Decision 12-02-029 February 16, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Building Industry Association, Complainant, vs. Pacific Bell Telephone Company d/b/a AT&T California (U1001C), Defendant.	Case 09-09-016 (Filed September 18, 2009)

James D. Squeri and Marlo A. Go, Attorneys at Law, for Complainant.
David P. Discher, Attorney at Law, for Defendant.

MODIFIED PRESIDING OFFICER'S DECISION GRANTING, IN PART, AND DENYING, IN PART, COMPLAINT

1. Summary

The complaint of California Building Industry Association (CBIA) against Pacific Bell Telephone Company, doing business as AT&T California (AT&T), is granted in part, and denied in part. AT&T has violated its own tariffs and General Order 96-B by applying actual cost billing to applicants not subject to Government Code Section 66473.6. Where Government Code Section 66473.6 applies, AT&T has violated no statutes or General Orders. We direct the following remedies: (1) AT&T must conform its Tariff Rule 32, Subsection A.3 to

Government Code Section 66473.6, and (2) AT&T must cease all actual cost billing to applicants not subject to Government Code Section 66473.6. If AT&T wishes to pursue actual cost billing for applicants not subject to Government Code Section 66473.6, AT&T must apply through the advice letter process to make the necessary changes to its tariffs. Refunds are denied to CBIA members and non-members due to a failure on the part of CBIA to show harm.

This proceeding is closed.

2. The Dispute between California Building Industry Association (CBIA) and Pacific Bell Telephone Company

2.1. Background

This proceeding focuses on Tariff Rule 32 of the California tariff of Pacific Bell Telephone Company, doing business as AT&T California, (AT&T).[1] When a developer requests the replacement of AT&T's aerial facilities with underground facilities, Tariff Rule 32 addresses payment for the cost of the undergrounding construction by AT&T. In relevant part (Subsection A.3), Tariff Rule 32 provides that:

> [W]here mutually agreed upon by the Company and an applicant, aerial facilities may be replaced with underground facilities, provided the applicant requesting the change pays, in advance, a nonrefundable sum equal to the estimated cost of construction less the estimated net salvage value of the replaced aerial facilities. [Footnote omitted.]

[1] Tariff Rule 32 is set forth in Section 2.1.32 of AT&T's Tariff Schedule Cal. P.U.C. No. A2.

CBIA is a statewide trade association representing over 5,000 homebuilders and homebuilding professionals, including trade contractors, architects, engineers, designers, suppliers, and other industry professionals. CBIA filed the original complaint against AT&T on September 18, 2009 and an amended complaint on February 16, 2010.[2] CBIA alleges that AT&T has changed its billing practice for undergrounding construction, resulting in an increase in charges under its tariff, without filing for or receiving prior Commission approval that such an increase is justified. CBIA alleges that this is in violation of both Section 454[3] and General Order 96-B.

CBIA alleges that AT&T previously required CBIA members to pay the *estimated* cost of converting aerial facilities to underground, but, since approximately April 2006, AT&T has changed its practice to billing the cost of the replacement of the facilities on an *actual* cost basis, with the actual cost being determined after completion of the work. CBIA states that many projects are billed more than a year after job completion, resulting in an unbudgeted bill arriving after the construction project has been closed. CBIA requests an order from the Commission enjoining AT&T to administer the provisions for replacement of aerial facilities with underground facilities in conformance with Tariff Rule 32. CBIA also seeks refunds from defendant AT&T on behalf of its members and all similarly situated applicants for aerial conversions for the excess charges that have been collected as a result of the alleged unauthorized change in practice.

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[2] The amended complaint alleged additional facts that were uncovered during discovery.

[3] Unless otherwise stated, all Code citations are to the Public Utilities Code.

AT&T answered the original complaint on November 12, 2009 and the amended complaint on April 26, 2010. AT&T admits that its practice is to render a bill when the estimated cost paid in advance by the applicant is less than the actual cost expended by AT&T at the conclusion of a job. AT&T also states that when the actual cost of the project is less than the estimated cost the applicant has already paid, its practice is to refund the difference to the applicant. In other words, according to AT&T, its practice is to "true-up" or "true-down" the estimated amount paid against the actual cost incurred for a project.

With respect to Tariff Rule 32, AT&T alleges that the reference to "estimated cost" simply establishes a condition precedent for individual applicants to obtain the replacement of aerial facilities with underground facilities, *i.e.*, if an individual applicant wants aerial facilities replaced with underground facilities, Tariff Rule 32, Subsection A.3 requires that the applicant must first pay a nonrefundable sum equal to the estimated cost of construction less the estimated net salvage value of the replaced aerial facilities. AT&T alleges that nothing in Subsection A.3 restricts it either from refunding to the applicant or billing the applicant for the difference between the estimated cost and the actual cost of construction at the conclusion of the job. AT&T also alleges that Government Code Section 66473.6 authorizes it to charge for all actual costs of the job when an entity requesting the replacement of aerial facilities with underground facilities is a developer or subdivider.

3. Burden of Proof

Under Pub. Util. Code § 1702, a complainant must prove an alleged violation of a specific standard contained in a statute, rule, or order of the Commission, or a tariff which has been approved by the Commission. The

standard of proof has been well settled and is by a preponderance of the evidence.[4]

4. Discussion

4.1. Introduction

The principal question before us is whether AT&T violated its own Tariff Rule 32, General Order 96-B and statute when it changed its billing practice for aerial to underground conversion projects in April 2006. Section 4.2 below addresses the factual aspects of this question. Sections 4.3 and 4.4 address its legal aspects.

4.2. AT&T's Billing Practice for Aerial to Underground Conversions

The underlying factual dispute in this proceeding concerns AT&T's past billing practice for undergrounding conversions under Tariff Rule 32. CBIA and AT&T agree that since April 2006, AT&T has billed on an actual cost basis for underground conversion projects estimated to exceed $10,000, *i.e.*, it has "trued up" the billing for such projects. CBIA and AT&T also agree that AT&T does not true up the billing for projects that were estimated at less than $10,000, *i.e.*, those projects are billed on an estimated cost basis, also known as a fixed cost basis. The factual dispute centers on AT&T's practice prior to April 2006.

AT&T maintains that its past (pre-April 2006) practice was the same as its practice since then. It bills on an actual cost basis when the estimate exceeds a defined threshold and on a fixed cost basis when the estimate is below the

[4] *See, e.g.*, Decision (D.) 01-08-067; D. 97-05-089.

threshold. According to AT&T, what changed in April 2006 was only that threshold, which AT&T reduced from $25,000 to $10,000.

CBIA witness Lower testified that based on the experiences of CBIA members in conducting business with AT&T for many years, AT&T's practice prior to April 2006 was to charge on an estimated cost basis for all undergrounding conversion projects regardless of the initial estimated cost.[5] Lower testified that CBIA members have not witnessed any actual cost billing practices of AT&T prior to April 2006.[6] Additionally, CBIA has been unable to find any evidence in its records or from its members of actual cost billing practices prior to 2006.[7] Further, Lower testified, CBIA members became aware of AT&T's change of billing practice from estimated cost billing to actual cost billing only in April 2006 when AT&T introduced new contract language requiring actual cost billing for projects exceeding $10,000.[8]

CBIA witness Lower provided an example of how a CBIA member witnessed a change in AT&T's billing practice.

> Yes, Standard Pacific, a CBIA member, had signed an agreement with AT&T on October 5, 2005, which required that Standard Pacific pay in advance an estimated amount of sixty-five thousand, seven hundred, eighty-six dollars and thirty-eight cents/$65,786.38, which represents the *estimated* cost of converting the aerial facilities to underground, less the estimated net salvage value of the replaced aerial communications facilities. The other provisions in the 2005 agreement said nothing about

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[5] CBIA Exhibit 1 at 3.

[6] *Id.* at 3-4.

[7] *Id.* at 4.

[8] *Ibid.*

> actual cost billing. Further, the agreement did not specify any alternative billing practice if the estimated cost of work was more than $25,000, as AT&T claims was its previous threshold for [actual cost billing]. However, a year later, AT&T revised its contract with Standard Pacific because of a minor change to the job costing an additional $4,916.99. The revised contract also instituted actual cost billing after job completion. Instead of Standard Pacific being responsible for paying only the estimated amount, AT&T revised its agreement on June 27, 2006 to require that Standard Pacific pay any additional costs above the paid initial estimate. The revised agreement required Standard Pacific to pay in advance the sum of seventy thousand, seven hundred, three dollars and thirty-seven cents/$70,703.37, which represents the estimated cost of converting the aerial facilities to underground, less the estimated net salvage value of the replaced aerial communications facilities.
>
> A new provision F.2 was added to agreement letters, which states the following:
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> If the estimated cost of the work is more than $10,000, Applicant shall pay for the relocation work on an actual cost basis. Upon completion of the work, AT&T will compute the actual cost of the work. Any difference between the amount of the advance payment and the actual cost will be either paid by the Applicant to AT&T or refunded to the Applicant by AT&T, as the case may be.[9]

In response to Lower's testimony, AT&T witness Shortle testified that AT&T's policy before and after April 2006 has been to estimate how much an aerial to underground conversion will cost to complete, and require the applicant to make an upfront payment equal to the estimated cost of the job, before it will

[9] *Id.* at 4-5.

start work.[10] At the conclusion of the job, AT&T would render a reconciliation statement for the difference between the upfront payment made by the applicant and the actual cost incurred by AT&T to complete the job.[11] As discussed later in this decision, while Lower's testimony confirms the addition of a new contract provision, CBIA fails to show harm to Standard Pacific or any other CBIA member as a result of this change.

4.2.1. AT&T's Billing Practices Prior to 2006 Are Unclear

As set out above, AT&T's billing practices for undergrounding aerial facilities prior to 2006 are disputed. Based on the limited record before us, we are unable to conclude, by a preponderance of the evidence, whether AT&T did or did not apply actual cost billing to projects over $25,000 prior to April 2006. However, as described in later sections of this decision, an understanding of AT&T's past billing practices is not needed in order to determine violations, if any, of Tariff Rule 32, Government Code 96-B, and statute.

CBIA does not show, by a preponderance of the evidence, that AT&T billed on an estimated cost basis prior to April 2006. CBIA did not provide any contracts for projects that were both started and completed prior to April 2006. The only evidence provided by CBIA regarding pre-2006 contracts, aside from the testimony of its witness, was a draft agreement in letter form between AT&T and Silveroak Development. That letter, however, is silent on both the project cost and the billing methodology (estimated or actual cost billing).

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[10] AT&T Exhibit 4 at 2.

[11] *Id.*

AT&T, on the other hand, provides as evidence a pre-2006 audit report, which it claims shows a refund due to Discovery Builders. However, AT&T fails to provide any evidence of a refund check (or other payment method) paid to Discovery Builders or confirmation of its receipt and deposit. AT&T also references an internal document,[12] dated January 1, 1998, discussing a $25,000 threshold for actual cost billing, but the letter is broad in nature and is not specific to Tariff Rule 32. While AT&T clearly changed its contracts in April 2006, neither party provides clear evidence showing whether CBIA members with projects over $25,000 prior to April 2006 were billed on an actual or estimated cost basis. In fact, it is unclear from the record before us whether a $25,000 threshold existed at all prior to 2006. What we are left with, then, are the testimonies of CBIA's witness versus that of AT&T's witness, which are in direct conflict. Therefore, we find that CBIA failed to meet its burden of proof to show that AT&T billed only on an estimated cost basis prior to April, 2006. Because the record is inconclusive, we will focus our analysis only on AT&T's billing practices after April 2006.

4.3. AT&T's Current Billing Practices are Inconsistent with Its Tariff

4.3.1. Tariff Rule 32

As discussed below, Subsection A.3 of Tariff Rule 32 is ambiguous; therefore, we find that AT&T's practice of billing on an actual cost basis to applicants not subject to Government Code Section 66473.6 is in violation of its tariff as currently written. Furthermore, where Government Code

[12] CBIA Exhibit 3. CBIA submitted the referenced AT&T document, but both parties made numerous references to the document in their respective filings.

Section 6473.6 applies, it clearly requires actual cost billing under certain circumstances. AT&T's Tariff Rule 32, as written, fails to comply with the direction of the government code.

In a case that turns so heavily on questions of tariff interpretation, we find it appropriate to begin our discussion with the actual language and structure of the tariff. Tariff Rule 32 is the section of AT&T's California tariff regarding payment for relocation construction costs, including aerial conversions. In deciding whether AT&T's billing practices are consistent with its own tariff, we look at whether the actual cost billing of CBIA developers for projects over the $10,000 threshold is in compliance with Subsection A.3 of Tariff Rule 32. Subsection A.3 states:

> [W]here mutually agreed upon by the Company and an applicant, aerial facilities may be replaced with underground facilities, provided the applicant requesting the change pays, in advance, a nonrefundable sum equal to the estimated cost of construction less the estimated net salvage value of the replaced aerial facilities. [Footnote omitted.]

AT&T argues that nothing in Subsection A.3 restricts AT&T either from refunding to the applicant or billing the applicant for the difference between the estimated cost and the actual cost of construction at the conclusion of the job; rather, Subsection A.3 is simply a condition precedent for individual applicants seeking replacement of aerial facilities.[13] While AT&T's reading is a plausible interpretation of Subsection A.3., it is not the only possible interpretation. CBIA, argues that Tariff Rule 32 does not authorize AT&T to collect "actual" costs,

[13] AT&T Opening Brief at 7.

rather it only allows the collection of the "non-refundable" estimated sum. CBIA argues that the tariff language, as written, is ambiguous, and AT&T cannot interpret that ambiguity as permissive of charging customers on an actual cost basis. Relying on case law, CBIA asserts that because the tariff language is ambiguous, it should be interpreted in favor of the customer, and against the utility.

Both AT&T and CBIA's interpretations of the tariff are plausible; the language in Subsection A.3 neither prohibits nor expressly authorizes AT&T's practice of actual cost billing. In short, we agree with CBIA that the tariff language, as written, is ambiguous. Case law shows that an ambiguity in a tariff must be construed against the utility and in favor of the customer.[14] This finding is further memorialized in General Order 96-B which states:

> Any ambiguity in a tariff provision shall be construed in the way most favorable to the customer, and any representation made by a utility, in advertising or otherwise, with respect to a tariffed service shall be consistent with the terms and conditions of the applicable tariff(s).

To support its argument that actual cost billing is consistent with its tariff, AT&T argues that Subsections A.1 and A.2 of Tariff Rule 32 only contain the word "costs" rather than "estimated costs." We find this reliance on Subsections A.1 and A.2 to be misplaced. Subsection A.1 applies to replacement of aerial facilities in areas affected by the public interest. Construction costs incurred under Subsection A.1 are paid for at AT&T's expense. Therefore the provisions set out in Subsection A.1 do not apply to the billing of CBIA members.

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[14] D.92-09-087 at 2; D.08-08-001 at 8.

Subsection A.2 applies specifically to undergrounding along public roads and on public lands that a company undertakes at the request of a party representing a governmental agency or a group of applicants. There are additional conditions that must be met for construction to fall under Subsection A.2, including a requirement that all property owners served by the aerial facilities to be replaced must agree in writing or must be required by legislation to pay the cost or provide and transfer ownership of the underground supporting structure to AT&T.

While we agree that both Subsections A.1 and A.2 refer simply to "costs" and do not differentiate between actual or estimated costs, we find it erroneous to conclude that the language of one subsection of a tariff applies to all other subsections. Therefore AT&T cannot use the provisions of either Subsections A.1 or A.2 to justify its use of actual cost billing of CBIA members under Subsection A.3.

The language of Subsection A.3 of Tariff Rule 32 is ambiguous, and we find in favor of the complainant. However, as discussed below, we limit this finding only to projects under Subsection A.3 that are not subject to Government Code Section 66473.6.

4.3.2. Government Code Section 66473.6

The current language of Tariff Rule 32, Subsection A.3 is not fully consistent with Government Code Section 66473.6. Government Code Section 66473.6, which has been in effect since 1985, provides that:

> Whenever a city or county imposes as a condition to its approval of a tentative map or a parcel map a requirement that necessitates replacing, undergrounding, or permanently or temporarily relocating existing facilities of a telephone corporation or cable television system, the developer or subdivider shall reimburse

> the telephone corporation or cable television system for all costs for the replacement, undergrounding, or relocation. All these costs shall be billed after they are incurred, and shall include a credit for any required advance payments and for the salvage value of any facilities replaced. In no event shall the telephone corporation or cable television system be reimbursed for costs incurred in excess of the cost to replace the facilities with substantially similar facilities.

While Government Code Section 66473.6 allows for up front estimated cost billing like that contained in Subsection A.3, it not only authorizes, but explicitly requires actual cost billing upon completion of the project.

Government Code Section 66473.6 applies only to developers or subdividers who are requesting undergrounding of aerial facilities due to conditions imposed by a city or county, and it requires payment of actual project costs upon project completion. Tariff Rule 32, as written, is silent on actual cost billing and, therefore, does not reflect the provisions of Government Code Section 66473.6. In this case, we find that a tariff should conform to a long-standing statute that governs the very activity that is the subject of the tariff, and it is the burden of the utility to draft its tariff provisions to reflect all applicable statutes. AT&T has failed to do so here.

There are two groups of applicants under Subsection A.3 of Tariff Rule 32, those that are subject to Government Code Section 66473.6, and those that are not. Because we have found that Government Code Section 66473.6 controls over Subsection A.3 of Tariff Rule 32, we find that for those applicants to whom Government Code Section 66473.6 applies, AT&T's practice of truing up actual and estimated costs at project completion, while inconsistent with its tariff as written, is not in violation of its tariff. We note, however, that Government Code Section 66473.6 requires that all projects subject to its provisions pay actual costs;

it makes no mention of a threshold for actual versus estimated cost billing. Therefore, AT&T's practice of collecting only the estimated amount for projects under $10,000 subject to Government Code Section 66473.6 may be in violation of the statute as written. We now turn to a discussion of potential violations as a result of AT&T applying actual cost billing to applicants not subject to Government Code Section 66473.6.

4.4. CBIA's Other Allegations

CBIA alleges that AT&T violated Pub. Util. Code § 454 and General Order 96-B when it implemented a $10,000 threshold for actual cost billing and added a new contract provision because the change in practice resulted in an increase in charges under AT&T's tariff, and AT&T did not file for or receive Commission approval to make such a change.

As discussed above, where Government Code Section 66473.6 applies, AT&T's practice of truing up actual and estimated costs at project completion is not in violation of its tariff despite being inconsistent with the language of the tariff as written and, therefore, is not in violation of Section 454 nor General Order 96-B. However, AT&T admits to applying the $10,000 threshold and actual cost billing to all customers that apply under Subsection A.3 of Tariff Rule 32, regardless of applicability of the Government Code.[15] Therefore, our analysis of violations under Section 454 and General Order 96-B is limited to AT&T's practice of billing actual costs to customers that apply under Subsection A.3 of AT&T's Tariff Rule 32 and are not subject to Government Code Section 66473.6.

[15] Reporter's Transcript, Volume 1 at 13:14-28.

4.4.1. Section 454

Section 454 states, in relevant part:

> … (N)o public utility shall change any rate or alter any classification, contract, practice, or rule such as to result in a new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified.

We do not find that AT&T violated Section 454. The principle question in making this determination is whether the estimates and charges billed by AT&T under Tariff Rule 32 constitute "rates" under Section 454. CBIA relies on D.01-03-051, *Barratt American, Inc., v. Southern California Edison Company* (*Barratt*), to support its claim that AT&T's change in practice constitutes a change in rates under Section 454. In *Barratt,* Southern California Edison instituted a new charge for the removal of poles where there had been no charge in the past.

In the case before us, AT&T has not instituted any new charge; rather, it has instituted a billing practice that is inconsistent with its tariff. CBIA fails to show that the application of actual cost billing necessarily results in a cost increase or in any change of costs whatsoever. An estimate is simply that, an estimate, and actual project costs could be equal to, higher or lower than the estimate. Nothing in the record before us shows that AT&T changed its methodology for deriving estimates,[16] nor has it instituted a change in its calculation of actual project costs by the inclusion of new costs. While the ultimate amount owed by a customer at the end of the project may differ from

[16] Even if AT&T had changed its methodology for calculating an estimate, D.05-01-005 found that estimates do not constitute rates or charges under Sections 451 and 454 and General Order 96-A, the predecessor order to General Order 96-B.

the amount paid in the estimate, AT&T did not change a rate or charge under Section 454.

4.4.2. General Order 96-B

CBIA alleges violations under two sections of General Order 96-B, Section 8.2.1 of the General Rules and Section 8.4 of Telecommunication Industry Rules. We find that AT&T has only violated Section 8.2.1 of the General Rules of General Order 96-B.

Section 8.2.1 of the General Rules of General Order 96-B states:

> Except for nontarrifed or detariffed service, or a deviation (whether by contract or otherwise) authorized by statute or Commission order, a utility shall serve its customers at rates and *under conditions contained in its tariffs* then in effect. Any ambiguity in a tariff provision shall be construed in the way most favorable to the customer… [Emphasis added.]

General Order 96-B is more expansive than Section 454 in that it pertains not only to changes in rates but also to changes in conditions contained in tariffs. As discussed earlier in this decision, except as governed by Government Code Section 66473.6, AT&T's application of actual cost billing represents a deviation from the conditions explicitly contained in its tariff; therefore, AT&T has violated General Rule 8.2.1 of General Order 96-B.

Section 8.4 of the Telecommunication Industry Rules states:

> An advice letter requesting approval of a change to a tariffed rate, charge, term, or condition, if the change is required to be submitted for review and disposition by Tier 3 advice letter, must demonstrate that the rate, charge, term, or condition, as proposed to be changed, would be just and reasonable.

AT&T's practice of applying actual cost billing to customers under Section A.3 of its Tariff Rule 32 (who are not subject to Government Code

Section 66473.6) and concurrent addition of the new contract provision represents a deviation from the explicit terms and conditions of its tariff. If AT&T wishes to use actual-cost billing practices, it must apply to do so via an advice letter. However, the Commission does not regulate AT&T's rates, that is to say AT&T is not a General Rate Case Local Exchange Carrier (GRC-LEC). Therefore, AT&T is not required to submit for review and disposition requests for changes to a tariffed rate, charge, term or conditions via *Tier 3* advice letter, as CBIA alleges. Even though we find that AT&T has violated its tariffs, AT&T has not violated Section 8.4 of the Telecommunication Industry Rules of General Order 96-B. We will clarify the procedure by which AT&T must make changes to its tariffs in the remedies section below.

5. Remedies

In our discussion above, we find that AT&T has, in certain instances, violated its Tariff Rule 32 and General Order 96-B. Where it has not violated its tariff or General Order 96-B, Subsection A.3 is inconsistent with Government Code Section 66473.6. We order the following remedies:

5.1. Conform Tariff Rule 32 Consistent to Government Code Section 66473.6

The current language of Tariff Rule 32, Subsection A.3 is not fully consistent with Government Code Section 66473.6. Government Code Section 66473.6 specifically allows for the type of up front estimated cost billing contained in Subsection A3; however, Subsection A3 should be updated to reflect the actual cost billing upon project completion required in the Government Code. Furthermore, Government Code Section 66473.6 does not specifically allow for the $10,000 threshold currently in use by AT&T. At a minimum, AT&T must file a Tier 2 advice letter within 30 days of the effective date of this decision

to conform its Tariff Rule 32, Subsection A.3 with the requirements of Government Code Section 66473.6. If AT&T wishes to continue to use a $10,000 threshold below which projects only pay the up front estimated cost, AT&T may make such a request and explain how this practice is allowable under Government Code Section 66473.6.

Given the sufficient legal complexity anticipated in analyzing a request to use the $10,000 threshold, should AT&T wish to make such a request, we direct AT&T to file a Tier 3 advice letter. We note that we are not prohibiting AT&T from continuing to bill under actual cost billing for those projects that are subject to Government Code Section 66473.6 despite an inconsistency between the tariff as written and the Government Code. Given our previous finding that Government Code Section 66473.6 prevails in this case, to order AT&T to cease actual cost billing when the Government Code applies would be an order to violate a statute. Rather, we find it more prudent to order AT&T to bring its tariff into conformance with applicable statute in a timely manner.

5.2. Cease All Actual Cost Billing Not Subject to Government Code Section 66473.6

As stated earlier, there are two groups of applicants under Subsection A.3, of Tariff Rule 32, those that are subject to Government Code Section 66473.6, and those that are not. AT&T may not sign any new contracts containing actual cost billing provisions under Subsection A.3 of Tariff Rule 32 with applicants not subject to Government Code Section 66473.6, effective ten days after the effective date of this decision. That is to say, AT&T may only bill for the estimated up-front cost of the project with no cost reconciliation upon project completion.

For those contracts already executed between AT&T and applicants under Tariff Rule 32, Subsection A.3 (but not subject to Government Code

Section 66473.6) where the project is not yet complete, AT&T must amend the contract to remove the contract provision requiring actual cost billing upon project completion. To the extent that AT&T wishes to implement actual cost billing with or without a threshold for applicants not subject to Government Code Section 66473.6, AT&T must file a Tier 3 advice letter requesting such changes to Tariff Rule 32.

5.3. No Refunds Are Awarded

On April 26, 2010, AT&T filed a motion to strike portions of CBIA's amended complaint seeking relief not only on behalf of CBIA members but also on behalf of all similarly situated "applicants." On June 24, 2010, then-assigned Administrative Law Judge (ALJ) Myra J. Prestidge issued a ruling denying AT&T's motion. We uphold ALJ Prestidge's ruling insomuch as our findings here apply to all similarly situated applicants under Tariff Rule 32. However, we decline to provide any refunds to CBIA members or non-members at this time.

CBIA provided several examples of specific contracts executed by its members containing the new contract provision as well as a list of some members and non-members allegedly harmed by AT&T's practices; however, as discussed earlier, neither CBIA nor AT&T provided any evidence showing billing for actual costs or payment of actual costs (or refunds) upon project completion. In its complaint, CBIA made an allegation of harm because AT&T's practice results in increased costs for applicants. CBIA failed to prove that an estimate is always less than the actual cost of a project; rather, as discussed above, an estimate could be greater than actual costs resulting in a refund to the applicant. More importantly, CBIA failed to provide even one representative plaintiff that was not subject to Government Code Section 66473.6 and that was harmed by AT&T's practice of actual cost billing. A list of names of members

(and non-members) allegedly harmed is not a sufficient record on which to determine harm or calculate refunds. Therefore, we find that CBIA has failed to show harm caused by AT&T's actual cost billing practice in this proceeding.

6. Conclusion

In conclusion, we find that AT&T violated its Tariff Rule 32, Subsection A.3 insomuch as it implemented actual cost billing for applicants under Subsection A.3 that are not subject to Government Code Section 66473.6. We further find that AT&T violated General Order 96-B, but did not violate Pub. Util. Code § 454. AT&T must remedy the violations as described above.

7. Procedural History

Prehearing and status conferences were held before then-assigned ALJ Myra J Prestidge on December 3, 2009 and on January 28, April 15, and June 23, 2010. The parties participated in mediation conducted by ALJ Jessica Hecht, but were unable to resolve the disputed issues. The proceeding was reassigned to ALJ Mark Wetzell on July 16, 2010. A scoping memo was released in this proceeding on July 20, 2010. An evidentiary hearing was held on July 27, 2010. On July 29, 2010, the Commission adopted D.10-07-034, extending the statutory deadline for this proceeding until September 18, 2011. In D.11-08-006, the Commission extended the statutory deadline for this proceeding until September 18, 2012. Concurrent opening briefs were filed on August 13, 2010 and reply briefs were filed on August 27, 2010 at which time this proceeding was submitted.

8. Appeal of Presiding Officer's Decision

On September 12, 2011, pursuant to Rule 14.4 of the Commission's Rules of Practice and Procedure, CBIA filed an appeal of the Presiding Officer's Decision (POD) alleging numerous factual and legal errors. Based on the alleged errors,

CBIA argues that the POD should be modified to find AT&T in violation of Section 454 and Telecommunications Rule 8.4, and AT&T should be ordered to refund applicants not subject to Government Code Section 66473.6 the difference between the estimated and actual costs incurred by the applicant. On September 27, 2011, AT&T filed a response opposing CBIA's appeal and requesting that the Commission adopt the POD.

CBIA's appeal raises many of the same arguments it has made throughout the case. The POD addresses these arguments, and that discussion need not be repeated here. To the extent that CBIA made new legal arguments, those arguments are addressed below. We affirm the POD, but make several minor changes in it to improve the discussion and correct typographical errors.

The following is a summary of CBIA's arguments on appeal and a designation (in parenthesis) of where they are addressed in the POD: Applicants not subject to Government Code Section 66473.6 should be awarded refunds to the extent that actual cost billing exceeded estimated cost billing (Section 5.3); the POD misunderstands CBIA's argument that AT&T changed its billing practices, which resulted in new costs for applicants (Section 4.4.1); the POD errs in limiting the scope of rates under Section 454 (Section 4.4.1); the POD incorrectly interprets Telecommunications Rule 8.4 (Sections 4.4.2 and 5.1); the POD incorrectly preempts the Commission's statutory authority. (Section 4.3.2); the POD errs in allowing AT&T to collect actual costs before approving modifications to its tariff (Section 5.1); and the POD unlawfully excuses AT&T's tariff violations of billing on an actual cost basis for projects subject to Government Code Section 66473.6 (Section 5.1).

In its appeal, CIBA, citing D.07-09-041, argues that the burden of proof to demonstrate harm lies squarely with AT&T, since AT&T has access to all

contracts and CBIA does not. Unlike the case resolved in D.07-09-041, CBIA clearly had access to contracts of its members as evidenced by the submission of such contracts as part of its testimony. Furthermore, CBIA had ample opportunity to build a record showing harm through the discovery process but failed to provide evidence of a single contract not subject to Government Code Section 66473.6 on which one of its members was billed for and paid actual costs. The appropriate time to establish harm is before a case is submitted, and as discussed above, no harm was shown on which to make a finding that refunds are warranted.

9. Assignment of Proceeding

Michel Peter Florio is the assigned Commissioner and Mark S. Wetzell is the assigned ALJ and Presiding Officer in this proceeding.

Findings of Fact

1. CBIA is a statewide trade association representing over 5,000 trade contractors, architects, designers, suppliers, and other industry professionals. CBIA brings its complaint against AT&T on behalf of its members generally and all similarly situated applicants.

2. When an applicant requests the replacement of AT&T's aerial facilities with underground facilities, AT&T conducts the necessary undergrounding construction.

3. In April 2006, AT&T's inserted a new contract provision into its agreements for undergrounding projects. The contract provision stated that if the estimated cost of the work was more than $10,000, the applicant would pay or be refunded any difference between the estimated and actual cost of the project upon project completion.

4. AT&T's billing practices prior to April 2006 are unclear.

5. Tariff Rule 32 is the section of AT&T's California tariff regarding payment for relocation construction costs, including aerial conversions. The meaning of Subsection A.3 of Tariff Rule 32 is in dispute.

6. The language of Tariff Rule 32, Subsection A.3 neither expressly authorizes nor prohibits AT&T from using actual cost billing practices such as the kind set out in the new contract provision.

7. Subsections A.1 and A.2 of Tariff Rule 32 only contain the word "costs" and do not describe the costs to be "estimated" or "actual."

8. The language of Tariff Rule 32, Subsection A.3 is ambiguous.

9. Government Code Section 66473.6 has been in effect since 1985 and applies specifically to developers or subdividers who are requesting undergrounding of aerial facilities due to conditions imposed by a city or county.

10. Some applicants who apply to underground lines under Subsection A.3 of Tariff Rule 32 will be subject to Government Code Section 66473.6, while others will not.

11. The language of Subsection A.3 of Tariff Rule 32 is not fully consistent with Government Code Section 66473.6.

12. Government Code Section 66473.6 does not explicitly state any exceptions to its actual cost billing requirement for projects under $10,000 or any other monetary threshold.

13. AT&T has not instituted a change in its calculation of actual project costs by the inclusion of new costs, and it has not changed its methodology for deriving project cost estimates; therefore, AT&T has not changed its rates.

14. Neither CBIA nor AT&T provided sufficient evidence showing billing for actual costs or payment of actual costs (or refunds) by CBIA members upon project completion.

15. CBIA has failed to show that actual project costs are always greater than estimated project costs.

Conclusions of Law

1. Under Pub. Util. Code § 1702, a complainant must prove an alleged violation of a specific standard contained in a statute, rule or order of the Commission, or a tariff which has been approved by the Commission. The standard of proof is by a preponderance of the evidence.

2. The language of one subsection of a tariff cannot be construed to apply to all subsections of a tariff.

3. Ambiguities in a tariff should be construed against the utility and in favor of the customer.

4. AT&T's practice of billing on an actual cost basis is in violation of Tariff Rule 32, Subsection A.3 of its own tariff except as expressly required under Government Code Section 66473.6.

5. In this case, AT&T's Tariff Rule 32, Subsection A.3 should conform to the long-standing Government Code Section 66473.6, which governs the very activity of the tariff and many of the applicants subject to the tariff.

6. Where Government Code Section 66473.6 applies, AT&T's practice of actual cost billing is not in violation of its tariff, although its tariff is ambiguous.

7. AT&T's practice of reconciling actual and estimated costs at project completion is not in violation of Section 454 or General Order 96-B, Telecommunication Industry Rule 8.4.

8. Where Government Code Section 66473.6 applies, AT&T's practice of reconciling actual and estimated costs at project completion is not in violation of General Order 96-B; however, AT&T's practice of billing actual costs to

customers that apply under Subsection A.3 who are not subject to Government Code Section 66473.6 is in violation of General Order 96-B, General Rule 8.2.1.

9. AT&T should be allowed to continue actual cost billing for applicants subject to Government Code Section 66473.6 even though AT&T's Tariff Rule 32, Subsection A.3 as currently written does not conform to Government Code Section 66473.6. To prohibit AT&T from engaging in actual cost billing would amount to an order to violate a statute.

10. No refunds should be awarded due to a failure to show harm.

11. AT&T should undertake the remedies detailed in the ordering paragraphs below.

O R D E R

IT IS ORDERED that:

1. California Building Industry Association's complaint against Pacific Bell Telephone Company doing business as AT&T California is granted to the extent set forth in the conclusions of law above.

2. No later than 30 days after the effective date of this decision, AT&T California must file a Tier 2 advice letter updating Subsection A.3 of its Tariff Rule 32 to reflect the requirements of Government Code Section 66473.6. If AT&T California wishes to continue to use a $10,000 threshold below which projects only pay the estimated cost, AT&T must file for permission to do so via a Tier 3 advice letter showing how this practice is in conformance with Government Code Section 66473.6.

3. AT&T California must cease all actual cost billing for projects not subject to Government Code Section 66473.6. AT&T California must also remove the new contract provision pertaining to actual cost billing from all new contracts with

applicants not subject to Government Code Section 66473.6 effective ten days after the effective date of this decision. For those contracts already executed by AT&T California and applicants under Tariff Rule 32 Subsection A.3 not subject to Government Code Section 66473.6 where the project is not yet complete, AT&T California must amend the contract to remove the contract provision requiring actual cost billing upon project completion within 90 days of the effective date of this decision.

4. To the extent that AT&T California wishes to implement actual cost billing with or without a threshold for applicants not subject to Government Code Section 66473.6, AT&T California must file a Tier 3 advice letter requesting such changes to Tariff Rule 32.

5. The June 24, 2010 Administrative Law Judge ruling denying AT&T California's motion to strike the portions of California Building Industry Association's amended complaint seeking relief not only on behalf of California Building Industry Association members but also on behalf of all "similarly situated applicants" is hereby affirmed.

6. Refunds will not be awarded to California Building Industry Association members or non-members.

7. Case 09-09-016 is closed.

This order is effective today.

Dated February 16, 2012, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners