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 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.	A.17-02-001 (Filed February 3, 2017)

COMMENTS OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) ON THE ALTERNATE PROPOSED DECISION

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SUBJECT INDEX OF RECOMMENDED CHANGES

Pursuant to Rule 14.3(b) of the California Public Utilities Commission's ("CPUC" or "Commission") Rules of Practice and Procedure, Southern California Edison Company ("SCE") provides the following Subject Index of Recommended Changes in support of its Comments on the Alternate Proposed Decision Approving With Modifications And Adopting 50/50 Revenue Allocation for Revenues Under the Master Dark Fiber Lease Agreement Between Southern California Edison Company and Verizon Wireless ("APD" or "Alternate Proposed Decision"):

- Delete language stating that SCE has not shown that dark fiber leasing meets the requirements for non-tariffed products and services ("NTP&S");
- Delete language stating that revenue from the Master Dark Fiber Lease Agreement ("MLA") between SCE and Cellco Partnership d/b/a Verizon Wireless ("Verizon") is not subject to the gross revenue sharing mechanism ("GRSM") established in D.99-09-070;
- Modify language to clarify that SCE has not engaged in a systemic build-up of assets funded by ratepayers and that fiber optic facilities in rate base are required for utility operations;
- Delete language stating that SCE's NTP&S dark fiber optic offering has reached a level greater than that envisioned by D.97-12-088, as amended by D.98-08-035 and D.99-09-070;
- Modify language to clarify that D.99-09-070 is intended to apply where, as here, assets constructed to meet utility needs prudently include excess capacity;
- Delete language that applying the GRSM to the MLA would be unreasonable;
- Delete language that automatic renewal provision is unreasonable and should not be approved;
- Delete language that individual lease route orders are preemptively considered public in their entirety;
- Delete language that SCE has not met its burden in seeking confidential treatment of the MLA.

Pursuant to Rule 14.3, SCE respectfully submits these Comments on the Alternate Proposed Decision of Commissioner Rechtschaffen ("APD"). The APD does not cure the legal and factual errors of the Proposed Decision.[1] On the contrary, it reflects additional errors and findings that are unsupported by the record.

I. INTRODUCTION: APPROVE MOTION TO WITHDRAW

SCE's primary recommendation[2] is that the Commission grant SCE's Motion to Withdraw the Application, which was filed on July 5, 2018, prior to the issuance of the APD.[3] The Motion explains that the Application is moot because SCE no longer plans to enter into any individual lease route orders under the Master Dark Fiber Lease Agreement ("MLA").[4] As such, the Commission should not adopt the APD, because SCE and Verizon will not carry out the MLA.

In addition, the APD should not be adopted because it is substantively flawed. The APD recognizes the important public interests advanced by maximizing the utilization of SCE's fiber facilities, which promotes "widespread broadband deployment, including in remote and unserved and underserved communities, and . . . competition in the broadband market."[5] But the APD fails to advance those goals. The APD, like the proposed decision, would have the unintended and unfortunate consequence of preventing SCE's customers, telecommunications customers, as well as shareholders, from realizing the benefits of expanded utilization of SCE's fiber network—benefits that the APD itself recognizes are significant.

First, the APD's adoption of a 50/50 shareholder-ratepayer sharing of gross revenues from the MLA is unsupported by the record and would render the MLA uneconomic, even if SCE and Verizon would otherwise carry out the MLA. Simply put, given the incremental shareholder investment SCE would have to make to build additional fiber to support lease route orders under the MLA, SCE would lose money under a 50/50 sharing of gross revenue. Second,

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1 *See* Comments of Southern California Edison Company (U 338-E) on the Proposed Decision (Jan. 29, 2018) ("Comments on PD").

2 Alternatively, the APD should be revised as recommended in Attachment A with the MLA approved under the GRSM as requested in SCE's application.

3 Motion of Southern California Edison Company (U 338-E) to Withdraw the Application (July 5, 2018) (the "Motion").

4 *Id*. at 3-5.

5 APD at 6; *see also id.* at 10.

the APD would condition approval of the MLA on two changes that are neither practical nor acceptable to SCE and Verizon (even if the parties would otherwise carry out the MLA). Those changes are the elimination of the automatic renewal provision and the requirement to publicly file individual lease route orders. Third, the APD's conclusion that the MLA should be made public is based on an unfair and unlawful retroactive application of standards that did not exist when the Application was filed and that are substantively erroneous.

II. THE APD'S CONCLUSIONS REGARDING 50/50 SHARING ARE ERRONEOUS

A. The Rationale For Adopting A 50/50 Sharing Is Erroneous

The APD finds that a 50/50 shareholder/ratepayer sharing allocation for gross revenues under the MLA is appropriate.[6] The APD sets forth three justifications for this conclusion, none of which are supported by the record.

1. There Is No Basis For The APD's Assumption That A 50/50 Sharing Would Be Sufficient To Attract Shareholder Incremental Investment

First, the APD finds that a 50/50 sharing "is more likely to promote utilization" of the MLA.[7] Allowing shareholders to retain 50% of gross revenues may provide more revenues to SCE than the 25% sharing contemplated by the Proposed Decision, but the record does not support the APD's assumption that 50% of gross revenues would be enough to make it economic for SCE to cover its incremental costs and invest the shareholder capital needed to perform under the MLA.[8] In fact, even if the MLA were otherwise viable (which it no longer is), SCE would incur a loss on the MLA based on sharing 50% of gross revenue. This conclusion is supported by the financial information, including revenues, expenses, and capital investments, for Edison Carrier Solutions ("ECS") that the Commission has on file as part of the annual Certificate of Public Convenience and Necessity filing. Those filings set forth the investments and expenses incurred by SCE shareholders to support the offering of telecommunications facilities and services to third parties, which demonstrates that 50% of gross revenues is not sufficient to cover costs, especially after deducting the initial $16.7 million off the top. While these filings are not part of the record of this proceeding, that is because the Commission did not make clear that it

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6 APD at 10.

7 *Id*.

8 *See id*. at 3 (noting that SCE will install new fiber at shareholder expense).

would consider such a radical change in the GRSM that has applied to dark fiber leases for many years; as a result, SCE did not have the opportunity to present such evidence in this proceeding. The absence of such evidence in this record demonstrates why the APD's conclusion that 50% of gross revenue would be adequate is not supported by the record.

2. There Is No Basis for the APD's Finding That A 50/50 Sharing Is Needed To Protect Customer Interests

Second, the APD finds that a 50/50 sharing "protects the interests of ratepayers"[9] and prevents cross-subsidization.[10] These findings appear to assume that customers should receive 50% of gross revenue because a portion of the assets that would have been used to perform the MLA are in rate base. That, however, is not the relevant issue. As the Commission recognized in approving the Gross Revenue Sharing Mechanism ("GRSM"):

> The overall concept of a revenue sharing mechanism for revenues from non-tariffed products and services is in the public interest because it provides the utility with incentives to use utility property for other productive purposes without interfering with the utility's operation or affecting service to utility customers.[11]

Unless shareholders can earn a sufficient return on the incremental investment needed to offer dark fiber leases to third parties, customers will not receive any revenue for the fiber in rate base. The "interests of ratepayers"[12] are better served by 10% of gross revenues than by 50% of zero.[13] Similarly, the APD does not explain why the 90/10 shareholder/ratepayer sharing of gross revenues under the GRSM creates a cross-subsidy. A subsidy implies that customers are bearing more than their fair share of the costs of a competitive activity, but it is not unfair to

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9 APD at 10.

10 *Id*. at 15.

11 D.99-09-070, 1999 Cal. PUC LEXIS 653, at *47-48. *See also* D.11-03-038 at 6 (Mar. 29, 2011) ("[T]he agreement makes productive use of what is currently vacant conduit space. It makes eminent good sense for California's energy utilities, with their extensive easements, rights of way, and underground conduits, to cooperate in this manner with the telecommunications utilities who are seeking to build the fiber optic network. Joint use of the 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." (quoting D.93-04-019, 1993 Cal. PUC LEXIS 275, at *4)).

12 APD at 10.

13 *See* Comments on PD at 3-4.

provide customers a 10%, risk-free share of gross revenues, particularly in the context of shareholder incremental investment.

3. There is No Basis For The APD's Conclusion That A Change To The GRSM Is Appropriate Due To The "Growth" In Dark Fiber Leasing

Third, the APD finds that a change to the GRSM is appropriate for the MLA because dark fiber offerings have grown to a level that exceeds what was envisioned when the GRSM was adopted.[14] This is incorrect as a matter of law and unsupported by the factual record. As a matter of law, the APD does not support the finding that the GRSM was premised on fiber offerings being limited to a low level. It was not. As the APD notes, whereas D.97-12-088 restricted the utilities' offerings of non-tariffed products and services ("NTP&S") to less than 1% of their customer base, the Commission eliminated this limitation in D.98-08-035.[15] This directly refutes the APD's suggestion that the Commission intended to limit the scope of NTP&S offerings. Nowhere in the GRSM, or in D.99-09-070 (which approved the GRSM), is there any indication that the GRSM is limited to a "low" level of dark fiber leasing. While D.98-08-035 required the utility, when it sought authority to offer a new product or service to address potential competitive impacts,[16] that issue is not implicated by this Application, as dark fiber leasing is not a new product or service and the APD does not find that the MLA would have adverse competitive impacts.

The growth of SCE's telecommunications business is a sign of the success of the GRSM, and not a reason to change it. The GRSM was designed to provide an incentive to SCE to maximize the value of the temporarily available capacity of its assets, including its fiber network. The fact that SCE has responded by pursuing such opportunities is a reason to retain the GRSM.[17]

The APD's assertion that SCE's "inventory of dark fiber available" for leasing to third parties has grown since the GRSM was adopted[18] is unsupported by the record and incorrect.

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14 APD at 2 ("We find that SCE's inventory of dark fiber available for non-tariffed products and services has reached levels beyond what was envisioned under the regulatory scheme in place today for SCE."); *see also id.* at 9.

15 *Id*. at 8.

16 *Id*. (citing D.98-12-088, 81 CPUC 2d 607, 619-20).

17 *See* Comments on PD at 5.

18 APD at 2.

This proceeding did not examine that question. If it had, the Commission would have found that ECS's only offering was dark fiber when the GRSM was approved in 1999; today, SCE leases a smaller number of stand miles of its fiber network for dark fiber than it did in 1999, as ECS's business has shifted to the offering of telecommunications services over lit fiber. In fact, the total number of strand miles in rate base subject to dark fiber leases has decreased significantly, by over 75 percent, notwithstanding the considerable growth in SCE's overall network during this period. As such, dark fiber leasing is neither the primary business focus of ECS nor representative of its overall business strategy.

The APD finds that SCE has installed bandwidth to last 15-20 years, and that 63% of network capacity is currently not utilized, with 17.8% used by SCE and 19.1% used for NTP&S.[19] These percentages are for SCE's existing network *as a whole*, which includes both rate base and shareholder-funded cable. Even so, the existence of capacity in excess of near-term electric utility operational needs, however, is a prudent and natural consequence of the construction of fiber facilities to meet those utility needs; this does not demonstrate that the excess capacity of the fiber infrastructure is inappropriate or that the fiber infrastructure reflects a "systematic build-up of assets funded by ratepayers"[20] for the purpose of supporting a non-tariffed line of business. There is no record evidence to support that conclusion. Rather, leasing of dark fiber does truly "stem from only incidentally underutilized utility assets" [21]—any alleged "systemic build-up" of dark fiber would be inconsistent with ECS's business focus.

SCE includes in rate base only those fiber optic facilities and routes needed for electric utility operations. These facilities are used for "some of [SCE's] most critical communications"[22] as part of SCE's utility operations, consistent with Public Utilities Code § 451. In particular, SCE's fiber optic facilities provide "for internal communications and electric system monitoring and automation."[23]

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19 *Id.* at 9.

20 *Id.* at 8.

21 *Id.*

22 D.12-11-051, at 404 (Dec. 10, 2012).

23 Reply Comments of The Utility Reform Network to Comments by Southern California Edison on September 11, 2017 Amended Scoping Memo Appendix A, Data Request Set A.17-02-001 TURN-SCE-01, Question 01 (Nov. 13, 2017) ("TURN Reply Comments").

Once SCE decides that a particular fiber optic facility is needed for utility operations, the vast majority of costs associated with that facility stem from its siting, construction, and installation, which do not vary based on the amount of fiber optic capacity that SCE chooses to install. Increasing the installed fiber optic capacity involves only de minimis additional costs.

Installing additional capacity fiber for utility needs is prudent and follows utility industry standards. SCE does "not engineer[] the system to just meet the bare minimum" of current utility needs.[24] Rather, SCE ensures there is "enough bandwidth to last . . . for the next 15 to 20 years," or the cable's useful life, to adequately meet the utility's projected future needs for grid operation.[25] SCE anticipates expanded energy-network functions, including smart grid applications, in the future. SCE designs fiber facilities to accommodate the likelihood that utility operations will require increased bandwidth in the future as technology continues to develop. SCE makes these decisions "to leverage the bandwidth for [its] own applications first."[26]

There is no record evidence to suggest that any fiber facilities in rate base are not needed for utility purposes. Nor is this the proper proceeding in which to undertake such an inquiry. In multiple General Rate Cases, SCE has proposed, and the Commission has approved, capital expenditures to be added to rate base for fiber facilities, based on a showing that such facilities are needed for utility operations.[27] Similarly, there is no record evidence to suggest that SCE decides to add fiber facilities to rate base based on the business opportunities of ECS. As noted, that is not the case: SCE adds facilities to rate base only if they are needed for electric utility operations.

Because SCE takes a long-term view of its future utility needs for bandwidth, and because the marginal cost of installing additional fiber optic capacity is de minimis, SCE installs higher capacity fiber, resulting in excess capacity in the near-term. That near-term excess

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[24] A.16-09-001, SCE/Gooding, 13 RT 1750, ll.16-17. The Commission can consider relevant testimony submitted in SCE's General Rate Case that is part of the evidentiary record in that proceeding. In fact, TURN specifically relied on Gooding's testimony and it is cited in the PD. *See* TURN Reply Comments at 3; APD at 9; Proposed Decision at 7.

[25] A.16-09-001, SCE/Gooding, 13 RT 1750, ll.18-19.

[26] *Id.* at ll.27-28.

[27] D.15-11-021, at 230-33 (Nov. 12, 2015); D.12-11-051, at 402-05.

capacity falls squarely within Rule VII.C.4 of the Affiliate Transaction Rules: assets "acquired for the purpose of and [are] necessary and useful in providing tariffed utility services."[28]

Finally, even if the growth in SCE's rate base fiber network for utility needs justified a re-examination of the GRSM (it does not, for the reasons stated), the APD does not explain why this growth supports a 50/50 sharing of gross revenues. The APD instead suggests that the 50/50 sharing would create a sufficient incentive for shareholders to make the additional investments needed for the MLA to be carried out—a suggestion that, as noted, is unsupported by the record and is incorrect.

4. The 50/50 Gross Revenue Sharing Is Contrary To Precedent

The APD concludes that other Commission decisions establishing shareholder/ratepayer allocations at different amounts are not applicable because they do not concern fiber leases or leasing capital assets.[29] SCE agrees that D.13-05-010, which rejected a 90/10 sharing, is inapposite because in that situation the utility was not putting additional shareholder capital at risk.[30] The APD, however, cannot be reconciled with D.99-04-021, where the Commission approved a 50/50 sharing of *net* revenues for PG&E's NTP&S, especially where 100% of the first $16.7 million is taken off the top for ratepayers under SCE's GRSM. In fact, because of the structure of the GRSM where customers receive the first $16.7 million and 10% of any additional gross revenue and shareholders receive their share of revenue only after accounting for all the incremental costs associated with NTP&S, on balance customers have received 74% of the *net* revenues over the 1999-2014 period, compared to only 26% for SCE shareholders.[31] Nor does the APD mention that the Commission has approved approximately 30 previous applications and advice letters seeking authority to engage in dark fiber leasing under the 90/10 sharing established in the GRSM.[32]

B. <u>This Is Not The Proper Proceeding To Modify the GRSM</u>

The APD notes that the policy framework that promotes the most effective utilization of ratepayer-funded dark fiber raises "important policy questions" which the Commission may

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28 D.06-12-029, Appendix A-3 at 20 (Dec. 14, 2006).

29 APD at 10.

30 Comments on PD at 8-9.

31 *Id*. at 4.

32 *Id*. at 8.

examine in a rulemaking or in general rate cases.[33] While SCE strongly believes that there is no justification to change the GRSM, SCE agrees that if the Commission were inclined to consider any change, it should do so in a rulemaking or other appropriate proceeding. Indeed, any reconsideration of the GRSM warrants broader participation beyond just the few parties in this proceeding. For this reason, the APD errs in modifying the GRSM as applied to the MLA. The proper course is to dismiss the application as moot (which would not affect the Commission's ability to address revenue sharing for NTP&S, if appropriate, in another proceeding), or alternatively to approve the GRSM as applied to the MLA while reserving the right to establish a new revenue sharing mechanism for other arrangements prospectively.

In addition, as SCE explained at length in its comments on the Proposed Decision, the change to the GRSM is beyond the scope of this proceeding[34] and violates Public Utilities Code § 1708.[35]

III. THE APD'S REQUESTED MODIFICATIONS TO THE MLA WOULD NOT BE ACCEPTABLE TO THE PARTIES

The APD conditions its approval of the MLA on the deletion of the automatic renewal provision.[36] In addition, the APD makes a "preemptive determination" that individual lease route orders executed pursuant to the MLA "will be considered public and not confidential,"[37] which is contrary to the expectations of SCE and Verizon as reflected in the MLA.[38]

While the Commission can condition its approval of a contract on the parties' agreement to modify its terms, the Commission cannot compel SCE and Verizon (which is not a party to

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33 APD at 6.

34 Comments on PD at 10-11.

35 *Id*. at 12.

36 APD at 6-7, 27 (OP 1).

37 *Id.* at 22.

38 Application, Appendix A (MLA) at 48-50; Southern California Edison Company's (U 338-E) Motion For Leave To File The Confidential Version Of Its Application 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 Under Seal at 2-3 (Feb. 3, 2017).

this proceeding) to accept contractual terms against their will.[39] The APD appears to recognize this point by stating that SCE shall modify the MLA "if SCE intends to utilize the MLA."[40]

The record, however, contains no evidence that the parties would accept the changes to the MLA and its operation as proposed by the APD. In fact, even if SCE and Verizon were otherwise in a position to pursue the MLA, these changes would be unacceptable. A five-year term is insufficient to meet Verizon's need to plan its network over the long-term. In addition, Verizon would not place individual lease route orders if they were made public. Unless the confidentiality of the Verizon's business proprietary information and trade secrets can be preserved, Verizon has informed SCE that it will avoid this problem in the future by contracting with companies besides SCE or other utilities subject to the Commission's jurisdiction. This would be an unfortunate result for SCE's customers and for the promotion of competition in the broadband market. The unacceptability of the APD's requested changes to the MLA reinforces the conclusion that the Motion to dismiss the Application as moot should be granted. For multiple reasons, if the APD were adopted, SCE and Verizon would not pursue the MLA.

IV. THE APD'S CONCLUSION THAT THE MLA SHOULD BE MADE PUBLIC IS ERRONEOUS

The APD's determination that SCE's motion for confidential treatment of the MLA should be denied, and the MLA made public, is erroneous. SCE filed the motion under GO 66-C, which was in effect at that time. Subsequently, in D.17-09-023, the Commission adopted GO 66-D, which establishes new standards and procedures effective January 1, 2018.[41] The APD applies these new standards retroactively, even though SCE and Verizon had no notice at the time they filed the motion for confidential treatment that the rules would change and, by its own terms, GO 66-D generally applies only to "information submitted to the Commission on or after January 1, 2018."[42] In fact, SCE is not aware of the Commission applying GO 66-D in deciding

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[39] *Cal. Water & Tel. Co. v. Pub. Util. Comm'n*, 51 Cal. 2d 478, 488 (1959) (citing *Atchison, T. & S. F. Ry. Co. v. Railroad Comm'n*, 173 Cal. 577 (1916) and noting that the "commission is not a body charged with the enforcement of private contracts . . . [and] cannot 'modify' a public utility's contract or order a public utility to perform a contract, whether 'modified' or 'unmodified'").

[40] APD at 7.

[41] *See id.* at 18 n. 22; D.17-09-023 at 50 (OP 2) ("The process established in General Order 66-D shall be implemented and supersede General Order 66-C on January 1, 2018.").

[42] GO 66-D, § 3.1.

on any other motion for leave to file under seal that was submitted before January 1, 2018. The Commission's decisions since GO 66-D became effective at the beginning of this year have uniformly refrained from applying GO 66-D in such circumstances.[43] To the contrary, in at least ten recent decisions the Commission has granted a motion for leave to file material under seal where the information was competitively sensitive and its disclosure could place the owner at an unfair business disadvantage.[44] In nine of those decisions, the motion was granted with the simple explanation that "We have granted similar requests in the past, and do so here."[45] Denying the motion for confidential treatment on this basis, without even giving the parties the opportunity to meet the new standard, would be inconsistent with those precedents and violate due process.

The APD erroneously rejects the showing made in the Verizon declaration regarding the unfair business disadvantage that would result from public disclosure of its trade secret and business proprietary information in the MLA.[46] The declaration met the standard set forth in GO 66-C, which was effective at that time. In addition, the declaration established that the MLA would be exempt from disclosure under the California Public Records Act because it constitutes "proprietary information including trade secrets."[47]

Initially, the APD asserts that the declaration fails to establish that Verizon's interests outweigh the public's interest in obtaining access to the MLA.[48] This conclusion is incorrect as a matter of law. The APD recognizes that D.17-09-023 limited the application of the balancing

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43 *See* D.18-05-025 at 57 (May 31, 2018) ("During the pendency of [the] application, the Commission's General Order (GO) 66-C addressed access to records in the Commission's possession." (citing D.17-09-023 adopting GO 66-D)); *see also* D.18-05-010 at 14 (May 10, 2018) (applying GO 66-C); D.18-03-024 at 20 (Mar. 22, 2018) (same).

44 D.18-06-019 (June 21, 2018); D.18-05-031 (May 31, 2018); D.18-05-010; D.18-04-008 (Apr. 26, 2018); D.18-04-010 (Apr. 26, 2018); D.18-03-026 (Mar. 22, 2018); D.18-03-001 (Mar. 1, 2018); D.18-03-005 (Mar. 1, 2018); D.18-02-010 (Feb. 8, 2018); D.18-01-007 (Jan. 11, 2018).

45 D.18-06-019 at 5; D.18-05-031 at 9; D.18-04-008 at 6; D.18-04-010 at 12; D.18-03-026 at 14; D.18-03-001 at 7; D.18-03-005 at 9; D.18-02-010 at 13; D.18-01-007 at 16.

46 APD at 19-20.

47 Gov't Code § 6254.15; *see* Southern California Edison Company's (U 338-E) Motion for Leave to File the Confidential Version of Its Application 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 Under Seal (Feb. 3, 2017) Appendix A at 2 ("Román Declaration") (citing Gov't Code § 6254.15, in addition to GO 66-C).

48 APD at 19-20.

test to the catch-all exemption in the Public Records Act,[49] yet it concludes, without explanation, that this reasoning is "equally applicable" to proprietary information.[50] On the contrary, no balancing private interests against the public interest in disclosure occurs as to proprietary information or trade secrets. The Public Records Act states: "Nothing in this chapter shall be construed to require the disclosure of records that are . . . corporate proprietary information including trade secrets."[51] The exception is not dependent on showing that the public's interest in disclosure is outweighed by the submitter's interest in protecting its proprietary information. Requiring the disclosure of proprietary information because of the public's claimed interest in such disclosure not only is contrary to the statute, but also raises significant Takings Clause issues.[52] But even if the Commission were to apply a balancing test, the United States and California Supreme Courts have long recognized that the protection of trade secrets from public disclosure serves important *public* interests.[53]

Trade secrets are also exempted from disclosure under Public Records Act by Cal. Gov. Code § 6254(k), which applies to "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including . . . provisions of the Evidence Code relating to privilege." As such, § 6254(k) incorporates the evidentiary privilege against disclosing a trade secret under Cal. Evid. Code § 1060.[54] This evidentiary privilege protects trade secrets as

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49 Gov't Code § 6255(a).

50 APD at 21 n. 32.

51 Gov't Code § 6254.15; *see also* Gov't Code § 6254.7(d) ("trade secrets are not public records"). The declaration sets forth facts establishing that the MLA contains trade secrets, that is, a "compilation of information . . . which is known only to certain individuals . . . and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it." Gov't Code § 6254.7(d).

52 *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) ("intangible property rights protected by state law [including trade secrets] are deserving of the protection of the Taking Clause").

53 *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 485 (1974) ("Trade secret law will encourage invention in areas where patent law does not reach, and will prompt the independent innovator to proceed with the discovery and exploitation of his invention. Competition is fostered and the public is not deprived of the use of valuable, if not quite patentable, invention."); *DVD Copy Control Assn. v. Bunner*, 31 Cal. 4th 864, 880 (2003) ("[T]rade secret law 'acts as an incentive for investment in innovation.' . . . And without trade secret protection, 'organized scientific and technological research could become fragmented, and society, as a whole, would suffer.'" (quoting *Kewanee*, 467 U.S. at 486)).

54 *See* D.18-05-010 n.38-39 (citing the exemption in Cal. Gov. Code § 6254(k), incorporating the trade secret privilege of Cal. Evid. Code § 1060 for trade secrets as defined in Cal. Civ. Code § 3426.1(d)).

defined in Cal. Civ. Code § 3426.1(d).[55] The declaration establishes that the confidential information contained in the MLA unquestionably meets this statutory definition. First, it derives independent economic value from not being generally known to the public, as "it would be of high value to any wireless carrier seeking to compete with Verizon" and disclosure would place Verizon "at a distinct disadvantage."[56] Second, Verizon has made reasonable efforts under the circumstances, including through the use of confidentiality agreements, to maintain the secrecy of this information.[57]

The APD proceeds to find that the declaration does not establish that the technical specifications and details regarding the installation of fiber or service are exempt from disclosure under the proprietary information exception in the Public Records Act.[58] The APD, however, does not question the declaration's showing that the MLA reflects Verizon's proprietary information in other respects. The declaration establishes that the template terms and conditions "is the product of years of effort," that it "constitutes intellectual property of Verizon that would be of high value to any wireless carrier seeking to compete against Verizon," that it is not disclosed absent a confidentiality agreement, and that disclosure could undermine Verizon's future negotiations.[59] The declaration further establishes that negotiated changes to the template reflect the give-and-take of negotiations with SCE, and public disclosure could allow other counterparties to seek to cherry-pick those terms.[60] The APD notes these aspects of the declaration[61] and does not find that they fail to meet the standard for proprietary information. As a result, the APD's finding that the declaration does not show that technical information provides an additional basis for withholding does not support the conclusion that the MLA should be made public. In addition, the Public Records Act exempts from disclosure

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55 "'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Cal. Civ. Code § 3426.1(d).

56 Román Declaration at 1-2.

57 Román Declaration at 1.

58 APD at 21.

59 Román Declaration at 1.

60 *Id*. at 1-2.

61 APD at 20.

"geophysical data . . . and similar information relating to utility systems development . . . that are obtained in confidence from any person."[62] The facts stated in the declaration regarding technical specifications of Verizon's purchases and installation meet this standard.

The confidentiality determination in the APD would apply regardless of whether SCE and Verizon agree to the modification to the MLA. As discussed, the Commission cannot force SCE and Verizon to modify the MLA. Yet, nevertheless, the APD would make the MLA public, apparently even in the event that the parties do not "intend[] to utilize the MLA"[63] and refuse to adopt the changes required by the APD. There is no reasonable justification for the Commission to disclose Verizon's proprietary information and trade secrets in such a scenario. At a minimum, the APD should be modified to protect the proprietary information and trade secrets in the MLA unless and until SCE and Verizon agree to the APD's modification of the MLA.

V. CONCLUSION

The Commission should grant SCE's motion to withdraw the Application. Alternatively, the APD should be revised as recommended herein and in Attachment A, and the MLA should be approved under the GRSM as requested in SCE's application.

Respectfully Submitted,

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Date: July 25, 2018

[62] Gov't Code § 6254(e).

[63] APD at 7.

Attachment A

SCE's Proposed Findings of Fact and Conclusions of Law

SCE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.~~

1. ~~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.~~will utilize SCE's assets in a manner compatible with its electric utility operations.

2. Use of the fiber system under the Master Lease Agreement will have no negative effect upon service to SCE's customers.

3. Under the terms of the Master Lease Agreement, SCE's customers will receive material financial benefit without incurring any additional financial risk, because all financial risk will be borne by SCE's shareholders.

4. ~~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.

5. ~~6.~~ The ~~fiber to be leased under this~~Master Lease Agreement is for dark fiber on SCE's fiber optic system, and SCE's participation in any Lease Route Orders under the Master Lease Agreement is ~~fiber that will not be activated by SCE, and SCE will not transmit any light or signals over it.~~therefore classified as "active" for the purpose of sharing revenues between shareholders and ratepayers, established in D.99-09-070.

6. ~~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.

7. ~~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.~~The Master Lease Agreement is similar to other such arrangements that have previously been approved by the Commission.

8. ~~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~~085.

9. The leasing arrangement qualifies for a categorical exemption as a minor alteration of existing utility structures involving negligible expansion of an existing use.

10. ~~Both existing fiber funded by ratepayers and new fiber funded by shareholders may be used to meet Verizon's Lease Route Orders.~~Should individual Lease Route Orders under the Master Lease Agreement require the building of new facilities, SCE has previously received authority for such construction pursuant to D.98-12-083.

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

12. Verizon's Lease Route Orders include technical specifications of the fiber and services Verizon is purchasing, as well as its installation.

13. Public disclosure of Verizon's Lease Route Orders would put Verizon at a competitive disadvantage and create cybersecurity risks.

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.~~Authorization of the Master Lease Agreement would not be contrary to the public interest by reason of the matters set forth in Findings of Fact 1 through 13.

2. ~~In light of the Commission's interest in revisiting issues regarding what policy frameworks promote the most effective utilization of ratepayer funded dark fiber throughout California's regulated electric utility infrastructure, and how to assure that the state's policy priorities, such as safety, universal access to utility services and non-discriminatory access to this infrastructure, are sustained at the increasingly important nexus of electric and communication infrastructure, the provision in the MLA that provides for automatic renewal for successive two-year periods after the initial five-year term of the MLA is unreasonable and should not be approved.~~The Commission should approve the application by reason of Conclusion of Law 1, governed by the gross revenue sharing mechanism adopted in D.99-09-070.

   ~~A 50/50 shareholder/ratepayer revenue sharing allocation of gross revenues from leases under the Master Lease Agreement more reasonably rewards ratepayers for their investment in the infrastructure necessary to offer the services under the Master Lease Agreement, and incentivizes SCE to make available fiber facilities to Verizon.~~

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.~~This leasing arrangement is exempt from CEQA.

4. ~~The fiber facilities that SCE seeks to lease meet the definition of dark fiber.~~Any future construction that may be accomplished under this leasing arrangement has previously been authorized by this Commission pursuant to D.98-12-083.

~~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 ROW 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.~~

5. ~~10.~~ SCE should be directed to regularly forward, on a confidential basis, the individual Lease Route Orders through the Tier 1 Advice Letter process outlined in GO 96-B to the Commission's Communications Division within 30 days of their receipt by SCE.

6. ~~11.~~ SCE's motion to file its unredacted application under seal should be ~~denied consistent with Public Utilities Code Section 583, GO 66-C, and California Government Code § 6254.15.~~granted for good cause shown.

7. ~~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.

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

~~14. The Master Lease Agreement should be approved with modifications, subject to the removal of the automatic renewal provision, a 50/50 shareholder/ratepayer revenue sharing allocation of revenues, and conditioned upon SCE's submission of the Lease Route Orders to the Communications Division via advice letter process.~~