BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Crown Castle NG West LLC (U-6745-C), pursuant to Decision 98-10-058 for Arbitration of Dispute over Denial by Pacific Gas and Electric Company (U-39-E) of Access to Utility Support Structures.	Application No. 18-10-004 (Filed: October 10, 2018)

PACIFIC GAS AND ELECTRIC COMPANY'S (U39E) APPLICATION FOR REHEARING OF DECISION 19-03-004

CHARLES R. LEWIS, IV
GRANT GUERRA

Pacific Gas and Electric Company
77 Beale Street, B30A
San Francisco, CA 94105
Telephone: (415) 9733728
Facsimile: (415) 973-5520
E-Mail: Grant.Guerra@pge.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

Dated: March 22, 2019

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Crown Castle NG West LLC (U-6745-C), pursuant to Decision 98-10-058 for Arbitration of Dispute over Denial by Pacific Gas and Electric Company (U-39-E) of Access to Utility Support Structures.	Application No. 18-10-004 (Filed: October 10, 2018)

PACIFIC GAS AND ELECTRIC COMPANY'S (U39E) APPLICATION FOR REHEARING OF DECISION 19-03-004

This Application for Rehearing of Decision 19-03-004 is filed pursuant to Rule 16.1 of the California Public Utilities Commission' s Rules of Practice and Procedure, and sections 1731 and 1756 of the California Public Utilities Code. Pacific Gas and Electric Company (PG&E), applies for rehearing of Decision 19-03-004 (the Decision) on the grounds that it commits multiple errors of law and fact. The Decision affirmed the final arbitrator's report determining that PG&E satisfies its responsibility under Decision 98-10-058 (ROW Decision) to grant non-discriminatory access to Crown Castle NG West LLC (Crown Castle) by offering to lease space on its poles under PG&E's Overhead Facilities License Agreement which the Commission has accepted as non-discriminatory. The arbitrator ordered the parties to craft an arbitrated License Agreement reflecting mutually acceptable terms for leasing spacing on PG&E poles. However, the parties could not reach mutual agreement on the form of the License Agreement. In lieu of an arbitrated License Agreement, the Decision adopted the revised License Agreement proposed by Crown Castle. PG&E, as the incumbent utility that owns nearly 2.4 million poles in its service territory, understands and shares the desire to provide non-discriminatory access that will permit Crown Castle to meet its goals to rapidly deploy of broadband and provide reliable service to its customers. However, the Decision contains significant legal and factual errors. The Decision included findings that are contrary to the undisputed facts. These include the following finding:

- The Decision found that PG&E has not objected to Crown Castle's revisions to the form of License Agreement. Decision p. 3, Finding of Fact 9. The undisputed facts

demonstrate otherwise. The record demonstrates that PG&E objected to Crown Castle's proposed license provisions. Moreover, the basis for PG&E's objection was that Crown Castle's proposed license provisions were contrary to the Commission's "preferred outcomes" set forth in the ROW Decision.

- Neither the Final Arbitrator's Report nor the Proposed Decision provided any opportunity for PG&E to comment on Crown Castle's proposed license provisions and identify the specific reasons why these provisions would violate principles approved in the ROW Decision. Crown Castle's proposed license provisions are directly contrary to the findings and guidance set forth in the ROW Decision and would negatively impact PG&E in the performance of its duties in public service. The same issues relating to timeframes for action under the ROW Decision are currently being considered in the Commission's pending OIR in R.17-06-028. In view of the safety implications of these provisions, the Commission should refer the matter for further consideration in the arbitration proceeding, or in the alternative, stay the matter pending consideration of these issues in R.17-06-028.

I. THE DECISION INCORRECTLY FINDS PG&E FAILED TO OBJECT TO CROWN CASTLE'S PROPOSED REVISIONS.

The Decision made a finding that "PG&E has not stated any disagreement to the revisions that Crown Castle proposes." Decision, p. 2. The Decision also finds "PG&E has not objected to Crown Castle's revisions to its License Agreement." Decision, p. 3, Finding of Fact 9. While the Final Arbitrator's Report provided no opportunity for PG&E to comment on Crown Castle's proposed license provisions, the record demonstrates that PG&E specifically objected to Crown Castle's proposed license provisions in the arbitration proceeding.

- PG&E's objected to Crown Castle's proposed elimination of the requirement that a licensee provide forty-eight (48) hours advance notice before any routine repair or

maintenance of its facilities on PG&E's poles.[1] As PG&E explained, the basis for this objection was that "preferred outcomes" in the ROW Decision indicate that telecommunication companies must provide the electric utility pole owner with 48-hour advance notice prior to commencing work on electric poles.[2]

- PG&E's further objected to Crown Castle's proposed 45-day "deemed approved" provision, noting that the "preferred outcomes" of the ROW Decision specifically do not impose such a requirement on PG&E or other electric utilities.[3]

These provisions were the subject of prepared testimony and Crown Castle cross-examined PG&E's witness at the evidentiary hearing on these issues.[4] Because these two contract provisions desired by Crown Castle deviated from the "preferred outcomes," PG&E objected that Crown Castle would carry the burden of proof on these issues.[5] Moreover, because the ROW Decision explicitly states that Appendix A sets forth the "preferred outcomes" PG&E argued the Commission should basis its determination on those specified "preferred outcomes." The undisputed facts in the record demonstrate the above-quoted statement and Finding of Fact No. 9 that PG&E did object to Crown Castle's proposed contract provisions.

II. CROWN CASTLE'S LICENSE PROVISIONS CONTRAVENE PRINCIPLES IN THE ROW DECISION AND THE "PREFERRED OUTCOMES."

The Decision concludes "The revisions to the License Agreement are within Crown Castle's right to obtain access to utility poles and support structures at reasonable terms and prices which do not impose a barrier to competition."[6] This conclusion lacks a sufficient evidentiary basis in the record. As explained below, the Commission has not had the opportunity

[1] Post-Hearing Brief of Pacific Gas and Electric Company filed December 11, 2018, p. 9-12.

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

[3] Post-Hearing Brief of Pacific Gas and Electric Company filed December 11, 2018, p. 9 (citing Appendix A, Rule IV.B of ROW Decision, 1998 WL 1109255 (Cal.P.U.C) at *76-77).

[4] Post-Hearing Brief of Pacific Gas and Electric Company filed December 11, 2018, p. 10 (citing EH Transcript, p. 87, line 2 to p. 88, line 5).

[5] Post-Hearing Brief of Pacific Gas and Electric Company filed December 11, 2018, p. 10.

[6] Conclusion of Law 2.

to consider whether Crown Castle's proposed contract provisions are consistent with the "preferred outcomes" in the ROW Decision. Crown Castle's revisions to the License Agreement directly contravene established principles in the ROW Decision and the "preferred outcomes" in the following respects:

Crown Castle proposed to eliminate an express provision requiring 48-hour notice prior to work on PG&E's poles and support structures. The elimination of this notice requirement contravenes the "preferred outcomes" in the ROW Decision that telecommunication companies must provide the electric utility pole owner with 48-hour advance notice prior to commencing work on electric poles.[7]

Crown Castle's proposed 45-day "deemed approved" provision[8] directly conflicts with the findings in the ROW Decision 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."[9] A "deemed approved" attachment procedure is also contrary to the ROW Decision's conclusion that "No party may attach to the ROW or support structure of a utility without the express written authorization from the utility."[10] Furthermore, the issue of whether request for attachment should be "deemed approved" 45 days from the time of request has been identified as an issue to be addressed in the R.17-06-028. This proceeding is considering proposed Right of Way rule amendments. Specifically, OIR identified among the issues to be considered in the proceeding "Should the CPUC revisit timelines it set out in D.98-10-58", including "whether pole owners must respond within 45 days to actual requests for space subject to mitigating circumstances."[11]

---

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

[8] This "deemed approved" provision appears in two separate provisions of the License Agreement, Section 3.1(b) [governing new attachments] and Section 3.2 [governing additional attachments].

[9] ROW Decision, Finding of Fact 23.

[10] ROW Decision, Conclusion of Law 5.

[11] R.17-06-028, p. 51. Assigned Commissioner's Scoping Memo and Ruling dated August 8, 2018, Section 3.1(1) pp. 12-13.

Crown Castle proposed a restriction that PG&E may not undertake any rearrangement or relocation work on any pole occupied by Permittee without written approval by Permittee. Such a restriction is contrary to other provisions of the License Agreement. First, relocation work is governed by in an entirely different provision, Section 7.2, titled Relocation. Under Section 7.2, PG&E may relocate all or any portion of its poles to other locations. PG&E provides the Permittee 60 days advance written notice or less if circumstances require. Under this provision, PG&E may require the Permittee to transfer its facilities, or with Permittee's consent, PG&E may transfer Permitee's Pole Attachments to the alternative location. In addition, Section 2.1 of the License Agreement is expressly made subject to the conditions prescribed in the Commission's General Order (GO) 69-C. This provision acknowledges that PG&E will use commercially reasonable efforts to accommodate relocations, the license is subject to revocation under GO 69-C. Yet another provision, Section 7.4(c), expressly provides that pole relocation may be required due to "Granting Authority action." This refers to an order to relocate the pole by a County or municipality that regulates use of the public right of way. Pole relocations are commonly required to accommodate changes in grade, width or alignment of public rights of way. PG&E is required under its franchise agreements to relocate to accommodate such changes in public ROW.[12] Crown Castle's restriction on pole relocation without the licensee's authorization would fundamentally undermine the principle that the GO 69-C license is subject to revocation, either to accommodate PG&E's own use of the pole in the interest of its core utility service or to accommodate use of public ROW by a Granting Authority. This condition would substantially impede PG&E's ability to serve its customers and comply with its obligations under its franchise agreements.

Finally, Crown Castle's proposed a new requirement that PG&E execute a pole replacement within sixty (60) days of Permittee's written request or less if circumstances require. This provision contradicts the timeframes specified in the ROW Decision, which requires the

[12] This requirement derives from PG&E's franchise agreements with municipalities. Public Utilities Code Section 6297.

incumbent utility perform make-ready work on its poles, ducts or conduit to accommodate a request for access within 60 business days of receipt of an advance payment for such work.[13]

III. THE ADOPTION OF THE DECISION DID NOT FOLLOW THE COMMISSION'S RULES GOVERNING COMMENT AND REPLY ON A PROPOSED DECISION.

A draft version of D.19-03-044 appeared electronically on the Commission's agenda on March 4. However, it was not served on parties prior to its adoption at the March 14, 2018 Commission Meeting. On March 20, 2019 the Commission served its Final Decision (D.) 19-03-004 on parties. In adopting the Decision without allowing for comment and reply, the Commission violated its own rules, and thereby committed a prejudicial abuse of discretion.[14] Had a proposed decision been served to parties, PG&E would have alerted the Commission to the factual and legal errors in the PD. In the Rules of Practice and Procedure, the Commission promulgated rules defining the process for comment on Proposed Decisions, providing that parties may file comments on a proposed decision within 20 days of the date of service[15] and a reply to comments within five days of the comment deadline.[16] Thus, the adoption of D.19-03-044 did not allow for the required comment and reply comment period in violation of Rule 14.1.

While the Rules of Practice and Procedure allow the Commission to reduce or waive the period for public review or comment, the circumstances surrounding D.19-03-004 do not match any of the criteria outlined in Rule 14.6, such as an unforeseen emergency situation, activities or disasters that would severely impair public health or safety, requests for relief based on extraordinary circumstances, or other unusual matters that cannot be disposed of by normal procedures. No such exigent circumstances exist that would warrant eliminating the comment period under Rule 14.1.

---

[13] ROW Decision, Conclusion of Law 39.

[14] Public Utilities Code Sections 1757.1(a)(1-2). See also, California Code of Civil Procedure 1094.5(b).

[15] Rule 14.3(a).

[16] Rule 14.3(d).

Finally, nothing in the D.98-10-058 ("ROW Decision") or ALJ-181 (superseding ALJ-174) negate the required comment and reply to comments in Rule 14.1. In fact, D.98-10-058 specifically contemplates that "[the Commission's] normal rules of practice and procedures should be followed at all times during the dispute resolution process."[17]

IV. THE ARBITRATED LICENSE AGREEMENT WAS NOT THE FOCUS OF THE ARBITRATION AND PG&E DID NOT HAVE A FAIR OPPORTUNITY TO BE HEARD ON CROWN CASTLE'S PROPOSED REVISIONS.

Crown Castle filed an Application (A.) 18-10-004 on October 10, 2018 requesting arbitration under the expedited dispute resolution process in Decision (D.) 98-10-058 ("ROW Decision"). PG&E filed its Response to the Application for Arbitration on October 25, 2018 and the parties field a Joint Statement on Unresolved Issues on October 29. Crown Castle requested that the Commission resolve whether PG&E may refuse to sell space on its pole and whether PG&E may condition the sale on agreement to purchase the entire communications space. PG&E requested the Commission resolve whether PG&E's Overhead Facilities License Agreement satisfies the ROW Decision's nondiscriminatory access requirements. Based on the original Application, Response, and Joint Statement on Unresolved Issues, on December 10, 2018 an Assigned Commissioner's Scoping Memo and Ruling set out four issues to be addressed.

The Final Arbitrator's Report resolved each issue in PG&E's favor. Specifically, it found that: PG&E's offer to lease space on its poles pursuant to PG&E's Overhead Facilities License Agreement satisfies PG&E's responsibility to provide non-discriminatory access (Issue 1);[18] that D.98-10058 does not compel PG&E to lease or sell space on its solely owned poles (Issue 2);[19] that the Commission is not required to defer to the procedures established by the Northern

[17] Pg. 112.

[18] "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?"

[19] "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?"

California Joint Pole Association (NCJPA) and therefore its procedures are irrelevant to this dispute (Issue 3);[20] and, finally, thus the Commission declines to compel PG&E to sell space and instead ordered parties to lease "under PG&E's approved License Agreement" (Issue 4).[21] The arbitration did not consider the extent to which Crown Castle's proposed revisions to the license agreement comports with the "preferred outcomes" or whether they could be harmonized in a consistent manner. Because the parties were not afforded the opportunity to be heard on this issue the Commission should close the proceeding without adoption of the revised License Agreement, or in the alternative, refer the matter back to arbitration for further consideration.

V. CONCLUSION.

The increased access that this Decision mandates PGE comply with does not properly consider the impact on safety that granting such increased access to Crown establishes. By incorporating the revised terms in Crown's revised License Agreement, namely 45 day response timeline, by 45 day deemed-approved without PGE review and written authorization, and by no notification by the Permittee for access to and working on Company poles, safety is compromised. In the current environment of the 'new-normal' and the imperative to maintain the safety of PG&Es infrastructure these increased and expedited access and attachment terms are imprudent. Such increased access affects safety, which is a concern of the public, the CPUC, and both electric and telecom utilities. All parties need time for full exploration of requirements and risks that would be the outcome of such changes. This is the basis for the OIR in R.17-06-028, so that amendments to the Right of Way rules can be carefully considered with input from all parties.

For the foregoing reasons, PG&E respectfully requests that the Commission vacate the portion of the Decision that adopts the revised License Agreement (Attachment 1). Because the

[20] "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?"

[21] "Should and may the Commission compel PG&E to sell space on its poles to promote broadband deployment?"

revised License Agreement proposed by Crown Castle substantively deviates from the "preferred outcomes" it should not be adopted without due consideration of the extent to which they may contradict and potentially be harmonized with the ROW Decision and the 'preferred outcomes." As noted in Finding of Fact 7, PG&E's License Agreement complies with the ROW Decision's nondiscriminatory access requirements. Therefore, the Commission should order the parties to enter into PG&E's License Agreement or alternatively, refer the matter back to the arbitrator to further consider the extent to which Crown Castle's revisions can be harmonized with the "preferred outcomes."

Finally, Ordering Paragraph 6 of the Decision ordered the parties to execute the Revised License Agreement (Attachment 1 of the Decision) and return a duly executed agreement to the Commission's Director of Communications within 14 days of the effective date of the Decision, which was March 15, 2019. Executing this agreement would cause irreparable harm to PG&E and accordingly PG&E will separately file a request of for an extension of time to comply until the petition has been granted or denied per Rule 16.6.

Respectfully Submitted,

CHARLES R. LEWIS, IV
GRANT GUERRA

By: */s/ Grant Guerra*
GRANT GUERRA

Pacific Gas and Electric Company
77 Beale Street, B30A
San Francisco, CA 94105
Telephone: (415) 973-3728
Facsimile: (415) 973-5520
E-Mail: Grant.Guerra@pge.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

Dated: March 22, 2019