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

COMMENTS OF CROWN CASTLE NG WEST LLC (U-6745-C) ON DRAFT ARBITRATOR'S REPORT

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Pursuant to California Public Utilities Commission (the "Commission") Decision 98-10-058 ("ROW Decision"), and the *Assigned Commissioner's Scoping Memo and Ruling* ("Scoping Memo") issued December 10, 2018, Crown Castle NG West LLC (U-6745-C) ("Crown Castle") respectfully submits these comments on the *Draft Arbitrator's Report* ("Draft Report") issued December 19, 2018.

The Draft Report inexplicably condones PG&E's unlawful practice of denying Crown Castle's requests to purchase pole space. These denials run directly contrary to the ROW Decision, which sets forth requirements to remove barriers to pole access and telecommunications competition for competitive carriers. The practical ramifications of PG&E's denials are negative and far reaching—not only undermining Crown Castle's business and unnecessarily forcing costs and obligations to Crown Castle, but also slowing broadband deployment, erecting barriers to superior reliable service, and creating an unlevel playing field. To remedy these harms, the Commission should revise the conclusions of the Draft Report and adopt an order directing PG&E to: (i) sell to Crown Castle the amount of available pole space requested for attaching equipment without requiring purchase of unneeded space, or conditioning 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. Ensuring that Crown Castle may obtain nondiscriminatory pole access is important for the health of a competitive telecommunications industry in California. Crown Castle is a rapidly growing telecommunications carrier in the State that relies on reasonable terms and conditions to provide a host of competitive telecommunications and broadband services to enterprises, schools, libraries, and medical institutions in California as well as wholesale services to other wireline and wireless carriers providing broadband in the State.[1]

I. SUMMARY

The Draft Report appropriately recognizes that the Commission has jurisdiction to ensure Crown Castle is able to purchase the space it needs (typically, 1 foot) to attach its equipment on PG&E poles, yet fails to exercise that jurisdiction. This failure to exercise jurisdiction harms Crown Castle's business and the competitive telecommunications market, and also devalues the expedited dispute resolution process set forth in the ROW Decision by sending a message that the Commission will not intervene to ensure competitive pole access.

The Draft Report is especially problematic given that the record establishes that PG&E has historically sold attachers only the space needed to attach their equipment, as recently as this year. PG&E's refusal to continue its practice of selling to Crown Castle the space it needs to attach is unduly discriminatory and anticompetitive. Moreover, the Draft Report's conclusion not to act, without explanation, is arbitrary and capricious.[2]

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[1] *See* Crown Castle Ex. 1, at 2:3-24 (Scandalis Testimony).

[2] Pub. Util. Code § 1757(a); *Woodbury v. Brown-Dempsey*, at 108 Cal.App.4th 421 (2003) (if agency interpretation of a law or regulation is "arbitrary and capricious," that action constitutes an abuse of discretion").

Although acknowledging that the Commission must balance opposing interests in reaching a decision, the Draft Report fails to correctly do so. Instead, the Draft Report attributes nearly all weight to PG&E's choice to employ a preferred sales practice—a practice PG&E has claimed as long-standing, but which the record established is undocumented, inconsistently employed, and driven by administrative convenience rather than any concerns regarding safety or reliability. The Draft Report gives no apparent weight to the extensive evidentiary showing that Crown Castle's ability to manage its own infrastructure and purchase only the space requested to attach equipment is critical to providing superior reliable service for its customers, supporting rapid deployment of broadband, and competing in a highly competitive markets—all of which align with goals the Commission is legislatively mandated to follow.

The Draft Report also accepts the false dilemma presented by PG&E that selling less space to Crown Castle than it does to incumbent local exchange carriers ("ILECs") would be unreasonably discriminatory. This position ignores the facts that: (i) PG&E has no consistent sales policy; (ii) even if PG&E did sell under different terms as between ILECs and competitive local exchange carriers ("CLCs"), such differential treatment is reasonable as it is grounded in deep practical, historical, legal, and policy reasons; and (iii) even if selling to Crown Castle was unreasonably discriminatory, there are alternative means (other than forced tenancy) to resolve the discrimination issue that would better serve the public interest.

Finally, the Draft Report champions PG&E's inapt position that its lease somehow resolves PG&E's discriminatory and anticompetitive practices.[3] Importantly, nowhere in the

[3] Draft Report at 1 ("PG&E satisfies its responsibility under D.98-10-058, 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, which the Commission has accepted as nondiscriminatory.") (footnotes omitted); *id.* at 9 ("[T]he 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.").

ROW Decision does it say that a valid lease option cures other instances of unlawful denial of access. Moreover, PG&E's lease does not contain the advantageous ownership provisions for Crown Castle to rapidly deploy a superior reliable broadband network on a level playing field.[4] While Crown Castle does attach as tenant where pole owners (like SDG&E) do not sell space to any carriers, in those situations Crown Castle is able to compete on an even playing field because competitors also do not obtain the benefits of ownership—this stands in contrast to PG&E's most recent pivot to deny all CLC (but not ILEC) purchase requests. By focusing on the PG&E lease as the sole option for Crown Castle, the Draft Report overlooks the other attachment options,[5] as well as important issues in the scope of this proceeding. Indeed, requiring sale of only space needed to attach is a valid option, and the right option to achieve California's policy objectives.

II. ANALYSIS

A. The Draft Report acknowledges the Commission's jurisdiction to ensure Crown Castle is able to purchase the space needed to attach facilities, yet fails to exercise that jurisdiction thereby devaluing the arbitration process.

The Draft Report rightly acknowledges that transactions concerning the sale of utility property (such as the transactions at issue between PG&E and Crown Castle here) are within the Commission's jurisdiction.[6] Moreover, the Draft Report correctly indicates that the ROW

[4] *See* Crown Castle Post-Hearing Br. at 25-26 (discussing the numerous reasons PG&E's lease is irrelevant to this proceeding).

[5] The Draft Report does not explain why PG&E could not sell just the space needed to attach equipment (especially because there is no safety or reliability reason for denial of access).

[6] Draft Report at 2 ("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.").

Decision places requirements on the terms of sale for PG&E and Crown Castle.[7] This is the right conclusion, especially because the ROW Decision contemplates CLCs as joint pole owners.[8] However, by denying Crown Castle's request for access by joint pole ownership, the Draft Report sets a precedent that the Commission will not exercise jurisdiction to ensure that pole sales follow rules governing competitive access, especially where doing so requires interpreting the rules.

In this regard, the Draft Report alludes to some ambiguity on whether it would be discriminatory for PG&E to sell space to Crown Castle on different terms than its sale to other incumbent carriers.[9] Rather than interpret the ambiguity and resolve the issue, which would be well within the role of an arbitrator,[10] the Draft Report retreats from ambiguity.[11] 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.[12]

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[7] Draft Report at 5 ("The aspect of the parties' dispute that they have requested the Commission to arbitrate falls squarely within the ROW Decision ....").

[8] *See, e.g.*, ROW Decision, 1998 Cal. PUC LEXIS 879, at *194, Conclusion of Law 20 ("[A] CLC may not arbitrarily deny an ILEC's request for access to the CLC's facilities or engage in discrimination among carriers."); *id*. at *164-65 ("Joint pole associations have traditionally fostered access to and the joint ownership of pole facilities. Membership is comprised of ILECs, CLCs ....").

[9] Draft Report at 7 ("PG&E now contends that offering Crown Castle terms of sale which differ substantially from its terms with AT&T, would itself be discriminatory, 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.") (footnote omitted).

[10] ROW Decision, 1998 Cal. PUC LEXIS 879, at *179-80 ("The ALJ is specifically equipped to resolve contested issues dealing with ... legal matters."); *see also Stasz v. Schwab*, 121 Cal. App. 4th 420, 430 (2004) ("[T]he role that [the arbitrator] exercises is analogous to that of a judge ....") (citation omitted).

[11] Draft Report at 7 ("In the absence of clear guidance from the Commission on this point, it is not appropriate for an arbitrator to clarify Commission policy in this context.").

[12] *See* ROW Decision, 1998 Cal. PUC LEXIS 879, at *175 ("[O]ur adopted rules leave discretion to the parties to negotiate individual agreements, and leave the potential for disputes to arise. We shall therefore

Indeed, the Draft Report recognizes that "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."[13] The present case is an instance when the ROW Decision does not directly address the facts, which is exactly why the expedited resolution process was created[14]—to resolve unique circumstances and not sidestep issues as the Draft Report does. By failing to exercise jurisdiction and ensure nondiscriminatory access, the Draft Report renders worthless the expedited dispute resolution process.

B. Without explanation, the Draft Report rejects Crown Castle's proposal to purchase space needed to attach on the same terms that PG&E historically sold to Crown Castle, and others, as recently as 2018.

As discussed below, the record in this proceeding establishes that PG&E has historically sold attachers—including Crown Castle—only the space needed for attachment on its solely owned poles. Sale of only a portion of the communications zone makes sense given that the ROW Decision recognized the importance of provisioning access to the available space needed to attach (typically one foot).[15] However, the Draft Report rejects, without explanation, Crown Castle's proposal to purchase on the same terms PG&E historically sold pole space.[16] This decision is plainly arbitrary and capricious.

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adopt an expedited procedure for resolving disputes relating to access to ROW and support structures as set forth below.").

[13] Draft Report at 7-8 (footnote omitted) (citing ROW Decision at 12).

[14] *See* notes 12 and 13 above.

[15] *See, e.g.*, ROW Decision, 1998 Cal. PUC LEXIS 879, at *88 ("[T]he total pole space used to support the one foot for communications space, as typically used by an attaching party."). Sales are typically for one foot of pole space, and less than the entire communications zone, because CLC pole installations typically only use one foot of vertical space, whereas the communications zone can measure six feet or more depending on the pole.

[16] Draft Report at 2 ("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.").

During the Arbitration Hearing on November 28, 2018, parties agreed that PG&E has historically sold less than the entirety of the communications zone to attachers: "The parties also agree that Pacific Gas & Electric Company has permitted Crown Castle and other entities ... to purchase less than six feet of space."[17] Indeed, Crown Castle Exhibits 4 and 5 both show instances in which PG&E has approved Crown Castle's requests for purchase of less than the entire communications zone. Even during the course of this proceeding PG&E initiated a pole replacement on a pole jointly-owned by PG&E and Crown Castle, and PG&E did not attempt to force purchase of the entire communications zone or shift its tenant to Crown Castle. According to PG&E, there could be several hundred instances in which it has sold less than the entire communications zone, and without tenant shifting.[18] In fact, PG&E could not identify a single instance when a CLC that requested to purchase space has agreed to purchase the entire communications zone and assume tenant management on a PG&E pole.[19]

It makes sense that PG&E's past practice has been to sell CLCs just the space needed to attach without tenant shifting given that such a practice aligns with utility industry norms. Pole owners throughout the State of California, including other electric utilities, like Southern California Edison, and various publicly owned utilities sell only the space needed to attach, and without requiring the purchaser to assume tenant management for current and future tenants in

[17] 11/28/18 Tr. 13:28-14:3; *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.").

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

[19] 11/29/18 Tr. at 109:22 to 110:1 (PG&E/De Teresa) ("Q. There was a question regarding whether any non-Crown Castle CLECs have ever agreed to purchase six feet of space and assume tenant management responsibility for PG&E's poles. Would you like to clarify your response to that question? A. Yes, that one I did not know.").

the communications zone.[20] Even PG&E acknowledges that its practice of forcing purchase of excess space, and tenant shifting, in pole transactions is unique in California.[21]

C. By rejecting Crown Castle's proposal to purchase space needed to attach, the Draft Report overlooks PG&E's discriminatory and anticompetitive practices, and wrongly shifts the burden of proof to Crown Castle.

Despite ample evidence, the Draft Report does not acknowledge that PG&E's purported new policy of denying request to purchase space that PG&E historically sold is unduly discriminatory and anticompetitive. The ROW Decision states that: "In resolving disputes over ROW access, the burden of proof shall be on the incumbent utility ... to show [their restrictions or denials] are not unduly discriminatory or anticompetitive."[22] A denial is unduly discriminatory if the restriction of access does not relate to "capacity constraints, and safety, engineering, and reliability requirements."[23] As shown above, and previously in this docket,[24] PG&E's denial of Crown Castle's requests to purchase space on the same terms that PG&E has historically sold it is unduly discriminatory—there is a lack of consistency in its terms of sale and PG&E has offered no valid safety or reliability rationale for the denial of access. Further, denying requests to purchase from Crown Castle while granting such requests to ILECs, as

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

[21] 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.").

[22] ROW Decision, 1998 Cal. PUC LEXIS 879, at *201, Conclusion of Law 51 ("In resolving disputes over ROW access, the burden of proof shall be on the incumbent utility to justify any proposed restrictions or denials of access which it claims are necessary to address valid safety or reliability concerns and to show they are not unduly discriminatory or anticompetitive.").

[23] *Id*. at *223 ("A utility shall grant access to its rights-of-way and support structures to telecommunications carriers...access on a first-come, first-served basis; access that can be restricted only on consistently applied nondiscriminatory principles relating to capacity constraints, and safety, engineering, and reliability requirements.").

[24] Crown Castle Post-Hearing Br. at Section III. Note that 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. *See* Pub. Util. Code §§ 767.5(c), 451, 452, 453.

PG&E now proposes to do,[25] is plainly anticompetitive and creates an unlevel playing field in opposition to the intent of the ROW Decision.[26]

Finally, in rejecting Crown Castle's proposal to purchase from PG&E the space needed for its equipment on the same terms that PG&E has historically sold it, the Draft Report violates the ROW Decision by neglecting to place the burden of proof on PG&E. The ROW Decision is clear that "[i]n resolving disputes over ROW access, the burden of proof shall be on the incumbent utility ...."[27] However, rather than requiring PG&E to show that denying Crown Castle's purchase requests is necessary to address valid safety or reliability concerns, and not unduly discriminatory or anticompetitive, the Draft Report makes no such analysis. This is important because the proper analysis would show that it is appropriate to ensure Crown Castle simply obtains access on the same terms as PG&E has historically granted it as recently as the past year.

D. The required balance of interests, noted in the Draft Report, heavily favors ensuring Crown Castle can purchase just the space needed to attach.

The Draft Report rightly acknowledges that "there is a need to balance opposing interests of incumbent utilities and CLCs."[28] Crown Castle respectfully submits that the Draft Report failed to correctly balance the interests—giving nearly all weight to PG&E's new purported policy of only selling space to CLC purchasers who acquire the entire communications zone and PG&E tenants. The Draft Report affords such weight even though PG&E admits its new and

[25] 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."

[26] *See* Crown Castle Post-Hearing Br. at Section III; ROW Decision, 1998 Cal. PUC LEXIS 879, at *2 ("We establish rules herein regarding ROW access as a crucial part of our continuing program to facilitate the emergence of robust competition for local exchange service within California."); *see also* Pub. Util. Code § 709 ("The Legislature hereby finds and declares that the policies for telecommunications in California are as follows: ... (g) To remove the barriers to open and competitive markets ....").

[27] ROW Decision, 1998 Cal. PUC LEXIS 879, at *201, Conclusion of Law 51.

[28] Draft Report at 5 n.19.

undocumented practice lacks consideration of safety or reliability of its network, but rather only administrative convenience. In so doing, the Draft Report fails to correctly balance the opposing interests and to give adequate weight to the important public policy and business reasons Crown Castle has for seeking to purchase space it needs on the poles.[29]

The Draft Report's approach is inconsistent with the policies reflected in the ROW Decision regarding balancing of interests. In that decision, the Commission stated:

> 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.[30]

Thus, under the ROW Decision, then Commission must balance: (i) the incumbent's need for safe and reliable service against (ii) the CLC's ability to provide access poles and provide its service on a nondiscriminatory basis. On PG&E's side of the scale, there is no showing on the record that PG&E's ability to provide reliable service is in any way impacted by selling attachers the amount of space they need for their facilities (*e.g.*, 1 foot) as opposed to selling excess space in the communications zone and tenant shifting. To the contrary, as noted above, PG&E's practice is based entirely on administrative convenience, which is not a factor that should be afforded weight under the balancing policy set forth in the ROW Decision.

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[29] The Draft Report further distorts Commission policy when it mentions balancing nondiscriminatory access against divestment of "benefits and obligations of ownership" without any accompanying analysis. First, the quoted language is taken from the discussion in the ROW Decision regarding the types of structures subject to access requirements—the types of structures is not an issue in this case. *See* Crown Castle Post-Hearing Br. at 12-13 (discussing legal basis for required transfer of portion of pole space). Further, Crown Castle's request is less invasive of PG&E's ownership rights than PG&E's plan. Crown seeks less ownership (i.e., less space) than PG&E wants to sell. Moreover, PG&E retains the power zone needed to provide service and retains all rights that Crown Castle seeks, e.g., replacement.

[30] Draft Report at 5 n.19 (citing ROW Decision at 82).

This is in stark contrast to the extensive evidentiary showing by Crown Castle that purchase of just the space needed to attach allows Crown Castle to rapidly deploy broadband, ensure superior reliable service, and compete on a level playing field.[31] Even the Draft Report recognizes that "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."[32] Indeed, Crown Castle has demonstrated that the benefits of ownership, such as the ability to initiate pole replacements, are crucial to its deployment strategy.[33] Further, PG&E's attempt to force the purchase of excess capacity, and shift tenants, places on Crown Castle the financial burden of paying for the costs of that additional space. Additionally, unlike PG&E, Crown Castle does not have personnel and business processes dedicated to managing pole tenants, and forcing tenant management responsibility would add significant costs to Crown Castle's deployments in PG&E territory.[34] Accordingly, PG&E's attempt to force the purchase of excess space would also unnecessarily diminish the funds Crown Castle has available to invest in its network. The balance of interests weigh heavily against forcing Crown Castle into tenancy, as the Draft Report seeks to do.

[31] *See* Crown Castle Post-Hearing Br., Section IV.

[32] Draft Report at 6.

[33] *See* Crown Castle Post-Hearing Br., Section IV.B (discussing the necessity of access to ownership benefits, including right to initiate pole replacement and a finite timeline for reviewing attachment requests).

[34] *See id*. Section III.B.

E. The Draft Report accepts the false dilemma presented by PG&E that selling less space to Crown Castle (and other CLCs) than to ILECs would be unlawful or improper.

The Draft Report endorses the false dilemma presented by PG&E, indicating that it would somehow be discriminatory and unlawful for PG&E to sell less space to Crown Castle than it does to ILECs.[35] This is an inaccurate and a false dilemma for numerous reasons.

First, there has been no demonstration that PG&E has a consistent policy to sell the entirety of communications zone to all purchasers.[36] In this regard, it is significant that PG&E has admitted that it has no written documentation of its new sale "policy" in any internal policy documents, despite the fact that PG&E does generally document operational procedures in written internal policies.[37]

Moreover, as discussed above, the record shows that PG&E has not applied even its informal "policy" on a consistent basis—instead selling to numerous attachers, including Crown Castle, less than the entire communications zone. In fact, since PG&E did not present any documentary evidence of its informal sales practice, even vis-à-vis AT&T, there is no way to know if even its informal sales practice has been adopted consistently as to ILECs. It is entirely possible PG&E has sold a portion of the communications space, without shifting tenants, to ILECs. Despite all of this, the Draft Report is silent as to the essential fact that PG&E has no

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[35] Draft Report at 7 ("PG&E now contends that offering Crown Castle terms of sale which differ substantially from its terms with AT&T, would itself be discriminatory, 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 [sic] prefer to lease rather than to sell additional space to Crown Castle within the communications zone.") (footnote omitted).

[36] Crown Castle respectfully submits that the Draft Report characterization of this as a "policy" is an error. *See* Draft Report at 4 n.15.

[37] 11/29/18 Tr. at 56:11-23 (PG&E/De Teresa) ("Q. Does PG&E have an [sic] 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.").

policy governing sale of pole interest. In fact, the Draft Report goes so far as to describe PG&E's inconsistent practice of tenant shifting as a "policy"[38] even though the record clearly demonstrates there is no "policy." Given that there has been no demonstration that PG&E has consistent sales policy, it would be plainly inaccurate to imply that it is unreasonably discriminatory for PG&E to sell the space needed for Crown Castle to attach.

Second, the opposite of PG&E's assertion is true. As demonstrated above, in Section C, when PG&E prevents the sale to Crown Castle on the terms it requests, such denial is unduly discriminatory, anticompetitive, and violative of the law.

Third, even if PG&E did sell under different terms as between ILECs and CLCs, such differential treatment is reasonable and proper.[39] The differential terms would be, in fact, grounded in deep practical, historical and policy reasons. Practically, ILECs have benefited from their incumbent position, and there is wide recognition that incumbents have supreme bargaining power. In this regard, the ROW Decision recognizes:

> [B]y 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.[40]

Accordingly, it would be disingenuous to imply that ILECs, who hold the benefits of approximately one hundred years of pole ownership, would somehow be at a competitive

[38] Draft Report at 4 n.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.").

[39] *See, e.g.,* 66 Cal.P.U.C. 366, 38 ("Discrimination by a public utility does not mean, merely and literally, unlike treatment accorded by the utility to those who may wish to do business with it, but refers to partiality in the treatment of those in like circumstances seeking a class of service offered to the public in general."

[40] *Id.*

disadvantage if CLCs were provided access under slightly different terms, in accordance with state policy intended to protect competitive access to infrastructure.

Moreover, the Commission concluded it was reasonable to apply leasing obligations to ILEC pole owners, and not to CLC pole owners.[41] This policy is consistent with federal and state schema, which also was specifically designed to require ILECs to lease space to their competitors.[42] Among the many reasons for shifting broad leasing obligations to ILECs, and not CLCs, is the fact that ILECs historically used monopoly ratepayer dollars to construct that infrastructure.[43]

Fourth, even if it were confirmed that PG&E did sell to Crown Castle and ILECs on different terms, and the practice was found to be unduly discriminatory, the Draft Report still ignores that there are several other ways (other than forced tenancy) to resolve the discrimination issue that would better serve the public interest. The Commission could order PG&E to act in accordance with other incumbent pole owners and sell just the space requested on an ongoing basis. Offering to all purchasers the amount of pole space requested, without tenant shifting, would solve any alleged discrimination issue. Alternatively, PG&E could withdraw from the business of selling space to any attachers—adopting the SDG&E model of pole management. Either way, PG&E cannot have its cake (i.e., sell space) and eat it too (i.e., evade ROW Decision requirements).

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[41] ROW Decision, 1998 Cal. PUC LEXIS 879, at *38 ("Similarly, we shall not require CLCs to provide access to cable companies. We shall thus limit the obligations to provide access to cable companies to the ILECs and electric utilities ....").

[42] *See* 47 U.S.C § 224; *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 15499 (1996)

[43] *See, e.g.,* 82 CPUC 162 (July 12, 1977) ("[AT&T] recovers its capitalized expense for plant construction through depreciation expense, and is allowed a reasonable return on investment with respect to its undepreciated plant.").

F. At a minimum, the Arbitrator should affirm that past requests for access should be permitted for space requested without tenant obligations, and prevent ongoing blanket denials to Crown Castle purchase requests.

While the Commission should, as matter of state law and Commission policy, ensure on an ongoing basis that Crown Castle can purchase just the space needed to attach its equipment, the Commission must at the very least determine that the purchases attempted prior to the filing of this arbitration application be approved.

Moreover, during the course of this proceeding, PG&E has become increasingly aggressive and retaliatory. Leading up to this proceeding, PG&E had started a new informal practice of unlawfully conditioning pole sales on purchase of the entire communications zone and assumption of tenant management. Now, since the proceeding began, PG&E has shifted to an even more draconian position of flat out denying all Crown Castle purchase requests (while continuing to sell space to ILECs). PG&E's most recent act of categorically denying all Crown Castle requests for purchase is plainly anticompetitive and impedes broadband deployment. At a minimum, the Commission should order PG&E to stop its practice of categorically denying all Crown Castle requests for purchase.

III. CONCLUSION

For the reasons stated above, Crown Castle requests that the Draft Report be revised to consider the facts on the record, which will support the conclusion that the Commission should adopt an order directing PG&E to: (i) sell to Crown Castle just the space requested for installing its 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 a safety or reliability rationale.

Respectfully submitted January 7, 2019 at San Francisco, California.

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