BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS COMPANY'S (U 904 G) RESPONSE TO PUBLIC ADVOCATES OFFICE'S MOTION TO FIND SOUTHERN CALIFORNIA GAS COMPANY IN CONTEMPT OF THIS COMMISSION IN VIOLATION OF COMMISSION RULE 1.1 FOR FAILURE TO COMPLY WITH A COMMISSION SUBPOENA ISSUED MAY 5, 2020, AND FINED FOR THOSE VIOLATIONS FROM THE EFFECTIVE DATE OF THE SUBPOENA (NOT IN A PROCEEDING)

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Southern California Gas Company ("SoCalGas") hereby files this response to Public Advocates Office's Motion to Find Southern California Gas Company in Contempt of This Commission in Violation of Commission Rule 1.1 for Failure to Comply with a Commission Subpoena Issued May 5, 2020, and Fined for Those Violations from the Effective Date of the Subpoena (Not in a Proceeding) (the "Contempt Motion").

I. INTRODUCTION

The Contempt Motion rests on a fundamentally flawed premise: Public Advocates Office ("Cal Advocates") claims its authority to access SoCalGas's books and records is unlimited, and therefore SoCalGas's attempts to resist this access should be punished with millions of dollars of fines. Cal Advocates is wrong. While Cal Advocates has broad discretion to obtain SoCalGas's books and records, that power is not limitless. Rather, under the United States and California Constitutions, its inspection authority is limited by SoCalGas's First Amendment rights to association, free expression, and to petition the government, and further, its powers are curtailed by this state's statutory attorney-client and work product privileges.

Indeed, the United States Supreme Court has confirmed that regulated utilities such as SoCalGas enjoy First Amendment protections.[1] Further, the California Supreme Court has

[1] *Pacific Gas & Elec. Co. v. Public Utilities Com.* (1986) 475 U.S. 1, 17 n. 14 ["[The CPUC] argue[s] that appellant's status as a regulated utility company lessens its right to be free from state regulation that burdens its speech. We have previously rejected this argument."]; see also *Pacific Gas & Elec. Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 86, 93 ["It is well established that corporations such as PG&E have the right to freedom of speech, since '[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."].

explicitly held that the Commission's power to inspect SoCalGas's books and records is "tempered by the attorney-client privilege," and that "no provision exempts [the Commission] from complying with the statutory attorney-client privilege."[2]

Cal Advocates' statutory powers to inspect SoCalGas's books and records are limited by these rights and privileges. Therefore, ***it is entirely proper*** for SoCalGas to assert these rights and privileges in the face of the overbroad and unconstitutional Subpoena. To preserve those rights and to avoid irreparable harm, it must shield its protected and privileged materials from Cal Advocates while those rights and privileges are adjudicated. Cal Advocates' demand that SoCalGas give over these materials prior to adjudication of its rights and privileges is unlawful; doing so would vitiate those rights and privileges altogether, which the law does not permit. The Contempt Motion should therefore be denied because it rests upon this fatally flawed premise.

The Contempt Motion is also procedurally improper. *First*, it improperly seeks sanctions for SoCalGas's purported refusal to comply with the Subpoena, but the legality of the Subpoena is the subject of SoCalGas's pending Motion to Quash.[3] The Contempt Motion therefore puts the proverbial cart before the horse, and should be denied or at the very least stayed until the Motion to Quash is adjudicated. *Second*, should this tribunal wish to entertain the merits of the Contempt Motion, Cal Advocates faces a further hurdle—due process requires that contempt proceedings and Rule 1.1 fines be heard and assessed in a full adjudicatory proceeding with an evidentiary hearing on disputed issues of fact (which SoCalGas will demand). For this Motion to be considered at all, Cal Advocates must seek to have this matter recategorized.

Finally, although this court should not consider this motion on prematurity and due process grounds, the motion nonetheless fails on the merits. The record shows that SoCalGas has produced significant amounts of data in response to the Subpoena, and that over a month ago it made available to Cal Advocates roughly 96% of the data in its accounting database, while shielding approximately 4% of constitutionally protected and privileged data necessary to preserve its rights and privileges. The record further demonstrates that the reason Cal Advocates does not already have access is because it refuses to sign a non-disclosure agreement it itself

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[2] *Southern California Gas Co. v. Public Utilities Com.* (1990) 50 Cal. 3d 31, 38-39.

[3] The full title of the Motion to Quash is "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)."

proposed and committed to signing. Accordingly, no finding of contempt or violation of Rule 1.1 is supported by the record.

The Contempt Motion is an effort to coerce SoCalGas to waive its privileges and First Amendment rights, under the threat of millions of dollars in fines. In so doing, Cal Advocates seeks to leverage the Commission's contempt powers to "punish" SoCalGas for its supposed "defiance" in asserting those rights and privileges. That illegitimate and improper gambit should be rejected. The Contempt Motion should be denied.[4]

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Cal Advocates' Contempt Motion rests upon a false factual premise: That SoCalGas made no meaningful attempt to comply with the Subpoena, and acted in bad faith to delay and stonewall its response. Cal Advocates' account omits key facts and context to create a distorted impression about SoCalGas's faithful efforts and candor.

Since being served with the Subpoena, SoCalGas has worked diligently to comply with it as promptly as practicable, but in a manner that preserves its rights under the attorney-client privilege, the attorney work product doctrine, and the First Amendment. Notwithstanding the breathtaking breadth and nature of the Subpoena's demands, SoCalGas completed the following within a mere 24-day period: (1) SoCalGas offered Cal Advocates at least three different options for compiling and delivering responsive data and providing the remote access it sought; (2) SoCalGas produced multiple fixed data accounting reports which Cal Advocates also demanded; and (3) SoCalGas, on its own initiative, designed, developed, and implemented a customized software solution to furnish Cal Advocates with a secure means to remotely access

[4] As a further example of Cal Advocates' attempts to pierce SoCalGas's privileges and constitutional protections, Cal Advocates served a data request on June 30, 2020 which seeks, among other things, records and invoices relating to SoCalGas's outside counsel in this matter, Willenken LLP. Declaration of Jason H. Wilson ["Wilson Decl."], Exh. P, at 7. Such information is clearly privileged, and Cal Advocates' efforts to obtain that information are wholly inappropriate. See *Los Angeles Cty. Bd. of Supervisors v. Superior Ct* (2016) 2 Cal.5th 282, 297 ("When a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees."); see also *id.* p. 298 ("During active litigation, that information [i.e., "the cumulative amount of money spent on the case"] can threaten the confidentiality of legal consultation by revealing legal strategy."). The June 30 data request also seeks information on contracts subject to SoCalGas's appeal on First Amendment grounds before the full Commission. Wilson Decl., Exh. P, at 9-10. The data request therefore seeks to deprive SoCalGas of its rights to full litigation of its First Amendment rights before further disclosure to Cal Advocates.

approximately 96%[5] of the requested data, while shielding from its view privileged and constitutionally protected material.

Further, throughout the entire meet-and-confer process, SoCalGas communicated with Cal Advocates every step of the way to apprise them on the status of its responsive efforts, to answer Cal Advocates' ongoing inquiries, and to ask clarifying instructions. When Cal Advocates confirmed that it sought access to materials protected by the First Amendment, the attorney-client privilege, and the attorney work product doctrine, SoCalGas immediately alerted Cal Advocates of its concerns. And when it became clear that the parties could not resolve their differences about these protected materials before Cal Advocates' deadline for SoCalGas to produce, SoCalGas filed its Motion to Quash with respect to the very limited amount of data in dispute—and continued its work to make the remainder of the data (approximately 96%) available to Cal Advocates as quickly as possible. Indeed, the only reason Cal Advocates has yet to access SoCalGas's records is because of Cal Advocates' own inexplicable about-face on its commitment to execute an NDA to protect the confidentiality of highly sensitive accounting information, separate and apart from the privileged and constitutionally protected material, contained in the database sought by the Subpoena.[6]

A. The Subpoena and SoCalGas's SAP System

On May 5, 2020, Cal Advocates served the Subpoena on SoCalGas, which required compliance by May 8, 2020, that is, no later than three days after service of the Subpoena.[7] Cal Advocates' email transmitting the Subpoena, as well as its data request served on May 1, 2020, both expressly sought access to SoCalGas's SAP system.[8] That database houses data on nearly

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[5] SoCalGas has made financial information fully available for roughly 96% of its vendors. SoCalGas has approximately 2,300 vendors. SoCalGas is claiming that information from 86 vendors (73 law firm and 13 firms that assist SoCalGas in exercising its political rights) are protected by either the attorney-client privilege, the attorney work product privilege, or the First Amendment. Thus, SoCalGas's Motion to Quash sought to protect information from approximately 4% of its vendors.

[6] For clarity, the NDA would not cover material that is the subject of SoCalGas's Motion to Quash—that is, material protected under the attorney-client privilege, attorney work product doctrine, or the First Amendment. As articulated in the Motion to Quash, Cal Advocates is not entitled to access that information even on a confidential basis.

[7] Wilson Decl., Exh. A.

[8] *Id.* [asking for, among other things, "[t]he date remote access to the SAP system will be provided," "[i]f remote access is not available, the date and location for a site visit so that the auditor can access the SAP system," "[a]t least two primary points of contact to ensure that the Cal Advocates auditor is able to access the SAP system," "[a]n afterhours contact to resolve SAP issues if such a contact exists for SoCalGas employees or auditors," and "[a]ny other SAP resources available to SoCalGas employees or auditors."); see also Contempt Motion, Exh. 2 (requesting,

all financial transactions made by SoCalGas.[9] It captures a wide variety of transactions, including payments to contractors and other third parties, worker compensation payments, and individual employee reimbursements.[10] The database currently references and contains information relating to approximately 2,300 unique vendors of SoCalGas.[11] The database also has line item records and attachments for payments made.[12] This means a user can often access, for example, a record of the corresponding invoice for a payment, which may include the vendor's description of the services provided and other narrative information about the work they performed.[13] For example, invoices for an outside law firm may include descriptions of the legal work it performed for SoCalGas.[14] With respect to consulting firms that aid SoCalGas in exercising its political rights, the invoices may include the name of the consultant as well as descriptions of its sensitive political work done on behalf of SoCalGas.[15] All combined, SoCalGas's SAP system contains millions of accounting records.[16]

B. After Being Served With the Subpoena, SoCalGas Took Immediate Action to Confer with Cal Advocates On Potential Ways to Provide Responsive Data As Promptly As Practicable

1. SoCalGas Initially Focused on Facilitating Remote Access, as Cal Advocates Instructed, and to Provide Data to Cal Advocates as Promptly as Practicable.

SoCalGas met and conferred with Cal Advocates the day after being served with the Subpoena, on May 6, 2020.[17] In advance of the meet and confer, SoCalGas carefully reviewed the Subpoena, as well as the email from Traci Bone, Cal Advocates' counsel, that transmitted the

among other things, "[r]emote access to the SoCalGas SAP system to a Cal Advocates auditor no later than May 8, and sooner if possible."].

[9] Attachment A: Declaration of Dennis Enrique in Support of Motion to Quash ["Enrique Decl. ISO Mot. to Quash"], at ¶ 4. Some of the information covered by the Subpoena does not reside on the SAP system. In certain instances, the documentation (*i.e.*, invoices) underlying certain transactions do not reside in SAP, although the transactions are recorded in SAP. Should Cal Advocates require access to such documentation, SoCalGas will agree to provide hard copies of that information, assuming it is not protected by SoCalGas's First Amendment rights, attorney-client privilege, or attorney work product privilege.

[10] *Id.*

[11] Declaration of Dennis Enrique ["Enrique Decl."] ¶ 6.

[12] Enrique Decl. ISO Mot. to Quash ¶ 6.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Declaration of Kelly Contratto ["Contratto Decl."], at ¶ 9.

[17] Wilson Decl., Exh. B.

Subpoena. While the Subpoena on its face demanded "both on-site and remote access" to SoCalGas' SAP accounting system, Ms. Bone's accompanying email instructed that Cal Advocates preferred remote access.[18] Relying on Ms. Bone's explicit instruction, SoCalGas prioritized its efforts on identifying potential remote access solutions, as opposed to on-site access.[19]

During the May 6 meet and confer, SoCalGas offered three options to furnish Cal Advocates with remote access to data.[20] The first option was to provide the information in a fashion similar to what SoCalGas did for Cal Advocates in connection with a prior General Rate Case: Cal Advocates would first identify the specific cost centers it wished to review, and then SoCalGas would download, copy, and transmit to Cal Advocates data in the SAP system from those cost centers. (This is known as "copy-access.") Cal Advocates initially declined this option because it did not know which specific cost centers it sought to review.[21]

SoCalGas also offered Cal Advocates a second form of copy-access: SoCalGas could download data from ***all*** of its cost centers within SAP and transmit the same to Cal Advocates.[22] Although it did not know how long this process would take, SoCalGas was willing to investigate and report back.[23] Cal Advocates ultimately declined this option.[24]

SoCalGas proposed Cal Advocates yet another option: SoCalGas could investigate providing Cal Advocates with "read-only" access to SAP, whereby it could remotely log into the database and access information in the database directly, but would not be able to add or alter any information.[25] SoCalGas cautioned that read-only access had been created and granted for

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[18] See Wilson Decl., Exh. A ["If remote access is not available, [provide] the date and location for a site visit so that the auditor can access the SAP system"]). Further, before serving the Subpoena, Cal Advocates served Data Request 14 (DR-14), also seeking access to SoCalGas's SAP system. See Contempt Motion, Exh. 2. DR-14 similarly prioritized remote access. *Id.*, Question 1 ["If remote access is not possible, identify a time and place where the auditor may access the SoCalGas SAP system"].

[19] For this reason, Cal Advocates' allegation that SoCalGas "unilaterally determin[ed]" that on-site access was not appropriate, (Contempt Motion at 5), is false. Indeed, during the May 6, 2020 meet and confer, the parties discussed and "seemed to agree" that the "restrictions due to coronavirus" "made physical access more difficult." Wilson Decl., Exh. B, at 1-2. On-site access therefore would have been difficult to secure and potentially hazardous from a public health standpoint.

[20] Wilson Decl., Exh. B, at 1.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Wilson Decl., Exh. C, at 1.

[25] *Id.*, Exh. B, at 1.

only one other third party in the company's recent past.[26] Further, even in that one instance, the circumstances were materially different because it involved an auditor retained by Sempra Energy, not SoCalGas, and the auditor executed a non-disclosure agreement.

During that meet and confer, the parties also discussed the nature of remote SAP access enjoyed by SoCalGas's accounting personnel.[27] Cal Advocates asked whether these employees had remote access to the SAP system.[28] If they did, Cal Advocates posited, it should be fairly straightforward and quick for the company to give Cal Advocates the same access.[29] But SoCalGas explained that the type of access Cal Advocates was seeking (read-only) is not equivalent to the access which company employees have (live access).[30] With live access, employees can read information in SAP ***and*** add to and change the information. Providing live access to Cal Advocates' auditor would therefore pose unacceptable risks to the integrity of data contained in the SAP system.

Given the unprecedented scope and nature of Cal Advocates' access demand, SoCalGas committed to investigate, report back, and confirm whether such access could in fact be created, and how long that might take.[31] In light of this, Cal Advocates agreed to extend the Subpoena compliance date to May 13, 2020 so that SoCalGas could investigate the feasibility of providing remote read-only access.[32]

2. SoCalGas Promptly Complied with Cal Advocates' Request for Copy-Access to Data In the SAP System, and Produced Data in Response to the Subpoena

On May 8, 2020, as SoCalGas was setting out to investigate an effective way to provide Cal Advocates with read-only access to the entire SAP system, Cal Advocates reversed its position stated two days earlier and requested fixed database copies of SAP data for eleven individual accounts.[33] In response to this request, SoCalGas produced multiple fixed data accounting reports in copy-access form to Cal Advocates on May 20, 2020.[34]

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1-2.
[32] *Id.* at 2.
[33] Wilson Decl., Exh. C, at 1.
[34] Wilson Decl., Exh. D; Enrique Decl. ¶ 8.

3. SoCalGas Notified Cal Advocates of Its Objections to the Subpoena

The parties held their second meet and confer on the Subpoena on May 8, 2020. In advance of the meet and confer, Cal Advocates notified SoCalGas that it expected and demanded access to accounts for 100% shareholder-funded activities, including political activities that are protected by SoCalGas's First Amendment rights.[35] Upon learning this, SoCalGas immediately raised its concern that Cal Advocates' demand violates its First Amendment rights to association, free speech, and to petition the government—the very subject of its appeal of an ALJ ruling that is pending before the full Commission.[36] During the meet and confer, SoCalGas notified Cal Advocates that it intended to create a way to provide SAP access "without waiving issues it has on appeal related to First Amendment protections conferred on its fully shareholder-funded contracts."[37]

In the meet and confer process, Cal Advocates also conceded that it should not have access to SoCalGas's privileged materials. On May 12, 2020, counsel for Cal Advocates stated unequivocally and unqualifiedly that, "***SoCalGas need not provide access to law firm invoices***, which could contain privileged information . . ."[38] In that email, Cal Advocates also extended the date by which it requested SoCalGas provide remote access to May 19, 2020.[39]

4. SoCalGas Repeatedly Explained to Cal Advocates that It Needed Additional Time to Create A Technical Solution to Shield Its Privileged and Constitutionally Protected Information From Disclosure

Throughout its process of responding to the Subpoena, SoCalGas has forthrightly and repeatedly informed Cal Advocates exactly why it needed additional time to respond to the

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[35] Wilson Decl., Exh. C, at 1 [seeking "all accounts that are 100% shareholder funded"].
[36] Wilson Decl., Exh. E, at 1.
[37] *Id.*
[38] Wilson Decl., Exh. F, at 1 (emphasis added). Despite this statement, Cal Advocates inexplicably takes issue with the fact that SoCalGas's customized read-only access solution will prevent Cal Advocates from viewing on SAP invoices from the company's outside law firms containing descriptions that would reveal sensitive attorney-client privilege and attorney work product material. See Contempt Motion, Exh. 4 [Declaration of Stephen Castello] ¶ 13 (acknowledging that although Cal Advocates "had no desire to review any privileged information in the SAP database," it objected to the notion that "it could only review SoCalGas' SAP database once such material was 'walled off'"). SoCalGas further notes that the identity of the law firms that SoCalGas uses as well as the amount spent with each law firm is contained in its General Order 77 report, and is therefore a matter of public record. However, information subject to the attorney client privilege and work product are not included in the General Order 77 report.
[39] *Id.*

Subpoena: It was developing a technical software solution to restrict Cal Advocates from accessing its protected and privileged material in the SAP system.[40]

As it designed, developed, and implemented its software solution, SoCalGas kept Cal Advocates informed of its work every step of the way. For example, during the May 8, 2020 meet and confer, SoCalGas notified Cal Advocates that it was "still determining" how to provide SAP access "without waiving" First Amendment protections in certain documents, and thus it needed "more time" for its IT professionals to do the necessary "security work."[41] Further, in a letter dated May 18, 2020, SoCalGas told Cal Advocates that a "special program will be written which will prevent access to attorney-client information and 1st Amendment protected information," and stated that it needed until May 29, 2020 to implement its software solution and provide remote access to Cal Advocates."[42] SoCalGas reiterated this intention during a meet and confer also held on May 18, 2020.[43]

Moreover, SoCalGas matched its words with deeds. It invested substantial resources and hours to accomplish precisely what it promised.[44] The company assigned at least nine employees to design, build, test, and implement the custom software solution for Cal Advocates.[45] This team consisted of a software development manager, two technical leads, one programmer, at least two business unit personnel, and three individuals from accounting and finance, who spent over three hundred hours building, testing, and completing the customized access solution.[46] Notably, these individuals did not stop working on May 19, 2020, the date on which SoCalGas initially filed its Motion to Quash. Rather, they persisted in their efforts until May 29, 2020, when they completed their project and offered Cal Advocates its customized SAP access.[47]

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[40] For this reason, Cal Advocates' allegation that SoCalGas employed pretext to forestall responding to the Subpoena until it had completed preparing its Motion to Quash is speculative and simply incorrect. Contempt Motion at 18 [SoCalGas made a "calculated decision not to comply for as long as possible by engaging in numerous meet and confers to defer compliance" so it could file an "untimely Motion to Quash"].
[41] Wilson Decl., Exh. E, at 1.
[42] Wilson Decl., Exh. G, at 2.
[43] Attachment B: Declaration of Elliott Henry in Support of Motion to Quash ¶ 13.
[44] Contratto Decl. ¶¶ 5-6.
[45] *Id.*
[46] *Id.* ¶¶ 6-8; Enrique Decl. ¶¶ 4-7.
[47] Contratto Decl. ¶¶ 6-8; Enrique Decl. ¶¶ 4-7.

5. With the Software Solution in Place, SoCalGas Has Been Ready Since May 29, 2020 to Provide Access to Approximately 96% of the Data Accessible In the SAP System

The software solution implemented by SoCalGas will give Cal Advocates unfettered read-access to the entirety of SoCalGas's SAP system, except for the records of specified vendors which would reveal materials protected by the First Amendment, the attorney-client privilege, or the attorney work product doctrine. Out of the approximately 2,300 SoCalGas vendors which populate SAP, SoCalGas excluded just 86 vendors, consisting of outside law firms and 100% shareholder-funded consultants that aid SoCalGas in exercising its political rights.[48] Accordingly, SoCalGas is prepared to provide unrestricted access to approximately 96% of all the vendors and their information residing within the SAP system.

6. Cal Advocates Proposed and Offered to Enter into a Non-Disclosure Agreement It Now Refuses to Sign

Because of the vast amount of accounting information (millions of records) contained in SoCalGas's SAP system,[49] it is impossible, as discussed in greater detail below, to isolate and pre-mark confidential information on the SAP system as before it is produced via remote read-only access. Given this difficulty, SoCalGas was relieved when Cal Advocates proposed to enter into a non-disclosure agreement with SoCalGas to protect the confidentiality of accounting information contained in that system.[50] Since then, Cal Advocates has entirely reversed its position on this issue. Indeed, had Cal Advocates executed the non-disclosure agreement it represented it would sign, it would have had access to SoCalGas's SAP system a month ago.

In a normal document production, a party can review and mark the responsive documents for confidentiality before production pursuant to Commission General Order ("GO") 66-D. Here, however, Cal Advocates seeks access to all of SoCalGas books and records in its SAP system. The SAP system contains millions of records.[51] Further, the SAP system cannot be marked for confidentiality as is required by GO 66-D section 3.2(a).[52] Thus, absent a non-disclosure

[48] Enrique Decl. ¶ 6.
[49] Contratto Decl. ¶ 9.
[50] To be clear, the non-disclosure agreement would not permit Cal Advocates to examine SoCalGas's privileged and First Amendment-protected material on a confidential basis.
[51] Contratto Decl. ¶ 9.
[52] GO 66-D, Section 3.2(a): "If confidential treatment is sought for any portion of information, the information submitter must designate each page, section, or field, or any portion thereof, as confidential. If only a certain portion

agreement, it is impossible for SoCalGas to protect its confidential materials as prescribed by GO 66-D. Further, it is well recognized that a non-disclosure agreement is the right way to protect vast databases.[53]

Cal Advocates recognized early on that special arrangements were necessary to protect the confidentiality of the vast amount of sensitive information in the SAP system. This issue was first discussed during the first meet and confer call the parties held on May 6, 2020. This is recounted in SoCalGas's May 7, 2020 confirming letter (the accuracy of which Cal Advocates has never disputed):

> Regarding confidential information, you [Cal Advocates] agreed that SoCalGas could review any outputs you desired to use for confidentiality, and that such items would be held securely and branded as confidential to prevent any public release via a CPRA request or any similar requirement to make public records in Cal Advocates' possession.[54]

On May 12, 2020, Cal Advocates' counsel expressly represented that Cal Advocates would execute a non-disclosure agreement ("NDA") for these purposes:

> As we have discussed previously, for the documents that the auditor seeks to retain copies of, ***Cal Advocates can execute a non-disclosure agreement (NDA)*** that permits SoCalGas to review and mark documents as confidential prior to public disclosure, provided that it does not limit Cal Advocates' rights to seek a Commission determination to de-designate information it concludes is not confidential. ***Please provide a draft NDA for Cal Advocates' review and approval***.[55]

Further, on May 18, 2020, Cal Advocates' counsel reiterated her offer and support for an NDA. In response to a question raised by SoCalGas regarding the potential confidentiality of certain accounting records found in SAP, Ms. Bone asked:

> What kind of confidentiality issues are raised in the accounting information that you would be providing us, and *can't this be addressed by the NDA we have discussed . . .*?[56]

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of information is claimed to be confidential, then only that portion rather than the entire submission should be designated as confidential."

[53] See *The Sedona Conference Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation*, THE SEDONA CONFERENCE JOURNAL (Vol. XV 2014), at 194 ["the requesting party usually must sign stringent confidentiality agreements to prevent the inadvertent disclosure of any proprietary information (relevant or irrelevant) that the requesting party may see when accessing the database."].

[54] Wilson Decl., Exh. B, at 2.

[55] *Id.*, Exh. F, at 1 (emphasis added).

[56] *Id.*, Exh. H, at 1 (emphasis added).

Relying on these representations, SoCalGas drafted the NDA and forwarded it to Cal Advocates on May 18, 2020.[57] It reiterated its request for Cal Advocates to sign the NDA on May 28, 2020, and it sent a version containing a minor revision on May 29, 2020.[58]

On May 29, 2020, after SoCalGas had completed its customized software to enable Cal Advocates to gain SAP access, SoCalGas advised that as soon as Cal Advocates executed the NDA, it would provide Cal Advocates with all of the necessary credentials to log on and that Cal Advocates' access would go live.[59] Cal Advocates did not respond to this email. In fact, since SoCalGas filed its Motion to Quash, Cal Advocates has cancelled all meet and confers related to the Subpoena.[60]

In its June 1, 2020 response to the Motion to Quash, SoCalGas learned of Cal Advocates' about-face on the NDA and its purported reasons why. In the response, Cal Advocates states, "While Cal Advocates had previously discussed signing a Non-Disclosure Agreement (NDA) with SoCalGas in order to speed its release of information, such an NDA is unnecessary given the statutory protections provided and Cal Advocates no longer proposes to sign one given that the purpose of the NDA was defeated by SoCalGas' May 22, 2020 Substitute Motion to Quash."[61] Cal Advocates stated an identical rationale in the Contempt Motion.[62] Cal Advocates has not further explained why it contends that the purpose of the NDA was defeated by the Motion to Quash nor has it denied that there is sensitive confidential information in SoCalGas's system. The Motion to Quash did not eliminate the highly unusual situation posed by the Subpoena, which involves access to millions of records some of which contain confidential information, nor did it resolve that, absent an NDA, SoCalGas could not comply with the requirements of GO 66-D necessary to preserve the confidentiality of the information contained in the database.

[57] *Id.*, Exh. I.
[58] *Id.*, Exhs. J, K.
[59] *Id.*, Exh L.
[60] *Id.* Exh. M-O.
[61] Attachment B: Cal Advocates' Response to Motion to Quash (June 1, 2020), at 38 n. 131.
[62] Contempt Motion at 23 n. 84.

C. Procedural History

1. SoCalGas's Pending Appeal Of An ALJ's Ruling That Erroneously Permits Access to Information Protected By the First Amendment

Because the SAP system contains information protected under the First Amendment, the Subpoena raises the same constitutional issues present in an appeal filed by SoCalGas that is pending before the full Commission. That appeal also involves Cal Advocates' efforts to obtain information on SoCalGas's 100% shareholder-funded political 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."[63] 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 sections 309.5 and 314. On October 7, 2019, Cal Advocates moved to compel production of the 100% shareholder-funded contracts. In opposition, SoCalGas argued that this request could have a chilling effect on SoCalGas's First Amendment rights.[64] 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.[65] 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, SoCalGas produced under protest the 100% shareholder-funded contracts at issue on November 5, 2019 and reserved its rights to appeal the decision.[66]

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").[67] There, SoCalGas explained why the 100% shareholder-funded contracts are entitled to First Amendment protection, and that Cal

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[63] Attachment C: 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 2, 6.
[64] Attachment D: Declaration of Elliott Henry in Support of Motion to Quash, Exh. K.
[65] *Id.*, Exh. L.
[66] *Id.*, Exh. M at 8.
[67] *Id.*

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.[68] As of the date of this Response, the Motion for Reconsideration/Appeal has been pending before the Commission for over six months.

2. SoCalGas's Motion to Quash

On May 19, 2020, SoCalGas filed its Motion to Quash.[69] There, SoCalGas sought 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 doctrine, and an extension of the compliance deadline for the Subpoena until May 29, 2020 so that SoCalGas could complete a software solution necessary to exclude those protected materials from Cal Advocates' access.[70] The Motion also sought 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 decarbonization goals, again until May 29, 2020 so that SoCalGas could implement its software solution.[71] (As noted above, SoCalGas completed that software solution as promised on May 29, 2020.)

III. ARGUMENT

The Contempt Motion should be denied for several reasons.

First, the motion rests on a fundamentally false premise: That SoCalGas should be punished for exercising its rights to shield from Cal Advocates its material protected from compelled disclosure under the attorney-client privilege, the attorney work product doctrine, and the First Amendment. Cal Advocates' authority to inspect SoCalGas's books and records is broad, but not limitless; rather, its authority is limited by the United States and California Constitution, as well as statutes providing for the attorney-client privilege and the attorney work

[68] *Id.* at 10-25.
[69] On May 22, 2020, SoCalGas filed a substitute version of its Motion to Quash. That version is the operative one filed before the ALJ.
[70] *Id.* at 3.
[71] *Id.* at 3-4.

product doctrine. The Contempt Motion improperly seeks to punish SoCalGas for asserting those rights.

Second, the motion is premature and should not be considered. On May 19, 2020, SoCalGas timely filed a Motion to Quash the Subpoena, and that motion is still pending. Any consideration of contempt or penalties associated with SoCalGas's purported disobedience of the Subpoena must be stayed until the issues presented in the Motion to Quash are fully adjudicated.

Third, if this motion is to be entertained, due process guaranteed by the United States and California Constitutions, applicable case law, and Commission precedent requires that the Commission (1) first recategorize this as an adjudicatory proceeding, and (2) provide SoCalGas the due process required for such proceedings, including among other things an evidentiary hearing on issues of disputed material fact.

Fourth, the Contempt Motion fails on the merits. Cal Advocates comes nowhere close to proving beyond a reasonable doubt that SoCalGas should be found in contempt. The full record—much of which is omitted from the Contempt Motion—demonstrates SoCalGas's extensive efforts to comply with the Subpoena. SoCalGas undertook great effort to implement a customized software solution to provide Cal Advocates with unfettered access to approximately 96% of the data contained in the SAP system, in a way that shields from Cal Advocates' view SoCalGas's privileged and constitutionally protected information. SoCalGas completed the customized software solution on May 29, 2020—just three and half weeks after service of the subpoena. The only thing standing in the way of Cal Advocates' access to the database is its mystifying refusal to sign an NDA that it itself proposed.

For similar reasons, SoCalGas has not violated Rule 1.1 of the Commission's Rules of Practice and Procedure. The underlying premise of Cal Advocates' argument on Rule 1.1 is that SoCalGas's efforts to defend its rights under the First Amendment, the attorney-client privilege, and the attorney work product doctrine—while taking steps to provide Cal Advocates with access to the vast majority of data in its database as required by the Subpoena—constitutes a Rule 1.1 violation. But while SoCalGas acknowledges Cal Advocates' generally broad authority to inspect its records, applicable law provides that Cal Advocates' inspection authority simply does not extend to SoCalGas's privileged and First Amendment-protected material. SoCalGas has not violated Rule 1.1 by asserting its legal rights.

Fifth, in asserting a litany of additional inappropriate discovery demands in the last two pages of its Contempt Motion,[72] Cal Advocates seeks to deny SoCalGas its due process rights guaranteed by the California Constitution. Article XII, Section 2 of the California Constitution provides that the Commission's procedures must comply with due process. Granting these demands—asserted in passing at the end of a Contempt Motion, not in a data request or validly issued subpoena—would be procedurally improper and would eviscerate SoCalGas's due process rights to object to those demands and have them litigated.

Essentially, Cal Advocates seeks to leverage the Commission's contempt powers to "punish" SoCalGas for its supposed "defiance" in asserting its privilege and constitutional rights, and for pursuing policy goals regarding the future of natural gas with which Cal Advocates disagrees. That is highly improper. If such an approach is endorsed by the Commission, it will eviscerate SoCalGas's constitutional rights and important privileges. The Contempt Motion should be denied.

A. The Fundamental Premise Underlying the Contempt Motion—That Cal Advocates Has Unlimited Authority to Inspect SoCalGas's Books and Records—Is False and Inconsistent With the Law

The Contempt Motion relies on the following fundamental premise: In its view, Cal Advocates' authority to inspect SoCalGas's books and records is unbounded by any other law or constitutional provision, and so SoCalGas's efforts to preserve its rights under the attorney-client privilege, the attorney work product doctrine, and the First Amendment constitute grounds for contempt and should be met with millions of dollars in fines. Not only is this premise wrong, Cal Advocates' attempt to punish SoCalGas for exercising its well-established constitutional and statutory rights is outrageous.

More than 30 years ago, the California Supreme Court admonished the Commission that "[a]lthough [it] is granted broad powers under the [California] Constitution, no provision exempts it from complying with the statutory attorney-client privilege."[73] It further held that "the commission's powers pursuant to the state

[72] Contempt Motion at 23-24.
[73] *S. Cal. Gas. Co. v. Pub. Util. Com.* (1990) 50 Cal.3d 31, 38-39.

constitution . . . are subject to the statutory limitation of the attorney-client privilege."[74] By claiming that SoCalGas has shown "willful disregard" of the Subpoena by shielding its privileged material, Cal Advocates is willful disregarding binding California Supreme Court precedent and seeks to punish SoCalGas for asserting its rights under that precedent.

Further, longstanding United States and California Supreme Court precedent guarantees to SoCalGas the "right to associate for the purpose of engaging in those activities protected by the First Amendment."[75] Well-established precedent also provides that demands for the production of materials furthering political association and expression encroach on constitutionally protected activity,[76] and 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.[77] Ninth Circuit law also provides that, to compel the disclosure of information arguably protected under the First Amendment, the government must "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."[78] Again, Cal Advocates seeks to punish SoCalGas for asserting these fundamental protections whose authority it chooses to ignore. This effort should be rejected out of hand.

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[74] *Id.*

[75] *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]; *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]; *Governor Gray Davis Committee v. Am. Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 464 [the right to free association is "fundamental"].

[76] See *Britt v. Super. Ct.* (1978) 20 Cal.3d 844, 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].

[77] *Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 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"].

[78] *Perry*, *supra*, 591 F.3d at 1161 (citation omitted).

B. The Contempt Motion Is Premature and Should Not be Decided Before SoCalGas's Motion to Quash the Subpoena

Cal Advocates' Contempt Motion is premature and thus should not be considered. Here, Cal Advocates seeks an order finding SoCalGas in contempt (and a violation of Rule 1.1 of the Commission's Rules of Practice and Procedure) for its purported disobedience of the Subpoena.[79] But the question whether the Subpoena validly orders access to SoCalGas's privileged and constitutionally protected information is the subject of SoCalGas's Motion to Quash, which was originally filed on May 19, 2020—that is, more than three weeks before Cal Advocates filed this Contempt Motion. The Motion to Quash is the proper procedure to challenge the Subpoena,[80] and SoCalGas is entitled to seek neutral adjudication of the challenged portion of the Subpoena before penalties are assessed for non-compliance.[81] Accordingly, the Contempt Motion puts the proverbial cart before the horse, and consideration of this Motion should, at the very least, be stayed until the issues presented in SoCalGas's Motion to Quash are fully litigated.[82] Indeed, Cal Advocates acknowledges that "[i]f the Commission desires to first

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[79] Contempt Motion at 1.

[80] 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." Contempt Motion, Exh. 3, at 1. Neither the Commission's Rules of Practice and Procedure nor the Public Utilities Code expressly address motions to quash such a subpoena, and in such circumstances the Commission has relied on the Code of Civil Procedure as instructive authority. *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 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 have been 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, see *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].

[81] See, e.g., *Craib v. Bulmash* (1989) 49 Cal.3d 475, 482 ["the subpoenaed party must have the opportunity for judicial review before suffering any penalties for refusing to comply"]; *Patel v. City of Los Angeles* (9th Cir. 2013) 738 F.3d 1058, 1064 ["[t[he party subject to the demand must be afforded an opportunity to obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." (citations omitted)]; see also *Donovan v. Lone Steer* (1984) 464 U.S. 408, 415 [a subpoenaed party may "question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court"].

[82] See *Harris v. U.S.* (9th Cir. 1969) 413 F.2d 314, 315 [issuing a stay of compliance with a subpoena "until the merits of the subpoena can be tested."].

issue rulings on SoCalGas' Motion for Reconsideration and/or Motion to Quash prior to granting the sanctions Cal Advocates requests here, it may stay action on this Motion for Contempt until those rulings have issued."[83]

Cal Advocates tries to sidestep this issue by contending—without proof—that SoCalGas's Motion to Quash was untimely filed.[84] Cal Advocates' failure to identify any evidence on the timeliness issue is telling; there is none. SoCalGas timely asserted its objections to the Subpoena on privilege and First Amendment grounds, and filed its Motion to Quash on May 19, 2020, the final date to which Cal Advocates extended the compliance deadline for the Subpoena. Moreover, a court may grant a motion to quash served even *after* the date set for production.[85] The Motion to Quash was timely and should be decided on the merits—before consideration of the Contempt Motion.

C. If The Contempt Motion Is to Be Considered, Due Process Requires that Cal Advocates Seek and Obtain Recategorization of this Matter to an Adjudicatory Proceeding with an Evidentiary Hearing[86]

The Contempt Motion is procedurally improper. Due process requires that the Commission recategorize this non-proceeding to be an adjudicatory proceeding under Rule 7 of the Commission's Rules of Practice and Procedure, with among other things an evidentiary hearing. This matter has not been categorized as an adjudicatory matter, and this motion can be heard—if at all—only after Cal Advocates has obtained recategorization of this matter as an adjudicatory process.

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

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[83] Contempt Motion at 3 n.9.
[84] Contempt Motion at 4, 18.
[85] *Slagle v. Superior Ct.* (1989) 211 Cal. App. 3d 1309, 1312-1313.
[86] As explained below, Section III.D., the record here comes nowhere close to justifying a finding for contempt or a fine under Rule 1.1. Accordingly. SoCalGas has not sought to have this matter recategorized.

1. The Commission Cannot Impose Monetary Penalties or Sanctions Without Notice and a Hearing

Under the United States and California Constitutions, the government may not deprive a person of property without due process of law.[87] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[88] Thus, as the California Supreme Court has held as applied to the Commission, "[d]ue process as to the [C]ommission's ... action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made."[89] Further, as the Commission has recognized, "the United States Supreme Court has provided guidance and has stated that in an administrative law context, due process requires some type of notice and an opportunity to be heard."[90]

This due process requirement is triggered by the determination of monetary penalties or sanctions. As the Court of Appeal has recognized, an agency "cannot impose administrative penalties unless an administrative hearing is held if such a hearing is requested."[91] Further, the California Rules of Court require that "[s]anctions must not be imposed . . . except on noticed motion by the party seeking sanctions or on the court's own motion after the court has provided

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[87] U.S. CONST. amend. V; XIV; CALIF. CONST. § 7.

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

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

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

[91] *State ex rel. Dep't of Pesticide Regulation v. Pet Food Express* (2008) 165 Cal. App. 4th 841, 852; see also *In re S. Pac. Trans. Co.* (Feb. 18, 1999) 85 CPUC 2d 117 [utility claimed "penalties were imposed in violation of SP's right to due process without adequate notice or an opportunity to be heard…."]; *Annex British Cars, Inc. v. Parker-Rhodes* (1988) 198 Cal.App.3d 788, 793 [in context of court-issued sanctions, "it is basic that counsel must have the opportunity to be heard on the issue before sanctions can be imposed]; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 654 ["sanctions [for frivolous appeals] should be imposed rarely and only if the mandates for procedural due process are obeyed"]; ibid. ["[T]he rudiments of fair play include notice, an opportunity to respond, and a hearing."].)

notice and an opportunity to be heard."[92] Citing to this rule, the Commission has refused to impose sanctions for violations not included in notice and hearing procedures.[93]

Thus far, Cal Advocates' investigation has been in a "non-proceeding." SoCalGas currently lacks the very basic protections of the Commission's Rules of Practice and Procedure.[94] SoCalGas has no right to even file briefs except at the ALJ's discretion.[95] These procedures are insufficient to meet the demands of due process imposed by the United States Constitution, applicable law, and Commission precedent. Before the ALJ can entertain Cal Advocates' motion, sufficient procedures complying with SoCalGas's constitutional due process rights must be implemented.

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

"A case where the Commission considers imposing monetary penalties is an adjudicatory matter."[96] The Commission's Rules of Practice and Procedure No. 1.3(a) defines "'[a]djudicatory' proceedings" as "enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission[.]" This encompasses Cal Advocates' motion claiming that SoCalGas has violated the Subpoena, an "order" of the Commission, and should therefore be held in contempt, and that it violated Rule 1.1 of the Commission's Rules and Procedures.

The Legislature has provided that the Commission's powers to adjudicate contempt proceedings must be done "in the same manner and to the same extent as contempt is punished by courts of record."[97] Findings of contempt are "quasi-criminal in nature, and therefore the procedural and evidentiary requirements are the most rigorous and exacting of all matters

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[92] Cal. Rules of Court 2.30(c).
[93] *Application of Pac. Gas & Elec. Co. Proposing Cost of Serv. & Rates for Gas Transmission & Storage Servs. for the Period of 2015-2017. (U39g) & Related Matter* (C.P.U.C. Nov. 20, 2014) No. D.13-12-012, 2014 WL 6791604, at *3 n. 2 ["[D]ue process restricts the Commission from imposing sanctions at this juncture for violations that were not noticed in the order to show cause."] [citing to Cal. Rules of Court Rule 2.30(c)]; see also ibid. ["While the California Rules of Court do not govern, they are instructive."].)
[94] See Attachment E ["[O]utside any formal proceeding, the Commission's Rules of Practice and Procedure and filing requirements for formal proceedings do not directly apply."].
[95] See *id.* ["No other documents [regarding discovery disputes in this matter] may be submitted for filing without the prior approval of ALJ [Regina] DeAngelis."].
[96] *PG&E*, *supra*, 237 Cal.App.4th at 829 n. 9.
[97] Pub. Util. Code § 2113.

handled by the Commission."[98] When sanctions or penalties are threatened, the Commission has recognized that due process requires it to provide notice and a hearing—by recategorizing investigations or proceedings as "adjudicatory" under Rule 7 and requiring a hearing.

The Commission examined this issue in *Order Instituting Investigation whether Pac. Gas & Elec. Co., So. Cal. Edison Co., San Diego Gas & Elec. Co., and their respective holding companies PG&E Corp., Edison Intl., and Sempra Energy, respondents, have violated relevant statutes and Commission decisions, and whether changes should be made to rules, orders, and conditions pertaining to respondents' holding company systems*, No. D.01-05-0161 (May 14, 2001). There, the Commission recategorized the proceeding to the "ratesetting" category but acknowledged that "[w]e were and continue to be fully prepared to recategorize the proceeding as adjudicatory if and when we find probable cause to believe Respondents have violated the law and we opt to make final findings on such violations and settle on remedies."[99] Similarly, relying on this decision in a proceeding considering sanctions on PG&E for violation of Public Utilities Code Section 851, General Order 69-C, Rule 1.1, and other Commission decisions, the Commission found it necessary to recategorize a proceeding as adjudicatory, as well as provide a more detailed specification of violations and evidence against PG&E, "in a manner that provides PG&E adequate notice and opportunity to be heard."[100] Moreover, although the Commission at times assesses fines outside of an adjudicatory proceeding, the Commission recognized that even in a ratesetting proceeding "due process requires adequate notice and an opportunity to be heard" prior to fines being assessed – procedural requirements SoCalGas currently lacks in this "non-proceeding."[101]

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

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

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

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

3. An Evidentiary Hearing Is Required Where, As Here, Material Factual Disputed Issues Exist

Consistent with the requirements of due process, a full evidentiary hearing is required to adjudicate the Contempt Motion.

Under the Code of Civil Procedure, civil contempt can be adjudicated only "[u]pon the answer and evidence taken."[102] Because Public Utilities Code Section 2113 authorizes the Commission the power to adjudicate contempt only "in the same manner and to the same extent as contempt is punished by courts of record," the Legislature has therefore mandated that the Commission take evidence before contempt can be adjudicated. For contempt proceedings, when, as here, "virtually none of the facts involved in the alleged contempt have occurred in the judge's presence, but have arisen entirely outside the courtroom . . . due process requires notice and hearing lest the alleged contemner be convicted ex parte."[103] Second, evidentiary hearings are required when "there are material factual disputed issues."[104] More specifically, the Commission has provided guidance that cross examination of witnesses was necessary to satisfy due process when "motive, intent, or credibility are at issue or there is a dispute over a past event."[105]

The Contempt Motion and this Response present several "material factual disputed issues" going to "motive, intent, or credibility." As discussed extensively above, SoCalGas vehemently disputes the misleading factual record presented by Cal Advocates,[106] and cross examination is required to assess the credibility of Cal Advocates' account of what transpired, including the cross-examination of Cal Advocates' staff members Stephen Castello (who submitted a declaration in support of the Contempt Motion) and Alec Ward, who participated in the meet and confers involving these issues. Whether SoCalGas, absent a non-disclosure agreement, could protect the confidentiality of the millions of accounting records contained in its SAP database also presents material factual disputed issues. Further, SoCalGas's intent in its efforts to respond to the Subpoena go to whether SoCalGas should be found in contempt of the

[102] Cal. Civil Proc. Code § 1218(a).
[103] *Arthur v. Super. Ct.* (1965) 62 Cal.2d 404, 408-09.
[104] *In Re in Touch Commc'ns, Inc.* (C.P.U.C. May 27, 2004) No. 03-11-011, 2004 WL 1368185 ["The Commission concluded that 'evidentiary hearings . . . are warranted only to the extent there are material factual disputed issues[.]'"] [citing D.95-07-054].)
[105] *In Re Verizon Commc'ns, Inc.* (C.P.U.C. Nov. 18, 2005) No. D.05-04-020, 2005 WL 3355225.
[106] Section II.A-B, *supra*.

subpoena, and whether fines or other penalties should be assessed, and an evidentiary hearing is required to assess that intent. As outlined below, disputed issues of fact are also present regarding Cal Advocates' contention that SoCalGas has violated Rule 1.1 of the Commission's Rules of Practice and Procedure.[107]

The criteria to be applied by the Commission in assessing a penalty for any contempt finding or Rule 1.1 violation also present material factual disputed issues. For example, in considering a Rule 1.1 violation, "the question of intent to deceive . . . goes to the question of how much weight to assign to any penalty that many be assessed."[108] The Commission considers two general factors in setting fines: "(1) the severity of the offense and (2) the conduct of the utility," as well as "the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent."[109] An evidentiary hearing would be required to resolve disputed issues of fact between the parties on these issues.

Perhaps the best example of the process due to SoCalGas concerning the Contempt Motion is the very case Cal Advocates insists is most analogous, involving the San Francisco Metropolitan Transit Authority's ("SF MTA") withholding of documents responsive to a Commission subpoena under a claim of privacy.[110] There, the Commission's Safety and Enforcement Division issued a subpoena outside of a proceeding, and in response to SF MTA's noncompliance with the subpoena, the Commission instituted an Order Instituting Investigation against SF MTA.[111] The Commission held a prehearing conference, and set forth a Scoping Memo and Ruling identifying specific issues for resolution.[112] That memo identified which rulings were legal and which required an evidentiary hearing; briefing was permitted on the legal issues, and an evidentiary hearing was held on the factual issues.[113] After the evidentiary hearing, the parties filed concurrent post-hearing briefs and reply briefs, the record was reopened, and further briefing was submitted.[114] Finally, the matter was submitted and a reasoned decision was issued.[115] SF MTA was also permitted to file an appeal.[116] All of this process was issued

[107] See Section III.D, *infra*.
[108] *SFMTA*, *supra*, 2015 WL 5159113, at *20 (citing D.01-08-019).
[109] *Id.* at *23 (citing D.98-12-075, mimeo at 34-39).
[110] See generally *id*.
[111] *Id.*
[112] *Id.* at *1-2.
[113] *Id.* at *2-3.
[114] *Id.*
[115] *Id.* at *4.
[116] *Id.* at *26.

consistent with Commission Rules of Practice and Procedure Rules 7.1 [categorization], 7.2 [prehearing conference], 7.3 [scoping memo], 7.6 [categorization appeal rights]; Rule 15.5 [appeal of decision]; and Public Utilities Code section 1701.2.

To be clear, as explained above, the Contempt Motion is procedurally improper and can be dismissed for that reason. However, before any adjudication of the motion on the merits can be made, the Commission is required to ensure SoCalGas is provided its constitutionally mandated due process. To satisfy those requirements, the Commission should open an adjudicatory proceeding and hold evidentiary hearings on the issue of whether any contempt has taken place, and if so whether fines should be assessed similar to what it did in the SF MTA matter.

D. The Contempt Motion Fails On the Merits[117]

1. The Contempt Motion Fails to Prove Beyond a Reasonable Doubt that SoCalGas Should Be Found in Contempt

Section 2113 of the Public Utilities Code authorizes the Commission to punish as contempt noncompliance with a Commission "order, decision, rule, regulation, demand, or requirement . . . in the same manner and to the same extent as by contempt is punished by courts of record."[118] Findings of contempt are "quasi-criminal in nature, and therefore the procedural and evidentiary requirements are the most rigorous and exacting of all matters handled by the Commission."[119] SoCalGas is entitled to a presumption of innocence.[120] Because the contempt power is a court's "ultimate weapon," it must be used "with great prudence and caution."[121]

To find SoCalGas in contempt, Cal Advocates must prove "beyond a reasonable doubt" that SoCalGas's conduct was "willful in the sense that the conduct was inexcusable" or that SoCalGas "has an indifferent disregard of the duty to comply."[122] Here, the record not only falls far short of that standard; rather, it demonstrates that SoCalGas has taken extensive efforts to

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[117] As explained above, Section III.A-B, this Contempt Motion should be denied as premature, or if it is entertained at all, it can be considered only after Cal Advocates obtains a recategorization of the matter in which the merits of the Contempt Motion can be weighed within the confines of the constitutional process due SoCalGas. In an abundance of caution, however, SoCalGas includes here the preliminary arguments it presently intends to make if such a proceeding was convened, and reserves the right to assert additional arguments in such a proceeding.
[118] Cal. Pub. Util. Code § 2113.
[119] *SFMTA*, *supra*, 2015 WL 5159113, at *5.
[120] E.g., *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 347 n.15; *McCann v. Municipal Court* (1990) 221 Cal.App.3d 527, 537.
[121] *In re Koehler* (2010) 181 Cal.App.4th 1153, 1171.
[122] *SFMTA*, *supra*, 2015 WL 5159113, at *5.

comply with the Subpoena in a way that protects its privileged and constitutionally protected information.

a) SoCalGas's Extensive Efforts to Comply with the Subpoena Without Waiving Its Important Privileges and Constitutional Protections Do Not Demonstrate Willful Disregard for the Subpoena

Since the Subpoena was issued, SoCalGas has taken the following steps to comply with the Subpoena in a manner that preserves its privileged and First Amendment-protected material. But SoCalGas's ability to comply with the Subpoena has been frustrated by Cal Advocates' refusal to much of SoCalGas's efforts to provide access to its database.

SoCalGas's Efforts To Comply With the Subpoena	Cal Advocates' Response
SoCalGas proposed downloading data from all of its cost centers in the SAP system and transmitting that to Cal Advocates[123]	Declined[124]
SoCalGas developed and implemented a custom technical software solution to shield privileged and First Amendment-protected material from Cal Advocates' view, which would allow it to access the vast majority of records in the SAP system[125]	Refused[126]
SoCalGas arranged for "read only" access to the SAP system and agreed to execute a non-disclosure agreement to address the confidentiality of material contained in the SAP system, as Cal Advocates proposed[127]	Refused, because Cal Advocates reversed its position on the non-disclosure agreement[128]
SoCalGas sought to continue to meet and confer about the parties' disagreements about the Subpoena[129]	Canceled all scheduled meet and confers[130]

Further, at Cal Advocates' request, SoCalGas allocated one of its employees to be available to Cal Advocates' staff should it have any technical questions about using SoCalGas's SAP system.[131] SoCalGas has also produced multiple fixed data accounting reports that Cal

[123] Wilson Decl., Exh. B.
[124] *Id.*, Exh. C.
[125] *Id.*, Exh. G, at 2; *id.*, Exh. L, at 1; Contratto Decl. ¶¶ 6-9; Enrique Decl. ¶¶ 4-7.
[126] See Cal Advocates' Response to Motion to Quash, at 17-29; Contempt Motion at 9-10.
[127] Wilson Decl., Exhs. E-L.
[128] See Cal Advocates' Response to Motion to Quash, at 38 n. 131; Contempt Motion at 9; see also *id.* at 23 n.84.
[129] Wilson Decl., Exhs. M-O.
[130] *Id.*
[131] Wilson Decl., Exh. L at 1.

Advocates requested.[132] The Contempt Motion overlook these significant efforts to provide Cal Advocates with as much access and support as SoCalGas could, as quickly as practicable.

Cal Advocates contends, however, that SoCalGas has showed a "willful disregard" for the Subpoena through purported "misrepresentations to Cal Advocates staff regarding its efforts to comply with" the Subpoena and its "programmatic exclusion of accounts related to law firms and vendors performing 100% shareholder activities."[133] Cal Advocates fails to identify even one actual "misrepresentation" made to Cal Advocates. Perhaps this is unsurprising; not only did SoCalGas never misrepresent its efforts to comply with the Subpoena, it actually informed Cal Advocates of each step it took to comply with its plethora of requests related to the Subpoena.[134] Importantly, SoCalGas apprised Cal Advocates of the challenges it faced with providing the "real-time" access to its staff in the manner sought by Cal Advocates, as documented in contemporaneously prepared writings memorializing the parties' meet and confer discussions.[135]

b) SoCalGas's Motion to Quash and Its Software Solution Shielding Its Privileged and Constitutionally Protected Information from Cal Advocates While That Motion Is Pending Do Not Demonstrate Willful Disregard of the Subpoena

Although SoCalGas acknowledges that Cal Advocates, as part of the Commission, has the statutory authority under the Public Utilities Code to inspect SoCalGas's books and records, that authority is not absolute, as Cal Advocates contends. Rather, its inspection rights are subject to the restraints imposed by the United States and California Constitutions and other applicable law. SoCalGas's rights under the attorney-client privilege, the attorney work product doctrine, and the First Amendment of the United States Constitution (and its California constitutional counterpart) impose restrictions on Cal Advocates' rights to inspect SoCalGas's books and records.[136] SoCalGas filed its Motion to Quash to enforce its rights under the attorney-client privilege, the attorney work product doctrine, and the First Amendment. Further, SoCalGas developed and implemented a custom software solution so that it could shield those materials from disclosure to Cal Advocates, but also provide Cal Advocates access to the undisputed

[132] Wilson Decl., Exh. D.
[133] Contempt Motion at 8.
[134] See Section II.A-B, *supra*.
[135] *Id.*
[136] See Motion to Quash at 14-26.

material in its SAP system (assuming an appropriate non-disclosure agreement was executed) while the issues were being litigated.

Cal Advocates' argument that SoCalGas is willfully disregarding the Subpoena by not providing "immediate and unfettered" remote access to its SAP system, notwithstanding the pending Motion to Quash, defies common sense and the law.[137] By Cal Advocates' logic, SoCalGas must provide unfettered access to its SAP system now—including to its privileged and constitutionally protected information—and if the ALJ or a court later determines that SoCalGas should not have obtained that information, the information would be returned. That ignores the irreparable harm that would ensure from the disclosure of that information; once conveyed, there would be no way to cure the harm to SoCalGas's rights to confidential communications with its attorneys, and its First Amendment rights to association, free speech and to petition the government. Indeed, "once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure. The attorney-client privilege 'deserves a particularly high degree of protection in this regard since it is a legislatively created privilege protecting important public policy interests, particularly the confidential relationship of attorney and client and their freedom to discuss matters in confidence."[138]

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[137] Contempt Motion at 9-10.

[138] *Korea Data Systems Co. v. Sup. Ct.* (1997) 51 Cal.App.4th 1513, 1516 (citations omitted); see also *Maness v. Meyers* (1975) 419 U.S. 449, 460 ["[w]hen a court during trial orders a witness to reveal information . . .[c]ompliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released."]; *In re Grand Jury Witness* (9th Cir. 1982) 695 F.2d 359, 362 [reversing contempt order with respect to attorney's failure to comply with subpoena duces tecum that sought, among other things, attorney time records describing the services performed the attorneys, retainer agreements, contracts, letters of agreement, and related correspondence]; *In re Navarro* (1979) 93 Cal.App.3d 325, 330-31 [attorney who refused to answer question inquiring into attorney-client privileged communication committed no contempt of court].

Cal Advocates tries to avoid SoCalGas's privilege objections by arguing in a footnote that SoCalGas must "provide a privilege log to support such assertions, which it has not done here." Contempt Motion at p. 10 n. 38. But waiver of the attorney-client privilege occurs only "when any holder of the privilege 'has disclosed a significant part of the communication or has consented to such disclosure made by anyone…'" *Mitchell v. Superior Court* (1984) 37 Cal. 3d 591, 601 [citing Evid. Code § 912]. A court "may not impose a waiver of the attorney-client privilege or work product doctrine as a sanction for failing to provide an adequate response to an inspection demand or an adequate privilege log"—and neither can this Commission. *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal. App. 4th 1116, 1127. As for Cal Advocates' suggestion that because legal protections exist to keep Cal Advocates from, in turn, disclosing SoCalGas's privileged information to third parties, SoCalGas's privileged information is somehow protected—disclosure to Cal Advocates threatens the very heart of the privilege, which is "the preservation of the confidential relationship between attorney and client"—not the "risk that parties seeking discovery may obtain information to which they are not entitled." *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal. 4th 725, 740-41.

Cal Advocates contends that the *SFMTA* case supports its view that SoCalGas should be found in contempt for shielding its privileged and First Amendment-protected material from its view, but that case is clearly distinguishable on the facts.[139] There, the SF MTA responded to a Commission-issued subpoena demanding the production of documents related to a light rail train crash. Instead of moving to quash the subpoena, the SF MTA redacted certain documents on privacy grounds, and refused to produce the unredacted versions as required by the subpoena. Though SF MTA argued that the subpoenaed documents could properly be withheld, the Commission disagreed, and found SF MTA in contempt and in violation of Rule 1.1 for refusing to produce the requested documents for 14 months after the subpoena's compliance date.[140]

Here, by contrast, SoCalGas timely filed its Motion to Quash, properly seeking the Commission's intervention to partially quash the Subpoena to exclude from its scope material protected from disclosure under the attorney-client privilege, the attorney work product doctrine, and the First Amendment. Further, it took steps to provide access to the remainder of the information in its SAP system as promptly as practicable after implementing a technical solution to exclude the modest amount of privileged and constitutionally protected information in the database. In doing so, SoCalGas did not "willfully disobey" the Subpoena as the SF MTA did by not challenging the Subpoena on the merits.

Cal Advocates also attempts to brush aside the First Amendment by suggesting that the Court of Appeal in *PG&E* somehow dismissed *all* constitutional claims that could be raised by regulated utilities (or those that may have been previously rejected by a lower-level tribunal or officer, such as an ALJ). Contempt Motion at p. 10, fn. 38. The court did no such thing. *PG&E* arose from false or misleading statements regarding pipeline safety made to the CPUC in the aftermath of the 2010 San Bruno pipeline explosion, and the language quoted by Cal Advocates —that PG&E could "not prevail in its attempt to repackage in constitutional wrapping the same intent-based arguments we have already rejected"—was a reference to the *Court of Appeal's own* prior rejection of PG&E's arguments that both Rule 1.1 and the Excessive Fines Clause contain an intent requirement. *PG&E,* at p. 865. The court said nothing about the First Amendment, and it certainly did not say—as Cal Advocates seems to suggest—that any and all constitutional arguments (or those previously rejected by a lower-level tribunal or officer) have been foreclosed in Commission proceedings. Any such holding would, of course, run afoul of section 1760 of the Public Utilities Code, as well as well-settled standards of review of constitutional and other legal arguments on appeal. That another regulated utility unsuccessfully raised arguments under a different provision of the Constitution in another proceeding against the Commission does not give Cal Advocates carte blanche to violate SoCalGas's First Amendment rights.

[139] Contempt Motion at 10-12.

[140] *Id.* at *15.

c) SoCalGas's Request that Cal Advocates Execute the Non-Disclosure Agreement It Committed to Signing Does Not Demonstrate Willful Disregard of the Subpoena

Cal Advocates' argument that SoCalGas is willfully disregarding the Subpoena by requiring it to enter into a non-disclosure agreement as a condition of providing Cal Advocates' access mischaracterizes the record. Executing a non-disclosure agreement to address SoCalGas's confidentiality concerns was ***Cal Advocates'*** idea. Indeed, Cal Advocates itself represented *in writing* that "***Cal Advocates can execute a non-disclosure agreement (NDA)*** that permits SoCalGas to review and mark documents as confidential prior to public disclosure" and even asked SoCalGas to "***provide a draft NDA for Cal Advocates' review and approval***."[141] In the Contempt Motion, Cal Advocates asserts that SoCalGas's Motion to Quash "defeat[ed]" the purpose of the NDA—but the purpose of the NDA is, as Cal Advocates itself put it, to "permit[] SoCalGas to review and mark documents as confidential prior to public disclosure."[142] The filing of SoCalGas's Motion to Quash did nothing to dispel the SoCalGas's confidentiality concerns to be addressed by the NDA, including the treatment of confidential information other than that subject to the Motion to Quash (including, but not limited to, social security numbers, vendor pricing, and third-party banking information). It appears, rather, that Cal Advocates' reversal on its position on the NDA is part of its effort to punish SoCalGas for filing a Motion to Quash.

Further, contrary to Cal Advocates' protestations, SoCalGas requires a non-disclosure agreement so that it can comply with Public Utilities Code Section 583 and the CPUC's GO 66-D, which applies to the treatment of confidential information provided to the Commission or its staff. Under that order, to merit confidential treatment of information it produces to Cal Advocates, SoCalGas must (among other things) identify in advance confidential information in material it produces to Cal Advocates. GO 66-D provides that a regulated entity "bears the burden of proving the reasons why the Commission shall withhold any information, or any portion thereof, from the public" and that "[u]nless information is submitted in accordance with Section 3.2-3.4 [of the Order], information submitted in non-compliance with this Section, may be released to the public. . . ." As explained above, because the SAP system contains millions of records, SoCalGas has no commercially reasonable or practicable means of designating each and

[141] Wilson Decl., Exh. F, at 1.
[142] *Id.*

every confidential "page, section, or field, or any portion thereof" before providing Cal Advocates with access to the SAP system—particularly in the three days before the original compliance date on the Subpoena.[143] For this reason, GO 66-D does not provide for a procedure that would adequately protect the confidentiality of SoCalGas's highly sensitive information in the SAP system. Absent a non-disclosure agreement to preserve the confidentiality of information accessed by Cal Advocates before SoCalGas could review it for confidentiality in compliance with GO 66-D, SoCalGas runs the risk of all of its highly confidential information in the SAP system being released to the public.[144] For this reason, Cal Advocates' contention that "the law already provides meaningful protections against a regulator's unauthorized disclosure of a utility's—and its subsidiaries' and affiliates'—confidential information" rings hollow: To secure those legal protections, SoCalGas must comply with Section 583 and GO 66-D, which it cannot do absent a non-disclosure agreement.[145]

2. The Contempt Motion Fails to Prove That SoCalGas Violated Rule 1.1

Rule 1.1 of the Commission's Rules of Practice and Procedure provides that "[a]ny person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission or its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law." The Commission has found Rule 1.1 violations "[w]here there has been a lack of candor, withholding of information, or failure to correct information or respond fully to data requests."[146] "The party claiming the violation must establish that fact by a preponderance of the evidence."[147]

Cal Advocates' argument that SoCalGas has violated Rule 1.1 relies entirely on the same allegations it made in support of its argument to find SoCalGas in contempt.[148] Accordingly, for the same reasons as explained above in refuting its arguments on

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[143] *Id.* at § 3.2(a).
[144] *Id.*
[145] Contempt Motion at 9; see also *id.* at 23 n.84 ["an NDA is unnecessary given the statutory protections provided"].
[146] See, e.g., *SFMTA*, *supra*, 2015 WL 5159113, at *20 [citations omitted].
[147] *Id.* [citations omitted].
[148] Contempt Motion at 14-15.

contempt, Section III.C, *supra*, SoCalGas has not engaged in *any* conduct meriting a Rule 1.1 violation. Far from it: SoCalGas has expended considerable effort to comply with the Subpoena and provide access to Cal Advocates, in a manner that does not waive its rights under the attorney-client privilege, the attorney work product doctrine, and the First Amendment.[149] Further, its technical software solution to shield from disclosure this privileged and First Amendment-protected material will facilitate Cal Advocates' access to roughly 96% of the data contained in the SAP system, so long as Cal Advocates agrees to execute the non-disclosure agreement it itself proposed to assure that SoCalGas can produce data responsive to the Subpoena that allows it to comply with the Commission's own order governing confidentiality. Moreover, SoCalGas communicated with Cal Advocates every step of the way to apprise them on the status of its responsive efforts. In sum, SoCalGas's conduct in responding to the Subpoena was proper and comes nowhere close to constituting a violation of Rule 1.1.

3. Cal Advocates' Request for Fines Are Excessive and Unreasonable

Cal Advocates acknowledges that the punishment for contempt is a $1,000 fine under Public Utilities Code Section 2113.[150] Eager to impose unreasonable and unwarranted penalties on SoCalGas, though, it seeks "additional" fines under Rule 1.1 of the Commission's Rules of Practice and Procedure, relying on its meritless allegations that SoCalGas has shown "willful disregard" in regards to the Subpoena.[151]

Cal Advocates' request for a fine of $4.5 million for SoCalGas's purported noncompliance is unreasonable on its face and exceeds constitutional limits. The United States and California Constitutions prohibit the imposition of "excessive fines."[152] The Excessive Fines Clause places a constitutional limit on the Commission's power to punish, including imposing civil fines or penalties.[153] The "touchstone of the constitutional inquiry . . . is the principle of proportionality."[154] In assessing whether a

[149] Further, any factual dispute between the parties must be adjudicated in an evidentiary proceeding. See Section III.B., *supra*.
[150] Contempt Motion at 13.
[151] *Id.* at 14-15.
[152] U.S. CONST. amend. VIII; CAL. CONST. art. I, § 17.
[153] *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co*. (2005) 37 Cal.4th 707, 727-28.
[154] *United States v. Bajakajian* (1998) 524 U.S. 321, 334

penalty is proportionate, courts generally weigh, among other factors, (1) the defendant's culpability and the relationship between the harm and the penalty, and (2) "the sanctions imposed in other cases for comparable misconduct."[155] The Commission, too, has its own set of factors to determine the reasonableness of a penalty.[156]

Here, although Cal Advocates spends several pages reciting various factors considered by the Commission in assessing fines, the gravamen of Cal Advocates' argument is to seek the largest dollar value of fines possible to have a purported "deterrent effect" on SoCalGas's purported "disregard [of] state laws and Commission requirements."[157] As explained above, SoCalGas vociferously denies that it has engaged in any misconduct regarding the Subpoena—much less any conduct that would merit a contempt finding or fines. No fine is needed to deter anything.

In fact, this Contempt Motion—and its demand for $4.5 million in fines—is part of Cal Advocates' broader effort to seek to punish a regulated utility that asserts lawful legal objections. Not only does the Motion seek to punish SoCalGas for its purported "defiance" of the Subpoena, it also wants to punish SoCalGas (a) for filing a motion to quash a completely unrelated subpoena in a wholly unrelated matter—even though it acknowledges that an ALJ already denied the Safety and Enforcement Division's effort to seek sanctions in that matter;[158] (b) for the actions of the Utility Workers Union of America, not SoCalGas, in San Luis Obispo; and (c) for purportedly engaging in efforts to "promote the use of natural and renewable gas, and to defeat state and local laws and ordinances proposed to limit the use of these resources."[159] In short, Cal Advocates seeks to punish SoCalGas for exercising its due process rights and protecting its privileges and constructional protections, and for pursuing policy goals involving natural gas and renewable gas with which Cal Advocates apparently disagrees. This Commission should reject Cal Advocates' inappropriate effort to use the Commission's contempt authority to punish SoCalGas for taking a position that Cal Advocates disfavors.

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[155] *Cooper Indus., Inc. v. Leatherman Tool Grp.* (2001) 532 U.S. 424, 434–35.
[156] See generally *In re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, D. 98-12-075, 84 CPUC 2d 155 (1998) [*i.e.*, severity of the offense, conduct of the utility, and the totality of the circumstances].
[157] Contempt Motion at 19.
[158] *Id.* at 4.
[159] *Id.* at 3.

E. Cal Advocates' Additional Unwarranted Demands Should Be Rejected

In its final breath, the Contempt Motion asserts a hodgepodge of unreasonable substantive and procedural demands that it insists the Commission order be imposed on SoCalGas. This is a blatant violation of due process. Half of the requests are merely new data requests in disguise—to which SoCalGas has the right to lodge objections which must be litigated. The other half seek burdensome procedural requirements that exceed Cal Advocates' constitutional and statutory authority. Cal Advocates' unlawful attempt to bypass due process should be rejected.

Article XII, section 2 of the California Constitution allows the Commission to set its own procedures "[s]ubject to statute and due process." Further, Public Utilities Code section 309.5(e) specifies that Cal Advocates may compel production or disclosure of information "necessary to perform its duties from any entity regulated by the commission, *provided that any objections to any request for information shall be decided in writing . . . .*"[160]

Thus, if Cal Advocates wants new information or data from SoCalGas, it must do so via a data request or a valid subpoena—not as part of a conclusion to a motion for sanctions related to a completely different request. And SoCalGas has procedural rights to object to those data requests, which civil discovery rules and the Commission's own precedent define.[161] Cal Advocates' new requests for information should therefore be rejected wholesale.

Independently, several of these demands are improper in that they repeat (indeed, compound) the offense to SoCalGas's constitutional rights from Cal Advocates' earlier requests. Demands 3(d), (e), and (f) request that SoCalGas "identify" information subject to the First Amendment and its California Constitution counterpart—but, as discussed at length above, to

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[160] *Id.* [emphasis added].

[161] See Pub. Util. Code § 309.5(e). For example, Cal Advocates' requests in 3(a)-(e) appear to seek information that SoCalGas need not provide, if it requires the creation of new documents responsive to the request. See, e.g., *In the Matter of the Joint Application of Verizon Communications Inc. and MCI, Inc., Administrative Law Judge's Ruling Addressing Motion of Qwest to Compel Responses* (CPUC Aug. 5, 2005) No. A.05-04-020, 2005 WL 1866062 at p. 7 [in relation to motion to compel emphasized that "Verizon is not required to create new documents responsive to the data request"]; *In the Matter of the Joint Application of SBC Communications Inc. and AT&T Corp., Administrative Law Judge's Ruling Regarding ORA's Second Motion to Compel* (CPUC June 8, 2005) A.05-02-027, 2005 WL 1660395, at *4 [in ruling on motion to compel stressed that SBC Communications "shall not be required to produce new studies specifically in response to this DR"].

identify that information is to lose that protection altogether. Ordering this done prior to adjudication of that right further offends SoCalGas's right to due process.[162]

Finally, the procedural demands in 3(g)-(h) and 4(a)-(c) violate due process in seeking to strip away SoCalGas's ability to meaningfully object to Cal Advocates' unreasonable demands by setting arbitrary deadlines regardless of the breadth and scope of Cal Advocates' data requests, and imposing requirements that far exceed those required by either GO 66-D or the Commission's Discovery Custom and Practice Guidelines. Cal Advocates wishes to cut SoCalGas's response time in half, demand which officer of the company verify the data request responses, and do so under penalty of perjury. These are unsupported by law. Further, the requirement that an attorney certify confidentiality claims under penalty of perjury exceeds the requirements of GO 66-D and is a pernicious attack on SoCalGas's attorney-client privilege, because an attorney would be unable to so declare without necessarily revealing his or her own advice to the client regarding same.

If Cal Advocates wishes to pursue additional discovery demands, it knows how to do so: It can serve an appropriate data request or subpoena. (Indeed, on June 30, 2020, Cal Advocates served its fifteenth data request, seeking among other things records and invoices relating to SoCalGas's outside counsel, Willenken LLP.) Tacking on such requests to this Motion, and seeking to strip way SoCalGas's due process rights in the current "non-proceeding," is improper and should be rejected.

IV. CONCLUSION

The Commission should deny the Contempt Motion on the grounds that it is premature and procedurally improper. Should the Commission decide not to deny this Contempt Motion outright, the Commission should stay consideration of the motion until SoCalGas's Motion to Quash is fully adjudicated, and after it opens an adjudicatory proceeding, in which SoCalGas will be afforded the full process due under the law, including but not limited to an evidentiary hearing on issues of disputed material fact. If the Contempt Motion is heard on the merits, the Commission should deny the motion by holding that SoCalGas is not in contempt, that SoCalGas has not violated Rule 1.1 of

[162] Moreover, Cal Advocates' requests for information regarding 100% shareholder-funded activities, by definition, has no relation to its statutory mission "to obtain the lowest possible rate for service consistent with reliable and safe service levels." Pub. Util. Code § 309.5(a).

the Commission's Rules of Practice and Procedure, that no fines should be assessed, and that Cal Advocates' additional discovery demands should be denied.

Respectfully submitted on behalf of SoCalGas,

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