BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Concerning Energy Efficiency Rolling Portfolios, Policies, Programs, Evaluation, and Related Issues.	Rulemaking 13-11-005

COMMENTS OF THE PUBLIC ADVOCATES OFFICE ON THE DECISION DIFFERENT OF COMMISIONER RECHTSCHAFFEN

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

California Public Utilities Code

CPUC Decisions

CPUC Rules of Practice and Procedure

I. INTRODUCTION

On February 9, 2022, the *Decision Different of Commissioner Rechtschaffen* (DD issued. Like the Presiding Officer's Decision (POD[1]) previously issued in this proceeding, the DD addresses the penalties and other remedies that should be imposed on Southern California Gas Company (SoCalGas) for its unauthorized codes and standards advocacy activities. The instructions preceding the DD explain that while Public Utilities Code Section 1701.2(e) and Rule 14.7 of the Commissions' Rules of Practice and Procedure (Rules) do not require that the DD be issued for comment, Commissioner Rechtschaffen provides the opportunity to submit comments. However, comments must be limited to differences between the DD and the Presiding Officer's Decision (POD). The Public Advocates Office at the California Public Utilities Commission (Cal Advocates) submits these comments on the DD.

The POD has determined that SoCalGas used ratepayer funds in a manner that contravened the Commission's clear intent for ratepayer funds. Unlike the POD, the DD does not limit SoCalGas's obligation to refund unauthorized costs to only the activities listed in the Joint Stipulation of Facts filed by Cal Advocates, Sierra Club, and SoCalGas.[2] Instead, the DD requires SoCalGas to refund the costs of other activities identified in the record that failed to align with the Commission's clear intent for ratepayer funds.[3] Unlike the POD, the DD finds that Commission decisions, Rule 1.1 of the Rules of Practice and Procedure and state laws provide a framework that supports the imposition of a fine on SoCalGas.[4] Cal Advocates supports the DD in this regard.

However, though the DD correctly determines to impose a penalty, it fails to follow Commission guidelines for determining the reasonable amount of the penalty

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[1] *Presiding Officer's Decision Ordering Remedies for Southern California Gas Company's Activities That Misaligned With Commission Intent for Codes And Standards Advocacy,* April 21, 2021 (POD), Findings of Fact 1, 2, 3 4 and 8, pp. 34-35.

[2] *Joint Statement of Stipulated Facts December 17, 2019 Order to Show Cause against Southern California Gas Company (U 904 G)* October 2, 2020 (Joint Stipulation of Facts).

[3] *Decision Different of Commissioner Rechtschaffen* (DD), February 9, 2022, pp.17, 23.

[4] DD, Finding of Fact 7, p. 52.

imposed. Specifically, the DD's penalty falls far short of an amount that could reasonably be expected to deter SoCalGas and other utilities from future misconduct.[5] [6] The Commission, consistent with its prior decisions, its established penalty framework, and its obligation to oversee the conduct and rates of the entities it regulates, must impose a fine that is likely to deter SoCalGas from disregarding Commission directives when faced with the choice of either complying with those directives or maximizing shareholder profits.

II. ARGUMENT

A. The DD correctly recognizes that the requirement for SoCalGas to reimburse ratepayers should not be limited to activities enumerated in the Joint Stipulation of Facts.

Citing Commission decisions beginning with D.05-09-043,[7] the DD recognizes that the Commission's intent for the use of ratepayer funds for codes and standards advocacy has been clear and unambiguous: large investor-owned utilities (IOUs) such as SoCalGas "should use ratepayer funds to advocate for more stringent codes and standards as part of their energy efficiency portfolios."[8] The Commission has been equally clear that large IOUs such as SoCalGas may use ratepayer funds to support local governments' adoption of reach codes."[9] The DD correctly concludes that SoCalGas used ratepayer

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[5] A fine of $150,000 cannot reasonably be expected to deter the future malfeasance of a company that is highly motivated to promote the use of natural gas as part of its profitable core business. Notably, a 2014 SoCalGas slide presentation stated that proposed higher codes for residential water heating posed a risk to shareholder revenues of up to $17 million in lost revenue and opportunity costs annually by 2020. *Opening Brief of Sierra Club in the Order to Show Cause Issued December 17, 2019 against Southern California Gas Company,* November 5, 2020 (Sierra Club Opening Brief), p. 17, citing Exhibit Cal Advocates/Sierra Club-20, Attach. B, Ex. 35.

[6] SoCalGas's last general rate case application reflected total assets and other debts of $15.5 billion and retained earnings of almost $3 billion. See A.17-10-008 (Application for Authority to Update Marginal Costs, Cost Allocation, and Electric Rate Design) (filed October 6, 2017), Appendix B (Balance Sheet, Income Statement, and Financial Statement), available at https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M196/K814/196814925.PDF.

[7] D.05-09-043, *Interim Opinion: Energy Efficiency Portfolio Plans and Program Funding Levels for 2006-2008 – Phase 1 Issues,* issued September 22, 2005 in Application (A.) 05-06-004, et. al.

[8] DD, p. 10; Finding of Fact 3, p. 51.

[9] DD, p. 12; Finding of Fact 3, p. 51.

funds for activities that failed to support higher codes and standards[10] and for activities that failed to support local governments adoption of reach codes.[11] Citing Public Utilities Code Section 451, the DD recognizes that expenditures for activities that fail to align with the Commission's clear intent for the use of ratepayer funds are unjust and unreasonable, and accordingly, concludes that it would be "unreasonable to allow SoCalGas to retain ratepayer funds for such expenditures."[12] Up to this point, the DD does not diverge from the POD.

While the POD limits SoCalGas's obligation to refund expenditures to the costs associated with improper activities listed in the Joint Stipulation of Facts, the DD expands the requirement to include the refund of costs associated with additional improper activities in the record of the proceeding.[13] The DD's determination that SoCalGas must refund the costs of additional activities that were misaligned with the Commission's intent corrects a legal error in the POD. As Cal Advocates explained in its Appeal, it is arbitrary and capricious to ignore the record evidence of additional activities that were misaligned with the Commission's consistent and unambiguous intent for ratepayer funding.[14] Nor would it be proper, as the POD claims, to construe the parties' waiver of evidentiary hearings as extending beyond an agreement to forgo oral testimony at hearings.[15] The DD's requirement that SoCalGas refund the costs of improper expenditures reflected in the record in addition to those listed in the Joint Stipulation of

[10] DD, pp. 13-18.

[11] DD, pp. 18-22.

[12] DD, p. 25. The DD makes this determination based on whether the activity was misaligned with the Commission's intent for ratepayer funds, regardless of whether the funds were authorized in an energy efficiency proceeding and recorded in the Demand Side Management Balancing Account (DSMBA)or authorized in SoCalGas's general rate case. DD, pp. 23-24.

[13] DD, pp.17-18; 23.

[14] *The Public Advocates Office's Appeal of Presiding Officer's Decision Ordering Remedies for Southern California Gas Company's Activities That Misaligned With Commission Intent For Codes And Standards Advocacy,* May 21, 2021 (Cal Advocates Appeal), pp.9-12.

[15] Cal Advocates Appeal, pp. 13-14.

Facts is consistent with the Commission's obligation to "render its decision based on the law and the evidence in the record."[16]

B. The DD correctly recognizes that Commission decisions, Rule 1.1 and state law provide sufficient guidance to determine that SoCalGas's misconduct warrants a penalty.

The POD concludes that it is "not reasonable to impose financial penalties for SoCalGas's conduct," given the lack of explicit prohibitions against SoCalGas's use of ratepayer funds to advocate against higher codes and standards. [17] The DD rejects this unreasonably narrow view of the Commission's obligation to regulate the conduct of utilities, explaining that specific prohibitions are neither necessary nor reasonable.

> The codes and standards program represents a straightforward—and generous—deal: if utilities spend *ratepayer* money advocating for stricter codes and standards, their shareholders receive *ratepayer* payments as a reward. It goes entirely counter to the program's purpose to allow a utility to use ratepayer money arguing *against* stricter codes and standards, and reward its shareholders for doing so, and it strains credulity to believe that anyone—let alone a sophisticated utility—could seriously think otherwise.[18]

Moreover, as the DD points out, a requirement that the Commission specify in advance the precise conduct that would violate its rules, even for a straightforward program such as codes and standards advocacy, would hamstring the Commission's ability to regulate.[19] The DD's finding that the Commission can impose a penalty for SoCalGas's use of ratepayer funds to undermine rather than advance codes and standards is consistent with the record in this case as well as the law.[20]

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[16] Public Utilities Code Section 1701.1(e)(8); see also Public Utilities Code Section 1757(a)(4) (The findings of fact in an adjudicatory decision shall be based on the entire record of the proceeding.)

[17] POD, pp. 24-25.

[18] DD, p. 36 (Emphasis in original).

[19] DD, pp. 36-37.

[20] Cal Advocates Appeal, pp.1-19.

C. The DD's proposed penalty fails to reflect all the evidence in the record.

The DD rejects Cal Advocates' proposed penalty on the ground that Cal Advocates failed to demonstrate that the ten activities that formed the basis for the recommended penalty of $255 million were ongoing violations.[21] [22] While the DD, finds that the letters and public comments Cal Advocates identified show violations[23] the DD finds the related behaviors evidenced by these documents dissimilar to other instances in which the Commission has found a continuing violation.[24] The DD adopts an unreasonably narrow definition of continuing violation, in stark contrast to other cases in which the Commission found ongoing violations for misconduct similar to that at issue in this order to show cause.

For example, the Commission has determined that a regulated entity's failure to provide accurate and complete information in violation of Rule 1.1[25] provides the basis for a continuing violation, beginning the day that the entity provides incomplete information or inaccurate information.[26] The Commission approved a settlement that resolved San Diego Gas & Electric's (SDG&E) failure to prudently manage the energy efficiency upstream lighting program and the utility's submission of inaccurate information and compliance documents to the Commission.[27] The Commission found

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[21] DD, pp. 37-38.

[22] DD, pp. 37-38.

[23] Cal Advocates Opening Brief, Table 3, p. 28.

[24] DD, p. 38.

[25] Rule 1.1 provides that any person who signs a pleading or transacts business with the Commission represents that they are authorized to do so and agrees to "comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

[26] D.19-12-041, *Modified Presiding Officers' Decision Regarding Alleged Violations By Certain Independent Small Local Exchange Carriers,* issued December 30, 2019, in A.07-12-026, p. 1; Finding of Fact 37, p. 99 (" A persistent failure by a regulated utility to act is a continuing violation; a sanction may reflect the continuing nature of a violation because otherwise it would eviscerate the Commission's power to require self-reporting by destroying the Commission's power to sanction noncompliance."); D.15-12-016,, Finding of Fact 23, p. 58.

[27] D.21-09-002, *Adoption of Settlement Agreement on San Diego Gas & Electric Company's Upstream Lighting Program 2017-2019,* issued September 9, 2021, in R.13-11-005, p. 8.

that the proposed settlement, which included a fine of $5.5 million for a continuing violations that began with the utility's submission of inaccurate reports (which were used as the basis for calculating shareholder incentives), was consistent with law.[28]

The ten violations on which Cal Advocates based its penalty recommendations reflectSoCalGas's ongoing pattern of failure to adhere to the Commission's directive for the use of ratepayer funds and failure to seek clarification in the event of any perceived ambiguity about those directives.[29]

Moreover, the DD recognizes that contrary to SoCalGas's obligation pursuant to Rule 1.1, "SoCalGas appears on the face of the record to have misled staff about the direction of its lobbying, as only charges for lobbying in favor of reach codes may be billed to ratepayers, not against reach codes."[30] This same rationale supports a finding that SoCalGas's requests for Energy Savings Performance Incentives (ESPI)[31] for codes and standards advocacy activities that undermined higher codes and standards, were inconsistent with SoCalGas's obligation not to mislead the Commission. To the extent that SoCalGas submitted ESPI requests[32] that sought incentives for codes and standards advocacy that failed to align with the Commissions directive for ratepayer funding, such

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[28] See e.g., D.21-09-002, pp. 11-13. One significant difference between SDG&E's conduct regarding the upstream lighting program, and SoCalGas's conduct in this order to show cause is SDG&E's cooperation with the investigation and prompt efforts to address the misconduct once it became aware of the allegations. D.21-09-002, p. 12.

[29] Although the Commission did not rely on the finding of a continuing violation, it imposed a $30 million for Southern California Edison Company's manipulation and submission of false customer satisfaction used to calculate incentives in D.08-09-039, *Decision Regarding Performance Based Ratemaking (PBR), Finding Violations of PBR Standards, Ordering Refunds, and Imposing a Fine,* issued September 18, 2008, in I.06-06-014.

[30] DD, p. 29.

[31] The Commission adopted the Efficiency Savings Performance Incentive in D.13-09-023. The codes and standards component of the ESPI is set at 12 percent of approved expenditures for the codes and standards programs. *Id.*, pp. 20, 94-95 (Ordering Paragraph 3), and 98 (Ordering Paragraph 15). Ratepayer funding for shareholder incentives is intended to encourage and reward the utilities for their work advocating for more stringent codes and standards and reach codes on ratepayers' behalf. *Id.,* pp. 20, 88, Finding of Fact 9, Ordering Paragraph 15.

[32] *See e.g.,* Resolution G-3510, December 3, 2015 (addressing 2014 ESPI requests), p. 6; Resolution E-4807, December 15, 2016 (addressing 2014 and 2015 ESPI requests), p. 3; Resolution E-4897, December 18, 2017 (addressing 2015-2016 ESPI requests); Resolution E-5007 October 10, 2019 (addressing 2016 ESPI requests).

requests represent ongoing violations that begin when SoCalGas submitted the misleading request.[33]

D. The Commission's obligation and the evidence in the record require a fine that exceeds $150,000.

1. A penalty greater than $15,000 per violation is required.

Prior to calculating the recommended fine for each violation, the DD acknowledges that in in D.98-12-075, the Commission decision enumerated the five criteria that have governed penalties for more than 20 years. The five-criteria that D.98-12-075 directs be used to determine the appropriate amount of any fine are:

1. The severity of the offence,[34]
2. The conduct of the utility, which considers the utility's efforts to prevent, detect, and rectify violations,[35]
3. The financial resources of the utility
4. The totality of the circumstances,[36] which considers the degree of wrongdoing and the public interest; and
5. The role of precent;[37]

After applying criterion numbers 2, 3, and 4, the DD finds that SoCalGas's conduct was "clearly blameworthy,"[38] that SoCalGas's behavior demonstrates "a deliberate and years-long pattern of conduct," which "tended to work against" California's policy of decarbonization,[39] and that SoCalGas's behavior "argues in favor of levying a sizable penalty."[40] Thus, the DD concludes not just that a penalty is in order, but that the penalty should be sizable.

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[33] D.21-09-022, pp. 8, 11-13.

[34] D.98-12-075, pp. 36 -37.

[35] D.98-12-075, pp. 37-38.

[36] D.98-12-075, p. 39.

[37] D.98-12-075, p. 39.

[38] DD, pp. 40-42.

[39] DD, p. 43.

[40] DD, pp. 42-43.

However, rather than levying a sizable penalty, the DD fines SoCalGas a total of $150,000, an amount equal to less than one percent of the revenue and opportunity cost that SoCalGas gained from opposing the California Energy Commission's instantaneous hot water heating standard.[41] The Commission has repeatedly acknowledged that the "primary purpose of imposing fines is to prevent future violations by the wrongdoer and to deter others from engaging in similar violations."[42] Given SoCalGas's significant assets, this fine amount is unreasonable on its face as it cannot be considered sufficient to fulfill "the goal of effective deterrence."[43]

In addition to being unreasonable, the nominal fine imposed by the DD is arbitrary and capricious. While the DD has ample and correct language that identifies the need for and appropriateness of a sizable penalty, it provides no clear explanation for the nominal fine imposed. Instead, the DD presents the required showing for the maximum fine under criteria 1 and 5 as an implied justification for the nominal fine it imposes. Specifically, in applying criterion number 1, the severity of the offence, the DD implies that, absent demonstrable physical harm the violations cannot be severe. The DD's error in this regard is two-fold. First, the DD fails to cite any support for this supposition. Second, based on this supposition the DD all but ignores the significant harm to the regulatory process,[44] the economic harm to ratepayers, that these violations were ongoing for a number of years, and that SoCalGas's actions were intended to undermine a state policy that seeks to protect the health and well-being of Californians.

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[41] Sierra Club Opening Brief, p. 17, citing Exhibit Cal Advocates/Sierra Club-20, Attach. B, Ex. 35.

[42] D.01-09-058, *Final Opinion on Pacific Bell's Marketing Practices and Strategies,* issued September 20, 2001, in Case (C.) 98-04-004 et al, p. 83; see also D.98-12-075, p. 35.

[43] Given SoCalGas's significant assets, which are more 19,000 times the penalty amount, the fine cannot reasonably be considered sufficiently sizeable to fulfill "the goal of effective deterrence." This ratio is based on SoCalGas's 2017 retained earnings of $ $2,905,500,599 from A.17-10-000, cited at p. 40 of Cal Advocates Opening Brief.

The Commission has recognized that for utilities with significant financial resources "the primary deterrence value is when financial penalties are sufficiently large that the utility must report them to investors." *Decision Affirming Violations of Rule 8.4 and Rule 1.1 and Imposing Sanctions on Southern California Edison Company*, issued December 3, 2015 in I.12-10-013, p. 47. .

[44] DD, Conclusion of Law 11, p. 53.

Nor does the DD's analysis of criterion 5 support the DD's low penalty. The DD notes that Cal Advocates and Sierra Club acknowledged that they could find no similar cases, and that SoCalGas cited a precedent that was clearly distinguishable.[45] The fact that the parties cited no similar cases does not alter the Commission's obligation to calculate a penalty that is consistent with the remaining criteria, all of which point to a penalty greater than $150,000.

The "primary purpose of imposing fines is to prevent future violations by the wrongdoer and to deter others from engaging in similar violations."[46] This requires imposing a fine "that is sufficient to achieve the objective of deterrence without being excessive in light of the offending utility's financial resources."[47] The DD is arbitrary and unreasonable in that while it correctly finds that a fine is in order, it fails to impose a fine that could reasonably be expected to deter SoCalGas from future misconduct.

2. The record supports a finding of 25 violations

The DD identifies 25 unauthorized activities that will be the subject of an audit by the Commission's Utility Audits Branch (UAB) to determine the full amount of ratepayer funds that SoCalGas expended on those unauthorized activities. The DD requires SoCalGas to refund the costs associated with those unauthorized activities to ratepayers. Each one of the 25 unauthorized activities also provides the basis for imposing a fine.

III. CONCLUSION

The DD, in contrast to the POD, recognizes that SoCalGas's unauthorized expenditures of ratepayer funds used to undermine codes and standards, are not limited to activities listed in the Joint Stipulation of Facts. The DD, in contrast to the POD, recognizes that state law, the Commission's decisions, and Rule 1.1 provides ample

[45] DD, pp. 44-45.

[46] D.01-09-058, *Final Opinion on Pacific Bell's Marketing Practices and Strategies,* issued September 20, 2001, in Case (C.) 98-04-004 et al, p. 83; see also D.98-12-075, p. 35.

[47] D.01-09-058, p. 83.

guidance and authority for imposing a fine for SoCalGas's misuse of ratepayer funds. Nevertheless, the DD falls short of meeting the Commission's obligation to oversee the conduct and rates of the entities it regulates

However, the DD is inconsistent and arbitrary in its application of the five criteria in D.98-12-075. Because it is disproportionately small in comparison to the harm that SoCalGas caused to the regulatory process, to the state's decarbonization goals, and to SoCalGas's ability to pay the penalty cannot reasonably be expected to deter future misconduct. The Commission should revise the DD's penalty because the $150,000 fine levied is unreasonable.

Respectfully submitted,

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APPENDIX A

(Proposed Changes to the Findings of Fact)

Findings of Fact

2a. SoCalGas's submission on ESPI requests that included unauthorized expenditures of ratepayer funds violated Rule 1.1 of the Commission's Rules of Practice and Procedure.