

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In The Matter Of The Public Advocates
Office Investigation Pertaining To Southern
California Gas Company's Accounting
Practices, Use Of Ratepayer Monies To
Fund Activities Related To Anti-
Decarbonization And Gas Throughput
Policies, And Related Matters

Not In A Proceeding

**PUBLIC ADVOCATES OFFICE REPLY TO SOUTHERN CALIFORNIA GAS
COMPANY'S RESPONSE TO MOTION FOR FINDINGS OF CONTEMPT AND
FINES FOR THE UTILITY'S FAILURE TO COMPLY WITH A COMMISSION
SUBPOENA ISSUED MAY 5, 2020**

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I. INTRODUCTION

Pursuant to Public Utilities Code §§ 309.5(e), 311(a), 314, 314.5(a), 581, 582, 584, 701, 702, 771, 2107 and 2113¹ and Administrative Law Judge (ALJ) DeAngelis' approval granted July 7, 2020, the Public Advocates Office at the California Public Utilities Commission (Cal Advocates) provides this Reply to Southern California Gas Company's (SoCalGas') Response to Cal Advocates June 23, 2020 motion for this Commission to find SoCalGas in contempt and subject to fines of \$100,000 a day for its refusal to comply with a subpoena issued May 5, 2020 by this Commission (Commission Subpoena).²

SoCalGas argues that it is entitled to withhold information of its choosing on claims of First Amendment rights of association and unsubstantiated claims of attorney-client privilege. Significantly, those First Amendment claims have already been considered, and rejected, in response to Cal Advocates' October 7, 2019 Motion to Compel certain contracts in SoCalGas' possession.³ Specifically, by ruling dated November 1, 2019, ALJ DeAngelis rejected SoCalGas' First Amendment arguments and ordered SoCalGas to provide the information requested by Cal Advocates within two business days (ALJ Ruling).⁴

SoCalGas sought a stay of the ALJ Ruling on November 4, 2019,⁵ and when no stay was granted it sought authorization to file its Motion for Reconsideration challenging

¹ All section references are to the California Public Utilities Code unless otherwise stated.

² That Motion for Contempt and Fines was submitted June 23, 2020 and is entitled: "*Public Advocates Office Motion To Find Southern California Gas Company In Contempt Of This Commission In Violation Of Commission Rule 1.1 For Failure To Comply With A Commission Subpoena Issued May 5, 2020, And Fined For Those Violations From The Effective Date Of The Subpoena.*"

³ That Cal Advocates October 7, 2019 Motion to Compel is entitled: "*October 7, 2019 Motion to Compel Responses from Southern California Gas Company to Question 8 of Data Request—CalAdvocates-SC-SCG-2019-05.*"

⁴ Exhibit 1, attached, November 1, 2019 ALJ Ruling.

⁵ SoCalGas' November 4, 2019 is entitled: "*Southern California Gas Company's (U 904 G) Emergency Motion To Stay Pending Full Commission Review Of Administrative Law Judge's*

the ALJ Ruling that rejected its frivolous First Amendment claims. Though its request for permission to file for reconsideration was not granted, SoCalGas nevertheless submitted its Motion for Reconsideration on December 2, 2019.⁶

Now, eight months after the ALJ Ruling rejected its First Amendment arguments, and seven months after submitting its unauthorized Motion for Reconsideration, SoCalGas continues to engage in self-help by refusing to comply with a validly issued Commission subpoena on *de facto* claims that its Motion for Reconsideration somehow grants it the stay the Commission previously withheld.

SoCalGas' submission of its Motion for Reconsideration does not grant it a stay of Cal Advocates' investigation discovery. Even in a formal proceeding involving a Commission decision, a rehearing application does not stay the effect of the decision.⁷

By withholding the requested information on the same First Amendment grounds that were rejected by the November 1, 2019 ALJ Ruling, SoCalGas further demonstrates its contempt for this Commission. Indeed, SoCalGas appears to be holding this Commission hostage by refusing to provide relevant discovery in this proceeding until the Commission takes action on its motion. Such behavior must not be permitted.

Further, SoCalGas' claim that it has cooperated with discovery by walling off from Cal Advocates' review law firm invoices is disingenuous. SoCalGas is well aware of its obligation to provide a privilege log to support such claims, but has made no effort to provide one. Indeed, like the multitude of privilege claims made in the Aliso Canyon civil litigation - 94% of which were withdrawn when SoCalGas' attorneys were required to affirm under penalty of perjury that they were valid⁸ - it is highly likely that the

Ruling In The Discovery Dispute Between Public Advocates Office And Southern California Gas Company, October 7, 2019 (Not In A Proceeding)."

⁶ SoCalGas' December 2, 2019 Motion for Reconsideration is entitled: "*Southern California Gas Company's (U 904 G) Motion For Reconsideration/Appeal To The Full Commission Regarding Administrative Law Judge's Ruling In The Discovery Dispute Between Public Advocates Office And Southern California Gas Company, October 7, 2019 (Not In A Proceeding).*"

⁷ California Public Utilities Code § 1735.

⁸ SoCalGas' discovery abuses in the Los Angeles Superior Court case *Gandsey v. SoCalGas* (civil litigation related to Aliso Canyon) are described at pages 30-31 of Cal Advocates June 1,

utility's privilege claims here have no basis in the law, and should therefore be viewed skeptically by the Commission. At a minimum, the Commission should order SoCalGas to provide a comprehensive privilege log within five business days, and make its staff available for examination based on that privilege log so that Cal Advocates can test the veracity of the utility's claims.

Finally, SoCalGas' arguments that the Commission must open a formal proceeding to ensure it receives adequate due process prior to any sanctions are misplaced. As described below, the process provided here has permitted a meaningful opportunity for the SoCalGas to be heard, and SoCalGas has repeatedly acknowledged the possibility of sanctions in this "non-proceeding" such that notice is not an issue. Moreover, there are no material issues of fact in dispute.

The fines and other relief requested in Cal Advocates' Motion for Contempt and Fines are more than justified; they are needed to incentivize compliance with the November 1, 2019 ALJ Ruling and to dissuade other utilities from adopting similar obstructionist tactics.² In no event should SoCalGas be permitted to continue to hold the Commission hostage by preventing Cal Advocates from performing its statutory duty until there is a ruling on its Motion for Reconsideration.

II. DISCUSSION

The bulk of SoCalGas' Response to Cal Advocates Motion for Contempt and Fines is a combination of misrepresentations, reliance on inapposite legal theories, and arguments that the Commission is to obliged provide it more "due process" by opening formal proceedings before issuing sanctions. None of these arguments are valid and the Commission should reject all of them.

2020, "*Response Of Public Advocates Office To Southern California Gas Company Motion To Quash Portion Of Subpoena, For An Extension, And To Stay Compliance.*" Among other things, the Minute Order in that case – which is Exhibit 17 in the June 1, 2020 Cal Advocates' pleading - found that "[b]ased on the prior history of this case, [SoCalGas'] initial claims of privilege are unsupportable and/or are withdrawn an average of 94 percent of the time." *Gandsey* February 20, 2020 Minute Order, pp. 2-3.

² Evidently aware of SoCalGas' thus far successful stalling tactics, two other utilities have recently filed notably similar motions to quash Cal Advocates' discovery in other proceedings.

A. SoCalGas' Multiple Misrepresentations In The Response Demonstrate That The Utility Has No Intention Of Complying With Commission Rulings

SoCalGas' Response contains multiple misrepresentations that appear intended to mislead the Commission. For example, SoCalGas claims that Cal Advocates' Motion for Contempt and Fines "fails on the merits" because "SoCalGas has produced significant amounts of data in response to the Subpoena" including "roughly 96% of the data in its accounting database."¹⁰ These representations are misleading because SoCalGas fails to acknowledge that the 4% of information it has withheld is precisely the information that Cal Advocates seeks to review. This includes information regarding SoCalGas' "100% shareholder-funded" activities. SoCalGas' months' long refusal to provide this information in response to data requests is the reason Cal Advocates sought access to SoCalGas accounting databases through a May 1, 2020 data request reinforced by the May 5, 2020 Commission Subpoena. In effect, SoCalGas seeks credit for providing a haystack of discovery responses, where it did not include the needle.

In repeatedly emphasizing the amount of data it has provided to Cal Advocates, SoCalGas also fails to disclose that it has provided *no* information regarding that 4% of information – which includes expenditures it claims are "100% shareholder-funded." Indeed, it has withheld basic information about that 4%, such as account numbers where its so-called "100% shareholder-funded" expenditures are booked, and has failed to provide a privilege log, which Commission rules and discovery instructions require in support of privilege claims.

In another misrepresentation SoCalGas claims that it "forthrightly and repeatedly informed Cal Advocates" that "[i]t was developing a technical software solution to restrict Cal Advocates from accessing its protected and privileged material in the SAP system."¹¹ This is demonstrably false.

SoCalGas' own correspondence to Cal Advocates demonstrates that Cal Advocates did not learn of SoCalGas' proposed "software solution" until receipt of a

¹⁰ SoCalGas Response, p. 2.

¹¹ SoCalGas Response, pp. 8-9.

letter one hour before its last meet and confer with SoCalGas on May 18, 2020.¹² That May 18, 2020 letter explains that SoCalGas conceived of and pursued the concept of a “software solution” between the parties’ May 13 and May 18, 2020 conference calls. On the May 18, 2020 call, SoCalGas presented the “software solution” for the first time to Cal Advocates as a near *fait accompli* and filed its 150+ page Motion to Quash the next day.

B. SoCalGas’ Claims That Further Notice And Process Are Required Have No Merit

The SoCalGas Response to Cal Advocates’ Motion for Contempt and Fines variously argues that the utility is entitled to “notice and a hearing” before monetary penalties or sanctions can be imposed,¹³ that Cal Advocates’ investigation must be “recategorized as adjudicatory” under Rule 7 of the Commission’s Rules of Practice and Procedures,¹⁴ and that evidentiary hearings are required because there are material factual disputes at issue.¹⁵ None of these arguments have any merit.

As an initial matter, while the Commission may have previously relied on Rule 7 to recategorize *existing docketed* proceedings to accommodate the potential for fines, nothing in the Commission’s Rules require it to create a formal proceeding here, in this “not in a proceeding” investigation.¹⁶

¹² That May 18, 2020 letter - Exhibit 8 to Cal Advocates Motion for Contempt and Fines - explains on page 2: “The solution that SoCalGas proposed Wednesday was based upon the existing functions in the SAP software. *After our call Wednesday*, we learned that we might be able to create custom software written that gives Cal Advocates remote access while at the same time restricting access to material protected by attorney-client privilege and the 1st Amendment. Realizing that providing Cal Advocates’ remote access is critical, we worked on this issue over the weekend. After speaking with IT specialists, we believe that we can provide Cal Advocates with remote access by May 29, 2020.” Emphasis added.

¹³ SoCalGas Response, p. 20.

¹⁴ SoCalGas Response, p. 21.

¹⁵ SoCalGas Response, p. 23.

¹⁶ To the extent the Commission decides to provide a formal appeal option in this matter, it may apply the appellate procedures for citations established in Resolution ALJ-377, Appendix A. Those procedures were recently updated and effective July 1, 2020.

The record related to Cal Advocates' Motion for Contempt and Fines is significant. SoCalGas has submitted a 36 page Response, three declarations in support of its arguments, and five sets of attachments, including 140 pages of documents supporting one of its declarations. Given this substantial record, what more due process is required? What will SoCalGas say that it has not already said?

SoCalGas' "notice" argument is also flawed; SoCalGas has received both constructive and actual notice of the potential for fines related to its actions. The provisions of Public Utilities Code § 2107 make clear that a utility is subject to substantial daily fines for its violations of Commission requirements. This constitutes more than sufficient notice, especially when dealing with a sophisticated utility that is well-versed in Commission rules and its regulatory obligations. In addition, SoCalGas has routinely acknowledged in this investigation that it faces fines of up to \$100,000 for each day of a violation.¹⁷ For all of these reasons, no further notice or process is due SoCalGas.

Finally, while SoCalGas claims there are material factual disputes, the parties' pleadings make clear that there are none. The facts are clear:

- The Commission Subpoena required SoCalGas to provide "access to all databases associated in any manner with the company's accounting systems" no later than May 8, 2020.
- SoCalGas clarified to Cal Advocates on May 18, 2020 that it would not provide the access to its "100% shareholder-funded" accounts as required by the Commission Subpoena based on the same First Amendment arguments that the November 1, 2019 ALJ Ruling rejected.
- SoCalGas has yet to fully comply with the Commission Subpoena

¹⁷ See, e.g., SoCalGas May 22, 2020 Substitute Motion to Quash, p. 5 ("Because the Commission has yet to issue a ruling on that matter, SoCalGas faces a dilemma here: It can comply with the Subpoena as issued and disclose material subject to the appeal, or it can risk fines of up to \$100,000 a day for refusing to comply."); *id.*, p. 13 ("On November 4, 2019, SoCalGas filed an Emergency Motion to Stay the ALJ Ruling. But with no ruling on that motion and facing significant potential fines of up to \$100,000 a day (see Pub. Util. Code § 2107), SoCalGas produced under protest the 100% shareholder-funded contracts at issue on November 5, 2019 but reserved its rights to appeal the decision. (Henry Decl., Exh. M [Motion for Reconsideration/Appeal], at p.8.); and SoCalGas Response, p. 13 (similar).

SoCalGas' claims that hearings are required to address "material factual disputed issues" involving "motive, intent, or credibility"¹⁸ also have no merit because intent is not a required element to establish a Rule 1.1 violation.¹⁹ Moreover, the numerous declarations and attachments submitted by the parties provide a full and accurate account of all parties' motives, intent, and credibility. Similarly, the documentary evidence, including SoCalGas' May 19, 2020 Motion to Quash, provides compelling evidence of SoCalGas' intent as it relates to Rule 1.1. Contrary to its intimations, due process requires that SoCalGas be heard, not that it be given the opportunity to distance itself from its prior acts and statements, all of which are already documented in the record.

III. CONCLUSION

In sum, SoCalGas has adopted the positions that it may (1) withhold from the Commission and its staff whatever information it deems as "protected" under the First Amendment, regardless of prior rulings on the same issues; and (2) withhold law firm invoices from the Commission on unsubstantiated claims that they contain privileged communications.

Based on these positions, SoCalGas has granted itself a stay of both the May 5, 2020 Commission Subpoena and the November 1, 2019 ALJ Ruling, and is holding subsequent discovery hostage in an attempt to force the Commission to take up a matter (its Motion for Reconsideration) that the Commission has no obligation to address.

¹⁸ SoCalGas Response, p. 23.

¹⁹ See, e.g., D.15-08-032 *mimeo* p. 35: "The Commission has determined that a person subject to the Commission's jurisdiction can violate Rule 1.1 without the Commission having to find that the person intended to disobey a Commission Rule, Order, or Decision. Instead, in D.01-08-019, the Commission ruled that intent to violate Rule 1.1 was not a prerequisite but that 'the question of intent to deceive merely goes to the question of how much weight to assign to any penalty that may be assessed. The lack of direct intent to deceive does not necessarily, however, avoid a Rule 1 violation.' Thus, as the Commission later reasoned in D.13-12-053, where there has been a 'lack of candor, withholding of information, or failure to correct information or respond fully to data requests,' the Commission can and has found a Rule 1.1 violation.' Citations omitted. See also footnote 33 of that decision which provides an extensive string cite to additional authority for this Commission rule.

Rather than allow SoCalGas to hold the Commission hostage to SoCalGas' frivolous *pro forma* submission, the Commission must incent SoCalGas to comply with state law and Commission requirements by using the abundant remedies available at its disposal.

Finally, the process Cal Advocates is using to enforce its statutory rights – through the President and the ALJ – is all the “due process” that is owed to SoCalGas as a regulated utility that is expressly defying well-established state law and Commission requirements regarding discovery. No court in the land requires a separate, docketed proceeding for a contempt finding, and such a proceeding is not needed for the Commission to take action here. Indeed, acquiescing to SoCalGas' demands will only compromise the Commission's authority, further delay Cal Advocates' discovery in this investigation, and encourage similar non-compliance by other utilities.

Respectfully submitted,

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July 10, 2020

EXHIBIT 1

November 1, 2019 ALJ Ruling

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

**ADMINISTRATIVE LAW JUDGE'S RULING IN THE DISCOVERY DISPUTE
BETWEEN PUBLIC ADVOCATES OFFICE AND SOUTHERN CALIFORNIA
GAS COMPANY, OCTOBER 7, 2019 (NOT IN A PROCEEDING)**

This ruling resolves the discovery dispute between Southern California Gas Company (SoCalGas) and Public Advocates Office of the California Public Utilities Commission (Cal Advocates) by granting Cal Advocates' October 7, 2019 *Motion to Compel Responses from Southern California Gas Company to Question 8 of Data Request- CalAdvocates-SC-SCG-2019-05*. SoCalGas shall, within two business days, provide the information sought in response to Data Request - CalAdvocates-SC-SCG-2019-05 (DR SC-SCG-2019-05) - Question 8.

1. Background

SoCalGas is regulated by the Commission. On October 7, 2019, Cal Advocates sent to the Commission's President a *Motion to Compel Responses from Southern California Gas Company to Question 8 of Data Request - CalAdvocates-SC-SCG-2019-05 (Not in a Proceeding)*. The data requests referred to in this Motion to Compel were not issued pursuant to any open Commission proceeding. Therefore, no assigned Commissioner exists for this discovery dispute. In this situation, Pub. Util. Code § 309.5(e) provides that the President of the Commission must decide any discovery objections. On October 25, 2019, the President of the Commission referred this dispute to the Chief Administrative Law Judge (ALJ) for resolution. On October 29, 2019, the Chief ALJ designated an ALJ to review and dispose of the dispute.

2. Discussion

The October 7, 2019 Motion to Compel states that SoCalGas responded to Data Request - CalAdvocates-SC-SCG-2019-05 but, regarding Question 8, refused to provide responsive documents in response to Question 8.¹

On October 17, 2019, SoCalGas sent to the President of the Commission the *Response of SoCalGas to the October 7, 2019 Motion to Compel Further Responses from Southern California Gas Company to Data Request (Not in a Proceeding)*. In this Response, SoCalGas objects to the Motion to Compel.

On October 30, 2019, the Administrative Law Judge granted Cal Advocates request to file a Reply. On October 31, 2019, Cal Advocates submitted a Reply to SoCalGas' Responses, *Reply of the Public Advocates Office to Response of SoCalGas to October 7, 2019 Motion to Compel Further Responses From Southern California Gas Company to Data Request-CalAdvocates-SC-SCG-2019-05 (Not in a Proceeding)*.

After reviewing the Cal Advocates' Motion, SoCalGas' Response, and Cal Advocates' Reply, Cal Advocates' Motion to Compel submitted pursuant to Pub. Util. Code § 309.5(e), § 314, and Rule 11.3 of the Commission's Rules of Practice and Procedure is granted.

¹ Prior to filing the Motion to Compel, Cal Advocates and SoCalGas held a meet-and-confer.

IT IS SO RULED that the October 7, 2019 Motion to Compel submitted by Cal Advocates pursuant to Pub. Util. Code § 309.5(e), § 314, and Rule 11.3 of the Commission's Rules of Practice and Procedure is granted. SoCalGas shall, within two businesses days, provide the information sought in response to Question 8 of Data Request - CalAdvocates-SC-SCG-2019-05.

Dated November 1, at San Francisco, California.

/s/ REGINA M. DEANGELIS

Regina M. DeAngelis
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served a copy of “*Public Advocates Office Reply To Southern California Gas Company’s Response To Motion For Findings Of Contempt And Fines For The Utility’s Failure To Comply With A Commission Subpoena Issued May 5, 2020 (Not In A Proceeding)*” to the following persons by electronic mail:

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Executed on **July 10, 2020** at San Francisco, California.

/s/ TRACI BONE

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