

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Application for Rehearing of Resolution ALJ-391

Application 20-12-011  
(Filed December 21, 2020)

**SIERRA CLUB RESPONSE TO SOUTHERN CALIFORNIA GAS COMPANY'S  
APPLICATION FOR REHEARING OF RESOLUTION ALJ-391 AND  
REQUEST FOR ORAL ARGUMENT**

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Pursuant to Rule 16.1 of the California Public Utilities Commission (“Commission”) Rules of Practice and Procedure and the *E-Mail Ruling Extending Deadline for Responses to Application for Rehearing and Adopting Ban on Ex Parte Communications* (“Application for Rehearing”) issued by Administrative Law Judge (“ALJ”) DeAngelis December 22, 2020, Sierra Club respectfully submits this *Response to Southern California Gas Company’s Application for Rehearing or Resolution ALJ-391 and Request for Oral Argument*.

**I. INTRODUCTION**

In its Application for Rehearing, Southern California Gas Company (“SoCalGas”) again resorts to meritless objections to further obstruct and delay a Commission investigation into activities that include forming and financing the astroturf group Californians for Balanced Energy Solutions (“C4BES”) to oppose state and local climate policies. Since C4BES first intervened in a Commission proceeding without disclosing its relationship to SoCalGas,<sup>1</sup> these activities have only continued. When San Luis Obispo was poised to pass an ordinance encouraging all-electric new construction, the C4BES board chair threatened to bus “in hundreds and hundreds of pissed off people potentially adding to this pandemic” should a vote proceed

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<sup>1</sup> LA Times, *Editorial: SoCalGas’ sleazy ‘Astroturf Effort to keep fossil fuels flowing in California* (Aug. 10, 2019), <https://www.latimes.com/opinion/story/2019-08-10/socalgas-astroturf-cpuc-aliso-canyon>. See also R.19-01-011, *Sierra Club’s Motion to Deny Party Status to Californians for Balanced Energy Solutions or, in the Alternative, to Grant Motion to Compel Discovery* (May 14, 2019), <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M292/K932/292932611.PDF>.

and a gas industry lobbyist attempted to manufacture a racial controversy by claiming the ordinance was opposed by the local NAACP when it was not.<sup>2</sup> Indeed, as the NAACP chapter president subsequently noted, “what’s discriminatory is having a company that profits from dirty energy and then makes you pay for it with your life.”<sup>3</sup> Most recently, C4BES sent unsolicited and misleading text messages to Santa Barbara residents urging them to oppose the adoption of a local all-electric reach code.<sup>4</sup> SoCalGas’ role in forming C4BES, its failure to comply with the subsequent investigation by the Public Advocates Office (“Cal Advocates”) and other activities prompted Senator Feinstein and Representative Barragán to express their concerns over the “clear and deeply concerning portrait of SoCalGas’ attempts to systematically undermine greenhouse gas reduction targets in California.”<sup>5</sup>

Resolution ALJ-391 (“Resolution”) properly rejects SoCalGas’ refusal to respond to Cal Advocates’ investigation into its role and potential use of customer money to underwrite these shadow lobbying tactics. Contrary to SoCalGas’ assertions, as an office of the Commission, Cal Advocates has the clear statutory authority to inspect SoCalGas’ “accounts, books, papers, and documents” at any time.<sup>6</sup> SoCalGas has also failed to make the prima facie showing that Cal Advocates’ review of its records infringes on its associational rights. Even if SoCalGas had made such a showing, whatever First Amendment interests SoCalGas may have in the secrecy of its political operations are outweighed by the compelling state interests in disclosure. Not only is disclosure to the Commission necessary for its oversight responsibility, but there is a compelling state interest in disclosure to the public to enable “informed public opinion.”<sup>7</sup> Finally, SoCalGas’ claim that the Resolution’s requirements for SoCalGas assertions of attorney-client

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<sup>2</sup> Sammy Roth, *How to stop a climate vote? Threaten a ‘no social distancing’ protest*, LA Times (May 6, 2020), <https://www.latimes.com/environment/story/2020-05-06/socalgas-union-leader-protest-threat-no-social-distancing>.

<sup>3</sup> Emily Atkin, *The quiet campaign to make clean energy racist*, Heated (Jul. 2, 2020), <https://heated.world/p/the-quiet-campaign-to-make-clean>.

<sup>4</sup> Dr. Leah Stokes, *It’s Time for Santa Barbara to Ditch Fossil Gas, Front Group for SoCalGas Spreads Disinformation*, Santa Barbara Independent (Dec. 31, 2020), <https://www.independent.com/2020/12/31/its-time-for-santa-barbara-to-ditch-fossil-gas/>.

<sup>5</sup> Letter from Senator Diane Feinstein and Representative Barragán, to SoCalGas CEO Scott Drury, (Oct. 29, 2020) [https://www.feinstein.senate.gov/public/\\_cache/files/5/6/5603237d-785b-4580-a95b-7c464bb74168/14BBBA0E17B0CC700915A918F7635BDA.2020.10.29-feinstein-barragan-letter-to-socalgas.pdf](https://www.feinstein.senate.gov/public/_cache/files/5/6/5603237d-785b-4580-a95b-7c464bb74168/14BBBA0E17B0CC700915A918F7635BDA.2020.10.29-feinstein-barragan-letter-to-socalgas.pdf).

<sup>6</sup> Pub. Util. Code § 314(a).

<sup>7</sup> *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (quoting *Grosjean v. American Pres Co.*, 297 U.S. 233, 250 (1936)).

privilege are “unprecedented” ignores that these are *exactly* the same requirements imposed on SoCalGas by state court following its repeated and egregious abuses of the discovery process. SoCalGas’ Application for Rehearing is yet another dilatory tactic by SoCalGas to evade accountability and should be flatly rejected.

## **II. DISCUSSION**

### **A. Resolution ALJ-391 Properly Found Cal Advocates Has the Right to Requested Information.**

The Resolution properly concluded that Cal Advocates, as an arm of the Commission, has broad discovery rights pursuant to its statutorily granted regulatory authority over SoCalGas. The Public Utilities Code unequivocally authorizes “the commission, each commissioner, and each officer and person employed by the commission” to inspect “at any time” regulated utilities’ “accounts, books, papers, and documents.”<sup>8</sup> This power also applies to utilities’ unregulated subsidiaries and affiliates, “with respect to any transaction . . . on any matter that might adversely affect the interests of the ratepayers . . . .”<sup>9</sup> The Resolution is correct to recognize that Cal Advocates, as an office of the Commission, is entitled both to the general, broad investigatory powers described above in addition to its specific statutory authority, as the Public Advocates Office, to compel disclosure from SoCalGas of “any information it deems necessary to perform its duties.”<sup>10</sup> To the extent that SoCalGas claims any information that Cal Advocates has requested should be subject to confidential treatment, such treatment does not provide a basis for evading regulatory oversight, and it is ultimately the Commission who decides the validity of confidentiality claims.

### **B. SoCalGas’ Invocation of the First Amendment to Evade a Commission Investigation is Without Merit.**

#### **1. SoCalGas Has Not Made a Valid Claim for First Amendment Privilege Because it did not Make a Prima Facie Showing that Cal Advocates’ Discovery Will Infringe its Associational Rights.**

SoCalGas correctly identifies the Ninth Circuit’s two-part test for when a First Amendment privilege protects a party from disclosing information that would burden its rights to association, but fails to satisfy the first step in the test with a prima facie showing of

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<sup>8</sup> Pub. Util. Code § 314(a).

<sup>9</sup> *Id.* § 314(b).

<sup>10</sup> *Id.* § 309.5(e).

infringement on those rights.<sup>11</sup> As SoCalGas recognizes, a party asserting First Amendment privilege must make a threshold showing that disclosure “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.”<sup>12</sup> SoCalGas has not shown that the Resolution will lead to any of these specific harms. It is likely impossible for SoCalGas to show that the Resolution would chill its members’ associational rights or make it difficult for the company to recruit new members because SoCalGas does not have members. Although SoCalGas has a First Amendment right to belong to advocacy organizations, the Company does not allege that it would alter its participation in any such association if it complied with the Resolution. Nor does SoCalGas allege that the Resolution will lead to harassment of the Company itself. The Commission can end its inquiry at the first step because SoCalGas simply did not show that it will suffer any of the harms that can make the First Amendment privilege available.

Not only does SoCalGas fail to allege that it would suffer any of the specific injuries that the Ninth Circuit requires in a *prima facie* showing for First Amendment privilege, but the Company’s claims lack sufficient particularity. This *prima facie* case requires “objective and articulable facts, which go beyond broad allegations or subjective fears.”<sup>13</sup> “Self-serving declarations are not sufficient.”<sup>14</sup> However, SoCalGas offers general statements about how the Company may somehow change its behavior if it must respond to Cal Advocates’ discovery.<sup>15</sup> The Company’s vague, self-serving declarations do not constitute a *prima facie* showing that the Resolution abridges their associational rights.

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<sup>11</sup> Application for Rehearing at 14 (citing *Perry v. Schwarzenegger* 591 F.3d 1147, 1161 (9th Cir. 2010)).

<sup>12</sup> *Perry*, 591 F.3d at 1161 (quoting *Brock v. Local 375, Plumbers Int’l Union of Am., AFL-CIO*, 860 F.2d 346, 349–50 (9th Cir. 1988)) (emphasis added).

<sup>13</sup> *Brock v. Local 375*, 860 F.2d at 350, n. 1 (9th Cir. 1988).

<sup>14</sup> *United States v. Duke Energy Corp.*, 218 F.R.D. 468, 473 (M.D. N.C. 2003), *aff’d*, No. 1:00CV1262, 2009 WL 10717776 (M.D. N.C. 2009), and *aff’d*, No. 1:00CV1262, 2012 WL 1565228 (M.D. N.C. 2012).

<sup>15</sup> Application for Rehearing at 24 (citing the Carrasco declaration’s statements that “SoCalGas will be less willing to engage in contracts and communications” if it must disclose them, that it “is being forced to reconsider its decisions relating to political activities and associations,” and that prior disclosures have “altered how SoCalGas and its consultant, partner or vendor associates with each other, and it has had a chilling effect on these associations”); *id.* at 23 (discussing Sharon Tomkins’ declaration that SoCalGas would be less likely to engage in certain communications and contracts if it were compelled to give Cal Advocates the information it requested in discovery).

SoCalGas suggests that declarations are sufficient to make a prima facie case because it copied the declaration from *Perry* “nearly word-for-word.”<sup>16</sup> This is absurd. Whether Commission action has infringed on SoCalGas’ associational rights is a fact-specific inquiry, which the Commission cannot answer by checking that the Company successfully parroted language from a different case. It would be especially inappropriate to allow SoCalGas to make its prima facie case by copying the declaration from *Perry* because the Ninth Circuit found that declaration to be “lacking in particularity.”<sup>17</sup> Nonetheless, the court found that some of the requested communications were subject to the First Amendment privilege because it was “self-evident” that a request for communications about the Prop 8 campaign’s strategy implicated important First Amendment interests.<sup>18</sup> There is nothing “self-evident” about SoCalGas’ associational interests in its accounting systems or bilateral contracts. The First Amendment privilege is a doctrine designed to protect the interests of associations so that individuals can exercise political power through collective action, and the Commission should reject SoCalGas’ attempts to expand the scope of the privilege to include communications or contracts between a corporation and its consultants.

In its one addition to the general assertions it copied from the *Perry* declaration, SoCalGas attempts to demonstrate that Cal Advocates’ discovery would infringe its associational rights by offering evidence that consultants would be too embarrassed to work for SoCalGas if their contracts became public knowledge.<sup>19</sup> This is not an injury to SoCalGas’ cognizable First Amendment rights. SoCalGas does not have a constitutional right to have consultants remain available for its business. The Company does not cite any authority for the notion that the First Amendment gives it the right to keep its political activities private so that its contracts do not become a reputational liability for SoCalGas’ business partners. Thus, the Commission is correct that the First Amendment privilege does not shield SoCalGas from Cal Advocates’ discovery because the Company has not made a prima facie showing that complying will abridge its associational rights.

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<sup>16</sup> Application for Rehearing at 23.

<sup>17</sup> *Perry*, 591 F.3d at 1163.

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

<sup>19</sup> Application for Rehearing at 23.

## 2. SoCalGas Has Not Demonstrated a Significant Burden on its Right to Free Speech.

SoCalGas' invocation of the Court's free speech jurisprudence to avoid discovery is just as unpersuasive as its attempts to shoehorn its claims into the First Amendment privilege doctrine. SoCalGas cites a single case involving disclosures of payment for work on a political campaign, which does not support the unfettered secrecy that SoCalGas seeks. In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court found that it was improper for the State of Colorado to require a ballot measure campaign to disclose the names and residential addresses of each person whom the campaign pays to collect signatures, as well as the amount paid to that individual each month.<sup>20</sup> These facts are entirely different from the discovery dispute that is now before the Commission. As far as Sierra Club is aware, Cal Advocates has never sought sensitive personal information from SoCalGas such as the home addresses of its political operatives or the campaign income of low-level workers. Instead, Cal Advocates is seeking information that is far more akin to the disclosure requirements that the Court left in place, including (1) a mandate that signature gatherers wear a badge that reveals whether they are being paid and, if so, by whom and (2) a requirement to disclose the names of initiative sponsors and the amounts each sponsor spends on the initiatives.<sup>21</sup> The Court observed that the requirement to disclose who is bankrolling the campaign responds to the state interest in checking the domination of the ballot initiative process by affluent special interest groups.<sup>22</sup> As discussed in detail in Section II.B.3 below, courts understand that public disclosure of corporate political spending is essential for a functioning democracy.

Not only is SoCalGas wrong to suggest that it has a sacrosanct right to conduct political activity in the dark, but it ignores the distinction between the First Amendment interests at stake in political communication by individuals who are directly interacting with the public versus SoCalGas' exercise of political power through mass communications and other strategies that do not expose individuals to harassment. In its 1999 *Buckley v. American Constitutional Law Foundation* decision, the Court overturned Colorado's requirement that signature gatherers put their names on their badges, while upholding the requirement that signature gatherers file an

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<sup>20</sup> *Buckley v. Am Const. Law Found.*, 525 U.S. at 201–04.

<sup>21</sup> *Id.* at 197–200, 202–03.

<sup>22</sup> *Id.* at 202–03.

affidavit that confirms their compliance with various election laws.<sup>23</sup> The affidavit is a public document that reveals the signature gatherer's identity.<sup>24</sup> However, the Court explained that this disclosure is not an impermissible burden on First Amendment rights because it does not force the signature gatherers to provide their names at the time they are delivering their message through one-on-one communications and exposed "to the risk of 'heat of the moment' harassment."<sup>25</sup> SoCalGas has not shown that it could suffer this type of "heightened" injury.<sup>26</sup>

### **3. There are Multiple Compelling State Interests in Requiring SoCalGas to Respond to Cal Advocates' Discovery.**

Even if SoCalGas could meet its prima facie case, there are multiple compelling state interests in Commission execution of its regulatory oversight responsibilities. First, the Resolution properly finds that "state regulatory agencies, such as the Commission, can request information to fulfill their regulatory mandate, even where doing so may potentially impact First Amendment rights."<sup>27</sup> As the Resolution also determines, "[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."<sup>28</sup> Review of utility financial information is part of the Commission's job and the state interest in executing its responsibility compels disclosure of the requested information even assuming SoCalGas has demonstrated a potential impact on its First Amendment rights.

Second, given that Cal Advocates' investigation focuses on SoCalGas' astroturf and related shadow lobbying activities, there are additional state interests the Resolution does not explicitly recognize that further militate against SoCalGas' First Amendment claims. As Courts have repeatedly determined, the state interest in an informed public supersedes First Amendment claims of secrecy of corporate lobbying. This same state interest applies here. "Astroturf" lobbying describes "lobbyist efforts to orchestrate a fake, or less than completely accurate,

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<sup>23</sup> *Id.* at 198–99.

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

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 199 ("The injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest.").

<sup>27</sup> Resolution at 16.

<sup>28</sup> *Id.* at 17.

showing of citizen support for a particular policy position, at the grassroots level, by advertising lobbying clients' positions to the public and encouraging individual citizens to call or write their representatives expressing support for those positions."<sup>29</sup> Parties that engage in astroturfing attempt to give officials the impression that significant public support for or opposition to a stance on a political issue exists when such concern are minimal or lacking altogether.

Transparency is essential to enable an informed citizenry.

To support its assertions of First Amendment protection, SoCalGas largely ignores the body of First Amendment jurisprudence that recognizes the compelling state interest in disclosing paid lobbying relationships and political expenditures. For example, in *McIntyre v. Ohio Elections Commission*, the Supreme Court overturned the conviction of a private citizen who had circulated an unsigned leaflet opposing a local ballot measure on the ground that state law prohibiting distribution of anonymous campaign literature unconstitutionally abridged citizens' right of free speech but specifically disassociating this ruling from paid lobbying relationships.<sup>30</sup> With regard to paid political activities, courts have routinely upheld disclosure requirements because "the state's interest in a well-informed electorate is a compelling one."<sup>31</sup> Thus, in *Griset v. Fair Political Practices Commission*, the California Supreme Court determined that requiring candidates and the committees they control to identify themselves in mass mailings serves the compelling state interest of providing "voters with important information to assist them in making a reasoned choice at the polls, the ultimate expression of their First Amendment rights."<sup>32</sup> Similarly, in *Buckley v. Valeo*, the Supreme Court upheld the disclosure provisions of the Federal Election Campaign Act after applying the "exacting scrutiny" of the First Amendment, finding that "informed public opinion is the most potent of all restraints on misgovernment."<sup>33</sup>

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<sup>29</sup> Anita Krishnakumar, *Towards a Madisonian, Interest-Group Based, Approach to Lobbying Regulation*, 58 Ala. L. Rev. 513 n. 205 (Feb. 18, 2007).

<sup>30</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995).

<sup>31</sup> *Griset v. Fair Pol. Practices Comm'n*, 8 Cal. 4<sup>th</sup> 851, 862 (1994). *See also* *Buckley v. Valeo*, 424 U.S. at 66 (1976) (citation omitted) ("there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved.").

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* *See also* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370–71 (2010) ("disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This

SoCalGas' heavy reliance on *Britt v. Superior Court* is fundamentally misplaced because that case granted First Amendment privilege to personal information that was not necessary for informed democratic processes.<sup>34</sup> In *Britt*, the California Supreme Court found that disclosure of the associational affiliations, activities and entire medical histories of community members seeking compensation for the diminution of property values, personal injuries, and emotional disturbances they alleged were caused by operations of a local airport infringed on the First Amendment.<sup>35</sup> In contrast, the Public Advocates Office has requested information on the relationships between a regulated utility and paid consultants and public relations firms employed to engage in shadow lobbying campaigns that support SoCalGas positions. In stark contrast to the community members seeking relief from airport operations in *Britt v. Superior Court*, information sought by the Public Advocates Office relates to SoCalGas tactics that subvert the democratic process and informed citizenry. As the Supreme Court recognized in rejecting a First Amendment challenge to legislation requiring disclosures of lobbying activities that included efforts to induce various interest groups and individuals to communicate by letter with members of Congress on pending legislation:

[F]ull realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.<sup>36</sup>

Because Cal Advocates discovery serves this exact purpose, there is a compelling Commission interest for this information.<sup>37</sup>

Moreover, even if SoCalGas could demonstrate disclosure would have a chilling effect on these relationships, courts have repeatedly rejected this impact as sufficient to warrant secrecy in the types of paid relationships at issue here. For example, in *Buckley v. American*

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transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”).

<sup>34</sup> Application for Rehearing at 15.

<sup>35</sup> *Id.* at 16–17 (citing *Britt v. Sup. Ct.*, 20 Cal.3d 844 (1978)),

<sup>36</sup> *United States v. Harriss*, 347 U.S. 612, 624 (1954).

<sup>37</sup> Sierra Club notes that it has an outstanding request under the Public Records Act for SoCalGas data request responses to Cal Advocate's investigation. Because public disclosure serves the compelling state interest of informing captive ratepayers of the origins of astroturf and related activities SoCalGas supports, the Commission should not withhold SoCalGas responses to Cal Advocates' data request from the public on First Amendment grounds.

*Constitutional Law Foundation*, the Supreme Court recognized that disclosure serves to “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.”<sup>38</sup> If the mere prospect of disclosure deters SoCalGas from financing or otherwise engaging in astroturf tactics, then this suggests it owes its effectiveness to misrepresentations and secrecy of its origins. Such a consequence does not impose an impermissible infringement of SoCalGas’ First Amendment rights. As the Supreme Court recognized in *Buckley v. Valeo* when upholding the disclosure provisions of the Federal Election Campaign Act after applying the “exacting scrutiny” of the First Amendment, “informed public opinion is the most potent of all restraints on misgovernment.”<sup>39</sup>

**C. Resolution ALJ-391’s Requirement that SoCalGas Produce Attorney Declarations Concurrent with Privilege Logs is Proper and Appropriate.**

SoCalGas’ claims that the Resolution’s requirement of attorney declarations of good faith produced concurrently with any privilege logs is illegal and unprecedented are without merit. The Superior Court imposed an identical remedy upon SoCalGas multiple times in 2019 and 2020 in litigation related to the Aliso Canyon gas leaks.<sup>40</sup> In *Gandsey v. So. Cal. Gas Co.*, the Superior Court ordered SoCalGas’ trial counsel to declare under penalty of perjury that their claims of attorney-client privilege in discovery had a good faith basis in an order in August 2019.<sup>41</sup> In a subsequent round of discovery, the court did not require similar declarations “on the basis of that exercise of good faith by counsel,” and SoCalGas proceeded to produce massive privilege logs that the court found “legally insufficient” yet again.<sup>42</sup> The court noted that “it is disturbing, to say the least, that the court only can obtain legally compliant litigation conduct by making outside trial counsel individually responsible in a posture that could support sanctions against counsel personally.”<sup>43</sup> In a March 2020 order, the court found that yet another round of privilege logs contained “clear misrepresentations,” and required SoCalGas to re-serve privilege

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<sup>38</sup> *Buckley v. Am Const. Law Found.*, 525 U.S. at 202 (citations omitted).

<sup>39</sup> *Buckley v. Valeo*, 424 U.S. 1, 66 (1976).

<sup>40</sup> See Minute Order Ruling on Mot. 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*”); 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) (hereinafter “*August 3, 2020 Order*”).

<sup>41</sup> See *Gandsey Order* at 13.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

logs accompanied by “a declaration from trial counsel made under penalty of perjury that all assertions of privilege are made in good faith and the information contained in the privilege logs accurately describes the documents at issue.”<sup>44</sup> This remedy has been heavily discussed and applied multiple times to SoCalGas within the last two years. Accordingly, SoCalGas’ claim in this proceeding that the remedy is “unprecedented” is misleading and erroneous.

Further, SoCalGas makes several circular and meritless claims about the impossibility of the remedy. For example, SoCalGas claims that it would be impossible for any attorney to review the privilege claims because the documents are too voluminous, thus putting the attorney “in jeopardy of perjuring him or herself and being potentially in violation of Rule 1. . . .”<sup>45</sup> SoCalGas made an identical argument in *Gandsey* that attorney review of documents listed on the privilege log would be excessively burdensome. The court rejected the argument, finding that “whether or not this is burdensome, it is legally required. The size of these proceedings does not give Defendants license to hide behind unjustified privilege claims,”<sup>46</sup> and that “the court has merely required that Defendants meet their most basic obligations under the discovery rules: namely, that an assertion of privilege be made in good faith and supported by sufficient factual information so that it can be evaluated by Plaintiffs and by this court. . . .”<sup>47</sup> Here, SoCalGas appears to be asserting that its counsel cannot declare they have fulfilled their basic discovery obligations in good faith without risking perjury and a Rule 1 violation, but does not seem concerned at the prospect of providing misleading or legally deficient privilege logs, which would also be a Rule 1 violation.

Additionally, SoCalGas argues that a declaration of good faith would constitute an improper waiver of attorney-client privilege, driving a wedge between attorney and client, and causing ethical issues for the attorney. These assertions only follow if SoCalGas’ counsel actually intends to produce privilege logs in bad faith with no basis in fact or law, as the Superior Court in the Aliso Canyon cases found they did. Any privilege log that SoCalGas produces must identify sufficient legal and factual bases for its good faith assertions of privilege over each

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<sup>44</sup> See August 3, 2020 Order at 11.

<sup>45</sup> Application for Rehearing at 44, n.145.

<sup>46</sup> *Gandsey* Order at 12.

<sup>47</sup> *Id.* at 20.

document, with particularity.<sup>48</sup> It is not a betrayal of litigation strategy or counsel’s legal theories to declare that a document produced for the Commission is legally compliant, and should not present any “divide between an attorney and his or her client.”<sup>49</sup>

### III. CONCLUSION

For these reasons, the Commission should reject SoCalGas’ Application for Rehearing.

Dated: January 11, 2021

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<sup>48</sup> *Catalina Island Yacht Club v. Superior Court*, 242 Cal. App. 4<sup>th</sup> 1116, 1130 (2015) (“A privilege log typically should provide the identity and capacity of all individuals who authored, sent, or received each allegedly privileged document, the document’s date, a brief description of the document and its contents or subject matter sufficient to determine whether the privilege applies, and the precise privilege or protection asserted.”).

<sup>49</sup> Application for Rehearing at 43.