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 ITS MOTION FOR EMERGENCY STAY OR OTHER INJUNCTIVE RELIEF; <u>IMMEDIATE RELIEF REQUESTED</u> BY TUESDAY, MARCH 16, 2021 OF ORDER TO PRODUCE CONSTITUTIONALLY PROTECTED MATERIAL

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I. INTRODUCTION

The Opposition filed yesterday by Respondent California Public Utilities Commission is a transparent attempt by the Commission to shield itself from any meaningful review by this Court, and thus serves to underscore why this Court should grant Petitioner Southern California Gas Company's ("SoCalGas") Motion for Emergency Stay or Other Injunctive Relief by no later than next Tuesday, March 16, in advance of the March 17 production deadline the Commission has insisted on. The Commission would have SoCalGas *immediately* turn over highly sensitive and constitutionally protected material to its litigation adversary, California Public Advocates Office ("CalPA"), based on nothing more than the Commission's say-so, without allowing this Court even a short period of time to review this highly consequential decision. But this exigency is unexplained in the Commission's Opposition, and at odds with the 15 months that the Commission took to resolve SoCalGas's Motion for Reconsideration and Appeal of the ALJ's decision requiring disclosure.

In opposing even a brief stay to allow the Court time to decide these issues of constitutional significance, the Commission attacks, in a fairly conclusory, vague, and unpersuasive fashion, the merits of SoCalGas's Petition (i.e., to suggest that the subject material is somehow not constitutionally protected). Although

this is not the proper stage to make such arguments, the Commission's breathtakingly broad arrogation of power—unconstrained apparently by the First or Fourteenth Amendments to the United States Constitution (or the corresponding provisions of the California Constitution)—and the dangerous merging of judge and litigant in the Commission/CalPA structure (which raises serious due process concerns), highlight the need for this Court's review.

The Opposition also mischaracterizes the standard for granting a stay, and ignores SoCalGas's clear showing of the irreparable harm that will occur if it is forced to disclose the subject materials (namely, the evisceration of SoCalGas's First Amendment and other rights). The Commission completely ignores the fact that confidentiality protections—such as they exist—are demonstrably inadequate to safeguard SoCalGas's constitutional rights given the Commission's repeatedly-stated view that SoCalGas's litigation adversary, CalPA, is, as part of the Commission's staff, entitled to access everything submitted to the Commission. Opp. at 13.

The Commission also argues that SoCalGas need not worry, since Section 583[1] and General Order 66-D will supposedly safeguard SoCalGas's constitutionally protected material,

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[1] Unless otherwise noted, statutory references are to the Public Utilities Code.

analogizing to this Court's process for *in camera* review of sealed filings. But the Commission fails to mention how Section 583 and General Order 66-D may (at least in the Commission and CalPA's view) give the Commission broad discretion to release the materials publicly if and when it decides to do so. (Petn. at 11.)

This Court's immediate intervention is needed to prevent the irreparable harm that would result if SoCalGas is required to disclose constitutionally protected material next Wednesday while the Court is still in the early stages of reviewing the merits of SoCalGas's Petition.

II. ARGUMENT

A. SoCalGas Has Shown Irreparable Harm that Readily Satisfies the Standard for an Emergency Stay.

Tellingly, the Commission largely ignores the clear showing of irreparable harm set out in SoCalGas's Petition and Motion for an Emergency Stay. Instead, the Commission focuses on recasting the standard for a stay as especially "stringent," and then asserts, in conclusory fashion, that SoCalGas cannot meet the standard, without actually addressing SoCalGas's showing of irreparable harm. This sleight of hand fails to justify denying a temporary stay, which may be granted whenever "irreparable loss or damage would result." (§ 1762, subds. (a)–(c).) The Commission cites *North Shuttle Service, Inc. v. Public Utilities Commission* (1998) 67 Cal.App.4th 386, to argue otherwise. (*Id.*

at p. 395.) But in so doing, the Commission mischaracterizes both *North Shuttle* and the familiar irreparable harm standard.[2]

First, *North Shuttle* is readily distinguishable because it did not involve constitutional claims or harm. In *North Shuttle*, the petitioner simply challenged the revocation of a permit, and argued that it would suffer $40,000 in lost revenues before the court could hold a hearing on its stay motion, and "between $75,000 and $120,000 per month" thereafter until the petition was resolved. (*Id.* at p. 392.) The court denied the stay request because the petitioner had "not shown that such financial loss would cause irreparable injury." (*Ibid.*) Here, by contrast, the harm is constitutional, not simply financial—if a stay is not granted SoCalGas will suffer immediate injury to its First Amendment rights, which the "Supreme Court has made clear ... unquestionably constitutes irreparable injury." (*Sammartano v. First Judicial Dist. Ct.* (9th Cir. 2002) 303 F.3d 959, 973, *abrogated on other grounds by Winter v. Nat. Res. Def. Council* (2008) 555 U.S. 7, 22, quoting *Elrod v. Burns* (1976) 427 U.S. 347, 373.) Indeed, "each passing day may constitute a separate and cognizable infringement of the First Amendment."

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[2] Notably, the Commission does not dispute—and thereby concedes, as it must—that SoCalGas has satisfied the other statutory stay requirements, including that the suspending bond SoCalGas has tendered is sufficient in amount and otherwise adequate. (§§ 1761–1764.)

(*CBS Inc. v. Davis* (1994) 510 U.S. 1315, 1317 [Blackmun, J., in chambers] [ordering immediate stay of injunction].) That is why the Public Utilities Code specifies that, for petitions challenging "the validity of any order or decision ... on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution," reviewing courts such as this Court must "exercise independent judgment on the law and the facts." (§ 1760; [noting also that "the findings or conclusions of the [C]ommission material to the determination of the constitutional question shall not be final"].)

Next, the Commission misstates what *North Shuttle* actually held to try to raise the bar higher than the law requires for a showing of irreparable harm. Although the court in *North Shuttle* did state that courts should "start with the presumption that the Commission's decision is correct," it noted that this is no different than the standard applicable "in other appellate court proceedings." (*Supra*, 67 Cal.App.4th at p. 395.) And although the court denied the petitioner's request based on a failure to show that the potential financial loss would cause irreparable injury, the court stressed that the result could very well have been different had the petitioner "shown that the [revoked] permits would become worthless before it could reasonably expect this court to hold a hearing on its motion for a stay," or if the petitioner had provided "the details of its financial

situation" showing the business impact of the $40,000 financial loss. (*Id*. at p. 392–95.) The court in *North Shuttle* was merely applying the familiar irreparable-harm inquiry, and found that the petitioner's request for a stay that set out only the dollar amount of the potential loss was insufficient. Here, in contrast, SoCalGas has set out in detail in its verified Petition and supporting documents the irreparable consequences of being forced to provide its litigation adversary with constitutionally protected material: the proverbial cat will be let out of the bag, and SoCalGas's First Amendment rights will be eviscerated. (See, e.g., Petn. at pp. 38–40, 57–60.)[3]

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[3] The Commission entirely fails to address the fact that, under the Commission's challenged rulings, SoCalGas would also be required to turn over, by next Wednesday, "all contracts (and contract amendments)" related to the 100% shareholder-funded accounts used, among other things, to advance SoCalGas's public-policy goals. (App. 445, 448.) As more thoroughly explained in the Petition, disclosure of this information—which includes consultants' identities, the amounts SoCalGas paid them, and the strategies employed to influence public policy—would impermissibly chill SoCalGas's constitutional rights and subject SoCalGas and third parties to harassment. (App. 373; see also Petn. at 39–40.) The Commission's failure to respond to this distinct showing of irreparable harm speaks volumes, and constitutes a waiver with respect thereto.

(Cont'd on next page)

The Court should see through the Commission's attempt to evade meaningful review of its rulings by having this Court withhold the temporary stay needed to keep the status quo in place and before requiring SoCalGas must turn over, by next Wednesday, constitutionally protected material to its litigation opponent before this Court has an opportunity to properly consider the serious constitutional concerns SoCalGas has raised with respect to both the Commission's decision-making process and its ultimate challenged rulings.[4]

B. Section 583 and General Order 66-D Provide Insufficient Protection Against the Constitutional Harms That Will Ensue If SoCalGas Is Forced to Produce the Protected Materials at Issue by Next Wednesday.

The Commission incorrectly contends that SoCalGas "has failed to demonstrate irreparable harm" given that SoCalGas can

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[4] The Commission notes that "the Court in PG&E vacated the stay it had originally issued" (Opp. at 16 n.29), but there, unlike here, the Commission contended that petitioner failed to properly exhaust through the Application for Review (AFR) procedure prior to seeking judicial review, and that petitioner failed to post a bond. (Public Utilities Commission Response to Issuance of Stay and Request for Reconsideration, *Pacific Gas & Electric Company v. P.U.C.*, Case No. A153642, Mar. 19, 2018.) Here, in contrast, SoCalGas indisputably went through the AFR procedure before petitioning this Court, and has also tendered a suspending amount, the adequacy of which the Commission has not disputed.

"submit any allegedly confidential materials with the Commission" pursuant to Section 583 and General Order 66-D. (Opp. at p. 19.) This misreads Section 583 and General Order 66-D—which only provide a process for *requesting* that materials be kept confidential, not a guarantee of confidentiality akin to a protective order—and ignores the reality that the Commission sees itself as one and the same with SoCalGas's litigation *adversary* (CalPA)—i.e., as both judge and litigant. (Opp. at p. 13.)

First, keeping certain material out of the hands of SoCalGas's litigation adversary (CalPA) is crucial to safeguarding SoCalGas's First Amendment and other rights. That is why, for example, SoCalGas has disclosed certain unredacted versions of declarations of persons with whom it associates to promote shared public-policy goals with the Commission, but *not* with CalPA. (App. 2006–2015.) The Opposition ignores this, reiterating the Commission's position in its Resolution that whatever information SoCalGas provides to the Commission—even if designated confidential—must *also* go to "its staff, such as Cal Advocates." (Opp. at pp. 12–13, 18.) The Commission's assertion is telling (and underscores the serious due-process concerns SoCalGas has also raised), as is its remarkably candid and breathtaking assertion that its authority, and that of its staff (such as CalPA), is unbounded by the

Constitution: as the Commission states at page 12 of its Opposition, in its Resolution, "the Commission *rejected* SoCalGas' argument that Cal Advocates' discovery rights … are limited by SoCalGas's First Amendment right to association" and expression. (Opp. at p. 12, italics added.) But that, of course, is not and cannot be the law, however many state statutory (and even constitutional) provisions the Commission cites. (U.S. Const. amends. I, XIV; Art. VI, cl. 2 (Supremacy Clause).). And the cat cannot be kept in the bag or the bell unrung—SoCalGas's and others' constitutional rights cannot be protected and the constitutional harms cannot be undone—if CalPA is given unrestricted access next Wednesday to the protected materials at issue.

Second, nothing guarantees that Section 583 and General Order 66-D would *actually* provide "ample protection" against public disclosure of the protected materials at issue. (Opp. at pp. 2, 18, quoting App. 1497 [Resolution ALJ-391].)

As the Commission itself has explained, "[n]othing in § 583 gives utilities a substantive right to confidential treatment for any type of information." (*Interim Opinion Implementing Senate Bill No. 1488, Relating to Confidentiality of Electric Procurement Data Submitted to Commission* (P.U.C. June 29, 2006) Decision 06-06-066 at p. 28.) Indeed, the plain language of Section 583 provides that "information furnished to the commission by a

public utility" may be made public "on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding." (§ 583.) That is why the only court SoCalGas has identified that has interpreted Section 583 held that the statute "does not forbid the disclosure of any information furnished to the CPUC by utilities." (*In re Cal. P.U.C.* (9th Cir. 1989) 892 F.2d 778, 783 [also noting that the CPUC "conced[ed] that § 583 gives it complete discretion to order disclosure of official information"].)

As for General Order 66-D, as an initial matter, and as SoCalGas has explained, the production of material subject only to a confidentiality restriction does not overcome the First Amendment's prohibition on the chilling of associational freedoms. (App. 515 fn. 12, citing, e.g., *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147.)

Most importantly, any request for confidentiality would run headlong into CalPA's stated position that the protected materials at issue *should be made public*. CalPA—which has not even denied previously funneling information to Sierra Club in the context of a formal Commission proceeding (App. 404)—asserted below that the "Commission [has] broad discretion to *disclose* information that a party deems confidential." (App. 1336, italics added.) And lest there be any doubt, CalPA then followed up by pressing for "the Commission [to] release a

significant portion of the information" at issue "as soon as practicable." (*Ibid.*; see Addendum.)

Section 583 and General Order 66-D do not come close to providing adequate protection for the First-Amendment-protected materials at issue. Instead, they merely provide a process by which the Commission can be asked (and then refuse) to treat certain material as confidential. And that obviously cannot suffice, particularly when, as here, the Commission and its staff (CalPA) have already foreshadowed the fate of such a request.

III. CONCLUSION

Irreparable harm of constitutional magnitude will ensue unless this Court promptly intervenes and grants the prayed-for temporary stay by no later than next Tuesday, March 16, in advance of the March 17 production deadline insisted on by the Commission. For the reasons stated above and in SoCalGas's Motion for Emergency Stay, as well as its Petition, the Court should grant such an emergency stay or other appropriate injunctive relief and set a pre-argument briefing schedule pending this Court's review of the merits of SoCalGas's Petition.

Dated: March 12, 2021

Respectfully submitted,

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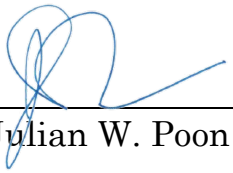
CERTIFICATE OF WORD COUNT

I certify this Reply of Petitioner Southern California Gas Company in Support of its Motion for Emergency Stay or Other Injunctive Relief, contains 2,452 words. In completing this word count, I relied on the "word count" function of the Microsoft Word program.

March 12, 2021



Julian W. Poon

ADDENDUM

has received from SoCalGas as a result of the instant investigation.[59] While a significant number of SoCalGas data responses to Cal Advocates' discovery have been made public in response to this PRA request,[60] some of the most relevant data responses remain in limbo because of SoCalGas' numerous confidentiality claims.

Adoption of the Draft Resolution, with the modifications proposed above, could provide some much needed clarity on these issues. Additional clarity is also needed so that the Commission may release a significant portion of the information that is still pending as soon as practicable. With these goals in mind, Cal Advocates proposes that the Findings in the Draft Resolution be supplemented as follows:

(1) There is an outstanding Public Records Act (PRA) request dated January 30, 2020, for, among other things, all SoCalGas "responses to data requests issued from June 1, 2019 to the present by [Cal Advocates] related to SoCalGas efforts to oppose fuel switching from natural gas to electric ends uses in the building and transportation sectors."

(2) The Commission and/or Cal Advocates shall make those materials not marked as confidential publicly available pursuant to the PRA as soon as practicable.

(3) The Commission reserves the right to disclose at any time the materials that it finds should not be protected as confidential consistent with the PRA and other laws and practices regarding confidential materials.[61]

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[59] That PRA request is available on Cal Advocates' website at https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4446 under "Additional Items of Interest."

[60] The public versions of many of these data requests are available on the Cal Advocates' website at https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4445

[61] See, e.g., D.20-03-014, pp. 21-22:

> Pub. Util. Code § 583 "neither creates a privilege of nondisclosure for a utility, nor designates any specific types of documents as confidential." (*Re Southern California Edison Company* (1991) 42 CPUC2d 298, 301; *Southern California Edison Company v. Westinghouse Electric Corporation* (1989) 892 F.2d 778, 783 ["On its face, Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities."]; and Decision 06-06-066, [fn. omitted] as modified by Decision 07-05-032 at 27 [583 does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for such treatment created by other statutes and rules.] In fact, Pub. Util. Code § 583 vests the Commission with broad discretion to disclose information that a party deems confidential. (D.99-10-027 [fn. omitted] (1999) CA PUC LEXIS 748 at *2 [Pub. Util. Code § 583 gives the Commission broad discretion to order confidential information provided by a utility be made public.].) As such, a party may not rely on Pub. Util. Code § 583 for the proposition that information required by the Commission to be submitted is confidential.

PROOF OF SERVICE

I, Kelsey Fong, 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 March 12, 2021, I served the following document(s):

SOUTHERN CALIFORNIA GAS COMPANY'S REPLY IN SUPPORT OF ITS MOTION FOR EMERGENCY STAY OR OTHER INJUNCTIVE RELIEF

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

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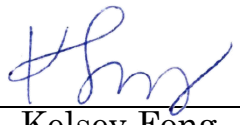
Executed on March 12, 2021.



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