



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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LA COLLINA DAL LAGO, L.P.;
BERNAU DEVELOPMENT
CORPORATION,

Complainants,

vs.

PACIFIC BELL TELEPHONE
COMPANY, dba AT&T California (U
1001 C),

Defendant.

Case No.: 09-08-021

COMPLAINANTS' REPLY BRIEF

MALDONADO & MARKHAM, LLP
William Markham
402 West Broadway, Suite 2050
San Diego, CA 92101
Telephone: (619) 221-4400
Facsimile: (619) 224-3974
E-mail: wm@maldonadomarkham.com

KERSHAW, CUTTER & RATINOFF, LLP
William A. Kershaw
Lyle W. Cook
401 Watt Avenue
Sacramento, CA 95814
Telephone: (916) 448-9800
Facsimile: (916) 669-4499
E-mail: wkershaw@kcrlegal.com

Date: February 4, 2011

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP
Thomas J. MacBride, Jr.
Suzy Hong
505 Sansome Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
E-mail: tmacbride@goodinmacbride.com
E-mail: shong@goodinmacbride.com

Attorneys for Complainants
La Collina Dal Lago, L.P., and Bernau
Development Corporation

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COMPLAINANTS' REPLY BRIEF

Pursuant to the briefing schedule set by Administrative Law Judge Katherine MacDonald, modified by her electronic mail dated January 13, 2011, Complainants La Collina Dal Lago, L.P. and Bernau Development Corporation hereby submit their Reply Brief.

I. INTRODUCTION

These proceedings arise out of the special referral from the Sacramento Superior Court. The proceedings are defined and limited by the SCOPING MEMO AND RULING OF ASSIGNED COMMISSIONER issued on August 16, 2010. In their Opening Brief, Complainants explained why the Commission should advise the Superior Court that:

1. Rule 15 applies to line extensions installed by developers rather than AT&T. (Scoping Memo, Issue No.1)
2. Rule 15 requires reimbursement by AT&T to developers for some portion of their costs incurred in installing line

- extensions. (Scoping Memo, Issue No 2.)
3. When calculating its reimbursement, AT&T should reimburse developers what AT&T reasonably would be required itself to pay for the work that the developers perform for it. (Scoping Memo, Issue No 2.)
 4. AT&T must reimburse developers for conduit in residential developments unless the developer has requested an unusual route or configuration. (Scoping Memo, Issue No 2.)
 5. AT&T may enter into “trench agreements” with developers with respect to the installation of line extensions but the amount of the reimbursement set forth in such agreements is not binding on the parties unless it is consistent with what Rule 15 C would otherwise require in the absence of such agreements. (Scoping Memo, Issue No 3.)
 6. AT&T’s actions as alleged in the administrative complaint constitute violations of Rule 15. (Scoping Memo, Issue No 4.)
 7. The violations of Rule 15 by AT&T harmed Complainants. (Scoping Memo, Issue No 5.)¹

AT&T took an entirely different course. It devoted little of its brief to the Scoping Memo or the underlying referral order. Instead, AT&T argued that (1) Complainants must prove that AT&T has engaged in systematic, statewide, bad faith practices and (2) a failure of proof on this point means that “Complainants’ claims and proffered proof of violations of Rule 15 on the part of AT&T failed entirely....”²

Of course, AT&T’s reframing of the issues finds no support in the Scoping

¹ Complainant’s Opening Brief at Part V.

² Opening Brief of Defendant Pacific Bell Telephone Company d/b/a/ AT&T California (U 1001 C) filed January 21, 2011 (“AT&T Op. Br.”) at p. 2.

Memo. Moreover, the propriety of a class proceeding is not before the Commission.³ The Superior Court has not sought guidance on that question. It is not embraced in the Scoping Memo.

Whether AT&T violated Rule 15 with regard to Complainants' developments does not turn on the state of the record with regard to any *class*. It turns on whether AT&T's construction of Rule 15 as articulated in this docket is incorrect as a matter of tariff construction. The presence or absence of bad faith or fraudulent conduct is irrelevant to that construction. Neither factor is a predicate to demonstrating that a utility violated its tariff any more than bad faith or fraudulent conduct on the part of the utility excuses the *customer* from the terms of the tariff.⁴ In the large portion of its brief asserting an absence of proof on a point where no proof is required, AT&T offers little to answer the questions actually presented by the Scoping Memo. AT&T has little to say about the issues actually before the Commission, leaving them to the last five pages of text (AT&T Op. Br. at 19-23.)

In the sections below, each of the issues actually presented will be discussed. AT&T concedes the first issue.⁵ Complainants will demonstrate that AT&T's positions on Issue No. 2, Issue No. 3, Issue No. 4 and Issue No. 5 are mistaken and that the issues should be resolved as Complainants urged in their Opening Brief.

³ A class case has been pled, but adjudication of class claims is not yet before the Superior Court, and surely is not before this Commission. No class has been certified and no notice has been given to a class that would permit any adjudication of their claims. As the Commission properly recognized in its Scoping Memo "each Complainant claimed a specific instance of under reimbursement by AT&T." (Scoping Memo at p. 5.) These are the only claims for violation and injury that are at issue. (See discussion at (p.17) *infra*.)

⁴ The obligations of a utility and its customer under a tariff turn on the terms of the tariff, as construed by the Commission, not on the presence or absence of bad intent. *Empire West. v. Southern Cal. Gas. Co.* (1974) 12 Cal 3d, 805, 809. (Customer bound by utility tariff even if utility intentionally mis-quotes rate.).

⁵ Whether Rule 15 applies to developer installations.

II. ARGUMENT

A. Whether Rule 15 Applies (and to what extent, if any) To Line Extensions Installed By Developers Rather Than AT&T (Issue No. 1).

AT&T concedes that Rule 15 applies to line extensions installed by developers. (AT&T Op. Br. at p. 19.) The Commission should, therefore, find in Complainants favor on Issue No. 1. The finding should be that the Rule 15 cost allocations apply to line extensions installed by developers to the same extent they would if AT&T had performed the work.

B. Whether Rule 15 Requires Reimbursement By AT&T To Developers For Any Portion Of Their Costs Incurred In Installing Line Extensions. And, If So, The Basis And Manner For Determining The Amount Of Such Reimbursement (Issue No. 2).

AT&T's discussion of this issue occurs at pages 19 and 20 of its Opening Brief. AT&T fails to clearly answer either part of the two-part question.

1. **The Commission Should Provide An Affirmative Response To The First Part Of Issue No. 2, "Whether Rule 15 Requires Reimbursement By The Utility To Developers For Any Portion Of Their Costs Incurred."**

The first question in Issue No. 2 is "whether Rule 15 requires reimbursement by the Utility to developers for any portion of their costs incurred." In response, AT&T describes what it claims as its "practice," and then asserts "Complainants presented insufficient evidence to establish that the reimbursement amounts offered by AT&T to developers were calculated in bad faith..." (AT&T Op. Br. at 19-20.) *The question, however, is not directed at what AT&T does, but on what Rule 15 requires.*⁶

By describing its "practice" regarding reimbursement..." (AT&T Op. Br.

⁶ This is a recurring misconception on AT&T's part. The primary purpose of the special referral by the Superior Court is to obtain the benefit of the Commission's special expertise in interpreting the requirements of Rule 15. It is the meaning of Rule 15 that matters here, not whether AT&T's conduct toward absent class members violates Rule 15. Any claimed violation as to the class is a matter to be
(footnote continued)

at 19), however, AT&T seem to concede that Rule 15 requires it to reimburse the developer for some portion of the developers' costs for installing line extensions. Whether conceded or not, it is clear that Rule 15 requires AT&T to reimburse developers for some portion of their costs incurred in installing line extensions. (*See* Complainants' Opening Brief at pp. 4, 17.) The Commission should, therefore, find that "Rule 15 requires reimbursement by the Utility to developers for some portion of their costs incurred"

2. The Commission Should Determine The "Basis And Manner" For Determining The Amount Of Such Reimbursement In A Manner That Preserves The Core Cost Allocations Of Rule 15 And Applies Rules Of Tariff Construction.

The second question presented in Issue No. 2 concerns the "basis and manner for determining the amount of such reimbursement." This question raises the central issues addressed at the hearing and in Complainants Opening Brief: (1) reimbursement for developer installed conduit in residential subdivisions and (2) the calculation of AT&T's cost of joint trenching.

In response to this portion of Issue 2, AT&T ignores Section C.1 of Rule 15. Section C.1 governs cost allocations for residential developments and was the principal tariff provision addressed over the two days of hearing in this matter. It expressly states that, "(T)he Company will construct an underground extension at its expense. Trenches will be occupied jointly, where economy dictates, *upon payment by the Company of its pro-rata cost thereof*." Rule 15.C.1.a (emphasis added).⁷

Instead of addressing Section C.1, AT&T selectively conflates various other provisions of Rule 15 in search of a path around Section C.1⁸. For example, AT&T

decided after the Commission issues its decision responding to the issues presented.

⁷ For ease of reference, Complainants cite to the provision of Rule 15 rather than the formal tariff cite which would embrace the location of Rule 15 in AT&T's tariffs on file at the Commission. Rule 15 is found in Schedule A.2 ("General Regulations") AT&T's Network and Exchange Services Tariff.

⁸ Since the reach of Section C. 1 was a principal issue in this proceeding it is remarkable that AT&T's

(footnote continued)

refers to section C.2.b, which deals with commercial or mixed used developments, and to section A.2, which deals with the exceptional circumstance of a developer requested type of construction, and to A.9, which refers to an available procedure for remedy under exceptional circumstances. (AT&T Op. Br. at 19-20.) None of these sections govern the standard “garden variety”, “most common”⁹ line extension to a residential subdivision. Section C.1 does. Rather than confront this text AT&T’ offers a litany of reasons why it need not construct line extensions in residential subdivisions “at its expense” as required by section C.1.

AT&T most prominent claim is that “[i]f, however, the contractor chooses a different method of construction for its own purposes (such as an underground conduit system), AT&T need not reimburse the developer for the extra costs associated therewith.” (AT&T Op. Br. at 19) AT&T asserts that under such circumstances, it may shift costs expressly allocated to AT&T under Rule 15 to the developer.

AT&T’s position is incorrect for several reasons. We address two that AT&T may not even contest (but which flow from its broad assertion) before turning to the key issue that is plainly contested.

a. AT&T Must Pay For Conduit Under Certain Provisions of Rule 15.

As a general matter, AT&T is simply wrong if it is broadly contending that it is not responsible for the cost of conduit. Even the portions of Rule 15 which impose more limited cost obligations on AT&T (in commercial or mixed-used developments governed by Rule 15 C.2.a) provide that AT&T must either install the conduit itself or reimburse the developer for doing so.¹⁰

brief barely addresses it at all, referring to it only in its summary of Complainant’s allegations, a single reference in response to Mr. Lower’s testimony and in its proposed findings.

⁹ AT&T’s witness, Mr. Shortle, testified that AT&T’s “most common practice” was to construct its underground line extensions by means of developer provided conduit installations. (Ex. 201, p. 5 (Shortle))

¹⁰ The reimbursement must be based on the current cost of the conduit to AT&T. All agree that the relevant cost is AT&T’s cost. Complainants contend that this measure of cost must be reasonably determined.

b. Section A.2 Does Not Excuse AT&T From Paying For Its Full Pro-Rata Share of Joint Trench.

It is not clear whether AT&T is relying on Section A.2 to avoid full payment for its share of joint trenches but, obviously, AT&T cannot avoid full payment for its pro-rata share of joint trenches it occupies in residential subdivisions. A joint trench cannot be conceived of as a more costly developer requested type of construction. A joint trench is a *less expensive* type of construction of which AT&T may only avail itself “upon payment by the Company of its pro-rata cost thereof.” Rule 15 C.1.a. AT&T should not be able to shift its pro-rata share to the developer by unilaterally reducing the estimated costs of the joint trench work. Instead, it should be obligated to pay for its reasonable pro-rata share of the joint trench costs. Nothing in section A.2 of Rule 15 provides AT&T with any defense against paying its pro rata share of joint trench costs.

c. Section A.2 Does Not Apply Simply Because a Developer Installs Conduit in a Residential Subdivision.

AT&T’s contends that the exception under A.2 (“where the applicant requests a route or type of construction which is feasible but differs from that determined by the Company”) applies simply because, as is usually the case, conduit is installed in a residential subdivision rather than direct buried cable. This assertion raises one of the principal questions of tariff construction to be resolved in this matter. AT&T is wrong for several reasons.

(1) AT&T’s expansive construction of A.2 would render the general rule for residential subdivisions (C.1) a nullity.

AT&T cannot seriously urge that the method of line extension to residential subdivisions described by AT&T itself as AT&T’s *most common practice*¹¹ is “not determined by the Company.” That *most common practice* is for AT&T to design,

¹¹ AT&T’s witness, Mr. Shortle, testified that AT&T’s “most common practice” was to construct its underground line extensions by means of developer provided conduit installations. (Ex. 201, p. 5

(footnote continued)

specify and own a conduit systems installed by a developer. By claiming that its *most common practice* is governed by a special rule that allows it to avoid payment, AT&T posits an exception so broad in scope that it swallows the general rule (Section C.1) and thereby defeats its purpose. The Commission’s fundamental principles of tariff interpretation, however, proscribe a “*construction.. which render(s) some provision of the tariff a nullity and which produce absurd or unreasonable results...*” *Re Southern California Power Pool* 60 CPUC2d at 471 quoting *Vultee Aircraft Corp. v. Atchison Topeka & Sante Fe Railway Co.*, 46 Cal.RRC 147, 149 (1945) (emphasis added). AT&T’s construction of section A.2 “nullifies” Section C.1 in most of the residential developments it governs.

(2) Complainants do not ask that AT&T be ordered to conform its schedule to the developer’s “critical path”, only that AT&T bear the costs described in Section C.1 of Rule 15.

AT&T correctly states that “nothing in Rule 15 requires AT&T to construct a line extension according to a developer’s unilaterally set ‘critical path.’” (AT&T Op. Br. at p. 7.) Obviously, it does not do so today. Its “most common practice” is to extend its lines in a manner that does not require AT&T to adhere to the “critical path” of a developer or anyone else.

Indeed, AT&T’s “most common practice” is to perform very little of the actual construction of line extensions in residential subdivisions. It rarely, if ever, performs the trench work. (Tr. Vol. 2 at pp. 157-158.) While it professes a choice for

(Shortle.)

direct buried cable¹² (AT&T Op. Br. at p.19), in most instances, it does not install direct buried cable. Instead, AT&T usually, at a time convenient for AT&T, manually installs its regular telephone cable in conduit and supporting structures that have been previously installed by the developer. It is the developer, at AT&T's direction, that undertakes the construction of much the line extension for AT&T, and does so in the only way available to the developer, by installing conduit.¹³ The conduit installation is one that AT&T, not the developer, designs and specifies.

There is nothing inherently wrong with this pattern of conduct and no violation of Rule 15 occurs simply by reason of AT&T's failure to conform to what it calls the "developer's unilaterally set schedule." (AT&T Op. Br. at 10.) AT&T may have myriad reasons to install buried cable in some installations and permit the developer to install conduit in others. Where AT&T is wrong is in its assertion that the latter course relieves AT&T of its obligation under section C.1 to construct the residential line extension at its expense. The violation occurs when AT&T fails to comply with its unequivocal obligation to bear the expense of the line extension under Section C.1.a.

(3) In most cases, conduit is not installed because the developer "chooses a different type of construction."

Section A.2 of Rule 15 contemplates circumstances where a developer will request a more expensive route or type of construction and will pay for the additional cost of this more expensive installation. Section A.2 states: "Where the applicant requests a

¹² AT&T concedes that section A.2 only allows it to escape its reimbursement obligation for the "extra costs associated" with more expensive developer requested types of construction. (AT&T Op. Br. at p. 19.) *This means that even if AT&T were correct (which it is not) in its claim that its most common practice of designing and installing residential conduit installations falls within the exception to the general rule that AT&T must install the line extension "at its expense," then only the "extra cost" is chargeable to the developer.* On this point, there is no genuine dispute. The "basis and manner" for reimbursing developers on a conduit installation *cannot shift the entire cost of the conduit to the developer.* Instead, only the additional cost -- the extra expense -- is chargeable. At a minimum, this means AT&T must reimburse developers for the cost AT&T saves installing the less expensive cable in conduit installations as compared to the more expensive "sheathed" cable in direct buried installations. AT&T cannot claim the entire cost of the conduit installation as an additional or extra cost to be shifted to the developer.

¹³ AT&T does not permit developers to install direct buried cable.

route or type of construction which is feasible but differs from that determined by the Company, the applicant will be required to pay the estimated additional cost involved.” Rule 15 A.2.

AT&T wrongly argues that contractors are “choosing a different method of construction” when they install conduit. (AT&T Op. Br. at 19.) There is no developer choice. AT&T does not allow developers to install direct buried cable; AT&T will only allow to developers to install conduit. For a developer to request or choose an alternative type of construction presumes that the developer has a choice between two methods. By eliminating the alternative (a developer direct buried cable installation), AT&T eliminates the choice. This defeats the predicate necessary for application of section A.2.

(4) “Choosing” to wait for AT&T to install direct buried cable is not a realistic choice for the developers, the choice lies with AT&T.

AT&T repeatedly suggests that the other “choice” is to “wait for AT&T to construct the line extension.”¹⁴ (*Id* at page 14.) Obviously, this is not a choice as to a *type of construction*. The developer has none since it may not install direct buried cable itself. It is a choice related to *timing*. While AT&T may have some choice as to timing, the developer does not. (Bernau, Tr. Vol. 1, p. 112, line 2 to p. 114, line 14.) The developer must perform the joint trench work on a critical path schedule that meets not only the developer’s needs, and the safety needs of the public, but also the needs of the other utilities in the joint trench. The developers have no real choice.

By contrast, AT&T does have choices with respect to both the timing and form of the line extension. AT&T may choose to lay direct buried cable on the reasonable schedule that applies both to it and to the other utilities occupying the joint trench (as it does in Orange County) or it can design and specify a developer conduit installation, which then allows AT&T to run the cable at a time of its choosing. What criteria AT&T

¹⁴ Notably, AT&T sets no outside limit on the “wait.” Were the Commission to concur with AT&T’s construction of Section A2, AT&T would be left with utterly no incentive to spend a nickel installing direct buried cable.

applies to its decision is of no moment here. What is important is that it is AT&T's choice and not the developers. It is wholly counter-intuitive to assume that myriad unrelated developers in Orange County are, as a class, operating in lock-step on different construction schedules than developers in the rest of the state such that the Orange County developers can accommodate AT&T's schedule for the installation of direct buried cable while the hapless developers in the rest of California cannot. The decision to install conduit is effectively AT&T's. It has choices while the developer does not.

AT&T representation that it is constrained and cannot, therefore, bring crew to the site on time, only demonstrates that the conduit installation is equally inevitable *from both parties' perspectives*. Whether conceived of as a lack of choice by the developer, or AT&T, *or both*, the fact remains that there is no real choice of alternatives with respect to installing conduit. A conduit installation cannot seriously be conceived of as a type of construction chosen or requested by the developer. Accordingly, in construing Section A2, the Commission should conclude that it is AT&T that determines its most common practice of installing conduit in residential subdivisions, not developers.

(5) If there is any doubt about the meaning of section A.2, it must be resolved against AT&T.

Where all ambiguities in the tariff must be construed against AT&T, it is apparent that conduit installation is not a type of construction that “differs from that determined by the Company” but is instead the predominating type of construction that *is* determined by AT&T, not the developer, in the vast majority of residential subdivisions. *Z.I.P., Inc. v. Pacific Bell*, D. 92-09-087, 45 CPUC2d 645 (1992). (See Pls.’ Op. Br. at p. 18-19.) See also, *Barratt American, Inc. v. Southern California Edison Company*, D. 01-03-051, 2001 Cal. PUC Lexis 186 (March 27, 2001)

3. AT&T's contention that the "basis and manner" for calculating reimbursement should be whatever amount it estimates should be rejected.

The other major issue in this proceeding related to the "basis and manner" for calculating reimbursement was the question of how AT&T should calculate its¹⁵ costs for purposes of reimbursement for joint trenching.

In its very brief discussion on the point, AT&T adheres to its position that the basis and manner for determining reimbursement should be whatever "amount that AT&T estimates." (AT&T Op. Br. at p. 19, 21, 22.) AT&T provides no example or authority for the notion that a utility may simply estimate its obligation under a tariff without employing some reasonable standard.

a. If there is any doubt about the meaning of "its prorata cost" in Section C.1 a., it must be resolved against AT&T.

The authority is entirely to the contrary. The rule is that ambiguities must be construed against AT&T. *Z.I.P., Inc. v. Pacific Bell*, D. 92-09-087, 45 CPUC2d 645 (1992). One of the reasons for the rule is that the Utility should not be permitted to draft ambiguous tariff provisions, which it then exploits to the economic disadvantage of parties who had no part in creating the tariff. *Id.* In addition, "the tariff should be given a fair and reasonable construction and not a strained or unnatural one... and constructions which render some provision of the tariff a nullity and which produce absurd or unreasonable results should be avoided..." *Re Southern California Power Pool*, 60 CPUC 2d 462, 471, quoting *Vultee Aircraft Corp. v. Atchison Topeka & Sante Fe Railway Co.*, 46 Cal.RRC 147, 149 (1945).

¹⁵At one point in its brief, AT&T discusses "a fair estimate." (AT&T Op. Br. at p. 19, 22.) To the extent that AT&T is here conceding that the basis and manner for calculating reimbursement should be a "fair estimate," little separates the parties on this question. Complainants have urged that reimbursement must be "reasonably" (largely synonymous with "fairly") calculated. Despite AT&T's reference to "a fair estimate", however, its adherence to the figures from the computer programs described at hearing, suggests estimates that do not comport with that description.

b. The “basis and manner” for determining reimbursement cannot be grounded solely in AT&T’s “estimates” of what it should pay.

Utility and developer alike are strictly bound by the tariff. Where the tariff provision at issue is an intangible (“cost”) rather than a number (\$.07/min.), some rule of reason must apply to the development of the cost figure. Complainants agree that the appropriate cost is the cost to AT&T but that cost must be reasonably determined.

Simply urging that AT&T’s costs be reasonably determined does not seem like much to ask. AT&T, however, demurs. Rather than agree to a rule of reasonableness, which would give effect to all applicable Rule 15 cost allocations, AT&T asserts that “Complainants’ market rate proposal likely would result in uncertainty and inefficiencies” and could cause “disputes as to the reasonableness of the costs....” (AT&T Op. Br. at 20.) The fact that a reasonable alternative to AT&T’s current method of reimbursement might engender disputes about whether AT&T has satisfied the current requirements of Rule 15 hardly establishes that AT&T’s current method satisfies the current rule. A tariff that permits the utility to fix the extent of its obligation will rarely be violated; but it is foreign to Commission jurisprudence.

There would be nothing novel in a Commission determination that Section C1.a. requires that AT&T pay what is truly its pro-rata cost (reasonably calculated) for joint trenching. The Commission should reject AT&T’s core contention that the measure of its reimbursement obligation under Rule 15 may be (1) premised on its expansive construction of Section A.2 and (2) its computer estimate of its own costs of joint trenching (without regard to whether it is reasonable.)

By so ruling, the Commission will describe for the Superior Court a basis and manner for reimbursement that gives meaning to the Rule 15 cost allocations by requiring reasonable reimbursement of costs allocated to AT&T that are initially paid for by developers.

C. **Whether It Is Permissible For AT&T To Enter Into ‘Trench Agreements’ With Developers With Respect To The Installation Of Line Extensions And Whether The Amount Of Reimbursement Set Forth In Such Agreements Is Binding On The Parties Regardless of What Rule 15 Might Otherwise Require In The Absence Of Such Agreements.**

AT&T agrees that nothing in Rule 15 prohibits AT&T from entering into trench agreements with developers. (AT&T Op. Br. at p. 20.) The parties therefore, agree on how part one of Issue No. 3 should be resolved.

As to the second part of Issue No. 3, AT&T largely misses the point or makes arguments that are unpersuasive. AT&T first repeats its argument saying that it has done nothing wrong and that “Complainants presented insufficient evidence to establish that the reimbursement amounts offered by AT&T to developers are calculated in bad faith....” (AT&T Op. Br. at p. 21.) These arguments, of course, do nothing to answer the question of whether “the amount of reimbursement set forth in such agreements is binding on the parties regardless of what Rule 15 might otherwise require in the absence of such agreements.” The answer is clear.

Where the terms of a tariff impose one set of rights and responsibilities and an “agreement” between the parties fixes another, it is the *tariff* that controls the obligations of the parties. This fundamental principle was recently addressed in the case of *Peter Solomon, dba Regency Homes v. Southern California Edison Company*. *Peter Solomon, dba Regency Homes v. Southern California Edison Company*, D. 10-11-001; 2010 Cal. PUC LEXIS 515, pp. 15-16 (November 9, 2010). (“*Solomon*”). AT&T has not attempted to rebut *Solomon* or the authority cited¹⁶ therein nor could it. Its witness agrees

¹⁶ “It is a long-standing requirement of public utility regulation that the lawful tariff provisions must be administered regardless of any statements by the utility at variance with the tariffs, whether oral or written. *Pinney & Boyle Mfg. Co. v. Atchison, T. & S.F. Ry.* (1914) 4 Cal RRC 404. A utility is under the duty to strictly adhere to its lawfully published tariffs. *Temescal Water Co. v. West Riverside Canal Co.* (1935) 39 Cal RRC 398. Tariffed provisions and rates must be inflexibly enforced to maintain equity and equality for all customers with no preferential treatment afforded to some. *Empire W. v. Southern Cal. Gas. Co.* (1974) 38 Cal App 3d 38, 112 Cal Rptr 925. Furthermore, the published tariff becomes established by law and can only be varied by law, not by an act of the parties. *Johnson v. Pacific Tel. & Tel. Co.* (1969) 69 Cal PUC 290. A misquotation or misunderstanding does not relieve the parties from the terms, conditions and rates in the tariff. *Sunny Sally, Inc. v. Lom Thompson* (1958) 56 Cal PUC

(footnote continued)

with the premise.¹⁷

AT&T, nonetheless, argues that the “trench agreements and the reimbursement amounts set forth therein are binding on the Utility and the developers” because the developers could “wait for AT&T to construct the line extension” or “refer the dispute to the Commission under Rule 15, section A.9.” (AT&T Op. Br. at p. 21.) Neither is a rational or lawful alternative to AT&T simply complying with Rule 15.

Complainants have already addressed the “wait for AT&T” argument. Suffice it to say, AT&T’s obligations under Rule 15 do not permit it to avoid the cost of residential line extensions by simply delaying installation. AT&T can install its line at its leisure; but if that flexibility requires the installation of conduit prior to installation of the line, as is usually the case, AT&T still bears the expense of the installation.

Section A.9, as AT&T is surely aware, offers no realistic alternative and is tantamount to telling the Commission that trench agreements may deviate from Rule 15, because the developer can always bring an action at the Commission to enforce Rule 15. AT&T’s argument makes no sense: a remedy for violation of substantive law does not modify it. In any event, the law on this point cannot be reasonably disputed. *The Commission should, therefore, find that a trench agreement is not binding on the parties to the extent the terms of the agreement differs from what Rule 15 requires in the absence of the agreements.*

D. Whether AT&T’s Actions Violated Rule 15, And If So, What Harm Was Caused To Each Complainant (Issue Nos. 4 & 5).

Before addressing whether AT&T’s actions toward Complainants violated Rule 15 and caused them harm, it is necessary to clear up some apparent confusion over the scope of these proceedings. With respect to Issue No. 4, AT&T claims that there was no violation because “[t]here was insufficient evidence of a ‘systematic,’ statewide

552.” *Solomon* at page 11.

¹⁷ In AT&T’s witness list dated July 1, 2010, it identified Mr. Shortle as the AT&T witness who would testify as to “any and all aspects of AT&T’s creation, understand, interpretation, and application of (and compliance with) the tariffs governing the design, construction and/or installation of line extensions and/or trench installations in California.” Mr. Shortle’s testimony on this issue was that “[t]he tariff is --

(footnote continued)

violation by AT&T of Rule 15 affecting ‘thousands’ of developers as alleged in the administrative complaint.”

1. The Superior Court’s Referral Order Required That Class Allegations be Included in the Administrative Complaint.

What AT&T fails to acknowledge for the Commission is that Plaintiffs (Complainants), in the civil court proceedings, were ordered to file an administrative complaint that included the factual allegations contained in their civil class action complaint. The Superior Court ruled that: “in order to effectuate the referral, Plaintiffs are hereby ordered to initiate an administrative proceeding with the CPUC within 30 days under Public Utilities Code § 1702, *by filing an administrative complaint containing a recitation of the factual allegations contained in the Plaintiffs’ complaint on file herein.*” (Order on Demurrer and Motion to Strike filed July 28, 2009 at p. 3:4-7, emphasis added.) This meant that the administrative complaint was required to include allegations concerning the class and the civil causes of action, *neither of which were intended to be a part of the narrower issues referred to the CPUC for administrative decision.*

Not only were these allegations outside the referral, they are also beyond the jurisdiction of the CPUC, which is not empowered to decide civil class action suits or to decide claims brought under Unfair Competition Law. *Greenlining Institute v. Public Utilities Commission*, 103 Cal. App. 4th 1324 (2002), 127 Cal. Rptr. 2d 736, 2002 Cal. App. LEXIS 5066. Even the Superior Court could not yet reach these issues as to “thousands” of developers, because that would require certification of the class and notice to the class. The finding that AT&T seeks as to putative absent class members would violate their rights to due process by circumventing protections required by the law of class actions.

2. The Scoping Memo Did Not Seek a Determination of Issues Related to a Class.

The Commission, in its Scoping Memo, understood the limited nature of the proceedings, and stated “[t]he issue of whether AT&T’s actions constituted a

in my opinion the tariff is the overriding factor. (Shortle, Tr. Vol. 2 at p. 129:16-27.)

violation of Rule 15 and, if so, what harm was caused to each complainant (Issue 5) is within the scope of this proceeding *because each Complainant claims a specific instance of under reimbursement by AT&T.*” (Scoping Memo at p. 5, emphasis added.) The Scoping Memo, therefore, contemplated that the question of violation and harm to Complainants was included within the proceedings, but properly rejected the idea that it would be trying the claims of the developer class as it had been pled in the class action complaint before the Sacramento Superior Court.

Despite this obvious and necessary limitation to the scope of these proceedings, AT&T’s first line of defense on the issue of violation is to argue that “[t]here was insufficient evidence of a ‘systematic,’ statewide violation by AT&T of Rule 15 affecting ‘thousands’ of developers, as alleged the administrative complaint.” (AT&T Op. Br. at p. 21.) Because question of statewide violation as to thousands of developers was not an issue within the scope of the proceedings, this claimed insufficiency of evidence is of no significance.

3. A Showing of “Bad Faith” Is Not required To Show That Complainants Were Harmed By AT&T’s Violation of Rule 15.

AT&T also contends that “Complainants presented no evidence of bad faith on the part of AT&T with respect to their developments, or with respect to AT&T’s offers of reimbursement.” (AT&T Op. Br. at p. 1.) Whether a utility violates its tariff out of bad faith or charity does not inform the question of whether it violated it in the first instance. If AT&T’s cost estimates are calculated in an unreasonable fashion (i.e. one not based on current costs for the locality), it is not relevant whether AT&T’s employment of such a method is grounded in bad faith or simply poor program design.

Its method must be corrected to comply with Rule 15. All that is required here is proof of violation of Rule 15. There was ample *uncontested* proof that A&T did not comply with Rule 15 requirements for reimbursing costs allocated to AT&T. The testimony of Mr. Bernau and Mr. Knight was overwhelming and no contrary evidence was submitted by AT&T. AT&T made no effort to rebut this testimony.

Briefly stated, AT&T failed to contest the fact that it reimbursed only a

small fraction of the costs allocated to it under Rule 15. There were six bids for joint trench costs on the Morning Walk project and AT&T reimbursed for only 37 % of its share of the lowest of these six bids. AT&T did not present any convincing evidence that it could have performed the work for 37 % of the lowest bid. It failed to challenge either of the Complainants' witnesses on this point and AT&T's witness, Mr. Shortle, had no relevant knowledge of how 37 % of the lowest of six bids could be justified as reasonable reimbursement. Rather, his testimony was that the reimbursement need not be reasonable. (Shortle, Tr. Vol. 2 at p. 176, line 13 to p. 177, line 23.) Similarly, AT&T failed to pay one cent for the cost of installation of the joint splice box on the Morning Walk project and about a third of the cost of the splice box itself. There is no sense in which AT&T can be said to have constructed either the Morning Walk or La Collina underground line extensions "at its expense" as required by section C.1.a of Rule 15. The undisputed evidence shows that AT&T did not pay its pro-rata share of the joint trench on either project. (*See*, Pls.' Op. Br. at pp. 30-34.) Violation and harm as to Complainants was fully proven.

4. AT&T's Claim That La Collina and Morning Walk Were Entitled to No Reimbursement At All Is Utterly without Merit.

Perhaps recognizing that it had no defense to the claims of under reimbursement, AT&T argues that "the evidence at hearing showed that neither La Collina Dal Lago nor Bernau Development should have received *any* reimbursement because their developments did not meet the density requirements set forth in Rule 15 to qualify for reimbursement." (AT&T Op. Br. at pp. 1-2.) This must be understood as a last-minute attempt to confuse the issues.

In none of the proceedings before the Superior Court was this issue ever raised. Despite the multiple challenges made to the complaint in AT&T's demurrer, it never questioned Complainants' status as subdivisions. Nor did AT&T raise this threshold issue in any of the preliminary proceedings before the Commission. Nowhere in its answer to the complaint herein did AT&T raise this issue, notwithstanding the express requirement of Rule 4.4 that it "fully advise the complainant and the Commission

of the nature of the defense.” By its conduct, AT&T waived any right to have this issue adjudicated.

Were this was a legitimate issue, which it is not, it was a threshold issue that would likely defeat standing and make the entire proceedings unnecessary. What is the point of deciding what Rule 15 means with respect to reimbursing developers if AT&T’s contention is that it did not have any reimbursement obligation to Complainants? It was, after all, AT&T that demanded a referral of issues under the doctrine of primary jurisdiction. It was AT&T that defined the issues that it sought to have referred and it was AT&T that entirely omitted this issue.

Because the issue of whether Complainants’ projects were subdivisions is beyond the scope of these proceedings, it can be easily resolved on that ground.

Alternatively, the argument fails on the merits.

As AT&T admits, “‘subdivision,’ is defined as a development with a ‘reasonable prospect,’ of 5 or more permanent telephone line terminations with 3 *years* after the completion of the line extension, at a density of at least one line per acre.” (AT&T Op. Br. at p. 16, referring to Ex. 201, Ex. 2, Rule 1, section 2.1.1.) There is no question whatsoever that both the La Collina and the Morning Walk satisfied the *reasonable prospects* definition of a subdivision. With respect to density, the actual relevant text is as follows: “where it can be shown that there are reasonable prospects within the next three years for five or more permanent telephone line terminations, at a density of at least one line per acre.” (*Id.*) AT&T confirmed that the prospective subdivision density requirement had been satisfied as to both developments in the trench agreements, which recited that both developments were subdivisions, not real estate developments. (Ex. 12 and Ex. 17.) This makes perfect sense given the size and density of the developments. La Collina was a 38-lot subdivision on 23.4 acres and Morning Walk was an 8-lot subdivision on 3.53 acres.

AT&T does not seriously contest that both projects qualified as subdivisions at the relevant point in time according to the “reasonable prospects” test that

applied. What AT&T does is to misunderstand the meaning of section C.4 of Rule 15, which allows *for real estate developments* (projects that *do not* meet the prospective test for subdivisions) to make a deposit and achieve a refund if they do in fact later achieve the density of a subdivision. AT&T transforms a rule that allows for a refund to a real estate subdivision, based on more than expected density, into a rule that converts a subdivision to a real estate development. No such rule exists.

Furthermore, there is a practical reason subdivisions are prospectively defined at the time AT&T's infrastructure is installed. Categorization at the outset allows for timely application of Rule 15 requirements. Nowhere does Rule 15 contemplate that these requirements would later be undone and the costs reallocated by reason of an after-the-fact redefinition of a subdivision.

It is not surprising that the Commission has never permitted what would prove a highly impractical process. The fact that the worst real estate crisis in memory resulted in less density than originally expected in subdivisions throughout California, including Complainants' subdivisions, does not alter the prospective definition of subdivisions, nor does it allow AT&T to redefine subdivisions under Rule 15. AT&T's last-ditch attempt to rewrite history (the prospective determination that La Collina and Morning Walk were qualified subdivisions), by rewriting the text of the applicable regulations, should be rejected.

Finally, and similarly, AT&T argues that La Collina's individual claim is barred by the statute of limitations. (AT&T's Op. Br. at p. 17-18.) *First*, this issue is not one of the issues within the scope of these proceedings. *Second*, AT&T constructs its statute of limitations by the artifice of presuming that the claims are for fraud under Public Utilities Code section 451. (*Id.* at p. 17.) Complainants have brought no such claim. Complainants' claims, brought in Sacramento Superior Court, are for unjust enrichment and for violation of Unfair Competition Law. *Third*, what has occurred is a special referral under the doctrine of primary jurisdiction. This properly brings some issues, subject to the CPUC's special expertise, before the Commission, but does not give the CPUC jurisdiction to decide whether the underlying claims, which are not before the

Commission, are barred by the applicable statute of limitations under the Code of Civil Procedure (“CCP”)¹⁸ or elsewhere. *Fourth*, the applicable statute of limitations for UCL claims is four years. (Cal. B&P Code section 17208.) The two-year statute under Public Utilities Code section 451 is irrelevant. AT&T does not even raise or consider the applicable statute of limitations in its statute of limitations argument. *Fifth*, the rules for accrual for the UCL claim are not the rules for accrual under section 451. AT&T does not raise or consider the applicable rules for accrual in its argument.

AT&T contention that La Collina’s claim is barred by the statute of limitations is wrong on the merits. For purposes of these proceedings, however, the question on the merits does not arise because it is not among the issues presented or properly within the jurisdiction of the CPUC based on the Superior Court’s referral order and the Commission’s Scoping Memo.

III. CONCLUSION

The Commission should advise the Superior Court that:

1. Rule 15 applies to line extensions installed by developers rather than by AT&T.
2. Rule 15 requires AT&T to pay reimbursement to developers for certain costs that they incur in order to install line extensions (in residential subdivisions, commercial subdivisions, and mixed use subdivisions).
3. When calculating its reimbursement, AT&T should reimburse developers what it reasonably would be required itself to pay for the work that the developers perform for it.
4. AT&T must reimburse developers for conduit and supporting structures used in line extensions in residential developments unless the developer genuinely requests non-standard and more expensive method of constructing the

¹⁸ The Commission takes the view that proceedings before it are not governed by the limitations of actions found in the CCP. *UCAN v. SBC Communications* Decision 09-04-036 (April 16, 2009) at pp. 68-69. It can hardly express a view on their scope in this docket.

extension.

5. AT&T may enter into “trench agreements” with developers by which the developers agree to install AT&T’s line extensions, but the amount of the reimbursement set forth in these agreements is not binding on the parties unless it is consistent with the cost allocations set forth in Rule 15.

6. AT&T’s under-reimbursement and non-reimbursement of Complainants constitute violations of its reimbursement obligations under Rule 15.

7. AT&T’s violations of Rule 15 caused economic loss to each Complainant.

Respectfully submitted this 4th day of February, 2011 at San Francisco,
California.

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP
Thomas J. MacBride, Jr.
Suzy Hong
505 Sansome Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
E-mail: tmacbride@goodinmacbride.com
E-mail: shong@goodinmacbride.com

By /s/ Thomas J. MacBride, Jr.
Thomas J. MacBride, Jr.

Attorneys for Complainants
La Collina Dal Lago, L.P., and Bernau
Development Corporation

MALDONADO & MARKHAM, LLP
William Markham
402 West Broadway, Suite 2050
San Diego, CA 92101
Telephone: (619) 221-4400
Facsimile: (619) 224-3974
E-mail: wm@maldonadomarkham.com

KERSHAW, CUTTER & RATINOFF, LLP
William A. Kershaw
Lyle W. Cook
401 Watt Avenue
Sacramento, CA 95814
Telephone: (916) 448-9800
Facsimile: (916) 669-4499
E-mail: wkershaw@kcrlegal.com

CERTIFICATE OF SERVICE

I, Lisa Chapman, certify that I have on this 10th day of February 2011 caused a copy of the foregoing

COMPLAINANTS' REPLY BRIEF

to be served on all known parties to C.09-08-021 listed on the most recently updated service list available on the California Public Utilities Commission website, via email to those listed with email and via U.S. mail to those without email service. I also caused courtesy copies to be hand-delivered as follows:

Commissioner President Michael R. Peevey
California Public Utilities Commission
Executive Division
505 Van Ness Avenue, Room 5218
San Francisco, CA 94102

ALJ Katherine MacDonald
California Public Utilities Commission
Executive Division
505 Van Ness Avenue, Room 5103
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of February 2011 at San Francisco, California.

/s/Lisa Chapman
Lisa Chapman

Service List C.09-08-021
Last Updated 11/16/10

WILLIAM MARKHAM
wm@maldonadomarkham.com

RAY BOLANOS
raymond.bolanos@att.com

THOMAS J. MACBRIDE, JR.
tmacbride@goodinmacbride.com

LYLE W. COOK
lcook@kcrlegal.com

FASSIL T. FENIKILE
fassil.fenikile@att.com

ROSS JOHNSON
rdj@att.com

THOMAS SELHORST
thomas.selhorst@att.com

WILLIAM A. KERSHAW
wkershaw@kcrlegal.com

Katherine MacDonald
kk3@cpuc.ca.gov

PUC/X125801.v1