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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

**Communications Division
Carrier Oversight & Programs Branch**

**RESOLUTION T-17270
June 23, 2011**

R E S O L U T I O N

Resolution T-17270. Verizon California Inc. (U-1002-C) requests authority to deviate from Public Utilities Code Section 320 requiring undergrounding of aerial facilities along Scenic Highway 243 in Riverside County near the towns of Banning and Idyllwild.

By Advice Letter No. 12414 dated June 18, 2009.

Summary

On June 18, 2009, Verizon California Inc. (Verizon) requested by Advice Letter (AL) 12414 a deviation from undergrounding requirements of Public Utilities Code Section ¹ (Section or §) 320 which requires that all communications or electric utility facilities within 1,000 feet of a scenic highway be placed underground. Verizon is requesting this deviation for approximately 13,199 feet of aerial facilities along Scenic Highway 243 near the towns of Banning and Idyllwild in Riverside County.

This resolution imposes a penalty on Verizon in the amount of \$5,000 for violating § 320. The request for deviation is approved in accordance with Decision (D.) 80864, conditional upon Verizon paying the specified fine amount and submitting a plan to the Commission for future compliance for California Scenic Highways.

Background

Section 320 was enacted in 1971 within Chapter 1697, and reads in part as follows:

The legislature hereby declares that it is the policy of this state to achieve, whenever feasible and not inconsistent with sound environmental planning, the undergrounding of all future electric and communication distribution facilities which are proposed to be erected

¹ All citations are to the Public Utilities Code unless otherwise indicated.

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in proximity to any highway designated a state scenic highway pursuant to Article 2.5 (commencing with Section 260) of Chapter 2 of Division 1 of the Streets and Highways Code and which would be visible from such scenic highways if erected above ground. The Commission shall prepare and adopt by December 31, 1972, a statewide plan and schedule for the undergrounding of all such utility distribution facilities in accordance with the aforesaid policy and the rules of the Commission relating to the undergrounding of facilities.

The Commission shall require compliance with the plan upon its adoption.

The Commission is responsible for the administration of § 320. After hearings were conducted in Case 9364, the Commission through state legislation, implemented D. 80864, which states:

In order to facilitate administration, letter requests for deviations² will be accepted, reviewed by the Commission staff and, where appropriate, approved by Commission resolution. (74 CPUC 457, Decision 80864)

D.80864 stipulates that no communications or electric utility shall install overhead distribution facilities "in proximity to" and "visible from" any prescribed corridor on a designated scenic highway in California unless a showing is made before the Commission and a finding made by the Commission that undergrounding would not be feasible or would be inconsistent with sound environmental planning. D.80864 also defines "in proximity to" as being within 1,000 feet from either edge of the right-of-way of a designated state scenic highway.

D.80864 further stipulates that when repairs or replacement of existing overhead facilities in the same location do not significantly alter the visual impact of the Scenic Highway, they should not be considered as new construction and need not be converted to underground.

Notice/Protests

Verizon's AL 12414 was filed on June 18, 2009, and appeared in the Commission's Daily Calendar on July 10, 2009. CD staff found Verizon's initial service list filing to be insufficient, and therefore, requested Verizon to file a more comprehensive list to

² In its filing, Verizon refers to its request for a "waiver". The language in Section 320 is "deviation".

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include additional parties. Verizon complied with this request by filing supplemental AL 12414a on September 18, 2009, which included the revised Service List.

On November 23, 2009, Stephen Kalish, a resident of Mono County, filed a protest to the Verizon's AL 12414a, requesting the Commission deny the deviation request and require Verizon to underground the telecommunications facilities.

Mr. Kalish asserted that Verizon provided insufficient notification to himself and other interested parties and questioned why Verizon was asking for relief. He further claimed that Verizon provided no documentation from local government agencies supporting the project; no environmental planning and visual impact analysis, poor project description, unreasonable cost analysis and did not file for a request to deviate from § 320 with the Commission.

On December 2, 2009, Verizon responded to Mr. Kalish's protest asserting that all information requested by Commission staff had been provided and the relief requested is consistent with law and Commission precedent.

Discussion

The Commission has evaluated this deviation request considering the following factors: (1) the nature of the project; (2) local government recommendations; (3) visibility, aesthetics and environmental impact; and (4) economic feasibility. Our recommendation is based on tangible evidence and analysis of these factors.

Nature of the Project

This project includes four separate placements of overhead distribution facilities along Scenic Highway 243 in Riverside County from mile marker 3.43 to mile marker 17.40 which are summarized as follows: ³

Section	Description	No. of Customers	Highway 243 Mile Marker
One	4,435 feet of cable on existing poles from Marian View Drive to Ridge View Drive at approximately 5,600 feet elevation	359	3.43 to 4.27
Two	1,848 feet of cable on existing poles from Jameson Drive to Point of Rocks Road at	105	4.75 to 5.10

³ In AL 12414, Verizon did not organize the sections of cable in mile markers from low to high. Instead, Verizon denotes Section 1 as mile marker 4.75 to 5.10 and Section 2 as mile marker 3.43 to 4.27. For purposes of this resolution, CD has changed the Sections in order of mile markers from low to high.

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	approximately 5,600 feet elevation		
Three	3,696 feet of aerial cable on existing poles located between Rock Glen Canyon and Round Robin Drive at approximately 5,800 feet elevation	34	9.25 to 9.95
Four	3,220 feet of aerial cable on existing poles located from 800 feet south of Mellor Ranch Road at approximately 5,000 feet elevation	16	16.79 to 17.40

Verizon requests a § 320 deviation for an approximate 13,199 feet or approximately 2.5 miles in four separate sections of overhead distribution facilities along Scenic Highway 243. Verizon placed the overhead distribution facilities at various intervals between 1976 through 1996 on existing electric utility poles. The equipment is collocated with electrical equipment, and in some cases, cable equipment from the local cable operator.

On November 2, 2010, CD conducted a site visit of the sections of Highway 243 relevant to this project. CD staff photographed the sections in AL 12414 and documented the existing facilities already in place along Highway 243. The existing facilities include electrical, telephone overhead distribution facilities and, in some locations, cable television cable. Also attached to the telecommunications and cable television cable, in some locations, are cylinders made of aluminum and other materials. The cylinders might be splice cases that house connections between cables or they can be pole mounted terminals that connect cable to service drops serving customers premises. These cylinders are approximately six inches round and twelve to eighteen inches in length.

Verizon has placed pedestals in at least two of the four sections along Highway 243. Pedestals provide access to telecommunications cable along underground cable installations. The pedestals observed were approximately four feet tall and eight inches wide and twelve inches in depth.

CD did observe that some of the pedestals had labels with the name General Telephone, a predecessor of Verizon, and the pedestals did not appear to be damaged given their age. Also, some of the pedestals appeared to be set back from the road. CD takes issue with Verizon that pedestals are not an option along Highway 243 as Verizon asserted in AL 12414: "There is little to no shoulder to protect underground facilities in much of these areas, which include highly mountainous, dense forest area subject to heavy snow fall, which could delay restoration of service if facilities were undergrounded. In addition, any pedestals necessary for undergrounding would be vulnerable to snow removal equipment."

Local Government Recommendations

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Verizon stated in AL 12414 that Riverside County Planning Department was sent a copy. CD conducted an analysis of those parties that are impacted or might be impacted by this § 320 waiver request. These additional parties were included in the AL 12414a Service List.

On August 4, 2009, CD requested additional information from Verizon to further process their request for deviation from § 320. In response to this Data Request, Verizon was unable to provide any opinions from local government agencies to support their project in accordance with D.80864. ⁴

Visibility, Aesthetics and Environmental Impact

The types of telecommunications cable placed on the above sections on Highway 243 are as follows:

Section	Aerial Cable Along Section (Cable type # Pair/Gauge)	Cable Diameter	Section Start Pole No.	Section End Pole No.
One	AE 100/26	.70"	37113CWT	18386CWT
	DE 400/26	1.30"		
	DE 100/19	1.50"		
	SS 300/26	1.25"		
	UEF 400/19	2.00"		
	AE 200/24	1.20"		
Two	AE 25/26	.50"	217037S	217045S
	AE 100/24	.91"		
	AE 200/24	1.25"		
Three	AE 25/26	.50"	221689S	1857345E
	AE 100/24	.91"		
	AE 200/24	1.25"		
Four	AE 25/19	.75"	1571565E	4212957E

Legend for Verizon Cable Designations in Above Chart	
AE	Air core plastic insulated cable non-filled
DE	Metallic shielded cable plastic insulated non-filled
SS	Stalpath paper insulated cable non-filled
UEF	Underground filled cable plastic insulated - may have been

⁴ Ordering Paragraph 3 (B) "Respondents shall review with, and seek an expression of opinion from, the appropriate local governmental agency prior to requesting Commission authorization for deviation from the requirements of paragraph 1 of this order."

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	used if ordinary cable was not in stock at time of installation
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Portions of Highway 243 from Highway 74 to the Banning city limit received designation as a scenic Highway on March 21, 1972, which include the locations above.

Based on our visual inspection, CD does not believe an order to underground the telecommunications cable is necessary to reduce the overall negative visual impact of all the cables. Therefore, CD does not recommend ordering Verizon to underground any of the overhead transmission facilities, even though Verizon has placed cable underground along Highway 243.

Economic Feasibility

Verizon Placement Costs: Highway 243, Riverside County		
	Overhead Deviation	Underground Requirement
Cost to Install 13,199 feet of cable	\$383,687	\$1,135,104
Cost Per Foot	\$29.07	\$86.00
Underground to Overhead Ratio	3:1	
Cost Differential	\$751,417	

The aerial facilities were placed by Southern California Edison prior to Verizon’s additional facilities. The undergrounding of these facilities will not remove the existing Southern California Edison facilities.

Violation of Public Utilities Code, Fines, Penalties and Remediation

Violations of Public Utilities Code can result in the imposition of fines. In D.98-12-075⁵ the Commission concluded that “disregarding a statutory, or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.” Section 702 states: “Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.” As set forth below, CD finds that Verizon violated this rule.

⁵ Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates Adopted by the Commission, April 9, 1998.

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It was not until June 18, 2009, that Verizon requested authority to deviate from the undergrounding requirements nineteen years post-construction of aerial facilities along Highway 243. Verizon filed AL 12414 requesting a deviation waiver from § 320 after inquiries from CD staff. Moreover, because Verizon failed to stay abreast of the Commission directives governing this project, Verizon was negligent, thus violating § 320.

Verizon does not contest that the aerial facilities were constructed in violation of § 320 but Verizon does not propose a remedy other than requesting this deviation. CD staff asserts that prudent practice requires all public utilities take reasonable steps to ensure compliance with Commission directives. This includes staying abreast of all applicable laws and regulations regarding telecommunications carriers. CD staff finds Verizon in non-compliance for failure to meet the requirements of § 320.

Remediation Efforts for Future Compliance

Verizon's non-compliance with D.80864 and § 320 is unacceptable. It is Verizon's responsibility as a regulated carrier to comply with all CPUC codes and regulations specific to California Scenic Highways. Verizon has provided no reasonable justification to excuse its inability to meet the requirements mandated by § 320. Therefore, requiring Verizon to submit a written plan for future compliance with § 320 within Verizon's territory is appropriate.

Verizon would benefit from having a planned course of action for future proposed construction in designated state scenic highway areas protected by § 320. The purpose of the statute is to protect California's natural beauty and environment.

The submitted plan should contain all of the actions necessary for proposed construction of communications facilities including procedures for:

- Discerning whether proposed construction of facilities is within a Designated State Scenic Highway area.
- Obtaining permits and/or authorization from government agencies, including a list of government agencies from which permits and/or authorization would be necessary.
- Providing notification to government agencies with interest, including the Commission, and facilitation for public comment by interested parties.
- The plan shall be submitted to the Commission within 60 days of this Resolution.

Penalties for Failure to Apply for § 320 Exemption Before Construction

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Under § 2107, the Commission has regulatory authority to assess a penalty ranging from \$500 to \$20,000 per offense, for which a penalty has not otherwise been provided. Furthermore, § 2108 states that each day that a violation continues or various parts of a project may stand as separate and distinct violations in and of themselves for the purpose of assessing fine amounts. D. 98-12-075 serves as a guide in assessing a suitable penalty for violations of the Commission's rules and regulations and states that "the purpose of a fine is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others." As they apply to this case, these criteria will be considered in this analysis: 1) severity of the offense; 2) conduct of the utility; 3) financial resources of the utility; 4) totality of the circumstances; and 5) Commission precedent.

CD Staff has calculated a fine of \$5,000 for operating without a deviation according to the requirements of § 320 Designated Scenic Highways in California. The following sections provide a discussion and justification of this penalty amount.

1. Severity of the Offense

In D. 98-12-075 the Commission found that the penalty amount should be commensurate with the severity of the violation. To determine the severity of the offense CD considered: (a) physical harm, (b) economic harm, (c) harm to the regulatory process, and (d) the number and scope of violations.

a. Physical Harm

CD did not find that Verizon significantly impaired the natural beauty of Highway 243.

b. Economic Harm

Verizon unlawfully constructed facilities without expending resources to secure necessary exemptions. As these telecommunications facilities have been and are currently in use and generating income, Verizon gained a competitive and/or operational benefit by violating § 320.

c. Harm to the Regulatory Process

In D.98-12-075 the Commission concluded that "disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity." There is no evidence to show that Verizon, as a regulatory entity, tried to file a deviation request prior to 1976. There is no evidence to show that Verizon tried to prevent this situation from occurring but

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rather was negligent in their failure to observe Commission rules and statutes governing scenic highways. Such negligence undermines the proper functioning of the regulatory process. CD finds that Verizon was negligent and disregarded § 320 and considers the offense severe according to D.98-12-075.

d. Number and Scope of Violations

Verizon has submitted one of four requests for deviation in violation of § 320, all filed after construction of the aerial facilities. These requests show a pattern of negligent behavior that consistently fails to adhere to Commission laws and regulations that protect scenic highways. The magnitude of these violations suggests the continuance of illegal practices.

2. Conduct of the Utility

In D.98-12-075, the Commission held that the size of the fine should also take into account the utility's conduct in preventing, detecting, and resolving the violation.

Prior to filing a request for deviation from § 320, June 18, 2009, with the Commission, Verizon did nothing to prevent or deter the construction of aerial facilities along Highway 243 in Riverside County. Rather, a resident of Mono County filed a complaint with the Commission to address Verizon's failure to meet the requirements of § 320. Consequently, CD asked Verizon in 2008 to determine if there were any other instances in California where Verizon had deployed overhead distribution facilities subject to § 320 requirements.

Verizon complied with this request and undertook an analysis to identify all Scenic Highways in Verizon service territory; placements of overhead distribution facilities along any Scenic Highway after the highway received such designation; and any associated § 320 waivers granted by the Commission. This analysis identified Scenic Highway 243 in Riverside County along which Verizon or its predecessor company GTE placed overhead distribution facilities without obtaining a waiver pursuant to § 320. Verizon filed AL 12414 to address this violation with no remedy for future compliance.

3. Financial Resources of the Utility

CD has evaluated Verizon's financial records for 2008-2009 to assess the company's financial resources to pay the penalty amount. Based on the chart below, Verizon has the resources to pay the recommended fine by CD.

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Net Income - Verizon Communications, Inc. and Subsidiaries (2009 Annual Report)	2009 - \$10.4 billion 2008 - \$12.6 billion 2007 - \$10.6 billion
§ 320, D.80864	Violated from 1976 through 1990
§ 2107, authority to assess penalty	Authorizes fines of \$500 to \$20,000 per each offense
Imposed Penalty	\$5,000
Total Fine Amount	\$5,000

4. Totality of the Circumstances in Furtherance of the Public Interest

In D.98-12-075, the Commission held that the fine level should be set such that it effectively deters further unlawful conduct by the company, while being specifically tailored to the unique facts of the case. The facts mitigate the degree of wrongdoing balanced with those that aggravate the level of wrongdoing.

CD staff finds that Verizon was severely negligent and failed to comply with all Commission statutes, rules and regulations governing § 320, prior to seeking this waiver. The imposed penalty amount of \$5,000 serves as a deterrent for future occurrences, acts as restitution for the wrongdoing, confirms Verizon adherence to all Commission rules and regulations, assures further protection for all California Scenic Highways and finally protects against a competitive advantage and illegal construction of aerial facilities.

5. Role of Precedent

Aside from Verizon's recent failures to comply with § 320, we have not found a prior § 320 post-construction violation for Verizon to apply as a precedent.

Comments

In compliance with § 311(g), a notice letter was emailed on May 24, 2011, informing the interested parties of the availability of the draft of this Resolution for public comments at the Commission's website www.cpuc.ca.gov. This letter also informed parties that

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the final Resolution adopted by the Commission will be posted and will be available at the same website.

Conclusion

Based on the information reviewed by CD, Verizon's application for deviation from § 320 should be approved for approximately 13,199 feet of aerial cable.

Based on all the data and information reviewed by CD staff, Verizon's request for a deviation in accordance with § 320 is reasonable, and therefore, granted, conditional upon submission of a plan for future compliance with § 320 and payment of a fine in the amount of \$5,000.

We concur with CD that Verizon should pay a penalty amount of \$5,000 and it should be paid in full within 60 days following the date of this Resolution. The check shall be made payable to the California Public Utilities Commission and mailed to the Commission's Fiscal Department, 3rd Floor, Room 3000, 505 Van Ness Avenue, San Francisco, CA 94102-3298. The Resolution number and fine amount should be noted in the memo section of the check with a copy of the transmittal sent to the Director of the Communications Division.

Findings

1. Public Utilities Code Section (Section or §) 320 was enacted in 1971.
2. Decision (D.) 80864 (74 CPUC 457) authorizes the California Public Utilities Commission (Commission) to accept, review and, where appropriate, approve § 320 waiver permission by Commission Resolution.
3. Portions of Highway 243 from Highway 74 to the Banning city limit, in Riverside County, received designation as a Scenic Highway on March 21, 1972, by the California Department of Transportation.
4. By letter dated June 18, 2009, Verizon California, Inc. (Verizon) requested authority to deviate from the undergrounding requirements of § 320 of the Public Utilities Code.
5. The Commission administers § 320 of the Public Utilities (PU) Code requiring undergrounding of utility lines along designated scenic highways and accept letter requests for deviations.
6. Verizon has requested multiple exemptions from § 320 for non-compliant

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completed construction, indicating the need for a written plan for compliance with § 320 prior to beginning any new construction near a Scenic Highway.

7. Verizon does not contest that the aerial facilities were constructed after designation of Scenic Highway 243 in violation of § 320 and does not propose any remedy other than requesting a waiver.
8. There is no “expression of opinion” from an appropriate local government agency or representative supporting the project as required by § 320.
9. There is no Environmental Impact Analysis discussing the ramifications of the project as required by § 320.
10. The Commission finds no evidence or documentation from 1976 to 1990 showing permits or licenses that match the construction of the aerial facilities outlined on the maps provided by Verizon or its predecessor General Telephone Company of California.
11. The Commission finds undergrounding the aerial facilities would still leave electrical lines and in some locations cable company facilities and thus does not improve the natural beauty of Highway 243 in Riverside County from mile marker 3.43 to 4.27; 4.75 to 5.10; 9.25 to 9.95; and 16.79 to 17.40.
12. The Commission finds Verizon noncompliant for failure to comply with the requirements of § 320 causing harm to the regulatory process.
13. The Commission finds that Verizon should pay a penalty amount of \$5,000 within 60 days following the date of this Resolution for failure to comply with the requirements of § 320.

THEREFORE, IT IS ORDERED that:

1. Verizon California, Inc.’s request to deviate from Public Utilities Code Section 320 for 13,199 feet of aerial facilities, along Highway 243 in Riverside County is approved.
2. Verizon California, Inc. must pay a penalty in the amount of \$5,000 to the Commission within 60 days following the date of this Resolution for its failure to comply with the requirements of Public Utilities Code Section 320.
3. Verizon California, Inc. must submit a plan for future construction of communications facilities within California Designated State Scenic Highway

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- areas. This plan should contain all the actions necessary for construction of communications facilities including procedures for:
- a. Discerning whether construction of facilities is within a Designated State Scenic Highway area;
 - b. Obtaining permits and/or authorization from governmental agencies, including a list of governmental agencies from which permits and/or authorization would be necessary;
 - c. Providing notification to governmental agencies with interest, including the Commission, and facilitation for public comment by interested parties should Verizon California, Inc. seek additional exemptions to Public Utilities Code Section 320.
4. Verizon California, Inc. will have 60 days upon approval of this Resolution to meet and complete the above remediation's, and will attest to the completion of the above conditions by filing a Tier II Advice Letter.

This Resolution is effective today.

I hereby certify that the Public Utilities Commission adopted this Resolution at its regular meeting on June 23, 2011. The following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director