BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Crown Castle NG West LLC (U-6745-C), 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.	Application 18-10-004

POST-HEARING BRIEF OF CROWN CASTLE NG WEST LLC (U-6745-C)

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Pursuant to California Public Utilities Commission Decision 98-10-058 ("ROW Decision"), and the order of Administrative Law Judge Miles on November 29, 2018,[1] Crown Castle NG West LLC (U-6745-C) ("Crown Castle") respectfully submits this post-hearing brief. Under the ROW Decision: "Post-hearing briefs shall present a party's argument in support of adopting its recommended position with all supporting evidence and legal authorities cited therein."[2] Crown Castle seeks nondiscriminatory pole access from Pacific Gas and Electric Company ("PG&E") in accordance with the Commission's long-standing rules adopted in the ROW Decision. Accordingly, Crown Castle's recommendation is for the Commission to adopt an order directing PG&E to: (i) sell to Crown Castle the amount of available pole space requested for installing facilities (without requiring purchase of unneeded space or conditioning Crown Castle's purchase on the assumption of PG&E's role as a tenant manager); and (ii) cease its unlawful practice of denying Crown Castle's requests for purchase, without valid rationale. This relief is critical for Crown Castle to rapidly deploy a reliable broadband network in Northern California

[1] 11/29/18 Tr. 116: 17 – 20: "I'm going to suggest that the post-hearing briefs be served by email on the parties and on me by Monday, December 10th [later changed to December 11th]."

[2] ROW Decision, 1998 Cal. PUC LEXIS 879, Appendix A, Section IX.A.17.

I. INTRODUCTION

Crown Castle is a rapidly growing telecommunications carrier providing a host of competitive telecommunications services to enterprise, schools, libraries, and medical institutions in California as well as wholesale services to other wireline and wireless carriers in the state.[3] In order to provide these services, Crown Castle installs its own facilities on existing poles and underground conduit.[4]

Crown Castle model relies on ownership of its fiber and network facilities so that it can best ensure it is providing customers with the fast, reliable, and secure services they demand.[5] Indeed, Crown Castle has long focused on pole ownership as part of its network expansion strategy, because, as explained below, ownership ensures numerous benefits that allow for rapid deployment of a superior reliable broadband service.[6] Indeed to date Crown Castle has attached to nearly 160,000 poles in California and over 20,000 poles in Northern California alone.[7]

In Northern California, Crown Castle requests ownership on joint poles through the Northern California Joint Pole Association ("NCJPA"), which facilitates ownership and occupancy of jointly owned poles.[8] Crown Castle purchases pole space through the submission

[3] *See* Crown Castle Ex. 1, at 2 (Scandalis Testimony). *See also*, D.16-12-025, at 128 ("[T]he increasing demand from smartphones and tablets, other connected devices such as health monitors could significantly increase the number of wireless connections... Pew Research reports that over half of American smartphone users in the year before October 2014 used their phone to look up health information and do online banking, and significant percentages use their smartphones for job searches and for education.") (citing *In re Deployment of Advanced Telecommunications Capability to all Americans Pursuant to Section 706*, 31 FCC Rcd. 699, 708 ¶ 20 (2016)).

[4] *See* Crown Castle Ex. 1, at 2 (Scandalis Testimony).

[5] *See* Crown Castle Ex. 1, at 3 (Scandalis Testimony).

[6] *See* Crown Castle Ex. 1, at 3 (Scandalis Testimony).

[7] *See* Crown Castle Ex. 1, at 3 (Scandalis Testimony).

[8] *See* Crown Castle Ex. 1, at 3 (Scandalis Testimony).

of a joint pole authorization ("JPA"), which essentially requests access to poles from NCJPA pole owners.[9]

A. Background of PG&E's Denial of Access

As Crown Castle has expanded its network in Northern California, more often it is now seeking access to poles in which PG&E is the sole pole owner.[10] PG&E has been inconsistent in responding to Crown Castle's requests for access. In many (but not all) of those cases, PG&E has denied Crown Castle's JPAs on such poles noting that it would allow Crown Castle to purchase space on the pole only if Crown Castle agreed to purchase the entire communications zone and assume tenant management responsibility for current and future tenants in the communications zone, i.e. PG&E's existing tenants.[11] As of September 2018, PG&E has effectively denied approximately 82 JPAs on this basis.[12] These effective denials impact broadband deployment throughout Northern California, including low-income areas of Alameda County, and rural areas, like Nipomo and Arroyo Grande in San Luis Obispo County.[13]

Even worse, after Crown Castle initiated this proceeding, PG&E has retaliated against Crown Castle by setting forth a new policy to deny all Crown Castle JPAs.[14] Both PG&E's previous conditional denials, and current practice of denying all JPAs, of Crown Castle JPAs are quite unusual and is unique to PG&E.[15] In fact, Crown Castle has purchased space on thousands of poles in the communications zone throughout the State of California — including directly

[9] *See* Crown Castle Ex. 1, at 3 (Scandalis Testimony).

[10] *See* Crown Castle Ex. 1, at 4 (Scandalis Testimony).

[11] *See* Crown Castle Ex. 1, at 4 (Scandalis Testimony).

[12] *See* Crown Castle Ex. 1, at 5 (Scandalis Testimony).

[13] *See* Crown Castle Ex. 1, at 5 (Scandalis Testimony).

[14] Ex. PG&E-1 at 8:17-18 (De Teresa/PG&E Rebuttal Testimony) ("PG&E has concluded that it can no longer offer Crown Castle with any terms of sale....").

[15] *See* Crown Castle Ex. 1, at 4 (Scandalis Testimony).

from other electric utilities, such as Southern California Edison, and various publicly-owned utilities — without any other incumbent pole owner requiring the purchase be conditioned on either the purchase of the entire communications zone or the assumption of landlord responsibility for future communications tenants on the poles.[16]

Under state law and Commission rules, PG&E, the largest pole owner in the state, has been granted the privilege to erect poles in the public right-of-way using ratepayer funds. But now PG&E argues that the Commission rules do not apply to them, and has started a practice of denying all Crown Castle's requests for pole access without lawful rationale, thereby impeding broadband deployment and telecommunications competition.

B. Proposed Resolution of Dispute

Crown Castle simply seeks pole access through purchase consistent with the requirements of state law and the ROW Decision, and not dominion over PG&E poles. This request is built on the basic premise that to the extent PG&E makes access by purchase available generally (including to Crown Castle's competitors), which it does, such offering must be made on a nondiscriminatory basis consistent with the ROW Decision. This case is focused on Crown Castle's access to PG&E solely-owned poles, which constitutes less than half of PG&E's poles.[17] Further, as mentioned above, this dispute is unique to PG&E, who has denied Crown Castle pole access in a manner Crown Castle has not experienced from any other incumbent pole owner that sells pole space in the State. Despite the narrow focus of this proceeding, the outcome will have a resounding impact of Crown Castle's ability to deploy broadband and compete in the telecommunications market.

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[16] *See* Crown Castle Ex. 1, at 4 (Scandalis Testimony).

[17] *See PG&E's (U-39-E) Response to Application for Arbitration* ("PG&E Response") at 2 and 15 ("...a small fraction of the total number of jointly-owned poles.").

Crown Castle has made significant efforts to resolve the issues over the past year, during which PG&E has become increasingly aggressive and less cooperative over the course of those negotiations. Crown Castle seeks relief from the Commission through its expedited dispute resolution process, only after having exhausted all other avenues for resolution of the dispute. The law and facts in this case dictate resolution of the issues in favor of Crown Castle, and adoption of Crown Castle's Proposed Agreement, which implements the resolution of those issues.

II. RESOLUTION OF ISSUES PRESENTED

The ROW Decision requires that the Draft Arbitrator Report include "(a) a concise summary of the issues resolved by the Arbitrator, and (b) a reasoned articulation of the basis for the decision."[18] The *Assigned Commissioner's Scoping Memo and Ruling* ("Scoping Memo"), issued December 10, 2018 lays out five issues to be considered in this proceeding. The record, and relevant law, militate in favor of the Commission ensuring Crown Castle can access through purchase to PG&E poles. Below Crown Castle has addressed each of the issues presented, in order.

1. Does PG&E's offer to lease space to Crown under PG&E's License Agreement satisfy the ROW Decision's nondiscriminatory access requirements?

Not under the factual circumstances presented regarding PG&E's course of conduct. If PG&E chose to provide access only through leasing (which it has not) then its License Agreement likely would satisfy the ROW Decision's nondiscriminatory access requirements.[19] However, since PG&E has chosen to provide access also through ownership, the terms of the

[18] ROW Decision, Appendix A, Section IX, para. 16.

[19] Crown has not conducted a detailed analysis of the terms of the license agreement in detail because it has not entered into such an agreement nor does it wish to do so.

ownership access option must also comply with the requirements of the ROW Decision. Compliance includes ensuring purchasers rights to nondiscriminatory access, purchasers right to acquire only the space requested on a pole (e.g 1 foot), and the seller's right to deny ownership only based on safety, reliability, or other lawful basis.

2. **Do the ROW Decision's nondiscriminatory access requirements, or as amended by D.18-04-007, compel both lease and sale of space on PG&E poles?**

Yes, if the pole owner has chosen to provide access through ownership. The ROW Decision makes no distinction between lease and sale[20]—if PG&E offers access through sale it must provide such access on a nondiscriminatory basis. There is good reason why the ROW Decision makes no such distinction. If access rules only applied to leasing (and not sale), pole owners could pick to whom and how ownership is granted without regard to important state policies, thereby distorting an otherwise competitive telecommunications market and impeding broadband deployment. As discussed below, PG&E has conceded that at least some of the ROW Decision's requirements apply to pole access through purchase. Furthermore, California law considers the provision of space on poles owned by public utilities to be a "public utility" service, and California law requires public utility services, like access, to be just, reasonable, and nondiscriminatory.[21]

3. **Does the JPA procedure established by the NCJPA require a pole owner to sell or lease space on its poles, and if so, are NCJPA procedures in conflict with nondiscriminatory access requirements under the ROW Decision?**

The NCJPA procedures are not the subject of this case. Rather, the ROW Decision access requirements and PG&E's requirement to provide nondiscriminatory access are at issue in

[20] See Section III.A

[21] *See, e.g.*, Pub. Util. Code Section 767.5(c) and Pub. Util. Code Sections 451, 452, 453.

this case. As Crown Castle previously stated in its opening testimony, the purpose of the NCJPA is for members to share expenses regarding the ownership, maintenance, use, setting, replacement, dismantling, abandonment or removal of jointly owned poles, and to ensure efficiency of administration of the ownership and occupancy of jointly owned poles,[22] and not enforce nondiscriminatory access requirements. More importantly, this proceeding does not require examination of NCJPA procedures to resolve the arbitration because NCJPA procedures are subsidiary to the Commission's rules, as PG&E noted off the record during the mark-up conference.

4. **Should and may the Commission compel PG&E to sell space on its poles to promote broadband deployment?**

Yes. The Commission may require PG&E to provide pole access through purchase in order promote broadband deployment. Pursuant to Pub. Util. Code § 709, the legislature has required the Commission to, among other things:

> encourage the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services...[and] remove the barriers to open and competitive markets.

The Commission has historically implemented this and other statutory directives by ordering various utilities and other property orders to ensure access to private property in a manner that ensure universal telecommunications deployment.[23] The underlying facts of this case

[22] *See* Crown Castle Ex. 1, at 3 (Scandalis Testimony).

[23] *See, e.g.*, D.08-06-021, at 11 (holding that Verizon California Inc.'s condemnation of an easement under Summit Road would serve the public interest, in part, because "[e]xtending and enhancing telecommunications facilities will require placement of these facilities in public right of ways as well as, in some instances, on private property ... These projects, however, are necessary to achieving our important goal of providing communications services to Californians and should not be subject to unwarranted delay."); D.18-04-007, at 10 ("providing CLECs with nondiscriminatory access to public utility infrastructure for the purpose of installing wireless telecommunications facilities will help to

are exactly the type of situation in which the Commission should implement the Section 709 policies—ordering access will have a large impact on Crown Castle's ability to rapidly deployment superior, reliable broadband, and will have a seemingly negligible impact on PG&E. Indeed, PG&E has already sold Crown Castle the space requested (in certain instances), and presumably manages those poles safely, demonstrating this arrangement is workable for PG&E.[24]

5. **Are there valid safety or reliability concerns that justify PG&E's decision to lease (not sell) space on its poles to Crown?**

No. Crown Castle has safely attached to PG&E's poles to date and PG&E has not once presented on the record a single safety or reliability concern associated with Crown Castle's attachments to date. As explained below, the denials issued to Crown Castle are focused on PG&E's requirements to purchase more space than requested and/or assume existing tenants.[25] PG&E stated that its engineer reviews the JPAs, but when asked to provide a reason why the engineers review would impact the amount of space sold in the communications zone, PG&E had no answer.[26] This demonstrates that PG&E has no safety or reliability reason for its decision not to sell space to Crown Castle. Further, PG&E admits that it has offered no examples in its testimony of any safety or reliability issues underlying their position on denial of Crown Castle's requests for access.[27]

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achieve the following public-interest goals for telecommunications services embodied in Pub. Util. Code § 709....").

[24] *See* Section IV.A

[25] *See,* e.g., Ex. Crown Castle-03.

[26] 11/29/18 Tr. at 81:8-14 (PG&E/De Teresa) "Q. what does the engineer's review have to do with...with the requirement to purchase the entire communications zone? A. I don't know that answer specifically."

[27] 11/29/18 Tr. at 96:24 to 97:2 (PG&E/De Teresa) ("Q. So you provided no examples in your testimony of specific safety or compliance concerns, correct? A. No, not in testimony. Q. And no examples of notices of violation in your testimony, correct? A. Not in the testimony").

III. CROWN CASTLE'S PROPOSED AGREEMENT ENSURES POLE ACCESS AND PREVENTS PG&E'S VIOLATIONS.

The ROW Decision states: "the Commission shall issue a decision approving or rejecting the arbitrated agreement."[28] However, because this dispute involves denial of access to utility poles, it is unclear under the ROW Decision whether a proposed agreement or contract language is necessary for the Commission's consideration. Indeed, the Commission could resolve the dispute by ruling on the issues above. However, out of an abundance of caution, Crown Castle has entered into evidence the Proposed Agreement (Crown-02), which resolves the issues in this case in line with the ROW Decision and state law. The four key provisions of the Proposed Agreement are as follows:

1. All sale of space in the communications zone from PG&E to Crown Castle is governed by Decision 98-10-058;
2. PG&E shall not require Crown Castle to assume tenant management responsibility in conjunction with the sale of space in the communications zone;
3. PG&E shall sell to Crown Castle the amount of available space requested by Crown Castle; and
4. PG&E shall not deny Crown Castle's request to purchase without providing to Crown Castle a safety or reliability rationale, or other lawful basis, as set forth in Decision 98-10-058 or other law.

Below is an explanation why each of the four key provisions should be approved by the Commission.

A. PG&E's position that Commission rules do not apply to pole access through purchase is untenable.

PG&E argues that the access requirements of the ROW Decision do not apply to pole access through purchase. This position shows PG&E's disregard for the Commission's rules—a

[28] ROW Decision, Appendix A, Section IX.A.20.

theme that has repeatedly emerged in recent years.[29] The first provision of the Proposed Agreement seeks to addresses this unlawful position by ensuring PG&E abides by the ROW Decision in provisioning pole access. PG&E's position is untenable for the following reasons:

1. *Despite its rhetoric, PG&E has put forward no authority for its allegation that ROW Decision does not govern pole access through purchases*.

PG&E has provided no authority for its position that the ROW Decision does not apply to access by purchase, because such authority does not exist. Indeed, the ROW Decision has been used by utilities to guarantee CLC ownership access and terms since it was first adopted in 1998.

Pub. Util. Code § 767, and 47 U.S.C. § 224, the ROW Decision grants Crown Castle the right to access utility support structures, including ducts, conduit, and other support structures, along with utility rights-of-way for the purpose of installing cabling and other facilities to be used by it in providing telecommunications services on a nondiscriminatory basis.[30] Specifically, Section III.C.2 of the ROW Decision states:

> We shall consider nondiscriminatory access to mean that similarly situated carriers must be provided the opportunity to gain access to the ROW and support structures of the incumbent utilities under impartially applied terms and conditions on a first-come, first-served basis .... The incumbent utility may only restrict access to a

[29] *See, e.g*, I.18-07-008 (investigation into the failure of PG&E to provide the 24-hour notice required in its Electric Rule No.8 A.2 Tariff prior to residential service disconnections between July 1 and July 18, 2016); D.16-08-020 (finding PG&E failed to comply with applicable law and regulations in maintaining accurate records of its natural gas distribution system); I.15-11-015 (investigation into PG&E's failure to timely report *ex parte* communications and for engaging in improper *ex parte* communications in violation of various Commission rules and statutes.). D.15-04-024 (citing violations of PG&E associated with September 9, 2010 San Bruno pipeline explosion).

[30] As provided by Section 224(c) of the Communications Act of 1934, as amended ("Act"), this Commission has adopted rules governing utility pole attachment rates, terms, and conditions and has certified to the Federal Communications Commission ("FCC") that it has asserted authority to regulate these issues. Pub. Util. Code § 767 grants this Commission authority to order a utility to grant access to its right of way to another utility as necessary in the public convenience and necessity. *See* 47 U.S.C. §§ 224(c)(1), (c)(2) and (c)(3). ROW Decision, Conclusion of Law ¶ 3 (adopting rules pursuant to Section 224 and certifying that the Commission has asserted jurisdiction over pole attachment matters). *See also Corrected List of States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 07-245, Public Notice, DA 08-653 (rel. Mar. 21, 2008).

> particular facility or may place conditions on access for specified reasons relating to safety or engineering reliability.[31]

Despite the fact that there are references to leases, licenses, and permits, in other sections of the ROW Decision, Section III.C.2 provides no such reference, instead only referring to nondiscriminatory access. This makes sense in light of the broader purpose of the ROW Decision, which was "to open the local exchange market within California to competition."[32] If the Commission limited the definition of "access," it would have impeded certain telecommunications business models from emerging in a competitive market, and created a second-class tier of access for competitive carriers that limits their rights of access and requires CLCs to be forever subservient to incumbent pole owners.

2. *Rather, PG&E has effectively admitted that the ROW Decision applies to the pole access through purchase.*

PG&E has effectively admitted that the ROW Decision applies to pole access through purchase. Notably PG&E has admitted on the record that it could not condition sale of space to Crown Castle on its obligation to assume tenant management responsibility because that sort of restricted-sale requirement itself would violate the ROW Decision. PG&E also expresses concern about selling to different carriers on different terms for fear it "perpetuates discriminatory treatment."[33] Undoubtedly, PG&E is referring to the discriminatory treatment barred under the ROW Decision. This further demonstrates that despite its rhetoric about the ROW Decision not applying to access through purchase, PG&E, rightly, understands that the ROW Decision governs pole access through purchase.

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[31] ROW Decision, 1998 Cal. PUC LEXIS at *30-*31 (emphasis added).

[32] ROW Decision, 1998 Cal. PUC LEXIS at *1.

[33] Ex PG&E-1, at 10:5-7 (De Teresa Rebuttal Testimony).

Consequently the issue is straightforward—to the extent that PG&E continues to offer pole space for sale to other utilities (which is has to date), it must comply with the ROW Decision in provision of that sale and not propose novel sale requirements that are anti-competitive or discriminatory in nature. The ROW Decision anticipates telecommunications companies using one foot of space (although it does not limit the amount of available space for attachments).[34] Nowhere in the ROW Decision is it discussed or contemplated that incumbent pole owners may require attachers, as a condition of access, purchase a greater amount of space than necessary for their deployments. And nowhere in the ROW Decision is it contemplated that incumbent electric utilities have the right to transfer their pole management responsibilities to an attacher.

3. *PG&E makes several irrelevant and inapplicable arguments seeking to restrict the access rights set forth in the ROW Decision.*

PG&E contends: "the Commission recognized the pole owners' constitutional rights under the Fifth Amendment and emphasized that the ROW requirements did not constitute an 'unlawful taking.'"[35] Crown Castle does not dispute this position. In fact, the ROW Decision makes clear that requiring access is not a taking:

> "Property ownership rights, however, do not give incumbent utilities unlimited discretion to deny access to telecommunications carriers unilaterally. As noted by the Coalition, public utilities are affected with a public interest and are therefore subject to regulation for the public good."[36]

The Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." In *Hawaii Housing Authority v. Midkiff*, the United States Supreme Court emphasized the deference courts owe to

[34] ROW Decision, 1998 Cal. PUC LEXIS at *88.

[35] PG&E Response at 4.

[36] ROW Decision, 1998 Cal. PUC LEXIS at *139-*140.

legislative determinations of public use—a taking satisfies the constitutional public use requirement if it advances a "conceivable public purpose."[37] Certainly in this case, pole access serves both conceivable and real public purposes associated with the deployment of competitive broadband services. Furthermore, in no way could PG&E argue Crown Castle's pole access is a taking because PG&E is provided with just compensation for the purchase of space on poles in the communications zone.[38] Finally, to the extent PG&E is complaining that Crown Castle's poles amounts to a taking, why would they force the sale of more space than Crown Castle wishes to purchase. They cannot have it both ways.

The PG&E Response also provides an irrelevant reference to a cable advocacy group's comments from 1998 regarding the ROW Decision, in which that group applied the term "use" to how it accesses infrastructure, and tried to expand the definition right-of-way access.[39] The term "use" instead of "access" makes complete sense for that group because cable companies lease rather than purchase space. In no way does that set of comments advance PG&E's position regardless whether ROW Decision is limited to leasing. Rather, the cable group's advocacy in that instance was an attempt to expand the definition of "right of way" as it relates to the type of infrastructure accessed, (for example, poles, duct, and conduit, and not other items like remote terminals and vaults).[40] Crown Castle is not asking to expand the type of infrastructure accessed and thus the cable advocacy group's 1998 comments are irrelevant.

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[37] *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229, 241 (1984).

[38] To the extent PG&E did not feel they were justly compensated, they could seek such compensation from property taken through rate setting before the Commission. *See, e.g*, Mountain Water Co. v. Montana Dep't of Pub. Serv. Regulation, 919 F.2d 593, 601 (9th Cir. 1990) ("Mountain Water [a utility] may seek just compensation for its property taken through rate setting before the PSC.").

[39] PG&E Response at 5, citing ROW Decision, 1998 Cal. PUC LEXIS at *24.

[40] ROW Decision, 1998 Cal. PUC LEXIS at *24-*25.

The PG&E Response focuses on the use of the term "piggyback" by the Commission in describing the federal government's law on access—presumably PG&E's effort to show the definition of "access" is limited to leasing. First, the discussion of "piggyback" in the ROW Decision focuses on the type of structures to which carriers may attach (i.e. poles, duct, and conduit), and not access generally. Moreover, the Commission opted out of the federal regime, so it is unclear why PG&E raises this issue.

Finally, PG&E makes non-sequitur arguments about the ROW Decision analysis of rental pricing, arguing that "the Commission's discussion pertained to annual rental rates between a utility pole owner and a tenant attacher, not one-time sales prices for owner-to-purchaser transactions."[41] Indeed the pricing section of the ROW Decision that PG&E quotes specifically references the annual recurring fee as the price for "third party attachments" and not the price for "access" generally.[42] However, by setting rates for leasing, the Commission did not limit the rights of pole access through purchase. In fact, the Commission has long recognized the fact that the purchase of pole access through one of the state's joint pole associations is an option for competitive carriers to gain access to poles.

B. PG&E's concedes that it cannot condition sale of pole space on assumption of landlord responsibilities.

The second key provision of the Proposed Agreement ensures that PG&E will not require Crown Castle to assume tenant management responsibility in conjunction with the sale of space in the communications zone. PG&E and Crown Castle agreed on the substance of this provision

[41] PG&E Response at 6.

[42] ROW Decision, 1998 Cal. PUC LEXIS at *67.

at the arbitration hearing: "the parties agree that Pacific Gas and Electric Company cannot require Crown Castle to assume tenant management responsibilities on PG&E poles...."[43]

There is good reason why PG&E should retain tenant management responsibilities when selling space to Crown Castle. PG&E already has a department devoted to utility pole leasing—in fact, as stated by PG&E's witness, the PG&E department governing leasing is the same department and personnel devoted to sale of pole space.[44] Conversely, requiring Crown Castle to be a landlord is problematic for three key reasons:

- Leasing Agreements: If Crown Castle took on tenants, it would be beholden to existing leasing agreements that PG&E entered into with tenants. As an initial matter, such agreements may not be assignable from PG&E to Crown Castle without the consent of the existing tenant. Moreover, even if assignable, PG&E's negotiated agreements may not align with Crown Castle's standard for indemnification, insurance etc. It would be manifestly unfair and harmful to Crown Castle's business (and thus in turn to its ability to provide safe and reliable service to its customers) to force Crown Castle to take on another company's agreement.[45] If Crown Castle were to initiate new negotiations with these tenants, it isn't clear what rights Crown Castle would have in these negotiations where existing tenants have an established right of access under existing terms in place today.

- Impedes Competition: 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.[46] Requiring one competitive provider to lease space to its competitors raises a host of competitive issues, including but not limited to the fact that an application to attach would in effect reveal a carrier's business plans to competitors. Moreover, tenant access is not afforded all of the rights guaranteed to joint pole owners for timely pole access, repair and pole replacement. PG&E's tenant shifting policy is thus antithetical to the Commission's goals of fostering competition and broadband deployment.[47]

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[43] 11/28/18 Tr. at 13: 23-27.

[44] 11/29/18 Tr. at 45:10-13 (PG&E/Teresa) ("I govern different parts of the Joint Pole Organization which include a joint pole management tenancy as well as owner to owner.").

[45] Ex. 1, at 9 (Scandalis/Crown Castle Testimony).

[46] ROW Decision, 1998 Cal. PUC LEXIS at *38.

[47] Ex. 1, at 9 (Scandalis/Crown Castle Testimony); Pub. Util. Code § 709 (stating the policy of "rapid implementation of advanced information and communications technologies); *see also* ROW Decision, 1998 Cal. PUC LEXIS at *156 ("We recognize, that the development of a competitive telecommunications infrastructure...by CLCs are important to the health of California's economy.").

- Business Model: Crown Castle's business is focused on the deployment of competitive broadband services, not managing tenants on PG&E's utility poles.[48] This is in contrast to PG&E, which has personnel and business processes already in place, dedicated to managing tenants. PG&E has managed tenants in the communications zone for at least 20 years and the cost of the management has been included in its rate base before this Commission. If competitive carriers were required to assume this responsibility for all incumbents, it would create an additional cost and hurdle for the deployment of competitive services.[49]

PG&E states that it "does not believe that requiring Crown Castle to serve as a nondiscriminatory landlord similar to AT&T would pose any competitive issues." However, as discussed below, this line of reasoning sidesteps the issue before the Commission, regarding PG&E's responsibility as an incumbent pole owner under the ROW Decision, completely ignoring the historical distinctions in responsibilities between incumbents and competitive carriers - previously decided by the Commission, and the practical and policy issues implicated.[50]

PG&E also raises the fact that Crown Castle has an entirely separate business whereby it leases space on cell towers in its argument that Crown Castle should assume tenant management responsibility of PG&E's telecommunications tenants.[51] It is not clear how this is relevant, given that the management of cell towers is not the subject of this case. Rather "poles and cell towers are vastly different structures. They are regulated by different agencies. The business model and reason for attachments are completely different, and the personnel managing network are completely different."[52]

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[48] Crown Castle Ex. 1, at 9:5-6 (Scandalis Testimony).

[49] *See* Crown Castle Ex. 1, at 9:7-9 (Scandalis Testimony) and Attachment 1, PG&E Responses to Data Requests 1-16 and 1-17.

[50] *See* Section IV.C.

[51] Although even PG&E seems to recognize that comparing leasing of cell towers to leasing of utility poles is a false comparison and inapposite. PG&E/De Teresa 11/29/18 at 93 ("Q. So you understand that a cell tower is not the same structure as a utility pole, correct? A. Correct.").

[52] 11/29/18 Tr. at 40:11-16 (Crown Castle/Scandalis).

Finally, PG&E proposes a novel transfer process for its existing and future tenants, where Crown Castle as "[t]he purchaser is to … send a letter of intent to the preexisting tenant(s). If the preexisting tenant(s) would like to remain on the pole, then the purchaser would enter into a *new* licensing agreement with the preexisting tenant(s)."[53] PG&E does not cite to a licensing agreement, law, or internal policy that governs the proposed tenant transfer process. Rather, PG&E appears to be making this process up from thin air. In fact, the plain terms of PG&E's Licensing Agreement show that consent from the lessee would be required prior to transfer. Section 1.4 of the License Agreement, states four exceptions when PG&E may transfer the License Agreement to a purchaser without consent of the "permitee" (lessee), and none of the exceptions are applicable to a scenario in which PG&E sold the communications zone to Crown Castle.[54] Importantly, PG&E's disregard for the importance of uninterrupted access for competitive telecommunications providers is telling.

C. PG&E must provide access through purchase of the available requested space on the pole.

The Proposed Agreement seeks to ensure that PG&E will sell to Crown Castle the amount of available space requested by Crown Castle, as required under the ROW Decision. As of September 2018, PG&E denied at least 82 requests for access, which means that there are several hundred poles in limbo.[55] In these cases, PG&E has issued denials even where there is available space.[56]

Even more problematic, these denials are inconsistent. During the Arbitration Hearing on November 28, 2019 parties came to agreement that PG&E's practices have been applied

[53] Ex. PG&E-1 at 14:4-7 (emphasis in original) (De Teresa/PG&E Rebuttal Testimony).

[54] Ex. PG&E-2, at Section 1.4, PG&E Licensing Agreement.

[55] Crown Castle Ex. 1, at 5:2-5 (Scandalis Testimony).

[56] Crown Castle Ex 3.

inconsistently: "The parties also agree that Pacific Gas & Electric Company has permitted Crown Castle and other entities (besides AT&T) to purchase less than six feet of space."[57] Indeed, Crown Castle Exhibits 04 and 05 both show instances in which PG&E has approved Crown Castle's requests for purchase of less than the entire communications zone. According to PG&E, there could be several hundred instances in which it has sold less than the entire communications zone.[58] And it appears from PG&E's testimony that it may continue to apply its terms of sale inconsistently.[59]

Although PG&E describes its requirement to purchase the entire communications zone as a "policy"—PG&E has admitted that it has no written documentation of this "policy" in any internal policy documents, despite the fact that PG&E does generally document operational procedures in written internal policies.[60] PG&E's unwritten and inconsistent application of its policy is highly problematic and suggests discriminatory practices for selling space on poles.

PG&E's practice of denying access for not purchasing the entire communications zone is quite unusual and appears to be unique to PG&E. Indeed, Crown Castle has purchased space on thousands of poles in the communications zone throughout the State of California from other electric utilities, including Southern California Edison, and various publicly-owned utilities without having had that purchase conditioned on Crown Castle having to agree to become the

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[57] 11/28/18 Tr. 13-14; *see also* 11/29/18 Tr. at 57:19-22 (PG&E/De Teresa): "Q. And there have been instances where PG&E has not sold the entire communications zone, correct? A. I believe so, yes."

[58] 11/29/18 Tr. at 58:26 to 60:9 (PG&E/De Teresa): "Q....how many poles in this state have had a differing sale of interest than your normal practice?...A. I do not know the exact number... under 500."

[59] 11/29/18 Tr. at 62:3-7 (PG&E/De Teresa): "That's why it's really important that that engineer review and do the full assessment as required by the Form 2 because each one [sell of communications zone space] is a case-by-case contract."

[60] 11/29/18 Tr. at 56:11-19 (PG&E/De Teresa): "Q. Does PG&E have an internal policy documents that describe this practice of selling the entire communications zone?...A. No, I don't believe there's a document...Q. And are there any policy documents regarding the operations of the company?...A. Yes."

landlord for all current and future tenants in the communications zone.[61] Even PG&E acknowledges that other utilities do not administer this problematic "policy."[62]

PG&E could identify a single instance when a CLC has agreed to purchase the entire communications zone on one of its poles, even though it did mention other CLCs do purchase space on poles.[63] Indeed, it seems PG&E has only recently decided to enforce this policy and it is unlikely any CLC has agreed to such terms, due to the limited market power associated with market entry for competitive carriers. PG&E has admitted that their discriminatory policies have no backing in law or joint pole association procedures[64]—it's merely a business practice they have chosen—and since it is a choice they could also choose to provide access, in a consistent with state policies and the Commission's rules.

D. PG&E cannot deny Crown Castle access by purchase without safety or reliability rationale, or other lawful basis.

The final provision of the Proposed Agreement address the fact that PG&E cannot deny Crown Castle's request for access by purchase without providing Crown Castle a safety or reliability rationale, or other lawful basis. The ROW Decision allows denial of access "only on consistently applied nondiscriminatory principles relating to capacity constraints, and safety, engineering, and reliability requirements."[65] PG&E has not, in any of the denials at issue in this case, articulated a safety or reliability, or any other valid reason for its denial—rather the denials

[61] Crown Castle Ex. 1, at 4:23-27 (Scandalis Testimony).

[62] 11/29/18 Tr. at 83:5-9 (PG&E/De Teresa): "Q. Are you aware that Southern California Edison does not require the purchase of the entire communications zone when it sells space on poles? A ... yes."

[63] 11/29/18 Tr. at 109:22 to 110:4 (PG&E/De Teresa).

[64] 11/29/18 Tr. at 54:1-22 (PG&E/De Teresa): "Q. Are you aware of any language in that [NCJPA] handbook that requires the sale of the entire communications zone?...A. I have not seen that exact language....Q. And are you aware of any language in the right-of-way rules that require purchase of the entire communications zone -- sorry -- require the sale or purchase of the entire communications zone when that – when there's a transaction in that space? A. Specifically I am not."

[65] ROW Decision, Appendix A, Section VI.A.

issued to Crown Castle contain requirements to purchase more space than requested and/or taking existing tenants.[66] Moreover although PG&E states that an engineer reviews all requests for attachment, PG&E has not provided a single reason why the engineer's review could not facilitate the purchase of a partial amount of the communications space. Indeed when asked the question directly, PG&E had no response.[67] PG&E admits that it has offered no examples in its testimony of any safety or reliability issues that might warrant denial of Crown Castle's requests for access.[68]

IV. PG&E'S NEW, STATED PRACTICE TO DENY CROWN CASTLE ACCESS THROUGH PURCHASE IS DISCRIMINATORY AND UNLAWFUL.

Rather than choosing to abide by the Commission's rules, PG&E instead proposes to deny access by purchase to Crown Castle while still selling access to Crown Castle's competitors[69] This, of course, is in direct contradiction to PG&E's stated "core business practice" of not "giving preferential treatment."[70]

A. Crown Castle seeks nondiscriminatory access in the same manner PG&E has previously sold pole space, and not preferential treatment.

Importantly, PG&E has admitted that they cannot discriminate in the sale of pole space.[71] But PG&E also admitted that it has sold less than the entire communications zone to Crown Castle and others.[72] These are not isolated events—in fact we don't know how often PG&E has

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[66] Crown Castle Ex.3.

[67] 11/29/18 Tr. at 81:8-14 (PG&E/De Teresa): "Q. what does the engineer's review have to do with...with the requirement to purchase the entire communications zone? A. I don't know that answer specifically."

[68] 11/29/18 Tr. at 96:24-27 and 96:28 to 97:2 (PG&E/De Teresa).

[69] 11/29/18 Tr. at 49:1-3 (PG&E/De Teresa): "Q: But you would continue selling space to certain utilities, correct? A: To ILECs."

[70] 11/29/18 Tr. at 82:10-13 (PG&E/De Teresa).

[71] Ex. PG&E-1 at 10:5-7 (De Teresa Rebuttal Testimony).

[72] *See* Section III.D.

sold partial communications space to carriers.[73] Moreover, the fact that PG&E has entered those deals, and presumably manages those poles safely, demonstrates that this form of access is a workable option for PG&E.

B. PG&E's denial of access would impede Crown Castle's ability to provide superior reliable service and compete on a level playing field.

PG&E's denial of access is especially problematic because pole ownership allows stronger rights, more control, and certainty with respect to pole attachments—attributes that are necessary and desirable for Crown Castle to deploy broadband infrastructure for its wireless carrier customers. Below are some of the key ownership benefits that Crown Castle seeks in order to provide a superior, reliable broadband service:

- Customers Require Reliable Service: In order to provide reliable service- indeed industry standards of service reliability. Crown Castle must be able to repair its equipment without delay; as an owner Crown Castle has that right. However, as a tenant Crown Castle must provide PG&E with at least 48 hours advance notice before permitting any work.[74] If Crown Castle were unable to commit to resolve infrastructure issues immediately (as is the case in leasing arrangements), it would negatively impact Crown Castle's business and provision of service to its carrier customers.[75]
- Insight and Authority Over Other Attachers on Pole: Pole owners have insight into requests for pole attachments and have the right to comment on/object to such requests.[76] This in turn helps Crown Castle ensure that facilities added to poles where it has an interest are attached in a safe manner that does not impact its own facilities or the underlying structural integrity of the pole.[77]

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[73] *Id*.

[74] PG&E Overhead Facilities License Agreement, § 4.2: "Permittee shall provide the Company forty-eight (48) hours advance notice by calling the Company's designated representative before any work is performed on the Company Overhead Facilities when an electric service shutdown is not required."

[75] Crown Castle Ex. 1, at 7 (Scandalis Testimony).

[76] NCJPA, § 4 ("Purchase or sale of interest in a pole or anchor shall be initiated on a Preliminary Joint Pole Authorization (Form 2), and shall be approved by all owners of record."); NCJPA, §17.0 ("The owner making space available to a non-owner is required to notify the other owner(s) on a JPA Form 2."); *see also* Ex. 1 at 7 (Scandalis/Crown Castle Testimony).

[77] *See* Ex. 1, at 8 (Scandalis/Crown Castle Testimony).

- Pole Replacement: Pole owners may initiate a pole replacement when necessary to ensure facilities are upgraded when necessary.[78] Tenant requests for pole upgrades are a low priority for incumbent pole owners. The ability to facilitate pole replacement both promotes safety and makes it easier for Crown Castle to serve its customer's needs.[79]

- Rearrangement: Tenants are subject to being moved up and down the pole per the direction of the owners, whereas an owner can buy a specific location on the pole and generally stay in that position[80]—this is especially important for wireless attachments that depend on specific positions designed by engineers with exacting to ensure optimal propagation.[81]

- Processing Time: the JPA process includes a 45 days approval process as PG&E concedes, leasing has no similar requirement.[82] Indeed, Crown Castle's experience as a tenant attacher is that approvals can take significantly longer, and with not recourse to ensure timely access. This is important because Crown Castle is growing at an exponential rate and cannot meet the demand for its services without appropriate and standard deployment timeframes.[83]

  Indeed, PG&E does not deny that ownership provides benefits not available to tenants:

> Q. Crown claims that if it attaches to PG&E's poles as a tenant Crown would (1) need to provide PG&E with 48 hours advance notice prior to performing work on poles; (2) be excluded from a 45-day-deemed approve provision; (3) have less insight and authority over other attachers on the pole; (4) lack the ability to initiate a pole replacement; and (5) be subject to rearrangement by the pole owner...In your testimony you don't disagree with any of these claims, do you?...

[78] *See* NCJPA Routine Handbook, § 7.0 ("Replacement may be made at the request of any Member, and adjustment as to sales, salvage, pulling, transportation, and transfer costs shall be at current prices as per date of replacement.").

[79] Ex. 1, at 8 (Scandalis/Crown Castle Testimony).

[80] *See* NCJPA Routine Handbook, § 10.0 ("No owner is authorized to undertake any rearrangement work on a jointly owned pole except by Joint Pole Authorization (JPA) approved by other owner's thereof."). *See also* Ex. 1, at 8 (Scandalis/Crown Castle Testimony).

[81] Ex. 1, at 8 (Scandalis/Crown Castle Testimony).

[82] *See* NCJPA Routine Handbook, § 3.0 (45 days, deemed approved); *see contra* ROW Decision, Appendix A, IV(B) ("A utility shall respond in writing to the written request of a telecommunications carrier or cable TV company for access ("request for access") to its rights of way and support structures as quickly as possible...."). The term "quickly as possible" is not defined and provides no guarantee at pole access in expeditious manner. *See* Ex. 1, Attachment 1, PG&E Response to Data Requests, 1-19 (Scandalis/Crown Castle Testimony). PG&E has stated in discussions that it aims to address tenant requests for access within 45 days but PG&E has provided no guarantee of such a timeframe.

[83] Ex. 1, at 8 (Scandalis/Crown Castle Testimony).

A. No....[84]

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Q....the need to provide PG&E with 48 hours advance notice prior to performing work on poles, is this an obligation of tenancy that would not be an obligation if Crown was an owner?...

A. The answer is yes.[85]

Deploying superior reliable broadband service to carrier customers, and the construction, operation and maintenance of pole infrastructure in a safe manner make ownership necessary for Crown Castle. These goals fit squarely within the California's stated goals of encouraging safe and reliable broadband deployment in a competitive telecommunications market.[86]

C. PG&E's reasoning for denying Crown Castle access, to avoid "discriminatory" implications, is flawed and fails to address long-standing telecommunications policies.

PG&E states that "purchasing one-foot of pole space would have serious discriminatory implications, considering that PG&E, for years, has offered terms of sale to AT&T that require the purchase of the entire communications zone."[87] This statement is flawed in several respects. First, there is no evidence that AT&T has in all instances purchased the entire communications zone—indeed, given PG&E's inconsistent practices, it's conceivable that AT&T has purchased less than the communications zone in certain instances. Second, this agreement between AT&T and PG&E appears to have been a commercially negotiated arrangement between two incumbent

[84] 11/29/18 Tr. at 83:19 to 84:10 (PG&E/De Teresa).

[85] 11/29/18 Tr. at 87:14-21 (PG&E/De Teresa).

[86] *See* Pub. Util. Code § 451 ("Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities ...."); Pub. Util. Code § 709 ("The Legislature hereby finds and declares that the policies for telecommunications in California are as follows...To encourage the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services.").

[87] Ex. PG&E-1 at 10:21-24 (De Teresa/PG&E Rebuttal Testimony).

infrastructure owners with similar bargaining power. There is nothing on the record entered this agreement to purchase the entire communications zone, but just because AT&T made that choice at some point to purchase the entire communications zone does not make that deal acceptable for all carriers. Crown Castle is not asking for access according to this arrangement. Rather, Crown Castle seeks access, in accordance with the nondiscriminatory terms of the ROW Decision, and which the record reflects has been sold to other CLCs by PG&E. Third, Crown Castle does not necessarily seek one-foot of space. There may be instances where it would purchase the entire communications zone, for example when attaching its nodes. Rather, Crown Castle seeks the amount of available space requested.

Fourth, PG&E's statement fails to acknowledge the Commission's intentional policies to assign different obligations as between CLCs and ILECs, even where assigning the same rights. In PG&E's testimony, it refers to the option of selling 1 foot of pole space to Crown Castle as "discriminatory." PG&E, however, disregards that the Commission already considered the different obligations as between CLCs and ILECs and concluded different treatment was reasonable.

> "We conclude, that by virtue of their incumbent status and control over essential ROW and bottleneck facilities, the local exchange carriers (LECs) and electric utilities have a significant bargaining advantage in comparison to the CLC with respect to ROW access."[88]

Indeed, the Commission intentionally chose to require ILECs, like AT&T, to provide access to cable companies while not requiring the same obligation for CLCs: "Similarly, we shall not require CLCs to provide access to cable companies. We shall thus limit the obligations to

[88] ROW Decision, 1998 Cal. PUC LEXIS at *80.

provide access to cable companies to the ILECs and electric utilities...."[89] Importantly, this provision of the ROW Decision only comes into play here because PG&E fails to acknowledge the focus of the ROW Decision on the provisioning access to the available space needed (typically one foot).[90] Rather than PG&E bringing its pole access "policy" in compliance with ROW Decision by refusing to sell pole space to Crown Castle, PG&E should (as already demonstrated) revise its "policy" to sell to Crown Castle only the amount of space needed for Crown Castle's deployments (which would obviate the need for tenant shifting).

The Commission has noted that "[c]ompetitive bottlenecks and barriers to entry in the telecommunications network limit new network entrants and may raise prices for some telecommunications services above efficiently competitive levels."[91] PG&E's denial of access to Crown Castle, while continuing to provide access to Crown Castle's ILEC competitors, is a prime example of a "competitive bottleneck" that should be addressed by adopting Crown Castle's Proposed Agreement.

V. PG&E'S ATTEMPTS TO DISTRACT FROM THE FOCUS OF THIS ARBITRATION ARE UNAVAILING.

A. PG&E's Overhead License Agreement is irrelevant to PG&E's denial of access by purchase.

The focus of this proceeding is PG&E's (i) unlawful practice of denying Crown Castle's requests for pole access by purchase, without valid rationale; and (ii) failure to provide nondiscriminatory access to Crown Castle for the space requested to install its facilities (without

[89] ROW Decision, 1998 Cal. PUC LEXIS at *38. Additionally, federal schema was specifically designed to require incumbent utilities to lease space to their competitors for a variety of reasons, including the fact that monopoly ratepayer dollars paid to construct that infrastructure. No such obligation was placed on competitive providers.

[90] ROW Decision, 1998 Cal. PUC LEXIS at *88.

[91] D.16-12-025, at 3.

requiring purchase of unnecessary space or requiring Crown Castle to manage PG&E's tenants). Yet states that it " ... satisfies the nondiscriminatory access requirements of the ROW Decision through PG&E's Overhead Facilities License Agreement...."[92] However, this is red herring because the case has never been about lease access, so it is unclear why PG&E now attempts to make leasing the focal point of this proceeding. PG&E's Licensing Agreement does not resolve the dispute for Crown Castle because the terms proposed do not contain the key ownership provisions for Crown Castle to deploy a superior reliable broadband network under nondiscriminatory access terms.

Importantly, nowhere in the ROW Decision does it say that a valid license agreement cures other instances of unlawful denial of access. Moreover, at no point in this proceeding has Crown Castle questioned the validity of the PG&E Overhead License Agreement. Any focus on this agreement distracts from the important issues in this proceeding.

Finally, when introducing its Licensing Agreement in its testimony, PG&E notes: "San Diego Gas and Electric Company (SDG&E) does not allow joint-ownership of the pole structures it owns, rather choosing to only allow access and attachment by license agreement."[93] However, the fact that SDG&E offers tenancy exclusively through lease is irrelevant because PG&E does not exclusively offer access by tenancy. SDG&E and PG&E access models are like apples and oranges Crown Castle's witness fully admits that: "[s]ince ownership is not an option with San Diego Gas and Electric, we do attach to their poles through tenancy."[94] In this manner SDG&E provides nondiscriminatory access to all CLCs. However, PG&E offers a joint

[92] Ex. PG&E-1 at 1:21-22 (De Teresa Rebuttal Testimony).

[93] Ex. PG&E-1 at 11:3-6 (De Teresa Rebuttal Testimony).

[94] *See* 11/29/18 Tr. at 38:28 to 39:2 (Crown Castle/Scandalis).

ownership option and to the extent ownership access is offered, such access must be in accordance with the ROW Decision and provided on a nondiscriminatory basis.

B. PG&E advocacy to amend the ROW Decision is out of scope and unnecessarily distracts from the important issues in this proceeding.

PG&E also attempts to distract from the issues in this proceeding by seeking amendment to the ROW Decision.[95] However, by its own admission, such actions are outside of the scope of this docket and simply an attempt to obscure the issues at hand.[96]

Moreover, to the extent PG&E is concerned about this issue, it has taken no steps toward filing such a petition and this issue is not within the scope of the Rulemaking docket, R.17-06-023, referenced by PG&E. Nor have any cable companies or CLCs (entities that would be directly impacted by any such rule changes) raised this issue in that Pole OIR docket. Even if this issue of tenant management was within scope of that docket or filed in a petition, it is not an industry-wide issue. Rather PG&E appears to be the only utility in the state that has conditioned access on tenant shifting.[97] Moreover it appears that most CLCs do not have the same business model as Crown Castle, instead relying on rights to lease instead of purchasing access.

Even if the tenant management issue was fit for a rulemaking, such a proceeding could run for more than a year (and possibly many years)—showing that PG&E advocacy to amend is speculative, and seemingly an attempt to impede resolution of this urgent issue. Moreover, PG&E's recommendation is misguided given that CLCs, like Crown Castle, are generally not structured to manage tenants, and there are important historical and policy rationales for applying separate obligations to CLCs and ILECs, as discussed above.

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[95] *See* PG&E Response at 11-12.

[96] *See* PG&E Response at 12-13.

[97] Section III.C.

VI. THE BURDEN OF PROOF IS ON PG&E.

The ROW Decision is clear: "In the event that the Commission must resolve disputes over access rights, the burden shall be on the incumbent to justify any claims asserted in defense of its refusal to permit access."[98] Clearly, PG&E as the incumbent has the burden to justify its refusal to permit access.

PG&E mistakenly states that Crown Castle retains the burden of proof, based on a burden of proof standard set forth in the "Rules and Tariffs" section.[99] The text of the ROW Decision, as PG&E points out, states: "The burden of proof shall be on the party advocating a departure from our adopted standards in prevailing in a disputed agreement." Since this is the first fully litigated expedited dispute resolution, there are necessarily no adopted standards. More importantly, Conclusions of Law ("COL") 80 states the same language from the body text, but in a more comprehensive and instructive manner:

> "The burden of proof should generally be on the party which asserts that a particular constraint exists which is preventing it from complying with the proposed terms for granting ROW access."[100]

Crown Castle is not "granting" (or denying) access here, rather PG&E has refused to grant access and therefore PG&E must shoulder the burden of proof.

VII. THE EXPEDITED DISPUTE RESOLUTION RULES ARE DESIGNED SPECIFICALLY FOR THE DISPUTE AT HAND AND ENSURE CROWN CASTLE'S DESIRED POLE ACCESS.

Crown Castle acknowledges that this is the first fully-litigated expedited dispute resolution proceeding brought under the ROW Decision, and that the Commission may have

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[98] ROW Decision, 1998 Cal. PUC LEXIS, at *31.

[99] *See* PG&E Response at 16-17.

[100] ROW Decision, 1998 Cal. PUC LEXIS at *208 (Conclusion of Law No. 80).

challenges dealing with the ambiguities of the ROW Decision language. Regardless, this arbitration proceeding is most certainly the proper venue for Crown Castle to bring this dispute. Indeed, Crown Castle has continually sought to find a mutually agreeable solution throughout the entire process, including the final day of the arbitration hearing.[101] As stated above, it appears that a petition or rulemaking would be an inappropriate to address this narrow dispute between Crown Castle and PG&E.[102] Further, it appears the Commission does not believe that the present dispute would be appropriate as a complaint proceeding or arbitration, but must be addressed through the expedited dispute resolution process.[103] Finally, because this is the first expedited dispute resolution under the ROW Decision process, the outcome of this proceeding will send a strong message to other CLCs as to whether the Commission intends to use this process to ensure a competitive market and deployment of advanced telecommunications facilities envisioned by the ROW Decision.[104]

VIII. CONCLUSION

For the reasons stated above, Crown Castle requests the Commission to order PG&E to: (i) sell to Crown Castle the amount of available pole space requested for installing facilities (without requiring purchase of unneeded space); and (ii) cease its unlawful practice of denying Crown Castle's requests for pole access by purchase, without valid rationale. To memorialize

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[101] *See* 11/29/18 Tr. at 21:2-5; Crown Castle Ex.1 at 9:16 to10:16 (Scandalis Testimony).

[102] Section V.B.

[103] D.18-09-016 at 5 ("[W]e conclude that while parties to initial pole access disputes may submit their dispute to the Commission only through the expedited arbitration process, parties to other types of pole access disputes (where access to the utility pole(s) has already been secured) may, at their option, bring their dispute before the Commission through arbitration or through the Commission's complaint process.").

[104] *See* ROW Decision, 1998 Cal. PUC LEXIS at *156 ("[T]he development of a competitive telecommunications infrastructure and deployment of alternative facilities to customers' premises by CLCs are important to the health of California's economy.).

the resolution of these issues, Crown Castle asks that the Commission approve its Proposed Agreement.

Respectfully submitted December 11, 2018 at San Francisco, California.

/s/

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