

Decision _____

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 Mandalay-Santa Clara Transmission Right of Way to Chaparral Land Company.

Application 03-04-030
(Filed April 25, 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 Pub. Util. Code § 851.¹ The SCE property consists of a 10-acre site located on a portion of SCE's Mandalay-Santa Clara transmission right of way in the City of San Buenaventura (Ventura) (Site). The Site is part of the Mandalay-Santa Clara 220-kilovolt (kV) and 66-kV systems and includes, among others, Commission jurisdictional facilities. The lease is sought to permit Chaparral Land Company (Chaparral or Lessee) to develop and operate a vehicle parking lot, landscaping area and bike path on the Site.

Background

The Site is subject to an Option Agreement (Option) between SCE and Chaparral dated March 23, 2002. Under the terms of the Option, upon approval by the Commission, SCE and Chaparral will enter into a lease of the Site (Lease).

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

Pursuant to the Lease, Chaparral will lease the Site from SCE for use as a vehicle parking lot, landscape area and bike path for a period of 65 years. The annual base rent rises throughout the initial term of the lease as follows:

Year 1	\$ -0-
Year 2	\$ 30,000
Year 3	\$ 60,000
Year 4	\$ 90,000
Year 5	\$ 120,000

At five-year intervals, commencing in Year 6, base rent will be adjusted by changes in the consumer price index for the preceding five years.

The Lease provides that Chaparral's activities must not interfere with the operation of the electric facilities that cross the Site. To that end, Chaparral is forbidden to use or store hazardous substances, explosives or flammable materials on the Site. Further, any equipment used by Chaparral on or adjacent to the Site must maintain at all times a clearance of at least seventeen (17) feet from all overhead electrical conductors. Chaparral must maintain a minimum radius of fifty (50) feet around all tower legs and ten (10) feet around all poles and anchors and 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 Lease including the rights to:

- Enter the Site at any and all reasonable times to inspect the property;

- Impose temporary restrictions on Chaparral'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.

Chaparral is also 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 April 25, 2003, SCE filed its application, seeking authorization from the Commission to enter into the lease with Chaparral. SCE's application is made under § 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

² Section 851 reads:

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

Footnote continued on next page

real property on which transmission towers and lines are located is therefore one of the enumerated activities that require approval under § 851.³

Determination of Best Secondary Use

The primary use of facilities located on the Site is the transmission and distribution of electricity in the City of Ventura (City). SCE's aboveground electric lines crossing the Site, and their associated restrictions and height

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." (Decision (D.) 92-07-007, 45 CPUC2d 24, 29.)

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 Chaparral project offers the highest potential revenue. Terry Farms currently occupies the Site, pursuant to an agricultural use permit that will expire on May 31, 2003. If the term of this permit were extended, the Site would generate approximately \$6,000 per year in revenue. The proposed uses of the Site will support a commercial development planned for adjacent property being purchased by Chaparral. Because of the Site's proximity to the Chaparral commercial development, Chaparral is the logical, and very probably the only, entity willing to pay an annual rent for the Site significantly in excess of the rent it generates from agricultural use. To evaluate the rental value for the Site, SCE reviewed the rent paid by comparable parking lot facilities in the area around the Site and the open space value of the Site. The annual base rent SCE will receive from Chaparral falls within the acceptable market range established by the analysis of comparable facilities and is in line with revenues SCE will receive from similar transactions that we have approved in the past.

Developer Selection

SCE states that it entered into the Agreement with Chaparral because of the economic benefits to SCE ratepayers. SCE chose Chaparral as its developer because of the proposed use and the background and financial position of the company's executive operating officer Dana Levy and Chaparral's project advisor and developer, John D. Stanek. Both men are experienced southern California real estate brokers and developers.

Environmental Review

Because the California Environmental Quality Act (CEQA) applies to discretionary projects to be carried out or approved by public agencies and because the Commission must act on the § 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)).

In this case, the City is the Lead Agency. The California Public Utilities Commission (CPUC) is a Responsible Agency for this proposed project. CEQA requires that the CPUC 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. (CEQA Guidelines Section 15050(b).) The specific activities that must be conducted by a Responsible Agency are contained in CEQA guidelines Section 15096.

In particular, on February 5, 2001, the Ventura City Council adopted Mitigated Negative Declaration EIR-2281 for the Olivas Park Drive Site B Project. The Olivas Park Drive Site B Mitigated Negative Declaration covers the Site and the adjacent 10.18 acre parcel, which is being acquired by Chaparral for development of a commercial center with a maximum of 211,000 square feet of building. The Site and adjacent parcel are located in an unincorporated area of the County of Ventura. To permit mixed-use development on the Site, SCE filed a zone change application with the City. On February 12, 2001, the Ventura City Council approved the zone change pursuant to City Council Ordinance No. 2001-03 "Approving a Change of Zone Case No. Z-861." The zone change will

become effective upon the City's annexation of the Site and the adjacent parcel, which is expected to occur in mid-2003.

The City filed its Notice of Determination (NOD) in compliance with Public Resources Code Sections 21108 or 21152, approving the project on March 14, 2001.

The City found that the Olivas Park Drive Site B Project would result in potentially significant environmental impacts related to aesthetics, air quality, biological resources, cultural resources, hazards, land use, utilities and service systems, and traffic and circulation. The City adopted a Mitigation and Monitoring Program to either eliminate or reduce each of the potentially significant impacts to less than significant levels.

Mitigations in the potential impact areas include: replacement of trees and incorporation of trees into the project design to address aesthetic impacts; compliance with the City Air Quality Mitigation Program and payment of required air quality mitigation fees to address air quality impacts; implementation of the tree replacement mitigations to address biological impacts; preparation of an archaeological study, retention of a qualified archaeologist, and potential work stoppages to address cultural resource impacts; preparation of an environmental site assessment to address hazards impacts; and development of a site plan and payment of fees necessary for a dedicated linear park site, and preparation of a plan for a specified bikeway facility to address land use impacts; preparation of a sewer flow study and physical capacity improvements or fee payments to address utilities and service systems impacts; and the payment of a proportional share of fees for the creation of specified turn lanes to address transportation impacts.

With respect to the potentially significant environmental impacts we find that the City adopted reasonable and feasible mitigation measures to either eliminate or reduce the impacts to less than significant levels. Accordingly, we adopt the City's findings and requirements under the Mitigation and Monitoring Plan for purposes of our approval.

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 Lease is "passive" for sharing purposes.⁴

Discussion

As a lease of utility-owned real property, the proposed transaction falls squarely within the requirements of § 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

⁴ 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.

its duties to the public. The basic task of the Commission in a § 851 proceeding is to determine whether the transaction serves the public interest: “The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.” (D.02-01-058 (2002).) We have reviewed the proposed agreement and find it does not interfere with SCE’s operation or affect its ability to provide service to its customers. Because ratepayers will receive 30% of the gross revenue from the transaction without incurring any measurable increased costs, we find that the property is being “used for other productive purposes” and accordingly the proposed Lease is in the public interest and the Application should be approved.

Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Karl J. Bemesderfer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. In order for Chaparral to operate a vehicle parking lot, landscape area and bike path on the Site, a lease from SCE is required.
2. Lease of the Site to Chaparral is consistent with the current uses of the related SCE properties.
3. The Lease will not impair SCE’s ability to provide service to the public.
4. The City of Ventura is the lead agency for environmental review under CEQA.

5. The Commission is a responsible agency for environmental review under CEQA.

6. The Commission has reviewed the City's Initial Study for the Olivas Park Drive Site B Project, its Mitigated Negative Declaration, its adopted Mitigation and Monitoring Program, and its Notice of Determination, and finds these documents adequate for our decision-making purposes.

7. The project activities, which are the subject of this application, received environmental review as part of the Olivas Park Drive Site B Project.

8. All revenue from the Lease in excess of a Commission-established threshold will be treated as OOR and shared 70/30 between SCE and its ratepayers, pursuant to D.99-09-070.

9. There is no known opposition to granting the authorization requested.

Conclusions of Law

1. Approving the requested Lease is in the public interest.

2. With respect to the potentially significant environmental impacts resulting from the project, we find that the City adopted reasonable and feasible mitigation measures to either eliminate or reduce the impacts to less than significant levels. We adopt the City's findings and required Mitigation and Monitoring Program for purposes of our approval.

3. This decision should be effective today in order to allow Chaparral to expeditiously enter into the Lease with SCE.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company's Application for authority to lease a portion of its Mandalay-Santa Clara Transmission Right of Way to Chaparral Land Company is granted, as described above.

2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.