

Decision ALTERNATE DECISION OF COMMISSIONER WOOD

(Mailed 11/21/01)

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 Walnut Substation to Power Storage Industry II, LLC.

Application 01-07-036
(Filed July 27, 2001)

O P I N I O N**1. Summary**

Southern California Edison Company (SCE) seeks authority to lease to Power Storage Industry II, LLC (Power Storage) a 5.7-acre site located on a portion of SCE's Walnut 220/12-kilovolt (kV) substation in the City of Industry. Power Storage would develop a self-storage facility on the site, a use that SCE states will not interfere with its utility operations. We deny the application, without prejudice, for failure to comply with the California Environmental Quality Act.

2. Background

The 5.7-acre site is used by SCE for aboveground transmission and distribution lines.¹ SCE acquired the land in three transactions that took place between 1955 and 1960. The book value of the 5.7 acres is \$25,625.30. The site

¹ The site is bounded on the north by the Salt Lake Railroad, on the east and on the west by industrial buildings, and on the south by Gale Avenue.

and an additional 3 acres have been licensed to Michael Craig for horticultural use since 1997, but the temporary agreement for that use will expire on October 2, 2001. SCE proposes to lease the 5.7 acres to Power Storage for development and operation of a self-storage facility. SCE would continue to own and operate its transmission and distribution facilities, and it would retain unobstructed access to the site. Revenue from the lease would be shared with SCE's ratepayers.

2. Terms of Lease

The term of the lease to Power Storage is 65 years. The lessee would pay a base rent of \$32,000 in Year 1, \$65,000 in Year 2, \$95,000 in Year 3, and \$178,250 in Year 4 to the end of the lease term. Additionally, the base rent would be adjusted by appraisal every tenth year to reflect fair market value. The lease rate is substantially greater than current revenue from the Craig agreement, which has ranged from \$17,200 to \$17,716 annually.

The Power Storage agreement provides that the lessee's activities must not interfere with the operation of the electrical transmission facilities that cross the site. Power Storage would not be permitted to store hazardous substances on the site, and the company would be required to maintain at least a 20-foot clearance from all overhead electrical conductors. SCE also would require the lessee to maintain a 50-foot radius around all tower legs and a 10-foot radius around all steel and wood poles. The lessee would provide and maintain access roads on the property. The lessee would be responsible for obtaining all permits and approvals for construction, as well as any zoning changes or use permits required for the operation of a self-storage facility.

Under the lease, Power Storage would be responsible for all personal property taxes and fees levied against the property and improvements, and it would maintain comprehensive liability insurance, auto insurance and workers'

compensation insurance. The company would indemnify SCE against all liability for damages or injury to persons or property not caused by SCE's negligent or willful misconduct.

3. Determination of Best Secondary Use

SCE states that its objective in selecting secondary uses for utility property is to find those uses that will provide the greatest revenue consistent with the utility's obligation to maintain the safety and reliability of its facilities. Because of the aboveground power lines crossing the site, secondary uses are limited by restrictions and height clearances. SCE states that, of the uses examined for the site, it determined that a self-storage facility offered the highest level of potential revenues.

To evaluate the rental value of the 5.7 acres, SCE analyzed lessee's cost and income projections. The utility further reviewed rent paid by comparable self-storage facilities in Southern California. The annual base rent SCE would receive from Power Storage falls within the acceptable market range based on this analysis and is in line with the revenues SCE receives in other transactions approved by this Commission.

4. Selection of Lessee

SCE states that Power Storage was selected to develop the site because of the proposed use and the background and financial position of the company's principal members, Bert Dumars and John A. McDonald.

Dumars, president and chief executive officer of Preferred Investments, has more than 20 years of experience in commercial and industrial real estate development. He has been involved with commercial and industrial park developments, high-rise complexes, and entertainment theme park organizations. He has participated in the development of 18 self-storage facilities, ranging in size from 38,000 to 98,000 square feet.

McDonald has more than 20 years of experience as a senior principal and consultant with major development organizations, including the Koll Company, Aetna Realty Advisors and the Irwindale Community Redevelopment Agency. He has managed commercial and industrial construction projects with finished costs ranging up to \$120 million.

5. Environmental Review

SCE states that Power Storage is in the process of obtaining all permits and approvals required by the appropriate governmental agencies having jurisdiction for the development of a self-storage facility on the site. In accordance with Article 6.2(h) of lessee's agreement with SCE, lessee must procure and deliver to SCE evidence of compliance with all applicable codes, ordinances, regulations and requirements for permits and approvals, including but not limited to grading permits, building permits, zoning and planning requirements, and approvals from the various governmental agencies and bodies having jurisdiction.

Under the California Environmental Quality Act (Public Resources Code §21000, et seq., hereinafter "CEQA"), the Commission is obligated to consider the environmental consequences of a project that is subject to the Commission's discretionary approval. (Public Resources Code §21080). In the Proposed Decision, the assigned administrative law judge (ALJ) discussed the fact that in past decisions, the Commission did not consider environmental impacts as part of its deliberations, but, instead, deferred to local environmental review that might occur after Commission approval.

However, as the ALJ reports, to ensure that no development will take place without CEQA review by the appropriate agency, the Commission on August 2, 2001, in D.01-08-022, determined that it must handle such applications differently. The Commission would require the utility to include with its

application copies of the necessary documents issued by the local entity acting as the lead agency under CEQA. The Commission would then assume the role of a responsible agency for CEQA purposes.

The ALJ proposed that since this application was filed before the issuance of D.01-08-022, the Commission should approve the application on condition that SCE submits the necessary documents within 120 days to confirm that the lead agency has, in fact, conducted environmental review for this project.

The ALJ is correct in observing that the Commission has approved prior such applications without first considering environmental impacts. However, this approach is incorrect under applicable law.

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 proposed activities.” (Title 14 California Code of Regulations, hereinafter “CEQA Guidelines”, §15002.) Each public agency is responsible for complying with CEQA. A public agency must meet its own responsibilities under CEQA and cannot not rely on comments from other public agencies or private citizens as a substitute for work CEQA requires the Lead Agency to accomplish. (CEQA Guidelines §15020)

Where a project is to be approved by more than one public agency, one agency must be responsible for preparing an Environmental Impact Report (EIR) or Negative Declaration for the project. This agency is called the Lead Agency. (CEQA Guidelines §15050) Any other public agency which has responsibility for approving the project is a “Responsible Agency” (Public Resources Code §21069). The decision-making body of each Responsible Agency must consider the Lead Agency's EIR or Negative Declaration prior to acting upon or approving the project. Each Responsible Agency must certify that its decision-

making body reviewed and considered the information contained in the EIR or Negative Declaration on the project. (CEQA Guidelines §15050).

Because the proposed project is subject to CEQA and the Commission must issue a discretionary decision without which the project cannot proceed, this Commission must act as either a Lead or Responsible Agency under CEQA. If the project is to be carried out by a private person or entity, the Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole. (CEQA Guidelines §15051 (b)). In the current situation, the Commission's discretionary role is very limited: to approve SCE's request for authority to enter into a lease. It is the City of Industry, as the agency which must approve and supervise the self-storage facility that will use the land subject to the lease, that will likely assume the duties of Lead Agency. Thus the Commission is a Responsible Agency for the purposes of this project.²

A Responsible Agency complies with CEQA by considering the EIR or Negative Declaration prepared by the Lead Agency and by reaching its own conclusions on whether and how to approve the project involved. (CEQA Guidelines §15096(a)). The Responsible Agency must be available to consult with the Lead Agency upon request, and should review and comment on draft EIRs and Negative Declarations for projects which the Responsible Agency would later be asked to approve. These comments must be limited to those project activities which are within the agency's area of expertise or which are required to be carried out or approved by the agency or which will be subject to

² In most circumstances, the determination by the Lead Agency of whether to prepare an EIR or a Negative Declaration is final and conclusive for all persons, including Responsible Agencies.

the exercise of powers by the agency. (CEQA Guidelines §15096(d)). In the case of a lease request such as this, the Commission's responsibility to comment on a draft document would be extremely limited.

Prior to reaching a decision on the project, the Responsible Agency must consider the environmental effects of the project as shown in the EIR or Negative Declaration. (CEQA Guidelines §15096(f)).³ The Responsible Agency must state that it considered the EIR or Negative Declaration as prepared by a Lead Agency. The Responsible Agency must make findings required for each significant effect of the project. (CEQA Guidelines §15096(h)). The Responsible Agency must file a Notice of Determination in the same manner as a Lead Agency, except that the Responsible Agency does not need to state that the EIR or Negative Declaration complies with CEQA. (CEQA Guidelines §15096(i)).

The Commission can do none of these things, in the current circumstances, because it faces an application devoid of environmental documentation and is asked to issue discretionary approval without knowledge of whether the City of Industry or any other agency has fulfilled its Lead Agency responsibilities subject to CEQA. Thus, we must reject the current application and advise SCE to first pursue its needed authority from the local Lead Agency.

This Commission will reject as insufficient any subsequent application that does not demonstrate that SCE or the project proponent has undertaken steps needed to ensure appropriate Lead Agency environmental review. Where environmental review under CEQA is required, first or concurrently, the applicant shall seek local government approval. SCE shall inform the

³ A Responsible Agency has responsibility for mitigating or avoiding only the direct or indirect environmental effects of those parts of the project which it decides to carry out, finance, or approve.

Commission of the local environmental review process early enough to ensure that the Commission can fulfill its duties as a Responsible Agency. The Commission must have complete lead agency environmental documentation before it can approve the application.

Findings of Fact

1. SCE is an electric public utility subject to the jurisdiction and regulation of this Commission.
2. SCE has property at the Walnut Substation in the City of Industry available for secondary use, and it seeks to obtain revenue for ratepayers and shareholders through a secondary use lease.
3. Subject to Commission authorization required under Pub. Util. Code § 851, SCE has negotiated a long-term lease of the property to provide lease revenues with no interference with the operation of the transmission lines.
4. The proposed lessee, Power Storage, is managed by principals with substantial experience in commercial and industrial projects, including self-storage facilities.
5. Power Storage will finance, construct and maintain a self-storage facility at the site, bearing the costs and making payments to SCE.
6. Revenue in excess of a Commission-established threshold will be shared 70/30 between the utility and ratepayers by treating all revenues as Other Operating Revenue, pursuant to D.99-09-070.
7. SCE has not submitted a Proponent's Environmental Assessment, or evidence that any public agency has prepared an Initial Study, EIR, or Negative Declaration for the proposed project pursuant to CEQA.
8. The City of Industry is the public agency with the greatest responsibility for supervising and approving the project as a whole.

9. The Commission also has discretion to approve a critical aspect of the proposed project.

Conclusions of Law

1. The City of Industry or a related agency should be the Lead Agency for this project for the purposes of CEQA.

2. This Commission should be a Responsible Agency for this project for the purposes of CEQA.

3. The current application is not in compliance with CEQA and should be denied.

O R D E R

IT IS ORDERED that:

1. The application of Southern California Edison Company (SCE) seeking authorization to enter into a lease of a 5.7-acre site located on a portion of SCE's Walnut 220/12 kilovolt substation in the City of Industry under the terms and conditions set forth in this application is denied.

2. SCE may reapply for the requested authorization when it can demonstrate that it has pursued appropriate approval and Lead Agency review under the California Environmental Quality Act.

3. Application 01-07-036 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Alternate Decision of Commissioner Wood as on all parties of record in this proceeding or their attorneys of record.

Dated November 21, 2001, at San Francisco, California.

/S/ SUSIE TOY
Susie Toy

N O T I C E

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