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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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)

Investigation 19-06-016

**MOTION OF SAFETY AND ENFORCEMENT DIVISION TO COMPEL
SOUTHERN CALIFORNIA GAS COMPANY TO PROVIDE
COMMUNICATIONS BETWEEN ITSELF AND ITS WELL KILL EXPERTS,
BOOTS & COOTS, TO PROVIDE INFORMATION TO SHOW WHETHER
SOCALGAS PROPERLY ASSERTED ATTORNEY-CLIENT PRIVILEGE OVER
SUCH COMMUNICATIONS, TO SANCTION SOCALGAS, AND TO REQUIRE
SOCALGAS TO EXPLAIN ITS BASIS FOR CONFIDENTIALITY ASSERTIONS
OVER INFORMATION IN THIS MOTION OR AGREE THAT INFORMATION
IN THIS MOTION BE MADE PUBLIC**

[PUBLIC VERSION]

DARRYL GRUEN
Attorney for the
Safety and Enforcement Division

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Phone: (415) 703-1973
Email: darryl.gruen@cpuc.ca.gov

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I. INTRODUCTION

Pursuant to Public Utilities (Pub. Util.) Code §§ 313, 314, 314.5, 581, 582, 584, 702 and Rule 11.3 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure (Rules), the Safety and Enforcement Division at the California Public Utilities Commission (SED) submits this Motion to require the following:

- SoCalGas be compelled to produce all communications between SoCalGas and its well kill contractor, Boots & Coots. (SED Data Request (DR) 16, Question (Q) 10).
- SoCalGas be compelled to fill out completely and accurately the spreadsheet and related responses needed for SED, its expert witness, and any third party to know (1) all of the documents over which SoCalGas has asserted privilege, (2) which of the formerly allegedly privileged documents have been released, and (3) whether SoCalGas has validly withheld documents in response to SED DR 16, Q 10 as privileged. (SED DR 93).
- SoCalGas be assessed sanctions for not asserting attorney-client privilege over communications with Boots & Coots in good faith.
- SoCalGas be required to explain why the information that has been redacted has been appropriately marked by SoCalGas as confidential, or else agree that such information should be made public.

II. FACTUAL AND PROCEDURAL BACKGROUND¹

A. SoCalGas Has Continuously Withheld Communications It Had With Its Well Kill Expert (DR 16 Question 10)

Approximately two and one half years ago, on February 12, 2018, SED issued a data request designed to help SED understand and evaluate whether SoCalGas and its well kill contractor, Boots & Coots, safely attempted to kill SoCalGas' Aliso Canyon Natural Gas Storage Facility (Aliso Canyon) Well SS-25 following the incident at that well beginning October 23, 2015. SED asked: "Please provide any and all

¹ Certain points in this section are re-used in discussion. Where applicable, discussion section subheadings provide footnotes referring back to subheadings in this factual and procedural background section where facts provided in the discussion section can be found in this background section.

communications relating to Aliso Canyon between SoCalGas and Boots & Coots for the time period October 1, 2015 – January 31, 2018.”²

During the time between its initial response to this question and today, SoCalGas has continuously withheld significantly large numbers of documents in response to this data request, alleging attorney-client privilege. In response to multiple requests from SED to re-consider its privilege assertions,³ SoCalGas released batches of documents it asserted were responsive to this question, and provided at least four different privilege logs as its basis.⁴ SoCalGas continues to withhold documents in response to the data request.⁵

B. SoCalGas Has a History of Improperly Asserting Privilege Regarding the Aliso Canyon Incident, Refusing to Show Cause, (SED DR’s 93 and 64) and Other Improper Withholding of Requested Information from the Commission

On February 20, 2020, the Los Angeles Superior Court issued a Minute Order in *Gandsey v. SoCalGas*, awarding monetary sanctions against SoCalGas and its defense counsel. The ruling references SoCalGas’ “unreasonable claims of privilege” in civil issues that arose out of the same incident at SoCalGas’ Aliso Canyon that is part of the focus of the instant proceeding.⁶ Emphasizing SoCalGas’ history of not properly asserting privilege, the court elaborated on its ruling,

As demonstrated by the tortured history below, the documents that were withheld by Defendants were provided only after extraordinary efforts by Plaintiffs’ counsel and by the court to force defense counsel to abandon unreasonable claims of privilege. What is not evident from this recitation, but is undeniably the case, is that the Plaintiffs were deprived of relevant

² See Exhibit A, SED Data Request 16, Question 10.

³ See for example, Exhibit B, SED Data Request 64 Question 2a and 2b, dated April 27, 2020. SoCalGas revised its privilege log and released documents in response to Data Request 64 on May 15, 2020.

⁴ See Exhibits C, D, F and G. SoCalGas privilege logs respectively dated March 5, 2018, May 24, 2018, March 15, 2019, and May 15, 2020.

⁵ See Exhibit G. SoCalGas’ last privilege log addressing a follow up request asking SoCalGas to re-consider answering this initial safety question, (Data Request 64) was provided on May 15, 2020.

⁶ See Exhibit H. *Gandsey v. SoCalGas*, February 20, 2020 Minute Order, p. 10.

documents during the time they were taking percipient discovery to meet the discovery deadline agreed to by the parties.⁷

After the *Gandsey* ruling, SED became concerned that SoCalGas was improperly claiming privilege in response to its safety related request for communications between SoCalGas and its well kill contractor, Boots & Coots.

To address this concern, SED issued DR 93 on May 19, 2020⁸ (described below). SoCalGas refused to answer SED's questions from DR 93 in their entirety.

SED explained via a meet and confer to SoCalGas that DR 93 was "intended to get SoCalGas to explain whether SoCalGas had a valid basis to assert the attorney-client privilege it asserted in response to SED Data Request 16, Question 10, which SED asked in February, 2018. . . ."⁹ To help understand whether SoCalGas provided valid privilege logs in response to DR 16 Q10, DR 93 requested that SoCalGas compile all of its privilege logs and provide Bates numbers for every entry on them so SED could match those documents SoCalGas released to SED with their corresponding entry on the privilege log. Without such information, it remained impossible to tell whether the four privilege logs SoCalGas provided: (a) had consistently the same entries as each other, but with updates to show which documents SoCalGas released, or (b) updated privilege logs that reflected the addition of new entries to, and possibly the subtraction of other entries, from the prior privilege log.

DR 93 specifically asked questions that would allow SED to clearly identify each document that was released, as well as provide specific information to determine whether documents not released had a valid legal basis.¹⁰

⁷ Exhibit H. *Gandsey* February 20, 2020 Minute Order, p. 3 of 27.

⁸ See Exhibit I. SED Data Request 93.

⁹ See Exhibit J, Meet and Confer Summary email from SED counsel to SoCalGas counsel, dated May 29, 2020.

¹⁰ Specific Questions posed in DR 93 can be seen in Exhibit I.

SoCalGas refused to answer any of the questions in response to this DR, objecting repetitively to most questions as unduly burdensome¹¹ or that SED was asking for information that had already been provided to it (in some cases with a qualification that it was provided to the extent that SoCalGas provided an updated privilege log).¹² In several other instances, SoCalGas objected to questions as vague and ambiguous¹³ or not reasonably calculated to lead to the discovery of admissible information pursuant to Rule 10.1 of the Commission's Rules.¹⁴ In only one instance did SoCalGas object on the grounds that a question asked for legal conclusion.¹⁵

On April 6, 2020, SED issued DR 64. Part of DR 64 followed up on SoCalGas' assertions of privilege in response to DR 16 Q10, and asked as follows:

“For those communications over which SoCalGas continues to assert attorney-client privilege, will SoCalGas stipulate to the following:

- a. A declaration that there is a valid legal basis under current statutory and case law to assert attorney-client privilege over each of these communications?
- b. An in-camera review by the Administrative Law Judges of the instant proceeding to determine whether the communications are validly protected by attorney-client privilege?”¹⁶

SED specifically asked for the declaration from SoCalGas in part because the *Gandsey* ruling noted using a similar tool in successfully getting SoCalGas to hone the

¹¹ See Exhibit K, SoCalGas Response to SED Data Request 93, dated June 8, 2020, Responses to questions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26b, 26c, 26d, 26e and 26f.

¹² See Exhibit K, SoCalGas Response to SED Data Request 93, dated June 8, 2020, Responses to Questions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 21, 22, 26b, 26c and 27 (asserted that the question sought information equally available to SED), and 28 (also asserted that the question sought information equally available to SED).

¹³ See Exhibit K, SoCalGas Response to SED Data Request 93, dated June 8, 2020, Responses to Questions 10, 11, 19, 20, 23, 24, 25, 26b, 26c, 26d, 26f, 27 and 29.

¹⁴ See Exhibit K, SoCalGas Response to SED Data Request 93, dated June 8, 2020, Responses to Questions 17, 18, 20, 23, 24, 25, 26a and 26e.

¹⁵ See Exhibit K, SoCalGas Response to SED Data Request 93, dated June 8, 2020, Response to Question 15.

¹⁶ See Exhibit L. SED Data Request 64, including email showing service, dated April 6, 2020.

documents to which attorney-client privilege *actually* applied. The Court required that SoCalGas counsel provide a declaration that counsel had a good faith basis to assert privilege in the civil case.¹⁷

Despite such requirements from the Court in *Gandsey*, SoCalGas refused to stipulate to providing a declaration or to an in-camera review. Instead the company stated, “SoCalGas objects to this request to the extent it does not seek information of a factual nature that is appropriate for discovery.”¹⁸

C. SoCalGas had neither an attorney-client nor an agency relationship with Boots & Coots. Thus SoCalGas had no basis to assert an attorney-client privilege over communications with Boots & Coots.

As set forth in this subsection and the next, SoCalGas had no basis whatsoever to assert attorney client privilege over communications with Boots & Coots. As shown in this section, Halliburton¹⁹ (parent company of Boots & Coots) has expressly disclaimed any agency relationship between Boots & Coots and SoCalGas; SoCalGas has stated that it had no control over Boots & Coots; and [REDACTED]

[REDACTED]

¹⁷ See Exhibit H. *Gandsey v. SoCalGas*, February 20, 2020 Minute Order, p. 3 of 27, p. 6 of 27.

“With respect to the 358 documents evidencing communications between Defendants and their public relations consultant, the court ordered trial counsel to submit a “declaration stating that counsel has personally reviewed the documents in this category as to which privilege continues to be claimed, that counsel is familiar with the relevant case law and statutes pertaining to privilege concerning such documents and that there is a good faith basis for withholding such documents on the basis of privilege.

On September 3, trial counsel for Defendants filed declarations with respect to the 358 documents involving or referencing public relations consultants that had been withheld based on privilege. Counsel stated that attorneys under their direction or control had reviewed the documents, that SoCalGas was continuing to claim privilege as to 32 such documents, and that the declarants had a good faith basis to assert SoCalGas’s attorney-client or work product privilege as to the 32 documents. (Declarations of James J. Dragna and Michelle Park Chiu, Sept. 3, 2019.)”

¹⁸ See Exhibit N, SoCalGas Response to SED Data Request 64, Question 2, April 27, 2020, p. 3.

¹⁹ Boots & Coots is a division of Halliburton’s.

Halliburton, not SoCalGas, who stated that Halliburton would not accede to Blade's request for an interview of Boots & Coots.²² In fact, in response to SED's request that SoCalGas produce Boots & Coots under subpoena, SoCalGas stated: "SoCalGas has no control over B&C, its personnel, or Halliburton."²³

Taking the above facts into account (1) that Halliburton [REDACTED] via letter/email specifically and expressly disclaim any agency relationship with SoCalGas, and (2) that SoCalGas did not have the authority to accept service on behalf of Boots & Coots, it is abundantly clear that no attorney-client relationship existed or exists between SoCalGas and Boots & Coots, and consequently, all communications between SoCalGas and Boots & Coots must and should be provided to SED. Counsel on behalf of Halliburton also made clear to SED that SoCalGas was not authorized to accept service of Commission subpoenas to produce Boots & Coots employees, again making clear there was and is no attorney-client relationship between SoCalGas and Boots & Coots.²⁴

²² Exhibit R, Letter from Wanger Jones and Helsley PC to SoCalGas Counsel, Mr. James Dragna, dated January 24, 2019. Exhibit Q, Letter from Wanger Jones Helsley PC, dated July 27, 2018 to SED Counsel Nicholas Sher, p. 1. In that letter, Halliburton's counsel stated in part,

"This letter is a follow up our July 24, 2018, telephone call related to the subpoenas the California Public Utilities Commission ("CPUC) served on SoCalGas for Halliburton's current and former employees Danny Walzel, James Kopecky, Mike Baggett, and Danny Clayton (collectively, the "Witnesses").

As I mentioned, Halliburton objects to the subpoenas on several grounds. As a preliminary matter, the subpoenas were served on SoCal Gas. Halliburton has not, and does not (sic), authorized SoCalGas to accept service of documents on its behalf. . . Halliburton and the Witnesses are neither public utilities nor agents of SoCal Gas. Therefore, the CPUC does not have jurisdiction over Halliburton or the Witnesses such that it can compel their presence and testimony."

²³ See Exhibit T, Email dated July 1, 2018 from SoCalGas counsel Sabina Clorfeine to SED counsel Nicholas Sher and Darryl Gruen.

²⁴ Exhibit Q, Letter from Wanger Jones Helsley PC, dated July 27, 2018 to SED Counsel Nicholas Sher, p. 1.

2. SoCalGas Stated It Had No Control Over Boots & Coots or Halliburton

On July 1, in response to SED's request that SoCalGas produce Boots & Coots under subpoena, SoCalGas stated, "SoCalGas has no control over B&C, its personnel, or Halliburton."²⁵

As set forth in the Discussion section below, this entire section of facts demonstrates that SoCalGas did not have an attorney-client relationship with Boots & Coots.

D. [REDACTED]

[REDACTED] that would be needed to establish an attorney-client relationship.

1. [REDACTED]

The [REDACTED]
[REDACTED] These [REDACTED] show no attorney-client relationship between SoCalGas and either Halliburton or Boots & Coots.

The [REDACTED] between SoCalGas and Halliburton provided a scope that focused exclusively upon [REDACTED], as shown here:

[REDACTED]

²⁵ See Exhibit T, Email dated July 1, 2018 from SoCalGas counsel Sabina Clorfeine to SED counsel Nicholas Sher and Darryl Gruen.

[REDACTED]

2. [REDACTED]

SoCalGas also provided SED with a [REDACTED]

[REDACTED]

Just as the [REDACTED]

[REDACTED]

The Scope of the [REDACTED] provided that,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁶ As discussed in Section A.3.a, Halliburton's attorneys confirmed that Halliburton was not the agent of SoCalGas in response to an SED subpoena served on SoCalGas to produce Boots & Coots. See also Exhibit Q, Letter from Wanger Jones Helsley PC, dated July 27, 2018 to SED Counsel Nicholas Sher, p. 1.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

E. Despite Having No Agency Relationship and No Attorney-Client Relationship with Either Halliburton or Boots & Coots, SoCalGas Asserted It Had Both

After these [REDACTED], and communications from Halliburton to SED showing that Boots & Coots was not SoCalGas' agent, SoCalGas then communicated to SED that Boots & Coots was its agent for attorney client privilege purposes; with the end result being the withholding of certain communications under the guise of privilege. On June 29 2018, SED and SoCalGas met to discuss the fact that, on one hand, SoCalGas was not producing Boots & Coots in response to a subpoena (asserting Boots & Coots could not be controlled), while on the other hand, asserting privilege over communications with Boots & Coots. As captured in an email on July 1, 2018, SoCalGas asserted Boots & Coots was its agent for purposes of asserting attorney-client privilege, claiming,

Inclusion of B&C on privileged communications does not result in waiver of privilege. . . In the context of the Aliso Canyon well kill operations, B&C would qualify SoCalGas' agents for purposes of the privilege analysis.²⁹

²⁸ [REDACTED]

²⁹ See Exhibit T, Email dated July 1, 2018 from SoCalGas counsel Sabina Clorfeine to SED counsel Nicholas Sher and Darryl Gruen.

And yet, in the same email, SoCalGas claimed it could not produce Boots & Coots in response to the subpoena, stating,

However, SoCalGas's assertion of privilege over communications on which B&C was included *does not* mean that SoCalGas has control over B&C personnel or the ability to produce B&C personnel in response to a PUC subpoena. The doctrines of privilege and control are separate and distinct. It is not incongruous for SoCalGas to claim that certain communications involving SoCalGas employees and B&C personnel may be privileged while at the same time disclaiming any ability to control B&C or to compel it to appear before the CPUC as SoCalGas' witness. In fact, SoCalGas has no control over B&C, its personnel, or Halliburton. We are unaware of any authority that would support the CPUC's contention that the assertion of privilege over certain communications including B&C necessarily means that SoCalGas has control over B&C personnel or can compel them to appear.³⁰ (emphasis in original.)

As a result of SoCalGas' contention that Boots & Coots could be an agent despite all of the documentation showing otherwise, SoCalGas denied SED the underlying facts related to communications between SoCalGas and Boots & Coots; and thus, SED could not interview Boots & Coots about the communications and also was not provided documents showing the communications.

F. SED Made Multiple Attempts, Including Several Meet and Confers, to Resolve These Data Request Disputes, But SoCalGas Has Not Shown Good Faith to Informally Resolve These Matters

On 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 that do not also include an attorney.³¹ SoCalGas represented that its privilege log at the time

³⁰ Exhibit T, Email dated July 1, 2018 from SoCalGas counsel Sabina Clorfeine to SED counsel Nicholas Sher and Darryl Gruen.

³¹ See Exhibit S. Email dated March 11, 2019 from SoCalGas counsel Sabina Clorfeine to SED Counsels Nicholas Sher and Darryl Gruen.

contained 17 total such conversations, and that it would release four of them.³² However, SoCalGas did not explain or account for the more than 1,000 entries in the three privilege logs SED received from SoCalGas in response to DR 16 Q 10 at that time.

[REDACTED]

[REDACTED] SoCalGas asserted Boots & Coots was its agent under certain circumstances. As discussed under subheading 5 above, via a meet and confer on June 29, 2018 email on July 1, 2018, SoCalGas asserted Boots & Coots was their agent under certain circumstances to claim attorney-client privilege, but not others where they said they could not produce Boots & Coots in response to a subpoena, thereby denying SED facts related to the communications between SoCalGas and Boots & Coots.

SED's efforts to informally have SoCalGas answer any part of DR 93 was also not effective. On May 19, 2020, SED emailed DR 93 to SoCalGas. In its initial response, SoCalGas refused to provide any substantive answers to the DR.³³ SED met and conferred with SoCalGas three separate times, attempting to answer questions about the DR and to resolve the failure to substantively respond. Throughout June and July, SED sent multiple emails capturing its understanding of these meet and confers, reminding SoCalGas it had not provided any substantive answers to DR 93.³⁴ ³⁵

As discussed in more detail under the next subheading below, SoCalGas finally provided an answer to DR 93 on August 7, 2020 that SoCalGas claimed was substantively responsive, but that answered questions SED never asked.

³² See Exhibit S. Email dated March 11, 2019 from SoCalGas counsel Sabina Clorfeine to Nicholas Sher and Darryl Gruen.

³³ Exhibit K, SoCalGas Response to SED Data Request 93, dated June 8, 2020.

³⁴ See Exhibit U. Email dated May 19, 2020 from SED to SoCalGas, including DR 93.

³⁵ See Exhibit V, Email thread between SED and SoCalGas counsel.

G. SoCalGas Represented in a Meet and Confer that It Would Answer Questions of DR 93 that Would Show Whether It Validly Asserted Privilege Over Documents, And Then Mischaracterized and Evaded Those Questions Almost Two Months Later

Despite SoCalGas' objections to all of DR 93, SED provided SoCalGas with a written understanding on June 16, 2020 of SoCalGas' representations from a meet and confer that SoCalGas represented it would answer Questions 23 through 25,³⁶ which asked the following of SoCalGas' privilege log entries.

23. "Was the entry released outside of SoCalGas?"

24. "If the answer to column "AC" is yes, to which person(s) and/or entity (entities) was the entry released?"

25. "Date of release to each person(s) or entity (entities) identified in column AD."

SED did not receive any correction from SoCalGas as to this understanding.

In reliance upon SoCalGas' representations captured in SED's June 16, 2020 email, between June 16 and August 5, over the span of almost two months, SED sent four separate emails to SoCalGas reminding SoCalGas that it had not answered these particular questions, even though SoCalGas had represented at the June 11, 2020 meet and confer it had not done so.³⁷ All of these emails went unanswered. During this time, SED emphasized that it was insisting SoCalGas answer these questions as they were written in the data request.³⁸ Indeed, SED informed SoCalGas that, "SED will reserve the right to request permission to amend its sur-reply to address lack of cooperation

³⁶ Exhibit J, Email from SED Counsel, Darryl Gruen to SoCalGas Counsel, Jack Stoddard and Avisha Patel, dated May 29, 2020, with subject heading title, "I1906016 SED Data Request 93 Remains the Same".

³⁷ Exhibit V, Emails from SED counsel Robyn Purchia and/or Darryl Gruen to SoCalGas counsel, Jack Stoddard and Avisha Patel, dated August 5, 2020, July 23, 2020, June 19, 2020 and June 16, 2020.

³⁸ Exhibit J, Email from SED Counsel, Darryl Gruen to SoCalGas Counsel, Jack Stoddard and Avisha Patel, dated May 29, 2020, with subject heading title, "I1906016 SED Data Request 93 Remains the Same".

violations related to this data response once SED receives SoCalGas' complete response to Data Request 93.³⁹

Finally, on August 7, 2020, SoCalGas' provided a supplemental response DR 93 that mischaracterized questions 23 through 25 in a way that allowed SoCalGas to evade the questions. SoCalGas claimed it "understood" these questions to be asking whether SoCalGas was "currently" withholding from SED any documents that have been produced to third parties, and answered, "no". In SoCalGas' words,

SoCalGas understands this request to ask whether SoCalGas is currently withholding from SED any documents on the DR 64 privilege log that have been produced to third parties, including litigants in the Aliso Canyon civil litigation, and which are not subject to claw-back. Based on a reasonable review of the records on the DR 64 privilege log, no.⁴⁰

H. SED Asked Simply For the Total Number of Emails and Attachments Over Which SoCalGas Asserted Privilege and Total Number of Emails SoCalGas Released, Yet SoCalGas' Stated Numbers Do Not Match the Number of Entries in SoCalGas' Privilege Logs

In response to a recent Data Request, SoCalGas answered with multiple caveats that it:

- Originally designated 467 emails as completely privileged;⁴¹
- Originally designated 347 emails as partially privileged;⁴²
- Originally designated 496 attachments as completely privileged;⁴³
- Originally designated one attachment as partially privileged;⁴⁴

³⁹ Exhibit V, See Email dated June 19, 2020 from SED counsel, Darryl Gruen to SoCalGas counsel, Jack Stoddard and Avisha Patel.

⁴⁰ See Exhibit Y, SoCalGas Supplemental Response to SED DR 93, August 7, 2020.

⁴¹ Exhibit Z, SoCalGas Response to SED Data Request 110, Question 1, August 18, 2020.

⁴² Exhibit Z, SoCalGas Response to SED Data Request 110, Question 1, August 18, 2020.

⁴³ Exhibit Z, SoCalGas Response to SED Data Request 110, Question 3, August 18, 2020.

⁴⁴ Exhibit Z, SoCalGas Response to SED Data Request 110, Question 3, August 18, 2020.

- Adjusted the privilege designation on 783 emails (when asked how many emails SoCalGas initially marked as privileged and later released to SED);⁴⁵
- Adjusted the privilege designation on 370 attachments (when asked how many attachments SoCalGas initially marked as privileged and later released to SED).⁴⁶

These totals do not match up with the number of entries that SoCalGas provided in its privilege logs in response to SED Data Request 16. In total, SoCalGas' privilege logs in response to DR 16 Question 10, as shown by Exhibits C, D, F and G, showed 2,784 entries,⁴⁷ whereas SoCalGas says it originally marked as privileged only 1,311 documents.⁴⁸ Even accounting for SoCalGas' adjusted privilege designations, the total number of documents SoCalGas claims is privileged is 2,464, which still does not match the total number of entries on SoCalGas' privilege logs shown in the exhibits.

I. In a Recent Data Request SED Asked Whether SoCalGas Asserted Privilege to SED Over Emails and Attachments that SoCalGas Simultaneously Released Publicly, and SoCalGas Appears to Have Answered “Yes” On Multiple Occasions

SED recently asked SoCalGas how many emails and attachments SoCalGas asserted privilege over to SED, while at the same time releasing those emails and attachments publicly. SoCalGas answered:

- “SoCalGas’ analysis shows that 231 emails were released to civil plaintiffs.”⁴⁹

⁴⁵ Exhibit Z, SoCalGas Response to SED Data Request 110, Question 2, August 18, 2020.

⁴⁶ Exhibit Z, SoCalGas Response to SED Data Request 110, Question 4, August 18, 2020.

⁴⁷ SoCalGas March 15, 2018 privilege log shows 931 entries (Exhibit C); SoCalGas May 24, 2018 privilege log shows 1,262 entries (Exhibit D); SoCalGas March 15, 2019 privilege log shows 513 entries (Exhibit F); SoCalGas May 15, 2020 privilege log shows 78 entries (Exhibit G). $931 + 1,262 + 513 + 78 = 2,784$.

⁴⁸ $467 + 347 + 496 + 1 = 1,311$.

⁴⁹ Exhibit Z, SoCalGas Response to SED Data Request 110, Question 5, August 18, 2020.

- “SoCalGas’ analysis shows that 159 attachments that were previously withheld as completely or partially privileged, were released to civil plaintiffs.”⁵⁰

III. DISCUSSION

A. SED Has Authority to Obtain the Information It Seeks

SoCalGas’ withholding of information from SED is a violation of law and harms the regulatory process by needlessly and inappropriately delaying the production of relevant safety information that SED has requested as part of its statutorily mandated authority,⁵¹ thus interfering with the statutory requirement that the Commission investigate all accidents like the Aliso gas leak;⁵² the largest gas leak in the country’s history.⁵³ Additionally, SoCalGas’ withholding of information harms the regulatory process by requiring the Commission to expend limited resources to obtain compliance with fundamental requirements, such as the production of information, imposed by law on regulated utilities like SoCalGas.⁵⁴ These mandatory discovery rights are amplified by the fact that in this case, SED is requesting, and has been denied for more than two years, potentially safety related information, which is essential for SED to execute its investigatory and prosecutorial duties in this proceeding.

B. The Burden Is On SoCalGas to Show It Has Properly Asserted Attorney-Client Privilege

In its motion to compel discovery against SED, SoCalGas argued, “Under California law, ‘the burden of justifying any objection and failure to respond remains at

⁵⁰ Exhibit Z, SoCalGas Response to SED Data Request 110, Question 6, August 18, 2020.

⁵¹ See, Public Utilities Code § 314.

⁵² See, Public Utilities Code § 315.

⁵³ <https://blogs.findlaw.com/injured/2018/08/socalgas-settles-largest-gas-leak-in-us-history-for-1195m.html>.

⁵⁴ See, e.g., Public Utilities Code §§ 311(a), 314, 314.5(a), 581, 582, 584, 701 and 702.

all times with the party resisting an interrogatory.”⁵⁵ Courts have placed an emphasis on this burden when applied to parties asserting privilege.⁵⁶

Despite the burdens that the Courts and SoCalGas have recognized, the Court ruled in *Gandsey* that SoCalGas did not come close to meeting its burden to assert privilege over requested documents.

In *Gandsey*, the Court ruled,

“Misuse of the discovery process” includes, but is not limited to, such actions as “[e]mploying a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense,” “[m]aking, without substantial justification, an unmeritorious objection to discovery,” or “[m]aking an evasive response to discovery.” (Code Civ. Proc., § 2023.010.)

The Court then found against SoCalGas, as follows:

The court finds that Defendants’ (1) abusive misconduct in discovery; (2) repeated, unmeritorious objections to discovery by assertion of unsubstantiated claims of privilege; (3) repeated failure to provide opposing counsel and the court with legally required information to permit opposing counsel and the court to evaluate Defendants’ claims of privilege; and (4) willful violation of court orders addressing these issues. . .”⁵⁷

In light of SoCalGas’ burden, and the *Gandsey* court ruling, particular scrutiny should be applied to SoCalGas’ assertions of privilege in this matter. As detailed below, SoCalGas has failed to satisfy its burden to assert privilege, and to justify the refusal to produce relevant information and answer questions germane to this proceeding.

⁵⁵ SoCalGas Motion to Compel Discovery Against SED, citing *Williams, supra*, 3 Cal.5th 531 at p. 541 [citing *Coy v. Superior Court* (1962) 58].

⁵⁶ See e.g. *Wood v. Superior Court of San Diego County* (2020) 46 Cal.App.5th 562, 580, *as modified* (Apr. 8, 2020), *review filed* (May 21, 2020). “The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship.”

⁵⁷ Exhibit H, *Gandsey* February 20, 2020 Minute Order, p. 9.

C. SoCalGas Is Required to Provide Requested Information In Response to DR 16 Q10 Because Attorney-Client Privilege Does Not Apply to SoCalGas 'Communications with Boots & Coots⁵⁸

In determining whether the attorney-client privilege applies to advice dispensed by attorneys to a third party, the California Supreme Court has looked to the dominant purpose of a relationship between contracted entity and in-house attorneys.⁵⁹ In *Costco Wholesale Corp. v. Superior Court (Costco)*, the Court disapproved of the lower court's decision regarding an insurance bad faith action. The insurer claimed all the communications were privileged, because they involved legal advice emanating from its attorneys, whereas the petitioner asserted none of the communications were privileged, as the attorneys were serving merely as claims adjusters. *Id.* at 739. In *Costco*, the Court reasoned that 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) In the words of the Court in *Costco*:

The corporation, having the burden of establishing the preliminary fact that the communications were made during the course of an attorney-client relationship (*D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal.2d at p. 729), was free to request an in-camera review of the communications to aid the trial court in making that determination, but the trial court could not order disclosure of the information over the corporation's objection. If the trial court determined the communications were made during the course of an attorney-client relationship, the communications, including any reports of factual material, would be privileged, even though the factual material might be discoverable by some other means. **If the trial court instead concluded that the dominant purpose of the relationship was not that of attorney and client, the communications would not be subject to the attorney-client privilege and therefore would be generally discoverable.** (Emphasis added.)⁶⁰

⁵⁸ Many facts in this section can be found in Sections I.A.2 and I.A.4, as factual background.

⁵⁹ *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 739-740.

⁶⁰ *Costco Wholesale Corp.*, 47 Cal. 4th at 739-740.

[REDACTED]

[REDACTED] 61 [REDACTED]

[REDACTED]

2

SoCalGas has also not met its required burden of establishing the preliminary fact that the communications were made during the course of an attorney-client relationship. When SED followed up to request that SoCalGas identify the names of the attorney who dispensed the advice in each entry of its privilege logs, SoCalGas refused to do so.⁶⁴

19. Where the legal advice was provided, and the individual making the communication was not an attorney, was that person making the communication as part of his or her pre-existing formal job description?

61 [REDACTED]

62

⁶⁴ See Exhibit K, SoCalGas Response to SED Data Request 93, dated June 8, 2020, Q's 16, 19, 20, 22.

23. Was the entry released outside of SoCalGas?
24. If the entry was released outside of SoCalGas, to which person(s) and/or entity (entities) was the entry released?
25. Date of release to each person(s) or entity (entities) identified in the prior question.
26. Chain of communication from attorney to the individual uttering the communication shown on the SoCalGas logs, as so many on the logs were not identified as an attorney.

Even if the communications at issue were determined to involve legal advice coming from counsel, SoCalGas waived its privilege by sharing the communication with Boots & Coots, [REDACTED] Courts have required that for consultants to sit in the same position as an employee for purposes of establishing that necessary piece of the attorney-client relationship, a consultant must have acted as a “functional equivalent[s] of an employee”.⁶⁵ A [REDACTED]

[REDACTED] work on the incident between [REDACTED]

[REDACTED]⁶⁶ The [REDACTED] explicitly says,

[REDACTED]⁶⁷

While the [REDACTED] did not contain the [REDACTED] found in the [REDACTED]

⁶⁵ See for example, *In re High-Tech Employee Antitrust Litigation* (N.D. Cal., Feb. 28, 2013, No. 11-CV-2509-LHK-PSG) 2013 WL 772668, at *3, referencing *United States v. Graf* (9th Cir. 2010) 610 F.3rd 1148, 1156; and *In re Bieter Co.* (8th Cir. 1994) 16 F.3d 929, 937.

⁶⁶ [REDACTED]

⁶⁷ [REDACTED]

[REDACTED] counsel for Halliburton made it clear that no agency relationship existed between Boots & Coots and that SED's service of subpoenas on SoCalGas, to have Boots & Coots employees appear for an Examination Under Oath (EUO), were thus ineffective: "Halliburton and the Witnesses are neither public utilities *nor agents* of SoCal Gas."⁶⁸ (Emphasis added). After SED served Halliburton to have Boots & Coots employees appear for the EUO, it was Counsel for Halliburton, not SoCalGas, who represented Boots & Coots at the EUO; and it was counsel for Halliburton, not SoCalGas who stated that Halliburton would not accede to Blade's request for an interview of Boots & Coots.⁶⁹ In fact, in response to SED's request that SoCalGas produce Boots & Coots under subpoena, SoCalGas stated: "SoCalGas has no control over B&C, its personnel, or Halliburton."⁷⁰

However, even if the terms of the [REDACTED]

[REDACTED] communications with SoCalGas in response to DR 16 Q10 are still not protected by attorney-client privilege.

The California Supreme Court has identified fundamental principles for determining whether a corporation employee enjoys the same privilege as the corporation. In the Court's words,

⁶⁸ Exhibit Q, Letter from Wanger Jones Helsley PC, dated July 27, 2018 to SED Counsel Nicholas Sher, p. 1.

⁶⁹ Exhibit R, Letter from Wanger Jones and Helsley PC to SoCalGas Counsel, Mr. James Dragna, dated January 24, 2019. Exhibit Q, Letter from Wanger Jones Helsley PC, dated July 27, 2018 to SED Counsel Nicholas Sher, p. 1. "This letter is a follow up our July 24, 2018, telephone call related to the subpoenas the California Public Utilities Commission ("CPUC) served on SoCalGas for Halliburton's current and former employees Danny Walzel, James Kopecky, Mike Baggett, and Danny Clayton (collectively, the "Witnesses").

As I mentioned, Halliburton objects to the subpoenas on several grounds. As a preliminary matter, the subpoenas were served on SoCal Gas. Halliburton has not, and does not (sic), authorized SoCalGas to accept service of documents on its behalf. . . Halliburton and the Witnesses are neither public utilities nor agents of SoCal Gas. Therefore, the CPUC does not have jurisdiction over Halliburton or the Witnesses such that it can compel their presence and testimony."

⁷⁰ See Exhibit T, Email dated July 1, 2018 from SoCalGas counsel Sabina Clorfeine to SED counsel Nicholas Sher and Darryl Gruen.

When the employee of a defendant corporation is also a defendant in his own right (or is a person who may be charged with liability), his statement regarding the facts with which he or his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents (or will represent) either or both of them, is entitled to the attorney-client privilege on the same basis as it would be entitled thereto if the employer-employee relationship did not exist;

When such an employee is not a codefendant (or person who may be charged with liability), his communication should not be so privileged unless, under all of the circumstances of the case, he is the natural person to be speaking for the corporation; that is to say, that the privilege will not attach in such case unless the communication constitutes information which emanates from the corporation (as distinct from the nonlitigant employee), and the communicating employee is such a person who would ordinarily be utilized for communication to the corporation's attorney. . . *D.I. Chadbourne, Inc. v. Superior Court of San Francisco*, 60 Cal. 2d 723, 736-737.

In this proceeding, the first prong of the *Chadbourne* test for attorney-client privilege is not met because Boots & Coots⁷¹ may not be charged with liability for its behavior. First, the Scoping Memo provides for investigation into the practices of only SoCalGas.⁷² Second, even if the Scoping Memo provided for potential liability of Boots & Coots, Boots & Coots still could not be charged with liability because [REDACTED]

[REDACTED]

[REDACTED] ⁷³

[REDACTED]

⁷¹ [REDACTED]

⁷² Scoping Memo, pp. 4-5.

⁷³ [REDACTED]

[REDACTED] ⁷⁴

Also, the second part of the Chadbourne test is not met [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ⁷⁵

With regards to determining whether an employee's communications with a corporation are protected by attorney-client privilege, the Court also stated:

Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his statement or report is that of the employer;

If, in the case of the employee last mentioned, the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same; that is to say, if the employer directs the making of the report for confidential transmittal to its attorney, the communication may be privileged.⁷⁶

As shown by the [REDACTED]
[REDACTED] and other context discussed in this paragraph, Boots & Coots' reports or statements to SoCalGas were not required in the ordinary course of SoCalGas' business. [REDACTED]

[REDACTED] ⁷⁷ According to

⁷⁴ [REDACTED]

⁷⁵ [REDACTED]

⁷⁶ *D.I. Chadbourne, Inc. v. Superior Court of San Francisco*, 60 Cal. 2d 723, 736-737.

⁷⁷ [REDACTED]

the terms of the [REDACTED], once well SS-25 was killed, the scope of services would be completed.⁷⁸ Moreover, SoCalGas' former Chief Executive Officer, described the incident at SS-25 that began on October 23, 2015 as "different",⁷⁹ and thus clearly not in the ordinary course of business.⁸⁰

For all of these reasons, SoCalGas' communications with Boots & Coots are not protected by the attorney-client privilege. Therefore, SoCalGas should be required to provide all communications between itself and Boots & Coots that are responsive to DR 16 Q10.

D. It Is Essential That SoCalGas Be Required to Answer DR 16 and DR 93 In Their Entirety

1. Requiring SoCalGas to Respond to DR 93 Will Correct Deficiencies in SoCalGas' Privilege Logs in Response to DR 16 Q10.

In this matter, a ruling requiring that SoCalGas turn over its communications with Boots & Coots without responding to all parts of DR 93 is insufficient. Requiring SoCalGas to answer DR 93 is necessary because vast numbers of entries in SoCalGas' privilege logs do not have Bates numbers.⁸¹ In addition, multiple other entries show duplicate time stamps. Given that these key pieces of authenticating information are missing on a large percentage of multiple entries, SED anticipates that answers to DR 93 are needed because without such it will be impossible to tell (1) whether SoCalGas will turn over all applicable communications in compliance with any ALJ ruling instructing it to do so; (2) which documents are part of the complete set of privilege log entries;⁸²

⁷⁸ [REDACTED]

⁷⁹ Exhibit X, Examination Under Oath Tr. Lane, Jan 24, 2018 EUO RT Vol. 1, pp 31 and 148, lines 8-13.

⁸⁰ This is unlike the [REDACTED]

⁸¹ Exhibit I, DR 93 Q's 5, 8 and 14 ask for SoCalGas to include Bates numbers on each log entry associated with the documents that SoCalGas has released. SED's request would include entries for all Bates numbers associated with every log entry, as SoCalGas should be required to release all documents.

⁸² Exhibit I, SED DR 93 Q1.

(3) which entries on the privilege logs have since been released by SoCalGas;⁸³ (4) which set of entries correspond with each entry;⁸⁴ (5) whether certain entries from each log are the same or different from one another;⁸⁵ (6) the valid legal basis for each privilege entry;⁸⁶ (7) whether SoCalGas released documents to the public while withholding it as privileged from SED;⁸⁷ (8) whether SoCalGas released duplicate documents;⁸⁸ and (9) whether documents that were redacted matched their alleged counterparts that were later released.^{89 90}

2. After Months of Meeting and Conferring with SED, SoCalGas Evaded the Sole Part of DR 93 It Represented It Would Answer⁹¹

SED held three meet and confers with SoCalGas over several months, beginning shortly after May 19, 2020, when SED sent DR 93, and ending on August 7, 2020, when SoCalGas finally provided a supplemental response to DR 93 that evaded the questions it promised it would answer on June 11, 2020. At an early meet and confer during this period, SED relied upon SoCalGas' representations that it would answer part of DR 93, and waited for SoCalGas' response to DR 93, all for naught. SoCalGas's evasion as set forth below illustrates this point.

SoCalGas promised to answer, and then evaded answering SED questions 23 through 25, which asked SoCalGas to answer whether and when SoCalGas had released information to the public while asserting privilege over it to SED.

⁸³ Exhibit I, SED DR 93 Q's 3, 4, 5, 6, 7, 8 and 9.

⁸⁴ Exhibit I, SED DR 93, Q27.

⁸⁵ Exhibit I, SED DR 93 Q1.

⁸⁶ Exhibit I, DR 93, Q's 15, 16, 17, 18, 19, 20, 21, 22, 26, and 28.

⁸⁷ Exhibit I, DR 93 Q's 23, 24, 25.

⁸⁸ Exhibit I, DR 93 Q10.

⁸⁹ Discernible by looking at Bates numbers from responses to Exhibit I, DR 93 Q's 5 and 8.

⁹⁰ Once SED sees the actual information provided by SoCalGas, SED may need to revise or add to these points to show where there are additional deficiencies in SoCalGas' privilege logs and released documents.

⁹¹ Many facts in this section can be found in Sections I.A.7, as factual background.

SoCalGas’ objections to all three of these questions uniformly included the following, “SoCalGas objects to this request to the extent it is unduly burdensome and is vague and ambiguous and unintelligible with respect to the phrase, ‘released outside of SoCalGas.’”⁹² SoCalGas further objects to this request to the extent it is outside the scope of this proceeding as determined by the Assigned Commissioner’s Scoping Memo and Ruling dated September 26, 2019 and is not reasonably calculated to lead to the discovery of admissible evidence pursuant to Rule 10.1 of the Commission’s Rules of Practice and Procedure.”⁹³

On June 11, 2020, via a meet and confer with SoCalGas, SED understood SoCalGas had acknowledged: “it had not answered whether SoCalGas withheld from SED information it already provided to entities outside of SoCalGas or its affiliates, including those in the civil proceedings.”⁹⁴ As discussed in more detail in Section I.A.6, between June 16, and August 5, SED sent four separate emails reminding SoCalGas that it had not answered these questions it said it would on June 11, 2020.⁹⁵ During this time, SED emphasized that SoCalGas answer these questions as they were written in the data request. Indeed, SED informed SoCalGas that, “SED will reserve the right to request permission to amend its sur-reply to address lack of cooperation violations related to this data response once SED receives SoCalGas’ complete response to Data Request 93.”⁹⁶

On August 7, 2020, SoCalGas finally provided a response. However, instead of answering SED’s questions, SoCalGas further evaded doing so by mischaracterizing SED’s questions, and instead answering a request not asked by SED. SED’s questions 23 through 25 were related to whether SoCalGas had released information to others while

⁹² In response to DR 93 Question 23 (Exhibit K), SoCalGas added at this point, “SoCalGas further objects to the extent that the request fails to identify a timeframe for which SoCalGas can tailor its response.”

⁹³ Exhibit K, SoCalGas Response to SED Data Request 93, dated June 8, 2020.

⁹⁴ Exhibit V, Email from SED Counsel, Darryl Gruen to SoCalGas Counsel, Jack Stoddard and Avisha Patel, dated June 16, 2020.

⁹⁵ Exhibit V, Emails from SED counsel Robyn Purchia and/or Darryl Gruen to SoCalGas counsel, Jack Stoddard and Avisha Patel, dated August 5, 2020, July 23, 2020, June 19, 2020 and June 16, 2020

⁹⁶ Exhibit V, Email dated June 19, 2020 from SED counsel, Darryl Gruen to SoCalGas counsel, Jack Stoddard and Avisha Patel.

withholding this same information as privileged from SED.⁹⁷ SoCalGas response claimed it “understood” these questions to be asking whether SoCalGas was “currently” withholding from SED any documents that have been produced to third parties, and answered, “no”. In SoCalGas’ words,

SoCalGas understands this request to ask whether SoCalGas is currently withholding from SED any documents on the DR 64 privilege log that have been produced to third parties, including litigants in the Aliso Canyon civil litigation, and which are not subject to claw-back. Based on a reasonable review of the records on the DR 64 privilege log, no.⁹⁸

Again, this begs the question: Had SoCalGas released information to others *while* inappropriately withholding this same information as privileged from SED? The answer is likely yes, as discussed in the next subsection.

3. SoCalGas Appears to Have Admitted It Publicly Released Information During the Time It Withheld that Information from SED as Privileged, and SoCalGas’ Response to DR 93 Is Needed to Show the Extent of this Problem⁹⁹

SED was concerned that SoCalGas asserted privilege over emails and attachments to SED but provided those same documents to civil plaintiffs. It asked SoCalGas to clarify. SoCalGas responded that: (1) “231 emails were released to civil plaintiffs”¹⁰⁰; and (2) “159 attachments that were previously withheld as completely or partially privileged, were released to plaintiffs”.¹⁰¹ Such answers appear to demonstrate that SoCalGas has not asserted privilege in good faith in multiple instances in this proceeding. There is no obvious reason why SoCalGas could or should assert privilege over documents SED has requested, while providing those very same documents to the civil plaintiffs, thus making

⁹⁷ SED’s questions 23 through 25 are set forth in Section I.A.6.

⁹⁸ See Exhibit Y, SoCalGas Supplemental Response to SED DR 93, August 7, 2020.

⁹⁹ Many facts in this section can be found in Sections I.A.8, as factual background.

¹⁰⁰ Exhibit Z, SoCalGas Response to SED Data Request 110, Question 5, August 18, 2020.

¹⁰¹ Exhibit Z, SoCalGas Response to SED Data Request 110, Question 6, August 18, 2020.

those communications public; nor has SoCalGas provided a defense for such. This improper assertion of privilege further illustrates the need for the Commission to require SoCalGas to reveal the information SED has requested.

4. SoCalGas' Answers About the Total Number of Emails and Attachments Over Which It Has Asserted Privilege Do Not Match the Total Number of Entries in Its Privilege Logs, Making It Unclear How Many Total Entries SoCalGas Is Asserting Privilege Over¹⁰²

In the normal course of business, SED should have been able to match the total number of privileged documents with entries in the privilege log(s). However, based on the responses provided by SoCalGas to SED, this basic task is impossible. Specifically, SoCalGas: originally designated 467 emails as completely privileged, 347 emails as partially privileged, 496 attachments as completely privileged, and one attachment as partially privileged.¹⁰³

These totals do not match up with the number of entries that SoCalGas provided in its privilege logs in response to SED Data Request 16. In total, SoCalGas' privilege logs in response to DR 16 Question 10, as shown by Exhibits C, D, F and G, showed 2,784 entries,¹⁰⁴ whereas SoCalGas says it originally marked as privileged only 1,311 documents.¹⁰⁵ Even accounting for SoCalGas' adjusted privilege designations, the total number of documents SoCalGas claims is privileged is 2,464, which still does not match the total number of entries on SoCalGas' privilege logs shown in the exhibits.

¹⁰² Many facts in this section can be found in Sections I.A.7 and I.A.8, as factual background.

¹⁰³ Exhibit Z, SoCalGas Response to SED Data Request 110, Questions 1 and 3, August 18, 2020.

¹⁰⁴ SoCalGas March 15, 2018 privilege log shows 931 entries (Exhibit C); SoCalGas May 24, 2018 privilege log shows 1,262 entries (Exhibit D); SoCalGas March 15, 2019 privilege log shows 513 entries (Exhibit F); SoCalGas May 15, 2020 privilege log shows 78 entries (Exhibit G). $931 + 1,262 + 513 + 78 = 2,784$.

¹⁰⁵ $467 + 347 + 496 + 1 = 1,311$.

SoCalGas should be required to explain this discrepancy, and account for every entry in its privilege logs provided to SED. A complete and accurate set of answers to DR 93 will help with this understanding.

5. Other Confusion Resulting from SoCalGas's Refusal to Answer DR 93 and DR 16:

a) Point of Confusion 1: SoCalGas' Comprehensiveness Underlying Its Alleged "Most Recent Privilege" Log Cannot Be Tested

With regards to its own privilege logs in response to DR 16, SoCalGas represented in a pleading before this Commission:

And relevant to SED's assertions, SoCalGas produced 15,000 of the documents (comprised of over 43,000 pages) in response to a single set of SED Data Requests (SED Data Request No. 16), and withheld as privileged communications only a small fraction of documents. SoCalGas produced the most recent privilege log to that request on May 15, 2020—before SED filed this Motion to Strike. That privilege log includes only 79 entries. (Declaration of J. Stoddard, ¶ 2.) Moreover, 58 of these 79 documents have been produced to SED in redacted form. (*Ibid.*)

The ALJs should not be left with the impression, as SED would like to impart, that SoCalGas has produced only a "fraction" of the documents at issue. SoCalGas' 79 privilege log entries represent only 6.26% of the 1,262 documents over which SED complains.¹⁰⁶ (emphasis added.)

What this pleading omits is that it is not clear that SoCalGas' alleged "most recent privilege log" is comprehensive of all of the others. There is no way to tell whether the May 15, 2020 privilege log includes all of SoCalGas' entries contained in all of the other logs, or reflects all documents in the prior privilege logs that have not yet been released to SED.

¹⁰⁶ Response Of Southern California Gas Company's (U904g) To The Safety And Enforcement Division's Motion To Strike, June 8, 2020, p. 11. Note: DR 16 Q10 is a subset of the response SoCalGas is stating here.

Counsel's declaration in support of this pleading also fails to address the lack of comprehensiveness as to what SoCalGas alleges to be the "most recent privilege log", stating in part:

On May 15, 2020, SoCalGas produced to SED a privilege log related to SED's Data Request No. 16. That log contains 79 entries. Of the 79 entries, 58 of them identify documents that have been produced to SED in redacted form.¹⁰⁷

Counsel's declaration also omits that many of the documents in this "most recent privilege log" from May 15, 2020, lack Bates numbers, a problem endemic to all the privilege logs. When SED asked SoCalGas over multiple meet and confers regarding DR 93 to fix this problem, SoCalGas consistently refused.

b) Point of Confusion 2: SoCalGas Has Successfully Moved to Compel SED to Provide Complete Factual Answers to Questions about Documents SoCalGas Provided that Are Related to These Deficient Logs, and Because SoCalGas Is Unwilling to Correct the Deficiencies, SED Has Been Unable to Provide a Comprehensive Answer

On April 21, 2020, SoCalGas moved to compel SED to answer certain questions, including SoCalGas DR-06. In this motion to compel, SoCalGas claims,

The questions in DR-06 seek to elicit the *factual* bases for the alleged violations—not legal conclusions for the violations. To date, SED has refused to provide substantive responses to any of the four questions in DR-06, depriving SoCalGas of a meaningful opportunity to understand the charges launched against it.¹⁰⁸

The Administrative Law Judge (ALJ) ordered SED to answer questions 1 and 2 of DR-06 to the extent it could do so, or to state in its response if SED did not have the

¹⁰⁷ Declaration Of F. Jackson Stoddard In Support Of Southern California Gas Company's (U904g) Response To The Safety And Enforcement Division's Motion To Strike, June 8, 2020, ¶3.

¹⁰⁸ Southern California Gas Company's (U904g) Motion To Compel Discovery, April 21, 2020, P. 17.

information or records in its possession.¹⁰⁹ SED complied with the ALJ's Ruling, and indeed did lack records in its possession to provide a comprehensive answer. SoCalGas' DR-06, Questions 1 and 2 asked:

1. Please identify which of the documents listed [below], if any, were material to SED's investigation into the LEAK [of Aliso Canyon Well SS-25 on October 23, 2015].
2. For the document YOU identify in response to Question 1, please identify which violation(s) that document informed.

SoCalGas gaps in Bates numbers on its logs made it impossible to answer this question. Response to DR 16 Q10 under the "Comments" column contain vague descriptions, such as "Email and Attachments sent internally reflecting legal advice regarding company response to SS-25 leak"; "Spreadsheet sent internally reflecting legal advice regarding company response to SS-25 leak"; or "Document sent internally reflecting legal advice regarding company response to SS-25 leak".¹¹⁰ While each of these comments correspond with entries in the attorney-client privilege logs vast numbers of the entries containing comments lack Bates numbers.

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. However, SED cannot tell whether SoCalGas has released this critical information because of, for example, missing Bates numbers and duplicate entries.

For these reasons, SoCalGas should be required to answer DR 93 in its entirety. For reference, a copy of the data request and accompanying spreadsheet that shows SoCalGas how it is to provide the response to DR 93 is attached.¹¹¹

¹⁰⁹ See Administrative Law Judges' E-Mail Ruling On Southern California Gas Company's Motion To Compel, June 10, 2020.

¹¹⁰ Examples of each such entries can be seen on Exhibits C, D and W SoCalGas March 5, 2018, May 24, 2018, and July 12, 2018 privilege logs under the column with the heading, "comments".

¹¹¹ Exhibit I, SED Data Request 93, including spreadsheet.

E. SoCalGas Should Be Sanctioned for Not Making Attorney-Client Assertions in Good Faith

The case law shows that none of the communications between SoCalGas and Boots & Coots in response to DR 16 Q 10 are protected by attorney-client privilege. Indeed, as shown in *Gandsey*, SoCalGas has not asserted privilege in good faith in the civil proceedings that arose from the Aliso Canyon leak beginning October 23, 2015. Given the Court’s Ruling and findings in *Gandsey*, it is not sufficient for SoCalGas to provide a declaration in support of its privilege assertions.

In *Gandsey*, the Court, in addition to the quotes and findings above, found that “[b]ased on the prior history of this case, [SoCalGas’] initial claims of privilege are unsupportable and/or are withdrawn an average of 94 percent of the time.”¹¹² The Court found the following with regards to SoCalGas:

(1) abusive misconduct in discovery; (2) repeated, unmeritorious objections to discovery by assertion of unsubstantiated claims of privilege; (3) repeated failure to provide opposing counsel and the court with legally required information to permit opposing counsel and the court to evaluate Defendants’ claims of privilege; and (4) willful violation of court orders addressing these issues, when taken together, warrant sanctions”¹¹³

The Court went on to observe the following about SoCalGas’ withholding behavior:

In many ways, what is most upsetting about the litigation tactics of Defendants is that they have *only asserted good faith objections when threatened with sanctions or when this court required trial counsel to declare under penalty of perjury that there was a good faith basis for the privilege claims asserted.*”¹¹⁴ (Emphasis added.)

The Court rejected claims that the conduct was unintentional:

The sheer number of privilege assertions that ultimately were unsupportable is evidence that [SoCalGas’] conduct is the result of a

¹¹² Exhibit H, *Gandsey* February 20, 2020 Minute Order, pp. 2-3.

¹¹³ Exhibit H, *Gandsey* February 20, 2020 Minute Order, p. 10.

¹¹⁴ Exhibit H, *Gandsey* February 20, 2020 Minute Order, pp. 12-13 (emphases added).

concerted policy, and not the hapless mistakes of a few document review attorneys.¹¹⁵

Based on these discovery abuses, the Court awarded, among other remedies, monetary sanctions of \$525,610 against SoCalGas and its attorneys.¹¹⁶

SoCalGas' inappropriate assertions of privilege identified in this motion are above and beyond those identified by SED in testimony. Indeed, while SED identified 226 violations related to misleading attorney-client and/or attorney work product privilege assertions on SoCalGas' part, this motion covers a systemic problem related to how SoCalGas has asserted privilege in bad faith in a fashion that has impaired SED's investigation. The exhibits provide in this motion are a separate and distinct basis for severely sanctioning SoCalGas.

F. Request for Relief

For the reasons stated above, SED requests the following relief.

- SoCalGas be compelled to produce all communications between SoCalGas and its well kill contractor, Boots & Coots. (SED DR 16, Q 10).
- SoCalGas be compelled to fill out accurately and completely the spreadsheet and related responses needed for SED, its expert witness, any third party to know (1) all of the documents over which SoCalGas has asserted privilege, (2) which of the formerly allegedly privileged documents have been released, and (3) whether SoCalGas has validly withheld documents in response to SED DR 16, Q 10 as privileged. (SED DR 93).
- Sanctions be levied against SoCalGas for failing to assert attorney-client privilege over communications with Boots & Coots in good faith.
- SoCalGas be required to explain why the information that has been redacted in this motion has been appropriately marked by SoCalGas as confidential, or else agree that such information should be made public.

¹¹⁵ Exhibit H, *Gandsey* February 20, 2020 Minute Order, p. 20.

¹¹⁶ Exhibit H, *Gandsey* February 20, 2020 Minute Order, p. 1.

IV. CONCLUSION

SED respectfully requests the Commission grant the relief sought in this motion.

Respectfully submitted,

DARRYL GRUEN
NICHOLAS SHER
ROBYN PURCHIA

/s/ DARRYL GRUEN
DARRYL GRUEN

Attorneys for the
Safety And Enforcement Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102
Telephone: (415) 703-1973
Email: darryl.gruen@cpuc.ca.gov

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