

MAILED 4/02/04

Decision 04-03-035 March 16, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Authority to Lease Available Land on the Barre-Villa Park and Lewis_Serrano Transmission Right of Way to RHC Communities, LLC

Application 03-06-014
(Filed June 13, 2003)

**DECISION GRANTING APPROVAL UNDER PUBLIC UTILITIES
CODE SECTION 851 FOR A LEASE OF UTILITY PROPERTY.**

We grant the Application of Southern California Edison Company (SCE) for authority to lease available land under Public Utilities Code Section 851.¹ The lease is sought to permit RHC Communities, LLC (RHC or Lessee) to construct and operate a self-storage and vehicle and boat storage facility. The SCE property consists of a 10.15-acre site located on a portion of SCE's Barre-Villa Park transmission right of way (ROW) in an unincorporated portion of Orange County (Site). The Site is part of the Barre-Villa Park 220 kilovolt (kV) system.

Background

The Site is approximately 10.15 acres on a portion of the Barre-Villa Park ROW in an unincorporated portion of Orange County. It is one of a number of sites subject to an Option to Lease Agreement (Option Agreement) between SCE and RHC dated September 6, 2001. Pursuant to the Option Agreement, RHC has the right, subject to Commission approval, to lease the Site from SCE for the

¹ All statutory references are to the Public Utilities Code unless noted otherwise.

described uses for a period of sixty-five years beginning on the date RHC exercises the option. Annual rent is as set out in the following table.

Base Rent:

Year 1	\$23,000
Year 2	\$80,000
Year 3	\$170,000
Year 4	\$262,000
Years 5 and following	\$262,000 + CPI increase not to exceed 3% annually.

Additional Rent:

At the end of each calendar year, starting in Year 1, RHC will pay as additional rent the amount by which 20% of its calendar year gross revenues exceed the base rent paid during that year.

The Option Agreement provides that RHC's activities must not interfere with the operation of the electric facilities that cross the Site. To that end, RHC is forbidden to use or store hazardous substances, explosives or flammable materials on the Site. Further, any equipment used by RHC on or adjacent to the Site must maintain at all times a clearance of at least eighteen (18) feet from all overhead electrical conductors. RHC must maintain a minimum radius of fifty (50) feet around all tower legs and ten (10) feet around all poles and anchors. FHC must provide access roads to the Site that are at least sixteen (16) feet wide and capable of supporting a gross load of forty (40) tons on a three-axle vehicle.

SCE retains various rights under the Option Agreement including the rights to

- Approve RHC's construction plans and specifications
- Enter the Site at any and all reasonable times to inspect the property

- Impose temporary restrictions on RHS's right to enter, occupy and use the Site in order to perform necessary work on the electrical facilities located on the Site and
- Take back all or part of the leasehold by eminent domain or inverse condemnation.

Under the Option Agreement RHC is required to

- Pay all personal property taxes, general or special assessments, or other fees levied against the Site or the improvements to be constructed thereon
- Obtain all permits and approvals for construction and any zoning changes or use permits required for operation of its business on the Site
- Maintain appropriate comprehensive general liability, auto liability and worker's compensation insurance and
- Indemnify SCE against all liability for damages or injury to persons on the Site except to the extent caused by SCE's negligent or willful misconduct.

The Application

On June 13, 2003, SCE filed its application, seeking authorization from the Commission to enter into the lease with RHC. SCE's application is made under Section 851, which requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise encumber the whole or any part of its property that is necessary or useful in the performance of its duties to the public.² Leasing real property on which transmission towers and lines are

² Section 851 reads:

Footnote continued on next page

located is therefore one of the enumerated activities that require approval under Section 851.³

Determination of Best Secondary Use

The primary use of facilities located on the Site is the transmission and distribution of electricity in Orange County. SCE's aboveground electric lines crossing the Site, and their associated restrictions and height clearances limit the potential secondary uses. SCE states that its objective has been to select secondary uses for its property that provide the highest revenue consistent with its utility safety and reliability obligations, and that it has determined that the RHC project offers the highest potential revenue. To evaluate the rental potential of the Site, SCE engaged an independent appraiser to analyze the rent paid for comparable parking and storage facilities in and around the Site. Based on the analysis prepared by its appraiser, SCE reasonably believes that the rent it will

No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing with Section 1001) of Chapter 5 of this part, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture. Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value; provided, however, that nothing in this section shall apply to the interchange of equipment in the regular course of transportation between connecting common carriers.

³ As the Commission previously stated: "The language of Section 851 is expansive, and we conclude that it makes sense to read "encumber" in this statute as embracing the broader sense of placing a physical burden, which affects the physical condition of the property, on the utility's plant, system, or property." (D. 92-07-007, 45 CPUC 2d 24, 29.)

receive falls within the acceptable market range and is in line with revenues it receives from similar Commission-approved transactions.

Developer Selection

SCE states that it entered into the Option Agreement because of the economic benefits it offers to SCE ratepayers. RHC was one of several developers who responded to a request for proposals to develop transmission ROW land in SCE's service territory. SCE chose RHC as its preferred developer after evaluating its proposal and qualifications relative to those of other respondents. RHC is an experienced and financially sound developer of similar projects in southern California.

Environmental Review

Because CEQA applies to discretionary projects to be carried out or approved by public agencies and because the Commission must act on the Section 851 application and issue a discretionary decision without which the project cannot proceed, the Commission must act as either a Lead or Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA guidelines Section 15051(b)).

Here, the County of Orange (County) is the Lead Agency for the project under CEQA. The Commission is a Responsible Agency for this proposed project under CEQA. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the Commission must consider the Lead Agency's environmental documents and findings before acting upon or approving the

project.⁴ The specific activities a Responsible Agency must conduct are contained in CEQA Guidelines Section 15096.

The proposed project reviewed by the County consists of the construction of 33 one-story buildings and an office structure on 10.15 acres of land on the Barre-Villa Park transmission line ROW. The County exercised discretionary authority over this project by virtue of a General Plan amendment, a zone change from R1 (single family residential) to C1 (Local Business), and a Development Plan for the property.

On October 9, 2002, the County circulated a Draft Mitigated Negative Declaration (DMND) through the County Clerk of Orange County for public review. The County then issued a proposed Final Mitigated Negative Declaration (FMND) for public review October 28, 2002. Although the FMND found that residual environmental impacts were anticipated in the areas of (a) Land use and Planning, (b) Hydrology and Drainage, (c) Water Quality, (d) Noise, (e) Aesthetics, (f) Hazards, and (g) Public Services, the FMND incorporated mitigation measures designed to reduce these potential environmental impacts to a less than significant level.

On December 17, 2002, the Board of Supervisors of Orange County received the proposed FMND, the Planning Commission's recommendation to disapprove the amendment and zone change, and the comments, statements, and other evidence presented by all persons, including members of the public who may have appeared and addressed the County. Subsequently, the County took discretionary action and approved the General Plan Amendment and Zone change. The County deferred action on the FMND and the Development Plan

⁴ *Id.*

until September 30, 2003 when, under Ordinance No. 03-014 and Resolution No. 03-325, the County approved the Development Agreement, certified the FMND, adopted the Findings of Fact and approved the project. A Notice of Determination was filed with Clerk-Recorder of Orange County on October 1, 2003, in compliance with Sections 21108 and 21152 of the Public Resources Code.

We have reviewed the County's environmental documents and find them adequate for our decision-making purposes. We also find that the County reasonably concluded that the project, as approved with required mitigation measures, would not have a significant negative effect on the environment. Accordingly, we adopt the County's environmental documents and conclusions for purposes of our approval.

We remind SCE that where the Commission is a Lead or Responsible Agency under CEQA, SCE should include all relevant environmental documents with its application. The Commission cannot act in its capacity as a Responsible Agency until the record is complete. In this case, while SCE provided some of the material with its application, it did not provide a full record of the proceedings before the County of Orange, requiring our Energy Division to request supplementation of the record. SCE's failure to furnish the full record delayed our processing of this application.

Revenue Treatment

All revenues from the proposed lease will be treated as Other Operating Revenue (OOR). In D.99-09-070, the Commission adopted a gross revenue sharing mechanism for certain of SCE's operating revenues. The sharing mechanism applies to OOR, except for revenues that (1) derive from tariffs, fee or charges established by the Commission or by the Federal Energy Regulatory Commission; (2) are subject to other established ratemaking procedures or

mechanisms; or (3) are subject to the Demand-Side Management Balancing Account.

Under the sharing mechanism, applicable gross revenues recorded from non-tariffed products and services like the proposed lease are to be split between shareholders and ratepayers after the Commission-adopted annual threshold level of OOR has been met. For those non-tariffed products and services deemed “passive” by the Commission, the revenues in excess of the annual threshold are split between shareholders and ratepayers on a 70/30 basis. The Option Agreement and the proposed lease are “passive “ for sharing purposes.⁵

Discussion

As a lease of utility-owned real property, the proposed transaction falls squarely within the requirements of Section 851, which requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise encumber the whole or any part of its property that is necessary or useful in the performance of its duties to the public. The task of the Commission in a Section 851 proceeding is to review the transaction, “[T]o ensure that it will not impair the utility’s ability to provide service to the public.” (D.96-04-045). We have reviewed the Option Agreement and the proposed lease, and find that they do not impair SCE’s ability to provide utility service to the public. Because the proposed lease will generate revenues from the secondary use of Site and ratepayers will share in those revenues, the Application should be approved.

⁵ See Attachment B to SCE’s Advice Letter 1286-E, which identifies the *Secondary Use of Transmission Right of Ways and Land* and the *Secondary Use of Distribution Right of Ways, Facilities and Substations* as categories of non-tariffed products and services. Advice Letter 1286-E was filed on January 30, 1998, pursuant to Rule VII.F of the Affiliate Transaction Rules contained in Appendix A of D.97-12-088.

Comments on Draft Decision

The Draft Decision of Administrative Law Judge Sarah R. Thomas in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Pub. Util. Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on February 2, 2004.

Findings of Fact

1. In order for RHC to construct its facilities on the Site, a lease from SCE is required.
2. Lease of the Site to RHC is consistent with the current uses of the related SCE properties.
3. The lease and associated construction will not impair SCE's ability to provide service to the public.
4. The County of Orange has conducted an environmental review that includes the Site.
5. The County of Orange has issued a mitigated negative declaration with regard to the Site.
6. It can be seen with certainty that construction and operation of the facilities contemplated by the lease as proposed in the Application will have no significant effect on the environment.
7. All revenue from the lease in excess of a Commission-established threshold will be treated as Other Operating Revenue and shared 70/30 between SCE and its ratepayers, pursuant to D.99-09-070.
8. There is no known opposition to granting the authorization requested.

Conclusions of Law

1. Approving the requested lease is in the public interest.
2. The mitigated negative declaration adopted by the County of Orange for the Site is adequate for the CPUC’s decision-making purposes as a Responsible Agency under CEQA.
3. No additional CEQA review by the Commission is required.
4. The proposed revenue sharing conforms to the Commission’s order in D.99-09-070.
5. A public hearing is not necessary.
6. The Application should be granted as set forth in the following Order.
7. This decision should be effective today in order to allow RHC to expeditiously enter into the lease with SCE and begin paying rent for the benefit of SCE and its ratepayers as soon as possible.

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O R D E R

IT IS ORDERED that:

1. SCE's Application for authority to lease a portion of its Barre-Villa Park Transmission Right of Way to RHC Communities, LLC is granted, as described above.
2. All revenue from the lease shall be treated as Other Operating Revenue subject to the sharing mechanism set forth in Decision 99-09-070.
3. SCE shall notify the Director of the Commission's Energy Division in writing of any amendment, extension or termination of the lease agreement, within 30 days after such amendment, extension or termination is executed.
4. Application 03-06-014 is closed.

This order is effective today.

Dated: March 16, 2004 San Francisco, California.

MICHAEL R. PEEVEY
President

GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I Dissent.
/s/ CARL W. WOOD
Commissioner

I Dissent
/s/ LORETTA M. LYNCH
Commissioner