of the office shall be to obtain the lowest possible rate for service consistent with reliable and safe service levels. For revenue allocation and rate design matters, the office shall primarily consider the interests of residential and small commercial customers."

[10] The pleadings submitted to the Commission related to this discovery dispute "outside of a proceeding" are available on the Commission's website at the Cal Advocates' webpage at: https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4444.

[11] R.19-01-011 *Order Instituting Rulemaking Regarding Building Decarbonization* (January 31, 2019).

itself as a "a coalition of natural and renewable natural gas users."[12] Sierra Club challenged the motion on May 14, 2019, claiming that, unbeknownst to the Commission and the public, SoCalGas founded and funded C4BES.[13] Commission staff, through Cal Advocates, responded to Sierra Club's motion to deny party status and stated that Cal Advocates would investigate the allegations raised by Sierra Club.[14]

On May 23, 2019, Cal Advocates initiated its inquiry by issuing Data Request (DR) SCG051719 to SoCalGas regarding its involvement with and funding of C4BES. Cal Advocates issued this data request outside of R.19-01-011, as the scope of R.19-01-011 was limited to decarbonization matters. In contrast, Cal Advocates' inquiry focused on SoCalGas' financial relationship with C4BES and the use of ratepayer funds to support lobbying efforts by C4BES. In addition, Cal Advocates initiated this discovery outside of a proceeding because no other Commission proceeding encompassed this specific issue. SoCalGas responded to the DR. Based on this response, Cal Advocates determined that justification existed to continue its inquiry.

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[12] *Motion for Party Status of C4BES* (Mar . 13, 2019), at p. 1, http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M273/K180/273180146.PDF.

[13] *See* R.19-01-011, Sierra Club's *Motion to Deny Party Status to Californians For Balanced Energy Solutions or, in the Alternative, to Grant Motion to Compel Discovery* (May 14, 2019); s*ee also* Cal Advocates' *Response to Sierra Club's Motion to Deny Party Status to Californians For Balanced Energy Solutions or, in the Alternative, to Grant Motion to Compel Discovery* (May 29, 2019).

[14] *See* R.19-01-011, Cal Advocates' *Response to Sierra Club's Motion to Deny Party Status to Californians for Balanced Energy Solutions or, in the Alternative, to Grant Motion to Compel Discovery* (May 29, 2019) at p. 2.

On June 14, 2019, in response to a data request from Cal Advocates, SoCalGas admitted that it has retained vendors who do both routine work for SoCalGas (which may be ratepayer-funded depending on the purpose of the work), as well as work for SoCalGas in creating C4BES (which cannot properly be billed to ratepayers). SoCalGas asserted in this data response that it split such vendor contracts 50/50 between shareholder accounts and ratepayer accounts. (*See* SoCalGas Data Response, June 14, 2019, at pp. 4-5 (Commission Exhibit B).)

On July 19, 2019, Cal Advocates issued DR CalAdvocates-SC-SCG-2019-04 to SoCalGas. In response, SoCalGas refused, in part, to comply with the DR. At this point, Cal Advocates and SoCalGas began the instant dispute regarding the lawfulness of the ongoing discovery.

With this discovery dispute still unresolved, on August 13, 2019, Cal Advocates served SoCalGas with another data request, DR No. CalAdvocates-SC-SCG-2019-05, which consisted of multiple questions built upon previous DRs. On August 27, 2019, SoCalGas responded to the DR with an objection to Question 8 based on the grounds that the requested production of its shareholder-funded contracts related to C4BES fell outside the scope of Cal Advocates' statutory authority set forth in Public Utilities Code sections 309.5(a) and 314.[15] Cal Advocates and SoCalGas engaged in discussions

[15] *See* SoCalGas' *Motion for Reconsideration/Appeal to the Full Commission Regarding Administrative Law Judge's Ruling In the Discovery Dispute Between Public Advocates Office and Southern California Gas Company, October 7, 2019 [PROPOSED] Order (Not In A Proceeding)* (December 2, 2019) at 5-6.

regarding Question 8 of the DR, and after multiple attempts the parties agreed that they were at an impasse.

On October 7, 2019, Cal Advocates submitted a motion to compel responses from SoCalGas to the President of the Commission pursuant to Public Utilities Code section 309.5(e).[16] SoCalGas opposed Cal Advocates' motion on October 17, 2019.[17] SoCalGas again alleged that, because the information sought was related to shareholder-funded activities, it fell beyond the Commission's statutory purview. The President of the Commission referred this dispute to the Commission's Chief Administrative Law Judge.

On October 29, 2019, the Chief Administrative Law Judge assigned the dispute to Administrative Law Judge Regina DeAngelis (ALJ) and informed the parties in writing of certain procedural rules to follow since this dispute was outside of a formal proceeding and, therefore, the Commission's Rules of Practice and Procedure (Title 20, Division 1, of the California Code of Regulations) (herein "Rules") did not directly apply.

On November 1, 2019, the ALJ issued a ruling granting Cal Advocates' motion to compel responses to DR No. CalAdvocates-SC-SCG-2019-05.[18] On November 4, 2019, SoCalGas submitted an

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[16] Cal Advocates' *Motion to Compel Responses from Southern California Gas Company to Question 8 of Data Request CALADVOCATES-SC-SCG-2019-05 (Not In A Proceeding)* submitted October 7, 2019.

[17] *Response of SoCalGas Pursuant to October 7, 2019 Motion to Compel Further Responses from Southern California Gas Company to Data Request - CalAdvocates-SC-SCG-2019-05* (*Not In A Proceeding)* submitted October 17, 2019.

[18] *Administrative Law Judge's Ruling in the Discovery Dispute Between Public Advocates Office and Southern California Gas Company, October 7, 2019 (Not In A Proceeding)* issued on November 1, 2019.

emergency motion for stay of the November 1, 2019 ALJ ruling but, with its motion for stay pending, on November 5, 2019, SoCalGas also submitted the DR responses to Cal Advocates under protest.[19]

On December 2, 2019, SoCalGas submitted a motion for reconsideration/appeal requesting the full Commission's review of the ALJ's November 1, 2019 ruling.[20] SoCalGas subsequently supplemented this December 2, 2019 motion by a separate motion dated May 22, 2020, and also filed a motion to file under seal certain declarations.[21]

On January 24, 2020, Commission staff for Cal Advocates issued a data request to SoCalGas in the Commission's Energy Efficiency proceeding (R.13-11-005), which included the following request: "Please provide any and all documentary evidence that charges to IO 30076601 [the Balanced Energy Internal Order] are

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[19] *Southern California Gas Company's (U 904 G) Emergency Motion to Stay Pending Full Commission Review of Administrative Law Judge's Ruling in the Discovery Dispute Between Public Advocates Office and Southern California Gas Company, October 7, 2019 (Not In A Proceeding)* submitted on November 4, 2019.

[20] *Southern California Gas Company's (U 904 G) Motion for Reconsideration/Appeal to the Full Commission Regarding Administrative Law Judge's Ruling in the Discovery Dispute Between Public Advocates Office and Southern California Gas Company, October 7, 2019 (Not In A Proceeding)* submitted on December 2, 2019. On December 2, 2019, SoCalGas also submitted a motion to file documents under seal.

[21] On December 2, 2019, SoCalGas concurrently filed *Motion of Southern California Gas Company's (U 904 G) for Leave to File Under Seal Confidential Versions of Declarations Numbers 3, 4, 5, and 6 In Support of Its Motion for Reconsideration/Appeal to the Full Commission Regarding Administrative Law Judge's Ruling In the Discovery Dispute Between Public Advocates Office and Southern California Gas Company, October 7, 2019 [PROPOSED] Order (Not In A Proceeding).*

shareholder funded."[22] On February 7, 2020, SoCalGas explained in response to this data request that it had intended to book these costs to a shareholder account, but that it had made a mistake which it subsequently corrected. SoCalGas stated: "Although the consultant charges have always been charged to the Balanced Energy internal order (IO) and the intent in setting up that IO was that it be shareholder-funded, due to an inadvertent accounting error, the balanced energy IO was not initially properly designated as a shareholder account." (SoCalGas Data Response, February 7, 2020, at p. 1 (Commission Exhibit C).) By its own admission, and contrary to its earlier assertions, SoCalGas had indeed booked advocacy costs to accounts other than its shareholder accounts.[23] SoCalGas further stated that "[t]he Balanced Energy internal order (IO) 300796601 was created in March 2019 for tracking all costs associated with Balanced Energy activities and the intent was to make it a shareholder funded IO. However, an incorrect settlement rule was set up for this IO to FERC 920.0 A&G Salaries, consequently, the costs initially settled to the incorrect FERC account." (SoCalGas Response to Data Request, February 7, 2020, at p. 7 (Commission Exhibit C); *see also* SoCalGas Exh. 14, p. 831.) SoCalGas alleged that the settlement rule was corrected on October 30, 2019.

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[22] *See* SoCalGas February 7, 2020 Response to CalAdvocates-SK-SCG-2020-01, Question and Answer 4, SoCalGas Exh. 14, p. 831; *see also* Commission Exh. C.

[23] The Commission obtained the February 7, 2020 data response from SoCalGas as part of a Cal Advocates investigation related to the Commission's Energy Efficiency rulemaking proceeding, R.13-11-005. SoCalGas did not disclose this information within the context of the instant astroturfing investigation related to SoCalGas' funding of C4BES.

On March 25, 2020, SoCalGas filed an emergency motion for a protective order staying all pending and future data requests from Cal Advocates served outside of any proceeding related to this dispute, and any motions and meet and confers related thereto, during the Governor of California's Covid-19 emergency "safer at home" executive orders.[24]

On April 6, 2020, via email, the ALJ reminded SoCalGas of Cal Advocates' statutory rights to inspect the accounts, books, papers, and documents of any public utility at any time and found that the company's request was contrary to California law. The ALJ advised parties to work together during these extraordinary times.

On May 1, 2020, Cal Advocates served SoCalGas with another data request, DR CalAdvocates-TB-SCG-2020-03, seeking access to SoCalGas' accounting database, as Cal Advocates continued its inquiry into SoCalGas' use of ratepayer monies to fund an anti-decarbonization campaign through astroturf organizations. On May 5, 2020, Cal Advocates served a subpoena, signed by the Commission's Executive Director, on SoCalGas seeking the same information as set forth in DR CalAdvocates-TB-SCG-2020-03, access to SoCalGas' accounting databases.[25]

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[24] *Southern California Gas Company's (U 904 G) emergency motion for a protective order staying all pending and future data requests from the California Public Advocates Office served outside of any proceeding (relating to the Building Decarbonization matter), and any motions and meet and confers related thereto, during California government Covid-19 emergency "safer at home" orders,* submitted on March 25, 2020.

[25] The Public Utilities Commission of the State of California's *Subpoena to Produce Access to Company Accounting Databases* dated May 4, 2020 and served on May 5, 2020.

On May 22, 2020, SoCalGas submitted a motion to quash the subpoena and to stay the subpoena until May 29, 2020, to allow it an opportunity to implement software solutions to exclude what it deemed as materials protected by attorney-client and attorney work product privileges, as well as materials allegedly implicating First Amendment issues.[26]

On June 23, 2020, Cal Advocates submitted a motion to find SoCalGas in contempt and to impose fines on SoCalGas for noncompliance with the May 5, 2020 subpoena.[27] Cal Advocates asserted that SoCalGas was avoiding compliance with the May 5, 2020 subpoena and that SoCalGas' conduct constituted a violation of Rule 1.1 and Public Utilities Code sections 309.5, 311, 314, 314.5, 314.6, warranting the imposition of daily penalties. Cal Advocates also sought an order requiring SoCalGas to provide Cal Advocates with access to financial databases on a read-only basis and to provide additional information from its accounting and vendor records systems showing which of its accounts are 100% shareholder-funded, which accounts have costs booked to them associated with activities that are claimed to be subject to First Amendment privileges or are shareholder-funded, and other information about vendors of SoCalGas related to the underlying investigation.

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[26] *Southern California Gas Company's (U 904 G) Motion to Quash Portion of the Subpoena to Produce Access to Certain Materials in Accounting Databases and to Stay Compliance until the May 29th Completion of Software Solution to Exclude those Protected Materials in The Databases (Not In A Proceeding)* submitted May 22, 2020.

[27] *Public Advocates Office Motion to Find Southern California Gas Company in Contempt of this Commission in Violation of Commission Rule 1.1 for Failure to Comply with a Commission Subpoena Issued May 5, 2020, and Fined for Those Violations From the Effective Date of the Subpoena (Not In A Proceeding)* submitted on June 23, 2020.

On July 2, 2020, SoCalGas submitted a response challenging Cal Advocates' motion for contempt and sanctions.[28] On July 10, 2020, Cal Advocates submitted a reply addressing SoCalGas' arguments.[29]

On December 21, 2020, the Commission issued Resolution ALJ-391. The Resolution resolved SoCalGas' December 2, 2019 motion for reconsideration/appeal, together with other related motions.[30] The Resolution denied SoCalGas' December 2, 2019 motion for reconsideration/appeal of the November 1, 2019 ALJ ruling and denied SoCalGas' May 22, 2020 motion to quash portions of the

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[28] *Southern California Gas Company's (U 904 G) Response to Public Advocates Office's Motion to find Southern California Gas Company in Contempt of this Commission in Violation of Commission Rule 1.1 for Failure to Comply with a Commission Subpoena Issued May 5, 2020, and Fined for those Violations from the Effective Date of the Subpoena (Not In A Proceeding)* submitted on July 2, 2020.

[29] *Public Advocates Office Reply to Southern California Gas Company's Response to Motion for Findings of Contempt and Fines for the Utility's Failure to Comply with a Commission Subpoena Issued May 5, 2020*, submitted on July 10, 2020.

[30] Cal Advocates also submitted a motion to compel SoCalGas to produce the confidential versions of the declarations submitted in support of SoCalGas' December 2, 2019 motion for reconsideration/appeal and for daily monetary fines. See *Public Advocates Office Motion To Compel Confidential Declarations Submitted In Support Of Southern California Gas Company's December 2, 2019 Motion For Reconsideration Of First Amendment Association Issues And Request For Monetary Fines For The Utility's Intentional Withholding Of This Information; [Proposed] Order,* submitted on July 9, 2020.

On July 17, 2020, SoCalGas filed a response*, Response to Public Advocates Office Motion to Compel Confidential Declarations Submitted in Support of Southern California Gas Company's December 2, 2019 Motion for Reconsideration of First Amendment Association Issues and Request for Monetary Fines for the Utility's Intentional Withholding of this Information.*

On July 24, 2020, Cal Advocates filed a reply*, Public Advocates Office Reply to Southern California Gas Company's Opposition to Motion to Compel and for Fines Related to the Utility's Intentional Withholding of Confidential Declarations.*

Commission's May 5, 2020 subpoena. In denying these motions, the Commission rejected SoCalGas' argument that Cal Advocates' discovery rights, as set forth in the Public Utilities Code, are limited by SoCalGas' First Amendment right to association and rejected SoCalGas' argument that the Commission violated its procedural due process rights.

The Resolution granted SoCalGas' December 2, 2019 motion for leave to file under seal confidential versions of certain declarations, but confirmed that SoCalGas must provide access to the unredacted versions of the confidential declarations to Commission staff, including Cal Advocates, under existing protections. The Resolution deferred consideration of Cal Advocates' June 23, 2020 motion for contempt and sanctions for SoCalGas' failure to respond to the May 5, 2020 subpoena. The Resolution directed SoCalGas to produce the information and documents requested by Cal Advocates within 30 days of the effective date of the Resolution.

On December 21, 2020, SoCalGas filed a motion for stay and an application for rehearing (SCG App. Rhrg.) of Res. ALJ-391. On January 11, 2021, responses to the rehearing application were filed by Cal Advocates and Sierra Club. On January 20, 2021, Cal Advocates also filed an application for rehearing of Res. ALJ-391

On January 6, 2021, the Commission's Executive Director extended the time for SoCalGas to comply with Res. ALJ-391 until 15 days from the date the Commission disposes of the rehearing applications.

On March 2, 2021, the Commission issued D.21-03-001, disposing of the rehearing applications filed by SoCalGas and Cal

Advocates. In D.21-03-001, the Commission modified Res. ALJ-391 in several respects. As modified, the Commission denied the applications for rehearing of the Resolution.

On March 8, 2021, SoCalGas filed with this Court its petition for writ of review, Motion for Emergency Stay, and accompanying exhibits. The Commission filed an opposition to SoCalGas' stay request on March 11, 2021.

On March 16, 2021, the Court issued a temporary stay of the Resolution and set a hearing regarding the stay for March 25, 2021. On March 19, 2021 the Commission's Executive Director issued a letter granting SoCalGas an extension to comply with the Resolution until the completion of the litigation in the Court of Appeal. On March 22, 2021, the Court vacated the temporary stay and took the March 25 hearing off calendar in light of the Executive Director's extension. The Court also directed the Commission to file its answer to the writ petition by June 1, 2021.

The Commission hereby submits this answer to SoCalGas' petition for writ of review. For the reasons discussed herein, the Commission respectfully denies that any writ should be issued.

III. ISSUES PRESENTED

The writ petition presents the following issues:

1. Did the Commission act within its constitutional and statutory authority in requiring Petitioner to comply with the discovery requests at issue in this proceeding?
2. Has Petitioner failed to demonstrate infringement of its First Amendment right of association?

3. Was Petitioner afforded sufficient procedural due process in connection with the discovery requests at issue in this proceeding?

The Commission respectfully submits that all of these questions should be answered in the affirmative. For this reason, the Commission asks the Court to deny the instant petition for writ of review.

IV. STANDARD OF REVIEW

The statutory provisions for court review of Commission decisions are unique among agency review procedures. Section 1756 (a) provides that, "any aggrieved party may petition for a writ of review in the court of appeal…." (*Pacific Bell v. Public Utilities Com.* (2000) 79 Cal.App.4th 269, 278.) Review of Commission decisions under section 1756 is discretionary, and the Court of Appeal is "not compelled to issue the writ if the PUC did not err…." (*Id.* at p. 282; *see also Southern Cal. Edison Co. v. Public Utilities Com.* (2005) 128 Cal.App.4th 1, 13-14 ["the court need not grant a writ if the petitioning party fails to present a convincing argument that the decision should be annulled."].)

The presumption in favor of the validity of Commission decisions is a "strong" one. (*Pacific Gas & Elec. Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 838, quoting *Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410 ("*Greyhound*") ["There is a strong presumption of validity of the commission's decisions."]; *Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1965) 62 Cal.2d 634, 647 ["strong presumption of the correctness of the findings and conclusions of the commission, which

may choose its own criteria or method of arriving at its decision…."].) A party seeking to overturn a Commission decision has the burden of overcoming this strong presumption of validity. (*Market St. Ry. Co. v. Railroad Com.* (1944) 24 Cal.2d 378, 399.)

Section 1757 specifies the standards for the Court's review of the Commission's decisions and resolutions. Pursuant to section 1757 (a), the review:

> . . . shall not extend further than to determine, on the basis of the entire record . . . whether any of the following occurred:
>
> (1) The commission acted without, or in excess of, its powers or jurisdiction.
>
> (2) The commission has not proceeded in the manner required by law.
>
> (3) The decision of the commission is not supported by the findings.
>
> (4) The findings in the decision of the commission are not supported by substantial evidence.
>
> (5) The order or decision was procured by fraud or was an abuse of discretion.
>
> (6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.

(Pub. Util. Code, § 1757, subds. (a)(1)-(6).)

In the Court's review, the Commission's interpretation of the Public Utilities Code, as the agency constitutionally authorized to administer its provisions, should be given great weight. (*Southern California Edison v. Peevey* (2003) 31 Cal.4th 781, 796; *Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411 ["the commission's interpretation of the Public Utilities Code should

not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.…"].)

In addition to this Commission-specific authority, even under the more general *Yamaha* guidelines, the Commission's exercise of its exclusive jurisdiction and determinations in its exercise of this authority is entitled to deference. This is particularly true where, as here, the Commission has pursued its regulatory responsibilities consistently for a century and a half. There can be no question that the Commission has required regulated entities such as SoCalGas to comply with information requests from Commission staff in order to carry out the Commission's oversight responsibilities. This is the case because the Legislature has specifically given the Commission exclusive jurisdiction over public utilities so as to ensure that customers' rates and the allocation of costs are just and reasonable, that utilities provide safe and reliable service in the public interest, and that the implementation of the Legislature's mandates for clean and renewable energy are accomplished. (*See*, *e.g.*, Pub. Util. Code, §§ 399.11, 399.12, 399.13, 399.14, 399.15, 399.16, 451, 454.52; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.)

The court is not permitted to hold a trial de novo or to exercise its independent judgment on the evidence. (Pub. Util. Code, § 1757, subd. (b).) It is the Commission and not the court that weighs the evidence. (*See Eden Hospital Dist. v. Belshe* (1998) 65 Cal.App.4th 908, 915.) Under section 1757, the Commission's findings of fact:

> …are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence. When conflicting evidence is presented from

> which conflicting inferences can be drawn, the PUC's findings are final.

(*Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal.App.4th 641, 649; *see also Toward Utility Rate Normalization v. Public Utilities Commission* (1978) 22 Cal.3d 529, 537-538.)

Despite separate provisions in section 1760 for constitutional issues, as the California Supreme Court has emphasized, that section does not greatly alter the Court's review. "The provisions of section 1760 … authorizing an independent judgment on the law and facts in cases in which an order or decision is challenged on constitutional grounds, do not authorize this court to substitute its own judgment as to the weight to be accorded evidence before the Commission…." (*Goldin v. Public Utilities Com.* (1979) 23 Cal.3d 638, 653; *see also Pacific Gas & Electric v. Public Utilities Com. ["PSEP Penalties"]* (2015) 237 Cal.App.4th 812, 839 ["even the presence of a constitutional dispute does not require the reviewing court to adopt de novo or independent review."].)

In this case, the Commission has complied with the law and has acted within its powers and jurisdiction. Therefore, the writ petition should be denied.

V. ARGUMENT

A. Petitioner's Challenge to the Commission's Broad Constitutional and Statutory Authority to Regulate Public Utilities in the State of California is Unprecedented.

From its inception as the California Railroad Commission, the Commission's constitutionally and statutorily designated mission has been to supervise and regulate powerful utility monopolies which provide essential services to a largely captive customer base. It is for

this critical purpose that the California Constitution confers such broad powers upon the Commission, powers that the California Legislature has regularly seen fit to expand over a century of legislation. It is against this constitutional and legislative background that Petitioner now comes before this Court and claims that the Commission lacks the authority to audit its regulatory accounts to ensure that Petitioner is not illegally utilizing ratepayer funds for astroturfing projects. This assertion should be summarily rejected by this Court.

As noted above, there are three categories of information that the Commission seeks access to: (1) Petitioner's SAP accounting system, detailing which accounts (ratepayer or shareholder) have been used to fund the advocacy costs at issue in the underlying investigation; (2) vendor contracts, which will provide data such as vendor IDs and account numbers to allow the Commission to distill the raw data contained in the SAP system; and (3) a set of confidential declarations provided to the Court as Petitioner's Exhibit 10. The four confidential declarations in category 3 amount to a total of ten pages alleging that this investigation may have a "chilling effect" on SoCalGas' relations with its vendors and contractors. These four declarations were filed under seal with the Commission almost a year and a half ago in December 2019 and have never been disclosed publicly and to date have not been provided to Cal Advocates.[31] SoCalGas also provided many of its vendor contracts

[31] While SoCalGas attempts to differentiate between the Commission and Cal Advocates in terms of access to data produced in the underlying investigation, they cite no authority to support such a

(*footnote continued on the next page*)

(category 2) to the Commission under protest months ago, and those contracts also have not been disclosed publicly. SoCalGas has never provided the Commission with access to its SAP system (category1) during the underlying Commission investigation.[32]

The Commission has extensive authority over public utility practices and facilities pursuant to the California Constitution and the Public Utilities Code. (*See* Cal. Const. art. XII; Pub. Util. Code, § 701.)[33] Section 701 provides: "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto,

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distinction. Public Utilities Code section 309.5(a) describes Cal Advocates as an office "within the Commission" whose specific mission is to "represent and advocate on behalf of the interests of" ratepayers, a mission closely tied to the purpose of the underlying investigation of SoCalGas. (*See* Pub. Util. Code, § 309.5(a).) As Commission staff, Cal Advocates' access to information produced in this investigation should be coextensive with the access of other Commission staff to such information. Indeed, Public Utilities Code section 309.5(e) specifies that Cal Advocates "may compel the production or disclosure of any information it deems necessary to perform its duties from any entity regulated by the commission…." (Pub. Util. Code, § 309.5(e).)

[32] SoCalGas has not demonstrated that it has suffered any harm as a result of producing the documents contained in category 2 (vendor contracts) and category 3 (confidential declarations). The Commission has never indicated that it intends to disclose these documents to the public. There is no allegation that the Commission has violated the confidentiality of the declarations contained in category 3. Further, no information identified as confidential by SoCalGas in the vendor contracts contained in category 2 has been publicly disclosed. Because there is no harm demonstrated as a result of complying with the Commission data requests, SoCalGas' claims are premature. Utilizing the information produced by SoCalGas for strictly internal purposes that are squarely within the Commission's authority and jurisdiction does not constitute harm. (See *Brock v. Local 375* (9th Cir 1988) 860 F.2d 346, 350, n.1. (objective and articulable facts must be shown, which go beyond broad allegations or subjective fears).)

[33] All statutory references are to Public Utilities Code, unless otherwise specified.

which are necessary and convenient in the exercise of such power and jurisdiction." (Pub. Util. Code, § 701.)

In *Southern California Edison Company v. Peevey* (2003) 31 Cal.4th 781, the California Supreme Court described the breadth of the Commission's constitutional and statutory authority as follows:

> PUC's authority derives not only from statute but from the California Constitution, which creates the agency and expressly gives it the power to fix rates for public utilities. (Cal. Const., art. XII, §§ 1, 6.) Statutorily, PUC is authorized to supervise and regulate public utilities and to "do all things … which are necessary and convenient in the exercise of such power and jurisdiction" (§ 701); this includes the authority to determine and fix "just, reasonable [and] sufficient rates" (§ 728) to be charged by the utilities. Adverting to these provisions, we have described PUC as "'a state agency of constitutional origin with far-reaching duties, functions and powers'" whose "'power to fix rates [and] establish rules'" has been "'liberally construed.'" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 914–915 [55 Cal. Rptr. 2d 724, 920 P.2d 669], quoting *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905 [160 Cal. Rptr. 124, 603 P.2d 41].) If PUC lacked substantive authority to propose and enter into the rate settlement agreement at issue here, it was not for lack of inherent authority, but because this rate agreement was barred by some specific statutory limit on PUC's power to set rates. (See *Assembly v. Public Utilities Com.* (1995) 12 Cal.4th 87, 103 [48 Cal. Rptr. 2d 54, 906 P.2d 1209].)

(*Peevey*, *supra*, 31 Cal.4th at 792.)

The California Supreme Court has further described the Commission's constitutional authority as including the power to hold various types of hearings and establish its own procedures. (*See Consumers Lobby Against Monopolies* (*CLAM*), *supra*, 25 Cal.3d 891

at 905; *see also* Cal. Const., art. XII, §§ 1-6.) The Supreme Court in *CLAM* further stated:

> The commission's powers, however, are not restricted to those expressly mentioned in the Constitution: "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission…." (Cal. Const., art. XII, § 5.)
>
> Pursuant to this grant of power the Legislature enacted Public Utilities Code section 701, conferring on the commission expansive authority to "*do all things*, whether specifically designated in [the Public Utilities Act] *or addition thereto*, which are necessary and convenient" in the supervision and regulation of every public utility in California. (Italics added.) The commission's authority has been liberally construed. (See, e.g., *People* v. *Superior Court* (1965) 62 Cal. 2d 515 [42 Cal. Rptr. 849, 399 P.2d 385]; *People* v. *Western Air Lines, Inc.* (1954) *supra*, 42 Cal. 2d 621; *Sale* v. *Railroad Commission* (1940) 15 Cal. 2d 612 [104 P.2d 38]; *Kern County Land Co.* v. *Railroad Com*. (1934) 2 Cal. 2d 29 [38 P.2d 401, 39 P.2d 402].)

(*CLAM*, *supra*, 25 Cal.3d at 905.)

As a gas corporation, SoCalGas is subject to the plenary jurisdiction of the Commission. (Pub. Util. Code, §§ 216, 218.) Courts have consistently opined that the Commission "is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers." (*See*, *e.g.*. *Wise v. Pacific Gas & Electric Company* (1999) 77 Cal.App.4th 287, 300; *Utility Consumers Action Network v. Public Utilities Com*. (2004) 120 Cal.App.4th 644; Cal. Const., art. XII.)

Relevant to the underlying proceeding, the Commission and its staff have extensive statutory rights to investigate the utilities that are subject to Commission jurisdiction. The Public Utilities Code expressly grants broad authority to Commission staff to inspect the books and records of investor-owned utilities. It states:

> The commission, each commissioner, and each officer and person employed by the commission may, at any time, inspect the accounts, books, papers, and documents of any public utility. The commission, each commissioner, and any officer of the commission or any employee authorized to administer oaths may examine under oath any officer, agent, or employee of a public utility in relation to its business and affairs. Any person, other than a commissioner or an officer of the commission, demanding to make any inspection shall produce, under the hand and seal of the commission, authorization to make the inspection. A written record of the testimony or statement so given under oath shall be made and filed with the commission.[34]

These broad powers apply:

> to inspections of the accounts, books, papers, and documents of any business that is a subsidiary or affiliate of, or a corporation that holds a controlling interest in, an electrical, gas, or telephone corporation, or a water corporation that has 2,000 or more service connections, with respect to any transaction between the water, electrical, gas, or telephone corporation and the subsidiary, affiliate, or holding corporation on any matter that might adversely affect the interests of the ratepayers of the water, electrical, gas, or telephone corporation.[35]

[34] Pub. Util. Code, § 314(a).

[35] Pub. Util. Code, § 314(b).

This authority applies to all Commission staff without limitation.

Other provisions of the Public Utilities Code repeat or amplify these discovery powers. Section 581 requires utilities to provide information in the form and detail requested by the Commission.[36] Section 582 requires utilities to provide to the Commission copies of records when requested, including contracts and agreements.[37] Section 584 requires utilities to furnish reports to the Commission at the time and in the manner as the Commission requires.[38] Section 771 authorizes "commissioners and their officers and employees" to "enter upon any premises occupied by any public utility, for the

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[36] Pub. Util. Code § 581 provides:

> Every public utility shall furnish to the commission in such form and detail as the commission prescribes all tabulations, computations, and all other information required by it to carry into effect any of the provisions of this part, and shall make specific answers to all questions submitted by the commission.
>
> Every public utility receiving from the commission any blanks with directions to fill them shall answer fully and correctly each question propounded therein, and if it is unable to answer any question, it shall give a good and sufficient reason for such failure.

[37] Pub. Util. Code § 582 provides:

> Whenever required by the commission, every public utility shall deliver to the commission copies of any or all maps, profiles, contracts, agreements, franchises, reports, books, accounts, papers, and records in its possession or in any way relating to its property or affecting its business, and also a complete inventory of all its property in such form as the commission may direct.

[38] Pub. Util. Code § 584 provides:

> Every public utility shall furnish such reports to the commission at such time and in such form as the commission may require in which the utility shall specifically answer all questions propounded by the commission. The commission may require any public utility to file monthly reports of earnings and expenses, and to file periodical or special reports, or both, concerning any matter about which the commission is authorized by any law to inquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the commission.

purpose of making the examinations and tests and exercising any of the other powers provided for in this part," and to "set up and use on such premises any apparatus and appliances necessary therefor."[39]

In addition to the extensive discovery authority conferred upon all Commission staff as a general matter, Cal Advocates has specific statutory authority to "compel the production or disclosure of *any information it deems necessary to perform its duties from any entity regulated by the commission*, provided that any objections to any request for information shall be decided in writing by the assigned commissioner or by the president of the commission, if there is no assigned commissioner."[40]

This statutory scheme expressly recognizes that information provided to Commission staff by utilities may in some instances involve sensitive and/or confidential material. Section 583 of the Public Utilities Code provides ample protection for such information.[41] Further, Commission General Order 66-D[42] provides a process for submitting confidential information to the Commission staff. Information collected pursuant to a books and records request is used as part of the staff's internal review process and, if properly designated as confidential by utilities, will not be publicly disclosed unless a process is followed whereby the Commission as a body determines that the information should be open to public inspection.[43]

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[39] Pub. Util. Code, § 771.

[40] Pub. Util. Code, § 309.5(e) (emphasis added).

[41] Pub. Util. Code, § 583.

[42] https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M302/K016/302016447.pdf

[43] Pub. Util. Code, § 583.

These constitutional and statutory provisions represent a clear legislative determination that the exercise of the power to review material by Commission staff is an integral part of California's comprehensive scheme to regulate investor-owned public utilities. A contrary determination by this Court could severely undermine the Commission's core mission to protect the ratepaying public from powerful utility monopolies and to ensure the availability of essential utility services to California citizens. *Simply put, if the Commission cannot require SoCalGas to comply with Commission data requests related to oversight of its regulatory accounts, it has no power at all.* Such a determination would be contrary to decades of jurisprudence regarding the Commission's expansive authority and jurisdiction.

Moreover, if the limitations on the Commission's authority proposed by SoCalGas were adopted by this Court, it would likely erode the voluntary compliance the Commission generally receives from regulated utilities. In this regard, the Commission can envision a situation in which utilities, emboldened by a court decision limiting the Commission's authority to pursue investigations such as the underlying Commission proceeding, simply refuse to comply with information requests without a protracted fight over various asserted privileges. This could result in a regulatory morass in which the Commission is hamstrung in its efforts to complete critical investigations.

Indeed, the Commission's concern in this area is not merely hypothetical. In fact, other California energy utilities have begun refusing to comply with Commission data requests. Interestingly, these utilities do not even bother to dress up their refusals as related

to First Amendment grounds, as SoCalGas has done herein; they refuse to comply on the bare allegation that the costs at issue were borne by shareholders and not ratepayers.[44] The obvious similarities between the arguments raised by these various gas and electric utilities, including SoCalGas, strongly suggest a coordinated attack on the Commission's constitutional and statutory authority. As noted above, that authority is longstanding and extensive.

For the reasons discussed above, the Commission respectfully submits that it has ample constitutional and legislative authority to require SoCalGas to comply with the reasonable discovery requests properly issued by Cal Advocates in the underlying Commission proceeding.

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[44] *See*, *e.g.*, SDG&E May 11, 2021 Data Response in Rulemaking (R.) 20-08-020 ("Costs associated with this coalition are funded by shareholders and is thus beyond the scope of this proceeding."); SCE May 10, 2021 Data Response in R.20-08-020 ("Costs associated with this coalition are funded by shareholders and is thus beyond the scope of this proceeding."); PG&E May 7, 2021 Data Response in R.20-08-020 ("Costs associated with this coalition are funded by shareholders and are thus beyond the scope of this proceeding."). These data responses are attached hereto as Commission Exhibit D. R.20-08-020 is the Commission's net energy metering (NEM) tariffs proceeding. NEM is an electricity tariff-based billing mechanism designed to support the installation of customer-sited renewable generation. The NEM proceeding is closely coordinated with other related Commission proceedings including, but not limited to, R.12-11-005 and R.20-05-012 on renewable distributed generation programs, R.19-09-009 on Microgrids and Resiliency, R.14-08-013 on Distribution Resources Planning, R.17-07-007 on Rule 21 and the interconnection of distributed generation resources, R.14-10-003 on Integrated Distributed Energy Resources, R.19-11-009 on Resource Adequacy, and R.14-07-002 on the development of a successor tariff to the original NEM tariff. (*See Order Instituting Rulemaking to Revisit Net Energy Metering Tariffs Pursuant to Decision 16-01-044, and to Address Other Issues Related to Net Energy Metering* (R.20-08-020) (September 3, 2020), at pp. 1-2.)

B. SoCalGas has failed to make a p*rima facie* showing of First Amendment Infringement.

The Ninth Circuit has established that making a *prima facie* showing "requires appellants to demonstrate that enforcement of the [discovery requests] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." (*Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1160, internal citation omitted.)

In Resolution ALJ-391, the Commission explained that:

> Meeting the initial showing of First Amendment infringement requires a showing that goes beyond a simplistic assertion that disclosure alone chills association. An organization must make a concrete showing that disclosure "is itself inherently damaging to the organization or will incite other consequences that objectively could dissuade persons from affiliating with the organization."

(Res. ALJ-391, p. 14, citing *Dole v. Local Union 375, Plumbers Int'l Union* (9th Cir. 1990) 921 F.2d 969, 973-974.)

SoCalGas' references to "reasonable probability" and "arguable" language from its cited cases represents a distinction without a difference. (Petn., 41, citing *Buckley v. Valeo* (1976) 424 U.S. 1, 74; *Perry, supra*, 591 F.3d at 1160.) SoCalGas cannot simply speculate that disclosure alone caused, or will cause, associational harm. In *Brock v. Local 375* (9th Cir 1988) 860 F.2d 346, 350, n.1., the Ninth Circuit explained that "[m]any courts have grappled with the sufficiency of such a showing" and that "[a] factor emphasized in each of those decisions is the need for objective and articulable facts, which go beyond broad allegations or subjective fears." The

Commission appropriately held SoCalGas' to that standard in determining that the *prima facie* showing was insufficient.

The harm alleged herein is limited to disclosure to a utility's regulator and its staff. SoCalGas' allegation that disclosure to staff will result in public disclosure is not supported by record evidence. Such public disclosure would occur, according to SoCalGas, *regardless* of the statutorily mandated confidentiality of documents submitted under Section 583.

Section 583 provides that:

> No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.[45]

(Pub. Util. Code, § 583.)

The Commission's confidentiality framework provides a path to ensure the appropriate treatment of confidentially submitted materials. Outside of a proceeding, after the submission of materials under Section 583, parties may seek to disclose publicly, or prevent the public disclosure, of such materials pursuant to General Order 66-D. General Order 66-D provides that:

[45] The fact that Commission staff risk a misdemeanor for failing to comply with Section 583 serves as a substantial incentive towards compliance.

> Before releasing information in response to a CPRA request, or in any other context, Legal Division will determine whether the information submitter has established a lawful basis of confidentiality. If Legal Division finds *the information submitter did establish a lawful basis of confidentiality*, then Legal Division will not release the information, and will proceed as described in Section 5.5(b) of this GO. If Legal Division finds *the information submitter has failed to establish a lawful basis of confidentiality*, Legal Division will proceed as described in Section 5.5(c) of this GO.

(General Order 66-D, section 5.5(a), emphasis in original.)

If the requirements of General Order 66-D have been met by the utility, and an assertion of confidentiality is determined to be lawful, then *the information will not be disclosed*. (General Order 66-D, section 5.5(b).) This determination is subject to a right to appeal. (*Id.*)

Critically, the General Order 66-D process has not yet occurred in this matter. Thus, provided that SoCalGas complies with General Order 66-D requirements in confidentially submitting the requested records, the only entities that receive the ordered production would be the Commission and its staff. Determining whether such records could be disclosed beyond the Commission is premature.

SoCalGas' appeal essentially seeks to circumvent the Commission's jurisdiction in determining whether the subject information is confidential. (*See* Pub. Util. Code, § 583.) It relies on the frail premise that state actors will break confidentiality rules based on some assumed agenda, pursuant to collateral agreements that do not, and cannot, alter the requirements of state law. There is absolutely no showing that the Commission and its staff (including

Cal Advocates) confidentially reviewing the ordered production pursuant to state law and the Commission's General Orders in any way harms SoCalGas' associational rights.

Under some circumstances, associational harm may occur by virtue of submission to the government in and of itself. (*See*, *e.g.*, *Gibson v. Fla. Legis. Investigation Comm.* (1963) 372 U.S. 539.) In *Gibson,* a governmental inquiry into Communism was insufficient to compel the production of an NAACP membership list, with the Court noting that "we rest our result on the fact that the record in this case is insufficient to show a substantial connection between the Miami branch of the N. A. A. C. P. and Communist *activities* which the respondent Committee itself concedes is an essential prerequisite[.]" (*Id*. at 551, emphasis in original.)

In *Dole v. Serv. Employees Union, AFL-CIO, Local 280* (9th Cir. 1991) 950 F.2d 1456, 1461, disclosure of Union meeting minutes to the Department of Labor was found to have chilled associational rights. However, there was an entirely different confidentiality context in *Dole*. The sealed documents there were subject to a "need to know" policy rather than statutory protection.

> [T]he Secretary's "need to know" policy does not have the force of law because it is not codified in a statute, nor is it promulgated as a regulation in the Federal Register. As such, it is not subject to judicial enforcement. (Citation omitted.) Should the Secretary deviate from the need-to-know policy, neither the Union nor its members would have any recourse. Furthermore, the Secretary could revoke the need-to-know policy without any advance warning. In short, the policy provides only so much protection to first amendment interests as the Secretary - in her discretion - chooses to grant at any particular moment.

(*Id.*)

As explained above, Section 583 and General Order 66-D are not a discretionary "need to know" policy, but rather a comprehensive statutory and regulatory framework for the confidential treatment of utility records. As the Commission has explained:

> SoCalGas has failed to show how submitting the relevant documents, to Commission staff (including Cal Advocates staff) under Section 583 confidentiality would cause any associational harm. Whether or not Cal Advocates has a "joint prosecution" agreement with the Sierra Club, it is not relieved of its confidentiality obligations under Section 583. Assumed motives have no bearing on such requirements.

(D.21-03-001, p. 13.)

This case is a far cry from the inquiry into Communism in *Gibson*, or the expressive and discretionarily confidential disclosures in *Dole*.[46] The utility expenditures documented in the SAP database and SoCalGas contracts are directly related to the underlying audit. The Commission routinely reviews such confidential records of costs incurred by utilities as part of its extensive ratemaking and oversight authority. Expenditures on utility vendors, like any utility expenditure can be audited by the Commission and its staff. (Pub. Util. Code, §§ 451, 701.)

Beyond that, in cases where governmental retaliation is not a substantial concern, such as in the present matter, disclosures limited to government regulators involve considerably less intrusion on associational privacy than public disclosures. (*See Nixon v.*

[46] In reviewing the *Dole* minutes the Ninth Circuit also noted that "[m]ost of these statements have no apparent bearing on the Union's finances - the subject of the Secretary's investigation[.]" (*Dole, supra.,* 950 F.2d at 1459.)

Admin. of Gen. Servs. (1977) 433 U.S. 425, 467; *Whalen v. Roe* (1977) 429 U.S. 589, 602–05. The "threat of sanctions" that SoCalGas complains about is not retaliatory. (*See* Petn., 39, quoting *NAACP v. Button* (1963) 371 U.S. 415, 433.) Neither the Resolution nor the Rehearing Decision actually impose any fines or sanctions. And the fact that potential sanctions have been deferred is due to the fact that wrongdoing has been alleged by Cal Advocates. The Commission appropriately chose not to prejudge Cal Advocates' allegations as to the imposition or dismissal of fines or sanctions until after parties, including SoCalGas, have had notice and an opportunity to be heard on the matter, and after appropriate findings have been made. (*See* Res. ALJ-391, p. 33.)

SoCalGas' allegation of "viewpoint discrimination" also fails to establish retaliation. (*See* Petn., pp. 51-53.) SoCalGas' disagreement with the scope of Cal Advocates' discovery and bald assertion that Cal Advocates' agreement with Sierra Club "suggest[s] viewpoint discrimination is afoot" are broadly speculative and without substantiation in the record.

As explained in the Rehearing Decision:

> [W]hether or not a utility is fined or sanctioned is determined by whether or not that utility "violates or fails to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission." (Pub. Util. Code § 2107.) A utility's viewpoint is irrelevant as to its obligation to comply with Commission directives.

(D.21-03-001, p. 21.)

Consistent with its broad rhetoric, SoCalGas points to *Citizen's United* to support the assertion that the ordered production "strikes

at the heart of SoCalGas' First Amendment Rights." (Petn., p. 38, citing *Citizen's United v. Fed. Election Com.* (2010) 558 U.S. 310, 339.) However, the cited parenthetical in SoCalGas' Petition is inapposite as the instant case does not "ban" or direct any expenditures by SoCalGas. Thus, even if banning certain expenditures were at the heart of First Amendment rights, as SoCalGas suggests, such a conclusion is irrelevant to the instant dispute. Rather, the ordered production requires an audit and examination of regulatory accounts in a database (SAP), vendor contracts, and declarations (which have already been submitted to the Commission, but not Cal Advocates). As explained above, all of this is within the Commission's broad mandate to investigate utility records, pursuant to the protections offered by Section 583 and General Order 66-D. *There is no attempt whatsoever to curtail SoCalGas' advocacy activities.*

SoCalGas disagrees with the Commission's determination that the declarations failed to establish the required *prima facie* showing, arguing falsely that the Commission would only consider allegations of "past harm." (Petn., pp. 41-43.) Yet in its analysis of the declarations, the Rehearing Decision plainly rebuts this assertion with its consideration of allegations of present and future harm: "SoCalGas submitted a declaration from Andy Carrasco, SoCalGas' new Vice President, Strategy and Engagement, and Chief Environmental Officer, which alleges present and future harm, opining that 'SoCalGas is being forced to reconsider its decisions relating to political activities and associations.'" (D.21-03-001, p. 14.) Upon review of the submissions, the Commission correctly

determined that the conclusory declarations failed to demonstrate that turning the subject documents over to the Commission staff, under Section 583 confidentiality, would be "inherently damaging to the organization or will incite other consequences that objectively could dissuade persons from affiliating with the organization." (*Local Union 375*, *supra*, 921 F.2d at 974.)

The declarations wrongly assume that the ordered confidential regulatory disclosures would inevitably become public through extra-legal actions. Such fears are unfounded and no practical impacts on associational activities have actually been shown. Indeed, SoCalGas has failed to demonstrate that the prior confidential regulatory disclosures, such as the November 2019 production to Cal Advocates, became public. (See Petn., p. 41.) Regarding prior regulatory disclosures, Cal Advocates has explained that "[w]hile non-confidential information from SoCalGas' data responses has been made public – indeed a Public Records Act request required that it be made public – Cal Advocates knows of no instance in this investigation where confidential utility information has been disclosed, and SoCalGas has failed to identify any such disclosure." (D.21-03-001, p. 13, internal citation and footnotes omitted.)

SoCalGas also cites to *Britt* in support of its claims. (Petn., 42-43, citing *Britt v. Superior Court* (1978) 20 Cal. 3d 844, 849-61.) SoCalGas apparently concedes that *Britt* does not hold that disclosure alone is sufficient to establish a *prima facie* case, while suggesting that the contrary was "an argument SoCalGas never made." (Petn., p. 43.) However, SoCalGas specifically argued in its Application for Rehearing under the section heading that: "The

Resolution Committed Legal Error in Failing to Hold Disclosure Alone Is Sufficient to Prove First Amendment Harm, As in *Britt v. Superior Court*."[47] In any event, *Britt* did not deal with a regulated entity submitting expenditure-related information confidentially to its regulator. Rather, it dealt with a broad discovery order in public litigation regarding political and even medical information of homeowners, absent the confidentiality framework provided by Section 583 and General Order 66-D. The comparison is apples to oranges.

SoCalGas' citation to *Perry* likewise fails to support its contentions. SoCalGas asserts that because its declarations were similar to those in *Perry*, they must be deemed sufficient. (See D.21-03-001, p. 15.) But as the Rehearing Decision explained:

> *Perry* did not establish a formula where the text of its declarations would establish a *prima facie* case when used in all subsequent matters. The supporters of Proposition 8 (regarding the legality of same-sex marriage), at issue in *Perry*, may be differently situated than the investor-owned utility consultants/contractors at issue here.

(*Id.*)

While "lacking in particularity," the "self-evident" declarations in *Perry* regarding Proposition 8 made clear that the declarants would be chilled by the disclosure. (*Perry*, *supra*, 591 F.3d at 1163.) A protective order limiting disclosure would have ameliorated, but not eliminated, the threatened harms. (*Id.* at 1164.) The subject

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[47] *Southern California Gas Company's Application for Rehearing of Resolution ALJ-391 and Request for Oral Argument* (December 21, 2020), p. 15. <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M355/K733/355733189.PDF>

matter of the Proposition 8 litigation included topics such as "[w]hether campaign messages were designed to appeal to voters' animosity toward gays and lesbians[.]" (*Id.* at 1165.) The potentially chilling effect of disclosure was clear.

Here, while the declarations assert that there have been or will be impacts, there is no showing as to why that would be true in the case of confidential disclosures to Commission regulatory staff. SoCalGas makes an overarching assumption of *public disclosure* of the documents that have been filed confidentially with the Commission, with no foundation whatsoever for that assumption. It also fails to explain how the Commission staff's confidential access to utility databases would cause associational harm. (*Cf* Pub. Util. Code § 1822.) Moreover, while SoCalGas misleadingly asserts that the Commission has somehow "put on notice all lobbyists and consultants" of some imagined overreach (Petn., p. 47), the point that the Commission was making is that it is not objectively credible that the utility or its contractors should expect that they could shield contracts and expenditures from the Commission, given its broad constitutional and statutory mandate over SoCalGas' natural monopoly. (*See*, *e.g.*, D.21-03-001, p. 15.)

SoCalGas also fails to show why it should be allowed to submit confidential declarations to the Commission, but not Cal Advocates. Both entities are covered under Section 583 and General Order 66-D. There is no cognizable harm in distributing the confidential declarations to pertinent Commission staff, including Cal Advocates.

For the reasons discussed above, SoCalGas has failed to make a *prima facie* showing of associational harm.

C. Even if SoCalGas had made a *prima facie* showing of first amendment infringement, the discovery is nevertheless permissible.

Even if SoCalGas had made a *prima facie* showing, it would fail the second step of the First Amendment analysis. The second step was articulated by *Perry* as follows: "[i]f appellants can make the necessary *prima facie* showing, the evidentiary burden will then shift to the government . . . [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the 'least restrictive means' of obtaining the desired information." (*Perry*, *supra*, 591 F.3d at p. 1161.) *Perry* explains that: "[m]ore specifically, the second step of the analysis is meant to make discovery that impacts First Amendment associational rights available only after careful consideration of the need for such discovery, but not necessarily to preclude it." (*Id*.)

In this regard, the Commission notes that there is currently pending litigation before the United States Supreme Court that could impact the analysis articulated in cases such as *Perry*. On April 26, 2021, the United States Supreme Court heard oral argument in two cases on certiorari from the United States Court of Appeals for the Ninth Circuit. (*See Thomas More Law Center v. Becerra*, Case No. 19-255; *Americans for Prosperity Foundation v. Becerra*, Case No. 19-251.)

These cases present the question of what level of scrutiny is required when infringement of the First Amendment right of association is alleged. In *Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000 (9th Cir. 2018), the Ninth Circuit determined that "exacting scrutiny" is the proper level of review, and upheld the

California regulation at issue, which permits the California Attorney General to collect from charities Internal Revenue Service Form 990 Schedule B, containing the names and addresses of the charities' largest contributors. The Attorney General has used the information collected to prevent charitable fraud. In the litigation currently pending before the Supreme Court, petitioners argue that strict scrutiny (rather than "exacting scrutiny") should apply to claims of alleged infringement on the First Amendment right of association.

In *Becerra*, the standard was articulated as follows:

> We apply "exacting scrutiny" to disclosure requirements. *See Doe v. Reed*, 561 U.S. 186, 196, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010). "That standard 'requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'" *Id.* (quoting *Citizens United v. FEC* , 558 U.S. 310, 366–67, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010)). "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Id.* (quoting *Davis v. FEC* , 554 U.S. 724, 744, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008)).

(*Becerra*, *supra*, 903 F.3d at p. 1008.)

The *Becerra* court also stated:

> The plaintiffs contend "[t]he 'substantial relation' element requires, among other things, that the State employ means 'narrowly drawn' to avoid needlessly stifling expressive association." They cite *Louisiana ex rel. Gremillion v. NAACP* , 366 U.S. 293, 297, 81 S.Ct. 1333, 6 L.Ed.2d 301 (1961).
>
> We are not persuaded, however, that the standard the plaintiffs advocate is distinguishable from the ordinary "substantial relation" standard that both the Supreme Court and this court have consistently applied in

> disclosure cases such as *Doe* and *Family PAC v. McKenna*, 685 F.3d 800, 805–06 (9th Cir. 2012). To the extent the plaintiffs ask us to apply the kind of "narrow tailoring" traditionally required in the context of strict scrutiny, or to require the state to choose the least restrictive means of accomplishing its purposes, they are mistaken.

(*Id.*)

It is anticipated that the Supreme Court will clarify the appropriate level of scrutiny for such claims in its upcoming decision, to be issued in June or July, 2021.[48]

In any event, the government interest at stake in this case is clear. In the Rehearing Decision, the Commission explained that it had determined "that there is 'a compelling government interest here, Cal Advocates' requests for information about SoCalGas' decarbonization campaign are consistent with its broad statutory authority to inspect the books and records of investor-owned utilities in furtherance of its proper interest in fulfilling the Commission's mandate to regulate and oversee utilities.'" (D.21-03-001, p. 18, citing Res. ALJ-391, pp. 15-16.) To the extent that SoCalGas continues to dispute the fact that the relevant discovery rights of the Commission and Cal Advocates in this matter are essentially coextensive, the Rehearing Decision explained:

[48] The Commission submits that SoCalGas' claims are meritless, even under the strictest potential standard under consideration by the Supreme Court. However, depending on the outcome of the pending Supreme Court litigation, and the analysis employed by the Supreme Court in rendering its decision, it is possible that the analytical framework applied to assess SoCalGas' claims might be altered. In that instance, the Commission would respectfully request an opportunity to submit supplemental briefing to the Court on this issue.

> Cal Advocates is part of the Commission's regulatory scheme, with Cal Advocates being explicitly authorized to "compel the production or disclosure of any information it deems necessary to perform its duties from any entity regulated by the commission." (Pub. Util. Code § 309(e).) The regulatory context thus informs the relevant discovery rights and the compelling government interest.

(*Id.*, p. 20.)

A central proposition in SoCalGas' case is that the "constitutionally protected" information in the SAP database or the subject vendor contracts is 100% shareholder-funded. (*See*, *e.g.*, Petn., p. 9.) SoCalGas apparently concedes that the ratepayer-funded information, whether intended for lobbying or otherwise, was properly requested by and turned over to the Commission. (*See*, *e.g.*, Petn., pp. 16-17.) It is well-established that regulated utilities may not use ratepayer funds for advocacy-related activities that are political or do not otherwise benefit ratepayers.[49]

Further, merely designating expenditures as "shareholder-funded" does not immunize SoCalGas from the Commission's exercise of its oversight jurisdiction in ensuring that advocacy costs have been booked to the appropriate utility accounts. (*See* Cal. Const. art. 12; *see also* Pub. Util. Code, §§ 311, 312, 313, 314, 314.5, 581, 582, 584,

[49] *Southern California Edison Co.*, 2012 Cal. PUC LEXIS 555, *765 (D.12-11-051) (finding that membership subscriptions to organizations that advance tax reduction policies are inherently political and funding should not be permitted under rate recovery); *Southern California Gas Co.*, 1993 Cal. PUC LEXIS 728, *103 (D.93-12-043) (finding that "ratepayers should not have to bear the costs of public relations efforts in this area, which according to SoCalGas, are designed primarily to increase load by promoting natural gas use to business and government leaders").

701, 702.) SoCalGas asserts that its advocacy was, in part, to *benefit customers*. (Petn., p. 15.) This is an admission that the subject advocacy *impacts ratepayers*. Given the broad discovery rights of the Commission and its staff, and the obligation to protect ratepayer interests, it is unreasonable for SoCalGas to assume that simple *booking* of their costs "below the line" would dispositively shield their dealings from Commission scrutiny.[50]

Whether SoCalGas actually booked the subject costs as shareholder only is also suspect, and is subject to verification by the Commission. In its discovery responses, SoCalGas does state that: "[r]atepayer funds have not been used to support the founding or launch of Californians for Balanced Energy Solutions (C4BES)"[51] and "[r]atepayer funds are not used to support C4BES."[52] More specifically, SoCalGas also asserted that half of its contractor invoices were booked to ratepayer-funded accounts and half were booked to shareholder accounts because the invoices included "routine work done for SoCalGas as well as some work done on behalf of C4BES."[53] However, in response to additional discovery, SoCalGas modified its response to reflect that all of the consultant costs would be funded by shareholders "in order to prevent further distraction

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[50] While SoCalGas explains that "below the line" account expenditures are shareholder-funded and not recovered from ratepayers, it admits that the "final ratemaking decision [is] settled at a GRC [General Rate Case]." (Petn., p.15, n.3.) The Commission presides over GRCs and orders the final ratemaking decision.

[51] SoCalGas June 14, 2019 Response to Data Request CALPA-SCG-051719, Question 1 (PA Vol. 1, Ex. 1, p. 49).

[52] SoCalGas June 14, 2019 Response to Data Request CALPA-SCG-051719, Question 2 (PA Vol. 1, Ex. 1, p. 50).

[53] SoCalGas June 14, 2019 Response to Data Request CALPA-SCG-051719, Question 5 (PA Vol. 1, Ex. 1, p. 53).

from the important issues" in the Commission's Building Decarbonization proceeding.[54]

On January 24, 2020, Cal Advocates asked SoCalGas to: "Please provide any and all documentary evidence that charges to IO 30076601 [the Balanced Energy Internal Order] are shareholder funded."[55] On February 7, 2020, SoCalGas explained in response to this January data response that it had *intended* to book the costs to a shareholder account, but that it had made a mistake which it subsequently corrected on October 30, 2019.[56] SoCalGas provided screen shots of its accounting system to show that the expenditures were moved from ratepayer account 920 to shareholder account 426.4 effective December 2019.[57] This data response also objected to the question's asserted chill of "the exercise of SoCalGas' and other's constitutional rights."[58]

Moreover, on July 12, 2019, the utility revised its responses to a data request, claiming that it would move all of the time for two associated employees' activities between May 1, 2018 to the present to a shareholder-funded account, to once again "prevent further distraction from the important issues" in the Commission's Building

[54] *See* SoCalGas July 12, 2019 Response to Data Request CALPA-SCG-051719, Questions 4 & 5 (PA Vol. 2, Ex. 9, pp. 490-491).

[55] SoCalGas February 7, 2020 Response to Data Request CALPA-SCG-202001**,** Question 4 (PA Vol. 4, Ex. 14, pp. 831-832).

[56] SoCalGas February 7, 2020 Response to Data Request CALPA-SCG-202001 Question 4 (PA Vol. 4, Ex. 14, pp. 831-832).

[57] SoCalGas February 7, 2020 Response to Data Request CALPA-SCG-202001 Question 4 (PA Vol. 4, Ex. 14, p. 831-832).

[58] SoCalGas February 7, 2020 Response to Data Request CALPA-SCG-202001 Question 4 (PA Vol. 4, Ex. 14, p. 831).

Decarbonization proceeding.[59] However, SoCalGas failed to identify any other employees working on its advocacy activities, limited its accounting adjustments to costs starting on May 1, 2018 without explanation, did not identify the accounts where the costs were booked, and failed to identify the nature of the employee costs moved to the shareholder account.

SoCalGas argues that the discovery orders are not the "least restrictive means" available and suggests that the Commission should be limited to examining above-the-line ratepayer accounts only. (Petn., pp. 48-49.) SoCalGas suggests that "examining the above-the-line accounts would enable CalPA to see whether political activity has been misclassified in the above-the-line accounts." (Petn., p. 49.) This is a case of a utility under investigation by its regulator telling its regulator which accounts can be examined to find relevant information. The Commission and its staff cannot be forced to simply take SoCalGas' word on these matters. The problem with SoCalGas' "least restrictive means" argument was noted in the Resolution:

> Taken to the logical conclusion, a utility might opt out of regulation at any time, at its own discretion, based on its self-serving description of its activities. SoCalGas' position that it may curtail Commission staff's ability to conduct its regulatory function of ensuring proper use of ratepayer funds -- by making unsupported assertions -- is fundamentally inconsistent with its status as a regulated public utility.

(Res. ALJ-391, p. 19.)

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[59] SoCalGas August 13, 2019 Response to Data Request CALPA-SCG-051719, Question 4 Modified Submission (PA Vol. 2, Ex. 1, p. 489).

The Commission has a statutory mandate to audit and verify the utility's assertions. (*See*, *e.g.*, Pub. Util. Code § 451.) While SoCalGas characterizes the C4BES disclosures as a red herring, the record clearly shows the utility changing its story and altering the account designations. (*See* Petn., p. 48.) So particularly when a utility has changed its answers about how costs were booked related to activities which impact ratepayers, opening those specific books for review by Commission staff who are bound by confidentiality laws is the "least restrictive means" to accomplish the Commission's duty of utility oversight. To hold otherwise would countermand the reason why powerful utility monopolies such as SoCalGas are regulated in the first place.

The Rehearing Decision also noted that:

> [A]s to the "least restrictive means" analysis, it should be noted that procedural safeguards exist at the Commission to protect asserted confidential or privileged information. The Resolution specifically provides: "Pub. Util. Code § 583 and General Order 66-D provide ample protection and processes for utilities to submit confidential information to the Commission," and the Resolution adopts additional protections "to provide SoCalGas with time to review, and designate as confidential, information and documents sought by Cal Advocates…." (Res. ALJ-391, p. 29 [Finding 9].) SoCalGas may avail itself of any and all of these protections, if necessary, in order to protect confidential or privileged information. (See, e.g., *Duke Energy*, *supra*, 218 F.R.D. at p. 477 (documents to be disclosed under terms of the court's protective order); *Americans for Prosperity Found v. Becerra* (9th Cir. 2018) 903 F.3d 1000, 1004 (disclosed information was not to be made public except in very limited circumstances); *Dole v. Local Union 375* (9th Cir. 1990) 921 F.2d 969, 974

> (limited disclosure to a select group of government employees).)

(D.21-03-001, pp. 26-27.)

Regarding the SAP database (category 1 of the data sought by the Commission), the Commission has gone further in carefully balancing the concerns raised by SoCalGas and provided the following approach:

> In response to unique concerns raised by SoCalGas regarding protecting confidential information remotely available to Cal Advocates while reviewing its "live" SAP database, we direct Cal Advocates to provide a list to SoCalGas of the documents it seeks to print or copy from the SAP database and these documents will be treated as confidential for 20 days from the date of Cal Advocates' request to copy or print. Thereafter, documents that Cal Advocates requested to copy or print from the SAP database will only remain confidential if specifically designated as such by SoCalGas in accordance with the provisions of Pub. Util. Code § 583 and General Order 66-D.

(Res ALJ-391, p. 11.)

And as explained in the Rehearing Decision: "[e]ven if the 'custom software solution in its SAP Database' suggested by SoCalGas would have provided responsive information, there is no guarantee that it would have provided Cal Advocates with 'all the information it needed to conduct its investigation.'" (D.21-03-001, p. 21; *see also* Pub. Util. Code, § 309.5(e).)

The vendor contracts (category 2 of the 3 categories of data sought by the Commission) demonstrate how and why the money is being spent (with its asserted benefits for ratepayers). The vendor contracts provide the background information such as vendor IDs,

account numbers, etc., that will allow Commission staff to understand and analyze the raw data contained in the SAP database. The Resolution explained that:

> DR No. CalAdvocates-SC-SCG-2019-05 is narrowly tailored to seek specific contracts and information about SoCalGas' potential use of ratepayer funds for lobbying activities. Indeed, it arose as part of an inquiry that escalated after SoCalGas did not disclose its affiliation with an entity that sought party status in a rulemaking proceeding before the Commission. SoCalGas refused to provide information about its affiliation, thereby leading to this series of data requests by Cal Advocates.

(Resolution, pp. 18-19, footnote omitted; *see also United States v. Duke Energy Corp.* (M.D.N.C. 2003) 218 F.R.D. 468, 473 (allowing discovery request for energy company's communications with trade association despite the potential to chill First Amendment rights).)

Thus, investigating whether the utility is providing accurate information regarding the allocation of its advocacy costs between ratepayer and shareholder accounts, requires review of the vendor contracts. These contracts have already been produced to the Commission under protest. Section 583 and General Order 66-D protect from disclosure all records filed confidentially by SoCalGas in the underlying investigation. As noted above, there is no showing that the Commission or its staff has publicly disclosed any information from vendor contracts designated as confidential by SoCalGas. Pursuant to the procedure outlined in Section 583 and General Order 66-D, the Commission can consider whether any materials designated as confidential should be disclosed to the public. For this Court to require the Commission to return the contracts to SoCalGas would improperly interfere with the Commission's

supervision and regulation of utilities. (*See* Cal. Const. art. XII; Pub. Util. Code, § 701.)

This Court should also not entertain the argument that a utility's production to one part of the Commission, and not another, as is the case with the confidential declarations, is somehow a less restrictive means of turning over the information. All Commission staff are bound by Section 583 and General Order 66-D. Prohibiting distribution to staff within the walls of the Commission interferes with the Commission's mandate to "supervise and regulate every public utility in the State and [to] do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (Pub. Util. Code, § 701.) This would impose an unnecessary restriction on the Commission's treatment of the utility records and would set a dangerous precedent by allowing utilities to pick and choose which personnel within the Commission may receive relevant records. There is no basis for placing such a restriction upon the Commission, and it would be entirely inconsistent with the broad regulatory authority entrusted to the Commission by the state Constitution and statute.

For the reasons discussed above, SoCalGas' claims of First Amendment infringement are without merit.

D. SoCalGas waived its due process claim by failing to raise this claim before the commission in its application for rehearing of resolution ALJ-391, as required by statute.

As its final argument, SoCalGas claims that it was not afforded sufficient due process because it was required to comply with Cal Advocates' data requests and subpoenas prior to the establishment of a formal Commission proceeding to investigate the funding of its astroturfing activities. (Petition, pp. 53-56.) This allegation should be summarily dismissed for three reasons.

First, contrary to its assertion at page 54, footnote 5 of its writ petition, SoCalGas abandoned its due process claim in its application for rehearing of Res. ALJ-391. Its rehearing application mentions the term "due process" only twice and cites no authority whatsoever in support of any alleged due process violations. (*See* SoCalGas App. For Reh. of Res. ALJ-391, at pp. 6, 20 (fn. 69).) Public Utilities Code section 1732 provides: "The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application." (Pub. Util Code, § 1732.) Mere reference to the term "due process" without supporting argument or citation to authority is insufficient to preserve a claim for court review under section 1732. (*See Postal Telegraph-Cable Co. v. Railroad Commission of California* (1925) 197 Cal. 426, 433-434.)

Second, there is nothing improper or even unusual about an investigation preceding the opening of a formal proceeding. In many agency contexts, it may be premature to open a formal proceeding without a sufficient evidentiary basis to support the initiation of such

a proceeding. The broad Commission powers discussed above in Section A, including extensive investigatory powers, are not in any way limited to formal Commission proceedings. SoCalGas cites no contrary authority, and the Commission is aware of none.

Third, as the exhibits to SoCalGas' writ petition amply demonstrate, SoCalGas has been provided sufficient due process throughout the underlying Commission investigation and proceeding. Since the investigation's inception, the Commission has fully considered numerous motions (SoCalGas Exh. 6, 7, 13, 14) and declarations (SoCalGas Exh. 3, 6, 8, 10, 12, 19-21, 29) filed by SoCalGas. One of these motions was a motion for reconsideration/appeal to the full Commission. (SoCalGas Exh. 6.) The Commission also considered many of the arguments raised by SoCalGas in two ALJ rulings. (SoCalGas Exh. 5, 17.) The Commission publicly issued for comment three draft versions of Res. ALJ-391 (SoCalGas Exh. 27, 35, 36) before issuing the final version of the Resolution (SoCalGas Exh. 37). SoCalGas filed comments on the draft of Res. ALJ-391. (SoCalGas Exh. 28.) The Commission expressly discussed and considered SoCalGas' comments on the draft Resolution in issuing Res. ALJ-391. (Res. ALJ-391, pp. 26-28 (SoCalGas Exh. 37).) SoCalGas also filed an application for rehearing of Res. ALJ-391 (SoCalGas Exh. 38), which the Commission fully considered in issuing D.21-03-001 (SoCalGas Exh. 55). In summary, SoCalGas has been afforded a multitude of opportunities to present its arguments to the Commission, and the Commission has considered all of SoCalGas' arguments in issuing Res. ALJ-391 and D.21-03-001.

For the reasons discussed above, SoCalGas' allegation that it was denied due process during the underlying Commission investigation and proceeding is without merit and should be summarily rejected by this Court.

VI. CONCLUSION

Based on the foregoing, the arguments raised in the writ petition have no merit. For this reason, the Commission respectfully requests that the Court deny SoCalGas' petition for writ of review.

Respectfully submitted,

AROCLES AGUILAR, SBN 94753
MARY McKENZIE, SBN 99940
CARRIE G. PRATT, SBN 186038
EDWARD MOLDAVSKY, SBN 239267

By: /s/ *CARRIE G. PRATT*
CARRIE G. PRATT

Attorneys for Respondent
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2742

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CERTIFICATE OF WORD COUNT

I certify this answer of Respondent California Public Utilities Commission to the Petition for Writ of Review contains 13,985 words. In completing this word count, I relied on the "word count" function of the Microsoft Word program.

June 1, 2021 /s/ *CARRIE PRATT*

Carrie Pratt