

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Verizon California, Inc. a California corporation (U1002C),

Complainant,

vs.

Paul M. Carrick III, an individual; Robert Mitchell Herman as Trustee of the Herman Family Trust, an individual; John N. Dukes, an individual; Gwyneth F. Dukes, an individual; Sidney Sue Slade as Successor Trustee of the MacDonald Family Trust UAD October 18, 1979, an individual; Paul R. Wilens, an individual; Cathy Wilens, an individual; Ramon Arredondo, an individual; Alice M. Reed, an individual; Sherry L. Wothers, an individual; Lawrence H. Selman, an individual; Martha Jean Selman, an individual; Brian Bean, an individual; Lawrence L. Howard, an individual; Armen Markarian, an individual; Hearst-Argyle Stations, Inc., a Nevada corporation; Consuelo L. Hernandez, an individual; Alan H. Reid, an individual; Kathleen Reid, an individual; Robert W. Tucker, an individual; Shelley Tucker, an individual; Leonard Steven Johnson, an individual; James P. Boyle, an individual; Angela M. Boyle, an individual; Elena Rauen, an individual; Kent A. Uhlenhopp, an individual; Shanne Carvalho, an individual; Barry Wothers, an individual; John Moore, an individual; Robert Ronald Cash, an individual; David Ow, an individual; Judd Wiesjahn, an individual; Annalisa Wiesjahn, an individual; Camilo Wilson, an individual; Anna Wilson, an individual; Irene Hall, an individual; Sarah Apostoleris, an individual; Jeff L. Osborn, an individual; Dana Matthew-Osborn, an individual; Stanley Towle, an individual; Cynthia A. Bird, an individual; Donald Brown, an individual; Charles W. Brown, an individual; David Tymn, an individual; Mark S. Hamlin, an individual; Thomas E. Atchison II, an individual; Rhonda Atchison, an individual; Faydra Atchison, an individual; Richard L. Wakeman, an individual; Dana Wakeman, an individual; The D’Orio Family, a limited partnership; Alicia P. Herman, an individual; Charles R. Cortsen, an individual; Susan P. Cortsen, an individual; Beatrice Supnet, an individual; Richard Nathanson, an individual; Xuan T. Casey, an individual; Yossef Zaguri, an individual; Arlette Sabag-Zaguri, an individual; Maryann C. Parsons, an individual;

(EDM)

Case 07-11-019

(Filed November 28, 2007)

Debrae Joan Lopes, an individual; Michele Margaret Landegger, an individual; Richard Nohrden, an individual; Jeffery J. Bradford, an individual; Scot S. Reid, an individual; Julie W. Reid, an individual; William A. Pryce, an individual; June R. Pryce, an individual; Sanjay Iyer, an individual; Asha Pandya, an individual; Richard C. Goldsmith, an individual; Laurie B. Goldsmith, an individual; Summit Road Association, an entity of unknown form,

Defendants.

**ORDER DENYING APPLICATION FOR REHEARING OF
DECISION 08-06-021**

I. INTRODUCTION

On July 16, 2008, the Summit Road Association, et al. (SRA or defendants), on behalf of itself and the named defendants, filed an application for rehearing of Decision (D.) 08-06-021; in addition, as a part of its rehearing application, SRA requests an oral argument.

In late November 2007, Verizon filed the underlying complaint, Case (C.) 07-11-019, to condemn reciprocal negative easements in a five-mile stretch of property on Summit Drive in Santa Clara and Santa Cruz Counties owned by individual property owners and a voluntary group of owners, collectively known as the Summit Road Association, in order to construct an underground portion of its 26-mile Inter Office Fiber (IOF) project. Verizon stated the purpose of the IOF project is to increase system reliability for Verizon and to remedy inadequate data transmission capabilities out of its Morgan Hill and Gilroy offices.¹ In pursuit of the IOF project Verizon has already

¹ In 2004, Verizon initially filed a civil complaint for eminent domain in the Santa Clara Superior Court. In its complaint, Verizon argued that Public Utilities Code section 616 empowered it to condemn the property at issue because it is necessary to the construction and maintenance of its telephone line. (Hereinafter all statutory references are to the Public Utilities Code unless otherwise indicated.) Verizon also argued that section 625 did not pertain to the action. The defendants argued that section 625 is

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obtained permits and extended underground cable on municipal portions of Summit Road extending about nine miles northwest from Gilroy and 12 miles southeast from Los Gatos. The remaining five miles of the IOF project is located on the private portion of Summit Road belonging to the defendants that lies between the two already constructed extensions.

The permanent facilities Verizon seeks to construct in the easement consist of a four-inch conduit located between four and six feet under Summit Road, as well as underground vaults with equipment connected to the cable that is to be located alongside the road. In about the mid-1990s, Verizon's predecessor, Contel of California, obtained an easement from property owners along Summit Road and installed copper-based telephone facilities along the road for use in providing basic telephone service in that area. The copper wires are not capable of providing telephone services to all purportedly interested residents and, due to obsolescence and failure-prone equipment, are subject to frequent outages. According to Verizon, about 250 customers located along portions of Summit Road already served by the IOF fiber-based project have purchased high-speed fiber-based internet access. While six customers are currently served by Verizon's copper-based landline service, it estimates that with the private section of Summit Road completed, there will be sufficient capacity to serve up to 200 additional customers with landline telephone service. Of those, up to 144 could purchase and receive DSL. The defendants argued that the current residents of Summit Road have no need for the additional capacity the IOF project may provide and contended that the real purpose for the project is to provide Verizon with a competitive advantage.

As initially proposed, Verizon would have used trenching and backfilling in the roadway to complete its project. Those are techniques it used on the other already

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applicable and in 2007 the superior court judge bifurcated the issue of whether section 625 was applicable. The superior court stayed its proceedings and ordered Verizon to obtain a determination from this Commission regarding the applicability of section 625.

completed portions of Summit Road and SRA argued that Verizon had done a poor job of completing the trenching work in those areas and of repairing damage allegedly caused by the original Contel trenching on the private section of Summit Road. The private portion of Summit Road is an environmentally fragile dirt road dating from the 1880s that receives about 30-40 inches of rain annually and sometimes snow and ice, and the defendants are concerned that Verizon's proposed work will render the private portion of Summit Road impassable. The defendants contend that trenching causes erosion and uneven surfaces and that Contel's trenches caused SRA additional annual maintenance expenses. The owners of the private portion of Summit Road are solely responsible for maintaining that section of the roadway. A Santa Clara County engineering report concluded that trench cuts do weaken the soil adjacent to the cuts and that additional road strengthening is required. However, Verizon revised its initial proposal, in order to cause fewer, if any, disturbances to the roadway, and intends to use directional boring to place the conduit for the fiber optic cable.² Verizon's expert roadway witness testified that by using directional boring roadway erosion concerns and subsidence would be eliminated and the surface restoration work to Summit Road would be "wholly unremarkable and conventional."

At the time of the hearing before this Commission, Verizon had already spent about \$3.3 million on the 21 completed miles of the IOF project. Verizon estimated that 65,000 residential and 80,000 business customers will benefit from the project. SRA argued that there is no need for Verizon's landline service because Summit Road residents can obtain wireless and satellite telephone and internet services. Further, they believed the IOF project is unnecessary that because Verizon already leases line capacity from AT&T and could continue to do so. SRA argued that in the alternative, even if an additional Verizon trunk line were needed, Verizon should have constructed it

² See D.08-06-021 at page 6, footnote 5 for a description of directional boring.

instead through the metropolitan areas—along Highway 101—using public right-of-ways, rather than the 26 mile stretch of Summit Road.

D.08-06-021 determines that the construction disturbance will impact less than 2% of the roadway surface on that private portion of Summit Road and should not result in any change to the ultimate use of the private portion of Summit Road. In order to ensure that Verizon repairs any damages to the private roadway caused by its facilities or construction we adopted “Implementation Requirements” which place Verizon under a continuing obligation to repair any damages caused by the project. Based on the record before us, we determined that the public benefits of the IOF project are significant and that neither of the defendants’ two proposed alternatives to the project would extend basic telephone service or advance telecommunications services into underserved areas.

In its application for rehearing, SRA contends that it did not have adequate time, materials or opportunity to present its case. SRA alleges that the challenged decision is unconstitutional because the objective behind the civil eminent domain action is Verizon’s profit rather than public need. In addition, SRA contends that D.08-06-021 caps Verizon’s potential liability for damages without any factual information regarding possible damages. Further, SRA takes issue with the order that it and Verizon mediate any future construction-related problems, including currently unknown engineering proposals, before our Communications Division Director. SRA also contends that the Implementation Guidelines adopted are illusory because it alleges they are based on proposals that were never submitted into evidence. SRA demands as part of its application for rehearing that it receive a copy of the construction proposal. In addition, SRA requests an oral argument. Verizon filed a timely response opposing the application for rehearing and the request for oral argument.

We have reviewed each and every allegation of error raised by SRA as well as its reasons for requesting oral argument and find, as discussed below, they are without merit and there is no good cause for granting the request for oral argument. Accordingly, we deny the defendants’ application for rehearing and request for oral argument.

II. DISCUSSION

A. Is D.08-06-021 supported by sufficient evidence?

SRA contends the finding that Verizon's design plans and its expert witnesses' testimony in support constitute an adequate basis for Commission approval of the project are unsupported because it alleges there are no design plans in the record. According to SRA, Verizon's expert witnesses' testimony was refuted by the fact that some of them never actually personally saw the road in question. In some instances Verizon's witnesses based their opinion on visual estimates and/or the testimony of other witnesses who had not seen the plans.

The basis of SRA's contention is its allegation that Verizon did not submit a plan containing drawings of the proposed construction. SRA argues that Verizon's witnesses essentially provided estimates rather than verifiable information. The defendants contend that as of the day the hearing began, they had not been provided with a copy of Verizon's proposal nor of any of the documents upon which the expert witnesses relied. SRA has previously raised this issue and we address it at page 29 of D.08-06-021:

The ... [d]efendants next argue that the absence of final construction plans undermines the evidentiary record. Verizon presented design plans showing the route the installation would take, explained the facilities to be installed and the method of installation, and provided a full team of experts to defend the plans....

California courts have, for some time, reviewed the question of what constitutes substantial evidence for purposes of determining whether a Commission decision is adequately supported by the evidentiary record. (See e.g., *Kern County Land Co. v. Railroad Com.* (1934) 2 Cal.2d 29, 35; *Western Canal Co. Railroad Com.* (1932) 216 Cal. 639, 646; *S. Edwards Associates v. Railroad Com.* (1925) 196 Cal. 62, 70; *Butte County W.U. Assn. v. Railroad Com.* (1921) 185 Cal. 218, 231; *Van Hoosear v. Railroad Com.* (1920) 184 Cal. 553, 555.) "If there was any evidence before the [C]ommission that could support its finding ..., such finding will not be disturbed." (*California Water*

& Tel. Co. v. Public Utilities Com. (1959) 51 Cal.2d 478, 493; see also, Pub. Util. Code, §1757(a)(4).) The underlying record is replete with evidence that supports D.08-06-021. SRA has not established that D.08-06-021 erred in finding that “Verizon presented the Commission with sufficient factual information to make the evaluations necessary pursuant to [section] 625.” (D.08-06-021 at p. 29.) Nor has SRA shown that the findings in D.08-06-021 that section 625 is applicable, that Verizon must comply with it and that the sought after easement is in the public interest, are not supported by substantial evidence.

B. Was the process accorded to this proceeding constitutional?

In addition to the allegation that the evidence was insufficient, SRA also argues that it had insufficient time. Verizon filed its complaint in late November and the December 3, 2007 scoping memorandum advised all parties of the filing deadlines and also notified the parties that an evidentiary hearing was scheduled to commence on January 10, 2008. In addition, the parties were notified of their opportunity to submit evidence and cross-examine witnesses. (See e.g., December 3, 2007 AC’s and Chief ALJ’s ruling and scoping memo at p. 4.) Further we publish notice of hearings in our daily calendar.

We state again that notice was provided in accord with established Commission procedure for this category of proceeding, and that the scoping memorandum adhered to the Commission’s Rules of Practice and Procedure regarding setting issues and notifying the parties of the process for written direct testimony and cross-examination limited to the issues raised on direct testimony. (See also, D.08-06-021 at pp. 25-27.) Further, the scoping memorandum also set a deadline for the defendants to request a 30-day hearing extension. Although the defendants did not request a delay until well after the deadline and thus the hearing schedule was not delayed, the presiding ALJ permitted the defendants additional time to prepare rebuttal testimony. (D.08-06-021 at p. 27.) In addition, defendants appealed the presiding officer’s decision (POD) and we address that appeal in D.08-06-021 at pages 28-29. The

record establishes that SRA was accorded the requisite process due. While it may be that SRA is unfamiliar with our process, albeit represented by counsel, such does not establish procedural irregularities in this proceeding. We note that persons appearing before the Commission are governed by our Rules of Practice and Procedure. The due process allegations are without merit.

C. Allegations concerning liability for and possible mediation of future construction-related issues.

SRA contends D.08-06-021 places a limitation on any potential liability for damages and that said limitation is not based on record evidence. In response to defendants' comments, D.08-06-021 "modified the Implementation Requirements to clarify that Verizon is under a Commission order to ensure that [it] repairs any damage to the roadway caused by its facilities or construction." (D.08-06-021 at p. 29.)³ Pursuant to Ordering Paragraph No. 3:

The Director of the Communications Division shall provide guidance to the parties as necessary and, with such additional advice as may be necessary, has the authority to oversee and resolve the parties' disagreements regarding the Implementation Requirements.

(D.08-06-021 at p. 36.)

The Implementation Requirements are attached as Appendix E to D.08-06-021. Pursuant to those requirements, "Verizon and the [d]efendants are required to meet, confer and cooperate as necessary to efficiently and effectively ensure the design and construction of a project fully consistent with sound engineering standards and compliant with all applicable roadway standards." (Appendix E to D.08-06-021 at p. E1.) Among other things, the requirements order Verizon to document the pre-construction condition of the roadway as well as each bore pit after construction is completed and a year later. (*Id.*) In addition, Verizon is ordered to pay for extra grading by a contractor to be

³ Certainly, Verizon is required by section 702 to obey this order and any directives issued by the Director of the Communications Division.

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selected by SRA but at a cost no greater than \$5000. To the extent this may be considered to constitute a limitation, it has to do with costs and has nothing to do with any real or potential damages.

Contrary to SRA's allegation that there is a monetary cap on damages and that the Communications Director is charged with resolving damages, there is no language limiting damages in the challenged decision, nor placing damages within the ambit of the Communications Division. Further nothing in D.08-06-021 prohibits SRA from bringing a civil suit for damages against Verizon arising from the construction. (*People ex rel Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132, 1145.) Under such circumstances, should SRA pursue a civil action against Verizon for damages arising from the construction, nothing in the record before us leads us to conclude that doing so would hinder or frustrate the Commission's regulatory authority over Verizon. (Compare e.g., *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 266.) While SRA takes issue with this aspect of the challenged decision it fails to establish error.

D. Request for oral argument

Apparently relying on D.06-08-030, SRA requests an oral argument on the applicability of section 625, arguing that the Commission's approval of Verizon's use of the condemnation process to seize property for competitive purposes is one of first impression.⁴ Commission Rules of Practice and Procedure rule 16.3 requires an applicant for rehearing seeking oral argument to "explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission." Rule 16.3 is discretionary and

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⁴ Although not mentioned by SRA, D.06-08-030, in R.05-04-005, was modified and a limited rehearing was granted by D.06-12-044 concerning Paragraph 21. D.06-08-030 examines the use of "competitive forces" for purposes of determining "just and reasonable" rates for California's telephone consumers; neither D.06-08-030 nor D.06-12-044 concern section 625.

highlights four possible areas of interest: (a) adopts without adequate explanation a new precedent or departs from an existing one; (b) changes or refines existing precedent; (c) presents legal issues of exceptional controversy, complexity or public importance; or (d) raises questions of first impression that are likely to have significant precedential impact.

In requesting an oral argument, SRA states: “The Commission and the ALJ’s decision on the applicability of ... [section] 625 and their approval of Verizon’s use of the condemnation process to seize property for competitive purposes is one of first impression....” (SRA application for rehearing at p. 20.) We disagree that our review of section 625 is one of first impression. Even if it had been, SRA does not provide how or why this proceeding is likely to have a significant precedential impact, nor does it explain how oral argument at this phase will assist us in resolving this proceeding. *Cox California Telecom v. Crow Winthrop* (2000) ___ Cal.P.U.C.3d ___, D.00-11-038, is the first case we entertained regarding section 625. In *Cox* we discuss our authority to determine a proposed condemnation is in the public interest under section 625 upon finding that the four requirements of section 625(b)(2) are met. (D.00-11-038 at pp. 3 and 13.) D.08-06-021 does not depart from that determination. Further, we have also reviewed the applicability of section 625 regarding easement issues affecting other non-telecommunications utilities. The underlying proceeding does not present a case of first impression regarding section 625, nor is there any inconsistency regarding the Commission’s determination of factors for ascertaining whether a proposed condemnation is in the public interest. SRA has not established good cause for granting oral argument and its request is denied.

III. CONCLUSION

For the reasons discussed above, the defendants’ application for rehearing of D.06-12-030 and request for oral argument are denied.

THEREFORE IT IS ORDERED that:

1. The application for rehearing of Decision 08-06-021 filed by SRA on behalf of itself and the defendants is denied.

2. The SRA defendants' request for oral argument is denied.
3. Case 07-11-019 is hereby closed.

This order is effective today.

Dated November 6, 2008, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners