

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT, DIVISION 1

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

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**SOUTHERN CALIFORNIA GAS COMPANY'S  
APPLICATION FOR LEAVE TO FILE REPLY IN  
SUPPORT OF APPLICATION FOR LEAVE TO FILE  
UNDER SEAL VOLUMES 9-10 OF THE EXHIBITS TO THE  
PETITION FOR WRIT OF REVIEW, MANDATE, AND/OR  
OTHER APPROPRIATE RELIEF & RESPONSE TO  
PUBLIC ADVOCATES' OFFICE REQUEST TO APPEAR AS  
REAL PARTY IN INTEREST**

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Southern California Gas Company (“SoCalGas”) hereby applies for leave to file a short reply in support of its March 8, 2021 application for leave to file under seal Volumes 9–10. A reply brief will assist this Court in considering whether to keep the declarations in Volume 10 sealed from both the public *and* the Public Advocates Office (“CalPA”).

On March 23, 2021, CalPA filed an opposition to SoCalGas’s application for leave to file Volume 10 under seal. As explained further in SoCalGas’s attached reply brief, CalPA is attempting to use the sealing application to prematurely litigate an issue central to the merits of SoCalGas’s Petition for Writ of Review, Mandate, and/or Other Appropriate Relief. Pursuant to this Court’s March 22, 2021 Order, the parties will complete briefing on the merits of that issue by July 16, 2021. This Court should not decide this important question before that time, without the benefit of full briefing.

This application is based on the attached Reply in Support of SoCalGas’s Application for Leave to File Under Seal Volumes 9–10 .

DATED: March 26, 2021

Respectfully submitted,  
GIBSON, DUNN & CRUTCHER LLP

By: 

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## I. INTRODUCTION

One of the central issues raised in Southern California Gas Company's ("SoCalGas") Petition for Writ of Review is whether the fundamental rights of speech and association under the United States and California Constitutions apply to certain limited confidential information that SoCalGas seeks to withhold from its litigation adversary, the Public Advocates Office of the California Public Utilities Commission ("CalPA"). SoCalGas has argued that disclosure of these materials would chill protected speech and political participation, and that the First Amendment to the U.S. Constitution takes precedence over state statutes and regulations that, in any event, cannot properly be read as broadly as CalPA contends. CalPA disagrees. But these issues should be resolved on the merits only after full briefing and argument.

CalPA's opposition to SoCalGas's application for leave to file under seal seeks to force the premature disclosure of materials directly at issue in this writ proceeding, which this Court has already preliminarily determined "may be protected by the United States and California Constitutions." (March 16 Temporary Stay Order ("TSO") at p. 1.) In light of that, this Court acknowledged the enforced disclosure of these materials may warrant a stay "prior to completion of the statutory judicial review process." (*Ibid.*)

The opposition constitutes an unwarranted attempted end-run around of the Respondent California Public Utilities Commission's (the "CPUC") Extension, granting SoCalGas the ability to maintain the status quo and not disclose the redacted portions of the declarations in Volume 10 (among other materials) until 21 days following this Court's final disposition of SoCalGas's Petition. CalPA's opposition to SoCalGas's application for leave to file under seal should be rejected for this reason alone.

Although CalPA does not acknowledge the Commission's Extension in its Opposition, the CPUC has expressly allowed SoCalGas to withhold the disputed materials from CalPA until this Court has ruled on the merits of SoCalGas's Petition, following full briefing and argument on the merits. (Notice of Withdrawal of Request for Emergency Stay, Poon Decl., Exh. A [March 19 Commission Letter Granting Extension of Time to Comply With Resolution ALJ-391 ("March 19 Extension")].) And SoCalGas relied on this extension in requesting that the Court take the emergency stay hearing off calendar.

CalPA is wrong that Rule 8.46 somehow requires the Court to deny SoCalGas's application to seal. In fact, it is CalPA, not SoCalGas, that would have the Court "disturb" the CPUC's Extension, which as described above allows SoCalGas to continue to refrain from disclosing Volume 10 to CalPA by effectively

treating it as under seal until 21 days following this Court's disposition of the Petition. Preventing CalPA's access to Volume 10 in this writ proceeding is therefore entirely consistent with both Rule 8.46(b) and the CPUC's March 19 Extension.

This suffices to warrant granting SoCalGas's application for leave to file under seal, which Respondent Commission has not opposed. CalPA's concessions confirm as much. Specifically, CalPA does not dispute that there is an overriding interest in sealing the records as SoCalGas requests. CalPA also does not dispute that the proposed sealing is narrowly tailored to serve that overriding interest, and that there is no less restrictive means of achieving that overriding interest. Indeed, each of the declarations in Volume 10 of the Petitioner's Appendix can be found (with limited redactions) in the publicly filed Volume 2. (Petitioner's Appendix ("App.") 371–384.) Rather, CalPA contends that SoCalGas cannot show there is a substantial probability that SoCalGas's interests will be prejudiced absent sealing. (Opp. at pp. 5–7.)

CalPA argues there would be no prejudice from disclosure here because the CPUC has the documents and SoCalGas has not shown how providing them to the CPUC is different from providing them to CalPA. CalPA's position on this issue is inconsistent, to say the least. In CalPA's Opposition, it presents the CPUC and CalPA as one and the same, as does the

Commission in its challenged Resolution. By contrast, in its request to appear separately as a real party in interest, submitted only 11 minutes earlier, CalPA takes great pains to distinguish itself from the CPUC as an “independent office.” (Request to Appear as a Real Party in Interest (“Request”) at p. 3.) This inconsistency provides yet another example of the continuing denial of due process to SoCalGas in the “non proceeding” before the Commission giving rise to these writ proceedings. The line between judge and prosecutor (or independent advocate) seems to shift whenever it suits the Commission or CalPA’s purposes.

Wherever that line is, providing the documents to the CPUC (effectively, the judge) is clearly not the same as providing them to CalPA (effectively, a government investigator and opposing counsel). For example, documents in the record show that CalPA has aligned itself with the Sierra Club in “investigating” and “[p]rosecuti[ng]” SoCalGas and it remains unclear to what extent CalPA has outsourced its governmental investigation authority to this private interest group “in development of discovery” targeting SoCalGas. (App. 1303–1304.) That is plainly not something a “court” (here, the CPUC) would do, and this exemplifies why SoCalGas has treated the CPUC and CalPA differently when it comes to the Volume 10 declarations.

SoCalGas has endured repeated unconstitutional and improper discovery demands from CalPA in an opaque non-proceeding for almost two years before finally being able to have its day in court. CalPA should not be able to undercut that effort under the guise of opposing an application for leave to file under seal. SoCalGas’s application for leave to file under seal should accordingly be granted, and—insofar as this Court is inclined to allow CalPA to appear separately as a real party in interest (instead of being represented by counsel for the Respondent Commission, of which it is a part)—then any such participation should be conditioned in a way to ensure judicial economy, proportionality, and fairness to all parties.

## II. ARGUMENT

### A. In Opposing SoCalGas’s Sealing Application, CalPA Attempts to Have This Court Prematurely Decide an Issue That Goes to the Heart of SoCalGas’s Petition.

In opposing SoCalGas’s application for leave to file Volume 10 under seal, CalPA seeks to have this Court prematurely decide a merits issue that goes to the heart of SoCalGas’s Petition. As SoCalGas explained in that Petition, keeping the redacted information in the declarations that make up Volume 10 from CalPA has been at the center of this dispute since late 2019, and the forced disclosure of those declarations to SoCalGas’s litigation adversary would undoubtedly chill the free political expression of both SoCalGas and those third parties it

chooses to associate with to promote shared public-policy goals. (See Pet'n at pp. 23, 36–37.)

Although restricting access to the declarations in Volume 10 is central to safeguarding SoCalGas's First Amendment rights, doing so will not prejudice CalPA. Indeed, while SoCalGas's Petitioner's Appendix spans over 2,000 pages, SoCalGas asks this Court to restrict CalPA's access to portions of only nine of those pages. As its voluminous filings below make clear, CalPA does not need to access that redacted material to respond to SoCalGas's constitutional arguments. And when SoCalGas initially filed a motion to seal those declarations in December 2019 (App. 385–388), CalPA did not oppose it—at least until it belatedly moved to compel the production of those same declarations seven months later (see Pet'n at p. 23).

In addition, CalPA's argument that it will not more broadly disseminate the now-redacted information contained in Volume 10 to either Sierra Club or the public is both questionable and irrelevant. It is questionable because CalPA has expressly argued below that the protected materials at issue should be made public. (E.g., App. 1336.) Moreover, as SoCalGas has previously explained, CalPA has a "Common Interest [and] Joint Prosecution" Agreement with Sierra Club whereby those entities agreed to "shar[e] information, documents, strategies, and resources with each other" during their "investigations into

SoCalGas[s] use of customer funds for anti-electrification activities.” (App. 1303–1304.)

Whether CalPA would in fact disseminate that material is also irrelevant. SoCalGas has shown that disclosure to CalPA would, in and of itself, violate SoCalGas’s constitutional rights.

If this Court were to force SoCalGas to disclose unredacted versions of the declarations to CalPA by denying SoCalGas’s application for leave to file under seal, that would prematurely, unfairly, and effectively undermine—at this early stage—SoCalGas’s Petition for Writ of Review seeking relief from this Court and the constitutional challenge brought therein. While keeping these declarations out of CalPA’s hands is not the only relief SoCalGas seeks through its Petition—for example, as SoCalGas has explained, CalPA is also seeking constitutionally protected material contained in SoCalGas’s SAP accounting database—it is a crucial part of the protection sought from this Court, as this Court preliminarily recognized in granting a temporary stay against the enforced disclosure of those materials “prior to completion of the statutory judicial review process,” which “could force disclosure of material that may be protected by the United States and California Constitutions.” (TSO at p. 1.)

As a result, this Court should decline CalPA’s suggestion that it jump the gun by effectively deciding this central merits issue before this question has been fully briefed and argued to

this Court. The Court should not, in other words, let the cat out of the bag by denying—even partially in the manner CalPA advocates—SoCalGas’s application for leave to file under seal.

CalPA’s Opposition seeks effectively to undo the de facto continued stay or extension of the compliance deadline as to this aspect of the Commission’s challenged Resolution (the requirement to also produce to CalPA unredacted versions of the declarations found in Volume 10), on which the parties and this Court relied in vacating the emergency stay hearing. If the Court is inclined to entertain that Opposition in any manner, this would change the circumstances for vacating the emergency stay hearing, which may require it to be reinstated (preferably no earlier than mid-April), as SoCalGas would not have withdrawn its request.

**B. CalPA Should Not Be Allowed Effectively to Undo the CPUC’s Extension and Prevent Meaningful Judicial Review by This Court.**

In opposing SoCalGas’s application for leave to file certain constitutionally protected documents under seal, CalPA characterizes itself as part and parcel of, and just another office within, the CPUC. CalPA argues that SoCalGas “can[not] select which parts of the CPUC it is going to provide information” to, and suggests that there is no difference between giving access to the CPUC and giving access to CalPA. (Opp. at pp. 5, 7.) It thus

claims that CalPA “is entitled to the same information ... that was provided to the Court and the [CPUC].” (*Id.* at p. 2.)

But in a separate submission filed by the same counsel just 11 minutes earlier, CalPA inconsistently characterizes itself as an “independent office” within the CPUC, noting that the Respondent Commission of which it is a part granted a compliance extension “over [CalPA]’s objections”, and declared its right to separately appear in these writ proceedings and apparently assert different interests than those asserted by the Respondent CPUC (which has already appeared and filed briefs in these proceedings in opposition to SoCalGas). (Request at pp. 2–5.) CalPA now apparently claims, in other words, the right to double-up on SoCalGas and assert different and more extreme positions than the Respondent CPUC, and to then turn around and claim inconsistently that it is effectively part and parcel of the CPUC—depending on which position suits CalPA’s purposes in the moment.

This Court should not allow such inconsistency, which has been a constant theme in the non-proceeding before the CPUC that gave rise to these writ proceedings. Below, CalPA bobbed and weaved between arguing that it is just another part of the CPUC’s regulatory apparatus when it suited them to (e.g., by seeking to treat opposition to CalPA’s positions as punishable “disrespect” of the Commission (App. 1113), or for purposes of

disclosure of constitutionally protected materials to the Commission (App. 1187)), while inconsistently claiming to be a wholly separate entity, free to litigate against SoCalGas within the CPUC's adjudicatory processes (e.g., Request at p. 2 [noting CalPA's objection to the CPUC's Extension]). CalPA's actions in these proceedings highlight the serious due-process problems raised by CalPA's murky and ever-shifting positions and conflation (when it suits CalPA's purposes) with the Commission. (See, e.g., Pet'n at pp. 53–56.)

CalPA's Opposition is just the latest iteration of its attempt to deprive SoCalGas of meaningful judicial review of CalPA's and the Commission's actions and rulings. And this attempt comes on the heels of the Commission's order late last week extending the status quo to allow for orderly and proper judicial review by this Court, following full briefing and argument on the merits. CalPA objected to such an extension by the Commission before it was issued, but ultimately did not prevail, so CalPA has now launched this belated and repeated attempt effectively to undo it. But that attempt is both incorrect and improper.<sup>1</sup>

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<sup>1</sup> After SoCalGas filed its Application for Rehearing of Resolution ALJ-391, and *prior to* the compliance deadline provided by the CPUC, CalPA filed a Motion for an Expedited Ruling, seeking an order for SoCalGas to produce the declarations contained in Volume 10. (App. 1673.) CalPA  
(*Cont'd on next page*)

CalPA is wrong that Rule 8.46 somehow mandates disclosure of the constitutionally protected material to CalPA at this point in time. (Opp. at pp. 3–4.) Granting SoCalGas’s application for leave to file under seal select material before this Court, to prevent CalPA’s access, would not “disturb the [CPUC]’s disposition of a request to file under seal.” (*Id.* at p. 4.) Just the opposite. The Commission’s Extension allows SoCalGas to continue to refrain from disclosing the constitutionally protected material to CalPA by effectively treating it as under seal until 21 days following this Court’s disposition of the Petition, and therefore effectively seals the Volume 10 material as required under Rule 8.46(b). (March 19 Extension.)

It was only on the basis of that extension that SoCalGas proposed, and the Court allowed, the emergency stay hearing that had been set for March 25 to be taken off calendar. Yet CalPA never opted to voice its concerns to this Court or seek leave to separately appear as a real party in interest until *after* the parties had submitted (and the Court granted) their request to take the hearing off calendar and to extend the briefing deadlines, in reliance on the Commission’s extension of SoCalGas’s compliance deadline. CalPA’s dilatory submissions to

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argued that if the Commission declined to issue such an order, it could instead “make [the declarations] available to [CalPA] at [the CPUC’s] discretion.” (App. 1676.)

this Court—which CalPA seems to blame on not having been included in the case caption (Request at pp. 2, 4–5)—are particularly perplexing (and improper) given that CalPA has been served with everything since SoCalGas’s March 8 filing of its Petition. Indeed, CalPA appears to have been tracking this proceeding closely since at least March 18, when it filed a formal opposition before the CPUC to SoCalGas’s extension request, which was ultimately granted. It is CalPA, not SoCalGas, that would have the Court belatedly disturb the CPUC’s ruling—and in doing so, let the proverbial cat out of the bag (contrary to SoCalGas’s First Amendment rights) and undercut the prospect of meaningful review by this Court.

**C. The Court Should Limit Briefing by the Commission and CalPA to Ensure Proportionality and Fairness and Preserve Judicial Economy.**

If this Court is inclined to let CalPA participate separately as a Real Party in Interest (rather than simply be represented by counsel to the CPUC), SoCalGas respectfully suggests that the Court may wish to clarify—in the interests of proportionality, fairness, judicial economy, and sound judicial administration—that each side be limited to briefing amounting to no more than 14,000 words per side on the remaining briefs to be submitted by the parties to this Court (e.g., 14,000 words combined for CalPA and the Commission on their Answer(s) to SoCalGas’s Petition, and 14,000 words in SoCalGas’s combined Reply thereto). Any

other result would unfairly and disproportionately allow CalPA and the Respondent Commission to “double-up” on SoCalGas and unduly and improperly tax this Court’s limited time and resources with potentially two 14,000-word briefs from two closely aligned entities, one of which is a part of the other—a situation not approved by any authority cited by CalPA.

### III. CONCLUSION

For the foregoing reasons, the Court should grant SoCalGas’s Application for Leave to File Under Seal Volumes 9–10 of the Exhibits to the Petition for Writ of Review, Mandate, and/or Other Appropriate Relief, and ensure that, if CalPA is allowed to separately appear as a real party in interest, it only be allowed to do so on terms that would be fair, proportionate, and consistent with judicial economy.

Dated: March 26, 2021

Respectfully submitted,

Gibson, Dunn & Crutcher LLP

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## CERTIFICATE OF WORD COUNT

I certify that this Southern California Gas Company's Reply In Support of Its Application For Leave To File Under Seal Volumes 9 And 10 Of The Exhibits To Its Petition For Writ Of Review & Response To Public Advocates' Office Request To Appear As Real Party In Interest, contains 2,791 words. In completing this word count, I relied on the "word count" function of the Microsoft Word program.

March 26, 2021



Michael H. Dore

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**PROOF OF SERVICE**

I, Kelsey Fong, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071, in said County and State. On March 26, 2021, I served the following document(s):

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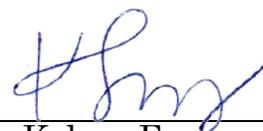
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- BY ELECTRONIC SERVICE THROUGH TRUEFILING:** I caused the documents to be electronically served through TrueFiling.
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Executed on March 26, 2021.

  
\_\_\_\_\_  
Kelsey Fong

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