

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-391
Administrative Law Judge Division

**COMMENTS OF SOUTHERN CALIFORNIA GAS COMPANY TO
DRAFT RESOLUTION ALJ-391**

JASON WILSON
KENNETH M. TRUJILLO-JAMISON
AMELIA L. B. SARGENT
Willenken LLP
707 Wilshire Blvd., Suite 3850
Los Angeles, California 90017
Telephone: (213) 955-9240
Facsimile: (213) 955-9250
Email: jwilson@willenken.com

Attorneys for:
SOUTHERN CALIFORNIA GAS
COMPANY

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Pursuant to Rule 14.5 of the California Public Utilities Commission’s Rules of Practice and Procedure, Southern California Gas Company (SoCalGas), hereby submits its Comments to Draft Resolution ALJ-391 (Draft Resolution).

I. Introduction

The Draft Resolution committed legal and factual error when it determined that Cal Advocates’ investigation into SoCalGas’s 100% shareholder funded First Amendment-protected political activities, contracts, and the identities of its consultants —via its consultant contracts (“DR-05 Contracts”), confidential declarations from its consultants (“Confidential Declarations”), and unfettered access to its SAP system (“SAP Database”)—met the strict scrutiny applied by courts when a fundamental First Amendment right is at stake. As a preliminary matter, it is important to clarify the exact nature of what SoCalGas has asserted as First Amendment protected material in its motions denied by the Draft Resolution – information about a small set of consultants that would reveal SoCalGas’s political thinking and associations that are 100% *shareholder funded*. The vast and unprecedented live access that Cal Advocates has sought in SoCalGas’s financial system of record for millions of entries and thousands of vendors over 21 years of data was not in dispute.

The Draft Resolution correctly concludes that “SoCalGas enjoys the same First Amendment rights as any other person or entity.”¹ However, the Draft Resolution erroneously discounted SoCalGas’s evidence of harm for this limited scope of First Amendment claims, and by doing so, afforded no actual First Amendment protection for a utility when faced with choosing between pursuing protection of its rights under threat of harm that cannot be undone. SoCalGas’ evidence of harm was documented in declarations mirroring those the Ninth Circuit ruled met the required *prima facie* showing of infringement in *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147.

Second, it misidentified the “compelling government interest” for the discovery here, which is Cal Advocates’ ratepayer protection mandate, not the Commission’s regulatory oversight powers. Cal Advocates’ statutory mandate “to obtain the lowest possible rate for service consistent with reliable and safe service levels”² simply does not empower it to investigate the content of SoCalGas’s political thinking and associations that are 100% *shareholder funded*.

Third, the Draft Resolution failed to demonstrate how each separate discovery request and the subpoena are “rationally related” to Cal Advocates’ investigation of “ratepayer monies.” Most egregiously, it fails to articulate the necessary connection between Cal Advocates’ purported investigation, and the discovery it seeks. Cal Advocates describes its investigation as “SoCalGas’ **use of ratepayer monies** to fund anti-decarbonization campaigns through ‘astroturf’ organizations, including efforts to both promote the use of natural and renewable gas, and to

¹ Draft Resolution ALJ-391 [“D. Res.”], at p. 14.

² Pub. Util. Code § 309.5(a).

defeat state and local laws and ordinances proposed to limit the use of these resources.”³ The Draft Resolution confirms Cal Advocates’ scope of investigation.⁴ However, neither Cal Advocates nor the Draft Resolution has articulated how examining 100% shareholder-funded political activities—the subject of the discovery at issue here—has any nexus to Cal Advocates’ investigation into the “use of ratepayer monies.” If Cal Advocates was really interested in whether SoCalGas inappropriately used ratepayer monies to fund political activity, it need examine only SoCalGas’s above-the-line accounts (the accounts for which SoCalGas generally seeks cost recovery at the general rate case (GRC)). SoCalGas made these available to Cal Advocates approximately six months ago: SoCalGas created a custom software solution in its SAP database that would have provided Cal Advocates access to **all** of its above-the-line accounts, with the exception of invoices from law firms or other records of legal expenditures that might reflect attorney-client privileged or attorney work product information. Instead, Cal Advocates refused this access and admitted that SoCalGas’s shareholder accounts are precisely the types of accounts Cal Advocates wanted to examine.⁵

The dangerous precedent that this Draft Resolution would set in empowering Cal Advocates in this manner should cause the Commission to pause and reflect on the broader, unintended implications that could result. Cal Advocates, particularly as an advocacy division of

³ 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 [hereinafter “Motion for Contempt and Fines”], June 23, 2020, p. 3 (emphasis added); *see also* 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 [hereinafter “Motion to Compel and for Fines”], July 9, 2020, p. 1.

⁴ D. Res. pp. 3, 8, 25.

⁵ Response Of Public Advocates Office To Southern California Gas Company Motion To Quash Portion Of Subpoena, For An Extension, And To Stay Compliance (Not In A Proceeding) [hereinafter “Response to Motion to Quash”], June 1, 2020 (“Response to Motion to Quash”), at pp. 9-10 [accounts protected by the First Amendment are “precisely the types of accounts . . . that Cal Advocates intends to audit”].

a governmental agency with no enforcement authority, should not be allowed to misuse its investigatory power to expose and punish entities with fines and sanctions merely for the content of their political views. Such a scheme would be ripe for abuse, particularly in situations similar to here where the party has a differing (but valid) viewpoint than Cal Advocates. And yet, because SoCalGas does not endorse the same pathway to decarbonization as Cal Advocates (and the Sierra Club), Cal Advocates has chosen to investigate SoCalGas's political activities and threaten it with fines and sanctions. This fails to meet the "strict scrutiny" required by courts when a fundamental right is at stake and the CPUC should not empower Cal Advocates by adopting this Draft Resolution.

For instance, as evident in a Common Interest⁶ Agreement between Cal Advocates and Sierra Club to investigate SoCalGas's "use of customer funds for anti-electrification activities,"⁷ the Commission should be asking why a CPUC division is sharing investigation information and strategies with a non-governmental organization like Sierra Club. If the Draft Resolution is not modified to protect SoCalGas's rights, there are open questions as to what this Common Interest Agreement means in the context of the Executive Director's SAP subpoena. Will that mean that now Sierra Club, by possibly co-opting Cal Advocates' investigative authority, also will get access to SoCalGas's live SAP information, let alone the First Amendment protected material that SoCalGas asserts? This is why we support the Draft Resolution's referral of this matter to

⁶ The Common Interest Agreement provides indication that Sierra Club may be improperly co-opting Cal Advocates investigative authority. In a proceeding, Sierra Club's discovery rights are limited by the scope of that proceeding. However, if Sierra Club is co-opting Cal Advocates' investigatory power, then Sierra Club is able to obtain information to which it is not otherwise entitled. If this is occurring, it would be an abuse of Pub. Util. Code § 309.5 and §314. This Common Interest Agreement is attached as Exhibit 4 to the Declaration of Jason H. Wilson, Nov. 19, 2020 (served concurrently herewith).

⁷ Publicly, however, Cal Advocates has characterized its investigation as an investigation into SoCalGas alleged anti-decarbonization campaign

an appropriate enforcement division so that any further investigation can be conducted in a transparent manner and consistent with our request for formal proceedings in an OII and OIR.

Fourth, the Draft Resolution erred in concluding that allowing the discovery to go forward is the “least restrictive means of obtaining the information” without analyzing the least restrictive means that SoCalGas proposed that would have provided Cal Advocates with the information it needed to continue its investigation.⁸ The Draft Resolution failed to consider that the undisputed, wide access to the millions of entries in SAP that SoCalGas made available since May 29, 2020 was the less restrictive means for Cal Advocates to pursue its validation of expenditure classifications. Thus, the Draft Resolution must correct its errors of fact and law to conclude that Cal Advocates’ investigation impermissibly infringes on SoCalGas’s First Amendment rights under the U.S. and California Constitutions.

Moreover, the Draft Resolution also erred in concluding that General Order (GO) 66-D is sufficient to protect the confidentiality of financial and other sensitive information, when providing Cal Advocates with live, remote access to SoCalGas’s SAP database. It is not possible for SoCalGas to review and mark ahead of time 13 million live data entries, and so there is effectively no means for SoCalGas to protect confidential information through the traditional marking process under GO 66-D. SoCalGas requests the Commission order Cal Advocates to execute a Non-Disclosure Agreement prior to accessing the database (which Cal Advocates had already offered to do back in May before SoCalGas brought its motions), or enter the attached Protective Order, to allow SoCalGas to interpose its confidentiality designations based on the information Cal Advocates chooses to view. SoCalGas further requests the Commission place a

⁸ *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1161.

reasonable time limit (e.g., 15 days, 30 days, 60 days) on the period of Cal Advocates' remote access.

In its Motion for Reconsideration/Appeal, SoCalGas pointed out that absent the full Commission's intervention, Cal Advocates' increasing incursion onto the constitutional rights of not just SoCalGas, but also others, would continue.⁹ Unfortunately, this has come to fruition, not only with other discovery at issue here, but also in discovery it has continued to serve.¹⁰ The discovery at issue violates SoCalGas's First Amendment rights of freedom of association and freedom of speech, and has no nexus to Cal Advocates' investigation of SoCalGas's alleged misuse of ratepayer funds for political activity.

As such, SoCalGas respectfully requests the following modifications to the Draft Resolution:

1. *Grant* the Motion for Reconsideration/Appeal, *grant* the Motion to Quash as to SoCalGas's First Amendment-protected information, and *deny* the Motion to Compel the Confidential Declarations, on the following grounds:
 - SoCalGas has demonstrated a sufficient *prima facie* showing of First Amendment harm caused by Cal Advocates' investigation;
 - Cal Advocates' alleged "compelling government interest" (and thus the First Amendment's limitations on inquiry outside of that interest) should

⁹ 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), Dec. 2, 2019, at p. 4.

¹⁰ Cal Advocates continued to serve extensive discovery requests on SoCalGas throughout the Summer of 2020. On June 30, 2020, Cal Advocates served Public Advocates Office Data Request No. CalAdvocates-TB-SCG-2020-04 ("DR-15") on SoCalGas, which contained 25 questions with dozens of subparts. This data request expressly called for information protected by the First Amendment as well as the attorney-client privilege, as it requested information on SoCalGas's relationships and financial support of third parties, including vendors, lobbying groups, consulting and communications groups, and, inexplicably, its outside counsel Willenken LLP.

be framed as its investigation into the alleged misuse of ratepayer funds, and not the Commission's general regulatory oversight power;

- Cal Advocates' discovery into 100% shareholder-funded political activities is not "rationally related" to its interest in the use of *ratepayer* funding;
 - Cal Advocates' discovery is not "narrowly tailored" to achieve the goals of its investigation, as SoCalGas' SAP solution available since May 29, 2020 provides a "least restrictive means" of accessing information in a way that does not violate First Amendment protections.
2. In addition to the Resolution's direction that any further investigation into SoCalGas's alleged misuse of ratepayer funds for political activities will be referred to an enforcement division within the Commission, affirm that the Commission will open an Order Instituting Rulemaking (OIR) to establish clarity for all investor-owned utilities on ratemaking treatment for lobbying and other advocacy activity, to establish clear definitions for lobbying for accounting purposes, and to create a structure for cost allocation studies of lobbying to be used in future GRCs.
 3. *Grant* the Motion to Quash as to SoCalGas's attorney-client privilege and work product privileged information, consistent with Finding No. 11 that SoCalGas "may assert" its attorney-client privileges.
 - Revise the requirement in Order Paragraph 8 that SoCalGas produce a privilege log to be consistent with the Parties' most recent agreement in

meet and confer discussions to log only from 2015 to the present and extend SoCalGas's deadline to produce the privilege log to 30 days.¹¹

4. Order the parties to enter into a Non-Disclosure Agreement to allow SoCalGas to assert its GO 66-D confidentiality rights on any document Cal Advocates chooses to print or copy off SoCalGas's SAP database. In the alternative, enter the attached protective order incorporating that process.¹² Clarify that Cal Advocates' unprecedented access to SoCalGas's SAP Database is not indefinite and provide for a reasonable time when the access will end (e.g., 15 days, 30 days, 60 days).
5. Because of the important constitutional rights at issue, if the Commission does not modify the Draft Resolution as requested in this Comment, SoCalGas intends to file an application for rehearing (AFR) and, if necessary, a petition for writ of review with the Court of Appeal. As such, SoCalGas respectfully requests that the Commission stay enforcement of at least the portion of the Resolution that requires SoCalGas to produce information protected by its First Amendment rights while still providing Cal Advocates with access to 100% of SoCalGas's above-the-line accounts. The Commission may do so by: (1) modifying the Draft Resolution to grant Cal Advocates access pursuant to SoCalGas's custom software solution which excludes the information SoCalGas asserts is protected under its First Amendment rights until the Commission issues a final decision on the AFR (and final resolution of a subsequent appeal to the Court of Appeal); or,

¹¹ D. Res. p. 26, p. 30 ¶ 11.

¹² See [Proposed] Protective Order Concerning Financial Data Related to Draft Resolution ALJ-391, Attachment 1.

in the alternative, (2) modifying Order Paragraph 8 to extend SoCalGas's compliance date from 15 days to 45 days as to the information SoCalGas asserts is protected under its First Amendment rights. Cal Advocates will still receive access to 100% of SoCalGas's above-the-line accounts, excluding information protected by the attorney client privilege and work product, within 15 days of the approval of the Resolution.

II. Discussion

A. The Draft Resolution Erred in Concluding the Discovery Does Not Infringe on SoCalGas's First Amendment Rights.

SoCalGas supports the Draft Resolution's conclusion that it "enjoys the same First Amendment rights as any other person or entity," which are not diminished by the fact that it is a regulated public entity.¹³ Nor does SoCalGas dispute that Cal Advocates' statutory mandate to "obtain the lowest possible rate for service consistent with reliable and safe service levels" under Pub. Util. Code § 309.5(a) can be a compelling government interest in certain circumstances. However, the Draft Resolution erred in concluding that the discovery sought by Cal Advocates did not infringe on SoCalGas's First Amendment rights.

To be clear, the discovery dispute at issue in the Draft Resolution is whether Cal Advocates has met its burden of showing that the information it is seeking (information about a small set of consultants that would reveal SoCalGas's political thinking and associations that are 100% *shareholder funded*) is rationally related to a compelling governmental interest and is the "least restrictive means" of obtaining the information. This current dispute is not about the founding and alleged funding of C4BES with ratepayer funds. Cal Advocates has that

¹³ D. Res. p. 14.

information, and as a result, SoCalGas has already voluntarily recategorized certain expenses that had erroneously been booked to above-the-line accounts (e.g., generally accounts recovered from ratepayers) to below-the-line accounts (e.g., generally accounts that are **not** recovered from ratepayers).¹⁴ This dispute is not about the Commission's broad authority to review SoCalGas's below-the-line accounts. SoCalGas's custom software solution would provide Cal Advocates with access to SoCalGas's below-the-line accounts except for information protected by the First Amendment.

The Draft Resolution committed legal and factual errors in finding that Cal Advocates has met its heavy burden. First, SoCalGas has met its *prima facie* burden showing arguable First Amendment infringement. The Draft Resolution erroneously discounted and ignored SoCalGas's declarations, which mirror ones the Ninth Circuit ruled were sufficient in *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, and further, it applied the wrong standard in assessing those declarations. Second, once this *prima facie* showing is made, First Amendment protection is presumed, and no purported governmental inquiry can pierce that right unless it meets strict scrutiny. Cal Advocates has failed to meet this heavy burden. The Draft Resolution commits legal error by misidentifying the "compelling government interest" for the discovery sought, which is Cal Advocates' ratepayer protection mandate, not the Commission's general regulatory oversight powers. Third, the Draft Resolution simply accepted Cal Advocates statements without analyzing how each separate request for SoCalGas's 100% **shareholder funded** First Amendment protected information is "rationally related" to Cal Advocates' investigation into SoCalGas's alleged misuse of **ratepayer funds**. Fourth, the Draft Resolution

¹⁴ See Response to Q3-Q5, Amended Submission to Data Request CALPA-SCG-051719, July 12, 2019; R.13-11-005 Data Response CalAdvocates-SK-SCG-2020-01 Q4.

erred in concluding that allowing the discovery is the “least restrictive means of obtaining the information,”¹⁵ particularly with respect to the request for access to SoCalGas’s entire SAP Database, where the Draft Resolution did not even consider whether SoCalGas’s custom software solution for SAP access was the least restrictive means for Cal Advocates to obtain the information needed for its investigation. Thus, Cal Advocates’ requests for the DR-05 Contracts, Confidential Declarations, and full SAP Database impermissibly infringe on SoCalGas’s First Amendment rights under the U.S. and California Constitutions.

1. The Draft Resolution Committed Legal Error in Applying an Incorrect Heightened Standard to SoCalGas’s Evidence of Harm.

The Draft Resolution erroneously read *National Assn. for Advancement of Colored People v. Ala. ex rel. Patterson* (1958) 357 U.S. 449, 461-62 (*NAACP*) to require a heightened standard—one requiring a “palpable fear of harassment and retaliation.”¹⁶ *NAACP* does not require such a showing. In *NAACP*, the Court found that the members showed that they would suffer economic reprisal, loss of employment, threat of physical coercion, and other manifestation of public hostility. However, the Court did not set that as a standard that has to be met to invoke First Amendment protection.

Instead, the appropriate legal standard is set by *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1160-61:

In this circuit, a claim of First Amendment privilege is subject to a two-part framework. The party asserting the privilege “must demonstrate . . . a ‘prima facie showing of arguable first amendment infringement.’” [Citations.] “This 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.”

¹⁵ *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1161.

¹⁶ D. Res. p. 16.

[Citation.] “If appellants can make the necessary prima facie showing, the evidentiary burden will then shift to the government . . . [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the ‘least restrictive means’ of obtaining the desired information.” [Citation.]¹⁷

The Ninth Circuit has stated, “chilling” occurs “when governmental action ‘would have the practical effect of discouraging the exercise of constitutionally protected political rights.’”¹⁸

“The compelled disclosure of political associations can have just such a chilling effect.”¹⁹

Indeed, the United States Supreme Court has “repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”²⁰ Similarly, as the Tenth Circuit has explained, “[T]he First Amendment privilege . . . generally ensures privacy in association when exposure of that association will make it less likely that association will occur in the future, or when exposure will make it more difficult for members of an association to foster their beliefs. These are the ‘chilling effects,’ or consequences of disclosure, that the First Amendment privilege seeks to avoid.”²¹

Thus, based on the appropriate legal standard, SoCalGas need only show a “chilling” of its First Amendment-protected associational rights, which can be caused by the disclosure of the information itself; it need not demonstrate an additional threat of outside harassment or physical coercion. As such, the Draft Resolution committed legal error in concluding that SoCalGas must show some harm above or beyond the disclosure of First Amendment protected information itself, if that disclosure chills its political rights.

¹⁷ *Perry, supra*, 591 F.3d at p. 1161.

¹⁸ *Perry, supra*, 591 F.3d at p. 1160 [quoting *Am. Commc’ns Ass’n v. Douds* (1950) 339 U.S. 382, 393].

¹⁹ *Id.*

²⁰ *Buckley v. Valeo* (1976) 424 U.S. 1, 64 [collecting cases].

²¹ *In re Motor Fuel Temperature Sales Practices Litigation* (10th Cir. 2011) 641 F.3d 470, 489.

2. The Draft Resolution Erred in Not Appropriately Considering the Declaration of Sharon Tomkins, the Confidential Declarations, and the Declaration of Andy Carrasco.

Based on the Draft Resolution’s reliance on an erroneous reading of *NAACP*, the Draft Resolution summarily dismissed the Declaration of Sharon Tomkins and Confidential Declarations as “hypothetical.”²² Further, in its analysis of whether SoCalGas made a *prima facie* showing, the Draft Resolution failed to consider or even cite to the Declaration of Andy Carrasco, submitted in support of the May 22, 2020 Motion to Quash.²³ This oversight is particularly puzzling given that the Draft Resolution grants SoCalGas’s motion to supplement the record of the December 2, 2019 Motion for Reconsideration/Appeal,²⁴ which cites the Carrasco Declaration at length at pp. 15-17. These declarations clearly demonstrated “a ‘prima facie showing of arguable first amendment infringement’” under *Perry v. Schwarzenegger*.²⁵ They describe the chilling effect that compelled disclosure of the DR-05 Contracts has *already* had, and that the SAP database discovery will continue to have, on SoCalGas’s First Amendment associational rights.

The Tomkins Declaration, the Confidential Declarations, and the Carrasco Declaration are nearly word-for-word equivalent to those in *Perry*. In *Perry*, the Ninth Circuit quoted at length from one of the declarations that it found sufficient in supporting a *prima facie* case of arguable First Amendment infringement. The declarant testified:

I can unequivocally state that if the personal, non-public communications I have had regarding this ballot initiative—communications that expressed my personal political and moral views—are ordered to be disclosed through discovery in this matter, it will drastically alter how I communicate in the future

²² D. Res. p. 16.

²³ Declaration of Andy Carrasco in support of Motion to Quash, May 22, 2020 [hereinafter “Carrasco Decl.”].

²⁴ D. Res. p. 26.

²⁵ *Perry, supra*, 591 F.3d at p. 1160-61 [citations omitted].

I will be less willing to engage in such communications knowing that my private thoughts on how to petition the government and my private political and moral views may be disclosed simply because of my involvement in a ballot initiative campaign. I also would have to seriously consider whether to even become an official proponent again.²⁶

The Ninth Circuit reasoned that “[a]lthough 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.”²⁷

The Draft Resolution describes the Tomkins and Confidential Declarations SoCalGas submitted as follows:

In support of its infringement claim, SoCalGas relies on a declaration from Sharon Tomkins, SoCalGas’ Vice President of Strategy and Engagement and Chief Environmental Officer, stating that she **would be less likely to engage in certain communications and contracts if required to produce the requested information and stating her belief that other entities would be less likely to associate with SoCalGas if information about SoCalGas’ political efforts are disclosed to the Commission.** SoCalGas submitted additional declarations [the 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.**²⁸

More specifically, in Confidential Declaration No. 6, the declarant testifies that

I can unequivocally state that if the non-public contract I have with SoCalGas regarding the public affairs work I am doing with the company is ordered to be disclosed in response to the demand of the California Public Advocates Office, **it will drastically alter how I communicate in the future.**²⁹

²⁶ *Perry, supra*, 591 F.3d at p. 1163.

²⁷ *Id.* at p. 1163.

²⁸ D. Res. p. 15.

²⁹ Decl. No. 6 i/s/o Mot. for Reconsideration/Appeal, ¶ 4.

It continues,

In the future, **I will be less willing to engage in communications knowing my non-public association with SoCalGas and private discussions and views may be (and have been) disclosed simply because of my association with SoCalGas** in connection with its efforts to petition the government on political matters related to, among other things, rulemaking. **I am also seriously considering whether to associate with SoCalGas in [the] future regarding ballot initiatives, rulemaking, or any other political process** due to the breach of privacy that comes with disclosure of my thoughts, processes, decisions, and strategies.³⁰

The other Confidential Declarations state similar concerns. These alone meet the standard set by the Ninth Circuit.

The Draft Resolution, however, erroneously dismissed these declarations as “primarily hypothetical.” As described above, this is the not appropriate standard. The harm need not have occurred before a party can enforce their First Amendment rights. To hold otherwise would allow a party’s First Amendment rights to be trounced upon before a party can assert First Amendment protection. This is not the law. As the United States Supreme Court has held, the evidence of *prima facie* harm must simply show “**a reasonable probability** that the compelled disclosure . . . **will subject** them to threats, harassment, or reprisals from either Government officials or private parties.”³¹ Further, the Ninth Circuit has stated in *White v. Lee* that “[i]n making their First Amendment claim, the plaintiffs were obligated to prove only that the officials’ actions would have chilled or silenced ‘a person of ordinary firmness from **future** First Amendment activities’”³² Second, even if the law requires SoCalGas show “concrete” harm—which it does not—SoCalGas has done so. In November 2019, SoCalGas was forced to

³⁰ *Id.* ¶ 5.

³¹ *Buckley v. Valeo* (1976) 424 U.S. 1, 74 [emphasis added].

³² *White v. Lee* (9th Cir. 2000) 227 F.3d 1214, 1241 [emphasis added] [citation omitted].

produce the DR-05 Contracts to Cal Advocates under protest. As a result, SoCalGas, and its consultants, in fact suffered harm. The Carrasco Declaration explains the chilling effect that the production of the DR-05 Contracts had on SoCalGas's associational rights:

As a result of even the December disclosures of several 100% non-ratepayer funded Balanced Energy IO contracts, the information regarding these associations disclosed to Cal Advocates **has altered how SoCalGas and its consultant, partner or vendor associates with each other, and it has had a chilling effect on these associations.** Such a result has (and would further) unduly impinge upon SoCalGas's constitutional right to free association, and to associate with organizations and individuals of its choosing in exercise of its right to petition the government and advocate its position relating to natural gas, renewable natural gas, and green gas solutions.³³

Further, "due to the compelled contract disclosures that SoCalGas previously made, and the specter of additional compelled disclosures [of the SAP Database], SoCalGas is being forced to reconsider its decisions relating to political activities and associations."³⁴ And "SoCalGas will be less willing to engage in contracts and communications knowing that its non-public association and communications with consultants, business partners and others on SoCalGas's political interests may be subject to compulsory disclosure."³⁵

In addition to the evidence in the record, SoCalGas intended to file additional declarations from its consultants in support of its Motion to Compel. However, ALJ DeAngelis ordered SoCalGas to serve the unredacted versions of the consultants' declarations on Cal Advocates, and as such, SoCalGas had to withdraw the declarations in order to preserve its First Amendment rights at issue in the pending motions.³⁶ As evidenced in the Carrasco Declaration,

³³ Carrasco Decl., ¶ 6.

³⁴ *Id.* ¶ 9.

³⁵ *Id.*

³⁶ This is explained in SoCalGas's Response to Cal Advocates' Motion to Compel, Southern California Gas Company's (U 904 G) 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

those consultant declarations attested to further concerns. One firm stated a fear that disclosure of its relationship with SoCalGas to Cal Advocates would cause “negative consequences—including financial and strategic information being released to its competitors, the breach of confidentiality its clients require for its services, the cost of responding to inquiries, and the breach of privacy that comes with disclosure of its contract.”³⁷ Another consultant, which also works with government entities, “indicated to SoCalGas that it has serious concerns about its business,” and “even indicated that it would not have done business with SoCalGas if it had known its information and contract details would have been disclosed.”³⁸ Thus, SoCalGas has amply shown a chilling effect on its own political speech and its political associations as required by *Perry*.

3. The Draft Resolution Committed Legal Error by Misidentifying the “Compelling Government Interest” As the CPUC’s General Investigatory Power Rather than Cal Advocates’ Authority Under Pub. Util. Code §309.5.

Once SoCalGas met its *prima facie* burden, First Amendment protection is presumed. No statutory power can overcome the supreme constitutional protection the First Amendment affords, unless the governmental entity can meet the heavy burden of strict scrutiny: “demonstrat[ing] that the information sought . . . is rationally related to a compelling governmental interest . . . [and] the ‘least restrictive means’ of obtaining the desired information.”³⁹

First Amendment Association Issues And Request For Monetary Fines For The Utility’s Intentional Withholding Of This Information, July 17, 2020, at pp. 6-7; *see also* Exhibit 7 [Email from R. DeAngelis dated May 22, 2020] attached to Cal Advocates’ Motion to Compel.

³⁷ Carrasco Decl. ¶ 8.

³⁸ *Id.*

³⁹ *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1160-61 [citations omitted].

The Draft Resolution asserts that the “compelling government interest” here is the Commission’s “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.”⁴⁰ This is error. First, the Commission’s mandate to regulate and oversee utilities is not implicated here. For example, the Confidential Declarations at issue have been filed with the Commission conditionally under seal. The Commission itself has access to the Confidential Declarations. SoCalGas has sought to protect disclosure of the Confidential Declarations to Cal Advocates, not to the Commission.

Second, the Commission’s mandate to regulate and oversee utilities is not tied to the existing need for the First Amendment protected information. As the United States Supreme Court has held, “Lawmaking at the investigatory stage may properly probe historic events for any light that may be thrown on present conditions and problems. But the First Amendment prevents use of the power to investigate enforced by the contempt power to probe at will and without relation to existing need.”⁴¹ To overcome First Amendment protection, any compelling government interest must be clearly defined and tied to the existing need for the First Amendment protected information.⁴² Indeed, as the Ninth Circuit has explained, the Supreme Court has “concluded that ‘an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit . . . protected associational rights.’”⁴³ If the Commission’s “broad statutory authority to inspect the books and

⁴⁰ D. Res. p. 17.

⁴¹ *DeGregory v. Attorney General of State of N.H.* (1966) 383 U.S. 825, 829 [ruling general investigatory power was not a “compelling state interest”]; *id.* at p. 830 [holding general investigatory power was “too remote and conjectural to override the guarantee of the First Amendment . . .”].

⁴² *Id.*

⁴³ *U.S. v. Mayer* (9th Cir. 2007) 503 F.3d 740, 748.

records of investor-owned utilities in furtherance of its proper interest in fulfilling the Commission’s mandate to regulate and oversee utilities,”⁴⁴ was a compelling government interest to permit Cal Advocates to inspect any and all books and records, it would swallow up any and all constitutional protections, as well as any other privileges or rights.⁴⁵ If that were the case, there would literally be no area into which Cal Advocates could not probe relating to SoCalGas’s First Amendment protected associations and political strategies. Such a broad articulation of a “compelling government interest” is legal error and must be rejected.

Instead, the existing need here is Cal Advocates’ desire to obtain information in order to investigate SoCalGas’s alleged misuse of ratepayer funds for political activity. In its own words, Cal Advocates relies on its authority under Pub Util. Code § 309.5(a) for its investigation. Cal Advocates states that it is investigating “SoCalGas’ **use of ratepayer monies** to fund anti-decarbonization campaigns through ‘astroturf’ organizations, including efforts to both promote the use of natural and renewable gas, and to defeat state and local laws and ordinances proposed to limit the use of these resources.”⁴⁶ Pub Util. Code § 309.5(a) states that Cal Advocates’ goal is to “obtain the lowest possible rate for service consistent with reliable and safe service levels.” The Draft Resolution similarly understood the scope of Cal Advocates’ investigation to be focused on ratepayer funding issues: “the extent to which SoCalGas was using *ratepayer funds* to support organizations . . . that also support anti-decarbonization positions held by SoCalGas . . .”⁴⁷

⁴⁴ D. Res. p. 17.

⁴⁵ See *Gibson v. Florida Leg. Invest. Com.* (1963) 372 U.S. 539, 541 (The Supreme Court held that the broad investigatory power was insufficient, because it lacked a nexus with the proposed information sought).

⁴⁶ Motion for Contempt and Fines, June 23, 2020, p. 3; *see also* Motion to Compel and for Fines, July 9, 2020, p. 1.

⁴⁷ D. Res. p. 3 (emphasis added); *see also id.* p. 8 [“Cal Advocates continued its inquiry into SoCalGas’ use of *ratepayer monies* to fund an anti-decarbonization campaign through astroturf organizations.” (Emphasis added.)]

Therefore, the compelling government interest here is Cal Advocates investigation into SoCalGas’s alleged misuse of ratepayer funds for political purposes under Pub. Util. Code § 309.5(a). SoCalGas does not dispute that Cal Advocates’ mandate under Pub Util. Code § 309.5(a) could qualify as a “compelling government interest.” However, Cal Advocates’ mandate (and its investigation) is much narrower than the Commission’s general broad oversight authority. The Draft Resolution committed legal error by failing to recognize this distinction and applying the incorrect compelling government interest.

In the alternative, even if the Commission’s broad authority to regulate and oversee utilities is a compelling government interest, it does not extend to the Commission’s regulation of SoCalGas’s use of shareholder funds for social, political, or corporate image-enhancement purposes.⁴⁸

4. The Draft Resolution Fails to Establish that Compelling the Discovery is “Rationally Related” to Cal Advocates’ Need for the Information to Further its Investigation.

The Draft Resolution committed legal error in failing to find a “nexus” between the compelling government interest (Cal Advocates’ investigation into the use of *ratepayer* funds), and Cal Advocates’ alleged need for discovery into SoCalGas’s First Amendment-protected *political* activities.⁴⁹ Cal Advocates’ discovery would reveal the identity of, amounts spent on,

and p. 25 [“ . . . Cal Advocates’ inquiry into specific contracts and information about SoCalGas’ potential use of *ratepayer funds* for political activities . . .” (Emphasis added.)]

⁴⁸ Even if the Draft Resolution relies on the Commission’s broad authority to regulate and oversee utilities, the Commission has made clear that “[t]he only commitment of shareholder earnings enforced by the Commission is 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.” *In Re S. California Gas Co.*, No. 02-12-027, 2004 WL 2963807, at *1 (Dec. 2, 2004).

⁴⁹ See *Gibson, supra*, 372 U.S. at p. 546 [“We understand this to mean—regardless of the label applied, be it ‘nexus,’ ‘foundation,’ or whatever—that it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.”].

and the activities undertaken by SoCalGas's partners, consultants and vendors in connection with its non-public, below-the-line, shareholder-funded political activities. Importantly, this discovery would not provide information concerning whether ratepayer funds were used for political activities, which is the crux of Cal Advocates' stated investigation. The Draft Resolution failed to address the record on this argument in the motions and simply accepted Cal Advocates' irrational and insufficient claim that access to SoCalGas's below-the-line accounts will allow it to verify misclassifications inappropriately charged to *above-the-line* accounts.

The proper scope of Cal Advocates' investigation is SoCalGas's alleged misuse of ratepayer funds to support its political activities. The way to confirm that no ratepayer funds were improperly used is to investigate SoCalGas's above-the-line accounts. As discussed further below, those are all currently available to Cal Advocates (once it signs an NDA) in the SAP database (with the exception of information protected by the attorney-client privilege and work product). If there were any inappropriate lobbying or political activities charged to above-the-line accounts, Cal Advocates would be able to find those inappropriate charges in the above-the-line accounts. Cal Advocates will not find any inappropriate charges to above-the-line accounts by examining below-the-line accounts, because they are simply not in the below-the-line accounts.

Instead, in seeking the DR-05 Contracts, the SAP Database, and the Confidential Declarations, Cal Advocates wants to investigate SoCalGas's 100% shareholder-funded political activities, including the identity of who engaged in those activities and the details of the underlying First Amendment-protected activity. This intrusive discovery goes far beyond an accounting exercise of whether SoCalGas used ratepayer funds to pay for political activities. The discovery is not geared towards actually investigating the alleged wrongful use of ratepayer

funds, but instead, the content and manifestation of SoCalGas’s political opinions and ideas, including the identities and activities protected by the First Amendment. This is in no way rationally related to Cal Advocates’ mandate.

The Draft Resolution further erred in essentially flipping the burden from Cal Advocates to SoCalGas, reasoning that “[a] statement of counsel for SoCalGas describing certain activities as ‘100% shareholder-funded’ does not, in and of itself, deprive Cal Advocates of its statutory authority to review and make its own determinations regarding financial information from a regulated utility.”⁵⁰ To be clear, it is Cal Advocates’ evidentiary burden to justify its need for the discovery under *Perry*, which it has not done.⁵¹ Otherwise, Cal Advocates at any time can assert that it wishes to “make its own determination” as to any fact and trample upon any and all First Amendment rights. Further, there is no discretionary “determination” to be made here—it is a factual statement by Cal Advocates that the discovery at issue seeks information that is solely booked to below-the-line accounts. That is the nature of what gave rise to this dispute, as Cal Advocates refused to be satisfied with investigating ratepayer monies and has stated point blank that the accounts protected by the First Amendment are precisely the types of accounts that Cal Advocates intends to access.⁵² Further, that SoCalGas has the burden to prove its activities are eligible for cost recovery,⁵³ has nothing to do with activities booked to 100% shareholder funded accounts for which SCG is *not* seeking cost recovery.

⁵⁰ D. Res. p. 19.

⁵¹ *Perry*, *supra*, 591 F.3d at p. 1161.

⁵² Response Of Public Advocates Office To Southern California Gas Company Motion To Quash Portion Of Subpoena, For An Extension, And To Stay Compliance (Not In A Proceeding) [hereinafter “Response to Motion to Quash”], June 1, 2020 (“Response to Motion to Quash”), at pp. 9-10 [accounts protected by the First Amendment are “precisely the types of accounts . . . that Cal Advocates intends to audit”].

⁵³ D. Res. p. 19.

Therefore, the Draft Resolution has failed to demonstrate that the discovery into SoCalGas's 100% shareholder funded political activity is rationally related to Cal Advocates' investigation into whether SoCalGas misused ratepayer monies.

5. The Draft Resolution Erred In Adopting Cal Advocates' Deficient Arguments that its Investigation is Narrowly Tailored.

As the Draft Resolution recognizes, a governmental request for First Amendment-protected information must be narrowly tailored, "such 'that the least restrictive means of obtaining the desired information' have been used."⁵⁴ As clear from the above discussion, Cal Advocates' investigation can in fact be "achieved through means significantly less restrictive."⁵⁵ Cal Advocates should investigate the above-the-line accounts to find out whether political activity has been misclassified. There is simply no need for Cal Advocates to investigate 100% shareholder-funded First Amendment protected political activity, or to compel the identities of SoCalGas's political partners and vendors. The Draft Resolution erred in simply adopting Cal Advocates' deficient conclusions to the contrary.

Cal Advocates has failed to meet its burden to demonstrate the discovery is narrowly tailored. In its response to SoCalGas's Motion for Reconsideration/Appeal, Cal Advocates argued that seeking the DR-05 Contracts was narrowly tailored because it "did not seek, for example, all contracts SoCalGas entered into regarding all lobbying activities, . . . [but only those] related to the Balanced Energy IO."⁵⁶ As noted in SoCalGas's reply brief, even at the time it was made, this argument was belied by the breadth of Cal Advocates' other requests, including PubAdv-SCG-001-SCS, which (as Cal Advocates clarified in meet and confer)

⁵⁴ D. Res. p. 18 [citing *Perry, supra*, 591 F.3d at p. 1161].

⁵⁵ *Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 623.

⁵⁶ Cal Advocates Response to Mot. for Reconsideration/Appeal, p. 15.

requests “contracts related to Communications, Advocacy and Public Outreach aimed at local, state and federal government audiences.”⁵⁷ If Cal Advocates was interested in C4BES-related contracts, it should have narrowly tailored its request to only include contracts related to C4BES (which, incidentally, it already has). Instead, Cal Advocates demanded broadly the production of *all* contracts that were charged to the Balanced Energy IO (a below-the-line account). In fact, none of the contracts at issue are charged to above-the-line accounts. Therefore, DR-05 Question 8 is not narrowly tailored for Cal Advocates to obtain the information it needs for its investigation.

The Subpoena seeking access to SoCalGas’s entire SAP database is even more tenuous. Cal Advocates does not even argue that its request for SoCalGas’s entire SAP database was narrowly tailored⁵⁸—because it cannot. Instead, it argued that SoCalGas had no First Amendment rights in its political activities at all. Since the Draft Resolution rejected this position in affirming SoCalGas does, in fact, enjoy First Amendment rights the same as any other entity,⁵⁹ it must find that Cal Advocates failed to prove up this element.

Similarly, Cal Advocates does not put forth any justification as to how obtaining the Confidential Declarations will further its investigation.⁶⁰ Again, this is because it cannot do so. The unredacted versions of the Confidential Declarations would only reveal the identity of SoCalGas’s associations and scope of the First Amendment political activity in which it

⁵⁷ Southern California Gas Company’s (U 904 G) Reply 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 (Not In A Proceeding), Dec. 27, 2019, p. 12 and n. 9.

⁵⁸ Cal Advocates’ Response to Mot. to Quash.

⁵⁹ D. Res. p. 14.

⁶⁰ Nor could Cal Advocates make the argument that they needed the Confidential Declarations in order to respond to SoCalGas’s Motion for Reconsideration/Appeal since Cal Advocates had already filed its response seven (7) months before it filed its Motion to Compel.

engaged—nothing about how the contracts are funded. The Draft Resolution similarly fails to specifically analyze how obtaining the Confidential Declarations is narrowly tailored to further Cal Advocates’ investigation.

6. The Draft Resolution Erred in Failing to Analyze Why SoCalGas’s Custom Software Solution For SAP Access Is Not An Appropriate Least Restrictive Means for Cal Advocates to Achieve Its Investigation.

The Draft Resolution committed legal error by failing to specifically analyze how the Subpoena for SoCalGas’s entire SAP database is narrowly tailored or the “least restrictive means” to obtain the needed information to inform Cal Advocates investigation into SoCalGas’s alleged misuse of ratepayer funds. Instead, the Draft Resolution summarily dismisses SoCalGas’s First Amendment rights by simply referring back to its discussion related to the DR-05 Contracts. The Draft Resolution fails to explain, and cannot explain, how access to all of SoCalGas’s accounts (above-the-line and below-the-line) in the SAP database is the least restrictive means of investigating the use of ratepayer funds.

SoCalGas has proposed a solution to Cal Advocates that would allow it to investigate all its above-the-line accounts for any misclassification of political activities: a custom software solution in its SAP database that would have provided Cal Advocates access to 100% of its above-the-line accounts, with the exception of invoices from law firms or other records of legal expenditures that are protected by the attorney-client privileged or attorney work product information. This is a least restrictive means that would provide Cal Advocates the ability to examine all of the above-the-line accounts to determine whether SoCalGas improperly charged any inappropriate political activity to ratepayers while still protecting SoCalGas’s First

Amendment information. The Draft Resolution fails to discuss or analyze this solution at all. This is clear error.

7. The Draft Resolution Erred in Relying on *Duke Energy* to Justify Cal Advocates' Discovery.

The Draft Resolution erred in relying on *United States v. Duke Energy Corp.* (M.D.N.C. 2003) 218 F.R.D. 468 to conclude the discovery was appropriate. First, *Duke Energy* is not a strict scrutiny case; it applies a mere “relevance” standard and expressly states it is not “employ[ing] a higher level of scrutiny” reserved for discovery that directly implicates First Amendment concerns.⁶¹ The Draft Resolution committed legal error in applying this lower “relevance” standard.⁶² The Court in *Duke Energy* determined the discovery sought did not go “to the heart of the group’s associational activities.”⁶³ Here, it does: Cal Advocates seeks information expressly about the identity and content of its political and associational activities. As such, the Commission must apply the strict scrutiny standard established by the Ninth Circuit in *Perry* and the California Supreme Court in *Britt v. Super. Ct.*⁶⁴

Second, the discovery requests in *Duke Energy* were very different factually from those here. In that case, the information sought was restricted to communications between the defendant utility company and an advocacy group “which would tend to show whether Duke Energy had actual or constructive notice of the meaning of National Source Review (“NSR”)

⁶¹ See *Duke Energy, supra*, 218 F.R.D. at p. 473 [applying “relevance” standard]; see also *id.* [“Of course, if the scope of the lawsuit and the discovery goes to the heart of the group’s associational activities, then the Court will employ a higher level of scrutiny.”].

⁶² D. Res. p. 20 [applying *Duke Energy* to conclude Cal Advocates’ discovery is permitted “because it was relevant to the subject matter of the litigation.”].

⁶³ *Duke Energy, supra*, at p. 473.

⁶⁴ *Britt v. Super. Ct.* (1978) 20 Cal.3d 844, 865 [government’s burden is “particularly heavy” to show demands are “precisely tailored” to serve a “compelling state interest”].

regulations and interpretations.”⁶⁵ It did not seek *all* communications between Duke Energy and the advocacy group—only those tending to show whether Duke Energy had knowledge of a particular fact. The court found that the government was not engaged in a “general fishing expedition” because the discovery order was “limited to a specific purpose” separate from the organization’s “associational activities.”⁶⁶ Unlike *Duke Energy*, Cal Advocates’ investigation is not targeted, and does go to the heart of SoCalGas’s associational activities. The discovery seeks *all* of SoCalGas’s financial information in SAP, including SoCalGas’s 100% shareholder-funded political activities, which Cal Advocates has admitted is the precise information it wants to audit. Cal Advocates discovery demand is akin to the fishing expedition referenced in *Duke Energy*. Instead of limiting its discovery to above-the-line account to determine whether ratepayer funds were improperly used, Cal Advocates is going on a fishing expedition for information that goes to the heart of SoCalGas’s associational activities (SoCalGas’s association with organizations and individuals in exercising its right to petition the government and advocate its position relating to natural gas, renewable natural gas, and green gas solutions).⁶⁷

Third, in *Duke Energy*, the parties failed “to offer any proposal for protection less than suppression.”⁶⁸ Here, SoCalGas has offered and enabled since May 29 a less restrictive means for Cal Advocates to obtain information it needs for its investigation: access to its *above-the-line* accounts, which is all Cal Advocates needs to investigate the use of *ratepayer* funds. SoCalGas’s custom software solution would provide Cal Advocates access to 100% of the above-the-line accounts, excluding information protected by the attorney-client privilege and

⁶⁵ *Duke Energy, supra*, 218 F.R.D. at p. 472.

⁶⁶ *Id.* at p. 473.

⁶⁷ Carrasco Decl., ¶ 6.

⁶⁸ *Id.* at p. 473.

work product. As discussed above, the Draft Resolution fails to explain why this is not an appropriate lesser restrictive means that provides Cal Advocates with the information it needs to conduct its investigation.

As these points make clear, the Draft Resolution's analysis of the First Amendment issue is riddled with legal and factual error. The Commission should correct these errors before approving the Resolution.

B. SoCalGas Supports the Draft Resolution's Affirmation of its Due Process Rights and the Deferral of Fines and Sanctions.

Because Cal Advocates' investigation has taken place outside any proceeding, no clear scope was initially defined, and due process guardrails have not always been assured. SoCalGas appreciates the Draft Resolution's post-hoc reaffirmance of its due process rights, including its right to bring motions and submit evidence on discovery disputes, including "an opportunity to submit responses to Cal Advocates' motions, submit motions itself, and even further, submit motions for the full Commission to act on," "prior to any decision or ruling."⁶⁹ As the Draft Resolution affirms, "SoCalGas had multiple opportunities and continues to have opportunities to challenge [Cal Advocates'] discovery requests."⁷⁰ Indeed, as the Draft Resolution recognizes, SoCalGas does have First Amendment rights, and (as discussed below) a right to protect its attorney-client privileged and work product information. Due process thus requires that SoCalGas have the opportunity to assert and request adjudication of those rights and privileges, and for those rights and privileges to actually be adjudicated by a neutral decisionmaker. This

⁶⁹ D. Res. p. 23.

⁷⁰ D. Res. pp. 23-24.

adjudication must occur before it can be deprived of those rights via compelled production, or be fined or found in contempt for seeking to adjudicate those rights.

SoCalGas also supports the Draft Resolution’s conclusion that “[t]his Resolution, and more specifically, the underlying process, is not the proper means for the Commission to consider [Cal Advocates’ requests for] fines and contempt.”⁷¹ As argued at length in SoCalGas’s response to Cal Advocates’ Motion for Contempt, and in response to its motion to compel, due process guaranteed by the United States and California Constitutions, applicable case law, and Commission precedent clearly requires that the Commission provide SoCalGas adjudicatory due process, including among other things an evidentiary hearing on issues of disputed material facts, prior to assessing fines and penalties.⁷²

C. SoCalGas Supports the Draft Resolution’s Referral of any Further Investigation into SoCalGas’s Alleged Misuse of Ratepayer Funds for Political Purposes to an Appropriate Enforcement Division Within the Commission.

SoCalGas further supports the Draft Resolution’s conclusion that any further investigation of SoCalGas’s alleged misuse of ratepayer funds for political purposes will be referred to an appropriate enforcement division within the Commission.⁷³ On July 17, 2020, SoCalGas submitted a letter to Commission President, Marybel Batjer, to request that the Commission open a statewide Order Instituting Rulemaking (OIR) to establish clarity for all

⁷¹ D. Res. p. 26.

⁷² 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, July 2, 2020, pp. 19-25; Southern California Gas Company’s (U 904 G) 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 (Not In A Proceeding), July 17, 2020, pp. 18-26

⁷³ D. Res. p. 27.

investor-owned utilities on ratemaking treatment for lobbying and other advocacy activity, to establish clear definitions for lobbying for accounting purposes, and to create a structure for cost allocation studies of lobbying to be used in future general rate cases. In the letter, SoCalGas pointed out that there is a lack of clarity in how the Commission approves costs for education, lobbying and advocacy and that gray areas exist. SoCalGas takes its obligation to comply with Commission rules seriously and as such also requested that the Commission open an Order Instituting Investigation (OII) of SoCalGas to be performed concurrently with the OIR in an open forum governed by established rules of practice and procedure. In furtherance of its July 17, 2020 letter, SoCalGas requests that the Commission modify the Draft Resolution to not only refer the investigation of SoCalGas’s alleged misuse of ratepayer funds for political activity to an enforcement division of the Commission but to also open a statewide OIR to provide all stakeholders clarity on how the Commission approves costs for education, lobbying and advocacy.

D. SoCalGas Supports Protection of its Attorney-Client Privilege and Attorney Work Product Privilege.

The Draft Resolution states that SoCalGas’s May 22, 2020 Motion to Quash Portions of the Subpoena is denied in full, when in fact, it was granted in part as to SoCalGas’s attorney-client privileged and attorney work product-protected information.⁷⁴ This should be clarified in the Draft Resolution, consistent with Finding No. 11 that SoCalGas “may assert” its attorney-client and work product privileges.⁷⁵ SoCalGas understands the Draft Resolution to approve of its software solution to shield its attorney-client privileged and work product-protected materials

⁷⁴ D. Res. p. 26.

⁷⁵ D. Res. p. 30.

from Cal Advocates in its SAP database. SoCalGas further requests that the Draft Resolution revise its order that SoCalGas provide a privilege log to encompass SoCalGas' agreement to Cal Advocates' offer of a privilege log consisting only of entries from 2015 to the present, and extend the compliance date to thirty (30) days from the date of entry of the Resolution.

SoCalGas maintains that it should not have to provide a log because Cal Advocates initially agreed it was not seeking attorney-client privileged or attorney-work product documents and conceded that such matters are not related in any way to its investigation.⁷⁶ In fact, Cal Advocates noted in writing: "Cal Advocates readily acknowledges that it has no desire to review any privileged information in the SAP database[.]"⁷⁷

Nevertheless, SoCalGas has always been willing to do a privilege log of an appropriate scope. In meet and confer discussions with Cal Advocates on this issue, SoCalGas noted that its accounting systems contained twenty-one years of data.⁷⁸ Cal Advocates therefore agreed to narrow the date range of the privilege log to January 1, 2015 to the present.⁷⁹ While SoCalGas appreciates the narrower date range, SoCalGas noted in response that it would have to review documents from many cases that have nothing to do with Cal Advocates' inquiry about the alleged use of ratepayer funds for lobbying (such as employment cases or personal injury cases).⁸⁰ Moreover, SoCalGas estimates that at least 10,000 documents will have to be reviewed for attorney client privilege or attorney work product.⁸¹ Nevertheless, SoCalGas agrees to limiting the privilege log starting on January 1, 2015. SoCalGas requests the Draft Resolution

⁷⁶ Henry Dec. ¶ 9.

⁷⁷ Declaration of Stephen Castillo dated May 28, 2020 filed in support of Cal Advocates' Opposition to Motion to Quash, ¶ 13

⁷⁸ Declaration of Jason H. Wilson, Nov. 19, 2020 (served concurrently herewith), ¶ XX.

⁷⁹ *Id.* ¶ XX

⁸⁰ *Id.* ¶ XX

⁸¹ *Id.* ¶ XX.

codify this scope of a privilege log and revise its order to SoCalGas to provide a log accordingly.⁸² Even such a narrowed scope, however, takes time, and thus, SoCalGas requests an extension from fifteen (15) days as provided in the Draft Resolution,⁸³ to thirty (30) days. SoCalGas is making diligent progress on the log, but the number of entries requires additional time for such an extensive time period.

E. The Draft Resolution Erred in Concluding GO 66-D Provided Ample Protection for SoCalGas’s Live SAP Database, and Should Order Cal Advocates to Enter Into an NDA or Alternatively Issue a Protective Order to Allow SoCalGas to Mark Entries for Confidentiality.

The Draft Resolution concludes that Pub. Util. Code § 583 and General Order 66-D (GO 66-D) “provide ample protection and processes for utilities to submit confidential information to the Commission, including Cal Advocates.”⁸⁴ GO 66-D provides that “[i]f confidential treatment is sought for any portion of information, the information submitter must designate each page, section, or field, or any portion thereof, as confidential.”⁸⁵ It must then specify the basis on which it claims confidential treatment,⁸⁶ and submit a declaration to that effect.⁸⁷ However, GO 66-D is impracticable given Cal Advocates’ request for live, remote access to SoCalGas’s full SAP database containing millions of entries.

In the May 5, 2020 Subpoena, Cal Advocates requested live, remote access to SoCalGas’s SAP database. The breadth of this request is unprecedented, as SoCalGas has never before provided live remote access to Cal Advocates or anyone at the Commission. To be clear,

⁸² D. Res. p. 26, p. 30 ¶ 11.

⁸³ D. Res. p. 34, ¶ 8.

⁸⁴ D. Res. p. 30, ¶ 9; *see also id.* pp. 12-13.

⁸⁵ GO 66-D ¶ 3.2(a).

⁸⁶ *Id.* ¶ 3.2(b).

⁸⁷ *Id.* ¶ 3.2(c).

the Subpoena's demand for SAP access is different than from prior fixed database that SoCalGas typically provides Cal Advocates in the GRC.

In addition to information protected by the First Amendment and the attorney-client and work product privileges, SoCalGas's SAP database contains sensitive information which merits confidential treatment under GO 66-D, such as financial and private information like vendor bank account numbers, social security numbers, contract prices, information about employee reimbursements, and workers' compensation payments.⁸⁸ Information that the Commission has regularly agreed is confidential. It is particularly important here since Cal Advocates has a Common Interest Agreement with Sierra Club and would likely share non-confidential information under that agreement.

GO 66-D does not provide for an adequate mechanism to assert confidentiality protection for remote access to a live database. SoCalGas is unable to review ahead of time the information Cal Advocates wishes to investigate, and cannot "mark" a live database. The database displays data in multiple fields, making "live" designation simply impossible.

Even if SoCalGas can somehow mark a live database, it would be unreasonably burdensome to require SoCalGas to review the entire database (millions of entries) ahead of time for confidential treatment. SoCalGas presented uncontroverted evidence about it would be unduly burdensome to mark the confidential information in the SAP financial database due the volume of records in that database alone. One declarant noted:

The SAP system contains millions of accounting records. For example, the SAP system contains millions of records called "accounting documents." An accounting document reflects postings of financial transactions in the SAP system, and the document contains fields including but not limited to those which

⁸⁸ Decl. of Dennis Enrique ISO Mot. to Quash (May 22, 2020), ¶¶ 4-5; Declaration of Kelly Contratto dated July 1, 2020 filed in opposition to Cal Advocates' Motion for Contempt, ¶ 9

reveal sensitive information such as social security numbers, banking accounting numbers and information, pricing information, amongst others. Further, through the accounting document a user can access or link through to underlying records such as invoices, which itself may contain additional sensitive information. **For the period from approximately January 1, 2015 to April 30, 2020, SoCalGas's SAP system contains approximately 13 million accounting documents.**⁸⁹

No doubt recognizing the difficulty of complying with Section 3.2 of GO 66-D during meet and confer discussions, Cal Advocates suggested that the parties enter into an NDA to protect the confidentiality of information in the SAP system that would allow SoCalGas to interpose its confidentiality designations on any document the auditor sought to copy or print.⁹⁰

On May 12, 2020, Cal Advocates sent SoCalGas an email stating in the relevant part:

As we have discussed previously, for the documents that the auditor seeks to retain copies of, Cal Advocates can execute a non-disclosure agreement (NDA) that permits SoCalGas to review and mark documents as confidential prior to public disclosure, provide that it does not limit Cal Advocates' rights to see a Commission determination to de-designate information it concludes is not confidential. Please provide a draft NDA for Cal Advocates' review and approval.⁹¹

SoCalGas provided Cal Advocates a draft NDA incorporating this process on May 18, 2020.⁹²

These procedures are similar to those found in Section 7 of GO 66-D. The process is a slight modification from Section 7 of GO 66-D since Section 7 also does not address this situation where remote access to a live database is requested.

However, when SoCalGas asserted its rights to protect *other* information in its SAP database via the Motion to Quash, Cal Advocates abruptly reneged on its earlier agreement,

⁸⁹ Declaration of Kelly Contratto dated July 1, 2020 filed in opposition to Cal Advocates' Motion for Contempt, ¶ 9 [emphasis added].

⁹⁰ Henry Dec., Ex. J (Letter of Jason Wilson to Traci Bone, May 18, 2020, re: Meet and Confer re Cal Advocates' Data Request and Subpoena for SAP Access).

⁹¹ Declaration of Jason H. Wilson ISO Response to Motion to Contempt (July 2, 2020), Ex. F [Email of Traci Bone to Elliott S. Henry, , Re: SAP questions – Follow Up Regarding Read-Only Remote Access, May 12, 2020.]

⁹² *Id.* at Ex. I [Email of Elliot S. Henry to Traci Bone, Re: NDA (May 18, 2020)].

claiming for the first time that statutory protections were adequate to protect the confidentiality of SoCalGas's SAP database and that "the purpose of the NDA has been defeated by the instant Motion to Quash."⁹³ Unfortunately, ALJ DeAngelis denied SoCalGas the right to file a reply, which deprived SoCalGas of the ability to respond to this argument. In fact, the purpose of the NDA was not "defeated" by the Motion to Quash. The NDA was designed to protect financial information and other non-public information that was *not otherwise protected* by the attorney-client or work product privileges or the First Amendment.

SoCalGas successfully implemented its custom software solution to make the SAP database available to Cal Advocates on May 29, 2020. Instead of signing the NDA to obtain access to 100% of SoCalGas's above-the-line accounts, which would have allowed Cal Advocates to continue its investigation into SoCalGas's alleged misuse of ratepayer funds for political activities, Cal Advocates filed a motion to find SoCalGas in contempt of the Subpoena.⁹⁴

The fact remains that GO 66-D is not sufficient to protect the confidentiality of private and financial information via remote access to the live SAP database. The Draft Resolution should order SoCalGas and Cal Advocates to enter into an NDA to allow SoCalGas 20 days to mark any document Cal Advocates chooses to print or copy off SoCalGas's SAP database and assert confidentiality protection under GO 66-D. In the alternative, the Draft Resolution should enter the attached protective order (Attachment 1) incorporating that process.

⁹³ *Id.* p. 38, n. 131.

⁹⁴ Public Advocates Office Motion to Find SoCalGas in Contempt of the 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, June 23, 2020.

Furthermore, SoCalGas request that the Commission put a reasonable time limit on Cal Advocates' remote access based upon the May 5, 2020 subpoena for several reasons. As discussed above, the access being provided here (live access to all of SoCalGas's financial information) is unprecedented and should not last indefinitely. Cal Advocates access should be limited to a reasonable amount of time that it needs to conduct its investigation into whether SoCalGas's misused ratepayer funds for political activity. Once Cal Advocates completes its review (e.g., 15 days, 30 days, 60 days), this unprecedented access should end. Further, there are expenses involved with permitting Cal Advocates ongoing remote access; for example, SoCalGas has to provide a technical support team for Cal Advocates. To the extent, Cal Advocates require additional information, Cal Advocates can serve further data requests in accordance with its discovery powers for the information.

F. The Draft Resolution Should Stay Enforcement of the Portion of the Resolution that Requires SoCalGas to Produce Information Protected by its First Amendment Rights Until the Commission Issues a Final Decision on the AFR (and Final Resolution of a Subsequent Appeal to the Court of Appeal).

Due to the important Constitutional rights at issue, if the Commission does not modify the Draft Resolution as requested in this Comment, SoCalGas intends to file an application for rehearing (AFR) and, if necessary, a petition for writ of review with the Court of Appeal. However, Rule 16.1 and Pub. Util. Code §1735 states that an application for rehearing (AFR) does not excuse compliance with the Resolution. As such, SoCalGas would be required to produce the discovery on December 18, 2020 (15 days after the Commission voting meeting on December 3) while the AFR is pending.⁹⁵ Given the important Constitutional issues at stake, SoCalGas respectfully requests that the Commission stay enforcement of at least the portion of

⁹⁵ The Draft Resolution is currently scheduled to be voted on at the Commission's December 3, 2020 meeting.

the Resolution that requires SoCalGas to produce information protected by its First Amendment while still providing Cal Advocates with access to 100% of SoCalGas's above-the-line account. The Commission can grant this very narrow stay in one of two ways: (1) modify this Resolution to grant Cal Advocates access pursuant to SoCalGas's custom software solution which excludes the information SoCalGas asserts is protected under its First Amendment rights until the Commission issues a final decision on the AFR (and final resolution of a subsequent appeal to the Court of Appeal); or (2) modify Order Paragraph 8 to extend SoCalGas's compliance date from 15 days to 45 days as to the information SoCalGas asserts is protected under its First Amendment rights. Cal Advocates will still receive access to 100% of SoCalGas's above-the-line account, excluding information protected by the attorney client privilege and work product, within 15 days of the approval of the Resolution.

This very narrow stay of the Resolution will serve several purposes:

First, it protects SoCalGas's First Amendment rights as well as SoCalGas's confidential information while the Commission considers SoCalGas's AFR. If SoCalGas is required to produce the discovery as required by the Draft Resolution, SoCalGas will suffer serious and irreparable harm as described in the Carrasco Declaration and Confidential Declarations. This harm cannot be undone. Once SoCalGas's First Amendment protected information has been turned over to Cal Advocates, that bell cannot be unrung.⁹⁶ Based on the Draft Resolution's legal errors that SoCalGas discussed above, SoCalGas is likely to prevail on the merits of the AFR.

⁹⁶ *Fed. Trade Comm'n v. Qualcomm Inc.*, 935 F.3d 752, 756 (9th Cir. 2019) (finding that there is a probability of irreparable harm where the injunction requires a party to enter new contractual relationships and renegotiate existing ones on a large scale and imposes fundamental business changes that cannot be easily undone should party prevail on appeal).

Second, it will conserve the parties', the Commission's, and potentially the Court of Appeal's resources in not having to address additional motions to stay on an expedited basis. If the Commission does not modify the Draft Resolution to provide for the requested limited stay, SoCalGas will have to immediately file a motion to stay the Resolution with a concurrent AFR and request an expedited ruling on the motion to stay. This will require additional briefing by the parties and expend Commission resources to consider and rule on the motion to stay on an expedited basis. Further, if the Commission does not rule on SoCalGas's motion to stay before SoCalGas must comply with the Resolution, SoCalGas will have to seek emergency relief from the Court of Appeal. This will necessitate further expedited briefing by the parties and the Commission to the Court of Appeal potentially in a very compressed span of time in or around major end-of-year public holidays.

Third, the balance of harm here overwhelmingly favors modifying the Draft Resolution to provide SoCalGas with a stay as to the narrow category of information that is protected by SoCalGas's First Amendment rights. Cal Advocates and the Commission will not be prejudiced by the narrow stay of the Resolution. Cal Advocates will still be able to access 100% of SoCalGas's above-the-line account while the stay is in place. Moreover, the Draft Resolution ordered that any further investigation into SoCalGas's use of ratepayer funds for political activities will be referred to an appropriate enforcement division within the Commission. This has yet to occur. Therefore, there is no procedural schedule that will be affected by a narrow stay of the Resolution.

