

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

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

A. 18-10-004

**EXTENET SYSTEMS (CALIFORNIA) LLC (U 6959 C)
COMMENTS ON DRAFT ARBITRATOR'S REPORT**

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January 7, 2019

Pursuant to Rule 3.18 of Resolution ALJ-174 and D.98-10-058, Appendix A, Section IX. Rule 17, ExteNet Systems (California) LLC (“ExteNet”) (U 6959 C) LLC hereby files comments on the Draft Arbitrator’s Report (“DAR”) in the above captioned proceeding identifying errors in the DAR and requests that they be corrected before a final order is issued. ExteNet is deeply concerned that the results set forth in the DAR will have the unintended effect of setting an industry-wide precedent and therefore will affect ExteNet’s substantive rights without affording it due process or an opportunity to be heard, as required by the Commission’s rules and state law.

I. BACKGROUND

ExteNet was certified as a full facilities-based competitive local exchange carrier (“CLEC”) in California in 2006.¹ In D. 06-04-063, the Commission authorized ExteNet to attach to utility poles or other aerial support structures in the public rights-of-way (“ROW”) and to construct its own facilities in or near the ROW.²

In California, ExteNet provides non-switched dedicated Point-To-Point Private Virtual Circuit (“PVC”) Transport Service on a wholesale basis to other carriers via small cell and Distributed Antenna System (“DAS”) networks. Additionally, ExteNet provides dark and lit fiber services to enterprise end user customers. In order to provide wholesale DAS and enterprise customer services, ExteNet must place equipment, including fiber optic cable, wireless antennas and radios on utility poles located in the public rights-of-way. ExteNet places its equipment on jointly owned utility poles through membership in the Northern and Southern Joint Pole Associations, and through bi-lateral pole attachment agreements with electric utilities.

¹ D. 06-04-063 issued April 27, 2006. At that time, ExteNet operated under the name Clearlinx Network Corporation.

² *Id.*, at p.2-3.

II. ARGUMENT

California Public Utilities Code Section 1708³ requires the Commission to provide notice and an opportunity to be heard to affected parties before modifying or rescinding its own orders.

The statute states:

The Commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.”

Resolving the dispute between Crown Castle and PG&E requires the interpretation of the legal requirements in D.98-10-058, the Commission’s seminal decision that granted CLECs access to public rights of way and infrastructure, such as utility poles, located therein. The result set forth in the DAR, therefore, will necessarily alter the rights and obligations set forth in D.98-10-058 and ExteNet submits that its substantive legal rights will therefore be affected, yet it has had no opportunity to participate in this proceeding.

ExteNet respectfully submits that because the dispute is a generally applicable legal issue (*i.e.* what pre-conditions may be placed on CLECs applying to become owners in utility poles), Pacific Gas & Electric (“PG&E”) will inevitably rely the decision to impose the same onerous demands on other CLECs that it is imposing on Crown Castle and in fact has made these same demands on ExteNet already. The DAR explicitly recognizes it would be a legal error to set an industry-wide policy in the context of a bi-lateral complaint case.⁴ Yet that is exactly what will happen. Specifically, if the Commission concludes that PG&E may deny Crown Castle’s application to buy into utility poles so long as Crown Castle is unwilling to assume the obligation

³ All subsequent statutory citations refer to the California Public Utilities Code unless otherwise noted.

⁴ DAR, at p. 7.

of managing the entire communications zone (including managing subsequent CLEC tenants), there appears to be almost no chance that it would change its policy with regard to other CLECs.

Further, ExteNet has substantial concerns about the DAR's suggestion that the Northern California Joint Pole Association ("NCJPA") should be required to submit pole agreements between JPA members to the Commission for review and approval under Section 851. ExteNet takes no position at this time regarding the Commission's asserted jurisdiction over the NCJPA. Regardless, ExteNet believes there is a substantial legal question regarding whether the Commission can substantially affect NCJPA members' rights under a private contractual agreement in a bi-lateral complaint proceeding at which, to the best of ExteNet's knowledge, neither the NCJPA nor its members have been able to participate. Thus the DAR as written would affect the rights of third parties without giving them due process or an opportunity to be heard. Here the legal error is even greater because the Commission is affecting the rights of entities under a third-party agreement (rather than a Commission order) without notice or an opportunity for the NCJPAs or its members to be heard.

If the Commission is nonetheless inclined to begin requiring the NCJPA to submit pole agreements for prior approval under Section 851, at the very least, it should develop an expedited procedure for processing such reviews. Otherwise, CLECs will likely be subjected to unreasonable delays. ExteNet observes that when it negotiated an agreement for access to PG&E's conduit for fiber placement, it took 15 months for the Commission to review and approve that agreement under Section 851.⁵ Such substantial delay is contrary to the California Legislature's mandate that the Commission facilitate the expeditious deployment of broadband facilities such as fiber in California in Section 709 and elsewhere. Other Section 851

⁵ A.15-07-012 was filed on July 7, 2015 and D.16-10-043 was issued 15 months later.

proceedings have also taken a considerable length of time.⁶

Rather than requiring Commission approval of NCJPA agreements through an application process, ExteNet recommends simply requiring the NCJPA to file the agreements as Tier I advice letters as is currently done for customer contracts so that other entities may review the agreements to determine if they are unreasonably discriminatory.

III. CONCLUSION

ExteNet submits that the issues raised by Crown Castle are legal in nature and will universally modify the rights and obligations set forth in D.98-10-058, the Commission's Right of Way decision. On that basis, the result in this proceeding will necessarily affect the substantive legal rights of ExteNet and other third parties that have had no opportunity to be heard. Therefore, ExteNet strongly urges the Commission to suspend the schedule in this proceeding and instead examine the issues raised by Crown Castle in the pending pole access proceeding, Rulemaking 17-06-028, as the DAR suggests.⁷

Signed and dated January 7, 2019 at Walnut Creek, CA.

Respectfully submitted,

/s/ Anita Taff-Rice

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⁶ See e.g., Application of Southern California Edison to Lease Fiber Optic Cables to Verizon Wireless. The Application was filed in February 2017 and a decision was issued on September 13, 2018, 19 months later.

⁷ DAR, at p. 7.