STATE OF CALIFORNIA GRAY DAVIS, *Governor*

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

February 4, 2003

TO: ALL PARTIES OF RECORD IN APPLICATION 02-02-015

Decision 03-01-083 is being mailed without the Concurring Opinion of Commissioner Lynch. The Concurring Opinion will be mailed separately.

Very truly yours,

/s/ CAROL A. BROWN
CAROL A. BROWN, Interim Chief
Administrative Law Judge

CAB:sid

Attachment

Mailed 2/4/2003

Decision 03-01-083 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 on the Laguna Bell-Mesa Transmission Line Right of Way to The California Commerce Club, Inc.	Application 02-02-015 (Filed February 14, 2002)

O P I N I O N

Summary

Southern California Edison Company (SCE) is authorized to lease to California Commerce Club, Inc. (Commerce Club) a site on SCE's Laguna Bell-Mesa transmission right of way in City of Commerce.

Background

SCE seeks Commission authorization under Pub. Util. Code § 851 to lease to Commerce Club a 22.2-acre site located on a portion of SCE's Laguna Bell-Mesa transmission right of way in City of Commerce. The right of way is part of the Laguna Bell-Mesa 220 kilovolt system and includes Commission-jurisdictional facilities.

Portions of the site have been licensed under three separate license agreements to Commerce Club since 1987 for vehicle parking, horticultural use, and a landscape and beautification area in support of Commerce Club's casino and restaurant. Commerce Club recently expanded its gaming and restaurant area and constructed a 200-room hotel on nearby property it owns, and now seeks the security of a long-term lease for the parking lot on SCE's site. 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 22, 2001 SCE and Commerce Club executed an option agreement fully defining the terms of the proposed lease and giving Commerce Club 30 days after the Commission's approval to either accept or reject the lease together with any conditions the Commission may impose.

A. Lease Terms

The initial term of the lease is five years commencing on the date of Commerce Club's acceptance, and Commerce Club may renew it for up to nine additional five-year terms. The base rent is $336,000 for the first year and $352,800 for each of the next four years. The base rent is to be increased by 5% on the first day of each five-year renewal and stays at that level for the remainder of that five year renewal term. If Commerce Club's use of the site changes, the base rent may be adjusted upward, but not downward, to reflect the new fair rent value for that use. Commerce Club 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 Commerce Club's 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 minimum specified vertical and horizontal clearances from SCE's towers, poles, pole anchors, and overhead conductors. Commerce Club 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. Commerce Club will be responsible for obtaining any permits or zoning changes that might be required for its intended use of the property, and SCE retains the right to approve any future construction. Commerce Club represents that its use will continue in a manner consistent with the site's present uses, and that it does not contemplate changes after the lease is approved. 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 and around City of Commerce. SCE's above- and underground lines on and crossing the site, and their associated restrictions and height clearances, limit the potential secondary uses. SCE states that its objective has been to select secondary uses for its property that provide the highest revenue consistent with its utility safety and reliability obligations, and that it has determined that the Commerce Club project offers that highest potential revenue. To evaluate the rental value of this particular site, SCE analyzed the rent paid for comparable facilities in each of the three different land use categories involved: vehicle parking, horticulture, and landscaping. SCE believes that the 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 Commerce Club because of Commerce Club's financial position, the background of its executive officers, and its ability to pay the highest rental rate for the site. According to SCE, Commerce Club has been in operation since 1982 and is presently the largest card club in the state. It occupies a 141,000 square foot facility with over 200 card tables, three restaurants, a bar, a gift shop, valet parking, and two banquet/tournament/special event ballrooms, and operates 24 hours a day, 365 days a year. Its recent expansion included construction of the 200-room Commerce Club Crowne Plaza Hotel. The application does not describe the background of Commerce Club's executive officers or explain how it related to SCE's selection of Commerce Club as the lessee.

D. CEQA Considerations

In reviewing the application, we note that construction of the vehicle parking lot, horticultural nursery and landscaped beautification area took place under three license agreements Commerce Club entered into with SCE in 1987. SCE contends that converting the licenses to a lease does not require the Commission to review the proposed transaction for compliance with the California Environmental Quality Act (CEQA, Public Resources Code Section 21000 et seq.) because the current use was and is permitted by right under City of Commerce's Zoning Ordinance and no new construction is contemplated. As additional support, SCE filed two supplements to the application. The first supplement confirmed City of Commerce's position that it has no discretionary authority in this matter and therefore no CEQA action on its part would be required. The second supplement provided Commerce Club's confirmation that

it will continue its present uses of the site and contemplates no additional changes to the property should the Commission authorize the lease.

First, 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.

Second, we have cautioned applicants in recent Commission decisions seeking approval of license to lease conversions that General Order (GO) 69-C cannot reasonably be read to allow utilities to bifurcate their transactions so that they would perform construction under an agreement not subject to Commission review by virtue of GO 69-C, and then, after the facilities are installed, seek approval of the lease arrangements for those facilities. GO 69-C allows utilities to enter agreements without Commission approval only for "limited uses." We have specifically noted that we will deny applications to convert GO 69-C agreements to lease agreements where the structure of those transactions was designed to circumvent the advance approval requirements of Pub. Util. Code § 851 and the associated CEQA review requirement.[1] In this instance, however, the fact that these three license agreements have been in effect since 1987 leads us to believe that this particular application and lease agreement were not part of a design to circumvent the advance approval requirements of § 851 and CEQA review.

SCE's and Commerce Club's representations in the application and its two supplements make clear that neither construction nor any change to the current

[1] See, e.g., Decision (D.) 00-12-006.

use of the lease site is contemplated as a result of our approval here. Under the facts SCE and Commerce Club have presented, it can be seen with certainty that no significant effect on the environment could result from our granting the authorization. Accordingly, the proposed transaction qualifies for an exemption from CEQA pursuant to Section 15061(b)(3) of the CEQA guidelines. We conclude, therefore, that 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.[2]

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[2] *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,*

Footnote continued on next page

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."[3]

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.[4] The public interest is not harmed here since the proposed lease will not affect the utility'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.

Procedural Considerations

The Commission in Resolution ALJ 176-3082 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

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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.

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

[4] 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."

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. Portions of the lease site have been licensed to Commerce Club under three separate license agreements since 1987 for vehicle parking, horticultural use, and a landscape and beautification area in support of Commerce Club's casino and restaurant.

2. Neither construction nor any change to the current use of the site is contemplated as a result of our approval here.

3. Under terms of the lease, Commerce Clubs use of the site will not interfere with SCE's operations or facilities on the site.

4. 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.

5. Conversion of three license agreements to a lease for this site was not part of a design to circumvent the advance approval requirements of Pub. Util. Code § 851 and CEQA review.

6. 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.

7. There is no known opposition to granting the authorization requested.

Conclusions of Law

1. City of Commerce'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 02-02-015 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 Commerce Club, Inc. a site on SCE's Laguna Bell-Mesa transmission right of way in City of Commerce, in accordance with the terms and conditions set forth in Application 02-02-015 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 02-02-015 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.02-02-015

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, 2003