BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application for Rehearing of Resolution ALJ-391.	Application 20-12-011

**PUBLIC ADVOCATES OFFICE REPLY
TO SOUTHERN CALIFORNIA GAS COMPANY'S RESPONSE TO
THE PUBLIC ADVOCATES OFFICE PETITION FOR MODIFICATION OF
RESOLUTION ALJ-391 AND DECISION 21-03-001**

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I. INTRODUCTION

Pursuant to Rule 16.4(g) of the California Public Utilities Commission (Commission or CPUC) Rules of Practice and Procedure (Rules) and the permission of the Acting Chief Administrative Law Judge granted by email on December 22, 2023,[1] the Public Advocates Office at the California Public Utilities Commission (Cal Advocates) submits this Reply to Southern California Gas Company's Response to Cal Advocates' November 22, 2023 Petition for Modification (Petition) of Resolution ALJ-391 issued December 17, 2020, and modified January 6, 2021 by Decision (D.) 21-03-001 (together "Resolution").[2]

II. FACTUAL DISCUSSION

Contrary to SoCalGas' arguments, it is entirely appropriate, indeed necessary, for the Resolution to be modified to recognize new facts and circumstances not considered at the time of the Resolution. Those facts and circumstances show that SoCalGas misled the Commission, its staff, and the Court of Appeal about the utility's First Amendment claim and other significant events.[3]

Specifically, when the Commission issued the Resolution it did not know that the Balanced Energy Contracts (Contracts) had not been moved from ratepayer accounts to shareholder accounts until the day the ALJ ordered them to be turned over to Cal Advocates; that Cal Advocates' would be able access the SoCalGas SAP system independently and in a manner that safeguards SoCalGas' confidentiality; or that SoCalGas would interpret *SoCalGas v. CPUC*[4] as barring the use of redacted versions of the Contracts.

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[1] On Friday, December 22, 2023, Assistant Chief Administrative Law Judge Patrick Doherty granted Cal Advocates authorization "to file a reply to responses of the parties to the petition for modification no later than January 12, 2024" in his capacity as Acting Chief Administrative Law Judge.

[2] *Resolution ALJ-391*, Administrative Law Judge Division, December 17, 2020, as modified by Decision (D.) 21-03-001, *Order Modifying Resolution ALJ-391 and, as Modified, Denying Rehearing of Resolution ALJ-391*, March 1, 2021.

[3] SoCalGas' Response also contains numerous false claims in violation of Rule 1.1.

[4] *Southern California Gas Company v. Public Utilities Commission*, 87 Cal.App.5th 324 (2023) (*SoCalGas v. CPUC*).

In response to these new and well-established facts, the utility offers a multitude of false claims and meritless legal arguments. For example, with regard to Petitions for Modification Rule 16.4(d) provides:

> Except as provided in this subsection, a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision.

Citing this rule, SoCalGas makes the wholly procedural arguments that Cal Advocates' Petition is not timely filed because the Commission's stay of the Resolution did not extend the time for filing a Petition for Modification, and as such, this required Cal Advocates to allege new or changed facts in its motion supported by a declaration.[5] This argument relies on SoCalGas' narrow and unsupported reading of the stay, ignores the declaration attached to Cal Advocates' Petition, and mischaracterizes the facts presented in Cal Advocates' Petition.

For example, with regard to the fact that the Balanced Energy Contracts (Contracts) were still booked to ratepayer accounts at the time of the October 2019 dispute, SoCalGas insists that "[t]his fact is not new."[6] Notably, the utility does *not* contradict Cal Advocates' showing that the Contracts were not booked to shareholders until November 1, 2019. Instead, SoCalGas argues that Cal Advocates was aware that there was an "error" that the utility intended to correct. Specifically, the utility claims that a footnote in Cal Advocates' October 7, 2019 Motion to Compel the Contracts demonstrates that Cal Advocates knew that the Contracts were being reclassified to shareholder accounts at the time of that dispute.[7]

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[5] *See* SoCalGas Response, p. 2, FN 3 and pp. 3-7.

[6] SoCalGas Response, p. 4.

[7] *See* SoCalGas Response, p. 4 and FN 24 quoting from *Cal Advocates Motion to Compel* (Oct. 7, 2019) at 9, n.28 ("Only after the Public Advocates Office discovered via data requests that these costs were being booked to ratepayer accounts did SoCalGas direct their accounting department to move these costs to a shareholder funded account.").

SoCalGas misses the point. While SoCalGas admitted prior to Cal Advocates' Motion to Compel that it had inappropriately billed certain lobbying expenses to ratepayer accounts and told Cal Advocates that those costs were moved, SoCalGas never admitted that those costs included the Contracts at issue in the dispute; nor did it promptly move those costs to a shareholder account. Rather, the evidence shows that SoCalGas did not book *any* of its lobbying costs to a shareholder account until November 1, 2019, the same day the ALJ ordered SoCalGas to produce the Contracts.

The record evidence also shows that Cal Advocates was decidedly *not on notice* that the Balanced Energy Contracts were still booked to ratepayers when Cal Advocates filed its October 7, 2019 Motion to Compel. Rather, the available documentary evidence – from utility data responses to pleadings – demonstrates that SoCalGas took every opportunity to emphatically insist that the Contracts were "100 percent shareholder funded" even though they were not, and that SoCalGas did *not* inform Cal Advocates of an "error" in its accounting for the Contracts until February 2020. For example, the utility's October 17, 2019 Response to Cal Advocates' Motion to Compel repeatedly stated (*sixteen times* over its ten-pages) that the Contracts were "100 percent shareholder funded."[8] The utility made similar statements in response to Cal Advocates' earlier data request for the Contracts, falsely stating that:

> The Balanced Energy IO is shareholder funded, not ratepayer funded. Thus, knowing this information will not assist the Public Advocates Office in performing its statutory duties."[9]

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[8] *See* SoCalGas Response to October 7, 2019 Motion to Compel, pp. 1, 2, and 4-10, *available at https://www.publicadvocates.cpuc.ca.gov/-/media/cal-advocates-website/files/legacy3/2---scg-response-to-cal-advocates-motion-to-compel---10-17-19.pdf*.

[9] *See* Cal Advocate' Petition, Attachment F – SoCalGas August 27, 2019 Response to SC-SCG-2019 and Cal Advocates' *Motion To Compel Responses From Southern California Gas Company To Question 8 Of Data Request Caladvocates-SC-SCG-2019-05 (Not In A Proceeding)* at 7 (SoCalGas falsely claimed in a meet and confer that the Contracts were booked to shareholders), served October 7, 2019 and available at https://www.publicadvocates.cpuc.ca.gov/-/media/cal-advocates-website/files/legacy3/1---caladvocates-motion-to-compel-responses-to-dr5-q8---10-7-19.pdf.

Nothing in these or any of the documents identified by SoCalGas suggests that the Contracts were not booked to a shareholder account until the day the ALJ ordered their production to Cal Advocates. SoCalGas only disclosed this fact to Cal Advocates in response to a data request in another proceeding, months after issuance of the November 1, 2019 Ruling. Specifically, on February 7, 2020 the utility blithely explained *for the first time* that:

> ... an incorrect settlement rule was set up for this IO to FERC 920.0 A&G Salaries, consequently, the costs initially settled to the incorrect FERC account. … The settlement rule was corrected on October 30, 2019 with an effective date of November 1, 2019.[10] [11]

Ultimately, SoCalGas asks the Commission to ignore the multiple times SoCalGas insisted the Contracts were shareholder funded and to ignore new information based on its mischaracterization of a single footnote.

Contrary to SoCalGas' claims, the issue here is not "that the expenses associated with the 'Balanced Energy Contracts …were 'booked to ratepayer accounts' and later reclassified."[12] Rather, in keeping with the newly discovered evidence presented in Cal Advocates' Petition, the issue here is that, contrary to SoCalGas' claims, it had not moved the Contracts to shareholder accounts when the dispute was live and indeed, did not do so until the day the ALJ Ruling ordered their disclosure. Taking the unsubstantiated claims in the SoCalGas Response at face value[13] – SoCalGas had at best, only initiated the process of moving the Contracts while it repeatedly claimed this was a *fait accompli*. Particularly in the context of the rights at issue, the distinction between

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[10] Cal Advocates' Petition, Attachment E.

[11] While the utility supplemented this data response with claims that it had been working on this accounting transition since September 21, 2019, these claims have yet to be tested or verified.

[12] SoCalGas Response, p. 4.

[13] SoCalGas asks us to assume: (1) that it took the utility months to identify the error – notwithstanding multiple data responses in which it repeatedly insisted that all the costs were booked to shareholders through a "separate invoice/order that is not ratepayer funded" (*see, e.g.* Cal Advocates' Petition, Attachment H, pp. 24, 30, 32, 36, and 38); (2) that it required more than a month to "fix" the "error" in its accounts; and (3) that several SoCalGas employees needed to be consulted to reach the unremarkable conclusion that the costs for political activities should be booked to FERC Account 426.4.

having actually moved the Contracts and not having done so (or merely having initiated the process) is paramount. As a matter of law, if the Contracts were in ratepayer accounts during the dispute, SoCalGas's First Amendment claim would not be ripe.

Cal Advocates' Petition asserts that because SoCalGas litigated an issue that differs from what the facts now show, it failed to exhaust its administrative remedies prior to filing in the Court of Appeal. SoCalGas disputes the claim that it failed to "exhaust" its "administrative remedies."[14] According to SoCalGas:

> Cal Advocates' argument is predicated on the notion that the '[c]ontracts at issue were . . . booked to a ratepayer account . . . throughout the dispute' that led to the Court of Appeal Opinion."[15]

To support this claim, SoCalGas selectively removed portions of what was said and reordered the remaining words to distort the meaning. What Cal Advocates *actually* said was that:[16]

> The timing of SoCalGas' movement of the contracts from ratepayer to shareholder accounts is important for three reasons. First, it shows that the Contracts at issue were, *when requested and throughout the dispute*, booked to a ratepayer account.[17]

Indeed, in the sentence that immediately follows the purported quote, Cal Advocates makes clear that because of this distinction, the issue SoCalGas took to the Court of Appeal was not based on the facts as they existed when the dispute arose. Because the Contracts were in ratepayer, rather than shareholder accounts, when requested, SoCalGas's subsequent claim was not based on the actual facts underlying the dispute.

Simply put, Cal Advocates' claim is that the facts were significantly different than SoCalGas knew and alleged, and that SoCalGas presented the Court of Appeal with a

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[14] SoCalGas Response, p. 8.

[15] SoCalGas Response, p. 8.

[16] By deleting "when requested" and moving "booked to a ratepayer account" SoCalGas gives the misleading impression that Cal Advocates is referring to SoCalGas' having moved the Contracts to a shareholder account, whereas the actual sentence makes clear that the issue was SoCalGas's claim of an intrusion into shareholder accounts while the Contracts were in ratepayer accounts.

[17] Cal Advocates' Petition, p. 10 (*italics added*).

hypothetical issue rather than the actual issue. Thus, while the Court of Appeal considered the speculative issue of whether Cal Advocates could examine contracts that were "100 percent shareholder funded" during the pendency of the dispute, the actual issue presented was whether a utility can evade regulatory scrutiny by moving contracts to a shareholder account to avoid providing them to its regulator. Having failed to obtain a decision on the actual merits, SoCalGas has also failed to exhaust its administrative remedies.

SoCalGas incorrectly asserts that "one of the cornerstones of Cal Advocates' position is the unremarkable proposition that the expenses associated with the 'Balanced Energy Contracts' were originally 'booked to ratepayer accounts' and later moved to shareholder accounts."[18] SoCalGas then asserts that "[t]his reclassification was similarly acknowledged at the appellate level by the Court of Appeal and then dispensed as irrelevant to its Opinion."[19] While the issue SoCalGas identifies was dealt with by the Court of Appeal, this is not the issue raised by the new evidence. Indeed, the new evidence calls into question whether the Court of Appeal's exercise of jurisdiction was informed and proper. The Commission can and should modify the Resolution so that it reflects the actual facts at hand and clarifies the impact of SoCalGas' misrepresentations.[20]

III. LEGAL DISCUSSION

A. Cal Advocates' Petition was timely filed.

By any reasonable measure the Petition was timely filed given the stay. As Cal Advocates' explains in the Petition, the Resolution was initially issued and effective on December 21, 2021 and, at SoCalGas' request, stayed indefinitely on March 19, 2021 in

[18] SoCalGas Response, p. 2.

[19] SoCalGas Response, p. 2.

[20] These impacts include, among other things, SoCalGas's failure to exhaust its administrative remedies and SoCalGas' violations of Rule 1.1.

response to SoCalGas' appeal to the courts.[21] Nonetheless, SoCalGas argues that the Petition should be dismissed, as the stay it requested did not toll the time frame for Petitions for Modification.[22] Specifically, SoCalGas notes that Rule 16.4 references the "effective date" of the decision or resolution at issue and claims that this is somehow distinct from the date on which a resolution's or decision's specific requirements might be implemented. In essence, SoCalGas claims that while the stay excused its non-compliance with the requirements of Resolution ALJ-391, the Resolution was solely for the purpose of filing a Petition to Modify, still in effect.

SoCalGas's attempt to draw a distinction between Rule 16.4(d)'s use of "effective date" and what SoCalGas refers to as implementation fails on several fronts. First, contrary to SoCalGas' intimations, the "plain language" of Rule 16.4 makes no such distinction. Second, consistent with SoCalGas' earlier observation, "no precedent supports this interpretation."[23] And finally, SoCalGas' interpretation creates an unnecessary conflict of law. The Commission has full discretion to review and grant a Petition for Modification that it deems justified *at any time*. Specifically, Public Utilities Code Section 1708 expressly provides:

> The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

As the Resolution is a prior Commission decision which the Commission may rescind, alter, or amend, SoCalGas' interpretation is contrary to law and its objections to the timeliness of Cal Advocates' Petition are baseless.

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[21] *See, e.g.,* Cal Advocates' Petition, Attachment A, February 24, 2023 SoCalGas letter to Executive Director regarding February 27, 2023 Compliance Date (reflecting history of extensions provided for compliance with the Resolution).

[22] *See* SoCalGas Response p. 2, FN 3 and pp. 3-7.

[23] SoCalGas Response, p. 2, FN 3.

B. Interpretations of the Resolution and *SoCalGas v. CPUC* raise important First Amendment issues the Resolution must address.

As reflected in Cal Advocates' Petition and Sierra Club's Response, briefs provided in the utility's GRC rely on new evidence provided by the utility demonstrating SoCalGas' historic pattern of booking political activities to ratepayer accounts and claiming "error" when caught.[24] SoCalGas, in its pending GRC, has urged broad interpretations of *SoCalGas v. CPUC* and in particular emphasized that the Court of Appeals affirmed shareholders' First Amendment rights.[25]

As part of the necessary clarification of the actual rights at issue in *SoCalGas v. CPUC* (the privacy of individuals doing business with SoCalGas) the Commission should elaborate on and respond to the Court of Appeal's acknowledgement that where there is an intrusion into a party's rights, those rights must be balanced by clarifying all the rights at issue, including those of ratepayers.

Notably, SoCalGas does not dispute that ratepayers have a First Amendment right to be free from compelled speech. Rather, SoCalGas claims that "[i]n addition to being flagrantly beyond the scope of the 'non-proceeding,' Cal Advocates' ratepayer-focused formulation of the First Amendment issue is misguided because SoCalGas has not included any of the below-the-line political activities at issue in its rate forecasts in its GRC."[26]

SoCalGas's response exemplifies both irony[27] and tunnel vision. SoCalGas asserts a claim of shareholder rights that the Court of Appeal specifically rejected in the GRC, in its Petition for Modification in this proceeding, and in its response to Cal

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[24] *See, e.g.,* A.22-05-015, Cal Advocates GRC Opening Brief pp. 364-402 and California Environmental Justice Alliance (CEJA) GRC Opening Brief pp. 96-105.

[25] *See, e.g.,* SoCalGas Response, pp. 3 and 8.

[26] SoCalGas Response, p. 8.

[27] The irony is that SoCalGas was found to be attempting to include the costs of political activities in the GRC, but claimed accounting "error" and removed the costs from the GRC. *See* Sierra Club Response, pp. 4-5; *see also* Cal Advocates GRC Opening Brief pp. 364-402 and CEJA GRC Opening Brief pp. 96-105.

Advocates' Petition.[28] More importantly, SoCalGas' claim that the issue of ratepayers' First Amendment rights is somehow mooted because it once again claims to have "not included any of the below-the-line political activities at issue in its rate forecasts in its GRC" ignores the bigger picture.[29] The Commission must look at the interpretation of *SoCalGas v. CPUC* offered in the GRC, consider the potential for the citation of the case in other proceedings, and adopt its own interpretation of what *SoCalGas v. CPUC* requires. Ultimately, SoCalGas has failed to identify anything that prohibits the Commission from modifying the Resolution to comport with *SoCalGas v. CPUC* based on the record and judicially noticeable facts.[30]

C. SoCalGas' legal arguments that the Commission cannot consider evidence of its booking political costs to ratepayers are meritless.

In response to Sierra Club's Response in support of Cal Advocates' Petition, SoCalGas attempts to diminish the relevance of the evidence relied upon in the GRC and characterizes the evidence Sierra Club cites to as "*hearsay*" information that cannot be officially noticed. According to the utility:

> many of the alleged facts are disputed in the GRC and have not been fully adjudicated in that proceeding. It would be legal error to treat these disputed facts as truth for the purposes of Cal Advocates' Petition.[31]

SoCalGas' legal arguments are demonstrably wrong.

The evidence both Cal Advocates and Sierra Club rely upon from the GRC primarily comprises publicly available information and the utility's own data responses and – with the exception of certain redactions to Cal Advocates' testimony ordered by the

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[28] See SoCalGas Response, p. 8 and discussion in Section III.E below.

[29] See FN 27 above.

[30] Ratepayers' right to be free from compelled speech is well established and judicially noticeable fact. See *Pacific Telephone and Telegraph Co. v. CPUC*, 62 Cal. 2d 634 (1965) p. 668. California Supreme Court quoting with approval from CPUC Decision No. 67369; U.S. Const., 1st Amend.; Cal. Const. art. I, § 3. See also discussion of the right to be free from compelled speech in Cal Advocates Opening Brief in SoCalGas' 2024 General Rate Case (GRC), filed August 14, 2023 in A. 22-05-015, pp. 366-370 and 387-388.

[31] SoCalGas January 2, 2024 Reply to Sierra Club, p. 4 (*emphasis in original*).

GRC Ruling[32] – that evidence has been incorporated into the record of the GRC. For example, the California Environmental Justice Alliance's (CEJA) discovery that SoCalGas was charging ratepayers for its legal challenge to the City of Berkeley's gas ban on new construction connections was based on the utility's publicly-available General Order 77-M filings, and the utility's data responses on the issue.[33]

Contrary to the utility's broad and ubiquitous claim that Sierra Club relies upon "inadmissible hearsay,"[34] the SoCalGas data responses relied upon are part of the record in the GRC[35] and the utility's General Order 77-M filings were officially noticed in the GRC.[36] SoCalGas asks the Commission to ignore that evidence in this proceeding on the basis of flawed procedural objections about the admissibility of evidence that it provided.[37] For example, the utility criticizes Sierra Club for relying upon Cal Advocates' testimony regarding the utility's use of ratepayer funds for speakers that would support SoCalGas policies at Commission meetings.[38] SoCalGas claims that the information is "protected" and that Sierra Club's "further disclosure and dissemination" of the information "further compounds the harm," to its First Amendment rights. On this basis, the utility demands that all documentation of its misuse of ratepayer accounts be destroyed and that the Commission close the books on all inquiries regarding its use of ratepayer funds for political activities.[39]

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[32] *See* A.22-05-015, *Administrative Law Judge's Ruling Granting In Part Public Advocates' Motion To Enter Testimony, Workpapers, And Other Evidence Regarding Southern California Gas Company's Pattern Of Booking Political Activities To Ratepayer Accounts* (October 19, 2023).

[33] Sierra Club Response, pp. 4-5. *See also* Cal Advocates GRC Opening Brief pp. 364-402 and CEJA GRC Opening Brief pp. 96-105.

[34] SoCalGas January 2, 2024 Reply to Sierra Club, p. 4.

[35] *See citations to the GRC record exhibits in* Cal Advocates GRC Opening Brief pp. 364-402 and CEJA GRC Opening Brief pp. 96-105.

[36] Numerous GO 77-M filings were officially noticed in the SoCalGas GRC. *See, e.g.,* A.22-05-015, *Administrative Law Judge's Ruling Granting Public Advocates' Motion For Official Notice* (October 4, 2023).

[37] SoCalGas January 2, 2024 Reply to Sierra Club, p. 2.

[38] SoCalGas January 2, 2024 Reply to Sierra Club, p. 3.

[39] SoCalGas January 2, 2024 Reply to Sierra Club, pp. 2-3 ("Rather than continue to entertain Cal Advocates' attempts to side-step the Court of Appeal's determinations or allowing this 'non-proceeding'

The utility falsely argues that *SoCalGas v. CPUC* requires this outcome and points to an October 19, 2023 Ruling in the utility's GRC (GRC Ruling) in support. That GRC Ruling required Cal Advocates to redact portion of its GRC testimony regarding certain political activities, and to entirely redact the scopes of work remaining on four pages of an exhibit. In ordering these changes to the record, the GRC Ruling relied upon *SoCalGas v. CPUC,* explaining that it was:

> Guided by the Court of Appeal's decision on this very issue, the names of vendors that have entered shareholder-funded contracts with SoCalGas and the scope of such contracts are not being admitted. Therefore, Section II(A)(5) of CA-23-E-R (PUBLIC) and CA-23-C-E-R (CONF) and the vendor names and contract scopes from pages 22, 42, 75, and 106 of CA-122-C-R (CONF) must be so redacted and may not be replaced with summaries of the scope of work, before those exhibits may be reconsidered for admission into the record of this proceeding."[40]

As an initial matter, SoCalGas' reliance on the GRC Ruling is misplaced because the GRC Ruling does not apply to this Petition. More importantly, SoCalGas places the 'cart before the horse' – an ALJ ruling, particularly one that has not been adopted in a decision by the Commission, is not binding on the Commission. Indeed, given the Commission's extensive involvement in this matter, it behooves the Commission to provide guidance to all ALJs by clarifying the meaning of the parts of the Resolution at issue here. Finally, contrary to SoCalGas' bald claims that the Cal Advocates' testimony at issue – which Sierra Club relied upon in its Response – discloses "protected" or "First Amendment" information,[41] even a cursory review of the Cal Advocates' testimony demonstrates that Cal Advocates carefully stuck to the basic facts.[42] Cal Advocates

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to be the prism for Cal Advocates' and Sierra Club's broader investigatory agenda and media campaign against SoCalGas, the Commission should grant SoCalGas's petition, order a return or destruction of the contracts, and close this matter.").

[40] *See* A.22-05-015, *Administrative Law Judge's Ruling Granting In Part Public Advocates' Motion To Enter Testimony, Workpapers, And Other Evidence Regarding Southern California Gas Company's Pattern Of Booking Political Activities To Ratepayer Accounts* (October 19, 2023) p. 7.

[41] SoCalGas Reply to Sierra Club p. 3.

[42] *See* Appendix A hereto, the public version of Cal Advocates' proposed GRC Exhibit CA-23, which was ordered almost entirely redacted for purposes of the GRC, including removal of footnotes 87 and 88.

explained that SoCalGas hired an "undisclosed vendor" to provide speakers to advocate on behalf of the utility's positions during Commission meetings, and relied on publicly available information to confirm that the speakers actually appeared. Consequently, Sierra Club's reliance on this testimony is entirely appropriate.

The Resolution should recognize that, contrary to SoCalGas' claims, nothing in *SoCalGas v. CPUC* prevents the Commission from considering the type of evidence in Section II.A.5 of the Cal Advocates' GRC testimony[43] which shows, among other things, that the utility violated Commission rules by contracting to have speakers advocate for its positions in Commission meetings. Rather than piecemeal rulings in other proceedings (such as the SoCalGas GRC), the Commission should clarify the Resolution to identify how *SoCalGas v. CPUC* shall be applied in Commission proceedings.

D. The new evidence shows that SoCalGas failed to satisfy the statutory prerequisites to its 2021 petition for writ of review.

1. Cal Advocates' proposed modifications to the Resolution properly address SoCalGas' misrepresentations.

The new evidence provided by Cal Advocates shows that SoCalGas had no First Amendment claim during the dispute and calls into question SoCalGas's claim to have "satisfied the statutory prerequisites to its 2021 petition for writ of review."[44] Cal Advocates proposes modifying the Resolution by adding the following findings so that if SoCalGas opts to further pursue this matter, the Court of Appeal can consider this new issue:[45]

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[43] *See* Appendix A hereto, the public version of Cal Advocates' proposed GRC Exhibit CA-23, which was ordered almost entirely redacted for purposes of the GRC, including removal of footnotes 87 and 88.

[44] SoCalGas Response, p. 7.

[45] Pursuant to Public Utilities Code section 1757(a) "No new or additional evidence shall be introduced upon review by the court."

37. Exhaustion of administrative remedies is a jurisdictional prerequisite to a Petition for Writ of Review of a Commission decision.
38. A party cannot be said to have exhausted its administrative remedies where the facts supporting its fundamental cause of action are other than as its petition claimed.
39. A Writ Petition that includes facts other than those leading to the underlying decision fails to provide an accurate basis for a court's review.

These findings address the fact that the dispute presented in *SoCalGas v. CPUC* related to contracts[46] that were booked to ratepayers at the time of the dispute, and only later moved to shareholder accounts.

The utility does not argue that the Commission lacks the authority to adopt the proposed modifications. Rather, SoCalGas combines meritless legal arguments (discussed below) with the assertion that the proposed language is "both inaccurate and irrelevant" because "the reclassification of the account from an above-the-line account to a below-the-line account was extensively referenced and was already part of the factual underpinnings of Resolution ALJ-391 and D.21-03-001 when they reached the Court of Appeal."[47]

What the utility casually ignores is the fact that while the Commission knew that SoCalGas had recorded the Contracts to ratepayer accounts at some point, neither the Commission nor the Court of Appeal knew that at the time of the dispute (in October 2019) the Contracts were still booked to ratepayers, even though the utility claimed the Contracts had been moved to shareholder accounts.[48] Had SoCalGas admitted that the Contracts were 100% ratepayer funded at the time of the dispute, there would have been no basis for its First Amendment appeal. Thus, despite SoCalGas' repeated claims to the

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[46] Specifically, the Balanced Energy Contracts.

[47] SoCalGas Response, p. 8.

[48] *See* FN 71 below (quantifying SoCalGas' prolific and misleading claims of "100 percent shareholder funded" political activities).

contrary, its misrepresentations to the Commission are material and Cal Advocates' proposed modifications are necessary.[49]

2. SoCalGas' citations to the law do not support its positions.

Throughout its Response the utility attempts to deflect from its misrepresentations by shifting the focus to Cal Advocates. The utility claims that Cal Advocates' Petition is nothing more than a late-filed application for rehearing and "a frivolous attempt to once again relitigate the issues resolved by the Court of Appeal in *Southern California Gas Company v. Public Utilities*…"[50] The utility cites to Decisions 23-05-004 and 11-10-034 in support of its claim. However, those Commission decisions only stand for the proposition that the Commission will not consider Petitions that do not present new facts or circumstances that the Commission has not already considered.[51] The facts here have not been considered by the Commission. As described above, the newly understood facts and circumstances contradict what SoCalGas repeatedly told the Commission.

Further, the utility's reliance on D.11-10-034 fails to recognize that the decision was supportive of "clarifications" notwithstanding the absence of new facts or circumstances. Here, Cal Advocates urges clarification regarding whether a party can be deemed to have exhausted its administrative remedies where it has not perfected its claim.

The utility cites three appellate cases in support of its claim that it properly exhausted its administrative remedies before proceeding to the Court of Appeal.[52] However, none of these cases endorse the utility's implicit argument – that material misrepresentations to the Commission do not undermine its petition for writ of review.

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[49] In addition to misleading the Commission when it baldly claimed – without clarification – that the Contracts were "100 percent shareholder funded," the utility made similar misrepresentations to the Court of Appeal. *See, e.g.,* SoCalGas March 8, 2021 *Petition for Writ of Review et. seq.,* pp. 10, 15, 16, 17, 18, 20, 21, 38, and 48.

[50] SoCalGas Response, p. 1. *See also* SoCalGas Response pp. 7, 8, 9, and 11.

[51] D.23-05-004 at FOF 6; D.11-10-034 p. 23 (finding no new facts presented but granting requests for clarification).

[52] SoCalGas Response, p. 7, FNs 35-37.

For example, in *San Pablo Bay Pipeline Co. LLC v. Pub. Util. Comm'n*, 221 Cal.App.4th 1436, 1443 (2014), the court states that: "The application for rehearing must raise each issue that the party intends to raise in the Court of Appeal—that is, the party must exhaust its administrative remedies."[53] Presumably SoCalGas cites this case in support of its contention that claims of its failure to exhaust its administrative remedies and failure to perfect its claim should have been raised earlier and are now waived. However, the holding of this case is inapplicable here where, by its repeated misrepresentations, SoCalGas actively worked to prevent the Commission from arguing that the utility's claim that the Contracts were "100 percent shareholder funded" was false at the time of the dispute, and SoCalGas therefore had no First Amendment claim. Relatedly, the Commission was also prevented from arguing that the utility's misrepresentation was *not* merely an accounting "error" despite the many months the utility failed to discover, fix, and admit its false statements. Consequently, the Commission's "original" and "subsequent" decisions were made without critical and relevant facts. Nothing in *San Pablo Bay Pipeline* suggests that the Commission may not revise its prior decisions in response to a party's misrepresentations.

Arguing against Cal Advocates' proposed modifications, SoCalGas cites *Evans v. City of San Jose*, 3 Cal.App.4th 728, 732 (1992), for the uncontroversial proposition that "exhaustion of remedies is 'not a matter of judicial discretion, but a jurisdictional prerequisite to resort to the courts'").[54] Here, SoCalGas correctly states that "exhaustion of remedies are pure legal arguments on matters of appellate justiciability" and, in a footnote concedes that exhaustion of remedies is "not a matter of judicial discretion, but a jurisdictional prerequisite to resort to the courts."[55] However, SoCalGas then appears to incorrectly suggest that the Commission cannot make findings relevant to the issue of exhaustion, claiming that "[t]hese subjects are the province of the appellate courts, not

[53] *San Pablo Bay Pipeline Co. LLC v. Pub. Util. Comm'n*, 221 Cal.App.4th 1436, 1443 (2014) (cited at SoCalGas Reply FN 35; citation to Pub. Util. Code, § 1732 *omitted*.).

[54] *Evans v. City of San Jose*, 3 Cal.App.4th 728, 732 (1992) (cited at SoCalGas Reply FN 36).

[55] Citing *Evans v. City of San Jose*, 3 Cal.App.4th 728, 732 (1992).

topics for retrospective determination by the underlying administrative agency whose resolution is subjected to judicial review."[56] While the Court of Appeal makes the ultimate determination regarding exhaustion of remedies, it relies on the facts from the decision and record below.

Finally, citing *Rittiman v. Pub. Util. Comm'n*, 80 Cal.App.5th 1018, 1028-1038 (2022), SoCalGas asserts that exhaustion of the Commission's administrative remedies is not a prerequisite to appeal. SoCalGas's reading of *Rittiman* is overbroad. While the *Rittiman* court rejected Commission claims that the plaintiff had failed to exhaust its administrative remedies, the Court limited this holding where it explained that "the administrative remedies set forth in the Public Utilities Code, and specifically section 1731, do not apply to Public Records Act requests."[57]

Undaunted by the lack of support provided by the cases it relies upon, SoCalGas wrongly asserts that exhaustion of administrative remedies is "outside of scope" of these proceedings and that the Commission lacks jurisdiction to address it.[58] SoCalGas is wrong on both counts. While the Court of Appeal is charged with ascertaining whether its jurisdictional prerequisites are met, it is up to the parties to the proceeding to present these issues. Consistent with *San Pablo Bay Pipeline*[59] the Commission must make findings of fact related to the new issue (and SoCalGas's failure to exhaust its administrative remedies) in order to bring this jurisdictional shortcoming to the attention of the Appellate Court.

Finally, in an apparent last-ditch effort to cure the infirmity in its case caused by its misrepresentations, the utility – *with no hint of irony* – asserts that Cal Advocates fails to acknowledge the one vendor contract that the utility actually booked to shareholders. [60]

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[56] *See* SoCalGas Response, p. 7, Citing *Rittiman v. Pub. Util. Comm'n*, 80 Cal.App.5th 1018.

[57] *Rittiman v. Pub. Util. Comm'n*, 80 Cal.App.5th 1018, 1028-1038 (2022) (cited at SoCalGas Response, p. 7, FN 37).

[58] SoCalGas Response, Attachment A, p. 16.

[59] *See* FN 53 above.

[60] SoCalGas Response, p. 4, FN 22.

This argument suggests that the utility's entire First Amendment case now relies on the fact that it produced one contract that was properly booked to shareholders. However, the utility's reliance on this single contract is misplaced. That contract was not a Balanced Energy Contract, and to Cal Advocates' knowledge, it is not in the record of this proceeding or the GRC.

E. Rule 16.4: SoCalGas Requests Inappropriate Relief.

Beyond requesting that the Commission deny the Petition, SoCalGas asks that the Commission "grant SoCalGas's pending Petition for Modification."[61] SoCalGas claims that its Petition for Modification "seeks focused modifications ... to reflect the results of the Court of Appeal Opinion" and that its modifications are necessary "to secure the return or destruction of the shareholder contracts whose First Amendment-protected status was vindicated by the Court of Appeal."[62]

As an initial matter, SoCalGas's request is procedurally improper – it requests additional modifications that are outside the scope of Cal Advocates' Petition and fails to comply with Rule 16.4. Beyond this procedural flaw, SoCalGas' request is rooted in the false claim that the Court of Appeal ruled in favor of SoCalGas on its First Amendment objections, including the issue of whether Cal Advocates must "return or destroy" the materials. This is simply not true.

The Court of Appeals' ruling specifically dismisses SoCalGas's claim "that if [SoCalGas's] non-public contracts and communications were disclosed to the Commission there would be a 'chilling effect on [SoCalGas] and [its] ability to engage in activities which are lawful,' which 'could limit [SoCalGas's] future associations."[63] Indeed, the Court of Appeals went on to identify this claim as "nothing more than a circular argument about a subjective fear."[64] Instead, the Court of Appeals specifically

[61] SoCalGas Response, p. 3.

[62] SoCalGas Response, p. 3.

[63] *SoCalGas v. CPUC*, p. 343.

[64] *SoCalGas v. CPUC*, pp. 343-344.

identified declarations by SoCalGas contractors "who stated they would be less likely to associate with [SoCalGas] if information about their political efforts were disclosed to the Commission" as presenting a First Amendment claim.[65]

In light of the court's focus on information about individuals, *SoCalGas v. CPUC* cannot reasonably be construed as sustaining "SoCalGas's constitutional objections," let alone meaning that "Cal Advocates does not have a right to the materials at all." Simply put, it is not the "associational materials" that are protected, as SoCalGas claims, but rather the individuals that associate with SoCalGas. This means that even if SoCalGas had moved the Contracts to a shareholder account as SoCalGas falsely claimed, and the identifying information of the parties to the contracts had been redacted, as Cal Advocates recommends, then SoCalGas would have no First Amendment claim for any refusal to produce the documents to Cal Advocates.[66]

F. The attorney work product issue identified in the Petition is new and should be addressed in the Resolution.

Cal Advocates' Petition raises another significant new issue regarding the attorney work product privilege that should be addressed via modifications to the Resolution.[67] In sum, based on the current language of the Resolution, Cal Advocates was ordered to provide to SoCalGas a collection of SAP screen shots in violation of its attorney work product privilege. Cal Advocates proposes that the Commission modify the Resolution to recognize the Official Information Privilege[68] and clarify that Cal Advocates need not disclose to SoCalGas documents that Cal Advocates copies from the SAP system. Further, the Resolution should explicitly require the utility to provide Cal Advocates with remote SAP access to all above-the-line accounts within no less than two

[65] *SoCalGas v. CPUC*, p. 344 (emphasis added).

[66] Cal Advocates proposal to redact identifying information is set forth in full in its Response to the SoCalGas' Petition to Modify, and incorporated here by reference.

[67] *See* Cal Advocates' Petition, pp. 22-28.

[68] Cal. Evidence Code 1040.

business days of any request for access. Such access should be available for as long as Cal Advocates deems necessary.

These modifications are particularly appropriate given that the utility's unqualified representations to the Court of Appeal that it had no objection to providing SAP access to its above-the-line accounts to Cal Advocates.[69] However, in its Response SoCalGas takes issue with this approach. After a lengthy and questionable recitation of its version of the facts, SoCalGas urges the Commission to reject this modification, claiming that Cal Advocates merely seeks to relitigate issues which the ALJ in the GRC has already rejected.[70]

Here again, SoCalGas misses the point. Cal Advocates has already fully complied with the ALJ's ruling in the GRC – that bell can neither be 'unrung' nor relitigated by Cal Advocates or any other party. However, going forward the requirements of the Resolution will likely be at issue again – in other GRCs, other proceedings, and for other investor-owned utilities. Contrary to SoCalGas's intimations, the ALJ's GRC ruling, which was not adopted by the Commission, does not represent a decision of the Commission and cannot render an issue *res judicata*. Rather than wait until the GRC is decided to seek final approval of the ALJ's interpretation of the intent of the Resolution, obtaining a clear and final interpretation of the Resolution in the proceeding where the Resolution is at issue is consistent with the law, the most efficient use of Commission resources, and in the best interest of Cal Advocates, the Commission, and ultimately even SoCalGas.

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[69] On July 16, 2021, SoCalGas told the Court of Appeal at least seven times that it was more than willing to make its ratepayer accounts available to Cal Advocates, including via remote access to its SAP database. SoCalGas was emphatic: "…SoCalGas has not taken, and still does *not* take, issue with CalPA inspecting its ratepayer (i.e., above-the-line) accounts to determine whether any of those funds have been improperly allocated to support SoCalGas's political and public-policy efforts." *Southern California Gas Company v. Public Utilities Commission of the State of California,* Court of Appeal for the Second Appellate District, Division One, Case No. B310811, *Southern California Gas Company's Reply In Support of Its Petition for Writ of Review, Mandate, and/or Other appropriate Relief; and Declaration of Michael H. Dore*, July 16, 2021 *at* 21 (emphasis in original), *available at* A.22-15-015, Cal Advocates January 12, 2023 Motion to Compel, Ex. 26 - SCG Reply ISO Writ re SAP Access, 7-16-21.

[70] SoCalGas Response, p. 10-11.

G. Rule 1.1: SoCalGas Conflates its Accounting Practices with Commission Reporting Requirements.

Finally, SoCalGas argues that Cal Advocates identifies mere accounting error and "now suggests that any SoCalGas accounting misclassification or reclassification is a 'violation of law' that should be the basis for finding that SoCalGas has misled the Commission under Rule 1.1." Nothing could be farther from the truth. Accounting errors are inevitable and Cal Advocates applauds any effort to make corrections and foster more accurate accounting.

The difference between the parties' positions here is that SoCalGas conflates a purported accounting error with repeatedly reporting false and misleading information to Cal Advocates and the Commission. Where SoCalGas provides vague and unsubstantiated allegations of persecution pursuant to some "shadow agenda" the fact is, neither Cal Advocates nor Rule 1.1 concern themselves with SoCalGas's internal corrections to its accounts – Cal Advocates and Rule 1.1 which it cites, are concerned with what SoCalGas reports.

Moreover, contrary to SoCalGas's intimations, a single, minor, or inadvertent error is not at issue here. All of the available documentary evidence - from utility data responses to pleadings – demonstrates that at every opportunity SoCalGas emphatically insisted that the Contract costs were "100 percent shareholder funded" and that it did *not* inform the Commission or Cal Advocates of an "error" in its reporting until February 2020. As described above, the utility's October 17, 2019 Response to Cal Advocates Motion repeatedly stated (*sixteen times* over its ten-pages) that the Contracts were "100 percent shareholder funded."[71] The utility made the same statements in response to Cal Advocates' earlier data request for the Contracts and a follow up meet and confer. Specifically, the utility (falsely) stated that:

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[71] SoCalGas' October 17, 2019 Response to Cal Advocates' Motion to Compel uses the term "100 percent shareholder funded" sixteen times to describe the Contracts on nearly every page. *See* SoCalGas' Response, pages 1, 2, and 4-10, *available at* https://www.publicadvocates.cpuc.ca.gov/-/media/cal-advocates-website/files/legacy3/2---scg-response-to-cal-advocates-motion-to-compel---10-17-19.pdf.

> The Balanced Energy IO is shareholder funded, not ratepayer funded. Thus, knowing this information will not assist the Public Advocates Office in performing its statutory duties.[72]

Ultimately, nothing in the above examples or numerous other statements by SoCalGas clarify that the Contracts were not then (or would be) booked to shareholders. Cal Advocates' proposed revisions reflecting the actual facts are correct,[73] highly relevant to the issues addressed in the Resolution, and should be incorporated in revisions to the Resolution.[74]

IV. CONCLUSION

For all of the reasons set forth above Cal Advocates requests that the Commission modify the Resolution as set forth herein and in its Petition for Modification filed November 22, 2023 and Appendix A thereto.

Respectfully submitted,

/s/ *DARWIN E. FARRAR*

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January 12, 2024

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[72] *See* Cal Advocate' Petition, Attachment F – SoCalGas August 27, 2019 Response to SC-SCG-2019 and Cal Advocates' *Motion To Compel Responses From Southern California Gas Company To Question 8 Of Data Request Caladvocates-SC-SCG-2019-05 (Not In A Proceeding)* at 7 (SoCalGas falsely claimed in a meet and confer that the Contracts were booked to shareholders), served October 7, 2019 and available at https://www.publicadvocates.cpuc.ca.gov/-/media/cal-advocates-website/files/legacy3/1---caladvocates-motion-to-compel-responses-to-dr5-q8---10-7-19.pdf.

[73] *See* Cal Advocates' Petition at Appendix A.

[74] Contrary to the utility's claim, Cal Advocates' declaration submitted with its Petition more than sufficient to meet the "basic requirements" for seeking relief through a Petition for Modification. *See* SoCalGas Reply at 7 and FN 40.

APPENDIX A

Cal Advocates' Public Testimony Without Ordered Redactions

Docket	:	A.22-05-015 et al
Exhibit Number	:	CA-23-E-R
Commissioner	:	D. Houck
ALJ	:	M. Lakhanpal
Witness	:	S. Castello

PUBLIC ADVOCATES OFFICE
CALIFORNIA PUBLIC UTILITIES COMMISSION

Report on the Results of Operations for San Diego Gas & Electric Company Southern California Gas Company Test Year 2024 General Rate Case

POLITICAL ACTIVITIES BOOKED TO RATEPAYER ACCOUNTS

PUBLIC

San Francisco, California
March 27, 2023

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14 **5. Payments To Produce Speakers At Public Meetings**

15 C4BES was not the only front organization SoCalGas sought to use to amplify its
16 pro-gas/anti-electrification positions at the Commission. As part of its Accounting
17 Review, Cal Advocates learned that SoCalGas signed a $[REDACTED] contract with [REDACTED]
18 [REDACTED] ([REDACTED]) to produce speakers at public meetings
19 to support SoCalGas' positions. Specifically, [REDACTED] contracted to "[REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]."[84] [REDACTED] was also tasked with "[REDACTED]
24 [REDACTED]

[82] WP 29 - SCG DR Resp. AW-SCG-2020-01, 3-31-21, LA Airport Lobbying Resp. 5-CONF, June 15, 2020 Resp. to Qs. 2 and 4.

[83] WP 29 - SCG DR Resp. AW-SCG-2020-01, 3-31-21, LA Airport Lobbying Resp. 5-CONF, Resp. to Q.2.

[84] WP 62 - SCG DR Resp. SC-SCG-2019-05, 11-15-19, K #566005625, eff 9-5-19-CONF, p. 10.

1 ."[85] That contract was effective September 5, 2019
2 through December 31, 2019, and was produced in response to Cal Advocates' August
3 13, 2019 request for all contracts associated with the Balanced Energy Work Order.[86]
4 At that time, the Balanced Energy Work Order Authorization directed that all costs be
5 booked to Account 920, an above-the-line account. SoCalGas has agreed that this
6 contract was "for Political Activities [and] was booked to an above-the-line account that
7 was later moved to a below-the-line account."
8 Publicly available videos from Commission meetings during that time frame show
9 that speakers associated with attended Commission business meetings and
10 advocated in favor of SoCalGas' position .[87] That same
11 evidence shows that some speakers disclosed their association with , but none
12 suggested either that encouraged them to speak, or that SoCalGas paid
13 to ensure their attendance at the meeting to advocate for the utility's positions.[88]
14 Indeed, the speakers at the meetings may have had no idea of the contract SoCalGas
15 negotiated to procure their attendance at those meetings.

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[85] WP 62 - SCG DR Resp. SC-SCG-2019-05, 11-15-19, K #566005625, eff 9-5-19-CONF, p. 11.

[86] *See* WP 320, PDF p. 496, Question 8 ("Provide all contracts (and contract amendments) covered by the WOA which created the BALANCED ENERGY IO.").

[87] Cal Advocates staff listened to the transcripts of Commission business meetings during the time frame the contract was in effect and transcribed speaker comments in support of SoCalGas' positions from at least one meeting during that time frame. That transcription is available at WP 188 – Partial Transcript, Pub Comment, 9-12-21 CPUC Mtg. A video of that meeting is available at Admin Monitor - California - California Public Utilities Commission. The public comments in favor of SoCalGas' positions begin around the six minute mark. *See also See, e.g.,* WP 173 - Speaker List, Commission Meeting, 9-12-19. A video of the October 10, 2021 Commission meeting is available Admin Monitor - California - California Public Utilities Commission.

[88] Utility payments made to produce speakers to support the utility's positions during Commission voting meetings violates Resolution ALJ-412, Rule 4(c) (formerly Resolution ALJ-252, Rule 8(c)): "Parties to a proceeding cannot speak to issues related to the proceeding to which they are a party." For the Commission Business meetings held during the time frame of the contract, page 4 of the instructions regarding Public Comment provided: "Per Resolution ALJ-252, any member of the public (excluding parties and their representatives) who wishes to address the CPUC about matters before the Commission must sign up with the Public Advisor's Office table before the meeting begins." *See* https://www.cpuc.ca.gov/about-cpuc/transparency-and-reporting/cpuc-voting-meetings/presentation-archive.