

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

**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)**

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I.	INTRODUCTION	2
II.	FACTUAL BACKGROUND AND PROCEDURAL HISTORY	5
	A. Cal Advocates’ Data Request and Subpoena Seeking Access to SoCalGas’s Accounting Databases.....	5
	B. SoCalGas’s SAP System.....	6
	C. The Parties’ Meet and Confers Regarding the Subpoena	7
	D. SoCalGas’s Pending Appeal Of A Ruling That Erroneously Permits Access to Information Protected By the First Amendment.....	11
III.	Legal Standard	13
	A. Motion to Quash	13
	B. Motion to Stay.....	14
IV.	ARGUMENT.....	14
	A. The Subpoena Should Be Quashed In Part To Exclude From Its Scope Material Subject To Attorney-Client and Attorney-Work-Product Privilege, and The Subpoena’s Compliance Date Should Be Stayed Until May 29 To Allow SoCalGas To Complete Software Solution To Protect Such Material Accessible Through Its Accounting Database	14
	B. Cal Advocates’ Access To Material Protected By The First Amendment Should Be Stayed Until Ongoing Litigation Presenting That Issue Is Resolved.....	17
	i. SoCalGas Will Suffer Irreparable Harm Absent a Stay.....	18
	ii. SoCalGas Will Likely Succeed on the Merits	20
	iii. The Balance Of Harms Tips In SoCalGas’s Favor.....	25
	iv. Other Factors Weigh In Favor of a Stay	25
V.	CONCLUSION.....	26

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Pursuant to Rules 11.1 and 11.3(a) of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure,¹ Southern California Gas Company (“SoCalGas”) moves for an order to quash portions of the Subpoena to Produce Access to Company Accounting Databases served on SoCalGas on May 5, 2020 (the “Subpoena”), and to stay compliance until the May 29, 2020 completion of a software solution to exclude those protected materials in the databases.²

¹ Rule 11.3(a) of the Commission’s Rules of Practice and Procedure permit motions to limit discovery. But neither the Commission’s Rules of Practice and Procedure nor the California Public Utilities Code directly address motions to quash. In such circumstances, the Commission has typically relied on the California Code of Civil Procedure as instructive authority. *See Pac-W Telecomm, Inc. (U5266C) v. Comcast Phone of California, LLC (U5698C)* (Feb. 12, 2015), D.15-02-011, 2015 WL 781078, at *1 (“Particularly with respect to procedural matters that are not the subject of specific rules under the Public Utilities code, the Commission has historically looked to the Civil Code and/or the Code of Civil Procedure for guidance.”). Section 1987.1 of the Code of Civil Procedure provides that “upon motion reasonably made” by any party, a court may issue an “order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders.” *Id.*

² Pursuant to the email approval from ALJ DeAngelis on May 22, 2020, this is a substitute filing for the May 19, 2020, filing of substantially the same motion.

I. INTRODUCTION

The Subpoena requires SoCalGas to provide to the Public Advocates Office (“Cal Advocates”) immediate access to “all databases associated in any manner” with SoCalGas’s “accounting systems.”³ SoCalGas’s accounting database contains, among other things, documents and information protected from disclosure under the attorney-client privilege, the attorney work-product doctrine, and the First Amendment. SoCalGas takes seriously its obligations as a regulated entity to make its books and records available to the Commission and Cal Advocates on request, and it is working to provide Cal Advocates the requested access as quickly as practicable. But it must comply with its obligations in a manner that protects its privileged and constitutionally protected information from disclosure to Cal Advocates.

SoCalGas has worked diligently to find a solution to implement as quickly as possible to provide Cal Advocates with access to its accounting system as required by the Subpoena while preventing Cal Advocates from accessing SoCalGas’s protected material. The SAP software used by SoCalGas as its accounting system lacks an automated function to prevent Cal Advocates from accessing protected material, so SoCalGas initially proposed a solution whereby counsel for SoCalGas could review in real time information identified by Cal Advocates in the database that was potentially protected from disclosure. Cal Advocates rejected that solution, however, insisting that that its auditor needs “instantaneous access to all attachments and invoices” accessible in the database. As an alternative, SoCalGas is developing a custom software solution, for which it anticipates it will need until May 29 to complete. But Cal Advocates has declined to agree to this reasonable extension, even though ALJ Regina DeAngelis’s most recent ruling admonished the parties that, considering the “extraordinary

³ Declaration of Elliott Henry (“Henry Decl.”), Exh. A, at p.1.

times,” the parties should “work together to find a schedule [for discovery in this investigation] that is *mutually agreeable* and *accommodates the additional demands resulting from the COVID-19 shelter-in-place directive*.” (emphasis added).⁴ SoCalGas has no recourse but to seek the Commission’s intervention.

In this Motion, SoCalGas seeks two forms of relief. *First*, it seeks an order quashing the portion of the Subpoena that would permit access to SoCalGas’s material protected from disclosure under the attorney-client privilege and attorney work product privilege, and an extension of the compliance deadline for the Subpoena until May 29 so that SoCalGas may complete its software solution to exclude those protected materials. It is well-established that such materials should not be disclosed. Cal Advocates admits that it should not have access to this material,⁵ so the Subpoena should be quashed to exclude it. The only dispute on this issue is whether SoCalGas can have until May 29 to implement its software solution. A stay of the compliance date until May 29 is warranted, particularly because absent a stay SoCalGas risks irreparable harm from unwarranted disclosure of its privileged information to Cal Advocates, while Cal Advocates would suffer no harm under a stay. There is no open proceeding or any deadline for Cal Advocates’ informal investigation that it has been conducting for an entire year, and there is no actual urgency requiring Cal Advocates’ immediate access to the system.

Second, the Motion seeks a stay of the Subpoena with respect to Cal Advocates’ access to information and documents for SoCalGas’s 100% shareholder-funded activities that are protected by the First Amendment, such as those related to its advocacy for natural gas, renewable natural gas, and green gas as a part of the solution to achieving the State’s

⁴ Henry Decl., Exh. B. ALJ DeAngelis’s Ruling dated April 6, 2020 denied SoCalGas’s Emergency Motion to Stay Cal Advocates’ discovery for a 60-day period in light of the COVID-19 pandemic’s constraints.

⁵ Henry Decl., Exh. J [Ltr. from J. Wilson to T. Bone dated May 18, 2020].

decarbonization goals. With respect to these materials, SoCalGas seeks a stay that lasts until May 29 to implement its software solution, and until the issue of whether such information is (as it should be) protected. If a stay is not granted, SoCalGas will be seeking alternative relief via another motion for the Commission to expeditiously resolve SoCalGas's December 2, 2019 Motion for Reconsideration/Appeal regarding an ALJ ruling rendered on November 1, 2019.

A stay is warranted for several reasons. This very issue is the subject of a Motion for Reconsideration/Appeal of an ALJ ruling that has been pending before the Commission for over five months. Because the Commission has yet to issue a ruling on that matter, SoCalGas faces a dilemma here: It can comply with the Subpoena as issued and disclose material subject to the appeal, or it can risk fines of up to \$100,000 a day for refusing to comply. On the merits, SoCalGas is likely to prevail on its First Amendment argument, because Cal Advocates cannot satisfy its "particularly heavy" burden of showing that the Subpoena is "rationally related to a compelling government interest" and the "least restrictive means of obtaining the desired information." (*Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1161; see also *Britt v. Super. Ct.* (1978) 20 Cal.3d 844, 855.) The balance of harms tips sharply in SoCalGas's favor, because disclosure of its First Amendment-protected material will have a chilling effect on its right of association under the First Amendment, and by contrast Cal Advocates would not be harmed by a delay. Finally, due process augurs in favor of a stay. Cal Advocates should not be permitted to exploit the timing of the Commission's consideration of the appeal by compelling SoCalGas to disclose First Amendment-protected information under threat of contempt and fines.

In short, SoCalGas recognizes Cal Advocates' authority to inspect its SAP database, but the subpoena as enforced by Cal Advocates infringes SoCalGas attorney client/ attorney work

privileges and rights under the First Amendment. With respect to the materials protected by the attorney-client and attorney work product privileges, SoCalGas requests a stay to May 29, 2020, when a technical solution would be in place. Cal Advocates does not contend it is entitled to view attorney-client or attorney work product privilege protected material so there is no reason for Cal Advocates to oppose this modest stay. With respect to the material protected by the First Amendment, SoCalGas also requests a stay to May 29, 2020, when a technical solution would be in place, so that SoCalGas can provide remote access to the SAP database in a manner that prevents Cal Advocates from accessing its First Amendment-protected material, and to protect that material until the protected status of such information is finally resolved. Alternatively, if the stay is not granted, SoCalGas will be requesting via separate motion that the Commission expeditiously resolves its December 2, 2019 Motion for Reconsideration/Appeal. The instant motion should be granted.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Cal Advocates' Data Request and Subpoena Seeking Access to SoCalGas's Accounting Databases

On May 1, 2020, Cal Advocates served SoCalGas with a data request seeking “[r]emote access to the SoCalGas SAP system to a Cal Advocates auditor no later than May 8, and sooner if possible” and “[i]f remote access is not possible, identify a time and place where the auditor may access the SoCalGas SAP system no later than May 11, 2020.” (Henry Decl., Exh. C, at p. 5 [Data Request No. CalAdvocates-TB-SCG-2020-03].) The Request also sought “[t]raining and assistance for the auditor” to, among other things, “access all SoCalGas accounts” and “access information regarding all contracts, invoices, and payments made to third parties.” (*Id.* at p. 6, emphasis added.) The data request demanded a meet-and-confer conference call no later than May 6, 2020, only three business days after the request was served. (*Id.* at p.1.)

On May 5, 2020—just two business days after Cal Advocates served its request, and before SoCalGas even had a chance to respond to the data request, much less meet and confer about it—counsel for Cal Advocates sent the Subpoena to SoCalGas via email. (Henry Decl., Exh. D.) The Subpoena attached to the email ordered SoCalGas to provide Cal Advocates (as well as “staff and consultants working on its behalf”) “access to all databases associated in any manner with the company’s accounting systems,” including “both on-site and remote access; on-site access [to] be provided at the times and locations requested by Cal Advocates” “no later than three business days after service of this Subpoena,” that is, by May 8, 2020. (Henry Decl., Exh. A, at p. 1) The Subpoena contained no substantive limit to the material Cal Advocates could access in SoCalGas’s accounting systems. (See *id.*) The Subpoena was apparently issued based on a roughly one-page declaration, in which the entirety of the good cause justifying the Subpoena was one sentence long. (*Id.* at pp. 2-3.)⁶

B. SoCalGas’s SAP System

SoCalGas’s SAP accounting system is a vast financial system which includes nearly all financial transactions made by the company, including but not limited to accounting and invoice information for over 2,000 vendors. (Declaration of Dennis Enrique (“Enrique Decl.”), at ¶ 4.) It captures a wide variety of transactions, from invoices with vendors, payments made to third parties, worker’s compensation payments, and individual employee reimbursements. (*Id.* at ¶ 5.) Because the system covers all these transactions, it includes a great deal of sensitive information. (*Id.*) The system allows for different levels of access, but those levels of access are generally very broad, and currently cannot be restricted to just certain vendors or discrete categories of

⁶ The entirety of the purported “good cause” was that “SoCalGas’ responses to data requests in the investigation have been incomplete and untimely.” (*Id.*) SoCalGas disputes this substantially oversimplified representation of events.

information. (Declaration of Kelly Contratto (“Contratto Decl.”) at ¶ 7)⁷ There is no current “out-of-the-box” means of excluding a user from accessing only information and entries for specific vendors, such as law firms or shareholder-funded consultants. (*Id.*) Information protected under the attorney-client privilege, the attorney work product doctrine, and the First Amendment affects approximately 70 of the 2,000 vendors used by SoCalGas in any given year. (Henry Decl. at ¶ 10.)

C. The Parties’ Meet and Confers Regarding the Subpoena

On May 6, 2020, the parties held a meet-and-confer conference call to discuss the May 1 data request and the Subpoena. During that call, the parties focused primarily on discussing technical issues associated with providing Cal Advocates with the remote access to SoCalGas’s SAP system. (Henry Decl., Exh. E [Ltr. from J. Wilson to T. Bone dated May 7, 2020], at 1.) SoCalGas explained that, as a result of the ongoing COVID-19 pandemic, the various legal, accounting, and IT professional personnel required to provide onsite access are primarily working from home, and requiring them to travel to SoCalGas’s offices to facilitate such access would pose risk to those employees. (*Id.*) SoCalGas further provided Cal Advocates with options for providing remote access to the SAP system, one of which was to produce a copy of the SAP database to Cal Advocates. (*Id.*) SoCalGas also informed Cal Advocates that if it identified the specific organizations and cost centers it sought to investigate, SoCalGas could likely provide remote access to those portions of the database in a couple of days. (*Id.*) Although the parties briefly discussed the logistics associated with providing Cal Advocates “read-only” access to the entire database, SoCalGas understood that Cal Advocates’ focus at the time was to obtain copy

⁷ Historically, Cal Advocates has requested and received a fixed copy of information pulled from SAP at a certain access level and without attachments. (Henry Decl., at ¶ 11.) Those productions therefore do not raise the issues presented by the Subpoena and the level of access Cal Advocates is demanding.

access—similar to the arrangement Cal Advocates typically uses in the General Rate Case audit. (*Id.* at pp. 1-2.)

In an email dated May 8, counsel for Cal Advocates identified eleven accounts for SoCalGas to produce “fixed databases”—that is, copies of the data contained in the SAP database for those accounts. (Henry Decl., Exh. F [Email from T. Bone to E. Henry dated May 8, 2020].) From this inquiry, as well as the discussion at the May 6 meet and confer, SoCalGas understood that Cal Advocates recognized getting real-time access would take time and that Cal Advocates was willing to take interim production of fixed data from the SAP system. In the same May 8 email, counsel for Cal Advocates also asked SoCalGas to produce fixed databases for all accounts that are “100% shareholder funded,” that “house[] costs for activities related to influencing public opinion on decarbonization policies,” and that “house[] costs for lobbying activities related to decarbonization policies.” (*Id.*) This email first put SoCalGas on notice that Cal Advocates sought to obtain information on 100% shareholder-funded accounts and on accounts related to SoCalGas’s advocacy for natural gas and renewable natural gas as a part of the solution to achieving the State’s decarbonization goals—that is, content protected under the First Amendment that is the subject of a pending appeal to the Commission.

The parties held a second meet and confer conference call about the Subpoena later that same day. (Henry Decl., Exh. G [Ltr. from J. Wilson to T. Bone dated May 11, 2020].) During that call, counsel for Cal Advocates stated that despite her requests for copies of fixed databases, Cal Advocates still was insisting on real-time access, not merely access to copies of the SAP database. (*Id.*) (In a second email sent later that day, counsel for Cal Advocates noted that, based on her first email requesting the “fixed databases,” she could “understand how SoCalGas got the impression that Cal Advocates was no longer seeking remote access,” and she “apologi[z]ed for

any misunderstanding.” (Henry Decl., Exh. H [e-mail from T. Bone to E. Henry dated May 8, 2020].) During the meet and confer, SoCalGas also explained that the unrestricted access to SAP sought by Cal Advocates exceeded the scope of access previously provided to Cal Advocates as a part of the standard General Rate Case process—and, indeed, had never been granted before to the CPUC—so the security and privilege issues posed by the request were novel for the company. (Henry Decl. ¶ 11.)⁸

In a letter dated May 11, 2020, SoCalGas informed Cal Advocates that, given Cal Advocates’ clarified request for real-time access, it was investigating how to provide Cal Advocates with the access to the SAP database “without waiving issues it has on appeal related to First Amendment protections conferred on its fully shareholder-funded contracts.” (Henry Decl., Exh. G at pp. 1-2.) SoCalGas further explained that providing the real-time access presented “a potential additional complication with respect to privileged material as well, as SAP may have work descriptions or bills themselves from outside counsel accessible to a user.” (*Id.* at p.3.) (The May 8 meet and confer and Cal Advocates’ clarification on May 8 that it still sought real-time, unlimited access to the SAP database, not merely copy access to fixed databases for particular accounts, prompted SoCalGas to memorialize these concerns in this letter and look into them further. (Henry Decl., ¶ 9))

On May 13, 2020, the parties conducted a third meet and confer concerning the Subpoena. (Henry Decl., Exh. J [Ltr. from J. Wilson to T. Bone dated May 18, 2020].) SoCalGas explained that the process of securing the copy and remote access to the SAP database has been slowed significantly due to the fact that several employees involved in facilitating the access are

⁸ SoCalGas explained in a later communication that the one time it is aware of that access had been granted to SAP externally it was to a contractor – issues regarding privilege and other protected rights were therefore not implicated in the same way as for Cal Advocates’ access. (Henry Decl., Exh. I [e-mail from E. Henry to T. Bone dated May 12, 2020]).

working from home, and onsite processes related to the access are slower via VPN. (*Id.* at p.1.) SoCalGas also informed Cal Advocates that it had identified a potential solution to provide Cal Advocates with real-time access to its SAP database while also preventing Cal Advocates from accessing privileged information. (*Id.*) Specifically, SoCalGas proposed that “access to attachments and invoices [in the SAP system] could be shut off [by default] but could be requested by Cal Advocates’ auditor,” and then “[a]n attorney would then be able to quickly review requested invoices and provide nonprivileged ones to the auditor.” (*Id.*) Although counsel for Cal Advocates conceded that it should not gain access to material protected by the attorney-client privilege, they indicated Cal Advocates would not accept this as a complete solution to the issue because “the auditor needed instantaneous access to all attachments and invoices.” (*Id.*)

In a letter dated May 18, 2020, counsel for SoCalGas proposed yet another solution to protect SoCalGas’s privileged information from disclosure to Cal Advocates. (Henry Decl., Exh. J at p. 2.) Specifically, SoCalGas stated that it was (and is) writing a special computer program that will prevent Cal Advocates from accessing its material protected by attorney-client privilege and the First Amendment, and that after implementing that program it can provide remote access by May 29, 2020. (*Id.*) Later that same day, SoCalGas produced fixed copies of two years of SAP data (2016-2017) for accounts specifically identified by Cal Advocates. (Henry Decl. ¶ 13.)

On May 18, 2020, the parties held a fourth meet and confer concerning the Subpoena. (Henry Decl., ¶ 13.) During that meet and confer, counsel for Cal Advocates did not agree to the SoCalGas’s request to extend the compliance deadline to May 29. (*Id.*) Instead, it proposed that SoCalGas provide its staff real-time access to the database by the following day, with an agreement that CalPA staff would not look at invoices of law firm accounts. (*Id.*) Cal Advocates further stated that they were not inclined to wait until May 29 for this data, that in their view

failure to provide remote access by Tuesday, May 19 would put SoCalGas in violation of the subpoena,⁹ and would recommend “some sort of motion” to obtain access sooner. (*Id.*) Although they requested that SoCalGas continue with their planned software solution, Cal Advocates also stated that the parties were at an impasse with respect to the confidentiality of the fully shareholder-funded information and that would only be resolved via motion practice. (*Id.*) Cal Advocates also refused to await resolution of the appeal before moving forward with seeking access to such information. (*Id.*)

D. SoCalGas’s Pending Appeal Of A Ruling That Erroneously Permits Access to Information Protected By the First Amendment

Because the SAP database contains information protected under the First Amendment, the Subpoena raises the same constitutional issues present in an appeal filed by SoCalGas pending before the full Commission. That appeal also involves Cal Advocates’ efforts to obtain information on SoCalGas’s 100% shareholder-funded activities.

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.” (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.) 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,

⁹ Cal Advocates had granted extensions to respond, a few additional days at a time, up to and including May 19. Henry Decl., Exh. J [Ltr. from J. Wilson to T. Bone dated May 18, 2020]

SoCalGas argued that this request could have a chilling effect on SoCalGas's First Amendment rights. (Henry Decl., Exh. K [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)].) The ALJ nevertheless granted Cal Advocates motion to compel on November 1, 2019, ordering SoCalGas to produce the documents at issue within *two* business days. (Henry Decl., Exh. L [ALJ Ruling].) On November 4, 2019, SoCalGas filed an Emergency Motion to Stay the ALJ Ruling. But with no ruling on that motion and facing significant potential fines of up to \$100,000 a day (see Pub. Util. Code § 2107), SoCalGas produced under protest the 100% shareholder-funded contracts at issue on November 5, 2019 but reserved its rights to appeal the decision. (Henry Decl., Exh. M [Motion for Reconsideration/Appeal], at p.8.)

On December 2, 2019, SoCalGas filed a 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) ("Motion for Reconsideration/Appeal"). (*Id.*) There, SoCalGas explained why the 100% shareholder-funded contracts are entitled to First Amendment protection, and that Cal Advocates failed to meet its evidentiary burden demonstrating that it had a compelling government interest in requesting the contracts, and that its request was narrowly tailored to achieve that interest. (*Id.* at 10-25).

As of the date of this Motion, the Motion for Reconsideration/Appeal has been pending before the Commission for over five months.

III. LEGAL STANDARD

A. Motion to Quash

The Subpoena cites as legal authority (among other statutes) Section 311 of the Public Utilities Code, which permits the Executive Director to “issue subpoenas for the . . . production of papers, waybills, books, accounts, [and] documents . . . in any inquiry, investigation, hearing, or proceeding in any part of the state.” (Henry Decl., Exh. A, at p.1.) Neither the Commission’s Rules of Practice and Procedure nor the California Public Utilities Code address the standard for motions to quash such a subpoena, and in such circumstances the Commission has relied on the Code of Civil Procedure as instructive authority.¹⁰ Section 1987.1(a) of the California Code of Civil Procedure provides that, “upon motion reasonably made” by any party, a court may issue an “order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders.” Motions to quash subpoenas should be granted where they encompass material protected under the attorney-client privilege, (see *Bank of America, N.A. v. Super. Ct.* (2013) 212 Cal.App.4th 1076, 1102); the attorney work-product privilege (see *Aetna Casualty & Surety Co. v. Super. Ct.* (1984) 153 Cal.App.3d 467, 479); and for information protected by the First Amendment (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1180 [reversing order denying motion to quash subpoena requiring disclosure of identity of online user asserting First Amendment rights in his anonymity].)

¹⁰ *Pac-W. Telecomm, Inc. (U5266C) v. Comcast Phone of California, LLC (U5698C)* (Feb. 12, 2015), D.15-02-011, 2015 WL 781078, at *1 (“Particularly with respect to procedural matters that are not the subject of specific rules under the Public Utilities Code, the Commission has historically looked to the Civil Code and/or the Code of Civil Procedure for guidance.”).

B. Motion to Stay

The Commission's Rules of Practice and Procedure and the California Public Utilities Code do not address the standards applicable to a motion to stay the compliance date for a subpoena issued by the Executive Director. In the context of whether to grant a stay pending rehearing of its own decisions, the Commission considers (1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; (2) whether the moving party is likely to prevail on the merits; (3) a balance of the harm to the moving party if the stay is not granted and the decision reversed, against the harm to the other parties if the stay is granted and the decision affirmed; and (4) other factors relevant to a particular case. (*Order Granting Motion for Stay of Decision 10-12-056*, D. 11-05-050, 2011 WL 2158839 (Cal. P.U.C. 2011), at *1). The Commission has further determined that a "due process allegation is a unique other factor . . . which merits preliminary and independent consideration." (*Order Granting Motion for Stay of Decision (D.) 08-01-031, Denying Rehearing, and Ordering Defendant to Answer the Complaint*, D. 08-04-044, 2008 WL 1841051 (Cal. P.U.C. 2008).

IV. ARGUMENT

A. The Subpoena Should Be Quashed In Part To Exclude From Its Scope Material Subject To Attorney-Client and Attorney-Work-Product Privilege, and The Subpoena's Compliance Date Should Be Stayed Until May 29 To Allow SoCalGas To Complete Software Solution To Protect Such Material Accessible Through Its Accounting Database

SoCalGas's SAP database contains documents and information protected from disclosure under SoCalGas's attorney-client privilege and/or the attorney work product privilege, such as invoices for at least 70 law firms providing legal services to SoCalGas. (Henry Decl. ¶ 10.) The invoices contain, among other things, detailed descriptions of legal work performed for SoCalGas. (Enrique Decl. ¶ 6.)

Such material is protected from disclosure, (*see, e.g., Los Angeles County Bd. of Supervisors v. Super. Ct.* (2016) 2 Cal. 5th 282, 300 [legal invoices are privileged if they “communicate information for the purpose of legal consultation or risk exposing information that was communicated for such a purpose”]), and Cal Advocates agrees that it should not have access such material, (Henry Decl. ¶ 9.) The Subpoena should be quashed to the extent that it encompasses this clearly privileged information. (*See, e.g., Bank of America, N.A., supra*, 212 Cal.App.4th at p. 1102 [reversing trial court’s order denying motion to quash on the ground that doing so would “result in the production of privileged materials.”].)

Further, a stay of the Subpoena’s compliance deadline until May 29, when SoCalGas will have completed its software solution to prevent Cal Advocates from accessing SoCalGas’s privileged material and can provide real-time access to the SAP database, is warranted. *First*, SoCalGas will suffer serious and irreparable harm absent a stay, because providing access to the SAP database without proper software controls would permit Cal Advocates to access SoCalGas’s privileged information. *Second*, Cal Advocates agrees that it should not be able to access privileged material.

Third, Cal Advocates will suffer no harm if the stay is granted. There is no active proceeding before the Commission imposing a deadline by which the information sought by the Subpoena must be obtained. Nor does Cal Advocates need the information for any testimony, evidentiary hearing or other scheduled event. Rather, Cal Advocates’ ongoing investigation of SoCalGas’s accounting practices and other activities is being conducted outside of a proceeding, with no end date.¹¹ Moreover, Cal Advocates’ asserted basis for the need for accessing the

¹¹ That said, the Subpoena seeks access to accounts related to local reach codes and decarbonization activity that is within the scope of an existing order to show cause. SoCalGas objects to the request to review SAP data related to Reach Codes. Whether SoCalGas has ever used ratepayer funds to advocate

databases is that SoCalGas's responses to data requests served previously in this investigation have purportedly been "incomplete and untimely." (Henry Decl., Exh. A [Subpoena], at p. 3 ¶ 4 (sic).) While SoCalGas disputes the drastically oversimplified summary of a vast amount of discovery, it is not a basis for needing privileged and protected information nor is it a reason that immediate access is required. (Indeed, SoCalGas has been working diligently to address the multitude of questions and expansive follow up about its prior responses to data requests that have been raised by Cal Advocates, even during the COVID-19 pandemic's challenging circumstances where SoCalGas's resources are diverted to this Cal Advocates' matter outside a proceeding. (See Declaration of Andy Carrasco ("Carrasco Decl."), ¶ 10.)) Cal Advocates' claimed urgency is manufactured; its informal investigation has been ongoing for over an entire year, and in any event, it is not a sufficient reason to prevent SoCalGas from taking the necessary technical steps to block Cal Advocates' access to undisputedly privileged information in response to this unprecedented request.

against local government's adoption of reach codes has been ordered as within the scope of the Order to Show Cause Directing SoCalGas to Address Shareholder Incentives for Codes and Standards Advocacy Expenditures in R.13-11-005 (OSC). (See Henry Decl., Exh. N [March 25, 2020 Email Ruling from Administrative Law Judge Valerie Kao Clarifying Scope of Order to Show Cause and Providing Further Instructions for Hearing]). In particular, ALJ Kao's ruling provides that among the factual question to be decided in the OSC is "Whether Respondent ever used ratepayer funds, regardless of the balancing account or other accounting mechanism to which such funds were booked, to advocate against local governments' adoption of reach codes." (*Id.*) Because there is an open and ongoing proceeding concerning SoCalGas's reach code activity and the use of ratepayer funds, any discovery related to such activity should be served and addressed within the OSC in R.13-11-005. Addressing discovery related to the same issue both inside an ongoing proceeding and outside of a proceeding is inefficient, wastes resources, and risks inconsistent outcomes to the extent any disputes on such discovery result in motion practice and rulings by the Commission. For SAP accounts related to the OSC, for purpose of formality and distinction, SoCalGas will be treating that portion of this data request as related to the OSC proceeding, including for purposes of applying Rule 10.1 of the Commission's Rules of Practice and Procedure and resolving any discovery disputes that may arise related to those SAP accounts through the SoCalGas personnel handling that proceeding and the assigned administrative law judge (ALJ Kao).

Fourth, additional relevant factors merit a stay. The duration of the requested stay is until May 29—a week from the filing of this Motion. SoCalGas is in the process of developing custom-built software that would limit Cal Advocates’ access to information subject to attorney-client privilege or attorney work product privilege on a record-by-record or categorical basis, in real time. (Contratto Decl. ¶ 7.) Moreover, as a result of the ongoing COVID-19 pandemic and the Safer at Home Orders requiring all residents of the State of California to stay at home as much as possible and to avoid all non-essential travel, the employees necessary to facilitate access to SoCalGas’s SAP system are working from home. (Carrasco Decl. ¶ 10; Enrique Decl. ¶ 8.) This slows SoCalGas’s ability to secure copy and remote access to its SAP database, because performing the technical processes to access the database are slower via VPN than onsite. (*E.g.* Enrique Decl. ¶ 8.) All SoCalGas needs is a modest amount of additional time to make that happen.

B. Cal Advocates’ Access To Material Protected By The First Amendment Should Be Stayed Until Ongoing Litigation Presenting That Issue Is Resolved

On December 2, 2019, SoCalGas filed its Motion for Reconsideration/Appeal. (Henry Decl., Exh. L.) The Motion for Reconsideration/Appeal raises one of the same issues present here and on some of the same content—namely, whether Cal Advocates can lawfully compel the production of information related to SoCalGas’s 100% shareholder-funded activities, including political association and free expression related to advocating for natural gas, renewable natural gas, and green gas solutions in rulemakings and petitioning other government bodies. (*Id.*, at p.2.) As of the date of this Motion, the Motion for Reconsideration/Appeal is still pending before the Commission. Because the Commission has yet to rule on the Appeal, enforcement of the Subpoena should be stayed until the May 29th completion of the technical solution, so that

SoCalGas’s First Amendment-protected materials can be excluded from Cal Advocates’ access.¹² Weighing the relevant factors, a stay is merited here.

i. SoCalGas Will Suffer Irreparable Harm Absent a Stay

If SoCalGas’s First Amendment-protected material is disclosed to Cal Advocates, it will have a chilling effect on its associational rights. Indeed, consultants that advise SoCalGas in furtherance of its efforts to influence the State’s decarbonization policy have declared that disclosure to the government of their identities will cause them to be more reluctant to associate with SoCalGas in the future. For example, one vendor that has contracted with SoCalGas to, among other things, create public and internal communications, and develop messaging for the use of natural gas technologies and the advancement of natural gas and renewable gas solutions in the State of California, has declared that if the nature of the public affairs work it is doing is disclosed to Cal Advocates, it will “drastically alter” how it communicates with SoCalGas going forward. (Carrasco Decl., ¶8.) That contractor further declares that it is “less willing” to contract with SoCalGas “knowing that its non-public association with SoCalGas” may be disclosed. (*Id.*) That vendor notes that disclosure to Cal Advocates will cause it to “suffer negative consequences—including financial and strategic information being released to its competitors, the breach of confidentiality its clients require for its services, the cost of responding to inquiries, and the breach of privacy” which “will hinder” the work it does with SoCalGas. (*Id.*) That vendor concludes that compelled disclosure of its information to Cal Advocates will make it reluctant to continue associating with SoCalGas and it is seriously considering limiting its association with SoCalGas in the future. (*Id.*)

¹² Given this overlap in issues and content, SoCalGas incorporates the briefing on the Appeal here by reference.

Indeed, the “chilling effect” associated with public disclosure of SoCalGas’s 100% shareholder-funded political activities has already been occurring. As Andy Carrasco, Director of Regional Public Affairs in the Strategy and Engagement, and Environmental group for SoCalGas attests in a concurrently filed declaration:

The sensitive nature of [SoCalGas’s] discussions goes beyond the substance of the communications or strategy. It encompasses the identity of the consultant, partner or vendor with whom SoCalGas contracts or engages with. In the political arena, alliances are strategic, and, depending on the circumstance, the disclosure of the identity of the organization or individual with whom SoCalGas associates could negatively impact how SoCalGas – or how the consultant, partner or vendor – is perceived or treated by public officials and other public policy stakeholders. As a result of even the December disclosures of several 100% non-ratepayer funded Balanced Energy IO contracts, the information regarding these associations disclosed to Cal Advocates has altered how SoCalGas and its consultant, partner or vendor associates interact with each other, and it has had a chilling effect on these associations. Such a result has (and would further) unduly impinge upon SoCalGas’s constitutional right to free association, and to associate with organizations and individuals of its choosing in exercise of its right to petition the government and advocate its position relating to natural gas, renewable natural gas, and green gas solutions.

(Carrasco Decl., ¶ 6)

Irreparable harm associated with unjustified disclosure of SoCalGas’s 100% shareholder-funded political activities related to decarbonization has already occurred. On November 5, 2019, SoCalGas produced, under protest and to avoid sanctions, various 100% shareholder funded contracts relating to its political activities. (*Id.* ¶ 7.) As a result, at least one vendor/contractor that works with government entities has serious concerns about their business being affected. (*Id.* at ¶ 8.) They have even indicated that they would not have done business with SoCalGas if they had known their information and contact details would have been disclosed. (*Id.*) Indeed, “due to the compelled contract disclosures that SoCalGas previously made, and the specter of additional compelled disclosures from the company’s accounting database concerning 100% non-ratepayer-funded activities, SoCalGas is being forced to

reconsider its decisions relating to political activities and associations.” (*Id.* at ¶ 9.) Going forward, “SoCalGas will be less willing to engage in contracts and communications knowing that its non-public association and communications with consultants, business partners and others on SoCalGas's political interests may be required to be disclosed.” (*Id.*)

The only means of preventing the additional irreparable harm from the “chilling effect” resulting from disclosure of more of its 100% shareholder-funded political activities is to prevent Cal Advocates from accessing the material. SoCalGas requires a stay until May 29 so it can take the technical steps necessary to make that happen, while at the same time providing Cal Advocates access to material not protected under the First Amendment.

ii. SoCalGas Will Likely Succeed on the Merits

1. Material Accessible In The SAP Database Is Protected Under The First Amendment

Although SoCalGas acknowledges that Cal Advocates has “broad authority and rights with respect to access to utility information, including the utility’s books and records,” (*In re Pacific Gas & Elec. Co.*, 199 P.U.R. 4th 177, 252 2000 WL 289723 (Cal. P.U.C. 2000)), SoCalGas has First Amendment rights that must be considered in connection with Cal Advocates’ inspection of its records.¹³ Longstanding Supreme Court precedent recognizes that the United States Constitution guarantees the “right to associate for the purpose of engaging in

¹³ It is “well established that corporations such as PG&E [and SoCalGas] have the right to freedom of speech,” as the “inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source.” (*Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n* (2000) 85 Cal. App. 4th 86, 93). Indeed, the United States Supreme Court has long rejected the notion that a corporation’s status as a regulated entity “lessens its right to be free from state regulation that burdens its speech.” (*See Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.* (1986) 475 U.S. 1, 17 fn. 14, plurality opinion; see also *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.* (1980) 447 U.S. 530, 534 fn. 1 [plaintiff’s status as a regulated utility “does not decrease the informative value of its opinions on critical public matters”].) The First Amendment therefore secures to SoCalGas (like other persons) the freedom of speech, association, and the right to petition the government for redress of its grievances, as does its California constitutional counterpart. (U.S. Const. amends. I, XIV; Cal. Const., art. I, §§ 2(a), 3(a).)

those activities protected by the First Amendment”; this is the “freedom of expressive association.” (*Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 618; 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].) The United States Supreme Court has repeatedly underscored the fundamental importance of the right to associate for political purposes. (See *NAACP v. Alabama*, 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*, 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 v. Sullivan* (1964) 376 U.S. 254, 270); see also *Governor Gray Davis Committee v. Am. Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 464 [the right to free association is “fundamental”].)

Accordingly, courts have found that demands for the production of materials furthering political association and expression encroach on constitutionally protected activity. (See *Britt v. Super. Ct.*, 20 Cal.3d at p. 861 (the forced “revelation of . . . details of [an] association’s finances and contributions” is far more detrimental to First Amendment interests than the compelled disclosure of “organizational affiliations which ha[d] routinely been struck down” before.); see also *In re GlaxoSmithKline plc* (Minn. 2007) 732 N.W.2d 257, 267-269 [associational freedom protects an organization’s external interactions and internal communications].) These cases reflect the principle that 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. (*Perry, supra*, 591 F.3d at pp. 1162-1163; see

AFL-CIO v. FEC (D.C. Cir. 2003) 333 F.3d 168, 170, 177-178 [substantial First Amendment interests implicated by forcing release of “political groups’ strategic documents and other internal materials”].)

Here, the SAP database contains information and documents for its 100% shareholder-funded activities related to its advocacy for natural gas, renewable natural gas, and green gas solutions reflect its political views on the State’s energy policy and reveal other entities and persons with which it associated in furtherance of that expression. (Enrique Decl., ¶ 6.) Aside from those identities of its political consultants, vendors, and partners, the SAP database contains invoices from third-parties which may reveal the type of work undertaken, and other information related to SoCalGas’s political advocacy. (*Id.*) Those materials strike at the very heart of SoCalGas’s freedoms under the First Amendment and are entitled to its protections from compelled disclosure to the government. (*See, e.g., Britt, supra*, 20 Cal.3d at p. 861; *Perry, supra*, 591 F.3d at pp. 1162-1163; *AFL-CIO, supra*, 333 F.3d at pp. 168, 170, 177-178).

2. SoCalGas Can Show Arguable First Amendment Infringement

To determine whether a government agency may compel disclosure of information protected under the First Amendment, a court applies a two-step framework. At step one, “[t]he party asserting the [First Amendment] privilege ‘must demonstrate . . . a prima facie showing of arguable first amendment infringement’ by showing that enforcing the discovery request will result in “(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or ‘chilling’ of, the members’ associational rights.” (*Perry, supra*, 591 F.3d at p. 1160.) If the objector can make the *prima facie* showing, then at step two the “evidentiary burden” shifts to the government to “demonstrate that the information sought” through the discovery is “rationally related to a

compelling government interest” and the “least restrictive means of obtaining the desired information.” (*Id.* at p. 1161, citation omitted.)

Here, at step one, evidence shows that disclosure to the government of the identities and strategies of SoCalGas’s contractors with which it associates to influence public policy on natural gas solutions—which, again, is entirely 100% funded by SoCalGas’s shareholders—will have a “chilling” effect on SoCalGas’s associational rights. As explained above, see Section IV.B.i, *supra*, the compelled disclosure of SoCalGas’s First Amendment-protected information is already having such an effect. (Carrasco Decl., ¶¶ 6-9.) Simply put, “SoCalGas will be less willing to engage in contracts and communications knowing that its non-public association and communications with consultants, business partners and others on SoCalGas’s political interests may be subject to compulsory disclosure.” (*Id.* ¶ 9.) Likewise, government-relations and public-affairs professionals have sworn that these disclosures have not only made them less willing to work and associate with SoCalGas in the future, but also make them seriously consider whether to associate with SoCalGas in future initiatives, rulemaking, or any other political processes at all. (*Id.* ¶ 8.)

3. Cal Advocates Cannot Demonstrate A Compelling Government Interest In Obtaining SoCalGas’s First Amendment-Protected Material, Nor That Unrestricted Access to SAP Is The Least Restrictive Means Of Infringing On SoCalGas’s First Amendment Rights

Because SoCalGas has made a prima facie showing of arguable First Amendment infringement, the “evidentiary burden” shifts to Cal Advocates to demonstrate that the Subpoena is (a) “rationally related to a compelling government interest” and (b) is the “least restrictive means of obtaining the desired information.” (*Perry, supra*, 591 F.3d at p. 1161, citation omitted; see also *NAACP v. Alabama, supra*, 357 U.S. at pp. 460-461 [government action curtailing freedom of association “is subject to the closest scrutiny”]; *Citizens United v. FEC*

(2010) 558 U.S. 310, 340 [infringements of the First Amendment, to be valid, must (1) further a compelling interest and (2) be narrowly tailored to achieve that interest]; *Governor Gray Davis Committee, supra*, 102 Cal.App.4th at p. 464 [same]; *Britt, supra*, 20 Cal.3d at p. 864 [government has a “particularly heavy” burden to justify infringements of First Amendment rights].)

Here, Cal Advocates cannot show a compelling government interest in accessing documents and information reflecting SoCalGas’s 100% shareholder-funded activities undertaken in furtherance of its First Amendment rights. Cal Advocates’ statutorily defined purpose is to “obtain the lowest possible rate for service consistent with reliable and safe service levels.” (Cal. Pub. Utils. Code § 309.5.) 100% shareholder-funded activities are, by definition, not funded by ratepayers, and have no impact on the “rate for service” charged by SoCalGas to its ratepayers. Moreover, Cal Advocates has not articulated how information on SoCalGas’s 100% shareholder-funded activities has any connection to the rates charged to ratepayers for SoCalGas services.¹⁴

In support of its request for the Subpoena, Cal Advocates cited Section 314(a) of the Public Utilities Code, which authorizes it to “inspect the accounts, books, papers, and documents of any public utility.” (Henry Decl., Exh. A, at 3 ¶ 3.) But this state statute cannot trump the protections afforded by the First Amendment, and in turn cannot vanquish SoCalGas’s protections against unwarranted invasions of its First Amendment-protected information. Moreover, to prevail Cal Advocates must produce evidence that it has a compelling government

¹⁴ Cal Advocates’ declaration in support of the Subpoena also demonstrates its overreach in seeking these materials: Cal Advocates is “currently conducting an investigation of Southern California Gas Company’s (SoCalGas’) accounting practices, use of ratepayer monies to fund activities related to the adoption of anti-decarbonization and gas throughput policies, *and other activities potentially contrary to state policies.*” (Henry Decl., Exh. A, at 3 ¶ 4.)

interest in seeking information protected by the First Amendment and that it is using the least restrictive means of obtaining that information. (See *Perry, supra*, 591 F.3d at p. 1161 [noting the government’s “evidentiary burden”].) Cal Advocates has not shown a compelling government interest in accessing SoCalGas’s materials protected by the First Amendment, and it has not articulated how the unrestricted access to the SAP database sought by Cal Advocates is not the “least intrusive means” of accessing information that would infringe on SoCalGas’s First Amendment rights. It therefore has not carried its burden to permit compelled production of First Amendment-protected material.

iii. The Balance Of Harms Tips In SoCalGas’s Favor

The balance of harms weighs heavily in favor of SoCalGas. On one hand, absent a stay, SoCalGas would face an impossible choice: It could comply with the Subpoena as issued and disclose material to Cal Advocates, which would have a severe chilling effect on its First Amendment associational rights, or it can risk fines of up to \$100,000 a day for refusing to comply. (See Cal Pub. Utils. Code §§ 2107, 2108.) On the other hand, Cal Advocates will suffer no harm if the stay is granted by the ALJ’s order permitting disclosure of First Amendment-protected information is affirmed. Cal Advocates is seeking this material outside of any proceeding, and therefore there are no deadlines imposing urgency on Cal Advocates obtaining the information. Furthermore, Cal Advocates is receiving access to nearly the entirety of SoCalGas’s financial transaction information with thousands of vendors—the carveout for a small handful of parties has minimal to no impact on their investigation of the use of ratepayer funds.

iv. Other Factors Weigh In Favor of a Stay

Due process concerns also weigh in favor of granting the stay. Cal Advocates—knowing that SoCalGas has appealed to the full Commission regarding its First Amendment-protected

[PROPOSED] ORDER

On May 22, 2020, Southern California Gas Company (“SoCalGas”) filed a Motion To Quash Portion Of The Subpoena To Produce Access To Privileged Materials In Accounting Databases And To Stay Compliance Until the May 29th Completion Of Software Solution To Exclude Those Protected Materials In The Databases (“Motion to Quash”), requesting an order (1) quashing the portion of the Subpoena that would permit access to SoCalGas’s material protected from disclosure under the attorney-client privilege, attorney work product privilege; (2) staying the Subpoena with respect to Cal Advocates’ access to information and documents for SoCalGas’s 100% shareholder-funded activities that are protected by the First Amendment; and (3) extending the compliance deadline for the Subpoena until May 29, 2020 so that SoCalGas can implement a software solution that would prevent Cal Advocates from accessing SoCalGas’s protected material. Upon due consideration, SoCalGas’s Motion to Quash is granted.

ORDER

(1) The portion of the Subpoena To Produce Access To Privileged Materials In Accounting Databases issued May 5, 2020 (the “Subpoena”) is quashed to the extent it would permit access to SoCalGas’s material protected from disclosure under the attorney-client privilege, and the attorney work product privilege;

(2) The Subpoena is stayed with respect to Cal Advocates’ access to information and documents for SoCalGas’s 100% shareholder-funded activities that are protected by the First Amendment until final resolution of the protected status of such information; and

(3) The compliance deadline for the Subpoena is extended through and including May 29, 2020 to permit SoCalGas to implement a software solution that would prevent Cal Advocates from accessing SoCalGas’s material protected under the attorney-client privilege, the attorney work-product privilege, and the First Amendment.

SO ORDERED

Dated: _____, 2020
