

Decision _____

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;

(EDM)
Case 07-11-019
(Filed November 28, 2007)

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; 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.

**DECISION FINDING THAT CONDEMNATION
WOULD SERVE THE PUBLIC INTEREST**

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**DECISION FINDING THAT CONDEMNATION
WOULD SERVE THE PUBLIC INTEREST**

1. Summary

This decision holds that Verizon California Inc.'s (Verizon) condemnation of an easement under Summit Road would serve the public interest. Implementation requirements are also adopted.

2. Background

2.1. Superior Court of California, County of Santa Clara

On October 7, 2004, Verizon filed a complaint seeking to acquire, by eminent domain, rights of way and easements in five miles of Summit Road in Santa Clara County.¹ Verizon also sought prejudgment possession of the property. Certain of the landowners opposed the proposed acquisition and prejudgment possession.

Numerous procedural events ensued, leading up to an August 22, 2007, decision of the Superior Court.² The procedural history of this matter is recounted in the decision and covers 10 pages.

Substantively, the court's decision held that prior to exercising the right of eminent domain, Verizon must comply with Pub. Util. Code § 625³ and obtain an

¹ Verizon California Inc. v. Carrick et al., Case 1-04-CV028324.

² Tentative Statement of Decision on Bifurcated Issue of Applicability of Public Utility Code Section 625, Verizon California Inc. v. Carrick et al., Case 1-04-CV028324 (August 22, 2007).

³ All references are to the Public Utilities Code unless otherwise indicated.

order of this Commission determining that the proposed condemnation would serve the public interest.

2.2. California Public Utilities Commission

On November 28, 2007, Verizon filed this complaint to condemn easements in certain property of the defendant property owners. The property is a five-mile stretch of Summit Drive located in Santa Clara and Santa Cruz Counties. The complaint is brought pursuant to § 625, which authorizes a public utility to condemn private property for the purpose of offering utility services. Verizon stated in its verified complaint that it served the complaint by mail on certain defendants and known counsel. Verizon subsequently amended its certificate of service to show direct service of additional defendants.

On December 3, 2007, the Chief Administrative Law Judge (ALJ) and the assigned Commissioner issued their ruling containing instructions to answer, setting the date for filing responses to the motion for summary judgment, noticing the prehearing conference and evidentiary hearings, setting the schedule for distributing written direct testimony, designating ALJ Maribeth A. Bushey the presiding officer, and adopting the scoping memo. The Ruling, hereafter referred to as the “scoping memo, is reproduced in Attachment A to today’s decision.

The parties distributed direct testimony prior to the hearings, which were held in Gilroy, California, before the Presiding Officer.

As shown in the List of Defendants (Attachment B), 38 of the 71 defendants appeared at the hearing to oppose the proposed condemnation. These defendants were jointly represented by one attorney. They will be referred to in today’s decision as the Opposing Defendants. Thirty-two of the

defendants did not appear, and one defendant appeared in support of the proposed condemnation.

Opening and reply briefs were filed by Verizon and the Opposing Defendants. The other defendants did not file briefs.

On March 24, 2008, the Presiding Officer issued her Decision Finding That Proposed Condemnation Would Serve the Public Interest.

The Opposing Defendants appealed the Presiding Officer's Decision on April 23, 2008. Verizon responded in opposition to the appeal on May 8, 2008. As described in Section 7 below, the appeal presented no basis for substantive alteration of the Presiding Officer's Decision and we make no such alterations.

3. Description of the Property Proposed to be Condemned

Summit Road crosses the hills east of Gilroy, eventually ending in Los Gatos along the borders of Santa Clara and Santa Cruz counties. About 21 miles of the road is under some type of municipal control, and Verizon has obtained permits for and completed the portions of its Inter Office Fiber project (the IOF project) that exist in these areas. Verizon has extended the cable approximately nine miles northwest from Gilroy, and 12 miles southeast from Los Gatos. Obtaining the right to extend the cable under the remaining and intervening five-mile portion of Summit Road is the issue in this proceeding.

Unlike the other 21 miles of Summit Road, the five-mile section at issue here is not under municipal control. This portion of the road is privately owned as reciprocal negative easements by the owners of the property through which the road passes. This section of the road is maintained by individual owners and the Summit Road Association (SRA), a voluntary group of owners. Each record owner of a portion of the roadway is a named defendant in this proceeding.

Verizon seeks to condemn a nonexclusive underground utility easement in a 10-foot wide section of the road, as well as a temporary construction easement to complete the installation work. Verizon estimates that its permanent facilities in the easement area will consist of a four-inch conduit, located between four and six feet under the roadway. Buried vaults with equipment connected to the cable will also be located alongside the roadway.

4. Evidence

4.1. Verizon

Verizon presented 10 witnesses to explain the two benefits of the IOF project. The project consists of a 26-mile fiber link from Gilroy to Los Gatos, of which about 21 miles have been completed at a cost of \$3.3 million. The purpose of the project is to increase system reliability and to remedy inadequate data transmission capabilities out of Verizon's Morgan Hill and Gilroy offices. Verizon estimates that 65,000 residential and 80,000 business customers⁴ will benefit from the increased reliability and data transmission capability of the IOF project.

Verizon explained that in addition to these broader benefits, the IOF project will bring direct local benefits to residents of Summit Road. Verizon stated that its predecessor, Contel of California, installed copper-based telephone facilities along Summit Road in the 1990's. These facilities are not capable of providing telephone service to all interested residents, and the service provided is subject to frequent outages due to obsolete and failure-prone equipment. By

⁴ Verizon did not specify what share of these customers is receiving local telephone service and high-speed internet access.

routing the IOF project along Summit Road, Verizon will be able to offer modern, fiber-based service to Summit Road residents and solve the persistent maintenance problems on this road. Verizon estimated that about 250 customers are able to purchase high-speed internet access for the first time along the portions of Summit Road where the IOF facilities have been installed leading up to the private section. Within the private section of Summit Road, with the completion of the IOF project, up to 200 customers will be able to receive landline telephone service, with DSL service to 144.

Verizon's proposed installation plan for its facilities on Summit Road initially involved trenching and backfilling in the roadway but Verizon revised its proposal to use directional boring to place the conduit for the fiber optic cable. Directional boring is an adaptation of oil drilling techniques.⁵ By using directional boring, Verizon concluded, most of the roadway surface would be entirely undisturbed by the placement of the conduit. Moreover, Verizon's roadway expert concluded that the surface restoration work would be "wholly unremarkable and conventional," and that directional boring "eliminates erosion concerns and any question about subsidence in the project area." Verizon did, however, commit to repairing any road damage that it may cause.

⁵ Directional boring requires the digging of a bore pit, a hole about four feet square, for insertion of the boring drill bit. A similarly-sized receiving pit is also dug, usually about 300 feet away. The drill is typically guided by using computer-generated coordinates and placed beacons. It can also be guided by workers on the surface with detection devices. When the drill bit reaches the receiving pit, the conduit is pulled through. In this case, two small (1½ inch or less) conduits will be placed together in the larger four-inch conduit, with one of the small conduits for current use and the other for subsequent use. The drill bit is then positioned towards the next receiving pit.

4.2. Opposing Defendants

The Opposing Defendants contended that Verizon has done a poor job of completing trenching work on other portions of Summit Road, and of repairing damage caused by the Contel trenching in the private section of Summit Road. These Defendants opposed allowing Verizon further access to their fragile roadway due to fear that Verizon would render it impassable and the residents would have no means of access to their homes.

The Opposing Defendants stated that landline service from Verizon is not needed because Summit Road residents can obtain wireless and satellite telephone and internet service. They questioned whether the IOF project was necessary because Verizon currently leases line capacity from AT&T and could continue to do so. Even if an additional trunk line owned by Verizon were necessary, they stated that Verizon could have constructed such a trunk line through the metropolitan areas (generally along the State Highway 101 corridor) using public right-of-ways, rather than along Summit Road, including the five-mile private section. The Opposing Defendants contended that Verizon had not repaired damage to the road caused by its current facilities, and could not be “counted on to correct and maintain the road as a result of this project.”

The Opposing Defendants stated that the owners of the road have been solely responsible for its maintenance and have spent much time and money to keep the road passable. It is an environmentally fragile dirt road, constructed in the 1800’s in an area that receives 30 to 40 inches of rain per year, with occasional snow and ice.

The Opposing Defendants testified that the fiber optic cable Verizon is proposing to install will exceed the capacity of the copper wires currently in the road by “thousands” of times. They contended that the residents of Summit

Road have no need for this amount of capacity and that the real purpose of this fiber optic line is to enable Verizon to compete more effectively with its high-speed services. The Opposing Defendants concluded that local telephone service could be upgraded by replacing certain obsolete equipment on the existing copper lines.

The Opposing Defendants disputed Verizon's assertions that trenching did not cause erosion and uneven settlement in the roadway. Their witnesses offered numerous photographs of ponded water on the road and worn away road edges. They alleged that Contel's trenches from the 1990's cause additional annual maintenance expense to the Summit Road Association to cover up and repair problem areas in the trenching. A Santa Clara engineering report evaluating trench cut damage concluded that trench cuts weaken the soil adjacent to the cuts and that additional road strengthening is required.

4.3. Mark Hamlin

Hamlin is the defendant who testified in support of the IOF project. He observed Verizon's work installing the fiber optic cable in the county-maintained section of the road. He asserted that "there were some problems with the finish work" but that no long term harm had been done. Hamlin stated that he looked forward to reliable landline telephone service and lower-priced high-speed internet access from the Verizon project.

5. Discussion of Substantive Issues

5.1. California Policy Encourages Widespread Deployment of Advanced Telecommunications Services

The policy of the State of California is to encourage widespread deployment of advanced telecommunications services, such as high-speed

internet access. One of the Commission's specific goals is to remove any governmental barriers to such deployment.

The Legislature has adopted these telecommunication principles for California:

- (a) To continue our universal service commitment by assuring the continued affordability and widespread availability of high-quality telecommunications services to all Californians;
- (b) To focus efforts on providing educational institutions, health care institutions, community-based organizations, and governmental institutions with access to advanced telecommunications services in recognition of their economic and societal impact;
- (c) To encourage the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services;
- (d) To assist in bridging the "digital divide" by encouraging expanded access to state-of-the-art technologies for rural, inner-city, low-income, and disabled Californians;
- (e) To promote economic growth, job creation, and the substantial social benefits that will result from the rapid implementation of advanced information and communications technologies by adequate long-term investment in the necessary infrastructure;
- (f) To promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct;
- (g) To remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice; and
- (h) To encourage fair treatment of consumers through provision of sufficient information for making informed

choices, establishment of reasonable service quality standards, and establishment of processes for equitable resolution of billing and service problems.⁶

Consistent with these directives, the Commission has adopted a ratepayer-funded program to bring advanced services to unserved and underserved areas in the state. See D.07-12-054, Order Instituting Rulemaking into the Review of the California High Cost Fund B Program, Interim Opinion Implementing California Advanced Services Fund. As explained by the Commission in creating the ratepayer-funded program:

[P]romoting deployment of additional broadband within areas that are not served at all or underserved is consistent with universal service policies aimed at bridging the “digital divide” as articulated in Pub. Util. Code §§ 709(c) and (d). While we believe that solutions to the digital divide are best driven by market forces within the telecommunications and internet industry, the public sector has a role to play as well, particularly where in some places in California, the market has failed to bring advanced communications to it. The first and most important public role is to identify and remove unnecessary regulations or barriers in the way of broadband deployment and adoption. (See D.07-12-054, at page 7 (*emphasis added*)).

Making basic telephone service universally available in California has been a longstanding policy goal of this Commission and the Legislature. The Commission administers extensive and expensive programs to ensure availability to low-income and rural customers. Nationally, Congress and the Federal Communication Commission also have longstanding similar programs.

⁶ Pub. Util. Code § 709.

With advanced telecommunications services, along with our Federal colleagues, we have recognized the importance and added urgency of strengthening the existing system to serve all interested customers, as well as expanding it into heretofore unserved areas. One critical role we have assumed is to identify and overcome unnecessary governmental or regulatory barriers to achieving these goals.

Extending and enhancing telecommunications facilities will require placement of these facilities in public right of ways as well as, in some instances, on private property. We are committed to minimizing the impact on private property owners and we support prompt compensation via the state court system for unavoidable impacts. These projects, however, are necessary to achieving our important goal of providing communications services to Californians and should not be subject to unwarranted delay.

In today's decision, we will be mindful of the Legislature's policies and our own previous commitment to encouraging widespread deployment of advanced telecommunications services.

5.2. The Proposed Condemnation is Subject to the Public Interest Test in § 625

The Commission is charged under § 625(a)(1)(A) with determining if a utility may condemn property for the purpose of competing with another entity:

For the purpose of this article, except as specified in paragraph (4), a public utility that offers competitive services may not condemn any property for the purpose of competing with another entity in the offering of those competitive services, unless the commission finds that such an action would serve the public interest.

The threshold issue in this proceeding is to determine whether this statute applies to the proposed condemnation, which we will address through Verizon's

motion for summary judgment and Opposing Defendants' response. The entire text of § 625 is reproduced in Attachment C.

In its motion for summary judgment, Verizon argues that § 625 does not apply to this situation because (1) it has no competitors for local landline telephone service in the Summit Road area, and (2) the IOF project will not allow Verizon to enter a new market as a competitor providing high-speed internet access but will only add redundancy and reliability to service Verizon already provides.

Verizon encouraged us to clarify the Superior Court's interpretation of § 625 and rule that the statute does not apply when a carrier is constructing a project within its Commission-approved service territory to enhance service reliability to its existing customers. In its post-trial brief, Verizon explained that in the Uniform Regulatory Framework proceeding (Rulemaking 05-04-005), the Commission concluded that Verizon, and all the large incumbent local exchange carriers, were subject to sufficient competition to lift virtually all price regulations.⁷ Verizon argues that this conclusion does not necessarily mean all projects undertaken by Verizon are competitive in nature; such an interpretation, in conjunction with § 625, would require Commission involvement in "*all* telecommunications plant upgrades statewide, regardless of purpose."⁸ To

⁷ See, e.g., D.06-08-030, at Conclusion of Law 17, "The demonstrated presence of competitors throughout Verizon's service territory further supports the conclusion that Verizon lacks market power in the voice communications market," and Conclusion of Law 24, "Since Verizon, AT&T, SureWest, and Frontier lack market power in their service territories, price regulation is no longer needed to ensure that their prices are just and reasonable. Such price regulations should be removed."

⁸ Verizon Opening Post-Hearing Brief, at page 5 (emphasis in original).

forestall this interpretation, Verizon recommended that the Commission grant its motion for summary judgment and find that § 625 does not apply to this project.

The Opposing Defendants contended that the Superior Court determined that § 625 applied to the proposed condemnation and that the principles of collateral estoppel, *res judicata*, and waiver nullify Verizon's arguments.

By its terms, § 625 applies whenever a "public utility" offers a "competitive service." There is no dispute that Verizon is a public utility.

As noted by Verizon, the Commission has previously determined that Verizon is subject to competition in its provision of voice services. However, D.06-08-030 does not address § 625 or otherwise discuss expansion of the Commission's eminent domain jurisdiction.

We need not and do not reach a final determination of the interrelationship of these two decisions. The Superior Court has determined that § 625 "places the issue of whether Verizon's project would serve the public interest within the special competence of the PUC." Verizon is constructing the IOF project to offer local telephone service and high speed internet access, for which there is intermodal competition.⁹ We, therefore, conclude that for purposes of today's decision, we should exercise jurisdiction and determine whether Verizon's proposed condemnation of a nonexclusive underground utility easement, and related temporary construction easement, serves the public interest as set forth in § 625.

⁹ Intermodal competition occurs where there are competitive substitutes offered by a different mode of service, *e.g.*, internet-based telephone service. (*See generally*, D.06-08-030.)

We next analyze the four statutory standards in relation to the evidence presented.¹⁰ We analyze the standards in the following order:

- Whether the property to be condemned is necessary for the proposed project;
- Whether the public benefit of acquiring the property by eminent domain outweighs the hardship to the owners of the property;
- Whether the proposed project is located in a manner most compatible with the greatest public good and least private injury; and
- Whether the public interest and necessity require the proposed project.

5.3. The Property to be Condemned is Necessary for the Proposed Project

Verizon's witnesses explained that the approximately five-mile private portion of Summit Road is the only feasible means to connect the ends of its IOF project. As discussed above, Verizon has extended the cable along Summit Road approximately nine miles northwest from Gilroy and along another section 12 miles southeast from Los Gatos, leaving the five-mile private section as the only feasible connection of the two sections.

No party disputed this assertion.

We, therefore, conclude that the property to be condemned is necessary for the proposed IOF project.

¹⁰ These standards are set forth in § 625(b)(2)(A) – (D). Section 625(b)(1) sets forth an alternative condition for showing “public interest,” namely, that the proposed project would provide service to an unserved area.

5.4. The Public Benefit of Acquiring the Property by Eminent Domain Outweighs the Hardship to the Owners of the Property

Verizon presented evidence that 65,000 residential and 80,000 business customers will benefit from the increased reliability and data transmission capability of the IOF project. In addition, along Summit Road, 250 customers will be able to purchase high-speed internet access, which is less expensive than the currently available options,¹¹ and within the private section of Summit Road, with the completion of the IOF project, up to 200 new customers, who currently have only wireless or satellite-based service available, will be able to receive landline telephone service, with high-speed internet service to 144,.

The Opposing Defendants testified that Verizon has done a poor job of completing trenching work on other portions of Summit Road, and of repairing damage caused by the Contel trenching in the private section of Summit Road. They concluded that they would be subject to the hardship of a deteriorated road, which would require individual landowner efforts or pooled financial contributions to repair. They feared that the road might become impassable, leaving residents no means of egress or ingress to their homes.

In response to the landowners' contentions, Verizon has committed to repair any damage it causes to the roadway. The Opposing Defendants are not persuaded that this commitment sufficiently mitigates the hardships to which they will be exposed.

We begin by noting that the nonexclusive underground utility easement will result in a subsurface four-inch diameter conduit being placed between four

¹¹ As presented in the Hamlin testimony.

and six feet below the road surface. Verizon is not proposing to condemn any residences, businesses, or buildings of any kind. The surface property over Verizon's proposed easement is itself subject to reciprocal negative easements for roadway purposes. It has been a road for many decades and for the reasonably foreseeable future will continue to be a road. There will be no change of use to the surface property with the proposed installation of Verizon's underground conduit. Similarly, there will be no change of use to the subsurface area because Verizon has committed to avoid all existing and planned road traversing facilities. In short, other than the bore pit disturbances addressed below, there will be no discernible difference between the use and appearance of the property subject to Verizon's proposed easement before and after the proposed condemnation.

The public benefits are set out above and are significant. These benefits outweigh the harm to the landowners. We conclude, therefore, that the public benefit of Verizon's proposed condemnation outweighs the private harm. To minimize this harm, we will also order Verizon to implement the project as set forth below.

Verizon's commitment to restoring the disturbances from the bore pits in the road is a useful initial step in addressing the particular hardships imposed upon the defendants. We note that Summit Road is the owners' sole access to their property and is located in a challenging roadway construction environment. Pursuant to § 701 and our policy encouraging widespread deployment of advanced telecommunications services, we find that additional Implementation Requirements should ensure that Summit Road is restored to a sound engineering standard, compliant with all applicable roadway standards, and should fully mitigate the hardships to be imposed upon the landowners.

Although the scoping memo sought such recommendations from the parties, the Opposing Defendants did not provide specific recommendations. Verizon stated that its construction technique would cause minimal impact to the road, and that the road would be returned to a sound engineering standard. We, therefore, are in the undesirable position of having to develop requirements to minimize the hardships on defendants on our own. Consequently, if the Superior Court permits Verizon to condemn the easements, we will require Verizon and the landowners to meet, confer, and cooperate as necessary to achieve the goal of a road restored to its pre-construction condition. To the extent the parties are unable to agree on sensible steps to be taken, we authorize the Director of the Communications Division, with such additional advice as may be necessary, to oversee and resolve the parties' disagreements regarding the Implementation Requirements set out below.

We, therefore, adopt a set of Implementation Requirements, which are set out in full in Attachment E, and address the following requirements:

- Consultation between Verizon and landowners
- Before and after documentation of roadway conditions
- Installation compliant with roadway engineering standards
- Return roadway to pre-IOF conditions, or better
- Periodic inspections
- Availability of locational information
- Contact information for immediate action, especially during storms

Verizon also requires a temporary construction easement for about six weeks of construction. The Opposing Defendants testified that additional road maintenance, especially grading, is needed. This road maintenance will

immediately benefit all owners and should make up for the short-term inconvenience.

Our goal in imposing the Implementation Requirements is to ensure that the private section of Summit Road is completely restored to its pre-IOF project condition, or better. With the imposition of these Requirements, the harm to the roadway and hardship to the defendants should be substantially mitigated.

5.5. The Proposed Project is Located in a Manner Most Compatible with the Greatest Public Good and Least Private Injury

The IOF project follows Summit Road from Gilroy to Los Gatos, and Verizon has completed about 21 miles of the 26-mile IOF project in two sections. The proposed condemnation is a nonexclusive underground utility easement for an approximately four-inch diameter conduit, placed four to six feet below the roadway. A temporary construction easement is also sought as part of the project. The condemnation will connect the two sections of the IOF project.

The Opposing Defendants offered two alternatives to the IOF project: (1) continuing to rely on the contract with AT&T for trunk line services; and (2) rerouting the IOF to generally follow State Highway 101 through population centers to enable use of public right-of-way. However, neither of these IOF alternatives furthers the Legislature's and the Commission's policy of extending high-speed telecommunications services to underserved areas as would be the case with the IOF project.¹²

¹² As noted above, the IOF project has already brought high-speed services to about 250 customers, with availability for another 144 customers if the project in the private section of Summit Road is completed.

The Summit Road route has a greater level of public good and a lower level of private harm. The Summit Road route will further the policy of bringing high speed internet access to underserved areas, unlike the two proffered alternatives. Both of the alternative projects have greater levels of private harm. Continuing to use the inadequate AT&T contract trunk line imposes lower levels of reliability on Verizon's existing 145,000 customers. Roadway construction permits to install conduit in heavily populated areas with well-known and severe traffic impacts, such as the State Highway 101 corridor, would be difficult to obtain in areas outside of Verizon's service territory and will impose traffic delays and inconvenience on the traveling public in a populous county. In contrast to the harm from the two alternatives, the limited condemnation easement will impose minimal levels of private harm on the 71 Summit Road property owners. Accordingly, even if the proposed project could be replaced as suggested, connecting the existing sections of the IOF in Summit Road is most compatible with the greatest public good and least private injury. We conclude that the proposed condemnation of the limited easement on the private section of Summit Road and the temporary construction easement is most compatible with the greatest public good and least private injury.

5.6. The Public Interest and Necessity Requires the Proposed Project

The Opposing Defendants focused their objection to the condemnation project on their rights as owners of private property. They made clear their lack of faith in Verizon's commitment to maintain the road and their desire to prevent Verizon's activities on their property.

The proposed connection of the two segments of the IOF project on Summit Road will further the public interest by enhancing the reliability and

redundancy of high speed internet services in the region, as well as initiating high speed and landline telephone service in an underserved area with limited wireless service. These are significant public benefits. The Opposing Defendants' concerns regarding Verizon's commitment to maintaining the road are addressed with the Implementation Requirements, such that the landowners should experience little, if any, difference in Summit Road's current conditions and after installation of the IOF project.

Balancing the significant public benefits against the nominal burdens placed on the landowners, we conclude that the public interest and necessity require the proposed condemnation. Therefore, pursuant to § 625(a)(1)(A), we find that Verizon's proposed condemnation would serve the public interest. Should Verizon's Superior Court condemnation be successful, Verizon shall comply with the Implementation Requirements set out above.

5.7. The Proposed Project is Exempt from Review Under the California Environmental Quality Act

In the scoping memo, the parties were directed to submit testimony addressing the issue of whether Verizon had made a sufficient demonstration that an exemption to the California Environmental Quality Act (CEQA) would apply to the proposed project.

Verizon presented testimony stating that the proposed project will be undertaken within the right-of-way of Summit Road, an unpaved roadway actively used for over 60 years, and no significant impacts on the physical environment are expected due to construction or operation of the proposed project. As such, it constitutes a minor alteration in the condition of land which

qualifies for a Class 4 Exemption from CEQA pursuant to CEQA Guidelines Section 15304.

No other party presented testimony on this issue.

CEQA (Public Resources Code Section 21000, *et seq.*) applies to discretionary projects to be carried out or approved by public agencies, and requires the Commission to consider the environmental consequences of its discretionary decisions, such as § 625 findings of public interest. A basic purpose of CEQA is to “inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities.” (Title 14 of the California Code of Regulations, hereinafter CEQA Guidelines Section 15002.)

Here, Verizon requests that the Commission find that its proposed condemnation is categorically exempt from CEQA.¹³ CEQA and the CEQA Guidelines enumerate various categorical exemptions to the requirement for environmental review under CEQA. CEQA Guideline Section 15304 provides an exemption from CEQA review for Minor Alterations to Land, which consists of minor public or private alterations in the condition of land with no tree removal. The proposed easements will result in the placement of telecommunications conduit under an established road bed, with disturbance of less than 2% of the surface roadway. No trees will be removed. Accordingly, we find that the facts submitted by Verizon support a conclusion that the proposed project is exempt from CEQA review.

¹³ The Commission is the lead agency.

6. Discussion of Procedural Issues

6.1. Alleged Violation of *Ex Parte* Contact Prohibition

As specified in Rule 8.2(b) of the Commission's Rule of Practice and Procedure, *ex parte* contacts are prohibited in this proceeding. The parties were informed of this prohibition in the scoping memo. (See Attachment A, p. 3, to today's decision.)

In response to allegations by the Opposing Defendants of impermissible *ex parte* contacts, the Presiding Officer ordered Verizon to present testimony at the hearing addressing the alleged contact.

Verizon's witness testified that a meeting occurred on November 27, 2007, between two Verizon representatives and an advisor to Commission President Peevey. The purpose of the meeting was to inform the advisor and the Commission staff that Verizon was preparing to file this complaint pursuant to § 625, with its expedited procedural schedule. The witness was present at the meeting and testified that no commitments to a particular outcome were sought or obtained by Verizon. The complaint was filed the next day, November 28, 2007.

Verizon argued that the Commission's *ex parte* rules apply only to formal proceedings, and that this complaint did not become "formal" within the meaning of the rules until filing on the day after the meeting.

The Opposing Defendants objected to the meeting and Verizon's analysis of Rule 8.2(b). The Opposing Defendants contended that a formal proceeding was in place – the Superior Court proceeding. The Opposing Defendants offered no authority for the proposition that a Superior Court proceeding met the Commission's definition of proceeding for purposes of the *ex parte* rule.

As provided in Rule 8.1(c), Rule 8.2 of the Commission's Rules of Practice and Procedure applies to communications that concern a substantive issue in a formal proceeding with a decision maker. A review of the Rules of Practice and Procedure, e.g., Rules 1.3, 1.4, 7.1 (especially Rule 7.1(e)(3)), and 8.1(c)(1), shows that the proceedings referred to in these Rules are Commission proceedings, not Superior Court proceedings.

We, therefore, conclude that the evidence does not support a finding that this meeting violated Rule 8. It is undisputed that the meeting occurred before the filing and was not intended to influence the post-filing outcome. Rule 8.2(b) prohibits *ex parte* communications in any adjudicatory "proceeding." On November 27, 2007, this proceeding had not started and Rule 8.2(b) was not applicable.

We caution Verizon, however, any future such prefiling informative meetings would be better directed to the organizational staff of the Commission, e.g., the Director of the Communications Division, rather than a Commissioner's advisor.

6.2. Other Procedural Objections

The Opposing Defendants raised several procedural objections which, they contend, frustrate legislative intent in adopting § 625. They contend that these procedural flaws prevent the Commission from rendering a legal and binding decision. We address each contention below specifically.

As a general matter, § 625 requires a very expedited schedule. The complaint must be brought to hearing within 45 days of filing, and a decision rendered 45 days after the end of the hearing and briefing. In contrast, the Commission's typical schedule for resolving complaints is within one year. (*See* § 1701.2(d).) Accordingly, the hearing schedule must be set quickly and strictly

adhered to, other than the single 30-day continuance authorized in § 625(a)(2)(A). This schedule necessarily imposes significant burdens on the parties, the Presiding Officer, and the Commission.

The Opposing Defendants stated that the “most significant flaw” was the complainant’s and the Commission’s failure to serve a copy of the complaint upon all of Verizon’s competitors. The Opposing Defendants contend that Verizon was required to give notice of this proceeding to all its competitors for local telephone and advanced telecommunications services that could be provided by the IOF project. The Opposing Defendants point to the Commission’s manual¹⁴ for property owners, utilities, and the public regarding these eminent domain proceedings as the source of this requirement. The manual, however, mandates service only on property owners; it only recommends service on a number of other potentially interested parties, including competitors.¹⁵ Under the statute, service on the property owner is mandatory (§ 625(a)(1(A))); no other entity is required to be served with the complaint.

Verizon contends that there is no requirement for service on competitors and, even if one existed, no other entities offer landline telephone service and DSL along Summit Road.

¹⁴ Information for Property Owners, Utilities, and the Public Regarding Senate Bill 177.

¹⁵ The page of the manual addressing filing and service of the complaint is reproduced in Attachment D, with the worldwide web address for the entire document. The page states that “utilities must serve the complaint on: the property owner” The next section states that the utility “should also serve the complaint on” six other listed types of entities, including “utilities or entities” that offer in the same geographic area the “type of service for which the public utility is seeking to condemn the property.”

We find and conclude that Verizon properly served its complaint. The Commission staff prepared the manual to assist parties in complying with § 625, which also contains obligations for the Commission to notify local jurisdictions. The plain words of the manual require service on the defendant, but only recommend service on competitors. Thus, Verizon was under no obligation to serve any competitors with the eminent domain complaint and, consequently, the failure to do so was not a procedural error.

The Commission publishes notice of all its hearings in its daily calendar, available on the Commission's web site, www.cpuc.ca.gov. Consistent with § 625(a)(2)(A), the Commission gave notice to both local jurisdictions, Santa Clara and Santa Cruz Counties, who in turn gave required notice. Consequently, any competitor concerned about Verizon's expansion into the private section of Summit Road could have readily obtained information from multiple sources about the hearings.

The Opposing Defendants next object to the use of a scoping memo to set issues and require written direct testimony with cross-examination limited to the issues raised on the direct testimony. The Opposing Defendants contend that these procedural devices effectively eliminated cross-examination as a tool of exposing the truth.

Verizon attributes the Opposing Defendants' procedural objections to their lack of familiarity with the Commission's processes.

A scoping memo is required by § 1701.2: "The assigned Commissioner or the assigned Administrative Law Judge shall hear the case in the manner described in the scoping memo." Rule 7.3 of the Commission's Rules of Practice and Procedure provide that the assigned Commissioner shall issue a scoping memo for each proceeding setting forth the schedule and the issues to be

addressed. The scoping memo for this proceeding is reproduced in Attachment A, and includes the following notification of hearing procedures:

All direct and reply testimony shall be in writing and shall be distributed prior to hearing on the schedule set out below. No additional direct or reply testimony shall be accepted at the hearing absent compelling circumstances. The hearing will be transcribed by a court reporter and limited to cross examination, under oath, of witnesses presenting evidence on disputed issues of material fact. The testimony shall be limited to factual assertions relevant to an issue of material fact in this proceeding.

These are standard Commission procedures designed to require parties to reveal their testimony ahead of the hearing and to allow opposing parties opportunities for discovery and preparation of cross-examination questions.

The Opposing Defendants next object because the Presiding Officer denied their untimely request for continuance. The scoping memo also set the deadline for defendants to request a 30-day hearing extension pursuant to § 625(a)(2)(A). The Commission requires sufficient notice of the extension request to enable the Commission to perform its noticing duties to the local jurisdictions. The Commission must “provide the local jurisdiction with copies of the notice of hearing in time for the local jurisdiction to mail that notice at least seven days in advance of the hearing to all persons who have requested copies of the local jurisdiction’s agenda or agenda packet.” § 625(a)(2)(A). In addition, that statute requires that the hearing be held in the local jurisdiction, which requires scheduling an appropriate hearing venue and making travel arrangements for court reporters and Commission staff. Accordingly, the scoping memo set December 28, 2007, as the last date to request a hearing extension. On January 7, the Opposing Defendants requested a delay in the hearing scheduled for January 10 to allow additional time to prepare their rebuttal testimony, which

was due on January 9. Although the hearing was not delayed, the Opposing Defendants desire for additional time to prepare rebuttal testimony was accommodated by accepting revised rebuttal testimony for the record on January 10, allowing the Opposing Defendants' witnesses to present extemporaneous surrebuttal testimony, and, over Verizon's hearsay objection, accepting testimony as to the content of a telephone message left by a person not a party or a witness.

The Opposing Defendants request judicial notice of 11 items listed in their brief. Several of the items are currently included in the record of this proceeding. Thus, the request for judicial notice of this proceeding's hearing exhibits, transcripts, and pleadings is denied as unnecessary.

Three of the items relate to the Opposing Defendants' opposition to Verizon's motion to dismiss. These items are the Superior Court trial transcripts and depositions offered in support of the opposition.

Verizon objects to receiving these voluminous documents into the evidentiary record because the Opposing Defendants have not specifically delineated what portions of these documents are relevant to an issue in the proceeding. Verizon states that the California Court of Appeal has found that seemingly superfluous or unaddressed matters in the record may have significant consequences, making it unfair to allow such items to be admitted, *citing* Demps v. San Francisco Housing Authority (2007) 149 Cal. App. 4th 564.

The Opposing Defendants offered these documents for their opposition to the motion to dismiss. We have addressed the motion to dismiss above. The Opposing Defendants also cited to these documents in their closing brief for the proposition that Verizon would not have made local improvements to the Summit Road facilities absent the larger IOF project, which was stipulated

between the parties, and that the Superior Court used legislative history in its interpretation of § 625. Neither of these propositions is reasonably subject to dispute.

We will allow the portions of the Superior Court transcripts identified in the Opposing Defendants' reply brief to be used for these purposes only.

7. Appeal of the Presiding Officer's Decision

The Opposing Defendants primarily presented arguments rejected elsewhere in today's decision, and we need not repeat the analysis.

Two issues require further discussion. The Opposing Defendants challenge as unconstitutional the use of eminent domain by a private (or investor-owned) utility. Since 1872, investor-owned utilities in California have been authorized to condemn private property for the purpose of providing public utility service.¹⁶ Pursuant to § 625, the Commission must make the required findings prior to certain condemnations, but that section does not change long-established law and prohibit condemnation of private property by a public utility.

The Opposing Defendants 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. Verizon's presentation provided the Commission with

¹⁶ See Code of Civil Procedure, Section 1238 repealed 1975, Historical and Statutory Notes West Code 2007. See also SDG&E v. Lux Land Co., 194 Cal.App2nd 472, 478. Current statutory authorization is § 616 of the Public Utilities Code.

sufficient factual information to make the evaluations necessary pursuant to § 625.

Therefore, we conclude that the Opposing Defendants' appeal presented no basis for substantive alteration of the Presiding Officer's Decision and we make no such alterations.

8. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Maribeth A. Bushey is the assigned ALJ and Presiding Officer in this proceeding.

Findings of Fact

1. Notice of Verizon's filing of this complaint appeared in the Commission's daily calendar on November 30, 2007.
2. The scoping memo, see Attachment A, was issued on December 3, 2007, and included the procedures and schedule to be followed for this proceeding.
3. Public notice of the January 10 and 11 hearings first appeared on the Commission's daily calendar on December 4, 2007, and each day thereafter until the dates of the hearing.
4. The five-mile section of Summit Road at issue in this proceeding is subject to reciprocal negative easements held by the 71 owners of record for the property over which the road passes.
5. Verizon served notice of this proceeding upon all 71 owners of record, who are named defendants to this proceeding.
6. Verizon's Inter Office Fiber Trunk Project is a 26-mile fiber optic trunk line running from Gilroy to Los Gatos along Summit Road.
7. Verizon has obtained municipal authorization and completed construction in the portions of Summit Road under municipal control, about 21 miles, by extending cable approximately nine miles northwest from Gilroy and 12 miles

southwest from Los Gatos. The remaining five-mile section is the private portion of the road.

8. The IOF project would require that Verizon obtain by condemnation or otherwise, a nonexclusive underground utility easement in a 10-foot wide section of the private section of Summit Road and a temporary construction easement.

9. Verizon is constructing the IOF project to offer local telephone service and high speed internet access, for which there is intermodal competition.

10. The chief purpose of IOF project is to increase system reliability and remedy inadequate data transmission capabilities out of Verizon's Morgan Hill and Gilroy offices, with about 65,000 residential and 80,000 business customers benefiting from the increased system reliability and data transmission capability.

11. The portions of the IOF that Verizon has installed along Summit Road leading up to the private section allow about 250 customers to now purchase high-speed internet access for the first time.

12. The IOF will also enable Verizon to offer modern, fiber-based service to residents of the private section of Summit Road and solve the persistent maintenance problems on this road. When the IOF is completed within the private portion of Summit Road, up to 200 customers will be able to receive landline telephone service with high speed internet service to 144 customers.

13. Verizon proposes to use directional boring to place the conduit for the fiber optic cable in the private portion of Summit Road.

14. Directional boring will result in disturbance of less than 2% of the roadway surface; disturbance will be limited to four feet square bore pits placed about every 300 feet.

15. The owners of the private portion of Summit Road are solely responsible for maintaining this section of the road.

16. The Opposing Defendants fear that Verizon's construction activities will result in deterioration of the roadway.

17. The policy of the State of California is to encourage widespread deployment of basic telephone service and advanced telecommunications services, and to remove any governmental or regulatory barriers to open and competitive markets so as to promote fair product and price competition.

18. There will be no change to the use of the surface property comprising the private section of Summit Road roadway with the proposed condemnation.

19. Verizon has agreed to avoid all existing and planned road traversing facilities, so the proposed condemnation would not affect the use of the subsurface property under the private portion of Summit Road.

20. The Implementation Requirements will substantially mitigate the harm to the roadway and, thus, to the landowners.

21. The public benefits of the IOF project, as set forth in Findings of Fact 9 through 12 above, are significant benefits.

22. Neither of the Opposing Defendants' two alternatives to the overall IOF project would extend basic telephone service or advanced telecommunication services into underserved areas.

23. Continuing to use only the AT&T contract would impose lower levels of reliability on Verizon's 145,000 customers, as compared to completing the IOF project.

24. Public right of way construction in the State Highway 101 corridor would impose traffic delay and inconvenience on dramatically more members of the traveling public than construction on Summit Road.

25. The IOF project, including Verizon's proposed condemnation along Summit Road, is located in a manner most compatible with the greatest public

good and least private injury than the two IOF alternatives suggested by the Opposing Defendants

26. The 71 landowners should experience little, if any, discernible difference in Summit Road's conditions before and after completion of the IOF.

27. The November 27, 2008, meeting of two Verizon representatives with Commission President Peevey's advisor occurred before this proceeding was filed and was not intended to influence the post-filing outcome.

28. In its proceedings, the Commission routinely uses scoping memos to set issues and written direct testimony distributed prior to hearings. Cross-examination is limited to issues raised in the direct testimony. Such use conforms to the statute and the Commission's Rules of Practice and Procedure.

29. Verizon's plans for its facilities in Summit Road showed a sufficient level of detail for the Commission to make its determinations under § 625.

Conclusions of Law

1. Verizon is a public utility.
2. In D.07-06-030, the Commission determined that Verizon is subject to intermodal competition in its provision of voice services.
3. In its August 22, 2007, decision in Case 1-04-CVO28324, the Santa Clara County Superior Court determined that § 625 "places the issue of whether Verizon's project would serve the public interest within the special competence of the PUC."
4. For purposes of today's decision, we should exercise jurisdiction and determine whether Verizon's proposed condemnation of a nonexclusive underground utility easement, and related temporary construction easement, serves the public interest as set forth in § 625.

5. The private five-mile portion of Summit Road is necessary to connect the extant sections of the IOF project extending from Gilroy and Los Gatos.

6. The surface of the property under which Verizon proposes to condemn a nonexclusive utility easement is already subject to reciprocal negative easements for a roadway among the landowners.

7. The Implementation Requirements set out in Attachment E should be adopted and the parties directed to comply with the measures.

8. The public benefits of the proposed condemnation outweigh the hardship to the landowners.

9. The IOF project is located in a manner most compatible with the greatest public good and least private injury.

10. Completing the IOF project will bring significant public benefits to 145,000 of Verizon's existing customers, and will extend landline telephone service to up to 200 new customers and advanced telecommunications service to up to 144 new customers.

11. The public interest and necessity require Verizon's proposed condemnation of a nonexclusive underground utility easement in Summit Road, and a temporary construction easement to install the facilities.

12. The November 27, 2008, meeting with Commission President Peevey's advisor did not violate Rule 8.2(b) of the Commission's Rules of Practice and Procedure.

13. The proceedings referred to in the Commission's Rules of Practice and Procedure are Commission proceedings, not Superior Court proceedings.

14. CEQA Guideline Section 15304 exempts from CEQA review minor alternations to land. The proposed easements are minor alterations and therefore are exempt from CEQA.

15. The Commission publication, Information for Property Owners, Utilities, and the Public Regarding Senate Bill 177, does not create a requirement that utilities seeking to condemn property serve a copy of the complaint on all entities offering or proposing to offer the same type of service in the same geographic area.

16. The evidentiary hearings in this proceeding were conducted consistent with the Commission's procedural standards for hearings and afforded both parties a fair hearing to resolve the issues raised by the complaint.

17. The timing constraints set by § 625 require an expeditious hearing.

18. The public interest would be served by Verizon's proposed condemnation.

19. The Superior Court transcripts and testimony may be used only to support the propositions set forth in the Opposing Defendant's opening brief.

20. The Opposing Defendants' appeal presented no basis for substantive alteration of the Presiding Officer's Decision and no such alterations should be made.

21. Today's order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. Pursuant to Public Utilities Code Section 625, this Commission finds that the condemnation by Verizon California Inc. (Verizon) of a nonexclusive underground utility easement under the private section of Summit Road, and a temporary construction easement will serve the public interest.

2. Verizon shall comply with all provisions of the Implementation Requirements contained in Appendix E, if Verizon is successful in its Superior Court condemnation action.

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.

4. The appeal of the Opposing Defendants, identified in Attachment B, is denied.

5. Case 07-11-019 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

[Bushey Agenda Dec Modified Presiding Officer's Decision Appendices A-](#)

[E](#)