BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
09/30/20
04:59 PM

Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Southern California Gas Company with Respect to the Aliso Canyon storage facility and the release of natural gas, and Order to Show Cause Why Southern California Gas Company Should Not Be Sanctioned for Allowing the Uncontrolled Release of Natural Gas from Its Aliso Canyon Storage Facility. (U904G).	I.19-06-016 (Filed June 27, 2019)

RESPONSE OF SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) TO THE SAFETY AND ENFORCEMENT DIVISION'S MOTION TO COMPEL DISCOVERY

F. JACKSON STODDARD
PEJMAN MOSHFEGH
MORGAN, LEWIS & BOCKIUS, LLP
One Market, Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 442-1153
Facsimile: (415) 442-1000
Email: fjackson.stoddard@morganlewis.com
pejman.moshfegh@morganlewis.com

AVISHA A. PATEL
SETAREH MORTAZAVI
555 West Fifth Street, Suite 1400
Los Angeles, California 90013
Telephone: (213) 244-2954
Facsimile: (213) 629-9620
Email: APatel@semprautilities.com
SMortazavi@semprautilities.com

Attorneys for:
SOUTHERN CALIFORNIA GAS COMPANY

SEPTEMBER 30, 2020

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RESPONSE OF SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) TO THE SAFETY AND ENFORCEMENT DIVISION'S MOTION TO COMPEL DISCOVERY

Pursuant to Rule 11.3 of the Commission's Rules of Practice and Procedure ("Rules"), Southern California Gas Company ("SoCalGas") submits this response to the Safety and Enforcement Division's ("SED") September 15, 2020 motion to compel discovery, for sanctions, and to require SoCalGas to explain its basis for confidentiality of information referenced in SED's motion to compel ("Motion"). Consistent with Rule 11.6, on September 23, 2020, the ALJs granted an extension for SoCalGas to respond to the Motion.

I. INTRODUCTION

SED's Motion is procedurally improper, unsupported by law or fact, and frivolous because SED already has the information it seeks through the Motion. SED Data Request 16 ("DR 16") was issued in early 2018 as part of SED's pre-formal investigation, not the instant proceeding—well over a year before initiation of I.19-06-016.[1] Although not acknowledged in SED's Motion,

[1] The Motion comes another year after initiation of this OII, for which the Scoping Ruling ordered SED to identify all alleged violations in its opening testimony due in November 2019. Yet, a primary purpose of

SoCalGas has provided SED every email between SoCalGas and Boots & Coots that is responsive to DR 16 save for *twenty* (20) documents that SoCalGas continues to reasonably and appropriately withhold. Notably, SED does not challenge the basis for SoCalGas' privilege claim over any single specific document remaining on SoCalGas' privilege log—which is the traditional process for challenging assertions of privilege.

Before initiation of this proceeding, the parties met and conferred on SoCalGas' response to DR 16 multiple times. Among issues raised by SED was SoCalGas' privilege log, which detailed documents which had been withheld from production in response to DR 16 based on specifically identified privileges. During the meetings, SoCalGas provided detailed explanations of both the law and the facts supporting its inclusion of communications with Boots & Coots on its privilege logs.

Within this proceeding, SED issued Data Request 93 ("DR 93") which asked SoCalGas, among other things, to take on the monumental burden of slicing and dicing information equally available to SED. As for the requests for information which SED did not already possess, SoCalGas sought clarification and responded to the request as stated by SED in its memorialization of the parties' meet and confer discussions.

Procedurally, as to both the data requests in the Motion, SED failed to satisfy the requirement in Rule 11.3 that parties meet and confer prior to taxing judicial resources. The meet-and-confer requirement cannot be ignored, and for good reason: had SED followed the rule, SoCalGas could have explained the errors in SED's legal argument, pointed out that SoCalGas had responded to the questions as framed by SED (or provided a further response after meeting

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the Motion is not to conduct discovery regarding the violations alleged by SED, but rather to ferret out additional perceived violations similar to Violations 95-320. SED presupposes the Commission will allow such procedural irregularity.

and conferring to reach an agreement), and given SED an opportunity to avoid wasting the Commission's, SoCalGas' and SED's resources. The failure to meet and confer is a violation of Commission rules and a standalone basis for dismissal.[2]

Substantively, the Motion fails for at least three reasons. First, SoCalGas' DR 16 privilege claims over communications on which Boots & Coots personnel were included is appropriate and consistent with California law. California Evidence Code § 952 and related authority provide that the inclusion of third parties in an otherwise privileged communication does not result in waiver of privilege if inclusion of the third party is necessary to further the interest of the client in the consultation or necessary to accomplish the purpose for which the lawyer is consulted by its client. Moreover, even the precedent cited in SED's own Motion establishes that a third party that is not legally an employee but is operating as the "functional equivalent" of an employee may be covered by attorney-client privilege. SED's reliance on contractual boilerplate language disclaiming an agency or employment relationship between SoCalGas and Boots & Coots is irrelevant—as a matter of law, the contractual relationship between two companies has no bearing on the privilege analysis.

Second, SoCalGas has already responded to SED's DR 93 based on the question recorded *by SED itself* in SED's email memorializing the parties' meet and confer discussions. After SoCalGas provided this data request response, SED never notified SoCalGas that it found SoCalGas' response inadequate or nonresponsive (*i.e.*, SED again failed to meet and confer as required by Rule 11.3). Accordingly, SoCalGas did not have an opportunity to address the specific concern SED raises in this Motion. As to the other information SED contends it must have, it is already in SED's possession, as SoCalGas has explained to SED multiple times.

[2] SED also failed to attach to its Motion a proposed ruling, as required by Rule 11.3.

Third, there is no basis for sanctioning SoCalGas for withholding privileged communications. SED's allegation that SoCalGas withheld documents in bad faith is conclusory and unsupported. In addition, SED yet again asks the Commission to sanction SoCalGas for the same conduct that has already been raised as violations in SED's Opening Testimony. Even if SED seeks sanctions only as to the 20 documents remaining on SoCalGas' privilege log, which is unclear in the Motion, a determination here that SoCalGas' withholding is sanctionable would prejudice the adjudication of Violations 95-320, which are asserted in SED's Opening Testimony based on SoCalGas' DR 16 privilege log.[3] As the ALJs have already ruled, "[p]ursuant to the Scoping Memo, the appropriate time and procedural vehicle for SED to allege violations" would have been SED's Opening Testimony, served on November 22, 2019.[4]

For any or all of the foregoing reasons, the Motion to Compel should be denied.[5]

II. BACKGROUND

This discovery dispute arises from SED's continued failure to review and/or understand SoCalGas' responses to SED's discovery. As a prime example, despite SoCalGas' many prior explanations, SED's Motion fails to recognize that as of today there are only 20 communications involving Boots & Coots that SoCalGas continues to withhold from SED on the basis of privilege—all others have been produced.[6] (Stoddard Decl. ¶2). Although the Motion does not

[3] SED does not explain why a motion to compel is appropriate here to adjudicate disputes over SoCalGas' assertion of privilege over the portion of DR 16 that is the subject of this Motion, but why it did not do the same with the portion of DR 16 that is the basis for violations 95-320. Based on SED's Motion, it appears SED's position is that Violations 95-320 would have been avoided altogether if SED had brought a motion to compel and that, as with this Motion, SED's only recourse would have been discovery sanctions, not violations of PUC Section 451 or Rule 1.1.

[4] *Email Ruling Denying, Without Prejudice, The Motion of The Safety and Enforcement Division For an Order to Show Cause*, I.19-06-016 (April 28, 2020).

[5] Additionally, the ALJs should strike the irrelevant, inflammatory, and prejudicial references to the Superior Court ruling. Not only is the Ruling non-precedential, it concerned a different discovery dispute and occurred in a different proceeding in a different forum.

[6] Even among these 20 communications, the majority relate to work that SoCalGas was pursuing in 2017, not Boots & Coots' efforts in controlling well SS-25.

acknowledge this, as further explained below, it is evidenced by the privilege log submitted to SED and the documents produced therewith, and was further clarified by SoCalGas through multiple meet-and-confers. (Stoddard Decl. ¶2, Exh. A.)

While SoCalGas believes that the discovery requests detailed in the Motion are largely answered by simple reference to materials already produced to SED, the long history concerning discovery of communications with Boots & Coots would benefit from some explanation—as SED's original request for Boots & Coots communications predates the opening of this OII—a period of pre-formal investigation that SED itself has referred to as generally irrelevant to Phase 1 of this proceeding.[7] Moreover, because the Motion provides an incomplete background on this issue, SoCalGas provides below a more detailed account, and highlights a number of additional discovery responses that evidence SoCalGas' prior efforts to address SED's questions.

A. SoCalGas' Responses and Productions to SED's Pre-formal Investigation Discovery.

On February 12, 2018, SED issued DR 16. DR 16 sought, among other things, the production of "any and all communications" between SoCalGas and Boots & Coots (DR 16, Question 10), and "any and all communications" between SoCalGas and one of SoCalGas' well control consultants, Don Shackelford (DR 16, Question 12). (SED Mot., Exh. A.) DR 16 also sought documents that called for SoCalGas' communications with the National Labs. (*Id*., DR 16, Question 16.)

After compiling the universe of communications from the relevant document custodians, SoCalGas evaluated the communications for responsiveness, adopting a broad interpretation of

[7] Response of SED to SoCalGas' Motion to Compel Discovery, May 4, 2020, p. 5 ("As stated above, one of the few portions of SED's pre-formal investigation that has any relevance to Phase 1 of his proceeding relates to SED's Opening Testimony addressing SoCalGas' lack of cooperation with SED's pre-formal and formal investigation.").

SED's request for "any and all communications." SoCalGas included within its search parameters documents that were not specifically responsive to SED's requests if they were part of the same document family, as explained below. (Stoddard Decl. ¶ 4.) SoCalGas' broad approach had a number of attributes that SED has seized on to misrepresent the volume of discrete communications that SoCalGas has produced, and those that it continues to withhold today. Notably, the following attributes generally apply to SoCalGas' productions (and documents withheld from production and memorialized in a privilege log):

- **Family-complete.** This means that the universe of documents produced to SED or withheld on the basis of privilege include communications with a "parent-child" relationship. For example, an email that is not responsive to SED's request would generally be included as responsive if an attachment to the non-responsive email *was* responsive to SED's request. As such, on account of the responsive attachment, an otherwise non-responsive document would be produced (or, if marked by a reviewer as attorney-client privilege or attorney work product doctrine, withheld from production and included on SoCalGas' privilege log).

- **Do Not Suppress Email Threads.** This means that SoCalGas produced email communications between SoCalGas and Boots & Coots *that were subsequently forwarded exclusively among SoCalGas employees.* In other words, SoCalGas, in an effort to be as forthcoming with SED as possible, produced documents *containing* a responsive communication, even if other distinct communications in the same email thread were not responsive to DR-16. Significantly, for these types of communications, SoCalGas redacted and logged the non-responsive portions of the communication if *that portion* was privileged, and produced the down-chain responsive portion of the communication. Where multiple custodians were on an email thread identical content may have been produced to SED multiple times.

Since 2018, SoCalGas has explained these characteristics of its productions to SED in responses to various data requests and related meet-and-confers. Concurrently, SoCalGas also explained to SED in great detail the basis for asserting privilege over the communications that are the subject of SED's Motion. (Stoddard Decl. ¶ 5.) For example, on December 21, 2018, SoCalGas provided an extensive response to SED Data Request 34 ("DR 34"), explaining in detail the factual and legal bases for withholding certain communications between SoCalGas and Boots

& Coots, and highlighting that, for a "substantial portion" of the entries on SoCalGas' privilege log, SoCalGas was asserting privilege *only* over portions of the documents that were *not* communications with Boots & Coots. In other words, SoCalGas logged these documents in the spirit of transparency; SoCalGas was not withholding any portion of the document that was actually responsive to SED's data request. (Stoddard Decl. ¶ 5, Exh. B.) As SoCalGas explained:

> There were several instances of email chains involving Boots & Coots that were forwarded internally within SoCalGas, resulting in portions of the email that were responsive to SED's request for communications "between SoCalGas and Boots and Coots," and other portions were not. While these emails were initially produced with "not responsive" redactions over the portions of the communications that were not between SoCalGas and Boots & Coots (and, as a result, not responsive to SED's request), in accordance with further instruction from SED, SoCalGas removed the "not responsive" redactions and re-produced the emails.
>
> In some instances, however, the "not responsive" redactions also covered SoCalGas' attorney-client communications and/or attorney work product. Accordingly, for those documents, the "non-responsive" redactions were replaced with "privileged" redactions. The privileged redactions are accurate and appropriate, as they apply to SoCalGas' attorney-client privileged communications and/or attorney work product. **To be clear, in this category of documents these claims of privilege are <u>not</u> being asserted over portions of the document that contain communications between SoCalGas and Boots & Coots; thus, the privilege claim does <u>not</u> apply to the portion of the document that is responsive to SED's request.** Nevertheless, in the interest of transparency, because these documents contain privileged information that has been withheld from production, SoCalGas listed these documents on the privilege log.

(*Id*., emphasis in original).

Nearly two years later, SoCalGas again described this fact to SED in response to SED Data Request 109 ("DR 109"): "[a]s described in SoCalGas' response to SED's Data Request 34, these documents were 'produced with redactions, but the redacted portion contains no communications between SoCalGas and Boots & Coots. Accordingly, SoCalGas is not asserting privilege over any portion of this document that is responsive to SED's request."[8] The significance of this last point

[8] See, e.g., (Stoddard Decl. ¶ 6, Exh. C [SoCalGas' Response to SED DR 109, Questions 1.b, 2.a, 3.a, 3.c, 4.b, 6.b, 7.a.].)

cannot be overstated. SoCalGas acknowledges that in the intervening two years it has voluntarily withdrawn and produced additional documents to SED, but few of these documents have revealed additional communications with Boots & Coots. Although the Motion states that "today" SoCalGas is withholding "significantly large numbers of documents" (Motion at 2)—as apparent in SoCalGas' most recent privilege log, which includes entries for 78 documents in total, today SoCalGas is withholding as privileged *only 20 documents* that reflect communications between SoCalGas and Boots & Coots. (Stoddard Decl. ¶ 2; Exh. A.[9]) In other words, from the universe of responsive documents, these 20 communications comprise the only remaining communications between SoCalGas and Boots & Coots that SoCalGas has not produced to SED. (*Id.*[10]). SoCalGas' current privilege log describes—in detail—the bases for asserting privilege over these 20 communications, and SED has neither challenged nor requested a meet-and-confer to discuss any concerns about specific privilege claims. (*Id.*, Stoddard Decl. ¶2-3, Exh. A).

B. SED Continues to Seek Discovery of Information Equally Available to SED.

On May 19, 2020, SED served SoCalGas with DR 93, which asks SoCalGas to populate an Excel spreadsheet with detailed information about documents that at some point were withheld

[9] Shortly after this proceeding commenced, SoCalGas informed SED that in light of the apparent conflict of interest involving SED's former program manager, Kenneth Bruno, SoCalGas would not respond to or supplement any data requests originated by Mr. Bruno, or which required SoCalGas to copy Mr. Bruno on its response. Many months later, on April 6, 2020, SED served SoCalGas with Data Request 64 ("DR 64"), which asked SoCalGas, in part, whether it continued to assert attorney client privilege over all of the communications on the most up to date privilege log produced in response to SED DR 16. (DR 64, Question 2.) SED DR 16, issued on February 12, 2018, had copied Mr. Bruno on the transmittal to SoCalGas. As such, SoCalGas did not supplement its response to SED DR 16 until SED served SoCalGas with SED DR 64. Beginning with its initial response to DR 64, and going forward, SoCalGas re-branded all documents previously responsive to DR 16 as "DR 64," and concurrently converted its prior "DR 16 privilege log" to DR 64. For SED's ease of reference, SoCalGas included on its DR 64 privilege log a cross-reference to the prior DR 16 bates numbered documents, for any document remaining on its most current (DR 64) privilege log. (Stoddard Decl. ¶ 2.).

[10] The remaining 66 entries on the privilege log for DR 64 represent communications that do not include personnel from Boots & Coots (and were therefore not responsive to DR 16, Question 10), or represent partially privileged communications where the communication involving Boots & Coots is unredacted and has therefore not been withheld from SED.

as privileged but later were de-designated and produced to SED. (SED Mot., Exh. I.) The 35 requests in DR 93 essentially ask SoCalGas to, among other things, re-evaluate every document appearing on each iteration of SoCalGas' DR 16 privilege log (including those documents already produced to SED), and provide detailed information that is equally available to SED by reference to the previously produced privilege logs themselves and the associated document productions. The instructions laid out by SED in DR 93 specifically highlight the complexity of the request and invite SoCalGas to "request a meet and confer with SED regarding the questions in this data request to the extent SoCalGas does not understand the questions asked, so that SoCalGas can precisely identify any points of confusion and requests for clarification." (*Id.*, SED Mot., Exh. I; (Stoddard Decl. ¶ 7, Exh. D, p.3.) SoCalGas accepted SED's invitation to meet-and-confer regarding DR 93. (*Id.*, Exh. D.) On May 28, 2020, SoCalGas and SED met and conferred to discuss, among other items, DR 93 and the privilege log SoCalGas produced in response to DR 64. (Stoddard Decl. ¶ 8.)

During the May 28 meet-and-confer call, SoCalGas described in detail its understanding that SoCalGas' response and associated privilege log provided in response to DR 64 provided much of the information SED sought in DR 93 and obviated the need for SoCalGas to expend significant resources in preparing a response to DR 93. (Stoddard Decl. ¶ 8; Exh. D, p. 1-2.). SoCalGas learned during this meet-and-confer that SED had neither downloaded nor reviewed SoCalGas' DR 64 privilege log before serving SoCalGas with DR 93, nor had SED reviewed the privilege log prior to the May 28 meet and confer call. (Stoddard Decl. ¶ 9).[11] After pausing to

[11] SED, on multiple occasions, has either lost or failed to review information sent by SoCalGas. (See, e.g., Stoddard Decl. ¶¶ 11-12 (Exh. E, and Exh. F) [email communications reflecting that SED had lost or misplaced discovery produced by SoCalGas].). While SoCalGas has endeavored to cooperate with such requests —such as walking SED step-by-step through privilege logs that should have been reviewed in advance of the meet-and-confer—SoCalGas should not be held responsible for SED's omissions.

allow SED to locate the privilege log that SoCalGas had served two weeks prior, counsel to SoCalGas described that the DR 64 privilege log was comprehensive of the universe of communications involving Boots & Coots, and served to replace prior privilege logs produced in response to DR 16. (Stoddard Decl. ¶ 8.) SoCalGas further explained at length, both generally and in reference to specific entries on its privilege log, how SED could find the information that it requested, including: whether a document was produced in redacted form, when a document was produced, which documents were withheld as completely privileged, and how to cross-reference documents among the iterations of SoCalGas' privilege logs in order to determine whether or not a document had been produced and when. (*Id*.)

Shortly after the May 28 meet-and-confer call, SED confirmed that in light of SoCalGas' explanation of the DR 64 privilege log, it was re-evaluating whether there was "merit to SED continuing to ask all or part of DR 93." (Stoddard Decl. ¶ 10, Exh. D, p. 1.) The next day, however, SED informed SoCalGas that while it "appreciated the time and effort SoCalGas took to explain" the DR 64 privilege log, SED was not withdrawing DR 93. (Stoddard Decl. ¶¶ 10-11; Exh. G, p. 1-2.) In maintaining that SoCalGas should respond to DR 93, SED offered as an example only one aspect of DR 93 that was not addressed by SoCalGas' DR 64 privilege log and the records already in SED's possession: whether documents claimed as privileged by SoCalGas were released outside of SoCalGas and, if so, to whom and when. (*Id.*, Exh. G).

SoCalGas and SED further met and conferred regarding DR 93 on June 11, 2020, during which SoCalGas again reiterated that the vast majority of the information SED sought in DR 93 was equally available to SED by reference to SoCalGas' privilege logs and the associated documents that were produced to SED. (Stoddard Decl. ¶ 14.) Nevertheless, SoCalGas agreed that it would respond to the portion of DR 93 that related to whether documents initially claimed

as privileged by SoCalGas were released to third parties, such as civil litigants, during the time they were withheld from SED. (Stoddard Decl. ¶ 14.) While SoCalGas worked on this portion of DR 93, the status of SoCalGas' response was raised during an omnibus discovery meet-and-confer call on July 31, 2020. After that call, on August 5, 2020, SED sent SoCalGas an email summarizing SED's understanding regarding the parties' agreements during the call. (Stoddard Decl. ¶ 15; SED Mot., Exh. V.) SED's August 5 email meet-and-confer summary stated that:

> SED recalled SoCalGas had represented at the last meet and confer that it would answer the portion of Data Request 93 that asked whether SoCalGas was withholding documents from SED under the grounds of privilege that SoCalGas had provided to other members of the public, such as the civil litigants in the Aliso proceeding.

On August 6, 2020, *the very next day*, SED served SoCalGas with another data request that sought information on precisely the same topic. (Stoddard Decl. ¶ 16; Exh. H.) SED Data Request 110 ("DR 110") asked SoCalGas a series of questions that called for the total numbers of emails and email attachments: (a) "over which SoCalGas asserted privilege" (DR 110, Questions 1 and 3), (b) "over which SoCalGas had asserted privilege at any given point in time, but then released to SED" (DR 110, Questions 2 and 4), and (c) "over which SoCalGas asserted privilege to SED" but had "released publicly (including to civil plaintiffs) during any part of the time SoCalGas asserted privilege to SED[.]" (*Id;* DR 110, Questions 5-6.)

Based on SED's May 29 email and its August 5 email clarification regarding DR 93, together with SED's issuance of DR 110 one day later, SoCalGas understood that the only portion of DR 93 for which SED continued to seek a response was, in SED's words: "whether SoCalGas was withholding documents from SED under the grounds of privilege that SoCalGas had provided to other members of the public, such as the civil litigants in the Aliso proceeding." (SED Mot., Exh. V.) With this understanding, on August 7, 2020, SoCalGas provided a supplemental response to DR 93 and explained that it was not, at that time, withholding from SED any

documents on the DR 64 privilege log that had been produced to a third party. (SED Mot., Exh. Y.) SoCalGas further specified in its Supplemental Response to DR 93 its understanding that SoCalGas' "response address[ed] SED 93 in its entirety." (*Id*.)

Until the filing of the instant Motion, SED never expressed to SoCalGas any concerns regarding SoCalGas' August 7 supplemental response to DR 93, nor SoCalGas' August 18 response to DR 110, which addressed certain questions that were otherwise redundant of DR 93. (Stoddard Decl. ¶ 17.)

III. ARGUMENT

A. SED Failed to Meet-and-Confer with SoCalGas in Good Faith Before Submitting the Instant Motion.

Pursuant to Rule 11.3 of the Commission's Rules, a motion to compel discovery is "not eligible for resolution unless the parties to the dispute have previously met and conferred in a good faith effort to informally resolve the dispute." Indeed, the motion "shall state facts showing a good faith attempt at an informal resolution of the discovery dispute presented by the motion." (Rule 11.3.) The purpose of the meet and confer requirement is to force lawyers to reconsider their positions, and to narrow their discovery disputes to the irreducible minimum, before calling upon the judge to resolve the dispute. *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1016. SED has failed to demonstrate a good faith effort to meet and confer with SoCalGas to resolve these matters informally. Instead, the Motion provides a misleading account of the parties' discussions and makes material misrepresentations and omissions of relevant facts.

First, regarding the request that SoCalGas be compelled to produce the remaining communications with Boots & Coots, the Motion states that "[o]n March 7, 2019, SED met and conferred with SoCalGas regarding DR 16, Q 10, including a specific question asking SoCalGas to reconsider its position on certain email communications between SoCalGas personnel and Boots

& Coots personnel." (SED Mot. at 11.) The basis cited for this 18-month old "meet and confer" is apparently a single email from SoCalGas, dated March 11, 2019, in which SoCalGas' counsel references a "discussion" regarding the communications with Boots & Coots. In that email SoCalGas' counsel agrees to produce certain additional communications, while explaining the basis for withholding others. (SED Mot., EX S.[12]) SED provided no facts showing that SED disagreed with SoCalGas' position at that time, nor did SED challenge the privilege log that SoCalGas produced a few days later on March 15, 2019. More significantly, since then, SoCalGas has produced a more current privilege log, which describes—in even greater detail—the bases for asserting privilege over the remaining 20 Boots & Coots communications. (Exh. A.) SED has neither challenged nor requested a meet-and-confer to discuss any perceived deficiencies in SoCalGas' DR 64 privilege log. (Stoddard Decl. ¶ 3.)

Second, regarding SED's request that SoCalGas be compelled to respond to DR 93, although the parties did meet and confer, SoCalGas understood that it had complied with SED's request, as clarified by SED's August 5 email, and believed that it had satisfied DR 93. While SED claims that it provided its "written understanding" of DR 93 following the parties' May 28 meet and confer, and SoCalGas did not correct SED's understanding as of that date (Motion at 13), SED ignores the clarification of its request in its August 5 meet-and-confer summary email (SED Mot., Exh. V) as well as its submission of the otherwise-redundant DR 110 one day later. Based on these later developments—in SED's own writings—SoCalGas understood that SED had modified and limited its original DR 93 request (as parties do as part of the meet-and-confer process). As such, when SoCalGas provided a supplemental response to DR 93 on August 7, 2020,

[12] In describing this March 11, 2019 email, SED falsely suggests that SoCalGas was withholding "more than 1,000" documents at that time. (Motion at 11-12). However, as evident by SoCalGas' then-current privilege log, SoCalGas was withholding less than half that figure. (See SoCalGas' Response to DR 34.)

SoCalGas affirmed its understanding that the supplemental response addressed "SED 93 in its entirety." (SED Mot., Exh. Y.)

Even with that statement, SED never reached out to SoCalGas with any concerns regarding SoCalGas' supplemental response. (Stoddard Decl. ¶ 17.) SED has therefore failed to satisfy Rule 11.3's requirement to "state facts showing a good faith attempt at an informal resolution of the discovery dispute."[13]

B. As Explained Repeatedly to SED, Attorney-Client Privilege Applies to the Communications Between SoCalGas and Boots & Coots.

SED claims (SED Mot. at 18-24) that the withheld communications between SoCalGas and Boots & Coots are not protected by attorney-client privilege. In making that assertion, SED confuses various tests for aspects of privilege that are not at issue here. In essence, SED asks the ALJs to narrow the scope of privilege in a way that is conflicts with California statutory law and other relevant authority. To the degree that the Commission were to find in favor of SED on this issue, it would constitute legal error.

To begin, the proper analysis for assessing attorney-client privilege for communications with third parties, under California law, is found in California Evidence Code Section 952. Section 952 defines "confidential communication between attorney and client" to mean:

> [I]nformation transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons *other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted*, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."
>
> (Emphasis added.)

[13] SED has also failed to attach to its Motion a proposed ruling. (See Rule 11.3 ["[t]he motion … shall attach a proposed ruling that clearly indicates the relief requested."]

California law explicitly recognizes that the presence of a third party on an otherwise privileged communication does not waive privilege. Instead, and consistent with Evidence Code section 952, "[a] disclosure in confidence of a [privileged communication] . . . , when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of the privilege." Cal. Evidence Code § 912(d). Accordingly, where, as here, SoCalGas' attorneys (or others acting at those attorneys' direction) sought or received information from a third-party contractor (here, Boots & Coots) that was necessary for the accomplishment of the purpose for which the attorneys were consulted by their client SoCalGas, that communication is privileged and may be withheld from disclosure.

Further, some courts, including at the Federal level, test the assertion of attorney-client privilege when third party contractors are part of those communications by assessing whether the contractor is a "functional equivalent" of an employee of the client in the context of the communication. *See* Motion at 20 n.65 (citing *In re Bieter Co.* (8th Cir. 1994) 16 F.3d 929, 937 and *U.S. v. Graf* (9th Cir. 2010) 610 F.3d 1148, 1159 (adopting *Bieter*)).

The extent of the attorney-client privileges as applied to otherwise privileged communications involving non-employees was explored in *Insurance Company of North America v. Superior Court*, 108 Cal. App. 3d 758 (2nd Dist. 1980). In that case, plaintiff sought discovery of memos and notes generated during a meeting between defendant, defense counsel and an officer of an affiliated company (who attended the meeting in his capacity as an accounting/actuarial advisor). The plaintiff argued that the presence of the affiliated company officer caused a waiver of privilege under Evidence Code Section 912. The Court found the privilege was not waived because the affiliated company officer was functionally not an "outsider" of the company *during the meeting*. The Court stated:

> [T]he formal status of Heth in relation to INA was that of a part-time expert consultant and adviser on reserve policies and sound actuarial practices, whose position was equivalent and comparable to that of a full-time expert employed by INA to give actuarial advice. Viewed in this light, Heth's attendance at the conference was that of a temporary employee and consultant to INA present to advise it whether it should modify its reserve policies by reason of Gallagher's legal presentation . . . . We conclude that, factually, there were no outsiders at the meeting of March 11, 1977, that the confidentiality of the proceedings was never breached, that the legal communications remain privileged in that all those in attendance were functioning in the capacity of counsel, officers, agents, or consultants to INA to further the interest of the client INA in the consultation.

Id. at 764–65; *see also Zurich Am. Ins. Co. v. Superior Court*, 115 Cal. App. 4th 1485, 1495–96 (2007) ("California courts have held that 'the privilege extends to communications which are intended to be confidential, if they are made to attorneys, to family members, business associates, or agents of the party or his attorneys on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interest of the litigant.' ") Again, SoCalGas is not arguing that Boots & Coots is or was the functional equivalent of an employee generally, and that is not what the law requires. Only that inclusion of Boots & Coots was reasonably necessary to further SoCalGas' interests in the consultation with its counsel. If Boots & Coots is acting as a "functional equivalent" of an employee for purposes of providing specific information to SoCalGas counsel in the context of an otherwise privileged communication, that does not result in a waiver of the privilege. For example, where counsel was required to consult with Boots & Coots regarding technical information for the purpose of formulating responses to information requests during the Incident. This determination must be made on a communication by communication basis and is not dependent on the nature of Boots & Coots relationship to SoCalGas more generally. The fact that the Master Services Agreement between Boots & Coots and SoCalGas designated Boots & Coots as an independent contractor and not an agent of SoCalGas, is irrelevant for purposes the privilege analysis in this context.

The Motion offers four arguments against SoCalGas' use of attorney-client privilege to shield a limited number of legal conversations with Boots & Coots. The arguments fail because they are based on misreadings of the caselaw and ignore California law(laid out above) that directly answers the question here.

First, the Motion quotes (SED Mot. at 18) an extended passage from *Costco* to support its claim that attorney-client privilege does not apply to communications between SoCalGas and Boots & Coots. According to SED, because Boots & Coots was hired to address the well leak and not to "receiv[e] advice from SoCalGas attorneys," the privilege does not apply. (SED Mot. at 19.) This is a misapplication of *Costco*.

Costco addresses the foundational relationship for establishing an attorney-client relationship—the analysis looks at the "dominant purpose of the relationship" *between the client and the lawyer* to determine if the privilege should apply. Thus, for example, if a law firm were hired to perform a function other than legal representation (*e.g.*, function as claims adjusters), then communications with the client would not be subject to privilege. 47 Cal. 4th at 739-40. This is clear from the sentence preceding SED's extended quotation: "The proper procedure would have been for the trial court first to determine the dominant purpose of the relationship between the insurance company and its in-house attorneys, i.e., was it one of attorney-client or one of claims adjuster-insurance corporation (as some of the evidence suggested)." *Id.* (citation omitted). But that is not the question here. The issue is not whether Boots & Coots was providing legal advice to SoCalGas (obviously, it was not); the issue is whether Boots & Coots was "necessary for the accomplishment of the purpose for which [SoCalGas'] lawyer . . . was consulted." Cal. Evid. Code § 912(d). For example, two of the remaining 20 Boots & Coots communications reflect the same email thread in which SoCalGas' outside counsel sought information from Boots & Coots to

use in response to a data request from Blade relating to the SS-25 gas leak. In this instance, the question sought additional information and clarification regarding the SS-25 kill attempts – information that Boots & Coots was uniquely situated to provide. Boots & Coots' presence on this email was "reasonably necessary" for SoCalGas' counsel to provide informed legal advice on an issue involving litigation strategy. Under the authorities cited above, this email is privileged.[14]

Under such a misapplication of *Costco*, privilege would never apply to any third-party contractor hired by clients. The Motion's characterization of *Costco* is not merely wrong; it misrepresents the law. Indeed, review of the authority cited by SoCalGas in its response to SED 34 in conjunction with a modicum of research would have made this clear.

Second, the Motion briefly argues (Mot. at 19) that SoCalGas has not met its burden of establishing that the communications in question were made during the course of an attorney-client relationship or were of a privileged nature. As set forth in SoCalGas' Response to DR 34, this is incorrect. Time and again SoCalGas has provided SED with both the law on privilege and explanations as to which privilege applies and why. *See supra* at 6-8. At base, though, SED's argument here relies on the assumption—refuted above—that no privilege could ever exist when a third party is involved in the communication. The argument thus begs the question at issue and must be rejected.

Third, the Motion claims (Mot. at 20-21) that SoCalGas waived any privilege by sharing communications with Boots & Coots because it is "a third party who was neither SoCalGas' agent or employee." Even if SoCalGas were solely relying on the "employee equivalent doctrine," which it is not, the Motion gets the law wrong. As shown above, inclusion of a third party in an otherwise privileged communication does not result in waiver if the inclusion of the third party is

[14] This too was explained to SED in DR 34 (Exh. B).

necessary to further the purpose for which the lawyer was consulted. The Motion betrays its confusion by inferring that "an employer-employee relationship [needed to be established] between SoCalGas and Boots & Coots." (SED. Mot. at 21.) Again, SoCalGas is not arguing that Boots & Coots had an employee-employer relationship. It is arguing that with respect to very limited communications, where attorneys were asking for information from Boots & Coots directly in order to provide legal advice, such communication was not a waiver of the attorney-client privilege. California law does not require that the third party be an agent or employee to preserve the privilege.

Most importantly, however, SED's unsupported waiver argument is directly refuted by California Evidence Code §§ 912(d) and 952. This statutory authority specifically excludes waiver of privilege where disclosure to a third party is reasonably necessary to further the interest of the client in the consultation, for the transmission of the information, or the accomplishment of the purpose for which the lawyer is consulted. SoCalGas engaged legal counsel to represent it in litigation stemming from the gas leak at SS-25, a leak in which Boots & Coots played a prominent role after being hired by SoCalGas. It was, of course, reasonably necessary for attorneys for SoCalGas to have communications with Boots & Coots in order for its attorneys to provide legal advice surrounding that event. Those communications remain privileged are thus covered by the statute and SED has no right to see them. Consistent with § 952, the Evidence Code separately provides that "[a] disclosure in confidence of a [privileged communication] . . . , when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of privilege." § 912(d); *see also Ins. Co. of N. Am. v. Sup. Ct.* (1980) 108 Cal.App.3d 758, 765 ("The key concept here is need to know. While involvement of an unnecessary third person in attorney-client communications destroys confidentiality, involvement

of third persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation preserves confidentiality of communication."). The Motion's charge of waiver fails.

Fourth, and finally, the Motion argues (Mot. at 21-24) that SoCalGas has not met the test from *Chadbourne* for asserting attorney-client privilege. But *Chadbourne* does not apply to the situation here at all.[15] *Chadbourne* looked at whether the statement of an employee interviewed by insurance investigators may be covered by privilege by virtue of the statement then being delivered to the employer's attorney. 60 Cal.2d at 727. Unlike *Chadbourne*, the communications at issue here were never communicated to outside investigators—they were for legal purposes only. Because attorney-client privilege is determined by the purpose for which the communications take place, *id.* at 737, the communications with Boots & Coots are thus privileged.

The Motion looks to seize on the portion of *Chadbourne* that says there is no privilege for a witness who is not a codefendant, so long as the witness is not the natural person to be speaking for the corporation. *Id.* That is irrelevant, though, because the issue here is not about communications involving factual statements by Boots & Coots to an outside party with adverse interests, such as an insurer, that SoCalGas is now trying to protect—it is about a very small subset of communications between Boots & Coots, SoCalGas, and SoCalGas' counsel in furtherance of the purpose for which SoCalGas' counsel was engaged. The Motion's reliance on *Chadbourne* is a red herring.

In sum, the Motion's arguments against the applicability of privilege to communications between SoCalGas and Boots & Coots are completely without merit. Because it fails even to acknowledge the pertinent statute and misapplies the precedent related to attorney-client privilege,

[15] SoCalGas cited to *Chadbourne* in prior correspondence on this issue simply for the general proposition

SED's motion must be denied in its entirety. For the same reasons, the Motion's request for sanctions should also be denied. In support of its request for sanctions, the Motion states that it "covers a systemic problem related to how SoCalGas has asserted privilege in bad faith in a fashion that has impaired SED's investigation." (Mot. at 33.) Yet SED does not offer any evidence of SoCalGas' "bad faith" or detail a single instance of how SoCalGas has impaired SED's investigation. More importantly, and as explained at length above, SoCalGas' withholding of the remaining 20 documents that include communications with Boots & Coots is appropriate and consistent with applicable law.

C. SED Has Failed to Demonstrate that The Information It Seeks in DR 93 Is Not Already in SED's Possession.

Where, as here, a party seeks information that is equally available, discovery should be limited on the grounds that such discovery is unduly burdensome and expensive. The Commission's Rule 10.1 provides that "a party may obtain discovery from any other party regarding any matter, not privileged, that is relevant to the subject matter involved in the pending proceeding … unless the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." Indeed, while "the scope of civil discovery is broad, it is not limitless." *Calcor Space Facility, Inc. v. Super. Ct.* (1997) 53 Cal.App.4th 216, 223. Discovery should be limited if it "is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive," "discovery sought is unreasonably cumulative or duplicative," and/or "the likely burden or expense of the proposed discovery outweighs the likely benefit." Cal. Code. Civ. Proc. § 2031.060(f). Accordingly, "[t]he trial court retains the discretion to weigh the burden of compliance against the likelihood of producing helpful information, to *avoid duplicative production*, and to narrow demands if appropriate to balance the reasonable concerns of both

parties." *Volkswagen of America, Inc. v. Super. Ct.* (2006) 139 Cal.App.4th 1481, 1497 (emphasis added); *see also*, *Calcor*, 53 Cal.App.4th at 223 ("[t]rial judges must carefully weigh the cost, time, expense and disruption of normal business resulting from an order compelling the discovery against the probative value of the material which might be disclosed if the discovery is ordered.").

Here, SoCalGas properly objected to DR 93 on the grounds that the request presented unduly burdensome questions, which—as further demonstrated below—sought, and does seek, information that SoCalGas had already provided and was therefore equally available to SED. (Mot., Exh. K.) The Motion does not refute this, and it is plain that the Motion seeks to require SoCalGas to conduct ministerial tasks that SED could conduct itself. The Commission's discovery rules do not have a provision for such delegation of tasks, and SoCalGas should be required to do no more. As detailed below, SED's Motion is guided by its own confusion, which, in turn, informs its failure to demonstrate that the information it seeks is not equally available to SED.

1. SED Misunderstands the Purpose and Function of SoCalGas' Privilege Logs Despite SoCalGas' Several Detailed Explanations.

Much of SED's perceived need for a response to DR 93 stems from SED's misconceptions about SoCalGas' privilege logs, and its failure to understand that the information it seeks is already in SED's possession. SoCalGas has made numerous attempts to explain to SED that the privilege logs SoCalGas has produced to SED in response to DRs 16 and 64 are successive and comprehensive. (Stoddard Decl. ¶¶ 2, 8). That is, in every instance where SoCalGas withdrew privilege over a document and produced that document, an updated privilege log was produced—removing that document from the new log—at the same time the document was produced to SED.[16] This is how a privilege log works—when a document is withdrawn from the log and produced, a diligent party will produce a new privilege log identifying the remaining documents withheld on

[16] SoCalGas has not added any documents to its DR 16 privilege logs since May 2018.

the basis of which privilege. SED, however, appears to be befuddled by this common practice, and for reasons that remain unclear, understands that the document entries in each successive iteration of SoCalGas' privilege logs should be added together (SED Mot. at 29 ["it is not clear that SoCalGas' alleged 'most recent privilege log' is comprehensive of all of the others."]; SED Mot. at 28 ["[i]n total, SoCalGas' privilege logs in response to DR 16 Question 10, as shown by Exhibits C, D, F and G, showed 2,784 entries,[] whereas SoCalGas says it originally marked as privileged only 1,311 documents."]). It is surprising that SED believes that a correct accounting of the universe of privileged documents responsive to DR 16 requires SED to total the number of entries represented on each successive iteration of SoCalGas' privilege log. (*Id*.; SED Mot. at 28, fn 104 and 105.) But the obvious error in SED's math is that by totaling successive iterations of the same privilege log, it is counting the same documents more than once. Again, had SED met and conferred with SoCalGas regarding this motion, this entire confusion could have been addressed without wasting the Commission's resources.

To avoid compounding the confusion created by the Motion, in the next section SoCalGas explains the relation between its privilege logs and how the information SED seeks in DR 93 is equally available to SED (which information has been explained, in detail, to SED more than once).

2. SoCalGas' Privilege Logs and Document Productions Provide the Information Sought in DR 93.

As indicated above, the information that the Motion seeks in DR 93 is equally available to SED by reference to SoCalGas' privilege logs and the associated documents that SoCalGas has produced in response to DRs 16 and 64. To dispel any notion that it is impossible for SED to find information about SoCalGas' current privilege log, prior privilege logs, or detail regarding documents that were previously released to SED, SoCalGas describes below several attributes of

its current DR 64 privilege log—as already explained to SED on May 28 (Stoddard Decl. ¶ 8) and further details how SED can locate information regarding documents previously produced to SED (also explained to SED on May 28).

First, SoCalGas' DR 64 privilege log currently represents 78 entries, of which only 20 reflect privileged communications involving Boots & Coots. (Stoddard Decl. ¶ 2). For SED's ease of reference, where a document appeared on SoCalGas' prior iteration of the privilege log, SoCalGas included a cross reference to the earlier bates numbering convention.

Prod Beg CPUC DR 16	Prod Beg CPUC DR 64	Email From	Email To	Email CC	Email BCC	Parent Date	Description
AC_CPUC_SED_DR_16_0024845	I1906016_SCG_SED_DR_64_0000003	Kundly, Christine M <CKundly@semprautilities.com>	Cho, Jimmie I <JCho@semprautilities.com>	Kitson, Amy <AKitson@semprautilities.com>; Hobbs, Rick <RHobbs@semprautilities.com>; Schwecke, Rodger <RSchwecke@semprautilities.com>; La Fevers, Glenn <GLaFevers@semprautilities.com>; Chechitelli, Frank <FChechitelli@semprautilities.com>		12/15/2015 21:17	Redaction of confidential email communication among SoCalGas personnel reflecting the legal advice and opinions of K. Lee (in-house counsel) regarding a draft services agreement for well control operations and engineering at SS-25.

Documents that are bates numbered on the log indicate that the document was produced to SED in redacted form. Documents that include *both* a SED DR 16 bates number *and* a DR 64 bates number indicate that the document was produced in partially redacted form at the time it was produced with the previous DR 16 bates number, and then reproduced as partially redacted with the DR 64 bates number at the time SoCalGas updated its privilege log. Entries bearing only a DR 64 bates number indicate that the document was previously withheld as completely privileged and was produced in response to DR 64 in partially redacted form, for the first time. (See example below.)

Prod Beg CPUC DR 16	Prod Beg CPUC DR 64	Email From	Email To	Email CC	Email BCC	Parent Date	Description
	I1906016_SCG_SED_DR_64_0000465	La Fevers, Glenn <glafever@enova.com>	Van de Putte, Todd <TVandePutte@semprautilities.com>; Jim LaGrone <Jim.LaGrone@boots-coots.com>	Tracy, Jill <JTracy@semprautilities.com>		9/1/2016 15:41	Redaction of confidential email communication among D. Ng (in-house counsel), SoCalGas personnel, and R. Levine (outside counsel) to facilitate the attorney-client relationship and provision of legal services in connection with a draft response to a Blade data request. Boots and Coots personnel are included in portions of this communication so that D. Ng may have the benefit of their technical expertise regarding this subject.

For the few remaining entries that reflect neither a DR 16 nor DR 64 bates number, the document continues to be withheld as entirely privileged for the reasons described in the description column. (See example below.)

Prod Beg CPUC DR 16	Prod Beg CPUC DR 64	Email From	Email To	Email CC	Email BCC	Parent Date	Description
		Eliasian, Maghdi <maghdi.eliasian@morganlewis.com>	Haley McIntosh <hmmcintosh@jonesday.com>; Frescas, Arturo <AFrescas@semprautilities.com>	Healy, Gregory <GHealy@semprautilities.com>; Ng, Deana M <DNg@semprautilities.com>; Mortazavi, Setareh <SMortazavi@semprautilities.com>		8/18/2016 12:28	Confidential email communications among SoCalGas personnel, H. McIntosh (outside counsel), D. Ng (in-house counsel), S. Mortazavi (in-house counsel), A. Frescas (in-house legal staff), and M. Eliasian (legal staff for outside counsel) in which H. McIntosh (outside counsel) provides information for the facilitation of legal advice, and legal staff provide information in response, regarding Blade data requests concerning well kill operations at Aliso Canyon. Boots and Coots personnel are included in portions of this communication so that H. McIntosh may have the benefit of their technical expertise regarding this subject.

For the documents that have been withheld as entirely privileged, like the example above, SED is able to locate the document on prior iteration(s) of the log using the details provided in the other populated privilege log fields. For example, the above-referenced entry from SoCalGas' current DR 64 privilege log consistently appears on the prior iterations of SoCalGas' log:

March 5, 2018 DR 16 Privilege Log (first privilege log)

Prod Beg CPUC	FROM	TO	CC	BCC	DATE	DESCRIPTION
	Eliasian, Maghdi <maghdi.eliasian@morganlewis.com>	Haley McIntosh <hmmcintosh@jonesday.com>; Frescas, Arturo <AFrescas@semprautilities.com>	Healy, Gregory <GHealy@semprautilities.com>; Ng, Deana M <DNg@semprautilities.com>; Mortazavi, Setareh <SMortazavi@semprautilities.com>		8/18/2016 12:28	Email and Attachments sent internally reflecting legal advice regarding company response to SS-25 leak.

March 15, 2019 DR 16 Privilege Log (last privilege log before updating to DR 64)

Prod Beg CPUC DR 16	Email From	Email To	Email CC	Email BCC	Parent Date
	Eliasian, Maghdi <maghdi.eliasian@morganlewis.com>	Haley McIntosh <hmmcintosh@jonesday.com>; Frescas, Arturo <AFrescas@semprautilities.com>	Healy, Gregory <GHealy@semprautilities.com>; Ng, Deana M <DNg@semprautilities.com>; Mortazavi, Setareh <SMortazavi@semprautilities.com>		8/18/2016 12:28

Similarly, to the extent that SED seeks information about a document in its possession that was previously withheld as privileged, SED could locate additional information about the

document (*e.g.*, the privilege log(s) on which it was previously referenced, and the basis for privilege), by referencing the standard email details available on the face of the document. For example, if SED were trying to find additional information regarding I1906016_SCG_SED_DR_64_0000104, a document produced fully to SED on May 15, 2020, it could locate the document by referring to the sender, recipient, and date/time stamp information on the face of the document to match it with an entry from a prior iteration of SoCalGas' privilege log. Using this information, SED would be able to learn, for example, that the document was previously produced in redacted form as AC_CPUC_SED_DR_16_0006175, and that SoCalGas had described the basis for privilege as follows:

39	This document falls into Category 1. The document was produced with redactions, but the redacted portion contains no communications between SoCalGas and Boots & Coots. Accordingly, SoCalGas is not asserting privilege over any portion of this document that is responsive to SED's request.

Privilege Log Re SED DR 16 [Updated December 21, 2018]

Doc #	Prod Beg CPUC DR 16	Email From	Email To	Email CC	Email BCC	Parent Date
39	AC_CPUC_SED_DR_16_0006175	Wagher, Ed <EWagher@semprautilities.com>	Rodriguez, Sonia <SRodriguez3@semprautilities.com>	Cho, Jimmie I <JCho@semprautilities.com>; Kerns, Barry <BKerns@semprautilities.com>; Ibay, Isaac <IIbay@semprautilities.com>		12/29/2015 18:20

The foregoing is standard legal practice for document productions and privilege logs. While it is not entirely clear how all of the information sought in DR 93 is relevant to this proceeding, as the above examples demonstrate, SoCalGas has already answered SED's questions, or the information SED seeks is otherwise already within SED's possession. Requiring SoCalGas to respond to questions that SED could answer itself with information already in SED's possession invites a slippery slope resulting in gamesmanship and futility.

D. SED's "Point of Confusion 2" Is As Promised—Confusing.

In SED's final argument as to why SoCalGas should be compelled to answer DR 93, SED forces a confused explanation that SoCalGas' response to DR 93 is required because SED cannot fully respond to SoCalGas' Data Request 6 without that information. (SED Mot. at 30-31.) In so arguing, SED states that "SoCalGas [*sic*] gaps in Bates numbers on its logs made it impossible to answer this question," and then provides puzzling references to SED's prior privilege logs. (SED Mot. at 31.) This is yet another red herring designed to misdirect and mislead the ALJs.

SoCalGas' Data Request 6, Question 1 asks SED to identify which, if any, of the 76 documents that serve as the basis for SED's 226 alleged violations against SoCalGas were material to SED's investigation into the October 23, 2015 Aliso Canyon leak. (Stoddard Decl. ¶ 18; Exh I.) Similarly, Question 2 asks that, for any document identified as material, SED identify which violation(s) the document informed. (*Id*.). The questions are based solely on clearly identified documents already in SED's possession—they require no reference to any other materials.

Untethered to any facts or logic, SED apparently uses this section only to make broad-brush allegations that it hopes will color the ALJs' impression: "In short, through SoCalGas' representations in these logs, SoCalGas has given SED factual reason to believe that SoCalGas has withheld and may continue to withhold critical safety information that is material to SoCalGas' actions in response to the leak." It is not clear what "representations in these logs" have given SED reason to believe that SoCalGas has withheld and may continue to withhold "critical safety information that is material to SoCalGas' actions in response to the leak." The Motion identifies none; it merely seeks to provoke with serious but baseless assertions.

E. SoCalGas Has Already Explained the Bases for Confidentiality of Its Third-Party Contracts.

SED's Motion requests that SoCalGas be required to explain why certain information that SED redacted in its Motion had been "appropriately marked by SoCalGas as confidential, or else agree that such information should be made public." (SED Mot. at 1, 33.) The two documents at issue—referenced in SED's Motion as "Exhibit O" (SED Mot. at 6, n. 20), and "Exhibit P" (SED Mot. at 10, n. 28.)—reflect SoCalGas' third-party well services agreements. In a companion filing to the instant Motion, SED references a declaration that SoCalGas provided to SED on March 5, 2018, and asserts that it is not clear from the confidentiality justifications provided by SoCalGas in its declaration that the contracts are appropriately marked confidential. (SED's Motion to File Its Confidential Motion to Compel under Seal ("SED Mot. to Seal") at 1-2.) The problem, however, is that SED is referring to the wrong declaration.

On March 1, 2018, SoCalGas originally produced to SED the two contracts at issue in response to Question 3 of the data request that SED would later relabel as DR 16. Question 3 asked: "[p]lease provide any and all contracts between Southern California Gas Company ("SoCalGas") and Boots and Coots for the years 2010-2018." (SED Mot., Exh. A). On March 1, 2018, SoCalGas produced the two contracts, and concurrently produced a declaration supporting the designation of confidentiality over the two documents. (Stoddard Decl. ¶ 19; Exhs. J, K.) SoCalGas' declaration supporting confidentiality over these contracts plainly states the basis for confidentiality.[17] (*Id*., Exh. K, Attachment A at 3-4.) Specifically, the declaration includes

[17] Moreover, SoCalGas has explained the bases for confidentiality over these agreements more than once. First, on March 1, 2018, SoCalGas provided the contracts in response to Question 3 of a SED Data Request dated February 12, 2018. As required by the Commission's rules SoCalGas included a declaration in support of its confidentiality designations of both contracts. (See Exhibit K, Attachment A at 3-4.) Second, on February 12, 2018 SED made another Data Request, which later became SED DR 16, and asked SoCalGas to re-provide that response with the SED DR 16 bates numbers in response to Question 1 of SED DR 17, dated March 30, 2018. In a May 23, 2018 response to SED, SoCalGas again provided the same confidential contracts, both supported with another declaration.

citations that provide the legal basis for designating the contracts as confidential, as well as a narrative justification. For example, the March 1, 2018 declaration (Exh. K) provides the following legal citation:

> CPRA Exemption, Gov't Code § 6254(k) ("Records, the disclosure of which is exempted or prohibited pursuant to federal or state law")
>
> - *See, e.g.,* D.11-01-036, 2011 WL 660568 (2011) (agreeing that confidential prices and contract terms specifically negotiated with a program vendor is proprietary and commercially sensitive and should remain confidential)
> - *Valley Bank of Nev. v. Superior Court,* 15 Cal.3d 652, 658 (1975) (financial information is protected – especially of non-parties)

Consistent with the legal authority cited, the declaration provides a narrative justification for designating the contracts as confidential, noting, in part: "[t]he produced documents are proprietary and represent and contain proprietary, commercially sensitive, trade secrets, and content not intended for public disclosure." (*Id*., Exh. K). Thus, contrary to SED's representation that SoCalGas has not provided applicable explanations for the confidentiality of these contracts, it has. The incorrect declaration that SED relies on, submitted to SED on March 5, 2018 and supporting confidentiality over documents produced in response to other questions that were part of DR 16, is, therefore, misplaced.

Further, SED's error aside, SoCalGas notes that SED is raising its issue with SoCalGas' declaration for the first time in a motion to compel. Prior to this Motion, SED had not disputed or questioned SoCalGas' declaration, nor did it request to meet and confer. Raising issues of confidentiality in a discovery motion, for the first time, runs against the Commission's established process for disputing issues of confidentiality.

IV. CONCLUSION

For the reasons stated herein, the Commission should deny SED's Motion in its entirety.

Respectfully submitted,

By: ***/s/ F. Jackson Stoddard***
F. Jackson Stoddard

F. JACKSON STODDARD

Attorney for:
SOUTHERN CALIFORNIA GAS COMPANY

Dated: September 30, 2020