

Decision 12-04-051

April 19, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LA COLLINA, DAL, LAGO LP, and
BERNAU DEVELOPMENT
CORPORATION,

Complainants

vs.

PACIFIC BELL TELEPHONE
COMPANY, dba AT&T California
(U1001C)

Defendant.

Case No. 09-08-021
(Filed August 27, 2009)

ORDER DENYING REHEARING OF DECISION (D.) 11-11-027

I. INTRODUCTION

In this Order, we dispose of the application for rehearing of Decision (D.) 11-11-027 (or “Decision”) filed by La Collina, Dal, Lago LP and Bernau Development Corporation (“Applicants”).

In March 2009, Applicants filed a proposed class action in Superior Court against Pacific Bell Telephone Company d/b/a AT&T California (“AT&T”). Applicants are the real estate developers of two residential housing developments: La Collina Dal Lago (“La Collina”) and Morning Walk.¹ Their dispute with AT&T involved the amount of reimbursement they were entitled to receive related to the construction of underground

¹ The two residential subdivisions are located next to each other in Folsom, California.

line extensions to provide telephone service to the two developments.²

AT&T Tariff Rule 15 contains the rules governing line extensions.³ The parties also signed individual contracts (or “Trench Agreements”) which set forth the responsibilities of the parties and the amount Applicants were to be reimbursed.⁴ Applicants alleged that the Trench Agreements were unlawful because they violated AT&T’s cost obligations under the tariff.

In July 2009, the Superior Court issued a referral order directing Applicants to submit an administrative complaint to this Commission seeking resolution of specific issues that the Court considered to be within the primary jurisdiction of this agency.⁵

D.11-11-027 addressed those issues and found in pertinent part:

- Tariff Rule 15 allows the use of Trench Agreements for line extensions;⁶
- In lieu of receiving reimbursement at the level it would cost for AT&T’s chosen construction method, an applicant may choose a different method and pay any additional cost;⁷
- The Trench Agreements at issue do not violate either Tariff Rule 15 [Line Extensions] or Rule 4 [Contracts];⁸ and
- Applicants failed to produce evidence to establish that AT&T’s calculation of its pro rata share of the trenching costs was unreasonable.⁹

² Dry utilities (telephone, gas, electric, and cable television) share trenches and the costs associated with extending service to developments. (D.11-11-027, at p. 9; See also e.g., Exhibit (“Exh.”) 11 [Form B Subdivision/Development Joint Trench Authorization].

³ Schedule Cal.P.U.C. A2.1.15. Pacific Bell Network and Exchange Services General Regulations.

⁴ Exh. 12 [La Collina Dal Lago Trench Agreement]; Exh. 17 [Morning Walk Trench Agreement]. The \$1,408.43 reimbursement for Morning Walk reflected in the Trench Agreement was later increased to \$1,995. (See Exh. 16 [Morning Walk Form B Trench Agreement].)

⁵ See e.g., Administrative Complaint – Special Referral From the Superior Court of California, Sacramento County (“Complaint”), dated August 27, 2009, at p. 3, para. 6 & pp. 13-15, para. 33-39.

⁶ D.11-11-027, at p. 21 [Conclusion of Law Numbers 8 & 9].

⁷ D.11-11-027, at p. 21 [Conclusion of Law Number 5].

⁸ D.11-11-027, at p. 21 [Conclusion of Law Number 10].

⁹ D.11-11-027, at p. 21 [Conclusion of Law Number 6].

Applicants filed a timely application for rehearing asserting the Decision was unlawful because it: (1) failed to construe Tariff Rule 15 consistent with established tariff interpretation principles; (2) erred in finding that Applicants failed to produce evidence to establish AT&T's calculation of costs was unreasonable; (3) failed to provide findings of fact on all material issues as required by Public Utilities Code Section 1705;¹⁰ and (4) erred in upholding the Trench Agreements as lawful. A response was filed by AT&T.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion good cause has not been established to grant rehearing. Accordingly, we deny the application for rehearing of D.11-11-027, as discussed herein, because no legal error has been shown.

II. DISCUSSION

A. Principles of Tariff Interpretation

Tariffs, when published and filed, are binding and have the force and effect of statutes.¹¹ Tariffs are also interpreted using traditional statutory construction principles. Thus, the starting point of tariff interpretation is to look to the plain language, giving words their ordinary or "plain meaning."¹² In addition, provisions should be construed in a reasonable common sense way.¹³ Generally, any ambiguity in the tariff language is construed against a drafter (utility), and in favor of a customer.¹⁴

¹⁰ All subsequent Section references are to the Public Utilities Code unless otherwise stated.

¹¹ See e.g., *Dyke Water Company v. Public Utilities Commission of the State of California* (1961) 56 Cal.2d 105, 123; *Pink Dot, Inc. v. Teleport Communications Group* ("Pink Dot") (2001) 89 Cal.App.4th 407, 416-417.

¹² *People v. Canty* (2004) 32 Cal.4th 1266, 1276-1277; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

¹³ See e.g., *Schlessinger v. Rosenfield, Meyer, & Susman* (1995) 4 Cal.App.4th 1096, 1103.

¹⁴ See e.g., *Pink Dot, supra*, 89 Cal.App.4th at pp. 415-416; *Transmix Corporation v. Southern Pacific Company* (1960) 187 Cal.App.2d 257, 267-268; *Masonite Corporation v. Pacific Gas and Electric Company* (1976) 65 Cal.App.3d 1, 9.

Applicants argue the Decision interpreted and applied Tariff Rule 15 contrary to these basic principles. In particular, they challenge the Commission's interpretation of Rule 15.C.1., Rule 15.A.2., and Rule 15.A.9. (Rhg. App., at pp. 10-24.) As discussed below, these arguments are without merit.

1. Tariff Rule 15.C.1.

Tariff Rule 15.C. applies to underground line extensions for telephone service in new residential subdivisions. The Rule provides in part:

1. Within new subdivisions in their entirety where all requirements will be for residential service or where buried cable is to be used for the line extension facilities...
 - a. The Company will *construct an underground extension at its expense*. Trenches will be occupied jointly...upon payment by the Company of its pro-rata cost....
 - b. The applicant will perform or pay for any pavement cutting and repaving, and for clearing the route and grading....

(Schedule Cal.P.U.C. No. A2.1.15.C. [Underground Line Extensions], subs. 1.a. & 1.b. (emphasis added).)

Applicants contend the plain language of Rule 15.C. requires the utility to pay for all line extension costs, except those costs listed in part 15.C.1.b. They assert the Decision wrongly limited the scope of costs AT&T's must pay by interpreting "construct" to mean that AT&T was responsible for only the cost of cable. (Rhg. App., at pp. 13-16, referencing D.11-11-027, at pp. 6-8, and also p. 10, fn. 13.)

Applicants misunderstand the Decision. The source of that misunderstanding appears to be excerpts quoted from the Decision's general background discussion. However, that discussion contained no formal findings or conclusions regarding the costs responsibilities of the parties in this case. Our discussion merely described a range of activities that could be involved in any given line extension, such as: trenching; placing underground support structures/facilities in the trench; and laying

cable.¹⁵ We also explained that there are two basic cabling methods: (1) laying cable directly into the trench (i.e., direct bury installations); or (2) placing conduit and supporting structures in the trench so that cable can be run through later (i.e., conduit installations”).¹⁶ In that general context, we merely noted that as compared to the whole range of construction activities, the cable would be viewed as the line extension itself.¹⁷

Further, review of the Decision reflects that Rule 15.C. was interpreted and applied in accordance with the plain language of the tariff. In particular, we found:

6. The Defendant [AT&T] is required to reimburse the Complainants [Applicants] for its pro rata share of trenching costs incurred for the joint utilities trench by AT&T California Schedule Cal.P.U.C. No. A2.1.15.C.1.a.

(D.11-11-027, at p. 18 [Finding of Fact Number 6].)

2. AT&T California Schedule Cal.P.U.C. No.A2.1.15.C. requires the Defendant to provide line extensions without cost to an applicant where all requirements are for residential service.

(D.11-11-027, at p. 21 [Conclusion of Law Number 2].)

3. AT&T California Schedule Cal.P.U.C. No. A2.1.15.C.a. requires the Defendant to pay for its pro rata share of trenches that will be jointly occupied with other utilities.

Consistent with these findings and the language of Rule 15.C., we held that AT&T was required to reimburse Applicants for its pro rata share of trench costs at both residential developments.¹⁸ At La Collina, that resulted in AT&T being responsible for

¹⁵ D.11-11-027, at pp. 6-8.

¹⁶ D.11-11-027, at pp. 7-8. For a direct buried cable the trench must remain open until AT&T lays the cable. If AT&T is unable to lay the cable in the time frame desired by a developer, it may prevent the developer from paving streets and moving along with a project at its desired pace. Thus, a developer may choose to install conduit so the trench can be closed sooner. (See e.g., Exh. 10, at pp. 16-17 (Applicants/Bernau).)

¹⁷ D.11-11-027, at p. 10, fn. 13 and p. 13, fn. 17.

¹⁸ D.11-11-027, at p. 14.

the entire pro rata share of construction “at its expense.”¹⁹ Nothing in the Decision limited AT&T's costs to cable only. We merely found that Complainants did not show that they had actually incurred any costs at La Collina. We see no evidence here that would support a contrary conclusion.

At Morning Walk, we again said nothing to limit or negate AT&T's cost responsibility under Rule 15.C. The difference there, however, was that Rule 15.A.2. also came into play and required Applicants to pay certain additional construction costs.²⁰ Applicants dispute that finding however, as discussed below, the finding was lawful.

2. Tariff Rule 15.A.2.

Tariff Rule 15.A. applies to line extensions generally, and states:

1. Except as otherwise provided in these rules...the Company will construct, own and maintain line extensions along dedicated streets and acceptable easements which can be obtained without charge or condition of condemnation.
2. 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.

(Schedule Cal.P.U.C. No. A2.1.15.A. [General], subs. A.1 & A..2. (emphasis added).)

The plain language of Rule 15.A.2. requires an applicant to pay any additional cost of construction if chooses a type of construction that differs from the type recommended by AT&T. It was not disputed that Applicants chose a different type of

¹⁹ D.11-11-027, at pp. 9-11, 13-14. Rule 15.C. applied at La Collina because AT&T constructed the line extension using the construction method it had determined, direct bury installation. Applicants had originally estimated that costs would be \$20,408. (Exh. 11 [La Collina Dal Lago Form B].) However, the amount of reimbursement was ultimately governed by the Trench Agreement which provided for reimbursement at the level of AT&T's cost to construct, \$18,290.15. (Exh. 12, at p. 66, para. F.3. See also D.11-11-027, at pp. 13, 18 [Finding of Fact Numbers 6 & 7].) Applicants point to no evidence to show that the higher amount they originally estimated was warranted. Further, nothing in the Rule requires AT&T to reimburse for amounts above their pro rata share of costs actually incurred.

²⁰ D.11-11-027, at p. 14.

construction at Morning Walk. They chose a more expensive conduit installation, while AT&T had determined that direct bury installation was adequate.²¹

Applicants acknowledged that a literal reading of the Rule would require them to pay the additional costs of construction at Morning Walk.²² However, they argue it was unreasonable to require them to do so, because it would effectively nullify the language in Rule 15.C. that requires AT&T to pay for line extensions "at its expense." At the very least, they argue the Commission's interpretation would mean that most of the time AT&T would only pay the full cost of construction when direct bury installation is used.²³ In their view that is an absurd result, and runs counter to established statutory interpretation principles. (Rhg. App., at pp. 16-21, relying on *Re Southern California Power Pool* ("So. Cal. Power Pool") [D.95-07-012] (1995) 60 Cal.P.U.C.2d 462, 471.)

We recognize that tariffs should not be interpreted to produce an unintended result, or so as to frustrate the manifest purpose of the provisions.²⁴ However, that did not occur here. Applicants ignore that the words of a tariff must be construed in context, and different provisions relating to the same subject must be harmonized to the extent possible.²⁵

When that is done, it is clear that we simply harmonized Rule 15.C. and Rule 15.A.2., recognizing that both provisions were relevant to the specific facts at

²¹ D.11-11-027, at p. 19 [Finding of Fact Number 13].

²² Exh. 9, at pp. 6-7 (Applicants/Lower). Accordingly, there is no basis to Applicants claim that Finding of Fact Number 18 and Conclusion of Law Number 4 erred.

²³ Applicants also suggest we wrongly applied the tariff so as to disfavor the customer (Applicants), contrary to the principle in *Z.I.P., Inc. v. Pacific Bell* [D.92-09-087] (1992) 45 Cal.P.U.C.2d 645. (Rhg. App., at p. 20.) While Applicants dislike the outcome in this instance, the Courts have never held that a tariff must be construed to produce a result that favors a customer even when the plain language and clear meaning of the tariff would produce a different result.

²⁴ See e.g., *Pacific Gas and Electric Company v. Department of Water Resources* (2003) 112 Cal.App.4th 477, 495-496.

²⁵ See e.g., *Lakins v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659; *Masonite Corporation v. Pacific Gas and Electric Company* (1976) 65 Cal.App.3d 1, 9 ["The whole of a contract must be taken together and effect be given to every part if reasonably practicable."].

Morning Walk.²⁶ Proper tariff interpretation requires that neither provision be ignored. Thus, Rule 15.C. applied to require AT&T to pay its pro rata share of costs, up to the additional amount required by the more expensive conduit installation. That result is consistent with the plain language of the tariff, and Applicants point to nothing which shows that the tariff was not intended to produce that result.²⁷

Finally, Applicants argue that the “general rule” (Rule 15.C.) and the “exception” (Rule 15.A.2.) have been wrongly flipped. They contend that the tariff should be read to reflect that conduit installations are now the predominant construction method used in California.²⁸ As a result, they argue AT&T should pay the entire cost for all conduit installations. The exception (Rule 15.A.2.) would apply only if a developer chose something other than conduit. Applicants assert that never happens now, because AT&T always recommends direct bury cable.²⁹ (Rhg. App., at pp. 18-19.)

²⁶ See D.11-11-027, at p. 19 [Finding of Fact Number 13] & p. 21 [Conclusion of Law Number 4]. Applicants also assert that requiring developers to pay certain costs where conduit is used would turn the word “or” under Rule 15.C.1 into an “and”, contrary to statutory interpretation principles. (Rhg. App., at p. 19, fn. 57, citing e.g., *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680.) Applicants miss the point. Nothing in the Decision negated the requirement in Rule 15.C.1. that AT&T pay for line extensions “at its expense” where the requirements are for “residential service *or* where buried cable is to be used.” At the same time, the fact that Applicants chose a different construction method than AT&T had chosen triggered concurrent application of Rule 15.A.2. Nothing in the case law cited by Applicants suggests the Commission should ignore that the two provisions were relevant.

²⁷ In addition, the facts in *So. Cal. Power Pool* are not analogous. That case involved whether a group of natural gas shippers fell within the meaning of the term “shippers” as used in utility’s tariff. In that case, we originally found they did not. However, we later determined that for practical purposes, the shippers did in fact operate in a manner that would bring them within the meaning and intent of the tariff. (*So. Cal. Power Pool, supra*, [D.95-07-012] 60 Cal.P.U.C.3d at pp. 471-472.) The facts here are not analogous, since there was no dispute as to whether Applicants fall within the meaning of the tariff. The issue here is how two provisions of the same tariff should be harmonized and applied.

²⁸ See also Exh. 9, at p. 7 (Applicants/Lower).

²⁹ See Exh. 28, at p. 57 (Applicants/Nolasco – AT&T’s Designated Witness) [Reflecting AT&T’s general policy to use direct bury installation]. Applicants wrongly suggest, however, that AT&T will never cover the full cost of a conduit installation. In fact, the evidence shows that AT&T will, when it is technically warranted. (See Exh. 28, at p. 29 [AT&T will determine to use conduit installation if warranted by the scope or uncertainty of a project, or depending on how an area will be developed.]. See also Exh. 201, at p. 9 (AT&T/Shortle) [AT&T will reimburse for the cost of a conduit installation if it is essential to the design, such as when fiber optic must be installed.]. Applicants offered no evidence that the conditions warranting conduit installation were triggered here.

Even if Applicants are correct about the prevalence of conduit installations, and that was not clearly established, it would not change the outcome here.³⁰ Applicants' position is based on an assumption that Rule 15.C. was intended to apply so that AT&T would always pay the cost of the more expensive construction method. However, that is uncertain since there was no record before us to support that assumption. We must apply the tariff as it is currently written in light of the plain language and facts of this case.³¹ And both the utility and the developers are bound by such tariffs.³² For that reason, even if some change to AT&T's tariff or policies may be warranted, it was correct to state that those changes could not be made here, in an individual complaint case. Changes of that nature must be considered in Commission rulemaking proceedings, consistent with Section 1708.5.³³ Applicants may dislike that result. However, their disagreement does not establish that we erred.³⁴

3. Tariff Rule 15.A.9.

Tariff Rule 15.A.9. provides an avenue for parties to seek Commission intervention should disputes arise related to Rule 15. In particular, Rule 15.A.9. states:

³⁰ The record contained no tangible evidence to document actual line extension projects or show that conduit installations are predominant. Some evidence suggested that state-wide, installations are split approximately 50%-50% between direct bury cable and conduit. (See e.g., Exh. 28, at pp. 59-60 (Applicants/Nolasco – AT&T Designated Witness).

³¹ See *ante* fn. 11.

³² *So. Cal. Power Pool, supra*, [D.95-07-012] 60 Cal.P.U.C.2d at p. 471 citing *Johnson v. PT&T Co.* (1969) Cal.P.U.C. 290, 297; *Richard Co. v. San Gabriel Valley Water Co.* (1951) 50 Cal.P.U.C. 545, 550; and *Sunny Sally, Inc. v. Lom Thomson* (1958) 56 Cal.P.U.C. 552. It is also within the Commission's legitimate exercise of discretion to determine whether an interpretation of a tariff rule, as sought, is reasonable. (See e.g., *So. Cal. Power Pool, supra*, [D.95-07-012] 60 Cal.P.U.C.2d at p. 471; *Almond Tree Hulling Company et. al v. Pacific Gas and Electric Company* [D.05-10-049] (2005) ___ Cal.P.U.C.3d ___, at p. 10 (slip op.).

³³ See Pub. Util. Code, § 1708.5, subd. (a) [Allows an entity to petition the Commission to adopt, amend, or repeal a regulation.]. See also Pub. Util. Code, § 1701.1, subd. (c)(1) [Quasi-legislative proceedings such as rulemakings and investigations establish policy], & § 1701.1, subd. (c)(2) [Adjudication proceedings include complaints and enforcement cases to challenge the reasonableness of rates/charges].

³⁴ *Southern California Edison Company v. Public Utilities Commission* (2005) 128 Cal.App.4th 1, 8 [“The fact that Edison does not like the Commission's findings and conclusions simply does not provide grounds for reversal.”].

9. In exceptional circumstances, when the application of these rules appears impractical or unjust, the Company or the applicant may refer the matter to the Public Utilities Commission for special ruling or for approval of mutually agreed upon special conditions prior to commencing construction.

(Schedule Cal.P.U.C. No. A2.1.15.A.9.)

Applicants contend that Rule 15.A.9. is not a panacea, and should not be construed as either a condition precedent or an exclusive remedy for the resolution of disputes involving the tariff.³⁵ (Rhg. App., at pp. 21-24.)

We agree, as is evidenced by the fact Applicants' instant complaint was accepted for consideration. Our Decision merely acknowledged that no special ruling was sought here before the parties entered their Trench Agreements.³⁶ That is nothing more than a statement of fact and it is not a basis for legal error.

Applicants also suggest any remedy under Rule 15.A.9. is illusory because the Commission's Rules of Practice and Procedure contain no process to seek a "special ruling." They argue that the only real option is to file a complaint and wait at least 6-8 months for it to be resolved.³⁷ That in their view is too long and/or too expensive for their liking. (Rhg. App., at pp. 22-23.)

Applicants' interest in resolving disputes quickly is understandable.

However, there is no legal requirement that the Commission's Rules contain a separate

³⁵ For example, Applicants cite remedies under Sections 734 & 532. Section 734 authorizes the Commission to order reparations if it finds a utility has charged unreasonable rates or charges. However, that statute was inapplicable here because Applicants failed to establish that the costs in dispute were unreasonable. Section 532 prohibits a utility from imposing rates or charges which differ from those in their schedules (tariffs) in effect and on file with the Commission. That statute might be relevant if AT&T's tariff required a specific rate or charge that it had deviated from. However, the tariff does not. Therefore, Section 532 has no bearing on this matter.

³⁶ D.11-11-027, at pp. 16, 20 [Finding of Fact Number 21].

³⁷ Applicants also appear to interpret Rule 15.A.9. to mean that a "special ruling" must be sought prior to construction of the residential subdivision. (Rhg. App., at pp. 23-24.) Nothing in the tariff supports such a conclusion. The term construction as used in Rule 15 is consistently refers only to the line extension itself, not construction of the residential development as a whole. (See e.g., Rule 15.D.1.a. ["Where construction of the line extension facilities...."], Rule 15.A.10. ["Where applicant requests...in advance of construction of permanent underground facilities...."].)

and unique mechanism for every possible remedy.³⁸ Neither does the time table Applicants prefer establish that our existing procedures are inadequate or unlawful.³⁹ The fact remains that in this case, Applicants entered into contractual agreements with AT&T prior to seeking any Commission intervention. Unless they can now establish that the agreements were unlawful or unreasonable, which they did not do here, we can not unwind those contracts and must uphold their terms.

Finally, Applicants contend that it was error to direct parties to 15.A.9. at all, since neither a developers' use of conduit nor AT&T's use of "cost decks" are "exceptional circumstances" within the meaning of the Rule. (Rhg. App., at p. 23.)

It is not the mere use of conduit or "cost decks" that is determinative. Under the Rule, an "extraordinary circumstance" exists where "the application of these rules [Tariff Rule 15] appears impractical or unjust...." Any number of circumstances could qualify, since what is impractical or unjust is left to the subjective view of an applicant. In this case, Applicants arguments clearly demonstrate their position that the tariff was unjustly applied, and the costs charged were unreasonable. Thus, it was correct to note that Rule 15.A.9. was relevant.

B. Evidence Regarding AT&T's Calculation of Line Extension Costs

Applicants contend that Conclusion of Law Number 6 was not supported by the record evidence. Conclusion of Law Number 6 stated:

Complainants failed to produce evidence that the Defendant's [AT&T's] calculation of its pro rata share of the trenching costs is unreasonable.

(D.11-11-027, at p. 21.)

³⁸ The Commission has broad constitutional authority which includes the discretion and authority to establish its own procedures. (See e.g., Cal. Const., art XII, § 2; *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 630.)

³⁹ Applicants discount the fact that a "special ruling" could be sought through a generally faster advice letter process. They discredit that option by arguing that only a utility may file an advice letter. That may be true. However, that cooperation may be needed to use that process does not mean the process it is unavailable. (See Resolution E-4410, dated June 23, 2011.)

In particular, Applicants argue that we failed to weigh or adequately discuss evidence they produced to show that AT&T's cost calculations were unreasonable.⁴⁰ (Rhg. App., at pp. 24-32.)

There is no question the Commission must weigh the relevant evidence.⁴¹ We may not ignore pertinent issues or exclude relevant information.⁴² However, there is no legal requirement that we discuss or summarize all the evidence that may have led to our ultimate determination. It is only necessary to reasonably apprise the reader of thereasoning behind and the basis for a determination.⁴³

Further, the Commission's findings are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence.⁴⁴ A review of the record here shows that the outcome was reasonable. For example, Applicants contend they presented significant evidence to show the shortcomings of AT&T's cost methodology. However, there was no evidence that the methodology was indeed flawed. Applicants simply argued that the bids they obtained were all higher. That may be true. However, there was nothing to show what criteria were used for the bids, or how the totals were derived.⁴⁵

⁴⁰ For example, Applicants suggest the Decision failed to discuss the circumstances under which the Trench Agreements were entered. They contend they were essentially forced to enter the Agreements by economic duress, and no evidence showed they had a genuine choice in the matter. (Rhg. App., at p 26, fn. 84 & p. 38, fn. 108.) It was not necessary to discuss that issue because whether or not to invalidate the Agreements on that ground was not a material issue to be determined. (See part II.C. below).

⁴¹ See e.g., *United States Steel Corporation v. Public Utilities Commission* (1981) 29 Cal.3d 603, 609; *Industrial Communications Systems v. Public Utilities Commission* (1978) 22 Cal.3d 572, 582-583.

⁴² *Id.*

⁴³ *Toward Utility Rate Normalization v. Public Utilities Commission* ("TURN v. PUC") (1978) 22 Cal.3d 529, 540-541; *Goldin v. Public Utilities Commission* (1978) 23 Cal.3d 638, 670; *In re San Diego Gas & Electric Company* [D.03-08-072] (2003) __ Cal.P.U.C.3d __, at p. 12 (slip op.); 2000 Cal. PUC LEXIS 1136, *20.

⁴⁴ See e.g., *TURN v. PUC*, *supra*, 22 Cal.3d at pp. 538-539. In addition, conflicts of evidence will be resolved in favor of the findings of the administrative agency. (*Id.* at p. 538; *City of Los Angeles v. Public Utilities Commission* (1972) 7 Cal.3d 331, 351). See also *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-874; *Eden Hospital District v. Belshe* (1998) 65 Cal.App.4th 908, 915-916.

⁴⁵ Applicant merely testified that the bids ranged from approximately \$98,000 to over \$200,000 for all utilities, and it then broke those amounts down to arrive at the cost for each individual utility. (Exh. 13, at p. 10 (applicant/Knight)).

Applicants also repeatedly accused AT&T of bad faith. However, they produced no evidence or examples of such behavior.⁴⁶ And they admitted they never looked at any actual cost data for La Collina or Morning Walk. Instead, they relied on a miscellaneous compilation of southern California projects, and even then without any underlying cost data.⁴⁷

By contrast AT&T developed its estimates using identifiable costing tools (and “cost decks”),⁴⁸ which utilized average California costs as well more project specific inputs such as: the depth of the trench; the amount of facilities being placed in the trench; the location; soil hardness/softness; how many utilities are involved; and the portion of trench AT&T occupies.⁴⁹ AT&T also reasonably explained that it tries to ensure ratepayers won’t be overcharged,⁵⁰ by paying developers only the amount that it would have paid had it hired a contractor or purchased the materials.⁵¹ Applicants, on the other hand, believed that AT&T should pay whatever cost a developer may have paid regardless of whether it paid too much or went with a bid that was too high.⁵²

Finally, Applicants ignore that in adjudicatory proceedings the complainants (Applicants) have the legal burden to prove that the challenged rates or

⁴⁶ R.T. Vol. 1, at pp. 7-9, 11-13, 41-43 (Applicants/Lower).

⁴⁷ R.T. Vol. 1, at pp. 18-33 (Applicants/Lower).

⁴⁸ R.T. Vol. 2, at pp. 155-157 (AT&T/Shortle) [JAMS system regarding engineering costs and the ACAS system regarding contract administration/contracting.]. Applicants appear to object to the fact that the models were not in the record. (Rhg. App., at p. 29.) However, that is not required. It is only required that such models be subject to verification by the Commission or parties if requested. (Pub. Util. Code, § 1822, subd. (a).) There is no indication Applicants sought such verification here.

⁴⁹ R.T. Vol. 2, at pp. 152-154, 155-157, 190-194, & p. 136 [“Cost decks” updated multiple times a year.]. Applicants argue that methodology is unreasonable because it arrived at “wildly disparate and unexplainable” estimates for the two developments between 2003 and 2007. (Rhg. App., at pp. 29, 31.) However, there was no evidence to compare the circumstances, conditions, or considerations relevant to each estimate. (See also R.T. Vol. 2, at pp. 155-157, 203 [Differences in the economy during the time periods in question may have been a contributing factor to the cost differences.].)

⁵⁰ R.T. Vol. 2, at pp. 166-167 (AT&T/Shortle).

⁵¹ Exh. 27, at pp. 260-268 (Applicants/Stanton – AT&T’s Designated Witness); Exh. 22, at p. 33-34, 36 (Applicants/Akin – AT&T’s Designated Witness) [Reflecting AT&T’s policy to not pay developers more than it would cost AT&T to do the work itself.].

⁵² R.T. Vol. 1, at pp. 67-68 (Applicants/Lower).

charges are unreasonable.⁵³ Based on the evidence discussed above, it was reasonable to conclude, as we did, that Applicants failed to meet that burden. Perhaps we could have said more regarding the particular failings of Applicants evidence. Nevertheless, our Decision did reasonably explain the reasoning behind, and the basis for the determination. We explained that that AT&T had reasonably supported its estimates as being the product of an identifiable methodology with known inputs. In addition, the parties had entered lawful Trench Agreements which were binding in this instance.⁵⁴

C. Findings Required by Section 1705

Applicants contend the Decision failed to contain adequate findings of fact and conclusions of law on all material issues in violation of Section 1705. In particular, they allege that we omitted material findings regarding: (1) whether the trench costs developed by the “cost decks” were reasonable; (2) whether AT&T’s interpretation of Rule 15.A.2. is consistent with statutory interpretation principles; (3) whether the requested conduit installation was necessitated by AT&T’s conduct; (4) what level of reimbursement was due under Rule 15.A.2.; (5) whether a utility may enter into a Trench Agreement that contravenes its tariff; and (6) what constitutes a line extension.⁵⁵ (Rhg. App., at pp. 32-38.)

⁵³ See e.g., *Smith v. Citizens Utilities Company of California* [D.86-08-028] (1986) 21 Cal.P.U.C.2d 524 (not reprinted), 1986 Cal. PUC LEXIS 534, *2-*3, citing *Shivell v. Hurd* (1954) 129 Cal.2d 320, 324; and *Ellenberger v. City of Oakland* (1943) 59 Cal.2d 337. See also *Investigation on the Commission’s own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wireless, and Related Entities (collectively “Cingular”) to Determine Whether Cingular has Violated the Laws, Rules and Regulations of this State in its Sale of Cellular Telephone Equipment and Service and its Collection of an Early Termination Fee and Other Penalties From Consumers* [D.04-09-062] (2004) ___ Cal.P.U.C.3d ___, 2004 Cal. PUC LEXIS 453, *19-*20.

⁵⁴ D.11-11-027, at pp. 14-17.

⁵⁵ Applicants also allege that certain issues simply disappeared, such whether the cost of the splice box at Morning Walk was reasonable. (Rhg. App., at pp. 33-34, fn. 96.) That is not correct. We did note the conflicting evidence on this issue. (D.11-11-027, at p. 11, fn. 14, referencing Exh. 13. See also R.T. Vol. 2, at pp. 209-211, 216-217.) However, there was no clear evidence to show the cost AT&T had assigned was unreasonable.

Section 1705 requires the Commission to make separately stated findings of fact and conclusions of law on all issues that are material to a decision.⁵⁶ The purpose of this requirement is to:

afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review....

(*Greyhound Lines, Inc. v. Public Utilities Commission* (1967) 65 Cal.2d 811, 813-814.)⁵⁷

Applicants correctly state the legal principle. However, we do not find any legal error in this instance. The Commission retains discretion to determine what issues are material in any given proceeding.⁵⁸ In this proceeding, the material issues were those directly posed to this Commission by the Superior Court of Sacramento County.⁵⁹ From the start, all parties agreed that those were the issues to be resolved.⁶⁰ Thus, the material issues as set forth in the Scoping Memo and Decision were as follows:

1. Whether rule 15 applies (and to what extent, if any) to line extensions installed by developers rather than AT&T;
2. Whether Rule 15 requires AT&T to reimburse developers for any portion of their costs incurred in installing line extensions and, if so, the basis and manner for determining the amount of such reimbursement;
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

⁵⁶ Pub. Util. Code, § 1705.

⁵⁷ See also e.g., *Utility Consumers’ Action Network v. Public Utilities Commission* (2004) 120 Cal.App.4th 644, 662; *Pacific Tel. & Tel. Co. v. Public Utilities Commission* (1965) 62 Cal.2d 634, 648; *California Motor Transport Co. v. Public Utilities Commission* (1963) 59 Cal.2d 270, 274-275.)

⁵⁸ See e.g., *California Motor Transport Company, supra*, 59 Cal.2d at p. 275; *City of Los Angeles v. Public Utilities Commission* (1972) 7 Cal.3d 331, 337.

⁵⁹ See La Collina Dal Lago, L.P. and Bernau Development Corporation Administrative Complaint, dated August 27, 2009, Attached Exh. 2, at p. 3, para. 14 & 15 [Superior Court of California County of Sacramento Order on Demurrer and Motion to Strike].

⁶⁰ Complainants’ Prehearing Conference Statement, dated November 12, 2009, at p. 2; Prehearing Conference Statement of Pacific Bell Telephone Company d/b/a/ AT&T California, dated November 10, 2009, at p. 3.

amount of reimbursement set forth in such agreements is binding on the parties regardless of what Rule 15 might otherwise require in the absence of such agreements;

4. Whether AT&T's actions as alleged in the administrative complaint constitute a violation of Rule 15; and
5. If the Commission determines that AT&T's actions as alleged in the administrative complaint constitute a violation of Rule 15, whether Applicants were damaged by the violation, the nature of the damage, the amount of damage, and the manner in which the damage was calculated.⁶¹

Applicants now attempt to reframe the relevant issues and inquiry.

However, the questions it poses are either subsumed within, tangential to, or irrelevant to a determination on the actual material issues listed above. Further, the Decision reflects that we did make adequate findings for each material issue.⁶² We explained the underlying controversy, the material issues,⁶³ the legal force of tariffs,⁶⁴ the relevant cost information,⁶⁵ the requirements of the tariff, and the interplay between the tariff and Trench Agreements.⁶⁶ We also reasonably articulated the conclusions based on that information.⁶⁷ Accordingly, even if our discussion could have been more detailed, it was

⁶¹ See D.11-11-027, at pp. 5; Scoping Memo and Ruling of Assigned Commissioner, dated August 16, 2010, at p. 4. The Decision ultimately found it was not appropriate for the Commission to consider damages because the Commission has no authority to award damages. (D.11-11-027, at p. 17; see also Pub. Util. Code, § 2106.) The Court had also asked the Commission to address whether any revisions or changes to Rule 15 are needed going forward and if so, the specifics of such revisions or changes. (See *La Collina Dal Lago, L.P. and Bernau Development Corporation Administrative Complaint*, dated August 27, 2009, Attached Exh. 2, at p. 3, para. 15, subd. (f).) Rule modifications or revisions was not within the scope of this proceeding because as explained herein, such determinations are properly the subject of Commission rulemaking proceedings. (See D.11-11-027, at p. 5, fn. 5. See also Pub. Util. Code, §§ 1701.1, subds. (c)(1) & (c)(2), 1708.5.)

⁶² See D.11-11-027, at pp.18-20 [Finding of Fact Numbers 6,7,8,9,10,11,12,13,14,15,16,17,18,19,20 & 23] & p. 21 [Conclusion of Law Numbers 2,3,4,5,6 &8]. In addition, it was not necessary to make any finding on the issue of damages, as only the Court may determine and award them. (See D.11-11-027, at p. 17; Scoping Memo, dated August 16, 2010, at p. 5. See also Pub. Util. Code, § 2106; *Vila v. Tahoe Southside Water Utility* (1965) 233 Cal.App.2d 469, 479.)

⁶³ D.11-11-027, at pp. 4-5.

⁶⁴ D.11-11-027, at p. 6.

⁶⁵ D.11-11-027, at pp. 9-12.

⁶⁶ D.11-11-027, at pp. 16-17.

⁶⁷ D.11-11-027, at pp. 12-16.

reasonably adequate to properly apprise a Court or other parties of the basis for the determination.

D. Lawfulness of the Trench Agreements

Applicants contend the Decision erred in upholding the Trench Agreements as lawful. They argue we ignored that the requirements in a tariff control where agreements between the parties deviate from those requirements. (Rhg. App., at pp. 38-39 citing *Peter Soloman dba Regency Homes v. Southern California Edison Company* (“*Regency Homes*”) [D.10-11-001] (2010) __ Cal.P.U.C.3d __, at p. 11 (slip op.).)

Applicants essentially state the basic tenet of the filed rate doctrine, i.e., that a utility may not charge rates other than those set out in the tariff.⁶⁸ That argument may have been relevant had the Agreements altered the parties’ rights under the tariff, or provided reimbursement at a level that differed from any rates/charges under the tariff. However, that did not occur. As discussed herein, the obligations of the parties under the Agreements were consistent with the tariff as it is currently written. And the level of reimbursement was not unlawful, because the tariff contains no rates or charges from which to deviate.⁶⁹

Applicants’ reliance on *Regency Homes* is also flawed. That case stands for the proposition that the terms of the tariff must be applied regardless of whether there was a mistake, misrepresentation, or misunderstanding regarding its terms/operation.⁷⁰ None of those things was alleged or occurred here. In addition, Applicants offer no authority to show that agreements are unlawful when they are explicitly allowed by the

⁶⁸ See e.g., *Kansas City Southern Railway Company v. Carl* (1912) 227 U.S. 639, 653; *Louisville & Nashville Railroad Company v. Maxwell* (1915) 237 U.S. 94, 97-98; *Evanns v. AT&T* (2000) 229 F.3d 837, 840-841; *Evanns v. AT&T* (2000) 229 F.3d 837, 840-841.

⁶⁹ Similarly, Tariff Rule 15 contains no timeline for the completion of line extensions. Thus, any suggestion that AT&T exceeded permissible timelines is flawed.

⁷⁰ *Regency Homes, supra*, [D.10-11-001] __ Cal.P.U.C.3d --, at p. 11 (slip op.). In *Regency Homes*, the Commission also found that the tariff and the contract did not differ. (*Id.*)

approved tariff itself. In this case, AT&T's tariff does precisely that. Specifically, it provides:

2. In the case of line extensions...a contract may be required for a period not to exceed three years unless by special permission from the Public Utilities Commission of the State of California.

(Schedule Cal.P.U.C. No. A2.1.4, subd. 2.)

In addition, Tariff Rule 15 provides:

2. 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 additional costs involved.
3. *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.*

(Schedule Cal.P.U.C. No. A2.15.A., subds. 2 & 3 (emphasis added).)

For these reasons, we reject Applicants argument.

III. CONCLUSION

For the reasons stated above, the application for rehearing of D.11-11-027 should be denied because no legal error has been shown.

THEREFORE, IT IS ORDERED that:

1. The application for rehearing of D.11-11-027 is denied.
2. This proceeding, Case 09-08-021 is closed.

This order is effective today.

Dated April 19, 2012, at San Francisco, California.

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