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 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

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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 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 ("PD" or "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 fiber optic offering has increased to an inappropriate magnitude;
- 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;
- Modify language to clarify that the revenue sharing arrangements considered in D.13-05-010 are not analogous to SCE's NTP&S fiber optic offering given the minimal shareholder investment required in those circumstances;
- Modify language to clarify that SCE may forward the individual Lease Route Orders confidentially to the Communications Division.

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 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

Pursuant to Rule 14.3, SCE respectfully submits these Comments on the Proposed Decision. Attachment A provides SCE's Proposed Findings of Fact and Conclusions of Law. As discussed below, the PD is replete with legal and factual errors and should not be adopted in current form. Instead, SCE's Cal. Pub. Util. Code § 851 application for the MLA should be approved under the gross revenue sharing mechanism ("GRSM") established in D.99-09-070 because it is governed by that decision, meets the criteria the Commission has established for NTP&S, and is no different than SCE's numerous past applications for dark fiber leasing.

I. <u>THE GRSM REFLECTS AN EQUITABLE ALLOCATION OF REVENUE FROM THE LEASING OF DARK FIBER</u>

The PD notes that 73% of SCE's fiber optic network installed since 2011 was funded by ratepayers[1] and concludes that a "25/75 shareholder/ratepayer revenue sharing allocation of gross revenues from leases under the Master Lease Agreement more reasonably reflects that the majority of the infrastructure to offer the services under the Master Lease Agreement was paid

[1] PD at 7.

for by ratepayer funds."[2] Therefore, according to the PD, "ratepayers should receive a majority share of the revenues."[3] These findings are unsupported by the record and are incorrect.

First, as discussed in more detail below, SCE's fiber optic network in rate base was built to support, and is required for, electric utility operations. As such, customers derive significant primary benefits from this investment in the provision of electricity.

Second, the PD's assertion that the "majority" of the infrastructure to offer services under the MLA was paid by customers is conjecture,[4] not supported by record evidence, and does not give sufficient weight to the significant shareholder investment required to lease dark fiber as an NTP&S. SCE's ratepayer-funded fiber optic network is designed to meet the utility's own facilities and needs, not Verizon's or a third party's. Commercial deployment of fiber as an NTP&S offering requires considerable additional investment by shareholders to extend the rate based network by adding facilities to locations required by Verizon or other customers. These additional investments are made by shareholders and are not added to rate base.

From 2011 to 2017, SCE shareholders funded the addition of 123 miles of fiber optic cable at a cost of $14.4 million.[5] By comparison, SCE invested $18.1 million in rate based fiber optic cable over this same period.[6] Under the MLA, SCE anticipates substantial incremental shareholder investments. Verizon will submit orders to lease fibers connecting two Verizon facilities along a particular route. A requested route may consist of existing SCE cable fiber (including fiber in rate base and shareholder-funded fiber) and/or require that new fiber be built at shareholder expense. Where no routes exist, SCE will install new cable, perfect land use rights, and construct any additional facilities necessary to connect the Verizon facilities specified, all at shareholder expense.[7] While SCE cannot quantify the incremental shareholder

[2] PD at 20.

[3] PD at 8.

[4] The proportion of the infrastructure used to provide services under the MLA that will come from existing SCE facilities (rate base and shareholder-funded) or new facilities is not yet known.

[5] 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 03 (Nov. 13, 2017) ("TURN Reply Comments").

[6] *Id.*

[7] Comments of the Southern California Edison Company (U-338-E) on Commissioner Rechtschaffen's September 11, 2017 Amended Scoping Memo and Ruling Regarding Additional Issues to Be Determined at 3 (Oct. 11, 2017) ("SCE Comments"); Application at 5.

investment required to carry out the MLA, SCE anticipates that most of the fiber leased to Verizon under the MLA will be newly built and therefore funded solely by shareholders.

Third, the PD assumes that revenues should be allocated in proportion to the respective investments of customers and shareholders and that the 25/75 split is appropriate because ratepayers funded 73% of SCE's recently added fiber optic network. This is incorrect and contrary to the basic premise of the GRSM. In approving SCE's GRSM, the Commission found:

> 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.[8]

Customers would receive *zero* revenue for rate based fiber optic investments unless shareholders elect to invest additional capital at their own expense and risk. Thus, the equitable allocation of revenue from NTP&S is the amount needed to incentivize shareholders to make those additional investments, not the proportion of assets funded by ratepayers. The GRSM implements that goal by allowing shareholders to retain 90% of gross revenues for active investments and 70% for passive investments, after ratepayers receive the first $16.7 million each year off the top.[9]

The PD makes no finding that the 25/75 shareholder/customer sharing would be sufficient to induce shareholders to make the substantial additional investments in fiber optic facilities needed to carry out the MLA. Nor could the PD make such a finding, as the record contains no evidence to indicate that shareholders would make these investments under any regime other than the existing GRSM, which was designed for this very purpose.

Adoption of the PD's change to the GRSM would have the unintended but unfortunate consequence of making it uneconomic for shareholders to invest additional capital in the fiber optic network and SCE will not go forward with any Lease Route Orders under the MLA. This

[8] 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)).

[9] D.99-09-070, 1999 Cal. PUC LEXIS 653, at *6 & n.4.

outcome would deprive customers of a 10%, risk-free share of gross revenues. Customers have zero downside risk; they only stand to benefit.[10] Shareholders incur 100% of the incremental costs and 100% of the business and liability risks.[11] The GRSM has yielded significant ratepayer benefits. From its adoption in 1999 through 2016, ratepayers received total benefits of $488.2 million.[12] Factoring in taxes and incremental costs that shareholders incur in pursuing NTP&S, ratepayers have received 74% of the total net benefits, while shareholders have received 26%.[13]

The PD's change to the GRSM would also deprive the public of the benefit of additional investment by shareholders that would enable more rapid deployment of 5th generation ("5G") wireless technology, including in underserved communities, and make SCE's existing fiber optic network (both rate base and shareholder-funded) more valuable and useful for other parties, fostering competition.[14] Specifically, for any new fiber cables built under the MLA, SCE will install a higher strand-count cable than the two strands required by Verizon.[15] Since SCE's shareholder-funded dark fiber investments are not dedicated to a single customer or carrier and SCE installs excess capacity, any new dark fiber that SCE constructs at shareholder expense will also be held out to the public for the provision of telecommunications services on non-discriminatory rates, terms, and conditions.[16] Thus, there is additional capacity still available for use by third parties. Moreover, should SCE require the use of its shareholder-funded fiber optic network for utility communication or grid operation, excess capacity can be made available to support SCE's electric service at no cost to customers. All of these benefits would be lost if the PD is adopted, rendering it uneconomic for shareholders to make these incremental investments.

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[10] Application at 7.

[11] TURN Reply Comments Appendix A, Data Request Set A.17-02-001 TURN-SCE-002, Question 01.

[12] Through the combination of FERC transmission rates and CPUC jurisdiction energy rates, SCE's retail ratepayers receive 100% of the ratepayers' share of GRSM revenues. Ratepayers receive $16.7 million of the annual Threshold Amount via FERC and CPUC GRCs. The disposition of the incremental revenue above the $16.7 million annual Threshold Amount (customers' share of the 70/30 and 90/10 passive and active sharing) is submitted in SCE's annual Electric Deferred Refund Account Balance Advice Letter.

[13] TURN Reply Comments Appendix A, Data Request Set A.17-02-001 TURN-SCE-002, Question 01.

[14] SCE Comments at 5.

[15] *Id.*

[16] *Id.*

II. THE GROWTH IN FIBER OPTIC LEASING DOES NOT JUSTIFY A CHANGE TO THE GRSM

The PD's finding that the inventory of excess capacity in SCE's rate base fiber optic network "has increased to an inappropriate magnitude,"[17] and that this growth justifies a change to the GRSM, is unsupported by the record and is erroneous.

Under the GRSM, customers receive the first $16.7 million of gross revenue each year; for any gross revenue in excess of $16.7 million, customers receive 10% for "active" NTP&S and 30% for "passive" NTP&S.[18] All of the incremental costs and expenses associated with SCE's offering of NTP&S are allocated to shareholders.[19] Incremental costs are also periodically reviewed by the Commission for compliance with the Affiliate Transaction Rules.[20]

As noted, the purpose of the GRSM is to provide an incentive to SCE to maximize the value of this excess capacity through NTP&S offerings.[21] The fact that the opportunities to engage in such NTP&S offerings have increased as SCE's fiber optic network has grown to meet electric utility operational needs is all the more reason to keep that GRSM in place – not, as the PD concludes, a reason to alter that mechanism.

The GRSM was not limited to a small volume of NTP&S. On the contrary, in D.98-08-035,[22] the Commission eliminated the prior restriction on the size of NTP&S business activities. Affiliate Transaction Rule VII had previously limited a utility's NTP&S to "less than 1% of the number of customers in its customer base," based on "concerns regarding competition, and . . . concerns that [NTP&S] do not increase to an inappropriate magnitude."[23] In D.98-08-035, the Commission removed the 1% limitation, while requiring that "the utilities meet the other criteria in Rule VII, which criteria, in part, address competitive concerns." In other words, the Commission concluded that its concern regarding effects on competition could be addressed

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[17] PD at 6.

[18] D.99-09-070, 1999 Cal. PUC LEXIS 653, at *6 & n.4.

[19] SCE Comments at 6. SCE applies a "but for" test to determine whether a cost is incremental: If SCE would not have incurred the cost, "but for" the offering of any NTP&S, the cost is deemed incremental. TURN Reply Comments Appendix A, Data Request Set A.17-02-001 TURN-SCE-002, Question 01.

[20] SCE Comments at 7.

[21] D.99-09-070, 1999 Cal. PUC LEXIS 653, at *47-48.

[22] *See* D.06-12-029 (Dec. 14, 2006) (providing the current Affiliate Transaction Rules).

[23] D.98-08-035, 1998 Cal. PUC LEXIS 594, at *31-33.

without imposing a limit on the size of the NTP&S businesses. The Commission recognized the growth potential of NTP&S and the corresponding benefits for ratepayers.

The Commission thereafter approved a settlement agreement between SCE and the Office of Ratepayer Advocates (ORA) that established the GRSM for SCE's NTP&S.[24] Nothing in D.98-08-035, or in the decision approving the GRSM, suggests that it is applicable only to businesses of a small size. On the contrary, the rationale for the GRSM applies directly to fiber optic cable infrastructure: the GRSM creates an incentive for a utility to maximize the economic value of excess capacity via beneficial secondary uses of utility property that do not affect service to customers and that do not expose customers to additional risks.

III. SCE CONSTRUCTS FIBER OPTIC FACILITIES TO MEET UTILITY NEEDS, WHICH PRUDENTLY INCLUDE CONSTRUCTING EXCESS CAPACITY

The PD cites evidence that "SCE installs enough bandwidth to last the utility for the next 15 to 20 years" and that "63% of [SCE's] network is unused capacity," with 17.8% used by SCE and 19.1% used for non-tariffed products and services.[25] Based on this evidence, the PD suggests that the excess capacity reflects a "systemic build-up of assets funded by ratepayers."[26] This conclusion does not follow from the evidence. The existence of capacity in excess of near-term electric utility operational needs 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 "systemic build-up of assets funded by ratepayers"[27] for the purpose of supporting a non-tariffed line of business.

SCE includes in rate base only those fiber optic facilities and routes that are needed for electric utility operations. These facilities are used for "some of [SCE's] most critical communications"[28] as part of SCE's utility operations, consistent with Cal. Pub. Utility Code § 451. In particular, SCE's fiber optic facilities provide "for internal communications and electric system monitoring and automation."[29]

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[24] D.99-09-070, 1999 Cal. PUC LEXIS 653.

[25] PD at 18-19.

[26] PD at 6.

[27] *Id.*

[28] D.12-11-051, at 404 (Dec. 10, 2012).

[29] TURN Reply Comments Appendix A, Data Request Set A.17-02-001 TURN-SCE-01, Question 01.

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 industry utility standards. SCE does "not engineer[] the system to just meet the bare minimum" of current utility needs.[30] 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.[31] 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."[32]

The percentage of SCE's fiber network capacity currently used for electric utility operations does not indicate that SCE has engaged in a "systemic build-up of assets funded by ratepayers"[33] for the purpose of supporting a non-tariffed business. 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.[34] Similarly, there is no record evidence to suggest that SCE decides to add fiber facilities to rate base based on the business opportunities of Edison Carrier Solutions ("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

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[30] 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; PD at 7.

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

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

[33] PD at 6.

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

higher capacity fiber, resulting in excess capacity in the near-term. That near-term excess 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."[35]

IV. THE PD'S MODIFICATION OF THE GRSM WOULD FRUSTRATE SCE'S REASONABLE INVESTMENT-BACKED EXPECTATIONS

In reliance on the GRSM, shareholders have invested nearly $700 million between 1999 and 2016 in non-rate based assets and other incremental costs for NTP&S offerings,[36] including investments in physical assets like fiber optic cables. SCE has made these investments with the expectation that it would retain 70%-90% of the gross revenues from NTP&S, after customers receive the first $16.7 million each year. The PD, however, would completely change the economics of these investments, transforming dark fiber from a program in which SCE retains 90% of gross revenues to one in which it retains only 25%, a difference of 65 percentage points. This formula not only renders future shareholder investments uneconomic, but also impacts past investments, which SCE expected to amortize via the 90% gross revenue formula. This sudden change in policy would be contrary to the public interest and fundamentally unfair.

V. THE PD IS INCONSISTENT WITH PAST DECISIONS

The PD's modification of the products and services (specifically, dark fiber leases) governed by the GRSM is a stark departure from previous Commission decisions approving SCE's § 851 applications for dark fiber leases. In approximately 30 previous applications and advice letters, SCE requested Commission approval of such leases under the same 90/10 revenue sharing mechanism as the present application. Each of those previous filings was approved as filed.[37] The PD does not even mention those prior Commission decisions, let alone explain why it would so significantly depart from the approved ratemaking.

The PD also departs from past Commission decisions involving other investor-owned utilities. The PD states that in D.13-05-010 the Commission "rejected SDG&E's proposed 90/10

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

[36] SCE submits Periodic Reports of Utility NTP&S annually in Compliance with Rule VII.H of the Affiliate Transaction Rules (D.06-12-029). These reports provide the incremental costs (investment) for all of SCE's NTP&S. SCE submitted its most recent report to the Energy Division for 2016 on June 30, 2017.

[37] *See, e.g.*, D.11-03-038; D.10-05-045 (May 20, 2010); D.04-04-002 (Apr. 1, 2004).

shareholder/ratepayer allocation of gross revenues from existing [NTP&S] . . . on the basis that the infrastructure or components to offer existing service offerings . . . do not require significant shareholder involvement or additional shareholder investment."[38] The cited decision, however, did not involve fiber, but instead "replacing parts on natural gas appliances, pipeline services, rental of property, and meter testing and repair services."[39] Because "the infrastructure or components are already in place to offer these existing service offerings," SDG&E "just need[ed] to engage in more marketing and promotion."[40] These offerings are unlike SCE's fiber network which, as noted, requires significant additional shareholder investment. Moreover, in D.13-05-010, the Commission did not adopt a 25/75 shareholder/customer sharing. Instead, by rejecting this revenue sharing proposal, the Commission left in place the existing practice where NTP&S revenues are forecasted in the General Rate Case to offset revenue requirement and shareholders "receive all of the revenues if the actual revenues exceed the test year . . . forecast."[41]

More apposite is D.99-04-021, where the Commission approved a revenue sharing mechanism for Pacific Gas and Electric Company's (PG&E) NTP&S. This decision adopted PG&E's proposal to share *net* revenues for any new NTP&S offering 50/50 between customers and shareholders. Under this mechanism, "all reasonable expenses related to the provision of new non-tariffed offerings, including corporate taxes"[42] are deducted before sharing occurs. This revenue sharing mechanism is considerably more generous to shareholders than SCE's existing *gross* revenue sharing mechanism, let alone the PD's allocation. SCE's GRSM has directed 26% of *net* revenues to shareholders and 74% to customers.[43] PG&E shareholders receive nearly twice as much at 50% of net revenues. The PD's 25/75 shareholder/customer split would yield far less to shareholders. There is no basis for treating SCE so much worse than PG&E. SCE's GRSM, however, is superior for ratepayers compared to the PG&E model because SCE's GRSM is based on gross revenue. In adopting the GRSM, the Commission noted that "Edison and ORA agree that a sharing mechanism based on gross revenue is preferable to a net revenue sharing

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[38] PD at 8.

[39] D.13-05-010, at 1011 (May 9, 2013).

[40] *Id.* at 1022.

[41] *Id.* at 1020.

[42] D.99-04-021, 1999 Cal. PUC LEXIS 228.

[43] TURN Reply Comments Appendix A, Data Request Set A.17-02-001 TURN-SCE-002, Question 01.

mechanism because it reduces the level of regulatory oversight required and provides utility customers with benefits even if the overall product or service has negative net values."[44]

The PD also cites the revenue sharing mechanism for commercialization of customer-funded research and development that was also considered in D.13-05-010 and, unlike the NTP&S proposal, was adopted.[45] SDG&E "propose[d] a sharing mechanism for any RD&D investments or activities that result in royalties or revenues. . . . [of] 60% (ratepayer) and 40% (shareholders)."[46] The Commission modified this proposal by 15 percentage points for a sharing mechanism of 75% for ratepayers, 25% for shareholders.[47] This decision is not relevant to SCE's dark fiber leasing and, even if it were, provides no justification for the PD's 65 percentage point modification. The only shareholder investment necessary to commercialize the RD&D was marketing costs. Indeed, the Commission noted that "SDG&E propose[d] the sharing mechanism to provide itself with an incentive to search out possible vendors who may have a profitable product or service to offer" and it "is equitable in that it will reward ratepayers for providing all of the funds for the venture, while providing an incentive to SDG&E to market such a venture."[48] This modest level of shareholder investment is completely unlike the large capital investments SCE makes in order to pursue dark fiber leasing.

VI. MODIFICATION OF THE GRSM ALLOCATION IS NOT PROPERLY BEFORE THE COMMISSION IN THIS PROCEEDING

The Commission cannot consider issues "beyond the scope of [those] identified in the scoping memo."[49] It is an abuse of discretion and a violation of SCE's procedural rights for the Commission to consider issues not identified in the scoping memo.[50]

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[44] D.99-09-070, 1999 Cal. PUC LEXIS 653, at *5.

[45] PD at 8.

[46] D.13-05-010, at 594.

[47] *Id.* at 600.

[48] *Id.*

[49] *S. Cal. Edison Co. v. Pub. Utils. Comm'n*, 140 Cal. App. 4th 1085, 1106 (2006).

[50] *See id.* at 1104-06 (holding that the Commission "failed to proceed in the manner required by law" in considering an issue beyond the scoping memo, in violation of its own rules, and giving parties only three business days to respond); *City of Huntington Beach v. Pub. Utils. Comm'n*, 214 Cal. App. 4th 566, 592-93 (2013) (holding that the Commission abused its discretion and violated the parties' "procedural rights" by "purporting" to decide an issue on reconsideration where that issue was not included in the scoping memo and "the [C]omission did not hold proceedings designed to entertain the question").

Here, the initial scoping memo identified the issues as: "Is the proposed lease adverse to the public interest?" and "Does the proposed lease require environmental review pursuant to the California Environmental Quality Act?"[51] The Assigned Commissioner amended the scoping memo, noting that certain other "related proceedings require us to take a closer look at the over-arching issue of whether the proposed Master Lease Agreement here is consistent with the revenue sharing mechanism set forth in D.99-07-070 [sic] and in the public interest." [52] The amended scoping memo identified additional specific issues, including "Does SCE's application meet the requirements for revenue sharing established in D.99-07-070 [sic]?" and "If this is dark fiber, is SCE's proposed 90/10 split reasonable?"[53]

The scoping memo as amended asks whether the GRSM covers the MLA, which it unambiguously does, not whether D.99-09-070 should be modified to adopt a sharing mechanism other than the GRSM for the MLA. In D.99-09-070, the Commission adopted the GRSM for *all* of SCE's NTP&S offerings, including dark fiber leasing. Thus, the Commission already decided the appropriate sharing allocation to apply. The question here, as identified in the amended scoping memo, is only whether the MLA meets NTP&S requirements to be covered by that established framework. The PD's consideration of NTP&S revenue sharing mechanisms other than the GRSM and adoption of a 25/75 shareholder/customer allocation was not identified in either scoping memo and is not properly before the Commission.

If the Commission had properly clarified the expanded scope of this proceeding, SCE would have sought to augment the record with additional evidence supporting the equitable nature of the GRSM and the detrimental impact to customers and the public of alternative sharing mechanisms insufficient to induce additional shareholder investment. While SCE believes there is sufficient record evidence to support the foregoing arguments, to extent the record is incomplete one "cannot fault . . . parties for failing to respond to the merits . . . absent an order amending the scope of issues to include the new proposals."[54]

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[51] Assigned Commissioner's Scoping Memo and Ruling at 2 (Apr. 27, 2017).

[52] Assigned Commissioner's Amended Scoping Memo and Ruling at 2 (Sept. 11, 2017).

[53] *Id.* at 3-4.

[54] *S. Cal. Edison*, 140 Cal. App. 4th at 1106.

VII. BEFORE MODIFYING THE GRSM ALLOCATION ADOPTED IN D.99-09-070, THE COMMISSION MUST COMPLY WITH SECTION 1708

The Commission approved the GRSM in D.99-09-070. Dark fiber leasing was an existing NTP&S at that time and is identified in the agreement, appended to the decision; it is classified as "active" and is subject to the GRSM.[55] As such, the MLA is clearly governed by the GRSM. However, to comply with § 851, SCE must receive approval before leasing "property necessary or useful in the performance of its duties to the public." Accordingly, instead of recurrently seeking approval for individual routes, SCE submitted an application seeking Commission authorization to lease certain fiber optic cables under the MLA.

SCE takes the position that its dark fiber leasing is governed by D.99-09-070 and the PD agrees.[56] Yet the PD concludes that although dark fiber leasing meets NTP&S criteria, applying the GRSM to the MLA would be "unreasonable."[57] Thus the PD modifies D.99-09-070 by carving out dark fiber leasing under the MLA for different treatment and a revenue sharing mechanism other than the GRSM.[58] While the Commission has broad authority under Cal. Pub. Util. Code § 1708 to "rescind, alter, or amend" its prior decisions, it must provide "notice to the parties . . . with an opportunity to be heard as provided in the case of complaints."[59] Moreover, there are special considerations here because "the Commission has articulated policies that favor settlement . . . [and] any alteration to a decision based on a settlement must be made only after careful consideration of the specific provisions of the agreement."[60] Since the PD rescinds D.99-09-070 with respect to dark fiber leasing under the MLA, the Commission must first comply

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[55] D.99-09-070, 1999 Cal. PUC LEXIS 653, Attachment A (identifying "Dark fiber on fiber optic system" as an "active" NTP&S offering).

[56] *See* PD at 5 ("D.99-09-070 adopted a settlement between SCE and the Office of Ratepayer Advocates (ORA) that established a revenue sharing allocation for SCE's qualifying non-tariffed products and services, including a 90/10 shareholder/ratepayer sharing allocation for revenues from SCE's leasing of dark fiber.").

[57] PD at 8.

[58] *See* D.08-10-017 at 21-22, 2008 WL 4516408 (Cal. P.U.C. Oct. 2, 2008) (noting that when a decision appends a settlement agreement, an alteration of the agreement is an alteration of the decision).

[59] Cal. Pub. Util. Code § 1708. *See Cal. Trucking Assn. v. Pub. Utils. Comm'n*, 19 Cal. 3d 240, 245 (1977).

[60] D.96-05-037, 1996 Cal. PUC LEXIS 652, at *4. *See also* D.93-03-075, 1993 Cal. PUC LEXIS 176.

with the requirements of § 1708. Yet, as already discussed, at no point did the Commission make clear, in the scoping memos or otherwise, its intent to reconsider D.99-09-070.[61]

VIII. CONFIDENTIALITY ISSUES

The PD requires SCE to forward individual Lease Route Orders to the Commissions Division within three days of receipt.[62] Lease Route Orders include technical specifications of the fiber and services Verizon is purchasing, as well as its installation. The public disclosure of this information would put Verizon at a competitive disadvantage and also creates cybersecurity risks for both Verizon and SCE. The PD should be modified to clarify that LROs can be submitted confidentially.

IX. CONCLUSION

The PD 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.

Date: January 29, 2018

Respectfully Submitted,

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[61] *See, e.g.*, D.00-07-046, 2000 Cal. PUC LEXIS 590.

[62] PD at 22 (OP 2).

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 "right-of-way" 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. ~~A 25/75 shareholder/ratepayer revenue sharing allocation of gross revenues from leases under the Master Lease Agreement more reasonably reflects that the majority of the infrastructure to offer the services under the Master Lease Agreement was paid for by ratepayer funds and ratepayers, consistent with D.13-05-010, our most recent decision to adopt a revenue sharing mechanism.~~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.

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 Right-of-Way 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 to the Commission's Communications Division within three business days of their receipt by SCE.

6. ~~11.~~ SCE's motion to file its unredacted application under seal should be 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 subject to a 25/75 shareholder/ratepayer revenue sharing allocation of revenues and conditioned upon SCE's regular submission of the Lease Route Orders to the Communications Division.~~