

**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.

A.17-02-001
(Filed February 03, 2017)

**OPENING COMMENTS OF THE UTILITY REFORM NETWORK
ON THE ALTERNATE PROPOSED DECISION**



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TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE ALTERNATE PROPOSED DECISION APPROPRIATELY ADOPTS A REVENUE SHARING MECHANISM TO PROVIDE 50% TO RATEPAYERS.....2

III. THE ALTERNATE PROPOSED DECISION APPROPRIATELY REQUIRES SCE TO SUBMIT LEASE ROUTE ORDERS BUT DOES NOT GO FAR ENOUGH TO MITIGATE THE RISKS OF THE OVERLY BROAD STRUCTURE OF THE MASTER LEASE AGREEMENT.....2

IV. CONCLUSION.....4

OPENING COMMENTS OF THE UTILITY REFORM NETWORK ON THE ALTERNATE PROPOSED DECISION

I. INTRODUCTION

Pursuant to Rule 14.3 of the Commission’s Rules of Practice and Procedure (“Rule”), The Utility Reform Network (“TURN”) files these opening comments on the Alternate Proposed Decision (“APD”) of Commissioner Rechtschaffen regarding Southern California Edison’s (“SCE’s”) Application for approval of a Master Lease Agreement (“MLA”) with Verizon Wireless for dark fiber facilities. TURN continues to support the revenue sharing mechanism as set out in the Proposed Decision of Administrative Law Judge Hallie Yacknin, but TURN recognizes the steps forward on this issue represented by the APD and supports the APD’s finding that SCE has not shown that the dark fiber that it seeks to lease meets the conditions for non-tariffed products and service (“NTP&S”) established in D.98-08-035.¹ Thus, as the APD also recognizes, SCE’s MLA should be subject to different sharing rules and mechanisms than those proposed by SCE in its Application. TURN also supports the requirement for SCE to submit, via the Advice Letter process, each Lease Route Order entered into with Verizon for specific dark fiber routes. TURN believes such a requirement will allow the Commission to monitor the impact of this MLA on safety and competitive access to SCE’s fiber facilities. In addition, TURN supports the APD’s denial of SCE’s motion to file unredacted version of its application under seal because while the APD requires SCE’s Lease Route Orders submitted to the Commission pursuant to the Master Dark Fiber Lease Agreement to be treated as public for confidentiality purposes, the APD also allows SCE to submit a claim for confidential treatment of an executed Lease Route Order pursuant to General Order 66-D. However, as discussed below, TURN requests narrow changes to the APD to correct errors of fact and to reinforce the Commission’s need for more detailed information to properly review these types of leases agreements.

¹ APD, p. 7.

II. THE ALTERNATE PROPOSED DECISION APPROPRIATELY ADOPTS A REVENUE SHARING MECHANISM TO PROVIDE 50% TO RATEPAYERS

The APD correctly concludes that 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 the magnitude of overcapacity of utility assets represented by the fiber build documented in this case and required to fulfill the Verizon MLA.² The APD notes that the Commission’s intent when authorizing a sharing mechanism for NTP&S was that the products would “stem from only incidentally underutilized utility assets, not from a systematic build-up of assets funded by ratepayers.”³ However, as indicated by the record here, SCE has used ratepayer funds to build excessive capacity on its fiber optic network, adding unreasonable expenses to its ratebase. For support, the APD notes that SCE is currently using only 17.8% of its fiber optic network for internal communications and electric system monitoring and automation, leaving the overwhelming majority of this primarily ratepayer funded asset available for sale or lease.⁴ In fact, SCE uses a greater percentage of its network (19.1%) to provide NTP&S than it does its core electric services, and these NTP&S result in 90% of revenues going to the shareholders.⁵ Meanwhile, 63% of the network capacity is unused.⁶ Therefore, while the record here supports a range of sharing ratios to reflect SCE’s overbuild of ratepayer funded assets, TURN supports the APD’s adoption of a 50/50 shareholder/ratepayer sharing mechanism.⁷

III. THE ALTERNATE PROPOSED DECISION APPROPRIATELY REQUIRES SCE TO SUBMIT LEASE ROUTE ORDERS BUT DOES NOT GO FAR ENOUGH TO MITIGATE THE RISKS OF THE OVERLY BROAD STRUCTURE OF THE MASTER LEASE AGREEMENT

TURN supports the requirement that SCE must submit its Lease Route Orders entered under the approved MLA to Communications Division and the direction to Communications Division through the Advice Letter. Even a Tier 1 advice letter allows parties to monitor these

² APD, Conclusions of Law 1.

³ APD, p. 8.

⁴ APD, p. 9.

⁵ *Id.*

⁶ *Id.*

⁷ APD, OP 5.

transactions to ensure fair and transparent competitive access and to protest any advice letters that may need further review.⁸ However, TURN urges the Commission to require that SCE and Verizon submit these advice letters within 10 days of receipt of SCE. TURN is concerned that a 30 day deadline will allow the parties to the Orders to move forward upon signature thus making it more difficult to “undo” if a stakeholder protests a specific Order. By shortening the timeframe for submission, parties can move forward more quickly with regulatory certainty and those reviewing the Order for possible protest will have a meaningful opportunity to protest. We also support the APD’s clear direction to SCE that it must not enter into Lease Route Orders under the protection of the pre-approved MLA that may contain different terms that prohibit non-discriminatory access or allow preferential treatment.⁹ This prohibition goes above and beyond the ability of stakeholders and the Commission to review those Orders and submit possible protests.

However, the APD errs when it finds that the potential safety and competitive concerns raised by this Application and the MLA are “equally implicated by all of SCE’s fiber leases” and that any protections the Commission might implement here are done only out of “an abundance of caution.”¹⁰ It is undisputed that this MLA provides SCE only a right to bid on future Verizon business¹¹ and, therefore, the Application and MLA contain only vague descriptions and details regarding the location, revenue, and scope of future leases. TURN noted in its comments that this Application equates to SCE asking the Commission to approve a “pig in a poke” and that previous fiber leases, including those cited by SCE in its Application, are not analogous to, and do not support, this MLA because those leases cover specific fiber routes and revenue details.¹² The APD acknowledges that CCTA’s comments also suggest that the terms and conditions of the sweeping contract may uniquely impact (or at least make it difficult to assess) competitive impacts such as preferential reservations of space and information sharing.¹³

While the APD accurately states that these issues can be taken up in other proceedings or with the backstop of a Tier 1 advice letter protest, TURN requests that the APD be revised to

⁸ APD, p. 14, 17.

⁹ *Id.*

¹⁰ APD, p. 11, 14.

¹¹ APD, p. 2, 13, FOF 7.

¹² TURN Reply Comments at pp. 1-2, 6-7.

¹³ APD at p. 13.

acknowledge the unique characteristics of this MLA and the risks to ratepayers and competitors posed by approval of these vague agreements. In doing so, the Final Decision can provide guidance for future applications to ensure applicants provide sufficient details to allow the Commission to better assess the safety and competitive impacts of these types of leases.

The APD discussed but rejects TURN's specific proposals for a framework that the Commission could use to review the Lease Route Orders under this MLA. TURN agrees that the APD's requirement for SCE to submit these Lease Route Orders to Communications Division via Advice Letter mitigates some of the concerns raised by TURN and CCTA. However, at a minimum, TURN suggests that the APD be revised to add two elements to this requirement. First, SCE to also submit the Lease Route Orders to Energy Division so that each division can use their expertise to review the Lease Route Orders for safety and competitive concerns. Second, the process should incorporate a subsequent review period initiated by an advice letter filing by SCE half way through the term of the MLA to allow the Commission and stakeholders to review multiple Lease Route Orders as a comprehensive group to allow a "bigger picture" holistic review of the impact of the Orders. If the number of Lease Route Orders submitted by that time is insufficient to allow Staff to conduct a proper review of safety and competitive impacts, Staff should have the authority to postpone the review until a different threshold is met. These changes will bolster the effectiveness of the requirement to submit the Lease Route Orders.

IV. CONCLUSION

TURN urges the Commission to adopt this APD with only the narrow changes recommended above. TURN supports the APD and its clear message that the potential scope and scale of this MLA highlights that SCE's deployment of fiber optic cable in its network cannot be characterized as excess capacity, thus compelling a different revenue sharing treatment for the sales under the MLA. Further, TURN supports the mechanisms adopted by the APD to guard against safety and competitive access concerns raised by this MLA as supported by comments from TURN and CCTA on the record.

Dated: July 25, 2018

Respectfully submitted,

By: _____/s/_____
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Revisions to Alternate Proposed Decision

Revise Findings of Fact

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 solely 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 "right of way" decision, D.98-10-085 but the Commission only has a template Lease Route Order to consider as part of this application process and additional details may be necessary to adequately assess safety and competitive impacts.

Add a FOF, Communications and Energy Divisions should use their separate expertise on safety and competitive issues to monitor the Lease Route Orders submitted by SCE pursuant to this Decision and to conduct a review of the Master Lease Agreement and collective impact of the Lease Route Orders submitted no sooner than half way through the term of the Agreement.

Revise Conclusions of Law

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, but further review by Staff of the Lease Route Orders entered into under this Master Lease Agreement will ensure the Commission monitors any potential impacts on safety and reliability of individual routes and equipment because the Master Lease Agreement does not provide sufficient information about individual routes and equipment requested by Verizon.

6. ~~Out of an abundance of caution,~~ Because the Mast Lease Agreement is broad, SCE should be barred from entering into any agreement under the Master Lease Agreement that prohibits nondiscriminatory access to the lease routes entered into with Verizon

10. SCE should be directed to regularly forward the individual Lease Route Orders to the Commission's Communications Division and Energy Division within three business days of their receipt by SCE and Staff should conduct a review of the MLA and collective Lease Route Orders no sooner than half way through the MLA to consider evolving safety and competitive impacts.

Revise Ordering Paragraphs

3. Southern California Edison Company (SCE) shall submit the individual Lease Route Orders pursuant to the Master Dark Fiber Lease, as modified by this decision, as a Tier 1 advice letter to the Commission's Communications Division and Energy Division at cdcompliance@cpuc.ca.gov and [insert appropriate email] within 30 days of their receipt by

SCE. SCE shall serve copies of the advice letter on the Application 17-02-001 service list and comply with the notice requirements in General Order 96-B, and Staff should conduct a review of the collective Lease Route Orders no sooner than half-way through the term of the Master Lease Agreement to assess potential safety and competitive impacts.