**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| 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 |

# REPLY COMMENTS OF CROWN CASTLE FIBER LLC ON PROPOSED DECISION AFFIRMING ARBITRATOR'S REPORT

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Pursuant to Rule 14.3 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, Crown Castle Fiber LLC (U-6190-C) ("Crown Castle")[1] respectfully submits these reply comments on the *Proposed Decision Affirming Final Arbitrator's Report and Order that Parties Adopt Revised License Agreement Draft Arbitrator's Report* ("Proposed Decision") issued September 9, 2019.

## I. INTRODUCTION

In Pacific Gas and Electric ("PG&E's") opening comments on the Proposed Decision ("PG&E Opening Comments"), PG&E presents significant extra-record evidence for the position that the Revised License Agreement would somehow interfere with safety and reliability. Presentation of this extra-record evidence, as highlighted in **Attachment 1**, plainly violates the Commission's Rules of Practice and Procedure ("Rules") and must be afforded no weight.[2] Moreover, the myriad new allegations are either incorrect or merely explain how PG&E currently operates; PG&E does not explain why it could not safely and reliably comply with the Revised License Agreement.

While PG&E puts forth significant extra-record evidence, it at the same time ignores the significant record evidence and alleges the revised terms are not supported by findings. Crown Castle believes the findings fully support the revisions, and any additional findings would be excessive, but out of an abundance of caution has presented certain findings rooted in the record which directly support each term revision. *See* **Attachment 2**.

Further, contrary to PG&E's allegations, the Revised License Agreement was achieved through a fair and process-driven arbitration. While PG&E argues that its Overhead Facilities License Agreement enjoys a presumption of validity,[3] it cites no law for this proposition, and more importantly, even if valid in prior situations, that does not mean it is suitable here. PG&E was appropriately ordered by the arbitrator to craft a licensing agreement that: (1) will not constrain Crown Castle's goals to rapidly deploy broadband; (2) will permit Crown Castle to continue to provide reliable service for its customers; and (3) will enable Crown Castle fulfill its goal to compete within the highly competitive markets which

[1] While the present proceeding was initiated by Crown Castle NG West LLC (U-6745-C), the California operations and assets of that entity, were consolidated into Crown Castle Fiber LLC (U-6190-C) on December 31, 2018, as set forth in Advice Letter No. 71(submitted Oct. 25, 2018) of Crown Castle NG West LLC (effective Nov. 24, 2018).

[2] *See* Rule 14.3(c) ("Comments shall focus on factual, legal or technical errors in the proposed or alternate decision and in citing such errors shall make specific references to the record or applicable law. Comments which fail to do so will be accorded no weight.").

[3] *See* PG&E Opening Comments at 2.

comprise the state of California.[4] PG&E presents no evidence that its Overhead Facilities License Agreement meets these criteria, while Crown Castle has clearly demonstrated on the record that the PG&E's Overhead Facilities License Agreement did not meet this criteria for Crown Castle.[5] Rather than comply with the order, PG&E refused to negotiate, and so Crown Castle presented the Revised License Agreement, which satisfies the three criteria required by the Final Arbitrator Report.

While the Revised License Agreement is not ideal for either party—Crown Castle believes it has a right to purchase space requested from PG&E, and PG&E would like Crown Castle to operate under the PG&E's Overhead Facilities License Agreement without modification—at least it is a solution that both parties can operationalize. Indeed, PG&E has effectively already operationalized the modified terms in the Revised License Agreement since it provides the equivalent of those terms, set forth in the Northern California Joint Pole Association Routine Handbook, to the incumbent local exchange carriers ("ILECs") (who compete with Crown Castle) with whom PG&E jointly own poles.[6] PG&E presents no reason why it could not also operationalize these terms safely and reliably in the licensing context. Indeed, by operating under Revised Licensing Agreement, PG&E would be increasing safety and reliability by, among other reasons, ensuring Crown Castle can expeditiously repair its network to ensure reliability and empower additional parties (i.e., Crown Castle) to monitor attachments to ensure safety. With all that said, if PG&E prefers not to lease pole space under the terms of the Revised License Agreement, Crown Castle would welcome the opportunity to purchase from PG&E the amount of pole space requested as a joint owner, as was done in the past.

Below is section-by-section rebuttal of PG&E's most egregious allegations in its opening comments:

## II. TIMEFRAME FOR APPLICATION APPROVAL (SECTIONS 3.1(B) AND 3.2)

- Allegation: "There are no findings in the Proposed Decision that address the reasonableness of this revision or its public safety implications nor sufficient evidence in the record for A.18-10-004 to support any such findings." (PG&E Opening Comments at 2.)

[4] Final Arbitrator's Report at 14 (Jan. 31, 2019).

[5] *See, e.g.*, Crown Castle Arbitrated License Agreement at 5 (Feb. 8, 2019) ("...operating under this agreement would significantly slow deployment, erect challenges to ensuring superior reliable service, and create an unlevel playing field such that the competitors of Crown Castle Fiber would benefit from enhanced attachment provisions.").

[6] *Id*. at 3-4 ("Each of these provisions are necessary to compete on a level playing field with ILEC pole-owners, who already benefit from these provisions through agreements governing joint pole-ownership.").

- Response: PG&E ignores the robust record evidence showing why this provision is necessary for Crown Castle's ability to compete and is therefore reasonable.[7] Further supporting the reasonableness of this provision is the fact that both state and federal law feature a 45-day timeframe to review an attachment application,[8] and PG&E provides this 45-day timeframe to its co-owners on jointly owned poles.[9] It is therefore the height of hypocrisy for PG&E to now question the reasonableness and safety implications in this context.

- Allegation: "GO 95 appropriately vests the owner with the appropriate control over attachments and expressly prohibits a third party from attaching without PG&E's permission. Similarly, 1998 ROW Decision shows similar respect and deference…." (PG&E Opening Comments at 3.)
  - Response: These references to General Order 95 and the ROW Decision are plainly inapplicable. While these rules do prohibit unauthorized attachments, they clearly do not prohibit the "deemed-approved" provision at issue here, which allow attachers to attach after a designated timeframe. In fact, this type of provision is explicitly permitted in the ROW Decision.[10]

- Allegation: "Of the applications received, approximately 70 percent of applications to attach are approved and approximately 30 percent are denied ... Without the safeguard of prior approval, many of these licensees would likely have installed attachments in conflict with the Commission's and PG&E's safety standards." (PG&E Opening Comments at 3.)
  - Response: The numbers presented are unsubstantiated extra-record evidence and must be afforded no weight. Even if these figures were in the record they are — in and of themselves — of no value because they do not explain what percentage of the denials are based on safety reasons. More importantly, PG&E has at no point during course of this proceeding, including in opening comments, explained if and/or why they would need more than 45 days to determine whether a given attachment is in conflict with its safety standards. Because PG&E is able to conduct its safety review within 45 days with joint owners, as noted above, there is no reason why it could not also do so here.

## III. REARRANGEMENT / RELOCATION AUTHORIZATION (SECTION 7.4(B))

- Allegations: (1) "There are no findings in the Proposed Decision that address the reasonableness of this provision or its public safety implications nor sufficient evidence in the record for A.18-10-004 to support any such findings." (2) "Generally, rearrangements/relocations would be driven by: emergency, un-planned work where PG&E must respond to an immediate safety or reliability risk (e.g., a vehicle striking a pole); or planned work driven by safety and reliability

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[7] *See, e.g.,* Application of Crown Castle NG West LLC (U-6745-C) for Arbitration of Pole Attachment Dispute with Pacific Gas and Electric Company at 13-14 (October 10, 2018); Post-Hearing Brief of Crown Castle NG West LLC (U-6745-C) at 22 (Dec. 11, 2018).

[8] See 47 C.F.R. 1.1411(c)(2) ("A utility [including electric utility] shall respond to the new attacher either by granting access or...denying access within 45 days of receipt of a complete application...."); ROW Decision, 1998 Cal. PUC LEXIS 879, Appendix A, Section IV.B ("Failure of Pacific or GTEC to respond within 45 days shall be deemed an acceptance of the re-quest for access.").

[9] *See* NCJPA Routine Handbook, § 3.0.

[10] *See* ROW Decision, 1998 Cal. PUC LEXIS 879, Appendix A, § IV.B.

needs, new business (e.g., providing service to a new customer) and work requested by others (e.g., facilitating a new telecommunications attachers)." (3) "Typically, the Exhibit F forms are sent between 60 and 90 days in advance to give the licensee adequate time to provide input on planned pole replacements." (PG&E Opening Comments at 4.)

- Response: The reason for rearrangement/relocations presented in Allegation (3) and the time frames for Exhibit F forms in Allegation (3) are unsubstantiated extra-record evidence and must be afforded no weight. Conversely, Crown Castle has demonstrated that the basis of this provision is to prevent against rearrangements and relocations of its facilities that would disrupt reliability of its network, and negatively impact public safety.[11] The record evidence also demonstrates that PG&E affords this provision to its co-owners on jointly owned poles,[12] so it is hypocritical to now question the reasonableness and safety implications in this context.

## IV. 60 DAY POLE REPLACEMENT TIMEFRAME (SECTION 7.4(C))

- Allegation: "There are no findings in the Proposed Decision that address the reasonableness of this provision or its public safety implications nor sufficient evidence in the record for A.18-10-004 to support any such findings." (PG&E Opening Comments at 5.)
  - Response: PG&E conveniently ignores the record showing why this provision is reasonable for Crown Castle and aligned with safety.[13]
- Allegation: "...60-day timeline would deprioritize critical public safety work." (PG&E Opening Comments at 5.)
  - Response: The allegations regarding public safety work are unsubstantiated extra-record evidence and must be afforded no weight. Moreover, aside from this bald allegation there is explanation of how replacing poles on Crown Castle's request would harm other pole replacement efforts, or why replacing poles in some areas is any more important than replacing poles upon Crown Castle's request.
- Allegation: "...(NCJPA) requires joint owners to complete pole replacement within 18 months of submitting the request for replacement." (PG&E Opening Comments at 5.)
  - Response: This statement is inaccurate. First, the "18 month" provision referenced by PG&E at no point mentions replacements. Moreover, unlike a tenant, any owner has the right to replace a pole,[14] which makes the reference to the NCJPA inapplicable.

## V. PROCEDURAL ISSUES

- Allegation: "its absence from the Scoping Memo alone makes considering revisions to PG&E's License Agreement legally impermissible absent an appropriate amendment of the Scoping Memo." (PG&E Opening Comments at 7.)

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[11] *See, e.g.,* Ex. 1, at 8:5-7 (Scandalis/Crown Castle Testimony).

[12] *See infra* n.6.

[13] *See, e.g.*, Ex. 1, at 8:4-5 (Scandalis/Crown Castle Testimony) ("The ability to facilitate pole replacement both promotes safety and makes it easier for Crown Castle to serve its customer's needs.").

[14] *See* NCJPA Routine Handbook, § 7.0.

- Response: As an initial matter, a scoping memo is not required under the ROW Decision rules governing expedited dispute resolution. Even so, the issue of the Overhead Facilities License Agreement was expressly in scope.[15]

- PG&E Allegation: "revisions contained in the Proposed Decision plainly provide Crown Castle with a material advantage over other similarly situated carriers ... It would be a clear abuse of discretion for the Commission … to favor the business objectives of one telecommunications company over other similar situated companies." (PG&E Opening Comments at 8-9.)
    - Response: Incorrect. ILEC competitors are afforded these terms under the NCJPA, just as Crown Castle did before PG&E arbitrarily decided to stop selling space to Crown Castle.[16] Even so, nothing in the Revised License Agreement prevents similarly-situated competitors from opting into this agreement.
- Allegation: "Crown Castle would both have advanced knowledge of the commercial activities of its competitors and the ability to block their entrance in cases where rearrangement was needed." (PG&E Opening Comments at 8.)
    - Response: Incorrect. The plain language specifically states that PG&E is to notify Crown Castle of new attachments (so that Crown Castle can ensure safety on poles that it attached), but "without identifying Company permittee."[17] Moreover, Crown Castle's ILEC competitors already are notified of attaching entities so it is unclear why this would be a problem here.

## VI. CONCLUSION

For the reasons stated above, Crown Castle requests that the Commission dismiss PG&E's opening comments, and proceed forward with approving the Proposed Decision, with the limited revision suggested by Crown Castle in its opening comments.

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Dated: October 7, 2019

[15] Scoping Memo at 4 ("Does PG&E's offer to lease space to Crown under PG&E's License Agreement satisfy the ROW Decision's nondiscriminatory access requirements?").

[16] *See supra* n.6.

[17] Revised Licensed Agreement, § 4.5.

# ATTACHMENT 1

## Extra Record Evidence in PG&E Opening Comments (Highlighted in Red)

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| 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 (Filed: October 10, 2018) |

# OPENING COMMENTS OF PACIFIC GAS AND ELECTRIC COMPANY (U 39 M) ON PROPOSALS DECISION AFFIRMING FINAL ARBITRATOR'S REPORT AND ORDER THAT PARTIES ADOPT REVISED LICENSE AGREEMENT

Pursuant Rule 14.4(b) of the California Public Utilities Commission (CPUC or Commission) Rules of Practice and Procedure, Pacific Gas and Electric Company respectfully submits the following opening comments on the Proposed Decision Affirming the Final Arbitrator's Report and Order that Parties Adopt Revised License Agreement.

The Proposed Decision, if adopted, would order PG&E to execute a revised License Agreement with Crown Castle that includes several modifications to PG&E's Standard License Agreement, namely: 1) revising Sections 3.1(b) and Sections 3.2 to allow Crown Castle to attach without PG&E's prior written authorization if PG&E has not responded to Crown Castle's attachment request within forty-five days[1] (i.e., a "deemed approved" provision); 2) revising Section 7.4(b) to require that PG&E obtain Crown Castle's written approval prior to rearrangement or relocation work on PG&E-owned facilities, which would include emergency repairs, urgent safety work or the attachment of a competitor[2]; and also require PG&E notify Crown Castle when a new permittee requests to attach; and 3) a sixty-day timeline to execute a pole replacement at Crown Castle's written request, or less if circumstances require.[3]

[1] *See* Proposed Decision of ALJ Patricia Miles Affirming Final Arbitrator's Report and Order That Parties Adopt Revised License Agreement (September 9, 2019), at Ordering Paragraphs 1 and 2.

[2] *Ibid* Ordering Paragraph 3.

[3] *Ibid* Ordering Paragraph 4.

As outlined in Appendix A, PG&E requests that the Proposed Decision be modified to reject these revisions to PG&E's License Agreement because they implicate public safety and would be plainly discriminatory in favor of Crown Castle at the expense of other attachers. Moreover, the original dispute and unresolved issues that initiated A.18-10-004 have been fairly resolved and good cause has not been shown for the Commission to adopt such modifications to PG&E's License Agreement. The Commission has approved PG&E's Standard License Agreement as nondiscriminatory and it thus enjoys the presumption of validity.[4] PG&E has executed its standard agreement with 28 parties, including Crown Castle, and has third-party attachments on more than 14,000 PG&E solely owned poles. Finally, the proposed revisions to PG&E's License Agreement—whatever the potential arguments in their favor—were arrived at in a manner that is plainly inconsistent with the established process and other Commission orders and rules. For these reasons, as elaborated on below, the Commission should reject the Revised License Agreement and close this proceeding.

## I. PROPOSED REVISIONS IMPLICATE PG&E'S ABILITY TO PROVIDE SAFE AND RELIABLE SERVICE

### A. The Proposed Revisions to Sections 3.1(b) and Sections 3.2 of PG&E's Approved License Agreement

Currently licensees must receive written authorization from PG&E prior to either installing an attachment to PG&E's infrastructure (*i.e.*, Section 3.1[b]) or installing additional attachments to PG&E's infrastructure (*i.e.*, Section 3.2). Requiring prior approval for potential attachments to PG&E's infrastructure is a longstanding practice and important safeguard and PG&E opposes this revision. There are no findings in the Proposed Decision that address the reasonableness of this revision or its public safety implications nor sufficient evidence in the record for A.18-10-004 to support any such findings.

Prior approval enables PG&E to ensure that all new attachments to its facilities meet the Commission's and PG&E's safety standards prior to installation, avoiding, for example, a

[4] *See* PG&E. Advice Letter 2982-E. Approved March 8, 2007. Available: https://www.pge.com/nots/rates/tariffs/tm2/pdf/ELEC_2982-E.pdf

permittee unintentionally overloading a pole by installing facilities that exceed the allowable safety factor. In recognition of this practice, GO 95 appropriately vests the owner with the appropriate control over attachments and expressly prohibits a third party from attaching without PG&E's permission.[5] Similarly, 1998 ROW Decision shows similar respect and deference, finding that that "Changing the size or type of any attachment, or increasing the size or amount of cable support by an attachment has safety and reliability implications that the utility must evaluate before work begins"[6] and "[n]o party may attach to the ROW or support structure of a utility without the express written authorization from the utility."[7]

A review of past applications underlines the importance of requiring prior approval. As outlined in the introduction, each year PG&E receives approximately 1200 applications for access on approximately 7000 of its solely owned utility poles. Of the applications received, approximately 70 percent of applications to attach are approved and approximately 30 percent are denied; the denials are due to the potential for pole overloads, anchor conflicts, insufficient space, clearance issues and planned PG&E work (*e.g.,* PG&E efforts to underground existing lines). Without the safeguard of prior approval, many of these licensees would likely have installed attachments in conflict with the Commission's and PG&E's safety standards.

### B. The Proposed Revisions to Section 7.4(b) of PG&E's Approved License Agreement

For numerous reasons, PG&E must rearrange existing communications facilities or relocate a pole and transfer existing communications facilities to the new structure. The revisions to Section 7.4(b) would require that PG&E obtain Crown Castle's prior approval before rearranging/relocating and provide it with the ability to block pole rearrangements/relocations.

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[5] *See* GO 95, Rule 11: "Nothing herein contained shall be construed as requiring utilities to grant permission for such use of their overhead facilities; or permitting any use of joint poles or facilities for such permanent or temporary construction without the consent of all parties having any ownership whatever in the poles or structures to which attachments may be made" and "all permanent attachments must be approved by the Commission (see Rule 15.1 ) and the owner(s) involved."

[6] Finding 23, ROW Decision, 82 CPUC 2d 510, 578.

[7] Conclusion of Law 5, ROW Decision, 82 CPUC 2d at 579.

PG&E opposes this revision because it is unnecessary—as described below, PG&E's existing process involves robust collaboration with attachers prior to rearrangements/relocations—and would interfere with important PG&E safety and reliability work. There are no findings in the Proposed Decision that address the reasonableness of this provision or its public safety implications nor sufficient evidence in the record for A.18-10-004 to support any such findings.

PG&E's existing rearrangement/relocation process already provides for robust collaboration with licensees. Generally, rearrangements/relocations would be driven by: emergency, un-planned work where PG&E must respond to an immediate safety or reliability risk (*e.g.,* a vehicle striking a pole); or planned work driven by safety and reliability needs, new business (*e.g.,* providing service to a new customer) and work requested by others (*e.g.*, facilitating a new telecommunications attachers). In emergency situations, PG&E does its best to communicate with any licensees while responding to the demands of the emergency. With planned work, PG&E provides licensees prior notification through its "Exhibit F" form when facilities need to be rearranged or transferred to a new pole. Typically, the Exhibit F forms are sent between 60 and 90 days in advance to give the licensee adequate time to provide input on planned pole replacements. PG&E does its best to accommodate issues raised by licensees and has not been made aware of dissatisfaction with the existing process.

In addition to being unnecessary, requiring prior approval would interfere with PG&E's important safety and reliability work. For its part, Crown Castle does not cite any genuine issue of concern with PG&E's existing notification process. Instead, it appears Crown Castle intends to utilize this provision to block rearrangements/relocations.[8] In emergency situations, this provision is plainly unworkable and imprudent. GO 95, Rule 18 requires the pole owner to "take corrective action immediately" to remedy any "immediate risk of high potential impact to safety

[8] *See* Crown Castle. February 8, 2019. Arbitrated License Agreement: "ILEC pole owners can buy a specific location on the pole and **generally stay in that position**. Tenants are subject to being moved up and down the pole per the direction of owners. Avoiding rearrangement is critical for Crown Castle Fiber's wireless attachments that depend on specific positions" (emphasis added).

or reliability."[9] PG&E strives for but cannot always obtain the advance written approval of attachers in emergency situations. Beyond emergencies, PG&E's planned work includes critical safety and reliability work, which often requires replacing a pole. PG&E is committed to and in practice does offer attachers every reasonable accommodation during rearrangement/relocation. However, providing a "veto" right is a step too far and should be rejected.

### C. The Proposed Revisions to Section 7.4(c) of PG&E's Approved License Agreement

For various reasons, PG&E must execute work requested by others (WRO) which is part of the larger portfolio of work managed by Electric Operations. PG&E strives to timely complete WRO and must balance WRO with its overall portfolio, including critical safety work. The revisions to Section 7.4(c) would require PG&E to execute pole replacements in 60 days. PG&E opposes revising its Standard License Agreement to execute pole replacements within 60-days because that timeline is practically infeasible (e.g., obtaining encroachment permits from cities or counties alone can take more than 60-days) and because 60-day timeline would deprioritize critical public safety work. There are no findings in the Proposed Decision that address the reasonableness of this provision or its public safety implications nor sufficient evidence in the record for A.18-10-004 to support any such findings. PG&E has identified over 100,000 poles that potentially need replacement over the next four years, with 85 percent of potential pole replacements occurring in Tier 2 and Tier 3 high fire threat districts.

A 60-day execution timeline is well outside the norm and is simply not feasible. As a reference point, the Northern California Joint Pole Association (NCJPA) requires joint owners to complete pole replacement within 18 months of submitting the request for replacement.[10] Similarly, for issues with a "moderate potential impact to safety or reliability", GO 95, Rule 18, provides between 6 and 36 months depending whether the issue poses an ignition risk or threat to worker safety. Moreover, even if 60 days was possible, it would require unreasonably

[9] GO 95, Rule 18.

[10] *See* 2019 NCJPA Routine Handbook, Section 18.1 C.

deprioritizing safety work. PG&E has identified over 100,000 poles that potentially need replacement over the next four years, with 85 percent of potential pole replacements occurring in Tier 2 and Tier 3 high fire threat districts.

## II. THE COMMISSION HAS FAIRLY AND THOROUGHLY RESOLVED CROWN CASTLE'S ORIGINAL DISPUTE

The Commission has fairly and thoroughly resolved Crown Castle's original dispute and has satisfied its obligations under the 1998 ROW Decision. The fundamental purpose of the expedited dispute resolution process is to resolve disputes over "access to utility rights of way and support structures." In the instant proceeding, Crown Castle's allegation that PG&E's denial of its request to purchase only a portion (as opposed to all) of the communication zone on PG&E owned poles was discriminatory per 1998 ROW Decision. The Final Arbitrator's Report correctly held that PG&E satisfied its responsibility to grant nondiscriminatory access to Crown Castle by offering to lease space on its poles, and explicitly rejected Crown Castle's proposed agreement. Thus, having rejected Crown Castle's allegation the Arbitrator was in a position to close the proceeding with PG&E's unmodified Joint Pole Agreement as the Arbitrated Agreement.

## III. ORDERING THE PARTIES TO NEGOTIATE A REVISED LICENSE AGREEMENT AND ADOPTING CROWN CASTLE'S REVISIONS VIOLATE THE COMMISSION'S RULES AND ORDERS

Perhaps knowing that Crown Castle found the JPA distasteful, the Arbitrator took the additional step of ordering the parties to "craft an arbitrated License Agreement reflecting mutually agreeable terms for leasing space on PG&E's poles" and then, when parties could not mutually agree, summarily adopted revisions suggested by Crown Castle. In doing so and perhaps not understanding the gravity of the changes, the Arbitrator acted in conflict with the Commission's rules governing the expedited dispute resolution process (i.e., the 1998 ROW Decision and Resolution ALJ 181 [replacing Resolution ALJ 174]) and the Commission's Rules of Practice and Procedure generally.

The process post-Final Arbitrator's Report and the Proposed Decision contain numerous

disconformities with the 1998 ROW Decision, Resolution ALJ 181, and the Commission's Rules of Practice and Procedure (too numerous to chronical comprehensively here). In brief, the arbitration process exists to resolve disputes over access and entitles a party to dispute resolution following and only following "denial of a request for access."[11] In the case of PG&E's Standard License Agreement, PG&E cannot have denied access to Crown Castle because Crown Castle already possesses an executed License Agreement. Because a request to attach under the Standard License Agreement was not (and could not be) included in Crown Castle's Application for arbitration, the numerous mandated steps in the arbitration process were not followed: it was not included as an issue in the Scoping Memo and Ruling,[12] and there is no record to support adopting the proposed revisions. Indeed, its absence from the Scoping Memo alone makes considering revisions to PG&E's License Agreement legally impermissible absent an appropriate amendment of the Scoping Memo.[13] Finally, what the Proposed Decision refers to as the "Arbitrated Agreement" does not conform to the meaning of that term as defined by the Commission and is invalid.[14] For an agreement to be arbitrated, the parties must submit unresolved issues to the arbitrator with the attendant processes for record development. That simply did not happen in this case.

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[11] Rule IX.A.1, ROW Decision, Appendix A.

[12] The December 10, 2018 Assigned Commissioner Scoping Memo and Ruling listed four issues: "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? 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? 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? 4. Should and may the Commission compel PG&E to sell space on its poles to promote broadband deployment? 5. Are there valid safety or reliability concerns that justify PG&E's decision to lease (not sell) space on its poles to Crown?"

[13] *See* S. Cal. Edison Co. v. Pub. Util. Comm'n, 140 Cal. App. 4th 1085, 1106 (2006) (holding that the Commission violated its own rules and "failed to proceed in the manner required by law" when it ruled on proposals that were not in the scoping memo, and that instead were first raised by commentators several months after issuance of the scoping memo).

[14] ALJ Resolution 181 defines Arbitrated Agreement as "the entire agreement filed by the parties in conformity with the Arbitrator's Report." The Arbitrator never properly considered the revisions presented by Crown Castle (as they occurred after the report) and the agreement is in lieu of an Arbitrated Agreement.

## IV. CROWN CASTLE'S CHANGES ARE PLAINLY DISCRIMINATORY AND VIOLATE THE 1998 ROW DECISION

Finally, the changes in the Proposed Decision are plainly discriminatory and thus violate the spirt and the letter of the 1998 ROW Decision. The 1998 ROW Decision establish the "rules govern[ing] access to public utilities rights-of-way and support structures by telecommunications carriers and cable TV companies in California" which are "deemed presumptively reasonable" in disputes with the burden of proof falling on "the party advocating a deviation from the rules to show the deviation is reasonable, and is not unduly discretionary and anticompetitive."[15] The 1998 Row Decision "consider[s] 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."[16]

The revisions contained in the Proposed Decision plainly provide Crown Castle with a material advantage over other similarly situated carriers. For example, the revisions to PG&E's Standard License Agreement would provide Crown Castle and only Crown Castle with faster attachment timelines (i.e., 45-day deemed approval for attachments and 60-day pole replacement timeline), violating both the principles of "first-come, first-serve" and "impartially applied terms." This would provide Crown Castle with the ability to access PG&E's facilities faster than its competitors, including jumping ahead of other companies and, in some cases, utilizing the remaining capacity available in the telecom zone. Similarly, requiring PG&E to both notify Crown Castle and about other attachers and obtain Crown Castles permission prior to rearrangement or relocation is open to abuse. Crown Castle would both have advanced knowledge of the commercial activities of its competitors and the ability to block their entrance in cases where rearrangement was needed.

[15] ROW Decision, Appendix A Section I, Purpose and Scope, 82 CPUC 2d at 586.

[16] ROW Decision, 82 CPUC 2d at 536, and Conclusion of Law 52; Rule VI.A.1.

Moreover, Crown Castle itself is plain that the changes would provide *it* a substantial benefit: "This provision is critical for [Crown Castle's] rapid broadband deployment . . . [and] Crown Castle Fiber's deployment should not be unduly delayed."[17] In turn, the Proposed Decision enshrines this favorable outcome for Crown Castle: finding that "The Revised License Agreement . . . will not constrain Crown Castle's goals to rapidly deploy broadband . . . and will enable Crown Castle to fulfill its goal to compete within the highly competitive market California marketplace.[18]

In attempting to justify the revisions, the Proposed Decision reasons that because the 1998 ROW Decision indicated that "differences are acceptable" and Crown Castle "substantially incorporates PG&E's License Agreement" that it therefore "comply[s] with the ROW Decision's nondiscriminatory access requirements." This applies the wrong standard. The proposed changes directly conflict with the Commission's Right of Way Rules, which are presumed nondiscriminatory, and alters PG&E's approved Standard License Agreement, which was found to be in conformity with those rules. Both the findings themselves and the record in the proceeding do support the conclusion and fails show the changes are "reasonable" and not "unduly discretionary and anticompetitive." It would be a clear abuse of discretion for the Commission—as the Proposed Decision openly suggests—to favor the business objectives of one telecommunications company over other similar situated companies.

In contrast, PG&E's Standard License Agreement has been approved by the Commission and has the presumption of validity, and Crown Castle already enjoys access to PG&E's facilities through said agreement. Given that the Commission has fairly considered and resolved Crown Castle's original complaint and cannot legally adopt the proposed revisions, PG&E requests that the Proposed Decision be modified to reject the Arbitrated Agreement.

[17] Crown Castle's rationale for Inclusion in Agreement submitted in Arbitrated License Agreement dated February 8, 2019, p. 4.

[18] ROW Decision, Conclusion of Law 2.

## V. CLOSING

For the aforementioned reasons, PG&E requests that the Proposed Decision be modified to reject the revisions to PG&E's License Agreement, which would have consequences for public safety and be discriminatory in favor of Crown Castle. Instead—given that original dispute and unresolved issues that initiated A.18-10-004 have been fairly resolved, and Crown Castle already enjoys access through PG&E's Standard License Agreement—the Commission should close A.18-10-004. Finally, the revisions to PG&E's License Agreement—whatever the arguments in their favor—were arrived at in a manner that deprived PG&E the opportunity to raise substantive issues and is plainly inconsistent with Commission orders and rules, and thus a clear abuse of discretion.

Respectfully Submitted,

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Dated: September 30, 2019

# ATTACHMENT 2

# Optional Proposed Findings of Fact

**ATTACHMENT 2**

**OPTIONAL PROPOSED FINDINGS OF FACT**

## Findings of Fact

1. A key principle of D.98-10-058 (ROW Decision) is that CLCs should have rights to obtain access to utility poles and support structures at reasonable terms and prices which do not impose a barrier to competition.

2. One objective of the ROW Decision is to set forth a general set of rules governing ROW access which would give parties discretion to tailor specific terms to the demands of their individual situations.

3. The Commission notes in the ROW Decision that differences are acceptable as long as they do not merely reflect anticompetitive discrimination among similarly situated carriers.

4. This arbitration proceeding involves two regulated parties subject to the Commission's jurisdiction.

5. Under the ROW Decision, parties may craft whatever terms they might agree upon within the broad concerns of nondiscriminatory access, because their agreement is ultimately subject to Commission approval.

6. The Final Arbitrator's Report ordered the parties to submit an arbitrated License Agreement.

7. In lieu of submission of an arbitrated License Agreement by the parties, the arbitrator may craft appropriate terms.

8. PG&E's License Agreement complies with the ROW Decision's nondiscriminatory access requirements and must provide the basis for the arbitrated agreement.

9. The Revised License Agreement by Crown Castle substantively incorporates PG&E's License Agreement. The Final Arbitrator's Report ordered the parties to submit an arbitrated License Agreement.

10. In lieu of submission of an arbitrated License Agreement by the parties, the arbitrator may craft appropriate terms.

11. PG&E's License Agreement complies with the ROW Decision's nondiscriminatory access requirements and must provide the basis for the arbitrated agreement.

12. The Revised License Agreement by Crown Castle substantively incorporates PG&E's License Agreement.

**13. Section 3.1(b) and 3.2 of the Revised License Agreement, governing application review timeframes, are critical in order avoid constraining broadband and telecommunications deployment and ensuring Crown Castle can compete on a level playing field.**

**14. Section 7.4(c) of the Revised License Agreement, governing pole replacement timeframes, ensures safety, reliability, and swift and predicable broadband and telecommunications deployment.**

**15. Section 7.4(b) of the Revised License Agreement, governing authorization for rearrangement and relocation, is critical to ensure reliability and that Crown Castle can compete on a level playing field.**

**16. Section 7.4(b) of the Revised License Agreement, governing notification of request to attach, ensures that Crown Castle can support safety and reliability goals.**

**17. Section 4.5 of the Revised License Agreement, governing notice of repair and maintenance, avoids negative impacts to reliability and ensures Crown Castle can compete on a level playing field.**