

Decision 09-10-011 October 15, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U338E) for Authority to Lease Available Land on the Walnut-Nogales-Puente Subtransmission Right-of-Way to Logistics Terminals, Inc., a California Corporation.

Application 09-04-020
(Filed April 29, 2009)

DECISION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE SECTION 851 FOR CONVEYANCE OF A LEASE BY SOUTHERN CALIFORNIA EDISON COMPANY TO LOGISTICS TERMINALS, INC.

1. Summary

This decision takes the following actions:

- Grants the unopposed application¹ of Southern California Edison Company (SCE) for Commission authorization under Section 851² for SCE to convey a 25-year lease of property located on SCE's Walnut-Nogales-Puente subtransmission right-of-way (ROW) in the City of Industry to Logistics Terminals, Inc. (LTI). LTI plans to operate a transportation terminal facility, consisting of truck and trailer parking, on the site;
- As a condition of approval of this application, requires SCE to apply for prior Commission authorization pursuant to

¹ The application was filed on April 29, 2009. In Resolution ALJ 176-3233, dated May 7, 2009, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings are unnecessary. No protests to the application were filed.

² All statutory references are to the Public Utilities Code unless otherwise referenced.

Section 851 and to undergo any required California Environmental Quality Act (CEQA) review if LTI decides to utilize the property for another purpose;

- As a condition of approval of this application, requires SCE to obtain prior Commission authorization pursuant to Section 851 for any proposed assignment, transfer, sublease or mortgage of the lease by LTI that would alter the terms of the existing lease.
- No estimated costs are foreseen. As a result of entering into this proposed lease, SCE will obtain substantial revenues from rent paid by LTI. This lease will also benefit SCE ratepayers, because the rent paid by LTI will be treated as Other Operating Revenue for ratemaking purposes, and SCE ratepayers will therefore be credited with 30 percent of the rent revenues.

2. Background

2.1. The Parties

SCE is an electric public utility organized under the laws of the State of California, which engages in the business of electric generation, transmission, and distribution. As a public utility, SCE is subject to Commission regulation.

LTI is a California corporation which has existed for six years. LTI provides secured parking and storage services for commercial transportation trailers, containers, and tractors and acts as a drop yard and local terminal to the general transportation industry. According to the application, LTI's current clients include major corporations from the rail, truck, and intermodal segments that compete in U.S. ground transportation. LTI's stock is owned by its two individual founders.

2.2. The Project

SCE proposes to lease to LTI 20.61 acres, as described in Attachment A to the proposed lease, on a portion of SCE's Walnut-Nogales-Puente ROW in the

City of Industry. SCE owns and operates above-ground subtransmission lines on the site. Otherwise, the land is vacant.

LTI will utilize the site to develop and operate a transportation terminal facility, consisting of truck and trailer parking on the site.

SCE represents that the proposed lease will not interfere with SCE's operation of its subtransmission lines and other utility facilities on the property or with its service to customers. SCE further states that of the permissible secondary uses for the site, the utilization of the site for a transportation terminal facility will yield the highest level of potential revenues.

2.3. The Proposed Agreement Between SCE and LTI

Under the option agreement dated July 28, 2004 and amended on December 13, 2007 (the agreement), LTI may exercise its option to lease the site upon Commission approval of this application, so long as the following conditions are met: 1) LTI has obtained SCE's approval of the plans for the site, 2) LTI has submitted to SCE satisfactory evidence of LTI's ability to finance the cost of development of the property and the financial viability of the transportation terminal project on the site, 3) LTI has provided SCE with evidence of adequate insurance coverage, and 4) LTI has obtained all necessary permits and authorizations from other governmental agencies. The agreement includes the proposed lease terms.

The agreement permits LTI to use the property for the construction, development and operation of the transportation terminal facility, or for any other lawful purpose consistent with SCE's operation of its power lines and other facilities, with SCE's consent, which may not be unreasonably withheld. Under the agreement, SCE may also lease parts of the site to third parties for the placement of billboards and for cell sites, in locations to be mutually agreed

upon by SCE and LTI. LTI may not unreasonably withhold its approval of proposed locations for billboards and cell sites.

The initial term of the proposed lease is 25 years and may be renewed for up to four additional 10-year terms. For the first ten years of the lease, LTI is required to pay an annual total of the following amounts to SCE as rent:

Year 1 of the Lease Term	\$ 66,000
Year 2 of the Lease Term	\$264,000
Years 3-5 of the Lease Term	\$396,000
Year 6 of the Lease Term	\$403,900
Year 7 of the Lease Term	\$412,000
Year 8 of the Lease Term	\$420,250
Year 9 of the Lease Term	\$428,650
Year 10 of the Lease Term	\$437,200

The rent shall be adjusted upon the expiration of the tenth and twentieth years of the lease term and upon the renewal of the lease, based on reappraisal adjustments to the fair rental value of the property. However, the adjusted rent shall not be less than the rent otherwise payable immediately before the adjustment or greater than the rent payable immediately before the adjustment increased by 10 percent for five years. SCE may also adjust the rent if LTI sublets the property to a third party for a rent higher than the rent paid by LTI under the lease.

SCE is responsible for all real property taxes assessed against the site by the State Board of Equalization. LTI has agreed to pay all personal property taxes, general and special assessments, and other charges levied or assessed against the site, LTI's improvements on the site, the leasehold, or LTI's personal

property. However, LTI is not responsible for payment of any taxes assessed against SCE's equipment or improvements on the site.

LTI acknowledges that SCE has the power of eminent domain and may at any time condemn the property if it is needed for utility purposes.

Under the agreement, LTI must use the property in a manner that does not interfere with SCE's use of its power lines and equipment and that complies with legal and regulatory requirements. LTI must also maintain the property and improvements in good condition and use the property safely. SCE has reserved the right to enter the property as necessary to inspect, to maintain and clean its electrical facilities, or to protect the electrical facilities in an emergency.

SCE must approve the plans and specifications for any facilities that LTI wishes to construct on the site. LTI shall own any improvements that it constructs on the property during the lease term and upon the expiration or termination of the lease. However, SCE may require LTI to remove its facilities from the site upon the expiration or earlier termination of the lease. During the lease term, LTI may not remove any improvements from the site or waste, destroy, or modify any improvements except as permitted by the lease.

LTI may not utilize the area directly under SCE's towers without SCE's written consent. The agreement requires LTI to maintain the following minimum clearances between its equipment and facilities on the site and SCE's facilities on the site: a) a 50-foot radius around all tower legs, and b) a 10-foot radius around all steel poles, wood poles, and anchors. LTI, its employees, agents, and contractors must maintain a minimum clearance of 17 feet between any equipment used on or adjacent to the site and SCE's overhead electrical conductors.

LTI will give SCE access to all of SCE's facilities on the site and will not interfere with the free movement of SCE's equipment and property over the property. SCE may require LTI to provide and maintain existing access roads that will be used by both LTI and SCE. All access roads constructed by LTI must be at least 16 feet wide and capable of supporting a gross load of 40 tons on a three-axle vehicle.

LTI may not use the property for any purpose which SCE deems to be a fire or other safety hazard. Further, LTI may not use or store gasoline or petroleum products (except for fuel stored in the tank of an operable vehicle) or manufacture or store flammable materials or explosives on the property.

LTI also may not use, permit, create, store or allow hazardous substances on the property. Under the agreement, LTI is responsible for the entire cost of removal of any hazardous substances placed on the site during the lease term, but not for any hazardous materials placed on the site before the lease term.

SCE represents in the agreement that except as otherwise disclosed to LTI, SCE does not know, or have reasonable cause to believe, that any release of hazardous substances exists on or beneath the site. Under the agreement, LTI has the right to inspect the property, review relevant SCE documents, and analyze the soil and ground water to determine if hazardous materials exist on the site before exercising its option to lease.

Similarly, SCE has advised LTI that power frequency electric and magnetic fields (EMFs) may cause health hazards.

In the agreement, LTI acknowledges that any structures it constructs on the property will be in close proximity to one or more high voltage (66 kilovolt or higher) electric transmission lines or substation facilities. LTI's structures may therefore be susceptible to induced voltages, static voltages or related electric

fault conditions (induced voltages) that create a health and safety risk, unless appropriate grounding or other mitigation measures are incorporated into the structures. LTI has agreed to assume responsibility for identifying and implementing appropriate mitigation measures to reduce this risk at its own expense.

In addition, LTI shall indemnify and defend SCE from any claims or liability connected with or arising from any cause in, on or about the site, except for claims which are caused by SCE's negligence or willful misconduct or which arise from SCE's entry onto the property in connection with the use and operation of SCE facilities. LTI has also specifically agreed to indemnify and defend SCE from any claims arising from or connected to induced voltages on the site. In order to further protect SCE from liability, LTI is required to provide SCE with evidence of adequate insurance coverage before executing the agreement or entering the property.

By entering into the lease and occupying the site, LTI is deemed to have acknowledged that the site is in good and leasable condition and to have accepted the property on an "as is" basis.

The proposed agreement would permit LTI to assign, transfer, sublease or mortgage the lease, without the prior consent of the Commission, but with SCE's approval, which may not be unreasonably withheld.

Any disputes between the parties that cannot be resolved through good faith negotiations will be subject to arbitration.

2.4. Environmental Review

The CEQA³ applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to “inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities.”⁴ Since the Commission must act on SCE’s Section 851 application and issue a discretionary decision without which the project cannot proceed, the Commission must act as either a Lead Agency or Responsible Agency under CEQA.

The City of Industry (City) is the Lead Agency for CEQA review of LTI’s proposed construction and operation of a transportation and terminal on the site (the project). The Commission is a Responsible Agency for the project. CEQA requires the Commission to consider the Lead Agency’s environmental documents and findings before acting upon or approving the project.⁵ SCE’s application includes the following environmental documents prepared by City for the Project:

- Negative Declaration for the Project, dated June 13, 2008;
- Notice of Determination for the Project, dated July 10, 2008;
- City Planning Commission Resolution No. PC-379, dated July 10, 2008, in which the Planning Commission: 1) Found that the project will have no significant adverse impact on the environment and adopted the negative declaration, 2) Approved the project application.

³ Public Resources Code Section 21000, *et seq.*

⁴ Title 14 of the California Code of Regulations (hereafter, CEQA Guidelines), Section 15002.

⁵ CEQA Guidelines, Section 15050(b). The specific activities that must be conducted by a Responsible Agency are contained in CEQA Guidelines, Section 15096.

We have reviewed the City's environmental documents and find them adequate for our decision-making purposes. We also find that the City reasonably concluded that the project will not have a significant adverse impact on the environment and that no mitigation measures are required.

Accordingly, we adopt the City's environmental documents for purposes of our approval of the project.

2.5. Ratemaking Considerations

SCE proposes to treat revenue from the proposed lease as other operating revenue (OOR). This treatment of lease revenues is unopposed.

On January 30, 1998, SCE filed Advice Letter 1286-E, which sets forth categories of non-tariffed products and services offered for sale by SCE and describes the products and services within each category. This advice filing was made pursuant to Rule VII.F of the Affiliate Transaction Rules contained in Appendix A of Decision (D.) 97-12-088. Attachment B to Advice Letter 1286-E identified the *Secondary Use of Transmission Right of Ways and Land* and the *Secondary Use of Distribution Right of Ways, Land, Facilities and Substations* as categories of existing non-tariffed products and services.

In D.99-09-070, the Commission adopted a gross revenue sharing mechanism for certain of SCE's other operating revenues. The adopted gross revenue sharing mechanism applies to OOR, except for revenues that: (1) derive from tariffs, fees or charges established by the Commission or 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 gross revenue sharing mechanism, all applicable gross revenues recorded from non-tariffed products and services subject to the mechanism will be split between shareholders and ratepayers after the

Commission-adopted annual threshold level of OOR has been set. For those non-tariffed products and services deemed “active” by the Commission, revenues in excess of the annual threshold will be split between shareholders and ratepayers on a 90%/10% basis. For those non-tariffed products and services deemed “passive” by the Commission, the revenues in excess of the annual threshold will be split between shareholders and ratepayers on a 70%/30% basis.⁶

SCE products or services offered under the Secondary Use of Transmission Right of Ways and Land and the Secondary Use of Distribution Right of Ways, Land, Facilities and Substations have been deemed “passive” for revenue sharing purposes. Therefore, here, the proposed lease with LTI would be treated as “passive,” so that any lease revenues which exceed the annual threshold would be allocated between shareholders and ratepayers on a 70%/30% basis.

⁶ Under the settlement approved in D.99-09-070, an existing product or service is classified as “active” if it involves a total incremental shareholder investment of \$225,000 or more, either on a one-time basis or within a 12-month period. An existing product or service is classified as “passive” if it involves a total incremental shareholder investment of less than \$225,000. “Incremental shareholder investment” includes capital-related costs and expenses. Capital-related costs, labor and other expenses properly charged to the utility shall not be included in calculating the \$225,000 threshold.

Each new category of products or services is presumed to be “passive.” To reclassify an existing product or service as “active,” or a new product or service as “active,” SCE must file an advice letter which shows that the product or service involves incremental shareholder investment of at least \$225,000 either on a one-time basis or within a 12-month period. SCE may file only up to four advice letters per year for this purpose. If no protests to the advice letter are filed, the change in classification becomes effective on the 31st day after the filing of the advice letter.

3. Discussion

Section 851 provides that no public utility shall sell, lease, mortgage, or otherwise encumber the whole or any part of property necessary or useful in the performance of its duties to the public, without first having obtained Commission approval.⁷

The primary question for the Commission in Section 851 proceedings is whether the proposed transaction is in the public interest. The public interest is served when utility property is used for other productive purposes without interfering with the utility's operations or affecting service to utility customers.⁸ In reviewing a Section 851 application, the Commission may "take such action, as a condition to the transfer, as the public interest may require."⁹

We find that SCE's proposed lease with LTI is in the public interest. The proposed lease will not interfere with SCE's use of the property or with service to SCE customers, and the property will be utilized safely and in a manner consistent with legal and regulatory requirements. The terms of the agreement between SCE and LTI are reasonable and do not subject SCE to an undue risk of liability that could affect SCE's ability to provide utility service to the public.

⁷ Section 851 states in pertinent part:

No public utility...shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its ... property necessary or useful in the performance of its duties to the public ... without first having either secured an order from the commission authorizing it to do so for qualified transactions valued above five million dollars (\$5,000,000) or for qualified transactions valued at five million dollars (\$5,000,000) or less, filed an advice letter and obtained a resolution from the commission authorizing it do to so. ...

⁸ D.00-07-010 at p. 6.

⁹ D.3320, 10 CRRC 56, 63.

SCE's entry into the lease with LTI will generate substantial OOR for the benefit of ratepayers and will permit the productive use of the site, without interfering with SCE's existing transmission facilities.

However, we are concerned that the agreement would permit LTI to assign, transfer, sublease or mortgage the lease, without prior Commission approval. We therefore require SCE to apply for Commission authorization pursuant to Section 851 for any proposed assignment, transfer, sublease or mortgage of the lease by LTI that would alter the terms of the existing agreement.

We are also concerned that in addition to use of the site for a transportation terminal, the proposed lease would permit LTI to utilize the property for other purposes, with SCE's approval, but without prior Commission approval of the change in use of the property.

Therefore, in order to comply with CEQA and Section 851, if LTI wishes to utilize the property for any use other than a transportation terminal, and SCE wishes to permit such use of the property, SCE must first apply for authorization pursuant to Section 851 and undergo any additional required environmental review. LTI must also obtain any necessary local approvals required for use of the property other than as the site for the transportation terminal.

We approve of the proposed ratemaking treatment for the compensation that LTI will pay to SCE under the lease. The treatment of this compensation as OOR and of the lease as a "passive" source of revenue for the purposes of allocation between shareholders and ratepayers is consistent with prior Commission decisions and our current policy.

4. Conclusion

For all of the foregoing reasons, we grant the application of SCE pursuant to Section 851, subject to the ordering paragraphs which follow, effective immediately.

5. Final Categorization

Based on our review of this application, we conclude that there is no need to alter the preliminary determinations made in Resolution ALJ 176-3233 (May 7, 2009) that this proceeding should be categorized as ratesetting, and that there is no need for a hearing.

6. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. No comments were filed.

7. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Myra J. Prestidge is the assigned ALJ in this proceeding.

Findings of Fact

1. The proposed lease/option agreement will not interfere with SCE's use of the property or its facilities or with service to SCE customers and the property will be utilized safely and in a manner consistent with Commission and legal requirements.
2. City is the Lead Agency for LTI's proposed project under CEQA.
3. The Commission is a Responsible Agency for the purposes of environmental review of the proposed lease/option agreement under CEQA.

4. Rent received by SCE from LTI under the lease will be treated as OOR from a “passive” revenue source and will be allocated among shareholders and ratepayers on a 70%/30% basis pursuant to D.99-09-070.

5. The proposed lease will generate substantial lease revenues for the benefit of SCE ratepayers.

6. The proposed lease will allow productive use of the site without interfering with SCE’s existing use of the property for its transmission and substation facilities.

Conclusions of Law

1. Under Section 851, a regulated utility must obtain prior Commission authorization before entering into a lease of utility property that is used or useful in serving the public.

2. Under Section 851, the Commission must review a proposed lease of utility property that is used or useful in serving the public to determine if the proposed lease is in the public interest.

3. The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operations or affecting service to utility customers.

4. The Commission has reviewed the City’s negative declaration and other environmental documents and finds them adequate for our decision-making purposes under CEQA.

5. The Commission finds that the City reasonably concluded that LTI’s construction, operation, and maintenance of a transportation terminal on the property will not have significant adverse effects on the environment, and requires no mitigation measures.

6. Consistent with Section 851, SCE's conveyance of the lease to LTI will serve the public interest and should be approved, as consistent with this order.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company is authorized pursuant to Public Utilities Code Section 851 to convey to Logistics Terminals, Inc. a lease of 20.61 acres of land located along certain portions of Southern California Edison Company's Walnut-Nogales-Puente subtransmission right-of-way located in the City of Industry, as described in the application.

2. Southern California Edison Company shall treat compensation received from Logistics Terminals, Inc. under the lease as Other Operating Revenue received from a "passive" revenue source pursuant to Decision 99-09-070 and shall allocate this revenue between shareholders and ratepayers on a 70%/30% basis, unless directed otherwise in a future Commission order.

3. Southern California Edison Company shall amend its option agreement and any subsequent lease with Logistics Terminals, Inc. to require advance Commission approval of any proposed assignment, transfer, sublease, or mortgage of the lease that would alter the lease terms or change the use of the property to other than for the Logistics Terminals, Inc.'s construction, operation, and maintenance of a transportation terminal on the site.

4. If Logistics Terminals, Inc. wishes to utilize the property for any purposes other than the uses analyzed in the environmental documents prepared by the City of Industry and relied upon by the Commission in this decision, and Southern California Edison Company wishes to permit such use, Southern California Edison Company shall first apply for Commission authorization

pursuant to Public Utilities Code Section 851, undergo any required environmental review, and apply for any required local approvals. Southern California Edison Company shall amend its option agreement and any subsequent lease with Logistics Terminals, Inc. to include this requirement.

5. Application 09-04-020 is closed.

This order is effective today.

Dated October 15, 2009, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners