PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Communications Division **RESOLUTION T-17330**
Carrier Oversight & Programs Branch **July 28, 2011**

R E S O L U T I O N

Resolution T-17330. Verizon California Inc. (U-1002 C) requests authority to deviate from California Public Utilities Code Section 320 along scenic Highway 395 in Mono County between Bishop and Mammoth Lakes.

By letter dated July 10, 2008 to the Executive Director.

Summary

On July 10, 2008, Verizon California Inc. (Verizon) requested by letter to the Communications Director a deviation from the undergrounding requirements of Pub. Util. Code[1] Section 320 (Section 320 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 32,000 feet of fiber optic cable it has deployed along scenic Highway 395 in Mono County.

This resolution imposes a penalty on Verizon in the amount of $5,000 for violating § 320. Additionally, Verizon shall apply for a California Advanced Services Fund (CASF) grant to add the necessary facilities to provide broadband from this fiber deployment to the currently unserved communities of Swall Meadows and Crowley Lake. This resolution does not require Verizon to underground aerial facilities along Highway 395 in Mono County between Bishop and Mammoth Lakes.

We approve this request for deviation in accordance with Decision (D.) 80864, conditional upon Verizon paying the specified fine amount, applying for CASF funding for those unserved communities, and submitting a plan to the Commission to ensure ongoing compliance with regulations protecting California's Scenic Highways.

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

Background

Section 320 was enacted in 1971, and reads in relevant 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 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 deviations[2] will be accepted, reviewed by the Commission staff and, where appropriate, approved by Commission resolution[3].

D.80864 held 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. This Decision 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.

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[2] In its filing Verizon also refers to its request for '"waiver". The language in Section 320 is "deviation."
[3] 74 CPUC 457, D.80864

Notice/Protests

This letter did not appear in the Commission's Daily Calendar because it was never filed as an Advice Letter or other formal document.

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

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

Comments

In compliance with § 311(g), a notice letter was emailed on July 28, 2011, informing the interested parties of the availability of the draft of this Resolution for public comments at the Commission's website http://www.cpuc.ca.gov. This letter also informed parties that the final Resolution adopted by the Commission will be posted and will be available at the same website.

Discussion

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

Nature of the Project

Verizon constructed a fiber optic trunkline consisting of a single 96-pair fiber-optic cable, black in color and less than one inch in diameter, deployed from Mammoth Lakes in Mono County to Bishop in Inyo County. Verizon began construction of this project in 2001, through the use of joint pole attachments to existing Southern California Edison (SCE) electric transmission and distribution poles.

The construction of the fiber optic trunkline increases broadband service capabilities to Verizon customers in Mammoth Lakes, which had previously exhausted its high bandwidth capacity and was therefore prohibited from providing service to new customers.

This project increases accessibility of advanced services such as DSL broadband to customers in Mammoth Lakes and communities northward, including June Lake, Lee Vining, and Bridgeport. However, the new broadband line will not serve the communities located along the right-of-way south of Mammoth Lakes. These customers were passed by the new line but are not afforded broadband services.

Swall Meadows and Crowley Lakes are the two largest communities to the south of Mammoth Lakes which are passed by the facilities yet remain unserved, and for which Verizon originally had no plans to provide broadband services.

A group of citizens from Swall Meadows contacted the Commission in 2008, requesting enforcement of § 320 along Highway 395, a designated scenic corridor. After investigation, the Commission found that Verizon did violate the Public Utilities Code and as a result directed Verizon to apply for a § 320 deviation if it did not wish to underground the facilities in question.

Local Government Recommendation

On September 10, 2008, the Commission held a public meeting in Mammoth Lakes, seeking input on the project. Stakeholders were invited to voice their concerns regarding the § 320 exemption request and impact of the project. There were approximately 30 attendees[4] who expressed opinions on a variety issues, including potential fire and avalanche danger, visual impact in winter as compared to summer conditions, the cumulative visual impact of additional facilities on the scenic highway area, and whether undergrounding is feasible given the geology of the area. Commission staff investigated these concerns, and any pertinent information resulting from this investigation is included in this resolution.

The City of Mammoth Lakes and several representatives of Mono County expressed support for the project at the public meeting. Additionally, during the second half of 2008, these parties periodically encouraged the CPUC to grant this request for deviation through telephone calls, letters and e-mails. Mammoth Lakes has an increasing population, as well as a growing tourism industry that is the area's main economic engine. Increasing tourism brings additional demand for advanced communications

[4] Attendees included representatives from: CalTrans, Concerned Residents of Swall Meadows, Kern Community College District, Mono County, Mono County Community Development Department, Mono County Planning Department, Mono County Public Works Department, NPG Cable, the Sierra Club, Town of Mammoth Lakes, Town of Mammoth Lakes Public Works, USFS, and Verizon.

services as tourists have come to expect broadband access along with other standard amenities.

Visibility, Aesthetics and Environmental Impact

In September 2008, CD staff toured the entirety of the project from Mammoth Lakes to Bishop. During this tour, CD staff documented current conditions, visual impact, existing facilities and area terrain, with an understanding that the intent of § 320 is to preserve California's natural beauty by limiting aerial deployment in scenic areas.

The right-of-way for this deployment runs through lands controlled by the USFS, Los Angeles Department of Water and Power, Bureau of Land Management, CalTrans, and private citizens.

Highway 395 is a high-altitude road passing rugged mountains and salt-flat lakes. Scenery here is typical of high desert meadows with peaks of the Sierra Nevada range to the west. The area is dry with rocky terrain and is sparsely populated with few sections of residential development between the cities of Mammoth Lakes and Bishop.

As noted above, these facilities are on existing SCE poles. These long-range electric transmission and distribution lines are substantial and significantly impact the aesthetic value of the scenic highway corridor. This was evidenced by CD staff on a site visit to the facilities in September 2008.

In addition to its fiber cable, Verizon also has existing underground copper trunk facilities between Mammoth Lakes and the Crowley Lake central office placed in 1974. Verizon asserts that it did not explore utilizing these existing easements due to construction costs and the need for environmental studies.

This project added a single 96-pair fiber-optic cable, less than one inch in diameter, black in color to the visible facilities along 32,000 feet of Highway 395. Some sections also include metal coiling along the cable for approximately two feet on either side of a pole attachment. Although these facilities are visible from the scenic highway, they do not significantly add to the cumulative aesthetic impact of the previously existing electric transmission towers and lines deployed along the aforementioned sections of Highway 395.

Based on a review of the project file, the status of the project, and recent analysis, the USFS issued a decision on September 30, 2008, wherein it was determined that there were no direct or indirect effects from the proposed project on botany, wildlife or heritage resources as a result of the installation.

Economic Feasibility

Verizon estimates a cost ratio of 5:1 between the installation of underground and overhead lines.

Verizon Fiber Optic Facilities Cost: Highway 395, Mono County	
Deviation Requested (Overhead)	$104,000
§ 320 Requirement (Underground)	$522,000
Cost Differential	$418,000
Underground to Overhead Ratio	5:1

The Commission finds that this cost disparity may make undergrounding not economically feasible. Additionally this cost ratio is similar to requests for exemption from § 320 which were previously approved.

Violation of the Public Utilities Code, Fines and Remediation

Violations of Public Utilities Code can result in the imposition of fines. 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". P.U. Code 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 anything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

Verizon did break the law by not complying with § 320 when it constructed facilities along scenic Highway 395 in Mono and Inyo Counties, although the factors discussed above favor the placement of overhead cables instead of underground. Therefore the Commission approves this deviation from § 320, but with the stipulation that Verizon pay a fine to the State of California in the amount of $5,000 for failure to comply with § 320 before constructing these facilities, and for failure to attempt to remedy this violation.

Project Specific Remediation Efforts

The Commission suggested remediation possibilities for Verizon, including an option for Verizon to provide benefit to those customers affected by this deployment by offering broadband service to those unserved residents between Mammoth Lakes and Bishop. A letter from residents organized as the Concerned Residents of Swall Meadows dated April 2, 2008 states that Verizon service upgrades for communities north of Bishop and south of Mammoth Lakes is one desired outcome of this resolution. Verizon estimated the cost of providing DSL to the residents of Swall Meadows and Crowley Lake to be about $350,000. However, Verizon would be eligible to apply for and receive 40% of the project cost from the California Advanced Services Fund, which is specifically designated for projects to build and extend internet and broadband connections to unserved and underserved areas.

While we direct Verizon to apply for a CASF grant, we will consider the merits of that application after Commission staff has completed its review.

Remediation Efforts for Future Compliance

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.

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. Therefore, requiring Verizon to submit a written plan for future compliance with § 320 within Verizon's territory is appropriate. CD proposes two specific remediations directed at assuring future compliance and past non-compliance.

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 should be submitted to the Commission within 60 days of this Resolution.

Penalties for Failure to Apply for § 320 Exemption Before Construction

Verizon applied for exemption only after neighbors opposing the overhead deployment brought it to their attention, and therefore constructed these facilities in violation of the Public Utilities Code. The Commission therefore imposes a fine of $5,000 on Verizon for failure to comply with the California Public Utilities Code § 320.

In calculating a fine, the Legislature has directed the Commission to apply the penalties provided in Section 2107 in the absence of a specific penalty scheme established for similar circumstances. D.80864, which implemented § 320, did not anticipate violations and therefore did not prescribe specific penalties for violations. D.80864 states: "Other portions of the Public Utilities Act provide ample means for effecting compliance if there are any rare cases where the order herein is ignored by any respondent." Public Utilities Code Section 2107 states that penalties shall be not less than $500 nor more than $20,000 for each offense.

Commission's Penalty Directives

Under PU Code § 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, PU Code § 2108 states that each day 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. Decision 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) the role of precedent.

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 the Commission may consider (a) physical harm, (b) economic harm, (c) harm to the regulatory process, and (d) the number and scope of violations.

a. Physical Harm

Having violated § 320, enacted to preserve the natural beauty of California's Scenic Highways, Verizon's failure to seek exemption prior to construction compromised the Scenic of overhead distribution facilities along scenic highways. The submitted plan should contain all the actions necessary for the proposed construction of communications facilities including procedures for:

b. Economic Harm

Verizon unlawfully constructed facilities without expending the resources to secure necessary exemptions. As these fiber optic facilities are 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." Public Utilities Code Section 702 states that "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." Such compliance is absolutely necessary to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.

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.

a. Actions to Prevent and Detect Violations

In this case, Verizon claims to have been unaware of § 320 prior to the construction of facilities along the Scenic Highway corridor. However, D.98-12-075 states that prudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives. This includes becoming familiar with applicable laws and regulations.

b. Actions to Disclose and Remedy Violations

Once Verizon became aware of its violation, no remedial action was taken. Commission staff suggested solutions that would satisfy stakeholders, but Verizon has continued to be unresponsive.

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.

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 1982-2000
§ 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 that tend to mitigate the degree of wrongdoing will be balanced with those that aggravate the level of wrongdoing.

While Verizon did not purposefully violate § 320 in its construction of the fiber optic facilities along Highway 395, Verizon has been unresponsive to suggested means of remedying the situation. Evaluating Verizon's actions against the criteria embodied in D.98-12-075, the Commission concludes that Verizon's violations have predominantly caused harm to the regulatory process.

5. The Role of Precedent

This is the first post-construction violation of § 320. Therefore there is no precedent to analyze.

Under Section 2107, the Commission has regulatory authority to assess a penalty not less than $500, nor more than $20,000 for each offense, for which a penalty has not otherwise been provided. Consistent with other concurrent Verizon applications for § 320 exemption, the fine is set at $5,000.

Conclusion

Based on the information reviewed by CD, Verizon's application for deviation from § 320 undergrounding waiver should be approved for the entirety of the project length along Highway 395 in Mono County.

Undergrounding is preferable in most instances where costs are minimal, but the 5:1 ratio to underground is consistent with other § 320 exemptions granted. Additionally, it would not provide a high degree of public benefit since this project, if undergrounded, would still leave the highly visible electric facilities.

However, 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. There is no justification or reason for Verizon's inability to meet the requirements mandated by § 320.

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, application for CASF funds to make broadband available to two currently unserved communities, and payment of a fine in the amount of $5,000.

The penalty amount of $5,000 shall be paid in full 60 days following the date of this Resolution. Payment shall be made to the California Public Utilities Commission and remitted to the CPUC's Fiscal Office, 3rd Fl. Rm. 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, and a copy of the transmittal shall be provided to the Director of the Communications Division.

Findings

1. Public Utilities Code Section 320 (§ 320) was enacted in 1971.

2. Decision 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 395 in Mono County received designation as a Scenic Highway in 1964.

4. A group of local citizens contacted the Commission in 2008 requesting enforcement of § 320 along Highway 395. After investigation, the Commission found that Verizon California, Inc. (Verizon) did violate § 320, and directed Verizon to apply for § 320 exemption..

5. By letter addressed to the Executive Director of the Commission and dated July 17, 2008, Verizon requested authority for deviation from the undergrounding requirements of § 320 of the Public Utilities Code.

6. By letter addressed to the Communications Division (CD) Director and dated November 23, 2009, Stephen Kalish, resident of Mono County, protested Verizon's simultaneous § 320 exemption requests and asked the Commission to deny the requests and require Verizon to underground the telecommunications facilities.

7. By letter addressed to the CD Director and dated December 1, 2009, Verizon responded to Stephen Kalish's protest stating that Stephen Kalish's protest did not apply to this particular project in Mono County which is the subject of this resolution, because portions in question are not visible from the scenic highway, that this request was not a filed as an Advice Letter but rather in a letter to the Executive Director of the Commission. Verizon also stated that the relief requested is consistent with law and with Commission precedent.

8. The Commission administers § 320 requiring undergrounding of utilities lines along designated Scenic Highways and the process by which to request exemptions.

9. Verizon does not contest that the aerial facilities were constructed on a Scenic Highway 395 in violation of § 320 and does not propose any remedy other than requesting a waiver.

10. Verizon has requested multiple exemptions from § 320 for non-compliant previously completed construction, indicating the need for a written plan for compliance with § 320 prior to beginning any new construction near a Scenic Highway.

11. This project adds approximately 32,000 feet of aerial cable, less than one inch in diameter, black in color, along Highway 395.

12. The Commission finds that the utility cost ratio to place telephone lines underground as opposed to aerial at this location is approximately 5:1.

13. The Commission finds that undergrounding these facilities on Highway 395 would not be economically feasible or consistent with sound environmental planning.

14. The Commission finds that the deviation request from the undergrounding requirements of § 320 should be granted for this project, with the following conditions:
    a. The remission of a fine in the amount of $5,000.
    b. The drafting and implementation of a compliance plan for future construction of overhead distribution facilities along state scenic highways.
    c. Application for a grant from the California Advanced Services Fund to serve two currently unserved communities: Swall Meadows and Crowley Lake.

15. The Commission finds that the communications infrastructure that Verizon installed is currently operational and is necessary for the public safety and economic viability of the communities it serves.

THEREFORE, IT IS ORDERED THAT:

1. Verizon California, Inc.'s request to deviate from Public Utilities Code Section 320 for 32,000 feet of existing overhead facilities from 3,400 feet south of McGee Creek Road to the aerial crossing 1,000 feet north of Highway 203 along Highway 395 in Mono County, an Officially Designated State Scenic Highway, is conditionally approved.

2. Verizon California, Inc. shall pay a penalty in the amount of $5,000 for failure to comply with Public Utilities Code Section 320.

3. Verizon California, Inc. will apply for California Advanced Services Fund assistance and build facilities to provide broadband to the communities of Swall Meadows and Crowley Lake.

4. Verizon California, Inc. must submit a plan for future construction of communications facilities within California Designated State Scenic Highway 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;

    a. Obtaining permits and/or authorization from governmental agencies, including a list of governmental agencies from which permits and/or authorization would be necessary;

    b. 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.

5. Verizon California, Inc. will have 60 days upon approval of this resolution to meet and complete the above remediation requirements, and will attest to the completion of the above conditions by filing a Tier 2 Advice Letter with the Communications Division.

6. Upon verification that Verizon California, Inc. has met the requirements stated herein, the deviation request will be effective.

I hereby certify that the Public Utilities Commission adopted this Resolution at its regular meeting on July 28, 2011. The following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director