

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

SOUTHERN CALIFORNIA GAS
COMPANY,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA,

Respondent.

Case No. B310811

Commission Decision
No. D.21-03-001 &
Resolution ALJ-391

**OPPOSITION TO SOUTHERN CALIFORNIA GAS
COMPANY'S APPLICATION FOR LEAVE TO FILE
VOLUME 10 UNDER SEAL**

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March 23, 2021

I. Introduction

The Public Advocates Office at the California Public Utilities Commission (“Cal Advocates”), a Real Party in interest, hereby opposes Southern California Gas Company’s (“SoCalGas”) March 8, 2021 Application for Leave to File Volume 10 Under Seal, but only as the request applies to Cal Advocates.¹ Specifically, Cal Advocates asks the Court to affirm that Cal Advocates is entitled to the same information filed under seal on March 8, 2021 that was provided to the Court and the California Public Utilities Commission (“CPUC” or “Commission”).

Cal Advocates seeks to supplement the record for the Court’s consideration of this issues with the following information regarding SoCalGas’ Application to File Under Seal.

II. The Application to File Under Seal

Petitioner SoCalGas requests that the Court file under seal Volumes 9-10 of its Exhibits to the Petition for Writ of Review, Mandate, and/or Other Appropriate Relief (“Petition”) and that Volume 10, in particular, should be withheld from Cal Advocates. Specifically, Petitioner explains that the Volume 10 exhibits consist of four declarations filed in support of its motion for reconsideration which it submitted to the California Public Utilities Commission (“CPUC”) with a motion to seal. Specifically, Petitioner SoCalGas asserts that “the material SoCalGas seeks to seal is confidential and that disclosing the

¹ Petitioner’s use of the acronym “CalPA” in reference to the Public Advocates Office at the California Public Utilities Commission is retained in quotations but otherwise avoided as it more commonly refers to the Public Advisor’s Office at the California Public Utilities Commission.

material (*including* to CalPA) would both infringe on SoCalGas’s constitutional rights and jeopardize the privacy of third parties.”² SoCalGas specifically states that it “seeks by its sealing application to avoid disclosure of the Volume 10 exhibits to keep these declarations shielded from CalPA.”³ For the reasons set forth below, Cal Advocates respectfully asks the court to deny SoCalGas’ Application for Leave to File Under Seal any documents (and Volume 10 of its Exhibits in particular), from Cal Advocates.

III. Discussion

1. California Rule Of Court 8.46 Requires That Cal Advocates Be Provided Volume 10 Of Petitioner’s Exhibits.

Petitioner acknowledges that the CPUC granted its motion to file under seal with regard to public access, and that the CPUC directed it to provide the declarations to the Public Advocates Office (“CalPA” or “Cal Advocates”). Petitioner then “submits that the exhibits in Volume 10 should be treated as filed under seal in the Commission and accepted as such under Rule 8.46.”⁴ However, Petitioner conveniently fails to identify which provision of Rule 8.46 is applicable to the facts presented.

² SoCalGas Application to File Under Seal Volumes 9-10 of the Exhibits To the Petition For Writ of Review, March 8, 2021, p. 5.

³ SoCalGas Application to File Under Seal Volumes 9-10 of the Exhibits To the Petition For Writ of Review, March 8, 2021, p. 9.

⁴ SoCalGas Application to File Under Seal Volumes 9-10 of the Exhibits To the Petition For Writ of Review, March 8, 2021, pp. 5, 6 (*emphasis in original*). *See also*, SoCalGas March 8, 2021 Letter to the Court.

Petitioner glosses over the fact that the relevant inquiry under Rule 8.46 is not just whether the exhibit at issue was filed under seal, but also whether the record was actually sealed by the lower court. This distinction is paramount because while Rule 8.46 authorizes the reviewing court to continue to keep records sealed (Rule 8.46(b)), and to act to seal the records where the issue was not presented to the lower court (Rule 8.46(d)), it does not allow the reviewing court to disturb the lower court's disposition of a request to file under seal. Rule 8.46(c) is succinct and dispositive in this regard. In totality Rule 8.46(c) provides: "A record filed or lodged publicly in the trial court and not ordered sealed by that court must not be filed under seal in the reviewing court."

Here Petitioner's request to have its declarations (now in Volume10) placed under seal by the CPUC was granted in part and rejected in part. As Petitioner acknowledges, the CPUC directed it to provide the declarations to Cal Advocates.⁵ Cal Advocates urges this court to consider Petitioner's application for an order to seal under Rule 8.46 as requested by Petitioner but in a manner consistent both with Rule 8.46(c) and the CPUC's prior rulings, and to grant the application as it relates to public review of the document and deny it as it relates to Cal Advocates receipt and review of the documents.

⁵ SoCalGas Application to File Under Seal Volumes 9-10 of the Exhibits To the Petition For Writ of Review, March 8, 2021, pp. 5.

2. Petitioner’s Motion To Deny Cal Advocates Access to Volume 10 Does Not Raise Constitutional Issues.

The issue here is whether Petitioner can select which parts of the CPUC it is going to provide information. Petitioner has already provided the information in Volume 10 to the CPUC, but now attempts to draw a line between the information it provides to the CPUC and what it will provide to Cal Advocates. However, Petitioner provides no rational basis for the differential treat it requests. Instead, Petitioner seeks to withhold the information from Cal Advocates on the basis of the same rumors and intimations that the CPUC has repeatedly rejected.⁶

While California Rule of Court 8.46(c) is controlling, the treatment of another request for a motion to seal records by the Second Appellate District Court of Appeal is also informative here. In *Todd*

⁶ Decision 21-03-001 documents the Commission’s repeated rejection of this SoCalGas contention. (See pp. 9, 10, and 17 where the Commission states: “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 Section 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. Rhrhg., pp. 24-25.) The implication of this language is that submission of the declarations to the Commission itself would not cause the ‘chilling effect.’”)

McNair v. National Collegiate Athletic Association 183 Cal. Rptr. 3d 490(*McNair*), the Second Appellate District Court recognized the “public’s First Amendment right of access to documents used at trial or as a basis of adjudication and a presumption of openness of substantive court proceedings in ordinary cases.” The Second Appellate District Court favorably cited the California Supreme Court’s holding in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1990) 20 Cal.4th 1178 (*NBC Subsidiary*), that both the trial and appellate courts must expressly make certain findings in order to seal a record. (*McNair* at p.2, citing *NBC Subsidiary* at pp. 1200, 1208-1209, fn. 25 & 1217.) Specifically, “Courts must find that (1) there is an overriding interest supporting sealing records; (2) there is a substantial probability that the interest will be prejudiced absent sealing; (3) the proposed sealing is narrowly tailored to serve the overriding interest; and (4) there is no less restrictive means of achieving the overriding interest. (*McNair* at p.2, citing *KNBC-TV* at pp. 1217-1218.)

Here Petitioner does not and cannot provide the Court with facts sufficient to make the second finding required above.⁷ As an initial matter, Petitioner does not and cannot present information to allow the court to conclude that “there is a substantial probability that the interest will be prejudiced absent sealing” with regard to Cal Advocates because it has already provided the CPUC the materials at issue, and both the state legislature and CPUC have established that Cal Advocates is subject to the same confidentiality requirements as the

⁷In the context of the instant Application, Cal Advocates takes no position on whether Petitioner fulfills the other requirements set forth above.

CPUC.⁸ So, while Petitioner states that “[r]equiring the disclosure of this information to CalPA or the public at large would reveal SoCalGas’s plans and strategies in furtherance of achieving its public-policy objectives,” it ignores its admission that Cal Advocates is not the public at large and fails to show how providing the documents to Cal Advocates differs from its giving the documents to the CPUC.

Instead, Petitioner labels Cal Advocates as its “litigation adversary” and intimates that an agreement between Cal Advocates and a nonprofit organization which helps the nonprofit qualify for funding under the state’s intervenor compensation program, is an agreement to share Petitioner’s confidential information. Nothing could be further from the truth. The fact is, though repeatedly provided the opportunity to do so, Petitioner has failed to provide any evidence to the CPUC that supports its claim that Cal Advocates, in contrast to the CPUC, will disseminate its confidential information. Accordingly, in dismissing Petitioner’s intimations that providing the information to Cal Advocates was akin to public disclosure CPUC Decision 21-03-001 notes:

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.”⁹

⁸ See CA Pub. Util. Code section 583 and CPUC Decision 21-03-001.

⁹ Decision 21-03-001, p. 13.

3. Cal Advocates Is Uniquely Positioned To Challenge The Declarations.

At no point in this lengthy and well-documented investigation has Petitioner SoCalGas provided any evidence that supports its decision to withhold the same information from Cal Advocates that it has provided the CPUC. In contrast, in addition to showing that obtaining such information is consistent with its legislative mandate, CPUC decisions, and the Public Utilities Code, Cal Advocates has shown that, even within the CPUC, it is uniquely positioned to evaluate the claims made in such declarations.

Specifically, as noted in its December 30, 2020 *Motion for the Commission to Produce Confidential Declarations No Later Than January 6, 2021 and to Shorten Time to Respond to Motion*, Cal Advocates is uniquely positioned to confirm whether SoCalGas' claims of confidentiality are valid.¹⁰ For example, it was Cal Advocates that determined that the identities of certain consultants that SoCalGas has variously claimed were confidential had been publicly available since before the declarations were signed. As was the case at the CPUC, the Court should order Petitioner to provide the same declarations to Cal Advocates that it has provided to the Court in order to ensure the veracity of the information and representations made therein.

Petitioner willingly turned over the information in Volume 10 of its exhibits to the CPUC but has refused to provide the same information to Cal Advocates. In the absence of any facts or law that might justify this differential treatment, Petitioner resorts to deception,

¹⁰ See Cal Advocates' December 31, 2020 Motion for Disclosure.

innuendo, and name calling in an attempt to avoid a critical review of its exhibits. Like the CPUC, this court should ignore Petitioner's histrionics and direct that Volume 10 be provided to Cal Advocates so that it is fully informed of the facts of this case and can meaningfully participate in the Court's review.

IV. Conclusion

For all of the foregoing reasons, Petitioner's Application for Leave to File Volume 10 of its Exhibits under seal should be denied as it relates to Cal Advocates.

Respectfully submitted,

DARWIN E. FARRAR
DIANA LEE

By: /s/ *DARWIN E. FARRAR*

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CERTIFICATE OF WORD COUNT

I certify that this Opposition to Southern California Gas Company’s Request for Leave to File Volume 10 Under Seal contains 2336 words. In completing this word count, I relied on the “word count” of the Microsoft Word program.

March 23, 2021

By: /s/ *DARWIN FARRAR*

DARWIN FARRAR

Document received by the CA 2nd District Court of Appeal.

PROOF OF SERVICE

I, Joseph P. Como, declare as follows:

I am employed in the County of San Francisco, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 505 Van Ness Avenue, San Francisco, CA 94102.

On March 23, 2021, I served the following document(s):

OPPOSITION TO SOUTHERN CALIFORNIA GAS COMPANY’S REQUEST FOR LEAVE TO FILE VOLUME 10 UNDER SEAL

on the parties stated below, by the following means of service:

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BY ELECTRONIC SERVICE THROUGH TRUEFILING: I caused the documents to be electronically served through TrueFiling.

(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 23, 2021.

By:

/s/ JOSEPH P. COMO

Joseph P. Como

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