No. S278642

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

REPLY IN SUPPORT OF PETITION FOR REVIEW OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION

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March 14, 2023

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REPLY IN SUPPORT OF 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 submits its reply brief in support of the petition for review (petition) filed with this Court on February 15, 2023. The petition asks the Court to grant review of the decision of the California Court of Appeal, Second Appellate District, Division One, in Case No. B310811. Respondent Southern California Gas Company (SoCalGas) filed an answer to the petition for review (answer) on March 7, 2023.

I. INTRODUCTION

The law is clear. SoCalGas may not book advocacy costs to ratepayer accounts. But nonetheless SoCalGas did so, and because SoCalGas did so, the Commission's Public Advocates Office (Cal Advocates) initiated an investigation into how SoCalGas accounts for its advocacy activities.

The investigation led to the crux of the instant dispute: whether Cal Advocates can ensure advocacy costs are not booked to ratepayer accounts by only examining ratepayer accounts. The Commission maintains that Cal Advocates cannot properly execute its statutory responsibility to protect ratepayer interests without examining both ratepayer and shareholder account data, subject to appropriate confidentiality provisions. SoCalGas and the Court of Appeal disagree.

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

As the Court is aware, the underlying dispute began with "astroturfing" allegations against SoCalGas. In May 2019 in the Commission's Building Decarbonization proceeding (Rulemaking (R.) 19-01-011), 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 despite the fact that it is an entity created and funded solely by SoCalGas. SoCalGas hid this fact from the Commission until it was discovered by Sierra Club.

At this point, the funding of C4BES became a concern for Cal Advocates, which is charged with the statutory duty to obtain the lowest possible rates for ratepayers and "may compel the production or disclosure of *any* information it deems necessary to perform its duties from any entity regulated by the commission…." (Pub. Util. Code, §§ 309.5 (a), (e) (emphasis added).) It is a fundamental regulatory principle that utilities cannot include costs in rates that do not benefit ratepayers.[2] Documents obtained by

[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

(*footnote continued on the next page*)

Cal Advocates reflect that SoCalGas booked costs for these astroturfing and advocacy activities to operation and maintenance accounts typically charged to ratepayers.[3] Cal Advocates has a statutory responsibility to ensure that utilities such as SoCalGas do *not* charge such costs to ratepayers.

The Commission, SoCalGas and the Court of Appeal have a fundamental difference of opinion as to what data Cal Advocates needs in order to satisfy its statutory duties. This is not merely an academic question. It goes to the heart of the work that the Commission and Cal Advocates do every day to protect the interests of ratepayers from the monopoly public utilities who provide essential and necessary services to these ratepayers. For this reason, the Commission respectfully asks the Court to grant the instant petition for review, and correct the legal errors contained in the Opinion. The Opinion departs from existing precedent granting substantial deference to the Commission when the Commission exercises its discretion in determining the extent of access to information that Cal Advocates needs to

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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)).

fulfill Cal Advocates' statutory duties, and constitutes an important question of law regarding the scope of Cal Advocates' authority. 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).)

II. ARGUMENT

The parties and the Court of Appeal agree on the case precedents and legal standards applicable to this dispute. As discussed extensively in the underlying briefing in the Court of Appeal and in the Commission's petition before this Court, the United States Supreme Court has 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* 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.)

It is the Court of Appeal's "narrow tailoring" analysis with respect to the asserted government interest that the Commission respectfully submits is erroneous. This necessitates an inquiry into the asserted need for the

information sought by Cal Advocates.[4] SoCalGas does not dispute that Cal Advocates has statutory authority to audit its accounts to ensure that ratepayers are not funding its advocacy activities, subject to the First Amendment concerns addressed by the Court of Appeal. (See Pub. Util Code §§ 309.5 (a), (e).) The central question therefore is: What need does Cal Advocates have to access SoCalGas shareholder information that overrides the First Amendment claims asserted by SoCalGas? The Court of Appeal determined that a sufficient need for the data had not been demonstrated. The Commission respectfully disagrees.

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. The underlying record unequivocally demonstrates that SoCalGas initially insisted to Cal Advocates that it was funding its advocacy organization C4BES with solely shareholder funds, as it is required to do since ratepayer funds cannot be used to fund advocacy. (See, e.g., SoCalGas Response to Data Request CalPA-SCG-051719 (June 14, 2019), Exh. 1, p. 49 ("Ratepayer funds have not been used to support the founding or launch of Californians for Balanced Energy Solutions (C4BES)."); Exh. 1, p. 50 ("Ratepayer funds are not used to support C4BES."); SoCalGas Response to Data Request CalAdvocates-SC-SCG-2019-05

[4] In its Answer, SoCalGas suggests that the Court's analysis at pages 27-28 of the Opinion applies to the Commission as a whole, as well as Cal Advocates. (See SoCalGas Answer, p. 33.) That is not what the Opinion says. The Opinion expressly finds that, given Cal Advocates' statutory mission to achieve the lowest rates for ratepayers, Cal Advocates had not stated a sufficient justification to access the shareholder data. (Opinion, pp. 27-28.) The Opinion does *not* say that the same would be true of an investigation conducted by a different division of the Commission, which does not have the articulated statutory mission of Cal Advocates under Public Utilities Code section 309.5.

(August 27, 2019), Exh. 2, p. 141 ("[T]he Balanced Energy IO is not ratepayer funded."); Exh. 2, p. 142 ("The Balanced Energy IO is shareholder funded, not ratepayer funded.") SoCalGas later acknowledged that for a period of approximately six months, from March 2019 until October 30, 2019, it utilized an "incorrect settlement rule" that improperly allocated advocacy costs related to C4BES to one or more ratepayer accounts. (See Exhibit 14, p. 831; see also Exhibit 3, p. 4.) This matter is not in dispute.[5]

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 and in the petition, 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?

The Opinion also fails to acknowledge that, as a monopoly public utility providing essential services to a captive customer base, and earning a

[5] SoCalGas has also allocated costs for other advocacy programs to ratepayer accounts, including the following: LAWA (Los Angeles World Airports), to influence updates to LAWA's Alternative Fuel Vehicle Requirement Program; Los Angeles Metropolitan Transit Authority (MTA), an advocacy campaign directed at MTA's preference for electric buses; and Ports, a lobbying campaign directed at the Port of Long Beach regarding transition to zero emissions equipment. SoCalGas has admitted to Cal Advocates that it booked these advocacy costs to ratepayer-funded accounts.

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.) 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.[6] 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 under statute, 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.

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

The Commission also 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. As noted in the Commission's petition, 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.

In its petition, the Commission posited the following hypothetical to demonstrate the quandary that the Opinion puts Cal advocates in: 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? Just seeing your own allocated share of the dinner does not permit you to determine the appropriateness of the allocation.

In response to this analogy, SoCalGas states:

> Even considered on its merits (or lack thereof), the Commission's latest rationale falls short because SoCalGas has not objected to providing CalPA with a version of its split invoices that clearly sets out the unredacted itemized expenses being booked to above-the-line accounts. (Amici Resp. at pp. 25–26; Reply at p. 17.) This information would more than suffice for CalPA to determine if such expenses are properly allocated to above-the-line accounts.
>
> The Commission invokes a colorful analogy featuring six people at a dinner table. (Petn. at p. 27, fn. 24.) But that, too, falls wide of the mark. A more apt analogy is that two people go to dinner—a ratepayer, who is vegetarian, and a shareholder, who is not. The shareholder orders a steak and the ratepayer orders pasta, and if the ratepayer wants to confirm he didn't pay for the steak, he can just *look at his portion of the itemized receipt*. (Op. at p. 27 ["[T]he allocation of . . . advocacy costs . . . may be learned simply by examining ratepayer expenditures"]; *id.* at p. 28 [CalPA "can confirm that no funds have been

> misclassified to ratepayer accounts by reviewing above-the-line accounts"].) There is no need for the ratepayer (or the ratepayer's advocate) to look at the shareholder's receipt (or portion of the receipt) to ensure he isn't paying for any portion of the shareholder's steak.

(SoCalGas Answer, p. 30 (fn. omitted).)

SoCalGas cannot dismiss the Commission's analogy so easily. Even assuming that SoCalGas' representations contained in the above-quoted paragraphs are accurate (a point the Commission does not concede), they make the Commission's point clearly. SoCalGas asserts that it has agreed to provide Cal Advocates with "a version" (not the original version) of its "split invoices" (presumably split as SoCalGas sees fit) that set forth the unredacted amounts billed to above-the-line accounts (not all accounts). (SoCalGas Answer, p. 30.) This self-interested assertion that it can cherry-pick what data to share with Cal Advocates is precisely the problem with the Court of Appeal's Opinion – it tacitly endorses this sort of conduct and will make Cal Advocates' job of utility oversight infinitely harder, and it will not allow Cal Advocates to fulfill its statutory responsibilities. And this, in turn, may impact the Commission, as Cal Advocates is an integral arm of the Commission.

In addition, the fallacy of SoCalGas' "pasta and steak" analogy is self-evident. In the situation described at page 30 of its Answer, both parties know the cost of the menu items because they both chose their meals from a menu with stated prices. Both parties are operating with full and equal access to information regarding the costs of their dinner, and both parties will know if their portion of the bill is being overstated. In stark contrast, in the present case, all of the information regarding its advocacy costs is within

the exclusive control of SoCalGas, unless it shares that information with the Commission. Cal Advocates is forced to rely on the data it receives from SoCalGas to ensure that advocacy costs are not borne by ratepayers, without having any idea how much those total costs are or how SoCalGas arrived at its allocation of such costs between above-the-line and below-the-line accounts. The Opinion leaves Cal Advocates in the untenable position of having to trust that SoCalGas has made a proper allocation, a circumstance that directly contravenes Cal Advocates' statutory responsibilities, without being able to confirm the underlying facts.

Finally, it bears repeating that the precise analogy utilized by the Commission in its petition is the *actual basis* for the underlying dispute between SoCalGas and the Commission in the first place. This is not merely a theoretical concern. Just like the dinner at the restaurant posited by the Commission, SoCalGas is prescribing to Cal Advocates what amounts should be funded by ratepayers without Cal Advocates having any understanding of the full nature of the costs and how SoCalGas arrived at the allocation. The Court of Appeal's Opinion suggests that this is sufficient to satisfy Cal Advocates' statutory responsibilities. The Commission respectfully disagrees.

III. 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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March 14, 2023

CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing Petition for Review is 3,360 words in length. In completing this word count, I relied on the "word count" function of the Microsoft Word program.

Dated: March 14, 2023

/s/ CARRIE G. PRATT____
Carrie G. Pratt

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 14th day of March 2023 at San Francisco, California.

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