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FINAL ARBITRATOR'S REPORT FILED

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
Crown Castle NG West LLC (U6745C),
pursuant to Decision 98-10-058 for
Arbitration of Dispute over Denial by
Pacific Gas and Electric Company
(U39E) of Access to Utility Support
Structures.

Application 18-10-004

FINAL ARBITRATOR'S REPORT

This report determines that Pacific Gas & Electric Company (PG&E) does not violate the Commission's¹ Decision (D.) 98-10-058,² by declining to grant Crown Castle NG West LLC (Crown Castle) joint ownership on its solely owned poles. PG&E satisfies its responsibility under D.98-10-058, to grant nondiscriminatory access to Crown Castle, a competitive local carrier,³ by offering Crown Castle the opportunity to lease space on its poles pursuant to PG&E's Overhead Facilities License Agreement, which the Commission has accepted as nondiscriminatory.⁴

¹ Commission refers to the California Public Utilities Commission.

² See D.98-10-058 dated October 22, 1998 in Rulemaking 95-04-043 (ROW Decision).

³ Competitive local carriers are described as those competing within the service territories of the large and mid-sized incumbent local exchange carriers (ILECs).

⁴ See Advice Letter 2982-E, filed by PG&E on February 13, 2017 at <https://www.pge.com/notes/rates/tariffs/2007-e.shtml>.

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We additionally determine that, although PG&E and Crown Castle voluntarily participate in the Northern California Joint Pole Association (NCJPA),⁵ we are not required to give deference to the provisions of agreements, policies or procedures of that association. Transactions concerning the sale or lease of utility property (such as the transaction at issue between PG&E and Crown Castle here), are already within the Commission's jurisdiction under Public Utilities Code Section (Pub. Util. Code §) 851.⁶

Crown Castle's proposed agreement, setting forth terms of sale of communications zone space on poles owned by PG&E, is rejected as presently written.

1. Procedural Background

Crown Castle NG West LLC (Crown Castle)⁷ filed an application on October 10, 2018,⁸ to request arbitration under the expedited dispute resolution

⁵ NCJPA is comprised of municipalities, irrigation districts, electric utilities, telephone companies, wireless companies and cable providers, some of which are entities regulated by the Commission, and some of which are nonregulated entities. The stated purpose of the NCJPA is to share expenses regarding the ownership, maintenance, use, setting, replacement, dismantling, abandonment or removal of jointly owned poles. However, the NCJPA Agreement and the NCJPA Operations Handbook go beyond accounting for expenses and deal with many terms and conditions of joint pole transfer and usage.

⁶ Pub. Util. Code § 851 requires Commission approval for the sale, lease, assignment, mortgage, or any encumbrance of property of a public utility.

⁷ Crown Castle is a competitive local exchange carrier (CLEC). Crown Castle (then named NextG Networks of California, Inc.) received authorization to provide limited facilities-based services as a non-dominant interexchange carrier in D.03-01-061 and was granted authority as a full facility-based carrier in D.07-04-045.

⁸ Crown Castle's application included an Exhibit 1-Testimony of Scott Scandalis, Asset Manager, Small Cell Solutions for Crown Castle.

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procedures established by Decision (D.) 98-10-058 (Application).⁹ In the right of way (ROW) decision, the Commission adopted rules to ensure that large and midsized incumbent local exchange carriers (ILECs), investor-owned electric utilities¹⁰ and local governments grant competitive local carriers (CLCs) such as Crown Castle, nondiscriminatory access to poles, ducts, conduits and ROW.¹¹

PG&E filed its Response to the Application for Arbitration (Response) on October 25, 2018.¹² The parties filed a joint revised arbitration statement on October 29, 2018.¹³ As provided in ALJ-174, an initial arbitration meeting was held on October 30, 2018, and an arbitration hearing was held on November 28 and-29, 2018. The Scoping Ruling of the assigned Commissioner was filed on December 10, 2018. The parties filed post-arbitration briefing on December 11, 2018.

2. The Dispute

Crown Castle and PG&E are members of the Northern California Joint Pole Association (NCJPA). Crown Castle has purchased pole space from PG&E

⁹ The ROW Decision provides that arbitration disputes there under shall generally follow arbitration rules adopted as Rule 3 of Resolution ALJ-174.

¹⁰ Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company and Southern California Edison Company are the major investor-owned electric utilities in California.

¹¹ In D.16-01-046, the Commission extended ROW Rules to provide commercial mobile radio service carriers with the same nondiscriminatory access to utility ROW as competitive local exchange carriers (CLECs). D.18-04-007 dated April 26, 2018 further amended the ROW rules to wireless telecommunications facilities installed by CLECs.

¹² PG&E's Response included Rebuttal Testimony of Tinamarie De Teresa, Manager of PG&E's Joint Pole/Joint Utilities group.

¹³ See Joint Statement of Crown and PG&E on Unresolved Issues dated October 29, 2018. The ROW decision requires a revised arbitration statement, which is referred to as a Revised Statement of Unresolved Issues in ALJ 174-Rule 3.8.

(and other member entities) by submitting a joint pole authorization form (JPA) to the NCJPA pole owner.¹⁴ Crown Castle contends that although PG&E has, in the past accepted its JPAs and permitted it to purchase a portion of the communications zone on PG&E owned poles, PG&E has begun denying JPAs from Crown Castle (and instead offers to lease the space on its poles to Crown Castle).¹⁵ Crown Castle contends that pole ownership is an integral part of its network expansion,¹⁶ and that time constraints related to the lease of space makes joint ownership on the poles preferable to leasing from PG&E. Crown Castle contends that PG&E's refusal to sell space on its poles violates nondiscriminatory access requirements set forth in the Commission's ROW Decision, and that PG&E may only impose conditions on attachment to its poles which are "necessary to endure the safety and engineering reliability of its facilities."¹⁷

¹⁴ Pursuant to NCJPA rules, upon submission of a JPA, pole owners may reply and modify the JPA or, if there is no reply, the JPA is deemed approved after 45 days and the applicant may then install its facilities.

¹⁵ PG&E has also implemented a policy requiring purchasers of space on its poles to agree to become a joint owner of the entire communications zone, and to manage tenants within the communications space.

¹⁶ See Application at 4-5. Crown Castle contends that it has utilized NCJPA agreed processes to acquire space on approximately 20,000 poles in Northern California and approximately 140,000 poles in Southern California.

¹⁷ Application at 7 citing Row Decision, 1998 Cal. PUC LEXIS at 114-115.

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PG&E acknowledges that it has begun declining JPAs to permit Crown Castle to purchase space on its poles. PG&E says it wants joint owners who are willing and able to purchase the entire communications zone and to assume the responsibilities to manage attachments by other tenants within the communications zone, which Crown Castle is unwilling to undertake.¹⁸ PG&E contends that the ROW Decision does not compel it to sell space on its poles to Crown Castle, and that, leasing space to Crown Castle under PG&E's License Agreement, complies with the ROW Decision's nondiscriminatory access requirements.

3. Discussion

The aspect of the parties' dispute that they have requested the Commission to arbitrate falls squarely within the ROW Decision, in which the Commission acknowledges that there is a need to balance opposing interests of incumbent utilities and CLCs,¹⁹ and discusses why it is important that electric utilities and the midsized and large ILECs implement ROW rules in an evenhanded manner

¹⁸ In its Application, Crown Castle objects that PG&E sought, as a condition of joint ownership, to require Crown Castle to assume tenant management responsibility for the communications zone on its poles (which PG&E requires of AT&T). During the arbitration, the parties agreed that the Commission does not require a CLC such as Crown Castle to assume tenant management responsibilities. In its post-arbitration briefing, PG&E additionally contends that its concern about nondiscriminatory access contributes to its decision to no longer offer CLCs any terms of sale unless and until the Commission requires all CLCs to provide tenants on jointly owned poles the same nondiscriminatory access required of electric utilities and ILECs.

¹⁹ See ROW Decision at 82. "On the one hand, incumbent utilities need to be able to exercise reasonable control over access to their facilities in order to meet their obligation to provide reliable service to their customers over time and plan for capacity needs to accommodate future customer growth. On the other hand, CLCs need to be able to gain access to the ROW and support structures of the incumbent utilities in order to provide local exchange service on a nondiscriminatory basis."

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to ensure nondiscriminatory access. The Commission observes that, by virtue of their incumbent status and control over essential ROW and bottleneck facilities, ILECs and incumbent electric utilities have a significant bargaining advantage in comparison to CLCs.²⁰ Therefore, a key principle of the ROW Decision is that CLCs should have rights to obtain access to utility poles and support structures at reasonable terms and prices which do not impose a barrier to competition. However, while the Commission explains that nondiscriminatory access requires incumbent utilities to permit access to the ROW and support structures under impartially applied terms and conditions, the Commission also states that nondiscriminatory access does not mean that the incumbent utility is divested of the benefits and obligations of ownership.²¹

During this arbitration proceeding, Crown Castle has made a cogent argument about the benefits of pole ownership, noting that it is a significant part of its network expansion strategy. It is understandable that Crown Castle would like to benefit from joint pole ownership with PG&E to the same degree as AT&T, the ILEC that jointly owns the majority of PG&E poles in northern California. Yet, Crown Castle argues in its application and briefing,²² that the

²⁰ The ROW Decision addresses these concerns by noting that an incumbent utility may not deny access simply to impede development of a competitive market or to retain its competitive advantage over new entrants (at 20); reciprocity of rights of way (at 41); with respect to pricing (at 50-51); with respect to avoiding unreasonable delays when connecting CLCs (at 61), and with respect to reserving capacity on poles and allowing new capacity (at 82-87 and 90-91).

²¹ See ROW Decision at 20.

²² Application at 8, citing ROW Decision, 1998 Cal. PUC LEXIS at 38. Also see Crown Castle Post Hearing Brief dated December 11, 2018 (Crown Castle Post Hearing Brief) at 15. "In the ROW Decision, the Commission decided that only incumbent utilities should be obligated to make space on poles available to competing providers, and specifically decided not to extend that obligation to competitive providers."

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ROW Decision expressly relieves it, as a CLC, of the obligation to give access to or manage subsequent providers who attach to the communications space it purchases.

The portion of the ROW Decision that Crown Castle cites seems to concede only that the Commission's authority does not extend to cable companies, which the Commission acknowledges are (in some cases) CLCs.²³ It is not at all clear that a telecommunications CLC, such as Crown Castle, is relieved of its obligation to extend access to other non-cable company CLCs.

This said, PG&E now contends that offering Crown Castle terms of sale which differ substantially from its terms with AT&T, would itself be discriminatory,²⁴ presumably because it agrees that it is not clear whether telecommunications CLCs, such as Crown Castle are obligated to assume tenant management responsibility of the communications zone. This arbitrator agrees that ambiguity in this portion of the ROW Decision may explain why PG&E would to prefer to lease rather than to sell additional space to Crown Castle within the communications zone. In the absence of clear guidance from the Commission on this point, it is not appropriate for an arbitrator to clarify

²³ The Commission states, at page 38 of the Row Decision: "This Commission's jurisdiction is limited to the regulation of public utilities. Since cable companies are not public utilities, they are not subject to this Commission's jurisdiction with respect to the rates or terms of service which they offer. Therefore, we shall not impose upon cable companies the obligations to provide access to telecommunications carriers. Similarly, we shall not require CLCs to provide access to cable companies."

²⁴ See Response at 3. Also see PG&E Post Hearing Brief dated December 11, 2018 (PG&E Post Hearing Brief) at 5. PG&E states that it does not intend to offer CLCs with any terms of sale unless and until the Commission requires all CLCs to provide tenants on its poles the same nondiscriminatory access that electric utilities and ILECs are required to provide.

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Commission policy in this context. This issue should be addressed in the ongoing pole access proceeding R.17-06-028.²⁵

Ironically, at the outset of its ROW Decision, the Commission acknowledges that the diversity of ROW access needs makes it infeasible to craft a uniform set of rules or tariffs which address every conceivable situation which may arise.²⁶ The Commission states that one objective of the ROW Decision is to set forth a general set of rules governing ROW access which would give parties discretion to tailor specific terms to the demands of their individual situations. The Commission notes that differences are acceptable as long as they do not merely reflect anticompetitive discrimination among similarly situated carriers.²⁷ Thus, in this dispute between two regulated entities subject to the Commission's jurisdiction, the parties arguably would have considerable latitude to craft whatever terms they might agree upon within the broad concerns of nondiscriminatory access, because their agreement would ultimately be subject to Commission approval under Pub. Util. Code § 851.

Instead, the parties here have somewhat reached a stalemate as to their respective rights and obligations, because the NCJPA, through its member Agreement and Operations Handbook, sets terms and conditions, as well as procedures related to utility pole transfer and sale. Crown Castle asserts that these terms and conditions support its contention that it is entitled to purchase, not merely lease, space on PG&E poles.

²⁵ R.17-06-028 is an Order Instituting Rulemaking (OIR) into Access by Competitive Communications Providers to California Utility Poles and Conduit, Consistent with the Commission's Safety Regulations.

²⁶ ROW Decision at 12.

²⁷ *Id.*

There can be no doubt that disputes such as the present one will arise again. For this reason, if NCJPA is going to continue to facilitate sale and purchase transactions pertaining to public utility poles among its member entities, the Commission should require NCJPA to submit (before implementation) for Commission review and approval under Pub. Util. Code § 851, its agreements, forms, procedures and handbooks which concern the transfer, sale, lease, assignment, mortgage, or encumbrance of public utility poles. Such transactions, which are being handled by NCJPA on behalf of its members, are clearly within the Commission's jurisdiction.

In the meantime, in this proceeding, the parties' failure to put forth an arbitrated agreement for purchase, which is acceptable to both, leaves Crown Castle with only one option - leasing under PG&E's approved License Agreement.

4. Comments on Draft Arbitrator's Report

The Draft Arbitrator's Report in this matter was mailed on December 19, 2018 to allow comments by the parties and interested members of the public as provided by Rule 3.18 of Resolution ALJ-174. Comments were filed by the parties, by California Municipal Utilities Association (CMUA)²⁸, and by Extenet Systems (ExteNet)²⁹.

²⁸ CMUA is a statewide organization of public agencies that provide water and electricity service to California consumers. The publicly owned electric utilities which belong to CMUA provide approximately 25 percent of the electricity load in California. CMUA takes no position on the dispute, but emphasizes that the Commission's authority over pole agreements between NCJPA members should be limited to such agreements between entities regulated by the Commission.

²⁹ ExteNet is a CLC providing wholesale non-switched point-to-point virtual circuit transport services to other carriers via small cell and distributed antenna system

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Crown Castle asserts that the arbitrator's conclusion that she should not require PG&E to sell additional space on its poles to Crown Castle, absent clear guidance from the Commission, is arbitrary and capricious, amounts to a failure to exercise jurisdiction to ensure competitive access on PG&E poles, and devalues the expedited dispute resolution process set forth in the ROW decision. Crown Castle contends that, PG&E's refusal to continue selling this space to Crown Castle is unduly discriminatory and anticompetitive. It says that although "the Draft Arbitrator's Report appropriately recognizes that the Commission has the jurisdiction to ensure Crown Castle is able to purchase the space it needs (typically one foot) to attach its equipment on PG&E poles," the arbitrator sends the wrong message – i.e., that the Commission will not intervene to ensure competitive pole access.³⁰

Crown Castle mischaracterizes the conclusion of the Draft Arbitrator's Report.

It is correct that the arbitrator notes that transactions concerning the sale or lease of utility property are within the Commission's jurisdiction. However, the arbitrator expressly notes that the ROW Decision does **not** compel PG&E to sell space on its poles to Crown Castle, and that, leasing space to Crown Castle under PG&E's License Agreement, which **does comply** with the ROW Decision's nondiscriminatory access requirements, is the only option that PG&E can be compelled to extend to Crown Castle due to the parties' failure to put forth a mutually acceptable agreement for purchase. As the arbitrator noted, the ROW

networks, and dark and lit fiber services to enterprise end user customers. It places fiber optic cable, wireless antennas and radios on utility poles throughout northern and southern California.

³⁰ See Comments of Crown Castle dated January 7 at 2, "I. - Summary."

Decision gives the parties considerable discretion, and had the parties been able to agree, they could have put forth an arbitrated agreement for purchase, that was acceptable to both.

Crown Castle contends that if the Commission would require PG&E to sell to it "only the space requested to attach equipment," this would enable Crown Castle to continue to provide superior reliable service for its customers and would support Crown Castle's goal to deploy broadband rapidly and compete in highly competitive markets (which are goals in line with goals that Commission is mandated to follow). Unfortunately, Crown Castle does not demonstrate that leasing the space it requires from PG&E would hinder it in meeting its goals.³¹

Crown Castle argues that PG&E presents a "false dilemma" in contending that selling less space to Crown Castle than it sells to ILECs is unreasonably discriminatory, because such differential treatment is grounded in deep practical, historical, legal and policy reasons.³² We acknowledge that these same reasons are those that led the Commission to require ILECs to grant access to CLCs within the zone that an ILEC - such as AT&T - might purchase.

But, given Crown Castle's burgeoning network expansion (see footnote 16) and its contention that pole ownership will be an integral part of its future plans, it is Crown Castle that presents a "false dilemma." Crown Castle has not provided support for its contention that the ROW Decision (as presently written) obligates an incumbent utility to sell space on its poles to a CLC.

³¹ During arbitration, Crown Castle expressed concerns about the lengthy time required under PG&E's lease process. However, the parties may remedy this issue by agreeing to more favorable time deadlines for any lease arrangement they may enter.

³² See Comments of Crown Castle at 3.

Additionally, Crown Castle has not cited any language in the ROW Decision which demonstrates that the Commission considers leased access to poles to be adverse to competition or that leasing is an impediment to rapid deployment of broadband.

The fact that PG&E has sold portions of space on its poles to Crown Castle and other CLCs utilizing NCJPA protocols/procedures (without Commission scrutiny or oversight), does not mean that the ROW Decision requires PG&E to continue to do so. To the contrary of Crown Castle's argument, it is precisely because of Crown Castle's intention to continue increasing joint pole ownership as an integral part of its future network expansion strategy, that clear guidance from the Commission is desirable. As D.98-10-058 is presently written, there is not clear guidance about whether an incumbent utility has any obligation to permit acquisition of ownership on its poles by CLCs. There is also inadequate explanation about whether CLCs have any obligation to provide nondiscriminatory access to other CLCs.³³

Crown Castle notes that the Draft Arbitrator's Decision alludes to ambiguity in the ROW Decision about whether it is discriminatory for PG&E to

³³ In ExteNet's January 7, 2019 Comments on the Draft Arbitrator's Report, there is concern that the result set forth in the Draft Arbitrator's Report will "necessarily alter the rights and obligations set forth in D.98-10-058." But, this is not the case. The point of the conclusion reached here is that, contrary to what Crown Castle requests, the arbitrator determines that it is not appropriate to create rights and obligations with regard to pole ownership that were not addressed by the Commission in D.98-10-058. ExteNet also expresses concern that, should parties subject to regulation by the Commission be required to submit their pole agreements to the Commission for review and approval under Pub. Util. Code § 851, this will substantially delay the expeditious deployment of broadband facilities. The Commission has authority to put in place a procedure that will ensure expeditious handling of such agreements, just as it has provided this expedited arbitration process under D.98-10-058.

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sell space to Crown Castle on different terms than its sale to ILECs, and Crown Castle contends that the arbitrator's decision to decline to interpret and resolve the ambiguity, is a "retreat from the ambiguity." Crown Castle claims that "this retreat undermines the expedited dispute resolution process and the framework established in the ROW Decision, which contemplates the need to look at pole access arrangements on a case-by-case basis."³⁴

However, this analysis by Crown Castle again misinterprets the goal of the ROW Decision. As the arbitrator notes, the objective of the ROW Decision is to set forth a general set of rules governing ROW access, which leave the **parties** considerable latitude and discretion to craft whatever terms **they** might agree upon. That is why the parties are expected to arrive to the arbitration with a draft "arbitrated agreement" with areas of disagreement highlighted. The arbitrator is clearly anticipated to assist the parties with resolution of their disagreements within the parameters of the ROW Decision.

In contrast, Crown Castle's comments essentially argue that the **arbitrator** should craft Crown Castle's and PG&E's respective rights and obligations, premised upon one of the parties' interpretation of what the Commission should allow the parties to do, based on the parties' past practice under protocols developed outside of Commission review (by NCJPA). This is not a retreat from ambiguity by the arbitrator. The ROW Decisions places upon the parties the responsibility to craft an agreement.

The parties' inability to do so here, is due to a fundamental disagreement between them (which the arbitrator suggests stems from lack of clarity in the ROW Decision) about their respective rights and obligations in respect to

³⁴ See Comments of Crown Castle at 5.

ownership of utility pole space. Accordingly, the arbitrator urges that, within its pending OIR proceeding R.17-06-028, the Commission should clarify its intent regarding rights of CLCs to acquire ownership on utility poles and should delineate what the corresponding obligations will be upon CLCs (which choose ownership) to grant nondiscriminatory access to others.

5. Agreement Reflecting Arbitrator's Report

As previously noted, the expedited dispute resolution procedures under the ROW Decision require the parties to put forth an arbitrated agreement reflecting the Final Arbitrator's Report. For this purpose, unless the parties can somehow reach agreement on purchase terms, the applicable agreement which will serve as the basis for the arbitrated agreement, must be PG&E's License Agreement.

The parties are ordered to craft an arbitrated License Agreement reflecting mutually agreeable terms for leasing space on PG&E's poles. In crafting the arbitrated License Agreement, PG&E must negotiate terms with Crown Castle that: 1) will not constrain Crown Castle's goals to rapidly deploy broadband; 2) will permit Crown Castle to continue to provide reliable service for its customers, and 3) will enable Crown Castle fulfill its goal to compete within the highly competitive markets which comprise the state of California.

O R D E R

IT IS ORDERED that the parties must file an arbitrated License Agreement with the Commission no later than the close of business February 8, 2019.

Dated January 31, 2019, at San Francisco, California.

 /s/ PATRICIA B. MILES

Patricia B. Miles
Administrative Law Judge Arbitrator