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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application For Rehearing Of Resolution ALJ-391

SOUTHERN CALIFORNIA GAS COMPANY'S APPLICATION FOR REHEARING OF RESOLUTION ALJ-391 AND REQUEST FOR ORAL ARGUMENT

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BEFORE THE PUBLIC UTILITIES COMMISSION
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SOUTHERN CALIFORNIA GAS COMPANY'S APPLICATION FOR REHEARING OF RESOLUTION ALJ-391 AND REQUEST FOR ORAL ARGUMENT

Pursuant to §§ 1731(b) and 1732 of the Public Utilities Code (Cal. Pub. Util. Code), Rule 16.1 of the California Public Utilities Commission's (Commission or CPUC) Rules of Practice and Procedure and General Order 96-B, General Rule 8.1, Southern California Gas Company (SoCalGas) files this Application for Rehearing (AFR) of Resolution ALJ-391 (Resolution). SoCalGas also respectfully requests that the Commission hold oral arguments pursuant to Rule 16.3(a) of the Commission Rules of Practice and Procedure.

I. INTRODUCTION

The fundamental question at issue is whether SoCalGas, as a regulated entity, has the same First Amendment rights to freedom of association and freedom speech as any other entity. The Resolution, consistent with the United States Supreme Court and the California Supreme Court, correctly concludes that SoCalGas "enjoys the same First Amendment rights as any other person or entity" and that "[i]ts status as a regulated public utility does not impair or lessen its rights."[1] However, this conclusion rings hollow in light of the Resolution's legal and factual errors. The impact of these errors is forced waiver of those rights entirely which contravenes the U.S. Supreme Court's assurances of a utility's First Amendment rights in *Pacific Gas & Elec.*

[1] Resolution ("Res."), p. 12.

Co. v. Public Utilities Com. (1986) 475 U.S. 1 and *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York* (1980) 447 US. 530, 533.

At the foundation of this dispute is Public Advocates Office's (Cal Advocates) stated investigation into SoCalGas's "Accounting Practices, ***Use of Ratepayer Monies*** to Fund Activities Related to Anti-Decarbonization and Gas Throughput Policies."[2] However, SoCalGas is increasingly concerned that Cal Advocates investigation is now being used as pretext for a different agenda: to single out and punish SoCalGas for the viewpoint it holds regarding promoting natural gas, renewable gas, and other clean fuels as an integral part of the State's decarbonization plans.

These concerns are further validated by the Common Interest, Joint Prosecution, and Confidentiality Agreement (Joint Prosecution Agreement) between Cal Advocates and Sierra Club whereby those two entities have apparently been jointly investigating and prosecuting SoCalGas for its alleged "anti-electrification" activities since August 2019.[3] This Joint Prosecution Agreement was not disclosed to SoCalGas until nearly a year later despite numerous opportunities and filings with the Commission on matters covered by the agreement.[4] It is questionable whether Cal Advocates is still interested in investigating ratepayer-funded issues. Cal Advocates opposed SoCalGas's request for a statewide Order Instituting Rulemaking (OIR) to establish clarity for all investor-owned utilities on ratemaking treatment for lobbying and other

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[2] This is how Cal Advocates titled its captions in its filings in this non-proceeding manner.
[3] See Exhibit 4 to the Declaration of Jason H. Wilson, submitted in support of SoCalGas's Comment, Nov. 19, 2020 ["Joint Prosecution Agreement"].
[4] Cal Advocates had numerous opportunities to disclose the existence of the Joint Prosecution Agreement and did not do so. In the non-proceeding alone, Cal Advocates did not disclose the Joint Prosecution Agreement when it filed its October 7, 2019 Motion to Compel the DR-05 Contracts, June 23, 2020 Motion for Contempt and Sanctions, July 9, 2020 Motion to Compel the Confidential Declarations and Fines, and November 19, 2020 Comments on Draft Resolution ALJ-391. All of these motions are the subject of this Resolution.

advocacy activity, and Order Instituting Investigation (OII) on SoCalGas itself.[5] Cal Advocates also opposes the Resolution's referral of the investigation to an "appropriate enforcement division within the Commission" and instead prefers to continue its investigation outside of any formal Commission rules or procedures.[6] Instead of supporting a formal OII into SoCalGas's accounting of ratepayer funds for lobbying activities which Cal Advocates claims is the purpose of its investigation, it appears that Cal Advocates is more intent on punishing SoCalGas with sanctions and fines.[7] SoCalGas is concerned Cal Advocates has chosen to investigate SoCalGas's political activities and threaten it with fines and sanctions to suppress or stifle its viewpoint. Governmental regulators are not allowed to misuse their investigatory power to punish entities with contempt, fines, and sanctions merely for expressing their political viewpoints. The United States Constitution protects individuals, entities, and regulated utilities alike against such viewpoint discrimination.

Further, if Sierra Club through the Joint Prosecution Agreement has coopted or inappropriately taken advantage of Cal Advocates' statutory authority for its own benefit, it would be an abuse of Cal. Pub. Util. Code § 309.5. Under Cal. Pub. Util. Code § 309.5, Cal Advocates was created and funded by ratepayers for the purpose of fulfilling its statutory obligation to obtain the lowest possible rates for ratepayers.[8] To perform its duties, Cal Advocates was specifically granted discovery authority that no other intervenor is entitled to.[9]

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[5] SoCalGas's OIR/OII letter July 17, 2020 letter to Commissioner Batjer, Exhibit 2 to Cal Advocates' Reply In Further Support of Motion to Compel and For Fines Related to the Utilities Withhold of Confidential Declaration (Cal Advocates' July 28, 2020 Response to SoCalGas Request for OIR/OII ("Cal Advocates Response to OIR/OII Letter"), Exhibit 4 to Jason Wilson Declaration Dated December 18, 2020 in Support of Motion to Stay ("Wilson December 18, 2020 Decl.").
[6] Cal Advocates' November 19 Comment to Draft Resolution ALJ 391 ("Cal Advocates Comment") at 5.
[7] Cal Advocates Response to OIR/OII Letter at 2 and Cal Advocates Comment at 3-6.
[8] Cal. Pub. Util. Code § 309.5(a), (f).
[9] Cal. Pub. Util. Code § 309.5(e).

Sierra Club, on the other hand, has no obligation to ratepayers and should not be permitted to make use of the discovery powers under Cal. Pub. Util. Code § 309.5. This disconnect between the goals of Cal Advocates and Sierra Club was recently highlighted in a letter by California State Legislators who expressed concerns over the legitimacy of the Joint Prosecution Agreement and whether Cal Advocates "new focus," which appears to be "to aid the Sierra Club in their effort to seek the ban of natural gas usage in California even though it is proven to be favored by customers as a fuel source because of the affordable cost," violates its stated mission under Cal. Pub. Util. Code § 309.5.[10]

In light of the prosecutorial purpose of Cal Advocates' and Sierra Club's investigation, and because the discovery at issue in the Resolution is solely about SoCalGas's First Amendment-protected political activities that are 100% shareholder-funded, there is heightened scrutiny that the Commission should have applied in justifying the purpose of that discovery and the Resolution fails to meet that heavy burden under the law. As the California Supreme Court has summarized, "recognizing that compelled disclosure of private associational affiliations or activities will *inevitably* deter many individuals from exercising their constitutional right of association," both it and the U.S. Supreme Court "have established that . . . intrusion into associational privacy may be sanctioned only upon the demonstration of a very important, indeed, 'compelling,' state interest which necessitates the disclosure."[11] Further, as the United

[10] Declaration of Jason H. Wilson, December 18, 2020, Exhibit 3 - November 30, 2020 letter from Assembly members Blanca Rubio and Jim Cooper to CPUC President Marybel Batjer, p. 2; *see also*, California's Natural Gas Bans Are Drawing Fire From Black and Latino Leaders, Robert Bryce, (Forbes December 15, 2020) available at https://www.forbes.com/sites/robertbryce/2020/12/15/californias-natural-gas-bans-are-drawing-fire-from-black-and-latino-leaders/?__twitter_impression=true&sh=36c807b557d3

[11] *Britt v. Sup. Ct.* (1978) 20 Cal.3d 844, 848-49 [emphasis added].

States Supreme Court and California Supreme Court has recognized time and time again "First Amendment freedoms, such as the right of association, 'are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'"[12] In fact, as is the case here, "compelled disclosure of an individual's private associational affiliations and activities, . . . frequently poses one of the most serious threats to the free exercise of this constitutionally endowed right."[13] Yet, the Resolution would permit the exact interference that the United States Supreme Court and California Supreme Court have sought to protect.

The information at issue in the Resolution would reveal the identities of organizations and individuals and the specific advice of political consultants who are advising SoCalGas as it exercises its right to petition the government and advocate for its position, publicly and privately, to decarbonize its gas system and molecules. The level of detail sought by the discovery goes far beyond what any company is required to report under California or federal law. For example, the discovery here would require SoCalGas to disclose the details of its contracts and detailed strategic political thinking, which exceeds its reporting requirements under California's Political Reform Act[14] and the United States Lobbying Disclosure Act.[15] Moreover, SoCalGas is not even required to report many of the consultants at issue here under California or Federal lobbying disclosure laws. Therefore, but for Cal Advocates' discovery, SoCalGas, and no other company for that matter, would have to disclose this information publicly. However, Cal Advocates argues that because SoCalGas is a regulated utility, it has "no First Amendment basis

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[12] *Britt*, *supra*, 20 Cal.3d at p. 852.
[13] *Id.*
[14] California Political Reform Act, California Government Code Section 81000, et. seq.
[15] Lobbying Disclosure Act, 2 United States Code Section 1601, et. seq.

to withhold from the public the identity of any person or any entity the utility pays to advocate, 'influence' or 'educate' on its behalf."[16] This is in clear conflict with the Resolution's finding that SoCalGas "enjoys the same First Amendment rights as any other person or entity" and that "[i]ts status as a regulated public utility does not impair or lessen its rights."[17]

As further evidence that Cal Advocates may be using its stated investigation into SoCalGas's misuse of ratepayer funds to achieve a different agenda, Cal Advocates' has provided no evidence that its discovery into SoCalGas's 100% ***shareholder-funded***, First Amendment-protected political activities has any nexus to Cal Advocates' investigation into SoCalGas's alleged misuse of ***ratepayer funds***. If Cal Advocates was really interested in whether SoCalGas inappropriately used ratepayer monies to fund political activities, it need only conduct an accounting exercise by examining SoCalGas's above-the-line accounts (i.e., accounts typically recovered from ratepayers). Cal Advocates will not find any inappropriate charges to above-the-line accounts by examining below-the-line accounts, because alleged mischarges to above-the-line accounts will only be reflected in above-the-line accounts. In examining the below-the-line accounts, Cal Advocates could potentially identify charges that were incorrectly recorded below-the-line that should have been recorded above-the-line, but not the other way around. Despite this fact, Cal Advocates unjustifiably demands the discovery at issue and threatens SoCalGas with contempt, fines, and sanctions for exercising its due process rights to challenge the intrusive discovery.

This should give the Commission pause and consider as part of this AFR the real possibility that this Resolution could be taken by Cal Advocates as precedent encouraging it to

[16] Cal Advocates Comment at 20.
[17] Res., p. 12.

investigate and punish entities with fines and sanctions merely for the content of their political viewpoints. Such a scheme would be ripe for abuse and violate fundamental First Amendment rights, particularly in situations similar to here where the party has a differing (but valid) viewpoint than Cal Advocates (and the Sierra Club). Sierra Club has made no secret of its position against natural gas and renewable natural gas and its position that 100% electrification is the only viable pathway to meet the State's climate goals.[18] As evidenced by the Joint Prosecution Agreement, Cal Advocates and Sierra Club are investigating SoCalGas's alleged "anti-electrification activities."[19] SoCalGas disagrees with Cal Advocates' and Sierra Club's characterization of its activities as "anti-electrification." SoCalGas's mission is to build the cleanest, safest, and most innovative energy company in America. SoCalGas intends to be a leader in decarbonization. Working towards clean fuels alongside clean molecules as part of a diverse energy mix in the State is essential to meeting SoCalGas's obligation to safely, reliably, and affordably serve its customers. For example, SoCalGas has established a voluntary goal of 5% core customer deliveries from renewable natural gas by 2022, and that goal ramps up to 20% by 2030.[20] To accomplish this, SoCalGas has proposed a voluntary Renewable Gas Tariff for its customers, which was approved yesterday[21] and was also supportive of SB 1440 (Hueso) which

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[18] *See* SoCalGas's Motion to Stay to Enforcement of Resolution which will be filed concurrently herewith.
[19] Joint Prosecution Agreement, *supra* note 4.
[20] *See* R.19-01-011, March 11, 2019 Opening Comments of Southern California Gas Company on Order Instituting Rulemaking Regarding Building Decarbonization at 13. Pursuant to Rule 13.9 of the CPUC's Rules of Practice and Procedure, SoCalGas requests that the Commission take judicial notice of this publicly available document.
[21] *See* A.19-02-015, October 27, 2020 Proposed Decision adopting Voluntary Pilot Renewable Natural Gas Tariff Program, approved December 17, 2020 (Decision number currently unavailable). Pursuant to Rule 13.9 of the CPUC's Rules of Practice and Procedure, SoCalGas requests that the Commission take judicial notice of this publicly available document.

would create a "Renewable Gas Standard."[22] SoCalGas (along with San Diego Gas and Electric Company) has also outlined several demonstration projects to ultimately move toward blending hydrogen into the pipeline system.[23] As recognized by a recent Commission staff report, SoCalGas's gas system is a key component of the State's decarbonization goals.[24] Further, as the Commission itself has recognized, "decarbonization will take many paths, some of which are clearly defined and some of which are yet to be determined. Building electrification is one of those paths whose exact route is not yet clear and where we are at the early stages of our journey. . . . [W]e will continue to explore the financial impacts of building electrification on customers, particularly low-income customers and those residing in disadvantaged communities[.]"[25] However, SoCalGas is concerned that because SoCalGas does not endorse the same pathway to decarbonization as Cal Advocates and the Sierra Club, they have chosen to investigate SoCalGas's political activities and threaten it with fines and sanctions to suppress or stifle its viewpoint.

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[22] *See*, e.g., R.13-02-008, May 2, 2019 Opening Comments of SoCalGas, SDG&E, PG&E, and Southwest Gas on Alternate Decision Regarding Biomethane Tasks in Senate Bill 840. Pursuant to Rule 13.9 of the CPUC's Rules of Practice and Procedure, SoCalGas requests that the Commission take judicial notice of this publicly available document.

[23] *See* A.20-11-004, Application of Joint Application of Southern California Gas Company (U904G), San Diego Gas & Electric Company (U902G), Pacific Gas And Electric Company (U39G), and Southwest Gas Corporation (U905G) Regarding Hydrogen-Related Additions or Revisions To The Standard Renewable Gas Interconnection Tariff. Pursuant to Rule 13.9 of the CPUC's Rules of Practice and Procedure, SoCalGas requests that the Commission take judicial notice of this publicly available document.

[24] R.20-01-007 Track 1A: Reliability Standards and Track 1B: Market Structure and Regulations – Workshop Report and Staff Recommendations, dated Oct. 2, 2020, available at https://www.cpuc.ca.gov/gasplanningoir (Workshop Report). For example, CPUC Staff's recommendations expressly "call[] attention . . . to the two rotating power outages of August 2020" as a "cautionary tale" noting that "[t]he role of California's natural gas infrastructure is especially important during times of low renewable generation." Workshop Report at 8.

[25] Exhibit 1 to Wilson Stay Decl., August 7, 2020 letter from CPUC President Marybel Batjer to Assemblymembers Patrick O'Donnell, Jim Cooper, and Blanca Rubio at 1.

As further discussed below, the Resolution proceeds in a manner contrary to law, is unsupported by evidence, and constitutes an abuse of discretion.[26] Further, the Resolution, as a whole, violates SoCalGas's First Amendment rights under the U.S. Constitution and Article I of the California Constitution.[27] Thus, the Resolution erred by denying SoCalGas's Motion for Reconsideration/Appeal and its Motion to Quash and commits the following factual and legal errors:

- The Resolution erred in finding that SoCalGas did not make a *prima facie* showing of arguable First Amendment infringement. The Resolution's analysis runs afoul of *Britt v. Superior Court*, where, when faced with discovery analogous to the discovery here, the California Supreme Court *assumed* that disclosure alone of individuals' organizational affiliations would cause First Amendment harm.

- The Resolution applied the wrong legal standard of relevancy to conclude that Cal Advocates discovery is appropriate when it should have applied the correct strict scrutiny standard;[28]

- The Resolution erred in concluding that the First Amendment's "chilling" test required SoCalGas to show past harm. Instead, evidence of future "chilling" is sufficient to present a *prima facie* case of First Amendment harm;

- The Resolution failed to recognize that the harm presented in SoCalGas's declarations is identical to the harm presented in the declarations submitted by appellants in *Perry v. Schwarzenegger*, which the Ninth Circuit found to be a sufficient *prima facie* showing;

- The Resolution incorrectly identified the Commission's broader general mandate to regulate and oversee utilities as the "compelling government interest" at issue instead of Cal Advocates' scope of investigation;
- The Resolution failed to establish how Cal Advocates' discovery into SoCalGas's ***shareholder-funded*** political activities is rationally related to Cal Advocates' investigation of whether SoCalGas misused ***ratepayer funds*** for improper political activities. In fact, the record lacks any evidence showing how the discovery in dispute (SoCalGas's 100% ***shareholder-funded*** activities) has any nexus to Cal Advocates' investigation (alleged misuse of ***ratepayer funds)***;

[26] Cal. Pub. Util. Code § 1757.1, subd. (a)(1), (2), (4).
[27] Cal. Pub. Util. Code §1757.1, subd. (a)(6).
[28] Res., pp. 17-18.

- The Resolution erred in adopting Cal Advocates' arguments, despite the fact that it presented no evidence supporting its heavy burden in demonstrating the discovery sought was narrowly tailored to meet a compelling government interest;
    - There is no evidence to support a finding that examining details of SoCalGas's First Amendment protected activity charged to ***below-the-line accounts*** (i.e., accounts typically not recovered from ratepayers) will allow Cal Advocates to determine whether SoCalGas improperly charged political activity to ***above-the-line*** accounts (i.e., accounts that are typically recovered from ratepayers);
    - The Resolution's finding that Cal Advocates' demand for the DR-05 "is narrowly tailored to seek specific contracts and information about SoCalGas' potential use of ***ratepayer funds*** for lobbying activities"[29] is not supported by the evidence, since the DR-05 Contracts are not ratepayer funded;
    - There is no evidence to support a finding that access to SoCalGas's entire SAP Database (including both above-the-line and below-the-line accounts) is narrowly tailored for Cal Advocates to obtain information related to whether SoCalGas improperly charged political activities to above-the-line accounts. Instead, the evidence dictates that examining the transactions in the above-the-line accounts is all that is necessary;
    - The Resolution failed to establish how SoCalGas's proposed customer software solution to access its SAP Database is not an appropriate least restrictive means;
    - There is no evidence to support a finding that examining the unredacted versions of the Confidential Declarations is narrowly tailored for Cal Advocates to obtain information related to whether SoCalGas improperly charged political activities to above-the-line accounts. To the contrary, the Confidential Declarations would only reveal the identity of SoCalGas's associations and scope of the First Amendment political activity in which it engaged—nothing about how the contracts are funded (i.e., above-the-line vs. below-the-line);
- The Resolution also imposes an illegal obligation on SoCalGas in the provision of the privilege log in the unprecedented form required, namely that, "[i]f providing a privilege log, SoCalGas must concurrently provide Cal Advocates with a declaration under penalty of perjury by a SoCalGas attorney that the attorney has reviewed the materials associated with the privilege claim and that such privilege claim has a good faith basis in the law, and the specific legal basis, with a citation,

[29] Res., p. 18.

> for withholding the document."[30] In other words, in addition to providing a privilege log, the Resolution compels an attorney to provide testimony about the privilege log's creation. This unprecedented requirement violates the attorney-client privilege and work product doctrines by forcing an attorney to reveal, put at issue, and therefore waive, his or her legal opinions, advice, and client communications regarding the claim of privilege. This violates Evidence Code sections 954, 955, 915, and 912, and exceeds the power of this Commission by seeking to modify the legislatively mandated privilege. It further violates Cal. Code Civ. Pro. sections 128.7, 2018.030(a), and 2031.250(a), and as such exceeds the power of the Commission by setting rules in conflict with statute. It further interferes with the attorney's ethical and legal duties to his or her client, and ability to conduct his or her work in creating the log without interference.

For the reasons explained herein, therefore, the Commission should grant SoCalGas's AFR to reconsider the Resolution's legally and factually incorrect First Amendment analysis. The Commission should also grant the AFR to reconsider the Resolution's unprecedented and illegal invasion of SoCalGas's attorney-client and attorney-work product privileges. In addition, because of the important fundamental rights at stake and legal errors committed by the Resolution, SoCalGas intends to concurrently file its Motion to Stay pursuant to Cal. Pub. Util. Code §1735 and requests an expedited ruling on the Motion to Stay so that those rights are not forcibly waived before the Commission or the Court of Appeal can consider and remedy these errors.[31]

II. LEGAL STANDARD

After any Commission order or decision, including a Resolution such as here, a party "may apply for a rehearing in respect to matters determined in the action or proceeding and specified in the application for rehearing."[32] Commission Rule 16.1 specifies that applications

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[30] Res., p. 24.
[31] SoCalGas understands that it may not be able to file its Motion to Stay concurrently with the AFR as it may have to wait for the Commission to assign a proceeding number. SoCalGas will endeavor to file the Motion to Stay as soon possible once the Commission assigns a proceeding number.
[32] Cal. Pub. Util. Code § 1731, subd. (b)(1).

for rehearing "shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous," and further, that the purpose of such an application "is to alert the Commission to a legal error, so that the Commission may correct it expeditiously."[33] Rehearing of the Resolution is warranted for the reasons set forth herein and pursuant to Cal. Pub. Util. Code § 1757.1. Should a petition for writ of review be filed in the Court of Appeal, the Court of Appeal may find the Commission's decision cannot be upheld because (1) the Resolution "was an abuse of discretion"; (2) the Commission "has not proceeded in the manner required by law"; (3) the Commission "acted without, or in excess of, its powers or jurisdiction"; (4) the Resolution "is not supported by the findings"; or (5) the Resolution "violates any right of the petitioner under the Constitution of the United States or the California Constitution."[34]

On the First Amendment issue, pursuant to Cal. Pub. Util. Code § 1760, "in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution, the Supreme Court or court of appeal shall exercise independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."[35] Thus, should SoCalGas need to petition for writ review, mandamus, an injunction, stay, and/or other appropriate relief, the Court of Appeal may review the Resolution *de novo*.[36]

This application for rehearing is timely under Rule 16.1(a).

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[33] CPUC Rule 16.1(c).
[34] Cal. Pub. Util. Code § 1757.1
[35] Cal. Pub. Util. Code § 1760.
[36] *Id.*

III. ARGUMENT

A. The Resolution Erred in Concluding Cal Advocates' Discovery Did Not Infringe on SoCalGas's First Amendment Rights.

The First Amendment to the United States Constitution and Article I of the California Constitution provide for the freedoms of speech and association, as well as the right to petition the government for redress of grievances.[37] The Resolution correctly concludes that "SoCalGas enjoys the same First Amendment rights as any other person or entity."[38] Indeed, the United States Supreme Court has confirmed as much on multiple occasions.[39]

As the California Supreme Court has summarized, "recognizing that compelled disclosure of private associational affiliations or activities will *inevitably* deter many individuals from exercising their constitutional right of association," both it and the U.S. Supreme Court "have held that . . . intrusion into associational privacy may be sanctioned only upon the demonstration of a very important, indeed, 'compelling,' state interest which necessitates the disclosure."[40] Courts use a two-part framework to evaluate whether the government can meet its heavy burden to justify such an incursion into a party's First Amendment privilege. First, "[t]he

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[37] U.S. Const., amends. I, XIV; Cal. Const., art. I, §§ 2(a), 3(a). SoCalGas will refer herein to the "First Amendment" but the arguments apply equally under the California Constitution, which is in fact "broader and more protective than the free speech clause of the First Amendment." *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366. Although Article I provides independent free-speech rights, California courts typically "consider federal First Amendment [cases]" in analyzing Article I issues. *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 481.

[38] Res., p. 12.

[39] *Pacific Gas & Elec. Co. v. Public Utilities Com.* (1986) 475 U.S. 1, 17 n. 14 ["[The CPUC] argue[s] that appellant's status as a regulated utility company lessens its right to be free from state regulation that burdens its speech. We have previously rejected this argument."]; *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York* (1980) 447 U.S. 530 [holding utility entitled to freedom of speech]; *see also Pacific Gas & Elec. Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 86, 93 ["It is well established that corporations such as PG&E have the right to freedom of speech, since '[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.'"(citation omitted)].

[40] *Britt v. Sup. Ct.* (1978) 20 Cal.3d 844, 848-49 [emphasis added].

party asserting the privilege 'must demonstrate . . . a 'prima facie showing of arguable first amendment infringement" . . . This prima facie showing requires appellants to demonstrate that enforcement of the [discovery requests] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights."[41] Second, "the evidentiary burden will then shift to the government . . . [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the 'least restrictive means' of obtaining the desired information."[42] The ultimate "question" courts consider is "whether the party seeking the discovery 'has demonstrated an interest in obtaining the disclosures it seeks . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association.'"[43]

The Resolution erred in concluding that SoCalGas failed to meet its *prima facie* showing of First Amendment infringement. The Resolution erroneously ignored and discounted the numerous declarations submitted by SoCalGas which were nearly identical in substance to those submitted by appellants in *Perry v. Schwarzenegger* (*Perry*) and which the Ninth Circuit held showed sufficient harm. Furthermore, once this *prima facie* showing is made, First Amendment protection is presumed, and no state statute can overcome the constitutional protection the First Amendment affords,[44] *unless* it meets the "particularly heavy" burden of justifying those demands, which are subject to strict (or in the words of the California Supreme Court,

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[41] *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1160 [citations omitted].
[42] *Id.* [citations omitted].
[43] *Id.* [quoting *NAACP v. Alabama* (1958) 357 U.S. 449, 463].
[44] U.S. Const., article VI, par. 2.

"exacting") scrutiny.[45] The Resolution erred in concluding Cal Advocates—which submitted *no* evidence—met its "evidentiary burden" demonstrating the discovery it seeks is "rationally related to a compelling government interest" and the "least restrictive means of obtaining the desired information."[46]

1. The Resolution Committed Legal Error in Failing to Hold Disclosure Alone Is Sufficient to Prove First Amendment Harm, As in *Britt v. Superior Court.*

"As both the United States Supreme Court and [the California Supreme Court] have observed time and time again, . . . First Amendment freedoms, such as the right of association, 'are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'"[47] "[N]umerous cases establish that compelled disclosure of an individual's private associational affiliations and activities, . . . frequently poses one of the most serious threats to the free exercise of this constitutionally endowed right."[48] Because "[t]he right to free speech and association is fundamental," "any governmental restraint is subject to the closest scrutiny."[49]

"Chilling" occurs "when governmental action 'would have the practical effect of discouraging the exercise of constitutionally protected political rights.'"[50] As the Ninth Circuit has stated, "The compelled disclosure of political associations can have just such a chilling effect."[51] Indeed, the United States Supreme Court has "repeatedly found that compelled

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[45] *Britt*, *supra*, 20 Cal.3d at p. 855; *see NAACP v. Alabama*, *supra*, 357 U.S. at pp. 460–461 [governmental actions curtailing freedom of association are "subject to the closest scrutiny"].
[46] *Perry*, *supra*, 591 F.3d at p. 1161 [citations omitted].
[47] *Britt*, *supra*, 20 Cal.3d at p. 852 [citations omitted].
[48] *Id.*
[49] *Governor Gray Davis Committee v. Am. Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 464 [internal quotation marks omitted].
[50] *Perry*, *supra*, 591 F.3d at p. 1160 [quoting *NAACP v. Alabama, supra, 357 U.S. at p. 461*].
[51] *Id.*

disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[52] Similarly, as the Tenth Circuit has explained, "[T]he First Amendment privilege . . . generally ensures privacy in association when exposure of that association will make it less likely that association will occur in the future, or when exposure will make it more difficult for members of an association to foster their beliefs. These are the 'chilling effects,' or consequences of disclosure, that the First Amendment privilege seeks to avoid."[53]

SoCalGas's association with political consultants and strategists to promote a decarbonization pathway to meeting the State's climate goals is constitutionally protected activity. Indeed, the Resolution does not appear to contest that SoCalGas's associational rights are constitutionally protected; only that disclosure of those associations posed no "threat" of chilling those activities.[54] However, the Resolution ignores the fact that Cal Advocates intends and desires to disclose all of SoCalGas's associational information publicly as soon as possible. Cal Advocates' intentions are made clear in its Comments on Draft Resolution ALJ-391, "there is no First Amendment basis to withhold from the public the identity of any person or entity the utility pays to advocate, 'influence" or 'educate' on its behalf."[55] It requests that the Commission confirm that SoCalGas does not have First Amendment rights "so that the Commission may [publicly] release a significant portion of the information that is still pending as soon as practicable."[56]

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[52] *Buckley v. Valeo* (1976) 424 U.S. 1, 64 [collecting cases].
[53] *In re Motor Fuel Temperature Sales Practices Litigation* (10th Cir. 2011) 641 F.3d 470, 489.
[54] Res., pp. 13-14.
[55] Cal Advocates Comments at 20.
[56] Cal Advocates Comments at 21.

This admission by Cal Advocates belies the stated purpose of their joint prosecution with Sierra Club. This is not about a compelling state interest around Cal Advocates' mission to ensure the lowest possible rates; it is now evident with their explicit inquiry into 100% shareholder-funded activities at issue in the Resolution, in conjunction with the Joint Prosecution Agreement and this admission, that the real purpose is about SoCalGas's political viewpoint, detailed strategies, and affiliations that they jointly want to suppress and chill.

Moreover, the Resolution erroneously concludes that SoCalGas failed to meet its *prima facie* showing of First Amendment harm because it "requires a showing that goes beyond a simplistic assertion that disclosure alone chills association."[57] The Resolution's analysis is incorrect. The California Supreme Court expressly rejected this reasoning in *Britt v. Superior Court*, which *assumed* that disclosure alone of individuals' organizational affiliations would cause First Amendment harm.[58] In *Britt*, the California Supreme Court reversed the trial court's grant of discovery into plaintiffs' local political activities, including their membership in any meetings opposed to the Port District, the identity of others at the meetings, content of the discussions at those meetings, and any financial contributions by plaintiffs to those organizations.[59] It described the discovery at issue as seeking "information concerning both [the plaintiffs'] and others' affiliations with, and activities in, organizations which, at various times, have protested operations at the San Diego airport and have attempted through traditional political efforts to influence the future conduct of such operations."[60] Without any additional

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[57] Res., p. 14.
[58] *Britt*, *supra*, 20 Cal.3d at p. 860 [describing membership and meeting attendee lists as "presumptively privileged information"].
[59] *Id.* at pp. 849-50.
[60] *Id.* at p. 852.

evidentiary support required, the Court held that "such peaceful and lawful associational activity is, without question, constitutionally protected activity which, under both our state and federal Constitutions, enjoys special safeguard from governmental interference."[61] The Court reasoned that "the source of the constitutional protection of associational privacy is the recognition that, as a practical matter, compelled disclosure will often deter such constitutionally protected activities as potently as direct prohibition."[62]

This is precisely analogous to the discovery here. The DR-05 Contracts, Confidential Declarations, and the small number of withheld entries at issue in SoCalGas's SAP Database would reveal identities, contracts, scope of work information, and financial information about SoCalGas's "traditional political efforts to influence the future conduct" of the State's decarbonization pathway.[63] Beyond strategy and messaging, courts routinely hold the First Amendment protects identities and political expenditures.[64] Cal Advocates seeks to investigate SoCalGas's political associations and activities, and threatens it with fines and sanctions, apparently because SoCalGas does not endorse the same pathway to decarbonization as Cal Advocates (and the Sierra Club, with whom Cal Advocates is apparently sharing information and investigational strategy under a Joint Prosecution Agreement).[65] This raises precisely the same

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[61] *Id.*
[62] *Id.*
[63] *Britt*, *supra*, 20 Cal.3d at p. 852.
[64] *Perry*, *supra*, 591 F.3d at pp. 1162–1163 [right to associate and exchange ideas in private is protectable]; *Buckley v. American Constitutional Law Foundation, Inc.* (1999) 525 U.S. 182, 203–204 [shielding the names of persons paid to disseminate political messages and collect petition signatures, as well as the specific amounts paid to each of them]; *Barnes v. State Farm Mut. Auto. Ins. Co.* (1993) 16 Cal.App.4th 365, 372 ["Political expenditures and contributions are forms of political speech at the core of . . . First Amendment freedoms."].
[65] During a meet and confer concerning SoCalGas's confidential information, when pressed as to why Cal Advocates was intent on making information public, Cal Advocates stated "SoCalGas's use of ratepayer funds to develop business plans that undermine California's climate change goals were an issue of public

specter as the First Amendment harm in *Britt.* Cal Advocates seeks discovery into what is, "without question, constitutionally protected activity."[66]

The Resolution erred in concluding that anything more was required to trigger strict scrutiny of Cal Advocates' discovery requests. Compelled disclosure of associational and political activity can be presumed to have deterrent, chilling effects based on the nature of the discovery requests themselves. Indeed, in *Britt*, the Court elaborated that "in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential."[67] Here, for proof of the threat to SoCalGas's First Amendment rights, the Commission need look no further than to the record in this very "non-proceeding." Cal Advocates has filed multiple motions threatening contempt and millions of dollars in fines and sanctions (totaling over $38.4 million as of the date of this filing)[68] in retaliation for SoCalGas asserting its First Amendment rights and its attorney-client and work product privileges.[69] The

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importance that the public has a right to know about." When SoCalGas explained that its advocacy in favor of natural gas and renewable gas was consistent with California policies, Cal Advocates responded "that was an open debate that requires an open forum." *See* SoCalGas' Motion to Supplement filed on May 20, 2020, (March 20, 2020 Email from Traci Bone to Shawane Lee and Johnny Tran re Confidentiality of Information in SoCalGas DRs provided to the Public Advocates Office.)

[66] *Britt*, *supra*, 20 Cal.3d at p. 852

[67] *Id.*

[68] Cal Advocates' June 26, 2020 Motion for Contempt and Cal Advocates' July 9, 2020 Motion to Compel. The Joint Prosecution Agreement also covers the CPUC Rulemaking Energy Efficiency Rolling Portfolios, Policies, Programs, Evaluations, and Related Issues (R.13-11-005) whereby Cal Advocates has demanded almost $380 million in penalties against SoCalGas in connection with the two Orders to Show Cause.

[69] Cal Advocates exerted extreme pressure on SoCalGas to waive its fundamental rights, including by threatening millions of dollars in fines because SoCalGas merely sought Commission review of an order requiring the production of constitutionally protected materials. But SoCalGas had no procedural protections on which to rely in confronting Cal Advocates' threats. The Resolution suggests that

California Supreme Court recognized in *Britt* that the harassment and abuse of the discovery process by a litigation opponent poses an especially dire threat to First Amendment and Article I rights.[70] Further, as the U.S. Supreme Court has stated, "The threat of sanctions may deter [speech] almost as potently as the actual application of sanctions."[71]

Cal Advocates has also apparently shared its investigatory power with Sierra Club under a Joint Prosecution Agreement specifically to investigate SoCalGas's "use of consumer funds for anti-electrification activities."[72] Thus, the threat of disclosure extends even further than Cal Advocates itself. Indeed, based on the breadth of the discovery it seeks, which (as discussed below) has nothing to do with Cal Advocates' ratepayer protection mandate or "consumer funds," deterring SoCalGas from pursuing "traditional political efforts to influence"[73] future action on decarbonization appears to be the precise purpose of Cal Advocates' investigation, because it seeks to deter SoCalGas's expressive activity involving the different pathway toward decarbonization SoCalGas prefers. This is not permitted under the Constitution.

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protections were there all along, but no Commission rule says that. Indeed, Chief ALJ Anne Simon's confirmed in her email instruction for this non-proceeding that disputes in this non-proceeding was not subject to the Commission's rules. Particularly where Cal Advocates is claiming an essentially boundless authority to intrude on SoCalGas' shareholder-funded activities (even while working in concert with a private litigant opposing SoCalGas), the absence of procedural protections is especially harmful and prone to abuse. SoCalGas still faces the prospect of huge fines at Cal Advocates' urging. And it may be in the same position in response to a future intrusive request. Then, as now, SoCalGas will have no established procedural safeguards to protect itself. An entity, even a regulated one, that has the same constitutional rights as everyone else cannot be forced to face the government's coercive threats without any defined recourse. It is an improper denial of due process that undermines the legitimacy of any "non-proceeding" order that follows, including this one.

[70] *Britt, supra*, 20 Cal.3d at p. 857.

[71] *NAACP v. Button* (1963) 371 U.S. 415, 433.

[72] Joint Prosecution Agreement, *supra* note 4.

[73] *Britt*, *supra*, 20 Cal.3d at p. 852.

2. The Resolution Committed Legal Error in Failing to Weigh the Evidence of Future Harm in SoCalGas's Declarations Under the Proper *Perry v. Schwarzenegger* Standard.

The Resolution erroneously concludes that the declarations SoCalGas submitted in support of its First Amendment claims were "unconvincing" because they were "primarily hypothetical" and "f[ell] short of the palpable fear of harassment and retaliation" it determined was required.[74] It then concluded that *NAACP v. Ala. ex rel. Patterson* (1958) 357 U.S. 449, 461-62, required SoCalGas to show some harm above or beyond the fact that disclosure of First Amendment protected information itself chills its political rights. This is not the appropriate standard. The harm need not have occurred before one can enforce one's First Amendment rights. To hold otherwise would allow a party's First Amendment rights to be trampled upon before a party can assert its rights under the First Amendment. This is not and cannot be the law. As the United States Supreme Court has held, the evidence of *prima facie* harm must simply show "**a reasonable probability** that the compelled disclosure . . . **will subject** them to threats, harassment, or reprisals from either Government officials or private parties."[75] Further, the Ninth Circuit has made clear in *White v. Lee* that "[i]n making their First Amendment claim, the plaintiffs were obligated to prove only that the officials' actions would have chilled or silenced 'a person of ordinary firmness from ***future*** First Amendment activities' . . . ."[76]

In support of its prima facie showing of arguable First Amendment infringement, SoCalGas submitted declarations that amply demonstrated such future harm, and in fact, were almost identically worded to declarations in *Perry v. Schwarzenegger,* which the Ninth Circuit

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[75] *Buckley v. Valeo* (1976) 424 U.S. 1, 74 [emphasis added].
[76] *White v. Lee* (9th Cir. 2000) 227 F.3d 1214, 1241 [emphasis added] [citation omitted].

found to be "self-evident."[77] In *Perry*, the Ninth Circuit quoted at length from one of the declarations that it found sufficient in supporting a *prima facie* case of arguable First Amendment infringement. The declarant testified to the *future harm* they would suffer should the discovery into their political communications be permitted:

> I can unequivocally state that if the personal, non-public communications I have had regarding this ballot initiative—communications that expressed my personal political and moral views—are ordered to be disclosed through discovery in this matter, it will drastically alter how I communicate in the future . . . .
>
> I will be less willing to engage in such communications knowing that my private thoughts on how to petition the government and my private political and moral views may be disclosed simply because of my involvement in a ballot initiative campaign. I also would have to seriously consider whether to even become an official proponent again.[78]

The Ninth Circuit reasoned that "[a]lthough the evidence presented by Proponents is lacking in particularity, it is consistent with the self-evident conclusion that important First Amendment interests are implicated by the plaintiffs' discovery request. The declaration creates a reasonable inference that disclosure would have the practical effects of discouraging political association and inhibiting internal campaign communications that are essential to effective association and expression."[79]

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[77] In support of its claims of First Amendment harm in its December 2, 2019 Motion for Reconsideration/Appeal, SoCalGas submitted: (1) a declaration from Sharon Tomkins, SoCalGas' Vice President of Strategy and Engagement and Chief Environmental Officer (Tomkins Declaration); and (2) three declarations from third-party government-relations professionals (Confidential Declarations), attesting that disclosure of their identities and/or activities to Cal Advocates will have serious chilling effects on their political activities.[77] Then, in support of its May 22, 2020 Motion to Quash the Subpoena, SoCalGas submitted (3) a further declaration from Andy Carrasco, SoCalGas's new Vice President, Strategy and Engagement, and Chief Environmental Officer (Carrasco Declaration).[77] *Perry*, *supra*, 591 F.3d at p. 1163.
[78] *Perry*, *supra*, 591 F.3d at p. 1163.
[79] *Id.* at p. 1163.

The Tomkins Declaration, the Confidential Declarations, and the Carrasco Declaration are nearly word-for-word equivalent to those in *Perry*. The Resolution describes the Tomkins and Confidential Declarations as follows:

> In support of its infringement claim, SoCalGas relies on a declaration from Sharon Tomkins, SoCalGas' Vice President of Strategy and Engagement and Chief Environmental Officer, stating that she **would be less likely to engage in certain communications and contracts if required to produce the requested information and stating her belief that other entities would be less likely to associate with SoCalGas if information about SoCalGas' political efforts are disclosed to the Commission**. SoCalGas submitted additional declarations [the Confidential Declarations] from private organizations specializing in government relations and public affairs, outside of SoCalGas, including statements that disclosure to the Commission would **dissuade them from communicating or contracting with SoCalGas**.[80]

More specifically, in Confidential Declaration No. 6, the declarant testifies that:

> **I can unequivocally state** that if the non-public contract I have with SoCalGas regarding the public affairs work I am doing with the company is ordered to be disclosed in response to the demand of the California Public Advocates Office, **it will drastically alter how I communicate in the future.**[81]

It continues,

> In the future, **I will be less willing to engage in communications knowing my non-public association with SoCalGas and private discussions and views may be (and have been) disclosed simply because of my association with SoCalGas** in connection with its efforts to petition the government on political matters related to, among other things, rulemaking. **I am also seriously considering whether to associate with SoCalGas in [the] future regarding ballot initiatives, rulemaking, or any other political process** due to the breach of privacy that comes with disclosure of my thoughts, processes, decisions, and strategies.[82]

The other Confidential Declarations state similar concerns. These alone readily meet the standard set by the Ninth Circuit.

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[80] Res., p. 13.
[81] Decl. No. 6 i/s/o Mot. for Reconsideration/Appeal, ¶ 4.
[82] *Id.* at ¶ 5.

Moreover, even if the law requires SoCalGas show past, "concrete" harm—which it does not—SoCalGas has done so. In November 2019, SoCalGas was forced to produce the DR-05 Contracts to Cal Advocates under protest. As a result, SoCalGas, and its consultants, in fact suffered actual harm. The Carrasco Declaration explains the chilling effect that the production of the DR-05 Contracts had on SoCalGas's associational rights:

> As a result of even the December disclosures of several 100% non-ratepayer funded Balanced Energy IO contracts, the information regarding these associations disclosed to Cal Advocates **has altered how SoCalGas and its consultant, partner or vendor associates with each other, and it has had a chilling effect on these associations**. Such a result has (and would further) unduly impinge upon SoCalGas's constitutional right to free association, and to associate with organizations and individuals of its choosing in exercise of its right to petition the government and advocate its position relating to natural gas, renewable natural gas, and green gas solutions.[83]

Further, "due to the compelled contract disclosures that SoCalGas previously made, and the specter of additional compelled disclosures [of the SAP Database], SoCalGas is being forced to reconsider its decisions relating to political activities and associations."[84] And "SoCalGas will be less willing to engage in contracts and communications knowing that its non-public association and communications with consultants, business partners and others on SoCalGas's political interests may be subject to compulsory disclosure."[85]

In addition to the evidence in the record, SoCalGas intended to file additional declarations from its consultants in support of its Motion to Quash. However, ALJ DeAngelis ordered SoCalGas to serve the unredacted versions of the consultants' declarations on Cal Advocates, and as such, SoCalGas had no real choice but to withdraw the declarations in order to

[83] Carrasco Decl., ¶ 6.
[84] *Id.* at ¶ 9.
[85] *Id.*

preserve the content of its First Amendment rights at issue in the pending motions.[86] This was the only way for SoCalGas to avoid the chilling effect at issue in its substantive arguments that would result from the disclosure of those consultants' identities to Cal Advocates (and Sierra Club under the Joint Prosecution Agreement, which was unknown at the time the Motion to Quash was filed in May). As evidenced in the Carrasco Declaration, those consultant declarations attested to further concerns. One consultant stated a fear that disclosure of the consultant's relationship with SoCalGas to Cal Advocates would cause "negative consequences—including financial and strategic information being released to its competitors, the breach of confidentiality its clients require for its services, the cost of responding to inquiries, and the breach of privacy that comes with disclosure of its contract."[87] Another consultant, which also works with government entities, "indicated to SoCalGas that it has serious concerns about its business," and "even indicated that it would not have done business with SoCalGas if it had known its information and contract details would have been disclosed."[88]

The Resolution committed legal error in failing to analyze the Tomkins Declaration, the Confidential Declarations, and the Carrasco Declaration under the proper *Perry* standard. The Resolution failed to even consider or cite the Carrasco Declaration, which is particularly puzzling given that the Resolution grants SoCalGas's Motion to Supplement the Record of the December 2, 2019 Motion for Reconsideration/Appeal, which cites the Carrasco Declaration at

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[86] This is explained in SoCalGas's Response to Cal Advocates' Motion to Compel, Southern California Gas Company's (U 904 G) Response To Public Advocates Office Motion To Compel Confidential Declarations Submitted In Support Of Southern California Gas Company's December 2, 2019 Motion For Reconsideration Of First Amendment Association Issues And Request For Monetary Fines For The Utility's Intentional Withholding Of This Information, July 17, 2020, at pp. 6-7; *see also* Exhibit 7 [Email from R. DeAngelis dated May 22, 2020] attached to Cal Advocates' Motion to Compel.
[87] Carrasco Decl., ¶ 8.
[88] *Id.*

length at pp. 15-17 precisely to demonstrate the continuing, expanding First Amendment harm via the SAP subpoena since this harm was first spoken of in the original December 2019 motion related to a small set of contracts. Based on the Tomkins Declaration, Confidential Declarations, and Carrasco Declaration, SoCalGas has amply shown a chilling effect on its own political speech and its political associations as required by *Perry*.

3. The Resolution Committed Legal Error by Misidentifying the "Compelling Government Interest" As the CPUC's General Investigatory Power Rather than Cal Advocates' Scope of Investigation.

The Resolution asserts that the "compelling government interest" here is the Commission's "broad statutory authority to inspect the books and records of investor-owned utilities in furtherance of its proper interest in fulfilling the Commission's mandate to regulate and oversee utilities."[89] This is error. First, the Commission's mandate to regulate and oversee utilities is not implicated here. For example, the Confidential Declarations at issue have been filed with the Commission conditionally under seal. The Commission itself has access to the Confidential Declarations. SoCalGas has sought to protect disclosure of the Confidential Declarations to Cal Advocates, not to the Commission.

Second, the Commission's mandate to regulate and oversee utilities is not tied to the existing need for the First Amendment-protected information. As the United States Supreme Court has held, "Lawmaking at the investigatory stage may properly probe historic events for any light that may be thrown on present conditions and problems. But the First Amendment prevents use of the power to investigate enforced by the contempt power to probe at will and

[89] Res., p. 15.

without relation to existing need."[90] To overcome First Amendment protection, any compelling government interest must be clearly defined and tied to the existing need for the First-Amendment-protected information.[91] Indeed, as the Ninth Circuit has explained, the Supreme Court has "concluded that 'an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit . . . protected associational rights.'"[92]

Here, the existing need is Cal Advocates' desire to obtain information in order to investigate SoCalGas's alleged misuse of ratepayer funds for political activity. Cal Advocates states that it is investigating "SoCalGas' **use of ratepayer monies** to fund anti-decarbonization campaigns through 'astroturf' organizations, including efforts to both promote the use of natural and renewable gas, and to defeat state and local laws and ordinances proposed to limit the use of these resources."[93] Cal Advocates relies on its authority under Cal. Pub. Util. Code section 309.5(a) for its investigation. Section 309.5(a) states that Cal Advocates' goal is to "obtain the lowest possible rate for service consistent with reliable and safe service levels." The Resolution similarly understood the scope of Cal Advocates' investigation to be focused on ratepayer funding issues: "the extent to which SoCalGas was **using ratepayer funds** to support organizations . . . that also support anti-decarbonization positions held by SoCalGas . . . ."[94] In

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[90] *DeGregory v. Attorney General of State of N.H.* (1966) 383 U.S. 825, 829 [ruling general investigatory power was not a "compelling state interest"]; *id.* at p. 830 [holding general investigatory power was "too remote and conjectural to override the guarantee of the First Amendment . . . ."].
[91] *Id*.
[92] *U.S. v. Mayer* (9th Cir. 2007) 503 F.3d 740, 748 [citation omitted].
[93] Motion for Contempt and Fines, June 23, 2020, p. 3; *see also* Motion to Compel and for Fines, July 9, 2020, p. 1.
[94] Res., p. 2 (emphasis added); *See also id. at* p. 7 ["Cal Advocates continued its inquiry into SoCalGas' use of ***ratepayer monies*** to fund an anti-decarbonization campaign through astroturf organizations" (emphasis added)]; *id.* at p. 22 [" . . . Cal Advocates' inquiry into specific contracts and information about SoCalGas' potential use of ***ratepayer funds*** for political activities . . ." (Emphasis added).]

other words, it is the use of ratepayer funds that Cal Advocates should be investigating according to its own statement, but that is not what is actually at issue for the disputed 100% shareholder-funded activity in the Resolution.

Cal Advocates' investigation (and its mandate) is much narrower than the Commission's general broad oversight authority. The Resolution's failure to recognize this distinction can have significant unintended consequences. For example, if Cal Advocates is permitted to use the Commission's "broad statutory authority to inspect the books and records of investor-owned utilities in furtherance of its proper interest in fulfilling the Commission's mandate to regulate and oversee utilities"[95] as a compelling government interest with no further particularized reason required, it would swallow up any and all constitutional protections, as well as any other privileges or rights.[96] If that were the case, there would literally be no area into which Cal Advocates could not probe relating to SoCalGas's First-Amendment-protected associations and political strategies. Moreover, even if the Commission's broad authority to regulate and oversee utilities is a compelling government interest, it does not extend to the Commission's regulation of SoCalGas's use of ***shareholder funds*** for social, political, or public-relations purposes.[97]

The Resolution failed to recognize the distinction between Cal Advocates' need for the discovery (and its narrower Cal. Pub. Util. Code § 309.5 mandate) and the Commission's broad

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[95] Res., p. 15.

[96] *See Gibson v. Florida Leg. Invest. Com.* (1963) 372 U.S. 539, 551 (The Supreme Court held that the broad investigatory power was insufficient, because it lacked a nexus with the proposed information sought).

[97] Even if the Resolution relies on the Commission's broad authority to regulate and oversee utilities, the Commission has made clear that "[t]he only commitment of shareholder earnings enforced by the Commission is the overarching requirement that the shareholders maintain sufficient invested capital to sustain the authorized capital structure of the company to finance its used and useful plant and equipment necessary to serve the ratepayers." *In Re S. California Gas Co.*, No. 02-12-027, 2004 WL 2963807, at *1 (Dec. 2, 2004).

oversight authority. In doing so, the Resolution committed legal error by applying the incorrect compelling government interest in its analysis.

4. The Resolution Committed Legal Error in Failing to Establish How Cal Advocates' Discovery is Rationally Related to the Scope of Cal Advocates' Investigation.

The Resolution committed legal error in failing to establish an adequate "nexus" between the compelling government interest (Cal Advocates' stated investigation into the *use of ratepayer funds*), and Cal Advocates' alleged need for discovery into SoCalGas's First Amendment-protected *political* activities.[98] Cal Advocates' discovery would reveal the identity of, amounts spent on, and the activities undertaken by SoCalGas's partners, consultants and vendors in connection with its non-public, below-the-line, shareholder-funded political activities. Importantly, this discovery would not provide information concerning whether ratepayer funds were used for political activities, which is the crux of the stated rationale given for Cal Advocates' investigation. The Resolution failed to address the record on this argument in the motions and simply accepted Cal Advocates' irrational and insufficient claim that access to SoCalGas's *below-the-line* accounts will somehow allow it to verify misclassifications inappropriately charged to *above-the-line* accounts.

The scope of Cal Advocates' investigation is SoCalGas's alleged misuse of ratepayer funds to support its political activities. If Cal Advocates was really interested in whether SoCalGas inappropriately used ratepayer monies to fund political activity, it need only conduct

[98] *See Gibson*, *supra*, 372 U.S. at p. 546 ["We understand this to mean—regardless of the label applied, be it 'nexus,' 'foundation,' or whatever—that it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."].

an accounting exercise by examining SoCalGas's above-the-line accounts. That is, if there were any inappropriate lobbying or political activities mischarged to above-the-line accounts, Cal Advocates would be able to find those inappropriate charges **in the above-the-line accounts**. Cal Advocates will not find any inappropriate charges to above-the-line accounts by examining below-the-line accounts. In examining the below-the-line accounts, Cal Advocates could potentially identify charges that were incorrectly recorded below-the-line that should have been recorded above-the-line, but not the other way around. SoCalGas made the above-the-line accounts available to Cal Advocates approximately six months ago (provided Cal Advocates sign an NDA, as it offered to do, to protect SoCalGas's confidential information): SoCalGas created a custom software solution in its SAP Database that would have provided Cal Advocates access to all of its above-the-line accounts, with the exception of invoices from law firms or other records of legal expenditures that might reflect attorney-client or attorney-work-product privileged information. In addition, Cal Advocates would have also gained access to SoCalGas's below-the-line accounts (even though it does not need that information for its stated investigation), except for the narrow scope of information that is protected by the First Amendment. That access would have provided Cal Advocates with all the information it needed to conduct its investigation. Cal Advocates refused that access.

Instead, in seeking the DR-05 Contracts, the SAP Database, and the Confidential Declarations, Cal Advocates makes it clear that it wants to investigate SoCalGas's 100% shareholder-funded political activities, including the identity of who engaged in those activities and the details of the underlying First Amendment-protected activity. Indeed, Cal Advocates has admitted that SoCalGas's shareholder accounts are precisely the types of accounts Cal Advocates

wanted to examine.[99] This intrusive discovery goes far beyond an accounting exercise of whether SoCalGas used ratepayer funds to pay for political activities. The discovery is not geared towards actually investigating the alleged wrongful use of ratepayer funds, but instead, the content and manifestation of SoCalGas's political opinions and ideas, including the identities and activities protected by the First Amendment.

SoCalGas has increasing concerns that it is in fact Cal Advocates' goal now to single out and punish SoCalGas for the viewpoint it holds regarding promoting natural gas and renewable gas as an integral part of the State's decarbonization plans, and not to investigate the allocation of ratepayer funds.[100] This concern is animated by the fact that Cal Advocates has aligned with Sierra Club under a Joint Prosecution Agreement to investigate SoCalGas's "anti-electrification" activities, which it has mischaracterized for the past year as an anti-decarbonization campaign. But simply because SoCalGas believes in a different pathway to decarbonization than Cal Advocates does—one that, as the Commission staff agrees, plays a vital role in California's energy future[101]—and works to educate customers and policymakers about emerging clean energy technology and fuel options, does not mean SoCalGas is working contrary to achieving

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[99] Response Of Public Advocates Office To Southern California Gas Company Motion To Quash Portion Of Subpoena, For An Extension, And To Stay Compliance (Not In A Proceeding) [hereinafter "Response to Motion to Quash"], June 1, 2020 ("Response to Motion to Quash"), at pp. 9-10 [accounts protected by the First Amendment are "precisely the types of accounts . . . that Cal Advocates intends to audit"].

[100] Indeed, a discrepancy between an articulated state interest and the effect of the law—or here, discovery request—can raise suspicion of content or viewpoint discrimination. *See First Nat. Bank of Bos. v. Bellotti* (1978) 435 U.S. 765, 793 ["The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders."].

[101] *See, e.g.*, R.20-01-007 Track 1A: Reliability Standards and Track 1B: Market Structure and Regulations – Workshop Report and Staff Recommendations, p. 37, Oct. 2, 2020, *available at* https://www.cpuc.ca.gov/gasplanningoir [CPUC Staff's recommendations expressly "call[] attention . . . to the two rotating power outages of August 2020" as a "cautionary tale" noting that "[t]he role of California's natural gas infrastructure is especially important during times of low renewable generation."].

the State's ultimate decarbonization goals. Furthermore, regardless of whether it agrees with those views, governmental regulators are not allowed to misuse their investigatory power to punish entities with fines and sanctions merely for expressing their political viewpoint. The Constitution does not permit such viewpoint discrimination. In *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York* (1980) 447 U.S. 530, the Commission sought to restrict the energy company's support of nuclear power via a ban on inserts in utility bills. The U.S. Supreme Court held that this constituted impermissible viewpoint discrimination in violation of the utility's freedom of speech.[102] If in fact Cal Advocates seeks to suppress or stifle SoCalGas's lawful speech in support of natural gas and renewable gas through its investigation, then the investigation itself would violate the Constitution.

Even if Cal Advocates is not motivated by such animus, the Resolution has failed to demonstrate that the discovery into SoCalGas's 100% shareholder-funded political activity is rationally related to Cal Advocates' investigation into whether SoCalGas misused ratepayer monies. This lack of a nexus between the stated purpose of Cal Advocates' investigation and the discovery it seeks compels a finding that Cal Advocates has failed to meet its heavy burden of justifying its infringement on SoCalGas's First Amendment rights.

5. The Resolution Erred in Adopting Cal Advocates' Deficient Arguments that the Discovery it Seeks is Narrowly Tailored.

As the Resolution recognizes, a governmental request for First Amendment-protected information must be narrowly tailored, "such 'that the least restrictive means of obtaining the desired information' have been used"[103]—i.e., the means that put the least amount of restrictions

[102] *Consolidated Edison*, *supra*, 447 U.S. at p. 543-44.
[103] Res., p. 15 [citing *Perry*, *supra*, 591 F.3d at p. 1161].

on a party's First Amendment rights. As clear from the above discussion, Cal Advocates' investigation can in fact be "achieved through means significantly less restrictive."[104] Cal Advocates need only examine the above-the-line accounts to find out whether political activity has been misclassified in above-the-line accounts. There is simply no need for Cal Advocates to investigate the details of SoCalGas's First Amendment-protected political activity, or to compel the identities of SoCalGas's political partners and vendors that are recorded below-the-line. As in *Britt*, "Instead of carefully delimiting the areas of private associational conduct as to which [Cal Advocates] has demonstrated a compelling need for disclosure," the Resolution "opens virtually all of [SoCalGas]'[s] most intimate information to wholesale disclosure."[105] "The very breadth of the required disclosure establishes that [the Resolution] did not apply traditional First Amendment analysis in passing on the validity of [Cal Advocates'] inquir[i]es into the private associational realm, and in particular did not heed the constitutional mandate that 'precision of (disclosure) is required so that the exercise of our most precious freedoms will not be unduly curtai[l]ed . . . .'"[106] The Resolution erred in simply adopting Cal Advocates' deficient conclusions to the contrary.

a. **The DR-05 Contracts Are Recorded Below-the-Line and Are Not Narrowly Tailored to Provide Cal Advocates with Above-the-Line Information to Further its Investigation.**

Cal Advocates' Data Request CalAdvocates-SC-SCG-2019-05, Question 8 sought "all contracts (and contract amendments) covered by the [Work Order Authorization] which created the BALANCED ENERGY IO." The Balanced Energy IO is an internal order for which costs

[104] *Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 623.
[105] *Britt, supra*, 20 Cal.3d at p. 861.
[106] *Ibid., quoting Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18, 22.

are classified in a below-the-line account and tracks, among other things, costs associated with SoCalGas's political activities related to the promotion of renewable natural gas in achieving the State's decarbonization goals.[107] In response to the request, SoCalGas produced contracts that were funded by both ratepayers and shareholders, but objected to the production of five contracts that were 100% shareholder-funded. Cal Advocates has not provided any justification as to how compelling the production of these five contracts that are charged to below-the-line accounts is narrowly tailored to achieve its goals of obtaining the information—because it cannot do so. Instead, in its response to SoCalGas's Motion for Reconsideration/Appeal, Cal Advocates argued that seeking the DR-05 Contracts was narrowly tailored because it "did not seek, for example, all contracts SoCalGas entered into regarding all lobbying activities, . . . [but only those] related to the Balanced Energy IO."[108] Simply stating that it could have asked for a broader set of information is inadequate to prove that it in fact exercised its power in the least restrictive means possible. Further, as noted in SoCalGas's reply brief, even at the time it was made, Cal Advocates' argument was belied by the breadth of its other requests, including PubAdv-SCG-001-SCS, which (as Cal Advocates clarified in meet and confers) requests "contracts related to Communications, Advocacy and Public Outreach aimed at local, state and federal government audiences."[109]

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[107] The Balanced Energy IO was always intended to be classified to a below-the-line account. However, an incorrect settlement rule originally settled this account in an incorrect FERC account. This was promptly corrected and disclosed to Cal Advocates in R.13-11-005 Data Response CalAdvocates-SK-SCG-2020-01 Q4.

[108] Cal Advocates Response to Mot. for Reconsideration/Appeal, p. 15.

[109] Southern California Gas Company's (U 904 G) Reply In Support Of Its Motion For Reconsideration/Appeal To The Full Commission Regarding Administrative Law Judge's Ruling In The Discovery Dispute Between Public Advocates Office And Southern California Gas Company, October 7, 2019 (Not In A Proceeding), Dec. 27, 2019, p. 12 and n. 9. SoCalGas has cooperated with the Cal Advocates' wide-ranging investigation, responding to over 150 questions (not including subparts),

Further, the Resolution commits error in finding that the discovery "is narrowly tailored to seek specific contracts and information about SoCalGas' potential use of ***ratepayer funds*** for lobbying activities."[110] The five contracts at issue here are charged to below-the-line accounts, not above-the-line accounts. In fact, the data request itself was not narrowly tailored to seek contracts that are recorded to above-the-line accounts at all. Quite the opposite, Cal Advocates demanded broadly the production of ***all*** contracts that were charged to the Balanced Energy IO (an internal order for which costs are classified in a below-the-line account).

The Resolution further cites C4BES as an example of how the discovery is relevant.[111] However, C4BES is a red herring, which Cal Advocates is using as a pretext to engage in otherwise impermissible discovery.[112] Cal Advocates already has the information related to the SoCalGas's founding and funding of C4BES. Through its investigation, Cal Advocates identified certain expenses that had been erroneously recorded to above-the-line accounts. It worth noting that Cal Advocates identified these expenses by examining information in above-the-line accounts not below-the-line accounts. SoCalGas voluntarily recategorized certain

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producing approximately 8,000 documents, and making access available to over 96% of the financial information contained in its SAP database.

[110] Res., p. 18 (emphasis added).

[111] Res., p. 20.

[112] In its Motion for Reconsideration/Appeal, SoCalGas pointed out that absent the full Commission's intervention, Cal Advocates' increasing incursion onto the constitutional rights of not just SoCalGas, but also others, would continue. Unfortunately, this has come to fruition, not only with other discovery at issue here, but also in discovery it has continued to serve. Cal Advocates continued to serve extensive discovery requests on SoCalGas throughout the Summer of 2020. On June 30, 2020, Cal Advocates served Public Advocates Office Data Request No. CalAdvocates-TB-SCG-2020-04 ("DR-15") on SoCalGas, which contained 25 questions with dozens of subparts. This data request expressly called for information protected by the First Amendment as well as the attorney-client privilege, as it requested information on SoCalGas's relationships and financial support of third parties, including vendors, lobbying groups, consulting and communications groups, and, inexplicably, its outside counsel Willenken LLP.

expenses from above-the-line to below-the-line accounts.[113] The five contracts at issue here are unrelated to C4BES. What Cal Advocates actually seeks are the names of SoCalGas's other political partners, descriptions of the strategic public-policy and government-relations work they do for SoCalGas, and amounts SoCalGas spends on its political messaging that are recorded below-the-line. Therefore, DR-05 Question 8 is not narrowly tailored for Cal Advocates to obtain the information it needs for its investigation.

b. **There is No Evidence to Support a Finding that Access to SoCalGas's Entire SAP Database is Narrowly Tailored for Cal Advocates to Obtain Information Needed for its Investigation.**

The Resolution's finding that the Subpoena seeking access to SoCalGas's entire SAP Database is narrowly tailored is not supported by the record. Cal Advocates does not even attempt to argue that its request for SoCalGas's entire SAP Database was narrowly tailored[114]—because it cannot. Instead, it argued that SoCalGas had no First Amendment rights in its political activities at all and intends to disclose all of SoCalGas's associational information publicly as soon as possible.[115] Since the Resolution rejected this position in re-affirming that SoCalGas is also protected by the First Amendment, as are other entities and individuals,[116] the Commission should find (and the Resolution should have found) that Cal Advocates failed to prove up this element.

Indeed, the Resolution committed legal error by failing to specifically analyze how the Subpoena for SoCalGas's entire SAP Database is narrowly tailored or the "least restrictive

[113] *See* Response to Q3-Q5, Amended Submission to Data Request CALPA-SCG-051719, July 12, 2019; R.13-11-005 Data Response CalAdvocates-SK-SCG-2020-01 Q4.
[114] Cal Advocates' Response to Mot. to Quash.
[115] Cal Advocates Comments at 20-21.
[116] Res., p. 12.

means" to obtain the needed information to inform Cal Advocates' investigation into SoCalGas's alleged misuse of ratepayer funds. Instead, the Resolution summarily dismisses SoCalGas's First Amendment rights by simply referring back to its discussion related to the DR-05 Contracts. The Resolution fails to explain, and cannot explain, how access to all of SoCalGas's accounts (above-the-line and below-the-line) in the SAP Database is the least restrictive means of investigating the use of ratepayer funds (i.e., the above-the-line accounts). To be clear, the Subpoena's demand for SAP access is different than from prior fixed databases that SoCalGas typically provides Cal Advocates in the GRC. The Subpoena requires unprecedented "live" access to the SoCalGas's entire SAP database.[117]

The Resolution commits further legal error by failing to analyze why SoCalGas's proposed custom software solution was not the appropriate least restrictive means. This solution would have provided Cal Advocates with all the information in SoCalGas's SAP (both above-the-line and below-the-line accounts) except for (1) less than 20 vendors out of approximately 2,300 vendors for which expense are recorded below-the-line and protected by SoCalGas's First Amendment rights and (2) information protected by the attorney-client and attorney-work product privileges. This solution puts fewer restrictions on SoCalGas's exercise of its First Amendment rights, while still providing Cal Advocates the ability to conduct its accounting exercise—the ostensible reason for its investigation—to determine whether SoCalGas charged

[117] It is worth noting that while SoCalGas was developing the custom software solution, SoCalGas provided Cal Advocates with fixed databases from its SAP database per its request. Cal Advocates did not object to the fixed database and has not asserted that the fix databases are not sufficient for its purposes.

any inappropriate political activity to ratepayers.[118] The Resolution fails to discuss or analyze this solution at all. This also constitutes clear error as a matter of law.

c. **There is No Evidence to Support a Finding that Examining the Unredacted Versions of the Confidential Declarations Are Narrowly Tailored to Enable Cal Advocates to Obtain the Information Needed for its Investigation.**

Cal Advocates also does not put forth any justification as to how obtaining the Confidential Declarations will further its investigation.[119] Once again, Cal Advocates has failed to do so, because it cannot do so. The Confidential Declarations were submitted in support of SoCalGas's Motion for Reconsideration/Appeal on December 2, 2019.[120] SoCalGas filed four Confidential Declarations conditionally under seal, with a concurrent motion to file under seal, and served redacted versions on Cal Advocates.[121] One of these Confidential Declarations was from Sharon Tomkins, SoCalGas' Vice President of Strategy and Engagement and Chief Environmental Officer, attesting to the "chilling effect" disclosure of SoCalGas's political associations and activities to Cal Advocates would have on SoCalGas. The other three Confidential Declarations were declarations from SoCalGas's contracting partners, including

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[118] SoCalGas invested substantial resources and hours to develop the custom software solution. SoCalGas spent over three hundred hours building, testing, and completing the customized access solution. SoCalGas's Response to Motion for Contempt filed on July 2, 2020 at 9.

[119] Nor could Cal Advocates make the argument that they needed the Confidential Declarations in order to respond to SoCalGas's Motion for Reconsideration/Appeal since Cal Advocates had already filed its response seven (7) months before it filed its Motion to Compel.

[120] Southern California Gas Company's (U 904 G) Motion for Reconsideration/Appeal to the Full Commission Regarding Administrative Law Judge's Ruling in the Discovery Dispute Between Public Advocates Office and Southern California Gas Company, October 7, 2019 (Not in a Proceeding), Dec. 2, 2019.

[121] Motion Of Southern California Gas Company's (U 904 G) For Leave To File Under Seal Confidential Versions Of Declaration Numbers 3, 4, 5 And 6 In Support Of Its Motion For Reconsideration/Appeal To The Full Commission Regarding Administrative Law Judge's Ruling In The Discovery Dispute Between Public Advocates Office And Southern California Gas Company, October 7, 2019; [Proposed] Order (Not In A Proceeding), Dec. 2, 2019.

government relations and public affairs firms, who testified to the harm they and SoCalGas would incur if their non-public association and activities were disclosed to Cal Advocates.[122] The unredacted versions of the Confidential Declarations would only reveal the identity of SoCalGas's associations and the scope of the First- Amendment-protected political activity in which it has engaged—rather than anything about how the contracts are funded (i.e., above-the-line or below-the-line). The Resolution similarly fails to explain how obtaining the Confidential Declarations is narrowly tailored to further Cal Advocates' investigation into misuse of ratepayer funds.

6. The Resolution Erred in Relying on *Duke Energy's* Relevance Standard to Justify Cal Advocates' Discovery Instead of the Appropriate Strict Scrutiny Standard.

The Resolution erred in relying on *United States v. Duke Energy Corp.* (M.D.N.C. 2003) 218 F.R.D. 468 to conclude the discovery sought by Cal Advocates was appropriate. First, *Duke Energy* is not a strict scrutiny case; it applies a mere "relevance" standard and expressly states it is not "employ[ing] a higher level of scrutiny" reserved for discovery that directly implicates First Amendment concerns.[123] The Resolution committed legal error in applying this lower "relevance" standard.[124] The court in *Duke Energy* determined the discovery sought did not go "to the heart of the group's associational activities."[125] Here, it does: As discussed above, the DR-05 Contracts, Confidential Declarations and the small number of protected vendors would

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[122] *See* Motion for Reconsideration/Appeal, pp. 14-15 (describing contents of declarations).
[123] *See United States v. Duke Energy Corp.* (M.D.N.C. 2003) 218 F.R.D. 468, 473 [applying "relevance" standard]; *see also id.* ["Of course, if the scope of the lawsuit and the discovery goes to the heart of the group's associational activities, then the Court will employ a higher level of scrutiny."].
[124] Res., p. 18 [applying *Duke Energy* to conclude Cal Advocates' discovery is permitted "because it was relevant to the subject matter of the litigation."].
[125] *Duke Energy*, *supra*, 218 F.R.D. at p. 473.

reveal the identities, contracts, scope of work information, and financial information about SoCalGas's political activities. In *Britt*, a group of owners and residents of homes sued the San Diego Unified Port District, a governmental agency that operated the nearby airport, seeking compensation for diminished property values, personal injuries, and emotional distress caused by the operation of the airport.[126] In response, the District sought discovery into plaintiffs' local political activities, including their membership in any meetings opposed to the District, the identity of others at the meetings, and content of the discussions at those meetings, and any financial contributions by plaintiffs to those organizations.[127] The Court found that the government sought "information concerning both [the plaintiffs'] and others' affiliations with, and activities in, organizations which, at various times, have protested operations at the San Diego airport and have attempted through traditional political efforts to influence the future conduct of such operations."[128] The Court determined such discovery implicated First Amendment harm. Similarly, the Commission must apply the strict scrutiny standard established by the California Supreme Court in *Britt v. Super. Ct. and* the Ninth Circuit in *Perry.*[129]

Second, the discovery requests in *Duke Energy* were very different factually from those here. In that case, the information sought was restricted to communications between the defendant utility company and an advocacy group "which would tend to show whether Duke Energy had actual or constructive notice of the meaning of National Source Review ("NSR") regulations and interpretations."[130] It did not seek *all* communications between Duke Energy

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[128] *Id.* at p. 852.
[129] *Britt v. Super. Ct.* (1978) 20 Cal.3d 844, 855 [government's burden is "particularly heavy" to show demands are "precisely tailored" to serve a "compelling state interest"].
[130] *Duke Energy*, *supra*, 218 F.R.D. at p. 472.

and the advocacy group. The court found that the discovery order was "limited to a specific purpose" (whether Duke Energy had knowledge of a particular fact) separate from the organization's "associational activities."[131] The government was not engaged in a "general fishing expedition."[132] Unlike *Duke Energy*, Cal Advocates' investigation is not targeted, and goes straight to the heart of SoCalGas's associational and expressive activities. The discovery seeks *all* of SoCalGas's financial information in SAP, including SoCalGas's 100% shareholder-funded political activities, which Cal Advocates has admitted is the precise information it wants to audit. Cal Advocates' discovery demand is akin to the dangerous fishing expedition referenced in *Duke Energy*. Instead of limiting its discovery to above-the-line accounts to determine whether ratepayer funds were improperly used, Cal Advocates is fishing for information that goes to the heart of SoCalGas's associational and expressive activities (SoCalGas's detailed strategies and association with organizations and individuals in exercising its right to petition the government and advocate its position, publicly and privately, relating to natural gas, renewable natural gas, and green gas solutions)[133] so that it and Sierra Club can jointly investigate, prosecute and punish SoCalGas with threats of contempt, fines and sanctions to suppress or stifle its viewpoint, as evidence by the Joint Prosecution Agreement.[134]

Third, in *Duke Energy*, the parties failed "to offer any proposal for protection less than suppression."[135] Here, even though it was Cal Advocates' burden to narrowly tailor a solution, SoCalGas has offered and enabled since May 29 a less restrictive means for Cal Advocates to

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[131] *Id.* at p. 473.
[132] *Id.*
[133] Carrasco Decl., ¶ 6.
[134] Common Interest Agreement, Exhibit 4 to Wilson Declaration filed in Support of SoCalGas's November 19, 2020 Comment at 1.
[135] *Id.* at p. 473.

obtain information it needs for its investigation: SoCalGas's proposed SAP custom software solution. The solution would have provided Cal Advocates with what it needed to investigate the use of *ratepayer* funds.[136] As discussed above, the Resolution fails to explain why this is not the appropriate least restrictive means that provides Cal Advocates with the information it needs to address the stated goals of its investigation.

Overall, Cal Advocates failed to meet its evidentiary burden to prove that its discovery requests were narrowly tailored to meet a compelling government interest. The Resolution erred in concluding otherwise.

B. The Resolution Committed Legal Error in Requiring an Attorney Declaration Accompanying the Privilege Log.

The Resolution commits legal error in requiring that, "If providing a privilege log, SoCalGas must concurrently provide Cal Advocates with a declaration under penalty of perjury by a SoCalGas attorney that the attorney has reviewed the materials associated with the privilege claim and that such privilege claim has a good faith basis in the law, and the specific legal basis, with a citation, for withholding the document."[137] To be clear, SoCalGas does not object to providing a reasonable privilege log, where appropriate. What SoCalGas does object to is this unprecedented requirement of compelled attorney testimony. The requirement is illegal at heart because it puts at issue an attorney's determination of whether something is privileged or not, which violates the attorney-client privilege and the attorney work-product doctrines.[138] By

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[136] Beyond what is needed, Cal Advocates would have had access to all of SoCalGas's below-the-line accounts that were not covered by this First Amendment dispute.
[137] Res. p. 24.
[138] The attorney-client privilege in California is codified by the Legislature in the Evidence Code. Evidence Code 954 establishes that "the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer

requiring an attorney to testify as to the substance of his or her own legal advice, process, research, and conclusions, it effectively causes the attorney to become a witness against his or her own client. This is an unprecedented invasion of the attorney-client privilege and work product doctrines, which contravenes the will of the Legislature and places an impermissible divide between an attorney and his or her client. The California Supreme Court has concluded that proceedings before the Commission, including in investigations, are "tempered by the attorney-client privilege."[139] Therefore it cannot require this declaration.

A detailed look at the requirement demonstrates the many ways it contravenes the law. Most importantly, it compels testimony of "a SoCalGas attorney" regarding the attorney's legal conclusions about the utility's privilege claims. Such compelled testimony effects a forced waiver of privilege, which can occur via implied waiver when "the client has put [an] otherwise privileged communication directly at issue" in an action.[140] Where "a client has placed in issue the *decisions, conclusions, and mental state of the attorney who will be called as a witness to prove such matters*," a party impliedly waives its attorney-client privilege.[141] Similarly, waiver

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. . . ." Evid. Code § 954. A "confidential communication" means "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence . . . and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship" Evid. Code § 952. As the California Supreme Court has held, "[T]he privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." *Costco Wholesale Corp. v. Sup. Ct*. (2009) 47 Cal.4th 725, 732. The attorney work-product doctrine, meanwhile, is a discovery rule codified in the Code of Civil Procedure that protects any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." Code Civ. Proc. §2018.030(a). Such work product is "not discoverable under any circumstances." Id. This is referred to as "absolute" work product.

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

[140] *Id.* at p. 40.

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

of work product protection "is generally found . . . by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the protection."[142] This is precisely what the Commission has ordered SoCalGas to do—have its attorney present testimony as a witness, via a declaration, regarding his or her conclusion that "such privilege claim has a good faith basis in the law, and the specific legal basis, with a citation, for withholding the document."[143] In doing so, the Commission is forcing the attorney to potentially waive the attorney's legal conclusions, facts upon which the attorney has based those conclusions, including attorney-client privileged communications with the client. Further, this calls for absolute attorney work product on its face, which protects from discovery any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories."[144] In fact, because it is impossible for a single attorney to review every single document on the privilege log requested by Cal Advocates,[145] it *necessarily* involves waiver as to the information on which the attorney has relied in substantiating the privilege claim. "When a client calls that party's attorney to testify . . . to information the attorney could have only learned through the attorney client privilege, the privilege is waived."[146]

This coerced waiver puts an attorney in an impossible position of violating his or her legal and ethical duties to the client. "It is the duty of an attorney to . . . maintain inviolate the

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[142] *DeLuca v. State Fish Co.* (2013) 217 Cal.App.4th 671, 688.
[143] Res. p. 24.
[144] Cal. Code Civ. Proc. § 2018.030(a).
[145] Indeed, this requirement alone puts any attorney in jeopardy of perjuring him or herself and being potentially in violation of Rule 1, because it is impossible to comply with the Resolution's requirement on its face in that a single attorney simply cannot personally review the number of documents at issue, as requested by Cal Advocates, in the time frame mandated. Inability to review an unreasonable number documents personally should not be a basis on which the Commission could assess a finding of perjury, Rule 1 violations, and subsequent possible disbarment or other professional discipline.
[146] *DeLuca*, *supra*, 271 Cal.App.4th at p. 689.

confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."[147] This duty of confidentiality, among other things, *requires* an attorney to claim the attorney-client privilege in any situation where a client communication is threatened to be disclosed: Evidence Code § 955 reads, "The lawyer who received or made a communication subject to the privilege under this article **shall claim** the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege . . . ."[148] This coerced waiver of privilege jeopardizes the individual attorney's legal duties to his or her client.

The Commission cannot coerce a waiver of the attorney-client privilege or work product doctrine. The attorney-client privilege is a creature of statute, and as the California Supreme Court has held, "[T]he privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case."[149] "[T]he attorney-client privilege is a legislative creation, which courts have no power to limit by recognizing implied exceptions."[150] In fact, so strong is the protection of the attorney-client privilege and attorney work product in California that the Evidence Code forbids disclosure of privileged and absolute work product information in order to rule on a claim of privilege.[151] The Evidence Code mandates that "the presiding officer [ruling on a claim of privilege] may not require disclosure of information claimed to be privileged under this division or attorney work product under subdivision (a) of Section 2018.030 of the Code of Civil Procedure in order to rule on the

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[147] Bus. & Prof. Code § 6068(e)(1).
[148] Evid. Code § 955 (emphasis added).
[149] *Costco Wholesale Corp. v. Sup. Ct*. (2009) 47 Cal.4th 725, 732.
[150] *Costco, supra*, at p. 739; *see also Wells Fargo Bank v. Sup. Ct.* (2000) 22 Cal.4th 201, 209 ["What courts in other jurisdictions give as common law privileges they may take away as exceptions. We, in contrast, do not enjoy the freedom to restrict California's statutory attorney-client privilege based on notions of policy or ad hoc justification."].)
[151] Evid. Code § 915.

claim of privilege . . . ."[152] Therefore, the Commission may not require SoCalGas to disclose privileged and work-product protected information via a compelled declaration in order to rule on the claim of privilege of the materials listed in the privilege log.[153] Moreover, privilege objections do not need to be verified under oath.[154] A court, and by extension the Commission, "has no authority to issue courtroom rules that are in conflict or inconsistent with statute."[155]

Furthermore, the Commission is improperly increasing the burden of proof in conflict with law. The California Supreme Court has noted that a party claiming privilege only has to present a prima facie evidence of a privilege claim. And "[o]nce that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (Evid.Code, § 917, subd. (a); *Wellpoint Health Networks, Inc.,* at pp. 123–124, 68 Cal.Rptr.2d 844.) Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725, 733, 219 P.3d 736, 741 (2009). Here, the Commission is requiring more than a prima facie case, but specific evidence in the form of an attorney declaration. The Commission has no authority to change the burden of proof established by law.

The Commission cannot rewrite the bounds of attorney-client and attorney-work product privileges. Particularly, since the attorney-client and the attorney-work product privileges are creatures of legislative creation and the Commission has no particular expertise on the subject

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[152] *Id.*
[153] *See Costco Wholesale Corp. v. Sup. Ct.* (2009) 47 Cal.4th 725, 732.
[154] Cal. Code Civ. Proc. § 2031.250(a) ("The party to whom the demand for inspection, copying, testing, or sampling is directed shall sign the response under oath unless the response contains only objections."); *see also Blue Ridge Ins. Co. v. Sup. Ct.* (1988) 202 Cal.App.3d 339, 344-345.
[155] *Bank of America, N.A. v. Sup. Ct.* (2013) 212 Cal.App.4th 1076, 1098.

matter. Moreover, there is no good policy reason to force a litigant to waive attorney-client and attorney-work product privileges regarding the creation of the privilege log.[156]

In addition, this requirement is not necessary given the existence of Rule 1. SoCalGas as a regulated entity must comply with Rule 1 and takes its obligations to comply with seriously. Under Rule 1, whenever a person transacts business with the Commission, including by submitting a privilege log, the person may never mislead the Commission or its staff by an artifice or false statement of fact or law. Should any person or entity violate Rule 1, the Commission may impose fines on the person or entity. As such, the Commission already has recourse should any entity assert frivolous attorney-client or work product privileges.

Finally, the Commission cannot make an attorney choose between signing the declaration to support its claim of privilege under threat of penalty and waiving its client's privilege rights. An inadequate log, or inadequate verifications of objections (which are not necessary in any event) do not waive the privilege itself, which is governed by the Evidence Code.[157] "[The attorney-client privilege] is not to be whittled away by means of specious argument that it has been waived. Least of all should the courts seize upon slight and equivocal circumstances as a technical reason for destroying the privilege."[158]

The requirement that SoCalGas compel its own attorney to testify, subjecting him or her to cross-examination against it with respect to the client's privilege claims, has no basis in the law.

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[156] If the Commission insists on this new standard, SoCalGas presumes that the Commission's legal division would also be required to abide by this new standard as well.

[157] *Blue Ridge Ins. Co. v. Sup. Ct.* (1988) 202 Cal.App.3d 339, 345; *see also Catalina Island Yacht Club v. Sup. Ct.* (2015) 242 Cal.App.4th 1116, 1120 ["May a trial court find a waiver of the attorney-client privilege and work product doctrine when the objecting party submits an inadequate privilege log that fails to provide sufficient information to evaluate the merits of the objections? No."].

[158] *Blue Ridge Ins. Co.*, *supra*, 202 Cal. App. 3d at p. 345.

IV. SOCALGAS REQUESTS ORAL ARGUMENTS ON THIS MATTER OF UTMOST PUBLIC IMPORTANCE.

Pursuant to Commission Rule 16.3, an application may request oral arguments in the application for hearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision: "(1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation; (2) changes or refines existing Commission precedent; (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or (4) raises questions of first impression that are likely to have significant precedential impact."[159] The Resolution's forced waiver of a utility's First Amendment rights contravenes numerous precedents of the United States and California Supreme Court, including in *Pacific Gas & Elec. Co. v. Public Utilities Com.* (1986) 475 U.S. 1, *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York* (1980) 447 US. 530, 533 and is a matter of utmost public importance warranting oral argument and rehearing by the Commission.[160]

Therefore, SoCalGas respectfully requests the Commission schedule oral arguments. There are serious unanswered questions and concerns raised by the Joint Prosecution Agreement, when and who knew about the Joint Prosecution Agreement, and whether the decisionmakers (the ALJ and Executive Director) would have made the decisions they made had they known about the existence and intent of the Joint Prosecution Agreement. Further, SoCalGas can present in further detail its arguments as to the broad and dangerous precedent this Resolution

[159] CPUC Rule 16.3(a).
[160] CPUC Rule 16.3(a).

will set for utilities' First Amendment rights and the effects on entities that may have a political or public-policy viewpoint that does not align with Cal Advocates (and Sierra Club); explain the new precedent and broad implications of how the Resolution would force waiver of attorney-client privilege and work product by requiring an attorney sign a declaration to accompany a privilege log; explain how Cal Advocates' discovery will not provide it with information to further its investigation from an accounting perspective; and explain how SoCalGas's SAP custom software solution will provide Cal Advocates with all the information it needs to conduct its accounting exercise. This information would materially assist the Commission in resolving this AFR in a manner that protects SoCalGas's First Amendment Rights and rights to assert attorney-client privileges.

V. CONCLUSION

The Resolution's analysis of the First Amendment issue is not supportable by the evidence and commits legal error. This issue is ripe for rehearing to provide the Commission an opportunity to correct the Resolution's error. Furthermore, the Commission should consider the policy implications implicit in the Resolution's findings and conclusions. If Cal Advocates may investigate any aspect of SoCalGas's political activity, even when 100% shareholder-funded, then neither SoCalGas, nor any other investor-owned utility, has any meaningful First Amendment rights vis-a-vis Cal Advocates (and by extension, Sierra Club). Cal Advocates should not be allowed to misuse its investigatory power outside of any proceeding to expose and threaten entities with fines and sanctions merely for the content of their political views—views that, while they may differ from Cal Advocates, are aligned with the many statements of

Commission staff who acknowledge that natural gas infrastructure has an important role to play in achieving the state's decarbonization goals.[161]

Furthermore, the Resolution's unprecedented effort to add a declaration requirement to privilege logs is an illegal order. This declaration requirement is a forced waiver of SoCalGas's attorney-client and attorney-work product privileges. Such a forced waiver is not permitted under the legislature's statutory scheme for attorney-client and attorney-work product privileges. Finally, SoCalGas respectfully requests the Commission schedule oral arguments as the Resolution contravenes numerous precedents of the United States and California Supreme Court and is a matter of utmost public importance warranting oral argument and rehearing by the Commission.[162]

Respectfully submitted,

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[161] *See, e.g.*, R.20-01-007 Track 1A: Reliability Standards and Track 1B: Market Structure and Regulations – Workshop Report and Staff Recommendations, p. 37, Oct. 2, 2020, *available at* https://www.cpuc.ca.gov/gasplanningoir [CPUC Staff's recommendations expressly "call[] attention . . . to the two rotating power outages of August 2020" as a "cautionary tale" noting that "[t]he role of California's natural gas infrastructure is especially important during times of low renewable generation."].
[162] CPUC Rule 16.3(a)(3).