



November 19, 2020

*VIA ELECTRONIC MAIL*

The Honorable Regina DeAngelis  
Administrative Law Judge Division  
California Public Utilities Commission  
[rmd@cpuc.ca.gov](mailto:rmd@cpuc.ca.gov)

**Re: Sierra Club and Earthjustice Comments on Draft Resolution ALJ-391**

To ALJ DeAngelis:

Pursuant to California Public Utilities Commission Rule 14.5, Earthjustice and Sierra Club respectfully submit these comments on the October 29, 2020 Draft Resolution ALJ-391 (“Draft Resolution”). The Draft Resolution properly rejects the meritless efforts of Southern California Gas Company (“SoCalGas”) to limit the investigation of the Public Advocates Office (“Cal Advocates”) into its misuse of ratepayer funds to thwart achievement of California’s decarbonization requirements through activities that include financing astroturf groups to oppose electrification. However, absent modifications, SoCalGas’ improper litigation tactics will only continue. The Draft Resolution leaves the door open for SoCalGas to continue to evade Cal Advocates’ investigation through specious claims of attorney-client privilege and imposes no consequence for SoCalGas’ vexatious obstruction of Cal Advocates’ statutory discovery rights that have resulted in over a year delay in its investigation. Because the Draft Resolution fails to impose consequences on SoCalGas, it functions to embolden investor-owned utilities (“IOUs”) to continue to raise specious objections to delay Commission investigations into their potential misconduct.

In addition, Cal Advocates’ investigation is a matter of significant public importance. Federal and state legislators have expressed their concerns over SoCalGas’ conduct, and exposure of astroturf groups and related tactics are necessary for decision-makers and the public to understand the origins of stakeholder opposition. Yet the extent to which Cal Advocates’ investigation and any additional action taken by the Commission will be publicly accessible is unclear.

To address these concerns, the Draft Resolution should be revised to:

- 1) Expressly prohibit SoCalGas from employing further delay tactics and abusing the discovery process by requiring an explicit deadline and required fields for SoCalGas' privilege log, and by requiring, as the California Superior Court did in *Gandsey v. So. Cal. Gas Co.*, that SoCalGas' counsel declare under penalty of perjury that any privilege claims it asserts going forward in this investigation are good faith objections to discovery;
- 2) Clarify that any protections that apply to SoCalGas' documents apply only to the specifically marked confidential portions of those documents, and that there is no blanket protection of entire documents;
- 3) Direct the appropriate division of the Commission to review SoCalGas' confidentiality claims on documents already produced, resolve any disputed or unsupported confidentiality claims promptly, and release to the public redacted versions of the documents it has collected in this investigation thus far;
- 4) Find SoCalGas in contempt of the Commission and levy appropriate fines;
- 5) Levy appropriate fines against SoCalGas for its violations of Commission Rule 1.1;
- 6) Open an Order Instituting Investigation ("OII") proceeding to resolve the substantive issues of SoCalGas' misuse of ratepayer funds in a transparent manner that allows for public participation.

**1. The Draft Resolution Should Expressly Prohibit SoCalGas From Employing Further Delay Tactics and Abusing the Discovery Process to Evade Its Statutory Obligations By Asserting Unsupported Claims Of Attorney-Client Privilege Or Attorney Work Product Privilege.**

The Draft Resolution should be revised to expressly prohibit SoCalGas from delaying compliance with its statutory obligation to provide the Commission access to its records by asserting voluminous and erroneous claims of attorney-client privilege and attorney work product privilege. SoCalGas has employed this delay tactic for months in this dispute, and has a well-documented pattern of doing so in bad faith across other proceedings before the Commission and the California courts. As currently written, the Draft Resolution simply directs SoCalGas to prepare a privilege log and comply with Cal Advocates' requests to review documents not subject to privilege.<sup>1</sup> This direction is insufficient, as SoCalGas already has an existing duty to comply with Cal Advocates' requests to review its books and records, and the

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<sup>1</sup> Draft Resolution at 26.

entire dispute revolves around SoCalGas' abusive discovery practices. Absent sanctions, or an explicit set of instructions with an explicit deadline, SoCalGas will not change its behavior. Accordingly, the Draft Resolution should be revised to set an explicit deadline and format for SoCalGas' privilege log, and to require SoCalGas' counsel to declare under penalty of perjury that any claims of privilege it asserts on the privilege log are good faith objections to discovery.

As the Draft Resolution acknowledges, the Public Utilities Code authorizes the Commission, and its officers and employees, to inspect the accounts, books, papers, and documents of any public utility "at any time."<sup>2</sup> Cal Advocates rightfully stressed in its Motion to Find SoCalGas in Contempt that this provision is crucial in preventing utilities from having the opportunity to destroy or otherwise tamper with evidence after learning that their regulators are requesting to review it.<sup>3</sup> Here, SoCalGas has abused the discovery process to evade its statutory obligation to provide regulators access to its documents for months, wasting Commission resources and willfully refusing to comply with Commission requests and orders.

This behavior is a pattern for SoCalGas, whether it is evading regulatory oversight or evading providing discovery to party opponents in litigation. For example, in February 2020 in *Gandsey v. S. Cal. Gas Co.*, the Superior Court ordered more than \$500,000 of monetary sanctions against SoCalGas in a case related to the Aliso Canyon gas leak for "engag[ing] in a pattern of abusive discovery by repeatedly withholding large numbers of documents without substantial justification and by producing privilege logs that are insufficient to allow Plaintiffs or the court to evaluate Defendants' claims of privilege."<sup>4</sup> There, SoCalGas provided a privilege log in 2017 with "an identifiable attorney listed on only 2% of the 12,000 entries," and another privilege log produced in 2018 in the same case had "39,000 entries [with] an attorney identified on only 2% of the entries."<sup>5</sup>

The court noted that even after a court order finding that SoCalGas' claims of privilege over a group of documents were not substantially justified, "the court continued to be faced with extensive, broad claims of privilege that were insufficiently described on existing privilege logs," such that the court "issued an order that the court never before had felt necessary in the court's previous 24 years of experience as a judge," requiring SoCalGas' counsel to declare under penalty of perjury that there was a good faith basis for the claim of privilege.<sup>6</sup> The court ultimately found that SoCalGas "stonewalled over an extended period of this litigation by misusing claims of privilege to attempt to throw Plaintiffs' counsel off the track with respect to

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<sup>2</sup> Pub. Util. Code § 314(a).

<sup>3</sup> *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.

<sup>4</sup> Minute Order Ruling on Motion of Private Plaintiffs for Monetary, Evidentiary, and Issue Sanctions and an Adverse-Inference Jury Instruction at 1–2, *Gandsey v. S. Cal. Gas Co.*, No. BC601844 (Cal. Super. Ct. Feb. 20, 2020) (hereinafter "*Gandsey Order*").

<sup>5</sup> *Gandsey Order* at 17–18.

<sup>6</sup> *Id.* at 13.

documents to which they were entitled,”<sup>7</sup> and found that SoCalGas’ privilege claims were “a mere strategy for flaunting the discovery rules and thereby avoiding the disclosure of relevant information.”<sup>8</sup> The court also noted that “[t]he sheer number of privilege assertions that ultimately were unsupported is evidence that Defendants’ conduct is the result of a concerted policy, and not the hapless mistakes of a few document-review attorneys,”<sup>9</sup> and that imposing sanctions was the only way to avoid “an infinite process wherein Defendants’ logs are reviewed, challenged, and then ordered to be re-served with greater detail to justify the privileges.”<sup>10</sup>

Similarly, in the wider coordinated proceeding for the Aliso Canyon gas leaks, the Superior Court found that the “practice of abandoning their own initial privilege assertions when challenged” had become “a defining aspect of [SoCalGas’] discovery practice,” and that SoCalGas “engaged in a practice of making broad and unjustified assertions of privilege over large swathes of documents, only to back down when met with motion practice” under the guise of reducing disputes and seeking compromise.<sup>11</sup> In *Gandsey*, the court found, after examining the “tortured history” of the case, that SoCalGas’ “initial claims of privilege are unsupported and/or are withdrawn an average of 94 percent of the time.”<sup>12</sup> Ordering SoCalGas to produce a privilege log does nothing to avoid this “infinite process.”<sup>13</sup> Indeed, a vague order to comply with legal obligations that SoCalGas has already repeatedly ignored plays into the Company’s strategy by providing an additional opportunity for delay and imposing no consequences for SoCalGas’ ongoing violation of the rules. Accordingly, the Draft Resolution should be revised to provide an explicit deadline and explicit required fields for SoCalGas’ privilege log, as well as to require SoCalGas’ counsel to declare under penalty of perjury that any claims of privilege it asserts over the documents at issue in this Resolution are in good faith.

## **2. The Draft Resolution Should be Revised to Clarify that Any Documents Cal Advocates Has Obtained in the Course of This Investigation Can Be Publicized in Redacted Form.**

Sierra Club and Earthjustice support the Draft Resolution’s rejection of SoCalGas’ First Amendment claims, but respectfully request that the Draft Resolution be revised to further clarify that to the extent any confidentiality protections apply to information contained in SoCalGas’ documents, those protections apply only to the appropriate portions of the documents, and not as a blanket protection of entire documents. Accordingly, the Draft Resolution should also be revised to reflect that any documents that Cal Advocates has obtained in the course of

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<sup>7</sup> *Id.* at 18.

<sup>8</sup> *Id.* at 19.

<sup>9</sup> *Id.* at 20.

<sup>10</sup> *Id.*

<sup>11</sup> Minute Order Ruling on Motion of Private Plaintiffs for Issue, Evidence, Monetary Sanctions, and other Remedies at 5, *Southern California Gas Leak Cases*, No. JCCP4861 (Cal. Super. Ct. Aug. 3, 2020).

<sup>12</sup> *Gandsey* Order at 3.

<sup>13</sup> *Id.* at 20.

this investigation are public documents—subject to redaction of any legitimately confidential information—and must be made available for public review upon request.<sup>14</sup>

Earthjustice has made a request for these public records pursuant to the California Public Records Act, which it understands is still partially outstanding after roughly ten months due to the Commission’s concerns about resolution of SoCalGas’ First Amendment claims. The Draft Resolution should be revised to make clear that any protection afforded to information within SoCalGas’ documents pursuant to the First Amendment—or any other confidentiality protection—only extends to such portions of the documents that are properly and legitimately confidential in the first place, and that redacted versions of the documents at issue are not protected from public access as they do not betray any of the confidential information.

As set forth in Section 1 above, SoCalGas has a well-documented history of making overbroad, frivolous confidentiality claims in discovery. To the extent that Cal Advocates makes redacted versions of the documents at issue in this resolution public, redactions should be limited only to those portions of the documents for which SoCalGas has provided a basis for marking confidential that meets the applicable legal standards for the type of protection asserted. With this outcome in mind, the Draft Resolution should be amended to direct the appropriate division of the Commission to review SoCalGas’ confidentiality designations on these particular documents and promptly resolve any disputed confidentiality claims, so that it may publicize appropriately redacted versions of the documents as expediently as possible. If the Commission anticipates significant delay in resolving confidentiality disputes, it should publicize versions of the documents with all of SoCalGas’ asserted confidentiality claims redacted promptly, and publicize updated versions of the documents with fewer redactions if those claims are found to be inconsistent with the applicable legal standards.

### **3. The Draft Resolution Should Be Revised to Open an Order Instituting Investigation Proceeding to Resolve the Substantive Issues of Cal Advocates’ Investigation, and to Sanction SoCalGas For Its Discovery Violations.**

The Draft Resolution should be revised to open an OII Proceeding to resolve the substantive issues of Cal Advocates’ investigation. It should be further revised to sanction SoCalGas for its contempt of the Commission and its violations of Rule 1.1. If the Commission does not impose sanctions in this Resolution, it should, at a minimum, include an Order to Show Cause (“OSC”) within the OII proceeding to address SoCalGas’ contempt and discovery violations.

The Draft Resolution acknowledges that Cal Advocates’ investigation of SoCalGas’ activities with regard to funding anti-decarbonization groups was proper, due to Cal Advocates’ role as an advocate on behalf of residential and small commercial customers.<sup>15</sup> The Commission

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<sup>14</sup> Cal. Const., Article 1 § 3(b)(1); Cal. Gov’t Code § 6253(a).

<sup>15</sup> Draft Resolution at 27.

has long acknowledged that ratepayers have a “right to know whether . . . [they] are burdened with costs unrelated to the services for which [they] are being charged.”<sup>16</sup> Cal Advocates’ investigation into SoCalGas’ activities and where the costs of those activities are booked is directly relevant to the interests of SoCalGas’ residential and small commercial customers, and transparency of enforcement proceedings is crucial when matters that affect the public interest are being considered. Yet the Draft Resolution would have Cal Advocates refer its investigation to an unspecified “appropriate enforcement division” rather than continuing to pursue it in a public, adjudicatory process.<sup>17</sup> This is contrary to the Commission’s longstanding precedent favoring open and transparent proceedings,<sup>18</sup> and acknowledging the importance of “the public interest of having an open and credible regulatory process.”<sup>19</sup> An OII proceeding will provide an open and transparent opportunity for the public to review and respond to this investigation, rather than an unspecified, closed-doors process in an enforcement division. Accordingly, the Draft Resolution should be revised to open an OII into the substantive concerns of Cal Advocates’ investigation regarding SoCalGas’ activities and the funding sources for them.

Additionally, the Commission need not wait for another proceeding to order sanctions against SoCalGas for its contempt of the Commission and its Rule 1.1 violations through its abusive discovery practices. As the Draft Resolution acknowledges, the Public Utility Code grants Cal Advocates, as an independent division within the Commission, “broad authority to compel any entity regulated by the Commission to disclose any information it deems necessary in furtherance of those duties.”<sup>20</sup> The Draft Resolution also acknowledges that “if a utility does not comply with the requests from the Commission’s staff or more formal injunctions from the Commission, such as subpoenas, it is not unreasonable for the utility to expect to be subject to sanctions up to and including monetary penalties.”<sup>21</sup> Cal Advocates provided ample evidence in its June 23, 2020 Motion that SoCalGas willfully disregarded the Commission’s subpoena, which the Draft Resolution references repeatedly.<sup>22</sup> Yet, the Draft Resolution fails to take the necessary next step of resolving Cal Advocates’ Motion.

This approach is in error. Under Public Utility Code § 2113, a public utility is unequivocally in contempt of the Commission if it “fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission . . . .”<sup>23</sup> Further, the Code empowers the Commission to punish a utility for contempt “in the same manner and to

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<sup>16</sup> *In re Pacific Bell*, D.94-02-007, 53 CPUC 2d 177, 1994 WL 106049 (Feb. 3, 1994).

<sup>17</sup> Draft Resolution at 27.

<sup>18</sup> *See, e.g.*, D.16-08-024; D.17-09-023; D.20-03-014.

<sup>19</sup> *In re Pacific Bell*, 20 CPUC 2d 237, 1986 WL 1300645 (Jan. 10, 1986).

<sup>20</sup> Draft Resolution at 27 (citing Pub. Util. Code § 309.5).

<sup>21</sup> *Id.*

<sup>22</sup> Draft Resolution at 4 (“SoCalGas refused, in part, to comply with [Cal Advocates’] DR.”), 21 (“[Cal Advocates’ DR] arose as part of an inquiry that escalated after SoCalGas did not disclose its affiliation with [C4BES] . . . SoCalGas refused to provide information about its affiliation, thereby leading to this series of data requests by Cal Advocates.”).

<sup>23</sup> Cal. Pub. Util. Code § 2113.

the same extent as contempt is punished by courts.”<sup>24</sup> Because such a remedy is cumulative, with no effect on any other remedies authorized under the code, the Commission has also found that it can levy additional fines for Rule 1.1 violations on top of those for contempt.<sup>25</sup> As Cal Advocates pointed out in its Motion for Contempt, the Commission has found Rule 1.1 violations where a utility has exhibited a “lack of candor, withholding of information, or failure to correct information or respond fully to data requests.”<sup>26</sup>

The Draft Resolution should be revised to find SoCalGas in contempt and order sanctions for the following abuses of the discovery process and noncompliance with Commission orders:

- 1) Failure to comply fully with Cal Advocates’ July 19, 2019 data request;
- 2) Failure to comply with Question 8 of Cal Advocates’ August 13, 2019 data request;
- 3) Failure to comply with ALJ DeAngelis’ September 10, 2019 ruling;
- 4) Failure to comply with ALJ DeAngelis’ November 1, 2019 ruling; and
- 5) Failure to comply with the May 5, 2020 Commission subpoena.

As discussed above, each of the above examples of contempt can also separately constitute a Rule 1.1 violation, for which SoCalGas should also face sanctions.

If sanctions are not imposed directly, then at a minimum, the Draft Resolution should be revised to issue an OSC regarding SoCalGas’ discovery violations within the OII for the substance of the investigation.

Thank you for your consideration of these comments.

Respectfully submitted,

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; D.15-08-032 at 34–36.

<sup>26</sup> D.15-08-032 at 38 (quoting D.13-12-053 at 21).