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 OPPOSITION TO PUBLIC ADVOCATES OFFICE MOTION FOR AN EXPEDITED RULING (1) ORDERING SOUTHERN CALIFORNIA GAS COMPANY TO PRODUCE CONFIDENTIAL DECLARATIONS NO LATER THAN JANUARY 6, 2021 AND FOR AN EXTENSION TO RESPOND TO THE UTILITY'S APPLICATION FOR REHEARING OR IN THE ALTERNATIVE TO GRANT AN ADVERSE PRESUMPTION AGAINST THE UTILITY OR FOR THE COMMISSION TO PROVIDE THE CONFIDENTIAL DECLARATIONS AND (2) TO SHORTEN TIME TO RESPOND TO MOTION

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I. INTRODUCTION

On December 21, 2020, the Public Advocates Office ("Cal Advocates") requested an extension of their January 4, 2021 deadline to respond to SoCalGas's Application for Rehearing of ALJ-391 ("AFR"), to avoid "requiring Cal Advocates staff to work through both the Christmas and New Year holidays" and "so that staff may spend the remaining days of this difficult year with family."[1] On December 22, 2020, ALJ DeAngelis granted Cal Advocates' request, extending their deadline to January 11, 2021. Under that pretext, however, Cal Advocates instead spent its time preparing a frivolous, procedurally improper motion, which it filed on December 30, 2020, seeking to alter the Commission's Resolution outside of the appropriate practice, and seeking immediate action by this Commission and forcing SoCalGas's attorneys and staff to work over the New Year holiday to prepare this response. The next day, Cal Advocates further served not one, but *two* data requests *on New Years' Eve* to SoCalGas, one of which it served after hours while demanding a shortened response date of January 6, 2021—only three business days later.[2]

[1] Declaration of Jason H. Wilson, concurrently filed Jan. 4, 2021 ["Wilson Decl."], Ex. D [Email of Traci Bone to Regina DeAngelis, et al. Subject "Extension Request for Responses to SoCalGas' Rehearing Application of Resolution ALJ-391, Dec. 21, 2020].

[2] Wilson Decl., Exhs. B-C. Cal Advocates has in fact served *three* new data requests since the Resolution was voted out on December 17, 2020, which are attached as Exhibits A-C of the Wilson Decl.

Setting aside this discourtesy,[3] Cal Advocates' motion, styled a "Motion for an Expedited Ruling (1) Ordering Southern California Gas Company To Produce Confidential Declarations No Later Than January 6, 2021 And For An Extension To Respond To The Utility's Application For Rehearing Or In The Alternativive [sic] To Grant An Adverse Presumption Against The Utility Or For The Commission To Provide The Confidential Declarations And (2) To Shorten Time To Respond To Motion" (the "Motion"), should be rejected as both procedurally defective and substantively erroneous.

First, the Motion violates General Order 96-B, General Rule 8.2, and CPUC Rule 16.4, as it is actually a Petition for Modification of the Resolution, and not a CPUC Rule 11 motion.

Second, the Motion claims to introduce new evidence, but does not adhere to the requirements to do so under CPUC Rule 16.4(b).

Third, the Motion requests an extension—yet again—of Cal Advocates' response to the AFR—but this is the *second* extension request Cal Advocates has made without meeting and conferring as required under CPUC Rule 11.6.

Fourth, the Motion claims that the public disclosure of certain lobbyist names under California's Political Reform Act is dispositive to the First Amendment issue in this case. It does not cite a single case for this proposition—and indeed, it cannot, because it is substantively incorrect. The information SoCalGas seeks to protect under its First Amendment rights is broader than the identities of its consultants and includes the scopes of detailed activity contemplated by the contracts and shown in invoices, the duration of the agreements, and the amounts and specific nature of SoCalGas's expenditures on political activities. Even if a person or entity's identity were publicly disclosed in one context (such as public lobbying efforts), it does not waive SoCalGas's First Amendment associational privacy rights in its detailed strategy, messaging, and other efforts. Finally, the Confidential Declarations are testimony in support of broader categories of First Amendment-protected information, which has been previously described in the record as encompassing information for fewer than twenty vendors. The

[3] *See, e.g.*, The State Bar of California, California Attorney Guidelines of Civility and Professionalism (Jul. 20, 2007), Section 7(d): "An attorney should not serve papers to take advantage of an opponent's absence or to inconvenience the opponent, for instance by serving papers late on Friday afternoon or the day preceding a holiday.", https://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf; *see generally* The State Bar of California, Attorney Civility and Professionalism, "Civility Toolbox," at https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Attorney-Civility-and-Professionalism.

Confidential Declarations are representative and only on behalf of three consultants. As previously described, SoCalGas has claimed First Amendment protection over fewer than twenty vendors.[4] Therefore, Cal Advocates' claim that the disclosure of a single name or set of names would be dispositive of SoCalGas's entire First Amendment argument is incorrect.

Finally, the urgency of the Motion is itself a red herring: Cal Advocates has believed that the Confidential Declarations might have overlap with SoCalGas's reporting obligations regarding paid lobbyists since at least July 24, 2020, when it included the issue in its Reply to SoCalGas's Opposition to its Motion to Compel and for Fines related to the Utility's Intentional Withholding of Confidential Declarations.[5] If these facts were so urgent, why did Cal Advocates not investigate whether the identities of the consultants were disclosed publicly sooner? In fact, the proper time for making those arguments would have been in opposition to SoCalGas's Motion for Reconsideration and Appeal or in the various motions that it filed prior to the Resolution, which Cal Advocates did not do. Cal Advocates may not now inappropriately introduce new information into the record at the AFR stage.[6] Essentially, Cal Advocates' request is for the Commission to force SoCalGas to waive its First Amendment rights prematurely to cure Cal Advocates' procedural error, which is entirely improper. Moreover, if the Commission is going to re-open the record and allow new facts to be introduced, it should set a briefing schedule on the AFR and grant SoCalGas's extension to comply with the Resolution, to avoid serious and irreparable harm to SoCalGas's rights.

II. ARGUMENT

A. The Procedurally Defective Motion Should Be Rejected.

1. The Motion Must Be Filed As a Petition for Modification.

In the Motion, Cal Advocates claims to have suddenly discovered that it cannot respond to SoCalGas's AFR because it lacks access to the Confidential Declarations, and therefore cannot argue that the declarants may have been disclosed in other contexts as paid lobbyists for SoCalGas. It therefore seeks that the Commission revise the Resolution's Order that "SoCalGas

[4] *See* AFR, p. 37 [describing "less than 20 vendors out of approximately 2,300 vendors for which expense[s] are recorded below-the-line and protected by SoCalGas's First Amendment rights"].
[5] Public Advocates Office Reply To Southern California Gas Company's Opposition To Motion To Compel And For Fines Related To The Utility's Intentional Withholding Of Confidential Declarations, July 24, 2020 [hereinafter "Reply"], at p. 4.
[6] CPUC Rule 16.1(c).

is directed to produce the information and documents requested by Cal Advocates . . . including the confidential declarations submitted under seal in support of SoCalGas' December 2, 2019 motion for reconsideration/appeal . . . within 30 days of the effective date of this Resolution[,]"[7] and instead order SoCalGas to produce the unredacted Confidential Declarations to Cal Advocates on January 6, 2021.[8] This is Cal Advocates' *fourth* attempt, beyond the original DR-05, to seek information SoCalGas seeks to protect under the First Amendment, and its *second* motion seeking the Confidential Declarations after having failed to oppose the original Motion to Seal.[9]

As clearly stated in CPUC Rule 16.4(a): "A petition for modification asks the Commission to make changes to an issued decision."[10] General Order 96-B makes it clear that a petition for modification is the proper vehicle to seek modification of a resolution as well as a decision.[11] General Rule 8.2 provides that "[a]ny person may petition for modification of a resolution and respond to such petition to the same extent and under the same procedures as provided, with respect to Commission decisions, by Rule 16.4 of the Commission's Rules of Practice and Procedure . . . ."[12] Such a petition is placed on the Daily Calendar and granted or rejected by the Commission.[13]

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[7] Resolution ALJ-391, at p. 1; *see also* Order No. 8, Resolution ALJ-391, at p. 33.
[8] Mot. at p. 1.
[9] On December 2, 2019—that is, over one year ago—SoCalGas filed a motion to seal four confidential declarations submitted to the Commission in support of SoCalGas's Motion for Reconsideration/Appeal (the "Confidential Declarations"), which seeks reversal of an ALJ ruling erroneously compelling the production of First Amendment-protected documents. The Confidential Declarations contain the identities of consultants and vendors who have performed work in furtherance of SoCalGas's 100% shareholder-funded political activities and the descriptions of those activities. As the declarations attest, the disclosure of the declarations containing the description of activities to Cal Advocates will have a chilling effect on the consultants and SoCalGas's First Amendment rights. Instead of opposing the motion to seal at the time it was filed, Cal Advocates filed its response to SoCalGas's Motion for Reconsideration/Appeal addressing the substance of the Confidential Declarations, then waited seven months before seeking to compel production of the Confidential Declarations and $1 million in fines against SoCalGas for filing them conditionally under seal. Having now received a Resolution ruling on those motions, Cal Advocates seeks again to compel immediate turnover of the Confidential Declarations, in spite of the timeline set out by the Resolution and SoCalGas's pending extension requests.
[10] CPUC Rule 16.4(a).
[11] *See* GO 96-B, General Rule 1.1: "The General Rules [of GO 96-B] also govern applications for rehearing and petitions for modification of a resolution regardless of whether the resolution was initiated by advice letter."
[12] GO 96-B, General Rule 8.2.
[13] GO 96-B, General Rule 8.2: "The Industry Division should ensure notice of the petition for modification appears on the Daily Calendar,"; *see also* GO 96-B, General Rule 3.5: "'Disposition' refers

It is clear that Cal Advocates requests the Commission "make changes to an issued [Resolution]."[14] Instead of bringing its request as a petition for modification, however, Cal Advocates has brought it as a simple Rule 11.1 motion.[15] Such a motion, however, cannot be used to unilaterally modify a Resolution that has already been voted on by the Commission. Instead, it is clear under General Order 96-B, General Rule 8 that the only proper mechanisms to modify the substantive provisions of a resolution are an application for rehearing or a petition for modification.

The ALJ, to whom Cal Advocates has directed its motion, lacks the power to modify the Resolution via a Rule 11 motion. And, the procedure for a petition for modification contains more robust procedural due process requirements with which Cal Advocates must comply. Cal Advocates is seeking to shortcut the ordinary petition for modification procedure via an inappropriate motion. Therefore, the Motion should be rejected, and Cal Advocates should seek its relief via the appropriate procedure.

2. The Motion Fails To Submit A Declaration Of Alleged New or Changed Facts.

As a petition for modification, under CPUC Rule 16.4, "[a]ny factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit."[16] Cal Advocates alleges that "it is possible that the declarants' or their employers' identities may not, in fact, be confidential."[17] Whether or not this fact is dispositive (and as discussed below, it is not), Cal Advocates cannot inappropriately supplement the record by making bald, conclusory statements; nor can it simply append new documents to its filing. Cal Advocates must, instead, comply with Rule 16.4, which it has failed to do. Therefore, the Motion is improper.

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to the grant or rejection (including modification) of the relief requested in an advice letter. The disposition of an advice letter will be by resolution adopted by the Commission . . . ."

[14] CPUC Rule 16.4.

[15] *See* CPUC Rule 11.1.

[16] CPUC Rule 16.4(b).

[17] Mot. at p. 2.

3. Cal Advocates Has Failed to Meet and Confer Twice on Its Extension Requests.

The Motion also includes Cal Advocates' second request for an extension of time to respond to SoCalGas's AFR. And much like Cal Advocates' first request, this second request violates Rule 11.6 because Cal Advocates has failed—yet again—to "make a good-faith effort to ask [SoCalGas] to agree to the extension" and to "report the results of this effort when it makes its request."[18] All that is required is a modicum of good faith meet-and-confer, which Cal Advocates refuses to do. Instead, Cal Advocates' repeated emails and motions run roughshod over this Commission's rules and procedures. And clearly, Cal Advocates' purported justification for its earlier extension was false, as it simply used the extra time to write the instant Motion and two data requests. The Commission should therefore deny any further extension of time on this basis.

B. The Motion Fails on the Merits Because the FPPC Reports Do Not Vitiate SoCalGas's First Amendment Rights.

Even assuming arguendo that the Motion was proper, which it is not, the Motion starts from an erroneous premise: that the First Amendment does not protect any information but names, and if a name is made public for lobbying work done on behalf of SoCalGas in another context, all First Amendment protection of SoCalGas's private political association with that entity regarding its private activity, strategy, and messaging is waived. No such premise exists in the law.

The Motion's claim that a name being disclosed on a public FPPC report vitiates all SoCalGas's First Amendment protections is necessarily false—even if a name were disclosed,[19] the associated scope of detailed activity, nature of the expenditures, and of course documents and communications that might disclose SoCalGas's "strategy and messages" are still protected. The fact that an organization is associating with another entity or person for political purposes is worthy of protection, including when there is a financial relationship between that organization

[18] CPUC Rule 11.6; *see* Wilson Decl. Exhs. D-E [correspondence from Cal Advocates to ALJ requesting extension with no meet and confer verification].

[19] The Motion focuses specifically on Marathon Communications and Imprenta Communications Group, Mot. at pp. 2-3, over whose contracts SoCalGas has not asserted a First Amendment right. Further, as the Commission can itself verify, neither of those groups are declarants of the Confidential Declarations.

and the entity or person promoting its policy message.[20] But beyond mere identities of *who* is associating with whom, courts have repeatedly held that organizations may not be forced to disclose "strategy and messages" that advance a political viewpoint, because those organizations have a right to associate and exchange such ideas in private.[21] 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. By contrast, the FPPC reports contain comparatively little information. 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. Thus, 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.

Furthermore, Cal Advocates' argument that the FPPC reports of public lobbying activity would cause or force waiver of *all* SoCalGas's First Amendment rights in its *internal* political strategy would arguably render the FPPC reports facially unconstitutional, because they would not be "narrowly tailored" to meet a compelling state interest in regulating *public* speech.[22]

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[20] *Buckley v. American Constitutional Law Foundation, Inc.* (1999) 525 U.S. 182, 199-200, 204 [shielding the names of persons paid to disseminate political messages and collect petition signatures, as well as the specific amounts paid to each of them].

[21] *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1162–1163 ["Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private."]; *see also id.* at p. 1152 ["The freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment."]; *AFL-CIO v. FEC* (D.C. Cir. 2003) 333 F.3d 168, 170, 177–178 [compelling public disclosure of internal materials obtained through FEC investigation "intrudes on the privacy of association and belief guaranteed by the First Amendment"].

[22] In *Griset v. Fair Political Practices Com.* (1994) 8 Cal.4th 851, 860, 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.

Under Cal Advocates' reading, SoCalGas's compliance with the FPPC reporting requirements waives all its First Amendment rights as to its associations and activities with those reported entities, including in its private political associations, private political speech, and internal strategy and messaging. This reading would impermissibly infringe on the First Amendment rights the Supreme Court has held SoCalGas enjoys,[23] because it is not narrowly tailored to a compelling state interest.[24]

In addition, it does not logically follow that disclosure of an association in one context—as a paid lobbyist required to be reported to the FPPC—necessarily discloses *all* SoCalGas's associations with that individual or entity, in the context of, for example, the political consultant's non-public internal advice concerning political strategy and messaging to SoCalGas. As the California Court of Appeal has held in an analogous context involving Article 1 rights of associational privacy, 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"—that is, merely because some information is made public does not dispositively waive a constitutional privilege.[25]

Finally, the Confidential Declarations themselves are just testimony in support of protecting the broader categories of information Cal Advocates has sought—and only from three consultants, not every consultant SoCalGas works with or has worked with in the past in order to exercise its First Amendment political rights. As previously described in the record, SoCalGas has claimed First Amendment protection over fewer than twenty vendors[26]—which is of course broader than the three representative vendors who submitted Confidential Declarations. The idea that possible disclosure of a name or subset of names on an FPPC report would "be dispositive to any SoCalGas First Amendment claim,"[27] even if unrelated to lobbying or even unrelated to those Confidential Declarations, makes no sense.

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[23] *See Pacific Gas & Elec. Co. v. Public Utilities Com.* (1986) 475 U.S. 1, 17 n. 14; *Consolidated Edison Co. of New York, Inc. v. Public Service Com. Of New York* (1980) 447 US. 530, 534, n. 1.
[24] *See Griset*, *supra*, 8 Cal.4th at p. 860.
[25] *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.
[26] *See* AFR, *supra* note 4.
[27] Mot. at p. 2.

C. The Commission Should Deny this Artificial Emergency of Cal Advocates' Own Making.

It bears asking why Cal Advocates waited until now to raise this issue. Cal Advocates has known that SoCalGas's consultants might also be paid lobbyists engaged in public-facing political activity on behalf of SoCalGas since it raised the issue itself in its Reply in support of its second Motion to Compel.[28] Cal Advocates failed to pursue this inquiry to get it into the record before the AFR stage, and the record is now closed.[29]

Instead, with its Motion, Cal Advocates is attempting to circumvent SoCalGas's ability to obtain meaningful rehearing of the Resolution and, if necessary, review at the Court of Appeal. SoCalGas has sought a stay of the Resolution through its December 21, 2020 Motion to Stay and December 30, 2020 Rule 16.6 letter. Not because SoCalGas is flouting or disrespecting the Commission's order or Cal Advocates, as Cal Advocates clearly believes, but because SoCalGas is simply attempting to exercise its procedural due process rights fully under the law, to have its claimed First Amendment rights adjudicated ***before*** being forced to disclose them. By contrast, Cal Advocates is trying to speed up the clock, and to goad the Commission into inflicting serious and irreparable harm on SoCalGas before it has the chance to litigate its rights. The Commission should decline to do so. In the alternative, if the Commission is going to re-open the record and allow new facts to be introduced, it should set a briefing schedule on the AFR and grant SoCalGas's extension to comply with the Resolution, to avoid serious and irreparable harm to SoCalGas's rights.

III. CONCLUSION

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

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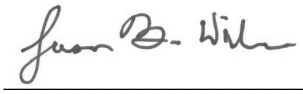
[28] Reply, *supra* note 5, at p. 4.
[29] CPUC Rule 16.1(c).

Respectfully submitted,



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