

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)

Investigation19-06-016

**MOTION OF THE SAFETY AND ENFORCEMENT DIVISION  
TO STRIKE SOUTHERN CALIFORNIA GAS COMPANY'S (SOCALGAS)  
FILING FROM SEPTEMBER 3, 2021, AND TO REPORT VIOLATIONS OF THE  
RULES OF PROFESSIONAL CONDUCT BY SOCALGAS COUNSEL TO THE  
STATE BAR OF CALIFORNIA**

**I. INTRODUCTION**

Southern California Gas Company (SoCalGas) submitted its filing based on the deposition of Safety and Enforcement Division's engineer Mr. Randy Holter on September 3, 2021. (September 3 Filing) The September 3 Filing omits salient facts that render the deposition of Mr. Holter unlawful and beyond the scope authorized in the Administrative Law Judges' (ALJs) ruling of May 28, 2021. SoCalGas did not show it provided a notice of deposition to the Commission that it was deposing its employee, and was seeking official information from the Commission.<sup>1</sup> Further, SoCalGas' counsel asked questions beyond the authorized scope of the deposition, which placed Mr. Holter,

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<sup>1</sup> SoCalGas did not provide Safety and Enforcement Division (SED) advocacy attorneys evidence of a notice of deposition on SED advisory attorneys. SED advisory represents California Public Utilities Commission (Commission) staff acting in a non-advocacy capacity on behalf of the Commission. On September 13, 2021, SED data requested SoCalGas to provide a Notice of Deposition on Commission's advisory staff, and SoCalGas has not yet responded.

who was not represented by counsel, in the unenviable position of providing expert testimony for SoCalGas against his employer, the Commission. SED advocacy counsel could only object to SoCalGas' unauthorized deposition questions on the basis that it was outside the scope authorized for the deposition but could not advise Mr. Holter not to answer the questions, as they could not assert deliberative process or official information privilege.<sup>2</sup> Only counsel representing Mr. Holter could assert such privileges and SoCalGas did not show that such counsel was given notice of the deposition.

Therefore, SoCalGas' September 3, 2021 filing is false and misleading and should be stricken in its entirety for not conforming to law and the ALJs' ruling May 28, 2021.<sup>3</sup>

By asking unauthorized non-percipient questions in the deposition without counsel for Mr. Holter present and instructing Mr. Holter that the law requires him to answer these questions over the objections of the parties present, notwithstanding the deliberative and official information privilege disclosures inherent in the questions, SoCalGas' counsel also violated the Rules of Professional Conduct, and should be reported to the State Bar of California.<sup>4</sup>

## **II. BACKGROUND**

On October 8, 2020, SoCalGas served a Notice of Deposition of Randy Holter on the following select parties: SED advocacy, the Public Advocates Office at the California Public Utilities Commission (Cal Advocates), The Utilities Reform Network, Southern California Generation Coalition, City of Long Beach, Indicated Shippers, and Save Porter Ranch. Notably, SoCalGas' service to these parties did not also include the Commission's advisory counsel on behalf of SED, when all that SoCalGas would have

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<sup>2</sup> Official information privilege is provided under Cal. Gov't. Code § 1040.

<sup>3</sup> See *Email Ruling on Document Production in Advance of Deposition of Randy Holter*, filed May 28, 2021, p. 4.

<sup>4</sup> This Motion is submitted pursuant to Commission Rule of Practice and Procedure Rule 11.1. SED's response to SoCalGas' September 3 Filing will be filed and served separately.

done to effect service on the Commission and its advisory counsel was to serve the Notice of Deposition on the proceedings' Service List as required by law.

California law requires the party who prepares a notice of deposition to give notice to every other party who has appeared in the action, and the deposition notice, or accompanying proof of service, shall list all the parties or attorneys for parties on whom it is served.<sup>5</sup> Commission's advisory staff, including advisers to the Commissioners, are usually joined in the service list to receive such notices on behalf of the Commission. SoCalGas also did not send SED advocacy an amended Notice of Deposition to reflect the actual date of the deposition, August 26, 2021.

It should be noted that SoCalGas was already on notice from the ALJs in this proceeding that the deposition of Mr. Holter must be narrowly tailored to achieve the questionable objective that SoCalGas claimed was necessary for the deposition. After already denying SoCalGas' request to depose Mr. Holter, ALJ Hecht issued a ruling on April 28, 2021 finding that the deposition of Mr. Holter as a percipient witness "appears reasonably calculated to lead to the discovery of admissible evidence."<sup>6</sup>

On May 28, 2021, ALJ Hecht further clarified her ruling from April 28, 2021 limiting the deposition of Mr. Holter to that of a percipient witness, stating: "Specifically, SED shall review *documents and written communications prepared or sent by Mr. Holter to identify those pertaining solely to Mr. Holter's personal experiences and observations of the leak, response, well kill, and general condition and operations he observed at the Aliso Canyon Storage Facility*. Mr. Holter's communications and documents that go beyond these categories are outside the scope of Mr. Holter's role as a percipient witness..."<sup>7</sup>

On August 26, 2021, SoCalGas deposed Mr. Holter. Present for the deposition were party representatives from SoCalGas, the SED advocacy team, and Cal Advocates.

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<sup>5</sup> Ca. Code Civ. Proc. § 2025.240.

<sup>6</sup> Administrative Law Judges' Ruling Granting Motion for Partial Reconsideration, April 28, 2021, p. 3.

<sup>7</sup> See *Email Ruling on Document Production in Advance of Deposition of Randy Holter*, filed May 28, 2021, p. 4.

The Commission’s SED advisory representatives were absent. Although SoCalGas provided SED’s advocacy team with a notice of deposition of Mr. Holter, it did not provide the Commission’s advisory attorneys for SED with that notice, despite an applicable statute.<sup>8</sup> At the deposition, SoCalGas counsel represented more than once that the scope and purpose of the deposition was of Mr. Holter as a percipient witness related to SED’s pre-formal investigation.<sup>9</sup>

SoCalGas proceeded to ask many questions that were not seeking Mr. Holter’s personal experiences or observations as a percipient witness, and questions that likely would have required objections and instructions not to answer on the grounds of deliberative process privilege. As a matter of law, SED advocacy counsel cannot prosecute and also serve in an advisory capacity in this proceeding.<sup>10</sup> Therefore, SED advocacy could not raise deliberative process privilege objections or issue instructions based on deliberative process and official information privilege.<sup>11,12</sup> However, because those questions were also beyond the scope authorized for the deposition, SED counsel asserted objections that the examination was outside-the-scope of the proceeding.

Examples of SoCalGas’ questions that seek deliberative process information or official information protected by Section 1040 include:

- Was a staff draft report prepared in this case?<sup>13</sup>

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<sup>8</sup> Ex. A. SoCalGas email service of deposition.

<sup>9</sup> Zoom Deposition of Randy Holter, August 26, 2021, Transcripts (Tr.) 15:11-14. “Mr. Holter, the purpose of this deposition is to examine your knowledge as a percipient witness to SED’s investigation of the October 23<sup>rd</sup> Aliso Canyon gas leak.” See also, Tr. 51:13-16 (Stoddard.).

<sup>10</sup> See *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 738–739. [“An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, *in that or a factually related case*, participate or advise in the decision, recommended decision, or agency review. . .”]

<sup>11</sup> *Id.* at 738 [“Significantly, however, the state Administrative Procedure Act requires the internal separation of prosecutorial and advisory functions on a case-by-case basis only.”]

<sup>12</sup> Official information privilege is provided under Cal. Gov’t. Code § 1040.

<sup>13</sup> Tr. 116:8-10. (Stoddard).

- Were any current threats to public safety discovered in the course of SED’s investigation of the Aliso Canyon SS25 gas leak?<sup>14</sup>
- Did Mr. Holter communicate that because the location of the leak was downhole, the incident should be closed?<sup>15</sup>
- Was Mr. Holter’s understanding that a downhole leak was DOGGR’s responsibility based on communications from his supervisors?<sup>16</sup>
- Were the scope and scale of the incident considered significant factors in terms of keeping the investigation open?<sup>17</sup>
- What different elements and factors go into whether an incident results in an investigation or not?<sup>18</sup>
- What was the purpose of Mr. Holter discussing the factors of whether an incident results in an investigation with his supervisors?<sup>19</sup>
- Is media attention a factor in deciding whether to pursue a commission investigation, and if so, explain how that would be considered?<sup>20</sup>
- Was media attention a factor that Mr. Holter discussed with his management with respect to whether to close the investigation?<sup>21</sup>
- Is it true that Mr. Holter might have discussed with his management where he said the investigation might have been closed out depending on the location of the leak if it’s downhole?<sup>22</sup>

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<sup>14</sup> Tr. 117:3-5. (Stoddard.)

<sup>15</sup> Tr. 59:8-19. (Stoddard.)

<sup>16</sup> Tr. 60: 15-19. (Stoddard.); Tr. 59: 1-9 (Stoddard.)

<sup>17</sup> Tr. 61: 22-25. (Stoddard.)

<sup>18</sup> Tr. 66: 10-17. (Stoddard.)

<sup>19</sup> Tr. 68: 3-9. (Stoddard.)

<sup>20</sup> Tr. 68: 13-16. (Stoddard.); Tr. 70: 7-9 (Stoddard.)

<sup>21</sup> Tr. 69: 16-21. (Stoddard.)

<sup>22</sup> Tr. 72:19-24. (Stoddard.)

- When Mr. Holter arrived on-site, what was his understanding of SED’s role with respect to the incident?<sup>23</sup>
- Did Mr. Bruno ever convey that he was concerned that SED or the PUC might look bad if they didn’t have a representative at the facility overseeing the leak response?<sup>24</sup>
- Did Mr. Bruno explain to Mr. Holter why he was asking Mr. Holter to go to the facility?<sup>25</sup>
- Was media attention one of the factors that resulted in Mr. Bruno directing Mr. Holter to go to the facility?<sup>26</sup>
- Did SED management take Mr. Holter’s assignment away from him?<sup>27</sup>
- Did Mr. Holter recall others questioning whether underground gas storage facilities were within the CPUC’s area of responsibility?<sup>28</sup>
- Was Mr. Holter involved in the review and approval of any of the gas safety plans that were submitted to the CPUC beginning in 2012, and if not, does he know who was?<sup>29</sup>
- Did drafts of SED’s official investigation report exist?<sup>30</sup>
- When Mr. Holter submitted the engineer’s status report to SED management, at that point in time, in his view, was it complete for purposes of his responsibility as lead investigator responsible for the investigation report?<sup>31</sup> Why not?<sup>32</sup>

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<sup>23</sup> Tr. 78:2-4. (Stoddard.)

<sup>24</sup> Tr. 82: 16-19. (Stoddard.)

<sup>25</sup> Tr. 81: 1-2. (Stoddard.)

<sup>26</sup> Tr. 81: 13-16. (Stoddard.)

<sup>27</sup> Tr. 78: 15-16. (Stoddard.)

<sup>28</sup> Tr. 86:22 to 87:4. (Stoddard.)

<sup>29</sup> Tr. 92: 13-22. (Stoddard.)

<sup>30</sup> Tr. 113: 2-20. (Stoddard.)

<sup>31</sup> Tr. 137: 6-12. (Stoddard.)

<sup>32</sup> Tr. 137: 13. (Stoddard.)

- With regards to code inspection cycles on temperature, noise, pressure surveys, was Mr. Holter requesting them so he could assess whether or not SoCalGas complied with them?<sup>33</sup>
- Did Mr. Holter, in the course of his investigation, analyze whether or not SoCalGas complied with requirements in an email identified by DOGGR,<sup>34</sup> and what did he conclude?<sup>35</sup>
- Did Mr. Holter recall what potential violations were included in the status report (a report that was not protected by attorney-client privilege)?<sup>36</sup>

During the deposition, SED objected to SoCalGas asking questions of Mr. Holter that were outside the scope of the deposition approximately 80 times.<sup>37</sup> SoCalGas' counsel read into the record that counsel could not instruct the witness to answer questions if there was not a privilege involved,<sup>38</sup> citing authority in support for this assertion.

### **III. SOCALGAS' SEPTEMBER 3, 2021 FILING SHOULD BE STRICKEN IN ITS ENTIRETY FOR NON-CONFORMANCE WITH LAW, FOR ELICITING INFORMATION THAT SHOULD HAVE BEEN PRIVILEGED, AND FOR EXCEEDING THE SCOPE OF THE PROCEEDING**

SoCalGas' September 3, 2021 Filing was based on an unlawful deposition.<sup>39</sup> The September 3 Filing should be stricken in its entirety for the following reasons: a) The deposition of Mr. Holter was against the law because it was not served on the Commission and all parties appearing in the proceeding; (b) the deposition of Mr. Holter elicited information that should have been subject to deliberative process privilege and

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<sup>33</sup> Tr. 150:14 to 152:21. (Stoddard.)

<sup>34</sup> TR. 157: 15-18. (Stoddard.)

<sup>35</sup> Tr. 157: 24-25. (Stoddard.)

<sup>36</sup> Tr. 142:23-143:1. (Stoddard.)

<sup>37</sup> See for example, Tr. 89: 19-25 (Gruen); 100: 14-18 (Gruen); 106:24 to 107:5 (Gruen).

<sup>38</sup> Tr. 118:4-7 (Stoddard.); Tr. 49:8-11 (Stoddard.); Tr. 50:1-3 (Stoddard.); Tr. 64:16 to 65:1.

<sup>39</sup> See Email Ruling on the June 30, 2021 Motion of SoCalGas Ruling Paragraph 4. ["Requests for additional activities or process based on the deposition of Mr. Holter shall be made in writing by September 3, 2021..."]

official information privilege objections, leaving Mr. Holter no choice but to answer those questions without representation; and (c) the deposition of Mr. Holter went beyond the authorized scope of the proceeding by examining Mr. Holter's expert opinion rather than his percipient observations and experiences related to the leak, response, well kill, and general condition and operations he observed at the Aliso Canyon Storage Facility.<sup>40</sup>

#### **A. SoCalGas' Notice of Deposition Was Defective**

SoCalGas did not serve its Notice of Deposition of Mr. Holter on the Commission, Mr. Holter's employer and a government agency, which is required to protect certain information that Mr. Holter might otherwise disclose under examination without representation.<sup>41</sup> California statute requires that any deponent that is not a party or an officer, director, or managing agent of a party, must be served with a subpoena in order to require attendance.<sup>42</sup> Unless the deponent is acting in his individual capacity, he is in effect standing in the shoes of the entity he represents. Proper notice must be given to that entity as well.

California statute also requires the party who prepares a notice of deposition to give notice to every other party who has appeared in the action, and that the deposition notice, or accompanying proof of service, shall list all the parties or attorneys for parties on whom it is served.<sup>43</sup> SoCalGas' service of its Notice of Deposition on parties did not list all entities representing Mr. Holter, namely the Commission's advisory attorneys, even though SoCalGas planned to ask questions that exceeded Mr. Holter's role as a percipient witness.<sup>44,45</sup> Therefore, SoCalGas' Notice of Deposition was defective because it was not properly served on Mr. Holter.

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<sup>40</sup> See *Email Ruling on Document Production in Advance of Deposition of Randy Holter*, filed May 28, 2021 at p. 4 for instructions that Mr. Holter's role in the deposition was limited in this way.

<sup>41</sup> Ca. Code Civ. Proc. § 2025.240.

<sup>42</sup> Ca. Code Civ. Proc. § 2025.280(b).

<sup>43</sup> Ca. Code Civ. Proc. § 2025.240.

<sup>44</sup> Exhibit (Ex.) A, SoCalGas' Notice of Deposition of Randy Holter.

<sup>45</sup> SED has issued a data request to discern whether SoCalGas served a Notice of Deposition on Commission attorneys at all. SoCalGas has not responded to that data request as of the date of this filing.

California statute also requires, in part, that for a deposition to be used in trial, the party must have been present or represented at the taking of the deposition or have had notice of the deposition.<sup>46</sup>

As noted above, SoCalGas did not serve the Notice of Deposition on the service list, but rather sent it directly to specific parties. However, after reaching an agreement that the deposition would go forward on August 26, 2021, SoCalGas did not re-serve its Notice of Deposition even on those parties who had received the original, thereby depriving those parties of the opportunity to attend as well.

SoCalGas's failure to give the Commission proper notice can only be cured by striking its entire September 3 Filing and sealing the deposition, because Mr. Holter had no authority to waive the Commission's deliberative process or official information privileges during his examination by accepting the advice of SoCalGas counsel to answer those questions. Having answered those questions without representation, he disclosed information against the public interest, and that information must not be made a part of the record of this proceeding.

It should be noted that SoCalGas's failure to give proper notice of this deposition to Mr. Holter's Commission advisory counsel in this proceeding is particularly egregious because SoCalGas outside counsel who served it was previously an attorney for the Commission<sup>47</sup> and knew the importance that the Commission ascribes to protecting its deliberative processes and official information. A ruling allowing Commission's regulated utilities to eschew our privileges and depose any staff they choose at will by circumventing their representation would be far-reaching and devastating given the Commission's vast jurisdiction.

For all these reasons, SoCalGas' Notice of Deposition was defective. Therefore, the deposition itself is defective.

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<sup>46</sup> Ca. Code Civ. Proc. § 2025.620.

<sup>47</sup> Mr. Stoddard was Commission staff counsel from September 2006 to October 2010. See: <https://www.bloomberg.com/profile/person/19209219> .

**B. By Deposing Randy Holter In an Unauthorized and Improperly Noticed Way, SoCalGas Obtained Information Otherwise Protected Under the Deliberative Process and Official Information Privileges**

By asking unauthorized questions of Mr. Holter, SoCalGas triggered privilege objections that SED advocacy staff could not make on behalf of Mr. Holter, and that the Commission could not make because it was not represented, leaving Mr. Holter no choice but to answer the questions on the advice of SoCalGas' counsel.

For example, SoCalGas asked:

- Did drafts of SED's official investigation report exist?<sup>48</sup>
- When Mr. Holter submitted the engineer's status report to SED management, at that point in time, in his view, was it complete for purposes of his responsibility as lead investigator responsible for the investigation report?<sup>49</sup> Why not?<sup>50</sup>
- Upon learning of this engineer's status report, SoCalGas then asked: Did Mr. Holter recall what potential violations were included in the status report (a report that was not protected by attorney-client privilege)?<sup>51</sup>

These questions are examples of many others that likely trigger deliberative process privilege that SED advocacy could not assert on behalf of the Commission. To determine whether deliberative process privilege is valid, Courts require an agency, not a party to a proceeding before it, to justify the withholding of records.<sup>52</sup> Further, California Appellate Courts have recognized that in order to validly assert deliberative process privilege on appeal: "The burden is on the [one claiming the privilege] to establish the

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<sup>48</sup> Tr. 113: 2-20. (Stoddard.)

<sup>49</sup> Tr. 137: 6-12. (Stoddard.)

<sup>50</sup> Tr. 137: 13. (Stoddard.)

<sup>51</sup> Tr. 142:23-143:1. (Stoddard.)

<sup>52</sup> See *Times Mirror Co.*, *supra*, 53 Cal.3d at 1336. [{"T]he deliberative process privilege, as subsumed under the 'public interest' exception of section 6255; and the threat to the Governor's personal security, also pursuant to section 6255."}]

See Cal. Gov. Code, § 6255(a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

conditions for creation of the privilege.”<sup>53,54,55</sup> Thus, SED advocacy staff is not authorized to represent the Commission before Courts of Appeal and could not validly assert such privilege in the deposition.

The consequences of SoCalGas asking these unauthorized non-percipient questions of Mr. Holter are extensive. Without SED advisory attorneys present to assert objections based upon deliberative process privilege, Mr. Holter and the Commission could not protect the State’s public interest in preventing disclosure of deliberative process information. The deliberative process privilege protects the decision-making processes of government agencies.<sup>56</sup> Thus, the importance of the deliberative process cannot be overstated, especially in this proceeding on one of the worst gas leaks by a utility in the United States. The Court in *Times Mirror Co.*, *supra*, further noted:

...As the high court has observed in an analogous context:  
“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decisionmaking process.” (United States v. Nixon, *supra* 418 U.S. at p. 705, 94 S.Ct. at p. 3106.)

To prevent injury to the quality of executive decisions, the courts have been particularly vigilant to protect communications to the decisionmaker before the decision is made. “Accordingly, the ... courts have uniformly drawn a distinction between predecisional communications, which are

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<sup>53</sup> *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 306; *see also*, *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 172–173 [“The burden is on the Governor to establish the conditions for creation of the privilege.”]

<sup>54</sup> *See also Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 612 [“We thus come to whether, under section 6255, the Controller satisfied her burden of demonstrating a public interest in nondisclosure that clearly outweighs the public interest in disclosure on the facts of this particular case.”]; (*Times Mirror Co.*, *supra*, 53 Cal.3d at p. 1339, 283 Cal.Rptr. 893, 813 P.2d 240; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 780, 192 Cal.Rptr. 415) [“*This is a matter on which we exercise de novo review*, according the usual deference to any express or implied factual findings of the superior court supported by substantial evidence.”]; (*Times Mirror Co.*, *supra*, 53 Cal.3d at p. 1336).

<sup>55</sup> *Times Mirror Co.*, *supra*, 53 Cal.3d at 1342. [“Although the precise question presented here—whether the Governor may properly invoke the deliberative process privilege with respect to his appointment calendars and schedules—has not heretofore been adjudicated, any number of decisions offer useful points of comparison.”]

<sup>56</sup> *Times Mirror Co.*, *supra*, citing *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 150, 95 S.Ct. 1504, 1516, 44 L.Ed.2d 29.

privileged [citations]; and communications made after the decision and designed to explain it, which are not.” (NLRB v. Sears, Roebuck & Co., supra, 421 U.S. at pp. 151–152, 95 S.Ct. at pp. 1516–1517.) As Professor Cox in his seminal article on executive privilege has explained, protecting the predecisional deliberative process gives the chief executive “the freedom ‘to think out loud,’ which enables him to test ideas and debate policy and personalities uninhibited by the danger that his tentative but rejected thoughts will become subjects of public discussion. Usually the information is sought with respect to past decisions; the need is even stronger if the demand comes while policy is still being developed.” (Cox, Executive Privilege (1974) 122 U.Pa.L.Rev. 1383, 1410.)<sup>57</sup>

It was evident from some of the questions SoCalGas was asking that the tactics were to seed doubt in Mr. Holter’s respect for the sanctity of the environment in which Commission’s deliberative processes take place and undermine his confidence. Here, as noted in *Times Mirror Co.*, the need for deliberative process protection is even stronger because the demand comes while issues around the gas leak have not been resolved. Hence, “policy is still being developed.”<sup>58</sup>

**C. The Deposition of Mr. Holter Went Beyond the Authorized Scope of The Proceeding by Examining Mr. Holter’s Expert Opinion Rather Than His Percipient Observations and Experiences**

The ALJs’ May 28, 2021 ruling authorizing SoCalGas to take the deposition of Mr. Holter made it very clear that “Mr. Holter’s communications and documents that go beyond these categories are outside the scope of Mr. Holter’s role as a percipient witness...”<sup>59</sup> Nonetheless, SoCalGas examined Mr. Holter on non-percipient testimony and SED advocacy staff were without certain defenses to SoCalGas’ non-percipient

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<sup>57</sup> *Times Mirror Co.*, supra, 53 Cal.3d 1325, 1340-1341.

<sup>58</sup> *Id.*

<sup>59</sup> See *Email Ruling on Document Production in Advance of Deposition of Randy Holter*, filed May 28, 2021 at 4.

questions. For example, SoCalGas asked Mr. Holter for his understanding that a downhole leak was the Division of Oil Gas and Geothermal Resources' (DOGGR's) responsibility based on communications from his supervisors.<sup>60</sup> The question was outside the scope of this proceeding because the scoping memo provided that:

The OII/OSC put SoCalGas on notice that the Commission intends to consider whether the concerns raised in the Blade Report represent violations of the Pub. Util. Code, Commission General Orders or decisions, or other applicable laws, rules, or requirements.<sup>61</sup>

Whether a Commission staffer understood that a downhole leak was another agency's responsibility is outside the scope of the applicable requirements under the Commission's jurisdiction that the scoping memo considered. Also, this question sought expert and person-most-knowledgeable opinions of Mr. Holter, not his percipient observation or experience, and put Mr. Holter in the uncanny position of providing expert testimony for a utility. Further, the question may have triggered a deliberative process privilege or official information privilege objection, but SED advocacy could not assert it.

Both SED advisory and advocacy attorneys were needed at the deposition to make proper objections in the same deposition. For example, SoCalGas asked Mr. Holter to explain SoCalGas' violations of the Public Utilities Code.<sup>62</sup> This question again sought expert opinion and legal conclusion, not just percipient observation, or experience.

Further, in asking Mr. Holter to explain violations, SoCalGas pulled a procedural lynchpin that it created. At SoCalGas' request,<sup>63</sup> the ALJs instructed that SED produce violations in opening testimony.<sup>64</sup> SED advocacy clarified that Mr. Holter is not SED's

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<sup>60</sup> Tr: 60: 15-19 (Stoddard.); Tr: 59: 1-9 (Stoddard.)

<sup>61</sup> Assigned Commissioner's Scoping Memo and Ruling (Scoping Memo), September 26, 2019, p. 3.

<sup>62</sup> Tr. 142:23-143:1. (Stoddard.)

<sup>63</sup> I.19-06-016, Pre-hearing Conference Tr. August 30, 2019 43: 24 to 44: 2 (Stoddard.) ["SoCalGas's position on this is that SED should identify the alleged violations with specificity in its opening testimony sooner, if possible; but in its opening testimony would be acceptable to SoCalGas as we had proposed in our prehearing conference statement."]

<sup>64</sup> Scoping Memo, p. 9. ["SED's opening testimony shall: 1. Identify all violations alleged by SED of the Pub. Util. Code, Commission General Orders or decisions, or other applicable regulations with respect to

sponsoring witness of that testimony.<sup>65</sup> SED's sponsoring witness was Ms. Margaret Felts. With the violations fully on the record and thoroughly vetted through testimony and cross-examination of SED's sponsoring witness, Ms. Felts, SoCalGas now seeks to use the expert opinion of another Commission staff to somehow contradict the record in the proceeding. Admission of these answers inappropriately allows SoCalGas to pick SED advocacy's witness for sponsoring certain violations after SED's sponsoring witness has already testified.

#### **IV. SOCALGAS' COUNSEL SHOULD BE REPORTED TO THE STATE BAR OF CALIFORNIA FOR VIOLATING SEVERAL RULES OF PROFESSIONAL CONDUCT**

As shown in the background section, SoCalGas asked many questions of Mr. Holter that were non-percipient witness questions. As shown in Section III above, by asking these non-percipient questions of Mr. Holter, SoCalGas triggered potential objections that SED advocacy could not raise at the deposition. As such, SoCalGas was asking questions of Mr. Holter as an unrepresented person.

In deposing Mr. Holter as an unrepresented person, SoCalGas' attorney who conducted the deposition, Jack Stoddard, has violated several rules of professional conduct that apply to attorneys.

First, Rule 4.3(a) provides in part:

[In communicating on behalf of a client with a person who is not represented by counsel], If the lawyer knows\* or reasonably should know\* that the interests of the unrepresented person\* are in conflict with the interests of the client, the lawyer shall not give legal advice to that person,\* except that the lawyer may, but is not required to, advise the person\* to secure counsel.<sup>66</sup>

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the SS-25 incident and the Blade Report; including the uncontrolled release of natural gas from Aliso Canyon; SoCalGas's maintenance and operation of Aliso Canyon and SoCalGas's related recordkeeping practices; and SoCalGas's cooperation with SED and Blade."]

<sup>65</sup> Motion of the Safety and Enforcement Division for Reconsideration of Administrative Law Judges' June 4, 2020 Email Ruling Authorizing the Deposition of Non-Witness Staff by the Southern California Gas Company, p. 2, ["Ms. Felts is **the only** sponsoring witness of SED's testimony and **the only** SED witness in Phase 1 of this proceeding."]

<sup>66</sup> The State Bar of California, California Rules of Professional Conduct, 2021, Rule 4.3(a).

Here, Mr. Stoddard actually advised Mr. Holter he could answer one of his questions during the deposition, as shown here:

Mr. Stoddard Q: And so part of your investigation was to be based on that root cause analysis, correct?

A: Yes.

Q: And in this instance, the industry practices piece was covered by Blade?

A. Yes. Yes.

Q. But you did do independent analysis regarding whether you reached a final conclusion of those practices; is that correct?

Mr. Gruen: Objecting. Outside the scope of the deposition, which is his work as a percipient witness out in the field, not as an individual.

Mr. Stoddard: No it isn't. You can answer the question.<sup>67</sup>

Mr. Stoddard violated Rule 4.3(a) because he knew or reasonably should have known that Mr. Holter had information that required advisory attorneys to be present to assess whether he could reveal it without violating his duty to his employer, but Mr. Stoddard advised Mr. Holter he could answer his question anyway.

Second, Mr. Stoddard separately and independently violated Rule 4.3(b) because he asked Mr. Holter, as an unrepresented person, questions that he knew or should have known elicited privileged information. Rule 4.3(b) provides in part:

In communicating on behalf of a client with a person\* who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows\* or reasonably should know\* the person\* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.<sup>68</sup>

The record shows that Mr. Stoddard knows that SED's advocacy attorneys cannot assert deliberative process privilege in an enforcement proceeding, explicitly representing

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<sup>67</sup> Tr. 106: 18 to 107: 8. (Stoddard, Holter, and Gruen.)

<sup>68</sup> The State Bar of California, California Rules of Professional Conduct, 2021, Rule 4.3(b).

to the Commission in a pleading signed by him: “SED fails to acknowledge that the deliberative process privilege, does not apply to litigants in enforcement actions...”<sup>69</sup>

The record also shows that Mr. Stoddard also knew or should have known that SoCalGas’ overly broad and vague data request for SED’s pre-formal investigation “findings” related to the Aliso Canyon incident was requesting materials protected by the deliberative process privilege, but for the overbreadth and vagueness of the questions in the Data Requests; questions he then honed in on at the deposition of Mr. Holter. In SoCalGas’ data request, “findings” was defined to include “preliminary or final...theories, and/or conclusion(s) or determinations reached by SED in the course of or as a result of SED’s pre-formal investigation.”<sup>70</sup> SED’s response to SoCalGas’ Motion to Compel SED to answer that data request said some of the materials requested by SoCalGas’ data request for “FINDINGS” related to the “INCIDENT” may have been privileged by deliberative process.<sup>71</sup> As previously noted, Mr. Stoddard was a Commission Staff Attorney, including having worked in the Office of the President of the Commission. He cannot plead ignorance of the manner in which his conduct violated the Code of Professional Responsibility and the deliberative processes of the Commission.

Armed with all of this knowledge, and with only SED’s advocacy attorneys present at Mr. Holter’s deposition, Mr. Stoddard advised several times that it was not appropriate to instruct a witness not to answer a question that was not privileged.<sup>72</sup> He also precisely and specifically honed SoCalGas’ vague and ambiguous data request questions about SED’s findings that had already raised deliberative process concerns. Examples of such questions include:

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<sup>69</sup> *Southern California Gas Company’s (U904G) Motion to Compel Discovery* (Mar. 1, 2021), (Motion to Compel) p. 4.

<sup>70</sup> Ex. C, SoCalGas Twenty-Fifth Set of Data Requests to SED, page 4 of 5, under definitions.

<sup>71</sup> SED’s Response to SoCalGas Motion to Compel Discovery (March 4, 2021), p. 7.

<sup>72</sup> EH Tr. 49: 9-11; See also EH Tr. 64:15 to 65:1.

- Did Mr. Holter recall what potential violations were included in the status report (a report that was not protected by attorney-client privilege)?<sup>73</sup>
- Did Mr. Holter, in the course of his investigation, analyze whether or not SoCalGas complied with requirements in an email identified by DOGGR,<sup>74</sup> and what did he conclude?<sup>75</sup>
- Is it true that Mr. Holter might have discussed with his management where he said the investigation might have been closed out depending on the location of the leak if it's downhole?<sup>76</sup>

The Commission should report Mr. Stoddard to the State Bar of California for separately violating Rule of Professional Conduct Section 4.3(a), and Section 4.3(b).<sup>77</sup>

## V. CONCLUSION

For the foregoing reasons, SED respectfully requests that this motion be granted, and that an order be issued striking SoCalGas' September 3 Filing in its entirety. Because SoCalGas conducted an unlawful deposition upon which the September 3 Filing is based, that entire Filing is defective. SED also requests sealing the deposition of Mr. Holter. SED also respectfully requests that the Commission require that SoCalGas' counsel, Mr. Jack Stoddard, be reported to the State Bar of California for separate and independent violation of Rules of Professional Conduct Section 4.3(a) and 4.3(b).

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<sup>73</sup> Tr. 142:23-143:1. (Stoddard.)

<sup>74</sup> TR. 157: 15-18. (Stoddard.)

<sup>75</sup> Tr. 157: 24-25. (Stoddard.)

<sup>76</sup> Tr. 72:19-24. (Stoddard.)

<sup>77</sup> SED is in the process of doing discovery to learn if other attorneys representing SoCalGas share responsibility for violating these rules of professional conduct.

Respectfully submitted,

DARRYL GRUEN  
ROBYN PURCHIA

/s/ **DARRYL GRUEN**

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September 23, 2021

**EXHIBIT A**

**SoCalGas email service of Notice of Deposition**

**From:** [Stoddard, F. Jackson](#)  
**To:** [Gruen, Darryl](#); [Purchia, Robyn](#)  
**Cc:** [Purchia, Robyn](#); [Bone, Traci](#); [Hilla, Donald P.](#); [Katy Morsony](#); [Norman Pedersen](#); [VidhyaPrabhakaran@dwt.com](#); [KatieJorrie@dwt.com](#); [NSheriff@Buchalter.com](#); [Lrafii@buchalter.com](#); [Maquirre@amslawyers.com](#); [Mary Frazier](#); [Patel, Avisha A](#); [Mortazavi, Setareh](#)  
**Subject:** I1906016 SoCalGas Notice of Deposition  
**Date:** Thursday, October 8, 2020 12:17:30 PM  
**Attachments:** [I.19-06-016 - Notice of Deposition - Randy Holter.pdf](#)

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Darryl and Robyn:

Attached please find SoCalGas' Notice of Deposition of Safety and Enforcement Division Utilities Engineer Randy Holter ("Notice"). Please note that the Notice includes a request for the production of documents due five (5) days prior to the date of the noticed deposition.

**F. Jackson Stoddard**

**Morgan, Lewis & Bockius LLP**

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Assistant: Marilyn Elkins | +1.415.442.1651 | [marilyn.elkins@morganlewis.com](mailto:marilyn.elkins@morganlewis.com)

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**EXHIBIT B**

**SoCalGas Notice of Deposition of Randy Holter**

**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)

**SOUTHERN CALIFORNIA GAS COMPANY'S NOTICE OF DEPOSITION OF  
SAFETY AND ENFORCEMENT DIVISION UTILITIES ENGINEER RANDY HOLTER**

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Attorneys for:  
SOUTHERN CALIFORNIA GAS COMPANY

OCTOBER 8, 2020

**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)

**SOUTHERN CALIFORNIA GAS COMPANY'S NOTICE OF DEPOSITION OF  
SAFETY AND ENFORCEMENT DIVISION UTILITIES ENGINEER RANDY HOLTER**

PLEASE TAKE NOTICE that in accordance with Article 10 of the Commission's Rules of Practice and Procedure, Southern California Gas Company ("SoCalGas"), on October 28, 2020, at 9:00 a.m., by and through its attorneys of record, requests the attendance of RANDY HOLTER for a deposition regarding the ALISO CANYON INCIDENT. The deposition will take place remotely on an electronic video platform (e.g., Webex or Zoom), before an officer authorized to administer oaths pursuant to California Code of Civil Procedure section 2025.010

PLEASE TAKE FURTHER NOTICE that the deposition will be recorded both stenographically and by video recording and may also be recorded through such means as to provide instant visual display of the testimony, as authorized by California Code of Civil Procedure section 2025.220(a)(5). Pursuant to California Code of Civil Procedure section 2025.620, SoCalGas reserves the right to introduce and use the stenographic transcripts and/or the audio or videotapes of the deposition, or portions thereof, at future proceedings related to this matter.

SED is also required to produce the documents and communications described below five (5) days prior to the date of the deposition.

### **DOCUMENTS TO BE PRODUCED**

All DOCUMENTS within the possession of Mr. Holter related to the ALISO CANYON INCIDENT; all DOCUMENTS generated and/or evaluated by Mr. Holter related to the ALISO CANYON INCIDENT; all COMMUNICATIONS related to the ALISO CANYON INCIDENT on which Mr. Holter is included.

### **DEFINITIONS**

“DOCUMENT” means all writings, recordings, or graphic material of any kind that were considered, prepared, evaluated, analyzed, studied, reviewed, referenced, and/or relied upon in connection with the above-captioned matter, including the following: agreements; contracts; e-mails; letters; inter-office and intra-office communications; memoranda; reports; records; instructions; manuals; specifications; notes; notebooks; drawings; sketches; blueprints; diagrams; photographs; photocopies; charts; graphs; calendar entries; agendas and minutes of meetings, conferences, and telephone or other conversations or communications; invoices; purchase orders; audio recordings; video recordings; published or unpublished speeches or articles; publications; transcripts, summaries, and notes relating to telephonic and in-person communications; SMS and text messages, messages transmitted in real-time via the Internet; voicemail messages; ledgers; financial statements; microfilm; tape or disc recordings; and computer print-outs. The term “DOCUMENT” also includes electronically stored data from which information can be obtained either directly or by translation through detection devices or readers; any such document is to be produced in a reasonably legible and usable form. The term “DOCUMENT” also includes all drafts of a document and all copies that differ in any respect from the original, including any notation, underlining, marking, or information not on the original.

“COMMUNICATIONS” means any disclosure, transfer, or exchange of information or opinion, however made.

“ALISO CANYON INCIDENT” means the gas leak that was discovered on October 23, 2015 at Aliso Canyon gas storage well Standard Sesnon 25.

Respectfully submitted,

By: /s/ F. Jackson Stoddard  
F. JACKSON STODDARD

Attorney for:

SOUTHERN CALIFORNIA GAS COMPANY

Dated: OCTOBER 8, 2020

**EXHIBIT C**

**SoCalGas Twenty-Fifth Set of Data Requests to SED**

**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)

**SOUTHERN CALIFORNIA GAS COMPANY'S TWENTY-FIFTH SET OF DATA  
REQUESTS TO THE SAFETY AND ENFORCEMENT DIVISION**

PLEASE TAKE NOTICE that Southern California Gas Company ("SoCalGas") hereby requests the Safety and Enforcement Division of the California Public Utilities Commission ("SED") to provide a written response to this Data Request in accordance with the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission").

In accordance with Article 10 of the Commission's Rules of Practice and Procedure, please produce the following information and described categories of DOCUMENTS. Please provide YOUR response no later than the due date requested below. If YOU are unable to provide the information by this date, please provide a written explanation as to why the response date cannot be met and YOUR best estimate of when the information can be provided. Please e-mail all responses that can be transmitted electronically. If attachments cannot be electronically transmitted, please notify the undersigned via e-mail or phone and arrangements will be made for the alternate submission of said attachments.

**INSTRUCTIONS**

1. Answer in the greatest detail YOU are able for each of the Data Requests.
2. Include a copy of each data request that the response addresses before each response.
3. Return the completed and signed copy of YOUR answers to [APatel@socalgas.com](mailto:APatel@socalgas.com) and [GHealy@socalgas.com](mailto:GHealy@socalgas.com) as an attachment to electronic mail by close of business on **January 6, 2020**.

4. Any of the Data Requests and YOUR answers thereto may be offered as evidence in any hearing in the above-styled and numbered cause.
5. In answering the Data Requests, YOU are required to set forth each responsive fact, circumstance, act, omission, or course of conduct, whether or not admissible in evidence at trial about which YOU have or had information, or which is or will be the basis for any contention made by YOU with respect to the Application.
6. The Data Requests shall be interpreted to make requests for information inclusive rather than exclusive.
7. YOU are required to supplement YOUR answers to include information acquired after filing YOUR responses to the Data Requests if YOU obtain information upon the basis of which YOU know that the response was incorrect or incomplete when made, or YOU know that the response that was originally correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading.
8. If YOU are not capable of answering any of the Data Requests completely, please state the portion of the Data Request that YOU are unable to answer, and to the extent possible set forth the reasons for YOUR inability to answer more fully, and state whatever knowledge or information YOU have concerning the unanswered portion.
9. If requested information is not available in exactly the form requested, furnish carefully prepared estimates, designated as such, and explain the basis of the estimate, or indicate that YOU are unable to obtain the information and explain the reason that YOU cannot obtain the information. Where information is supplied pursuant to this instruction, explain why the information is being supplied in a form different from that requested.
10. If YOU withhold under a claim of privilege any document(s) responsive to the Data Requests, furnish a list specifying each document so identified, then set forth separately with respect to each document:
  - a. the type of document;
  - b. the date of the document;
  - c. for email or other correspondence, the author, sender(s), and recipient(s); and,
  - d. the legal and factual basis of privilege claim.
11. Please include such privilege log in service of responses to the Data Requests.
12. If a responsive document has been destroyed, is alleged to have been destroyed, or exists but is unavailable or no longer in YOUR possession, custody or control, please provide the following:
  - a. the date of the document;

- b. the names and titles of the author(s), sender(s), and recipients(s) of the document;
  - c. the reason for the document's destruction, disposition, or non-availability;
  - d. person(s) having knowledge of its destruction, disposition, or non-availability; and
  - e. the person(s) responsible for its destruction, disposition, or non-availability.
13. As to any document produced in response to the Data Request, state the Data Request to which the document is made available as a response.
14. Where the context herein makes it appropriate, each singular word shall include its plural and each plural word shall include its singular. All words and phrases shall be construed as masculine, feminine or neuter gender according to the context.
15. DOCUMENTS to be produced include all DOCUMENTS in YOUR possession, custody or control, which includes not only actual physical possession, but constructive possession, and the right to obtain possession from a third party, such as an agent or representative.
16. For each request below that calls for an admission, please state whether YOU admit or deny. For any response that is not an unqualified admission, 1) state all facts upon which YOU base YOUR response; 2) state the names, addresses, and telephone numbers of all persons who have knowledge of those facts; and 3) identify all DOCUMENTS and other tangible things that support YOUR response, and state the name, address, and telephone number of the person who has each document or thing.

#### **DEFINITIONS**

1. "BLADE" means Blade Energy Partners.
2. "DOCUMENTS" means, without limitation, the following items, whether in electronic form, printed, recorded, or written or reproduced by hand: reports, studies, statistics, projections, forecasts, decisions, and orders, intra-office and interoffice communications, correspondence, memoranda, financial data, summaries or records of conversations or interviews, statements, returns, diaries, calendars, work papers, graphs, notebooks, notes, charts, computations, plans, drawings, sketches, computer printouts, summaries of records of meetings or conferences, summaries or reports of investigations or negotiations, opinions or reports of consultants, photographs, bulletins, records or representations or publications of any kind (including but not limited to microfilm, videotape, and records however produced or reproduced), electronic or mechanical or electrical records of any kind (including, without limitation, tapes, tape cassettes, discs, emails, and records) other data compilations (including without limitation, input/output files, source codes, object codes, program documentation, computer programs, computer printouts, cards, tapes, discs and recordings used in automated data processing, together with the programming instructions and other material necessary to translate, understand, or use the same), and other DOCUMENTS or tangible things of whatever description which constitute or contain information within the scope of these data requests.

3. “DOGGR” means the California Department of Conservation, Division of Oil, Gas, and Geothermal Resources, currently the Geological Energy Management Division (CalGem).
4. “FINDINGS” means any preliminary or final, perceptions, observations, theories, and/or conclusion(s) or determinations reached by SED in the course of or as a result of SED’s pre-formal investigation (i.e., prior to the commencement of the above-captioned proceeding) into the INCIDENT.
5. “INCIDENT” means the Aliso Canyon gas storage leak that was discovered on October 23, 2015.
6. “SED” means the Safety and Enforcement Division, including all current or former personnel.
7. “YOU,” “YOUR,” or “SED” means the Commission’s Safety and Enforcement Division or its predecessors, including all employees, contractors, personnel, and individuals working on its behalf.

#### **DATA REQUESTS**

1. State whether YOU made any FINDINGS, prior to May 16, 2019, resulting from YOUR pre-formal investigation into the INCIDENT
2. If YOUR response to Question 1 is anything other than an unqualified “no,” describe each of YOUR FINDINGS in detail.
3. If YOUR response to Question 1 is anything other than an unqualified “no,” provide all DOCUMENTS reflecting each of YOUR FINDINGS.
4. If YOUR response to Question 1 is anything other than an unqualified “no,” state whether YOU communicated any of YOUR FINDINGS to BLADE.
5. If YOUR response to Question 4 is anything other than an unqualified “no,” describe each of the FINDINGS you communicated to BLADE.
6. If YOUR response to Question 1 is anything other than an unqualified “no,” state whether YOU communicated any of YOUR FINDINGS to DOGGR.
7. If YOUR response to Question 6 is anything other than an unqualified “no,” describe each of the FINDINGS you communicated to DOGGR.
8. State whether SED made 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.

9. If YOUR response to Question 8 is anything other than an unqualified “no,” describe each of YOUR FINDINGS in detail.
10. If YOUR response to Question 8 is anything other than an unqualified “no,” provide all DOCUMENTS reflecting each of YOUR FINDINGS.
11. If YOUR response to Question 8 is anything other than an unqualified “no,” state whether YOU communicated any of YOUR FINDINGS to BLADE.
12. If YOUR response to Question 11 is anything other than an unqualified “no,” describe each of the FINDINGS you communicated to BLADE.
13. If YOUR response to Question 8 is anything other than an unqualified “no,” state whether YOU communicated any of YOUR FINDINGS to DOGGR.
14. If YOUR response to Question 13 is anything other than an unqualified “no,” describe each of the FINDINGS you communicated to DOGGR.