

Decision 04-12-044 December 16, 2004

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Southern California Edison Company (U338-E) for Authority to Lease Available Land on the Laguna Bell-Lighthipe Transmission Right of Way to RHC Communities, LLC.

Application 04-07-034  
(Filed July 16, 2004)

**OPINION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE SECTION 851 FOR CONVEYANCE OF A LEASE BY SOUTHERN CALIFORNIA EDISON COMPANY TO RHC COMMUNITIES, LLC**

**I. Summary**

This decision grants the unopposed application<sup>1</sup> of Southern California Edison Company (SCE) for Commission authorization under Public Utilities Code Section 851<sup>2</sup> for SCE to convey a lease on its property located on the Laguna Bell-Lighthipe Right of Way (ROW) in the City of Southgate, California to RHC Communities, LLC (RHC). This lease will permit RHC to use the site for a storage facility and RV parking. If RHC wishes to utilize the site for other purposes permitted by the agreement, SCE must file a new application for

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<sup>1</sup> The application was filed on July 16, 2004. In Resolution ALJ 176-3137, dated August 19, 2004, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings are unnecessary. No protests to the application were filed.

<sup>2</sup> All statutory references are to the Public Utilities Code unless otherwise referenced.

approval under Section 851, obtain any additional required local permits, and undergo any additional required environmental review.

## **II. Background**

### **A. 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.

RHC is a real estate investment firm based in Tustin, California.

### **B. The Project**

SCE proposes to lease to RHC approximately 5.88 acres on a portion of SCE's Laguna-Lighthipe ROW in Southgate, California. This property is part of the Laguna Bell-Lighthipe 220 kilovolt (KV) system. SCE owns and operates transmission and subtransmission lines which cross the site. The property is not currently used for any secondary purpose.

If the lease is approved, RHC may operate a self-storage and vehicle storage facility on the site. RHC has obtained a conditional use permit (CUP) and a general plan amendment from the City of Southgate (City), which approved the secondary use of the property as a storage facility, with an associated office, parking spaces, and 47 outdoor parking spaces for recreational vehicles (RVs).

SCE represents that the proposed lease will not interfere with its operation of its transmission and subtransmission lines on the property or with its service to customers.

**C. The Proposed Agreement between SCE and RHC**

Under the option agreement signed by SCE and RHC on July 14, 2002 (agreement), RHC may exercise its option to lease the property upon Commission approval of this application, so long as RHC has met certain conditions. The agreement includes the proposed lease terms.

The agreement permits RHC to use the property for the construction of self-storage, vehicle and boat storage, and retail facilities and for any other purpose permitted by law that will not interfere with SCE's use of the site for its power lines and other equipment. SCE must consent to use of the property for any purpose other than self-storage, boat and vehicle storage and retail facilities.

The initial term of the proposed lease is 65 years. The lease would generate a base rent of \$20,000 in the first year and would increase to \$230,000 in the fourth year. The base rent will be adjusted after the fourth year based on a percentage equal to the percentage change in the Consumer Price Index (CPI) for the Los Angeles-Long Beach-Riverside area, not to exceed a 3 percent increase.<sup>3</sup> RHC must also pay SCE 20% of its gross revenues derived from use of the property as additional rent. If RHC subleases the site, SCE may increase the rent to reflect the current fair market value of the property.

RHC 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, RHC must use the property in a manner that does not interfere with SCE's use of its power lines and equipment and that

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<sup>3</sup> The base rent for years following the fourth year also cannot be less than the base rent for the immediately preceding year.

complies with legal requirements. SCE has reserved the right to enter the property as necessary to inspect the property, to maintain and clean its electrical facilities or to protect the electrical facilities in an emergency. In non-emergency situations, SCE must give RHC at least 30 days' notice before obtaining temporary possession of the site to perform work.

SCE has also reserved the right to license portions of the property to third parties for cell sites and the placement of billboards.

Under the agreement, SCE must approve the plans and specifications for any improvements that RHC wishes to construct on the site. RHC shall own any improvements that it constructs on the property during the lease term.

RHC must maintain the property and improvements in good condition and use the property safely.

RHC may not utilize the area directly under SCE's towers without SCE's written consent. The agreement requires RHC to maintain clearances of at least 18 feet between equipment it uses on the site and SCE's overhead electrical conductors that are less than 500 kV and at least 29 feet from all 500 kV overhead electrical conductors. RHC must also maintain clearances of at least 50 feet from all tower legs and 10 feet from all steel poles on the site. SCE may require RHC to construct and maintain access roads that are at least 16 feet wide and are capable of supporting a gross load of 40 tons on a three-axle vehicle.

RHC also may not use, permit, create, store or allow hazardous substances on the property<sup>4</sup> and may not use or store gasoline or petroleum products (except for fuel stored in the tank of an operable vehicle) or flammable materials on the property.

In the agreement, RHC acknowledges that any structures it constructs on the property will be in close proximity to one or more high voltage (66 kW or higher) electric transmission lines or substations. RHC's structures may therefore be susceptible to induced voltages, static voltages or related electric fault conditions (induced voltages), unless appropriate grounding or other mitigation measures are incorporated into the structures. RHC has agreed to assume responsibility for identifying and implementing appropriate mitigation measures to reduce this risk.

In addition, RHC shall indemnify and defend SCE from any claims for liability for damage, expense, or liability incurred with or arising from any cause in, on or about the property, 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. RHC has

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<sup>4</sup> Under the agreement, RHC is responsible for the entire cost of removal of any hazardous substances placed on the property during the lease term, but not for any hazardous materials previously introduced onto the site by SCE.

SCE represents in the agreement that it does not know, or have reasonable cause to believe, that any release of hazardous substances exists on or beneath the property. Under the agreement, RHC 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. If RHC enters into the lease, RHC is deemed to have determined that the property will safely support the type of improvements that RHC wishes to construct and is fit for these types of uses, and to have accepted all associated risks.

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also specifically agreed to indemnify and defend SCE for any claims arising from or connected to induced voltages or from RHC's performance of work related to the construction of improvements on the site. In order to further protect SCE

from liability, RHC is required to provide SCE with evidence of adequate insurance coverage before executing the agreement or entering the property.

The agreement would permit RHC to assign, transfer, sublease or mortgage the lease, without the prior consent of the Commission, but with SCE's approval.

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

#### **D. Environmental Review**

The California Environmental Quality Act (Public Resources Code Section 21000, et seq., hereafter "CEQA") 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." (Title 14 of the California Code of Regulations, hereinafter "CEQA Guidelines," Section 15002.)

Since CEQA applies to discretionary projects to be carried out or approved by public agencies and since 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 City of South Gate (City) 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. The specific activities a Responsible Agency must conduct are contained in CEQA Guidelines Section 15096.

The proposed project reviewed by the City consists of the construction of eight one-story buildings and an office structure on 5.88 acres of land on the Laguna Bell-Lighthipe transmission line ROW. The City exercised discretionary authority over this project by virtue of a General Plan amendment No. 03-02, a Development Plan for the property No. 264, and a Resolution No. 6943 for the Conditional Use Permit.

In July 2003, the City staff prepared a Preliminary Environmental Assessment No. 1687 (SCH 2003091135). At its September 2, 2003 meeting, the Planning Commission determined that the project would have no significant environmental effect and adopted Resolution No. 03-27. The Planning Commission directed the Secretary of the Planning Commission to file a Notice of Environmental Determination (Negative Declaration) with the County Clerk of Los Angeles. On November 10, 2003, the City Council adopted Resolution No. 6941 approving General Plan Amendment No. 03-02, Resolution No. 6942 approving Site Plan No. 264, and Resolution No. 6943 approving Conditional Use Permit No. 757. On December 14, 2003, the Notice of Determination was filed with the Los Angeles County Clerk.

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, defined as an eight low-rise building storage facility with an associated office and parking, and 47 outdoor RV parking stalls, would not have a significant negative effect on the environment.

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

### **E. Ratemaking Considerations**

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

On January 30, 1998, SCE filed Advice 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 D.97-12-088. Attachment B to Advice 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 FERC, (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.<sup>5</sup>

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 RHC 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.

### **III. Discussion**

Section 851 provides that no public utility “shall . . . encumber the whole or any part of . . . property necessary or useful in the performance of its duties to the public, . . . without first having secured from the Commission an order

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<sup>5</sup> 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 31<sup>st</sup> day after the filing of the advice letter.

authorizing it to do so.” Since the proposed lease would be an encumbrance on SCE property, we must apply Section 851 in considering this application.<sup>6</sup>

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 operation or affecting service to utility customers.<sup>7</sup> In reviewing a Section 851 application, the Commission may “take such action, as a condition to the transfer, as the public interest may require.”<sup>8</sup>

We find that SCE’s proposed lease with RHC is in the public interest. SCE’s entry into the lease with RHC will generate substantial OOR for the benefit of ratepayers. The terms of the agreement between SCE and RHC are reasonable and appear not to subject SCE to undue potential liability that could affect SCE’s ability to provide utility service to the public. 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 requirements.

We are concerned that the agreement would permit RHC to assign, transfer, sublease or mortgage the lease, or to change the use of the leased property to any other legally permitted use, without prior Commission review. However, the agreement does require RHC to notify SCE in advance before taking any of these actions. We will therefore address these concerns by

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<sup>6</sup> D.01-08-069.

<sup>7</sup> D.00-07-010 at p. 6.

<sup>8</sup> D.3320, 10 CRRC 56, 63.

requiring SCE to apply for Commission authorization pursuant to Section 851 for any proposed assignment, transfer, sublease or mortgage of the lease by RHC that would alter the terms of the existing lease and for any proposed change in the use of the leased property.

We also note that the proposed lease would permit RHC to utilize the property as the site for retail facilities or any other use permitted by law that would not interfere with SCE's facilities without prior Commission approval of the change in use. However, the conditional use permit granted to RHC by the City only authorizes use of the property for a storage facility, with an associated office and parking and RV parking spaces, and the environmental analysis conducted by the City and the Commission addressed only these proposed uses of the site. Therefore, in order to comply with CEQA and Section 851, if RHC wishes to utilize the property for any use other than a personal storage facility with an associated office and parking and RV parking spaces, SCE must first apply for authorization pursuant to Section 851 and undergo any additional required environmental review. RHC must also obtain any necessary local approvals required for use of the property other than as the site for a storage facility with an associated office and parking and RV parking spaces.

We approve of the proposed ratemaking treatment for the compensation that RHC 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.

#### **IV. 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.

#### **V. Uncontested Decision Grants Relief Requested**

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.

#### **VI. Final Categorization**

Based on our review of this application, we conclude that there is no need to alter the preliminary determinations as to categorization and need for a hearing made in Resolution ALJ 176-3137 (August 19, 2004).

#### **VII. Assignment of Proceeding**

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

#### **Findings of Fact**

1. The proposed lease 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 requirements.
2. The City is the Lead Agency for RHC's proposed project under CEQA.
3. In July, 2003, the City completed a Preliminary Environmental Assessment pursuant to CEQA to review the potential environmental effects of RHC's project, described as an eight low-rise building storage facility with an associated office and parking and 47 outdoor RV parking stalls, and concluded that the project would have no significant effect on the environment.

4. On September 2, 2003, the City Planning Commission determined that RHC's project would have no significant environmental effect and adopted Resolution No. 03-27.

5. On November 10, 2003, the City Council adopted Resolution No. 6941 approving an amendment to the General Plan related to RHC's project, Resolution No. 6942 approving a site plan for RHC's project, and Resolution No. 6943 approving a conditional use permit for RHC's project.

6. On December 14, 2003, the City filed a Notice of Determination with the Los Angeles County Clerk, which stated that the City had prepared a negative declaration for RHC's project and that no mitigation measures were required.

7. The City's CEQA review did not address uses of the site for a retail facility or uses other than for a storage facility with an associated office and parking and an RV parking area.

8. The conditional use permit granted to RHC by the City authorizes use of the site only for a storage facility with an associated office and parking and outdoor RV parking.

9. The Commission is a Responsible Agency for the purposes of environmental review of the proposed lease under CEQA.

10. Rent received by SCE from RHC under the lease will be treated as OOR from a "passive" revenue source and will be allocated among shareholders and ratepayers pursuant to D.99-09-070.

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

### **Conclusions of Law**

1. The Commission has reviewed the City's environmental documents and finds them adequate for our decisionmaking purposes under CEQA.

2. The Commission finds that the City reasonably concluded that RHC's project, defined as a personal and vehicle storage facility with an associated office, will not have a significant effect on the environment and that no mitigation measures are necessary.

3. Consistent with Section 851, SCE's conveyance of the lease to RHC will serve the public interest and should be authorized.

## O R D E R

### **IT IS ORDERED** that:

1. Southern California Edison Company (SCE) is authorized pursuant to Public Utilities Code Section 851 (Section 851) to convey a lease across its Laguna Bell-Lighthipe Right of Way property in the City of South Gate, California (as described in Exhibit A to Appendix A of the application) to RHC Communities LLC (RHC) as described in this decision.

2. SCE shall treat compensation received from RHC under the lease as other operating revenue received from a "passive" revenue source pursuant to Decision 99-09-070.

3. SCE shall amend its option agreement and any subsequent lease with RHC 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 as a personal storage facility with an associated office and parking and recreational vehicle parking spaces.

4. If RHC wishes to utilize the property for any purposes other than the uses analyzed in the environmental documents prepared by the City of Southgate and relied upon by the Commission in this decision, SCE shall first apply for Commission authorization pursuant to Section 851, undergo any required

environmental review, and apply for any required local approvals. SCE shall amend its option agreement and any subsequent lease with RHC to include this requirement.

5. Upon final execution of lease documents consistent with this order, SCE shall submit a copy by advice letter filing within 60 days of this order.

6. This proceeding is closed.

This order is effective today.

Dated December 16, 2004, at San Francisco, California.

MICHAEL R. PEEVEY

President

CARL W. WOOD

LORETTA M. LYNCH

GEOFFREY F. BROWN

SUSAN P. KENNEDY

Commissioners