BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

SOUTHERN CALIFORNIA GAS COMPANY'S (U904G) MOTION TO COMPEL DISCOVERY

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March 1, 2021

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Pursuant to Rule 11.3 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure ("Rules"), Southern California Gas Company ("SoCalGas") submits this motion to compel discovery, seeking an order to require the Commission's Safety and Enforcement Division ("SED") to fully respond to SoCalGas' discovery requests. Consistent with Rule 11.3(a), SoCalGas has met and conferred with SED concerning all the discovery disputes addressed herein. Despite SoCalGas' efforts, SED has failed and/or refused to respond fully to certain discovery requests. Most recently, "SED confirm[ed] that it will not provide a privilege log or a discussion of the legal basis for the potential privilege claims"[1] made in response to SoCalGas' data requests, prompting the filing of this motion.[2]

[1] Declaration of F. Jackson Stoddard in Support of Southern California Gas Company's (U904g) Motion to Compel Discovery (Mar. 1, 2021) ("Decl. of J. Stoddard") ¶ 10, Ex. I at 1 (Email Correspondence between Avisha Patel, Darryl Gruen, Robyn Purchia, and J. Stoddard, dated February 19, 2021).

[2] This motion follows the filing of the participating parties' Joint Case Management Statement on February 19, 2021; the discovery matter addressed herein is noted as disputed in that statement.

I. INTRODUCTION

As noted previously, SED has deviated from its typical custom and practice in this proceeding. SED, the CPUC Division tasked with conducting and prosecuting incident investigations, chose not to issue a staff report, or any findings, recommendations, or conclusions, prior to the Commission's opening this Order Instituting Investigation—notwithstanding the Commission's or SED's stated intent in December 2015 to prepare such a report.[3] Significantly, this proceeding appears to mark the first time that SED failed to issue an investigation report in a formal enforcement action. SED further chose to shield from testimony and discovery at least ***24*** SED engineers and personnel who participated in SED's investigation by selecting an external consultant, with no involvement in SED's pre-formal investigation, to be its sole witness in this proceeding.[4] SED thus divorced its pre-formal investigation and the findings and conclusions of its investigators from the violations ultimately sponsored at the last minute by the external consultant who was completely unfamiliar with SED's pre-formal investigation, has never spoken with SED's investigators, and has no awareness of any observations or findings made by SED in the course of its investigation.[5] While it is within SED's discretion to decide how it will staff and prosecute its cases, SoCalGas is entitled to the basic procedural protections afforded by due process, including the right to obtain discovery of relevant information, as reflected in Rule 10.1.

But no matter the excuse offered, SED is not legally able to hide the entirety of its investigation from SoCalGas. Relevant information is discoverable. The pre-formal investigation,

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[3] CPUC/DOGGR Joint Statement on Investigations, *Key State Investigations into Southern California Gas Company Natural Gas Leak at Aliso Canyon*, December 15, 2015 (noting that SED had launched its investigation and citing Appendix B for additional information regarding the scope of SED's investigation); see also *Appendix B: Scope of CPUC Investigation Into Well Failure at Aliso canyon* at 1 ("SED will release its official investigation report upon completion of all aspects of its investigation."; available at: https://www.cpuc.ca.gov/aliso/.)

[4] Decl. of J. Stoddard ¶ 2, Ex. A at 16 (SED's Second Supplemental Response to SoCalGas Data Request 21) (Response to Question 29). SoCalGas notes that certain of SED's personnel, namely, SED's engineer Randy Holter, worked on SED's investigation beginning on October 25, 2015—two days after SoCalGas discovered the leak at well SS-25. (See *id*. at 10, (Response to Question 11: "Mr. Holter was assigned to work for SED on the Aliso Canyon incident on October 25, 2015.").)

[5] Decl. of J. Stoddard ¶ 3, Ex. B (Deposition of Margaret Felts (February 5, 2020) at Tr. 86:23-89:13.)

which took place over more than three years, certainly produced information relevant to the scope of issues in this proceeding. It is of no consequence whether SED is relying on that information for purposes of its testimony. Moreover, SED fails to acknowledge that the deliberative process privilege, does not apply to litigants in enforcement actions and, even if applicable, would only cover pre-decision deliberations with the Commission's decision makers, and is qualified—requiring a specific showing that nondisclosure interests outweigh "the strong public interest in disclosure."[6]

This Motion to Compel addresses SoCalGas' Data Requests 24 and 25, primarily focusing on the claims of deliberative process privilege asserted by SED in response to SoCalGas' questions.

- ***Data Request 24*** seeks information regarding SED's review of SoCalGas' well files and preparation of any staff report created in connection with SED's investigation.[7] One question in this request asked whether SED personnel had reviewed SoCalGas records as part of SED's pre-formal investigation.[8] After initially objecting to this question on the basis of deliberative process privilege,[9] SED recently supplemented its initial response and now admits that SED personnel did, in fact, review SoCalGas' well files in connection with the Incident.[10] SED's correction, however, was only made after SoCalGas independently discovered this fact through a deposition where the witness testified that SED conducted a lengthy records review as part of its pre-formal investigation. Notably, counsel to SED, who

[6] *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1125; *See also* Calpine Ruling at 10 (holding, in part, that the fact that the case was an enforcement/adjudicatory matter made it "reasonable to allow the deposition" of a Consumer Protection and Enforcement Division Energy Analyst); *See also Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 307.

[7] Decl. of J. Stoddard ¶ 4, Ex. C (SoCalGas' Twenty-Fourth Set of Data Requests to SED).

[8] *Id*. at 5 (Question 4).

[9] Decl. of J. Stoddard ¶ 5, Ex. D at 5 (SED's Response to SoCalGas' Data Request No. 24) (Response to Question 4).

[10] Decl. of J. Stoddard ¶ 6, Ex. E at 5 (SED's Supplemental Response to SoCalGas' Data Request No. 24) (Supp. Response to Question 4).

were present at this deposition,[11] did not state a privilege objection. Nor did SED seek to claw back this information following the deposition. SED's conduct here suggests that its initial privilege assertion with respect to this request was, at best, unconsidered and casts doubt on SED's privilege assertions elsewhere. SED still, however, refuses to produce communications related to that review or disclose any information regarding the report it developed in connection with its investigation. SED's primary and most frequently stated objection throughout this response is deliberative process privilege. SoCalGas is entitled to probe the basis for any privilege asserted by SED, and SED has failed to provide an adequate factual or legal basis to substantiate its privilege claims (as confirmed by the email from SED's counsel to SoCalGas' counsel[12]). Moreover, SED fails to acknowledge that the deliberative process privilege does not apply to litigants in enforcement actions;[13] and, even if applicable, the privilege would only cover pre-decision deliberations with the Commission's decision makers, and is qualified—requiring a specific showing that nondisclosure interests outweigh "the strong public interest in disclosure."[14]

- ***Data Request 25*** contains a series of related requests about factual findings made by SED during the course of its investigation, if any, and whether SED communicated these findings to Blade and/or DOGGR.[15] SED again offers its legally deficient deliberative process privilege claim that fails for the same reasons

[11] Separate counsel for CPUC was also present and did not state a privilege objection to the questions regarding the SED records review.

[12] Decl. of J. Stoddard ¶ 10, Ex. I at 1 (Email Correspondence between Avisha Patel, Darryl Gruen, Robyn Purchia, and J. Stoddard, dated February 19, 2021).

[13] *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1125; see also ALJ's Ruling Denying Motions to Quash Deposition (Aug. 6, 2009), I.09-01-017 (*Calpine Ruling*) at 10 (holding, in part, that the fact that the case was an enforcement/adjudicatory matter made it "reasonable to allow the deposition" of a Consumer Protection and Enforcement Division Energy Analyst).

[14] *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 307.

[15] Decl. of J. Stoddard ¶ 7, Ex. F (SoCalGas' Twenty-Fifth Set of Data Requests to SED).

as stated above.[16] SED additionally asserts attorney-client privilege, but does so without identifying which documents would be privileged and without accounting for the vast amount of communications that presumably would have taken place between non-attorneys at SED. Similarly, SED's general recitation of unsupported objections are legally insufficient to avoid answering SoCalGas' data requests.

SoCalGas respectfully requests that the ALJs grant SoCalGas' motion to compel because SED has failed to substantiate—and cannot substantiate—its assertions of deliberative process privilege. Permitting SED to withhold the requested information based on invalid privilege claims will result in prejudice to SoCalGas by impairing SoCalGas' ability to discover information relevant to its defense, and will infringe SoCalGas' right to due process.

II. APPLICABLE LAW

CPUC Rule 10.1 is clear: "[A]ny party may obtain discovery from any other party regarding any matter, not privileged, that is relevant to the subject matter involved in the pending proceeding, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence…." Parties can pursue discovery through depositions or written discovery. As the Commission recognizes, Public Utilities Code Section 1794 requires it to follow the California Code of Civil Procedure ("CCP") for discovery involving depositions,[17] and it generally follows the CCP for other discovery related procedures. (*In re Alternative Regulatory Frameworks for Local Exchange Carriers* (1994) D. 94-08-028, 55 Cal. PUC 2d 672,

[16] Decl. of J. Stoddard ¶¶ 8-9, Ex. G (SED's Revised Response to SoCalGas' Data Request No. 25) and Ex. H (SED's Supplemental Revised Response to SoCalGas' Data Request No. 25).

[17] Public Utilities Code § 1794 provides:

> The commission or any commissioner or any party may, in any investigation or hearing before the commission, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure and to that end may compel the attendance of witnesses and the production of books, waybills, documents, papers, and accounts.

677 ["[f]or a party to a proceeding, a wide range of discovery procedures are available," citing CCP §§ 2025, 2028, 2030, 2031, 2032, 2033.].)

Under the Civil Discovery Act, "[i]n establishing the statutory methods of obtaining discovery, it was the intent of the Legislature that discovery be allowed whenever consistent with justice and public policy." (*Sinaiko Healthcare Consulting, Inc. v. Pac. Healthcare Consultants* (2007) 148 Cal.App.4th 390, 402.) This discovery statute "must be liberally construed in favor of discovery" (see *Irvington–Moore, Inc. v. Superior Court* (1993) 14 Cal.App.4th 733, 738–739), and "the burden of justifying any objection and failure to respond remains at all times with the party resisting an interrogatory." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 541 [citing *Coy v. Superior Court* (1962) 58 Cal.2d 210, 220–21] (emphasis added).) As detailed below, SED has failed to satisfy its burden to justify refusing production of relevant information and answering questions germane to this proceeding.

III. ARGUMENT

The unusual circumstances of this proceeding do not diminish SoCalGas' right to discover relevant information. SED, of course, may choose to rely on only certain portions of its pre-formal investigation—as it has here—but SED's decision not to rely on aspects of its pre-formal investigation for purposes of its testimony does not render those portions irrelevant. This is true regardless of whether this information supports SED's claims or undermines them. Either way, it is relevant. Given that SED has not substantiated its assertions of deliberative process privilege,[18] and given that SED cannot substantiate them based on its broad application of the privilege (which is contrary to the law) and inconsistent approach regarding assertion of the privilege, SED must be compelled to respond to SoCalGas' legitimate discovery. Anything short of full responses to these questions will result in a violation of SoCalGas' due process rights.[19]

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[18] *See*, *e.g.*, *Golden Door Properties, LLC v. Superior Court of San Diego County* (2020) 52 Cal.App.5th 837, 792, as modified on denial of reh'g (Aug. 25, 2020), review denied (Nov. 10, 2020) (holding that asserting the deliberative process privilege over 1,900 documents required more than generalities regarding policy statements, and a "specific explanation of the role played by any of the 1,900 documents"); *see also Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1073 (stating, in dicta, that when a party asserts the deliberative process privilege, it must provide an inventory of the responsive records, when the other party seeking discovery petitions to compel disclosure).

[19] See *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 302.

A. Data Request 24

The first data request at issue here seeks information about SED's review of SoCalGas' well files[20] and whether SED prepared (or began preparing) a Staff Report related to its Aliso Canyon investigation.[21] Under California law, SoCalGas has a broad right to discovery. (*Sinaiko Healthcare Consulting, Inc. v. Pac. Healthcare Consultants* (2007) 148 Cal.App.4th 390, 402.) And "the burden of justifying any objection and failure to respond remains at all times with the party resisting an interrogatory." (*Williams*, *supra*, 3 Cal.5th 531 at p. 541 [citing *Coy v. Superior Court* (1962) 58 Cal.2d 210, 220–21].) SED has not met that burden here.

As its justification for withholding information regarding its review of SoCalGas' well files, SED offers the boilerplate objections that the questions are "onerous," "unduly burdensome," "vague," and "irrelevant" without explaining why, including during the meet-and-confer process, which is intended in part to ferret out whether the plain objections have any merit.[22] Indeed, SED does not believe it is obliged even to attempt to support or substantiate its conclusory claims of privilege.[23] SED, in a supplemental response, has now acknowledged that SED personnel reviewed SoCalGas' well files in connection with the incident.[24] SED, however, still wants to withhold any findings resulting from such review. The same boilerplate objections are offered in response to SoCalGas' questions about any staff report that may have been prepared and SED also claims that information about such a report is protected by the deliberative process and attorney-client

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[20] Decl. of J. Stoddard ¶ 4, Ex. C at 5 (SoCalGas' Twenty-Fourth Set of Data Requests to SED) (Questions 1-4).

[21] *Id*. (Questions 5-8).

[22] Decl. of J. Stoddard ¶ 6, Ex. E at 4-7 (SED's Supplemental Response to SoCalGas' Data Request No. 24).

[23] Decl. of J. Stoddard ¶ 10, Ex. I at 1 (Email Correspondence between Avisha Patel, Darryl Gruen, Robyn Purchia, and J. Stoddard, dated February 19, 2021). *See*, *e.g.*, *Golden Door Properties, LLC v. Superior Court of San Diego County* (2020) 52 Cal.App.5th 837, 792, as modified on denial of reh'g (Aug. 25, 2020), review denied (Nov. 10, 2020) (holding that asserting the deliberative process privilege over 1,900 documents required more than generalities regarding policy statements, and a "specific explanation of the role played by any of the 1,900 documents"); *see also Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1073 (stating, in dicta, that when a party asserts the deliberative process privilege, it must provide an inventory of the responsive records, when the other party seeking discovery petitions to compel disclosure).

[24] Decl. of J. Stoddard ¶ 6, Ex. E at 5 (Supp. Response to Question 4).

privileges. Additionally, SED claims that it "cannot ascertain every incomplete draft report(s) or memo(s) prepared by individual SED personnel members"—as requested by SoCalGas' defined term "STAFF REPORT"—and thus SED believes it would be "unduly burdensome and oppressive" to respond to SoCalGas' request about the preparation of a staff report.[25] In its supplemental response, SED proceeded to redefine "STAFF REPORT" as "a report or memo prepared by SED personnel that is complete and final, which reflects the findings and/or conclusions of SED personnel, and which has undergone SED management review and approval" and then answers that there is no such staff report. *Id.*[26] A party cannot be allowed to redefine an already defined term in order to avoid answering the other party's legitimate discovery request. Thus, SED must answer the question as written by SoCalGas, not the question as reworded by SED. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783 ["A party may not deliberately misconstrue a question for the purpose of supplying an evasive answer."].)

After meeting and conferring with SoCalGas, SED indicated that it would stand on its objections and would not provide additional information to substantiate its privilege objections. SED assumes that by merely invoking these magic words that it is absolved of its duty to participate in the discovery process. That is not the law, of course. "If an objection is made to a request, the specific ground for the objection shall be set forth clearly in the response." (CCP § Section 2033.230(b).) And if "[a]n objection to a particular request is without merit or too general," the party requesting the information "may move for an order compelling a further response." (CCP § 2033.290(a).)[27] Unsurprisingly, then, California courts have recognized that "the use of 'boiler

[25] *Id*. at 5 (Supp. Response to Question 5).

[26] SoCalGas met and conferred with SED on February 8, 2021 regarding Data Request 24. Decl. of J. Stoddard ¶ 10, Ex. I at 1 (email Correspondence between Avisha Patel, Darryl Gruen, Robyn Purchia, and J. Stoddard, dated February 19, 2021). SED supplemented its Responses to Questions 4, 5, 7, and 9-11 on February 19, 2021, and SED informed SoCalGas that it would stand on its objections.

[27] These statutory provisions are for requests for admission in civil litigation, a type of data request used before the Commission. (See, e.g., *Order Instituting Investigation and Ordering NetFortris Acquisition Co., Inc. to Appear and Show Cause Why It Should Not Be Sanctioned for Violations of the Laws, Rules, and Regulations of this State by Monitoring and Recording Employee Telephone Conversations Without Prior Consent* (CPUC Sept. 14, 2017) 2017 WL 4285549.)

plate' objections . . . may be sanctionable." (*Korea Data Systems Co. v. Superior Court* (1997) 51 Cal.App.4th 1513, 1516.)[28]

More importantly, SED's assertion of the deliberative process privilege does not justify withholding the discovery here since the privilege does not apply in this context.[29] The deliberative process privilege gives decisionmakers "a qualified, limited privilege not to disclose or to be examined concerning [] the mental processes by which a given decision was reached." (*Lodi*, 205 Cal.App.4th at 305 (internal citations omitted)). It "protects the recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the evaluation, analysis, or personal opinions of the writers rather than the policy of the agency." (*Order Instituting Investigation to Address Intrastate Rural Call Completion Issues*, No. D. 19-09-042, 2019 WL 4889102, at *19 (C.P.U.C. Sept. 26, 2019) (*Rural Call*) [citing *Nat'l Wildlife Fed. v. U.S. Forest Service* (9th Cir. 1988) 861 F.2d 1114, 1119].)

The data requests directed to SED, however, do not address the limited issues (recommendations, proposals, mental processes, etc.) covered by the claimed privilege. (*Rural Call* at *19 ["[T]he information sought to be exempted from disclosure must be part of some deliberative process." (citing *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 151-54)].) And SED is not a decisionmaker in the enforcement context (see CPUC Rule 8.1(a)), a necessary prerequisite for its claims. (*Calpine Ruling* at 9.) Additionally, SED does not offer any facts to substantiate how and to what the privilege applies in this context.[30] Finally, even if deliberative

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[28] The principle of rejecting mere boilerplate objections holds true in courts across the Country. Elsewhere, "[c]ourts have consistently held that an objection to a discovery request cannot be merely conclusory, and that intoning the 'overly broad and burdensome' litany, without more, does not express a valid objection." (*Mead Corp. v. Riverwood Nat. Res. Corp.* (D. Minn. 1992) 145 F.R.D. 512, 515–16.) "A party resisting discovery must show how the requested discovery is overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden." (*Zenith Ins. Co. v. Texas Inst. for Surgery, L.L.P.* (N.D. Tex. 2018), 328 F.R.D. 153, 161.)

[29] The California Court of Appeal has held that deliberative process privilege, as codified under the Public Records Act, "simply do[es] not apply to the issue whether records are privileged *in pending litigation* so as to defeat *a party's* right to *discovery*." *See Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1125-28 (holding, also, that there is no common law deliberative process privilege in California) (emphasis in original).

[30] *See*, *e.g.*, *Golden Door Properties, LLC v. Superior Court of San Diego County* (2020) 52 Cal.App.5th 837, 792, as modified on denial of reh'g (Aug. 25, 2020), review denied (Nov. 10,

process privilege applied here, SED would still have failed altogether to meet its burden of showing both the "public's specific interest in nondisclosure" and why that interest outweighs the public interest in disclosure—a failure fatal to the privilege claim.[31] And that does not even account for the fact that the law recognizes that a party to a pending enforcement action has a stronger interest in disclosure than the government has in maintaining secrecy.[32]

If SED had actually provided sufficient authority and factual information to substantiate its assertion that the deliberative process privilege applies to the requested information—which SED has not—it would still fall to the ALJs to test the accuracy of those claims, particularly because SED alleges all responsive information, including facts, is protected by the privilege. In addition, as discussed below, SED has claimed that the deliberative process privilege protects SED's communications with both DOGGR and Blade. As a general matter, and subject to certain exceptions, disclosure of privileged information to third parties such as DOGGR or Blade would result in waiver of any privilege. SED has not provided any basis, explanation or rationale as to why information exchanged with DOGGR or Blade can be withheld as privileged in this instance.

In the same way, SED's brief mention of attorney-client privilege does not shield the discovery sought in this data request. First of all, SoCalGas is seeking non-privileged information from SED non-attorney personnel concerning the investigation. Second, SED offers no justification for invoking the attorney-client communication privilege over the requested information and does not bother to provide a privilege log. SoCalGas is entitled to the discovery of "any matter, not *privileged*, that is relevant to the subject matter involved in the pending proceeding." (CPUC Rule 10.1 (emphasis added).) It is SED's responsibility here to justify the

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2020) (holding that asserting the deliberative process privilege over 1,900 documents required more than generalities regarding policy statements, and a "specific explanation of the role played by any of the 1,900 documents"); *see also Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1073 (stating, in dicta, that when a party asserts the deliberative process privilege, it must provide an inventory of the responsive records, when the other party seeking discovery petitions to compel disclosure).

[31] See *Lodi*, 205 Cal.App.4th at 307 [emphasis added] (holding failure to identify the public's specific interest in non-disclosure was fatal to the government's privilege claim); see also *Calpine Ruling* at 10 (holding, in part, that the fact that the case was an enforcement/adjudicatory matter made it "reasonable to allow the deposition" of a Consumer Protection and Enforcement Division Energy Analyst).

[32] *Marylander*, 81 Cal.App.4th at 1125.

withholding of highly relevant information from SoCalGas, and SED does not even attempt to meet that burden.

B. Data Request 25

The second data request at issue here seeks two categories of information. First, "any FINDINGS, prior to May 16, 2019, resulting from [SED's] pre-formal investigation into the INCIDENT" and whether SED communicated any of those findings to Blade or DOGGR.[33] Second, SoCalGas asks about "any FINDINGS, between October 23, 2015 and May 16, 2019, regarding SoCalGas' recordkeeping, operations and/or maintenance practices related to SoCalGas' gas storage facilities located at the Aliso Canyon" and whether SED communicated any of those findings to Blade or DOGGR.[34]

Aside from its usual boilerplate objections such as "this request is oppressive" or "unduly burdensome," SED's primary argument is that each of the questions seeks information that is "protected by deliberative process privilege."[35] SED attempts in its Supplemental Response to qualify that it is objecting based on "SoCalGas' definition of FINDINGS" as it "cannot ascertain every preliminary perception, observation, theory and/or conclusion reached by its various staff members in the course of or as a result of the pre-formal investigation."[36] SED thus changes the definition of "FINDINGS" to "final conclusions and/or determinations that have been subject to review and approval by SED management" and then answers "no."[37] But even accepting SoCalGas' definition—as SED should for purposes of its data response—SED still claims that "to

[33] Decl. of J. Stoddard ¶ 7, Ex. F at 5 (SoCalGas' Twenty-Fifth Set of Data Requests to SED) (Questions 1-7).

[34] *Id.* at 5-6 (Questions 8-14).

[35] Decl. of J. Stoddard ¶ 8, Ex. G at 4-6 (SED's Revised Response to SoCalGas' Data Request No. 25) (Responses to Questions 1-14).

[36] Decl. of J. Stoddard ¶ 9, Ex. H at 4 (SED's Supplemental Revised Response to SoCalGas' Data Request No. 25) (Supp. Response to Question 1).

[37] *Id*. It should be noted that SED supplemented its initial response only after SED's former Program Manager disclosed at his recent deposition that Randy Holter, SED's lead engineer for the Aliso Canyon investigation, had prepared a draft staff report. (See Declaration of F. Jackson Stoddard in Support of Southern California Gas Company's (U904G) Reply in Support of Motion to Compel (Feb. 16, 2021), Exhibit A [Deposition of Kenneth Bruno (Jan. 29, 2021) at Tr. 188:8-195:4].)

the extent FINDINGS exist . . . they may be protected by deliberative process privilege and attorney-client privilege."[38] SED offers this exact response with respect to both categories of information sought.[39]

For the same reasons noted above, SED's privilege claims fail. To begin, it is unclear why deliberative process privilege applies at all here[40]—and SED has offered no explanation for why it would. Indeed, SED is not a decisionmaker in the enforcement context,[41] and thus it lacks a statutory basis for the privilege it is claiming. Even more, a party to a pending enforcement action has a stronger interest in disclosure than the government has in maintaining secrecy—that is why the Public Records Acts expressly states that it does not impact the discovery rights of litigants.[42] That means SED would face an uphill battle if it even attempted to meet its burden for invoking the deliberative process privilege (which it has not bothered to do). The deliberative process privilege is a qualified privilege, and SED would have to show (i) what the "public's specific interest in nondisclosure" is in the case and (ii) why that interest clearly outweighs the strong public interest in disclosure.[43] And even if all that had been done, SED would still not be able to shield all of the factual information it has regarding its findings at Aliso Canyon, especially if it

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[38] Decl. of J. Stoddard ¶ 9, Ex. H at 4 (Supp. Response to Question 1).

[39] *Id*. at 5-6 (Supp. Response to Question 8). SoCalGas met and conferred with SED on February 8, 2021 regarding Data Request 25. See Decl. of J. Stoddard ¶ 10, Ex. I at 1 (Email Correspondence between Avisha Patel, Darryl Gruen, Robyn Purchia, and J. Stoddard, dated February 19, 2021). SED supplemented its Responses to Questions 1 and 8. SoCalGas again met and conferred with SED on its responses on February 19, 2021, and SED informed SoCalGas that it would stand on its objections.

[40] The California Court of Appeal has held that deliberative process privilege, as codified under the Public Records Act, "simply do[es] not apply to the issue whether records are privileged *in pending litigation* so as to defeat *a party's* right to *discovery*." *See Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1125-28 (holding, also, that there is no common law deliberative process privilege in California) (emphasis in original).

[41] Response of Southern California Gas Company (U 904 G) to the Safety and Enforcement Division's Motion to Quash Southern California Gas Company's Notice of Deposition of Utilities Engineer Randy Holter at Part IV(B)(i).

[42] *Marylander*, 81 Cal.App.4th at 1125.

[43] See *Lodi*, 205 Cal.App.4th at 307 [emphasis added] (holding failure to identify the public's specific interest in non-disclosure was fatal to the government's privilege claim); see also *Calpine Ruling* at 10 (holding, in part, that the fact that the case was an enforcement/adjudicatory matter made it "reasonable to allow the deposition" of a Consumer Protection and Enforcement Division Energy Analyst).

shared any of those findings with DOGGR or Blade. SED is not allowed to waive its privilege and then claim that any other entity with whom it shared information is suddenly covered by the privilege as well.

Similarly, SED does not offer any justifications for invoking attorney-client privilege over the requested information and does not bother identifying any covered documents that would either be on or need to be on SED's privilege log. And as already noted, it is not enough for SED to offer standard discovery objections without any indication of why those might be applicable. (See CCP § 2033.230(b); *Brooks v. Motsenbocker Adv. Developments, Inc.* (S.D. Cal. 2008) 2008 WL 109061, at *3 [rejecting "boilerplate objections" to discovery requests such as vague, ambiguous, and burdensome].)

In sum, SED cannot withhold any factual findings it made during the investigation process by simply stating that those findings "*may* be protected" by privileges that SED will not even attempt to justify (likely because they very clearly do not apply).

IV. CONCLUSION

Recognizing due process principles, California law requires that a defendant be afforded the opportunity to conduct reasonable discovery into charges brought against it—it is legal error not to enforce this right. Here, the ALJs should uphold SoCalGas' due process rights and grant SoCalGas' motion to compel discovery responses in its entirety. At a minimum the ALJs should require SED to preserve all materials related to the Aliso Canyon incident, particularly all draft staff report(s) related to SED's pre-formal investigation. This will prevent the potential for spoliation of evidence in the event that an appeal is required in this proceeding.

Respectfully submitted,

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

F. JACKSON STODDARD

Attorney for:
SOUTHERN CALIFORNIA GAS COMPANY

Dated: March 1, 2021

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

[PROPOSED] RULING

On March 1, 2021, the Southern California Gas Company ("SoCalGas") filed a Motion to Compel Discovery. In the Motion, SoCalGas requests that the Commission order its Safety and Enforcement Division ("SED") to respond to Questions 2-8 of SoCalGas' Data Request No. 24; and Respond to Questions 1-14 of Data Request 25.

Having considered SoCalGas' Motion and SED's Response, accordingly, **IT IS HEREBY ORDERED** that the Motion to Compel is **GRANTED**:

- SED shall respond to Data Request No. 24, Questions 2-8
- SED shall respond to Data Request No. 25, Questions 1-14

SED shall respond to the aforementioned within ten days of the date of this order.

Dated this _____ day of _____ 2021, in San Francisco, California.

_____
ADMINISTRATIVE LAW JUDGE