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)

MOTION OF CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS FOR LIMITED PARTY STATUS AND TO ACCEPT AMENDED DECLARATION INTO THE RECORD

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Pursuant to Rule 1.4(a)(4), Cellco Partnership D/B/A Verizon Wireless ("Verizon") respectfully moves the Commission for limited party status to submit the amended declaration in Attachment A ("Amended Román Declaration") into the record.

On February 3, 2017, Southern California Edison Company ("SCE") publicly filed a redacted version of Application 17-02-001. SCE concurrently filed an uncontested motion for leave to file the unredacted version of the application under seal.[1] SCE attached a declaration from Jesús Román on behalf of Verizon Wireless ("Román Declaration") in support of the motion and establishing the confidentiality of the redacted portions of the Master Lease Agreement ("MLA") appended to the application.

On January 9, 2018, the Administrative Law Judge issued a Proposed Decision that would grant SCE's motion.[2]

On July 5, 2018, Commissioner Rechtschaffen issued an Alternate Proposed Decision ("APD") that would deny SCE's motion.[3] After SCE filed its Motion for Leave to File Under Seal in February 2017, the Commission replaced General Order (GO) 66-C with GO 66-D, adopted in D.17-09-023. GO 66-D became effective January 1, 2018 and generally applies only to "information submitted to the Commission on or after January 1, 2018."[4] Notwithstanding that SCE filed its motion under GO 66-C, which was effective at that time, the APD would retroactively apply GO 66-D and deny the motion.

Verizon is a signatory to the MLA but has not sought to become a party to this proceeding. In light of the APD's proposed denial of SCE's Motion to File Under Seal, Verizon now files this Motion for limited party status for the purpose of requesting that the Commission accept the Amended Román Declaration in Appendix A into the record as supplemental support for SCE's Motion to File Under Seal.

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1 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) ("Motion for Leave to File Under Seal").

2 *See* Proposed Decision Approving and Adopting 25/75 Revenue Allocation for Revenues Under the Master Dark Fiber Lease Agreement Between Southern California Edison Company and Verizon Wireless at 17 (Jan. 9, 2018).

3 *See* 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 at 18-22 (July 5, 2018) ("APD").

4 GO 66-D, § 3.1.

Verizon's motion is timely because it was not until the issuance of the APD that it became apparent that the standards in GO 66-D might be applied to the MLA. Because Verizon has a strong interest in the protection of confidential information in the MLA, and because that interest cannot be fully protected by other parties, Verizon files this motion so that the Commission is informed of the factual and legal basis for the protection of the MLA from public disclosure.

I. SCE'S MOTION TO FILE UNDER SEAL IS NOT GOVERNED BY GO 66-D

The Commission should not apply GO 66-D to SCE's Motion to File Under Seal. SCE filed its 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.[5] Although the APD would apply GO 66-D to SCE's Motion for Leave to File Under Seal, Verizon is not aware of the Commission applying GO 66-D in considering 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.[6] 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.[7] 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."[8] Denying SCE's Motion to File Under Seal on this basis, without even giving Verizon and SCE the opportunity to meet the new standard, would be inconsistent with those precedents and violate due process.

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5 *See* APD 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.").

6 *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).

7 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).

8 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.

II. THE REDACTED PORTIONS OF THE MLA CONTAIN PROPRIETARY INFORMATION, INCLUDING TRADE SECRETS, AND ARE EXEMPT FROM DISCLOSURE UNDER THE CALIFORNIA PUBLIC RECORDS ACT

The Román Declaration and Amended Román Declaration establish that the redacted portions of the MLA are exempt from disclosure under the California Public Records Act. The confidential information redacted from the MLA falls into three categories:

(1) **Template Terms and Conditions:** These terms and conditions are the product of years of effort by Verizon's internal business clients and attorneys that support the network organization. They incorporate Verizon's "going-in" positon on numerous commercial and technical issues and reflect Verizon's current view on an acceptable risk allocation between the vendor and Verizon.

(2) **Negotiated Positions:** The negotiated positions reflect Verizon's decisions to alter the risk allocation from the standard found in its templates. If these negotiated positions were made public, this would open the possibility that in future negotiations against Verizon, third party vendors could seek to cherry-pick provisions to their favor and make the argument that they are entitled to the same provisions as SCE.

(3) **Technical Information:** The technical specifications of the fiber and the service that Verizon is purchasing, as well as technical details regarding the installation of the fiber or service by SCE relate to the development of utility fiber infrastructure. The technical details are also competitively sensitive, the disclosure of which would give valuable information regarding Verizon's business to its competitors.

As such, the confidential information redacted from the MLA is protected from disclosure under the Public Records Act as corporate proprietary information, trade secrets, and geophysical or similar information relating to utility systems development.

The Public Records Act exempts corporate proprietary information and trade secrets. Section 6254.15 states: "Nothing in this chapter shall be construed to require the disclosure of records that are . . . corporate proprietary information including trade secrets . . . furnished to a government agency by a private company for the purpose of permitting the agency to work with

the company in retaining, locating, or expanding a facility within California."[9] Because they are subject to an evidentiary privilege,[10] trade secrets are also exempted from disclosure § 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 to refuse to disclose a trade secret under Cal. Evid. Code § 1060.[11] This evidentiary privilege protects trade secrets as defined in Cal. Civ. Code § 3426.1(d).[12] The declarations establish that the confidential information contained in the MLA meets the standards for corporate proprietary information and trade secrets. The template terms and conditions, the negotiated positions, and the technical information are competitively sensitive and Verizon protects them from public disclosure, especially to its competitors. The declarations establish that the template terms and conditions "is the product of years of effort," that it "constitutes valuable 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.[13] The declarations further establish 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.[14] And disclosure of the technical information would provide an economic advantage to Verizon's competitors, revealing the technical, proprietary specifications of the fiber and services Verizon is requesting.[15] As such, this information meets the definition

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9 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).

10 Cal. Evid. Code § 1060.

11 *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)).

12 "'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).

13 Amended Román Declaration at 1; Román Declaration at 1.

14 Amended Román Declaration at 1-2; Román Declaration at 1-2.

15 Amended Román Declaration at 2; Román Declaration at 2.

of a trade secret. Verizon derives independent economic value from the information not being generally known to the public, as it "would be of high economic value to any wireless carrier seeking to compete against Verizon"[16] and disclosure would place Verizon "at a distinct disadvantage."[17] Verizon also has made reasonable efforts under the circumstances, including by restricting internal disclosure, following standard protocols for assessing requests for confidential information, and using confidentiality agreements as a standard practice, to maintain the secrecy of this information.[18]

The redacted information here is of a type that is routinely sealed by courts from public disclosure. For instance, a federal court recently sealed documents that showed "a detailed snapshot of . . . proprietary and non-public information technology infrastructure" where there was concern that public disclosure "may provide hackers or competitors with a roadmap of how [the company] stores its electronic information."[19] Another federal court sealed "portions of [a] source code" where public disclosure "would create a security risk by potentially allowing unauthorized access to or hacking of Apple's products."[20]

In addition, the Public Records Act exempts from disclosure "geophysical data . . . and similar information relating to utility systems development . . . that are obtained in confidence from any person."[21] The facts stated in the declarations establish that the technical specifications of the fiber and the service that Verizon is purchasing and the technical details regarding the installation of the fiber or service by SCE "relate[] to the development of utility fiber infrastructure."[22] This technical information meets the standard of § 6254(e) and is exempted from disclosure.

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16 Amended Román Declaration at 1-2. *See also* Román Declaration at 1.

17 Amended Román Declaration at 2; Román Declaration at 2.

18 Amended Román Declaration at 1-2; Román Declaration at 1-2.

19 *BofI Federal Bank v. Erhart*, No. 15-cv-02353-BAS(NLS), 2016 WL 4595536, at *2 (S.D. Cal. June 22, 2016).

20 *Uniloc United States of Am., Inc. v. Apple Inc.*, No. 18-cv-00362-PJH, 2018 WL 2392561, at *7 (May 25, 2018).

21 Gov't Code § 6254(e).

22 Amended Román Declaration at 2; Román Declaration at 2.

III. THERE IS NO PUBLIC INTEREST BALANCING UNDER § 6255(a) FOR EXPRESS EXEMPTIONS TO THE PUBLIC RECORDS ACT

Section 6255(a) requires an agency to justify withholding any record by demonstrating that either (1) the record is exempt under express provisions of the Public Records Act or (2) "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Where, as here, the redacted information is protected by express provisions of the Public Records Act, namely §§ 6254(e), (k) and § 6254.15, there is no balancing of the "public interest served by not disclosing" the information against the "public interest served by disclosure."[23] 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.[24] And 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.[25]

Here, adequate protection of trade secrets and business proprietary information is crucial for fostering competitive innovation in the fiber market. As such, it is a key consideration for Verizon as it makes decisions regarding additional investments in California related to the deployment of advanced communications technology. Public disclosure would harm the public interest by both hindering technological innovation and reducing the incentive for investment in

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[23] Gov't Code § 6255(a); *see Wilson v. Superior Court*, 51 Cal. App. 4th 1136, 1141 (1996) ("In addition, section 6255, . . . the 'public interest' or 'catchall' exemption, provides a means by which an agency may withhold a public record which would not be exempt under any of the specific exemptions delineated in section 6254, if the agency makes a showing that 'on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.'" (citations omitted)).

[24] *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)).

[25] *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").

fiber infrastructure and services in California. Unless the confidentiality of the Verizon's business proprietary information and trade secrets can be preserved, Verizon has informed SCE that it will avoid the possibility of such disclosure 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, for the customers of other utilities, for the deployment of advanced communications technology, and for the promotion of competition in the broadband market.

Verizon respectfully requests that the Commission grant it limited party status solely for the purpose of requesting that the Commission accept the Amended Román Declaration in Attachment A into the record as supplemental support for SCE's Motion to File Under Seal.

Respectfully Submitted,

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