

**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)

**RESPONSE OF THE UTILITY REFORM NETWORK TO THE MOTION OF
SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO WITHDRAW
THE APPLICATION**



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APPLICATION**

I. INTRODUCTION AND SUMMARY

Pursuant to Rule 11.1(e) of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), The Utility Reform Network (“TURN”) files this response to the Motion of Southern California Edison Company (“SCE”) requesting permission to withdraw the instant application (“Motion”).

The Commission should deny SCE’s Motion because, at this point in a contested proceeding, SCE may not unilaterally withdraw its original application. Allowing SCE to withdraw its application would effectively allow SCE to “process shop,” and the issue of whether SCE’s non-tariffed dark fiber optic offering meets the requirements for revenue sharing established in D.99-09-070, an issue well supported by the record, addressed by both the PD and the APD, and in the public interest to address, would not be resolved.

II. DISCUSSION

SCE seeks permission to withdraw the instant application, claiming that circumstances have changed and that diminished business opportunities render the application moot.¹ At this point in the proceeding, with a record developed on the disputed issues, the Commission should exercise its authority to move forward with the proceeding. In similar situations, the Commission has consistently denied the requests of applicants to withdraw their applications, stating that, “only the Commission has the authority to close or dismiss a contested proceeding,” especially if the applicant is attempting to withdraw for the purpose of avoiding an adverse

¹ SCE’s Motion to Withdraw, p. 1.

outcome.² Thus, at this point SCE may not unilaterally withdraw its original application under the circumstances here.

Furthermore, in D.92-04-027, the Commission noted that “submission of a matter upon an evidentiary record and obtaining a proposed decision within the meaning of Section 311(d) involve steps which clearly make termination a matter of the Commission’s discretion.”³ Here, not only is there a Proposed Decision (“PD”),⁴ but an Alternate Proposed Decision (“APD”) has also recently been issued.⁵ Significant amounts of resources, including the Commission’s own resources, have been devoted to this application since February of 2017. The Commission should not ignore the progress made here or the public interest in moving forward on this issue and allow SCE to unilaterally withdraw its application at this point.

SCE cites instances where the Commission exercised its discretion to permit withdrawal of an application and claims that the instant application is at a similar procedural stage.⁶ However, the instances cited by SCE are not analogous. In the cited cases, if the applicant chose at a later date to seek relief similar to that in the withdrawn application, the Commission knew the matter would return as the subject of a new application (for example, a new application seeking approval of a merger or long-term contract).⁷ Here, SCE is explicitly seeking to create an outcome that would permit it to bypass the procedural process of an application, but obtain the same result (approval of future non-tariffed dark fiber leases) through the much less

² D.04-16-016, pp. 3, 7, reaffirming D.92-04-027.

³ D.92-04-027, 1992 Cal. PUC LEXIS 340, *3.

⁴ Proposed Decision of ALJ Yacknin, issued January 9, 2018.

⁵ Alternate Proposed Decision of Commissioner Rechtschaffen

⁶ SCE’s Motion to Withdraw, p. 3.

⁷ SCE’s Motion to Withdraw, p. 3. Indeed, the examples provided by SCE are applications for approval of mergers on a national scale that were no longer moving forward (Comcast/Time Warner) or for transactions supported by federal rules that had been changed (interconnection tariffs) and in each case the Commission could not move forward.

transparent advice letter process.⁸ The Commission should not permit SCE’s attempt to “process shop” under the guise of declaring the current application moot, even as it concedes that it may seek approval of related leases in the future through a non-application process.⁹

In addition, SCE implies in its Motion that it seeks to withdraw its application in order to avoid a decision on the issue of whether the gross revenue sharing mechanism applicable to its non-tariffed products and services (“NTP&S”) should be “changed.”¹⁰ This is a continuing misstatement of the issue and scope of this proceeding, as no party has proposed any “change” to the sharing mechanism applicable to activities that are appropriately treated as NTP&S. Instead, the issue here is whether SCE’s fiber optic offering should be characterized as a non-tariffed product and service, and, if not, what revenue sharing is reasonable under the circumstances.¹¹ Both the PD and APD agree. The PD notes, “The record demonstrates that SCE’s non-tariffed fiber optic offering has increased to an inappropriate magnitude.”¹² The APD similarly states,

The record demonstrates that SCE’s non-tariffed dark fiber optic offering has reached a level far greater than that envisioned for non-tariffed product or service (D.97-12-088, as amended by D.98-08-035), and on which the 90/10 shareholder/ratepayer revenue sharing is based (D.99-09-070).¹³

Thus, the Commission should not leave this issue unaddressed by allowing SCE to withdraw its application. The underlying facts, fully supported by the record here, will not change with a mere shift in process, and SCE’s proposed advice letter process for this transaction is not conducive to effectively addressing or resolving this issue. At best, the Commission would have to address this issue on a piecemeal basis, one advice letter at a time. At worst, the Commission

⁸ SCE’s Motion to Withdraw, pp. 4 – 5.

⁹ SCE’s Motion to Withdraw, pp. 4-5.

¹⁰ SCE’s Motion to Withdraw, p. 5.

¹¹ TURN Comments, pp. 3 – 6.

¹² PD, p. 6.

¹³ APD, p. 9.

would not be able to effectively address this issue at all under SCE's proposed advice letter process in lieu of this application.

III. CONCLUSION

For the foregoing reasons, TURN recommends that the Commission deny SCE's motion to withdraw its application.

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Respectfully submitted,

/S/

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