STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

February 3, 2003

TO: ALL PARTIES OF RECORD IN APPLICATION 02-04-046

Decision 03-01-084 is being mailed without the Concurring Opinion of Commissioner Lynch. The Concurring Opinion will be mailed separately.

Very truly yours,

ANGELA K. MINKIN for
CAROL A. BROWN, Interim Chief
Administrative Law Judge

CAB:tcg

Attachment

Mailed 2/3/2003

Decision 03-01-084 January 30, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U 338-E) for Authority to Lease Available Land at the Johanna Substation to BRRVS, Inc.	Application 02-04-046 (Filed April 26, 2002)

O P I N I O N

Summary

Southern California Edison Company (SCE) is authorized to lease to BRRVS, Inc. a site on SCE's Johanna Substation in City of Santa Ana.

Background

SCE seeks Commission authorization under Pub. Util. Code § 851 to lease a 5.9-acre site located on a portion of SCE's Johanna Substation in City of Santa Ana to BRRVS for development of a recreational vehicle storage facility. The Johanna Substation is part of the Johanna-Santiago and Ellis-Johanna 220 kilovolt system and includes Commission-jurisdictional facilities. SCE would continue to own and operate its transmission and distribution facilities, and would retain unobstructed access to the site. Revenue from the lease would be shared with SCE's ratepayers as described in the Revenue Treatment section below.

On June 15, 2001 SCE and BRRVS executed an option agreement giving BRRVS 30 days after the Commission's approval to lease the site. The option agreement fully defines the terms of the proposed lease, and is framed to incorporate any conditions the Commission may impose. BRRVS paid SCE $30,000 as consideration for granting the option.

A. Lease Terms

The initial term of the lease is 45 years commencing on the date BRRVS exercises the option to lease, and BRRVS may renew the lease for up to two additional ten-year terms. The base rent is $50,000 for the first year, increasing by steps to $111,800 in year 20. Thereafter, the base rent is to be adjusted by up to 10% (but may not be decreased) to reflect the site's fair market rental value beginning in year 21, and again in years 31 and 41, and upon exercise of each ten-year renewal option. The base rent may also be adjusted if BRRVS sublets any portion of the site. BRRVS is to pay all real property taxes, personal property taxes, general and special assessments and other charges assessed against the property and improvements, other than those assessed against SCE-owned equipment or improvements.

Terms of the lease provide that BRRVS' activities must not interfere with SCE's operations or facilities on the site, it may not allow any hazardous substances on the site, and it must maintain specified minimum vertical and horizontal clearances from SCE's towers, poles, pole anchors, and overhead conductors. BRRVS would be required to maintain workers' compensation and insurance of various types at specified levels for itself and its contractors and subcontractors, and to defend and indemnify SCE against all liability and damage claims except those caused by SCE's own negligence or willful misconduct. BRRVS may obtain any permits or zoning changes required for its intended initial use of the property, and SCE retains the right to approve BRRVS' construction plans and specifications for the initial use, and any changed use. BRRVS' use of the site must be consistent with SCE's operation of its power lines and equipment. SCE retains the right to enter the property for purposes of operating, maintaining, constructing or reconstructing its facilities; the right to

condemnation of all or part of the leasehold through its exercise of eminent domain should that become necessary; and additional rights in case of emergencies.

B. Determination of Best Secondary Use

The primary use of facilities located on the site is the transmission and distribution of electricity in North Orange County. SCE's substation and above- and underground 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 allowable secondary uses for its property that provide the highest revenue consistent with its utility safety and reliability obligations, and that it has determined that a recreational vehicle storage facility offers that highest potential revenue here. To evaluate the rental value of this particular site, SCE analyzed the rent paid for comparable recreational vehicle storage facilities in Southern California. SCE believes that the base rent it will receive falls within the acceptable market range and is in line with revenues it receives in numerous other, similar Commission-approved transactions.

C. Lessee Selection

SCE states that it selected BRRVS because of the proposed use of the site, the experience of BRRVS' principals, and BRRVS' longstanding, successful operation in the Orange County real estate market. According to SCE, BRRVS has been involved in the Orange County property development and management business for seventeen years and currently manages the largest recreational vehicle storage facility in Orange County. BRRVS' principals have directed the planning, construction and property management of three recreational vehicle storage facilities in Orange County; one is experienced in site design and infrastructure planning, and the other has an extensive acquisition

and development background in the Southern California residential, commercial and industrial real estate market.

D. CEQA Considerations

In the application, SCE implies that the Commission is not required to review the proposed transaction for compliance with the California Environmental Quality Act (CEQA, Public Resources Code Section 21000 et seq.) because the City of Santa Ana has determined that the project is exempt as a "ministerial project" under Section 15268(a) of the CEQA guidelines. However, the fact that a local authority has no discretionary approval and CEQA review for an activity does not eliminate the Commission's responsibility to consider CEQA when, as here, there is a discretionary approval required by this agency.

At the request of the Commission's Energy Division Environmental Review Team, SCE supplemented the application with additional detail of BRRVS' planned use for the site. According to SCE's supplement, the Johanna Substation is in an industrial area and adjacent to warehouses, railroad tracks, manufacturing plants, a fire station, and similar facilities. The site currently consists of 95% compacted soil covered by a three-inch all-weather gravel surface. SCE currently uses the proposed project site to store equipment and materials. BRRVS will remove approximately three inches of the surface gravel and replace it with asphalt, with no net change in elevation or grading. A road from the substation entrance to the storage area will also be paved with asphalt, and a small, mobile, modular unit office will be placed at the entrance to the storage facility. BRRVS will continue to use the existing drainage system. No structures will be constructed at the site; the vehicles will be stored in the open. The project will involve some trenching for installation of wet and dry utilities. Because the site has been previously excavated to a depth of about six feet to

install an electrical ground grid, the proposed project will have no effect on surface waters or on archeological or historical resources. The City of Santa Ana, which has approved BRRVS' proposed use, requires improved security lighting for the project, and the new lighting will be installed on 15-foot poles. New landscaping will also be planted on one side of the site. Because the vehicle owners require access to their vehicles only occasionally, no significant increase in traffic is expected to result from the storage facility.

The Environmental Review Team reviewed the project plan in detail with SCE and BRRVS and recommends that we find that the project will have no significant effect on the environment. As the Environmental Review Team notes, this is a completely developed site that has been graded, six feet of soil removed and replaced with drains installed, and compacted. There is no possibility of any sub-surface cultural or historic resource remaining. The site has been developed as a substation facility with gravel surface, enclosure, lighting and electrical facilities, so there is no possibility that any habitat for threatened or endangered species would be destroyed and there is no evidence of such species nor any reason to suspect their presence. The activities proposed for the site are consistent with previous activities (e.g., installation of lighting, drain systems, surfacing, landscaping and enclosures) and do not appear to present any possibility of incremental impacts that would rise to a level of significance. Several of the activities proposed (lighting and enclosure) were requested by either the neighboring establishments or the City of Santa Ana as conditions of the City's ministerial permitting process. After reviewing the plans and requesting changes or additions, the City approved the project on the basis that it falls within the City's established land use and zoning requirements.

With the existing setting consisting of surface and subsurface resources that have been completely disturbed, natural habitat and species impacts have been considered. The proposed activities at the site fall well within the existing uses of the site, so human impacts have been considered. The proposed activities also fall within the existing zoning for the site, so local authority and jurisdiction have been addressed. And the local jurisdiction's review and approval of the proposed project have allowed for any other unknown issues to be raised by or to the City. We therefore agree with our Environmental Review Team's conclusion: Under the facts SCE and BRRVS have presented, it can be seen with certainty that no significant effect on the environment could result from our granting the authorization requested. Accordingly, the proposed transaction qualifies for an exemption from CEQA pursuant to Section 15061(b)(3), and no environmental review by the Commission is required.

E. 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, fees 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 here 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 proposed here is passive for sharing purposes.[1]

Discussion

Pub. Util. Code § 851 provides that no public utility "shall … lease … [property] necessary or useful in the performance of its duties to the public … without first having secured from the [C]ommission an order authorizing it so to do." The relevant inquiry for the Commission in Section 851 proceedings is whether the proposed transaction is "adverse to the public interest."[2]

The proposed lease satisfies this test. The Commission has determined that the public interest is served when utility property is used for other productive purposes without interfering with the utility's operation.[3] The public interest is not harmed here since the proposed lease will not affect SCE's operation of its facilities. Because the proposed agreement will generate revenues from the secondary use of the site and ratepayers will share in those revenues, the application should be approved.

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[1] *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, Land, 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.

[2] *See, e.g., Universal Marine Corporation* (1984) 14 CPUC2d 644.

[3] In D.93-04-019, p. 3, we observed: "Joint use of utility facilities has obvious economic and environmental benefits. 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."

Procedural Considerations

The Commission in Resolution ALJ 176-3088 preliminarily categorized this as a ratesetting proceeding not expected to require hearings. There are no material facts in dispute, and there is no known opposition to granting the relief requested. We conclude that it is not necessary to disturb our preliminary determinations.

This is an uncontested matter in which the decision grants the relief requested. Accordingly, the requirement for a 30-day period for public review and comment is waived as permitted by Pub. Util. Code § 311(g)(2).

Assignment of Proceeding

Carl Wood is the Assigned Commissioner and James McVicar is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Under terms of the lease, BRRVS' use of the site will not interfere with SCE's operations or facilities on the site.
2. 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.
3. It can be seen with certainty that conversion of the three license agreements to a lease as proposed in the application will have no significant effect on the environment, consistent with Section 15061(b)(3) of the CEQA guidelines.
4. There is no known opposition to granting the authorization requested.

Conclusions of Law

1. City of Santa Ana's lack of discretionary approval and CEQA review related to the activity in question does not eliminate the Commission's

responsibility to consider CEQA when, as here, the Commission must issue a discretionary decision.

2. The transaction proposed in Application 02-04-046 is exempt from CEQA pursuant to Section 15061(b)(3) of the CEQA guidelines.

3. The proposed revenue sharing conforms to the Commission's order in D.99-09-070.

4. A public hearing is not necessary.

5. The Application should be granted as set forth in the following order.

6. This order should be made effective immediately to allow the lease to take effect and its benefits to begin flowing to SCE and its ratepayers as soon as possible.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company (SCE) is authorized to lease to California BRRVS, Inc. a site located on a portion of SCE's Johanna Substation in City of Santa Ana, in accordance with the terms and conditions set forth in Application 02-04-046 and this order.

2. All revenue from the lease shall be treated as Other Operating Revenue and 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 amendments to, extension of, or termination of the lease agreement, within 30 days after such amendments are executed.

4. Application 02-04-046 is closed.

This order is effective today.

Dated January 30, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I will file a concurrence.

/s/ LORETTA M. LYNCH
Commissioner

I will file a concurrence.

/s/ CARL W. WOOD
Commissioner

Concurrence of Carl Wood January 30, 2003 - A.02-04-046

What is missing from the current spate of decisions related to modest requests to encumber utility property is clear, consistent and well-considered guidance for the utilities to follow when leasing their land. I object to the unnecessarily lax and often inconsistent standard of review that the Commission has applied to these matters in the last few years and to the apparent lack of scrutiny often applied by the staff in reviewing these requests.

The energy and telecommunications utilities are major landowners in the State of California and that land becomes increasingly valuable for other commercial uses as the state's urban areas become more and more densely populated. It is tempting and most always reasonable to allow for secondary uses of that land where it will not interfere with utility use, but the inquiry should not stop there. I do not believe the Commission should approve a secondary use unless it is persuaded that such a use will be consistent with the public interest, which includes the interest of the utility's ratepayers. The two orders before us only require that the applicants pass a "do no harm" test. I will concur, rather than dissent, because although I believe this to be an insufficient basis for approving an encumbrance of utility property, these two orders contain a modest amount of analysis, applying the facts of each case to the chosen standard of review. In other recent decisions, there has been no analysis at all.

What is missing, when we minimize the review of these applications, is a clear understanding that the utility has chosen a good secondary use – one that is sufficiently compatible with utility business, will produce a reasonable amount of revenue, and will serve the surrounding community. Having acquired these lands for public use and sometimes invoking their powers of eminent domain to gain title, the utilities are vested with an obligation for responsible stewardship. By extension, this Commission bears that responsibility, as well. Many of these projects will receive little or no local review. We should be aware of situations in which the new use may change the character of a neighborhood. We should stop to consider any environmental restrictions this or some other agency may have placed on the utility's construction and business activities at the

site and assure ourselves that the secondary use will not defeat the purpose of these earlier protections.

We should consider other policies set forth by this agency, such as those related to electro-magnetic field exposure and toxic waste cleanup, and make sure that we are applying them consistently in these cases as well. We should stop to look at the way the utilities choose the lessees to ensure that they are being fair in offering a parcel of land to the public and not merely helping out a friend or enacting a quid pro quo. Through revenue sharing, we are providing an incentive for the utilities to enter into these deals. We had better make sure we are encouraging them to do the right thing. These decisions repeat the utilities' assertions on some of these points, but do not stop to scrutinize the facts underlying the assertions.

In her comments prior to the vote on these matters, Commissioner Kennedy stated that she has been able to find more than 20 decisions since 1986 employing the "do no harm" standard. During that same period, however, the Commission has issued more than a hundred decisions implementing Section 851. The Commission is not consistent in its interpretation of this code section – a matter of concern because Section 851 governs all encumbrances of utility property, even when they are much more significant than the one addressed in this order. Yet, consistency should not be our only concern. We should apply a standard of review that reflects the long-term interests of the state and its ratepayers, rather than settling for words that allow us to minimize the work involved in processing these requests.

/s/ CARL W. WOOD
Carl W. Wood
Commissioner

San Francisco, California
January 30, 2002