BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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)

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(NOT IN A PROCEEDING)

Southern California Gas Company ("SoCalGas") hereby files this response to Public Advocates Office's 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) (the "Motion to Compel").[1]

I. INTRODUCTION

The Motion to Compel is Cal Advocates' *third* attempt in the past three months to compel SoCalGas to disclose information related to its 100% shareholder-funded political activities—information which is protected from compelled disclosure under the First Amendment of the United States Constitution (and its California Constitution counterpart), as well as longstanding United States Supreme Court and California Supreme Court precedent. As SoCalGas argued regarding Cal Advocates' two earlier attempts—its overbroad and unconstitutional subpoena dated May 5, 2020, which should be partially quashed; and its motion for contempt and fines filed three weeks ago, which should be denied—this Motion to Compel

[1] This briefing is connected with the Docket related to SoCalGas's Motion for Reconsideration/Appeal, and as such, subject to Chief ALJ Anne Simon's October 29, 2019 email instructions to the parties that they must request permission before filing. SoCalGas notes that Cal Advocates requested no such permission prior to filing its frivolous Motion to Compel.

improperly seeks information to which it is not entitled under the U.S. and California Constitutions, and should therefore be denied.

On December 2, 2019—that is, over seven months ago—SoCalGas filed a motion to seal four confidential declarations submitted to the Commission in support of SoCalGas's Motion for Reconsideration/Appeal[2] (the "Confidential Declarations"), which seeks reversal of an ALJ ruling erroneously compelling the production of First Amendment-protected documents.[3] The Confidential Declarations contain the identities of consultants and vendors who have performed work in furtherance of SoCalGas's 100% shareholder-funded political activities and the descriptions of those activities. As the declarations attest, the disclosure of that information to Cal Advocates will have a chilling effect on SoCalGas's First Amendment rights. Instead of opposing the motion to seal at the time it was filed, Cal Advocates filed its response to SoCalGas's Motion for Reconsideration/Appeal addressing the substance of the Confidential Declarations, then waited seven months before seeking to compel production of the Confidential Declarations and $1 million in fines against SoCalGas for filing them conditionally under seal.

The Motion to Compel fails for five reasons.

First, Cal Advocates has waived its right to compel production of the Confidential Declarations because it failed to oppose SoCalGas's duly filed Motion to Seal. Under Commission Rules of Practice and Procedure Rule 11.4(b), Cal Advocates had ten days to oppose the Motion to Seal. It didn't. The Commission should reject Cal Advocates' eleventh-hour attempt to deflect onto SoCalGas the consequences of its own delay via a frivolous motion for fines.

Second, SoCalGas followed the correct procedure in filing a Motion to Seal and withholding the Confidential Declarations from Cal Advocates. This procedure, albeit

[2] The full name of this motion is SoCalGas's 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).

[3] The full name of the motion is Motion of Southern California Gas Company's (U 904 G) For Leave to File Under Seal Confidential Versions of Declaration Numbers 3, 4, 5, and 6 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). It shall be referred to hereinafter as the "Motion to Seal." The Commission has not yet ruled on either motion.

uncommon, is necessary here because the harm SoCalGas seeks to protect against is precisely disclosure of its information to Cal Advocates.

Third, even if Cal Advocates had timely filed an opposition to the December Motion to Seal, which it did not, Cal Advocates is not entitled to compel disclosure of SoCalGas's private political associations. The Motion to Compel invites the Commission to openly defy the U.S. and California Constitutions and California Supreme Court precedent. The Commission should decline to do so and deny the motion.

Fourth, the Motion to Compel improperly treats SoCalGas's Motion to Seal as an abuse of process and seeks to impose fines on SoCalGas for engaging in protected activity—petitioning the Commission. This runs afoul of the litigation privilege and *Noerr-Pennington* doctrine. The Commission cannot assess liability on SoCalGas in the form of enormous fines for engaging in the adjudicatory process. The due process protections afforded by the United States and California Constitutions, which apply in full force to proceedings and "non-proceedings" alike before this Commission, mean that SoCalGas may not be forced to waive or forfeit its rights and privileges without basic adjudication of those rights and privileges.

Finally, this Commission should not assess fines outside of a proceeding and without notice and an evidentiary hearing on issues of disputed material facts. (Indeed, Cal Advocates' Motion to Compel suffers from the same fundamental flaw as the Contempt Motion it filed three weeks ago.[4])

To be clear, Cal Advocates is simply attempting to gin up a controversy for which it can threaten millions of dollars of fines and sanctions, because at least once before, it succeeded in forcing SoCalGas to turn over First Amendment-protected information under protest to avoid them. This is improper, and the Motion should be denied.

[4] The full name of the Contempt Motion is the 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).

II. FACTUAL BACKGROUND

The Motion to Compel raises a familiar refrain: the same constitutional issues present in the pending Motion for Reconsideration/Appeal, SoCalGas's Motion to Quash,[5] and Cal Advocates' Contempt Motion.

A. SoCalGas Submitted Confidential Declarations Under Seal to the Commission in December 2019, Which Cal Advocates Chose Not to Oppose.

On August 13, 2019, Cal Advocates served SoCalGas with a data request seeking "all contracts (and contract amendments) covered by the WOA which created the BALANCED ENERGY IO."[6] In response, SoCalGas produced contracts funded by both SoCalGas ratepayers and shareholders, but it objected to producing its 100% shareholder-funded contracts on the grounds that it exceeded the scope of Cal Advocates' duties under Public Utilities Code §§ 309.5 and 314. On October 7, 2019, Cal Advocates moved to compel production of the 100% shareholder-funded contracts. In opposition, SoCalGas argued that production of those contracts would have a chilling effect on its First Amendment rights.[7]

On November 1, 2019, the ALJ granted Cal Advocates' motion, ordering SoCalGas to produce the contested contracts within two business days.[8] SoCalGas disagreed with that ruling, which compelled it to turn over information subject to protection under the First Amendment of the U.S. Constitution and the corresponding articles of the California Constitution, and accordingly it filed a motion to stay the ruling.[9] But with no ruling on the stay motion and facing

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[5] Southern California Gas Company's (U 904 G) Motion to Quash Portion of the Subpoena To Produce Access to Certain Materials in Accounting Databases and to Stay Compliance until the May 29th Completion of Software Solution to Exclude Those Protected Materials in the Databases (Not in a Proceeding).

[6] Mot. to Compel Responses from Southern California Gas Company to Question 8 of Data Request CalAdvocates-SC-SCG-2019-05 (Not in a Proceeding) (Oct. 7, 2019) at pp. 2, 6.

[7] See Response of SoCalGas Pursuant to October 7, 2019 Motion to Compel Further Responses from Southern California Gas Company to Data Request—Cal Advocates-SC-SCG-2019-05 (Not in a Proceeding).

[8] Motion to Compel, Ex. 1.

[9] The full name of that motion is Southern California Gas Company's (U 904 G) Emergency Motion to Stay Pending Full Commission Review of 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, dated Nov. 4, 2019.

significant potential fines of up to $100,000 a day, SoCalGas produced under protest the 100% shareholder-funded contracts at issue on November 5, 2019 and reserved its rights to appeal the decision.[10]

On December 2, 2019, SoCalGas filed its Motion for Reconsideration/Appeal seeking reversal of the ALJ's November 1 ruling. In support of that Motion, SoCalGas attached six declarations attesting to the chilling effect that disclosure to Cal Advocates would cause to its private political activity. Four of these declarations—the Confidential Declarations—redacted identifying information that would reveal precisely the information SoCalGas seeks to protect: the identity of third-party consultants and vendors with whom SoCalGas associates, and the descriptions of its associational activities and speech. At the same time, SoCalGas also filed a Motion to Seal the unredacted versions of the Confidential Declarations. Electronic copies of the Motion for Reconsideration and Motion to Seal were served on several Cal Advocates personnel.[11]

The Motion to Seal clearly states that SoCalGas filed the unredacted versions of the Confidential Declarations with the Commission. The Motion to Seal's concluding paragraph requests the Commission grant the motion "designating the redacted portions of Declaration Numbers 3, 4, 5, and 6 ***filed directly with the Docket Office in connection with the Motion for Reconsideration/Appeal*** as confidential and protect the material under seal."[12]

Under Rule 11.4(b) of the Commission's Rules of Practice and Procedure, Cal Advocates' opposition to the Motion to Seal was due on December 10, 2019. Cal Advocates did not file a response to the Motion to Seal. On December 17, 2019, Cal Advocates, through its attorney Rebecca Vorpe, filed a response to the Motion for Reconsideration/Appeal.[13] In that response, Cal Advocates addressed the Confidential Declarations on the merits, arguing that the

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[10] See Motion for Reconsideration/Appeal, p.8. Cal Advocates appears to suggest the November 1 Ruling applied to the Confidential Declarations as well, Motion to Compel p. 5—but this would be impossible, since the Confidential Declarations post-date that ruling by more than one month.

[11] Motion to Compel, Ex. 4.

[12] Motion to Seal, p. 3 (emphasis added).

[13] *See* Public Advocates Office's Response to 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), dated Dec. 17, 2019.

"declarations from [SoCalGas's] contracting partners" failed to "establish a prima facie case of probable First Amendment infringement."[14] At no point did Cal Advocates claim that not having the Confidential Declaration prejudiced their Response. Instead, Cal Advocates addressed the merits of the Confidential Declarations in its Response.

B. SoCalGas Attempted to Submit, and then Substituted Out, New Declarations in Support of its May 2020 Motion to Quash, Which the ALJ Approved.

On May 5, 2020, Cal Advocates served a subpoena on SoCalGas seeking access to SoCalGas's SAP accounting database—which includes information implicating SoCalGas's First Amendment rights, not to mention attorney-client and attorney work product privileges. On May 19, 2020, SoCalGas filed its Motion to Quash. There, SoCalGas sought an order quashing the portion of the Subpoena that would permit access to SoCalGas's material protected from disclosure, and an extension of the compliance deadline for the subpoena until May 29, 2020 so that SoCalGas could complete a software solution necessary to exclude those protected materials from Cal Advocates' access.[15]

As support for its Motion to Quash, SoCalGas also filed a motion to seal new confidential declarations from its vendors (the "New Declarations") demonstrating the chilling effect Cal Advocates' unmitigated access to SoCalGas's 100% shareholder-funded political activities would have. But, due to the COVID-19 pandemic, SoCalGas lacked the capacity to file the hard copies of the New Declarations that same day. SoCalGas's counsel requested permission to file the New Declarations with the Docket Office the next week, which was granted by the ALJ on May 22, 2020.[16] The ALJ ordered that electronic copies of the New Declarations (not the Confidential Declarations filed in December) should be provided to the Commission staff, "including the Cal Advocates office."[17] Counsel for SoCalGas explained in a follow up email that it was "not in a position to provide the confidential materials to CalPA," as "explained further in the pending motions."[18] SoCalGas proposed that it instead file substituted motions and

[14] *Id.* at pp. 13-14.

[15] Motion to Quash, p. 3.

[16] Motion to Compel, Ex. 7 [Email from E. Henry dated May 19, 2020].

[17] *Id.* [Email from R. DeAngelis dated May 22, 2020].

[18] *Id.* [Email from E. Henry dated May 22, 2020].

declarations that did not contain **any** confidential information.[19] ALJ DeAngelis responded that SoCalGas's "request is approved," and SoCalGas made that filing the same day.[20] Accordingly, Cal Advocates' suggestion that SoCalGas is currently in violation of some kind of "determination" by the ALJ that it is "entitled" to the Confidential Declarations is wrong.[21] The ALJ made no reasoned determination that Cal Advocates was entitled to the Confidential Declarations as they were not at issue (the New Declarations were), *and* the ALJ approved of SoCalGas's proposal to file substituted, non-confidential declarations in any event.

C. Cal Advocates Requests the Confidential Declarations Anew.

In late June, in an attempt to cure its earlier waiver of its objection to the Motion to Seal, Cal Advocates inexplicably demanded the Confidential Declarations from the December motion in a meet and confer email.[22] By letter, SoCalGas rejected Cal Advocates' untimely and unjustified request.[23] Cal Advocates threatened to move for sanctions—and filed the instant motion.

D. Cal Advocates Misrepresents SoCalGas's Record on Providing Data.

Cal Advocates attempts to paint this dispute as part of a long-running campaign by SoCalGas to "disrespect" the Commission. To briefly correct the remaining factual record:

- SoCalGas is not withholding information from the Commission. The Confidential Declarations were provided to the Commission in hard-copy form filed with the Docket Office. Cal Advocates' suggestion to the contrary is inapposite.[24]

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[19] *Id.*

[20] *Id.* [Email from R. DeAngelis dated May 22, 2020].

[21] Motion to Compel, p. 4 ["Cal Advocates is entitled to the confidential versions of the declarations, consistent with the determination made by ALJ DeAngelis on May 22, 2020 that SoCalGas 'provide electronic copies of the confidential information to *all* Commission staff on the above service list, including the Cal Advocates office.'"].

[22] Motion to Compel, Ex. 5 [Email of T. Bone to E. Henry dated June 24, 2020].

[23] Motion to Compel, Ex. 6 [Ltr. of J. Wilson to T. Bone dated June 29, 2020].

[24] Motion to Compel, p. 8. Cal Advocates equivocates on this point, but, as an adversarial body whose mission is to advocate for ratepayers' interests within the Commission, it is positioned differently toward SoCalGas than the full Commission.

- SoCalGas is not in violation of the November 1, 2019 Order. It complied with that order in turning over the contracts under protest. The Confidential Declarations were not at issue at the time the order was released—indeed, they post-date that order by a month.
- There are no Data Requests that have been outstanding for three months. As of June 25, 2020, SoCalGas had responded to all fourteen of Cal Advocates' data requests, consisting of 110 questions. In meet and confers during May, SoCalGas agreed to revise certain responses it had previously provided. This process is ongoing. Five amended responses have been provided as of June 15, 2020. On June 30, 2020, Cal Advocates served an extensive fifteenth data request including 25 questions. On July 10, 2020, SoCalGas responded to 15 of the 25 questions, and it is in the process of preparing its responses to the remainder.
- SoCalGas has offered Cal Advocates access to 96% of the data contained in its SAP database, as soon as it executes a non-disclosure agreement it itself committed to signing before inexplicably reversing its position on that issue.
- Cal Advocates' reference to the SED's Aliso Canyon Motion for Sanctions is inapt, as that motion was denied.

The factual record does not support the imposition of fines.

III. ARGUMENT

A. Cal Advocates Has Waived its Objections to the Motion to Seal.

Cal Advocates waived its objections to filing the Confidential Declarations under seal because it failed to respond within the ten-day deadline under Commission procedures. As discussed above, SoCalGas filed the Confidential Declarations in hard copy with the full Commission on December 2, 2019, along with a Motion to Seal, and served redacted versions of those declarations on opposing counsel. Under Rule 11.4(b), "[r]esponses to motions to file pleadings, or portions of pleading, under seal shall be filed and served within 10 days of the date that the motion was served."[25] Cal Advocates' response was therefore due on December 12, 2019. Cal Advocates did not file any response to the Motion to Seal on or before that date.[26] Cal

[25] Com. Rule of Practice and Procedure Rule, rule 11.4(b).

[26] Cal Advocates is bound by the actions of its then-counsel under Cal. Civ. Code § 283.

Advocates' belated Motion to Compel—filed seven months after its opposition was due—is untimely and should be disregarded on that basis alone.[27]

Cal Advocates claims that it "did not realize" the Confidential Declarations were provided to the Commission in December, until "newly assigned counsel realized that the confidential versions of the declarations were necessary to respond to SoCalGas's May 2020 motions[.]"[28] This is patently false—Cal Advocates, including its attorney Rebecca Vorpe, were notified that the Confidential Declarations were hard-copy filed with the Docket Office through the Motion to Seal, which says so explicitly. And clearly the Confidential Declarations were not necessary to respond to the Motion for Reconsideration/Appeal, which Cal Advocates opposed addressing the Confidential Declarations on the merits. Cal Advocates is therefore barred from bringing its motion now because it waived its opposition when the ten-day deadline passed.[29]

B. SoCalGas Followed the Proper Procedure By Filing a Motion to Seal And Not Giving The Confidential Declarations to Cal Advocates.

Cal Advocates' assertion that SoCalGas wrongfully withheld the Confidential Declarations when it moved to file them under seal is incorrect. Commission procedures as well as analogous procedures in the court system provide that sealing confidential information is proper when opposing counsel as well as the public must be excluded from viewing it.

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[27] The Commission routinely grants unopposed motions to seal. *See Application of San Diego Gas & Elec. Co. (U902E) for Approval of: (i) Contract Admin., Least Cost Dispatch & Power Procurement Activities; & (II) Costs Related to Those Activities Recorded to the Elec. Res. Recovery Account, Incurred During the Record Period Jan. 1, 2007 Through Dec. 31, 2007.*, A.08-05-036, 2009 WL 254790, at *3 (Jan. 29, 2009) ["Pursuant to Rules 11.4 and 11.5, SDG&E also filed a motion to seal a portion of the evidentiary record. There is no opposition to the motions. Accordingly, the motions are granted, as requested."]; see also *Application of NRG Energy Ctr. San Francisco LLC (U909H), NRG Energy, Inc., NRG Repowering Holdings LLC, & GIP III Zephyr Acquisition Partners, L.P. for Auth. to Sell & Transfer Indirect Control of NRG Energy Ctr. San Francisco LLC to GIP III Zephyr Acquisition Partners, L.P.*, A.18-02-019, 2018 WL 3753822, at *6 (July 12, 2018) [same outcome]; *Application of S. California Edison Co. (U 338-E) for Approval of Its Forecast 2009 ERRA Proceeding Revenue Requirement, to Increase Its ERRA Proceeding Revenue Requirement by $341.9 Million Beginning Jan. 1, 2009, to Consolidate All Comm'n-Authorized Revenue Requirements, & to Set Unbundled Rate Components Beginning Jan. 1, 2009.*, A.08-09-011, 2009 WL 254786 (Jan. 29, 2009) [same].

[28] Motion to Compel, p. 3.

[29] Cal Advocates' argument that it is not bound by Commission Rules confirms that this "non-proceeding" fails to provide basic due process to SoCalGas.

Article XII, section 2 of the California Constitution allows the Commission to establish its own procedures "subject to . . . due process."[30] Procedural due process requires SoCalGas be allowed to adjudicate its rights without waiving them in the process. The Commission has provided for confidential treatment of information to be filed in the docket pursuant to a motion under Rule 11.4 of the Commission Rules.[31] That Rule provides for parties to file a motion for leave to file under seal.[32] Nothing in General Order 66-D or Rule 11.4 require SoCalGas to serve the Confidential Declarations on opposing counsel—particularly when (as explained in the motions) to do so would violate SoCalGas's rights.

Analogous situations in California courts confirm that a motion to seal is proper to keep confidential information from an adversary pending adjudication of rights or privileges. The California State Legislature has recognized that protecting rights and privileges requires that in certain circumstances the opposing party is not entitled to see privileged information. For example, for most attorney client privilege claims or attorney work product privilege claims, opposing counsel is forbidden to view the information—and for the attorney-client privilege, even "the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product under subdivision (a) of Section 2018.030 of the Code of Civil Procedure in order to rule on the claim of privilege."[33]

Similarly, Evidence Code section 915(b) provides that in other cases, such as in trade secret matters:

> [T]he court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.[34]

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[30] Cal. Const., art. XII, § 2.

[31] Cal.P.U.C., General Order No. 66-D (Feb. 1, 2019) § 3.3.

[32] Com. Rules of Practice and Procedure, rule 11.4.

[33] Evid. Code, § 915, subd. (a).

[34] Evid. Code, § 915, subd. (b).

In addition, defendants often have constitutional rights against disclosure of certain information from the adverse party. In those instances, the California Supreme Court has made it clear that a motion to seal is an appropriate procedure to protect a constitutionally protected right. For example, in *Garcia v. Superior Court* (2007) 42 Cal.4th 63, Garcia, who was in a dispute with a police department, filed an attorney declaration under seal as part of a Pitchess motion.[35] Counsel for the police department demanded that the declaration be unsealed.[36] The California Supreme Court upheld the sealing, noting that "'declarations and other supporting evidence may be submitted to the trial court for in camera examination' to protect a defendant's constitutional rights."[37] Similarly, in *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, , the Court of Appeal condoned a procedure exactly analogous to what SoCalGas here:

> To preserve a defendant's claim of confidentiality at the time of any discovery motion, declarations and other supporting evidence may be submitted to the trial court for in camera examination so that the court may decide if the claim of confidentiality is justified and, if so, to what extent.[38]

The trial court should, "in light of all the facts and circumstances," make the information available to the party opposing the motion only when "consistent with [the] protection of the defendant's constitutional rights[.]"[39]

Here, Cal Advocates' assertion that SoCalGas did something wrong by serving only redacted versions of the Confidential Declarations on Cal Advocates is at odds with the sealing procedure that the California Supreme Court set forth in *Garcia*:

> Counsel should give "proper and timely notice" of the privilege, and provide the court with the affidavit the defense seeks to file under seal, along with a proposed redacted version. The proposed redacted version should be served on opposing counsel.[40]

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[35] *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 68.

[36] *Ibid.*

[37] *Id.* at p. 78.

[38] *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, 1130, as mod. (Dec. 1, 1988) (superseded by statute on other grounds).

[39] *Ibid.*

[40] *Garcia v. Superior Court*, *supra*, 42 Cal.4th at p. 73 [citations omitted].

This is precisely the process SoCalGas followed. SoCalGas gave Cal Advocates notice of its First Amendment claim, and it served a redacted copy of the declarations on Cal Advocates. Thus, the procedure SoCalGas followed when it filed the Motion to Seal and Confidential Declarations before the Commission was proper.

C. The Motion to Compel Should Be Denied Because Cal Advocates Is Not Entitled to the Confidential Declarations Under the First Amendment.

Even if Cal Advocates' Motion to Compel was timely (which it is not), it should be denied. Although Cal Advocates has broad investigatory powers under the Public Utilities Code, those powers are necessarily curtailed by the rights afforded by the First Amendment of the U.S. Constitution and Article I of the California Constitution. Therefore, its claim that "undisputed facts" support an order to compel here[41] rests on a fundamentally false premise: Cal Advocates is not entitled to the underlying information it seeks. The only authority on which Cal Advocates relies to demand the Confidential Declarations is its statutory authority under Public Utilities Code §§ 309.5(e) and 314.[42] This is insufficient. As SoCalGas has argued in its earlier Motion for Reconsideration/Appeal, Motion to Quash, and opposition to the Contempt Motion, Cal Advocates' statutory authority is limited by the U.S. and California Constitutions.

1. Cal Advocates' Statutory Authority to Inspect SoCalGas's Books and Records is Limited by the First Amendment

The United States Supreme Court has confirmed that regulated utilities such as SoCalGas enjoy the full protections of the First Amendment—including as against this Commission. In *Pacific Gas & Elec. Co. v. Public Utilities Com.*, 475 U.S. 1 (1986), the Commission argued before the Supreme Court that regulated utilities had fewer free speech rights than private entities. The Supreme Court rejected the argument.[43] More recently, the Court of Appeal reiterated that Commission authority is necessarily curtailed by utilities' First Amendment rights, stating, "It is well established that corporations such as PG&E have the right to freedom of speech, since '[t]he inherent worth of the speech in terms of its capacity for informing the public

[41] Motion to Compel, pp. 5-6.

[42] Motion to Compel, p. 6.

[43] *Pacific Gas & Elec. Co. v. Public Utilities Com.* (1986) 475 U.S. 1, 17, fn. 14 ["[The CPUC] argue[s] that appellant's status as a regulated utility company lessens its right to be free from state regulation that burdens its speech. We have previously rejected this argument."].

does not depend upon the identity of its source, whether corporation, association, union, or individual.'"[44] Therefore, Cal Advocates' authority to review SoCalGas's books and records is limited by SoCalGas's First Amendment rights.

Longstanding United States and California Supreme Court precedent guarantees to SoCalGas the "right to associate for the purpose of engaging in those activities protected by the First Amendment."[45] Accordingly, organizations cannot be forced to disclose "strategy and messages" that advance a certain political viewpoint, position, or belief, because those organizations have a right to associate and exchange such ideas in private.[46] Demands for the production of materials furthering political association and expression encroach on constitutionally protected activity because of its deterrent effect on those activities. The California Supreme Court has made clear that such compelled disclosure is improper:

> As we explain, for more than two decades decisions of both the United States Supreme Court and this court, recognizing that compelled disclosure of private associational affiliations or activities will inevitably deter many individuals from exercising their constitutional right of association, have established that such intrusion into associational privacy may be sanctioned only upon the demonstration of a very important, indeed "compelling," state interest which necessitates the disclosure.[47]

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[44] *Pacific Gas & Elec. Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 86, 93.

[45] *Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 617; see also *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1019 [given its "more definitive and inclusive" language, the California Constitution's free-speech clause is interpreted even "more expansive[ly]" than the First Amendment (citation omitted)]; *National Assn. for Advancement of Colored People v. State of Ala. ex rel. Patterson*, (1958) 357 U.S. 449, 460 [it is "beyond debate" that the freedom to engage with others to advance "beliefs and ideas is an inseparable aspect of the 'liberty'" protected by the Constitution]; *Buckley v. Valeo*, (1976) 424 U.S. 1, 14 [the First Amendment constitutes a "profound national commitment" to the idea that debating public issues "should be uninhibited, robust, and wide-open." (quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270]; *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 464 [the right to free association is "fundamental"].

[46] *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1162-1163; see *American Federation of Labor and Cong. of Industrial Organizations v. Federal Election Com.* (D.C. Cir. 2003) 333 F.3d 168, 170 [substantial First Amendment interests implicated by forcing release of "political groups' strategic documents and other internal materials"].

[47] *Britt v. Superior Court* (1978) 20 Cal.3d 844, 848–849.

2. Cal Advocates' Demand for the Confidential Declarations Is Subject to Strict Scrutiny, Which It Fails to Meet

Cal Advocates' demand for the Confidential Declarations falls squarely within *Britt's* description of a "compelled disclosure of private associational affiliations or activities."[48] The redacted portions of the Confidential Declarations reveal precisely with whom SoCalGas has associated and what political work was done on SoCalGas's behalf. This is the type of information protected by the right of association under the First Amendment.

Disclosure of the Confidential Declarations would impermissibly chill SoCalGas's ability to engage in its constitutionally protected rights. Ironically, *this is precisely the harm to which the Confidential Declarations attest*.[49] As discussed at length in the Motion for Reconsideration/Appeal, in Declaration 6, the head of one government relations and public-affairs firm attested 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."[50] Another government relations professional stated that disclosures to Cal Advocates "have made me reconsider whether I want to work and associate with SoCalGas in the future," and that "[a]s a result of the disclosures to the California Public Advocates Office (and likelihood of its additional demands for disclosure), I am reluctant to continue associating with SoCalGas and am seriously considering limiting my association with SoCalGas in the future."[51] Yet another public affairs professional confirms that the disclosure to Cal Advocates of that professional's contract with SoCalGas "has made me less willing to work and associate with SoCalGas in the future."[52] Disclosure of the Confidential Declarations would consist of the same harm described in the declarations themselves.

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[48] *Britt v. Superior Court*, *supra*, 20 Cal.3d. at pp. 848–849.

[49] The redacted Confidential Declarations are attached to the Motion to Compel as Exhibit 2. *Perry v. Schwarzenegger*, *supra*, 591 F.3d. at p. 1163 discusses at length the propriety of using declarations to attest to the impact compelled disclosure would have on associational rights, as part of a *prima facie* showing of infringement on the First Amendment.

[50] Motion to Compel, Ex. 2 [Declaration 6, ¶ 4].

[51] Motion to Compel, Ex. 2 [Declaration 4, ¶¶ 5, 8].

[52] Motion to Compel, Ex. 2 [Declaration 5, ¶ 4].

Because compelled disclosure of the Confidential Declarations to Cal Advocates would have a chilling effect on SoCalGas's exercise of its rights, the law requires exacting scrutiny of the disclosure. This means Cal Advocates is not entitled to compel the disclosure of SoCalGas's private political affiliations unless it can demonstrate that it furthers a "compelling interest" that is "narrowly tailored" to achieve that interest.[53] Cal Advocates cannot meet this test. Cal Advocates does not identify *any* compelling state interest that compels the disclosure of this information—not in its meet and confer correspondence from June, and not in its Motion to Compel. Cal Advocates identifies only that it has the right to seek these materials under its statutory powers, in order to further its investigation into alleged use of ratepayer monies to fund anti-decarbonization "astroturf" organizations.[54] But obviously, this is not enough—as discussed above, those statutory powers are subject to SoCalGas's constitutional rights. And, Cal Advocates cannot demonstrate that it needs to know the identities of 100% *shareholder-funded* consultants in order to investigate *ratepayer-funded* contracts.

Cal Advocates also argues that it needed the Confidential Declarations to properly respond to the Motion to Quash—but obviously, it did not. First, the Motion to Quash involved the New Declarations—a different set of declarations than those submitted in December. Second, SoCalGas substituted the New Declarations out and did not rely on them in its Motion to Quash, to which Cal Advocates—through the very same counsel who filed this Motion—submitted a response without incident.[55] Cal Advocates' demand to turn over the Confidential Declarations wholesale is not "narrowly tailored" to meet *any* compelling state interest, and therefore should be rejected.

D. Fining SoCalGas Under Rule 1.1 for Filing its Motion to Seal Would Run Afoul of the Litigation Privilege and *Noerr-Pennington* Doctrine.

Rather than attack SoCalGas's Motion to Seal on its merits before the full Commission, Cal Advocates' treats SoCalGas's Motion to Seal like it is some sort of abuse of process.[56] Thus,

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[53] *Citizens United v. Federal Elections Com.* (2010) 558 U.S. 310, 339; see also *Governor Gray Davis Com.v. Am. Taxpayers Alliance*, *supra*, 102 Cal.App.4th at p. 464 [same]; *Britt v. Superior Court*, *supra*, 20 Cal.3d at p. 864 [same].

[54] Motion to Compel, p. 6; *see also id.*at pp. 1,4.

[55] Motion to Compel, p. 3.

[56] The "tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed." *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056. The elements a

the essence of Cal Advocates' argument for fines is that, because it is entitled to the Confidential Declarations (which it is not), SoCalGas's Motion to Seal those declarations was not proper and a violation of Rule 1.1 through an unlawful "withholding of information" from Cal Advocates.[57] But regardless whether SoCalGas ultimately prevails on its First Amendment arguments in the Motion for Reconsideration/Appeal, it was absolutely proper for it to file the Confidential Declarations conditionally under seal pending adjudication of its rights. Fining it for exercising those rights would run afoul of the litigation privilege and the *Noerr-Pennington* doctrine, which precludes liability for actions taken in petitioning the Commission.

It bears noting in the first instance that the Commission has not even ruled on the Motion to Seal, which Cal Advocates concedes.[58] Demanding fines in a motion directed to the ALJ, when the Commission has not even ruled on the merits of the Motion to Seal (which Cal Advocates did not oppose), is procedurally improper. Moreover, Cal Advocates cannot seek fines on SoCalGas for filing its Motion to Seal on the theory that the filing is an abuse of process because that activity was absolutely privileged under the litigation privilege, and seeking relief from the full Commission is protected by the *Noerr-Pennington* doctrine.

The litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action."[59] "Judicial or quasi-judicial" proceedings "are defined broadly to include 'all kinds of truth-seeking proceedings,' including administrative, legislative and other official proceedings."[60] Though originally enacted with reference to defamation, the privilege "is now held applicable to

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litigant must prove are "that the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings." *Id.* at p. 1057. Cal Advocates' motion is short on explanations but clearly views the Motion to Seal as an improper attempt to withhold information from Cal Advocates and thus an abuse of process. SoCalGas's motion is not an abuse of process because, as discussed in the motion itself, is has a clear and valid basis in the First Amendment.

[57] Motion to Compel, pp. 6-7.

[58] Motion to Compel, p. 2, fn. 8.

[59] *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212, as mod. (Mar. 12, 1990); Civ. Code, § 47, subd. (b).

[60] *People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 958, as mod. (Feb. 1, 2008).

any communication . . . and all torts except malicious prosecution."[61] This includes an abuse of process claim, as long as it is based on communicative conduct.[62]

Communicative conduct includes declarations[63] as well as "motions filed by persons seeking relief from a court,"[64] and communications before a governmental agency to spur agency action.[65] SoCalGas's Motion to Seal the Confidential Declarations before the full Commission is just such a protected communication. Because Civil Code section 47(b) creates a safe harbor for such communications, Rule 1.1 cannot be used like an abuse of process claim to "assault that harbor" via a collateral attack by creating liability for such conduct in a separate motion before the ALJ.[66] Further, "[a]ny doubt about whether the privilege applies is resolved in favor of applying it."[67] Therefore, the litigation privilege applies to absolutely bar a Rule 1.1 violation premised on the notion that the filing of the Motion to Seal was some sort of wrongful abuse of process—before the Commission has even ruled upon it.

Similarly, the *Noerr-Pennington* doctrine "preclude[s] virtually all civil liability for a defendant's petitioning activities before not just courts, but also before administrative and other governmental agencies."[68] "It is only when efforts to influence government action are a 'sham'

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[61] *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p.1057 [quoting *Silberg v. Anderson, supra,* 50 Cal.3d at p. 212].

[62] *Id.* at p. 1065.

[63] *Pollock v. Univ. of Southern Cal.* (2003) 112 Cal.App.4th 1416, 1431 [declaration "functions as written testimony," is a "communication, not conduct," and "is exactly the sort of communication the privilege is designed to protect"].

[64] *Ramona Unified School Dist. v. Tskinas* (2005) 135 Cal.App.4th 510, 522, fn. 7; *see also Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529-532 [filing of motion for reconsideration fell within the litigation privilege; "There should be an actionable tort [of abuse of process] only when the attempt is so misguided that there is no rational connection to the lawsuit; otherwise attempts to invoke judicial jurisdiction are privileged."].

[65] *People ex rel. Gallegos v. Pacific Lumber Co., supra,* 158 Cal.App.4th at pp. 958-959. In *People ex rel. Gallegos v. Pacific Lumber Co.,* the litigation privilege applied to bar an unfair competition claim brought by the State against a lumber company that had communicated fraudulent information to government agencies during CEQA administrative proceedings. *Id.* The court found that "Pacific Lumber's communications, whether fraudulent or not, fall squarely within the scope of the litigation privilege." *Id.* .

[66] *Id.* at p. 959 [with respect to UCL claim].

[67] *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913.

[68] *People ex rel. Gallegos v. Pacific Lumber*, *supra*, 158 Cal.App.4th at pp. 964-965 [citing among other cases *California Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 510-511].

that they fall outside the protection of the *Noerr-Pennington* doctrine[.]"[69] For a petitioning activity to fall within this "sham" exception, it must meet both prongs of a strict two-part test: "first, it 'must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits'; second, the litigant's subjecting motivation must 'conceal an attempt to interfere directly with the business relationships of a competitor . . . through the use of the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.'"[70] This test is strictly applied, and improper tactics or even false statements do not render a petitioner's activities to be "less genuine" with respect to the exception.[71]

The Motion to Seal was clearly a proper procedure for protecting SoCalGas's First Amendment rights.[72] Therefore, under the *Noerr-Pennington* doctrine, SoCalGas cannot be held liable under for a Rule 1.1 violation on that basis.

E. Due Process Requires Cal Advocates Seek and Obtain Recategorization of this Matter as an Adjudicatory Proceeding with Evidentiary Hearing Prior to Contempt Findings and Assessment of Fines.

As discussed above, without citing any legal authority, Cal Advocates claims that SoCalGas is in contempt of the Commission and in violation of Rule 1.1 because it appropriately withheld its First Amendment-protected Confidential Declarations when it filed them conditionally under seal.[73] Those unsupported allegations should be rejected. But, as extensively argued in SoCalGas's prior response to Cal Advocates' earlier unfounded claims of contempt, this motion cannot be heard in the first instance because this matter has not been categorized as an adjudicatory matter under Rule 7. Due process guaranteed by the United States and California Constitutions, applicable case law, and Commission precedent requires that the Commission recategorize this as an adjudicatory proceeding, and to provide SoCalGas the due process required for such proceedings, including among other things an evidentiary hearing on

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[69] *Id.* at p. 965.

[70] *Ibid.*

[71] *Id.* at p. 968 [citing *BE & K Construction Co. v. National Labor Relations Board* (2002) 536 U.S. 516, 526].

[72] Even Cal Advocates acknowledges in a footnote that SoCalGas's First Amendment arguments might "be upheld" by the Commission. Motion to Compel, p. 13, fn. 47.

[73] Motion to Compel, pp. 6-7.

issues of disputed material fact. Moreover, Cal Advocates' demand for $1 million in fees exceeds due process as an excessive fine.

SoCalGas expressly demands that the Commission protect its rights to be heard prior to a determination of Cal Advocates' Rule 1.1 allegations, and that the Commission afford SoCalGas all the of due process protections of an adjudicatory proceeding, including an evidentiary hearing. Any attempt to award contempt and Rule 1.1 sanctions in this "non-proceeding" would be a blatant violation of SoCalGas's due process rights.

1. Before Cal Advocates' Motion Can Be Heard, This Non-Proceeding Matter Must Be Recategorized as Adjudicatory Under Rule 7.

Under the United States and California Constitutions, the government may not deprive a person of property without due process of law.[74] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[75] Thus, as the California Supreme Court has held as applied to the Commission, "[d]ue process as to the [C]ommission's ... action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made."[76] Further, as the Commission has recognized, "the United States Supreme Court has provided guidance and has stated that in an administrative law context, due process requires some type of notice and an opportunity to be heard."[77]

An agency "cannot impose administrative penalties unless an administrative hearing is held if such a hearing is requested."[78] Thus, "[a] case where the Commission considers imposing

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[74] U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 7.

[75] *Pacific Gas & Elec. Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 859 ["*PG&E*"] [citing *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314].

[76] *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 632; see also *PG&E*, *supra*, 237 Cal.App.4th at p. 859 [the PUC's power to establish its own procedures is "subject, of course, to the constitutional obligation to satisfy due process[.]"].

[77] *Order Instituting Investigation & Ordering Pacific Gas & Elec. Co. to Appear & Show Cause Why It Should Not Be Sanctioned for Violations of Article 8 & Rule 1.1 of the Rules of Practice & Procedure & Pub. Utilities Code Sections 1701.2 & 1701.3*. (Cal.P.U.C. Apr. 26, 2018) No. D. 18-04-014, 2018 WL 2149032, at *7; see also 53 Cal.Jur.3d, Public Utilities, § 95 ["The Public Utilities Commission, consistent with due process, public policy, and statutory requirements, must determine whether a proceeding requires a hearing."].

[78] *State ex rel. Dept. of Pesticide Regulation v. Pet Food Express* (2008) 165 Cal.App.4th 841, 852; see also *In re S. Pacific Trans. Co.* (Feb. 18, 1999) 85 Cal.P.U.C.2d 117 [utility claimed "penalties were

monetary penalties is an adjudicatory matter."[79] The Commission's Rules of Practice and Procedure No. 1.3(a) defines "'[a]djudicatory' proceedings" as "enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission[.]" This encompasses Cal Advocates' motion claiming that SoCalGas violated Rule 1.1 of the Commission's Rules and Procedures.

When sanctions or penalties are threatened, the Commission has recognized that due process requires it to provide notice and a hearing—by recategorizing investigations or proceedings as "adjudicatory" under Rule 7 and requiring a hearing. Further, to the extent that the Motion to Compel seeks a contempt finding (as it appears to request in the Proposed Order), the Legislature has provided that the Commission's powers to adjudicate contempt proceedings must be done "in the same manner and to the same extent as contempt is punished by courts of record."[80] Findings of contempt are "quasi-criminal in nature, and therefore the procedural and evidentiary requirements are the most rigorous and exacting of all matters handled by the Commission."[81]

The Commission examined the recategorization issue in *Order Instituting Investigation whether Pacific Gas & Elec. Co., So. Cal. Edison Co., San Diego Gas & Elec. Co., and their respective holding companies PG&E Corp., Edison Intl., and Sempra Energy, respondents, have violated relevant statutes and Commission decisions, and whether changes should be made to rules, orders, and conditions pertaining to respondents' holding company systems*, No. D.01-05-0161 (May 14, 2001). There, the Commission recategorized the proceeding to the "ratesetting" category but acknowledged that "[w]e were and continue to be fully prepared to recategorize the proceeding as adjudicatory if and when we find probable cause to believe Respondents have

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imposed in violation of SP's right to due process without adequate notice or an opportunity to be heard…."]; *Annex British Cars, Inc. v. Parker-Rhodes* (1988) 198 Cal.App.3d 788, 793 [in context of court-issued sanctions, "it is basic that counsel must have the opportunity to be heard on the issue before sanctions can be imposed]; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 654 ["sanctions [for frivolous appeals] should be imposed rarely and only if the mandates for procedural due process are obeyed"]; ibid. ["[T]he rudiments of fair play include notice, an opportunity to respond, and a hearing."].)

[79] *PG&E*, *supra*, 237 Cal.App.4th at p. 829, fn. 9.

[80] Pub. Util. Code, § 2113.

[81] *Order Instituting Investigation on the Commissions Own Motion into the Fatal Accident at the San Francisco Mun. Transportation Agency's Mission Rock Station in the City & Cty. of San Francisco, on Dec. 1, 2012.*, No. D. 15-08-032, 2015 WL 5159105, at *5 (Aug. 27, 2015) ["*SFMTA*"].

violated the law and we opt to make final findings on such violations and settle on remedies."[82] Similarly, relying on this decision in a proceeding considering sanctions on PG&E for violation of Public Utilities Code Section 851, General Order 69-C, Rule 1.1, and other Commission decisions, the Commission found it necessary to recategorize a proceeding as adjudicatory, as well as provide a more detailed specification of violations and evidence against PG&E, "in a manner that provides PG&E adequate notice and opportunity to be heard."[83] Moreover, although the Commission at times assesses fines outside of an adjudicatory proceeding, the Commission recognized that even in a ratesetting proceeding "due process requires adequate notice and an opportunity to be heard" prior to fines being assessed – procedural requirements SoCalGas currently lacks in this "non-proceeding."[84]

The example in *Order Instituting Investigation on the Commissions Own Motion into the Fatal Accident at the San Francisco Mun. Transportation Agency's Mission Rock Station in the City & Cty. of San Francisco, on Dec. 1, 2012*, No. D. 15-08-032, 2015 WL 5159105 (Aug. 27, 2015) ["SFMTA"] demonstrates the process due SoCalGas before the Commission may assess fines and penalties. There, the Commission's Safety and Enforcement Division issued a subpoena outside of a proceeding, and in response to SF MTA's noncompliance with the subpoena, the Commission instituted an Order Instituting Investigation against SF MTA.[85] The Commission held a prehearing conference, and set forth a Scoping Memo and Ruling identifying

[82] *Id.* at *6; see also *id.* at *7-8 ["At the end of the investigation, if we determine that one or more of the Respondents likely have violated the conditions imposed by our holding company decisions or other law, we will specify, in detail, the nature of those alleged violations, and the evidence supporting those charges. At that point, if we decide to proceed to determine finally whether such violations occurred, and whether Respondents should be held liable for such violations, we will recategorize the proceedings as adjudicatory—thus imposing an ex parte ban and affording Respondents the right to cross-examine witnesses—and proceed to make those determinations."].)

[83] *In Re Application of Pacific Gas & Elec. Co.* (Cal.P.U.C. Sept. 20, 2001) No. D.01-06-043, 2001 WL 1287503.

[84] See *In the Matter of the Application of Ilatanet, LLC for Authorization to Obtain A Certificate of Pub. Convenience & Necessity As A Tel. Corp. Pursuant to the Provisions of Pub. Utilities Code Section 1001* (Cal.P.U.C. Apr. 16, 2020) No. D.20-04-036, 2020 WL 1942753, at *11 [finding Ilatanet had been provided adequate due process where the Scoping Memo had provided sufficient notice of the possibility of fines, and the respondent had the opportunity to be heard in a merits brief, reply brief, and comments on the proposed decision].)

[85] *SFMTA*, *supra*, at *5.

specific issues for resolution.[86] That memo identified which rulings were legal and which required an evidentiary hearing; briefing was permitted on the legal issues, and an evidentiary hearing was held on the factual issues.[87] After the evidentiary hearing, the parties filed concurrent post-hearing briefs and reply briefs, the record was reopened and further briefing was submitted.[88] Finally, the matter was submitted and a reasoned decision was issued.[89] SF MTA was also permitted to file an appeal.[90] All of this process was issued consistent with Commission Rules of Practice and Procedure Rules 7.1 [categorization], 7.2 [prehearing conference], 7.3 [scoping memo], 7.6 [categorization appeal rights]; Rule 15.5 [appeal of decision]; and Public Utilities Code section 1701.2.

Thus, before any adjudication of the motion "on the merits" can be made, the Commission should open a proceeding similar to the SFMTA matter to ensure SoCalGas is provided its constitutionally mandated due process.

2. Current Process is Inadequate Because There is No Notice and An Evidentiary Hearing Is Required Where, As Here, Material Factual Disputed Issues Exist.

Cal Advocates baldly claims in its Motion to Compel that "SoCalGas' ability to respond to Cal Advocates' Motion to Compel and For Fines is adequate process to impose fines on SoCalGas."[91] This, again, invites the Commission to commit reversable error, which the Commission should decline to do.

In the first instance, Cal Advocates cites no authority for the position that due process requires any less of the Commission when assessing a fine in a "non-proceeding" rather than a "proceeding." Article XII of the California Constitution and the California Supreme Court are

[86] *Id.* at *1-2.

[87] *Id.* at *2-3.

[88] *Id.*

[89] *Id.* at *4.

[90] *Id.* at *26.

[91] Motion to Compel, p. 7.

clear that every action of this Commission, including that of Cal Advocates, must comply with basic notice and hearing requirements.[92]

Second, Cal Advocates is wrong that SoCalGas's understanding of various statutory schemes that provide for fines supplies sufficient "notice" under due process that fines may be assessed.[93] It does not—if it did, then no notice of the possibility of levying fines in *any* proceeding would ever be necessary. And yet, as the Commission acknowledged in *Application of Pacific Gas & Elec. Co. Proposing Cost of Serv. & Rates for Gas Transmission & Storage Servs. for the Period of 2015-2017. (U39g) & Related Matter* (Cal.P.U.C. Nov. 20, 2014) No. D.13-12-012, "[D]ue process restricts the Commission from imposing sanctions at this juncture for violations that were not noticed in the order to show cause."[94] That is, due process requires *specific* notice of the fines threatened to be assessed.

Third, an evidentiary hearing is required for the disputed issues of fact raised by Cal Advocates. Cal Advocates submits no evidence in support of its motion; only conclusory statements that are insufficient to form a basis to assess fines. Consistent with the requirements of due process, a full evidentiary hearing is required to adjudicate the Motion to Compel. Evidentiary hearings are required when "there are material factual disputed issues."[95] More specifically, the Commission has provided guidance that cross examination of witnesses was necessary to satisfy due process when "motive, intent, or credibility are at issue or there is a dispute over a past event."[96]

The Motion to Compel and this Response present several "material factual disputed issues" going to "motive, intent, or credibility." As discussed extensively above, SoCalGas

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[92] Cal. Const., art. XII, § 2; *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 632; see also *PG&E*, *supra*, 237 Cal.App.4th at p. 859 [the PUC's power to establish its own procedures is "subject, of course, to the constitutional obligation to satisfy due process[.]"].

[93] Motion to Compel, p. 6; p. 2, fn. 7.

[94] *Application of Pacific Gas & Elec. Co. Proposing Cost of Serv. & Rates for Gas Transmission & Storage Servs. for the Period of 2015-2017. (U39g) & Related Matter* (Cal.P.U.C. Nov. 20, 2014) No. D.13-12-012, 2014 WL 6791604, at *3, fn. 2; see also ibid. ["While the California Rules of Court do not govern, they are instructive."].

[95] *In Re in Touch Commc'ns, Inc.* (Cal.P.U.C. May 27, 2004) No. 03-11-011, 2004 WL 1368185 ["The Commission concluded that 'evidentiary hearings . . . are warranted only to the extent there are material factual disputed issues[.]'"] [citing D.95-07-054].)

[96] *In Re Verizon Commc'ns, Inc.* (Cal.P.U.C. Nov. 18, 2005) No. D.05-04-020, 2005 WL 3355225.

vehemently disputes the misleading factual record presented by Cal Advocates,[97] which is unsupported by any declarations. Cross-examination is required to assess the credibility of Cal Advocates' account of what transpired, including the cross-examination of Cal Advocates' staff who were involved in the apparently deliberate decision not to challenge the Motion to Seal during the statutory period. Further, Cal Advocates does not support with any facts its contention that the identity of the declarants is needed for its investigation into ratepayer funding of anti-decarbonization campaigns.[98] This would need to be explored in an evidentiary hearing.

The criteria to be applied by the Commission in assessing a penalty for any contempt finding or Rule 1.1 violation also present material factual disputed issues. For example, in considering a Rule 1.1 violation, "the question of intent to deceive . . . goes to the question of how much weight to assign to any penalty that many be assessed."[99] The Commission considers two general factors in setting fines: "(1) the severity of the offense and (2) the conduct of the utility," as well as "the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent."[100] An evidentiary hearing would be required to resolve disputed issues of fact between the parties on these issues.

The list of exemplary cases cited by Cal Advocates on page 12 of its Motion to Compel merely highlight the need for a full evidentiary hearing here. None of these cases are analogous to the instant case. Indeed, Cal Advocates appears to have copied-and-pasted this list from other motions, as it protests in a footnote that "[N]one of these cases involved loss of life, which can result in significantly higher penalties."[101] Is Cal Advocates comparing SoCalGas's Motion to Seal to a loss of life event? That seems an exaggeration, at best, or a farce, at worst.

To be clear, as explained above, the Motion to Compel is procedurally improper and can be dismissed for that reason. However, before any adjudication of the motion on the merits can be made, the Commission is required to ensure SoCalGas is provided its constitutionally mandated due process. To satisfy those requirements, the Commission should open an adjudicatory proceeding and hold evidentiary hearings on the issue of whether any contempt has

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[97] Section II.A-D, *supra*.

[98] Motion to Compel, pp. 1, 4, 6.

[99] *SFMTA*, *supra*, 2015 WL 5159113, at *20 (citing D.01-08-019).

[100] *Id.* at *23 (citing D.98-12-075, mimeo at 34-39).

[101] Motion to Compel, p. 12, fn. 44.

taken place, and if so whether fines should be assessed similar to what it did in the SF MTA matter.

3. Cal Advocates' Demand for $1 Million in Fines Is Excessive.

Cal Advocates' request for a fine of $1 million for SoCalGas's lawful protection of its First Amendment rights is unreasonable on its face and exceeds constitutional limits. The United States and California Constitutions prohibit the imposition of "excessive fines."[102] The Excessive Fines Clause places a constitutional limit on the Commission's power to punish, including imposing civil fines or penalties.[103] The "touchstone of the constitutional inquiry . . . is the principle of proportionality."[104] In assessing whether a penalty is proportionate, courts generally weigh, among other factors, (1) the defendant's culpability and the relationship between the harm and the penalty, and (2) "the sanctions imposed in other cases for comparable misconduct."[105] The Commission, too, has its own set of factors to determine the reasonableness of a penalty.[106]

Here, although Cal Advocates spends several pages reciting various factors considered by the Commission in assessing fines, the gravamen of Cal Advocates' argument is to seek the largest dollar value of fines possible to have a purported "deterrent effect" on SoCalGas's purported "determination to defy its obligations to the Commission as a regulated utility."[107] What Cal Advocates actually seeks to "deter" is clear: it would like to prevent SoCalGas from asserting its rights under the First Amendment in the future. But deterring such protected activity not only inappropriate—it runs afoul of SoCalGas' fundamental due process rights.

As with its earlier Contempt Motion seeking $4.5 million in fines, this Motion to Compel and its demand for $1 million are part of Cal Advocates' broader effort to bully SoCalGas into

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[102] U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.

[103] *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co*. (2005) 37 Cal.4th 707, 727-728.

[104] *United States v. Bajakajian* (1998) 524 U.S. 321, 334

[105] *Cooper Indus., Inc. v. Leatherman Tool Grp.* (2001) 532 U.S. 424, 434–445.

[106] See generally *In re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, D. 98-12-075, 84 Cal.P.U.C.2d 155 (1998) [i.e., severity of the offense, conduct of the utility, and the totality of the circumstances].

[107] Motion to Compel, p. 10.

waiving its First Amendment rights for fear of excessive fines. These tactics are highly improper and should be rejected.

IV. CONCLUSION

The Commission should deny the Motion to Compel outright because it is procedurally improper—the time has long passed when Cal Advocates could properly oppose SoCalGas's Motion to Seal. If it is inclined to consider the Motion on the merits, it must open an adjudicatory proceeding, in which SoCalGas will be afforded the full process due under the law, including but not limited to an evidentiary hearing on issues of disputed material fact. In the alternative, the Commission should deny the motion, conclude that SoCalGas has not violated Rule 1.1.

Respectfully submitted on behalf of SoCalGas,

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