BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application For Rehearing Of Resolution ALJ-391	A.20-12-011 (Filed: December 21, 2020)

SOUTHERN CALIFORNIA GAS COMPANY'S RESPONSE TO PUBLIC ADVOCATES OFFICE'S APPLICATION FOR REHEARING OF RESOLUTION ALJ-391

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I. INTRODUCTION

Pursuant to Commission Rule of Practice and Procedure 16.1(d), Southern California Gas Company (SoCalGas) hereby files this Response to *Public Advocates Office's Application for Rehearing of Resolution ALJ-391* ("CalPA AFR").

Cal Advocates' actions and words add up to a clear picture. Contrary to Cal Advocates repeated representations that it is investigating SoCalGas's "use of ratepayer monies to fund pro-gas advocacy," Cal Advocates does not appear to be as interested in the use of ratepayer funding as it is in exploiting and punishing speech with which it does not agree.[1] Indeed, this theme of punishing SoCalGas for the content of its speech is consistent with Cal Advocates' agreement with the Sierra Club to jointly prosecute SoCalGas for its alleged "anti-electrification" activities.[2] And it is further consistent with Cal Advocates' refusal to accept the discovery SoCalGas has offered for now over eight (8) months: complete access to its above-the-line accounts, which are the accounts generally recovered from ratepayers.[3] Examining those accounts would give Cal Advocates all the information it needs to determine whether ratepayer funding is improperly being used for advocacy or lobbying purposes. Yet, Cal Advocates has

[1] CalPA AFR, pp. 7-8; *id.* p. 17; *compare* CalPA AFR p. 9-10: "There is no question that Cal Advocates is the real party in interest in this proceeding: Cal Advocates initiated the investigation into SoCalGas' pro-gas advocacy, it is the subject matter expert on the facts regarding this investigation, and it will be the primary beneficiary of proper resolution of the issues raised here."

[2] See Exhibit 4 to the Declaration of Jason H. Wilson, submitted in support of SoCalGas's Comment, Nov. 19, 2020 ["Joint Prosecution Agreement"].

[3] Cal Advocates would have also gained access to SoCalGas's below-the-line accounts (even though it does not need that information for its stated investigation), except for the narrow scope of information that is protected by the First Amendment.

provided no reasonable justification as to why accessing SoCalGas's above-the-line accounts would not be sufficient to achieve the stated purpose of its investigation.[4]

Instead of limiting its discovery to above-the-line accounts, Cal Advocates is apparently on a fishing expedition for information that goes to the heart of SoCalGas's associational and expressive activities. It appears from the Joint Prosecution Agreement that the purpose of the fishing expedition is for Cal Advocates and Sierra Club to jointly investigate, prosecute, and punish SoCalGas in order to suppress or stifle its viewpoints so that they can further their own electrification agenda. All-electrification is not the policy of the State nor of the Commission. As the Commission itself has recognized, "decarbonization will take many paths, some of which are clearly defined and some of which are yet to be determined. Building electrification is one of those paths whose exact route is not yet clear and where we are at the early stages of our journey. . . . [W]e will continue to explore the financial impacts of building electrification on customers, particularly low-income customers and those residing in disadvantaged communities[.]"[5] Further, Cal Advocates' and Sierra Club's characterizations of SoCalGas's activities as being "anti-electrification" are untrue. SoCalGas has gone on record in support of electrification when done right. What SoCalGas cannot support, is an "all-electrification" policy, as there are more effective ways to build the State's decarbonized energy system. SoCalGas is therefore working to decarbonize our gas grid so clean molecules can work in tandem with clean electrons to meet SoCalGas's obligation to safely, reliably, and affordably serve its customers. Above and beyond being consistent with California's decarbonization goals, the gas grid is in fact essential to achieving the State's decarbonization goals.[6]

We also note that Sierra Club is a board member of the Building Decarbonization Coalition (Coalition), a very active advocate in CPUC proceedings like the Building Decarbonization OIR,[7] as well as other state and local level actions, as evident in the Coalition's *Momentum: Accelerating Building Decarbonization.* With leadership from Sierra Club, the

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[4] Cal Advocates has stated that it is investigating SoCalGas's "Accounting Practices, Use of Ratepayer Monies to Fund Activities Related to Anti-Decarbonization and Gas Throughput Policies." See Cal Advocates' captions in its filings in this non-proceeding manner.
[5] Exhibit 1 to Wilson Stay Decl., August 7, 2020 letter from CPUC President Marybel Batjer to Assemblymembers Patrick O'Donnell, Jim Cooper, and Blanca Rubio at 1.
[6] Sierra Club is a board member of the Building Decarbonization Coalition.
[7] *Momentum: Accelerating Building Decarbonization,* at 5, available at http://www.buildingdecarb.org/uploads/3/0/7/3/30734489/fossil_free_buildings_final_jan_13.pdf.

Coalition is actively engaged in a "comprehensive strategy for the wind down of the gas system."[8] This core message and detailed advocacy statements in this campaign funding document reveal: (1) an acknowledgment that all-electrification is not the *existing* state policy, (2) Cal Advocates' underlying premise for the SAP Subpoena of prosecuting SoCalGas for its "anti-electrification activities" and characterizing them as "illegal" in the media is false;[9] and (3) legitimate questions about a lack of transparency around the true nature of Sierra Club's joint prosecution endeavor with Cal Advocates. These questions call for the Commission itself and the public to understand the motives behind this type of partnership (SoCalGas has received very little through answers Public Records Act requests), especially in light of the Coalition's stated goals to "capture market share" and shift it to other market participants[10] by causing "the retreat of ratepayers from the gas system … to cause gas retail sales to decrease and rates to rise."[11]

The stakes are high for SoCalGas's customers who will bear the burden of those rate increases, as evident in this document. Along with other members of The Coalition, Sierra Club is "spearheading" a partnership[12] to advocate before local governments, the State Legislature, the Governor's office, the CPUC, the California Energy Commission, among others, to "(1) prohibit new natural gas hookups in building, (2) phase out fossil fuel-burning appliance sales and (3) begin the wind-down of the gas network."[13] At the very least, these circumstances should prompt the Commission to ask and the public to get answers about the nature of this joint prosecution so that there is clarity about whether Cal Advocates' objectives in this investigation truly align with its statutory mission. Cal Advocates and Sierra Club's misuse of Commission process should not be allowed to stifle and suppress SoCalGas's expressive activities involving a different pathway towards decarbonization, one that other Commission staff agrees plays a vital role in California's energy future.[14] This is the classic case of viewpoint discrimination.

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[8] *Id.*
[9] See https://www.utilitydive.com/news/socalgas-merits-255m-fine-for-opposing-efficiency-standards-with-customer/588597/
[10] *Id.* at 6.
[11] *Id.* at 7.
[12] *Id.* at 5.
[13] *Momentum: Accelerating Building Decarbonization,* at 1, available at http://www.buildingdecarb.org/uploads/3/0/7/3/30734489/fossil_free_buildings_final_jan_13.pdf.
[14] *See, e.g.*, R.20-01-007 Track 1A: Reliability Standards and Track 1B: Market Structure and Regulations – Workshop Report and Staff Recommendations, p. 37, Oct. 2, 2020, *available at* https://www.cpuc.ca.gov/gasplanningoir [CPUC Staff's recommendations expressly "call[] attention . . .

This chilling effect is not limited to SoCalGas. Third-party government-relations professionals have similarly sworn that disclosure of the information Cal Advocates demands will cause them to seriously reconsider whether to associate with SoCalGas in future initiatives, or any other political processes at all.[15] The chilling and harassing effect of disclosure is amplified by the way that Cal Advocates has used information SoCalGas has already turned over—including apparently funneling it to other litigants opposing SoCalGas in formal proceedings (e.g., Sierra Club) and the media.

Cal Advocates sets up a straw man fallacy to distract from the real issues by asserting that SoCalGas's declarations contain misrepresentations that imply Cal Advocates has disclosed confidential information to the media.[16] SoCalGas has not stated that Cal Advocates has disclosed information marked as confidential to Sierra Club or the media. This is because SoCalGas has not been able to determine whether Cal Advocates has or has not improperly disclosed confidential information as its public records access requests from over six (6) months ago are still pending.[17] The California State Legislators' also requested that the Commission provide information as to how Cal Advocates' is complying with Pub. Util. Code § 583 over two (2) months ago.[18] As of the date of this filing, SoCalGas is unaware whether the Commission has responded with the information requested in the Legislators' letter. Instead, the fact is that Cal Advocates has shared information that it obtained from SoCalGas through its statutory discovery authority (Pub. Util. Code §309.5)—information that no other intervenor or the media would have been able to obtain otherwise. In furtherance of these efforts, Cal Advocates wrongfully argues that SoCalGas's FPPC reports of *public* lobbying activity compel a forced waiver of all of SoCalGas's First Amendment associational rights in its *internal* political strategy. The FPPC reports contain relatively little, high level information: firm names, aggregate total costs, and aggregate lists of legislative lobbying activities. In contrast, Cal

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to the two rotating power outages of August 2020" as a "cautionary tale" noting that "[t]he role of California's natural gas infrastructure is especially important during times of low renewable generation."].

[15] Declaration of Sharon Tomkins and Confidential Declarations in support of SoCalGas's December 2, 2019 Motion for Reconsideration/Appeal; Declaration of Andy Carrasco in support of SoCalGas's May 22, 2020 Motion to Quash.

[16] CalPA AFR at p. 13.

[17] SoCalGas's Public Records Requests to Public Advocates Office, Public Records Act Request Nos. 20-322 and 20-327 (July 2020).

[18] Declaration of Jason H. Wilson, December 18, 2020, Exhibit 3 - November 30, 2020 letter from Assembly members Blanca Rubio and Jim Cooper to CPUC President Marybel Batjer, pp. 2-3.

Advocates demanded materials include, among other things, the identities of consultants SoCalGas has contracted with, specifically tied to the scope of detailed activity contemplated by the contracts and shown in invoices, the duration of those agreements, and the amount and specific nature of SoCalGas's expenditures on political activities. Therefore, even assuming that information on the FPPC report is not protected, the disclosure of certain high-level information about lobbying activities does not waive any First Amendment protection of information beyond what is contained on those reports. Once Cal Advocates obtains this information, information that goes beyond what any company is required to report under California or federal law, it is very likely that Cal Advocates will continue to funnel this information to advocacy groups and the media in an effort to suppress or stifle SoCalGas's expressive activities.[19]

Cal Advocates' funneling of information is not limited to SoCalGas's information but also information related to SoCalGas's consultants and organizations that SoCalGas associates with. In fact, Cal Advocates unabashedly admits that it is seeking information from SoCalGas since it cannot get the same information from an unregulated entity.[20] Unchecked, Cal Advocates would be able to abuse its statutory discovery powers in order to obtain information—information it is not entitled to—from unregulated entities who have disparate ideas, viewpoints, and/or positions than Cal Advocates simply because of the unregulated entities' association with SoCalGas. Cal Advocates would simply request that information from SoCalGas. One can imagine what sort of chilling effect that would have on SoCalGas's ability to associate with unregulated entities.

Cal Advocates' apparent strategy to stifle and suppress SoCalGas's viewpoints is not just limited to sharing information with other intervenors and the media but also to mischaracterize the information it obtained. For example, in its response to SoCalGas's AFR, Cal Advocates states that "SoCalGas had allocated over $27 million to operations and maintenance in an 'above-the-line' ratepayer account to fund…Californians for Balanced Energy Solutions (C4BES)."[21] As Cal Advocates is aware, the $27 million amount is an estimate for the total

[19] See Cal Advocates' website where it posts information it obtains from the non-proceeding available at https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4294.
[20] CalPA AFR at p. 7 ("Other entities may hold some of the information, but not all of it, and the majority of those entities are not regulated by the Commission.")
[21] Public Advocates Office Response to Southern California Gas Company's Application for Rehearing of Resolution ALJ-391 and Response to Request for Oral Argument, January 11, 2020, p. 1.

Balanced Energy Internal Order over five years and was not specific to C4BES[22]. Further, the Balanced Energy Internal Order was always intended to be a shareholder-funded account. However, an incorrect settlement rule initially settled it to the incorrect FERC account. It was subsequently recategorized in September 2019, as was disclosed to Cal Advocates last year.[23]

To further effectuate Cal Advocates' strategy to stifle and suppress opposing viewpoints, whenever SoCalGas attempts to seek full and fair adjudication of its First Amendment rights and attorney-client privileges, Cal Advocates seeks to punish SoCalGas with sanctions, fines and contempt. Cal Advocates obviously does not agree with SoCalGas's decarbonization viewpoint, and its AFR is a further attempt to punish SoCalGas for that viewpoint. However, governmental regulators are not allowed to misuse their investigatory power to punish entities with contempt, fines, and sanctions merely for expressing their political viewpoints.

In its AFR, Cal Advocates urges the Commission to accept flawed and unconstitutional interpretations of the legal framework surrounding this dispute. To adopt Cal Advocates' arguments would push Resolution ALJ-391 further into error.[24] The Commission should decline to adopt Cal Advocates' inflated interpretations of its statutory powers and its proposals to punish SoCalGas for asserting its First Amendment rights.

II. ARGUMENT

A. Cal Advocates' Investigatory Rights Are Tempered by SoCalGas's Constitutional Rights.

Cal Advocates first argues that its legislative powers to investigate regulated entities trump SoCalGas's First Amendment rights. It recites this error over and over, claiming that it is "entitled to investigate [SoCalGas] even if such review infringes on SoCalGas's First Amendment rights,"[25] and that it may "investigate the entities that it regulates, regardless of First Amendment claims."[26] But simply repeating a flawed argument does not make it true. It is indisputable that the United States Constitution and California Constitution protects SoCalGas's

[22] See Attachment A ("Work Order Authorization"), Public Advocates Office Response to Southern California Gas Company's Application for Rehearing of Resolution ALJ-391 and Response to Request for Oral Argument (Jan. 11, 2021).
[23] *See* R.13-11-005 Data Response CalAdvocates-SK-SCG-2020-01 Q4.
[24] SoCalGas has filed its own AFR outlining the errors at issue in Resolution ALJ-391. For the most part, those arguments are not repeated here.
[25] CalPA AFR p. 1.
[26] CalPA AFR p. 4.

First Amendment right to free expression.[27] Indeed, even the cases on which Cal Advocates relies fail to support its incorrect claims.

1. The Supremacy Clause Forbids Cal Advocates' Claims.

Cal Advocates argues that its legislatively granted powers to regulate SoCalGas trump SoCalGas's First Amendment rights. Not so. Article VI, paragraph 2 of the United States Constitution provides in the relevant part, "The Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."[28] SoCalGas's right to associate, which is clearly implicated here by Cal Advocates' discovery requests,[29] is protected by the First Amendment: The Supreme Court has found that "implicit in the right to engage in the activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[30] The Supreme Court has also found unequivocally that regulated utilities such as SoCalGas have First Amendment rights equal to any other entity—and the fact that it is regulated or overseen by a governmental body does not lessen those rights.[31] Therefore, Cal Advocates may only pursue the discovery it seeks if it "demonstrate[s] that its [action] is constitutionally permissible"—which it has failed to do.[32]

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[27] And certainly, the law does not permit Cal Advocates to engage in unlawful viewpoint discrimination in the application of its investigatory powers. *Police Dept. of City of Chicago v. Mosley* (1972) 408 U.S. 92, 95 ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[28] U.S. Const. Art. VI, ¶ 2.

[29] This is established, among other places, in SoCalGas's AFR at p. 18.

[30] *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 622.

[31] *Pacific Gas & Elec. Co. v. Public Util. Com.* (1986) 475 U.S. 1, 17 n. 14 ["Appellees also argue that appellant's status as a regulated utility company lessens its right to be free from state regulation that burdens its speech. We have previously rejected that argument."]; *Consolidated Edison Co. of New York, Inc. v. Public Service Com. Of New York* (1980) 447 U.S. 530, 534 n. 1 ["Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights. [Citations.] . . . Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters." [Citations].]. Similarly, under the California Constitution, "peaceful and lawful associational activity is, without question, constitutionally protected activity which . . . enjoys special safeguard from governmental interference." *Britt v. Superior Court* (1978) 20 Cal.3d 844, 852.

[32] *Consolidated Edison*, *supra*, 447 U.S. at p. 535.

2. Cal Advocates' Own Authorities Establish That Its Discovery Requests Must Pass Constitutional Muster.

While Cal Advocates has selectively quoted language from a number of cases to imply its administrative powers are unfettered, even the cases Cal Advocates cites establish that Cal Advocates must demonstrate its discovery requests pass constitutional muster. As the Ninth Circuit stated in *Brock v. Local 325*, the case on which Cal Advocates most relies, "[The government's] purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[33] Cal Advocates misleadingly recites the Ninth Circuit's standard of judicial scrutiny in enforcing an agency subpoena, *outside* of a First Amendment context, by citing to *Brock*[34]—but fails to mention that in *Brock* the Ninth Circuit *rejected* applying this standard, reversing the district court, because the First Amendment was implicated.[35]

Similarly, the D.C. Circuit strongly reaffirmed in *Federal Election Commission v. Machinists Non-Partisan Political League* that "first amendment jurisprudence makes clear that before a state or federal body can compel disclosure of information which would trespass upon first amendment freedoms, a 'subordinating interest of the State' must be proffered, and it must be 'compelling.'"[36] That case, moreover, dealt with a question of whether the FEC had subject matter jurisdiction over a so-called "draft-Kennedy" organization, and not whether the challenged subpoena itself passed the exacting scrutiny required to be permissible under the First Amendment.[37] The court expressly did not decide whether a compelling interest was shown, and instead "assume[d] arguendo that if the FEC ha[d] statutory jurisdiction . . . then a compelling interest for the subpoenaed information c[ould] be shown."[38] Thus, nothing about it or the dicta cited by Cal Advocates is "dispositive" in this case, because the court did not express a view on the First Amendment question—only on the jurisdictional issue.[39] Instead, as established by *Brock* and reiterated by *Perry v. Schwarzenegger*, courts must carefully scrutinize *any*

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[33] *Brock v. Local 375, Plumbers Intern. Union of Am., AFL-CIO* (9th Cir. 1988) 860 F.2d 346, 350.
[34] CalPA AFR p. 5.
[35] *Brock*, *supra*, 860 F.2d at p. 350.
[36] *FEC v. Machinists Non-Partisan Political League* (D.C. Cir. 1981) 655 F.2d 380, 389.
[37] *Id.* at p. 384.
[38] *Id.* at 389.
[39] CalPA AFR p. 5.

government action that threatens to chill First Amendment rights, even when—and especially when—such action is pursuant to broad regulatory powers.

B. The Commission Used the Correct "Narrowly Tailored" Standard.

Cal Advocates next raises the meritless argument that the Commission used the wrong legal standard to its actions because it used the phrase "narrowly tailored" to describe the exacting scrutiny applied by courts faced with state-required disclosure of information protected by associational rights.[40] Cal Advocates claims that "[t]he 'narrowly tailored' standard is not the same" as the standard described by *Perry v. Schwarzenegger*, and that the *Perry* standard is "less restrictive."[41] Cal Advocates cites no authority for this position, and there is none, because it is flat-out wrong.[42] Nor is there a distinction between the test that "applies to statutes and regulations" as opposed to "discovery."[43] The Commission correctly cited to *Perry v. Schwarzenegger* standard—itself a case in the discovery context—in the Resolution.[44]

C. The Commission Correctly Did Not Decide the Issue of Fines or Sanctions.

SoCalGas agrees with the Commission's decision not to issue sanctions and fines as part of the Resolution.[45] Cal Advocates is wrong to urge the Commission to curtail SoCalGas's due process rights even further by "clarify[ing] that trial-type hearings are not necessary to

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[40] CalPA AFR pp. 6-8.
[41] CalPA AFR p. 7.
[42] Indeed, the Supreme Court has granted certiorari in *Americans for Prosperity v. Becerra* (9th Cir. 2018) 903 F.3d 1000, where a panel of the Ninth Circuit applied a lower standard of scrutiny to a state tax regulation implicating First Amendment associational rights. In dissent to the denial of rehearing en banc, Judge Ikuta, joined by four other circuit judges, noted that the standard in *Perry v. Schwarzenegger* "remain[ed] faithful to the principles of *NAACP v. Alabama* by applying its heightened scrutiny and requiring ***narrow tailoring***." *Americans for Prosperity Foundation v. Becerra* (9th Cir. Mar. 29, 2019) 919 F.3d 1177, 1182 n. 2 (Ikuta, J., dissenting) (emphasis added). In addition, to the extent they differ, the "least restrictive means" standard is arguably more, not less restrictive than narrow tailoring. *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 218 (2014) (explaining that "the least restrictive means" is harder to satisfy than "a means narrowly tailored to achieve the desired objective").
[43] *See* CalPA AFR p. 6 n. 21. *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147 is itself a discovery case, adjudicating a request for production seeking "[a]ll versions of any documents that constitute communications referring to Proposition 8, between you and any third party, including, without limitation, members of the public or the media."
[44] SoCalGas maintains that the Commission's *application* of the standard was incorrect and that it should have found the requested discovery infringed on SoCalGas's First Amendment rights. *See* SoCalGas's Application for Rehearing of Resolution ALJ-391 and Request for Oral Argument (Dec. 18, 2020), pp. 13-42.
[45] Resolution ALJ-391, p. 33, Order Nos. 6-7; *see* SoCalGas's Comments on Draft Resolution ALJ-391 (Nov. 19, 2020), p. 31.

consideration and imposition of" the millions of dollars in fines and sanctions it has sought, based on a crabbed reading of *Mathews v. Eldridge.*[46]

First, it bears noting that Cal Advocates' has not only sought fines against SoCalGas, but, in both its motions at issue, a finding of contempt.[47] Public Utilities Code section 2113 authorizes the Commission to adjudicate contempt only "in the same manner and to the same extent as contempt is punished by courts of record."[48] Under the Code of Civil Procedure, civil contempt can be adjudicated only "[u]pon the answer and evidence taken."[49] Thus, the Legislature has mandated that the Commission take evidence before contempt can be adjudicated. When, as here, "virtually none of the facts involved in the alleged contempt have occurred in the judge's presence, but have arisen entirely outside the courtroom . . . due process requires notice and hearing lest the alleged contemner be convicted ex parte."[50] And, the Commission has concluded that evidentiary hearings are required when there are material factual disputed issues or when "motive, intent, or credibility are at issue or there is a dispute over a past event."[51] As thoroughly argued in SoCalGas's Response to Cal Advocates' contempt motion, there are numerous disputed factual issues at issue.[52]

Second, imposition of administrative penalties likewise implicates due process. *Mathews v. Eldridge* itself reaffirms that "some form of hearing is required before an individual is finally

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[46] CalPA AFR p. 9.
[47] *See* Public Advocates Office Motion to Find Southern California Gas Company in Contempt of this Commission in Violation of Commission Rule 1.1 for Failure to Comply with a Commission Subpoena Issued May 5, 2020, and Fined for those Violations from the Effective Date of the Subpoena (June 23, 2020); Proposed Order, Public Advocates Office Motion to Compel Confidential Declarations Submitted in Support of Southern California Gas Company's December 2, 2019 Motion for Reconsideration of First Amendment Association Issues and Request for Monetary Fines for the Utility's Intentional Withholding of this Information (July 9, 2020).
[48] Pub. Util. Code § 2113.
[49] Cal. Code Civ. Proc. § 1218(a).
[50] *Arthur v. Super. Ct.* (1965) 62 Cal.2d 404, 408-09.
[51] *In re Verizon Commc'ns, Inc.* (C.P.U.C. Nov. 18, 2005) No. D.05-04-020, 2005 WL 3355225; *see also In Re in Touch Commc'ns, Inc.* (C.P.U.C. May 27, 2004) No. 03-11-011, 2004 WL 1368185 ["The Commission
concluded that 'evidentiary hearings . . . are warranted only to the extent there are material factual disputed
issues[.]'"] [citing D.95-07-054].)
[52] SoCalGas's Response to Public Advocates Office's Motion to Find Southern California Gas Company in Contempt of this Commission in Violation of Commission Rule 1.1 for Failure to Comply with a Commission Subpoena Issued May 5, 2020, and Fined for those Violations form the Effective Date of the Subpoena (July 2, 2020), pp. 23-24.

deprived of a property interest,"[53] and its holding reaffirmed that the minimum process due requires a balancing of 1) "the private interest that will be affected by the official action," 2) "the risk of an erroneous deprivation of such interest through the procedures used," and 3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[54] Thus, Cal Advocates' suggestion that the *Mathews* test means that "due process almost *never* requires a trial-type hearing,"[55] simply is not accurate: The *Mathews* test means that in any given situation, the process due depends on the interests and risks involved. Cal Advocates suggests that the fiscal impact of certain amounts of fines is the sole dispositive factor—that because SoCalGas has the resources, it can afford enormous fines, and no evidentiary hearing is required before the Commission impose them. This is demonstrably wrong; even charitably read, it considers only the first prong of the *Mathews* test. In *Mathews*, the court ultimately determined that the plaintiff was not entitled to an evidentiary hearing, because all the facts regarding whether he was in fact disabled (and therefore entitled to benefits) had been established by a paper medical record. There is little analogy with the current dispute, where Cal Advocates has accused SoCalGas of bad faith Rule 1 violations. SoCalGas vigorously disputes that it has violated Rule 1 merely by seeking to protect its First Amendment rights and attorney-client privileges, and should have the opportunity to present its disputed facts at a hearing.[56]

As the California Supreme Court has held as applied to the Commission, "[d]ue process as to the [C]ommission's ... action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made."[57] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[58] Further,

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[53] *Mathews v. Eldridge* (1976) 424 U.S. 319, 333.
[54] *Id.* at p. 335.
[55] CalPA AFR at p. 9.
[56] *Supra* note 52; *see also* Southern California Gas Company's (U 904 G) Response To Public Advocates Office Motion To Compel Confidential Declarations Submitted In Support Of Southern California Gas Company's December 2, 2019 Motion For Reconsideration Of First Amendment Association Issues And Request For Monetary Fines For The Utility's Intentional Withholding Of This Information (July 17, 2020), pp. 22-24 [listing similar disputed factual issues].
[57] *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 632.
[58] *Pacific Gas & Elec. Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 859.

where, as here, disputed factual issues arise, much more "process" is "due"—as this Commission has itself held.[59] Therefore, an evidentiary hearing is appropriate before the impositions of fines and sanctions.

The Resolution has correctly limited its rulings only to "those claims that may be resolved as a matter of law based on the submitted pleadings,"[60] and deferred any consideration of fines and contempt. The Commission should not prejudice any future proceedings by adopting a strained reading of the *Mathews* test to categorically preclude procedures necessary to protect SoCalGas's due process rights.

D. Cal Advocates' Arguments About the Confidential Declarations Should be Dismissed.

Cal Advocates essentially argues that the Resolution should be modified to grant it the power to be judge, jury, and executioner regarding the Confidential Declarations. The Commission should decline to do so.

1. Cal Advocates' Request for an Adverse Inference Fails.

Cal Advocates' first request is that the Commission impose an "adverse inference" of some unspecified type as a penalty on SoCalGas for withholding the unredacted versions of the Confidential Declarations from Cal Advocates. Once again, Cal Advocates seeks to punish SoCalGas for seeking to have its rights adjudicated *before* being forced to waive those rights by turning over First Amendment-protected information to Cal Advocates. This is improper.

An adverse inference is not appropriate here. As Cal Advocates itself concedes, the Commission has the unredacted Confidential Declarations. An adverse inference allows the "trier of fact" to infer adverse facts from a party's failure to rebut evidence or provide such evidence.[61] The Commission itself is the "trier of fact," and it in fact has the Confidential Declarations. Therefore, no adverse inference is warranted, because nothing has been withheld that would affect the trier of fact's ability to accurately assess the evidence before it. The Commission should decline to substitute Cal Advocates' speculations for its own assessment.[62]

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[59] *See supra*, note 46.
[60] Resolution ALJ-391, p. 24.
[61] Cal. Evid. Code § 413.
[62] SoCalGas has argued in its own AFR that the Confidential Declarations meet the *prima facie* standard set out in *Perry v. Schwarzenegger*, and urges the Commission to find likewise on rehearing.

Because the Commission has the Confidential Declarations, the cases on which Cal Advocates relies are inapposite, as they deal with spoliation of evidence.[63] No evidence has been spoliated here; it has been submitted directly to the Commission. This is more analogous to an *in camera* inspection of documents for privilege, where documents that are arguably privileged are submitted directly to the judge, but not provided to the opposing party. Thus, examples from the San Bruno investigation and FERC cases are inapplicable here as they all concern spoliation.

2. Cal Advocates' Remaining Arguments Regarding the Confidential Declarations Must Fail

Cal Advocates makes several additional claims it argues demonstrate that the Confidential Declarations were not made in good faith. All these arguments must fail.

First, Cal Advocates claims that SoCalGas's FPPC reports of public lobbying activity compel a forced waiver of all of SoCalGas's First Amendment associational rights in its *internal* political strategy. Not so. As discussed extensively in SoCalGas's Response to Cal Advocates' motion for an expedited ruling, the fact that certain information has been disclosed in FPPC forms does not vitiate SoCalGas's First Amendment rights in other contexts. The FPPC reports contain relatively little information: showing only firm names, aggregate totals, and aggregate lists of legislative lobbying activity. They do not reveal the contracts, the scope of work, or the political goals and strategy for achieving those goals, which is protected by the First Amendment. In fact, they do not even distinguish which particularized activities or legislative assembly bills the various disclosed lobbyists were responsible for. By contrast, Cal Advocates has demanded, and SoCalGas has sought to protect, information far broader than simple names: The demanded materials include, among other things, the identities of consultants SoCalGas has contracted with, specifically tied to the scope of detailed activity contemplated by the contracts and shown in invoices, the duration of those agreements, and the amount and specific nature of SoCalGas's expenditures on political activities. Thus, even assuming *arguendo* that information on the FPPC report is not protectable, the disclosure of certain high-level information about lobbying activities does not waive any First Amendment protection of information beyond what is contained on those reports. Cal Advocates' interpretation would arguably render the FPPC reports facially unconstitutional, because under Cal Advocates' reading, compliance with the

[63] CalPA AFR p. 11.

FPPC reporting would lay bare all SoCalGas's otherwise protected activity.[64]

The authorities on which Cal Advocates relies offer it no help. First, the case Cal Advocates cites for the proposition associational privilege is waived when information is made public is an out-of-state, out-of-circuit authority, which has been vacated and is not good law.[65] (Cal Advocates fails to mention *Wyoming* is vacated in its brief.) And the cases further cited are inapposite, since they do not deal with a situation where one person may be wearing two hats (i.e., a public lobbyist and a private political consultant), where one association might be disclosed for certain contexts, and undisclosed for others.[66] In short, these cases do not support the proposition for which they are cited. By contrast, in-state authority that squarely addresses an analogous context involving Article 1 rights of associational privacy under the California Constitution holds that even if certain information is "disclosed in other contexts," a constitutional right can still shield that information from "the specific audience that seeks to compel such disclosure."[67]

Second, Cal Advocates' strawman argument attempting to question the credibility of the Tomkins declaration should be rejected. Cal Advocates itself misrepresents the content of the Tomkins declaration: Ms. Tomkins never said Cal Advocates disclosed *confidential* information to the media.[68] Instead, the declaration stated (truthfully) that information provided to Cal Advocates in response to data requests was disclosed to the Los Angeles Times. Cal Advocates

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[64] In *Griset v. Fair Political Practices Com.* (1994) 8 Cal.4th 851, 859-60, the California Supreme Court affirmed that FPPC disclosure requirements "implicate[] First Amendment [rights] because [they] prohibit[] anonymous political speech." It upheld disclosure requirements of sender information on mailers because they were "public speech-speech designed to influence the outcome of an election." *Id.* at p. 862. But the Court's reasoning strongly suggests that regulations on *private* speech-speech—such as internal political consulting and strategy—would not be a compelling state interest. *Id.* Cal Advocates' suggestion that the FPPC disclosure requirements force waiver of SoCalGas's private political speech, strategy, and messaging would render them unconstitutional.

[65] *Wyoming v. U.S. Dept. of Agr.* (D. Wyo. 2002) 239 F.Supp.2d 1219, 1237, *vacated by Wyoming v. U.S. Dept. of Agr.* (10th Cir. 2005) 414 F.3d 1207.

[66] *Wyoming v. USDA* cites to *Kisser v. Coalition for Religious Freedom* (E.D. Penn. July 13, 1995) 1995 WL 422786, an unpublished district court memorandum order from Pennsylvania. *Kisser* granted in part a motion to quash a third-party subpoena in a defamation dispute between an organization called the Cult Awareness Network (CAN) and, *inter alia*, the Church of Scientology. The third party claimed his association with CAN in trying to extract his son from organizations connected with Lyndon LaRouche was protected by the First Amendment. But the third party himself had himself disclosed his association with CAN in those very efforts.

[67] *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 366-67, *disapproved on other grounds by Williams v. Superior Court* (2017) 3 Cal. 5th 531, 557.

[68] CalPA AFR p. 13.

does not dispute this fact. Further, responses to SoCalGas's own public records request has yielded documents demonstrating Cal Advocates proactively alerted advocacy groups of briefing and other issues in the "non-proceeding" they might take interest in.[69] Indeed, the Joint Prosecution Agreement between Cal Advocates and Sierra Club demonstrates that the two entities have been working together to jointly investigate and prosecute SoCalGas for its alleged "anti-electrification" activities since August 2019.[70]

Finally, Cal Advocates speculates that SoCalGas's (and its consultants') allegations of First Amendment harm is due to *other* public disclosure of that relationship, claiming without evidence that "any First Amendment 'harm' [SoCalGas and its consultants] might experience may not be the result of disclosure to Cal Advocates" but because "the information [is] already in the public domain."[71] This misses the mark. First, as discussed above, the information is not all already in the public domain. Second, even if the information is in the public domain in some form, the "harm" is disclosing the information to a specific audience: Cal Advocates.[72] The harm alleged in the Confidential Declarations is that disclosure to *Cal Advocates* will result in a chilling effect, because disclosure to *Cal Advocates* will paint a proverbial target on the backs of SoCalGas's associations. Thus, in *Planned Parenthood Golden Gate v. Superior Court*, an associational privacy case under the California Constitution, the Court of Appeal issued a writ of mandate vacating a discovery order that would disclose the identities, home addresses, and telephone numbers of nonparty staff and volunteers of a Planned Parenthood to the real parties in interest, who staged anti-abortion protest activities outside Planned Parenthood facilities, even though the information may be generally accessible or disclosed in other contexts.[73] In that case, the court determined that the potential chilling effect would be due to disclosure *to the party seeking the information*. Evidence further suggested that, like here, this information would be shared with other anti-abortion advocacy groups, and posted on the internet. Thus, it is the disclosure *to a party advocating a particular adverse viewpoint*, not the relative availability of

[69] These have been provided back to Cal Advocates in Exhibit 1 to Data Request No. CalAdvocates-SC-SCG-2020-03 [DR-18], which include six emails from Ms. Traci Bone to Matthew Vespa from Earthjustice, forwarding him substantive briefing and correspondence with the ALJ with notes "FYI" or "Happy to discuss if you have questions."
[70] See Exhibit 4 to the Declaration of Jason H. Wilson, submitted in support of SoCalGas's Comment, Nov. 19, 2020 ["Joint Prosecution Agreement"].
[71] CalPA AFR p. 13-14.
[72] *Planned Parenthood Golden Gate v. Superior Court, supra,* note 62.
[73] *Id*.

such information in the public generally, that has the potential to cause the First Amendment harm. That is precisely the harm to which the Confidential Declarations attest here.[74]

E. SoCalGas's Attorney-Client Privilege In Records Stored in its Accounting Databases Has Not Been Waived.

1. Cal Advocates' Proposed Presumption of Waiver Is Illegal.

Cal Advocates urges the Commission to adopt a presumption that no attorney-client privilege or work product privilege exists for documents stored in its accounting databases, on the basis that its powers to inspect "books and records" compels waiver of any privilege.[75] Unsurprisingly, it cites no legal authority for this position.

First, Cal Advocates' arguments specifically regarding storage in SoCalGas's accounting database lack logical consistency, unless Cal Advocates is suggesting that its inspection powers are limited to accounting databases. Public Utilities Code section 314 allows the Commission to inspect "the accounts, books, papers, and documents of any public utility."[76] Why would storage in an accounting database, as opposed to anywhere else in SoCalGas's "books, papers, and documents," waive privilege because of the Commission's inspection rights? Cal Advocates' argument in this regard makes no sense and should be rejected.

Second, this proposed subversion of the legal scheme would run afoul of the California Supreme Court's unequivocal holding that proceedings before the Commission, including investigations, are "tempered by the attorney-client privilege."[77] SoCalGas, as any other entity, enjoys a legislatively created privilege to refuse to disclose its attorney-client communications. This privilege applies as against the Commission.

Third, the Commission lacks the power to modify the boundaries of the attorney-client privilege and create a presumed waiver of that privilege. In this state, the attorney-client privilege and attorney work product doctrine have been codified by the Legislature. "[T]he attorney-client privilege is a legislative creation, which courts [and the Commission] have no

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[74] Cal Advocates also disingenuously suggests that "SoCalGas has yet to produce any evidence that Cal Advocates will treat its confidential information any differently than the Commission." CalPA AFR p. 14. As discussed above, SoCalGas does have evidence that Cal Advocates treats its non-confidential information *very differently* – by funneling it directly to viewpoint-based advocacy groups and the media.
[75] CalPA AFR pp. 15-17.
[76] Cal. Pub. Util. Code § 314(a).
[77] *Southern Cal. Gas Co. v. Public Util. Com.* (1990) 50 Cal.3d 31, 38.

power to limit by recognizing implied exceptions."[78] For this reason, courts have consistently held that an inadequate log, or inadequate verifications of objections, do not effect a waiver of the privilege itself.[79] Cal Advocates' proposed presumption would violate California law.

2. Compelling Attorney Testimony Invades the Attorney-Client Privilege and Work Product Doctrines

Cal Advocates argues that the Resolution's requirement compelling a SoCalGas attorney to testify and affirm a good-faith basis underlying the company's claims of privilege is legal because it was also required by the Los Angeles Superior Court overseeing the Aliso Canyon litigation.[80] In the first instance, SoCalGas has laid out extensively why the requirement is unlawful in its own AFR, and incorporates those arguments here.[81] Cal Advocates' responses to those arguments are unavailing. The Commission should not simply adopt a requirement because another court, whose orders do not have precedential authority, in another context under different facts has decided to do so. Cal Advocates' justification for such an order based on the supposed precedent of an order of the Los Angeles Superior Court violates the doctrine of stare decisis.[82] Further, SoCalGas has argued extensively why compelled testimony of this nature would put attorney work product "at issue" and therefore risk broad waiver of privilege. Cal Advocates offers no analysis or reasoning to the contrary.

III. CONCLUSION

Based on the foregoing, Cal Advocates' AFR should be denied.

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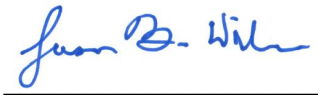
[78] *Costco Wholesale Corp. v. Sup. Ct.* (2009) 47 Cal.4th 725, 739.
[79] *Blue Ridge Ins. Co. v. Sup. Ct.* (1988) 202 Cal.App.3d 339, 345; *see also Catalina Island Yacht Club v. Sup. Ct.* (2015) 242 Cal.App.4th 1116, 1120 ["May a trial court find a waiver of the attorney-client privilege and work product doctrine when the objecting party submits an inadequate privilege log that fails to provide sufficient information to evaluate the merits of the objections? No."].
[80] CalPA AFR p. 15.
[81] SoCalGas's AFR, pp. 42-47.
[82] *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1148 ["Trial court decisions are not precedents binding on other courts under the principle of stare decisis."].

Respectfully submitted,



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