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.	**A.18-10-004** (Filed: October 10, 2018)

POST-HEARING BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY (U39E)

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Dated: December 11, 2018

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POST-HEARING BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY (U39E)

Pursuant to Rule IX of Appendix A of Commission Decision ("D.") 98-10-058 ("the right-of-way/ROW Decision"), Pacific Gas and Electric Company ("PG&E") timely submits this post-hearing brief for the above-referenced proceeding. PG&E seeks a ruling from the Commission determining that PG&E's Overhead Facilities License Agreement satisfies PG&E's right-of-way ("ROW") access requirements under the ROW Decision, and PG&E has fulfilled its ROW obligations by offering this License Agreement to Crown Castle.[1/] Furthermore, PG&E respectfully requests that the Commission reject Crown Castle's proposed agreement.[2/]

PG&E notes that the December 10, 2018 Assigned Commissioner's Scoping Memo and Ruling ("Scoping Memo") sets a due date of December 10 for the parties' respective post-hearing briefs.[3/] On December 10, PG&E emailed a procedural inquiry to Administrative Law Judge ("ALJ") Patricia Miles and the Service List requesting clarification about the December 10

1/ During the November 29, 2018 evidentiary hearing ("EH"), PG&E's Overhead Facilities License Agreement was entered into evidence as Exhibit PG&E-02. See EH transcript, p. 124, lines 13-21.

2/ During the EH, Crown Castle's proposed agreement was entered into evidence as Exhibit Crown-02. See EH transcript, p. 125, line 24 to p. 126, line 11.

3/ Scoping Memo, p. 5.

due date, considering that the parties had agreed to a December 11 date during the evidentiary hearing ("EH").[4/] In her email response, ALJ Miles indicated that she would accept post-hearing briefs submitted on December 11.[5/]

Pursuant to ALJ Miles's instructions during the EH,[6/] PG&E is serving its post-hearing brief but not filing it.[7/] In the event that the Commission would like PG&E to file the post-hearing brief as well, PG&E respectfully requests that the Commission instruct the parties to do so.

I. INTRODUCTION

On October 10, 2018, Crown Castle filed this Application for Arbitration against PG&E, claiming that PG&E "has effectively denied access" to PG&E's solely-owned poles in violation of the ROW Decision.[8/] However, PG&E has never denied access to Crown Castle; instead, PG&E has continued to offer its Overhead Facilities License Agreement to Crown. This License Agreement satisfies all of the access requirements of the ROW Decision and fully complies with the set of "preferred outcomes" set forth in the ROW Decision.[9/] In fact, PG&E has filed this License Agreement with the Commission in PG&E's Advice Letter ("AL") 2982-E, and the

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4/ See EH transcript, p. 122, line 18 to p. 123, line 7.

5/ See email from ALJ Miles sent to the Service List at 5:04 PM on December 10, 2018.

6/ See EH transcript, p. 120, line 13.

7/ The Scoping Memo does not provide any additional guidance regarding the service and/or filing of the post-hearing briefs.

8/ Application for Arbitration, p. 1.

9/ The ROW Decision established a set of "preferred outcomes" to provide guidance in instances of access disputes. See ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *7-8.

Commission has not reported any deficiencies.[10/] [11/]

Despite the Overhead Facilities License Agreement's compliance with the ROW Decision, Crown Castle demands that PG&E sell an ownership interest in PG&E's solely-owned poles under terms of sale dictated by Crown. However, nothing in the ROW Decision provides Crown Castle or any other attacher the right to dictate the terms of sale for an electric utility's solely-owned assets. Instead, the ROW Decision emphasizes that the nondiscriminatory access requirements pertain to tenancy licensing, not ownership, as explained in detail in PG&E's Response to the Application for Arbitration, which PG&E incorporates in this post-hearing brief. Furthermore, Crown Castle seeks to exceed the ROW requirements by attempting to impose additional obligations on PG&E, such as a 45-day "deemed-approved" provision and the elimination of the 48-hour advance notice requirement prior to commencing work on PG&E's poles. In the ROW Decision, the Commission expressly rejected these additional requirements sought by Crown, and consequently, the Commission should deny Crown Castle's proposed agreement.

Ultimately, Crown Castle seeks to dictate the terms of sale for PG&E's solely-owned assets. Such a concept should trouble any regulatory agency and would raise serious constitutional concerns if entertained by the Commission. Accordingly, PG&E respectfully requests that the Commission adopt PG&E's Overhead Facilities License Agreement as the arbitrated agreement between PG&E and Crown Castle in this proceeding.

10/ See AL 2982-E, filed by PG&E on February 13, 2007, and the Commission's response letter dated March 8, 2007. PG&E provides a copy of AL 2982-E and the Commission's response letter on PG&E's website here: https://www.pge.com/nots/rates/tariffs/2007-e.shtml. PG&E referenced this AL and provided the website link on page 1 of the legal pleading of PG&E's Response to the Application for Arbitration.

11/ PG&E filed AL 2982-E as an informational submittal. Pursuant to General Order 96-B, sections 3.9 and 6.2, the Commission does not approve informational submittals but may notify the utility of any omissions or defects in the submittal. In its March 8, 2007 response letter to AL 2982-E, the Commission did not indicate any omissions or defects in PG&E's Overhead Facilities License Agreement.

II. BACKGROUND

PG&E is an incumbent utility that owns nearly 2.4 million poles located within its service territory.[12/] Of these 2.4 million poles, over 1.1 million are jointly-owned.[13/] PG&E allows for telecommunication carriers and cable TV providers to attach to PG&E's structures through two means: tenancy or ownership.[14/]

Through the tenancy option, PG&E leases one-foot increments of vertical space in the communications zone of the pole to qualified entities.[15/] PG&E facilitates this transaction through an Overhead Facilities License Agreement with the prospective tenant, who is required to hold a Certificate of Public Necessity and Convenience ("CPNC") from the Commission that thereby authorizes the entity to access structures in governmental ROW for communication conductor attachments.[16/] PG&E's Overhead Facilities License Agreement, which PG&E filed with the Commission in AL 2982-E, satisfies all of the mandatory nondiscriminatory access provisions of the ROW Decision.[17/]

Through the ownership option, PG&E facilitates the *voluntary* sale and purchase of an ownership interest, which specifically includes the entire communications zone.[18/] This owner-to-owner transaction occurs through the Northern California Joint Pole Association ("NCJPA").[19/] AT&T, an incumbent local exchange carrier ("ILEC"), serves as PG&E's

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12/ PG&E's Prepared Rebuttal Testimony, p. 1. This Prepared Rebuttal Testimony was sponsored by Ms. Tinamarie De Teresa, who served as PG&E's witness. During the EH, this Prepared Rebuttal Testimony was entered into evidence as Exhibit PG&E-01. See EH transcript, p. 124, lines 4-12.

13/ Exhibit PG&E-01, p. 1.

14/ Exhibit PG&E-01, p. 3.

15/ Exhibit PG&E-01, p. 3.

16/ Exhibit PG&E-01, p. 3.

17/ Exhibit PG&E-01, p. 3, 5.

18/ Exhibit PG&E-01, p. 3.

19/ Exhibit PG&E-01, p. 3.

primary pole joint-owner.[20/] Because PG&E requires purchase of the entire communications zone under this ownership option, PG&E requires the purchaser to assume the responsibilities for administering tenants in the communications zone.[21/] As expressed in the legal pleading of PG&E's Response to the Application for Arbitration, this ownership option is separate from the ROW Decision, which pertains to mandatory tenancy access, not ownership.

In its Application for Arbitration, Crown Castle, a competitive local exchange carrier ("CLC"), acknowledges that PG&E has offered both options of attachment.[22/] However, Crown Castle claims that PG&E's tenancy option somehow violates the ROW Decision.[23/] With regards to the ownership option, Crown Castle argues that PG&E should be "required to sell to Crown Castle and any other requesting CLCs the space the CLC needs for its attachment (e.g. one foot)."[24/] In other words, Crown Castle seeks terms of sale that deviate from PG&E's long-standing terms of sale with AT&T.[25/]

Citing the ROW Decision, Crown Castle's Application for Arbitration states that the ROW rules "[do] not require CLCs to provide access to cable companies."[26/] Thus, during the course of this arbitration proceeding, PG&E determined that it could no longer offer CLCs with any terms of sale unless and until the Commission requires all CLCs to provide the same

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20/ Legal pleading of PG&E's Response to the Application for Arbitration, p. 3.

21/ Exhibit PG&E-01, p. 3.

22/ Crown Castle's Prepared Testimony, p. 6. This Prepared Testimony was sponsored by Mr. Scott Scandalis, who served as Crown Castle's witness. During the EH, this Prepared Testimony was entered into evidence as Exhibit Crown-01. See EH transcript, p. 125, lines 11-23.

23/ See Exhibit Crown-01, p. 6.

24/ October 29, 2018 Joint Statement of Crown Castle and PG&E on Unresolved Issues ("Joint Statement"), p. 4.

25/ During the EH, Ms. De Teresa testified that PG&E's policy of requiring all purchasers to buy the entirety of the communications zone and assume all tenant management responsibilities for that zone has been in place for at least the past 10 years. See EH transcript, p. 110, line 13 to p. 111, line 13.

26/ See Application for Arbitration, p. 8, citing to the ROW Decision, 1998 Cal. PUC LEXIS at *38.

nondiscriminatory access required of electric utilities and ILECs.[27/]

III. LEGAL ARGUMENT

A. Crown Castle Carries the Burden of Proof Because Crown Seeks to Impose Requirements that Exceed the ROW Decision.

The ROW Decision states,

> We shall, therefore, adopt a set of rules as prescribed in Appendix A governing ROW arrangements, and shall administer the rules in the form of "preferred outcomes" . . . In resolving disputes over ROW access, we shall consider how closely each party has conformed with our adopted "preferred outcomes" and whether proposed terms are unfairly discriminatory or anticompetitive. The burden of proof shall be on the party advocating a departure from our adopted standards in prevailing in a disputed agreement.[28/]

In the arbitration at hand, PG&E's Overhead Facilities License Agreement fully conforms with the "preferred outcomes" set forth in the ROW Decision, whereas Crown Castle's proposed agreement seeks wide-ranging deviations from the "preferred outcomes." As a result, Crown Castle carries the burden of proof.

1. PG&E's Overhead Facilities License Agreement Complies with the ROW Decision's "Preferred Outcomes," and the Commission Has Not Indicated Any Deficiencies in the License Agreement.

PG&E's Overhead Facilities License Agreement fully conforms with the ROW Decision's "preferred outcomes," considering that PG&E filed this License Agreement with the Commission in AL 2982-E, and the Commission did not indicate any deficiencies.[29/] [30/] In AL

27/ Exhibit PG&E-01, p. 8, lines 17-20. See also Ms. De Teresa's oral testimony in EH transcript, p. 48, lines 22-28.

28/ ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *7-8.

29/ Pursuant to ALJ Miles's request during the October 30, 2018 arbitration conference call, PG&E provided a copy of its current Overhead Facilities License Agreement to the Service List via email on October 31, 2018. In that email, PG&E indicated that "the substance of this current Overhead Facilities License Agreement is virtually identical to the License Agreement that PG&E filed with the Commission in Advice Letter 2982-E on February 13, 2007." As previously noted, PG&E's current Overhead Facilities License Agreement was entered into evidence as PG&E-02 during the EH. See EH transcript, p. 124, lines 13-21.

30/ PG&E filed AL 2982-E as an informational submittal. Pursuant to General Order 96-B, sections

2982-E, PG&E explained,

> In accordance with D.98-10-058 [the ROW Decision], PG&E negotiated a standard agreement with the California Cable Television Association (CCTA), which represents cable companies in PG&E's service territory and which was authorized by those cable companies to negotiate standardized terms for pole attachment access with PG&E. Together, PG&E and the CCTA created the attached Overhead Facilities License Agreement that strikes an acceptable balance between operational and other concerns of the utility and the needs of the cable/telecommunications companies for efficient access to PG&E's support structures. PG&E makes this negotiated standard contract available to any third party that qualifies for access under the mandatory attachment rules of D.98-10-058, regardless of whether they are members of the CCTA.[31/]

Thus, PG&E's Overhead Facilities License Agreement is derived directly from the ROW Decision and was developed with assistance from the attachment community. In the event that the Commission or Crown Castle pinpoints any defects in the Overhead Facilities License Agreement, PG&E will gladly work with the parties to amend the License Agreement as appropriate.[32/]

3.9 and 6.2, the Commission does not approve informational submittals but may notify the utility of any omissions or defects in the submittal. In its March 8, 2007 response letter to AL 2982-E, the Commission did not indicate any omissions or defects in PG&E's Overhead Facilities License Agreement.

31/ AL 2982-E, pp. 1-2.

32/ PG&E notes that D.18-04-007, which the Commission issued on April 27, 2018, "amends the Right-of-Way Rules . . . to provide competitive local exchange carriers (CLECs) with expanded nondiscriminatory access to public utility infrastructure for the purpose of installing antennas and other wireless telecommunications facilities." D.18-04-007, 2018 WL 2059409 (Cal.P.U.C.) at *1. Consistent with D.18-04-007, PG&E created a Pole License Agreement for CLEC Wireless Attachments, which is separate from PG&E's Overhead Facilities License Agreement. Since Crown Castle's Application for Arbitration does not reference D.18-04-007, PG&E has not provided a copy of its Pole License Agreement for CLEC Wireless Attachments to ALJ Miles and the Service List. Upon request, however, PG&E can provide copies.

2. Crown Castle's Proposed Agreement Deviates from the "Preferred Outcomes" of the ROW Decision.

In contrast to PG&E's fully-compliant Overhead Facilities License Agreement, Crown Castle's proposed agreement departs drastically from the "preferred outcomes" of the ROW Decision by (1) requiring PG&E to sell, not lease, pole space; (2) seeking contract provisions explicitly rejected in the ROW Decision; and (3) requiring PG&E to provide a safety or reliability reason should PG&E deny Crown Castle's request to purchase. Because Crown Castle advocates for a broad departure from the Commission's "preferred outcomes," Crown carries the burden of proof.

a. Crown Castle Greatly Expands the ROW Decision by Requiring PG&E to Sell an Ownership Interest in PG&E's Solely-Owned Poles.

Crown Castle's proposed agreement requires PG&E to "sell to Crown Castle the amount of available space requested by Crown Castle."[33/] As described in length in PG&E's Response to the Application for Arbitration, the ROW Decision mandates access through tenancy, not ownership. Thus, Crown Castle's insistence that PG&E sell pole space to Crown far exceeds the requirements of the ROW Decision, and Crown has no legal basis to suggest that it is entitled to assume an ownership interest in PG&E's solely-owned assets.

The fact that the ROW Decision pertains to access through tenancy, not ownership, is especially evident in the Commission's analysis of annual rates. The "preferred outcomes" of the ROW Decision state,

> Whenever a public utility and a telecommunications carrier, or cable TV company, or associations, therefore, are unable to agree upon the terms, conditions, or annual compensation for pole attachments or the terms, conditions, or costs of rearrangements,

33/ See Exhibit Crown-02, bullet point 3.

> the Commission shall establish and enforce the rates, terms and conditions for pole attachments and rearrangements.[34/]

The Commission then proceeds to describe the calculation of the "annual recurring fee" for attachment, which is equal to "two dollars and fifty cents ($2.50) or 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor, whichever is greater."[35/] Undoubtedly, an "annual recurring fee" refers to a recurring rental rate, not a one-time purchasing cost, thereby highlighting that the ROW Decision pertains to access through tenancy, not ownership. Tellingly, the ROW Decision contains no discussion whatsoever on a "preferred outcome" for the price of *purchasing* pole space, in spite of the common-sense understanding that issues revolving around price constitute a key component of any negotiated agreement. The reason for the absence of a default *purchase* price is clear: the ROW Decision does not require pole access through ownership, nor did the Commission intend for parties to interpret the ROW Decision as encompassing the sale of utility-owned assets. Crown Castle's attempt to require PG&E to "sell to Crown Castle the amount of available space requested by Crown Castle"[36/] far exceeds any reasonable interpretation of the Commission's "preferred outcomes."

As an aside, PG&E notes that in Exhibit B of its Overhead Facilities License Agreement, PG&E sets an annual pole attachment rate consistent with the 7.4 percent annual rate indicated in the "preferred outcome" of the quote above.[37/]

b. Crown Castle Seeks Contract Provisions that Contravene the ROW Decision.

The "preferred outcomes" of the ROW Decision specifically do not impose a 45-day "deemed-approved" provision on PG&E and the other electric utilities.[38/] Furthermore, the

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34/ Appendix A, Rule VI.B.1 of ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *79.

35/ Appendix A, Rule VI.B.1 of ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *79.

36/ See Exhibit Crown-02, bullet point 3.

37/ See Exhibit B of PG&E-02.

38/ Appendix A, Rule IV.B of ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *76-77.

"preferred outcomes" indicate that telecommunications companies must provide the electric utility pole owner with 48-hour advance notice prior to commencing work on electric poles.[39/] However, Crown Castle appears to seek (1) a 45-day "deemed-approved" provision and (2) the elimination of the 48-hour advance notice requirement indicated in PG&E's Overhead Facilities License Agreement, considering that Crown described the importance it places on these two items in its Prepared Testimony[40/] and also cross-examined Ms. De Teresa on these two issues during the EH.[41/] Notwithstanding any NCJPA stipulations, these two contract provisions desired by Crown Castle deviate from the "preferred outcomes" of the ROW Decision and therefore reemphasize that Crown carries the burden of proof. Ultimately, the ROW Decision does not, in any way, suggest that when a pole access dispute arises between a pole owner and a prospective attacher, the documents of the joint pole association should serve as the "preferred outcomes." Instead, the ROW Decision explicitly states that Appendix A of the ROW Decision sets forth the "preferred outcomes,"[42/] and as a result, the Commission should base its determination on those specified "preferred outcomes."

(1) The ROW Decision's "Preferred Outcomes" Do Not Impose a 45-Day Timeline on PG&E.

The ROW Decision requires the ILECs, Pacific Bell ("Pacific")[43/] and GTE California Incorporated ("GTEC"), to "respond to the telecommunications carrier within 45 days after receipt of the written request [for attachment]."[44/] Furthermore, "[f]ailure of Pacific or GTEC to

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39/ Appendix A, Rule IV.C.2 of ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *77.

40/ See Exhibit Crown-01, p. 7, lines 17-21 and p. 8, lines 8-10.

41/ See EH transcript, p. 87, line 2 to p. 88, line 5.

42/ See ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *7: "We shall, therefore, adopt a set of rules as prescribed in Appendix A governing ROW arrangements, and shall administer the rules in the form of 'preferred outcomes.'"

43/ Now AT&T. See Exhibit Crown-01, p. 4, lines 3-4.

44/ See ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *35.

respond within 45 days shall be deemed an acceptance of the request for access."[45/] However, the ROW Decision specifically excludes PG&E and the other electric utilities from any such 45-day requirement: "[W]e shall prescribe standard response times only for the two large ILECs, Pacific[46/] and GTEC."[47/] The Commission provides a well-reasoned rationale for this determination: "We agree that the electric utilities should not compromise their primary obligations to serve their own customers in the process of complying with telecommunications carriers' requests for information or for ROW access."[48/] Consistent with the ROW Decision, PG&E's Overhead Facilities License Agreement does not contain any 45-day "deemed-approved" provision.

In spite of the clear directives in the ROW Decision's "preferred outcomes," Crown Castle's actions in this proceeding suggest that Crown seeks a 45-day "deemed-approved" provision in any agreement with PG&E, considering that Crown mentions this item in its Prepared Testimony[49/] and also cross-examined Ms. De Teresa on this issue.[50/] Because Crown Castle seeks to impose on PG&E a requirement that the Commission expressly rejected in the ROW Decision, Crown carries the burden of proof in advocating for this departure from the Commission's "preferred outcomes."

(2) The ROW Decision's "Preferred Outcomes" Require Crown Castle to Provide PG&E with 48-Hour Advance Notice Prior to Commencing Work on PG&E's Electric Poles.

The ROW Decision's "preferred outcomes" state,

45/ Appendix A, Rule IV.B.1 of ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *76.

46/ As noted above, "Pacific" refers to Pacific Bell, not PG&E.

47/ See ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *34.

48/ See ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *35.

49/ See Exhibit Crown-01, p.8, lines 8-10.

50/ See EH transcript, p. 87, line 24 to p. 88, line 5.

> To use its own personnel or contractors on electric utility poles, the telecommunications carrier or cable TV company must give 48 hours advance notice to the electric utility, unless an electrical shutdown is required. If an electrical shutdown is required, the telecommunications carrier or cable TV company must arrange a specific schedule with the electric utility.[51/]

PG&E's Overhead Facilities License Agreement contains similar language:

> Permittee shall provide the Company forty-eight (48) hours advance notice by calling the Company's designated representative before any work is performed on the Company Overhead Facilities when an electric service shutdown is not required. If an electric service shutdown is required, the Permittee shall arrange a specific schedule with the Company prior to performing any work on the Company Overhead Facilities.[52/]

Similar to the discussion above regarding Crown Castle's desire for a 45-day "deemed-approved" contract provision, Crown appears to seek authority to perform work on PG&E's electric poles without providing 48-hour advance notice to PG&E, considering that Crown lists this item in its Prepared Testimony[53/] and cross-examined Ms. De Teresa on this topic.[54/] In making this request, Crown Castle once again clearly seeks a deviation from the ROW Decision's "preferred outcomes." Consequently, Crown retains the burden of proof.

c. Crown Castle Seeks to Require PG&E to Provide a Safety or Reliability Rationale Whenever PG&E Denies Crown Castle's Request to Purchase,[55/] but such a Requirement is Unsupported by the "Preferred Outcomes."

The ROW Decision's "preferred outcomes" state,

> A utility shall grant access to its rights-of-way and support structures to telecommunications carriers or cable TV company and cable TV companies on a nondiscriminatory basis. Nondiscriminatory access is

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51/ Appendix A, Rule IV.C.2 of ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *77.

52/ Exhibit PG&E-02, p. 8.

53/ See Exhibit Crown-01, p. 7, lines 17-21.

54/ See EH transcript, p. 87, lines 2-23.

55/ See Exhibit Crown-02, bullet point 4.

> 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.[56/]

The body of the ROW Decision further defines nondiscriminatory access:

> We shall consider nondiscriminatory access to mean that *similarly situated carriers* must be provided the opportunity to gain access to the ROW and support structures of the incumbent utilities under impartially applied terms and conditions on a first-come, first-served basis.[57/]

In the matter at hand, PG&E has never denied pole access to Crown Castle. Instead, pursuant to the ROW Decision, PG&E has continued to offer Crown Castle the same Overhead Facilities License Agreement that PG&E offers to all prospective tenant attachers, which would provide Crown with all mandatory access rights.

PG&E has, however, rejected Crown Castle's proposed terms of sale; but as PG&E has continuously argued, the ROW Decision's "preferred outcomes" do not extend to access through ownership, since the ROW Decision only pertains to mandatory tenancy access. Thus, in rejecting Crown's terms of sale, PG&E is not obligated to provide a safety or reliability rationale, bearing in mind that the poles at issue are PG&E's solely-owned assets, and the ROW Decision does not prevent PG&E from setting terms of sale. Crown Castle has failed to cite any provision in the ROW Decision that would require PG&E to state a safety or reliability rationale whenever PG&E refrains from selling an ownership interest in its solely-owned poles, and Crown cannot credibly do so given that the sale of pole space is not even mandated by the ROW Decision.[58/] Ultimately, the ROW Decision only requires PG&E to provide a safety or reliability reason if PG&E refuses access, and that scenario is inapplicable to the case at hand because PG&E continues to offer access to Crown Castle through PG&E's Overhead Facilities License

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56/ Appendix A, Rule VI.A.1 of ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *78.

57/ ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *11 (emphasis added).

58/ For example, it is undisputed in the record that San Diego Gas & Electric Company does not sell its pole space. See PG&E's discussion of this issue in section III.B.1 of this post-hearing brief.

Agreement.

Regardless, PG&E has provided a legitimate reason as to why it is not offering to sell pole space to Crown Castle. As Crown itself acknowledges in its Application for Arbitration, the ROW Decision "[does] not require CLCs to provide access to cable companies."[59/] Thus, to avoid potential discriminatory treatment of cable companies by CLC pole owners, PG&E will not sell pole space to CLCs unless and until the Commission requires all CLCs to provide the same nondiscriminatory access required of electric utilities and ILECs.[60/]

Given Crown Castle's previous statements in this arbitration, Crown will likely argue that PG&E engages in discriminatory practices by extending an ownership option to AT&T while only offering a tenancy option to Crown. However, as quoted above, the ROW Decision defines 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."[61/] As indicated in Ms. De Teresa's oral testimony, PG&E's policy of not selling pole space applies to all CLCs, not just Crown Castle.[62/] Furthermore, as Crown Castle has repeatedly suggested, CLCs are not similarly situated to ILECs.[63/] Consequently, because PG&E has offered Crown Castle the same terms and conditions of tenancy access provided to other CLCs, i.e., to "similarly situated carriers," PG&E's policy of not selling pole space to all CLCs unless and until the Commission

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59/ See Application for Arbitration, p. 8, citing to the ROW Decision, 1998 Cal. PUC LEXIS at *38.

60/ See Exhibit PG&E-01, p. 8, lines 17-20. See also Ms. De Teresa's oral testimony in EH transcript, p. 48, lines 17-28.

61/ ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *11 (emphasis added).

62/ EH transcript, p. 48, lines 22-28.

63/ See e.g. Exhibit Crown-01, p. 4, lines 13-16: "PG&E was asking Crown Castle to basically assume the role that AT&T has historically fulfilled – as the owner/manager of the entire communications zone and to any tenants in that space;" Joint Statement, p. 5: "This proposal lacks an understanding of the historical distinction in responsibilities between incumbents like AT&T and competitive carriers."

mandates CLCs to provide the same nondiscriminatory access required of ILECs does not run afoul of the ROW Decision, nor does it violate any of the Commission's "preferred outcomes." Once again, Crown Castle seeks to drastically depart from the "preferred outcomes" by attempting to bring ownership into the ROW Decision, and as a result, the burden of proof rightfully falls to Crown.

B. Crown Castle Has Made Several Mischaracterizations that PG&E Seeks to Clarify.

In its Prepared Testimony, Crown Castle claims that (1) PG&E's "attach as a tenant" option is "simply unworkable" for Crown's business,[64/] despite the fact that Crown Castle attaches to San Diego Gas & Electric Company's (SDG&E) poles as a tenant.[65/] Furthermore, Crown made several mischaracterizations during the EH, including (2) Crown's suggestion that PG&E's Prepared Rebuttal Testimony omits a key footnote; (3) Crown's misstatements regarding its own Prepared Testimony; and (4) Crown's presentation of Exhibits Crown-03, Crown-04, and Crown-05. Below, PG&E provides clarification on these four issues.

1. PG&E's Tenancy Option is Not Truly "Unworkable" for Crown Castle, Considering that Crown Attaches as a Tenant to Poles Owned by SDG&E.

In its Prepared Testimony, Crown Castle alleges that PG&E's "attach as a tenant" option is "simply unworkable" for Crown's business.[66/] However, it is undisputed in the record that SDG&E only leases pole space,[67/] and during cross-examination, Mr. Scandalis indicated that

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64/ See Exhibit Crown-01, p. 6, lines 16-17.

65/ EH transcript, p. 38, line 28 to p. 39, line 2.

66/ See Exhibit Crown-01, p. 6, lines 16-17.

67/ See e.g. Joint Statement, pp. 3-4: "[PG&E] could, if it wished follow the SDG&E model and only lease space;" Exhibit PG&E-01, p. 11, lines 3-6: "PG&E is aware that San Diego Gas and Electric Company (SDG&E) does not allow joint-ownership of the pole structures it owns, rather choosing to only allow access and attachment by license agreement."

Crown attaches to SDG&E's poles as a tenant: "Since ownership is not an option with San Diego Gas and Electric, we do attach to their poles through tenancy."[68/] Thus, the record does not support Crown Castle's assertion that attaching to PG&E's poles as a tenant is somehow "unworkable," given that Crown attaches as a tenant in SDG&E's service territory. Unless Crown Castle can indicate a deficiency in PG&E's Overhead Facilities License Agreement, which Crown has yet to do, the Commission should give no credence to Crown's broad claim that PG&E's "attach as a tenant" option "violate[s] the ROW Rules and den[ies] Crown Castle access to poles on terms and conditions to which it is entitled."[69/]

2. Crown Castle Incorrectly Claimed that PG&E's Prepared Rebuttal Testimony Omits a Footnote Regarding Different Rules for ILECs and CLCs.

During the cross-examination of Ms. De Teresa,[70/] Crown Castle referenced a statement included in PG&E's Prepared Rebuttal Testimony that in turn quoted the following language from page 9 of Crown Castle's Prepared Testimony: "[R]equiring one competitive provider to lease space to its competitors raises a host of competitive issues, including but not limited to the fact that an application to attachment would in effect reveal its business plans in advance to its competitor as part of the pole attachment process."[71/] Continuing its cross-examination of Ms. De Teresa, Crown Castle then stated, "[A]re you aware that for the quoted language that you cited there was a footnote which explains the different rules for incumbents versus competitive carriers in light of the right-of-way decision and federal law as well?"[72/] Crown Castle went so far as to state that "I don't think you [Ms. De Teresa] cited the right page."[73/] However, upon

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68/ EH transcript, p. 38, line 28 to p. 39, line 2.

69/ See Exhibit Crown-01, p. 6, lines 17-19.

70/ See EH transcript, p. 89, lines 1-17.

71/ See Exhibit PG&E-01, p. 12, lines 4-8, which cites to Exhibit Crown-01, p. 9.

72/ EH transcript, p. 89, line 25 to p. 90, line 2.

73/ See EH transcript, p. 92, lines 6-7.

review of PG&E's Prepared Rebuttal Testimony, it is clear that PG&E correctly cited to page 9 of Crown Castle's Prepared Testimony, since page 9 of Crown's Testimony contains the quote at issue. Furthermore, contrary to Crown Castle's assertions during cross-examination, no footnote appears on page 9 of Crown's Prepared Testimony regarding "the different rules for incumbents versus competitive carriers in light of the right-of-way decision and federal law."[74/] PG&E makes this point of clarification to counter the notion that PG&E surreptitiously and improperly omitted a footnote when quoting from Crown Castle's Prepared Testimony.

3. Crown Castle Mischaracterized its Own Prepared Testimony Regarding the Number of Poles that it has Purchased through the NCJPA Process.

In its Prepared Testimony, Crown Castle describes the NCJPA process for facilitating the sale of pole space.[75/] Crown then states, "Through this process, Crown Castle has acquired space on approximately 20,000 poles in Northern California."[76/] In PG&E's Prepared Rebuttal Testimony, PG&E challenges this 20,000 figure posed by Crown, and PG&E references an August 2018 NCJPA Operations Financing Worksheet which suggests that Crown Castle and its affiliated companies jointly own no more than 7,700 poles in the jurisdictional territory of the NCJPA.[77/] [78/]

During Crown Castle's cross-examination of Ms. De Teresa, Crown questioned the 7,700 figure presented by PG&E by stating, "[I]s it possible that Crown Castle in reaching its 20,000

74/ See EH transcript, p. 89, line 27 to p. 90, line 2.

75/ See Exhibit Crown-01, p. 3, line 14 to page 4, line 1.

76/ Exhibit Crown-01, p. 4, lines 1-2.

77/ See Exhibit PG&E-01, p. 2, lines 18-21.

78/ Pursuant to ALJ Miles's request during the EH (see EH transcript, p. 136, lines 1-11), PG&E provided ALJ Miles a redacted copy of this August 2018 NCJPA Operations Financing Worksheet on December 6, 2018. See PG&E's December 6, 2018 Motion for Leave to File Under Seal the Additional Evidence Requested by the Administrative Law Judge During the November 29, 2018 Evidentiary Hearing.

number included solely-owned poles that would not have been referenced in the worksheet?[79] . . . Does the worksheet include solely-owned poles that are solely owned outside of the NCJPA process?"[80] As indicated in the objection made by PG&E's counsel during the EH, Crown Castle is conflating different issues.[81] Crown Castle's testimony first describes the NCJPA process,[82] then clearly states that "[t]hrough *this process*, Crown Castle has acquired space on approximately 20,000 poles in Northern California."[83] Thus, when questioning PG&E's witness during cross-examination, Crown Castle cannot now suggest that Crown's 20,000 figure could "include solely-owned poles that are solely owned *outside* of the NCJPA process."[84] Such a statement by Crown Castle during the EH undermines and contradicts its own Prepared Testimony.

4. The Commission Should Give No Weight to Exhibits Crown-03, Crown-04, and Crown-05.

During the EH, Crown Castle sought to enter three sets of Joint Pole Transaction documents into the evidentiary record.[85] Subsequently, ALJ Miles marked these three documents as Exhibits Crown-03, Crown-04, and Crown-05, and ALJ Miles admitted these documents into the record over PG&E's objections.[86] Specifically, PG&E objected to these documents on the grounds that these documents were never provided in Crown Castle's Prepared

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79/ See EH transcript, p. 99, lines 19-22.

80/ See EH transcript, p. 99, line 28 to p. 100, line 2.

81/ See EH transcript, p. 100, lines 10-21.

82/ See Exhibit Crown-01, p. 3, line 14 to page 4, line 1.

83/ Exhibit Crown-01, p. 4, lines 1-2 (emphasis added).

84/ See EH transcript, p. 99, line 28 to p. 100, line 2 (emphasis added).

85/ See EH transcript, pp. 126-132.

86/ See EH transcript, pp. 127-132.

Testimony, and as a result, PG&E was not afforded the opportunity to rebut these documents in PG&E's Prepared Rebuttal Testimony.[87/] Furthermore, PG&E indicated during the EH that these documents lacked context and could not reasonably be interpreted as laying the whole foundation regarding past NCJPA transactions between PG&E and Crown Castle.[88/] In this post-hearing brief, PG&E reiterates its objections to these three exhibits, and for the reasons stated in the EH, PG&E respectfully requests that the Commission give no weight to these exhibits.

Furthermore, the justification stated by Crown Castle to support the entry of these documents into the evidentiary record is somewhat misleading. For example, PG&E acknowledges that Exhibits Crown-03 and Crown-04 were provided to PG&E during the November 28, 2018 arbitration conference held on the day prior to the EH; however, Crown Castle's statement during the EH that PG&E had "ample opportunity" to review Exhibits Crown-03 and Crown-04 prior to the EH[89/] fails to paint a complete picture of the circumstances at hand. Absent a few short breaks during the November 28 arbitration conference, PG&E and Crown Castle were together in the arbitration room from the time of Crown's presentation of Exhibits Crown-03 and Crown-04 to 5:30 PM on that day (i.e., after the close of business).[90/] Furthermore, on the following morning (i.e., the day of the November 29, 2018 EH), PG&E met with Crown Castle prior to the start of the 10:00 AM hearing in order to discuss the proceeding.[91/] Thus, PG&E never had "ample opportunity" to review the documents internally

87/ See EH transcript, p. 33, line 27 to p. 34, line 5; see also EH transcript p. 130, lines 11-13.

88/ See EH transcript, p. 34, lines 2-5; see also EH transcript, p. 130, lines 7-13.

89/ See EH transcript, p. 128, lines 12-13.

90/ See November 28, 2018 transcript, p. 15, lines 19-21.

91/ See EH transcript, p. 19, lines 1-22.

without Crown present, since PG&E was consumed by the arbitration meetings and hearings. In addition, due to these time constraints, PG&E did not have a sufficient chance to dig up additional Joint Pole Transactions or offer clarifying details on the Joint Pole Transaction documents provided by Crown Castle (e.g. any Crown/PG&E correspondence or details unique to these specific Joint Pole Transactions). Therefore, giving any weight to these exhibits would prove prejudicial against PG&E.

Moreover, Crown Castle did not provide PG&E with Exhibit Crown-05 until after the EH had already begun on November 29, just minutes prior to Crown Castle's cross-examination of PG&E's witness.[92/] Thus, as indicated in PG&E's objection to Exhibit Crown-05, Crown's use of this exhibit to cross-examine PG&E's witness raises fairness concerns.[93/] In advocating for the inclusion of Exhibit Crown-05 to the evidentiary record, Crown indicated that this exhibit "is more representative of the kinds of instances, these few instances described in the rebuttal testimony."[94/] This echoes statements made by Crown to support the inclusion of Exhibit Crown-03: "[I]t is responsive to Ms. De Teresa's testimony."[95/] Likewise, Crown made a similar statement pertaining to Exhibit Crown-04: "This document is an approval, which goes to the rebuttal testimony of De Teresa regarding the few, which she calls the 'few instances' when Crown Castle has used terms of sale that differ from their normal practice."[96/] Ultimately, by acknowledging that Exhibits Crown-03, Crown-04, and Crown-05 all serve to respond to Ms. De

92/ See EH transcript, p. 131, line 24 to p. 132, line 3.

93/ See EH transcript, p. 132, lines 3-4.

94/ See EH transcript, p. 131, lines 18-20.

95/ See EH transcript, p. 127, line 27 to p. 128, line 2.

96/ See EH transcript, p. 129, lines 23-28.

Teresa's Prepared Rebuttal Testimony, Crown has essentially presented surrebuttal testimony through these exhibits. The expedited dispute resolution procedures set forth in Appendix A of the ROW Decision do not include a step for surrebuttal testimony, which further emphasizes that it would be improper for the Commission to give any weight to Exhibits Crown-03, Crown-04, and Crown-05.

IV. CONCLUSION

The ROW Decision established a set of "preferred outcomes" for the Commission to use as a "disciplined point of reference"[97/] whenever an access dispute arises between a pole owner and a prospective attacher. In this arbitration proceeding, PG&E's Overhead Facilities License Agreement fully complies with the access requirements of the ROW Decision and adheres to the "preferred outcomes" set forth by the Commission. In contrast, Crown Castle's proposed agreement seeks to drastically depart from the ROW Decision's "preferred outcomes" by requiring PG&E to sell an ownership interest to Crown Castle on poles solely-owned by PG&E, pursuant to terms of sale dictated by Crown. Nothing in the ROW Decision entitles Crown Castle to purchase pole space, since the mandatory access requirements of the ROW Decision pertain only to access through tenancy, not ownership. Because Crown Castle's proposed agreement fails to comply with the ROW Decision's "preferred outcomes," PG&E respectfully requests that the Commission reject Crown's proposed agreement and adopt PG&E's Overhead Facilities License Agreement as the arbitrated agreement in this proceeding.

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97/ See ROW Decision, 1998 WL 1109255 (Cal.P.U.C.) at *7.

Respectfully Submitted,

RX UY

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