



**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

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Order Instituting Rulemaking Concerning  
Energy Efficiency Rolling Portfolios, Policies,  
Programs, Evaluation, and Related Issues.

Rulemaking 13-11-005  
(Filed November 14, 2013)

**OPENING BRIEF OF SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) ON ITS  
FIRST AMENDMENT RIGHTS IN THE ORDER TO SHOW CAUSE REGARDING  
ALLEGED VIOLATION OF DECISION AND RULE 1 OF THE COMMISSION'S  
RULES OF PRACTICE AND PROCEDURE**

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RULES OF PRACTICE AND PROCEDURE**

Pursuant to Rule 13.11 of the California Public Utilities Commission's ("CPUC" or "Commission") Rules of Practice and Procedure and directives of the Assigned Administrative Law Judge ("ALJ") Valerie Kao,<sup>1</sup> Southern California Gas Company ("SoCalGas") respectfully provides this opening brief regarding SoCalGas's First Amendment rights in the Order to Show Cause why it should not be sanctioned by the Commission for violation of California Public Utilities Code Sections 702, 2107 or Rule 1.1 of the Commission's Rules of Practice and Procedure ("OSC") (issued October 3, 2019) in the above-captioned proceeding.

**I. INTRODUCTION**

As ordered by the Ruling Directing Further Briefing, this brief is focused on SoCalGas's ratepayer funded<sup>2</sup> public engagement in the California Energy Commission's ("CEC") dockets concerning the current Title 24 cycle.<sup>3</sup> As addressed in SoCalGas's final briefing, this engagement should not be considered when assessing the factual questions and issues to be determined in this OSC, namely whether SoCalGas failed to comply with the prohibition in Decision ("D.")18-05-041 and whether any sanctions or fines are appropriate, as SoCalGas's

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<sup>1</sup> ALJ Kao email ruling directing further briefing in order to show cause regarding alleged violation of decision and of Rule 1 (June 28, 2021) ("Ruling Directing Further Briefing").

<sup>2</sup> As addressed in SoCalGas's testimony and prior briefing, currently costs associated with these activities have been booked to a mix of above the line and below the line accounts. However, as historical costs for this time period are part of SoCalGas's next General Rate Case ("GRC") that has not yet been filed, accounting can be subject to future adjustment during that cycle.

<sup>3</sup> These dockets include 19-BSTD-03, 21-BSTD-01, and 21-BSTD-02. The CEC also opened dockets 19-BSTD-04 and 21-BSTD-03, which SoCalGas has not participated in.

Title 24 engagement does not violate D.18-05-041. Despite this, Sierra Club and the Public Advocates Office (“Cal Advocates”) argue that SoCalGas should be assessed millions of dollars in penalties and should face a long term, or even permanent, prohibition on future engagement in energy efficiency codes and standards rulemakings. This is a clear attempt to punish SoCalGas for expressing viewpoints before one of its regulators that are different than Cal Advocates’ and Sierra Club’s, including on issues such as cost-effectiveness, customer affordability, and opportunities for the State to meet its longer-term decarbonization goals. To the extent the Commission does assess fines or other penalties based on SoCalGas’s Title 24 engagement, this will violate SoCalGas’s First Amendment and due process rights.

The CEC opened a new docket, 19-BTSD-03, for the 2022 Energy Code Pre-Rulemaking on March 5, 2019.<sup>4</sup> The CEC updates the Energy Code for new construction of, and additions and alterations to, residential and nonresidential buildings on an approximately three-year cycle. Per statute, electric and gas utilities, in consultation with the CEC, are required to “provide support for building standards and other regulations . . . including appropriate research development, and training to implement those standards and other regulations.”<sup>5</sup> SoCalGas initially monitored this docket<sup>6</sup> and then in the fall of 2020 began to more actively participate after the CEC brought into the scope of the proceeding issues concerning indoor air quality.<sup>7</sup> Indoor air quality is not itself necessarily related to energy efficiency codes and standards. However, at the urging of some stakeholders, including Sierra Club, the CEC is considering issues related to indoor air quality as part of the Title 24 dockets. None of SoCalGas’s Title 24 engagement for this cycle has been undertaken as part of SoCalGas’s approved energy efficiency (“EE”) portfolio and costs have not been charged to accounts that are funded through Public Purpose Program (“PPP”) surcharges.<sup>8</sup> Rather, this effort has been led by SoCalGas’s policy group. Activities conducted by SoCalGas’s policy group were addressed and approved for the

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<sup>4</sup> California Energy Commission Docket Log, *available at*, <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=19-BSTD-03>.

<sup>5</sup> Cal. Pub. Res. Code § 25402.7

<sup>6</sup> Ex. SCG-02, Prepared Direct Testimony of Deanna R. Haines on Behalf of Southern California Gas Company (January 10, 2020) (“Haines Testimony”), pp. 11-13.

<sup>7</sup> See Ex. SCG-05, Supplemental Prepared Direct Testimony of Deanna R. Haines on Behalf of Southern California Gas Company (August 24, 2020) (“Haines Supplemental Testimony”); Ex. SCG-06, Second Supplemental Prepared Direct Testimony of Deanna R. Haines on Behalf of Southern California Gas Company (October 23, 2020) (“Haines Second Supplemental Testimony”).

<sup>8</sup> Activity undertaken as part of SoCalGas’s EE portfolio is funded exclusively by PPP surcharges.

test year 2019 and 2020-2021 attrition years in SoCalGas's last General Rate Case ("GRC") decision.<sup>9</sup>

There is a real distinction between activity undertaken as part of SoCalGas's EE portfolio ("SoCalGas's EE activity") and activity undertaken by departments or employees that are subject to funding through SoCalGas's GRC ("SoCalGas's GRC activity"). Namely, SoCalGas's EE activity is subject to different mandates, reporting requirements, and Commission decisions than SoCalGas's GRC activity. Most importantly for purposes here, the prohibition on EE codes and standards ("C&S") in D.18-05-041 applies to the two Statewide EE C&S advocacy programs that were part of SoCalGas's EE portfolio, and not to other activities potentially related to C&S advocacy that are *not* undertaken as part of SoCalGas's EE portfolio and which are subject to the approval of funding in other proceedings, such as the GRC.<sup>10</sup> Rather, SoCalGas's GRC funded activities are guided by its GRC decisions, including its most recent GRC decision which approved similar activity by SoCalGas's policy team, including comment letters to the CEC.

It is clear that the other Investor Owned Utilities ("IOUs") are allowed to use ratepayer funding to engage in the very same activities at issue here, namely, participation in a public process before their regulators on policy issues affecting their customers or operations, without the same restrictions, scrutiny, or threat of punishment that SoCalGas faces. The difference in treatment appears to be based only on the particular viewpoints that SoCalGas, the sole large gas-only utility in California, has expressed and Cal Advocates' and Sierra Club's dislike of any viewpoint that is not 100% electrification.<sup>11</sup> If the Commission does what Sierra Club and Cal Advocates ask and assesses penalties on SoCalGas based on its Title 24 engagement, or places further restrictions on SoCalGas's ability to participate in a public process before its regulators on policy issues using GRC funds, the Commission will be engaging in unconstitutional viewpoint discrimination in violation of the First Amendment.

Assessing fines and penalties against SoCalGas based on its Title 24 engagement will also violate SoCalGas's due process rights. As discussed in prior briefing and addressed again

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<sup>9</sup> D.19-09-051.

<sup>10</sup> Additionally, SoCalGas would not expect a decision in an EE proceeding that concerns energy efficiency codes and standards to impact other codes and standards having to do with safety and operations, such as codes affecting pipeline safety.

<sup>11</sup> SoCalGas supports electrification measures in conjunction with other measures that will allow the State to succeed in meeting its ambitious climate goals.

below, D.18-05-041 does not prohibit SoCalGas's Title 24 engagement undertaken outside of its energy efficiency portfolio and the activity is consistent with SoCalGas's most recent GRC decision. Thus, punishing SoCalGas for past behavior that was not prohibited would be equivalent to ex post facto rule making. Further, it is evident that SoCalGas is not being subject to equal treatment with the other IOUs as far as what advocacy before its regulators is allowed to be ratepayer funded, also implicating SoCalGas's due process rights.

## II. RELEVANT BACKGROUND

On October 3, 2019, ALJ Kao issued a ruling granting a motion by Cal Advocates for an OSC to consider whether SoCalGas had violated a prohibition on engaging in EE C&S advocacy ordered in D.18-05-041 or Rule 1.1 of the CPUC's Rules of Practice and Procedure.<sup>12</sup> A prehearing conference was held on October 22, 2019, where parties informed the Commission of a dispute regarding the proper scope of this OSC.<sup>13</sup> In particular, Cal Advocates interprets the prohibition in D.18-05-041 as covering all ratepayer-funded federal and statewide energy efficiency codes and standards advocacy. SoCalGas, however, interprets the prohibition as prohibiting federal and statewide EE C&S advocacy that takes place as part of SoCalGas's approved EE portfolio. At the prehearing conference, the parties, including Sierra Club, presented their respective arguments for what the proper scope of the prohibition is and SoCalGas requested an opportunity to brief the issue, as the proper scope would have implications for the rest of the OSC.<sup>14</sup> The Scoping Ruling that followed the prehearing conference did not address whether the prohibition in D.18-05-041 covers activity that takes places outside of SoCalGas's EE portfolio. The Scoping Ruling did, however, direct SoCalGas

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<sup>12</sup> Administrative Law Judge's Ruling Granting the Motion of the Public Advocate's Office of the Public Utilities Commission and Directing Southern California Gas Company to Show Cause Why It Should Not Be Sanctioned by the Commission for Violation of California Public Utilities Code Sections 702, 2107 or 2108 or Rule 1.1 of the Commission's Rules of Practices and Procedure (October 3, 2019), p. 4.

<sup>13</sup> Transcript of Prehearing Conference on the Order to Show Cause directing SoCalGas why it should not be sanctioned by the Commission for violation of California Public Utilities Code Sections 702, 2107, or 2018 or Rule 1.1 of the Commission's Rules of Practice and Procedure in R.13-11-005 (October 22, 2019) ("Transcript of Prehearing Conference") at pp. 258-259.

<sup>14</sup> *Id.* at 259:7-27 ("It became more and more clear during our meet and confers that there's just a fundamental disagreement there about the scope and whether it's appropriate to bring in accounts outside of the demand side management balancing account, which is the account where PPP surcharges are recorded. We brought this up to Cal Advocates, and – and want to request here – we'd like to formally request that this issue be briefed. . . . to address that issue prior to any other dates, because I think the scope's going to affect everything else as far as, you know, discovery and – and testimony.").



to provide testimony to explain why C&S activities cited to in Cal Advocates' motion initiating the OSC were charged to SoCalGas's Operation and Maintenance ("O&M") and GRC accounts and to provide testimony on any additional C&S related charges in the O&M and GRC accounts.<sup>15</sup>

The parties thereafter served testimony pursuant to the schedule and direction provided for in the Scoping Ruling.<sup>16</sup> With regard to the issue of EE C&S activity that is not undertaken as part of SoCalGas's approved EE portfolio, SoCalGas initially submitted the January 10, 2020 Prepared Direct Testimony of Deanna R. Haines.<sup>17</sup> For each of the activities discussed in Ms. Haines' testimony, Ms. Haines explained why SoCalGas did not believe that the activity discussed "constitutes C&S activity that is EE-related, ratepayer funded, and statewide or federal advocacy."<sup>18</sup>

SoCalGas subsequently submitted the Supplemental Prepared Direct Testimony of Deanna R. Haines, dated August 24, 2020 and the Second Supplemental Prepared Direct Testimony of Deanna R. Haines, dated October 23, 2020, which both discussed activity that had occurred after Ms. Haines' January 10, 2020 testimony.<sup>19</sup> Unlike Ms. Haines' January 10, 2020 testimony, Ms. Haines' supplemental testimony discussed advocacy activity related to energy efficiency codes and standards, specifically SoCalGas's engagement in the CEC dockets related to Title 24. This activity was undertaken outside of SoCalGas's approved EE portfolio (no PPP surcharge funding used) and the associated costs were booked to both below the line and above the line accounts.<sup>20</sup> The testimony of Ms. Haines provided that, given this OSC, SoCalGas was also separately tracking the costs associated with its Title 24 engagement and, if necessary after a

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<sup>15</sup> Assigned Commissioner's Amended Scoping Memo and Ruling for Order to Show Cause Against Southern California Gas Company (December 2, 2019) ("Scoping Ruling"), pp. 2 and 5.

<sup>16</sup> Ex. SCG-01, Prepared Direct Testimony of Darren M. Hanway on Behalf of Southern California Gas Company (OSC Ordered Items of Testimony 1 and 2) (January 10, 2020); Ex. SCG-02, Haines Testimony; Ex. SCG-03, Prepared Direct Testimony of Darren M. Hanway on Behalf of Southern California Gas Company (March 27, 2020) ("Hanway Testimony on Compliance"); Ex. SCG-04, Prepared Rebuttal Testimony of Darren M. Hanway on behalf of Southern California Gas Company (May 15, 2020); Ex. SCG-05, Haines Supplemental Testimony; Ex. SCG-06, Haines Second Supplemental Testimony; Ex. Cal Advocates 01E, Cal Advocates' Testimony.

<sup>17</sup> Ex. SCG-02, Haines Testimony.

<sup>18</sup> *Id.* at 9-10, 13, 15-17.

<sup>19</sup> Ex. SCG-05, Haines Supplemental Testimony; Ex. SCG-06, Haines Second Supplemental Testimony.

<sup>20</sup> SoCalGas charges costs either above the line or below the line. These terms refer to whether an income or expense item appears above or below the operating income line on a utility's regulatory income statement.

decision in this OSC, would adjust accounting treatment to reflect the appropriate accounts for ratemaking purposes in advance of SoCalGas's next GRC.<sup>21</sup>

The Commission held two days of evidentiary hearings on November 2 and 3, 2020.<sup>22</sup> The parties filed their final briefing for this OSC on December 11, 2020<sup>23</sup> and January 15, 2021,<sup>24</sup> with the last date also being the date the record for this OSC was submitted.<sup>25</sup> On June 25, 2021, Assigned Commissioner Genevieve Shiroma issued an Amended Scoping Memo and Ruling to more explicitly include within the scope of this OSC the activities addressed in Ms. Haines' supplemental testimony which described SoCalGas's engagement in the CEC's Title 24 dockets.<sup>26</sup>

On June 28, 2021, ALJ Kao issued an email ruling directing further briefing from the parties.<sup>27</sup> Specifically, ALJ Kao quoted from SoCalGas's opening brief:

SoCalGas also has concerns that its First Amendment rights to free speech and free association could be negatively impacted by including non-[energy efficiency, or EE] activity within the scope of the prohibition in D.18-05-041. SoCalGas's public participation in a [California Energy Commission, or CEC] rulemaking, as discussed in Ms. Haines's testimony, is entirely ethical, appropriate, and in the best interests of its customers. There needs to be a broad and open debate about the best paths forward for

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<sup>21</sup> Ex. SCG-05, Haines Supplemental Testimony, p. 6; Ex. SCG-06, Haines Second Supplemental Testimony, p. 5.

<sup>22</sup> Transcript of Evidentiary Hearing in the Order to Show Cause initiated via Ruling dated October 3, 2019, R.13-11-005, Volume 1 and Volume 2 (November 2-3, 2020).

<sup>23</sup> Opening Brief of SoCalGas to the OSC Directing SoCalGas to Show Cause Why It Should Not be Sanctioned by the Commission for Violation of CPUC Sections 702, 2107 or 2108 or Rule 1.1 of the Commission's Rules of Practice and Procedure (December 11, 2020) ("SoCalGas Opening Brief"); Opening Brief of the Public Advocates on the Commission's October 3, 2019 OSC (December 11, 2020) ("Cal Advocates Opening Brief"); Opening Brief of Sierra Club in the OSC Issued December 2, 2019 Against SoCalGas (December 11, 2020) ("Sierra Club Opening Brief").

<sup>24</sup> Reply Brief of SoCalGas to the OSC Directing SoCalGas to Show Cause Why It Should Not be Sanctioned by the Commission for Violation of CPUC Sections 702, 2107 or 2108 or Rule 1.1 of the Commission's Rules of Practice and Procedure (January 15, 2021) ("SoCalGas Reply Brief"); Reply Brief of the Public Advocates on the Commission's October 3, 2019 OSC (January 15, 2021) ("Cal Advocates Reply Brief"); Reply Brief of Sierra Club in the OSC Issued December 2, 2019 Against SoCalGas (January 15, 2021) ("Sierra Club Reply Brief").

<sup>25</sup> Email Ruling of ALJ Valeri Kao Revising Schedules for Orders to Show Cause (October 6, 2020); *see also* Scoping Ruling, pp. 3-4.

<sup>26</sup> Assigned Commissioner's Amended Scoping Memo and Ruling for Order to Show Cause Regarding Alleged Violation of Decision 18-05-041 and Rule 1 of the Commission's Rules of Practice and Procedure (June 25, 2021).

<sup>27</sup> Ruling Directing Further Briefing.

climate solutions. Members of SoCalGas’s policy team, which is completely separate from its EE team, should be able to participate openly in a policy debate before one of its regulators, the very purpose of a public process that encourages participation. Moreover, SoCalGas questions whether it is the only [investor-owned utility, or IOU] in California facing restrictions on its use of ratepayer funding for rulemaking advocacy before its regulators on issues affecting its customers and for matters of direct operating concern. To the extent decisions on whether SoCalGas can use ratepayer funding for such speech is solely based on the content of SoCalGas’s speech, as evidenced by other IOUs not facing the same restrictions, this potentially violates SoCalGas’s First Amendment rights.<sup>28</sup>

ALJ Kao then presented two questions for the parties to address in briefing, which SoCalGas responds to below.

### III. FIRST QUESTION

The first question in the Ruling Directing Further Briefing, provides:

The parties’ briefs must address all possible impacts to SoCalGas’s First Amendment rights of:

“including non-EE activity within the scope of the prohibition in D.18-05-041.” Specifically, address whether and how to distinguish “non-EE activity” from energy efficiency activity, including in instances where such “non-EE activity” is not readily distinguishable from activities a utility would undertake as part of the energy efficiency Codes and Standards program. Parties’ briefs must also identify and explain their rationale for what authorities govern a utility’s “non-EE activity” as opposed to what authorities govern a utility’s energy efficiency activity.<sup>29</sup>

#### A. Activities Not Undertaken as Part of SoCalGas’s EE Portfolio Are Subject to Different Mandates, Rules, and Decisions

As an initial matter, SoCalGas used the term “non-EE activity” to mean activity that, although related to energy efficiency codes and standards, is undertaken outside of SoCalGas’s Commission approved EE portfolio, and not funded by PPP surcharges. Thus, the distinction is between SoCalGas’s EE activity on the one hand and SoCalGas’s GRC activity on the other hand.

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<sup>28</sup> Ruling Directing Further Briefing (quoting from SoCalGas Opening Brief, pp. 38-39).

<sup>29</sup> Ruling Directing Further Briefing.

As addressed in SoCalGas’s final briefing for this OSC,<sup>30</sup> SoCalGas’s EE portfolio is a distinct program and department within SoCalGas and is actively monitored by the Commission. Activities undertaken as part of SoCalGas’s approved EE portfolio are tracked and recorded in SoCalGas’s Demand Side Management Balancing Account (“DSMBA”), which in turn is funded through PPP surcharges, and is subject to different mandates, reporting requirements, and Commission decisions than its GRC funded activity. For example, activity funded by PPP surcharges is subject to separate statutory provisions and tariffs, including Public Utilities Code (“P.U.C.”) Section 381(b)(1), and Sections 890 through 900.<sup>31</sup> In addition, funds used pursuant to SoCalGas’s EE program have specific rules on how they can be used,<sup>32</sup> which do not apply to funds used pursuant to SoCalGas’s GRC decisions. Further, SoCalGas’s EE program is subject to yearly audits by the Commission to “ensure that SoCalGas was in compliance with EE program rules and regulations and to determine whether its reported EE expenditures and commitments were accurate, allowable and verifiable.”<sup>33</sup> The EE portfolio and the DSMBA are not part of SoCalGas’s GRC, which is a separate set of Commission proceedings with different cost recovery mechanisms and requirements under the Rate Case Plan to demonstrate just and reasonable rates.<sup>34</sup> In addition, the purpose behind using EE funds is different than the purpose behind other ratepayer funded activity.

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<sup>30</sup> See e.g., SoCalGas Opening Brief pp. 25-26.

<sup>31</sup> See also SoCalGas Schedule No. G-PPPS, available at <https://www2.socalgas.com/regulatory/tariffs/tm2/pdf/G-PPPS.pdf>.

<sup>32</sup> See, e.g., Energy Efficiency Policy Manual (Version 5, July 2013), Appendix F, available at [https://www.cpuc.ca.gov/uploadedfiles/cpuc\\_public\\_website/content/utilities\\_and\\_industries/energy\\_-\\_electricity\\_and\\_natural\\_gas/eepolicymanualv5forpdf.pdf](https://www.cpuc.ca.gov/uploadedfiles/cpuc_public_website/content/utilities_and_industries/energy_-_electricity_and_natural_gas/eepolicymanualv5forpdf.pdf). 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.

<sup>33</sup> UAFCB Energy Efficiency Audit, Southern California Gas Company Program Year 2016, at p. 1, available at [www.cpuc.ca.gov/utilityaudits](http://www.cpuc.ca.gov/utilityaudits).

<sup>34</sup> See, e.g., D.13-05-010 (SoCalGas and SDG&E’s TY 2012 GRC), p. 572 (“The costs of the program activities for energy efficiency and the majority of demand response programs are funded elsewhere, and are not part of base rates.”); Third Revised SoCalGas Direct Testimony of Iftekharul (Sharim) Chaudhury (July 31, 2018) (filed in support of SoCalGas’s TY 2019 GRC A.17-10-007/008) (“SoCalGas’ TY 2019 GRC proposals, if adopted, would impact its intrastate transportation rates and revenues. Rates and revenues for other components of the bundled rates, including gas commodity cost and Public Purpose Program (PPP) surcharges, would not be impacted by this Application and therefore, have been held constant for the present versus proposed revenues and rates comparison.”); Second Revised SoCalGas Direct Testimony of Ryan Hom (April 6, 2018) (filed in support of SoCalGas’s TY 2019 GRC A.17-10-007/008) (“Adjustments have been made to the 2016 O&M data to exclude all revenues and expenses that

Thus, given the myriad differences between SoCalGas's EE portfolio and its other departments, including the different mandates, decisions (including D.18-05-041), and funding mechanisms, the distinction is whether activity was undertaken as part of SoCalGas's EE portfolio or not. Here, it is clear that the Title 24 activity at issue was undertaken outside of SoCalGas's EE portfolio.<sup>35</sup>

#### **B. SoCalGas's GRC Funded Activities are Guided by Its GRC Decisions**

The standards and authorities used in assessing SoCalGas's GRC funded activities, including its Title 24 engagement for the current cycle, should be evaluated in accordance with SoCalGas's GRCs, and not with the standards and authorities applicable to SoCalGas's EE portfolio. Activities conducted by SoCalGas's policy group were addressed and approved for the test year 2019 and 2020-2021 attrition years in SoCalGas's last GRC decision.<sup>36</sup> Further, in that decision, issues were raised regarding SoCalGas's engagement with state and local government agencies.<sup>37</sup> There, Sierra Club and the Union of Concerned Scientists contended that SoCalGas, by submitting comment letters to state and local government agencies, including to the CEC, had engaged in improper "lobbying activities aimed at promoting natural gas over electric options."<sup>38</sup> In addressing the letters, the Commission found:

We reviewed each letter and find that each letter, as a whole, and when read in its entirety, does not constitute a means to block measures to replace natural gas with electric options. Instead, the comment-letters in question contain or provide SoCalGas' input and opinion with regards to the topics being addressed in the comment-letters. Some of the letters include information on the

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are recovered through separate filings before the Commission or the FERC. Examples of excluded costs are Demand Side Management (DSM), Energy Savings Assistance Program (ESAP), and California Alternate Rates for Energy (CARE) costs"); D.20-01-002, p. 9 ("Required revenues and the rates necessary to realize them are established via the rate case, which is a quasi-judicial procedure designed to provide due process to all affected parties (e.g., the utility, investors, customers) and produce rates which are just and reasonable. As part of the rate case process, regulators evaluate the prudence (i.e., recoverability) of costs after they are incurred.").

<sup>35</sup> Ex. SCG-05, Haines Supplemental Testimony, p. 6; Ex. SCG-06, Haines Second Supplemental Testimony, p. 5.

<sup>36</sup> D.19-09-051 at 379-380.

<sup>37</sup> *Id.* at 379.

<sup>38</sup> *Id.* See also *id.* n. 301, citing Exhibit 139 Appendix A to E. Appendix C identified and included several comment letters from SoCalGas to the CEC. Exhibit 139 and its appendices can be found at <https://www.socalgas.com/regulatory/documents/a-17-10-008/SCG-221%20-%20Customer%20Services%20S%20Tomkins%20Final.pdf>.

benefits of natural and renewable gas options or suggest consideration of these options but we find that these are generally informational as opposed to what Sierra Club and UCS suggest. To the extent that SoCalGas utilizes ratepayer funds on expenditures that go beyond providing information about natural gas and constitute inappropriate political activity,[fn] the Commission will address such activities in the appropriate proceeding. Furthermore, the Commission reminds SoCalGas that any informational or educational material funded by ratepayers should not contravene the State’s implementation of adopted legislation furthering programs to incentivize low emission buildings [fn] and increasing transportation electrification to achieve the state’s climate goals [fn].<sup>39</sup>

This GRC decision, which was issued after D.18-05-041, thus allowed ratepayer funding for activity that is very similar to the policy group’s engagement in the CEC’s Title 24 dockets. SoCalGas’s engagement in the CEC’s Title 24 dockets has primarily centered on issues of indoor air quality, which is a broader issue and not only relevant to energy efficiency codes and standards, as well as underlying appliance costs and electricity and natural gas rate forecasts. SoCalGas has publicly participated in this proceeding by providing additional scientific literature on indoor air quality, as well as technical information about sources and public health impacts of pollutants including the particulate matter emission from food and oils being cooked, regardless of stove type, and how ventilation strategies can support mitigating these emissions.<sup>40</sup> SoCalGas’s policy group has a history of authorized engagement with the CEC, one of SoCalGas’s regulators, including in the CEC’s Integrated Energy Policy Report (“IEPR”) docket. A SoCalGas letter to the CEC in IEPR was one of the letters at issue in SoCalGas’s last GRC, where ratepayer funding was approved.

SoCalGas should be allowed to publicly participate in CEC proceedings just like any other regulated utility or other stakeholder is allowed to do. As the sole large gas-only utility in California, SoCalGas is an important voice for its customers. The CEC welcomes broad stakeholder participation, and rulemakings can only benefit from the presence of diverse voices, viewpoints, and experiences. There must be a broad and open debate about the best paths

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<sup>39</sup> *Id.* at 380 (footnotes omitted).

<sup>40</sup> *Id.* at 5 (citing to Comments on Commissioner Hearing on Indoor Cooking, Ventilation and Indoor Air Quality, available at <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=19-BSTD-03>).

forward for climate solutions. The Commission should not seek to limit the information and perspectives that the CEC is entitled to consider. Members of SoCalGas’s policy team, which is completely separate from its EE team, should be able to participate openly in a policy debate before one of its regulators, using approved GRC funding, which is the very purpose of a public process that encourages participation.

**C. Punishing SoCalGas for Its Title 24 Engagement Would be Impermissible Viewpoint Discrimination**

SoCalGas recognizes that the Commission has general authority to restrict ratepayer-funded advocacy that is not in the ratepayers’ interests or otherwise before a regulator. Under the First Amendment, the Commission is not allowed to engage in viewpoint discrimination. Under the ratepayer-benefit test, the Commission allows advocacy costs to be charged to ratepayers when the utility demonstrates that “such activities are clearly in the interest of its customers.”<sup>41</sup> For example, the Commission previously considered whether a portion of the cost of Southern California Edison’s (“SCE”) “Public Affairs” work could be allocated to ratepayers.<sup>42</sup> SCE contended that while the work of certain public affairs employees could be characterized as classic lobbying that should be shareholder-funded, other work was “devoted to responding to proposed ordinances and legislation that would have an adverse cost impact on ratepayers.”<sup>43</sup> The Commission recognized that certain public affairs activities—even some that could be characterized as lobbying—can improve coordination between local governments and utilities, resulting in lower utility bills. The cost for this sort of activity could therefore be passed on to ratepayers. As a result, the Commission struck only 25% of SCE’s request for public-affairs costs to be passed on to its ratepayers.<sup>44</sup>

Similarly, the Commission permitted PG&E to recover from ratepayers a portion of its membership dues to the American Gas Association (“AGA”) related to “AGA’s research and information efforts in the arenas of conservation, consumer cost reduction, and government

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<sup>41</sup> Decision No. 86281, App. of *PG&E*, 80 Cal. P.U.C. 396 (1976); *see also* D.92-12-057, Re *PG&E Co.*, 47 C.P.U.C. 2d 143, (Dec. 16, 1992) (noting that “[s]uch benefits need not always be quantifiable, but they must be tangible” and agreeing that payment for research into the “efficient and effective operation of the utility industry” could be borne by ratepayers).

<sup>42</sup> D.04-07-022, *In re S. Cal. Edison Co.*, 2004 WL 1635725 (C.P.U.C. July 8, 2004).

<sup>43</sup> *Id.* at 229.

<sup>44</sup> *Id.* at 233.

relations” because those activities could “have potential benefits to ratepayers and shareholders alike.”<sup>45</sup>

An application of the Commission’s ratepayer-benefit test which punishes or further restricts SoCalGas’s ability to use GRC funds to engage in rulemakings before the CEC would amount to unconstitutional viewpoint discrimination in violation of the First Amendment. SoCalGas has shown that its engagement before the CEC is to the benefit of ratepayers.<sup>46</sup> SoCalGas’s comments to the CEC have included additional scientific literature on indoor air quality, offered viable solutions to address indoor cooking emissions and indoor air quality, and provide additional, technical information about natural gas cooking and potential health impacts. SoCalGas’s comments have also pointed out flaws in the studies relied on by other stakeholders, including Sierra Club. It is in everyone’s interest, including SoCalGas’s ratepayers, to have accurate and complete information on indoor air quality and the CEC values having a range of information and viewpoints, as well as participation from various stakeholders.

While 100% electrification is the viewpoint of some stakeholders, like Sierra Club, it is not State law. Further, as recognized by a recent Commission staff report, SoCalGas’s gas system is a key component of the State’s decarbonization goals.<sup>47</sup> And, 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

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<sup>45</sup> D.92-12-057, *Re PG&E Co.*, 1992 WL 438010 (C.P.U.C. Dec. 16, 1992) (finding these membership dues were a “legitimate cost of service which under a regulatory scheme should be a recoverable cost”); *see also* D.19-09-051 *App. of SDG&E for Auth. to Update Elec. & Gas Revenue Req. and Base Rates*, 2019 WL 5079235, at \*192–93 (C.P.U.C. Sept. 26, 2019) (approving ratepayer costs regarding customer strategy and engagement where utility testimony explained that expenses were driven by spending on informing customers of resources available to address the effect of climate change by using energy-efficient appliances and low-emission vehicles).

<sup>46</sup> *See* SoCalGas Opening Brief, pp. 35-39; SoCalGas Reply Brief, pp. 28-29.

<sup>47</sup> 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.



low-income customers and those residing in disadvantaged communities[.]”<sup>48</sup> Thus, discussion around how to meet the State’s decarbonization goals truly does benefit from multiple viewpoints.

Further, the at issue conduct is participation in a rulemaking before a regulator on issues affecting SoCalGas’s customers and operations. It is clear that the other IOUs are allowed to participate in CEC dockets using ratepayer funds, without the same restrictions and threat of penalty as SoCalGas.<sup>49,50</sup> To the extent decisions on whether SoCalGas can use ratepayer funding for such speech is solely based on the content of SoCalGas’s speech, as evidenced by other IOUs not facing the same restrictions or even the same scrutiny, this amounts to viewpoint discrimination. The Commission is not allowed to use discriminatory and biased enforcement of the ratepayer-benefit test to restrict or punish SoCalGas’s views before its regulator simply because it may not agree with those views.

Viewpoint discrimination is anathema to the First Amendment. First Amendment doctrine “distinguish[es] between content-based and content-neutral regulations of speech.”<sup>51</sup> Content-based regulations target a specific subject matter.<sup>52</sup> The U.S. Supreme Court has made

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<sup>48</sup> August 7, 2020 letter from CPUC President Marybel Batjer to Assemblymembers Patrick O’Donnell, Jim Cooper, and Blanca Rubio, p. 1. Pursuant to Rule 13.9 of the CPUC’s Rules of Practice and Procedure, SoCalGas requests that the Commission take judicial notice of this document.

<sup>49</sup> D.18-05-041, Ordering Paragraph 12, p. 185.

<sup>50</sup> It also appears that the other IOUs have been engaging in the Title 24 docket outside of the Statewide Codes and Standards Advocacy program, and the energy efficiency portfolio, where comments to the CEC are docketed as the “Statewide Codes And Standards Enhancement Team.” SoCalGas has been unable to confirm what funding the other IOUs have used for this separate activity. *See* Southern California Edison (“SCE”) Comments for 2022 Energy Code Changes CEC Docket 21-BSTD-01 (June 21, 2021), *available at* <https://efiling.energy.ca.gov/GetDocument.aspx?tn=238340&DocumentContentId=71635>; SCE Letter to CEC - Energy Code July 2020, CEC Docket 19-BTSD-03 (July 2, 2020), *available at* <https://efiling.energy.ca.gov/GetDocument.aspx?tn=233725&DocumentContentId=66367>; Pacific Gas & Electric (“PG&E”) Comments on Proposed 2022 Energy Code – Solar PV and Storage Proposals, CEC Docket 19-BSTD-03 (December 23, 2020), *available at* <https://efiling.energy.ca.gov/GetDocument.aspx?tn=236154&DocumentContentId=69138>; PG&E Comments on the Revised JA13 - HPWH Demand Management Specification, CEC Docket 19-BTSD-03 (July 6, 2020), *available at* <https://efiling.energy.ca.gov/GetDocument.aspx?tn=233781&DocumentContentId=66426>; PG&E Comments on 2022 Pre-Rulemaking, CEC Docket 19-BTSD-03 (November 13, 2019), *available at* <https://efiling.energy.ca.gov/GetDocument.aspx?tn=230667&DocumentContentId=62279>.

<sup>51</sup> *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

<sup>52</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015).

clear that a “law that is content based on its face is subject to strict scrutiny . . . .”<sup>53</sup> “Viewpoint discrimination is . . . an egregious form of content discrimination.”<sup>54</sup> Viewpoint discrimination occurs “[w]hen the government targets not [just] subject matter, but particular views taken by speakers on a subject.”<sup>55</sup> “A regulation engages in viewpoint discrimination when it regulates speech based on the specific motivating ideology or perspective of the speaker.”<sup>56</sup> By attempting to quash one particular perspective, “the violation of the First Amendment is all the more blatant.”<sup>57</sup>

Because viewpoint discrimination violates the “bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,”<sup>58</sup> strict scrutiny in this context would be fatal in fact. In other words, when viewpoint discrimination occurs, only in the rarest of occurrences will the government’s stated interest in restricting speech be upheld. Two recent U.S. Supreme Court cases make this clear. In *Matal v. Tam*, 137 S. Ct. 1744 (2017), Justice Kennedy noted: “It is telling that the Court’s precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf.”<sup>59</sup> Recognizing this fact, in *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), Justice Kagan framed the Court’s analysis in simple terms: “The Court’s finding of viewpoint bias ended the matter.”<sup>60</sup>

The special, and near absolute, prohibition on viewpoint discrimination is also apparent in the divergence between how courts treat content and viewpoint discrimination in limited public forums. “In a limited public forum . . . content restrictions consistent with the purposes of the forum are permissible . . . .”<sup>61</sup> “However, even in such cases, . . . ‘viewpoint discrimination’

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<sup>53</sup> *Id.* at 165.

<sup>54</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

<sup>55</sup> *Id.*

<sup>56</sup> *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017) (quoting *Town of Gilbert*, 576 U.S. at 168).

<sup>57</sup> *Rosenberger*, 515 U.S. at 829.

<sup>58</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989)

<sup>59</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1768 (Kennedy, J., concurring).

<sup>60</sup> *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

<sup>61</sup> *Rosenberger*, 515 U.S. at 830.

is forbidden.”<sup>62</sup> For example, while the government can restrict all discussion of energy policy in a limited public forum, it cannot forbid only speakers who make the case for a diversified energy policy that extends beyond electric energy.

Yet, this is precisely what Sierra Club and Cal Advocates ask the Commission to do. They ask that the Commission levy substantial fines against SoCalGas, as well as impose additional limits (limits not imposed on any of the other IOUs) on SoCalGas’s use of ratepayer funding because of the *content* of SoCalGas’s advocacy in proceedings before its regulators and SoCalGas’s particular *viewpoint*. This is straightforward viewpoint discrimination squarely prohibited by the First Amendment. The Commission should reject Cal Advocates’ and Sierra Club’s request and not engage in biased, selective enforcement of the ratepayer-benefit test by penalizing or further prohibiting SoCalGas’s use of GRC funds for advocacy in rulemakings before its regulators.

#### IV. SECOND QUESTION

The second question in the Ruling Directing Further Briefing, provides:

The parties’ briefs must address all possible impacts to SoCalGas’s First Amendment rights of:

...  
restrictions on SoCalGas’s use of ratepayer funding for “rulemaking advocacy before its regulators on issues affecting its customers and for matters of direct operating concern,” as described in SoCalGas’s opening brief. Specifically, address whether and how the Commission should distinguish between “rulemaking advocacy” on “issues affecting a utility’s customers and for matters of direct operating concern,” on the one hand, and activities that do not support more stringent energy efficiency codes or standards, on the other hand. Parties’ briefs must also identify and explain their rationale for what authorities govern a utility’s use of ratepayer funding to conduct “rulemaking advocacy” on “issues affecting a utility’s customers and for matters of direct operating concern.”<sup>63</sup>

##### A. SoCalGas’s Title 24 Engagement is Distinguished by the Focus of the Activities and is Governed by Different Authorities

The second question asks the parties to address “whether and how the Commission should distinguish between ‘rulemaking advocacy’ on issues affecting a utility’s customers and

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<sup>62</sup> *Matal*, 137 S. Ct. at 1763.

<sup>63</sup> Ruling Directing Further Briefing.

for matters of direct operating concern,’ on the one hand, and activities that do not support more stringent energy efficiency codes and standards, on the other hand.”<sup>64</sup> However, SoCalGas believes the important question is not whether a rulemaking concerns energy efficiency codes and standards or not (or SoCalGas’s position in that rulemaking), but rather whether SoCalGas is undertaking the activity as part of its approved EE portfolio, which has specific purposes, mandates, and a separate funding mechanism and requirements, or whether the activity is being undertaken by a different department which has a different purpose, funding mechanisms, and different authority proscribing how associated costs are treated.

The second question also asks the parties to identify and explain the authorities that govern “a utility’s use of ratepayer funding to conduct ‘rulemaking advocacy’ on ‘issues affecting a utility’s customers and for matters of direct operating concern.’”<sup>65</sup> As discussed above and in SoCalGas’s final briefing,<sup>66</sup> the prohibition in D.18-05-041 applies to the two Statewide EE C&S advocacy programs that were part of SoCalGas’s EE portfolio, and not to other activities potentially related to C&S advocacy that are *not* undertaken as part of SoCalGas’s EE portfolio and which are subject to the approval of funding in other proceedings, such as the GRC.

The two Statewide EE C&S programs that SoCalGas participated in prior to the Commission’s ruling in D.18-05-041 no longer exist at SoCalGas either within its EE department or anywhere else in the company, aside from transferring funding for these programs to the lead IOU – PG&E. In the case of the CEC’s Title 24 dockets, this cycle’s Title 24 proceedings, although still focused on updating the State’s energy efficiency building codes, have also concerned issues broader than just C&S, including issues surrounding indoor air quality. Indoor air quality is an important issue affecting SoCalGas’s operations and its customers. Thus, SoCalGas believes it was entirely appropriate for its policy team, which is primarily GRC funded,<sup>67</sup> to submit public comments in that proceeding and to otherwise participate. In addition, electric and gas utilities, in consultation with the CEC, are required to “provide support

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> SoCalGas Opening Brief, pp. 25-29.

<sup>67</sup> As addressed in Ms. Haines’ testimony, costs associated with SoCalGas’s Title 24 activity have been charged to a mix of BTL and ATL accounts.

for building standards and other regulations . . . including appropriate research development, and training to implement those standards and other regulations.”<sup>68</sup>

Not only are SoCalGas’s Title 24 activities governed by the GRC process and authorities,<sup>69</sup> SoCalGas’s engagement in the Title 24 dockets with ratepayer funding is also consistent with the accounting guidance provided by the Federal Energy Regulatory Commission (FERC) in its Uniform System of Accounts (USofA),<sup>70</sup> which has been adopted by the Commission.<sup>71</sup> FERC USofA is used by various utilities, including SoCalGas, to record O&M costs and identify both above and below the line costs. The overriding purpose of the USofA is to ensure uniformity and consistency in the reporting of the accounting transactions in the books and records of utilities. Uniformity and consistency are important not only for regulators, but also for other parties requiring accounting information, such as utility management, shareholders, creditors, and other parties to rate proceedings.

Most relevant here is FERC Account 426.4. FERC guidance for Account 426.4(a) provides:

This account must include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials.<sup>72</sup>

Subpart (b) of 426.4 provides an important and relevant exception:

This account must not include expenditures that are directly related to appearances before regulatory or other governmental bodies in connection with an associate utility company’s existing or proposed operations.<sup>73</sup>

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<sup>68</sup> Cal. Pub. Res. Code § 25402.7.

<sup>69</sup> See Section III(B), *supra*.

<sup>70</sup> See, 18 C.F.R. Pt. 101 (Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act).

<sup>71</sup> P.U.C. § 793 (requires the CPUC to adopt FERC’s system of accounts and precludes any conflict between state and federal accounting); see also Decision No. 61160, In the Matter of the Investigation on the Commission’s Own Motion to consider the Adoption of a Revised Uniform System of Accounts for Gas Corporations (December 13, 1960).

<sup>72</sup> 18 CFR § 367.4264(a).

<sup>73</sup> 18 CFR § 367.4264(b).

Thus, while activities which fall within the definition of Account 426.4(a) are below the line and thus generally not recoverable from ratepayers, activities within the exception of 426.4(b) are above the line and thus presumed recoverable from ratepayers.

The exception found in 426.4(b) provides a basis which allows SoCalGas's use of ratepayer funding to conduct rulemaking advocacy on issues affecting its customers and matters of operating concerns, such as future load on the natural gas system and electricity and natural gas rate forecasts. As discussed in detail in SoCalGas's final briefing, the CEC is a regulatory body which SoCalGas appears before in connection with its existing operations.<sup>74</sup> The CEC, noted that for the 2022 Energy Code update, they are "considering options to modify compliance baselines and metrics to increase the Energy Code's support for the state's carbon-reduction goals."<sup>75</sup> The CEC is one of SoCalGas's regulators, and SoCalGas should participate in CEC proceedings just like any other regulated utility, as well as any stakeholder is allowed to do. The activities by the CEC and SoCalGas's appearances before it falls within FERC Account 426.4(b), which provides additional authority for SoCalGas's use of ratepayer funding to conduct rulemaking advocacy on issues affecting its customers and for matters of operating concern. The Commission should not seek to interfere with matters that can be presented and advocated to the CEC.

**B. Penalizing SoCalGas for Its Title 24 Engagement Would Violate SoCalGas's Due Process Rights**

Along with the First Amendment concerns above, SoCalGas also believes that to the extent the Commission assesses penalties, including monetary fines, against SoCalGas for its engagement in the CEC's Title 24 dockets, that would violate SoCalGas's due process rights. As discussed above, the prohibition in D.18-05-041 was directed towards the two Statewide EE C&S advocacy programs in SoCalGas's EE portfolio and did not encompass activity undertaken outside of SoCalGas's EE portfolio. Further, similar SoCalGas activity, including SoCalGas comments to the CEC, was specifically litigated before the Commission in its last GRC, was found to be consistent with FERC USofA which allowed for ratepayer funding, and ratepayer

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<sup>74</sup> SoCalGas Opening Brief, p. 36.

<sup>75</sup> Ex. SCG-05, Haines Supplemental Testimony, pp. 4-5 (citing to Notice of Lead Commissioner Workshop, CEC Docket No. 19-BSTD-03, docketed on September 17, 2019).

funding was approved.<sup>76</sup> It is fundamentally unfair and a violation of SoCalGas's right to due process for the Commission to impose a fine for activities that are similar to those that have been previously allowed without first providing notice to SoCalGas that the Commission had decided to prohibit them. It would also be unfair given that SoCalGas asked for an opportunity to brief and have a decision on this very issue prior to engaging in the Title 24 activities. The Commission was aware of the dispute between the parties as to the scope of the prohibition in D.18-05-041 and SoCalGas has been upfront about its position and its participation at the CEC. Lastly, it is evident that SoCalGas is not being subject to equal treatment with the other IOUs as far as what advocacy before its regulators is allowed to be ratepayer funded. This further implicates SoCalGas's due process rights.

### VIII. CONCLUSION

Assessing fines and penalties against SoCalGas based on its Title 24 engagement or further restricting SoCalGas's ability to participate in rulemakings before its regulator will violate SoCalGas's First Amendment and due process rights. For the reasons stated here, as well as in SoCalGas's final briefing, the Commission should find that SoCalGas's Title 24 engagement does not amount to a violation of D.18-05-041 and that no fines or other penalties or restrictions are appropriate.

Respectfully submitted on behalf of SoCalGas,

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<sup>76</sup> D.19-09-051.