

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CROWN CASTLE FIBER LLC,

Complainants,

v.

COMMONWEALTH EDISON COMPANY,

Respondent.

File

POLE ATTACHMENT COMPLAINT FOR DENIAL OF ACCESS

Robert Millar
Rebecca Hussey
Crown Castle Fiber LLC

T. Scott Thompson
Ryan M. Appel
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20006
202-973-4200 (Main Phone)
202-973-4499 (Main Fax)
scottthompson@dwt.com (Email)

Attorneys for Crown Castle Fiber LLC

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PARTIES	2
III.	JURISDICTION	3
IV.	BACKGROUND AND FACTS	5
A.	ComEd’s Unlawful Red Tag Practice.....	7
i.	Red Tag Costs For Fiber Attachments.....	14
ii.	Red Tag Costs For Wireless Attachments	15
B.	ComEd’s Failure To Timely Process Attachment Permit Applications	17
i.	Fiber Application Delays	18
ii.	Wireless Application Delays.....	19
V.	DISCUSSION	20
A.	ComEd’s Refusal to Permit Crown Castle to Attach to “Red Tag” Poles Is An Unlawful Denial Of Access in Violation of Section 224.....	20
B.	ComEd’s Requirement to Pay For Replacement or Reinforcement of “Red Tag” Poles for Violations That It Did Not Cause is An Unlawful Denial of Access in Violation of Section 224	27
C.	ComEd’s Refusal to Provide Crown Castle with Detailed Information Regarding its “Red Tag” Practice is an Unreasonable Term and Condition of Attachment in Violation of Section 224	31
D.	ComEd’s Unreasonable Delay in Completing Pre-Construction Surveys and Issuing Make-Ready Estimates Constitutes a Denial of Access.....	32
VI.	ATTEMPTS TO RESOLVE ALL DISPUTES	36
VII.	INFORMATION DESIGNATION	38
VIII.	COUNTS.....	39
IX.	RELIEF REQUESTED.....	41

Crown Castle Fiber LLC (“Crown Castle”) respectfully submits this Pole Attachment Complaint pursuant to Subpart J of the Federal Communications Commission (“FCC” or “Commission”) Rules, 47 C.F.R. §§ 1.1401 *et seq.*, against Commonwealth Edison Company, (“ComEd”) for denying Crown Castle access to ComEd poles.

I. INTRODUCTION

1. Since 2017, Crown Castle has worked tirelessly, but unsuccessfully, to resolve pole attachment denial of access issues with ComEd.

2. First, ComEd refuses to permit Crown Castle to attach to poles that have been “red tagged” by ComEd unless and until Crown Castle first pays to replace or reinforce those red tagged poles, even though the conditions that caused the red tag status existed prior to and are unrelated to Crown Castle’s proposed attachment. ComEd’s denial of access to the red tagged poles and demands for payment as a condition of access have impacted applications for 1,202 poles and has already cost Crown Castle over \$14,000,000. ComEd’s actions are directly contradicted by the Commission’s One Touch Make-Ready Order and violate Section 224 of the Act.

3. Second, ComEd has consistently failed to comply with the Commission’s timelines for surveys, make-ready estimates, and ultimate action on applications. Indeed, ComEd has failed to act in a timely manner under the Commission’s Rules on applications for at least 10,000 poles.

4. By denying access unless and until Crown Castle pays to correct pre-existing non-compliance as a condition of accessing its poles, and in refusing to timely process Crown’s applications, ComEd is in violation of Commission’s rules, effectively denying Crown Castle access to ComEd’s poles that are necessary to Crown Castle’s provision of telecommunications services in violation of 47 U.S.C. § 224 and the Commission’s Rules.

II. PARTIES

5. Complainant Crown Castle provides facilities-based, fiber-optic telecommunications services, including but not limited to telecommunications services to enterprise customers and telecommunications services over small cell and distributed antenna system networks, in the state of Illinois pursuant to a Certificate of Service Authority issued by the Illinois Commerce Commission.¹

6. Crown Castle's mailing address is 1220 Augusta Drive, Suite 600, Houston, Texas 77057-2261.

7. Crown Castle provides telecommunications services to wireless carriers and to other large enterprise customers. When it provides telecommunications service to wireless carriers, Crown Castle typically does so via a service it calls "RF transport service." Crown Castle typically provides "RF transport service" using fiber optic lines to transport communications between remote wireless equipment called "Nodes" (consisting of antennas and related equipment) that are located on poles in the public rights of way and centralized hub facilities. Thus, Crown Castle attaches equipment that is "wireless" in nature, as well as equipment that is "wireline" in nature to ComEd poles.²

8. Respondent ComEd is an investor-owned electric utility in the business of providing electric transmission and distribution services. ComEd has a general business address of 440 South LaSalle Street, Chicago, IL 60605.

¹ See Attachment A hereto, Declaration of Rebecca Hussey dated June 17, 2019 ("Hussey Decl."), ¶ 12 and Exhibit 1, *RCN New York Communications, LLC, Application for a certificate of local and interexchange authority to operate : 07-0429 as a reseller and a facilities based carrier : of telecommunications services within : the State of Illinois*, Order, Docket 07-0429 (Dec. 17, 2007) (Crown Castle's Certificate of Service Authority).

² Hussey Decl. ¶ 12.

9. ComEd owns or controls poles in the State of Illinois that are used for, among other things, the attachment of wireline and wireless communication facilities.

10. Crown Castle alleges, upon information and belief, that ComEd is not owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

11. Attached to this Complaint is a certificate of service certifying that ComEd and the Illinois Commerce Commission (“ICC”) were served with copies of the Complaint.

III. JURISDICTION

12. The FCC has jurisdiction over this action under the provisions of the Communications Act of 1934, as amended, including, but not limited to, Section 224 thereof, 47 U.S.C. § 224 (hereinafter “Section 224”).

13. The Commission has jurisdiction over rates, terms, and conditions of pole attachments except “where such matters are regulated by a State.”³

14. The State of Illinois does not regulate telecommunication service providers’ pole attachments to poles owned by electric utilities, as required by Section 224(c) to preempt the Commission’s jurisdiction.

15. A State does not regulate pole attachment rates, terms, and conditions “unless the State has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments.”⁴

³ 47 U.S.C. § 224(c)(1).

⁴ 47 U.S.C. § 224(c)(3).

16. While the ICC has certified to the FCC that it regulates pole attachments,⁵ the ICC's pole attachment regulations, set forth in Title 83, Sections 315.10 through 315.70 of the Illinois Administrative Code, apply only to attachments by "cable television ("CATV") companies."⁶

17. The ICC's pole attachment regulations do not apply to or make reference to attachments by telecommunications companies.⁷

18. Because the ICC's rules do not include attachments by telecommunications companies, the ICC does not have the authority to regulate attachments by telecommunications companies to electric utilities' poles, and, therefore, jurisdiction over Crown Castle's telecommunications attachments remains with the Commission.

19. Appended hereto as Exhibit B is a letter from the Chairman of the ICC, confirming that the ICC does not claim jurisdiction over Crown Castle's attachments to ComEd's poles or this dispute.⁸ The ICC adopted the position set forth in the letter at its open meeting on October 25, 2018.⁹

⁵ See *States That Have Certified They Regulate Pole Attachments*, Public Notice, WC Docket No. 10-101, 25 FCC Rcd. 5541 (2010).

⁶ See 83 Ill. Admin. Code 315.10-315.70; 315.10(a) ("The purpose of this Part is to designate a presumptive methodology for computation of annual rental rates to be paid by cable television ('CATV') companies to electric utilities and local exchange telecommunications carriers (collectively 'regulated entities') . . . for the use of space on distribution poles for attachment of CATV cables and associated facilities.").

⁷ See *id.*

⁸ See Attachment B hereto, Letter from ICC Chairman Brien J. Sheahan dated October 25, 2018.

⁹ See Minutes of Illinois Commerce Commission October 25, 2018 meeting attached hereto as Attachment C.

20. The Commission has held that jurisdiction for pole attachments reverts to the Commission if a State has not implemented pole attachment rules and regulations.¹⁰

21. Accordingly, the Commission has jurisdiction over Crown Castle's telecommunications attachments to ComEd poles that are the subject of this Complaint.

IV. BACKGROUND AND FACTS

22. Crown Castle requires access to utility-owned and controlled poles, conduits, and rights-of-way to build its telecommunications services networks and to provide competitive telecommunications services to its customers.

23. On December 22, 2004, Crown Castle (at the time operating under the name NextG Networks of Illinois, Inc.) and ComEd entered into a pole attachment agreement (the "Crown Castle Pole Attachment Agreement") that permits Crown Castle to attach fiber and wireless attachments to ComEd poles.¹¹

24. On May 5, 2005, Sunesys, Inc., which was later acquired by Crown Castle, and ComEd entered into a pole attachment agreement (the "Sunesys Pole Attachment Agreement") that permits Crown Castle to attach fiber optic and related attachments to ComEd poles.¹²

25. On July 26, 2013, Sidera Networks d/b/a Lighttower Fiber Networks, which was later acquired by Crown Castle, and ComEd entered into a pole attachment agreement (the

¹⁰ See, e.g., *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6781 n.20 (Feb. 6, 1998); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 12 FCC Rcd 11725, 11,727 n.13 (Aug. 12, 1997)

¹¹ Hussey Decl. Ex. 1.

¹² Hussey Decl. Ex. 2.

“Lighttower Pole Attachment Agreement”) that permits Crown Castle to attach fiber optic and related attachments to ComEd poles.¹³

26. On May 23, 2018, Lighttower Fiber Networks II, LLC notified the Illinois Commerce Commission that it changed its name to Crown Castle Fiber LLC. On December 31, 2018, Crown Castle NG and Sunesys, both of which were affiliates of Crown Castle Fiber LLC, consolidated into Crown Castle Fiber LLC, and consequently, cancelled their Certificates of Service Authority to provide telecommunications services in the State of Illinois.¹⁴

27. Crown Castle has installed and continues to install fiber and small cell facilities on ComEd poles in the Chicago area pursuant to the three agreements described above.¹⁵

28. Upon information and belief, ComEd jointly owns some poles with AT&T.¹⁶

29. Crown Castle currently has multiple projects underway to deploy significant telecommunications infrastructure and services in the Chicago area. In connection with these projects, Crown Castle plans to deploy approximately [REDACTED] miles of fiber optic lines across multiple communities in the Chicago area that would be used to provide various telecommunications services, including to enterprise customers and wireless-carrier customers.¹⁷ In deploying these fiber optic lines for these projects, Crown Castle requires attachment to more

¹³ Hussey Decl. Ex. 3.

¹⁴ Hussey Decl. ¶¶ 9, 11.

¹⁵ Declaration of Maureen A. Whitfield ¶ 8 (attached hereto as Attachment D).

¹⁶ Whitfield Decl. ¶ 9.

¹⁷ Whitfield Decl. ¶ 10.

than [REDACTED] ComEd poles.¹⁸ In addition, Crown Castle requires attachment to more than [REDACTED] ComEd poles for its deployment of wireless facility nodes for these projects.¹⁹

A. ComEd’s Unlawful Red Tag Practice

30. In the regular course of business, as the result of regular pole inspections, ComEd identifies a certain number of its poles as being “red tagged.”²⁰ On information and belief, ComEd’s designation of “red tagged” for a pole means that the pole has lost more than 33 percent of its original strength.²¹

31. As explained in the Declaration of NESC, pole, and safety expert, Nelson Bingel, under the NESC and standard industry practices, the application of a red tag to a pole means that the pole needs to be either replaced or in some cases, where possible, reinforced.²²

32. According to a document provided to Crown Castle by ComEd, ComEd designates red tagged poles as either “Priority” or “Non-priority,” and further differentiates poles that are Restorable or Non-Restorable. Thus, ComEd has four categories: (i) Priority Non-Restorable (Replacement) Reject poles, (ii) Non-priority Non-Restorable (Replacement) Reject poles, (iii) Priority Restorable Reject poles, and (iv) Non-priority Restorable Reject poles.²³

33. ComEd has not provided Crown Castle with information identifying the standards used for designating poles as priority/non-priority or restorable/replacement.²⁴

¹⁸ Whitfield Decl. ¶ 10.

¹⁹ Whitfield Decl. ¶ 11.

²⁰ Whitfield Decl. ¶ 12.

²¹ Whitfield Decl. ¶¶ 13-14, Ex.1.

²² Declaration of Expert Nelson Bingel ¶¶ 9-10, 13 (“Bingel Decl.”) (attached hereto as Attachment E).

²³ Whitfield Decl. ¶ 15, Ex. 1.

²⁴ Whitfield Decl. ¶ 16.

34. NESC Rule 214.A.5(a) states, “Lines and equipment with recorded conditions or defects that would reasonably be expected to endanger human life or property shall be promptly corrected, disconnected or isolated.” Rule 214.A.5(b) states “Other conditions or defects shall be designated for correction.”²⁵

35. Consistent with the NESC’s requirements, standard industry practice is to replace “priority” red tagged poles within approximately 90 days after inspection (depending on the severity of the loss of strength), and to replace or restore non-priority red tagged poles within approximately one year.²⁶

36. In addition, under standard industry practice, poles are originally red tagged during inspection when the remaining strength of the pole is compared to the original strength of the pole. However, the exact requirement of the NESC, as stated in Footnote 2 of Table 261-1, is that a pole becomes a “reject” (i.e. red tagged) when the strength is reduced to two-thirds of what is required for the *actual loading*. Because the inspection process typically does not include an analysis of the actual loading, the inspection process assumes that the pole is fully loaded. Therefore, as a practical matter, a pole becomes a red tagged pole when the remaining strength is two-thirds or less of the original pole strength, regardless of actual loading. However, when the actual loading for a pole is determined, the pole may actually be available for attachment because under the NESC the remaining strength must exceed two-thirds of the strength required to support the loading *actually on the pole*. Most wood utility poles are not fully loaded. As a result, many poles that may appear to be below the 67% strength threshold based only on the original strength of the pole may not rise above the threshold for red tagging when the actual

²⁵ Bingel Decl. ¶ 13.

²⁶ Bingel Decl. ¶ 13.

loading were taken into account. As an example, if a pole is only loaded to 75% of its capacity, then the NESC only requires the pole to have 50% of its original strength before it should be red tagged. Despite the fact that to determine whether a pole should be red tagged based on the actual load would require a loading analysis, the practice of analyzing the actual load on a red tag pole to see if it still meets code requirements is not widely applied in the industry today. What this means is that there may be some number of poles that may have been assigned a red tag status, but under the NESC those poles should not be red tagged because if a loading analysis were performed, the pole would not reach the threshold for reject status.²⁷

37. According to the document provided by ComEd, Priority Restorable poles are restored in the current inspection year and Priority Non-Restorable (Replacement) poles are scheduled for replacement the “next calendar year after inspection.”²⁸

38. Crown Castle is not aware of whether this policy of ComEd has been practiced.

39. Moreover, the ComEd Summary document asserts that Non-Priority Restorable poles “will be *Restored/Reinforce/C-Truss* after Load Calculation classification within a set timeframe,” and likewise, Priority Non-Restorable (Replacement) poles will be replaced “after Load Calculation classification within a set timeframe.”²⁹

40. However, Crown Castle understands that ComEd is *not* performing Load Calculations on any Non-Priority red tagged poles.³⁰

41. On information and belief, ComEd uses a 10-year year cycle for inspecting its poles, which means that ComEd inspects each of its poles once every ten years. Thus, poles that

²⁷ Bingel Decl. ¶ 12.

²⁸ Whitfield Decl. Ex. 1, ComEd “Red Tag” Summary at 3.

²⁹ Whitfield Decl. Ex. 1, ComEd “Red Tag” Summary at 3.

³⁰ Whitfield Decl. ¶ 17.

are designated as non-priority red tags will go at least 10 years without being corrected, and will be re-evaluated at the next inspection, 10 years later, unless an attaching party seeks to do work or attach to the pole during that time.³¹ Such Non-priority red tag poles will only be corrected if some attaching party seeks to do work on the pole, at which point, as discussed below, ComEd requires the pole to be replaced at the expense of the attaching party.³²

42. It is not a reasonable industry practice nor is it reasonable or appropriate engineering practice to wait more than 1 year and up to as much as 10 years before correcting a pole after it is labeled with a red tag.³³

43. Since May 2017, ComEd has responded to Crown Castle's applications to attach to 1,202 poles (987 poles for fiber attachments and 215 poles for wireless attachments) by denying access to the poles on the ground that the poles were "red tagged."³⁴

44. ComEd will not allow Crown Castle to attach its fiber or wireless nodes to a "red tag" pole unless Crown Castle first pays to replace the pole with, at minimum, a Class 1 pole, or, in very limited circumstances, to reinforce the pole.³⁵

45. Of the 987 red tagged poles to which Crown Castle has proposed to attach fiber, ComEd has designated 862 poles for replacement, ComEd has designated 66 poles for reinforcement, and 59 poles have not been designated for replacement or reinforcement as of April 30, 2019.³⁶

³¹ Whitfield Decl. ¶ 18.

³² Whitfield Decl. ¶ 19, Ex. 2.

³³ N. Bingel Decl. ¶¶ 13 25-27.

³⁴ Whitfield Decl. ¶ 21, Ex. 3, Red Tag Invoice Summary. This is not every pole to which Crown Castle has applied to attach during that time.

³⁵ Whitfield Decl. ¶ 19.

³⁶ Whitfield Decl. Ex. 3, Red Tag Invoice Summary.

46. ComEd has designated for replacement all 215 red tagged poles to which Crown Castle has proposed to attach wireless nodes.³⁷

47. ComEd has not provided Crown Castle the information or opportunity to assess whether these “red tag” poles in fact require replacement or reinforcement.

48. Although Crown Castle has repeatedly requested that ComEd explain the reason why any given pole is marked as “red tagged,” or designated as Priority versus Non-Priority, or Restorable versus Non-Restorable, ComEd has not provided a clear and complete explanation of the standards, criteria, or basis for its red tag designations nor for the red tag status of any given pole to which access was denied.³⁸ As a result, the basis for ComEd’s labeling of poles as “red tagged” is still not clear.³⁹

49. ComEd’s make-ready invoices also do not reveal any rationale for labeling a pole with a “red tag.”⁴⁰

50. Upon information and belief, ComEd has developed a database that contains detailed information about its “red tag” poles.⁴¹ ComEd has refused to provide Crown Castle with access to this database.⁴²

51. In addition to failing to provide an explanation of the standards used to apply a “red tag” to a pole, or to provide specific information regarding each pole to which ComEd has denied Crown Castle access based on “red tag” status, ComEd refuses to identify the locations of

³⁷ Whitfield Decl. Ex. 3, Red Tag Invoice Summary.

³⁸ Whitfield Decl. Ex. 4, Red Tag E-mail Correspondence

³⁹ Whitfield Decl. ¶¶ 22-26.

⁴⁰ Whitfield Decl. ¶ 26, Ex. 5, Red Tag Invoice Samples

⁴¹ Whitfield Decl. ¶ 27.

⁴² Whitfield Decl. ¶ 27.

red-tagged poles prior to Crown Castle's submission of pole attachment applications.⁴³ As a result, Crown Castle is unable to design its deployment so as to avoid red tagged poles, if possible.

52. On information and belief, if ComEd had corrected the cause of the red tag status in a reasonable, appropriate, and timely manner,⁴⁴ some and possibly all of the poles that ComEd has denied access to based on red tag status would not have required replacement or reinforcement to accommodate Crown Castle's attachment.

53. In addition, because ComEd's red tagging is based on physical inspection only, with no analysis of actual loading on the pole, it is possible that some or many of ComEd's red tagged poles should not be labeled red tagged and could accommodate Crown Castle's attachments. ComEd is denying Crown Castle access to poles without performing an analysis of the actual loading of the pole.

54. From June 2017 to March 2019, ComEd would permit attachment to "red tag" poles if and only if Crown Castle *replaced* the pole; ComEd did not give Crown Castle the option to reinforce the poles.⁴⁵

55. Upon information and belief, during the time period of June 2017 to March 2019, and before, for attachment of its own facilities, ComEd remedied "red tag" poles through reinforcement in some cases rather than pole replacement in every case.⁴⁶ At the same time, however, ComEd refused to allow Crown Castle the same option of reinforcing red tagged poles

⁴³ Whitfield Decl. ¶ 28.

⁴⁴ See Bingel Decl. ¶ 13.

⁴⁵ Whitfield Decl. ¶ 29.

⁴⁶ Whitfield Decl. ¶ 30.

that could be remedied through reinforcement, and instead, demanded that Crown Castle replace every red tagged pole with a minimum Class 1 pole.⁴⁷

56. While ComEd has permitted Crown Castle to reinforce some “red tag” poles since March 2019, ComEd continues to require Crown Castle to replace the overwhelming majority of “red tag” poles, and it requires that the poles be required with a larger class pole in every case.⁴⁸

57. Crown Castle should not bear the cost of replacing or reinforcing any red tagged poles.

58. ComEd has even required Crown Castle to pay for pole replacement *after* it granted attachment applications. In October and November 2017, ComEd issued permits to Crown Castle for attachments to 35 poles.⁴⁹ Subsequently, ComEd rescinded those permits and declared that the poles were being “red tagged.”⁵⁰ As a result, Crown Castle was required pay \$484,059.93 to replace the 35 poles.⁵¹

59. Until May 2019, ComEd had allowed Crown Castle to install temporary attachments on some red-tagged poles as an interim solution to delays associated with pole replacements; however, in May 2019, ComEd instituted a policy prohibiting all temporary attachments to “red tag” poles.⁵² This ban on temporary attachments to red tag poles effectively denies Crown Castle access to ComEd’s “red tag” poles and will prevent Crown Castle from deploying its telecommunications equipment in a timely fashion.

⁴⁷ Whitfield Decl. ¶ 30.

⁴⁸ Whitfield Decl. ¶ 31.

⁴⁹ Whitfield Decl. ¶ 32.

⁵⁰ Whitfield Decl. ¶ 32.

⁵¹ Whitfield Decl. ¶ 32.

⁵² Whitfield Decl. ¶ 33.

60. Crown Castle requested executive-level intervention from ComEd's leadership to end this temporary attachment restriction.⁵³ On May 22, 2019, ComEd denied this request and affirmed its position on temporary attachments to red tag poles.⁵⁴

61. Fundamentally, with its red tag policy, ComEd is denying Crown Castle access to ComEd poles unless Crown Castle pays for the correction of preexisting issues that were not caused by Crown Castle, and, essentially, is forcing Crown Castle to pay to refurbish and improve ComEd's pole plant.

i. Red Tag Costs For Fiber Attachments

62. As noted above, of the 19,651 poles to which Crown Castle has applied to attach fiber, as of April 30, 2019, ComEd has responded by denying access on the ground that 987 of the poles were red tagged.

63. Of these 987 red tagged poles, as of April 30, 2019, ComEd has required replacement of 862 poles, reinforcement of 66 poles, and has not yet designated 59 poles for replacement or reinforcement.⁵⁵

64. As of April 30, 2019, ComEd had sent Crown Castle invoices alleging that the cost to replace the 862 red tagged poles for fiber attachments is \$11,625,206 and the cost to reinforce 66 red-tagged poles is \$85,758.⁵⁶

⁵³ Whitfield Decl. ¶ 34.

⁵⁴ Whitfield Decl. ¶ 34.

⁵⁵ Whitfield Decl. Ex. 3, Red Tag Invoice Summary.

⁵⁶ Whitfield Decl. Ex. 3, Red Tag Invoice Summary.

65. Despite its disagreement with the red tag charges, through April 30, 2019, Crown Castle has paid ComEd \$11,202,608 for 830 of 862 red tag pole replacements and \$85,758 for all 66 red tag pole reinforcements to allow Crown Castle to attach fiber optic lines.⁵⁷

66. If Crown Castle had not paid ComEd the invoiced amounts for replacement or reinforcement of red tagged poles, Crown Castle would have been denied access to those ComEd poles, effectively halting Crown Castle's network deployment.⁵⁸

67. The unreasonable and unlawful requirement to pay for correction of red tag poles will continue because Crown Castle, in order to complete its planned build, needs to attach to thousands more ComEd poles. Indeed, as of April 30, 2019, Crown Castle still had applications outstanding for more than 6,700 ComEd poles that ComEd had not acted on within the Commission's timeframes, plus additional applications that are still pending but have not yet exceeded the Commission's timelines, and Crown Castle will need to attach to more poles for which Crown Castle has not yet submitted applications.⁵⁹

ii. Red Tag Costs For Wireless Attachments

68. As noted above, ComEd has denied access to two hundred fifteen (215) poles for wireless attachments on the grounds that the poles were red tagged.⁶⁰

69. ComEd has sent Crown Castle invoices alleging that the cost to replace those 215 red tagged poles for wireless attachments is \$3,023,441.⁶¹

⁵⁷ Whitfield Decl. Ex. 3, Red Tag Invoice Summary

⁵⁸ Whitfield Decl. ¶ 36.

⁵⁹ Whitfield Decl. Ex. 3, Red Tag Invoice Summary.

⁶⁰ Whitfield Decl. Ex. 3, Red Tag Invoice Summary.

⁶¹ Whitfield Decl. Ex. 3, Red Tag Invoice Summary.

70. Despite its disagreement with the “red tag” charges, through April 30, 2019, Crown Castle has paid ComEd \$2,923,906 for replacement of 210 of the 215 red tagged poles to allow Crown Castle to attach wireless equipment.⁶²

71. If Crown Castle had not paid ComEd the invoiced amounts for replacement of red tagged poles, Crown Castle would have been denied access to those ComEd poles, effectively halting Crown Castle’s network deployment.

72. The unreasonable and unlawful requirement to pay for correction of red tag poles will continue because Crown Castle still needs permits to attach wireless facilities to hundreds more ComEd poles. Indeed, as of April 30, 2019, Crown Castle still has applications for 254 poles for which ComEd has not taken final action within the Commission’s timelines, plus more applications for poles that have not yet exceeded the Commission’s timeline, and Crown Castle will need to attach to more poles in the future for which it has not yet submitted applications.⁶³

73. In fact, the financial burden will likely worsen. As of April 30, 2019, the average cost to replace a pole is approximately \$13,600 and the average cost to reinforce is approximately \$1,300 per pole.⁶⁴ Yet, on May 30, 2019, ComEd issued invoices for 15 “red tag” pole replacements. The replacement costs have significantly increased, ranging from approximately **\$21,000 per pole to \$29,000 per pole.**⁶⁵

74. In total, to prevent ComEd’s red tag practice from effectively stopping Crown Castle’s network deployment, as of April 30, 2019, Crown Castle has paid ComEd a total of

⁶² Whitfield Decl. Ex. 3, Red Tag Invoice Summary.

⁶³ Whitfield Decl. ¶ 38.

⁶⁴ Whitfield Decl. Ex. 3, Red Tag Invoice Summary.

⁶⁵ Whitfield Decl. Ex. ¶ 37, Ex. 7, May 30, 2019 Invoices.

\$14,212,273 (for both wireline and wireless attachments) to correct preexisting conditions on red tag poles.⁶⁶

B. ComEd's Failure To Timely Process Attachment Permit Applications

75. Separate and apart from its denial of access to red tagged poles, ComEd has failed to timely process applications for pole attachments.

76. In 2017 and 2018, Crown Castle provided ComEd with forecasts to give ComEd advanced notice of the volume of fiber and wireless attachment applications that Crown Castle intended to submit in 2018 and 2019.⁶⁷

77. Despite this ample notice, since 2017, ComEd has not processed all of Crown Castle's applications within the timelines prescribed by the Commission, as required.

78. In an attempt to remedy these delays, Crown Castle has met with ComEd on at least 29 separate occasions since 2017.

79. For example, Crown Castle proposed a "turnkey" solution, which would allow Crown Castle to control and direct ComEd-approved third party contractors in completing pre-construction surveys and completing make-ready estimates.⁶⁸ ComEd rejected this proposal, explaining that it would not allow Crown Castle to exercise control over the third-party contractors.⁶⁹

80. In addition, to address ComEd's purported shortage of resources, on May 28, 2019, Crown Castle requested ComEd to approve Thayer Power & Communication as an

⁶⁶ Whitfield Decl. Ex. 3 Red Tag Invoice Summary.

⁶⁷ Whitfield Decl. ¶ 46, Exs. 10-11.

⁶⁸ Whitfield Decl. ¶ 50.

⁶⁹ Whitfield Decl. ¶ 51.

authorized contractor to perform complex and above the communications space make-ready and simple make-ready.⁷⁰

81. ComEd has not granted or denied the request to approve Thayer Power & Communication as an authorized contractor.⁷¹

82. The following data related to the application processing delays was prepared as of April 30, 2019.⁷²

i. Fiber Application Delays

83. Since May 2018, Crown Castle has submitted 836 fiber applications (**covering 9,159 poles**) that are still pending without final action by ComEd as of April 30, 2019.⁷³

84. ComEd has not completed pre-construction surveys for 41 of the pending fiber applications (covering 342 poles) within 60 days from the application submission dates.⁷⁴

85. Some of these surveys are overdue by as many as 262 days.⁷⁵

86. ComEd has not issued make-ready estimates for 446 of the pending fiber applications (covering 5, 271 poles) within 74 days.⁷⁶

⁷⁰ Whitfield Decl. Ex. 14, Letter from Maureen Whitfield to Mark Falcone dated May 28, 2019.

⁷¹ Whitfield Decl. Ex. 15 (June 12, 2019 Letter from Bradley Perkins, ComEd Ass't Gen. Counsel, Regulatory to Maureen Whitfield). In addition to incorrectly arguing that the ComEd is not subject to the FCC's poles, contrary to Mr. Perkins' assertion, Crown Castle is not "asking ComEd to expand capacity by replacing its poles with taller poles" except in rare instances.

⁷² Whitfield Decl. ¶ 48.

⁷³ Whitfield Decl. ¶ 48, Ex. 12, Application Processing Study, pp. 1-2.

⁷⁴ Whitfield Decl. Ex. 12, Application Processing Study, pp. 1, 3.

⁷⁵ Whitfield Decl. Ex. 12, Application Processing Study, p. 3.

⁷⁶ Whitfield Decl. Ex. 12, Application Processing Study pp. 1, 3.

87. Crown Castle has been waiting for most of these estimates for at least 78 days and, in some cases, almost a year (355 days).⁷⁷

88. Ultimately, ComEd has failed to take final action on 579 of the 836 pending fiber applications (covering 6,701 poles) within the 193 days required under even the longest scenario in the Commission's Rules.⁷⁸

89. Despite Crown Castle's diligent attempts to cooperate and communicate with ComEd, ComEd has not promptly rectified these delays.⁷⁹

90. ComEd will not permit Crown Castle to hire or control approved contractors to perform the survey or make ready work.⁸⁰

ii. Wireless Application Delays

91. Crown Castle has also submitted many applications for wireless attachments over the past year, and, like the fiber applications, ComEd has failed to process these wireless applications in accordance with the FCC's Rules.⁸¹

92. Since March 2018, Crown Castle has submitted 854 wireless applications that are still pending as of April 30, 2019.⁸²

93. Despite constant follow-up from Crown Castle, ComEd has not completed pre-construction surveys for 114 pending wireless attachment applications within 60 days from the application submission date.⁸³

⁷⁷ Whitfield Decl. Ex. 12, Application Processing Study, pp. 1, 3, 12.

⁷⁸ Whitfield Decl. Ex. 12, Application Processing Study, pp. 1, 13.

⁷⁹ Whitfield Decl. ¶¶ 45-53.

⁸⁰ Whitfield Decl. ¶ 51.

⁸¹ Whitfield Decl. ¶ 47, Ex. 12, Application Processing Study, p. 1.

⁸² Whitfield Decl. ¶ 48, Ex. 12, Application Processing Study, p. 1.

⁸³ Whitfield Decl. Ex. 12, Application Processing Study, pp 1, 25.

94. Crown Castle has been waiting well over 74 days for make-ready estimates for 378 wireless attachment applications.⁸⁴

95. In the case of nine (9) wireless attachment applications, Crown Castle has been awaiting make-ready estimates for over a year.⁸⁵

96. Ultimately, ComEd has failed to take final action on 254 of the wireless attachment applications within the 223 days set forth in the Commission's Rules.⁸⁶

97. At least 124 of the wireless attachment applications have been pending over 9 months.⁸⁷

98. Seventeen (17) of the wireless attachment applications have been pending over 12 months.⁸⁸

99. Despite Crown Castle's diligent follow-up, including meetings, phone calls, and e-mail correspondence, ComEd has not corrected these delays.⁸⁹

V. DISCUSSION

A. ComEd's Refusal to Permit Crown Castle to Attach to "Red Tag" Poles Is An Unlawful Denial Of Access in Violation of Section 224

100. ComEd's refusal to allow Crown Castle to attach to ComEd poles that have been "red tagged" is an effective denial of access to ComEd's poles in violation of Section 224.

⁸⁴ Whitfield Decl. Ex. 12, Application Processing Study, pp. 1, 29.

⁸⁵ Whitfield Decl. Ex. 12, Application Processing Study, p. 29 .

⁸⁶ Whitfield Decl. Ex. 12, Application Processing Study, p. 37.

⁸⁷ Whitfield Decl. Ex. 12, Application Processing Study, p. 37.

⁸⁸ Whitfield Decl. Ex. 12, Application Processing Study, pp. 37-39.

⁸⁹ Whitfield Decl. ¶¶ 46-58.

101. Section 224(f) of the Communications Act requires a utility to provide telecommunications carrier with “non-discriminatory access to any pole . . . owned or controlled by it.”⁹⁰

102. Under the Commission’s Rules, if a utility denies access to a specific pole, it is required to confirm the denial in writing. “The utility’s denial of access **shall be specific**, shall **include all relevant evidence and information supporting its denial**, and **shall explain** how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.”⁹¹

103. In its August 3, 2018 Third Report and Order and Declaratory Ruling, the Commission confirmed that utilities cannot deny access to poles based on the pole being “red tagged.”⁹² The Commission clarified that utilities may not deny attaching parties access to a pole based on safety concerns arising from a pre-existing condition, and specifically not where the pole was red tagged.⁹³ Indeed, the Commission explicitly stated that “[t]his includes situations **where a pole has been red-tagged**, and new attachers are prevented from accessing a pole until it is replaced.”⁹⁴ Moreover, the Commission explained that “[s]imply denying new attachers access prevents broadband deployment and does nothing to correct the safety issue,” and “[f]or this reason, we reject Xcel Energy and Alliant Energy’s suggestion that we provide utilities, where there is a preexisting violation, ‘the right to stop all work on that pole and prohibit

⁹⁰ 47 U.S.C. 224(f).

⁹¹ 47 C.F.R. § 1.1403(b) (emphasis added).

⁹² *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111 ¶ 122 (Aug. 3, 2018) (“OTMR Order”).

⁹³ *Id.*

⁹⁴ *Id.* n.455 (emphasis added).

physical access to that pole until the preexisting safety issue is resolved and the pole is brought into compliance.’’⁹⁵

104. As discussed above, ComEd has refused to fully articulate and explain its basis for identifying a pole as “red tagged” and for determining why that pole must be replaced or reinforced. As to each pole to which ComEd has denied access on the general basis of “red tag” status, ComEd has not provided specific information identifying all relevant evidence and information supporting its denial or explaining how the evidence supports denial based on lack of capacity, safety, reliability or engineering standards.⁹⁶

105. As the Commission clarified in the OTMR Order, the mere fact that a pole has been red tagged by ComEd does not satisfy Section 224(f) or the Commission’s Rules.⁹⁷ Maintaining the structural safety and integrity of its poles is ComEd’s responsibility. If a pole has red tag status, it means that ComEd needs to replace or in some cases reinforce that pole, and it needs to do so in a timely manner.⁹⁸ Specifically, Under NESC Rule 214.A.5, lines and equipment with “recorded conditions or defects that would reasonably be expected to endanger human life or property shall be promptly corrected, disconnected or isolated” and “[o]ther conditions or defects shall be designated for correction.”⁹⁹

106. As discussed above, ComEd is not correcting the defects in its pole in a reasonably timely manner.¹⁰⁰ Under standard industry practice, ComEd should be replacing its

⁹⁵ *Id.* n.456.

⁹⁶ Whitfield Decl. ¶¶ 13, 16, 23-26.

⁹⁷ OTMR Order ¶ 122.

⁹⁸ Bingel Decl. ¶ 13.

⁹⁹ NESC Rule 214.A.5.

¹⁰⁰ Bingel Decl. ¶¶ 25-29.

“Priority” poles within approximately 30, 90, or at most 180 days after inspection depending on the utility company’s standard for pole strength that triggers red tag status.¹⁰¹ For all other red tagged poles, ComEd should be correcting the issue, either by replacement or reinforcement where possible, within approximately one year after inspection.¹⁰² Yet, ComEd is not replacing or reinforcing its red tagged poles in an even remotely timely fashion. Although Crown Castle cannot confirm that ComEd is actually following its own policy, at most ComEd’s policy is to restore Priority Restorable poles within the current inspection year, and to replace Priority Non-Restorable poles in the next calendar year.¹⁰³ Yet, standard industry practice says that ComEd should be replacing those priority poles with a matter of approximately 90 days.¹⁰⁴ For its “Non-Priority” red tagged poles, ComEd’s policy is to restore or replace the pole “after Load Calculation classification within a set timeframe.”¹⁰⁵ Yet, Crown Castle understands that ComEd is not performing such “load calculation” on any Non-Priority poles, and there is no set timeframe for correction of any of the Non-Priority poles. Crown Castle understands that approximately 75% of ComEd’s red tagged poles are “Non-Priority.”¹⁰⁶ As a result, ComEd has hundreds (or more) poles that have been labeled red tag, but which may go uncorrected for many years. Under standard industry practice, ComEd should be repairing (either with replacement or

¹⁰¹ Bingel Decl. ¶ 13.

¹⁰² Bingel Decl. ¶ 13.

¹⁰³ Bingel Decl. ¶ 20.

¹⁰⁴ Bingel Decl. ¶ 13.

¹⁰⁵ Bingel Decl. ¶ 21.

¹⁰⁶ Whitfield Decl. ¶ 18.

reinforcement where possible) all red tag poles within one year.¹⁰⁷ Allowing red tagged poles to go un-corrected for many years is not reasonable.¹⁰⁸

107. While, upon information and belief, ComEd has developed a database that tracks and contains detailed information about “red tag” poles, ComEd has refused to provide Crown Castle with access to this database.¹⁰⁹

108. ComEd’s practice of labeling poles with a red tag, but potentially taking no action to repair or replace those poles for over a year and possibly as long as 10 years raises significant issues and questions. Notably, if ComEd is using standard industry thresholds for defining when a pole is “red tagged,” then its failure to remediate that condition within a year is unreasonable in light of the NESC, standard industry practice, and good and standard engineering practice. Alternatively, if ComEd is using a different standard than the 33 percent threshold stated in its documents (in such a way as to justify ComEd’s failure to replace the pole within a year), then ComEd’s practice raises questions about whether ComEd is inappropriately applying the red tag status to a significant number of poles and then denying access to those poles unless the attaching party pays for a new pole. Indeed, ComEd’s practices suggest that some significant number of its Non-Priority Poles may be able to accommodate attachment by Crown Castle. At a minimum, it is not reasonable for ComEd to apply red tag status to a significant number of poles and have those poles remain in that status for potentially many years, unavailable for additional third party attachment or even any work by existing attachers.¹¹⁰

¹⁰⁷ Bingel Decl. ¶¶ 13, 25.

¹⁰⁸ Bingel Decl. ¶ 26.

¹⁰⁹ Whitfield Decl. ¶ 27.

¹¹⁰ Bingel Decl. ¶ 27.

109. In addition, as Mr. Bingel explains, to determine whether a red tagged pole is strong enough to hold an existing load or a new attachment, a utility ultimately needs to perform a pole-specific load analysis that determines the actual load on the pole, which may require less remaining strength than if the pole is assumed to be fully loaded.¹¹¹ However, on information and belief, ComEd is not performing pole-specific load analyses on any red tagged poles.¹¹²

110. ComEd has refused to perform a pole-specific load analysis on red tagged poles to determine whether these poles can be strengthened through reinforcement.¹¹³

111. Refusing to perform a pole-specific load analysis on red tagged poles to determine whether these poles are able to accommodate Crown Castle's proposed attachment, or even to determine whether the pole can be strengthened through reinforcement, is unreasonable.¹¹⁴

112. In summary, ComEd's denial of access based on red tag status, particularly when ComEd has not provided any justification for prohibiting Crown Castle to attach to "red tag" poles, does not satisfy the requirements to justify denial set forth in 47 C.F.R. § 1.1403.¹¹⁵

113. To the extent that red tag status might, arguably constitute a "safety, reliability [or] generally applicable engineering" issue, it does not justify denial under Section 224(f)(2) because it is a safety, reliability, or generally applicable engineering issue that is a pre-existing condition that ComEd is required to have corrected in a timely fashion. ComEd's failure to

¹¹¹ Bingel Decl. ¶ 12.

¹¹² Whitfield Decl. ¶ 17.

¹¹³ Whitfield Decl. ¶ 17.

¹¹⁴ Bingel Decl. ¶¶ 28-29.

¹¹⁵ OTMR Order ¶ 122.

correct pre-existing conditions in a timely fashion cannot create lawful grounds for denial of access.¹¹⁶

114. In addition, ComEd’s treatment of red tagged pole is not consistent with standard industry practice.¹¹⁷

115. Accordingly, the Commission should declare that ComEd’s practice of denying access to poles labeled “red tag” is unlawful and order ComEd to permit Crown Castle immediately to install its facilities on “red tag” poles to the extent permitted by the NESC.

116. If these “red tag” poles created imminent danger, ComEd should have replaced them within 90 days.¹¹⁸

117. Under Rule 214 of the NESC, pole owners must *promptly* correct “lines and equipment with recorded conditions or defects that would reasonably be expected to endanger human life or property.”¹¹⁹ Rule 214.A.5(b) states “Other conditions or defects shall be designated for correction.”¹²⁰

118. However, according to guidance provided in the NESC Handbook, if the noncompliant conditions or defects are not life threatening, new work can be performed prior to the correction of the non-compliant conditions or defects if “(a) the new addition would not

¹¹⁶ OTMR Order ¶ 122.

¹¹⁷ Bingel Decl. ¶¶ 14-29.

¹¹⁸ Bingel Decl. ¶ 13.

¹¹⁹ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 214(A)(5)(a) (Apr. 26, 2016); Bingel Decl. ¶ 13.

¹²⁰ 2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 214(A)(5)(b) (Apr. 26, 2016); Bingel Decl. ¶ 13.

create a new noncompliant condition, (b) worsen an existing noncompliant condition, or (c) overload the structure.”¹²¹

119. Therefore, replacing red-tagged poles that are not an immediate danger should not be a condition precedent to attachment.

120. Consequently, to the extent permitted by the NESC, Crown Castle should be permitted to both permanently and temporarily attach wireless nodes and fiber optic lines to red tag poles.

B. ComEd’s Requirement to Pay For Replacement or Reinforcement of “Red Tag” Poles for Violations That It Did Not Cause is An Unlawful Denial of Access in Violation of Section 224

121. ComEd’s refusal to allow Crown Castle to attach its facilities to “red tagged” poles unless and until Crown Castle assumes the sole financial burden of correcting the preexisting conditions of the pole that Crown Castle did not cause is a denial of access in violation of Section 224 of the Communications Act and an unjust and unreasonable term and condition of attachment.¹²²

122. The Commission’s Rules forbid a utility from denying a new attacher access to a pole “based on a preexisting violation not caused by any prior attachments of the new attacher.”¹²³

123. The Commission recently confirmed its long held position that “new attachers are not responsible for the costs associated with bringing poles . . . into compliance with current

¹²¹ ALLEN L. CLAPP, NESC HANDBOOK, at 759 (7th ed. 2015).

¹²² OTMR Order ¶ 122.

¹²³ 47 C.F.R. § 1.1411(c)(2); *see also* OTMR Order ¶ 122.

safety and pole owner construction standards to the extent such poles . . . were out of compliance prior to the new attachment.”¹²⁴ In its OTMR Order, the Commission explained:

Although utilities have sometimes held new attachers responsible for the costs of correcting preexisting violations, ***this practice is inconsistent with our long-standing principle that a new attacher is responsible only for actual costs incurred to accommodate its attachment.*** The new attachment may precipitate correction of the preexisting violation, but it is the violation itself that causes the costs, not the new attacher. Holding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment, and provides incentives for attachers to complete make-ready work irresponsibly and count on later attachers to fix the problem. This is true whether the make-ready work that corrects these preexisting violations is simple or complex.¹²⁵

124. The Commission further clarified that “that utilities may not deny new attachers access to the pole solely based on safety concerns arising from a preexisting violation.”¹²⁶ The Commission added that “[t]his includes situations where a pole has been ‘red tagged’—that is, found to be non-complaint with safety standards and placed on a replacement schedule. ***When a pole has been red tagged, new attachers are not responsible for the cost of pole replacement.***”¹²⁷

125. Moreover, the Commission has repeatedly stated that “to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will

¹²⁴ OTMR Order ¶ 121 (emphasis added); see also *Knology, Inc. v. Georgia Power Co.*, Order, FCC 03-292, 18 FCC Rcd. 24615, ¶ 37 (Nov. 14, 2003) (ordering an investment-owned utility to refund an attacher for “costs of any change-outs necessitated by the safety violations of other attachers. . .”).

¹²⁵ OTMR Order at ¶¶ 121 (emphasis added).

¹²⁶ OTMR Order at ¶¶ 122 (emphasis added).

¹²⁷ OTMR Order at ¶¶ 122 n. 450 (emphasis added) (citing Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 3).

be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification.”¹²⁸

126. Even if ComEd is not considered to be the sole beneficiary, ComEd, at minimum, should share in the costs of the change-out with other existing attaching parties, rather than impose that cost on Crown Castle.¹²⁹

127. From June 2017 to March 2019, as a condition precedent to attachment, ComEd has required Crown Castle to either replace or reinforce red tag poles for violations that Crown Castle did not cause, while at the same time, ComEd reinforced “red tag” poles for its own benefit.

128. The Commission addressed a similar dispute in *Kansas City Cable Partners v. Kansas City Power & Light Co.*¹³⁰

129. In *Kansas City Cable*, Kansas City Power & Light (“KCPL”) required Time Warner Cable (“TWC”) to replace poles prior to attachment.¹³¹

130. TWC learned that a number of poles “that KCPL identified as needing replacement . . . either would meet NESC guidelines or were in need of replacement *before*

¹²⁸ See *Local Competition Provisions in the Telecommunications Act of 1996 Interconnection Between Local Exch. Carriers & Commercial Mobile Radio Serv. Providers*, Order on Reconsideration, 14 F.C.C. Rcd. 18049 ¶90 (1999).

¹²⁹ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 95-185, 11 F.C.C. Rcd. 15499 ¶1212 (1996) (“A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost.”) (subsequent history omitted).

¹³⁰ See *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 ¶ 19 (Cable Serv. Bureau 1999) (“*Kansas City Cable*”).

¹³¹ See *id.* at ¶7.

additional attachments would be added.”¹³²

131. TWC asked KCPL for “sufficient backup information so that [TWC] can understand the basis” for requiring pole replacement.¹³³

132. Time Warner subsequently filed a complaint with the Commission, alleging that KCPL’s pole replacement practice constituted an effective denial of access and requesting the Commission to “order KCPL to immediately grant access to all poles that do not need replacement or to which attachment can be made temporarily, pending replacement, without causing a safety hazard.”¹³⁴

133. The Commission ordered KCPL to, within 7 days of the release of its Order, immediately commence all pole changeout and make-ready work and asserted that KCPL was responsible for all corrections of preexisting violations:

It appears that a number of poles that need replacement violate NESC requirements prior to attachment by Time Warner and the violation of the NESC would not be caused by Time Warner's facilities. ***Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner’s attachment to keep the pole within NESC standards should be borne by Time Warner.***¹³⁵

134. The dispute here resembles the dispute in *Kansas City Cable*.

135. Like TWC, Crown Castle lacks adequate data and explanation to understand the pole owner’s basis for requiring pole replacements and needs immediate access to complete its ongoing projects.

¹³² See *id.* (emphasis added).

¹³³ See *id.* at ¶8.

¹³⁴ See *id.* at ¶1.

¹³⁵ See *id.* ¶¶19, 25.

136. ComEd, similar to KCPL, prohibits deployment of facilities unless and until Crown Castle replaces poles for defects that it did not cause.

137. Notwithstanding ComEd’s lack of transparency and candor, it is clear that the “red tag” status of ComEd poles is wholly unrelated to Crown Castle’s proposed attachments and such replacements primarily, if not solely, benefit ComEd.

138. Therefore, Crown Castle should not be responsible for such costs and ComEd, pursuant to the Commission’s Rules, should refund Crown Castle \$14,482,307, plus interest (or such amount as is appropriate at the end of this dispute), for payments to correct, replace, or reinforce red tagged poles.

C. ComEd’s Refusal to Provide Crown Castle with Detailed Information Regarding its “Red Tag” Practice is an Unreasonable Term and Condition of Attachment in Violation of Section 224

139. ComEd’s concealment of criteria and data used to determine whether a pole is “red tagged” is a violation of Section 224(e) of the Communications Act, which requires that all rates, terms and condition of attachment to be “just and reasonable.”

140. In *Knology, Inc. v. Georgia Power*, Georgia Power “refused to itemize, describe, or otherwise provide clarifying information that would assist Knology in identifying the basis for make-ready charge.”¹³⁶

141. In response, *Knology*, a cable operator, filed a pole attachment complaint with the Commission, asserting that the utility’s refusal to provide detailed information regarding make-ready charges was an unjust and unreasonable term and condition of attachment in violation of Section 224.¹³⁷

¹³⁶ *Knology* at ¶8.

¹³⁷ *Knology* at ¶8.

142. The Commission agreed with the attaching party and ordered the utility to “to provide reasonable billing back-up information in the future consistent with” the findings in the Commission’s Order.¹³⁸

143. In reaching its holding, the Commission explained that the utility “had an obligation to provide a reasonable amount of information sufficient to substantiate its make-ready charges.”¹³⁹

144. As discussed above, ComEd is not permitted to charge Crown Castle anything for replacement or reinforcement of red tagged poles. However, even if there were some basis for ComEd to charge Crown Castle, ComEd clearly has not met this obligation as it has not provided *any* “information sufficient to substantiate” its “red tag” pole replacement costs.

145. Consequently, at a minimum, the Commission should order ComEd to fulfill its responsibility under the Communications Act by providing Crown Castle access to any and all information that substantiate replacement and reinforcement for “red tag” poles.

D. ComEd’s Unreasonable Delay in Completing Pre-Construction Surveys and Issuing Make-Ready Estimates Constitutes a Denial of Access

146. ComEd’s failure to process pole attachment applications in accordance with the Commission’s timelines prescribed in 47 C.F.R. § 1.1411 constitutes an effective denial of access in violation of 47 U.S.C. § 224.

147. Under the Commission’s rules, a utility is required to complete pre-construction surveys for larger orders within 60 days of receipt of a complete application to attach facilities to its utility poles.¹⁴⁰

¹³⁸ *Knology* at ¶62.

¹³⁹ *Knology* at ¶61.

¹⁴⁰ *See* 47 C.F.R. § 1.1411(c).

148. A utility is also required to present new attachers a detailed, itemized make-ready estimate within 14 days of completing a pre-construction survey.¹⁴¹

149. Therefore, a utility must complete a pre-construction survey and issue a make-ready estimate for both fiber and wireless application for large orders within 74 days of receipt of a complete pole attachment application.

150. For large orders of fiber attachments within the communications space, a utility must take final action within 193 days of attachment of receipt of pole attachment application.¹⁴² For large orders of wireless attachments above the communications space, a utility must take final action within 223 days of attachment of receipt of pole attachment application.¹⁴³

151. Although Crown Castle does not believe its applications constitute “large orders,” even if the Commission assumes for purposes of this Complaint that the timeframes for large orders apply, ComEd still has failed to comply with the Commission’s timelines.

152. As discussed above, Crown Castle has been waiting well over 60 days for pre-construction surveys for 114 pending wireless attachment applications and 41 pending fiber attachment applications.¹⁴⁴

153. ComEd has also failed to issue make ready estimates for 378 wireless applications and 446 fiber applications (covering 5,649 poles for fiber and wireless attachments) within the required 74 days.¹⁴⁵

¹⁴¹ See 47 C.F.R. § 1.1411(d).

¹⁴² See 47 C.F.R. § 1.1411(c)-(h).

¹⁴³ See 47 C.F.R. § 1.1411(c)-(h).

¹⁴⁴ Whitfield Decl. Ex. 12, Application Processing Study pp. 1, 2, 26.

¹⁴⁵ Whitfield Decl. Ex. 12, Application Processing Study pp. 1, 3, 29.

154. What is most concerning is that ComEd has failed to take final action on 254 wireless applications within the 223-day timeframe and 579 fiber applications (covering 6,955 poles for fiber and wireless attachments) within the 193-day timeframe.¹⁴⁶

155. The Commission has noted that the lack of a timeline can cause “excessive delays” and that “having timeline offers certainty to attachers and allows them to make concrete business plans.”¹⁴⁷

156. In other words, the Commission’s timelines are designed to combat the exact issues created by ComEd’s delay.

157. ComEd’s disregard of for the Commission’s pole attachment timeframes has disrupted Crown Castle’s business operations and jeopardized Crown Castle’s relationships with its customers.

158. Crown Castle, in most cases, cannot take advantage of the Commission’s one-touch make-ready rules, which only apply to “simple” make-ready.¹⁴⁸ Most of Crown Castle’s attachments require “complex” make-ready.¹⁴⁹

159. However, Crown Castle has made and continues to make great efforts to work with ComEd in resolving the application processing delays.

¹⁴⁶ Whitfield Decl. Ex. 12, Application Processing Study, pp. 1, 13, 27.

¹⁴⁷ *Implementation of Section 224 of the Act; A Nat’l Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245; GN Docket No. 09-51, 26 F.C.C. Rcd. 5240 ¶21 (Apr. 7, 2011).

¹⁴⁸ 47 C.F.R. § 1.1411(j).

¹⁴⁹ “Complex” make-ready means “transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are to be considered complex.” 47 C.F.R. § 1.1402(p).

160. Crown Castle has met with ComEd on at least 29 occasions to address this matter since 2018.

161. In at least one attempt to resolve the delays, Crown Castle has proposed a “turnkey” solution, which would allow Crown Castle to hire, control, and direct ComEd-approved third party contractors to perform pre-construction surveys and complete make-ready estimates. ComEd denied this proposal, refusing to allow Crown Castle to hire or control contractors, despite the fact that such “self-help” is permitted under the Commission’s Rules.¹⁵⁰

162. Crown Castle also asked ComEd to expand its list of authorized contractors to perform make-ready, but ComEd has yet to approve or deny Crown Castle’s request.¹⁵¹

163. Under 47 C.F.R. §1.1412, new attachers, for both simple make-ready and complex make-ready above the communications space, “may request the addition to the list of any contractor that meets the minimum qualifications” listed in 47 C.F.R. §1.1412(c)(1)-(5) and “the utility may not unreasonably withhold its consent.”¹⁵²

164. Pursuant to 47 C.F.R. §1.1412, on May 28, 2019, Crown Castle, requested ComEd to approve Thayer Power & Communication to conduct self-help complex and above the communications space make-ready and simple make-ready.¹⁵³ To help alleviate these roadblocks to deployment, the Commission should order ComEd to allow Crown Castle to hire, direct, and control ComEd-approved third-party contractors to complete survey and make ready work at the direction of Crown Castle. In addition, the Commission should order ComEd to

¹⁵⁰ Whitfield Decl. ¶ 51.

¹⁵¹ Whitfield Decl. ¶ 52.

¹⁵² 47 C.F.R. §1.1412(a)-(b).

¹⁵³ Whitfield Decl. ¶ 52.

approve Thayer Power & Communication as an authorized contractor to perform complex above the communication space and simple make-ready.

165. Permitting Crown Castle to direct and control third-party contractors is the only viable solution for curing these delays. An order compelling ComEd to meet the Commission's timeframes will not suffice because ComEd has demonstrated that it cannot efficiently manage its field crews. For example, from May 27, 2019 to May 30, 2019, despite having fifteen (15) ComEd field crews working, ComEd was only able to change out three (3) poles for the Crown Castle deployment.¹⁵⁴ Therefore, Crown Castle requires the ability to manage third-party contractors in order to successfully and timely complete its deployment projects in Illinois.

VI. ATTEMPTS TO RESOLVE ALL DISPUTES

166. Pursuant to Section 1.722(g) of the Commission's Rules, Crown Castle has engaged in good faith attempts to resolve the dispute regarding ComEd's "red tag" requirements and failure to act in a timely manner.¹⁵⁵

167. As a threshold matter, Crown Castle has engaged in many meetings and communications with ComEd in an attempt to address the various red tag and delay related issues involved in the project. For example, Crown Castle and ComEd have a "director level" meeting on the project once per week.¹⁵⁶

168. Pursuant to the Commission's Rules, on October 25, 2018, Mr. Brian Cabe of Crown Castle of sent a letter to Mr. Vito Martino of ComEd, requesting a final executive level

¹⁵⁴ Whitfield Decl. ¶ 53.

¹⁵⁵ Whitfield Decl. ¶¶ 39-44.

¹⁵⁶ Whitfield Decl. ¶ 57.

negotiation before November 6, 2018 to resolve the ongoing disputes between Crown Castle and ComEd related to ComEd's red tagging practice and unlawful pole attachment rates.¹⁵⁷

169. On December 4, 2019, Crown Castle and ComEd held an executive-level meeting at ComEd's office located at 2 Lincoln Centre, Oakbrook Terrace, IL 60181.¹⁵⁸

170. At the executive-level meeting, the parties agreed to schedule a follow-up meeting for December 14, 2018, to further discuss the "red tag" issue.¹⁵⁹

171. During the follow-up call on December 14, 2018, parties agreed to form two "sub-teams" comprised of operational representatives from both Crown Castle and ComEd to specifically focus on resolving the red tag issue and pole attachment rates.¹⁶⁰

172. Since the follow-up meeting on December 14, 2018, Crown Castle and ComEd have had nine (9) subsequent meetings (four (4) executive meetings and five (5) sub-team meetings) to address the red tag issue.¹⁶¹ Despite the many meetings, as set forth above, ComEd continues its unlawful practices, and the Parties' dispute is unresolved.¹⁶²

173. On April 26, 2019, Ms. Karen Rohrkemper of Crown Castle sent a letter to Mr. Vito Martino requesting final executive level negotiation before May 3, 2019 to resolve ongoing disputes related to ComEd's failure to complete pre-construction surveys and issue make-ready estimates in accordance's with the Commission's prescribed timelines.¹⁶³

¹⁵⁷ Whitfield Decl. Ex. 9.

¹⁵⁸ Whitfield Decl. ¶ 41.

¹⁵⁹ Whitfield Decl. ¶ 41.

¹⁶⁰ Whitfield Decl. ¶ 42.

¹⁶¹ Whitfield Decl. ¶ 43.

¹⁶² Whitfield Decl. ¶ 44.

¹⁶³ Whitfield Decl. ¶ 55, Ex. 17.

174. An executive-level meeting was held on May 13, 2019 at Crown Castle's office located at 947 Parkview Boulevard, Lombard, Illinois.¹⁶⁴ In addition to discussing application delays, Crown Castle requested executive-level intervention from ComEd to cease the new policy of prohibiting temporary attachments.¹⁶⁵

175. Crown Castle and ComEd have not been able to resolve their current and on-going disputes regarding the red tag issues or ComEd's failure to act on applications within the Commission's timeframes.

VII. INFORMATION DESIGNATION

The following individuals likely have information relevant to the proceeding:

Maureen Whitfield

Crown Castle Fiber LLC
Manager, Utility Relations
2000 Corporate Drive, Canonsburg, PA 15317
(724) 416-2791
Maureen.Whitfield@crowncastle.com

Karen Rohrkemper

Crown Castle Fiber LLC
Vice President, Engineering & Operations, Central Region
2000 Corporate Drive, Canonsburg, PA 15317
(513) 478-4448
Karen.Rohrkemper@crowncastle.com

Michael Smith

Crown Castle Fiber LLC
Vice President
947 Parkview Blvd. Lombard, IL 60148
(630) 480-5222
Michael.Smith@crowncastle.com

¹⁶⁴ Whitfield Decl. ¶ 56.

¹⁶⁵ Whitfield Decl. ¶ 34.

VIII. COUNTS

Count 1: Denial of Access (Red Tag)

176. Crown Castle incorporates by reference as if fully set forth herein paragraphs 1 through 176 of this Complaint.

177. As the Commission clarified in the OTMR Order, ComEd's refusal to permit Crown Castle to attach to poles based solely on the poles' having been declared "red tagged" by ComEd is a denial of access in violation of 47 U.S.C. § 224(f) and 47 C.F.R. § 1.1403.¹⁶⁶

178. ComEd's failure to provide the information required by Section 1.1403(b) of the Commission's Rules to support denial of access to each pole creates a denial of access in violation of 47 U.S.C. § 224(f) and 47 C.F.R. § 1.1403.

Count 2: Denial of Access (Red Tag Replacement Costs)

179. Crown Castle incorporates by reference as if fully set forth herein paragraphs 1 through 179 of this Complaint.

180. ComEd's requirement that Crown Castle first pays for correction of preexisting conditions that were not caused by Crown Castle, including but not limited to replacement or reinforcement of the pole, prior to attachment is an effective denial of access to ComEd's poles in violation of 47 U.S.C. § 224(f) and 47 C.F.R. § 1.1403. The Commission explicitly held this in its OTMR Order.¹⁶⁷

181. Crown Castle has been unlawfully required to and has paid ComEd **\$11,288,367** in response to ComEd's unjust and unreasonable demand to pay for correction and replacement

¹⁶⁶ OTMR Order ¶¶ 121-122.

¹⁶⁷ OTMR Order ¶¶ 121, n.450, 122, n.455.

of red tag poles associated with fiber attachment applications. Crown Castle is entitled to refund of **\$11,288,367** for the unlawful overpayment, plus interest pursuant to 47 C.F.R. § 1.1407(a)(3).

182. Crown Castle has been unlawfully required to and has paid ComEd **\$2,923,906** in response to ComEd's unjust and unreasonable demand to pay for correction and replacement of red tag poles associated with wireless attachment applications. Crown Castle is entitled to refund of **\$2,923,906** for the unlawful overpayment, plus interest pursuant to 47 C.F.R. § 1.1407(a)(3).

Count 3: Unjust and Unreasonable Term of Attachment (Refusal to Provide Sufficient Detail about Red Tag Policy)

183. Crown Castle incorporates by reference as if fully set forth herein paragraphs 1 through 183 of this Complaint.

184. ComEd's failure to provide the information required by Section 1.1403(b) of the Commission's Rules to support denial of access to each pole is an unjust and unreasonable term and condition of attachment in violation of 47 U.S.C. § 224(e) and 47 C.F.R. § 1.1403(b).

Count 4: Denial of Access (Fiber Application Processing)

185. Crown Castle incorporates by reference as if fully set forth herein paragraphs 1 through 185 of this Complaint.

186. ComEd's failure to conduct pre-construction surveys, issue make-ready estimates, and timely act on applications for Crown Castle's applications to attach fiber attachments within the timelines established by the Commission's Rules violates 47 C.F.R. § 1.1411 and constitutes a denial of access in violation of 47 U.S.C. § 224(f).

Count 5: Denial of Access (Wireless Application Processing)

187. Crown Castle incorporates by reference as if fully set forth herein paragraphs 1 through 187 of this Complaint.

188. ComEd’s failure to conduct pre-construction surveys, issue make-ready estimates, and timely act on applications for Crown Castle’s applications to attach wireless equipment within the timelines established by the Commission’s Rules violates 47 C.F.R. § 1.1411 and constitutes a denial of access in contravention of 47 U.S.C. § 224(f).

IX. RELIEF REQUESTED

Crown Castle respectfully requests an order from the Commission:

189. Declaring that the Commission has jurisdiction over this dispute and over the terms, and conditions imposed by ComEd on Crown Castle’s pole attachments in Illinois.

190. Declaring that ComEd’s refusal to permit Crown Castle to attach to “red tag” poles is a denial of access in violation of 47 U.S.C. § 224(f).

191. Declaring that ComEd’s denial of attachment to poles based only on a status of “red tag” fails to satisfy the requirements of 47 C.F.R. § 1.1403(b).

192. Ordering ComEd to correct all red tagged poles to which Crown Castle seeks attachment within no later than 90 days of the Commission’s Order, or in the alternative, allow Crown Castle to hire and direct approved contractors, to be paid for by ComEd, to immediately correct the red tagged poles.

193. Declaring that ComEd’s refusal to allow Crown Castle to temporarily attach to red tagged poles pending ComEd’s correction of the preexisting conditions is a denial of access in violation of 47 U.S.C. § 224(f).

194. Ordering ComEd to allow Crown Castle to attach to ComEd poles that have been identified as “red tagged” to the extent consistent with NESC Rule 214 without Crown Castle paying for replacement of or correction to those ComEd poles for conditions caused by other parties.

195. Declaring that ComEd's refusal to allow Crown Castle to attach to red tag poles unless and until Crown Castle pays for replacement of and/or corrections to "red tag" poles to remedy preexisting conditions that Crown Castle did not cause is an effective denial of access in violation of 47 U.S.C. § 224(f).

196. Ordering ComEd to pay Crown Castle **\$11,288,367**, plus interest to refund unlawful charges and costs imposed for correction of red tagged poles associated with fiber attachment applications pursuant to 47 C.F.R. § 1.1407(a)(3).

197. Ordering ComEd to pay Crown Castle any amount paid by Crown Castle after April 30, 2019, plus interest, to refund unlawful charges and costs imposed for correction of red tagged poles associated with fiber attachment applications pursuant to 47 C.F.R. § 1.1407(a)(3).

198. Ordering ComEd to pay Crown Castle **\$2,923,906** plus interest to refund unlawful charges and costs imposed for correction of red tagged poles associated with wireless attachment applications pursuant to 47 C.F.R. § 1.1407(a)(3).

199. Ordering ComEd to pay Crown Castle any amount paid by Crown Castle after April 30, 2019, plus interest, to refund unlawful charges and costs imposed for correction of red tagged poles associated with wireless attachment applications pursuant to 47 C.F.R. § 1.1407(a)(3).

200. Ordering ComEd to provide Crown Castle with any and all information related to poles that it has "red tagged," including ComEd's database that it uses to track "red tag" poles.

201. Ordering ComEd to allow Crown Castle to hire, control, and direct approved third-party contractors to complete all pre-construction surveys, issue make-ready estimates, and perform make-ready on poles applied for by Crown Castle.

202. Ordering ComEd to comply with all commission pole attachment timeframes provided in 47 C.F.R. § 1.1411.

203. In the alternative, ordering ComEd to promptly complete all pre-construction surveys for fiber attachments applications that have been outstanding for over 60 days for large orders in accordance with in 47 C.F.R. § 1.1411.

204. In the alternative, ordering ComEd to promptly issue all make-ready estimates for fiber attachments applications that have been outstanding for over 74 days for larger orders in accordance with 47 C.F.R. § 1.1411.

205. In the alternative, ordering ComEd to immediately complete all make-ready for fiber attachments applications that have been outstanding for over 193 days for larger orders in accordance with 47 C.F.R. § 1.1411.

206. In the alternative, ordering ComEd to promptly complete all pre-construction surveys for wireless attachments applications that have been outstanding for over 60 days for large orders in accordance with 47 C.F.R. § 1.1411.

207. In the alternative, ordering ComEd to promptly issue all make-ready estimates for wireless attachments applications that have been outstanding for over 74 days for larger orders in accordance with 47 C.F.R. § 1.1411.

208. In the alternative, ordering ComEd to immediately complete all make-ready wireless attachment applications that have been outstanding for over 223 days in accordance with 47 C.F.R. § 1.1411.

209. Ordering all such other relief as the Commission deems just, reasonable and proper.

Respectfully submitted,

/s/ T. Scott Thompson

T. Scott Thompson

Ryan M. Appel

Davis Wright Tremaine LLP

1919 Pennsylvania Avenue, N.W., Suite 800

Washington, D.C. 20006

202-973-4200 (Main Phone)

202-973-4499 (Main Fax)

scottthompson@dwt.com (Email)

Attorneys for Crown Castle Fiber LLC

Robert Millar

Rebecca Hussey

Crown Castle Fiber LLC

Date submitted: June 19, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2019, I caused a copy of the foregoing Complaint, exhibits and declarations in support thereof, to be served on the following via overnight delivery unless otherwise noted:

Marlene J. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554
(original and four copies by hand delivery)

Mr. Mark Falcone
Commonwealth Edison Company
Two Lincoln Centre
Oakbrook Terrace, IL 60181

Bradley R. Perkins
Assistant General Counsel, Regulatory
ComEd
10 South Dearborn Street
49th Floor
Chicago, IL 60603

Chief Clerk's Office
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701

/s/ T. Scott Thompson
T. Scott Thompson