BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application For Rehearing of Resolution ALJ-391	Application 20-12-011 (Filed December 21, 2020)

SIERRA CLUB RESPONSE TO PUBLIC ADVOCATES OFFICE PETITION FOR MODIFICATION OF RESOLUTION ALJ-391 AND DECISION 21-03-001

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Pursuant to California Public Utilities Commission ("Commission") Rule of Practice and Procedure 16.4(f), Sierra Club submits this response to the Public Advocates Office ("Cal Advocates") Petition for Modification of Resolution ALJ-391 and Decision 21-03-001 ("PFM").[1]

I. INTRODUCTION

Sierra Club strongly supports the PFM and Cal Advocates' requested modifications to Resolution ALJ-391. Since the Commission adopted Resolution ALJ-391, the California Court of Appeal issued *Southern California Gas Co. v. CPUC* (2023) 87 Cal.App.5th 374 ("*SoCalGas v. CPUC*"), Cal Advocates has uncovered multiple instances of SoCalGas improperly booking the costs of its political activities to ratepayer accounts, and SoCalGas has invoked an overly broad interpretation of *SoCalGas v. CPUC* to withhold information necessary for the Commission to determine whether SoCalGas has continued to attempt to charge ratepayers for its political activities. Cal Advocates' requested modifications to Resolution ALJ-391 are necessary for the Commission's oversight responsibilities and to protect ratepayers from continuing to fund SoCalGas' political activities. By making clear that political expenses must not be charged to ratepayer accounts at any time, and that the protections set forth in *SoCalGas v. CPUC* do not apply to expenses initially booked to ratepayer accounts, the PFM's recommended additional findings will ensure that SoCalGas cannot evade regulatory oversight by simply moving—or claiming to move—political expenses into shareholder accounts in the event that they are discovered. Further, given SoCalGas' documented history of misclassifying political expenses into ratepayer accounts and the additional evidence provided in the PFM that

[1] Public Advocates Office Petition for Modification of Resolution ALJ-391 and Decision 21-03-001 (Nov. 22, 2023) ("Cal Advocates PFM"), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M520/K997/520997829.PDF.

SoCalGas expressly lied to the Commission about where some political expenses were booked, the PFM's recommended additional finding that SoCalGas must provide proof that it has rebooked political expenses into shareholder accounts when it claims to have done so is both necessary and reasonable. The PFM's recommended findings will balance SoCalGas' First Amendment rights with those of captive ratepayers who should not be forced to fund SoCalGas' lobbying activities, will affirm the Commission and Cal Advocates' statutory authority to inspect SoCalGas' books "at any time," and will provide clarity regarding the reach of the *SoCalGas v. CPUC* ruling.

II. FACTUAL BACKGROUND: SOCALGAS' HISTORY OF MISCLASSIFYING POLITICAL ACTIVITIES TO RATEPAYER ACCOUNTS

SoCalGas has a history of booking costs of its political activities to ratepayer accounts and, subsequently, moving those costs to shareholder accounts to evade scrutiny when they are discovered. For example, as Cal Advocates explained with regard to the Californians for Balanced Energy Solutions ("C4BES") campaign underlying this proceeding and Resolution ALJ-391, SoCalGas initially booked the campaign's costs to the ratepayer-funded Account 920, which is "an account for administrative and general salary expenses."[2] Despite claiming for months that "[r]atepayer funds have not been used to support the founding or launch of [C4BES]," SoCalGas did not actually move the costs out of Account 920 and into Account 426.4—the shareholder account that the Federal Energy Regulatory Commission ("FERC") has designated for political activities[3]—until an ALJ Ruling ordered SoCalGas to produce the contracts associated with the costs.[4]

Beyond the C4BES campaign, SoCalGas has repeatedly misclassified costs of political activities into ratepayer accounts, moving them to shareholder accounts only after the costs are externally investigated, and often attempting to obfuscate or minimize the extent to which ratepayers funded these activities. In 2017, SoCalGas engaged in a successful lobbying campaign to influence the Los Angeles Metropolitan Transit Authority ("MTA") into procuring

[2] A.22-05-015, Ex. CA-23-E-R, Report on the Results of Operations for San Diego Gas & Electric Company, Southern California Gas Company Test Year 2024 General Rate Case: Political Activities Booked to Ratepayer Accounts, at 17 n.57 (Mar. 27, 2023) ("Castello GRC Testimony"), https://docs.cpuc.ca.gov/PublishedDocs/SupDoc/A2205015;A2205016/6458/513889302.pdf.
[3] 18 C.F.R. § 367.4264.
[4] Cal Advocates PFM at 10.

gas-fired buses instead of electric buses and booked the campaign's costs to ratepayer accounts.[5] Cal Advocates' investigation of this campaign revealed that SoCalGas "routinely misrepresented and minimized the scope and cost of this campaign in response to Cal Advocates' data requests," making it impossible to determine the veracity of SoCalGas' claim that it has removed the costs of this campaign from its test year.[6] For example, SoCalGas initially estimated costs for the campaign in response to a Cal Advocates data request by calculating the time of three employees attending seven meetings for one hour each, but ultimately identified "at least six other SoCalGas employees" involved in the campaign, as well as services of three consultants, a repeated weekly strategy call, additional meetings with MTA officials beyond the seven initially identified, and "significant" social media work.[7]

SoCalGas also improperly booked costs to ratepayer accounts for its campaigns promoting natural gas vehicles at the San Pedro Bay Ports and the Los Angeles World Airports. In its "campaign to convince the San Pedro Bay Ports to modify their Clean Air Action Plan to include natural gas vehicles," SoCalGas engaged in months of planning, funded a coalition, employed "at least four consulting firms," performed direct outreach to elected officials, and engaged in media and communications work, all of which it charged to ratepayers.[8] The campaign also included sponsorship of "We Can," a front group whose consultant costs SoCalGas booked to ratepayer accounts.[9] Despite their attempts to investigate, Cal Advocates "has no evidence that the costs [of this campaign] were ultimately moved to FERC Account 426.4."[10] Similarly, SoCalGas "lobbied the Los Angeles World Airports (LAWA) in 2017 to influence the updates to LAWA's Alternative Fuel Vehicle Requirement Program," initially reporting to Cal Advocates that only two employees engaged in lobbying for a total of one hour of employee time and admitting that the lobbying costs were booked to ratepayer-funded Account 920.[11] Over numerous amendments to its data request response regarding this

[5] Castello GRC Testimony at 6–9.
[6] *Id.* at 6, 9.
[7] *Id.* at 6–9.
[8] Castello GRC Testimony at 10–11.
[9] *Id.* at 12–13.
[10] *Id.* at 13.
[11] *Id.* at 21-22.

campaign, SoCalGas eventually revealed the campaign was substantially larger, involving five employees, a consulting firm, and eight additional "instances of Political Activities."[12]

In the course of its investigation, Cal Advocates also discovered that SoCalGas entered into a contract in 2019 to "produce speakers at public meetings to support SoCalGas' positions."[13] This contract was associated with SoCalGas' "Balanced Energy Work Order," the same work order used for C4BES-related expenses, and its costs were initially booked entirely to the ratepayer-funded Account 920.[14] Speakers associated with the contracted party attended Commission business meetings during the period covered by the contract and advocated in favor of a SoCalGas position—while "some speakers disclosed their association with [the contracted party] . . . none suggested either that [the contracted party] encouraged them to speak, or that SoCalGas paid [the contracted party] to ensure their attendance at the meeting to advocate for the utility's positions."[15] Upon Cal Advocates' investigation, SoCalGas admitted that "this contract was 'for Political Activities [and] was booked to an above-the-line account that was later moved to a below-the-line account.'"[16]

SoCalGas has repeated this pattern with other cost categories as well. For example, in its current General Rate Case ("GRC"), the California Environmental Justice Alliance ("CEJA") identified outside legal expenses for unrecoverable legal matters that SoCalGas improperly charged to ratepayers through Account 923.[17] These expenses included retainer fees for the law firm Reichman Jorgensen LLP "at approximately the same time this law firm filed a lawsuit on behalf of the California Restaurant Association challenging the City of Berkeley's ban on gas connections in new construction" on grounds of federal preemption.[18] To avoid disclosing any information in discovery about the matter for which it had retained this firm, SoCalGas invoked attorney-client privilege, and after CEJA filed a Motion to Compel, SoCalGas moved the costs

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[12] *Id*. at 22.
[13] Castello GRC Testimony at 23–24.
[14] *Id.* at 24.
[15] *Id.* The name of the contracted party is confidential and redacted from the public version of the Castello GRC Testimony to which Sierra Club cites here. The identity of the contractor is not relevant to the question of whether ratepayers should be forced to pay SoCalGas' costs to produce members of the public advocating for SoCalGas' interests at Commission meetings.
[16] Castello GRC Testimony at 24.
[17] A.22-05-015, Opening Brief of California Environmental Justice Alliance, at 94–95 (Aug. 14, 2023) ("CEJA GRC Opening Brief"), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M517/K407/517407509.PDF.
[18] *Id.* at 96.

into a shareholder-funded account in an attempt to evade review, claiming it had discovered "errors" in its legal expense forecasts and that now any questions regarding any of the misclassified expenses were "moot."[19] After CEJA's Motion to Compel was granted, SoCalGas admitted it retained the firm for legal analysis related to laws "potentially affecting natural gas service, including the legality of such laws and actions, such as whether they might be preempted by federal law," the same questions at issue in the Berkeley gas ban litigation.[20]

III. DISCUSSION

A. Resolution ALJ-391 Should be Modified to Make Clear that Political Activities Must Be Booked to FERC Account 426.4 at the Time They Are Incurred.

In *SoCalGas v. CPUC*, the Court of Appeal noted that "[a]ctivities or contracts are preliminarily booked to an above-the-line or below-the-line account, with the final ratemaking decision settled at a [GRC]."[21] SoCalGas has taken an overly expansive view of the ruling, treating its challenged accounting designations as immune from regulatory oversight unless they are ultimately included in its GRC application.[22] SoCalGas' position that compliance with accounting standards can only be scrutinized within a GRC is not supported by the FERC Uniform System of Accounts, relevant case law interpreting the boundaries of FERC accounts, or the California Public Utilities Code. Utilities are responsible for allocating expenses to the appropriate accounts, and the Commission should modify Resolution ALJ-391 to expressly state that utilities are expected to do so at the time the costs are incurred. This modification is necessary in light of SoCalGas' abuse of the *SoCalGas v. CPUC* decision.

The Uniform System of Accounts states unequivocally that utilities' political expenditures "must" be included in Account 426.4.[23] As the D.C. Circuit recently affirmed, "[e]xpenditures for the purpose of influencing the decisions of public officials—whether directly or indirectly—belong in Account 426.4."[24] While some ratepayer accounts to which SoCalGas has improperly booked unrecoverable costs, such as Account 923, are "broad in scope," they

[19] *Id.* at 96, 96 n. 477.
[20] *Id.* at 96–97.
[21] *Southern Cal. Gas Co. v. California Pub. Util. Comm'n*, 87 Cal.App.5th 324, 330 (2023).
[22] *See* PFM at 11 n.45 (citing Reply to Responses to Petition of Southern California Gas Company for Modification of Resolution ALJ-391 and D.21-03-001, at 5 (Nov. 13, 2023)).
[23] 18 C.F.R. § 367.4264(a).
[24] *Newman v. FERC*, 27 F.4th 690, 703 (D.C. Cir. 2022); 18 C.F.R. § 367.4264(a).

"[do] not include expenses 'eligible for Account 426.4 in the first place.'"[25] To the extent that a cost's proper accounting treatment is not clear to SoCalGas at the time the expense is incurred, the Commission should find SoCalGas must err on the side of charging potentially political activities' costs to account 426.4 rather than booking questionable costs to ratepayer-funded accounts.

Allowing SoCalGas to book political costs to any account or accounts that it sees fit on a "preliminary" basis places the burden on the Commission and intervenors to attempt to investigate SoCalGas' improper accounting practices during the course of a GRC, leaving ratepayers bearing the risk of improper practices that are not discovered.[26] The extensive scope and limited time frame of GRCs means that this burden is not only improper but also impractical. For Cal Advocates and intervenors, finding misclassified expenses in a sea of GRC workpapers and discovery responses is like finding needles in haystacks, with the added barriers of discovery objections and with SoCalGas able to move the needles from one haystack to another if it senses they may soon be discovered. Requiring this search to take place during a GRC also takes up Commission and intervenor time and resources that would be better used engaging substantively with GRC issues.

Investigation of misclassifications and accounting anomalies is better suited for Cal Advocates' legislatively-authorized spot audits outside of GRC proceedings.[27] As the PFM rightly notes, the Commission's authority to "at any time, inspect the accounts, books, paper, and documents of any public utility" is not limited to GRC proceedings, and, indeed, is expressly temporally flexible.[28] The suggestion that a utility only needs its expenditures properly allocated among its accounts at the time of a GRC filing obviates the purpose of this statutory provision.

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[25] *Newman v. FERC* at 704.

[26] For example, in SoCalGas' currently ongoing GRC, SoCalGas reclassified more than $4 million of its test year outside legal forecast from ratepayer accounts into shareholder accounts due to classification "errors" it claimed to have discovered after CEJA investigated the expenses through discovery. CEJA GRC Opening Brief at 94. At the evidentiary hearing, the witness responsible for these expenditures explained that "there were mistakes and those mistakes were identified," and that "[s]ometimes we do that on our own; sometimes those are pointed out to us by others." A.22-05-015, Hearing Tr. Vol. 16, at 2809:22–2810:3 (SoCalGas, Barrett) (June 21, 2023). SoCalGas did not record an error log when it addressed the misclassified costs, so the Commission and intervenors cannot "understand the basis for the systemic misclassifications" or assess whether the costs were properly reclassified. CEJA Opening Brief at 94. Had CEJA's discovery inquiry not taken place, it is highly unlikely that SoCalGas would ever have corrected its accounting classifications of these expenses, leaving ratepayers to fund its political activities.

[27] *See* PFM at 15–16 (citing Cal. Pub. Util. Code § 584); *SoCalGas v. CPUC* at 337.

[28] Cal. Pub. Util. Code § 314(a); PFM at 15.

Applying *SoCalGas v. CPUC* so broadly would dramatically constrict the ability of the Commission and Cal Advocates to carry out their statutorily-authorized and mandated oversight duties.

To ensure that SoCalGas understands that it is responsible for compliance with accounting rules on an ongoing basis—not just during the litigation of its GRCs—and to ensure that its political expenditures are booked to Account 426.4 at the time they are incurred, the Commission should adopt the PFM's proposed findings 7, 8, 9, 16, and 17.[29]

B. Resolution ALJ-391 Should be Modified to Find that First Amendment Protections Do Not Apply to Expenses SoCalGas Originally Booked to Ratepayer Accounts.

The Commission should provide clarity about the applicability of the *SoCalGas v. CPUC* ruling on First Amendment privilege with regard to costs originally booked to ratepayer accounts and later moved to shareholder accounts. SoCalGas has cited the *SoCalGas v. CPUC* decision to avoid answering even basic questions about costs moved from above-the-line accounts to below-the-line accounts, such as the vendor name, the date the move occurred, the original and destination accounts to which SoCalGas booked the accounts, and the related work order or internal order associated with the cost.[30] Costs booked to ratepayer accounts at any time are subject to Commission review. Application of First Amendment protection to costs SoCalGas initially allocated to ratepayers will give SoCalGas a consequence-free option to book any costs it wants to ratepayer accounts and then simply move them to shareholder accounts in the event they are discovered, entirely evading scrutiny.

Moving individual expenses to shareholder accounts does not remedy the harm caused to ratepayers by initial misclassification. As ALJ Lakhanpal noted in SoCalGas' current GRC, allocating a cost to an above-the-line account "indicates that SoCalGas was planning to recover these costs as a ratepayer expense," and "[r]emoving the forecast in the current general rate case does not remove the underlying allocation assumptions that SoCalGas considers in rate recovery."[31] Indeed, as Cal Advocates' expert explained in GRC testimony, prior misclassified

[29] PFM, Appendix A at A-1, A-2.
[30] PFM, Attach. G.
[31] A.22-05-015, Administrative Law Judge's Ruling Granting California Environmental Justice Alliance's Motion to Compel, at 3 (Apr. 11, 2023) ("ALJ Ruling on CEJA Motion to Compel"), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M505/K833/505833533.PDF.

costs become "imbedded in historical costs and improperly reflected in the utility's GRC request as routine costs of doing utility business."[32] As discussed in Section (II), SoCalGas has a demonstrated history of charging ratepayer accounts for costs that should be borne by shareholders. Without a system that requires SoCalGas to be accountable for justifying the expenses it allocates to ratepayer accounts, SoCalGas will be incentivized to continue this practice. It may even become emboldened to expand the practice of misclassification, resting on its overbroad interpretation of the protections described in *SoCalGas v. CPUC*. Accordingly, the Commission should adopt the PFM's suggested finding 34, and should make clear that the First Amendment protections for shareholders' expenditures described in *SoCalGas v. CPUC* are not applicable to expenses moved after initially being booked to ratepayer accounts.[33]

C. Resolution ALJ-391 Should be Modified to Require Proof that Charges Have Been Billed to Shareholder Accounts Where There is a Withholding on First Amendment Grounds.

Where SoCalGas seeks to withhold information regarding an expense on the ground that the information is protected by First Amendment privilege as a shareholder expense, the Commission should require SoCalGas to provide evidence that the expense is, in fact, booked to a shareholder account. In addition to the pattern of misclassifying expenses discussed above, the PFM identified the concerning new fact that SoCalGas affirmatively claimed to have moved its C4BES expenses into shareholder accounts for several months before actually doing so.[34] The Commission cannot adequately carry out its duty to protect ratepayers' interests under a "take our word for it" regulatory regime, particularly when faced with evidence that SoCalGas has lied about the allocation of a contested expense to shareholder accounts. To ensure that any protections set forth in *SoCalGas v. CPUC* for shareholder expenses is properly applied, and to ensure that SoCalGas is accountable for the allocation of its expenses, the Commission should adopt the PFM's recommended finding 36.[35]

[32] Castello GRC Testimony at 37–38.
[33] PFM, Appendix A at A-4.
[34] PFM at 9–10 (explaining that SoCalGas claimed repeatedly that ratepayer funds had not been used to fund C4BES, but did not actually move the costs to a shareholder funded account until after an ALJ Ruling ordered SoCalGas to produce the contracts, more than five months later).
[35] PFM, Appendix A at A-4.

D. Cal Advocates' Requested Modifications Are Necessary to Balance SoCalGas' First Amendment Rights with Those of its Captive Ratepayers.

Cal Advocates' requested modifications to Resolution ALJ-391 are needed to ensure that the Commission can properly carry out its duty to protect the interests of ratepayers, including ratepayers' First Amendment rights. As the PFM notes, there is well established case law regarding the Commission's duty to protect ratepayers' "First Amendment interest to be free from compelled speech," by preventing utilities from recovering through rates any "dues, donations, and contributions" that would constitute an "involuntary levy on ratepayers."[36] To the extent that SoCalGas argues its First Amendment rights are burdened by having to prove its political costs are booked to shareholder accounts, that burden is a minimal intrusion by a regulator that is needed to ensure the competing First Amendment rights of ratepayers are not violated. Accordingly, the Commission should adopt the PFM's recommended findings 24, 25, 26, 28, and 29.[37]

IV. CONCLUSION

For the reasons set forth above, Sierra Club recommends that the Commission adopt the recommended changes enumerated in Cal Advocates' PFM.

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Respectfully submitted,

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[36] PFM at 12–13 (citing *Pacific Tel. and Tel. Co. v. CPUC*, 62 Cal 2d 634, 668 (1965)).
[37] PFM, Appendix A at A-3.