

**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  
(Filed: October 10, 2018)

**JOINT STATEMENT OF CROWN CASTLE NG WEST LLC (U-6745-C) AND PACIFIC  
GAS AND ELECTRIC COMPANY (U-39-E) ON UNRESOLVED ISSUES**

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**A. Overview of Unresolved Issues**

Crown Castle NG West LLC (“Crown Castle”) and Pacific Gas and Electric Company (“PG&E”) jointly submit that the following issues remain unresolved by the parties:

1. Crown Castle: Whether PG&E may refuse to sell space on its poles to any CLCs unless and until the CPUC amends the ROW Rules to require CLCs to provide nondiscriminatory access to the poles.
2. Crown Castle: Whether PG&E may condition the sale of space on its pole only to attachers which agree to purchase the entire communications space and who would then be obligated to lease portions of the communications space to tenants and manage the tenant relationship or, alternatively, whether PG&E should be required to sell the amount of space to attachers which they request for the installation of their facilities (and thereby not assume responsibility for tenant management).
3. PG&E: Whether PG&E’s Overhead Facilities License Agreement, which PG&E has offered to Crown Castle, satisfies the ROW Decision’s nondiscriminatory access requirements.

## **B. Description of Parties' Positions on Unresolved Issues**

Crown Castle: Crown Castle's position is that it has a right to purchase the amount of space requested on a PG&E pole without the requirement to assume tenant management responsibility. Originally PG&E asserted that Crown Castle purchase space on its poles only if it (i) agreed to buy the entirety of the communications space on the pole and (ii) if Crown agreed to manage existing and future tenants in the entirety of the communications zone. In its Response, PG&E has revised its position and now will not even offer Crown Castle the option to purchase space on its poles, unless and until the CPUC (in another docket) revises the ROW Rules to require CLCs to lease space to tenants.<sup>1</sup> In the interim, PG&E proposes that Crown Castle become a tenant, rather than an owner, on those poles. In support of its position PG&E claims that the ROW Rules only require it to lease space on their poles to attachers and, effectively, that if the company chooses to allow attachers to purchase space on a pole that they (PG&E) may impose whatever terms and condition they like on that access.<sup>2</sup> PG&E's position has no merit and must be rejected by the Commission.

As PG&E now admits, its attempt to obligate CLCs to lease space to tenants clearly violates the ROW Rules and thus was unlawful. The alternative it now offers – refusing to sell space to Crown until the CPCU amends the ROW Rules – is equally unlawful. PG&E does not have an obligation to sell space on its poles; it could, if it wished follow the SDG&E model and

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<sup>1</sup> PG&E Response at 12 (“However, after reviewing Crown Castle’s Application for Arbitration and re-analyzing the ROW Decision, PG&E agrees with Crown that the ROW Decision “[does] not require CLCs to provide access to cable companies.... PG&E respectfully urges the Commission to revise its ROW Rules to require CLC pole owners to provide the same nondiscriminatory access to cable companies and all other qualified entities, consistent with the requirements that the Commission has already imposed on electric utilities and ILECs.”).

<sup>2</sup> PG&E Response at 15-16 (“ PG&E finds that it is reasonable for pole-owning electric utilities to set terms of sale for their poles, provided that the utilities continue to ensure nondiscriminatory access through tenancy license agreements, consistent with the ROW Decision.”).

only lease space. However to the extent that it determines to sell space on its poles it must make that space available on non-discriminatory terms and conditions consistent with the ROW decision. PG&E cannot unilaterally decide to sell space to some attacher (e.g. ILECs) but only offer a leasing option to the CLCs (which notably are direct competitors of the ILECs) for an undefined and potentially permanent time period – until the CPUC amends its ROW Rules to afford non-discriminatory access to CLCs. Such a result is particularly improper given the fact that the leasing option is, as PG&E effectively admits in its Response, less advantageous from a business perspective in a numerous respects than the ownership option.<sup>3</sup> Instead, given the current ROW Rules the only option which is both lawful and consistent with the Commission's policy objectives – including notably its policy of promoting broadband deployment – is for PG&E to be required to sell to Crown Castle and any other requesting CLCs the space the CLC needs for its attachment (e.g. one foot). This appears to be option 2 in PG&E's response and is the approach used by SCE throughout Southern California.

Crown Castle responds to statements made by PG&E below.

**a) PG&E Confuses Crown Castle's Position as Advocating a Right of Ownership.**

Crown Castle believes that PG&E is mischaracterizing Crown Castle's position as advocating a right to ownership. This is not, and has never been, Crown Castle's position. Instead, Crown Castle's position is that to the extent access by ownership is available, which PG&E has made available for decades, such access must abide by Decision 98-10-058 ("ROW Decision") because the ROW Decision applies to pole access by any means (purchase or tenancy). *See* Crown Castle Application at 10.

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<sup>3</sup> PG&E Response at 15.

- b) PG&E Provides No Support for Its Position that the ROW Decision Does Not Apply to Access By Ownership.** PG&E has provided no authority for its position that the ROW Decision does not apply to access by ownership, because such authority does not exist. Nothing in the ROW Decision limits access to lease or licensing, as opposed to access by purchase or sale.
- c) PG&E Inappropriately Advocates Amending the ROW Decision and ROW Rules.** PG&E requests that Commission amend the ROW Decision and ROW Rules to require Crown Castle to provide nondiscriminatory access to its tenants. This proposal lacks an understanding of the historical distinction in responsibilities between incumbents like AT&T and competitive carriers, and the very real practical and policy issues implicated. PG&E's advocacy for such an amendment has nothing to do with PG&E seeking competitive access and everything to do with PG&E avoiding its responsibilities as an incumbent pole owner.
- d) PG&E Attempts to Distract from the Subject of this Arbitration.** PG&E repeatedly references the "Overhead Licensing Agreement," despite the agreement having nothing to do with whether its conditioning access on tenant shifting violates the ROW Rules or Decision, the subject of this arbitration. Additionally, PG&E cherry-picks statements from the ROW Decision in a further attempt to distract from the pertinent issues in this arbitration. For instance, PG&E provides the following statement from the ROW Decision, "The access policy we establish does not eliminate the incumbents' ownership of their property nor does it give CLCs dominion over the incumbents' property" (*See* PG&E Response at 4) while conveniently omitting the remainder of the passage which states, "*Property ownership rights, however, do not give incumbent utilities unlimited discretion to deny access to telecommunications carriers unilaterally*" (emphasis added). The passage is

derived from Section VII regarding “Reservation of Capacity,” not the section in the ROW Decision focusing on access. It is further unclear to Crown Castle why PG&E appears to be concerned with being deprived of property when Crown Castle is in fact seeking *less* amount of the pole space than PG&E seeks to sell, not more property. PG&E yet again attempts to distort the issues by providing a quote from the ROW Decision in its Response at page 6: “These quotes highlight 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.” The section in the ROW Decision focused on rates is distinct from the section of the ROW Decision focused on access and should not be confused.

**e) The Burden of Proof is on PG&E, Not Crown Castle.** PG&E mistakenly states that Crown Castle retains the burden of proof. The burden of proof is on PG&E because it is the party advocating a departure from adopted standards of the ROW Decision, which as Crown Castle explained in its Application, applies to all forms of access, including that by purchase. In fact PG&E does not just seek to deviate from the standards of the ROW Decision, it seeks to amend the ROW decision itself! The ROW Decision makes clear that, “In the event of such dispute, the *burden of proof shall be on the incumbent utility* to justify that its proposed restrictions or denials are necessary to address valid safety or reliability concerns and are not unduly discriminatory or anticompetitive.”<sup>[1]</sup> As the incumbent entity, the burden in this case is on PG&E to justify its denial.

PG&E: PG&E believes that issue (3) should be the primary focus of this arbitration. As PG&E emphasized in its Response filed on October 25, 2018, PG&E’s position is that the ROW Decision pertains to mandatory nondiscriminatory access through tenancy, not ownership.

Therefore, so long as PG&E’s Overhead Facilities License Agreement, which sets forth PG&E’s

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<sup>[1]</sup> ROW Decision at 121.

terms of agreement with tenant attachers, satisfies the ROW Decision's nondiscriminatory access requirements, PG&E believes that it has fulfilled its ROW obligations pursuant to the ROW Decision. Given that PG&E filed its Overhead Facilities License Agreement with the Commission, and the Commission raised no objections to the contents of the License Agreement, PG&E firmly believes that it has satisfied the ROW Decision's nondiscriminatory access requirements by offering the License Agreement to Crown Castle.

With regards to issues (1) and (2), PG&E believes that nothing in the ROW Decision strips electric utility pole owners of the right to set the terms of sale for pole space on their respective poles. In fact, PG&E maintains that the ROW Decision requires mandatory nondiscriminatory access through tenancy, not ownership; to the extent that the Commission addresses ownership in the ROW Decision, the Commission does so in order to reassure pole owners that their ownership rights will be protected, and that no unlawful taking of property will occur. PG&E believes that a Commission ruling that allows attachers to dictate the terms of sale for space on PG&E's solely-owned poles would constitute an unlawful taking in violation of the Fifth Amendment, thereby contravening the assurances made by the Commission to pole owners in the ROW Decision.

Respectfully submitted October 29, 2018 at San Francisco, California.

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