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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS COMPANY,
Petitioner,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSON,
Respondent.

From a Decision of the California Court of Appeal,
Second Appellate District, Division One,
Case No. B310811

Commission Resolution ALJ-391 &
Commission Decision D.21-03-001

PETITION FOR REVIEW OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE PATRICIA GUERRERO AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.500 of the California Rules of Court, the California Public Utilities Commission (Commission),[1] respectfully petitions this Court to review the decision of the California Court of Appeal, Second Appellate District, Division One, in Case No. B310811. A copy of the relevant Court of Appeal Opinion (Opinion) is attached hereto as **Exhibit A**. Pursuant to Rule 8.500(c)(2), the Commission applied for rehearing of the Court of Appeal Opinion on January 23, 2023. The Court of Appeal corrected several errors in the Opinion and denied rehearing of the Opinion on February 3, 2023. A copy of the Court's February 3, 2023 order is attached hereto as Commission **Exhibit B**.

I. ISSUES PRESENTED

Pursuant to Rule 8.504(b)(1), the Commission submits the following important questions of law for the Court's review:

1. Does a regulated utility such as Southern California Gas Company (SoCalGas) need to do more than submit contractor declarations to support a First Amendment prima facie case?
2. Given that Public Advocates Office (Cal Advocates) has a forty-year history operating as an office within the Commission, is the Commission entitled to broad deference when exercising its discretion in determining the extent of Cal Advocates' access to information to audit and examine utility records, so that Cal Advocates, as an office within the

[1] Subsequent references to "Rule" are to the California Rules of Court, unless otherwise noted.

Commission, can fulfill its statutory duties to advocate for California ratepayers ?

3. Are a utility's shareholder-funded expenditures still part of a utility's regulated activities that are subject to the review of Cal Advocates?

The Commission respectfully submits that the answer to each of the above questions is yes. Accordingly, the instant petition for review should be granted to address these important questions of law (see Cal. Rules of Court, Rule 8.500, subd. (b)(1)).

II. INTRODUCTION

The instant dispute relates to Cal Advocates' investigation into SoCalGas' activities to advocate for the use of natural gas, and specifically how the company has accounted for the costs associated with these activities. Public Utilities Code section 309.5 (e) provides in relevant part, "The office [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…." (emphasis added).

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). 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.) C4BES attempted to participate as an "independent" party in gas-related proceedings held at the Commission. (*Ibid.*)

It is a fundamental regulatory principle that utilities cannot include costs in rates that do not benefit ratepayers.[2] The 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.[3] While SoCalGas may lobby government entities and officials regarding the state's climate change policies, it is improper for SoCalGas to obscure its role in these lobbying

[2] 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 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).)

[3] 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)).

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. Commission staff cannot perform their statutorily-mandated audit functions when a regulated entity such as SoCalGas refuses to provide relevant information and data.[4] It is untenable for SoCalGas to ask Cal Advocates to basically take it at its word that it is not funding advocacy activities with ratepayer funds.

Moreover, as this Court has stated, in California a public utility is in many respects more akin to a governmental entity, and "the nature of the California regulatory scheme demonstrates that the state generally expects a public utility to conduct its affairs more like a governmental entity than like a private corporation." (See *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 469-470 (both the prices which a utility charges for its products or services and the standards which govern its facilities and services are established by the state; state also determines the system and form of the accounts and records which a public utility maintains).) Indeed, even funds that eventually go to shareholders are derived from captive ratepayers, making public utilities special status entities. Hence, although utilities have the rights of free speech and association, they are also regulated special status entities, and their actions can and must be overseen.

As the Opinion makes clear, the First Amendment is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."[5] To support this

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[4] Perhaps emboldened by SoCalGas' refusal to comply with Commission data requests in this proceeding, other California gas and electric utilities have 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.

[5] Opinion, Exh. A, p. 21.

idea, the Opinion cites *NAACP v. Alabama*[6] in which the Supreme Court found that disclosing the names of NAACP members who were working in the NAACP Alabama office might chill such members' freedom of association. It is not clear how SoCalGas, a large and well-funded investor-owned utility, represents a minority interest.

Moreover, the Opinion clarifies that any prima facie showing (for an infringement of one's right to associate freely) "requires more than bare allegations."[7] But SoCalGas admits, in its Court of Appeal filings, that it submitted contractor declarations designed to track those at issue in *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147 in support of its prima facie infringement claim. (See SoCalGas Application for Rehearing of Resolution AJ-391, Exh. 38, p. 1527 (declarations submitted by SoCalGas "were nearly identical in substance to those submitted by appellants in *Perry*").) The Commission respectfully submits that if all that is needed to assert a case of prima facie infringement is to mimic the *Perry* declarations, it is really no standard at all, and a prima facie infringement claim may be upheld in virtually all instances.

For these reasons, the Commission respectfully asks the Court to grant the instant petition for review, and correct the legal errors contained in the Opinion. The Opinion blocks Cal Advocates from accessing critical accounting data necessary to fulfill its core functions. This warrants review by this Court pursuant to Rule 8.500(b)(1) in order to "secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, Rule 8.5000(b)(1).)

[6] Opinion, Exh. A, p. 21, citing *National Ass'n for Advancement of Colored People v. State of Ala. Ex rel. Patterson* (1958) 357 U.S. 449, 462.

[7] Opinion, Exh. A, p. 24.

III. BACKGROUND

In May 2019, Cal Advocates initiated a discovery inquiry into SoCalGas' funding of anti-decarbonization campaigns using "astroturfing" groups. 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 Commission Rulemaking (R.) 19-01-011[8] when C4BES filed a motion for party status on March 13, 2019, and falsely described itself as a "a coalition of natural and renewable natural gas users."[9] Sierra Club challenged the motion on May 14, 2019, claiming that, unbeknownst to the Commission and the public, SoCalGas founded and funded C4BES.[10] 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.[11]

On May 23, 2019, Cal Advocates initiated its inquiry by issuing a series of data requests to SoCalGas related to the funding for C4BES. These data

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

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

[10] 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); see 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).

[11] 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.

requests continued until October 2019, with SoCalGas refusing to comply fully with several of the requests. In October 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).[12] SoCalGas opposed Cal Advocates' motion on October 17, 2019, alleging that, because the information sought was related to shareholder-funded activities, it fell beyond Cal Advocates' statutory purview.[13] An Administrative Law Judge (ALJ) was appointed to oversee the instant dispute between Cal Advocates and SoCalGas. On November 1, 2019, the ALJ issued a ruling granting Cal Advocates' motion to compel responses to some of Cal Advocates' data requests.[14]

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 shareholder funded."[15] 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

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[12] 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.

[13] *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.

[14] *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.

[15] SoCalGas February 7, 2020 Response to CalAdvocates-SK-SCG-2020-01, Question and Answer 4, SoCalGas Exh. 14, p. 831.

subsequently corrected.[16] By its own admission, and contrary to its earlier assertions, SoCalGas had indeed booked advocacy costs to accounts other than its shareholder accounts.[17] SoCalGas alleges that this error was corrected on October 30, 2019.

Between March and December 2020, Cal Advocates and SoCalGas filed multiple rounds of motions, requests for protective orders, motions to compel and motions for sanctions related to the ongoing dispute.

On December 21, 2020, the Commission issued Resolution ALJ-391 (Resolution or Res. ALJ-391), which is the subject of the appellate proceedings herein. The Resolution resolved several of the motions submitted by the parties and 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 with the Commission a motion for stay and an application for rehearing of Res. ALJ-391. On March 2, 2021, the Commission issued D.21-03-001, modifying Res. ALJ-391 in several respects and denying rehearing, as modified.

On March 8, 2021, SoCalGas filed its petition for writ of review, motion for emergency stay, and accompanying exhibits in the Court of Appeal, Second Appellate District, Division One, Case No. B310811. The Commission filed an opposition to SoCalGas' stay request on March 11, 2021.

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[16] SoCalGas Data Response, February 7, 2020, at pp. 1, 7 (Commission Exhibit C, attached to Commission Answer to SoCalGas' petition for writ of review, filed June 1, 2021); see also SoCalGas Exh. 14, p. 831.

[17] 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 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 21 days following the final disposition of proceedings 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 Commission filed its answer to the writ petition on June 1, 2021. SoCalGas filed its reply in support of the writ petition on July 16, 2021.

On July 30, 2021, the Sierra Club and Public Citizen/Consumer Watchdog filed applications for leave to appear in the case as amicus curiae. The applications were granted on August 5, 2021. On September 3, 2021, the Commission and SoCalGas filed responses to the amicus curiae briefs.

On February 1, 2022, the Court of Appeal granted the petition for writ of review. On March 17, 2022, the Commission and SoCalGas filed a stipulation certifying the underlying administrative record. On April 18, 2022, the Commission filed its response in opposition to the writ of review. On May 27, 2022, SoCalGas filed its response in support of the writ of review.

The case was argued before the Court of Appeal on October 19, 2022. Thereafter, on January 6, 2023, the Court of Appeal issued its Opinion, affirming the Resolution in all respects except as to the shareholder data sought by Cal Advocates for which SoCalGas claimed First Amendment infringement. As to that data, the Court annulled the Resolution.

On January 23, 2023, the Commission filed its petition for rehearing in the Court of Appeal. On February 3, 2023, the Court of Appeal corrected several factual errors in the Opinion, and denied rehearing.

The Commission now brings the instant petition for review before this Court. For the reasons discussed herein, the Commission respectfully asks the Court to grant review in order to correct legal errors in the Opinion.

IV. ARGUMENT

A. The Opinion's First Amendment Analysis Is Erroneous.

The Opinion concludes that: (i) SoCalGas demonstrated a threat to its constitutional right to freely associate; and (ii) the data requests issued by Cal Advocates are not narrowly tailored to achieve what the Court considered to be Cal Advocates' statutory mission – to achieve the lowest rates for ratepayers. (Opinion, Exh. A, pp. 26-28.) This analysis misapplies the legal standard pertaining to a prima facie showing for a First Amendment violation, as well as the narrow-tailoring requirement, in the context of this request and Commission regulation, as discussed below. For these reasons, review of the Opinion should be granted and both of these analyses should be corrected.

As noted above, the First Amendment is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."[18] A prima facie showing of an infringement of one's right to freely associate "requires more than bare allegations."[19] Here, relationships with vendors hired to carry out SoCalGas' objectives on SoCalGas' own behalf were deemed to represent associational activity within the meaning of the First Amendment. But these contractual relationships do not amount to two people or entities working towards a common goal. They are merely services for hire and inherently distinct from

[18] Opinion, Exh. A, p. 21.
[19] Opinion, Exh. A, p. 24.

the sorts of associational relationships the First Amendment is meant to protect.

Moreover, none of the declarations that SoCalGas submitted to support its prima facie case suggest that either SoCalGas or its vendors will face any reprisals because third parties will find out their viewpoints. For these reasons, the Commission believes that the Court's prima facie infringement analysis in Discussion section C.2 (Opinion, Exh. A, pp. 21-26) is erroneous. The Commission respectfully submits that if all that is needed to assert a case of prima facie infringement is to mimic the *Perry* declarations, it is really no standard at all, and a prima facie infringement claim may be upheld in virtually all instances. This is especially true when the party asserting the prima facie claim is a long-standing regulated public utility.

Furthermore, even if SoCalGas made its prima facie showing, SoCalGas cannot fund its advocacy programs with ratepayer funds. On this point, the parties and the Court of Appeal agree. The Opinion states:

> A regulated utility may not use ratepayer funds for advocacy-related activities that are political or do not otherwise benefit ratepayers. (*Southern California Edison Co*. (2012) Cal.P.U.C. (Nov. No. 12-11-051) [Lexis 555, *765] [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.P.U.C. (Dec. No. 93-12-043) [Lexis 728, *103] [finding that "ratepayers should not have to bear the costs of public relations efforts in this area, which according to [SCG], are designed primarily to increase load by promoting natural gas use to business and government leaders"].)

(Opinion, Exh. A, p. 26.) Even SoCalGas does not contend that it has a right to fund political advocacy efforts from ratepayer-funded accounts, and for good reason: The state has a strong interest in preventing ratepayers from being compelled to support SoCalGas' advocacy efforts through state-approved rates that consumers must pay to obtain necessary utility services.[20]

As discussed extensively in the underlying briefing in the Court of Appeal, the United States Supreme Court has recently clarified that exacting scrutiny, rather than strict scrutiny, is the applicable standard for evaluating the First Amendment claims asserted by SoCalGas. (See *Americans for Prosperity Fdn. v. Bonta* (2021) 141 S. Ct. 2373, 2382 (*APF*) (holding that a requirement that charities disclose the identities of financial supporters implicates the freedom of association).) *APF* therefore establishes that, to the extent that the disclosure requirements here trigger First Amendment scrutiny, the appropriate standard is exacting scrutiny, which requires that the disclosure be substantially related to a sufficiently important government interest and that it be reasonably narrowly tailored to advance that interest. Importantly, the Court in *APF* determined that the "least restrictive means" is not required in advancing an asserted governmental interest. In other words, the means utilized by Cal Advocates do not have to be the "best fit" with the asserted state interest; a "good fit" is sufficient for narrow-tailoring analysis under the present circumstances. (*APF*, *supra*, 141 S. Ct at 2383.)

The Opinion's "narrow tailoring" analysis errs because it begins with the assumption that the only relevant government interest at stake is Cal Advocates statutory obligation to obtain the lowest utility rates for

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[20] See, e.g., Pub. Util. Code, §§ 309.5(e), 311(a), 314, 314.5(a), 581, 582, 584, 701 and 702; and *Federal Election Comm. v. Machinists Non-Partisan Political League* (D.C. Cir. 1981) 655 F. 2d 380, 387 (similar to the Federal Trade Commission and the Securities and Exchange Commission, the Commission and Cal Advocates have "broad duties to gather and compile information and to conduct periodic investigations concerning business practices").

ratepayers. (Pub. Util Code, § 309.5.) Proceeding from this very limited view of Cal Advocates' authority, the Opinion concludes that this interest can be served by accessing only ratepayer account information. As such, the Court determined that the discovery sought by Cal Advocates was not narrowly tailored to achieve this interest, because it included shareholder account information that the Court determined Cal Advocates did not need.[21]

This analysis errs in two significant respects. First, under the present circumstances in which there is record evidence of SoCalGas booking advocacy costs to ratepayer accounts (see Order Correcting Errors, Exh. B, February 3, 2023, at p. 2, ¶ 4), the Commission respectfully submits that the narrow tailoring requirement is met. Given this evidentiary foundation, the data sought by Cal Advocates is necessary in order to determine that no advocacy costs are funded by ratepayer accounts. As is discussed below, there are many utility costs that are not clear-cut ratepayer or shareholder costs; in fact, many utility costs are a mixture of both. For example, staff time is often a cost that needs to be allocated between ratepayer and shareholder accounts. (See, e.g., Exh. 3, p. 196 (SoCalGas notes that it can be necessary to split activities and staff time between ratepayer and shareholder-funded accounts.); Exh. 3, p. 262 (discussing apportionment of SoCalGas staff time among various ratepayer and shareholder-funded accounts). Without seeing all of the staff time and understanding how the allocation was performed, how can Cal Advocates assess the basis for passing through these costs to ratepayers? Simply taking SoCalGas at its word that it has performed a proper allocation does not satisfy Cal Advocates' or the Commission's statutory utility oversight responsibilities.

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[21] As will be discussed below, the Commission takes a far broader view of the role of Cal Advocates as an office within the Commission, dating back to its inception in 1985.

Second, the Opinion further errs by focusing exclusively on the data requested by Cal Advocates, without recognition of the fact that Resolution ALJ-391 was issued by the Commission, not Cal Advocates. As an expression of the Commission's judgment that the data sought is necessary for its utility oversight responsibilities, the Resolution is, and should be, entitled to great deference by California courts. The Opinion's own analysis suggests as much, and yet the Court declined to defer to the Commission's determination in issuing the Resolution that the data sought is necessary to ensuring that advocacy costs are not being borne by ratepayers. (See *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, 410 ("There is a strong presumption of validity of the commission's decisions.").)

The Opinion also fails to acknowledge that, as a monopoly public utility providing essential services to a captive customer base, and earning a guaranteed rate of return on its investments, SoCalGas does not operate as a private corporation. It is this rarefied relationship that makes even broad audits of utility accounts, "narrowly-tailored" to the important governmental interest of making sure that their actions are legal and just. (Public Utilities Code, § 701.) Although utilities have First Amendment rights, in California, a public utility is more akin to a governmental entity than a private corporation, and the special relationship that exists between the Commission and the utilities that it regulates requires utility compliance with Commission directives, including Commission staff directives for relevant information. (See *Gay Law Students Ass'n, supra,* 24 Cal.3d at 469-470 (both the prices which a utility charges for its products or services and the standards which govern its facilities and services are established by the state; state also determines the system and form of the accounts and records which a public utility maintains).) As applied to the current controversy, SoCalGas' First Amendment rights must be read in light of the fact that SoCalGas is a monopoly public utility providing essential services to a captive customer base, and earning a guaranteed rate of return on its investments.[22] Indeed, utilities are aware of these limitations at the time they first apply for authorization from the Commission to do business as a public utility. (See, e.g., Public Utilities Code, § 1001.) The Opinion's decision to deprive Cal Advocates of data that it considers critical means that Cal Advocates cannot confirm, as it is required to, that SoCalGas advocacy projects are not being funded by ratepayers or that SoCalGas is not behaving in some other unlawful manner that adversely affects ratepayer interests..

For the reasons discussed above, the Commission respectfully submits that the Court of Appeal erred in concluding that the data sought by Cal Advocates is not narrowly tailored to achieve an important government interest. This warrants review by this Court pursuant to Rule 8.500(b)(1) in order to "secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, Rule 8.5000(b)(1).)

B. Resolution ALJ-391 Was Issued By The Full Commission, Not Cal Advocates, Which Is An Arm of the Commission.

The Commission respectfully asks the Court to review the determination in Discussion section C.3 of the Opinion that the authority of Cal Advocates is confined to obtaining the lowest possible rates for utility service. The Commission submits that Discussion section C.3 of the Opinion errs in three significant respects, thus requiring review on this issue. First, the Opinion contains an inaccurate discussion of the history of Cal Advocates,

[22] This is particularly true under the present circumstances in which SoCalGas has admitted to booking advocacy costs to ratepayer accounts in the past.

notwithstanding minor corrections the Court made.[23] (See Opinion, Exh. A, Discussion section C.3, pp. 26-27; see also Opinion, Exh. A, p. 3.) Second, the Commission asks the Court to reconsider its determination in Discussion section C.3 that the authority of Cal Advocates is confined to obtaining the lowest possible rates for utility service. (Opinion, Exh. A, Discussion section C.3, pp. 26-28.) Finally, even if the Court's description of Cal Advocates' authority in Discussion section C.3 is correct, the Court fails to acknowledge that Resolution ALJ-391 was issued by the full Commission, not Cal Advocates. (See Opinion, Exh. A, Discussion section B, pp. 17-19; Discussion section C.3, pp. 26-28.) Review of these issues is necessary because the Opinion relies heavily on a narrow and incomplete view of Cal Advocates' role at the Commission and the manner in which it has operated for decades as an office within the Commission.

In 1985, the Legislature mandated the Commission create an entity within itself to:

> …represent the interests of public utility customers and subscribers in commission proceedings. The commission shall, by rule or order, provide for the assignment of personnel to and the functioning of the organization or division.

(Section 309.5 to the Public Utilities Code pursuant to AB 476 of the Stats 1985 ch 562 § 1; see also **Commission Exhibit C**, A, explaining the legislative history of AB 476.)

As a division or office of the Commission, Cal Advocates has evolved over the course of several decades. Commission decisions dating back to 1986 refer to the Commission's Public Staff Division, which is the Commission

[23] In its February 3, 2023 order, the Court of Appeal corrected the legislative origination date of Cal Advocates to 1985. (February 3, 2023 Order, Exh. B, ¶¶ 1, 5.)

office now known as Cal Advocates. (See *SDG&E Holding Company I* [D.86-03-090] 1986 Cal. PUC LEXIS 198 (Cal. P.U.C. March 28, 1986), at * 8-10, 38, 61.) Published appellate cases dating back to 1990 refer to the Commission's Division of Ratepayer Advocates, which is also the office currently known as Cal Advocates. (See *Southern California Gas Co. v. Public Utilities Comm.* (1990) 50 Cal.3d 31, 35 ("In response, the commission's Division of Ratepayer Advocates (DRA) sent a data request to SoCalGas on June 9, 1986, seeking, among other information, the identity of staff consulted, the basis of staff's concurrence, and copies of notes and memoranda taken in preparing for or summarizing any meetings regarding the negotiations.").) More recently, Cal Advocates was known as the Office of Ratepayer Advocates, and was referred to as such in published appellate cases. (See *Southern California Edison Co. v. Public Utilities Comm.* (2002) 101 Cal.App.4th 384, 392 (discussing a 1992 study by the Commission's Division of Ratepayer Advocates, "the predecessor to ORA [Office of Ratepayer Advocates]"); see also *Ponderosa Telephone Company v. Public Utilities Comm.* (2019) 36 Cal.App.5th 999, 1004 (noting that the Commission's Public Advocates Office was "formerly known as the office of ratepayer advocates (ORA)").)

Over the years, courts have referred to the duties of Cal Advocates in far more expansive terms than the Opinion's analysis in Discussion section C.3. (See, e.g., *Southern California Edison Co.*, *supra*, 101 Cal.App.4th at 390, fn. 8 (noting that ORA, the predecessor to Cal Advocates, is a "consumer advocacy division of the Commission"); *Southern California Edison Co. Public Utilities Comm.* (2002) 101 Cal.App.4th 982, 988, fn. 10 ("ORA is a division of the Commission and is charged with advocating consumer interests."); *Pacific Bell v. Public Utilities Comm.* (2000) 79 Cal.App.4th 269, 275 (describing

ORA as "a subdivision of the PUC charged with representing the interests of customers (§ 309.5)").)

In addition, the legislative history of AB 476 makes clear that the stated mission of the Commission's Public Staff Division, the predecessor to Cal Advocates, was intended to be far broader than merely seeking lowest rates for utility service. The Enrolled Bill Report for AB 476, attached hereto as Commission Exh. C, indicates that the Public Staff Division was created "to represent the interests of public utility customers in PUC proceedings." (Exh. C, p. 1.) The Enrolled Bill Report states:

> A major role of the PSD [Public Staff Division] is to bring engineering, auditing, financial, economic and general regulatory expertise to bear on utility proposals, projects and expenditures. There are about 200 professionals assigned to this division.

(Exh. C, p. 1.)

The Enrolled Bill Report further notes:

> The PSD [Public Staff Division] is charged with the responsibility of making recommendations which take into consideration the "interests of ratepayers over the long-run." This requires their awareness of the impacts imposed on future utility customers when analyzing current utility expenditures and investments.

(Exh. C, p. 2.)

The Enrolled Bill Report also addresses specific functions of the Public Staff Division as follows:

> Some of the major functions of the Public Staff Division include evaluation of: (a) rate design, revenue allocations to customer classes, and marginal costs of gas and electricity; (b) cost of capital and rate of return; (c) resource planning and capital budgets; and (d) the reasonableness of costs and the ratemaking treatment for major additions to the rate base such as large power plants.

(Exh. C, p. 2.) The Enrolled Bill Report concludes by noting that codifying the Public Staff Division through the enactment of AB 476 ensures that "the ratepayer benefits gained by creation and operation of this new unit would be continued." (Exh. C, p. 2.)

The Commission respectfully submits that the Opinion's narrow focus on low utility rates as the mission of Cal Advocates is not correct. (Opinion, Exh. A, Discussion section C.3, pp. 26-28.) This is particularly true in light of the legislative history cited above, indicating a far more complex and robust set of responsibilities for this important Commission division. No California court has ever construed Cal Advocates' authority so narrowly.

In addition, the Opinion's analysis of Cal Advocates' authority in Discussion section C.3 gives no weight to the Commission's own understanding of the manner in which Cal Advocates has operated within the Commission for decades. The Commission has consistently taken the position that Cal Advocates is Commission staff, with all of the requisite regulatory and investigatory tools as other Commission staff. (See, e.g., Exh. 37, Resolution ALJ-391, pp. 28, 29, 31 [Findings 2, 7, 27].) That the Opinion affords no deference or attention to the Commission's understanding of Cal Advocates as Commission staff is particularly surprising given the Opinion's extensive analysis in Discussion sections A and B of the constitutional and statutory origins of the Commission and the substantial deference that is generally afforded to Commission determinations. (See Opinion, Exh. A, Discussion sections A & B, pp. 14-19.) This narrow interpretation of Cal Advocates' authority as an office within the Commission is not appropriate, particularly when the Commission has operated for decades under a far broader understanding of Cal Advocates' role, supported by the legislative history of AB 476. Indeed, the Commission depends on Cal Advocates' broad mandate to fulfill the Commission's own goals. Imposing this narrow interpretation on Cal Advocates' ability to meet its mandate is inconsistent with the Commission's broad power to "do all things … which are necessary and convenient in the exercise of such power and jurisdiction," to "establish its own procedures," and to "establish rules, examine records" and "prescribe a uniform system of accounts for all public utilities." (Pub. Util. Code, § 701; Cal. Const., Art. XII, §§ 2, 6.)

As noted above, even assuming that Cal Advocates' mission is confined, as the Opinion suggests, to obtaining the lowest rates for utility service (a proposition the Commission strongly disagrees with), the Opinion fails to acknowledge that the full Commission issued Resolution ALJ-391, not Cal Advocates. In issuing the Resolution, the Commission expressly stated the following:

> A significant element of the regulatory framework for utilities in California, such as SoCalGas, is the utility's obligation to provide the Commission and its staff, such as Cal Advocates, with requested information pertaining to regulatory oversight.

(Exh. 37, Resolution ALJ-391, p. 31 [Finding 27].)

Thus, for the reasons discussed above, the Commission respectfully asks the Court to grant review of the Opinion on the issue of Cal Advocates' authority. These unprecedented holdings concerning Cal Advocates have already impacted Cal Advocates ability to do its job. Review is warranted as to this issue pursuant to Rule 8.500(b)(1) in order to "secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, Rule 8.5000(b)(1).)

C. Review Should Be Granted In Order To Clarify The Discussion Of Ratepayer And Shareholder-Funded Accounts.

The Commission respectfully submits that review should be granted in order to clarify the Opinion's discussion of utility accounting practices, particularly the distinction the Opinion draws between ratepayer and shareholder-funded accounts. At pages 3-4, the Opinion states:

> As an investor-owned utility, SCG differentiates between "ratepayer funds" ("above-the-line accounts") and "shareholder funds" ("below-the-line accounts"). Activities or contracts are preliminarily booked to an above-the-line or below-the-line account, with the final ratemaking decision settled at a "general rate case" proceeding (GRC). At a GRC, SCG generally seeks cost recovery from ratepayers only for expenditures in its above-the-line accounts. Expenditures in SCG's below-the-line accounts (i.e., shareholder-funded accounts) are not recovered from ratepayers. In this manner, SCG may use its 100 percent shareholder-funded accounts to, among other things, advocate for natural gas, renewable gas, and other clean-fuel (e.g., hydrogen) solutions.

The Commission respectfully submits that this description of utility accounting practices, and the Commission's oversight of these practices, is inaccurate. These mistaken holdings will hobble Cal Advocates' ability to meet its legal mandate to advocate on behalf of California ratepayers, and the Commission's ability to ensure that it has a complete record it before it when making determinations. Review of this issue is therefore necessary in order to secure uniformity and to settle an important question of law that is integral to the Commission's utility oversight responsibilities. (Cal. Rules of Court, Rule 8.5000(b)(1).)

The distinctions between shareholder and ratepayer-funded accounts are not always clear-cut. The division itself is a regulatory construct. Contrary to the descriptive terminology, there is no clear distinction or "line" in the accounting records of utilities to designate the accounts as funded by ratepayers or shareholders. The line is a theoretical limitation of the expenses that the utilities are authorized to recover from ratepayers, which has been created over time. As such, costs are sometimes booked to both above-the-line and below-the-line accounts, and the accounting can be subject to future adjustments. For example, a single invoice from a law firm may include costs for services that are properly ratepayer-funded along with other services that must be funded by shareholders. In addition, below-the-line accounts may be created for future recovery from ratepayers, and some accounts contain both ratepayer and shareholder-funded costs. Finally, there are often costs that need to be allocated between ratepayer and shareholder accounts, such as SoCalGas staff time. (See, e.g., Exh. 3, p. 196 (SoCalGas notes that it can be necessary to split activities and staff time between ratepayer and shareholder-funded accounts.); Exh. 3, p. 262 (discussing apportionment of SoCalGas staff time among various ratepayer and shareholder-funded accounts).)

The Opinion relies on this mistaken assessment of utility accounting to conclude: "The PAO is authorized to ensure only that advocacy costs are *not* booked to *ratepayer* accounts. This it may do by examining ratepayer, not shareholder, accounts." (Opinion, Exh. A, Discussion section C.3, p. 28.) But this is not true. Cal Advocates cannot ensure that advocacy costs are not booked to ratepayer accounts by strictly examining ratepayer accounts.

One current real-time example of the problem the Commission now faces can be found in the pending SoCalGas General Rate Case (GRC). (See

Application of Southern California Gas Company (U 904 G) for Authority, Among Other Things, to Update its Gas Revenue Requirement and Base Rates Effective on January 1, 2024 (Applications (A.) 22-05-015 & A.22-05-016).) In the GRC, Cal Advocates is seeking data from SoCalGas related to staff time split between advocacy that is shareholder-funded, and non-advocacy matters that may be ratepayer-funded. Cal Advocates has no way to confirm that the split of staff time proposed by SoCalGas is correct or sufficiently protects ratepayer interests.[24] Moreover, there is no way to ascertain whether SoCalGas has "embedded" certain costs into ratepayer accounts that should in actuality be allocated to shareholder accounts.

SoCalGas asserts that it has removed all advocacy costs from the rate increases requested in its GRC, but provides no substantive evidence to demonstrate this. As to the staff time allocation, the issue is: How can Cal Advocates demonstrate in the GRC that staff time should be adjusted on the ratepayer side if they cannot quantify how much total advocacy work was done and by which SoCalGas staff? Similar to the "dinner tab" analogy discussed herein, Cal Advocates has no way of knowing whether the allocation ratepayers are being asked to pay is correct because they lack sufficient information about how the allocation was made by SoCalGas in the first place. The notion that SoCalGas should simply be trusted to perform a proper allocation, without any requirement to substantiate the allocation, renders the Commission's oversight jurisdiction meaningless.

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[24] For example, suppose six people go to dinner together. Later, an attendee receives a request for their share of the dinner bill. How can that person know if the amount allocated as their share is correct? How much was the total bill? How was the allocation done? Was it an equal division? Was each person charged for the specific items they ordered? Who determined the tip? How was the tip allocated to each person? The point is that just seeing your own allocated share of the dinner does not permit you to determine the appropriateness of the allocation.

The Commission respectfully submits that these are critical matters of utility regulation that the Commission deals with on a regular basis with respect to the many public utilities it regulates. For this reason, the Commission asks the Court to grant review in order to secure uniformity of decision on this matter and to settle an important question of law. (Cal. Rules of Court, Rule 8.5000(b)(1).)

V. CONCLUSION

For the foregoing reasons, the Commission respectfully urges the Court to grant review and affirm Cal Advocates' authority to audit utility accounts to ensure regulatory compliance. Accordingly, the Commission requests that this Court reverse the errors in the Opinion issued by the Court of Appeal, Second Appellate District, Division One. A grant of review is warranted to settle important questions of law and erroneous legal analysis by the Court of Appeal. (Cal. Rules of Court, Rule 8.500, subd. (b)(1).)

Respectfully submitted,

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February 15, 2023

CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing Petition for Review is 6,895 words in length. In completing this word count, I relied on the "word count" function of the Microsoft Word program.

Dated: February 15, 2023

/s/ CHRISTINE J. HAMMOND
Christine J. Hammond

CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a true copy of the foregoing document to be served by electronic mail to each of the parties via electronic mail, as reflected on the attached Service List. For those parties without an email address, service is completed by mailing via U.S. Postal mail a properly addressed copy with prepaid postage.

Executed on the 15th day of February 2023 at San Francisco, California.

/s/ ROSCELLA GONZALEZ

Roscella Gonzalez

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EXHIBIT A

Court of Appeal Opinion
January 6, 2023

COURT OF APPEAL – SECOND DIST.
FILED
Jan 06, 2023
EVA McCLINTOCK, Clerk
JLozano Deputy Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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

ORIGINAL PROCEEDING; review of Decision No. D.21-03-001 and Resolution ALJ-391 of the Public Utilities Commission of the State of California. Petition for writ of mandate granted.

Gibson, Dunn & Crutcher, Julian W. Poon, Michael H. Dore, Andrew T. Brown, Daniel M. Rubin and Matthew N. Ball for Petitioner.

John A. Pacheco, for San Diego Gas & Electric Company as Amicus Curiae on behalf of Petitioner.

Arocles Aguilar, Mary McKenzie, Christine Hammond, Dale Holzschuh, Carrie G. Pratt and Edward Moldavsky for Respondent.

Earthjustice, Matthew Vespa, Rebecca Barker and Sara Gersen for Sierra Club as Amicus Curiae on behalf of Respondent.

Jerry Flanagan, Scott L. Nelson for Public Citizen and Consumer Watchdog as Amici Curiae on behalf of Respondent.

These original proceedings involve efforts by the Public Utilities Commission (PUC or the Commission) to discover whether the political activities of Southern California Gas Company (SCG) are funded by SCG's shareholders, which is permissible, or ratepayers, which is not. The Commission propounded several discovery requests (called "Data Requests") on SCG, and when SCG failed fully to comply, moved to compel further responses that ultimately resulted in an order to comply or face substantial penalties. SCG seeks a writ of mandate directing the Commission to rescind its order on the ground that the discovery requests infringe on SCG's First Amendment rights.

We grant the petition. SCG has shown that disclosure of the requested information will impact its First Amendment rights, and the Commission failed to show that its interest in determining whether SCG's political efforts are impermissibly funded outweighs that impact.

BACKGROUND

The California Constitution authorizes the Legislature to exercise control over companies delivering heat or power to the public, and authorizes the PUC to "establish rules, examine records, issue subpoenas, . . . take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." (Cal. Const., art. XII, § 6.)

In 1996, the Legislature created a division within the Commission, later naming it the Public Advocate's Office (PAO, the Office, or CalAdvocates), "to represent and advocate on behalf of the interests of public utility customers and subscribers within the jurisdiction of the commission." (Stats. 2018, ch. 51, § 39.) The PAO's goal is "to obtain the lowest possible rate for service consistent with reliable and safe service levels." (Pub. Util. Code, § 309.5, subd. (a).)[1]

To serve this goal, the PAO is authorized to "compel the production or disclosure of any information it deems necessary to perform its duties from any entity regulated by the commission." (§ 309.5, subd. (e).) Any objection to a PAO request for production is adjudicated by the PUC. (*Ibid.*)

SCG, an investor-owned utility that provides natural gas to the public in several Southern California counties, is subject to Commission regulation and PAO discovery inquiries.

As an investor-owned utility, SCG differentiates between "ratepayer funds" ("above-the-line accounts") and "shareholder funds" ("below-the-line accounts"). Activities or contracts are preliminarily booked to an above-the-line or below-the-line account, with the final ratemaking decision settled at a "general rate case" proceeding (GRC). At a GRC, SCG generally seeks cost recovery from ratepayers only for expenditures in its above-the-line accounts. Expenditures in SCG's below-the-line accounts

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[1] Undesignated statutory references will be to the Public Utilities Code.

(i.e., shareholder-funded accounts) are not recovered from ratepayers. In this manner, SCG may use its 100 percent-shareholder-funded accounts to, among other things, advocate for natural gas, renewable gas, and other clean-fuel (e.g., hydrogen) solutions.

A. PAO Discovery Inquiry

1. Rulemaking 19-01-011 proceeding

On January 31, 2019, the PUC initiated an unrelated proceeding, designated "Rulemaking 19-01-011," regarding building decarbonization. In that proceeding, an association known as Californians for Balanced Energy Solutions (C4BES), which presents itself as "a coalition of natural and renewable natural gas users," moved to obtain party status.[2] The Sierra Club opposed the motion, alleging that C4BES was actually an "astroturfing" group founded and funded by SCG.[3]

2. Discovery requests before the ALJ

As a result of the Sierra Club's allegation in Rulemaking 19-01-011 that C4BES was an astroturfing group funded by SCG, the PAO undertook to investigate the allegation, and in May 2019, initiated a discovery inquiry into the extent to which SCG used ratepayer funds to support putative grassroots organizations advocating for SCG's anti-decarbonization

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[2] Available at: https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4444.

[3] Astroturfing is 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.

positions. The discovery inquiry, conducted outside any formal proceeding, comprised three data requests and one subpoena.

a. July 2019 Data Request

On July 19, 2019, the PAO issued a data request to SCG, Request No. "CalAdvocates-SC-SCG-2019-04," concerning the financing of SCG's activities.[4]

SCG responded by producing a Work Order Authorization, which in turn contained a Balanced Energy Internal Order which accounted for shareholder contributions to fund the work order. The point of SCG's production was to show that it did not use shareholder contributions to fund astroturf groups.

However, SCG redacted from its response shareholder dollar figures from the Balanced Energy Internal Order, and objected to their production as nonresponsive to the PAO's request and unnecessary to the discharge of its duties. The PAO moved the Commission's administrative law judge (ALJ) to compel further responses containing an unredacted Work Order Authorization, which the ALJ granted.

b. August 2019 Data Request

On August 13, 2019, the PAO served SCG with a request for all contracts covered by the Work Order Authorization, Request No. "CalAdvocates-SC-SCG-2019-05." In response, SCG produced contracts funded jointly by ratepayers and shareholders, but objected to producing C4BES-related contracts funded solely by shareholders on the ground that to produce them

[4] To reiterate, the PAO issued this data request outside of the R.19-01-011 proceeding, as the scope of that proceeding was limited to building decarbonization matters.

would violate its rights of free speech and association. The PAO moved the ALJ to compel further responses.

(1) ALJ November 1, 2019 Ruling

On November 1, 2019, the ALJ granted the PAO's motion to compel further responses to the August 13 request, ordered SCG to produce requested documents within two business days, and denied SCG's request for a two-week stay to afford it an opportunity to appeal the ruling.[5]

(2) SCG November 1, 2019 Motion to Stay

On November 1, 2019, SCG moved to reconsider and stay enforcement these rulings.

c. May 2020 Data Requests and Subpoena

(1) May 1 Request

On May 1, 2020, as part of its continuing inquiry into SCG's use of ratepayer monies to fund an anti-decarbonization campaign through astroturf organizations, the PAO served Request No. "CalAdvocates-TB-SCG-2020-03" on SCG, seeking remote access to SCG's System Applications & Products accounting system. This accounting system is a large database that includes sensitive financial and nonfinancial material related to SCG's transactions, including vendor invoices, third-party payments, workers-compensation payments, employee reimbursements, and other attachments relating to approximately 2,000 vendors and other parties. The PAO's

[5] The ALJ assigned by the Commission to handle the matter notified the parties of certain procedural rules to follow since this discovery dispute was outside of any formal proceeding in which the Commission's Rules of Practice and Procedure (Title 20, Division 1, of the California Code of Regulations) (herein "Rules") would directly apply.

request included a request for “information regarding all contracts, invoices, and payments made to third parties,” and a request to train and assist a PAO auditor to access SCG’s accounts.

(2) Subpoena

On May 5, 2020, the PAO served a subpoena on SCG, commanding the utility to provide PAO “staff and consultants” with the same information as set forth in Request No. CalAdvocates-TB-SCG-2020-03, including “access to all databases associated in any manner with the company’s accounting systems,” and “both on-site and remote access . . . at the times and locations requested by [PAO],” “no later than three business days after service,” i.e., by May 8. The focus was on determining, for example, what accounts were used to track shareholder-funded activity, what payments are made from those accounts, and what invoices were submitted in support of those payments. The subpoena was supported with a PAO declaration that SCG’s “responses to data requests in the investigation have been incomplete and untimely.”

(3) May 8 Request

On May 8, 2020, the PAO demanded the production of data contained in SCG’s accounting system for all “100% shareholder funded” accounts that “house[] costs for activities related to influencing public opinion on decarbonization policies,” and “for lobbying activities related to decarbonization policies” (the May 8 data request).

SCG responded by proposing that “access to attachments and invoices [in the accounting system] would be shut off [by default] but could be requested by [PAO’s] auditor,” at which time “[a]n attorney would then be able to quickly review requested invoices and provide nonprivileged . . . materials to the auditor." The PAO rejected SCG's proposal.

SCG also offered to provide access to approximately 96 percent of the information related to its accounts—shielding only constitutionally protected and/or privileged material—provided that the PAO agreed to a non-disclosure agreement or confidentiality protocol. The PAO rejected this offer as well.

On May 18, 2020, SCG produced fixed copies of two years' worth of its accounting data (2016-2017) for accounts specifically identified by the PAO.

B. Proceedings before the Full Commission

1. December 2, 2019 and May 22, 2020 SCG Motion for Reconsideration/Appeal and Motion to File Declarations Under Seal

On December 2, 2019, SCG appealed from and moved the full Commission to reconsider the ALJ's November 1, 2019 ruling. On May 22, 2020, SCG supplemented this motion with (1) a separate motion, and (2) a motion to file certain declarations under seal.

SCG observed that the PAO's discovery inquiry is not itself a formal proceeding, and requested that the inquiry be brought within a formal proceeding by issuance of a Commission Order Instituting Rulemaking or Order Instituting Investigation, which SCG argued would provide more transparency and ensure due process. The PAO opposed this request.

In its motion for reconsideration, SCG argued that the Commission's interest in obtaining information about SCG's political activities and activities that are "100% shareholder-funded" was not compelling because such activities are not subject to Cal Advocates' oversight.

SCG further argued that disclosure of information about political activities and activities that were "100% shareholder funded" would infringe on SCG's First Amendment rights.

In support of the motion, Sharon Tomkins, SCG's Vice President of Strategy and Engagement and Chief Environmental Officer, declared, "If the non-public contracts and communications [SCG] has had regarding its political activity to advance natural gas are required to be disclosed in response to the demands of the [PAO], it will alter how [SCG] and its partners, consultants, and others work together and communicate in the future regarding matters of shared political interest." Tompkins declared that SCG's production to date had already "had a chilling effect on [SCG] and [its] ability to engage in activities which are lawful."

Tompkins declared that her work includes "sensitive discussions in furtherance of developing strategy and advocacy associated with natural gas solutions and selecting [SCG's] message and the best means to promote that message. It also has included recommending that others become involved with [SCG] in this political process." She declared that further disclosures to the PAO "will have a chilling effect" on those communications and "could limit [SCG's] future associations" because she and SCG "will need to take into consideration the potential disclosure of such communication in the future as a result of such forced [discovery] disclosure."

Tompkins declared that "Based on conversations [she] had, others may be less likely to associate with [SCG]" if information about its political efforts were disclosed to the Commission.

In further support of its motion for reconsideration, SCG submitted three declarations from private organizations specializing in government relations and public affairs, including statements that disclosure of shareholder information to the Commission would dissuade them from communicating or contracting with SCG.

2. May 22, 2020 SCG Motion to Quash or Stay the May 5 Subpoena

Also on May 22, 2020, SCG moved to quash or stay portions of the PAO's May 5, 2020 subpoena to allow SCG an opportunity to implement software solutions to exclude what it deemed to be materials protected by attorney-client and attorney work product privileges, as well as materials implicating First Amendment issues.

3. June 23, 2020 PAO Motion for Contempt and Monetary Sanctions

On June 23, 2020, the PAO moved the Commission to find SCG in contempt.

4. July 9, 2020 PAO Motion to Compel and Request for Assessment of Fines

On July 9, 2020, the PAO moved to compel SCG to produce certain unredacted declarations it had produced to the

Commission in December 2019 but not to the PAO, and to assess SCG $100,000 per day in fines retroactive to June 30, 2020.

C. Commission Ruling: PUC Resolution ALJ-391

1. Original Ruling

On December 21, 2020, the Commission issued PUC Resolution ALJ-391, which it later modified, *post*, to become the operative ruling.

In it, the Commission rejected SCG's assertion that its First Amendment rights to association would be chilled by Data Request No. CalAdvocates-SC-SCG-2019-05. Although SCG's declarations attempted to link the disclosure of such documents with a chilling effect on certain communications and contracts with outside entities, such contentions were "primarily hypothetical," and fell short of the threatened harm and "palpable fear of harassment and retaliation in recognized instances of First Amendment infringement, such as that in" *NAACP v. Alabama*, *infra*. The Commission found "no infringement on SCG's First Amendment rights by disclosing to the Commission, including Cal Advocates, responses to Data Request No. CalAdvocates-SC-SCG-2019-05 seeking documents about its decarbonization campaign."

Even if SCG had established that responding to the data request would chill communications, the Commission found that the government's compelling interest in disclosure outweighed the chilling effect. The Commission flatly rejected SCG's argument that it had no authority to inspect the records of investor-owned utilities concerning political activities. On the contrary, a compelling government interest existed where the PAO's requests for information about SCG's decarbonization campaign were consistent with its statutory authority to regulate investor-owned utilities.

Resolution ALJ-391 ordered SCG to comply with the PAO's discovery requests, but deferred the matter of sanctions to a later date.

SCG moved for a rehearing on Resolution ALJ-391, and moved to stay enforcement. On December 30, 2020, SCG sought an extension of time to comply with the resolution, which the Commission granted.

On December 30 and 31, 2020, the PAO moved to expedite the Commission's ruling on Resolution ALJ-391, sought an extension of time to respond to SCG's motion for rehearing, and propounded four more data requests on SCG.

2. Modified Ruling

On March 2, 2021, the Commission issued an order modifying Resolution ALJ-391 and denying SCG's request for a rehearing and its motion for a stay.

The Commission found that a "utility may [not] unilaterally designate certain topics off-limits to Commission oversight," and PAO discovery is the "least restrictive means of obtaining the desired information." The Commission rejected SCG's argument that the PAO's discovery rights were limited by SCG's First Amendment right to association, as well as its argument that conducting the discovery inquiry outside the confines of a formal proceeding violated SCG's procedural due process rights.

The Commission ordered SCG to produce the information and documents responsive to Request No. CalAdvocates-SC-SCG-2019-05, including confidential declarations submitted under seal to the Commission but not the PAO, and to comply with the May 5, 2020 subpoena within 30 days of the effective date of the

Resolution. Although the Commission ordered SCG to provide access to unredacted versions of its confidential declarations under existing protections, it permitted the utility to file confidential versions of certain declarations under seal. The Commission deferred consideration of the PAO's motions for contempt, sanctions and fines.

D. Summary

In sum, this dispute started when, in a formal Commission proceeding, R.19-01-011, the Sierra Club exposed a potential financial relationship between SCG and C4BES. Based on the record of that proceeding, there was no transparency as to whether the Sierra Club's allegation was correct or, if it was, whether C4BES was funded by SCG's ratepayers as opposed to shareholders. The PAO submitted a series of discreet data requests to SCG outside of any proceeding, which led to the request in question, Data Request No. CalAdvocates-SC-SCG-2019-05, designed to discover whether SCG used ratepayer funds to finance astroturf groups. SCG partially complied with the request but has always maintained that its shareholder information (not its ratepayer information) is privileged by constitutional rights to free speech and freedom of association. The ALJ and full Commission both disagreed with SCG's position.

We granted SCG's petition for a writ of review of the Commission's resolution of the dispute. The Commission filed a response supporting its decision, and SCG filed a reply challenging it. We also granted the requests of several entities to file amicus briefs.

DISCUSSION

SCG contends (1) the Commission exceeded its constitutional and statutory authority by requiring SCG to comply with the PAO's discovery requests pertaining to shareholder accounts; (2) the requests infringe on SCG's First Amendment right of association insofar as they pertain to shareholder accounts; and (3) conducting this dispute as a discovery matter rather than a formal proceeding violates procedural due process.

A. PAO Authority

The Commission is authorized to supervise and regulate utility monopolies. "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) . . . . 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." ' " (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 792.)

The Commission may hold hearings and establish procedures to carry out its mandate. (See *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905; see also Cal. Const., art. XII, §§ 1-6.)

"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." (§ 314, subd. (a).)

These 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 . . . with respect to any transaction between the . . . corporation and the subsidiary, affiliate, or holding corporation *on any matter that might adversely affect the interests of the ratepayers* . . . ." (§ 314, subd. (b).) (Italics added.)

"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." (§ 581.)

"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." (§ 582.)

"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." (§ 584.)

Commission employees are authorized to "enter upon any premises occupied by any public utility, for the 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." (§ 771.)

As noted, in 1996 the Legislature created the PAO, a division within the Commission, "to represent and advocate on behalf of the interests of public utility customers and subscribers within the jurisdiction of the commission." (Stats. 2018, ch. 51, § 39.)

The PAO is authorized 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." (§ 309.5, subd. (e).) Any objection to a PAO request for production is adjudicated by the PUC. (*Ibid.*)

"No information furnished to the commission by a public utility . . . , except those matters specifically required to be open to public inspection . . . , shall be open to public inspection or made public, except on order of the commission . . . or a commissioner in the course of a hearing or proceeding." (§ 583, subd. (a).)

SCG, as a public utility, is subject to the Commission's jurisdiction. (§§ 216, 218.)

B. Standard of Review

"[A]ny aggrieved party may petition for a writ of review in the court of appeal." (§ 1756, subd. (a); see also *Pacific Bell v. Public Utilities Com'n* (2000) 79 Cal.App.4th 269, 278.)

"There is a strong presumption of validity of the commission's decisions." (*Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, 410 (*Greyhound*).)

Review of a Commission decision "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." (§ 1757, subd. (a)(1)-(6).)

We give great weight to the Commission's interpretation of the Public Utilities Code, as that agency is constitutionally authorized to administer its provisions (*Southern California Edison v. Peevey*, *supra*, 31 Cal.4th at p. 796), and will disturb its interpretation only if "it fails to bear a reasonable relation to statutory purposes and language" (*Greyhound*, *supra*, 68 Cal.2d at pp. 410-411). We do not conduct a trial de novo, nor weigh nor exercise independent judgment on the evidence. (§ 1757, subd. (b); see *Eden Hosp. Dist. v. Belshe* (1998) 65 Cal.App.4th 908, 915.) The Commission's findings of fact " 'are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence. [Citation.] . . . "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 Com.* (1978) 22 Cal.3d 529, 537-538.)

"Notwithstanding Section[] 1757 . . . , in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution, the Supreme Court or court of appeal shall exercise independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final." (§ 1760.) "But even the presence of a constitutional dispute does not require the reviewing court to adopt de novo or independent review. Even there, 'the question of the weight of the evidence in determining issues of fact lies with the commission acting within its statutory authority; the "judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence." ' [Citation.] In other words, judicial reweighing of evidence and testimony is ordinarily not permitted." (*Pacific Gas & Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 838.)

C. Application

Pursuant to the Commission's broad constitutional and statutory authority, SCG is required to respond to the PAO's data requests of its SAP accounting system unless to do so would violate SCG's constitutional rights.

SCG argues the PAO's data requests infringe on its First Amendment rights with no substantial relation between the requests and a sufficiently important governmental interest. We agree.

1. SCG's Due Process Rights

SCG contends that the PAO's discovery "non-proceedings" constitute a "largely rules-free no-man's-land" of "unbounded discovery and investigatory authority." It argues that conducting this dispute as a discovery matter outside the confines of a formal proceeding, where the Commissions Rules of Practice and Procedure and filing requirements do not directly apply, violates procedural due process. We disagree.

A regulatory agency enjoys flexibility in fashioning the procedures necessary to exercise its responsibilities. Nevertheless, the PAO's use of ad hoc procedures must be consistent with due process. (*San Pablo Bay Pipeline Co., LLC v. Public Utilities Com.* (2015) 243 Cal.App.4th 295, 313; Cal. Const. art. XII, § 2 [Commission procedures are "[s]ubject to statute and due process"].)

Procedural due process requires that a party be given notice and an opportunity to be heard when a government action threatens deprivation of liberty or property. (*Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 569-571.)

Here, the dispute started when, in a formal Commission proceeding, R.19-01-011, a potential financial relationship between SCG and C4BES came to light in a pleading filed by the Sierra Club. Based on the record of that proceeding, the PAO submitted a series of discreet Data Requests to SCG outside of any proceeding, which led to the Data Request in question, Data Request No. CalAdvocates-SC-SCG-2019-05, designed to discover whether SCG used ratepayer funds to finance astroturf groups. SCG only partially complied with the request, maintaining that its shareholder information (not its ratepayer information) was privileged by constitutional rights to free speech and freedom of association.

The PAO then invoked section 309.5, which allows it to compel "production or disclosure of any information it deems necessary to perform its duties from any entity regulated by the commission" and to bring any resulting discovery disputes to the President of the Commission.

The President of the Commission referred the matter to the Chief Administrative Law Judge to provide for a procedural path to address the dispute. The Chief Administrative Law Judge assigned an ALJ to preside over the dispute, and provided the parties with certain procedural rules to follow.

At each step of this process, the PAO defended discrete discovery requests focused on the information needed to perform its statutory duties. SCG had an opportunity to challenge the PAO's motions, submit motions itself, and move for the full

Commission to act on its requests. SCG neither requested evidentiary hearings nor contested relying on written pleadings to resolve the issues set forth herein.

Under these circumstances, we conclude SCG has been afforded ample due process.

2. SCG's First Amendment Rights

"The First Amendment prohibits government from 'abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' This [includes] . . . 'a corresponding right to associate with others.' [Citation.] Protected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.' [Citation.] Government infringement of this freedom 'can take a number of forms.' " (*Americans for Prosperity Foundation v. Bonta* (2021) ___U.S.___ [141 S.Ct. 2373, 2382, 210 L.Ed.2d 716, 726-727] (*Americans for Prosperity*).) For example, freedom of association may be violated "where individuals are punished for their political affiliation," "or where members of an organization are denied benefits based on the organization's message." (*Ibid*.)

"[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." (*National Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson* (1958) 357 U.S. 449, 462 [78 S.Ct. 1163, 2 L.Ed.2d 1488] (*NAACP v. Alabama*).) "*NAACP v. Alabama* involved this chilling effect in its starkest form. The NAACP opened an Alabama office that supported racial integration in higher education and public transportation. [Citation.] In response, NAACP members were threatened with economic reprisals and violence. [Citation.] As part of an effort to oust the organization from the State, the Alabama Attorney General sought the group's membership lists. [Citation.] We held that the First Amendment prohibited such compelled disclosure." (*Americans for Prosperity*, *supra*, 210 L.Ed.2d at pp. 726-727.) The Supreme Court explained that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and noted there was a "vital relationship between freedom to associate and privacy in one's associations." (*NAACP v. Alabama*, at pp. 460, 462.) "Because NAACP members faced a risk of reprisals if their affiliation with the organization became known—and because Alabama had demonstrated no offsetting interest 'sufficient to justify the deterrent effect' of disclosure, [citation]—we concluded that the State's demand violated the First Amendment." (*Americans for Prosperity*, at p. 727.)

When compelled disclosure is challenged on First Amendment grounds, we apply a standard of "exacting scrutiny" to the government's action. (*Americans for Prosperity*, *supra*, 210 L.Ed.2d at p. 727.) "Under that standard, there must be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.' [Citation.] 'To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.' [Citation.] Such scrutiny . . . is appropriate given the 'deterrent effect on the exercise of First Amendment rights' that arises as an 'inevitable result of the government's conduct in requiring disclosure.' " (*Ibid.*)

"A party who objects to a discovery request as an infringement of the party's First Amendment rights is in essence asserting a First Amendment privilege." (*Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1160.) "[A] claim of First Amendment privilege is subject to a two-part framework. The party asserting the privilege 'must demonstrate . . . a "prima facie showing of arguable first amendment infringement." ' [Citation.] 'This *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.' [Citation.] [¶] 'If 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.' " (*Id.* at pp. 1160-1161, fn. omitted.) "To implement this standard, we 'balance the burdens imposed on individuals and associations against the significance of the . . . interest in disclosure,' [citation], to determine whether the 'interest in disclosure . . . outweighs the harm.' " (*Id.* at p. 1161.) This balancing may consider, for example, the seriousness of the threat to the exercise of First Amendment rights against the substantiality of the state's interest. (*Ibid.*) "The argument in favor of upholding the claim of privilege will ordinarily grow stronger as the danger to rights of expression and association increases." (*Black Panther Party v. Smith* (D.C. Cir. 1981) 661 F.2d 1243, 1267.)

A prima facie showing requires more than bare allegations of possible First Amendment violations. " '[T]he record must contain "objective and articulable facts, which go beyond broad allegations or subjective fears." ' " (*Dole v. Local Union 375, Plumbers Intern. Union of America, AFL-CIO* (9th Cir. 1990) 921 F.2d 969, 973 (*Dole*); see also *Brock v. Local* 375 (9th Cir. 1988) 860 F.2d 346, 350, fn. 1.)

Here, SCG argued before the Commission, and reasserts in these writ proceedings, that Data Request No. CalAdvocates-SC-SCG-2019-05 seeks information about shareholder funding of SCG's decarbonization campaign, which constitutes political activity. SCG argues that insofar as the PAO seeks this information, its data request chills its First Amendment rights.

In support of its argument, Sharon Tomkins, SCG's Vice President of Strategy and Engagement and Chief Environmental Officer, declared that if SCG's non-public contracts and communications were disclosed to the Commission there would be a "chilling effect on [SCG] and [its] ability to engage in activities which are lawful," which "could limit [SCG's] future associations" because she and SCG would "need to take into consideration the potential disclosure of [sensitive communications] in the future as a result of such forced [discovery] disclosure." Tompkins declared that "Based on conversations [she] had, others may be less likely to associate with [SCG]" if information about its political efforts were disclosed to the Commission. Three declarants from private organizations specializing in government relations and public affairs stated that disclosure of shareholder information to the

Commission would dissuade them from communicating or contracting with SCG.

Tomkins's concern that disclosure of political information to the Commission will cause her to "take into consideration" whether sensitive communications will be revealed constitutes nothing more than a circular argument about a subjective fear. Tompkins said nothing about how the requested disclosure "is itself inherently damaging to the organization or will incite other consequences that objectively could dissuade persons from affiliating with the organization." (*Dole*, *supra*, 921 F.2d at p. 974.) In *NAACP v. Alabama*, for example, the NAACP proved that disclosure of its membership roles would subject its members to economic reprisals and threats of physical coercion. (*NAACP v. Alabama*, *supra*, 357 U.S. at p. 462.)

However, Tompkins voiced a concern about membership discouragement or withdrawal, supported by three declarations from representatives of entities who stated they would be less likely to associate with SCG if information about their political efforts were disclosed to the Commission. These declarations presented objective and articulable facts, beyond broad allegations or subjective fears, suggesting that enforcement of the data requests insofar as they pertained to shareholder expenditures would incite "consequences that objectively could dissuade persons from affiliating with the organization." (*Dole*, *supra*, 921 F.2d at pp. 973, 974.) It is not SCG's subjective fear that disclosure of shareholder expenditure information would dissuade third parties from communicating or contracting with SCG: Several third parties told them it would.

The Commission argues that pursuant to section 583, which prohibits public disclosure of information obtained by the

PAO in discovery, shareholder information disclosed to the PAO would remain confidential. The point is irrelevant because SCG's evidence demonstrates that disclosure to the PAO itself would chill third parties from associating with the utility.

Because SCG demonstrated that a threat to its constitutional rights exists, the burden shifted to the Commission to demonstrate that the data requests serve and are narrowly tailored to a compelling governmental interest.

3. Governmental interests

A governmental entity seeking discovery must show that the information sought is highly relevant to the claims or defenses in the proceeding at hand. (*Perry v. Schwarzenegger*, *supra*, 591 F.3d at pp. 1160-1161.) "The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." (*Id.* at p. 1161.)

A regulated utility may not use ratepayer funds for advocacy-related activities that are political or do not otherwise benefit ratepayers. (*Southern California Edison Co.* (2012) Cal.P.U.C. (Nov. No. 12-11-051) [Lexis 555, *765] [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.P.U.C. (Dec. No. 93-12-043) [Lexis 728, *103] [finding that "ratepayers should not have to bear the costs of public relations efforts in this area, which according to [SCG], are designed primarily to increase load by promoting natural gas use to business and government leaders"].)

The PAO's statutory mandate is to "obtain the lowest possible rate for service," primarily for residential and small commercial customers. (§ 309.5, subd. (a).) In service of this mandate, the PAO may compel regulated entities to produce or disclose information "necessary to perform its duties"—i.e., information relating to "rate[s] for service." (*Id.* at subds. (a), (e); see § 314.)

As an investor-owned utility, SCG differentiates between shareholder funds and ratepayer funds, and claims to use only shareholder funds for lobbying activities. Although regulation of the utility requires understanding whether SCG provides accurate information regarding the allocation of its advocacy costs between ratepayer and shareholder accounts, this may be learned simply by examining ratepayer expenditures. If ratepayers do not pay for advocacy-related activities, the PAO's mandate is satisfied.

However, the PAO's discovery inquiries into all sources of funding for SCG's lobbying activities go beyond ratepayer expenditures. Insofar as the requests seek information about shareholder expenditures, they exceed the PAO's mandate to obtain the lowest possible costs for ratepayers and its authority to compel disclosure of information necessary for that task.

The requests therefore are not carefully tailored to avoid unnecessary interference with SCG's protected activities.

The Commission argues that the PAO's discovery rights are "essentially coextensive" with the Commission's own rights. We disagree. The PAO is authorized to compel only that discovery which is "necessary to perform its duties." (§ 309.5, subd. (e).) The PAO's and Commission's discovery rights would be coextensive only if their duties were the same, which of course they are not. (See § 309.5, subd. (a) [explaining the PAO's mandate].)

The Commission argues the PAO is authorized to ensure that "advocacy costs have been booked to the appropriate utility accounts." With respect, we disagree. The PAO is authorized to ensure only that advocacy costs are *not* booked to *ratepayer* accounts. This it may do by examining ratepayer, not shareholder, accounts. SCG has repeatedly offered access to ratepayer accounts.

The Commission argues that sometimes SCG misclassifies expenditures, and has at times moved expenditures from ratepayer to shareholder accounts. But this just shows that a less invasive discovery process is working, and the PAO can confirm that no funds have been misclassified to ratepayer accounts by reviewing above-the-line accounts.

4. Contempt and Sanctions

In its briefing and at oral argument petitioner raised the issue of looming sanctions based on actual or potential contempt findings, although no sanctions are currently accreting. Because we will vacate Resolution ALJ-391 insofar as it compels disclosure of shareholder expenditures, no basis for sanctions exists.

DISPOSITION

The petition for writ of mandate is granted. Commission Resolution ALJ-391 is vacated with respect to shareholder data sought by the Commission for which petitioner asserts its First

Amendment right of association. Resolution ALJ-391 is affirmed in all other respects.

CERTIFIED FOR PUBLICATION

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

EXHIBIT B

Order Correcting Errors
February 3, 2023

COURT OF APPEAL – SECOND DIST.
FILED
Feb 03, 2023
EVA McCLINTOCK, Clerk
Angelica Lopez Deputy Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SOUTHERN CALIFORNIA GAS COMPANY, Petitioner, v. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Respondent.	B310811 Commission Decision No. D.21-03-001 & Resolution ALJ-391 ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on January 6, 2023, be modified as follows:

1. On page 3, the first full paragraph, the phrase “In 1996, the Legislature created a division within the Commission, later naming it the Public Advocate’s Office” is changed to:

> In 1985, the Legislature authorized the creation of a division within the Commission, later named the Public Advocate's Office.

2. On page 5, the first full sentence is changed from "The discovery inquiry, conducted outside any formal proceeding, comprised three data requests and one subpoena" to:

> The discovery inquiry, conducted outside any formal proceeding, comprised more than a dozen data requests. We will focus on three data requests and one subpoena.

3. On page 5, the second full paragraph, the phrase "did not use shareholder contributions" is changed to "did not use ratepayer contributions" so the sentence reads:

> The point of SCG's production was to show that it did not use ratepayer contributions to fund astroturf groups.

4. On page 5, the third full paragraph is changed to:

> However, SCG redacted a name or signature from its response, and the Work Order Authorization itself indicated the work *was* billed to a ratepayer-funded account (Federal Energy Regulatory Commission (FERC) account 920.0). (SCG later claimed this was an accounting error, which it corrected to FERC 426.4.) The PAO moved the Commission's administrative law judge (ALJ) to compel a further response, which the ALJ granted.

5. On page 16, the penultimate paragraph is changed to the following:

> As noted, in 1985 the Legislature authorized creation of the PAO's predecessor, the ultimate purpose of which was "to represent and advocate on behalf of the interests of public utility customers and subscribers within the jurisdiction of the commission." (Stats. 2018, ch. 51, § 39.)

These modifications effect no change in the judgment.

The Public Utilities Commission's petition for rehearing is denied.

ROTHSCHILD, P. J. CHANEY, J. BENDIX, J.

EXHIBIT C

Assembly Bill 476
Enrolled Bill Report

Ana.,st: Oscar Betts mc
Bus. Ph: 322-4292
Home Ph:

ENROLLED BILL REPORT

AGENCY: STATE AND CONSUMER SERVICES AGENCY	BILL NUMBER: AB 476
DEPARTMENT, BOARD OR COMMISSION: CONSUMER AFFAIRS	AUTHOR: Moore

SUMMARY
1 ___Description
BACKGROUND
2 ___History
3 ___Purpose
4 ___Sponsor
5 ___Current Practice
6 ___Implementation
7 ___Justification
8 ___Alternatives
9 ___Responsibility
10 ___Other Agencies
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FISCAL IMPACT ON STATE BUDGET
13 ___Budget
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35 ___Proponents
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RECOMMENDATION JUSTIFICATION
38 ___Support
39 ___Oppose
40 ___Neutral
41 ___No Position
42 ___If Amended

BILL SUMMARY

Existing law does not create specific divisions within the Public Utilities Commission (PUC).

This bill would direct the PUC to create and staff an organization or division within their operation to represent the interests of public utility customers in PUC proceedings.

<u>Background</u>

On July 5, 1984 the PUC adopted a resolution which directed their Executive Director to create two new staff divisions, the Public Staff Division (PSD) and the Evaluation and Compliance Division. PUC representives indicate that the major reasons for this reorganization were "to clarify the roles of major parts of the staff and to provide increased flexibility in the organization."

The PUC's resolution stated that "the electric, gas and telecommunications industries are in the midst of substantial and far-reaching changes," that "the commission must maintain a high-quality staff...to critically review utility applications" and that "the effectiveness of staff is increased when assignments and roles are clearly defined."

These two new divisions were created from the then existing Utilities Revenue Requirements and Communications Divisions.

A major role of the PSD is to bring engineering, auditing, financial, economic and general regulatory expertise to bear on utility proposals, projects and expenditures. There are about 200 professionals assigned to this division.

VOTE:	Assembly	Partisan R	Partisan D		Senate	Partisan R	Partisan D
Floor:	74-0			Floor:	25-5		
Policy Committee:				Policy Committee:			
Fiscal Committee:				Fiscal Committee:			

RECOMMENDATION TO GOVERNOR: SIGN ✓ VETO ___ NO POSITION ___ DEFER TO OTHER AGENCY ___

DEPARTMENT DIRECTOR:	DATE:	AGENCY SECRETARY:	DATE:
Marie Thibury-Sue	8/30/85		

The PSD is charged with the responsibility of making recommendations which take into consideration the "interests of ratepayers over the long-run." This requires their awareness of the impacts imposed on future utility customers when analyzing current utility expenditures and investments.

The PSD is required to consider the interest of all ratepayers, not any one class or sector of utility customers. The intent is to design rates that are equitable to all utility customers.

Specific Findings

Some of the major functions of the Public Staff Division include evaluation of: (a) rate design, revenue allocations to customer classes, and marginal costs of gas and electricity; (b) cost of capital and rate of return; (c) resource planning and capital budgets; and (d) the reasonableness of costs and the ratemaking treatment for major additions to the ratebase such as large power plants.

The purpose of AB 476 is to codify the internal reorganization which created the PSD within the PUC.

Fiscal Impact

None on the Department of Consumer Affairs.

Socio-economic Impact

The PSD of the PUC will represent the long-term interest of all utility ratepayers more effectively. This could result in a more moderate rise in utility rates throughout the state.

Interested Parties

Proponents: Public Utilities Commission (PUC)

Opponents: None known

Arguments:

Proponents of the bill argue codification of the newly created PSD within the PUC would ensure that the ratepayer benefits gained by creation and operation of this new unit would be continued.

The PUC indicated support for the amended version of the bill.

Recommendation

The Department of Consumer Affairs recommends that the Governor SIGN this bill.

The Department supports, in concept, the creation of the Public Staff Division within the PUC. This internal reorganization: (a) allows the PUC to more clearly define the role of its technical and professional resources regarding the long-term interests of all ratepayers. The bill was amended, on April 15, as recommended by the Department of Consumer Affairs, to delete that section of the bill which would have allowed the Public Staff Division to appeal to the Supreme Court PUC decisions which were adverse to its own. The Department felt this provision had potential for causing internal reporting problems within the PUC.