

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application For Rehearing of Resolution
ALJ-391.

Application 20-12-011

**ORDER MODIFYING RESOLUTION ALJ-391 AND, AS MODIFIED,
DENYING REHEARING OF RESOLUTION ALJ-391**

I. INTRODUCTION

In this Order, we dispose of the applications for rehearing of Resolution ALJ-391 (Resolution or Res. ALJ-391) filed by Southern California Gas Company (SoCalGas) and the Public Advocates Office at the California Public Utilities Commission (Cal Advocates). We have determined that good cause has been demonstrated to modify the Resolution as discussed below. As modified, rehearing of the Resolution is denied. The motion for stay of the Resolution and request for oral argument filed by SoCalGas are also denied.

II. BACKGROUND

In May 2019, Cal Advocates initiated a discovery inquiry into SoCalGas’ funding of anti-decarbonization campaigns using “astroturfing” groups.¹ Cal Advocates initiated this discovery inquiry “outside of a proceeding” pursuant to its statutory authority.² Cal Advocates’ inquiry focused on the extent to which SoCalGas was using ratepayer funds to support organizations presenting themselves to the

¹ Astroturfing is a practice in which corporate sponsors of a message mask their identity by establishing separate organizations to state a position or make it appear as though the movement originates from and has grassroots support.

² The pleadings submitted to the Commission related to this discovery dispute "outside of a proceeding" are available on the Commission's website at the Cal Advocates' webpage at: <https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4444>.

Commission as independent grassroots community organizations that also support anti-decarbonization positions held by SoCalGas, such as Californians for Balanced Energy Solutions (C4BES) and other similar organizations.

Cal Advocates' discovery inquiry was prompted by allegations initially raised in Rulemaking (R.) 19-01-011³ when C4BES filed a motion for party status on May 13, 2019, and Sierra Club challenged the motion on May 14, 2019, claiming that, unbeknownst to the public, SoCalGas founded and funded C4BES.⁴ Cal Advocates responded to Sierra Club's motion to deny party status and stated that Cal Advocates would investigate the allegations raised by Sierra Club.⁵

On May 23, 2019, Cal Advocates initiated its inquiry by issuing Data Request (DR) SCG051719 to SoCalGas regarding its involvement with C4BES. Cal Advocates issued this data request outside of R.19-01-011, as the scope of R.19-01-011 was limited to de-carbonization matters. In contrast, Cal Advocates' inquiry focused on SoCalGas' financial relationship with C4BES and the use of ratepayer funds to support lobbying efforts by C4BES. In addition, Cal Advocates initiated this discovery outside of a proceeding because no other Commission proceeding encompassed this specific issue. SoCalGas responded to the DR. Based on this response, Cal Advocates alleged that justification existed to continue its inquiry.

On July 19, 2019, Cal Advocates issued DR CalAdvocates-SC-SCG-2019-04 to SoCalGas. In response, SoCalGas refused, in part, to comply with the DR. At this point, Cal Advocates and SoCalGas began the instant dispute regarding the lawfulness of the ongoing discovery.

³ R.19-01-011 *Order Instituting Rulemaking Regarding Building Decarbonization* (January 31, 2019).

⁴ See R.19-01-011, *Sierra Club's Motion to Deny Party Status to Californians For Balanced Energy Solutions or, in the Alternative, to Grant Motion to Compel Discovery* (May 14, 2019). See also *Cal Advocates' Response to Sierra Club's Motion to Deny Party Status to Californians For Balanced Energy Solutions or, in the Alternative, to Grant Motion to Compel Discovery* (May 29, 2019).

⁵ See R.19-01-011, *Cal Advocates' Response to Sierra Club's Motion to Deny Party Status to Californians for Balanced Energy Solutions or, in the Alternative, to Grant Motion to Compel Discovery* (May 29, 2019) at 2.

With this discovery dispute still unresolved, on August 13, 2019, Cal Advocates served SoCalGas with another data request, DR No. CalAdvocates-SC-SCG-2019-05, which consisted of multiple questions built upon previous DRs. On August 27, 2019, SoCalGas responded to the DR with an objection to Question 8 based on the grounds that the requested production of its 100% shareholder-funded contracts related to C4BES fell outside the scope of Cal Advocates' statutory authority set forth in Public Utilities Code (Pub. Util. Code) §§ 309.5(a)⁶ and 314.⁷ Cal Advocates and SoCalGas engaged in discussions regarding Question 8 of the DR and after multiple attempts the parties agreed that they were at an impasse.

On October 7, 2019, Cal Advocates submitted a motion to compel responses from SoCalGas to the President of the Commission pursuant to Pub. Util. Code § 309.5(e).⁸ SoCalGas responded in opposition to Cal Advocates' motion on October 17, 2019.⁹ SoCalGas again argued that because the information sought was 100% shareholder funded, it fell beyond Cal Advocates' statutory purview. The President referred this discovery dispute to the Commission's Chief Administrative Law Judge.

On October 29, 2019, the Chief Administrative Law Judge assigned the dispute to Administrative Law Judge Regina DeAngelis (ALJ) and informed the parties in

⁶ Pub. Util. Code § 309.5(a) states: "There is within the commission an independent Public Advocate's Office of the Public Utilities Commission to represent and advocate on behalf of the interests of public utility customers and subscribers within the jurisdiction of the commission. The goal of the office shall be to obtain the lowest possible rate for service consistent with reliable and safe service levels. For revenue allocation and rate design matters, the office shall primarily consider the interests of residential and small commercial customers."

⁷ See SoCalGas' *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 [PROPOSED] Order (Not In A Proceeding)* (December 2, 2019) at 6.

⁸ Cal Advocates' *Motion to Compel Responses from Southern California Gas Company to Question 8 of Data Request CALADVOCATES-SC-SCG-2019-05 (Not In A Proceeding)* submitted October 7, 2019.

⁹ *Response of SoCalGas Pursuant 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)* submitted October 17, 2019.

writing of certain procedural rules to follow since this discovery dispute was outside of any formal proceeding and, therefore, the Commission's Rules of Practice and Procedure (Title 20, Division 1, of the California Code of Regulations) (herein "Rules")¹⁰ did not directly apply.

On October 31, 2019, Cal Advocates filed a reply to SoCalGas' response.¹¹ On November 1, 2019, the ALJ issued a ruling granting Cal Advocates' motion to compel responses to DR No. CalAdvocates-SC-SCG-2019-05.¹² On November 4, 2019, SoCalGas submitted an emergency motion for stay of the November 1, 2019 ALJ ruling but, with its motion for stay pending, on November 5, 2019, SoCalGas also submitted the DR responses to Cal Advocates under protest.¹³

On December 2, 2019, SoCalGas submitted a motion for reconsideration/appeal requesting the full Commission's review of the ALJ's November 1, 2019 ruling.¹⁴ SoCalGas' motion sought the Commission's review of that ruling and reversal. In support of its motion, SoCalGas raised several constitutional arguments. SoCalGas alleged: (1) the materials sought by Cal Advocates unlawfully infringed on SoCalGas' First Amendment rights to association; and (2) that, because the discovery dispute was occurring outside of a proceeding, the lack of procedural safeguards to govern the

¹⁰ All references to "Rules" herein are to the Commission's Rules of Practice and Procedure.

¹¹ *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)* submitted on October 31, 2019.

¹² *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)* issued on November 1, 2019.

¹³ *Southern California Gas Company's (U 904 G) Emergency Motion to Stay Pending Full Commission Review of 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)* submitted on November 4, 2019.

¹⁴ *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)* submitted on December 2, 2019. On December 2, 2019, SoCalGas also submitted a motion to file documents under seal.

dispute violated SoCalGas' procedural due process rights.¹⁵ SoCalGas also sought an order from the Commission directing Cal Advocates to return or destroy the constitutionally protected materials provided to Cal Advocates on November 5, 2019. (SoCalGas subsequently supplemented this December 2, 2019 motion by a separate motion (dated May 22, 2020), discussed in more detail below). SoCalGas also filed a motion to file under seal certain declarations.¹⁶ On December 17, 2019, Cal Advocates submitted a response.¹⁷

On March 25, 2020, SoCalGas filed an emergency motion for a protective order staying all pending and future data requests from Cal Advocates served outside of any proceeding related to this dispute, and any motions and meet and confers related thereto, during the Governor of California's Covid-19 emergency "safer at home" executive orders.¹⁸

Before Cal Advocates had an opportunity to respond, the ALJ, via an email on April 6, 2020, reminded SoCalGas of Cal Advocates' statutory rights to inspect the accounts, books, papers, and documents of any public utility at any time and found that its request was contrary to California law. The ALJ advised parties to work together during these extraordinary times.

¹⁵ SoCalGas also contended that if the Commission did not stop Cal Advocates from invoking its statutory right to compel production of information, Cal Advocates would continue with the data requests that allegedly infringe on SoCalGas' First Amendment rights.

¹⁶ On December 2, 2019, SoCalGas concurrently filed *Motion of Southern California Gas Company's (U 904 G) for Leave to File Under Seal Confidential Versions of Declarations Numbers 3, 4, 5, and 6 In Support of Its 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 [PROPOSED] Order (Not In A Proceeding)*.

¹⁷ *Public Advocates Office's Response to 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)* submitted December 17, 2019.

¹⁸ *Southern California Gas Company's (U 904 G) emergency motion for a protective order staying all pending and future data requests from the California Public Advocates Office served outside of any proceeding (relating to the Building Decarbonization matter), and any motions and meet and confers related thereto, during California government Covid-19 emergency "safer at home" orders*, submitted on March 25, 2020.

On May 1, 2020, Cal Advocates served SoCalGas with another data request, DR CalAdvocates-TB-SCG-2020-03, seeking access to SoCalGas' accounting database, as Cal Advocates continued its inquiry into SoCalGas' use of ratepayer monies to fund an anti-decarbonization campaign through astroturf organizations. On May 5, 2020, Cal Advocates served a subpoena, signed by the Commission's Executive Director, on SoCalGas seeking the same information as set forth in DR CalAdvocates-TB-SCG-2020-03, access to SoCalGas' accounting databases.¹⁹

SoCalGas delayed responding to the subpoena and, instead, on May 22, 2020, SoCalGas submitted a motion to quash the subpoena and to stay the subpoena until May 29, 2020, to allow it an opportunity to implement software solutions to exclude what it deemed as materials protected by attorney-client and attorney work product privileges, as well as materials implicating the same First Amendment issues raised in SoCalGas' December 2, 2019 motion for reconsideration/appeal of the November 1, 2019 ALJ ruling.²⁰

On May 22, 2020, SoCalGas also submitted a motion to supplement the record of its December 2, 2019 motion for reconsideration/appeal and to request an expedited Commission decision (in the event SoCalGas' May 22, 2020 motion for a stay of the subpoena was not granted).²¹

¹⁹ The Public Utilities Commission of the State of California's *Subpoena to Produce Access to Company Accounting Databases* dated May 4, 2020 and served on May 5, 2020.

²⁰ *Southern California Gas Company's (U 904 G) Motion to Quash Portion of the Subpoena to Produce Access to Certain Materials in Accounting Databases and to Stay Compliance until the May 29th Completion of Software Solution to Exclude those Protected Materials in The Databases (Not In A Proceeding)* submitted May 22, 2020. SoCalGas originally submitted this motion on May 19, 2020 with redacted declarations. The ALJ ordered SoCalGas to provide confidential electronic versions of the declarations to the Commission and Cal Advocates. SoCalGas elected to instead file a "substituted" version of the Motion to Quash on May 22, 2020.

²¹ *Southern California Gas Company's (U 904 G) Motion to Supplement the Record and Request for Expedited Decision by the Full Commission on Motion for Reconsideration/Appeal Regarding Administrative Law Judge's Ruling in the Discovery Dispute Between the Public Advocates Office and Southern California Gas Company, October 7, 2019 (Not In A Proceeding) if the Motion is not Granted to Quash Portion of the Subpoena to Produce Access to Certain Materials in Accounting Databases and to Stay Compliance Until the May 29th Completion of Software Solution to Exclude Those Protected Materials in the Databases (Not In A Proceeding)* submitted on May 20, 2020. SoCalGas originally submitted this motion on May 20, 2020 with

On June 23, 2020, Cal Advocates submitted a motion to find SoCalGas in contempt and to impose fines on SoCalGas for noncompliance with the May 5, 2020 subpoena.²² More specifically, Cal Advocates asserted that SoCalGas was continuing to avoid complying with the May 5, 2020 subpoena and that SoCalGas' conduct following the issuance of the subpoena constituted a violation of Rule 1.1 and Pub. Util. Code §§ 309.5, 311, 314, 314.5, 314.6, which warrants the imposition of daily penalties. Cal Advocates also sought an order requiring SoCalGas to, among other things, provide Cal Advocates with access to financial databases on a read-only basis and to provide additional information from its accounting and vendor records systems showing which of its accounts are 100% shareholder funded, which accounts have costs booked to them associated with activities that are claimed to be subject to First Amendment privileges or are shareholder funded and other information about vendors of SoCalGas.

On July 2, 2020, SoCalGas submitted a response challenging Cal Advocates' motion for contempt and sanctions, alleging that: (1) the underlying premise of the motion, Cal Advocates' authority to inspect SoCalGas' books and records, lacked a legal basis; (2) the motion was premature and should not be decided before SoCalGas' motion to quash the subpoena; (3) that if Cal Advocates' June 23, 2020 motion for contempt and sanctions was to be considered, then further procedural safeguards would

redacted declarations. The ALJ ordered SoCalGas to provide confidential electronic versions of the declarations to the Commission and Cal Advocates. SoCalGas elected to instead file a "substituted" version of the motion on May 22, 2020.

²² *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 (Not In A Proceeding)* submitted on June 23, 2020.

be required under due process rights; and (4) the motion failed on its merits.²³ On July 10, 2020, Cal Advocates submitted a reply addressing SoCalGas' arguments.²⁴

We reviewed the requests for Commission action discussed above together, for reasons of administrative efficiency. All four motions address information sought by either DR No. CalAdvocates-SC-SCG-2019-05 or the May 5, 2020 subpoena; and all four motions rely on arguments related to the scope of Cal Advocates' statutory authority to engage in discovery of information from SoCalGas under the Public Utilities Code and the application of the First Amendment right to association and procedural due process rights to protect SoCalGas from disclosure of shareholder-related information sought by Cal Advocates.

On December 21, 2020, we issued Resolution ALJ-391. The Resolution resolved SoCalGas' December 2, 2019 motion for reconsideration/appeal requesting the full Commission's review of the ALJ's November 1, 2019 ruling together with the other related motions, all pertaining to DR No. CalAdvocates-SC-SCG-2019-05 or the May 5, 2020 Commission subpoena.²⁵ The Resolution denied SoCalGas'

²³ *Southern California Gas Company's (U 904 G) Response to Public Advocates Office's 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 (Not In A Proceeding)* submitted on July 2, 2020.

²⁴ *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*, submitted on July 10, 2020.

²⁵ Cal Advocates also submitted a motion to compel SoCalGas to produce the confidential versions of the declarations submitted in support of SoCalGas' December 2, 2019 motion for reconsideration/appeal and for daily monetary fines. See *Public Advocates Office Motion To Compel Confidential Declarations Submitted In Support Of Southern California Gas Company's December 2, 2019 Motion For Reconsideration Of First Amendment Association Issues And Request For Monetary Fines For The Utility's Intentional Withholding Of This Information; [Proposed] Order*, submitted on July 9, 2020.

On July 17, 2020, SoCalGas filed a response, *Response to Public Advocates Office Motion to Compel Confidential Declarations Submitted in Support of Southern California Gas Company's December 2, 2019 Motion for Reconsideration of First Amendment Association Issues and Request for Monetary Fines for the Utility's Intentional Withholding of this Information*.

On July 24, 2020, Cal Advocates filed a reply, *Public Advocates Office Reply to Southern California Gas Company's Opposition to Motion to Compel and for Fines Related to the Utility's Intentional Withholding of Confidential Declarations*.

December 2, 2019 motion for reconsideration/appeal of the November 1, 2019 Administrative Law Judge's ruling and denied SoCalGas' May 22, 2020 motion to quash portions of the Commission's May 5, 2020 subpoena. In denying these motions, we rejected SoCalGas' argument that Cal Advocates' discovery rights, as set forth in the Public Utilities Code, are limited by SoCalGas' First Amendment right to association, assuming that such a right exists, and also rejected SoCalGas' argument that the Commission violated its procedural due process rights.

The Resolution granted SoCalGas' December 2, 2019 motion for leave to file under seal confidential versions of certain declarations but, in doing so, confirmed that SoCalGas must provide access to the unredacted versions of the confidential declarations to the Commission, including its staff, such as Cal Advocates, under existing protections.

The Resolution also deemed moot SoCalGas' May 22, 2020 motion to stay compliance with the May 5, 2020 subpoena until May 29, 2020, granted SoCalGas' May 22, 2020 motion to supplement the December 2, 2019 motion for reconsideration/appeal, and deferred consideration of Cal Advocates' June 23, 2020 motion for contempt and sanctions for SoCalGas' failure to respond to the May 5, 2020 subpoena. By granting SoCalGas' December 2, 2019 motion for leave to file under seal and directing it to provide unredacted, confidential versions to Commission staff, including Cal Advocates, the Resolution also deemed moot Cal Advocates' July 9, 2020 motion to compel and deferred consideration of Cal Advocates' request therein for monetary fines.

The Resolution directed SoCalGas to produce the information and documents requested by Cal Advocates in DR No. CalAdvocates-SC-SCG-2019-05, including the confidential declarations submitted under seal in support of SoCalGas' December 2, 2019 motion for reconsideration/appeal, and in the May 5, 2020 Commission subpoena, within 30 days of the effective date of the Resolution.

On December 21, 2020, SoCalGas filed a motion for stay and an application for rehearing (SCG App. Rhrhg.) of Res. ALJ-391, challenging the Resolution on the

following grounds: (1) the Resolution errs in concluding that Cal Advocates' discovery does not infringe on SoCalGas' First Amendment rights; and (2) the Resolution commits legal error in requiring an attorney declaration accompanying the privilege log. SoCalGas also requests oral argument on its rehearing application. On January 11, 2021, responses to the rehearing application were filed by Cal Advocates and Sierra Club.

On January 6, 2021, the Commission's Executive Director extended the time for SoCalGas to comply with Res. ALJ-391 until 15 days from the date the Commission disposes of the rehearing applications.

On January 20, 2021, Cal Advocates filed an application for rehearing (CA App. Rhrhg.) of Res. ALJ-391, challenging the Resolution on the following grounds:

(1) Res. ALJ-391 errs by failing to recognize the black letter case law affirming the Commission's right to fully investigate the utilities it regulates; (2) Res. ALJ-391 errs by articulating the wrong standard for permissible discovery where a *prima facie* case is made; (3) Res. ALJ-391 errs by failing to recognize the due process principles set forth in *Mathews v. Eldridge* regarding the limited applicability of trial-type hearings; (4) Res. ALJ-391 errs by failing to recognize all of the factors showing that the confidential declarations offered in support of SoCalGas' *prima facie* case are insufficient; and (5) Res. ALJ-391 errs by failing to recognize that SoCalGas' attorney/client and other privilege claims associated with its SAP accounting system have been waived. SoCalGas filed a response to Cal Advocates' rehearing application on February 4, 2021.

We have reviewed the allegations of error contained in the applications for rehearing of the Resolution and have determined that good cause has been demonstrated to modify the Resolution as discussed below. As modified, rehearing of the Resolution should be denied. The motion for stay of the Resolution and request for oral argument filed by SoCalGas should similarly be denied.

III. DISCUSSION

A. The Resolution Correctly Determined that “Disclosure Alone” Does Not Establish a *Prima Facie* Showing of First Amendment Harm in this Matter.

SoCalGas asserts that “the Resolution erroneously concludes that SoCalGas failed to meet its *prima facie* showing of First Amendment harm because it ‘requires a showing that goes beyond a simplistic assertion that disclosure alone chills association.’” (SCG App. Rhrng., p. 17, quoting Res. ALJ-391, p. 14.) SoCalGas relies on its interpretation of *Britt v. Superior Court*²⁶ in support of its contention. SoCalGas also argues that Cal Advocates is seeking to undermine SoCalGas’ associational rights based on events occurring in the underlying litigation. SoCalGas has failed to demonstrate legal error.

In Resolution ALJ-391, the Commission explained that:

Meeting the initial showing of First Amendment infringement requires a showing that goes beyond a simplistic assertion that disclosure alone chills association. An organization must make a concrete showing that disclosure “is itself inherently damaging to the organization or will incite other consequences that objectively could dissuade persons from affiliating with the organization.”

(Res. ALJ-391, p. 14, citing *Dole v. Local Union 375, Plumbers Int’l Union* (9th Cir. 1990) 921 F.2d 969, 973-974.)

The Ninth Circuit has elaborated that: “[t]his *prima facie* showing requires appellants to demonstrate that enforcement of the [discovery requests] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or ‘chilling’ of, the members’ associational rights.” (*Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1160, internal citation omitted.)

SoCalGas asserts that *Britt* rejected the Commission’s analysis, instead assuming “that disclosure alone of individuals’ organizational affiliations would cause First Amendment harm.” (SCG App. Rhrng., p. 17.) SoCalGas is mistaken. Its citation to

²⁶ (1978) 20 Cal. 3d 844.

Britt, in support of this position, identifies language which describes membership and meeting attendee lists as “presumptively privileged information.” (SCG App. Rhrgr., p. 17, n. 58.) The whole sentence from *Britt* states: “As we explain in the margin, the relationship of such activities to the suggested defenses is extremely tenuous at best; we seriously doubt that the district has made the requisite showing even to justify the disclosure of presumptively privileged information which directly relates to such defenses.” (*Britt, supra*, 20 Cal. 3d at 860, citing *N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 463-465.)

Britt may have assumed that the specific information identified in that case was privileged. However, even though *Britt* does assert “that compelled disclosure of private associational affiliations or activities will inevitably deter many individuals from exercising their constitutional right of association,” it does not follow that disclosure alone, in any context, establishes a *prima facie* case. (*Id.* at 848.) Nor does it follow that the discovery contemplated here would inevitably cause harm to associational rights.

Britt cautioned that “[o]ur decision in the present case breaks no new constitutional ground.” (*Id.* at 864.) By its own terms, *Britt* explained that: “[t]he present decision simply recognizes that these firmly established constitutional precepts cannot be ignored merely because the issue of compelled disclosure arises in the context of litigation discovery[.]” (*Id.*) It does not appear that *Britt* held more broadly that “disclosure alone” in any context is sufficient to establish a *prima facie* case.

Even if *Britt*, which was decided in 1978, had held that “disclosure alone” was sufficient to establish a *prima facie* case, in 2010 *Perry* clarified that “[t]he existence of a *prima facie* case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities.” (*Perry, supra*, 591 F.3d at 1162, citations omitted.) *Dole* also explains that “[t]he cases in which the Supreme Court has recognized a threat to first amendment associational rights, however, have consistently required more than an argument that disclosure leads to exposure.” (*Dole, supra*, 921 F.2d at 974.) While SoCalGas would have had the Commission hold that “disclosure alone” would establish a *prima facie* case, the

Commission correctly applied the principles articulated above, determining that SoCalGas' contentions were hypothetical and did not demonstrate a "palpable fear of harassment and retaliation." (Res. ALJ-391, p. 15, see also FOF #17.)

SoCalGas emphasizes Cal Advocates' alleged motives in making its *prima facie* case. SoCalGas asserts that "the Resolution ignores the fact that Cal Advocates intends and desires to disclose all of SoCalGas's associational information publicly as soon as possible." (SCG App. Rhrng., p. 16.) SoCalGas alleges that as to Cal Advocates' (and the Sierra Club's) litigation in this proceeding "the real purpose is about SoCalGas's political viewpoint, detailed strategies, and affiliations that they jointly want to suppress and chill." (SCG App. Rhrng., p. 17.) SoCalGas also argues that Cal Advocates' advocacy regarding contempt and fines is retaliatory. (SCG App. Rhrng., p. 19.) In a footnote, SoCalGas complains about the "extreme pressure" Cal Advocates had allegedly applied. (SCG App. Rhrng., p. 19, n. 69.)

The presumed motives of Cal Advocates alleged by SoCalGas do not establish legal error in Resolution ALJ-391. Cal Advocates states that "[w]hile non-confidential information from SoCalGas' data responses has been made public – indeed a Public Records Act request required that it be made public – Cal Advocates knows of no instance in this investigation where confidential utility information has been disclosed, and SoCalGas has failed to identify any such disclosure." (CA App. Rhrng., p. 13, internal footnotes omitted.) And SoCalGas has failed to show how submitting the relevant documents, to Commission staff (including Cal Advocates staff) under Section 583 confidentiality would cause any associational harm. Whether or not Cal Advocates has a "joint prosecution" agreement with the Sierra Club, it is not relieved of its confidentiality obligations under Section 583. Assumed motives have no bearing on such requirements.

Moreover, SoCalGas is subject to Commission regulation and any reasonable lobbyist or consultant should understand the potential that the Commission staff could exercise their broad powers to seek to learn about such contacts. (See Cal. Const. art. 12; see also Pub. Util. Code §§ 311, 312, 313, 314, 314.5, 581, 582, 584, 701, 702.) Any

belief on the part of SoCalGas that it could lawfully conceal its contacts and expenditures from Commission scrutiny would thus be erroneous.

SoCalGas has failed to establish that disclosure alone would be enough to establish a *prima facie* case.

B. The Resolution Properly Evaluated SoCalGas' Declarations.

SoCalGas contends that its submitted declarations demonstrated future harm and thus were sufficient to establish a *prima facie* case. (SCG App. Rehg., pp. 22-26.) While Cal Advocates supports the outcome of this issue, it argues that Resolution ALJ-391 errs by failing to recognize all of the factors showing that the confidential declarations offered in support of the SoCalGas' *prima facie* case are insufficient. (CA App. Rhrhg., p. 9.) In particular, Cal Advocates contends that SoCalGas' refusal to turn over the confidential declarations requires an adverse inference, and that SoCalGas' declarations cannot be taken at face value. (CA App. Rhrhg., pp. 9-14.) Neither party has demonstrated legal error.

As part of its showing, SoCalGas submitted a declaration from Sharon Tomkins, a Vice President of Strategy and Engagement and Chief Environmental Officer, which asserts that "she would be less likely to engage in certain communications and contracts if required to produce the requested information and [states] her belief that other entities would be less likely to associate with SoCalGas if information about SoCalGas' political efforts are disclosed to the Commission." (Res. ALJ-391, p.14.) SoCalGas also submitted confidential declarations, "from private organizations specializing in government relations and public affairs, outside of SoCalGas, including statements that disclosure to the Commission would dissuade them from communicating or contracting with SoCalGas." (Res. ALJ-391, p.14.) In addition, SoCalGas submitted a declaration from Andy Carrasco, SoCalGas' new Vice President, Strategy and Engagement, and Chief Environmental Officer, which alleges present and future harm, opining that "SoCalGas is being forced to reconsider its decisions relating to political activities and associations." (Carrasco Decl., ¶ 9.) SoCalGas admits that it intended to file additional

declarations with the Commission but declined to do so because it would be required to share said declarations with Cal Advocates. (SCG App. Rehg., pp. 24-25.)

SoCalGas argues that its declarations are nearly identical to those used in *Perry*.

Perry explains that:

Although the evidence presented by Proponents is lacking in particularity, it is consistent with the self-evident conclusion that important First Amendment interests are implicated by the plaintiffs' discovery request. The declaration creates a reasonable inference that disclosure would have the practical effects of discouraging political association and inhibiting internal campaign communications that are essential to effective association and expression.

(*Perry, supra*, 591 F.3d at p. 1163.)

However, *Perry* did not establish a formula where the text of its declarations would establish a *prima facie* case when used in all subsequent matters. The supporters of Proposition 8 (regarding the legality of same-sex marriage), at issue in *Perry*, may be differently situated than the investor-owned utility consultants/contractors at issue here. In essence, the First Amendment interest at stake in *Perry* would have been more "self-evident" than in this litigation. Different circumstances may call for different declarations.

Indeed, the Commission correctly determined that the conclusory declarations here lacked the concrete showing that the disclosures in question would be "inherently damaging to the organization or will incite other consequences that objectively could dissuade persons from affiliating with the organization." (*Dole, supra*, 921 F.2d at 974.) The Commission is not required to affirm the veracity of the unfounded fears expressed in the declarations, particularly considering their faulty assumptions about the contours of the Commission's regulatory reach. If any party is reconsidering its contacts based on this controversy, that entity's realization of the Commission's longstanding regulatory jurisdiction does not implicate the First Amendment.

As to the confidential declarations, Cal Advocates alleges that the Commission should go further and apply an adverse inference because it “has been prejudiced by SoCalGas’ withholding of the confidential declarations[.]” (CA App. Rhrng., p. 10.) The California Evidence Code provides for applying such inferences given “the party’s failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto.” (Evid. Code § 413.) As noted by Cal Advocates, the Commission has applied this sanction for a utility’s failure to retain records. (CA App. Rhrng., p. 11, citing D.15-04-024, pp. 211-212.) In D.15-04-024, the Commission had applied the *Cedars-Sinai* inference, which provides for this sanction in situations involving spoliation of evidence. (See *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 11-13).

Here, however, even if an adverse inference could be applied, Cal Advocates has failed to establish legal error. The language in Evidence Code section 413 is permissive, allowing a court to apply the inference, but not requiring it in all situations. Further, as the Commission has already determined that the declarations do not make a *prima facie* case, applying an adverse inference would not alter the outcome, and would thus be unnecessary.

Cal Advocates also encourages the Commission not to take the submitted declarations at face value.

Cal Advocates recently learned that the identities of certain consultants that SoCalGas has variously claimed are confidential – including, without limitation, Marathon Communications (Marathon) and Imprenta Communications Group (Imprenta) – have been publicly available since before the declarations were signed. Indeed, the identities of these consultants, and many others, were provided in forms SoCalGas filed with the Fair Political Practices Commission (FPPC) in 2018 and 2019 pursuant to the Political Reform Act, and are publicly available on the FPPC’s website. Notwithstanding these public disclosures (made by SoCalGas), SoCalGas claimed the Marathon and Imprenta consultants’ identities were confidential long after the FPPC filings were made.

(CA App. Rhrng., p. 12.)

Cal Advocates thus argues that privilege would be waived for any associational information that is already public. (CA App. Rhrng., p. 13.) Cal Advocates also asserts that the Tomkins Declaration is misleading as to disclosure of information to the LA Times. (CA App. Rhrng., p. 13.)

Indeed, assertions of confidentiality would be undercut if the associational information were already public. And any misleading information in a declaration would diminish the weight accorded to the assertions therein. However, legal error has not been shown. Cal Advocates' contention that the declarations should not be taken at face value is essentially re-litigation of the issue. (See *Eden Hospital Dist. v. Belshe* (1998) 65 Cal App. 4th 908, 915-916.) Thus, this contention does not "alert the Commission to a legal error, so that the Commission may correct it expeditiously," which is the purpose of a rehearing application. (See Rule 16.1(c).)

SoCalGas also admits that it failed to submit certain declarations into the record, arguing that providing said declarations to Cal Advocates would result in additional harm. SoCalGas' argument concedes that it was prepared to submit the documents to the Commission, but not Cal Advocates, though the relevant discovery rights for this case are essentially coextensive. (See Pub. Util. Code § 309.5(e).) While SoCalGas sees a significant distinction on this point, it admits that despite its intention to submit said declarations to the Commission, it withdrew "the declarations in order to preserve the content of its First Amendment rights at issue in the pending motions. This was the only way for SoCalGas to avoid the chilling effect[.]" (SCG App. Rhrng., pp. 24-25.) The implication of this language is that submission of the declarations to the Commission itself would not cause the "chilling effect." In any event, no weight should be accorded to this evidence that is not in the record.

Finally, SoCalGas' complaint that the Commission failed to discuss the Carrasco declaration is meritless. "The fact that a Decision does not refer to a party's argument does not demonstrate it was ignored, or that, absent such a reference, the Decision lacks support from the record." (D.20-05-027, p. 6.)

Resolution ALJ-391 properly evaluated the submitted declarations.

C. The Resolution Correctly Identified the Compelling Government Interest in this Matter and Correctly Determined that the Discovery Was Rationally Related to that Compelling Government Interest.

The Commission determined that there is “a compelling government interest here, Cal Advocates’ requests for information about SoCalGas’ decarbonization campaign are consistent with its broad statutory authority to inspect the books and records of investor-owned utilities in furtherance of its proper interest in fulfilling the Commission’s mandate to regulate and oversee utilities.” (Res. ALJ-391, pp. 15-16.) SoCalGas asserts that this is error because the Commission’s mandate is not implicated here and because the Commission’s mandate is not tied to the existing need for First Amendment-protected information. (SCG App. Rhrgr., pp. 26-29.) In contrast, Cal Advocates contends that the Commission erred by failing to recognize the Black Letter case law affirming the Commission’s rights to fully investigate utilities. (CA App. Rhrgr., pp. 3-6.) Neither party has shown legal error on this point.

SoCalGas’ assertion that the Commission’s mandate is not implicated appears to be focused on the confidential declarations, which SoCalGas confirms have been filed with the Commission conditionally under seal. (SCG App. Rhrgr., p. 26.) Nevertheless, SoCalGas still seeks to prevent disclosure of those documents to Cal Advocates. Even that fact implicates the Commission’s authority because requesting that the Commission not share information with its staff interferes with the Commission’s mandate to “supervise and regulate every public utility in the State and [to] do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.” (Pub. Util. Code § 701.) The assertion that the Commission’s mandate is not implicated in this matter is plainly incorrect.

SoCalGas further asserts that the Commission’s mandate is not tied to the need for the requested information. SoCalGas argues that to overcome First Amendment protection, the compelling government interest must be “clearly defined and tied to the

existing need.” (SCG App. Rhrgr., p. 27, citing *DeGregory v. Attorney General of State of N.H.* (1966) 383 U.S. 825, 829.) SoCalGas further argues that Cal Advocates’ mandate under Section 309.5(a) is narrower than the Commission’s and is limited to a review of ratepayer-funded accounts. SoCalGas also submits that not even the Commission’s authority extends to SoCalGas’ use of shareholder funds.

In contrast, Cal Advocates opines that Black Letter case law establishes an administrative agency’s right and obligation to investigate the entities that it regulates regardless of First Amendment claims and that the Commission does not need to show more than its statutory framework to establish a compelling government interest. (CA App. Rhrgr., p. 4.) In particular, Cal Advocates contends that *Federal Election Commission v. Machinists*²⁷ recognized that agencies like the Commission, which are vested with broad investigatory duties from certain regulated entities, have more expansive authority to gather information that may infringe First Amendment rights than other agencies. (CA App. Rhrgr., pp. 4-5, citing *Federal Election Commission v. Machinists, supra*, 655 F.2d at 387.) Cal Advocates confirms that such agencies could pursue an investigation simply based on “official curiosity.” (CA App. Rhrgr., pp. 4-5, citing *Id.* at 387-88.)

Cal Advocates also points to *Brock v. Local 375*²⁸ for the proposition that, like a grand jury, administrative agencies such as the Commission may investigate based on the mere suspicion that a law has been violated. (CA App. Rhrgr., pp. 4-5, citing *Brock, supra*, at 348.) Cal Advocates notes both cases rely on *United States v. Morton Salt*²⁹ for the cited propositions.

Cal Advocates’ reading of the law is correct, while SoCalGas’ interpretation is incorrect. While there may be differing roles and functions between the Commission and Cal Advocates, such distinctions do not alter the analysis on determining what the

²⁷ (D.C. Cir 1981) 655 F.2d 380.

²⁸ (9th Cir 1988) 860 F.2d 346.

²⁹ (1950) 338 U.S. 632.

compelling government interest is here. Cal Advocates is part of the Commission's regulatory scheme, with Cal Advocates being explicitly authorized to "compel the production or disclosure of any information it deems necessary to perform its duties from any entity regulated by the commission." (Pub. Util. Code § 309(e).) The regulatory context thus informs the relevant discovery rights and the compelling government interest.

Moreover, designating expenditures as "shareholder funded" does not immunize SoCalGas from Commission jurisdiction. *In Re S. California Gas Co.*, cited by SoCalGas for the proposition that the Commission only enforces "the overarching requirement that the shareholders maintain sufficient invested capital to sustain the authorized capital structure of the company to finance its used and useful plant and equipment necessary to serve the ratepayers" only speaks to a policy articulated in that 2004 decision. (See SCG App. Rhrgr., p. 28, n. 97, citing *In Re S. California Gas Co.*, No. 02-12-027, 2004 WL 2963807, at *1 (Dec. 2, 2004).) Designation of expenditures as shareholder-funded does not, and cannot, limit the Commission's broad authority to investigate utilities. (See Cal. Const. art. 12, see also Pub. Util. Code §§ 311, 312, 313, 314, 314.5, 581, 582, 584, 701, 702.)

SoCalGas further argues that Resolution ALJ-391 failed to establish an adequate nexus between the compelling government interest and the alleged need for discovery. (SCG App. Rhrgr., p. 29.) SoCalGas also alleges that the discovery "would not provide information concerning whether ratepayer funds were used for political activities[.]" (SCG App. Rhrgr., p. 29.) After suggesting a different approach to discovery that it asserts Cal Advocates should have taken, SoCalGas opines that the "intrusive discovery goes far beyond an accounting exercise[.]" (SCG App. Rhrgr., p. 31.) This argument is meritless.

SoCalGas does not rebut the determination that "[i]t is well-settled that state regulatory agencies, such as the Commission, can request information to fulfill their regulatory mandate, even where doing so may potentially impact First Amendment rights." (Res. ALJ-391, p. 16.) The gist of SoCalGas' argument is that the responsive

information regarding shareholder-funded accounts goes beyond Cal Advocates' mandate and discovery needs in this case. Yet as stated above, as part of the Commission's broad mandate over investor-owned utilities, Cal Advocates "may compel the production or disclosure of *any information it deems necessary* to perform its duties from any entity regulated by the commission, provided that any objections to any request for information shall be decided in writing by the assigned commissioner or by the president of the commission, if there is no assigned commissioner." (Pub. Util. Code § 309.5(e), emphasis added, see also Pub. Util. Code § 309.5(a).) In contrast, as a regulated entity, SoCalGas does not have any statutory mandate to determine the information that Cal Advocates would need to effectively represent utility customers.

Even if the "custom software solution in its SAP Database" suggested by SoCalGas would have provided responsive information, there is no guarantee that it would have provided Cal Advocates with "all the information it needed to conduct its investigation." (See SCG App. Rhrgr., p. 30.) SoCalGas' suggestions as to how Cal Advocates should have conducted its inquiry do not establish legal error. Cal Advocates has alleged that ratepayer funds may have been used to support lobbying activity. As regulated utilities may not use ratepayer funds for activities that do not benefit ratepayers, the discovery here is rationally related to a compelling government interest.

SoCalGas also expresses related concerns regarding potential viewpoint discrimination. Yet these concerns about the potential for viewpoint discrimination are not substantiated by record evidence. SoCalGas is also not definitive in asserting that this form of discrimination has occurred, and admits the potential that "Cal Advocates is not motivated by such animus[.]" (SCG App. Rhrgr., p. 32.) Generally, whether or not a utility is fined or sanctioned is determined by whether or not that utility "violates or fails to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission." (Pub. Util. Code § 2107.) A utility's viewpoint is irrelevant as to its obligation to comply with Commission directives.

Legal error has not been shown.

D. The Resolution Correctly Determines that the Discovery Sought by Cal Advocates is the Least Restrictive Means of Obtaining the Desired Information.

SoCalGas next alleges that the Resolution is not narrowly tailored to obtain properly discoverable information regarding its above-the-line accounts. (SCG App. Rhrgr., pp. 32-39.) SoCalGas claims that a governmental request for First Amendment-protected information must be narrowly tailored such that the least restrictive means of obtaining the desired information are used -- in other words, the means that put the least amount of restrictions on a party's First Amendment rights. (SCG App. Rhrgr., pp. 32-33.) SoCalGas asserts that Cal Advocates' investigation can be achieved through means significantly less restrictive, namely examining only the above-the-line accounts to find out whether political activity has been misclassified in above-the-line accounts. (SCG App. Rhrgr., pp. 32-33.) SoCalGas further claims that there is no need for Cal Advocates to investigate the details of SoCalGas' First Amendment-protected political activity, or to compel the identities of SoCalGas' political partners and vendors that are recorded below-the-line. (SCG App. Rhrgr., p. 33.)

In its rehearing application, Cal Advocates asserts that the Resolution erroneously applies an analysis as to whether the desired discovery is narrowly tailored to a compelling government interest. (CA App. Rhrgr., pp. 18-20.) Cal Advocates alleges that the "narrowly tailored" analysis at pages 18-19 of the Resolution is not required under applicable case law. (CA App. Rhrgr., pp. 7, 18-20; see also Res. ALJ-391, pp. 16-19.)³⁰

After determining that SoCalGas failed to demonstrate a prima facie case of infringement on its First Amendment rights (Res. ALJ-391, pp. 12-15), the Resolution determined that, even if such a prima facie case existed, a compelling governmental

³⁰ Cal Advocates argues that "narrow tailoring" is not the specific language utilized in the *Perry* analysis. (See *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147.) The *Perry* analysis first examines whether there is a prima facie showing of infringement on First Amendment rights, and if so, the second inquiry is whether the information sought through discovery is rationally related to a compelling governmental interest and the least restrictive means of obtaining the desired information. (See *Perry*, supra, 591 F.3d at p. 1140.) The "narrowly tailored" discussion contained in the Resolution at pp. 18-19 relates to the second prong of part two of the *Perry* analysis – whether the discovery request utilizes the least restrictive means of obtaining the requested information.

interest supports the disclosure of the requested information to Cal Advocates (Res. ALJ-391, pp. 15-18). Having made this determination, the Resolution then evaluated whether the requested discovery is rationally related to a compelling government interest and is also narrowly tailored to that specific government interest. (Res. ALJ-391, pp. 16-19.)

With respect to narrow tailoring, the Resolution expressly found that the discovery sought by Cal Advocates is narrowly tailored, meaning that it does not “place a burden on more of the First Amendment right of associational privileges than necessary to achieve its interest.” (Res. ALJ-391, p. 18.) The Resolution further determined that the scope of the requested discovery is consistent with numerous disclosure requirements upheld by other courts. (Res. ALJ-391, pp. 18-19.) For example, in *Duke Energy*, the Court upheld a government request for a utility company’s communications with a third-party because it was relevant to the subject matter of the litigation, even though the disclosure infringed on First Amendment associational rights.³¹

SoCalGas takes issue with the Resolution’s citation of *Duke Energy* because, according to SoCalGas, *Duke Energy* employs a mere relevance standard, rather than a higher level of scrutiny. (SCG App. Rhrgr., pp. 40-43.) This argument ignores the fact that the Resolution specifically analyzes the discovery requests under a high level of scrutiny pursuant to the factors outlined in *Perry, supra*. This includes analysis as to whether SoCalGas has made a prima facie case of First Amendment infringement, whether a compelling government interest exists to justify the requested discovery, whether the requested discovery is rationally related to a compelling government interest, and whether the discovery request constitutes the least restrictive means of obtaining the desired information. (See Res. ALJ-391, pp. 12-19.) Moreover, like *Duke Energy*, the discovery sought by Cal Advocates “is limited and for a specific purpose other than

³¹ See *United States v. Duke Energy* (M.D.N.C. 2003) 218 F.R.D. 468, 473 (allowing discovery request for energy company’s communications with trade association despite their potential to chill First Amendment rights).

inquiry into the UARG'S associational activities. It is not a general fishing expedition.” (*Duke Energy, supra*, 218 F.R.D. at p. 473.) Such is the case here as well.

In the present instance, the discovery requested by Cal Advocates, specifically DR No. CalAdvocates-SC-SCG-2019-05, is narrowly tailored, as well as the least restrictive means, to seek specific contracts and information about SoCalGas’ potential use of ratepayer funds for lobbying activities. In its rehearing application, SoCalGas relies on its argument that activities involving “100% shareholder-funded” activities are off limits to the Commission, including Cal Advocates, to assert that this DR is not narrowly tailored. As the Resolution notes, “[t]his argument suggests, incorrectly, that a utility may unilaterally designate certain topics off-limits to Commission oversight.” (Res. ALJ-391, p. 18.) Indeed, the instant discovery dispute arose as part of an inquiry that escalated after SoCalGas did not disclose its affiliation with an entity that sought party status in a rulemaking proceeding before the Commission.³² As noted in the Resolution, SoCalGas refused to provide information about its affiliation, thereby leading to this series of data requests by Cal Advocates. (Res. ALJ-391, p. 19.)

In its rehearing application, SoCalGas is clear about the type of “narrow tailoring” and “less restrictive means” it would prefer to see in the Resolution:

Cal Advocates need only examine the above-the-line accounts to find out whether political activity has been misclassified in above-the-line accounts. There is simply no need for Cal Advocates to investigate the details of SoCalGas’s First Amendment-protected political activity, or to compel the identities of SoCalGas’s political partners and vendors that are recorded below-the-line.

(SCG App. Rhrng., p. 34.) Thus, SoCalGas seeks to define the appropriate scope of properly discoverable material quite narrowly, and to exclude any material related to its below-the-line accounts.

As discussed above, the Commission has the right to inspect all records necessary as part of its general supervisory authority over all regulated utilities. Public Utilities

³² R.19-01-011, *Order Instituting Rulemaking Regarding Building Decarbonization* (January 31, 2019).

Code section 314(a) expressly provides that “[t]he commission, each commissioner, and each officer and person employed by the commission may, at any time, inspect the accounts, books, papers, and documents of any public utility.” (Pub. Util. Code, § 314(a).) SoCalGas does not have a reasonable expectation of privacy as to its accounts and documents due to the Commission’s constitutional and legislatively mandated oversight responsibilities. Merely asserting the conclusion that certain activities are “exclusively shareholder funded” (or below-the-line) does not deprive the Commission of its statutorily granted authority to review a utility’s books and records to ensure compliance with applicable regulatory laws and standards. Further, SoCalGas’ argument begs the question, since SoCalGas merely asserts, but has not proven, that the funds in question are truly separate shareholder funds. As noted in the Resolution:

Taken to the logical conclusion, a utility might opt out of regulation at any time, at its own discretion, based on its self-serving description of its activities. SoCalGas’ position that it may curtail Commission staff’s ability to conduct its regulatory function of ensuring proper use of ratepayer funds -- by making unsupported assertions -- is fundamentally inconsistent with its status as a regulated public utility.

(Res. ALJ-391, p. 19.)

In response to the argument raised by Cal Advocates above regarding whether “narrow tailoring” is explicitly required as part of the *Perry* analysis, the Commission will modify the Resolution at section 2(a)(iv) (pp. 18-20) to clarify this point and cite case law that more closely tracks the *Perry* analysis. Specifically, the first two paragraphs of section 2(a)(iv) at page 18 of the Resolution are removed in their entirety, and replaced with the following:

We now turn to the second step of the analysis for evaluating the constitutionality of Cal Advocates DR No. CalAdvocates-SC-SCG-2019-05: Whether the DR is the least restrictive means to obtain the requested information. SoCalGas again relies on its maxim that activities involving “100% shareholder-funded” activities are off limits to the Commission, including Cal Advocates, to assert that this DR is not narrowly tailored. This argument suggests,

incorrectly, that a utility may unilaterally designate certain topics off-limits to Commission oversight.

In circumstances in which the First Amendment right of association is claimed with respect to a government request for discovery, *Perry* indicates that the discovery request at issue must be the “least restrictive means” of obtaining the desired information. (*Perry, supra*, 591 F.3d at p. 1140; see also *Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1459-61 (9th Cir. 1991).) This is the second step of part two of the *Perry* analysis, after determining that the information sought through the requested discovery is rationally related to a compelling governmental interest. (*Perry, supra*, 591 F.3d at p. 1140.) The party seeking the discovery must show that the information sought is “highly relevant to the claims or defenses in the litigation,” and the request must be “carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable.” (*Perry, supra*, 591 F.3d at p. 1141.) The purpose in seeking the requested discovery “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” (*Brock v. Local 375* (9th Cir. 1988) 860 F.2d 346, 350, citing *Shelton v. Tucker* (1960) 364 U.S. 479, 488.)

In addition, the heading for section 2(a)(iv) at page 18 of the Resolution should be modified to read as follows: “DR No. CalAdvocates-SC-SCG-2019-05 is the least restrictive means of obtaining the requested information.”

Finding 15, at page 30 of the Resolution, should also be modified to read as follows: “If this showing is made, the burden shifts to the government entity to demonstrate that the information sought is rationally related to a compelling state interest and the least restrictive means of obtaining the desired information.”

Finally, as to the “least restrictive means” analysis, it should be noted that procedural safeguards exist at the Commission to protect asserted confidential or privileged information. The Resolution specifically provides: “Pub. Util. Code § 583 and General Order 66-D provide ample protection and processes for utilities to submit confidential information to the Commission,” and the Resolution adopts additional protections “to provide SoCalGas with time to review, and designate as confidential,

information and documents sought by Cal Advocates....” (Res. ALJ-391, p. 29 [Finding 9].) SoCalGas may avail itself of any and all of these protections, if necessary, in order to protect confidential or privileged information. (See, e.g., *Duke Energy, supra*, 218 F.R.D. at p. 477 (documents to be disclosed under terms of the court’s protective order); *Americans for Prosperity Found v. Becerra* (9th Cir. 2018) 903 F.3d 1000, 1004 (disclosed information was not to be made public except in very limited circumstances); *Dole v. Local Union 375* (9th Cir. 1990) 921 F.2d 969, 974 (limited disclosure to a select group of government employees).)

After modifying the Resolution as discussed above, rehearing as to this issue is denied.

E. The Attorney Declaration Requirement

SoCalGas next alleges that the Resolution improperly requires SoCalGas to provide a privilege log along with its discovery responses, as well as a declaration signed by its attorney under penalty of perjury. (SCG App. Rhrng., pp. 43-48.) According to SoCalGas, such a requirement constitutes “compelled attorney testimony” and violated the attorney-client privilege and the attorney work product doctrine. (SCG App. Rhrng., p. 43.)

We will modify the Resolution to remove the attorney declaration requirement at this time. Instead, whether SoCalGas should be required to file an attorney declaration to accompany its privilege log may be considered in the future, along with possible sanctions, if SoCalGas continues to refuse to produce the discovery requested by Cal Advocates. The Resolution specifically notes that sanctions will be considered at a later time, if necessary. (See Res. ALJ-391, pp. 31, 33 [Finding 28; Ordering Paragraphs 6-7].) The Resolution will be modified at pages 24 and 34 to reflect this change. (See Res. ALJ-391, pp. 24, 34 [Ordering Paragraph 8(1)(3)].)

F. Cal Advocates' Due Process Argument Regarding *Mathews v. Eldridge* Will Be Addressed at a Later Time if the Commission Needs to Consider Imposing Sanctions Against SoCalGas.

Cal Advocates agrees with the Commission's analysis in the Resolution that SoCalGas was provided with sufficient due process. (Res. ALJ-391, pp. 19-22, 31 [Ordering Paragraph 26].) In its rehearing application, Cal Advocates asks the Commission to modify the Resolution to include a discussion regarding *Mathews v. Eldridge* (1976) 424 U.S. 319, and the due process principles discussed in *Mathews*. (CA App. Rhrng., pp. 8-9.) In this regard, it should be noted that SoCalGas does not raise a due process argument in its rehearing application. Its sole focus is on alleged First Amendment violations.

Cal Advocates notes in its rehearing application that it is primarily raising the *Mathews* argument in anticipation of a possible future hearing or proceeding in which SoCalGas could be subject to sanctions for alleged discovery abuses. (See CA App. Rhrng., p. 8.) Cal Advocates states: "While ALJ-391 – over Cal Advocates' objections – puts off to another day proceedings to sanction SoCalGas for its discovery abuses, it should, at a minimum, acknowledge the holdings in *Mathews* that make clear that the Commission need not engage in trial-type hearings to impose sanctions when that day comes." (CA App. Rhrng., p. 8.) This excerpt from Cal Advocates' rehearing application makes clear that there is no need for us to address this issue at this time. If we determine in the future that sanctions should be considered as to SoCalGas' conduct, the Commission may at that time decide what sort of process SoCalGas is entitled to, and whether the principles outlined in *Mathews* are applicable. As such, rehearing as to this issue raised by Cal Advocates is denied.

G. Allegation that SoCalGas Has Waived its Privileges With Respect to its SAP Accounting System.

As its final allegation of error, Cal Advocates asserts that SoCalGas has waived attorney-client privilege and other privileges with respect to its SAP accounting system. (CA App. Rhrng., pp. 15-17.) According to Cal Advocates, the Resolution should be modified to presume that SoCalGas has waived any privileges regarding its SAP

accounting system due to the following factors: (1) SoCalGas' refusal to provide any information, such as a privilege log, that establishes its privilege claims; (2) the long-standing requirement that a utility's accounts shall be available for inspection by its regulator at any time; and (3) the fact that SoCalGas' claim that it included privileged information in its accounts is inconsistent with the rule that privileged information may not be made available to persons who do not have a need to access such information. (CA App. Rhrgr., p. 16 (footnotes omitted).) This allegation of error is without merit.

While Cal Advocates would prefer for the Commission to presume a waiver of privileges with respect to SoCalGas' SAP accounting system, such a presumption is not required at this time. Declining to make such a presumption does not constitute legal error. The Resolution reasonably provides SoCalGas with a final opportunity to comply with Cal Advocates' discovery requests and to provide appropriate privilege logs. (See Res. ALJ-391, pp. 33-34 [Ordering Paragraph 8].) The Commission has expressly reserved the option of imposing sanctions on SoCalGas at a later time if it continues to refuse to produce the discovery requested by Cal Advocates. (See Res. ALJ-391, pp. 31, 33 [Finding 28; Ordering Paragraphs 6-7].)

Thus, rehearing as to this issue is denied because Cal Advocates has not established legal error.

H. Oral Argument

SoCalGas requests oral argument on its rehearing application pursuant to Rule 16.3 of the Commission's Rules of Practice and Procedure. (App. Rhrgr., pp. 48-49.) Rule 16.3 provides that the Commission may, in its complete discretion, order oral argument on a rehearing application if it would materially assist the Commission in resolving the application, and if the rehearing application raises an issue of major significance for the Commission. (Rule 16.3, subd. (a) of the Commission's Rules of Practice and Procedure.) Examples of such issues include: (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation; (2) changes or refines existing Commission precedent; (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or (4) raises

questions of first impression that are likely to have significant precedential impact. (Rule 16.3, subd. (a)(1-4) of the Commission's Rules of Practice and Procedure.)

SoCalGas has had ample opportunity to fully brief all of the issues before the Commission, and we are well-aware of SoCalGas' position as to all of the issues raised in its rehearing application. We do not believe that oral argument would assist us in disposing of the rehearing applications. As noted above, whether or not to grant oral argument is within our "complete discretion" pursuant to Rule 16.3. Accordingly, SoCalGas' request for oral argument is denied.

I. Motion for Stay

SoCalGas filed a separate motion for stay of the Resolution at the same time that it filed its rehearing application on December 21, 2020. However, since we have determined to modify the Resolution and, as modified, deny rehearing of the Resolution, there is no basis to grant a stay of the Resolution. As such, SoCalGas' motion for stay of the Resolution is denied.

IV. CONCLUSION

For the reasons stated above, we have determined that good cause has been demonstrated to modify the Resolution. As modified, rehearing of the Resolution should be denied. SoCalGas' motion for stay of the Resolution and request for oral argument should similarly be denied.

THEREFORE, IT IS ORDERED that:

1. The motion for stay of Resolution ALJ-391 is hereby denied.
2. The request for oral argument before the Commission on the rehearing applications is hereby denied.
3. The first two paragraphs of section 2(a)(iv) at page 18 of the Resolution are hereby removed in their entirety, and replaced with the following:

We now turn to the second step of the analysis for evaluating the constitutionality of Cal Advocates DR No. CalAdvocates-SC-SCG-2019-05: Whether the DR is the least restrictive means to obtain the requested information. SoCalGas again relies on its maxim that activities involving "100% shareholder-funded" activities are off

limits to the Commission, including Cal Advocates, to assert that this DR is not narrowly tailored. This argument suggests, incorrectly, that a utility may unilaterally designate certain topics off-limits to Commission oversight.

In circumstances in which the First Amendment right of association is claimed with respect to a government request for discovery, *Perry* indicates that the discovery request at issue must be the “least restrictive means” of obtaining the desired information. (*Perry, supra*, 591 F.3d at p. 1140; see also *Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1459-61 (9th Cir. 1991).) This is the second step of part two of the *Perry* analysis, after determining that the information sought through the requested discovery is rationally related to a compelling governmental interest. (*Perry, supra*, 591 F.3d at p. 1140.) The party seeking the discovery must show that the information sought is “highly relevant to the claims or defenses in the litigation,” and the request must be “carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable.” (*Perry, supra*, 591 F.3d at p. 1141.) The purpose in seeking the requested discovery “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” (*Brock v. Local 375* (9th Cir. 1988) 860 F.2d 346, 350, citing *Shelton v. Tucker* (1960) 364 U.S. 479, 488.)

4. The heading for section 2(a)(iv) at page 18 of the Resolution is hereby modified to read as follows: “DR No. CalAdvocates-SC-SCG-2019-05 is the least restrictive means of obtaining the requested information.”

5. Finding 15, at page 30 of the Resolution, is hereby modified to read as follows: “If this showing is made, the burden shifts to the government entity to demonstrate that the information sought is rationally related to a compelling state interest and the least restrictive means of obtaining the desired information.”

6. At page 24 of the Resolution, under Heading 4, Item (3) is hereby removed in its entirety. Item (4) is renumbered as Item (3).

7. At page 34, Ordering Paragraph 8 of the Resolution is hereby modified to remove section (3) of Ordering Paragraph 8 in its entirety. Section (4) of Ordering Paragraph 8 is renumbered as section (3).

8. At page 33, Ordering Paragraph 8, section 1 of the Resolution is hereby modified to read as follows: “(1) SoCalGas must provide a privilege log to Cal Advocates concurrent with the production of documents. All privilege claims must be supported by a good faith basis for asserting the privilege.”

9. At page 34, Ordering Paragraph 8, section 2(e)-(f) of the Resolution is hereby modified to read as follows: “(e) legal basis, with citation to authority, for withholding the document, and (f) the document number.”

10. As modified, rehearing of Resolution ALJ-391 is hereby denied.

11. The proceeding is closed.

This order is effective today.

Dated March 1, 2021, at San Francisco, California.

MARYBEL BATJER
President
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
GENEVIEVE SHIROMA
DARCIE L. HOUCK
Commissioners