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 (U 904 G) MOTION TO STAY RESOLUTION ALJ-391, TO SHORTEN TIME TO RESPOND TO MOTION, AND EXPEDITED RULING ON THE MOTION

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I. INTRODUCTION

Pursuant to § 1735 of the Public Utilities Code (Pub. Util. Code), and the California Public Utilities Commission's (CPUC or Commission) Rules of Practice and Procedure 11.1, Southern California Gas Company (SoCalGas) moves the Commission: (1) to stay the Resolution ALJ-391 (Resolution) in its entirety, or in the alternative, to partially stay enforcement of the Resolution as it pertains to information protected by SoCalGas's First Amendment rights and to the requirement that "[i]f providing a privilege log, SoCalGas must concurrently provide Cal Advocates with a declaration under penalty of perjury by a SoCalGas attorney that the attorney has reviewed the materials associated with the privilege claim and that such privilege claim has a good faith basis in the law, and the specific legal basis, with a citation, for withholding the document"; (2) to shorten parties' response time to December 28, 2020; and (3) for an expedited ruling before December 31, 2020. This motion is necessary to (1) protect SoCalGas against the potential misuse of the Public Advocates Office's (Cal Advocates) investigatory power to punish entities with contempt, fines, and sanctions merely for expressing their political viewpoints; and (2) protect against unlawful, forced waiver of the attorney-client privilege and work product.

As discussed in detail in the Application for Rehearing (AFR), the Resolution correctly concludes that SoCalGas "enjoys the same First Amendment rights as any other person or entity" and that "[i]ts status as a regulated public utility does not impair or lessen its rights."[1] However, this conclusion rings hollow in light of the Resolution's legal errors. The impact of the errors is forced waiver of those rights entirely which contravenes the U.S. Supreme Court's assurances of a utility's First Amendment rights in *Pacific Gas & Elec. Co. v. Public Utilities Com.* (1986) 475

[1] Resolution ("Res."), p. 14.

U.S. 1 and *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York* (1980) 447 US. 530, 533. Absent a stay of the entire Resolution while there are still unanswered questions about the purpose of Cal Advocates' joint prosecution with Sierra Club and the circumstances around CPUC decisionmakers' knowledge before the relevant motions and subpoena were granted, SoCalGas will suffer serious or irreparable harm. SoCalGas would be required to turn over vast amounts of information including its First Amendment-protected information, to Cal Advocates and be forced to waive its attorney-client and work product privileges before the Commission can issue its final decision on the AFR and, if necessary, a final resolution from the appellate court. Cal Advocates would be able to see SoCalGas's First Amendment-protected information and will be forever privy to the information. In addition, SoCalGas would be forced to waive its attorney-client privilege and work product. Neither harm can be undone even if the Commission or the Court of Appeals later finds that the Resolution violates SoCalGas's First Amendment rights.

There are legitimate concerns raised by SoCalGas and California Legislators that Cal Advocates is using its investigation as pretext for a different agenda: to single out and punish SoCalGas for the viewpoint it holds regarding promoting natural gas, renewable gas, and other clean fuels as an integral part of the State's decarbonization plans. These concerns are further validated by the Common Interest, Joint Prosecution, and Confidentiality Agreement (Joint Prosecution Agreement) between Cal Advocates and Sierra Club whereby those two entities have apparently been jointly investigating and prosecuting SoCalGas for its "anti-electrification" activities since August 2019.[2] This Joint Prosecution Agreement was not disclosed to SoCalGas until nearly a year later, and there is no indication or response to the Legislators thus far by Cal Advocates that it notified any of the relevant CPUC decisionmakers (ALJ, Executive Director, or Commissioners) so that they would know about its existence and relevance to these disputed issues despite numerous opportunities and filings with the Commission on matters covered by the agreement.[3] Further, if Sierra Club through the Joint Prosecution Agreement has coopted or

[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 had numerous opportunities to disclose the existence of the Joint Prosecution Agreement and did not do so in this non-proceeding, R.19-01-011, and R.13-11-005. In the non-proceeding alone, Cal Advocates did not disclose the Joint Prosecution Agreement when it filed its October 7, 2019 Motion to Compel the DR-05 Contract, June 23, 2020 Motion for Contempt and Sanctions, July 9, 2020 Motion

inappropriately taken advantage of Cal Advocates' statutory authority for its own benefit (authority that was specifically granted to Cal Advocates as a division of the Commission and that no other intervenor is entitled to), it would be an abuse of Pub. Util. Code § 309.5. Under Pub. Util. Code § 309.5, Cal Advocates was created and funded by ratepayers for the purpose of fulfilling its statutory obligation to obtain the lowest possible rates for ratepayers.[4] To perform its duties, Cal Advocates was specifically granted discovery authority that no other intervenor is entitled to.[5] Sierra Club, on the other hand, has no obligation to ratepayers and should not be permitted to make use of the discovery powers under Pub. Util. Code § 309.5. These same concerns were raised by State Legislators in a letter to Commission President Batjer. In the letter, the Legislators expressed concerns over the legitimacy of the Joint Prosecution Agreement and whether Cal Advocates "new focus," which appears to be "to aid the Sierra Club in their effort to seek the ban of natural gas usage in California even though it is proven to be favored by customers as a fuel source because of the affordable cost," violates its stated mission under Pub. Util. Code § 309.5.[6] They also raised questions about who knew about the Joint Prosecution Agreement, when they knew about it, and whether there are other similar agreements.[7] It is unclear whether the decisionmakers (the ALJ, Executive Director, or Commissioners) would have made the decisions they made had they known about the existence and intent of the Joint Prosecution Agreement. More specifically, for example, if the ALJ had known about the agreement, she may not have granted the original Motions to Compel or the Executive Director may not have granted the SAP subpoena. These questions remain unanswered and should be addressed before SoCalGas is required to comply with any part of the Resolution. Moreover, whatever response Cal Advocates provides to the Legislators may prompt further questions by them, the Commission, or other relevant stakeholders responsible for government and political accountability, and thus warrants this broader stay of the Resolution. If such new, material facts arise, the Commission should allow time and set a schedule for further briefing in SoCalGas's AFR docket to address what may be additional legal errors that could not have been known or

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to Compel the Confidential Declarations and Fines, and November 19, 2020 Comments on Draft Resolution ALJ-391. All of these motions are the subject of this Resolution.

[4] Cal. Pub. Util. Code § 309.5(a), (f).

[5] Cal. Pub. Util. Code § 309.5(e).

[6] 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, p. 2.

[7] *Id*.

addressed by SoCalGas before Rule 16.1(a)'s 30-day AFR deadline after the final Resolution's mailing date. Such additional facts may perhaps be unknown even as far back as when the SAP subpoena was first issued.

In the alternative, if the Commission does not grant SoCalGas's request to stay the Resolution in its entirety, the Commission should, at the very least, grant a partial stay of the Resolution as it pertains to (1) information protected by SoCalGas's First Amendment rights and (2) to the requirement that an attorney provide a declaration under penalty of perjury in connection with a privilege log. Aside from the potential impropriety of Cal Advocates' investigation and the Joint Prosecution Agreement, Cal Advocates has failed to meet its heavy evidentiary burden under the strict scrutiny standard applied by the courts to overcome SoCalGas's fundamental First Amendment rights of free association and free speech. As such, SoCalGas should not be required to produce information protected by its First Amendment rights. In granting this alternative partial stay, Cal Advocates will still have access to all of the remaining information required by the Resolution and all the information Cal Advocates needs for its stated investigation into whether SoCalGas misused ratepayer funds for political activities. Therefore, Cal Advocates will not be prejudiced by the partial stay.

As part of the partial stay, the Commission should also stay the requirement that "[i]f providing a privilege log, SoCalGas must concurrently provide Cal Advocates with a declaration under penalty of perjury by a SoCalGas attorney that the attorney has reviewed the materials associated with the privilege claim and that such privilege claim has a good faith basis in the law, and the specific legal basis, with a citation, for withholding the document."[8]

To be clear, SoCalGas does not object to providing a reasonable privilege log, where appropriate. What SoCalGas does object to is this unprecedented requirement of compelled attorney testimony. The requirement is illegal at heart because it puts at issue an attorney's determination of whether something is privileged or not, which violates the attorney-client privilege and the attorney work-product doctrines.[9] By requiring an attorney to testify as to the

[8] Res., p. 24.

[9] The attorney-client privilege in California is codified by the Legislature in the Evidence Code. Evidence Code 954 establishes that "the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . ." Evid. Code § 954. A "confidential communication" means "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence . . . and includes a legal

substance of his or her own legal advice, process, research, and conclusions, it effectively causes the attorney to become a witness against his or her own client. This is an unprecedented invasion of the attorney-client privilege and work product doctrines, which contravenes the will of the Legislature and places an impermissible divide between an attorney and his or her client. The California Supreme Court has concluded that proceedings before the Commission, including in investigations, are "tempered by the attorney-client privilege."[10] Therefore it cannot require this declaration.

For the reasons set forth herein, the Commission should exercise its discretion to stay enforcement of the entire Resolution or, in the alternative, the portion of the Resolution pertaining to information protected by SoCalGas's First Amendment rights and to the requirement that an attorney provide a declaration under penalty of perjury "that the attorney has reviewed the materials associated with the privilege claim and that such privilege claim has a good faith basis in the law, and the specific legal basis, with a citation, for withholding the document" until it issues a final decision on the AFR (and final resolution of a subsequent appeal to an appellate court)

Time is of the essence as Ordering Paragraph 9 of the Resolution requires SoCalGas to comply with the Resolution by no later than January 19, 2021. SoCalGas will be required to produce unprecedented, vast amounts of information including its First Amendment protected information and waive its attorney-client and work product in connection with its privilege log. Therefore, SoCalGas requests that the Commission shorten time for any responses to this motion to December 28, 2020, and requests that the Commission rule on this motion expeditiously—by no later than December 31, 2020. If the Commission does not grant this partial stay by December 31, 2020, SoCalGas will seek emergency relief from the Court of Appeal through a petition for writ of review and request for stay on or about January 4, 2021.

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opinion formed and the advice given by the lawyer in the course of that relationship" Evid. Code § 952. As the California Supreme Court has held, "[T]he privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." *Costco Wholesale Corp. v. Sup. Ct*. (2009) 47 Cal.4th 725, 732. The attorney work-product doctrine, meanwhile, is a discovery rule codified in the Code of Civil Procedure that protects any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." Code Civ. Proc. §2018.030(a). Such work product is "not discoverable under any circumstances." *Id.* This is referred to as "absolute" work product.

[10] *Southern Cal. Gas Co. v. Public Util. Comm.* (1990) 50 Cal.3d 31, 38.

II. THE COMMISSION SHOULD STAY ENFORCEMENT OF THE RESOLUTION OR, IN THE ALTERNATIVE, PARTIALLY STAY THE PORTION THAT PERTAINS TO INFORMATION PROTECTED BY THE FIRST AMENDMENT AND REQUIREMENT THAT AN ATTORNEY PROVIDE A DECLARATION UNDER PENALTY OF PERJURY IN CONNECTION WITH A PRIVILEGE LOG.

Pub. Util. Code § 1735 governs requests for stay in connection with an application for rehearing. Section 1735 states:

> An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except *in such cases and upon such terms as the commission by order directs*.[11]

"Under section 1735, the Commission's authority to grant a stay is discretionary. In exercising this discretion, the Commission normally considers the following factors: (1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; (2) whether the moving party is likely to prevail on the merits of the application for rehearing; (3) whether the public interest warrants a stay through balancing harm to the moving party if the stay is not granted and the decision is later reversed, versus the harm to other parties if the stay is granted and the decision is later affirmed; and (4) other factors relevant to the particular case."[12] This standard is applied "flexibly."[13] As described below, each of these factors weighs in favor of granting a partial stay of the Resolution.

A. SoCalGas Will be Seriously or Irreparably Harmed if it is Required to Disclose its First Amendment-Protected Information and to Waive its Attorney-Client Privilege and Work Product.

SoCalGas will suffer serious or irreparable harm as it would be required to turn over vast amounts of information including its First Amendment-protected information, and forced to waive its attorney-client privilege and work product before the Commission can issue its final decision on the AFR and, if necessary, obtain a final resolution from the appellate court. Once this happens, Cal Advocates would be able to see SoCalGas's First Amendment-protected information. Even if the Commission or the Court of Appeals later reverses the Resolution entirely or finds that the Resolution violates SoCalGas's First Amendment rights, the harm

[11] Cal. Pub. Util. Code § 1735 (emphasis added).
[12] D.19-01-022 at 4.
[13] D.04-08-056 at 3.

would already have occurred.[14] Cal Advocates cannot unsee what it has already seen. In addition, SoCalGas would be forced to waive its attorney-client privilege and work product. Similarly, even if the Commission or the Court of Appeals later finds that the Resolution violates California law concerning forced waiver of the attorney-client and work product privileges, the waiver would have already occurred and cannot be undone.

As further detailed in the AFR, the information at issue here is SoCalGas's entire SAP database including information protected under SoCalGas's First Amendment rights to free association and free speech. The information would reveal the identities of organizations and individuals and the specific advice of political consultants who are advising SoCalGas as it exercises its right to petition the government and advocate for its position, publicly and privately, to decarbonize its gas system and molecules. These activities are 100% shareholder funded. The Resolution requires SoCalGas to turn over this information which is contained in: (1) SoCalGas's consultant contracts that are 100% shareholder funded (DR-05 Contracts); (2) the confidential consultant declarations that were submitted under seal in support of SoCalGas's Motion for Reconsideration/Appeal (Confidential Declarations); and (3) SoCalGas's SAP Database (SAP Database).

As explained in the AFR, the Resolution correctly concludes that "SoCalGas enjoys the same First Amendment rights as any other person or entity." However, this conclusion rings hollow in light of the Resolution's numerous legal errors. One of the Resolution's errors is that it incorrectly found that SoCalGas failed to establish a First Amendment harm. In doing so, the Resolution misinterpreted and applied an incorrect heightened standard that requires SoCalGas to show past harm.[15] The United States Supreme Court and California Supreme Court have made clear that evidence of future "chilling" is sufficient for a *prima facie* case of First Amendment

[14] *In re Search of Elec. Commc'ns in the Account of chakafattah@gmail.com at Internet Serv. Provider Google, Inc*., 802 F.3d 516, 529 (3d Cir. 2015) [noting that "no remedy assuages disclosure" in the context of a "subpoena requesting attorney-client privileged documents . . . (because) you cannot 'unring the bell'"]); *Maldonado v. Super. Ct*. (2012) 53 Cal.4th 1112, 1137 [holding that if constitutionally-protected material is disclosed, "the disclosure itself breaches the privilege, the 'cat is out of the bag,' and the damage cannot be undone"]; *Fed. Trade Comm'n v. Qualcomm Inc*., 935 F.3d 752, 756 (9th Cir. 2019) (finding that there is a probability of irreparable harm where the injunction requires a party to enter new contractual relationships and renegotiate existing ones on a large scale and imposes fundamental business changes that cannot be easily undone should party prevail on appeal).

[15] Res., at pp. 12-13.

harm.[16] As SoCalGas and its consultants have stated in sworn declarations, forcing SoCalGas to turn over information that discloses its political thinking and strategies would have (and would further worsen) a chilling effect on their associations and speech. The forced disclosure of SoCalGas's political activities that are funded 100% below-the-line (i.e., accounts that generally are not recovered from ratepayers) "has altered how SoCalGas and its consultant, partner or vendor associates with each other, and it has had a chilling effect on these associations."[17] Further, "SoCalGas will be less willing to engage in contracts and communications knowing that its non-public association and communications with consultants, business partners and others on SoCalGas's political interests may be subject to compulsory disclosure." In addition to SoCalGas's own statements as to how the forced disclosure will affect its willingness to associate and engage with its consultants, several consultants explain how forced disclosure will affect their willingness to associate with SoCalGas. One consultant states:

> In the future, I will be less willing to engage in communications knowing my non-public association with SoCalGas and private discussions and views may be (and have been) disclosed simply because of my association with SoCalGas in connection with its efforts to petition the government on political matters related to, among other things, rulemaking. I am also seriously considering whether to associate with SoCalGas in [the] future regarding ballot initiatives, rulemaking, or any other political process due to the breach of privacy that comes with disclosure of my thoughts, processes, decisions, and strategies.[18]

As a result of the Resolution's errors, it affords no actual First Amendment protection for a regulated utility. Assuming the Commission or the appellate court eventually finds that the Resolution violates SoCalGas's First Amendment rights, SoCalGas will be seriously or irreparably harmed because SoCalGas would have been forced to turn over the protected information under threats of sanctions and fines. Once SoCalGas's First Amendment information is turned over to Cal Advocates, that bell cannot be unrung.

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[16] *See Buckley v. Valeo* (1976) 424 U.S. 1; *Britt v. Sup. Ct.* (1978) 20 Cal.3d 844; *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147.

[17] Declaration of Andy Carrasco in support of Southern California Gas Company's Motion to Quash Portion of the Subpoena to Produce Access to Certain Materials in Accounting Databases and to Stay Compliance Until the May 29th Completion of Software Solution to Exclude Those Protected Materials in the Databases ("Carrasco Decl.") ¶ 6 (May 22, 2020).

[18] Decl. No. 6 in support of Mot. for Reconsideration/Appeal, ¶ 5.

Moreover, SoCalGas alerted the Commission a year ago that Cal Advocates has used two Administrative Law Judge's (ALJ) Rulings, dated September 10, 2019 and November 1, 2019, as a sword to force SoCalGas and other utilities to turn over information protected under the First Amendment or face threats of contempt, sanctions, and fines.[19] SoCalGas also warned that absent the full Commission's intervention (by granting SoCalGas's Emergency Motion to Stay or Motion for Reconsideration/Appeal), Cal Advocates' incursion on SoCalGas's constitutional rights will continue unabated.[20] Unfortunately, this has come to fruition, not only with the discovery at issue in the Resolution (i.e., SAP Database, and confidential consultant declarations), but also in discovery Cal Advocates has continued to serve outside of a proceeding.[21] Furthermore, it is important to note that the two ALJ Rulings on September 10 and November 1 did not provide any reasoning to support its orders, yet Cal Advocates has interpreted and expanded those two ALJ Rulings to hold that SoCalGas is forbidden from asserting any further First Amendment rights.[22] The Resolution's erroneous application of First Amendment precedent, unless stayed, will worsen and further embolden Cal Advocates by

[19] Southern California Gas Company's Motion for Reconsideration/Appeal to the Full Commission Regarding Administrative Law Judge's Ruling in the Discovery Dispute Between Public Advocates Office and Southern California Gas Company, October 7, 2019 (Not in a Proceeding), ("Motion for Reconsideration") at 23-25 (December 2, 2019).
[20] *Id.* at 4.
[21] Comment of Southern California Gas Company to Draft Resolution at 8 fn. 10. (November 19, 2020).
[22] Below are samples of how Cal Advocates has interpreted and used the September 10 and November 1 ALJ to prevent SoCalGas from asserting its First Amendment Rights.

- Public Advocates Office's Response to Southern California Gas Company's Motion for Reconsideration/Appeal to the Full Commission Regarding Administrative Law Judge's Ruling in the Discovery Dispute Between Public Advocates Office and Southern California Gas Company, October 7, 2019 (Not in a Proceeding) (December 17, 2019) at 7. ("The Public Advocates Office attempted to resolve the issue informally, noting to SoCalGas that ALJ DeAngelis's September 10, 2019 ruling implicitly rejected SoCalGas' grounds for refusing to answer Question 8. The Public Advocates Office sought to avoid the extreme waste of Commission resources in seeking judicial intervention on a legal issue that had already been decided.")
- 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) at 4-5. ("It is also entitled to these documents consistent with the November 1, 2019 ALJ Ruling rejecting SoCalGas' First Amendment Association Claims.") and ("SoCalGas intentionally refuses to comply with Cal Advocates June 26, 2020 demand to provide the information on the basis of its First Amendment association claims which were rejected in the November 1, 2019 ALJ Ruling.")

arming it with the ability to force SoCalGas (and other utilities)[23] to turn over more information protected under its First Amendment or be subject to contempt, sanctions and/or fines further exacerbating the serious or irreparable harm to SoCalGas.

In addition, the Resolution's requirement that "[i]f providing a privilege log, SoCalGas must concurrently provide Cal Advocates with a declaration under penalty of perjury by a SoCalGas attorney that the attorney has reviewed the materials associated with the privilege claim and that such privilege claim has a good faith basis in the law, and the specific legal basis, with a citation, for withholding the document" would result in a forced waiver of the attorney-client and work product privileges.

As noted earlier, this unprecedented requirement of compelled attorney testimony is illegal at heart because it puts at issue an attorney's determination of whether something is privileged or not, which violates the attorney-client privilege and the attorney work-product doctrines.[24] Again, by requiring an attorney to testify as to the substance of his or her own legal advice, process, research, and conclusions, it effectively causes the attorney to become a witness against his or her own client. Because the California Supreme Court has concluded that proceedings before the Commission, including in investigations, are "tempered by the attorney-client privilege,"[25] the Commission cannot require this declaration.

A detailed look at the requirement demonstrates the many ways it contravenes the law. Most importantly, it compels testimony of "a SoCalGas attorney" regarding the attorney's legal conclusions about the utility's privilege claims. Such compelled testimony effects a forced waiver of privilege, which can occur via implied waiver when "the client has put [an] otherwise privileged communication directly at issue" in an action.[26] Where "a client has placed in issue the *decisions, conclusions, and mental state of the attorney who will be called as a witness to*

[23] While it is possible that Cal Advocates can use the Resolution to force other utilities to turn over First Amendment protected material, based on the Common Interest Agreement between Cal Advocates and Sierra Club, it appears they are only targeting SoCalGas because its preferred pathway to decarbonization (one that includes decarbonizing the gas system) does not align with what appears to be Cal Advocates and Sierra Club's preferred all-electrification pathway. *See* Common Interest, Joint Prosecution, and Confidentiality Agreement between the Public Advocates Office and the Sierra Club, dated August 30, 2019.
[24] *Supra*, n.9
[25] *Southern Cal. Gas Co. v. Public Util. Comm.* (1990) 50 Cal.3d 31, 38.
[26] *Id.* at p. 40.

prove such matters," a party impliedly waives its attorney-client privilege.[27] Similarly, waiver of work product protection "is generally found . . . by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the protection."[28] This is precisely what the Commission has ordered SoCalGas to do—have its attorney present testimony as a witness, via a declaration, regarding his or her conclusion that "such privilege claim has a good faith basis in the law, and the specific legal basis, with a citation, for withholding the document. client privilege and work product by requiring an attorney sign a declaration to accompany a privilege log." This requirement puts SoCalGas in a catch-22 situation: either it must agree to force waiver of privileges or forego asserting privileges on its documents.

Cal Advocates' demand for this illegal declaration appears to be a further attempt to create a means to punish SoCalGas for its viewpoints by forcing the waiver of its attorney-client and attorney work product privileges. Cal Advocates' attempts to stifle SoCalGas's viewpoint must be rejected.

B. SoCalGas is Likely to Prevail on the Merits for the Reasons Explained in the AFR.

SoCalGas is likely to prevail on the merits. SoCalGas's AFR explains in detail the Resolution's numerous factual and legal errors in concluding that Cal Advocates' investigation into SoCalGas's 100% shareholder funded First Amendment-protected political activities, contracts, and the identities of its consultants met the strict scrutiny applied by courts when a fundamental First Amendment or Article I right is at stake. As such, SoCalGas will not repeat the detailed arguments here but highlight the Resolution's legal and factual errors.

The Resolution made numerous errors in its First Amendment analysis. For example, the Resolution runs afoul of the holding in *Britt v. Superior Court,* and erred in finding that SoCalGas did not make a *prima facie* showing of arguable First Amendment infringement by requiring SoCalGas to show past harm to meet the "chilling" test. Instead, future "chilling" is sufficient to present a *prima facie* case. Additionally, the Resolution failed to recognize that the

[27] *Id.* at pp. 42-43 [quoting *Mitchell v. Sup. Ct.*, (1984) 37 Cal.3d 591, at p. 605] [emphasis added by Court]. Relatedly, where an attorney verifies a discovery response as a corporate officer or agent, such verification constitutes a limited waiver of the attorney-client and work product privileges. *Melendrez v. Sup. Ct.* (2013) 215 Cal.App.4th 1343, 1351.
[28] *DeLuca v. State Fish Co.* (2013) 217 Cal.App.4th 671, 688.

harm presented in SoCalGas's declarations is identical to the harm presented in the declarations submitted by appellants in *Perry v. Schwarzenegger*, which the Ninth Circuit found to be a sufficient *prima facie* showing.[29]

Moreover, the Resolution failed to establish how Cal Advocates' discovery into SoCalGas's ***shareholder-funded*** political activities is rationally related to Cal Advocates' investigation of whether SoCalGas misused ***ratepayer funds*** for improper political activities. There is no evidence to support the Resolution's finding that Cal Advocates' demand for the DR-05 Contracts "is narrowly tailored to seek specific contracts and information about SoCalGas' potential use of ***ratepayer funds*** for lobbying activities"[30] since the DR-05 Contracts are not ratepayer-funded. Further, there is no evidence to no support the finding that access to SoCalGas's entire SAP Database (including both above-the-line and below-the-line accounts) is narrowly tailored for Cal Advocates to obtain information related to whether SoCalGas improperly charged political activities to above-the-line accounts. The Resolution did not even analyze how SoCalGas's proposed customer software solution to access its SAP Database is not an appropriate least restrictive means.

Finally, the Resolution's imposition of a declaration requirement for the privilege log imposes a forced waiver of the attorney-client and attorney-work product privilege. Moreover, it runs afoul of the legislative mandates for these privileges.

C. The "Balance of Harm" Weighs in Favor of Granting the Stay

The balance of harm is much greater to SoCalGas if the stay is not granted and the Resolution is later reversed, than the harm to Cal Advocates if the stay is granted and the Resolution is later affirmed. As discussed above, if the stay is not granted and the Resolution is later reversed, SoCalGas would be forced to turn over its First Amendment protected information

[29] *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147.1163-1164.
[30] Res., pp. 20-21.

concerning the identity of SoCalGas's associations, the scope of the First Amendment-protected political activity, and the amounts spent on such activities. Once SoCalGas is forced to turn over the information, Cal Advocates will see SoCalGas's First Amendment-protected information and the harm is done. Cal Advocates cannot unsee what it has already seen and the "chilling" effect described by SoCalGas and its consultants above, and in more detail in the AFR, would have occurred. In addition, once SoCalGas's attorney is required to submit a declaration in support of the privilege log, the attorney-client privilege and work product would be waived as to the attorney's work in connection with the privilege log. This has the potential to open up to investigation and cross-examination not only the single attorney's legal conclusions, but also the facts upon which the attorney has based those conclusions, including attorney-client privileged communications with the client. Both of these harms are serious and irreparable and cannot be undone.

On the other hand, if the stay is granted and the Resolution is later affirmed, the harm to Cal Advocates is that it would have to wait for the Commission's decision on the AFR. Cal Advocates will not be prejudice since there is no procedural schedule that will be affected by a narrow stay of the Resolution. The Resolution stated that the Commission may conduct further investigation of SoCalGas' conduct through the appropriate enforcement division within the Commission and, based on any resulting recommendation such enforcement division, the Commission may elect to initiate an order instituting investigation. If so, Cal Advocates may decide to participate in such a proceeding…"[31] This has yet to occur. Therefore, the balance of harm here overwhelmingly favors granting the stay of the Resolution until the unanswered question revolving around the potential impropriety of Cal Advocates investigation and the Joint Prosecution Agreement can be addressed.

To the extent the Commission grants the alternative partial stay requested by SoCalGas, the balance of harm further tilts towards SoCalGas. Cal Advocates will not be prejudiced by the partial stay of the Resolution since it will still be able to access 100% of SoCalGas's above-the-line accounts and below-the-line accounts except for SoCalGas's First Amendment-protected information that is in dispute in the AFR while the stay is in place.[32] The information protected

[31] Res., at p. 25.
[32] Pursuant to the Resolution, Cal Advocates will not have access to information protected by SoCalGas's attorney-client privilege and work product.

by SoCalGas's First Amendment rights concern less than 20 vendors out of approximately 2,300 vendors for which expenses are recorded below-the-line. This is all the information that Cal Advocates needs for its investigation into the alleged misuse by SoCalGas of ratepayer funds for political activities. Moreover, not having the attorney declaration in connection with the privilege log will have no bearing on Cal Advocates actual investigation into the alleged misuse of ratepayer funds by SoCalGas.

D. Other Relevant Factors Support the Stay

The Commission should consider as part of this motion and AFR the dangerous precedent that this Resolution could set in empowering Cal Advocates, an advocacy agency with no enforcement authority, to misuse its investigatory power to punish entities with contempt, fines and sanctions merely for the content of their political views. SoCalGas has increasing concerns that it is in fact Cal Advocates' goal now to single out and punish SoCalGas for the viewpoint it holds regarding promoting natural gas, renewable gas, and other clean fuels as an integral part of the State's decarbonization plans, and not to investigate the allocation of ratepayer funds.[33]

As evidenced by the Joint Prosecution Agreement, Cal Advocates and Sierra Club are jointly investigating SoCalGas's "anti-electrification activities."[34] Sierra Club has made no secret of its position against natural gas and renewable natural gas and its position that 100% electrification is the only viable pathway to meet the State's climate goals.[35] SoCalGas disagrees with Cal Advocates and Sierra Club's characterization of its activities as "anti-electrification." SoCalGas supports electrification measures in conjunction with other measures that will allow

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[33] Indeed, a discrepancy between an articulated state interest and the effect of the law—or here, discovery request—can raise suspicion of content or viewpoint discrimination. *See First Nat. Bank of Bos. v. Bellotti* (1978) 435 U.S. 765, 785 ["The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders."].

[34] Joint Prosecution Agreement, *supra* note 2.

[35] *See,* e.g., July 1, 2019 Sierra Club Press Release, We Can't Get Beyond Carbon with Gas, available at https://www.sierraclub.org/michael-brune/2019/07/beyond-carbon-no-fracked-shale-fossil-gas; June 7, 2019 Sierra Club Press Release, Sierra Club and Bloomberg Philanthropies Partnership to Continue Under Beyond Carbon Initiative, available at https://www.sierraclub.org/press-releases/2019/06/sierra-club-and-bloomberg-philanthropies-partnership-continue-under-beyond#:~:text=Oakland%2C%20CA%20--%20Today%2C%20Michael%20Bloomberg%20unveiled%20his,plants%20announcing%20retirement%20since%20Donald%20Trump%20was%20elected; October 9, 2019 Sierra Club Press Release, Electrification for Climate Resiliency, available at https://www.sierraclub.org/articles/2019/10/electrification-for-climate-resiliency.

the State to succeed in meeting its ambitious climate goal.[36] SoCalGas's mission is to build the cleanest, safest, and most innovative energy company in America. SoCalGas intends to be a leader in decarbonization. Working towards clean fuels alongside clean molecules as part of a diverse energy mix in the State is essential to meeting SoCalGas's obligation to safely, reliably, and affordably serve its customers. For example, SoCalGas has established a voluntary goal of 5% core customer deliveries from renewable natural gas by 2022, and that goal ramps up to 20% by 2030.[37] To accomplish this, SoCalGas has proposed a voluntary Renewable Gas Tariff for its customers, which was approved yesterday[38] and was also supportive of SB 1440 (Hueso) which would create a "Renewable Gas Standard."[39] SoCalGas (along with San Diego Gas and Electric Company) has also outlined several demonstration projects to ultimately move toward blending hydrogen into the pipeline system.[40] SoCalGas's mission is not inconsistent with the Commission's approach 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…."[41] A recent Commission staff report recognizes SoCalGas's

[36] Declaration of Jason H. Wilson, December 18, 2020, Exhibit 2- November 13, 2020 letter from SoCalGas to Senator Dianne Feinstein and Representative Nanette Barragán, p. 2.
[37] *See* R.19-01-011, March 11, 2019 Opening Comments of Southern California Gas Company on Order Instituting Rulemaking Regarding Building Decarbonization at 13. Pursuant to Rule 13.9 of the CPUC's Rules of Practice and Procedure, SoCalGas requests that the Commission take judicial notice of this publicly available document.
[38] *See* A.19-02-015, October 27, 2020 Proposed Decision adopting Voluntary Pilot Renewable Natural Gas Tariff Program, approved December 17, 2020 (Decision number currently unavailable). Pursuant to Rule 13.9 of the CPUC's Rules of Practice and Procedure, SoCalGas requests that the Commission take judicial notice of this publicly available document.
[39] *See*, e.g., R.13-02-008, May 2, 2019 Opening Comments of SoCalGas, SDG&E, PG&E, and Southwest Gas on Alternate Decision Regarding Biomethane Tasks in Senate Bill 840. Pursuant to Rule 13.9 of the CPUC's Rules of Practice and Procedure, SoCalGas requests that the Commission take judicial notice of this publicly available document.
[40] *See* A.20-11-004, Application of Joint Application of Southern California Gas Company (U904G), San Diego Gas & Electric Company (U902G), Pacific Gas And Electric Company (U39G), and Southwest Gas Corporation (U905G) Regarding Hydrogen-Related Additions or Revisions To The Standard Renewable Gas Interconnection Tariff. Pursuant to Rule 13.9 of the CPUC's Rules of Practice and Procedure, SoCalGas requests that the Commission take judicial notice of this publicly available document.
[41] Declaration of Jason H. Wilson, December 18, 2020, Exhibit 1 - August 7, 2020 letter from CPUC President Marybel Batjer to Assemblymembers Patrick O'Donnell, Jim Cooper, and Blanca Rubio, p. 1.

gas system is a key component of the State's decarbonization goals.[42] Further, California State Legislators have also expressed concerns over the legitimacy of the Joint Prosecution Agreement and whether Cal Advocates "new focus" which appears to be "to aid the Sierra Club in their effort to seek the ban of natural gas usage in California even though it is proven to be favored by customers as a fuel source because of the affordable cost."[43] The State Legislators also raise questions of who knew about the Joint Prosecution Agreement and when.[44] The Joint Prosecution Agreement was entered into on August 30, 2019. Cal Advocates did not disclose the Joint Prosecution Agreement in any of its filings in this non-proceeding matter,[45] or in any other filings in proceedings that it apparently pertains to.[46] It is unclear whether it disclosed the Joint Prosecution Agreement to the Executive Director before the Executive Director issued her subpoena (it was not disclosed in the declaration by Cal Advocates to support the issuance of the Subpoena).

SoCalGas is concerned that because it does not endorse the same pathway to decarbonization as Cal Advocates (and the Sierra Club), Cal Advocates (and the Sierra Club) have chosen to investigate SoCalGas's political activities and threaten it with fines and sanctions. Such a scheme would be ripe for abuse and violate fundamental First Amendment rights. Governmental regulators are not allowed to misuse their investigatory power to punish entities with contempt, fines, and sanctions merely for expressing their political viewpoints. The Constitution does not permit such viewpoint discrimination. Moreover, if Sierra Club through the Joint Prosecution Agreement has coopted or inappropriately taken advantage of Cal Advocates' statutory authority for its own benefit (authority that was specifically granted to Cal

[42] R.20-01-007 Track 1A: Reliability Standards and Track 1B: Market Structure and Regulations – Workshop Report and Staff Recommendations, dated Oct. 2, 2020, available at https://www.cpuc.ca.gov/gasplanningoir (Workshop Report). For example, CPUC Staff's recommendations expressly "call[] attention . . . 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." Workshop Report at 8.

[43] 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, p. 2.

[44] *Id*. at 2.

[45] Cal Advocates had numerous opportunities to disclose the existence of the Joint Prosecution Agreement and did not do so. In the non-proceeding alone, Cal Advocates did not disclose the Joint Prosecution Agreement when it filed its October 7, 2019 Motion to Compel the DR-05 Contract, June 23, 2020 Motion for Contempt and Sanctions, July 9, 2020 Motion to Compel the Confidential Declarations and Fines, and November 19, 2020 Comments on Draft Resolution ALJ-391.

[46] The Joint Prosecution Agreement covers R.19-01-011, R.13-11-005, A.17-10-008.

Advocates as a division of the Commission and that no other intervenor is entitled to), it would be an abuse of Pub. Util. Code § 309.5 and a violation of SoCalGas's fundamental First Amendment rights. This is particularly concerning since Cal Advocates investigation is being conducted outside of a proceeding, where the Commission's Rules of Practice and Procedure do not apply. SoCalGas has been concerned about the lack of transparency around Cal Advocates' investigation and requested on July 17, 2020 that the Commission open an Order Instituting Investigation (OII) of SoCalGas and a statewide Order Instituting Rulemaking (OIR) to provide an open forum governed by established rules of practice and procedure.[47] Surprisingly, Cal Advocates opposed the OII and OIR and instead requested that the Commission simply sanction SoCalGas for asserting its Constitutional rights.[48] This further begs the question of whether Cal Advocates really is interested in investigating the alleged misuse of ratepayer monies by SoCalGas or to punish SoCalGas for its political viewpoints. The Commission should stay the entire Resolution until these important unanswered questions are addressed.

Finally, due to the important Constitutional rights at issue, if the Commission does not grant a stay of the entire Resolution or, in the alternative, a partial stay before December 28, 2020, SoCalGas has no choice but to seek preservation of its fundamental rights via the Court of Appeal. SoCalGas intends to seek emergency relief from the Court of Appeal through a petition for writ of review and request a stay on or about January 4, 2021. This will necessitate further expedited briefing by the parties and the Commission to the Court of Appeal potentially in a very compressed span of time. Granting this limited stay will conserve the parties,' the Commission's, and the Court of Appeal's resources in not having to address additional motions to stay on an expedited basis.

III. THE COMMISSION SHOULD GRANT SOCALGAS'S REQUEST TO SHORTEN TIME TO RESPOND TO THIS MOTION AND EXPEDITED RULING ON THIS MOTION.

Rule 11.1 of the Commission's Rules of Practice and Procedures states that responses to a motion must be filed within 15 days of the date that the motion was served. Rule 11.1 also provides that nothing in the rule prevents the Commission or the ALJ from ruling on a motion

[47] Declaration of Jason H. Wilson, December 18, 2020, Exhibit 4 - July 28, 2020 letter from Cal Advocates to President Batjer, Commissioners Randolph, Shiroma, Guzman-Aceves, and Rechtschaffen.
[48] *Id.* at p. 2.

before responses are filed. This motion requests the partial stay of Ordering Paragraph 9 of the Resolution which requires SoCalGas to comply within 30 days of the effective date of the Resolution, January 19, 2021.

If the Commission does not grant SoCalGas's motion, to preserve its Constitutional rights, SoCalGas intends to seek emergency relief from the Court of Appeal. SoCalGas intends to file a petition for writ of review and request a stay on or about January 4, 2021 to allow the Court of Appeal sufficient time to rule on the emergency relief before SoCalGas is required to comply with the Resolution and risk being subject to sanctions. Therefore, SoCalGas cannot wait for the normal motion timeline to run its course and requires an expediting ruling on this motion.

As such, SoCalGas requests that the Commission shorten time for any responses to this motion to December 28, 2020, and requests that the Commission rule on this motion expeditiously—by no later than December 31, 2020.

IV. CONCLUSION

For the foregoing reasons, SoCalGas respectfully request that the Commission grant this motion to shorten time for responses to December 28, 2020, grant SoCalGas's request for an expedited ruling on this motion, and grant a stay of the entire Resolution or, in the alternative, grant a partial stay as it pertains to information protected by SoCalGas's First Amendment rights and to the requirement that an attorney provide a declaration under penalty of perjury "that the attorney has reviewed the materials associated with the privilege claim and that such privilege claim has a good faith basis in the law, and the specific legal basis, with a citation, for withholding the document" by no later than December 31, 2021.

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Respectfully submitted,

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