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

SOUTHERN CALIFORNIA GAS COMPANY, Petitioner, v. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Respondent.	Case No. B310811 Commission Decision No. D.21-03-001 & Resolution ALJ-391

SOUTHERN CALIFORNIA GAS COMPANY'S REPLY IN SUPPORT OF WRIT OF REVIEW

*Julian W. Poon, SBN 219843
Michael H. Dore, SBN 227442
Andrew T. Brown, SBN 311734
Daniel M. Rubin, SBN 319962
Matthew N. Ball, SBN 327028
Attorneys for Petitioner
SOUTHERN CALIFORNIA GAS COMPANY
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213.229.7000
Facsimile: 213.229.7520
JPoon@gibsondunn.com

TABLE OF CONTENTS

Page

I. INTRODUCTION 5

II. ARGUMENT 9

A. The Commission's *Statutory* Authority, Once Again, Does Not Trump or Allow It to Circumscribe SoCalGas's *Constitutional* Rights. 9

B. This Court Should Reject the Commission's Last-Ditch Attempt at Salvaging Its Resolution by Adopting Unpersuasive, Post Hoc Rationales Manufactured by Amici. 12

C. The Commission Fails to Recognize That Enforcing CalPA's Data Requests and Subpoena in the "Non-Proceedings" Below Violates SoCalGas's Due Process Rights. 22

III. CONCLUSION 26

CERTIFICATE OF WORD COUNT 28

PROOF OF SERVICE 29

TABLE OF AUTHORITIES

Page(s)

Cases

Americans for Prosperity Foundation v. Bonta (2021)
141 S.Ct. 2373 ..... 13, 18, 19

Aragon v. Republic Silver State Disposal Inc. (9th Cir. 2002)
292 F.3d 654 20

Arnett v. Kennedy (1974)
416 U.S. 134 25

Britt v. Super. Ct. (1978)
20 Cal.3d 844 ..... 18, 19

Bunzl Distribution USA, Inc. v. Franchise Tax Bd. (2018)
27 Cal.App.5th 986 15

Consumer Advocacy Group, Inc. v. Exxon Mobil Corporation (2002)
104 Cal.App.4th 438 15

Federal Election Com. v. Machinists Non-Partisan Political League (D.C. Cir. 1981)
655 F.2d 380 ..... 10, 11

Federal Power Com. v. Texaco Inc. (1974)
417 U.S. 380 15

IMDB.com Inc. v. Becerra (9th Cir. 2020)
962 F.3d 1111 12

In re Marriage of Siller (1986)
187 Cal.App.3d 36 25

New Cingular Wireless PCS, LLC v. P.U.C. (2016)
246 Cal.App.4th 784 16

Pacific Gas & Electric Co. v. P.U.C. (2000)
85 Cal.App.4th 86 15

TABLE OF AUTHORITIES (*continued*)

Page(s)

Pacific Gas & Electric Co. v. P.U.C. of Cal. (1986)
475 U.S. 1 11

People v. Ramirez (1979)
25 Cal.3d 260..... 26

Reeves v. MV Transportation, Inc. (2010)
186 Cal.App.4th 666 20

San Pablo Bay Pipeline Co. v. P.U.C. (2015)
243 Cal.App.4th 295 23

Securities & Exchange Com. v. Chenery Corp. (1947)
332 U.S. 194 16

United States v. Stevens (2010)
559 U.S. 460 12

Constitutional Provisions

Cal. Const. art. I, §§ 2–3.....9

Cal. Const. art. I, § 7..... 26

Cal. Const. art. I, § 17..... 26

Cal. Const. art. XII, § 2..... 23

U.S. Const. amend. I.....9

U.S. Const. amend. V..... 23, 26

U.S. Const. amend. VIII 26

U.S. Const. amend. XIV..... 23, 26

Statutes

Pub. Util. Code § 309.5 22

I. INTRODUCTION

At bottom, this is a case about the abuse of state power. The California Public Utilities Commission ("Commission" or "CPUC") has invoked its statutory authority to bless an ever-widening investigation into the public policy positions and activities of Petitioner Southern California Gas Company ("SoCalGas"). This investigation, conducted by the Commission's consumer-advocate-turned-prosecutor, CalPA, is ostensibly about following the use of ratepayer funds, and purportedly stems from an accounting error that has long since been remedied. SoCalGas, however, has already provided more than enough information for CalPA to conduct its follow-the-money investigation, but that is not enough for CalPA, which demands to know the details of how SoCalGas is using shareholder funds to engage in constitutionally protected speech. This lays bare the true reason for CalPA's demands: to chill SoCalGas's expression of its viewpoints, and to intimidate those who associate with SoCalGas for that purpose.

Such overreaching by a regulatory agency should not be countenanced by this Court. This Court's intervention is needed to protect against further violations of SoCalGas's (and others') First and Fourteenth Amendment rights.

The Commission's pretextual justification unravels under close scrutiny. In its first brief to this Court, the Commission (like CalPA before it) was unable to explain the total disconnect between its asserted governmental interest and the vastly overbroad means it has insisted on to satisfy that interest: namely, compelling disclosure of all ratepayer accounts *as well as* shareholder-funded accounts, related contracts, invoices, and public-policy-consultant declarations.

Apparently realizing that glaring defect, the Commission has now, for the first time, adopted new rationales never offered by CalPA before the Commission, never mentioned by the Commission in its Resolution, and never before offered by the Commission to this Court in its numerous prior filings. But these new post-hoc rationalizations should sound familiar—they were lifted nearly verbatim from a recent brief filed in this case by amici Consumer Watchdog and Public Citizen. This Court should disregard these newly adopted rationales, just as it routinely refuses to consider new rationales first raised by amici or agencies' appellate counsel on appeal. What is at issue in this case is the Commission's Resolution (and the Order modifying it), not the rationales the Commission has now essentially copied and pasted without attribution from its amici at the eleventh hour.

The Commission's attempts to stave off further review by this Court rise and fall on the terms of its challenged Resolution, which fails under both the federal and California Constitutions and settled law. That is because the Resolution fails to provide a plausible answer to the question that lies at the heart of this case: why CalPA cannot use the information in SoCalGas's *above-the-line* accounts, which SoCalGas has repeatedly provided or offered to provide, to accomplish its stated goals.[1] Indeed, the Resolution does not even attempt to answer that question, asserting instead that it must double-check SoCalGas's previous "assert[ions]." (App. 1486–1487.) As with all the other rationales manufactured throughout this litigation, however, CalPA could achieve that goal with the information that SoCalGas has already provided or offered to provide.

And while the Commission fails to mention SoCalGas's due process arguments in its latest brief, CalPA's investigation is

---

[1] SoCalGas generally seeks its costs in the general rate case proceeding ("GRC") for "above-the-line" accounts. Its "below-the-line" accounts are expenditures generally not sought from ratepayers at the GRC (i.e., shareholder-funded accounts). Activities or contracts are preliminarily booked to an above-the-line or below-the-line account, with the final ratemaking decision settled at a GRC. (See Petition for Writ of Review ("Petition") at p. 15 fn. 3.)

undergirded by its still-looming request for tens of millions of dollars in fines—a request that the Commission, through its Resolution, has continued to dangle over SoCalGas's head. These staggering daily fines stem from SoCalGas's temerity to challenge the constitutionality and lawfulness of CalPA's and the Commission's demands. This Sword of Damocles hanging over SoCalGas serves to underscore the many due process violations in the "non-proceedings" below, which the Commission and CalPA have impermissibly designated as a rules-free zone (at least for themselves). The law does not permit the CPUC to threaten regulated utilities with heavy fines simply for defending their constitutional rights.

What is happening in this case is clear: CalPA has a particular view of our State's optimal path to decarbonization—one that it believes conflicts with SoCalGas's view. Instead of debating the merits of the various ways to achieve California's decarbonization targets, CalPA has opted to use its investigatory powers to "hold [SoCalGas] accountable" for daring to have expressed a different and supposedly "inconsistent" view on this important question of public policy. (App. 672, 1335.) No one doubts the Commission's significant statutory powers, but those powers do *not* include the right to suppress SoCalGas's (and

others') exercise of their constitutional rights. But that is precisely what the Resolution does, and why this Court should refuse to let it stand.

This Court should vacate the Resolution and enjoin the Commission and CalPA from infringing any further upon SoCalGas's (and others') rights.

II. ARGUMENT

A. The Commission's *Statutory* Authority, Once Again, Does Not Trump or Allow It to Circumscribe SoCalGas's *Constitutional* Rights.

In arguing that SoCalGas, "[i]n exchange for the right to sell gas to captive ratepayers," is "legally obligated to make all of its accounts and records . . . available to its regulator at any time" (Resp. at pp. 7–8), the Commission has again forgotten that its *statutory* authority *cannot* override or limit the *constitutional* rights secured to SoCalGas and others by the First Amendment to the United States Constitution and its counterpart in the California Constitution. (U.S. Const. amend. I; Cal. Const. art. I, §§ 2–3.) Indeed, the Commission's assertions that "multiple statutes establish[] the Commission's investigatory and discovery powers," and that it has "not only a statutory right, but a statutory obligation," to engage in the inquiries at issue (Resp. at pp. 9–10), just rehash its earlier meritless argument that

SoCalGas's Petition for Writ of Review, which this Court has now granted, supposedly represents an improper and "unprecedented attack on the Commission's constitutional and statutory authority to regulate utilities" (Ans. at pp. 7–8). Not so.

To be clear, SoCalGas acknowledges that the Commission has significant regulatory authority over public utilities like SoCalGas. But repeating that truism ad nauseum does little to answer the real question before this Court: whether that authority is being deployed in a manner infringing on a utility's constitutional rights. The answer to that question is "yes."

It is hornbook law that the First and Fourteenth Amendments impose limits that no governmental actors may transgress, even powerful ones with significant regulatory authority such as the Commission. Although the court in *Federal Election Commission v. Machinists Non-Partisan Political League* (D.C. Cir. 1981) 655 F.2d 380, which the Commission cites (Resp. at p. 9 fn. 8), did recognize the FTC and SEC's "broad duties to gather and compile information and to conduct periodic investigations," that court never once suggested that those agencies could exercise their authority in a manner that would trample on the constitutional rights of those businesses being investigated.

And that court, considering the propriety of a Federal Election Commission subpoena, expressed concern over the "delicate nature of the materials demanded in this broad subpoena," which "represent[ed] the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association." (*Machinists Non-Partisan Political League*, *supra*, 655 F.2d at p. 388.) It further reasoned that the information at issue was of a "fundamentally *different* constitutional character from the commercial and financial data which forms the bread and butter of SEC or FTC investigations, since release of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment." (*Id.* at pp. 388, 396, italics added [ultimately holding that the FEC "subpoena should not have been enforced"].)

Even the Commission itself has recognized that SoCalGas "enjoys the same First Amendment rights as any other person or entity." (App. 1480–1481, citations omitted.) And as SoCalGas has previously explained, its status as a regulated utility does not "lessen[] its right to be free from state regulation that burdens its speech." (*Pacific Gas & Electric Co. v. P.U.C. of Cal.* (1986) 475

U.S. 1, 17 fn. 14; see App. 1480–1481 [the Commission conceding a similar point].)

SoCalGas does not take issue with the Commission examining its above-the-line accounts. SoCalGas simply seeks to vindicate the constitutional guarantees of freedom of expression, association, and due process secured to it (and to those with whom it associates), which would be violated by compelled disclosure of information concerning its political and public-policy-advocacy activities contained entirely in below-the-line accounts. Notwithstanding its statutory and regulatory powers, the Commission does not have unlimited, "freewheeling authority" to circumvent such fundamental and longstanding constitutional protections. (*IMDB.com Inc. v. Becerra* (9th Cir. 2020) 962 F.3d 1111, 1121, quoting *United States v. Stevens* (2010) 559 U.S. 460, 472.)

B. This Court Should Reject the Commission's Last-Ditch Attempt at Salvaging Its Resolution by Adopting Unpersuasive, Post Hoc Rationales Manufactured by Amici.

Section III.A.2 of the Commission's latest brief is little more than old wine in a new bottle: The Commission has lifted—nearly verbatim—its entire argument as to whether CalPA's discovery demands are "narrowly tailored to the government's

asserted interest" (*Americans for Prosperity Foundation v. Bonta* (2021) 141 S.Ct. 2373, 2383 ("*AFP*")) from the amicus brief filed by Consumer Watchdog and Public Citizen on August 5, 2021 ("CW/PC Brief").

In that brief, amici came up with four novel reasons why CalPA might conceivably need to examine SoCalGas's below-the-line accounts (CW/PC Brief at pp. 23–28)—none of which had ever been articulated by CalPA or the Commission. In the wake of the Court's issuance of its writ of review, it has now apparently dawned on the Commission that its own rationales lack merit, and therefore that new ones are needed. With the exception of a handful of non-substantive line edits notated below, the Commission has sub silentio copied this portion of amici's brief word for word:

Amicus Brief of Consumer Watchdog and Public Citizen	**Response in Opposition to Writ of Review**
"[E]xamination of the expenditures that SoCalGas has assigned to the proper below-the-line account, and identification of the vendors involved, will facilitate identification of similar expenditures that may still be improperly assigned to ratepayer accounts."	"Examination of the expenditures that SoCalGas has assigned to the proper below-the-line account, and identification of the vendors involved, will facilitate identification of similar expenditures that may still be improperly assigned to ratepayer accounts."

"[A]nalysis of the below-the-line account to determine whether items that regulators would expect to be there are missing will assist the regulators in focusing their efforts to determine whether those items are hidden in above-the-line accounts."	"[A]nalysis of the below-the-line account to determine whether items that regulators would expect to be there are missing will assist the regulators in focusing their efforts ~~to determine~~ on whether those items are hidden in above-the-line accounts."
"[T]o the extent payments to the same vendors may be allocated between advocacy work not chargeable to ratepayers and other work that may be properly recoverable from ratepayers, see *Expenditures for Political Purposes*, 30 F.P.C. at 1541–42, examination of both above-the-line and below-the-line accounts may be necessary to ensure that the allocation is correct."	"[T]o the extent that payments to the same vendors may be allocated between advocacy work not chargeable to ratepayers and other work that may be properly recoverable from ratepayers, ~~see *Expenditures for Political Purposes*, 30 F.P.C. at 1541–42,~~ examination of both above-the-line and below-the-line accounts may be necessary to ensure that the allocation is correct."
"Finally, review of the relative magnitude of amounts reclassified as below-the-line only after the Public Advocates Office began its inquiry with those that were properly allocated to begin with will provide the context necessary for evaluating SoCalGas's arguments that its improper allocation of expenditures was an inadvertent mistake involving no intentional misconduct."	"Finally, review of the relative magnitude of amounts reclassified as below-the-line only after ~~the Public Advocates Office~~ Cal Advocates began its ~~inquiry~~ investigation with those that were properly allocated to begin with will provide the context necessary for evaluating SoCalGas's~~s~~ argument~~s~~ that its improper allocation of expenditures was an inadvertent mistake involving no intentional misconduct."

(Compare Resp. at pp. 27–28, with CW/PC Brief at pp. 22–28.)

The Court should reject this last-ditch attempt by the Commission at saving its Resolution from being invalidated. Wholly new rationales proffered by amici (or, indeed, by an agency's appellate counsel) cannot properly be considered by this Court, as SoCalGas has explained before. (SoCalGas's Consolidated Answer to Amici (Sept. 3, 2021) ("Amici Resp.") at p. 14; see *Consumer Advocacy Group, Inc. v. Exxon Mobil Corporation* (2002) 104 Cal.App.4th 438, 446 fn. 10 [disregarding a new rationale for the application of a statute offered by amicus curiae "because it was . . . not raised by the appealing parties"]; *Bunzl Distribution USA, Inc. v. Franchise Tax Bd.* (2018) 27 Cal.App.5th 986, 999 fn. 8 ["[A]n amicus curiae must accept the case as it finds it and . . . [a] 'friend of the court' cannot launch out upon a juridical expedition of its own," citation omitted].) The Commission cannot overcome that obstacle by using another round of briefing to pass off amici's newly minted rationales as its own.

Even if the Commission's appellate counsel *had* come up with these rationales on their own in their prior briefing to this Court, courts still "cannot accept appellate counsel's *post hoc* rationalizations for agency action." (*Pacific Gas & Electric Co. v. P.U.C.* (2000) 85 Cal.App.4th 86, 96–97, citing *Federal Power*

Com. v. Texaco Inc. (1974) 417 U.S. 380, 396.) That is because "an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself"—a rule this Court has applied to the CPUC before. (*New Cingular Wireless PCS, LLC v. P.U.C.* (2016) 246 Cal.App.4th 784, 820, citing *Securities & Exchange Com. v. Chenery Corp.* (1947) 332 U.S. 194, 196.) Ultimately, the Commission must defend the Resolution as to which this Court has granted its Writ of Review (Order Granting Writ of Review (Feb. 1, 2022))—something the Commission fails to plausibly do.

Finally, as previously explained in detail in SoCalGas's Consolidated Answer to Amici, even on their merits, these four newly adopted rationales do not come close to justifying why CalPA needs access to all of SoCalGas's below-the-line accounts in order to pursue its purported goal of ensuring that costs are not misclassified to above-the-line accounts. The Commission first asserts that examining below-the-line accounts and identifying vendors "will facilitate identification of similar expenditures" in above-the-line accounts. (Resp. at p. 22.) But this ignores the fact that CalPA is already familiar with invoices for advocacy expenditures; after all, reviewing above-the-line accounts on behalf of ratepayers is what CalPA routinely does.

(See Amici Resp. at pp. 21–22.) This rationale also fails to explain why CalPA cannot complete this accounting exercise using the vendor identification numbers corresponding to the below-the-line expenditures at issue—numbers which SoCalGas has already provided.

The Commission then claims that CalPA's auditors must look at below-the-line accounts "to determine whether items that regulators would expect to be there are missing." (Resp. at p. 22.) But that also makes no sense: Rather than looking at below-the-line accounts for what is *missing*, CalPA could and should simply look at above-the-line accounts to see what is *actually there* (see Amici Resp. at pp. 24–25).

Next, the Commission speculates that there may be single invoices paid out of both below-the-line and above-the-line accounts (Resp. at p. 22), which, if true, poses no obstacles to CalPA's review of above-the-line expenditures. Moreover, if this situation arises, SoCalGas does not object to providing CalPA with a redacted invoice that sets out any unredacted expenses booked to above-the-line accounts. (See Amici Resp. at pp. 25–26.)

Finally, the Commission claims that the below-the-line accounts will "provide . . . context" by showing the "relative

magnitude" of SoCalGas's prior accounting mistake. (Resp. at pp. 22–23.) Yet CalPA can already evaluate the "relative magnitude" of the now-remedied misclassification by comparing the amount that was reclassified with SoCalGas's total expenses, both of which are available to the Commission. (See Amici Resp. at pp. 26–27.)

In the end, all amici (and now the Commission) have offered are creative ways that CalPA could use the below-the-line accounts if CalPA had them at its disposal. But these pleas of "administrative convenience" fall far short of demonstrating the required "means-end fit." (*AFP*, *supra*, 141 S. Ct. at pp. 2386–2389). Contrary to the Commission's claims, CalPA is not entitled to constitutionally protected information that could somehow "facilitate" its investigation. (Resp. at p. 22.) The opposite it true: "[N]ot only must disclosure serve a 'compelling' state purpose, but . . . such 'purpose cannot be pursued . . . when the end can be more narrowly achieved.'" (*Britt v. Super. Ct.* (1978) 20 Cal.3d 844, 855–856, citation omitted; see also *AFP*, 141 S. Ct. at p. 2384.)

Notably, the Commission says nothing to defend what is actually in the Resolution about whether CalPA's overbroad discovery demands are narrowly tailored to achieve its stated

goals. This omission is understandable: The Resolution, after all, says nothing about "the means-end fit that exacting scrutiny requires." (*AFP*, *supra*, 141 S.Ct. at p. 2386.) Aside from invoking the Commission's "general supervisory authority," the Resolution simply suggests that CalPA must double-check SoCalGas's "assert[ions]" because SoCalGas has not yet "proven" that its above-the-line accounts do not fund political activities. (App. 1486–1487.) But proof of that fact lies in SoCalGas's above-the-line accounts, which SoCalGas has repeatedly provided or offered to provide (e.g., App. 581, 588–589); the Resolution never explains why CalPA needs access to *below-the-line* accounts to accomplish its stated goals. (See *Britt*, *supra*, 20 Cal.3d at pp. 855–856.)

By this point, both the Commission and this Court have heard a steady stream of rationalizations for why CalPA purportedly needs access to SoCalGas's constitutionally protected information. (App. 301, 425, 672, 1715; Answer to Petition for Writ of Review at pp. 52–56; CW/PC Brief at pp. 23–28.) Each time, SoCalGas has explained how recourse to information contained in above-the-line accounts could resolve the latest problem invented by CalPA or its amici (e.g., App. 313–345,

1156–1164; Petition at pp. 48–49; Reply in Support of Petition ("Reply") at pp. 45–47; Amici Resp. at pp. 14, 21–27.)

All this game of whack-a-mole demonstrates is that CalPA is more interested in chilling the political and public-policy-advocacy activities of SoCalGas than in "following the money" to protect ratepayers. (See, e.g., *Aragon v. Republic Silver State Disposal Inc.* (9th Cir. 2002) 292 F.3d 654, 661 ["[F]undamentally different justifications . . . give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that [none] of the official reasons [are] the true reason"]; *Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 677 ["[W]here 'fundamentally different justifications' were offered, changing explanations could be considered 'pretextual, developed over time to counter the evidence . . .,'" citation omitted].)

CalPA has even let slip, on several occasions, its actual—and constitutionally impermissible—motives. (E.g., App. 672 [CalPA seeks to "review the contracts' scope of work to determine whether SoCalGas' shareholders are taking positions that are inconsistent with State policy"]; App. 786 [CalPA seeks to investigate "business plans that undermine California's climate change goals," "an issue of public importance . . ."]; App. 1335 [CalPA seeks "to hold the utility accountable" by preventing

SoCalGas from "withhold[ing] from the public the identity of any person or entity the utility pays to advocate . . . on its behalf"].) These admissions lay bare the constitutional infirmity of CalPA's years-long inquisition.

That is not to mention the unprecedented Joint Prosecution Agreement between CalPA and Sierra Club, which the Commission now attempts to downplay. (Resp. at pp. 23–24.) The Commission claims that SoCalGas has "insinuat[ed]" that CalPA is "leaking" confidential information to Sierra Club. (*Id.* at p. 23.) Then, it makes the lawyerly statement that "no *intentional* leaks to Sierra Club or the press *have been established* by SoCalGas" (*id.* at p. 24, italics added), which raises more questions than it answers.

But this is all beside the point: What SoCalGas has taken issue with is whether CalPA has "deployed its governmental investigation authority in support of a non-governmental entity" (Petition at p. 10)—a question several legislators have also rightly asked. (App. 1605–1606 [letter from Assembly Members Rubio and Cooper asking whether CalPA is "aid[ing] the Sierra Club in their effort to seek the ban of natural gas usage in California" through the "shocking" Joint Prosecution

Agreement].)[2] And the broader question, of course, is simply why CalPA even has a Joint Prosecution Agreement with Sierra Club.

All of this points to the conclusion that CalPA is chiefly concerned with punishing SoCalGas for taking political and public-policy positions that CalPA and its allies disagree with, rather than conducting any kind of legitimate oversight seeking to "obtain the lowest possible rate for service." (Pub. Util. Code § 309.5, subd. (a).)

C. The Commission Fails to Recognize That Enforcing CalPA's Data Requests and Subpoena in the "Non-Proceedings" Below Violates SoCalGas's Due Process Rights.

The Commission's Response ignores the repeated violation of SoCalGas's due process rights through the "non-proceedings" that have taken place below—the largely rules-free no-man's-land in which the Commission has upheld CalPA's exercise of its assertedly unbounded discovery and investigatory authority. The

---

[2] It is also a question CalPA has refused to answer, as CalPA tellingly declined to respond when asked to identify any data requests "for which input on the questions was provided and/or the questions were reviewed by Sierra Club." (July 16, 2021 Request for Judicial Notice, Ex. A at p. 20 ["Whether Sierra Club provided input and/or reviewed data requests propounded on SoCalGas by the Public Advocates Office is not relevant"].)

Commission's Response never once even mentions "due process." But as the Court of Appeal has recognized, the Commission's use of ad hoc procedures must still be "consistent with the requirements of due process." (*San Pablo Bay Pipeline Co. v. P.U.C.* (2015) 243 Cal.App.4th 295, 313; Cal. Const. art. XII, § 2 [Commission procedures are "[s]ubject to statute and due process"]; U.S. Const. amends. V, XIV.)

Tellingly, SoCalGas's challenge to CalPA's discovery requests and subpoena has taken place *outside* the confines of any formal Commission proceedings, which means, as the Chief ALJ made plain, that the "Commission's Rules of Practice and Procedure and filing requirements for formal proceedings *do not directly apply*." (App. 351, italics added.)[3] As a result, CalPA

---

[3] In its Answer to SoCalGas's Petition, the Commission tried to sweep this fact aside, arguing that "SoCalGas has been afforded a multitude of opportunities to present its arguments to the Commission." (Ans. at p. 58.) While SoCalGas has had the opportunity to submit briefs—an "opportunity" that has spurred CalPA to seek gob-smacking daily fines that the Commission has continued to dangle over SoCalGas's head—that does not alter the fact that it has had to operate in a procedural no-man's-land, where the normal rules, including those "intended to ensure due process and fairness for all interested parties" (CPUC, Strategic Directives, Governance Process Policies, and Commission-Staff Linkage Policies (Feb. 20, 2019) p. 21), expressly do not apply.

has been emboldened to argue that SoCalGas's efforts before the Commission and this Court to protect its First Amendment rights constitute punishable "disrespect" toward the Commission, worthy of six-figure-a-day fines and other draconian penalties. (App. 1162, 1187.)

SoCalGas has sought to remedy this by requesting that the dispute be brought within a larger formal proceeding, which would have yielded more transparency and due process. (App. 1199–1201.) Yet CalPA opposed—and the Commission has refused to accede to—that request. By allowing CalPA to obtain, outside of any proceeding, constitutionally protected information, the Resolution fails to protect SoCalGas's due process rights.

CalPA's efforts to obtain such information have been undergirded by the still-looming threat of multiple sets of staggering *retroactive* six-figure-a-day fines amounting to tens of millions of dollars (App. 909, 928, 1114–1120), all in an effort to "punish" SoCalGas for the perceived offense of "disrespect[ing] the Commission and its staff" (i.e., CalPA) by daring to assert SoCalGas's constitutional rights (App. 920, 925). The Commission initially "deferred" the issue of fines and invited CalPA to "resubmit[]" its sanctions motion "at a later date." (App. 1462, 1493.) But in its Order Modifying the Resolution, the

Commission on four occasions made sure to reiterate that sanctions remain very much a live option. (App. 1863, 1869, 1870–1871.)

That the Commission may ultimately relent from imposing such draconian sanctions hardly suffices to show that SoCalGas's due process rights are not in jeopardy. The "value of a sword of Damocles," after all, "is that it hangs—not that it drops." (*In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 49 fn. 10, quoting *Arnett v. Kennedy* (1974) 416 U.S. 134, 231 (dis. opn. of Marshall, J.).)

As SoCalGas previously explained, the lack of established procedures in this "non-proceeding" has had very real consequences. (Petition at pp. 55–56.) In November 2019, for example, SoCalGas was forced to produce certain contracts under protest to stave off potential fines of $100,000 a day while awaiting a ruling on an emergency motion to stay an ALJ order. (App. 309–311, 327, 428.) In that instance, the mechanism to appeal the ALJ's ruling was opaque, but the consequences of non-compliance were clear. (Petition at p. 56.)

The procedural uncertainties in the no-man's-land created by the Commission conflict with the notion that "freedom from arbitrary adjudicative procedures is a substantive element of

one's liberty." (*People v. Ramirez* (1979) 25 Cal.3d 260, 268.) They likewise violate bedrock principles of due process (U.S. Const. amend. V, XIV; Cal. Const. art. I, § 7), and the Excessive Fines Clause (U.S. Const. amends. V, VIII, XIV; Cal. Const. art. I, §§ 7, 17). Despite that, the Commission has allowed CalPA to exploit the absence of meaningful procedural protections to chill SoCalGas's and others' rights to speak, associate, and petition the government, in violation of the First and Fourteenth Amendments (and their correlative provisions in the California Constitution)—due process violations which the Commission did not even address in its Response.

CalPA's abuses here illustrate the danger of what an agency may be emboldened to do if its actions are left unchecked by meaningful judicial review. This Court should put a stop, once and for all, to the Commission's and CalPA's repeated incursions on SoCalGas's and others' constitutional rights and freedoms.

III. CONCLUSION

SoCalGas respectfully requests that the Court vacate the portions of D.21-03-001 and Resolution ALJ-391 challenged by the Petition, and enjoin the Commission and its staff from any further attempts at forcing the disclosure of any of SoCalGas's

(and others') constitutionally protected associational, expressive, and petitioning activities, information, and materials.

Dated: May 27, 2022 Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____
Julian W. Poon

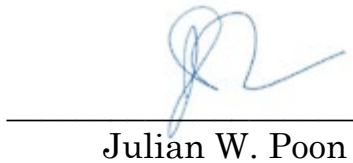
Attorneys for Petitioner
SOUTHERN CALIFORNIA GAS COMPANY

333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213.229.7000
Facsimile: 213.229.7520
JPoon@gibsondunn.com

CERTIFICATE OF WORD COUNT

I certify that this Consolidated Answer to Amici Briefs of Petitioner Southern California Gas Company contains 4,520 words. In completing this word count, I relied on the word count function of the Microsoft Word program.

May 27, 2022



Julian W. Poon

PROOF OF SERVICE

I, Andrew Brown, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071-3197, in said County and State. On May 27, 2022, I served the following document(s):

SOUTHERN CALIFORNIA GAS COMPANY'S REPLY IN SUPPORT OF WRIT OF REVIEW

on the parties stated below, by the following means of service:

California Public Utilities Commission	**California Advocates**
Christine Jun Hammond General Counsel cjh@cpuc.ca.gov Dale Holzschuh dale.holzschuh@cpuc.ca.gov Carrie G. Pratt carrie.pratt@cpuc.ca.gov Edward Moldavsky edm@cpuc.ca.gov 505 Van Ness Avenue San Francisco, CA 94102 Telephone: (415) 703-2742	Matt Baker Director 505 Van Ness Avenue, San Francisco, CA 94102 415-703-2381 matt.baker@cpuc.ca.gov Darwin Farrar Chief Counsel 505 Van Ness Avenue, San Francisco, CA 94102 415-703-1599 darwin.farrar@cpuc.ca.gov Traci Bone Counsel 505 Van Ness Avenue,

Facsimile: (415) 703-2262	San Francisco, CA 94102 415-703-2048 traci.bone@cpuc.ca.gov

☑ **BY ELECTRONIC SERVICE THROUGH TRUEFILING**: I caused the documents to be electronically served through TrueFiling.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 27, 2022.

Andrew Brown