

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



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California Building Industry Association,

Complainant,

vs.

Pacific Bell Telephone Company d/b/a AT&T  
California (U1001C),

Defendant.

Case No. 09-09-016  
(Filed September 18, 2009)

**REPLY BRIEF OF THE CALIFORNIA BUILDING  
INDUSTRY ASSOCIATION**

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Date: August 27, 2010

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In accordance with Rule 13.11 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”) and the schedule established by the Joint Ruling and Scoping Memo of Assigned Commissioner and Assigned Administrative Law Judge (“Joint Ruling”) dated July 20, 2010, the California Building Industry Association (“CBIA”) respectfully submits its reply brief.

**I. AT&T CHANGED ITS PRACTICE WHEN IT IMPLEMENTED A NEW THRESHOLD IN 2006 FOR DETERMINING HOW RULE 32 UNDERGROUNDING PROJECTS WOULD BE BILLED**

Both CBIA and Pacific Bell Telephone Company, d/b/a AT&T California (“AT&T”) agree that AT&T began using a \$10,000 threshold in 2006 to determine whether a Rule 32 undergrounding conversion project would be billed on an Estimated Cost Basis (“ECB”) or a Fixed Cost Basis (“FCB”) versus an Actual Cost Basis

(“ACB”).<sup>1</sup> As AT&T’s Opening Brief, Section IV.B. is titled, “AT&T’s Adoption of a \$10,000 Billing Threshold in 2006 Did Not Violate Any Law, Rule or Tariff,” AT&T fails to recognize that the adoption of the \$10,000 threshold constitutes a change in practice that requires prior Commission approval under Public Utilities Code § 454 and General Order 96-B.

AT&T contends that CBIA fails to carry its burden of proof to support the allegation that a change in practice occurred. However, AT&T admitted that there was a change of practice beginning in April of 2006.<sup>2</sup> Both CBIA and AT&T have submitted ample evidence to demonstrate that AT&T’s billing practice changed in April 2006 without Commission approval and without a change to Rule 32. Specifically, the testimony of both CBIA’s and AT&T’s witnesses as well as pre-2006 and post-2006 AT&T standard contracts show that AT&T adopted a new \$10,000 threshold for billing undergrounding conversion projects on an ACB.<sup>3</sup> Regardless of the parties’ contrasting recollections of AT&T’s billing practices prior to 2006, both concur that whatever AT&T’s practices may have been, they are different than they are today and that a new and different practice – implementation of a \$10,000 threshold – was first employed in April 2006.

As CBIA argues in its Opening Brief, the strength of AT&T’s evidence,

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<sup>1</sup> Tr. p.11; Exhibit No. 1, “Prepared Testimony of Carl C. Lower on Behalf of California Building Industry Association” at 2-3 (“CBIA Exhibit No. 1”).

<sup>2</sup> Tr. p 43.

<sup>3</sup> Exhibits Nos. 2, 6, Aerial to Underground Conversion Agreements; Exhibit No. 4, “Testimony of Michael Shortle on Behalf of Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C),” at Attachment 1, CBIA 000221 (“AT&T Exhibit No. 4”).

particularly the nonspecific internal company document and the documentation regarding sample jobs, does little to support AT&T's claim and its witness' testimony that prior to 2006 it employed actual cost billing, much less a \$25,000 threshold, for Rule 32 underground conversion projects.<sup>4</sup> Indeed, AT&T has presented no documentary evidence to refute CBIA's testimony that AT&T's practice, prior to the admitted April 2006 change, was to bill for underground conversions on an ECB – not on an ACB as contended by AT&T. The documentary evidence, in the form of AT&T standard contracts, is entirely consistent with CBIA's claim that AT&T's practice was to bill on an ECB and entirely inconsistent with AT&T's claim that it has billed conversion projects on an ACB for over twenty years.

**II. AT&T'S BILLING PRACTICES PURSUANT TO ITS TARIFF RULE 32 ARE SUBJECT TO THE CONSTRAINTS OF PUBLIC UTILITIES CODE SECTION 454**

The *Barratt* case is dispositive; the Commission has already decided that a change in practice by a utility that results in an increase in a tariff schedule falls within the scope of § 454.<sup>5</sup> In its Opening Brief, AT&T contends that “Section 454 does not apply to Tariff Rule 32 conversions,” since “Section 454 prohibits a *rate* change or a change in practice that results in a new *rate*” and that “Tariff Rule 32 contains neither rates nor charges.”<sup>6</sup> In the *Barratt* case, Southern California Edison (“SCE”) made a similar argument that § 454 applied only to “new rates,” and that no new rates were at

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<sup>4</sup> CBIA Opening Brief, at 4-5.

<sup>5</sup> See *Barratt American, Inc. v. Southern California Edison Company*, Decision No. 01-03-051, at 10 (Mar. 27, 2001) (“*Barratt*”).

<sup>6</sup> AT&T Opening Brief, at 5-6.

issue in that proceeding.<sup>7</sup> The Commission found SCE's highly restrictive reading of § 454 to be incorrect. Section 454 did apply to the facts of the case because SCE had changed its practice of 30 years to impose a substantial new charge on customers, which required a showing by the utility before the Commission that the increase is justified, and a finding by the Commission the increase is proper.

It is undisputed that both Tariff Rule 32, which governs AT&T's services with respect to the replacement of aerial with underground facilities, and AT&T's standard Rule 32(a)(3) aerial to underground conversion agreements, require the payment of the estimated cost of converting the aerial facilities to underground. Accordingly, Tariff Rule 32 dictates the terms of payment, and how AT&T shall charge applicants for the conversion work, while saying nothing to authorize actual cost billing or any method for determining rates or changes based on a threshold amount.

AT&T rests its argument on the interpretation of the word "rate" in § 454(a) is synonymous with "default tariff rate," rather than the amount paid by applicants for underground conversions. CBIA believes that the Legislature intended a broader, plainer meaning.

"This Commission's first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such an intent we must look to the words of the statute, giving to the language its usual, ordinary import." (D.95-10-051, slip op. at 5.)... "Rate" is defined by Webster as "a charge, payment or price fixed according to a ratio, scale or standard: as (1) a charge per unit of a public service commodity."... A "charge" is likewise defined as synonymous with "expense," "cost," or "price."...

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<sup>7</sup> *Barratt*, at 10.

These nouns imply an amount actually paid. We have long held that §454.4 applies to more than simply the tariff rate.<sup>8</sup>

Likewise, the Commission should hold here that § 454(a) applies to more than simply the tariff rate. In D.97-04-082, the Commission recognized that an accepted canon of construction is that “a statute should never be construed so strictly as to render it absurd or nugatory.”<sup>9</sup> If AT&T’s strict interpretation of the word “rate” in § 454(a) were to be adopted, AT&T could easily alter how it will assess rates charged for undergrounding conversions while avoiding any showing before and a finding by the Commission that its billing practice, which has the practical effect of increasing charges assessed to Rule 32 applicants, is justified. Such a reading would eviscerate § 454(a), reducing it to a nullity.

Accordingly, the Commission should find here that AT&T is incorrect in its contention that § 454 does not apply to the facts of this case. Instead, the Commission should conclude as it did in *CBLA v. SCE* that because AT&T has changed a longstanding practice by which it accounts for the charges required by one of its tariffs, AT&T was “required by § 454 to seek [the Commission’s approval] through the advice letter process (or, if necessary, an application).”<sup>10</sup>

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<sup>8</sup> *In re Application of Southern California Gas Company*, D.97-04-082, A.96-03-031, 1997 Cal. PUC LEXIS 241, \*136 (Apr. 23, 1997).

<sup>9</sup> *Id.* at \*139, citing *Walworth v. Bank of America*, 9 Cal. 2d 49, 52.

<sup>10</sup> *California Building Industry Assoc. v. Southern California Edison*, Decision No. 08-08-001, at 20 (July 31, 2008) (“*CBLA v. SCE*”).

**III. AT&T'S CHANGE IN POLICY AND PRACTICE HAS LED TO NEW RATES OR INCREASED CHARGES FOR APPLICANTS OF RULE 32 UNDERGROUNDING CONVERSIONS WITHIN THE MEANING OF PUBLIC UTILITIES CODE § 454**

In *CBIA v. SCE*, the Commission concluded that “[b]ecause it results in developers having to pay additional funds to cover charges for which they are liable, the change of policy [ ] constitutes an alteration of a practice that has resulted in a new rate within the meaning of Pub. Util. Code § 454.”<sup>11</sup> Similarly, AT&T’s change of billing policy results in applicants having to pay additional funds to cover charges for which they are liable under their undergrounding conversion agreements, which constitutes an alteration of a practice that results in a new rate within the meaning of § 454.

AT&T attests that “[p]rior to April 2006, AT&T’s policy was to bill for undergrounding projects on an actual cost basis (“ACB”) if a project was estimated to cost more than \$25,000 to complete.”<sup>12</sup> AT&T further states that “[i]n or about April 2006, AT&T changed the threshold from \$25,000 to \$10,000 for determining whether to bill a Rule 32 undergrounding project on an ACB or FCB.”<sup>13</sup> Assuming *arguendo*, the validity of AT&T’s claim that ACB for projects exceeding \$25,000 was a longstanding practice, AT&T’s change in policy has resulted in applicants whose projects were estimated to cost between \$10,000 and \$25,000 now being billed on an ACB.<sup>14</sup> The alteration of AT&T’s policy in 2006 has led to more applicants for underground conversions being subject to actual cost billing than prior to the change. Consequently,

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<sup>11</sup> *CBIA v. SCE*, at 25.

<sup>12</sup> AT&T Exhibit No. 4, at 2.

<sup>13</sup> AT&T Exhibit No. 4, at 7.

<sup>14</sup> AT&T Opening Brief, at 7.

more applicants are having to pay additional funds for which they are liable, pursuant to any reconciliation bills issued after project completion.

The potential for an applicant being subject to increased charges is further supported by AT&T's testimony confirming that if an applicant were to disagree with AT&T's method of collecting actual costs, AT&T would not go forward with the undergrounding project.<sup>15</sup> The practical effect of actual cost billing is that applicants have difficulty budgeting and planning ahead for the costs the applicant may incur. Even if an applicant were to question AT&T's billing methods and increasing costs, "project completion time is critical and any hurdles that slow the construction process is financially detrimental to the applicant."<sup>16</sup> With many projects billed the actual costs more than a year after job completion, the increased charges mean an unbudgeted and unexpected bill arriving well after the construction project has closed.<sup>17</sup>

**IV. AT&T FAILS TO OFFER ADEQUATE SUPPORT FOR WHY IT IS ALLOWED TO UNILATERALLY CHANGE ITS PRACTICE WITHOUT A SHOWING BEFORE THE COMMISSION**

In its Opening Brief, AT&T argues that "even if Section 454 did somehow apply (which it does not), it is preempted by Section 66473.6 of the California Government Code."<sup>18</sup> AT&T is implying that because the Government Code expressly

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<sup>15</sup> Tr. 27-29.

<sup>16</sup> CBIA Exhibit No. 1, at 6-7.

<sup>17</sup> *Id.*

<sup>18</sup> AT&T Opening Brief, at 6. CBIA notes that the California Government Code § 66473.6 only addresses applicants that are developers or subdividers and only projects in which the city or a county requires the replacing, undergrounding or relocating of existing facilities as a condition to its approval of a tentative map or a parcel map.

speaks to undergrounding conversion jobs and § 454 “does not explicitly address the costs AT&T may recover for such work,” § 454 is preempted and shall have no effect.<sup>19</sup> AT&T’s preemption analysis and reading of § 454 is incorrect. Rather, § 454 requires a utility to demonstrate to the Commission and that the Commission subsequently find that the resulting new rate is justified before the utility may change any rate or alter any contract, practice, or rule. Even if the collection of actual costs from developers or subdividers is sanctioned under Government Code § 66473.6 as AT&T argues, then § 454 requires AT&T to make a showing before the Commission that the resulting new rate is justified before it may alter its undergrounding conversion agreements, billing practices, or rules.

Moreover, if the Government Code stands to require that developers and subdividers reimburse AT&T for all costs of replacement, undergrounding, or relocation and actual cost billing has *always* been AT&T’s practice for such jobs, as AT&T argues, then why would the specific legislation, which singles out developers and subdividers from all other undergrounding applicants, be necessary? If AT&T’s practice was to always bill for actuals, then such a statute would be superfluous. Instead, the existence of § 66473.6 tends to show that the Code is the exception and not the rule, enacted to specially apply to only a subset of potential applicants for undergrounding projects. Even then, the Government Code does not preempt § 454, but rather prior approval was necessary for AT&T to make a change to its billing practices that would impact only a certain group of applicants.

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<sup>19</sup> AT&T Opening Brief, at 6.

AT&T also argues that in order for AT&T to be found in violation of § 454, CBIA must show that Tariff Rule 32 prohibits the charging of actual costs.<sup>20</sup> Again, this is an incorrect interpretation of § 454. In the *Barratt* case, the Commission's response to SCE's insistence that its change in policy was consistent with the language of the Rule, was that the issue was not whether SCE's pole removal practice conforms to its tariffs.<sup>21</sup> Rather, the issue was whether the change in that practice required prior Commission approval. Likewise, the issue of whether AT&T's charging of actual costs is prohibited or permitted under Tariff Rule 32 is irrelevant for purposes of § 454. The issue here is whether the change in AT&T's billing practice required prior Commission approval.

As previously stated, AT&T unilaterally changed its practice without any showing before and a finding by the Commission. AT&T offers inadequate support for why the Commission should rule in contradiction to the holding of the *Barratt* decision, which found that “[c]hanging a 30-year practice to impose a substantial new charge on a customer requires more than mere notice. It requires a showing by the utility before the Commission that the increase is justified, and a finding by the Commission that the increase is proper.”<sup>22</sup> Additionally, AT&T has offered little to support a ruling contrary to D.08-08-001, which affirmed the *Barratt* decision and found that “[i]f a utility wishes to make such a change to a well-established practice, it is required by Pub. Util. Code §

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<sup>20</sup> *Id.* at 6-7, “nothing in Tariff Rule 32 prohibits AT&T from charging actual costs. Consequently, AT&T's imposition of such charges did not require “a showing before the commission and a finding by the commission that the new rate is justified” under Section 454.”

<sup>21</sup> *Barratt*, at 7-8 .

<sup>22</sup> *Barratt*, at 10.

454 to seek our approval through the advice letter process (or, if necessary, an application).”<sup>23</sup> Similarly, changing AT&T’s longstanding billing practice, which imposes a substantial new charge on customers for undergrounding services, requires more than mere notice of a change to AT&T’s standard Rule 32 contracts, it requires AT&T to make the proper showing and to seek the Commission’s approval through the advice letter process, or if necessary, via an application.

## V. CONCLUSION

CBIA emphasizes that its complaint with regard to AT&T’s violation of Public Utilities Code § 454 is whether AT&T permissibly changed its longstanding billing policy and practice without a showing before and a finding by the Commission. Although AT&T has attempted to persuade the Commission that § 454 is inapplicable or otherwise preempted, AT&T fails to adequately support a finding that it is entitled to unilaterally change its practice without prior Commission approval.

Accordingly, CBIA requests that the Commission rule that since AT&T’s change in its billing practice results in a new rate or an increase in charges under § 454 and G.O. 96-B, AT&T should have made a showing before and a finding by the Commission that the increase was justified prior to making that change. The Commission should also find that AT&T’s practice of charging on an actual cost basis rather than estimated cost basis or fixed cost basis fails to conform with Rule 32 because of the rule’s silence and lack of authorization to collect “actual” costs. Rule 32 only

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<sup>23</sup> *CBIA v. SCE*, at 20.

allows the collection of “a nonrefundable sum equal to the estimated cost of construction less the estimated net salvage value of the replaced aerial facilities.”

CBIA urges the Commission to enjoin AT&T to administer the provisions for replacement costs under Rule 32 of its tariff and not bill applicants for aerial conversions for actual costs upon completion of work, until such time the Commission finds, if the Commission chooses to do so, that this change in billing practice for assessing charges is justified. CBIA further requests that AT&T refund the excess charges that have been collected under AT&T’s new and different billing practice and revised contracts. Finally, any relief granted to CBIA members should be extended to all similarly situated applicants for conversion projects by AT&T.

Dated: August 27, 2010

Respectfully submitted,

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By           /s/ Marlo A. Go            
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**CERTIFICATE OF SERVICE**

I, Lisa Chapman, certify that I have on this 27th day of August 2010 caused a copy of the foregoing

**REPLY BRIEF OF THE CALIFORNIA BUILDING  
INDUSTRY ASSOCIATION**

to be served on all known parties to C.09-09-016 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:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of August 2010 at San Francisco, California.

/s/ Lisa Chapman  
Lisa Chapman

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