

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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 (U-39-E) of Access to Utility Support Structures.

A.18-10-004

ORDER GRANTING REHEARING OF DECISION (D.) 19-03-004, AND VACATING THE DECISION

I. SUMMARY

On March 22, 2019, Pacific Gas & Electric Company (“PG&E”) filed a timely application for rehearing of Decision (D.) 19-03-004 (or “Decision”).¹ That decision affirmed a final arbitrator’s report (or “FAR”) in a pole access dispute between PG&E and Crown Castle NG West LLC (“Crown Castle”). The FAR determined that PG&E satisfies its responsibility under D.98-10-058 (“*Rights of Way Decision*” or “*ROW Decision*”)² to grant nondiscriminatory access to Crown Castle, a competitive local carrier, by offering Crown Castle the opportunity to lease space on its poles pursuant to PG&E’s Overhead Facilities License Agreement (“License Agreement”). The FAR ordered the parties to craft an arbitrated License Agreement reflecting mutually agreeable terms for leasing space on PG&E’s poles. The parties failed to submit such an agreement. Instead, PG&E submitted its standard License Agreement, and Crown Castle submitted a revised version of PG&E’s License Agreement. In lieu of an arbitrated License Agreement, D.19-03-004 adopted Crown Castle’s revised License Agreement.

¹ Unless otherwise noted, citations to Commission decisions issued since July 1, 2000 are to the official pdf versions, which are available on the Commission’s website at: <http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx>.

² *Re Competition for Local Exchange Service – Right of Way Decision* (“*ROW Decision*”) [D.98-10-058] (1998) 82 Cal.P.U.C.2d 510.

PG&E's application for rehearing alleges the following: (1) the Decision incorrectly found that PG&E failed to object to Crown Castle's proposed revisions; (2) Crown Castle's license provisions contravene principles in the *ROW Decision* and the "Preferred Outcomes"; (3) the adoption of the Decision did not follow the Commission's Rules governing comment and reply on a proposed decision; and (4) PG&E did not have a fair opportunity to be heard on Crown Castle's proposed revisions.

We have carefully considered all of the arguments raised in the application for rehearing, and conclude that rehearing should be granted in order to provide the public review and comment period on the proposed decision in accordance with Public Utilities Code section 311(g) and our Rules of Practice and Procedure ("Rule").³

A motion for a stay of D.19-03-004 was filed subsequently to the application for rehearing. That motion is denied as moot. Also, as we have disposed of this matter based on the filed application for rehearing and response thereto, we deny PG&E's request to file a reply brief. PG&E may raise any relevant remaining legal issues in its subsequent comments on the proposed decision.

II. PROCEDURAL BACKGROUND

This case stems from a pole access dispute between PG&E and Crown Castle. Both parties are members of the Northern California Joint Pole Association ("NCJPA"), and Crown Castle has previously purchased pole space from PG&E by submitting a joint pole authorization form ("JPA") to PG&E. Pursuant to NCJPA rules, pole owners may reply and modify a JPA, or if there is no reply, the JPA is deemed approved after 45 days and applicant may install its facilities. Whereas previously, Crown Castle was able to purchase a portion of the communications zone on PG&E owned poles, PG&E began denying JPAs from Crown Castle, and instead offered to lease a portion of the communications space on its poles. PG&E established a new policy

³ Subsequent section references are to the Public Utilities Code, unless otherwise specified. Also, subsequent rule references are to the Commission's Rules of Practice and Procedure.

requiring purchasers of space on its poles to agree to become a joint owner of the entire communications zone, and accordingly manage tenants within the communications space.

Crown Castle did not want that responsibility. On October 10, 2018, Crown Castle filed an Application for Arbitration of Pole Access Dispute (“Application”) in which it contended that PG&E’s refusal to sell just a portion of the space on its poles violates nondiscriminatory access requirements set forth in the *Row Decision* [D.98-10-058], *supra*, and that PG&E may only impose conditions on attachment to its poles which are “necessary to ensure the safety and engineering reliability of its facilities.” (Application, at p. 7.) The Application presented one issue for arbitration: “The issue to be considered in this proceeding is whether PG&E is entitled to condition Crown Castle’s purchase of space on PG&E-owned poles on Crown Castle’s agreement that it assume tenant management responsibility for current and future tenants in the communications zone (i.e. PG&E tenants).” (Application, at pp. 20-21.)

In its Response to the Application, PG&E contended that leasing via its Overhead Facilities License Agreement met all of the nondiscriminatory access requirements of the *ROW Decision*, and asked the Commission to reaffirm that PG&E fulfilled its ROW obligations by extending this License Agreement to Crown Castle. (Response, at pp. 1-2.)

On October 29, 2018, the Parties filed a Joint Statement of Unresolved Issues. Crown Castle listed the following issues: (1) Whether PG&E may refuse to sell space on its poles to any CLCs unless and until the CPUC amends the ROW Rules to require CLCs to provide nondiscriminatory access to the poles; and (2) whether PG&E may condition the sale of space on its pole only to attachers who agree to purchase the entire communications space and who would then be obligated to lease portions of the communications space to tenants and manage the tenant relationship or, alternatively, whether PG&E should be required to sell to attachers only the amount of space needed for the installation of their facilities (and thereby not assume responsibility for tenant management).

PG&E listed the following issue: Whether PG&E's Overhead Facilities License Agreement, which PG&E has offered to Crown Castle, satisfies the *ROW Decision's* nondiscriminatory access requirements.

On November 19, 2018, the ALJ Arbitrator directed parties to submit their proposed single-text "mark-up" document containing the language upon which the parties agree or disagree, as required by the ROW Dispute Resolution Procedures and Rule 3.3(c) of Resolution ALJ-174. The parties failed to do so. Instead, on November 28, 2018, Crown Castle's counsel sent an email to the ALJ Arbitrator stating the following: "The parties have met and conferred and determined that given the nature of the dispute, it would not be possible to submit a single-text 'mark-up' document, but rather parties propose to share their differing protocols for pole access at the arbitration hearing." PG&E brought a copy of its master licensing agreement to the arbitration, and Crown Castle brought a copy of an agreement setting forth terms of sale.

Arbitration hearings were held November 28-29, 2018, and post-hearing briefs were subsequently filed. A Draft Arbitrator's Report ("DAR") was filed on December 19, 2018. The DAR held that PG&E satisfies its responsibility under D.98-10-058 to grant nondiscriminatory access to Crown Castle 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. The DAR explicitly rejected Crown Castle's proposed agreement setting forth terms of sale of communications zone space on poles owned by PG&E. (DAR, at pp. 1-2.)

The parties and members of the public filed comments on the DAR on January 7, 2019. A Final Arbitrator's Report was filed on January 31, 2019. The FAR also held that PG&E satisfied its responsibility to grant nondiscriminatory access to Crown Castle by offering to lease space on its poles, and explicitly rejected Crown Castle's proposed agreement. The FAR, however, further directed parties 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.” (FAR, at p. 14.)

The parties failed to submit a single agreement reflecting the Final Arbitrator’s Report, as required by the Expedited Dispute Resolution Rules. Instead, on February 8, 2019, PG&E filed an unexecuted copy of its standard License Agreement with no revisions; Crown Castle submitted an unexecuted copy of PG&E’s License Agreement, but with several substantive proposed revisions to reflect Crown Castle’s Preferences. A proposed decision adopting Crown Castle’s version appeared on the Commission’s agenda on March 4, 2019. It was not served on the parties or issued for comment. The final decision, D.19-03-004, adopted on March 14, 2019, also adopted Crown Castle’s version. Both the proposed and final decisions state, “PG&E has not objected to Crown Castle’s revisions to its License Agreement.” (Finding of Fact No. 9.)

III. DISCUSSION

A. Rehearing Is Granted to Provide Required Public Review and Comment Period on the Proposed Decision

A draft version of D.19-03-044 appeared electronically on the Commission’s agenda on March 4, 2019, but was not served on the parties. The Commission did not seek comment on the proposed decision, nor did it reduce or waive the comment period. PG&E claims that the Commission violated its own rules by adopting the decision without allowing for comment and reply, thereby committing abuse of discretion.

PG&E cites to the Commission’s Rules of Practice and Procedure (“Rules”), which provide that parties may file comments on a proposed decision within 20 days of the date of service and reply comments within 5 days of the comment deadline. (Rules 14.3(a) and (d).) PG&E further claims that nothing in D.98-10-058 or Resolution ALJ-181 (which superseded Resolution ALJ-174) negate the required comment period.

Crown Castle responds that the Commission's Rules were modified by the expedited dispute resolution process set forth in the *ROW Decision*. Crown Castle states that those Arbitration Rules provide no opportunity for parties to comment on the filed arbitrated agreement.⁴ Crown Castle contends that the Arbitration Rules require a final Commission decision within 30 days of the arbitrator's report.

The dispute resolution procedures set forth in D.98-10-058 were patterned on Resolution ALJ-174, with modified time requirements to accommodate the specific needs of the ROW dispute resolution process. Resolution ALJ-174, in turn, revised rules for mediating and arbitrating disputes involving interconnection agreements between Incumbent Local Exchange Carriers and Competing Local Exchange Carriers pursuant to Sections 251 and 252 of the 1996 Federal Telecommunications Act.⁵

Subsequent to the adoption of the ROW dispute resolution procedures, the California Legislature passed Senate Bill 779, effective January 1, 1999, which, among other things, expanded the categories of Commission decisions subject to a 30-day public review and comment period (codified at Pub. Util. Code § 311(g)). The statute exempts certain matters from this public review and comment period, and further authorizes the Commission, through rulemaking, to establish "additional categories of decisions subject to waiver or reduction" of the period for public review and comment.

In 1999, the Commission instituted Rulemaking (R.) 99-02-001, in order to amend its Rules of Practice and Procedure to align with the requirements of SB 779. The Commission established other categories of decisions subject to waiver or reduction of the public review and comment period, including "for a decision under the state arbitration provisions of the federal Telecommunications Act of 1996." (Rule 14.6(c)(5), previously Rule 77.7.) Notably, other types of arbitrations are not listed.

This arbitration proceeding was not conducted pursuant to the federal Telecommunications Act of 1996. Nor was there any order or ruling indicating existence

⁴ PG&E does not contend it did not have the opportunity to comment on the filed arbitrated agreement. PG&E contends it did not have opportunity to comment on the proposed decision.

⁵ See 47 U.S.C. §§ 251, 252.

of the other circumstances in which the Commission may reduce or waive the public review and comment period, including an unforeseen emergency situation or upon stipulation by the parties. (See Rule 14.6(a) or (b).)

Accordingly, we find that we did not follow the public review and comment requirement on proposed decisions, set forth in section 311(g) and our Rules of Practice and Procedure. We grant rehearing and refer the proceeding back to the arbitrator in order to serve a new proposed decision on the parties and provide the required public review and comment period (or issue a ruling, if appropriate, reducing or waiving the comment period). PG&E may raise any relevant remaining legal issues in comments to the proposed decision.

IV. CONCLUSION

In accordance with the discussion above, we grant rehearing of and vacate D.19-03-004. We accordingly deny the filed motion for a stay of D.19-03-004 as our disposition of the rehearing application has rendered it moot. Further, we deny the motion to file a reply to the response to the application for rehearing, as it is moot.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.19-03-004 is granted.
2. D.19-03-004 is vacated.
3. The assigned Arbitrator-ALJ shall serve a new proposed decision in this proceeding upon the parties and provide the required public review and comment period in accordance with section 311(g) and our Rules of Practice and Procedure.
4. The motion for a stay of D.19-03-004 is hereby denied as moot.
5. PG&E's request to file a reply brief is denied.
6. The proceeding, Application 18-10-004, remains open.

This Order is effective today.

Dated August 15, 2019, at San Francisco, California.

MICHAEL PICKER

President

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

Commissioners