



**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' OPENING BRIEF**

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**COMPLAINANTS' OPENING 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 Opening Brief. Judge MacDonald's January 13, 2011 electronic mail set the date for the filing of Opening Briefs at January 21, 2011. This pleading is timely filed.

**I. INTRODUCTION**

The purpose of this proceeding is to construe AT&T's Rule 15 and determine whether it was applied properly to Complainants' developments. Whether any of the parties to this matter acted out of good faith, bad faith, malice, charity or naivety is largely irrelevant to the resolution of this question. Similarly, the views of the expert witness on matters of policy matter little.

Rule 15 is not a set of guidelines or "best practices" to be loosely applied

on a case-by case basis. The terms of the tariff bind AT&T with the force of law.<sup>1</sup> The requirements of the tariff cannot be abrogated by contract<sup>2</sup> unless the contract is approved by the Commission. If the terms of the tariff are susceptible to more than one construction, that which results in the least cost to the customer and the greatest cost to AT&T governs,<sup>3</sup> a presumption that applies to developers as well as end users.<sup>4</sup>

The central tariff provision at issue here is Rule 15 C.1.a, which provides that AT&T will construct underground line extensions within residential subdivisions “at its expense.”<sup>5</sup> There is no ambiguity about this requirement in Rule 15 C.1.a. Yet, notwithstanding that requirement, the lion’s share of the cost of most such extensions has been borne by the developers of the residential subdivisions. The purpose of this complaint is to close the gap between the requirements of law and AT&T’s practice.

## **II. THE GENESIS OF THIS PROCEEDING AND SUMMARY OF POSITON ON THE ISSUES RAISED IN THE SCOPING MEMO**

### **A. Referral From the Superior Court.**

Complainants are two real estate development businesses that filed a proposed class action in the Superior Court of California for Sacramento County (Superior Court) on March 10, 2009. On July 28, 2009, the Superior Court ordered a special referral to the California Public Utilities Commission (Commission).

C. 09.08-021 was filed to create a forum to respond to the Superior Court. Pursuant to Rule 7.3(a), the Commission issued a Scoping Memo on August 16, 2010.

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<sup>1</sup> *Dyke Water Co. v. Public Utilities Commission*, 56 Cal.2d 105, 123, 363 P.2d 326, 337 (1961) .

<sup>2</sup> *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) .

<sup>3</sup> *Z.I.P., Inc. v. Pacific Bell*, D. 92-09-087, 45 CPUC2d 645 (September 16, 1992).

<sup>4</sup> *Barratt American, Inc. v. Southern California Edison Company*, D. 01-03-051, 2001 Cal. PUC Lexis 186 (March 27, 2001).

<sup>5</sup> The same tariff requires AT&T to construct the extension at its expense where buried cable is used or where another telecommunications provider will provide the extension at no expense. Any of the three conditions triggers the requirement that AT&T provide the extension at its expense. Notwithstanding any suggestion to the contrary, the use of the disjunctive “or” in tariff, dispels any suggestion that two or more of the conditions must be present before AT&T must meet its legal obligation to construct the underground extension at its expense. See discussion at p. 26 *infra*.

The matter was set for hearing and heard on November 16-17, 2010.

**B. Complainants' Position on Issues Set Forth In The Scoping Memo.**

The Scoping Memo sets forth the following issues, and below each issue Complainants have provided a summary of their position:

**1. Whether Rule 15 Applies (and to what extent, if any) to Line Extensions Installed By Developers Rather Than AT&T**

Complainants' contend that Rule 15 applies when developers install AT&T's underground line extensions. AT&T has conceded this very point. Indeed, more specifically, AT&T concedes that Rule 15 applies to its most common practice, which has been to design and specify its underground line extensions and have the developer perform most of the required work.<sup>6</sup>

Part C of Rule 15 ("Underground Line Extensions") allocates the cost of the installation between the developer ("Applicant") and AT&T. The specific allocations depend on the type of use in the subdivision *not on who performs the actual work*. The Commission should therefore find that the Rule 15 cost allocations<sup>7</sup> apply to line extensions installed by developers to the same extent they would if AT&T had performed the work.<sup>8</sup>

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<sup>6</sup> AT&T's lone witness was asked, "does Rule 15 apply to applicant installations of AT&T underground line extensions, would you agree that that's true?" His unequivocal response was, "Yes." (Shortle, Tr. Vol. 1, p. 125, lines 10-25.)

<sup>7</sup> Rule 15 includes a number of specific cost allocations as between the utility or company and the developer or applicant. For example, section C.1.a. states "[t]he Company [AT&T] will construct an underground line extension at its expense," and section C.1.b. states "[t]he applicant [developer] will perform or pay for any pavement cutting and repaving...."

<sup>8</sup> AT&T concedes the point: "Q. And if a developer were to do the work for AT&T rather than a contractor or AT&T itself, would AT&T still have the expense obligation recited in the rule? A. Yes, it would." (Shortle, Tr. Vol. 2, p. 135, lines 1-5.)

2. **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**
  - a. **Does Rule 15 Require reimbursement by AT&T to developers for some portion of the developers' costs incurred installing line extensions?**

The answer is unambiguous: AT&T must reimburse developers for costs that are allocated to AT&T under Rule 15 but initially incurred by developers. AT&T concedes this point.<sup>9</sup>

Thus, under Section 15 C.1, AT&T must provide residential line extensions at its expense. It may perform all the work on its own or permit developers to do so. In either event, AT&T must bear the cost.

AT&T may dispute the “basis and manner” of the reimbursement.<sup>10</sup> It cannot, and does not, however, dispute that it has a reimbursement obligation to developers who perform work installing AT&T’s underground line extensions. The only issue reasonably in dispute is how this reimbursement should be calculated.

- b. **The basis and manner for determining the amount of such reimbursement**

The parties do not agree on “the basis and manner for determining the amount of reimbursement” due under Rule 15. Even in summary fashion, it is useful to identify here the key elements of that disagreement.

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<sup>9</sup> See, footnote 9 *supra*.

<sup>10</sup> Reimbursement is provided for both explicitly and implicitly in the Rule. Rule 15.C.2.a, for example, which applies to business or mixed used subdivisions, states that “the applicant may provide the conduit material to the Company’s specifications and the Company will reimburse the applicant at the Company’s current cost for that type of conduit.” Rule 15.C.1.a, which applies to both line extensions within residential subdivisions and direct-buried installations in any kind of subdivision, states that “[t]he Company [AT&T] 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.” We address the issue of joint trench cost at 21-24 *infra*.

## (1) Conduit and Supporting Structures

One principal dispute between the parties is with regard to conduit and supporting structures (i.e., tubes placed underground and supported by underground vaults that are then used as repositories of AT&T's regular telephone cable). (For ease of reference these facilities will frequently be referred to herein simply as "conduit.")

The specific dispute is whether AT&T should pay for the installation of conduit where it is installed by a developer. These installations, called "developer-provided installations," constitute the overwhelming majority of underground landline extensions by which AT&T extends its local exchange network to property developments in California. (AT&T states that "developer-provided installations," are the "most common practice")<sup>11</sup>.

AT&T states that while it prefers to install direct-buried installations (placing specially encased telephone cable directly in an underground trench), developers prefer to place conduit installations to suit their convenience. On this reasoning, AT&T maintains that the developers' conduit installations are governed by Rule 15 A.2 and 3<sup>12</sup> and that, therefore, AT&T bears no responsibility for any part of the cost of the conduit through which AT&T lines will interconnect AT&T's customers with AT&T's local exchange network.

Complainants, by contrast, maintain that the conduit installation is determined by AT&T and is not the product of a genuine developer request for a more expensive or unusual type of construction. Complainants note that, outside of Orange County, developer-provided conduit installations are the *de facto* standard line extension that AT&T uses in residential developments. Accordingly, developer-provided conduit installations, like any other line extensions to residential subdivisions, are governed by Rule 15 C. 1 and must be constructed "at ... [AT&T's] expense."

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<sup>11</sup> 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).)

<sup>12</sup> Section A2 and A3 are addressed at pp. 25-28 *infra*.

## (2) Joint Trenching

AT&T concedes that it must reimburse residential developers for AT&T's pro-rata share of trenching costs that the developers incur to place AT&T's line extensions within residential subdivisions or for any kind of direct-buried installation. The parties disagree, however, as to what constitutes proper reimbursement. Both AT&T and Complainants agree that the amount of reimbursement should be predicated on AT&T's costs, but they differ regarding the fashion in which that cost is determined.

AT&T's practice has been to determine the amount of reimbursement by simply paying whatever amount its "cost desk" system generates. Complainants' believe that (1) the reimbursement should be based on data relevant to the specific project or, minimally, its locality and (2) AT&T's "cost desk" system does not reflect that cost.<sup>13</sup>

### 3. **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 the 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**

As a matter of law, it is *not* permissible for AT&T to contract around tariff requirements. *See Solomon v. Southern California Edison Company*.<sup>14</sup> AT&T is permitted to enter into agreements whereby the developers undertake the work and initial expense of installing AT&T's underground line extensions, but AT&T is not permitted to vary the underlying cost allocations found in Rule 15 by means of these or any other agreements. Where the terms of a trench agreement vary from the stated requirements of Rule 15, it is the tariff that controls.

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<sup>13</sup> The joint trench on the Morning Walk project highlights this problem. AT&T's pro rata share of the joint trench was calculated at approximately \$12,000. This included \$3,500 to purchase and install a "splice box" specified by AT&T, and \$2,070 in costs for the conduit. (Ex. 13, pp. 3-4, 10-11 (Knight); and Ex. 14 (Knight).) Nevertheless, based on the average costs generated by its "cost decks," AT&T unilaterally reduced the amounts set forth in the Form B and only agreed to reimburse the developers \$1,995 as the company's pro rata share of the joint trench on the Morning Walk project. (Ex. 13, pp. 3-4, 11-12, 16 (Knight); and Ex. 15 (Knight).)

<sup>14</sup> See citation from *Solomon* at pp. 29-30 *infra*.

**4. Whether AT&T's actions as alleged in the administrative complaint constitute a violation of Rule 15**

The simple answer is yes.

As set forth in detail at pp. 30-34 *infra*, the Complainants bore more of the expense of the AT&T line extensions at La Collina and Morning Walk than was required by Rule 15. They did so, quite simply, because AT&T did not bear its portion of the cost fixed by Rule 15.

**5. Whether the Rule 15 violations, if any, harmed Complainants**

Again, the simple answer is yes. Complainants paid more for AT&T's extension of AT&T service to La Collina and Morning Walk than was required by Rule 15.

**III. STATEMENT OF FACTS**

**A. Background Facts Concerning AT&T's Underground Line Extensions.**

**1. The Purpose of a Telephone Line Extension**

A line extension is the means by which AT&T's existing local exchange network in California is extended and connected to a new subdivision (residential, business service or mixed use), so that it can serve the subdivision where potential local exchange subscribers are located. (Ex. 201, pp. 3-4 (Shortle); Ex. 1, pp. 2-4 (Lower).)

**2. Underground Line Extensions**

An AT&T landline extension can be run underground, in which case it is called an "underground line extension," or it can be run aboveground, in which case it is called an "aerial line extension." In California, most new line extensions are underground line extensions. On rare occasion, a new line extension will be an aerial line extension. On these rare occasions, AT&T directly provides or otherwise fully defrays

the expense of installing the new aerial line extension.<sup>15</sup> This proceeding solely concerns underground line extensions. (Ex. 1, p. 4 (Lower).)

### **3. Types of Underground Line Extensions**

Broadly speaking, there are two kinds of underground line installations: (1) a direct-buried installation and (2) a conduit installation. A direct-buried installation refers to encased or insulated telephone cable that is suitable for placement directly in the underground trench. A conduit installation typically uses regular telephone cable that is placed inside conduits that are often supported by underground vaults. The cable and conduits are placed in the underground trench, and any supporting vaults are typically placed in an adjoining excavation. Both of these methods of installation are employed to connect AT&T's existing network to (1) potential AT&T local exchange customers (Ex. 1, pp. 5-6 (Lower)) or (2) the customers of other local exchange companies (known as "CLEC"s) that reach their subscribers by reselling AT&T's local exchange line and paying AT&T a charge for the use of the line.<sup>16</sup>

### **4. Design of Underground Line Extensions**

AT&T specifies the trench design on all AT&T line extensions, including developer-provided installations.<sup>17</sup> AT&T also specifies the materials and structures to be used by developers when the developer installs the line extension. (Shortle, Tr. Vol. 1, p. 209, lines 2-14.) Developers must purchase the trenching materials and structures

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<sup>15</sup> A "service feed" is a related, but different concept: A "service feed" is an individual connection within the tract from the line extension to a cluster of units or to an individual unit located in the new subdivision. The present dispute does not concern the installation or funding of service feeds, but only the installation and funding of underground line extensions.

<sup>16</sup> As a practical matter, notwithstanding nominal competition in the residential local exchange market, it remains overwhelmingly the domain of AT&T. See, Commission's Report to the Legislature on the Status of Telecommunications Competition in California. [http://docs.cpuc.ca.gov/word\\_pdf/REPORT/16454.pdf](http://docs.cpuc.ca.gov/word_pdf/REPORT/16454.pdf)

<sup>17</sup> AT&T's witness generally testified that the company "will work with the developer to design the line extension to AT&T's specifications." (Ex. 201, p. 5 (Shortle).) With regard to the Morning Walk project, the developers "received a sheet of specifications from AT&T showing the design of the AT&T connection. We then put the work out for bid based on the composite." (Ex. 13, p. 9 (Knight).)

specified by AT&T from a list of approved suppliers. (Shortle, Tr. Vol. 1, p. 208, line 18 to p. 209, line14.) AT&T does not permit developers or outside contractors (contractors other than those working in the direct employ of AT&T) to install direct-buried cable or the telephone cable used in conduit installations.

## **5. The Predominance of Developer Installed Line Extensions**

Except for Orange County, where AT&T works with developers to timely perform direct buried installations, the most common installation is a “developer provided installation.” (Ex. 201, p. 5 (Shortle).) In a “developer-provided installation,” the developer arranges to provide the underground trench, any adjoining excavation, and all of the necessary materials (except for the telephone cable itself). These materials always include conduit and typically include one or more supporting vaults. Once the installation has been completed and approved by AT&T’s inspectors, the developer transfers ownership of the materials to AT&T.<sup>18</sup> AT&T benefits from conduit installation, as compared to a direct buried installation, because the conduit installation is easier to maintain and to upgrade. (Ex. 1, p. 5 (Lower).)

### **B. The Cost Allocations Prescribed By Rule 15.**

Rule 15, Section C sets forth the cost allocations for underground landline extensions that connect AT&T’s existing network to new subdivisions. By these cost allocations, developers are obliged to bear certain costs, while AT&T is obliged to incur others. The principal costs in question here are as follows: (1) The expense of providing the underground trench (“joint trench”) and any adjoining excavation; and (2) the expense of purchasing and installing conduit, any supporting vaults, and miscellaneous materials (“conduit.”)

Section C.1 sets forth the cost allocations that apply to (1) *all* underground

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<sup>18</sup> AT&T’s witness confirmed that when the installation is completed it “will become part of AT&T’s facilities to maintain for the rest of the duration of the cable’s life and things.” (Shortle, Tr. Vol. 2, p. 209, lines 6-14; *see also*, Ex. 1, p. 11 (Lower).)

line extensions within residential subdivisions; and (2) all direct-buried installations.<sup>19</sup> The cost allocations themselves are set forth at Sections C.1.a and C.1.b are as follows:

Section C.1.a. “[AT&T] 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.”

Section C.1.b. “The applicant will perform or pay for any payment cutting and repaving, and for clearing the route and grading it to within six inches of final subgrade, all in time to give the Company a reasonable construction period.”

Section C.2 sets forth the cost allocations for business service and mixed use subdivisions where conduit installations are placed. Section C.2.a states: “The Company will provide the conduit material, and metallic manhole covers where specified, or, where mutually agreeable, the applicant may provide the conduit material to the Company’s specifications and the Company will reimburse the applicant at the Company’s current cost for that type of conduit.”

Rule 15 A.2 and A.3 set forth two related *exceptions* to the general cost allocations provided in 15.C. These exceptions apply only where the developer *prefers a more expensive, unconventional line extension than an AT&T standard line extension*, in which case either the developer must bear the added expense entailed by the costlier installation (A.2), or AT&T and the developer can negotiate the terms on which the developer will provide its own preferred, costlier installation (A.3).<sup>20</sup>

AT&T admits that Rule 15 applies to developer-provided installations. (Shortle, Tr. Vol. 1, p. 125, lines 10-25.) AT&T also admits that it must bear the expense obligations set forth in Rule 15 without regard to whether the installation is performed by

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<sup>19</sup> “Within new [residential] subdivisions ... *or* where buried cable is to be used [the following cost allocations shall apply]”.

<sup>20</sup> AT&T takes a very expansive view of these exceptions, arguing that they govern nearly all conduit installations, even though conduit installations are used for nearly all line extensions (according to AT&T, they are “most common practice” today). If AT&T’s view prevails, the exceptions set forth in A.2 and A.3 have eviscerated the general cost allocations set forth in C.1 and C.2.

AT&T, an AT&T contractor, or a developer. (Shortle, Tr. Vol. 1, p. 135, lines 1-5.)

**C. The Underground Line Extensions at Morning Walk and La Collina dal Lago.**

Complainants are the developers of two residential subdivisions, Morning Walk and La Collina dal Lago. These two subdivisions are located in the Folsom, California (near Sacramento) and are directly adjacent to each other. (Shortle, Tr. Vol. 1, p. 171, line 28 to p. 172, line 7; Bernau, Tr. Vol. 1, p. 116, lines 8-17; Exs. 207, 208.)

**1. La Collina dal Lago**

La Collina is a 38-lot residential development the construction of which began in 2003. (Ex. 10, p. 5 (Bernau).)<sup>21</sup>

AT&T maintained a policy for the Sacramento region that addressed underground line extensions. (Ex. 203.) The policy stated that “if the developer chooses to provide trench, SBC Pacific Bell usually requires (3) bids submitted by the developer to negotiate reimbursable trench costs.” (Ex. 203 at p. 2.) AT&T’s witness acknowledged that the policy was reasonable, but confirmed that it was not followed with respect to either the La Collina development or, later, the Morning Walk development. (Shortle, Tr. Vol. 2, p. 183, line 18 to p. 184, line 20.)

Complainants obtained multiple bids for the joint trench on the La Collina project. The low bid was reflected in “Form B”- the document provided to AT&T and the other “dry” utilities occupying the joint trench. (Ex. 10, p. 12 (Bernau).) The estimated cost was calculated at \$124,689, resulting in a bid for trenching of \$21.49 per linear foot. Accordingly, AT&T’s pro rata share of the joint trench, calculated pursuant to the low bid from the competing contractors, was determined to be \$20,408. (Ex. 10, pp. 14-15 (Bernau).)

When AT&T returned the Form B, it had crossed out \$21.49 per linear foot

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<sup>21</sup> AT&T indicated on the “Engineering Application/Agreement” that La Collina is a “Subdivision” and not a “Real Estate Development.” (Ex. 204, p. 3.)

and written in a figure of \$19. (Ex. 10, pp. 14-15 (Bernau); Ex. 11 (Bernau); Bernau, Tr. Vol. 1, p. 116, lines 18-22.) AT&T thereby reduced its pro rata share of the joint trench from \$20,408 to \$17,990.15. (*Id.*) AT&T did not explain the basis for these reductions and would not negotiate any additional reimbursement. (AT&T did later agree to reimburse the developer \$300 for a structure requested by the company, bringing the total reimbursement to \$18,290.15.) (Ex. 10, p. 15 (Bernau).)

## **2. Morning Walk**

Morning Walk is an 8-lot residential development, adjacent to La Collina, the construction of which began in 2007. (Ex. 13, p. 5 (Knight).) Construction of the *entire project* was scheduled to take place in nine weeks. (Bernau, Tr. Vol. 1, p. 113, lines 6-10.)

The Morning Walk developers would have preferred a direct-buried installation.<sup>22</sup> Owing to their past experience, however, they were concerned that unaffordable delays would occur if AT&T were to provide a direct-buried installation. (Bernau, Tr. Vol. 1, p. 110, line 21 to p. 114, line 14; Ex. 13, p. 16 (Knight).) The developers then attended a “pre-construction meeting” that was scheduled after they had already begun work on the development. At this meeting, AT&T announced that it could only provide a direct-buried installation seven weeks later – i.e., by the time that most of the development was supposed to be complete. (Bernau, Tr. Vol. 1, p. 108, lines 2-11.) Thus AT&T’s offer of a direct-buried installation was impracticable: It would have held up the entire project for a period almost as long as the time the developers had allocated to complete the project. (Bernau, Tr. Vol. 1, p. 112, line 2 to p.114, line 14.)

The Morning Walk developers did not request a route or type of construction that differed from that designed and specified by AT&T. But a seven-week delay presented serious economic and safety concerns for the Morning Walk developers. (Ex. 13, p. 15 (Knight); Bernau, Tr. Vol. 1, p. 111, line 14 to p. 114, line 14.) AT&T

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<sup>22</sup> Mr. Bernau testified, “it’s not our intention to put in conduit. We have no interest in putting in conduit. We’d prefer direct burial.” (Bernau, Tr. Vol. 1, p. 111, lines 25-28.)

specifically told the developers “the only way you can speed up the process is put in conduit.” (Bernau, Tr. Vol. 1, p. 111, lines 22-24.) Thus, they had no choice but to construct a developer-provided installation, over precisely the same route over which the direct buried cable would have been placed, according to AT&T’s design and specification, using conduit. (Ex. 13, p. 16 (Knight); Bernau, Tr. Vol. 1, p. 112, line 2 to p. 114, line 14.)

The Morning Walk developers prepared a “utility composite” for the joint trench based on information received from each of the trench occupants. Specifically, the Morning Walk developers received a sheet of specifications from AT&T showing the design for the AT&T connection. (Ex. 13, p. 9 (Knight).) The joint utility trench was then put out for bid based on these specifications. The Morning Walk developers obtained between four and six bids for the joint dry utilities trench. The bids ranged in price from approximately \$98,000 to over \$200,000. (Ex. 13, pp. 9-10 (Knight); Bernau, Tr. Vol. 1, p. 115, lines 21-26.)

Following this extensive bid process, the Morning Walk developers prepared a Form B, which included a breakdown of each occupant’s pro rata share of the joint trench as well as the total cost. The total cost shown on the Morning Walk Form B was \$100,916, which was slightly more than the low bid. (Ex. 13, p. 19 (Knight).)

AT&T’s pro rata share of the joint trench was calculated at \$12,078. (Ex. 14 (Knight).) This amount included \$3,500 to purchase and install a “splice box” specified by AT&T. It also included \$2,070 in costs for the conduit. (Ex. 13, pp. 3-4, 10-11(Knight).)

As was the case at La Collina, AT&T unilaterally reduced the amounts set forth in the Form B. The total amount AT&T agreed to reimburse the developers for its pro rata share of the joint trench on the Morning Walk project was \$1,995. (Ex. 15 (Knight); Ex. 13, pp. 3-4, 11-12, 16 (Knight).) This amount included \$7 per linear foot for trenching and \$250 for an AT&T specified splice box, which cost the developer \$725 to purchase from an authorized supplier. (Ex. 15 (Knight); Shortle, Tr. Vol. 1, p. 210, lines 1-19; Ex. 13, pp. 11-12 (Knight).) AT&T provided no reimbursement for the costs

to install the splice box (Shortle, Tr. Vol. 2, p. 212, lines 10-23.) and no reimbursement for the costs of conduit. (Ex. 13, p. 4 (Knight).) AT&T provided no explanation for how it calculated the \$1,995 in reimbursement, and the Morning Walk developers were told that this amount was non-negotiable. (Ex. 13, pp. 13, 14 (Knight).)

Complainants experience on both the La Collina and the Morning Walk subdivisions are unsurprising in one respect. Numerous AT&T witnesses have confirmed that AT&T unilaterally sets the price it will reimburse developers for developer-provided installations, and that it does not revisit these prices. (See Ex. 20, pp. 24-25, 28-29, 36 (highlighted passages) (Orta); Ex. 21, pp. 36, 38 (highlighted passages) (Goins); Ex. 31, pp. 32-33 (highlighted passages) (Reitman); Ex. 23, pp. 16-17 (highlighted passages) (Cooper); Ex. 18, pp. 21-23, 25 (highlighted passages) (Pierce); Ex. 24, pp. 82-83 (highlighted passages) (Baird); and Ex. 19, pp. 24-25, 154-55 (highlighted passages) (Pickard).) This practice might be reasonable, even laudible, if AT&T were pointing to a number in a tariff (i.e. 7 cents/minute) it felt bound to charge. But it is instead pointing to an undefined term (“cost”) and refuses to explain how it was quantified.

**D. AT&T’s “Basis and Manner” for Determining Reimbursement Amounts.**

AT&T’s witness, Michael Shortle, testified that the company uses two computer databases to determine the amount it will reimburse developers for AT&T’s pro rata share of joint trenches. These databases are known as the JAM and ACAS systems. AT&T’s witness could not identify what these acronyms stand for and generally referred to them as AT&T’s “cost decks.” (Shortle, Tr. Vol. 2, p. 154, line 27 to p. 155, line 24.) AT&T’s witness testified that the “cost deck” databases are used to generate a statewide average for trenching costs based on projects done by AT&T. (Shortle, Tr. Vol. 2, p. 156, line 27 to p. 157, line 6.) AT&T’s witness did not know who programmed or made up the rules for the “cost deck” databases, and did not “know where the numbers come from.” (Shortle, Tr. Vol. 2, p. 153, lines 6-22.) Although AT&T’s witness testified about a few factors that might be specific to certain counties in California (e.g., hard dig

or soft dig), no evidence was presented to show how the statewide average is calculated, or the number of costs used by AT&T to calculate the average. (Shortle, Tr. Vol. 1, p. 168, lines 8-23.)

According to AT&T's witness, the average cost generated by AT&T's "cost decks" for the joint trench on the La Collina project was \$19 per linear foot. (Shortle, Tr. Vol. 2, p. 170, line 17 to p. 171, line 18.) Although the Morning Walk project is directly adjacent to the La Collina project, and was constructed three years later, the average cost generated by AT&T's "cost decks" for the joint trench on the Morning Walk project was \$7 per linear foot. AT&T's witness had no firsthand knowledge of how AT&T's average costs could have decreased \$12 per linear foot (from \$19 to \$7), 63%, between 2003 and 2007, or how there could be such a substantial difference for projects that are located right next to each other.

AT&T's witness had no knowledge about how AT&T determines its pro rata share of any particular trench, "[o]nly what comes out of the ACAS, your honor." (Shortle, Tr. Vol. 2, p. 203, lines 24-28.) AT&T's witness did not believe the company has an obligation under Rule 15 to reasonably calculate its pro rata share of joint trenches in residential subdivisions, testified in that its pro rata share is "whatever we calculate" from the "cost decks" and that "[t]he tariff does not talk about reasonable. It just says 'pro rata' on it." (Shortle, Tr. Vol. 2, p. 176, line 13 to p. 177, line 23.)

AT&T did not make any determination of what it claims as the additional cost of a conduit installation (compared to the cost of a direct buried installation). Instead it simply refused to reimburse the developer for any part of the cost of conduit, which has the effect of imposing the entire cost rather than the additional cost of a conduit installation on the developer. The conduit is ultimately owned by AT&T.

#### **IV. DISCUSSION**

##### **A. Rule 15 Applies To A Developer Installation Of AT&T's Underground Line Extension.**

The Commission may wonder why this first issue, which did not engender

controversy at the Commission hearings in November, was included in the Superior Court's Referral Order. The issue was included because of arguments AT&T advanced in the civil court proceedings. AT&T sought to convince the Superior Court that Rule 15 did not apply to developer installations and that the terms of the trench agreements controlled.

AT&T has abandoned the argument that Rule 15 does not apply to developer installations of its underground line extensions. The direct written testimony of AT&T's witness, Mr. Shortle, recognizes that Rule 15 applies to developer installations. (Ex. 201, pp. 5-6 (Shortle).) To clear up any possible confusion on this issue, Mr. Shortle was specifically asked "whether Rule 15 applies to line extensions installed by developers rather than AT&T" and his answer was "Yes." (Shortle, Tr. Vol. 1, p. 126, lines 14-24.) Mr. Shortle also testified:

Q: And if a developer were to do the work for AT&T rather than a contractor or AT&T itself, would AT&T still have the expense obligation recited in the rule?

A: Yes, it would.

(Shortle, Tr. Vol. 2, p. 135, lines 1-5.)

The essential point is that Rule 15, including the cost allocation rules for underground line extensions, applies to AT&T whether AT&T performs the installation work itself or whether it is performed for AT&T by a developer.<sup>23</sup>

Accordingly, as to the first issue referred to the Commission, the Commission should find that the Rule 15 cost allocations apply to line extensions installed by developers to the same extent they would if AT&T performed the work.

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<sup>23</sup> Any notion that it is performed for anyone other than AT&T is belied, as noted throughout this pleading, by the fact that the extension (whether direct buried or conduit) is designed, owned and employed solely by AT&T (except for the joint trench which AT&T shares with other utilities.)

**B. AT&T Does Not Contest That Rule 15 Requires It To Reimburse Developers For Some Portion Of The Costs They Incur To Install Underground Line Extensions.**

The second issue referred, like the first, is not controversial. AT&T's own witness, Mr. Shortle, submitted the following direct testimony:

In the case of residential subdivisions, Rule 15 requires AT&T to “construct an underground extension at its expense” and to pay “its pro-rata cost” of trenches that are jointly occupied. (Rule 15, § C.1.a.) In the case of commercial or mixed-use subdivisions, AT&T's obligations are more limited. The developer, not AT&T, is responsible for constructing the necessary USS<sup>24</sup> for the subdivision's communication services. (Rule 15, § C.2.d.) AT&T's obligation for a commercial or mixed-use subdivision is limited to “provid[ing] the conduit material, and metallic manhole frames and covers where specified, or where mutually agreeable, the [developer] may provide the conduit material to the Utility's specifications, and the Utility will reimburse the applicant at the Utility's current cost for that type of conduit. (Rule 15, § C.2.b.)”<sup>25</sup>

The text of Rule 15 plainly, and logically, contemplates that AT&T will reimburse developers for certain costs the developers incur when they perform the work of installing AT&T's underground line extensions. AT&T contends that it properly reimburses developers, while Complainants contend that AT&T under-reimburses developers. Both parties agree that AT&T must and does reimburse developers for certain costs they incur in installing AT&T's underground line extensions. For these reasons, which are not disputed, the Commission should make the threshold finding that Rule 15 requires AT&T to reimburse developers for certain costs the developers incur to install AT&T's underground line extensions.

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<sup>24</sup> Underground Support Structures.

<sup>25</sup> Ex. 201, p. 4.

**C. The Basis And Manner Of Determining The Amount Of Reimbursement Due Under Rule 15 Must Be Consistent With The Underlying Cost Allocations Set Forth In The Rule And Must Be Objectively Reasonable.**

This issue presents the first, and perhaps only, area of genuine controversy. Complainants maintain that AT&T must reimburse developers as follows:

If the developer provides a line extension within a residential subdivision or trenching for a direct-buried installation within any subdivision, AT&T must reasonably reimburse the developer for these costs (Rule 15, C.1.a.), except for the specific costs set forth at C.1.b.<sup>26</sup>

If the developer provides conduit or manhole covers for a line extension within a business service or mixed use subdivision, AT&T must reimburse the developer for these costs according to its own current cost for these items, but on condition that it calculate its current costs in good faith.

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. The above stated reimbursement principles are implied by the text of Rule 15 and are necessary to its implementation. Moreover, the case law on point supports, if not requires, these interpretations.

**1. Rules of Tariff Construction**

Any ambiguity in Rule 15 must be interpreted against AT&T. *Z.I.P., Inc. v. Pacific Bell*, D. 92-09-087, 45 CPUC2d 645 (1992). Furthermore, “[o]ur rule that ambiguous tariff provisions should be interpreted in order to give the customer the lowest rate is well established.” *Id.* (citations omitted).

“It is well-established that ambiguous tariff provisions are to be construed strictly against a utility and any doubt resolved in favor of the customer.’ (Citations omitted.) (*Carlton Hills School v. SDG&E* [D.82-04-007] (1982) 8 Cal.P.U.C.2d 438, 440.) The Commission has also said, ‘It is not fair to apply unclear tariff provisions against the ratepayer.’ (*Complaint of*

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<sup>26</sup> Pavement cutting, repaving, clearing the route and grading.

*Ellickson v. Gen. Tel. Co. of Calif.* [D.93365] (1981) 6 C.P.U.C.2d 432, 437.)”

*Application of PG&E for Rehearing of Resolution G-3372*, D.05-09-046, 2005 Cal. PUC Lexis 467, footnote 6 (September 22, 2005).

The foregoing principle applies in favor of developers as well as end users. *Barratt American, Inc. v. Southern California Edison Company*, D.01-03-051, 2001 Cal. PUC Lexis 186 (March 27, 2001).

Moreover, the presumption against the utility in cases of tariff ambiguity is expressly incorporated in General Order 96-B (“GO 96-B”), which governs AT&T. *California Building Industry Association v. SCE*, D.08-08-001, 2008 Cal. PUC Lexis 303 (July 31, 2008), footnote 5.

In addition, “[t]ariffs, like statutes, should be read in context, as a whole and in a reasonable, common sense way.” *Almond Tree Hulling Co. v. P.G.E.*, D.05-10-049, 2005 Cal. PUC Lexis 494, p. 18 (October 27, 2005). “Under generally recognized rules of tariff interpretation 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) (emphasis added).

## **2. Application of Rules of Construction to Reimbursement Under Rule 15**

The rules of construction govern the proper basis and manner for determining the amount of reimbursement due to developers. By enlarging the scope of Section A.2 to reach most residential line extensions, AT&T has advanced a “basis and manner” for determining its obligations under Section 15 C.1 (and thus what it will reimburse developers) that renders Section 15 C.1, largely a nullity. That outcome is proscribed by *Southern California Power Pool* and cases cited therein. AT&T’s broad

construction disfavors the “customer” and cannot survive scrutiny under *Z.I.P, Inc.* and cases cited therein.

Moreover, an overarching requirement of reasonableness governs all utility rates, contracts and practices. Public Utilities Code Section 451. Where Rule 15 expressly allocates a cost to AT&T, the basis and manner for determining that cost, and thus the level of reimbursement, must be one that results in AT&T actually bearing that cost rather than, contrary to Rule 15, forcing the developer to bear it. The result can only be achieved if a reasonable method is employed to determine the amount of reimbursement to be paid to developers for developer installations. Rule 15 must be given a reasonable, common sense construction. *AirTouch Cellular v. Pacific Bell*, D. 98-12-086, 84 CPUC2d 555 (December 17, 1998)

More specifically, absent some showing that an objectively reasonable estimate of AT&T’s expenses would be less than the actual expense of installing the underground line extension - measured by competitive bidding for the site - the actual expense should be the measure of AT&T’s reimbursement obligation. This measure will fully protect AT&T’s interest in avoiding overpayment and will only cause developers to suffer less than full payment of their actual expense where that expense is more than an objectively reasonable measure of AT&T’s expense.

Accordingly, the Commission should find that where section C.1.a mandates that the underground line extension be at AT&T’s expense, the basis and manner for determining the amount of reimbursement must be a reasonable measure of AT&T’s expense, one that estimates the current costs to AT&T were it to bear those costs at the specific project at issue. The Commission need not specify the precise calculation that AT&T must use to determine the amount of payment it must make for the expenses allocated to it under C.1.a. But it should direct a general basis and manner for determining the amount of reimbursement that AT&T must pay, one predicated on a good faith, reasonable calculation of AT&T’s costs for the project at issue.

**D. Application of Rules of Construction and Reason Show That AT&T Has Not Complied With Rule 15 With Respect to Joint Trench Costs and Reimbursement for Conduit.**

The two principal issues regarding the “basis and manner” of determining the level of reimbursement related to (1) AT&T’s share of joint trench costs and (2) reimbursement to developers for the installation of conduit.

**1. The Basis and Manner for Determining AT&T’s Pro-Rata Share of Trenches That Will Be Occupied Jointly**

Rule 15 C.1 provides AT&T a savings when it extends into a residential development by affording the benefit of reducing its trenching expense by occupying a joint trench, a trench also employed by other utilities. AT&T is only allowed to obtain the economic benefit of a joint trench “upon payment by the Company of its pro-rata cost thereof.” The word ‘pro-rata’ means “proportional or proportionately” and ‘proportional’ means “in correct proportion, corresponding in size or amount or degree.” The “joint trench” rule thus requires AT&T to pay for the correct proportion of, or its share of, the cost of the joint trench. The rule cannot be understood as permitting AT&T to pay anything less than its full “pro-rata cost” of the joint trench.

Inevitably, the measure of AT&T’s reimbursement obligation for joint trenching involves two variables. The first is the total cost of the joint trench (in dollars) and the second is AT&T’s proportional share of the total trench cost (expressed as fraction or percentage.). AT&T’s pro-rata cost is simply the product of the two.<sup>27</sup>

Calculation of the proportional share component of pro-rata cost was not an issue of controversy at hearing. Complainants’ expert presented an approach to determine AT&T’s pro-rata share of a joint trench. (Ex. 6, p. 2 (Lower).) AT&T’s witness agreed that this was a very “nice” way to measure AT&T’s proportional share. (Shortle, Tr. Vol. 1, p. 196, line 13 to p. 197, line 18.) Alternatively, AT&T’s share could be determined as it was on the Morning Walk and La Collina Form Bs by dividing

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<sup>27</sup> As shown on the Form B exhibits, the calculation of pro rata share must be performed for different  
*(footnote continued)*

the trench costs by the number of utilities occupying particular trench segments. AT&T did not object to this method of determining its proportional share, nor did it change this pro-rata allocation in either project. (Exs. 11 (Bernau) and 15 (Knight).)

What produced the reductions in the reimbursements to the developers was AT&T's reductions of the other variable – actual trench costs. After being presented with bid-based<sup>28</sup> “Form Bs” by the developers, AT&T reduced reimbursed cost per linear foot of joint trench, which had the effect of reducing the actual trench cost downward by approximately 12 % in La Collina and 84% on Morning Walk<sup>29</sup>.

Because the reimbursement to the developers is driven by AT&T's estimate of its trenching cost, one of the key issues in this docket is whether the means employed by AT&T for determining its trenching cost was sufficiently reasonable that AT&T has met its obligation to bear its pro-rata share of the joint trench. To the extent it is not, that cost has been passed on to the developer in contravention of Rule 15 C. How then does AT&T determine its cost?

Based on the limited evidence before the Commission, it appears that AT&T employs a “cost deck” system as the basis and manner for determining its pro-rata share of joint trench costs. (Shortle, Tr. Vol. 2, p. 154, line 27 to p. 155, line 24; p. 166, lines 13-17.) AT&T's only witness, however, was not knowledgeable about AT&T's system for generating these non-negotiable amounts, but did opine that the amount need not be reasonable and should instead be whatever number the system generated. (Shortle, Tr. Vol. 2, p. 176, line 13 to p. 177, line 23.) AT&T did not present any evidence to show that any cost inputs it used were reasonable.<sup>30</sup> AT&T's witness had no personal

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segments of the joint trench because not all of the utilities sharing the trench occupy all segments of it.

<sup>28</sup> The cost of the joint trench, shown in the Form B presented to AT&T, was based on bids from contractors in the area. (See pp. 11-14 *supra*, and EX 10, p. 12 & EX 13, p. 10.)

<sup>29</sup> Adjustments on the Form B, other than trenching cost, contributed to the sharp under reimbursement at Morning Walk. EX 13, p. 12.

<sup>30</sup> The unreasonableness of AT&T's “cost deck” system is demonstrated by the two projects at issue in this case. Although the Morning Walk project is directly adjacent to La Collina, the average cost generated by AT&T's “cost decks” for the joint trench on the Morning Walk project was \$7 per linear foot versus \$19 on La Collina. (Shortle, Tr. Vol. 1, p. 171, lines 20-27.) How could the same soil conditions produce a 2007 trenching cost at Morning Walk of \$7 when the cost four years earlier was almost triple

*(footnote continued)*

knowledge concerning these matters, and AT&T did not present any evidence concerning the data used by its system or how the system operated on this data. (Shortle, Tr. Vol. 2, p. 153, lines 6-22; p. 168, lines 8-23; p. 203, lines 24-28.) AT&T's witness did say its system was in some sense operating based on average costs. (Ex. 201, p. 12 (Shortle); Shortle, Tr. Vol. 2, p. 156, line 27 to p. 157, line 6.)

AT&T cannot be deemed to be reimbursing developers in the "basis and manner" required by Rule 15 by simply paying whatever figure is generated by its "cost deck" system. It is both counter-intuitive and foreign to the Commission's administration of Section 532 and GO 96-B to conclude that a utility's obligation under its tariff will be calculated by the utility at the time of service and then presented to the non-utility party under circumstances where the non-utility was required to either accept the figure or bear significant or ruinous economic harm. Again, AT&T is not pointing to a number in its tariff but to a concept ("costs").

The issue referred by the Superior Court is the "basis and manner" for determining the reimbursement that is due. The measure cannot be simply whatever AT&T announces. *Instead, to avoid construing Rule 15 in a way that would defeat its purpose (AT&T's payment of its pro-rata share of joint trench costs), AT&T must pay a reasonable amount for its pro-rata share of the joint trench.*

In this regard, AT&T's "Sacramento Subdivision Engineering Policy," admitted into evidence as its Exhibit 203, is instructive. The policy states: "If the developer chooses to provide trench, SBC Pacific Bell usually requires (3) bids submitted by the developer to negotiate reimbursable trench costs. If multiple bids are not available from the developer, SBC Pacific Bell will use an internal comparative bid method, using the Form B as reference allocation chart, to determine reimbursable amounts."

Here, multiple bids were readily available and the policy recognizes that the preferred measure of the cost of joint trenches is obtained by considering multiple

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that amount? (Ex. 13, p. 13 (Knight).) AT&T's witness had no firsthand knowledge of how AT&T's average costs could have *decreased* \$12 per linear foot (from \$19 to \$7) between 2003 and 2007, or how there could be such a substantial difference for projects that are located right next to each other. (Shortle, *(footnote continued)*)

competitive bids for the joint trench work *for the specific project*. Employing multiple bids as a benchmark avoids the under or overestimating that is inherent in using statewide averages or other average cost measures. The policy also reflects that where this best, project-specific, measure is not available a reasonable alternative is to use a comparable bid method based on internal bid information.

AT&T cannot resort to internal cost measures that do not capture the relevant project costs. AT&T grudgingly acknowledges that it does not usually do joint trench work within residential subdivisions in the ordinary course of its business. Shortle, (Tr. Vol. 2, p. 157-158). The reality is that developers or their contractors, with rare exception, perform this work.

Because AT&T does not do this type of work, its internal cost on other kinds of work, measured in some ill-defined way, is not a reasonable measure of its joint trench costs. AT&T does, however, have the ability to use relevant cost information (in the form of bid information collected from developers) to reasonably estimate the costs of residential joint trenches. The Commission should conclude that AT&T was, and is, required to do so to meet its reimbursement obligations under Section 15 C. of Rule 15.

AT&T's costs should simply be developed for a project by examining comparative bids that are genuinely comparable and that include all relevant costs. If it does, it will produce a reasonable measure. If it does not, it will fail to produce a reasonable measure because it will leave out or understate certain costs of joint trenching or ignore real differences in the cost of performing joint trench work under differing circumstances.

The Commission could, but need not, direct that AT&T determine its payment obligation for its pro-rata share of joint trench costs using the Sacramento Subdivision Engineering Policy. It is enough to find that (1) AT&T's "basis and manner" for determining what it will pay must be reasonable and produce reasonable results and (2) the present use of "costs decks" does not assure the Commission that such

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Tr. Vol. 2, p. 174, lines 5-23.)

is the case today.

## **2. Reimbursement for Conduit in Residential Developments**

Sections A.2 and A.3 of Rule 15 contemplate 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 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.” Section A.3 states: “In lieu of all or part of the payment in 2., above, the applicant may furnish such materials or perform such work as may be mutually agreed between the company and the applicant. Upon acceptance by the Company ownership of such material shall vest in the Company.”

A conduit installation is not a convoluted mechanism by which the developer circumvents usual procedures. Rather, the conduit is (1) of a type selected by AT&T, (2) installed in a manner directed by AT&T, (3) ultimately owned by AT&T, and (4) houses AT&T’s cable, connecting AT&T’s central office with AT&T’s potential local exchange customers. Were AT&T installing it itself, it would be doing so for the same reason the developer is installing it today, to leave AT&T with the flexibility to install cable at a date after the trench is closed. The desirability of that flexibility makes conduit installations the most common form of residential line extension today.<sup>31</sup> AT&T is plainly a beneficiary of conduit installation.

AT&T argues that its own preferred installation is a direct-buried system, and that developers routinely lay conduit installations to suit their own convenience, so that these conduit installations should be governed by A.2 and A.3. This is how AT&T justifies its refusal to pay for the conduit where conduit is used for a residential underground line.

AT&T cannot seriously urge that what AT&T itself characterizes as its

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<sup>31</sup> 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).)

most common practice,<sup>32</sup> which is to design and specify the conduit systems installed by developers, is “not determined by the Company.” What AT&T proposes is an exception so broad in scope that it swallows the general rule (Section C.1) and thereby defeats its purpose.

AT&T’s expansion of the scope of Section A.2 is precisely what the Commission’s fundamental principles of tariff interpretation 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 broad reading of Section A.2 essentially changes the text of Section C.1, which requires that AT&T install line extensions at its own expense in residential subdivisions or where direct buried cable is used.<sup>33</sup> By requiring developers to pay for a significant cost of the extension where conduit is used, AT&T has turned the “or” in C.1 into an “and.” Rules of tariff construction do not permit it to do so.<sup>34</sup>

AT&T’s interpretation of sections A.2 and A.3 would also have the effect of reallocating an expense it bears under section C.1.a, to an expense the developer must bear in as though it were a C.1.b expense like pavement cutting and repaving. If Rule 15 intended that developers bear the cost of conduit for AT&T’s most common type of construction, the Rule would have been expressly allocated those costs the developer in the manner described in C.1.b. These costs were not allocated to the developers; they were allocated to AT&T.

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<sup>32</sup> *Id.*

<sup>33</sup> The third instance in which AT&T will install the extension at its expense is where another telecommunications provider would do so at no expense to the applicant. In other words, AT&T has the authority construct a line extension to a business development at no cost to the developer if necessary for AT&T to compete with another carrier seeking to serve the same development.

<sup>34</sup> “The plain and ordinary meaning of the word “or” is well established. When used in a statute, the word “or” indicates an intention to designate separate, disjunctive categories. (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 [183 Cal. Rptr. 520, 646 P.2d 191]; see *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861 [80 Cal. Rptr. 2d 803, 968 P.2d 514] [“or” is disjunctive].)” - *Smith v. Selma Community Hospital*, 188 Cal. App. 4th 1, 30 (2010).

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 the Company, not the Applicant, in the vast majority of residential subdivisions.

Here, the presumption required by the rules of construction comports with reality. Although AT&T purports to have a “direct buried policy” by which it expresses a preference for direct buried cable, its actual conduct defeats this claim of preference. It is undisputed that AT&T designs and specifies conduit installations for most residential subdivisions and prefers conduit installations because they allow for easier maintenance and future upgrading of AT&T’s service capabilities. (Ex. 1, p. 5 (Lower).) As a practical matter, AT&T’s actions, against the backdrop of housing construction schedules, have dictated that conduit installations are the most common practice and not the kind a developer requested exception that is contemplated by Section A2.

Complainants’ assertion that developer conduit installations are “determined” by AT&T rather than the developer is borne out by the record on the Morning Walk development. The unchallenged testimony of Mr. Knight establishes that he did *not* request conduit as a preferred type of construction, nor did he mutually agree to suffer any additional expense for an alternative type of construction. (EX 13, pp. 16-18). Rather, AT&T determined that its conduit design would be used for the Morning Walk subdivision by eliminating direct buried cable as a reasonable possibility. AT&T would not permit the developer to install direct buried cable when the trench was open, nor would they install it themselves within a workable schedule. It was AT&T that caused conduit to be used in the Morning Walk subdivision because it was AT&T that eliminated any practical alternative to this type of construction.

Finally, even if sections A.2 and A.3 could be understood as permitting AT&T to force developers to donate conduit for its most common installations, which is an inaccurate reading of the tariff, AT&T concedes that the developer would only be responsible for the *additional cost of this type of construction*. Mr. Shortle testified that

“if the developer for its own purposes wants to use a type of construction which is feasible but differs from that determined by the Company, the developer is required to pay the *additional cost* involved.” (Ex. 201, p. 6 (Shortle)(emphasis added). Under the test articulated by Mr. Shortle, the costs savings that AT&T realizes by not using direct buried cable must be credited to the developer. Otherwise the developer will be paying for the *entire* cost of the alternative type of construction rather than *additional* cost. AT&T achieves a significant cost savings by using the less expensive cable installed in conduit rather than the more expensive direct buried cable. If there were any developer responsibility to pay for additional costs, the measure of these costs would have to take this into account.

The Commission should find that AT&T cannot claim exceptional treatment for its most common practice, which inevitably results in conduit installations without regard to what the developer may desire or request. If the Commission were to find that A.2 and A.3 apply to conduit installations, it should find that its application is limited to circumstances where the developer genuinely requests conduit as an alternative type of construction. Finally, even if the Commission were to agree with AT&T that its C.1.a cost obligation can be shifted to developers under sections A.2 and A.3, regardless of the developer’s preference, it should find that this cost shifting only applies to additional costs and cannot be employed to force developers to bear the entire cost of the conduit installation. This would require AT&T to reimburse the difference in cost between a direct buried installation and a conduit installation.

### **3. Reimbursement For Underground Line Extensions In Business or Mixed Use Subdivisions**

AT&T’s more limited obligation to reimburse developers for underground line extensions in business or mixed used subdivisions is set forth in section C.2.a: “The Company will provide conduit material, and metallic manhole covers where specified, or, where mutually agreeable, the applicant may provide the conduit material to the Company’s specifications and the Company will reimburse the applicant at the

Company's current cost for that type of conduit.”

The basis and manner for determining the reimbursement amount is “the Company's current cost for that type of conduit.” While the rule plainly provides for reimbursement based on AT&T's cost rather than the developers', the “current cost” must be just that -- the cost AT&T would incur to perform the work itself on the specific project under current market conditions. Complainants ask only that the Commission find that AT&T is required to determine its current costs in good faith and in a manner that produces a reasonable result as detailed at pp. 23-24 supra employing bids or recognition of costs set forth in bids obtained by developers for the project.

AT&T can hardly quarrel with this as a reasonable measure of its obligation to “reimburse the applicant at the Company's current cost for that type of conduit.”

**E. The Amount Of Reimbursement Set Forth In A Trench Agreement Is Not Binding If It Is Inconsistent With the Requirements of Rule 15.**

Where the terms of a tariff impose one set of rights and responsibilities and an “agreement”<sup>35</sup> 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*. In that case, the Commission recognized that:

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

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<sup>35</sup> Even setting aside the jurisprudence that proscribes abrogation of a tariff by contract, Complainants do not believe that the admittedly non-negotiable “trench agreements” that AT&T imposes on developers constitutes a binding agreement. These agreements lack the element of consent and are instead executed under economic duress. Because the authorities cited herein bar enforcement of agreements contrary to the terms of a tariff, however, the Commission need not decide this issue (which is not among the referred issues.) Only if the Commission were to decide that the terms of the tariff can be varied by inconsistent contract terms would it become necessary to determine whether the trench agreements are valid contracts.

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 552. Whether or not defendant's service representative misspoke, complainant misunderstood, or the contract contains mistakes, the lawful tariff provisions must be administered and applied.

*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).

AT&T cannot dispute vitality of this authority<sup>36</sup> today and, indeed, it does not do so. (Shortle, Tr. Vol. 2, p. 129, lines 16-27.) The Commission should, therefore, find that the amount of reimbursement set forth in a trench agreement does not abrogate what Rule 15 might otherwise require.

**F. AT&T Violated Rule 15 When It Failed To Fully Reimburse Complainants For Costs AT&T Was Required To Pay.**

The direct testimony of Jeremy G. Bernau (EX 10) and Roger A. Knight (EX 13) sets forth facts concerning the joint trenching and other costs incurred on the La Collina and Morning Walk subdivisions. *None of these facts were challenged by AT&T through cross-examination or through any meaningful contrary evidence.*

Rather than paying the full costs for its pro-rata share of the joint trenching or the reasonable cost of other expenses allocated to it, AT&T paid the developers of the La Collina and Morning Walk subdivisions at *a fraction of the costs allocated to AT&T under Rule 15.*

AT&T will argue that even though it paid cents on a dollar of costs, that

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<sup>36</sup> See also Public Utilities Code Section 532 which underlies much of the case law.

amount was the full reimbursement of costs allocated to it under Rule 15. But AT&T's evidence of its share of the costs under Rule 15 consisted entirely of (1) what its "cost deck" said it should pay; and (2) its belief that section A.2 absolves it of responsibility for paying for the most common form of AT&T residential line extension, which is a developer-provided conduit installation.

AT&T elected not to submit evidence attempting to show that Complainants' actual costs were equal to or less than either (1) AT&T's reimbursement obligation under the Rule or (2) what AT&T actually reimbursed. Instead, AT&T simply took the view that regardless of the actual cost of the extension, AT&T would only pay what was generated by (1) the cost deck and (2) AT&T's expansive application of its "direct buried" only policy.

AT&T's multiple and specific violations of Rule 15 are as follows:

**1. Morning Walk Joint Trench Costs**

AT&T did not dispute its pro-rata share (fraction) of the joint trench it occupied in the Morning Walk subdivision. The dispute, as noted earlier, was over the cost of the trench itself.

The uncontested direct testimony of Roger Knight established that "[i]nstead of the roughly \$12,000 I had calculated, AT&T agreed to reimburse us only \$1,408 for the trench costs (a figure that was subsequently increased to \$1,995.)" AT&T achieved this sharp reduction by unilaterally determining that it would only pay \$7.00 per linear foot for trenching. (EX 13, p.12.(Knight)). This number, which Mr. Shortle testified likely came from AT&T's "cost desks," appears arbitrary and bears no demonstrated relationship to the costs AT&T or anyone else would have to pay for the joint trenching at issue.

The payment amount is irrational because the same "cost decks" system had identified \$19 per linear foot as the cost per linear foot of the joint trench for La Collina trenching, which was adjacent to the Morning Walk subdivision and had the same underlying soil conditions and site conditions. It is inconceivable that \$7 per linear foot

reflects the true trenching costs on Morning Walk, when AT&T found the costs to be \$19 per linear foot a few years before in an adjacent subdivision – and even the \$19 figure failed to constitute reimbursement for the low bid amount on that project. (Ex. 13, p. 13 (Knight)). Whatever system is being used by AT&T, it fails to calculate the costs reasonably. AT&T did not present any witnesses or documents that meaningfully explained the operations of its internal estimating systems. (See discussion at pp. 14 and 22 *supra*.) For purposes of the present proceedings, the unexplained disparity shows that AT&T’s system did not produce reasonable estimates for the La Collina and Morning Walk subdivisions.

The testimony and documentary evidence further demonstrated that AT&T did not make a payment of “its pro-rata cost” of the Morning Walk joint trench. Mr. Bernau explained in his testimony that a trench could not even be dug for \$7 a linear foot. (RT: Vol. 1.p116 (Bernau)). The amount paid by AT&T cannot reflect the costs of digging the trench, preparing the trench bed to install AT&T’s conduit, and then backfilling the trench.

## **2. La Collina Joint Trench Costs**

Nor did AT&T attempt to show that it fully paid for its pro-rata share of the La Collina joint trench. AT&T’s Rule 15 obligation is unequivocal. AT&T is only permitted to benefit by jointly occupying a trench in a residential development “upon payment by the Company of its pro-rata cost thereof.” AT&T does not dispute that its own policy provides “[i]f the developer chooses to provide trench, SBC Pacific Bell usually requires (3) bids submitted by the developer to negotiate reimbursable trench costs.” (Ex. 203, p. 2, paragraph 7.) AT&T did not dispute that six bids were received for the La Collina joint trench or that it refused to pay anything more than approximately 90% of the lowest bid. AT&T did not contest Complainants’ evidence that AT&T’s pro-rata share of the joint trench, the Form B, which was based on the lowest bid. AT&T does not dispute that the pro-rata share shown was \$20,408 and that it unilaterally reduced its payment to \$18,290.15.

### **3. Morning Walk Splice Box**

It is also undisputed that AT&T reduced to \$250 the reimbursement for the splice box it specified for the Morning Walk installation, even though the uncontested evidence showed the lowest price for purchasing this box was \$725, and even though the price for an *installed* box was quoted at \$3,500. As Mr. Knight testified, without challenge from AT&T, “this latter adjustment meant that we were to donate the labor to install a box for AT&T on which we had just lost \$475 at purchase.” (EX 13, p.12 (Knight)). This can only be understood as a failure by AT&T to reimburse (and thereby avoid bearing) an expense that is expressly allocated to AT&T under Rule 15.C.1.a. AT&T refused to pay even 10% of the installed cost, and only a small fraction of the direct material costs.

### **4. Morning Walk Conduit**

Complainants paid \$2,070.05 for the conduit specified by AT&T as a part of its design for the project. AT&T refused to reimburse Complainants for any part of this material cost. AT&T wrongly claims that it owes nothing for conduit because Complainants requested a conduit installation and mutually agreed to it. As Mr. Bernau’s uncontested testimony proved, there was no request and no freely given consent that sought any alternative type of construction. AT&T, not Complainants, determined the end result, which was a conduit installation according to AT&T’s design and specification.

Even if AT&T were correct on this point – and it is not – AT&T has harmed Complainants because AT&T forced Complainants to bear the entire cost of the conduit installation and did not offset that cost with AT&T’s savings. Even AT&T acknowledges that Rule 15 A.2 and A.3 only shift the responsibility to the developer for *additional* costs. (Ex. 201, p. 6 (Shortle)). AT&T saved on the expense of cable because it was able to install the less expensive cable that is used in conduit installations rather than the more expensive direct-buried cable. Nonetheless, and without any support under Rule 15, AT&T forced Complainants to bear the entire cost of a conduit installation

rather than the additional cost, which could have been ascertained by comparing the difference between the cost of direct-buried cable and that of regular cable used in a conduit installation.

**G. AT&T's Violations Of Rule 15 Harmed Complainants.**

Where AT&T's violation of Rule 15 arises out of its proven failure to fully reimburse Complainants, economic harm is established. The scope of this proceeding is limited to the determination of the harm caused by specific instances of under reimbursement by AT&T. Complainants have proven, by uncontested evidence, that they were harmed.

**V. CONCLUSION**

The Commission should advise the Superior Court that:

1. Rule 15 applies to line extensions installed by developers rather than AT&T.
2. Rule 15 requires reimbursement by AT&T to developers for some portion of their costs incurred in installing line extensions.
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 in residential developments unless the developer has requested an unusual route or configuration.
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.
6. AT&T's actions as alleged in the administrative complaint constitute violations of Rule 15.
7. The violations of Rule 15 by AT&T harmed Complainants.

Respectfully submitted this 21st day of January, 2011 at San Francisco,  
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**CERTIFICATE OF SERVICE**

I, Lisa Chapman, certify that I have on this 21st day of January 2011 caused a copy of the foregoing

**COMPLAINANTS' OPENING 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:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of January 2011 at San Francisco, California.

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