

Decision **PROPOSED DECISION OF ALJ YACKNIN** (Mailed 1/9/2018)

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
Certain Fiber Optic Cables to CELLCO
PARTNERSHIP D/B/A VERIZON
WIRELESS under the Master Dark Fiber
Lease Agreement Pursuant to Public
Utilities Code Section 851.

Application 17-02-001

**DECISION APPROVING AND ADOPTING 25/75 REVENUE
ALLOCATION FOR REVENUES UNDER THE MASTER DARK
FIBER LEASE AGREEMENT BETWEEN SOUTHERN CALIFORNIA
EDISON COMPANY AND VERIZON WIRELESS**

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**DECISION APPROVING AND ADOPTING 25/75 REVENUE
ALLOCATION FOR REVENUES UNDER THE MASTER DARK
FIBER LEASE AGREEMENT BETWEEN SOUTHERN CALIFORNIA
EDISON COMPANY AND VERIZON WIRELESS**

Summary

This decision adopts a 25/75 shareholder/ratepayer revenue allocation for gross revenues from leases of fiber optic cables under the Master Dark Fiber Lease Agreement (Master Lease Agreement) between Southern California Edison Company (SCE) and Cellco Partnership d/b/a Verizon Wireless (Verizon) and directs that SCE submit the individual Lease Route Orders by informational letter to the Commission's Communications Division. This proceeding is closed.

1. Summary of Request

Southern California Edison Company (SCE) seeks Commission approval of the Master Lease Agreement pursuant to Public Utilities Code Section 851, which provides that a public utility shall not sell, lease, assign, dispose of, encumber the whole or any part of its line, plant, system, or other property necessary or useful in the performance of its duties to the public without the Commission's approval.

Under the terms and conditions of the Master Lease Agreement, SCE will grant an exclusive lease for Cellco Partnership d/b/a Verizon Wireless (Verizon)'s use of certain optical fibers along various cable routes within Southern California. Verizon will submit to SCE Lease Route Orders specifying the circuits and number of optical fibers it will lease, subject to SCE's review and

approval. In return, Verizon will make initial, non-refundable payments and monthly payments.¹

SCE will use existing fiber optic cables when excess capacity is available and, for those portions of the routes that do not have existing capacity, will install new fiber optic cable, perfect land use rights, and construct any necessary facilities at shareholders' expense. SCE will own, operate, and maintain the entire fiber optic cable, while Verizon will pay for and arrange all connections of its facilities with the fibers that it leases. Verizon is responsible for all taxes resulting from its installation activities and will keep SCE's facilities free from all liens and encumbrances.

SCE seeks to have the revenue under the Master Lease Agreement allocated between shareholders and ratepayers using a 90/10 split pursuant to the revenue sharing allocation adopted in D.99-09-070.

2. Procedural Background

No protests or responses to the application were filed. A telephonic prehearing conference (PHC) was held on April 17, 2017; no persons appeared other than the applicant. Upon consideration of the application and discussion

¹ Section 851 requires approval by Commission order if the transaction is valued at over \$5 million, and allows approval (upon the utility's submittal of an advice letter) by the executive director if the transaction is valued at \$5 million or less. While the value of the individual Lease Route Orders may be less than \$5 million, SCE expects that it could receive 100 to 200 Lease Route Orders over the term of the Master Lease Agreement and that their collective value will exceed that amount. SCE seeks advance approval to execute future Lease Route Orders under the Master Lease Agreement in order to avoid the necessity of filing a separate application or submitting a separate advice letter for each Lease Route Order. SCE notes that the Commission approved similar master agreements in Decision (D.) 02-12-023 and D.02-12-024.

at the PHC, the assigned Commissioner's scoping memo identified the issues to be determined as follows:

1. Is the proposed lease adverse to the public interest?
2. Does the proposed lease require environmental review pursuant to the California Environmental Quality Act (CEQA)?

As there were no contested issues of material fact, the assigned Commissioner's April 27, 2017, scoping memo determined that evidentiary hearing was not required,² and the matter was submitted for resolution based upon the determination of the following issues:

1. Is the proposed lease adverse to the public interest?
2. Does the proposed lease require environmental review pursuant to the CEQA?

The assigned Commissioner issued an amended scoping memo on September 11, 2017, to more closely consider whether the proposed lease is adverse to public interest by addressing the following related issues:³

1. Does SCE's application meet the requirements for revenue sharing established in D.99-07-070?
2. How does SCE's proposed Master Lease Agreement impact safety and reliability?
3. Does SCE's description of its fiber facilities in this proceeding meet the definition of dark fiber?
4. What effects will SCE's Master Lease Agreement have on the competitive market for telecommunications services in California?

² Resolution ALJ-176-3393 preliminarily determined that evidentiary hearing was needed.

³ Sub-issues are omitted from this summary.

5. With regard to revenue sharing, is the distinction between “dark” and “lit” fiber a meaningful basis for determining the revenue sharing allocation, will existing or new fiber be used to meet Verizon’s Lease Route Orders, and will shareholders or ratepayers fund new fiber if any?
6. What steps can the Commission take to ensure that SCE does not subsidize its competitive local exchange carrier (CLEC) business with its electric customers?
7. Should any new rules developed through the Pole Attachment and Right-of-Way proceedings (Investigation (I.) 17-06-027/Rulemaking (R.) 17-06-028/R.17-03-009) be applied to this Master Lease Agreement, if approved?
8. Is SCE’s Master Lease Agreement proposal compliant with General Orders (GOs) 95 and 128, applicable local, state, and federal safety regulations, and best safety standards and practices?
9. Should the terms of the Master Lease Agreement and/or Lease Route Orders with Verizon be public under GO 96? If not, why not? Should SCE submit its Lease Route Orders to the CPUC?

SCE filed comments on amended scope of issues on October 11, 2017, and The Utility Reform Network (TURN) and the California Cable & Telecommunications Association (CCTA) filed comments on November 10, 2017,⁴ upon which the matter was submitted.

3. Does SCE’s application meet the requirements for revenue sharing established in D.99-07-070?

SCE has not shown that the unused (or dark) fiber that it seeks to lease meets the conditions for non-tariffed products and services established in D.98-08-035. Accordingly, revenues from the proposed Master Lease Agreement

⁴ TURN’s September 8, 2017, and CCTA’s November 8, 2017, motions for party status were granted on October 9, 2017, and November 9, 2017, respectively.

are not reasonably entitled to the revenue sharing allocation established in D.99-07-070 for “active” non-tariffed products and services.

D.97-12-088, as amended in D.98-08-035, adopted the Affiliate Transaction Rules governing the relationship between California's energy utilities and their affiliates and establishing rules and criteria for the energy utilities’ marketing of products and services.⁵ Rule VII of the Affiliate Transaction Rules allows the energy utilities to offer products and services on a non-tariffed basis provided that, among other things:

- The product or service utilizes a portion of a utility asset or capacity that has been acquired for the purpose of and is necessary and useful in providing tariffed utility services;
- The product or service will not adversely affect the cost, quality or reliability of tariffed utility products and services;
- The product or service can be marketed with minimal or no incremental ratepayer capital and minimal or no ratepayer liability or risk; and
- the Commission has adopted a reasonable mechanism for treatment of benefits and revenues derived from offering such products and services.

D.99-09-070 adopted a settlement between SCE and the Office of Ratepayer Advocates (ORA) that established a revenue sharing allocation for SCE’s qualifying non-tariffed products and services, including a 90/10 shareholder/ratepayer sharing allocation for revenues from SCE’s leasing of dark fiber. It is undisputed that the Master Lease Agreement is for dark fiber, and Verizon is responsible for paying for and arranging all connections to enable

⁵ The Affiliate Transaction Rules were later amended in D.06-12-029, but these provisions remained the same.

communications transmission using the leased fiber. As such, revenues from the lease would presumably be subject to the sharing allocation adopted in D.99-09-070, as SCE requests in this application.

However, when the Commission adopted the revenue sharing allocation for SCE's qualifying non-tariffed products and services in D.99-09-070, it was contemplated that the availability of those products and services would stem from only incidentally underutilized utility assets, not from the systematic build-up of assets funded by ratepayers. As explained in D.98-08-035, Rule VII of the Affiliate Transaction Rules as originally adopted in D.97-12-088 restricted the utilities' offerings of non-tariffed product or service to less than 1% of their customer base, "in part, because of our concerns regarding competition, and our concerns that non-tariffed [sic] utility products and services do not increase to an inappropriate magnitude."⁶ D.98-08-035 modified Rule VII and eliminated the 1% limitation, but sought to address these concerns by requiring the utility, in any advice letter seeking authority to offer a *new* product or service, to address the potential impact of that product or service on competition in the relevant market.⁷ Although the modification eliminated any constraint on the potential for a non-tariffed product or service to "increase to an inappropriate magnitude,"

⁶ The utility respondents to the rulemaking and investigation leading to the Affiliate Transaction Rules adopted in D.97-12-088 described the appropriate products and services as "temporarily available capacity (e.g., space in utility fiberoptic [sic] cable) and compatible secondary uses (e.g., leasing land under transmission lines to nurseries)." D.97-12-088, 77 CPUC 422, 485.

⁷ D.98-12-088, 81 CPUC2d 607, 619-620.

we did not waiver from the underlying policy and principle that ratepayers should be protected from cross-subsidizing non-tariffed products and services.⁸

The record demonstrates that SCE's non-tariffed fiber optic offering has increased to an inappropriate magnitude. According to SCE's witness in SCE's 2018 general rate case (GRC), A.16-09-001, SCE installs enough bandwidth to last the utility for the next 15 to 20 years.⁹ SCE has added approximately 447 cable miles to its fiber optic network since 2011 (at a rate of approximately 64 miles per year on average), of which approximately 73% (324 cable miles) were at ratepayer expense.¹⁰ As a result, as of October 2017, SCE uses only 17.8% of its fiber optic network for internal communications and electric system monitoring and automation, and 19.1% of the network to provide non-tariffed products and services, including commercial telecommunications service and leasing/licensing of dark fiber to third parties; the remaining 63% of the network is unused capacity.¹¹ The Master Lease Agreement reflects the long-term nature of this overcapacity by offering an initial term of five years, and the automatic renewal of successive two-year terms (unless either party gives 90-days' notice of termination), for this non-tariffed product and service.¹² The rules permitting utilities to offer non-tariffed products and services and the revenue sharing

⁸ See also D.13-05-010 at 1012, "These rules were also designed to protect ratepayers from cross subsidizing non-utility products and services provided by the utilities, and to ensure that the utilities do not use their market position to unfairly compete in areas where the Commission is trying to foster competition."

⁹ A.16-09-001, SCE/Gooding, 13 RT 1751:2. TURN cites to this information in its comments at 3.

¹⁰ TURN comments, Appendix A, Data Request TURN-SCE-01, Question 03.

¹¹ TURN comments, Appendix A, Data Request TURN-SCE-01, Question 01.

¹² Master Lease Agreement, Article VIII, "Term and Termination." The Master Lease Agreement is found in Attachment A to the application in this matter.

allocation established for SCE in D.99-07-070 were not intended to apply to this magnitude of overcapacity of utility assets.

SCE asserts that the revenue expected from the Master Lease Agreement meets the requirements for revenue sharing established in D.99-07-070 because the leasing of dark fiber on SCE's fiber optic system was an existing non-tariffed product or service at the time and because the settlement approved by D.99-07-070 plainly provides that revenues (over a \$16.7 million threshold) from the product or service shall be split 90/10 between shareholders and ratepayers. Regardless, for all the reasons discussed above, it is unreasonable to apply the revenue sharing established in D.99-07-070 to revenue from this magnitude of overcapacity of utility assets funded by ratepayers.

Instead, we adopt a 25/75 shareholder/ratepayer revenue sharing allocation for gross revenues under the Master Lease Agreement, consistent with D.13-05-010, our most recent decision to adopt a revenue sharing mechanism. There, the Commission adopted a 25/75 shareholder/ratepayer allocation for San Diego Gas & Electric Company's (SDG&E) research and development activities on the basis that it would equitably reward ratepayers for providing all of the funding for the venture while providing an incentive to SDG&E to market the venture.¹³ In contrast, in that same decision, the Commission rejected SDG&E's proposed 90/10 shareholder/ratepayer allocation of gross revenues from existing non-tariffed products and services above the test year 2012 forecast of miscellaneous revenues on the basis that the infrastructure or components to offer the existing service offerings are already in place and do not require

¹³ D.13-05-010 at 600.

significant shareholder involvement or additional shareholder investment.¹⁴ Similarly, the majority of the infrastructure to offer the services under the Master Lease Agreement was paid for by ratepayer funds and ratepayers should receive a majority share of the revenues.

4. How Does SCE's Proposed Master Lease Agreement Impact Safety and Reliability?

SCE states its belief that the Master Lease Agreement does not implicate or expand safety or reliability issues or concerns for SCE facilities because the construction, installation, and maintenance to be performed under the Master Lease Agreement are within the scope of SCE's normal course of business as an electric utility and telecommunications service provider. SCE adds that all existing poles that may be used for this project will be assessed to identify poles requiring repair or replacement in order to meet pole loading safety factor requirements of GO 95. We agree that the Master Lease Agreement does not raise safety and reliability concerns that are not otherwise addressed in existing safety and reliability requirements and SCE's duty to conform to best practices in its normal course of business.

TURN states its concerns that the Master Lease Agreement might overburden or divert shared resources that SCE currently relies on to ensure the safety and reliability of its electric service and its workers, that Verizon's or third-party contractors' access to the leased fiber might impact safety or reliability and that, if any leased fiber is located in the electric supply space, SCE workers will be put at increased risk. The issues of whether SCE is reasonably operating and maintaining its infrastructure in accordance with applicable safety

¹⁴ *Id.* at 1022.

regulations, and properly accounting for its financial and operational activities as required by the Affiliate Transaction Rules, are equally implicated by all of SCE's fiber leases, whether to Verizon or to any other CLEC; they are best addressed in the context of industry-wide safety regulations, the audit of SCE's financial and operational activities required under Rule VI of the Affiliate Transaction Rules, and in SCE's GRCs where the utility is required to demonstrate that it is appropriately allocating incremental non-tariffed products and services costs to ratepayers, and not in the context of an application seeking approval of an individual carrier lease.

5. Does SCE's Description of Its Fiber Facilities in this Proceeding Meet the Definition of Dark Fiber?

It is undisputed that the fiber facilities that SCE seeks to lease meet the definition of dark fiber.

The definition of dark fiber in the United States Code of Federal Regulations, Title 47 Part 51, Subpart D, §51.319 (a)(6) is:

Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services.

The definition of dark fiber in Newton's Telecom Dictionary, 14th ed. (Flatiron Publishing, New York, 1998) 197-98, which the Federal Communications Commission relied on in its Local Competition Third Report and Order [UNE Remand Order], 15 Federal Communications Commission Record at 3771, paragraph 162 note 292, is:

Dark fiber is defined as "[u]nused fiber through which no light is transmitted, or installed fiber optic cable not carrying a signal." It is "dark" because it is sold without light communications transmission. The [carrier] leasing the fiber is expected to put its own electronics and signals on the fiber and make it "light."

The fiber to be leased under this Master Lease Agreement meets both definitions of dark fiber in that it is fiber that will not be activated by SCE, and SCE will not transmit any light or signals over it.¹⁵

6. What Effects Will SCE's Master Lease Agreement Have on the Competitive Market for Telecommunications Services in California?

Approval of the Master Lease Agreement will allow SCE to competitively bid on Verizon's dark fiber leasing opportunities within SCE's telecommunications service territory. As CCTA notes:

[T]he market for backhaul is a competitive service, and that many of SCE's competitors for this service also attach fiber and other facilities to SCE's poles. SCE's leasing of fiber for backhaul while owning the infrastructure that other competitors must utilize places it in a strategic position that could permit it to limit access to its poles by third parties in order to benefit its own service. Moreover, preferential reservation of space for the electric utilities' communications infrastructure is difficult to assess where the utility itself controls the timing, the potential make-ready work and eventual access to the pole by other third parties. And it would be nearly impossible to ascertain if certain third parties' access to poles were delayed in order to prevent or limit their ability to provide the same competitive backhaul service that SCE intends to provide to a potential customer. (CCTA comments at 3.)

¹⁵ On page 6 of its application, SCE stated, "SCE is responsible for the construction and maintenance of the cable and its electronics, while Verizon Wireless shall pay for and arrange all connections of its facilities with the fibers Verizon Wireless leases under the Agreement." SCE filed a motion on November 9, 2017, stating that the use of the phrase "and its electronics" was inadvertent and seeking leave to amend its application to delete it. No objections were filed. The motion is granted.

In order to prevent such anti-competitive preferential treatment, CCTA recommends that the Commission extend the application of processing timelines and other right-of-way (ROW) rules that the ROW Decision imposes on the incumbent local exchange carriers to SCE.

We reject CCTA's recommendation. To the extent that SCE might inappropriately use its strategic position as electric utility to benefit its role as a competitor in the backhaul market business, that possibility is not a function of the Master Lease Agreement. As CCTA put it in its comments, this concern "raises larger issues associated with nondiscriminatory access to utility infrastructure -- many of which, as the Scoping Memo notes, are teed up for consideration" in the Pole Attachment and Right-of-Way proceedings and is "more appropriately considered in [that] industry-wide rulemaking than in the context of an application seeking approval of an individual carrier lease." (CCTA comments at 1.)

6.1. Consistency with Competitive Access Rules and Regulations

Neither the Master Lease Agreement nor the Lease Route Order form included in it contains any terms or conditions that interfere with competitive access to telecommunications infrastructure, non-discriminatory access for carriers as required by the Commission's "right-of-way" decision, D.98-10-085 (ROW Decision).¹⁶ Nor do they contain terms or conditions that

¹⁶ Although CCTA states that the agreement is generally consistent with the ROW Decision, it asserts that two of the terms in the Master Lease Agreement are more favorable to Verizon than those in SCE's contracts for third party attachments: (1) the Master Lease Agreement provides that SCE will acquire easements needed to allow Verizon's attachments to SCE's poles while, according to CCTA, SCE's contracts for third party attachments require the third party to obtain the requisite easements and pay to rearrange or expand the poles, and (2) the Master

Footnote continued on next page

contradict the non-discriminatory provisions in SCE's Federal Communications Commission tariff.¹⁷

TURN asserts that the Commission cannot assess the Master Lease Agreement's consistency with competitive access rules and regulations without reviewing the specific Lease Route Orders. This assertion only makes sense if the concern is that Verizon will insert into the Lease Route Orders, and SCE will accept, a term prohibiting access to those routes by other carriers in clear violation of the ROW Decision. We address that concern by directing SCE to submit its Lease Route Orders to Communications Division to monitor them to ensure competitive access. Nevertheless, in an abundance of caution, we hereby bar SCE from entering into any agreement under the Master Lease Agreement that prohibits non-discriminatory access to the lease routes entered into with Verizon.

7. With Regard To Revenue Sharing, Is The Distinction Between "Dark" And "Lit" Fiber A Meaningful Basis For Determining The Revenue Sharing Allocation, Will Existing or New Fiber Be Used to Meet Verizon's Lease Route Orders, and Will Shareholders Or Ratepayers Fund New Fiber If Any?

Lease Agreement provides that, should the poles used by Verizon become necessary for electric utility operations, SCE will expand the existing capacity at its own cost, while the ROW Decision provides that the third party must pay to rearrange or expand the poles, or the poles can also be reclaimed by SCE outright and the third party must remove its attachments. However, as CCTA further notes, the ROW Decision allows for flexibility depending on the particular circumstances between the parties.

¹⁷ SCE's tariff is available at <https://cdn2.hubspot.net/hubfs/2617781/Tariff.pdf>.

7.1. Significance of Distinction Between “Dark” and “Lit” Fiber for Purposes of Revenue Sharing Allocation Under D.99-07-070

We do not reach this issue because we deny revenue sharing pursuant to the revenue sharing allocation adopted in D.99-07-070.

7.2. Existing or New Fiber

As stated in the application and undisputed in the record, both existing fiber funded by ratepayers and new fiber funded by shareholders may be used to meet Verizon’s Lease Route Orders.

7.3. Shareholder or Ratepayer Funding of New Fiber

As stated in the application and undisputed on the record, SCE shareholders would fund any new fiber required to be built under the Master Lease Agreement.

8. What Steps Can the Commission Take to Ensure that SCE Does Not Subsidize Its CLEC Business with Its Electric Customers?

The issue of what steps the Commission can take to ensure that SCE does not subsidize its CLEC business with its electric customers issue raises larger issues associated with nondiscriminatory access to utility infrastructure, many of which are teed up for consideration in the Pole Attachment and Right-of-Way proceedings, and is more appropriately considered in that industry-wide rulemaking and investigation than in the context of this application seeking approval of an individual carrier lease. We do not reach it here.

9. Should any New Rules Developed Through the Pole Attachment and Right-of-Way Proceedings be Applied to this Master Lease Agreement, if Approved?

The question of whether any new, yet-to-be-developed rules in the Pole Attachment and Right-of-Way proceedings should be applied to the Master Lease Agreement is best restated as, is there anything in the Master Lease Agreement that would allow or require SCE to be exempt from compliance with any applicable rules or regulations adopted by this Commission? The answer is “no.”

TURN asserts that SCE is using “regulatory double-speak” and a “game of semantics” when SCE says that the Master Lease Agreement is not itself subject to rules regarding utility pole safety and that any new rules that are developed “may potentially” apply to the facilities may become the subject of future Lease Route Orders under the Master Lease Agreement. (TURN comments at 16.) TURN offers no basis for this assertion. The Master Lease Agreement does not address pole specifications or maintenance, and rules have yet to be developed in the Pole Attachment and Right-of-Way proceedings. The issue as stated in the Scoping Memo sought confirmation that the agreement does not shield SCE from any otherwise-applicable rule or regulation that may be enacted in the future, and we are satisfied that it does not.

10. Is SCE’s Master Lease Agreement Proposal Compliant with GOs 95 and 128, Applicable Local, State, and Federal Safety Regulations, and Best Safety Standards And Practices?

The question of whether the Master Lease Agreement complies with GOs 95 and 128 and applicable safety regulations is best restated as, is there anything in the Master Lease Agreement that would impede or exempt SCE’s

compliance with GO 95 and 128 and applicable safety regulations? The answer is “no.”

11. Should The Terms of The Master Lease Agreement and/or Lease Route Orders with Verizon be Public Under GO 96? If Not, Why Not? Should SCE Submit Its Lease Route Orders To The CPUC?

11.1. Should SCE Submit its Lease Route Orders to the CPUC?

SCE asks the Commission to approve this application to eliminate the need for it to submit individual advice letters for approval of individual Lease Route Orders under GO 96-B, in the interest of allowing SCE to respond timely to the individual requests. SCE notes that the Commission has approved similar Master Agreements for SCE to lease communication sites and antenna location to Spring PCS and Nextel.¹⁸ SCE suggests that, if the Commission wishes to monitor the individual Lease Route Orders, it might approve the application, but require SCE to submit the individual Lease Route Orders to the Commission as a compliance filing or letter to the Commission’s Communications Division. We agree that this is a practical and sufficient approach to processing the Master Lease Agreement and individual Lease Route Orders pursuant to it. SCE is directed to regularly forward the individual route orders to the Commission’s Communications Division within three business days of SCE’s receipt of an executed Lease Route Order.

TURN urges the Commission to require SCE to submit: (1) individual Lease Route Orders under an appropriate dollar or mileage threshold as an “informational filing” every quarter; (2) individual Lease Route Orders over that

¹⁸ Application at 9, citing to D.02-12-023 and D.02-12-024.

threshold as Tier 2 advice letters under GO 96-B; and (3) notices of construction, of changes to the agreement, plant in service, and rights of way related to the agreement, and of any agreement whereby SCE or its affiliate would make direct use of the fiber subject to the agreement; and report all new related construction in a quarterly advice letter as required under SCE's certificate of public convenience and necessity. TURN maintains that this is appropriate in order to allow the Commission to definitively determine whether the lease request orders will impact safety, reliability, and competitive access to SCE's facilities, and to ensure that the appropriate revenue sharing mechanism is applied. With respect to allowing the Commission to monitor the Lease Route Orders to ensure safety, reliability, and competitive access, the direction that SCE submit the Lease Route Orders to Communications Division accomplishes this. With respect to ensuring that the appropriate revenue sharing mechanism is applied, we are satisfied that the 25/75 shareholder/ratepayer revenue sharing allocation that we adopt for gross revenues from Lease Route Orders under the Master Lease Agreement accomplishes this.

11.2. Should the terms of the Master Lease Agreement be public under GO 96? If not, why not?

By uncontested motion filed concurrently with the application, SCE moves to file its unredacted application under seal, seeking confidential treatment of (1) the "template" terms and conditions of the master Agreement that reflect Verizon's current view on an acceptable risk allocation between the vendor and Verizon, (2) the terms and conditions that deviate from Verizon's template terms and conditions as a result of negotiations with SCE, and (3) the technical specification of the fiber and service that Verizon is purchasing and the technical details regarding its installation. SCE in its motion, and Verizon in its

declaration accompanying the motion, assert that the template and negotiated terms and conditions are entitled to confidential treatment because their disclosure could be used to Verizon's competitive disadvantage, and the technical information is entitled to confidential treatment because its disclosure could threaten cyber security. We grant the motion for good cause shown.¹⁹

11.3. Should the terms of the Lease Route Orders be public under GO 96? If not, why not?

The issue of whether the Lease Route Orders are entitled to confidential treatment is more appropriately considered pursuant to the processes adopted in GO 66-D than in the context of this application seeking approval of an individual carrier lease. Accordingly, we do not reach it here.

12. Motion to Amend Application

By motion filed November 9, 2017, SCE seeks leave to amend its application as follows:

- Application, page 1: The reference to D.98-10-058 should be changed to D.98-12-083 in order to correctly reference the decision granting SCE's Certificate of Public Convenience and Necessity to provide telecommunication services as a competitive local exchange carrier.
- Application, page 5, footnote 11: The words "of the Application" need to be inserted to footnote 11 to reflect SCE's position that the application eliminates the need for SCE to file, and the Commission to approve, numerous advice letters if SCE were to classify each Lease Route Order as a single transaction.

¹⁹ This determination does not preclude the Commission from publicly releasing the information upon request if warranted under GO 66-D.

- Application, page 6: The words “and its electronics” should be deleted because it suggests that the subject of the application involves lit fiber, when it does not.

The motion is unopposed and we hereby grant it.

13. Assignment of Proceeding

Clifford R. Rechtschaffen is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge to the proceeding.

14. Public Review and Comment

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission’s Rules of Practice and Procedure. Comments were filed on January 29, 2018, and reply comments were filed on February 5, 2018. No revisions are made to the ALJ’s proposed decision.

Findings of Fact

1. SCE installs enough bandwidth to last the utility for the next 15 to 20 years.
2. SCE has added approximately 447 miles to its fiber optic network since 2011 (at a rate of approximately 64 miles per year on average), of which approximately 73% (324 miles) were at ratepayer expense.
3. As of October 2017, SCE uses only 17.8% of its fiber optic network for internal communications and electric system monitoring and automation, and 19.1% of the network to provide non-tariffed products and services, including commercial telecommunications service and leasing/licensing of dark fiber to third parties; the remaining 63% of the network is unused capacity.
4. The Master Lease Agreement reflects the long-term nature of SCE’s fiber optic overcapacity by offering an initial term of five years, and the automatic

renewal of successive two-year terms (unless either party gives 90-days' notice of termination), for this non-tariffed product and service.

5. All existing poles that may be used for this project will be assessed to identify poles requiring repair or replacement in order to meet pole loading safety factor requirements of GO 95.

6. The fiber to be leased under this Master Lease Agreement is fiber that will not be activated by SCE, and SCE will not transmit any light or signals over it.

7. Approval of the Master Lease Agreement will allow SCE to competitively bid on Verizon's dark fiber leasing opportunities within SCE's telecommunications service territory.

8. To the extent that SCE might inappropriately use its strategic position as electric utility to benefit its role as a competitor in the backhaul market business, that possibility is not a function of the Master Lease Agreement.

9. The Master Lease Agreement does not contain any terms or conditions that interfere with competitive access to telecommunications infrastructure, non-discriminatory access for carriers as required by the Commission's ROW decision, D.98-10-085

10. Both existing fiber funded by ratepayers and new fiber funded by shareholders may be used to meet Verizon's Lease Route Orders.

11. SCE shareholders will fund any new fiber required to be built under the Master Lease Agreement.

Conclusions of Law

1. The rules permitting utilities to offer non-tariffed products and services and the 90/10 shareholder/ratepayer revenue sharing allocation established for SCE in D.99-07-070 were not intended to apply to this magnitude of overcapacity of utility assets.

2. A 25/75 shareholder/ratepayer revenue sharing allocation of gross revenues from leases under the Master Lease Agreement more reasonably reflects that the majority of the infrastructure to offer the services under the Master Lease Agreement was paid for by ratepayer funds and ratepayers, consistent with D.13-05-010, our most recent decision to adopt a revenue sharing mechanism.

3. The Master Lease Agreement does not raise safety and reliability concerns that are not otherwise addressed in existing safety and reliability requirements and SCE's duty to conform to best practices in its normal course of business.

4. The fiber facilities that SCE seeks to lease meet the definition of dark fiber.

5. The concern that that SCE might inappropriately use its strategic position as electric utility to benefit its role as a competitor in the backhaul market business raises larger issues associated with nondiscriminatory access to utility infrastructure that are teed up for consideration in the Pole Attachment and Right-of-Way proceedings (I.17-06-027/R.17-06-028/R.17-03-009) , and are more appropriately considered in that industry-wide rulemaking than in the context of an application seeking approval of an individual carrier lease.

6. Out of an abundance of caution, SCE should be barred from entering into any agreement under the Master Lease Agreement that prohibits non-discriminatory access to the lease routes entered into with Verizon.

7. We do not reach the issue of the significance of the distinction between "dark" and "lit" fiber with respect to the revenue sharing allocation adopted in D.99-07-070 because we deny revenue sharing pursuant to that allocation.

8. Nothing in the Master Lease Agreement requires or allows SCE to be exempt from compliance with any applicable rules or regulations adopted by this Commission.

9. Nothing in the Master Lease Agreement impedes with or exempt SCE's compliance with GO's 95 and 128 and applicable safety regulations.

10. SCE should be directed to regularly forward the individual Lease Route Orders to the Commission's Communications Division within three business days of their receipt by SCE.

11. SCE's motion to file its unredacted application under seal should be granted for good cause shown.

12. GO 66-D governs the administrative processes for the submittal and release of confidential information in the Lease Route Orders to be submitted to Communications Division, including the process for considering and resolving any claims of confidentiality.

13. SCE's motion to amend its application should be granted.

14. The Master Lease Agreement should be approved subject to a 25/75 shareholder/ratepayer revenue sharing allocation of revenues and conditioned upon SCE's regular submission of the Lease Route Orders to the Communications Division.

ORDER

IT IS ORDERED that:

1. Southern California Edison Company is granted authority pursuant to Public Utilities Code Section 851 to lease to Cellco Partnership d/b/a Verizon Wireless certain optical fibers along existing routes and additional routes that are being constructed in Southern California pursuant to their Master Dark Fiber Lease Agreement dated November 17, 2016.

2. Southern California Edison Company shall forward the individual Lease Route Orders received under the Master Dark Fiber Lease Agreement dated November 17, 2016, to the Commission's Communications Division at cdcompliance@cpuc.ca.gov within three business days of their receipt by Southern California Edison Company.

3. SCE shall report the incremental costs and gross revenues resulting from the Master Lease Agreement with Verizon as a separate line item in the Use of Communications Computing Systems Product/Service Category in its Periodic Annual Report of Utility Non-Tariffed Products and Services that is currently provided to the Commission's Energy Division. A copy this report shall be provided concurrently to the Communications Division via email to the cdcompliance@cpuc.ca.gov mailbox.

4. Revenues from the lease of optical fibers pursuant to the Master Dark Fiber Lease Agreement dated November 17, 2016, shall be shared between shareholders and ratepayers by allocating 25% to shareholders and 75% to ratepayers.

5. Southern California Edison Company's motion to file the unredacted version of its application under seal is granted.

6. Southern California Edison Company's motion to amend its application is granted.

7. Any other pending motions are deemed denied.

8. Application 17-02-001 is closed.

This order is effective immediately.

Dated _____, 2018 at San Francisco, California.