Attachment C

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July 8, 2019

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Crown Castle Fiber LLC v. Commonwealth Edison Company,
Proceeding Number 19-170
Bureau ID Number EB-19-MD-005

Ms. Dortch:

Pursuant to 47 C.F.R. § 1.729(e), Crown Castle Fiber LLC submits the attached Opposition to Commonwealth Edison Company's Motion To Dismiss For Lack Of Jurisdiction filed in the above-referenced proceeding.

Davis Wright Tremaine LLP

Ryan M. Appel

Cc: Service List

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

CROWN CASTLE FIBER LLC, *Complainant*, v. COMMONWEALTH EDISON COMPANY, *Respondent*.	Proceeding Number 19-170 Bureau ID Number EB-19-MD-005

OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISIDICTION

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July 8, 2019

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Crown Castle Fiber LLC ("Crown Castle"), by and through undersigned counsel, and pursuant to 47 C.F.R. § 1.729(e), opposes Respondent Commonwealth Edison Company's ("ComEd") Motion to Dismiss For Lack of Jurisdiction in the above-referenced docket.

I. INTRODUCTION

Although 47 C.F.R. § 1.729(d) permits motions to dismiss, the Commission has made clear "that motions to dismiss are rarely warranted."[1] ComEd's Motion to Dismiss is unwarranted here and should be promptly denied. As set forth below, the Illinois Commerce Commission ("ICC") has notified the Commission that its pole attachment jurisdiction does not extend to telecommunications attachments to electric utility poles. Accordingly, the Commission's jurisdiction over this matter is clear, and prompt resolution of this issue will allow the Parties and Commission to move forward to a timely resolution of the merits.

Merely certifying to the Federal Communications Commission ("FCC" or "Commission") that a State regulates pole attachments is not sufficient to divest this Commission of jurisdiction over pole attachments. The plain statutory language of Section 224(c)(3) requires not only certification, but that the State "has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments."[2] ComEd's Motion is based on the false premise that because the ICC in 1978 certified to the FCC that it had authority to regulate pole attachments, and then in 1985 certified that it had actually issued and made effective rules and regulations governing pole attachments *by cable television operators*, that the FCC is forever divested of jurisdiction.

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[1] *Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enf't Bureau*, Report and Order, EB Docket No. 17-245, 33 FCC Rcd. 7178, ¶13 (July 18, 2018).

[2] 47 U.S.C. § 224(c)(3)(A); *see also* 47 C.F.R. § 1.1405(a)-(b).

ComEd's argument entirely ignores that the ICC has not issued or made effective rules governing pole attachments by *telecommunications providers* to poles owned by electric companies. The ICC's pole rules, which were adopted before the 1996 Act opened the telecommunications market to competition, explicitly apply only to cable television operators.[3] The ICC has not promulgated rules to regulate attachments by telecommunications providers.

Moreover, ComEd's argument ignores the fact that the ICC has notified the Commission that the ICC does *not* regulate or have jurisdiction over attachments by telecommunications providers to poles owned by electric utilities. In a notification adopted at an open meeting on October 25, 2018, addressed to the FCC, and subsequently filed with the FCC on December 12, 2018 (the "ICC 2018 Notice"), the ICC explicitly states that it "has not adopted any rules or regulations specifically governing rates, terms, and conditions for attachments by *telecommunications* companies to poles owned by electric utilities and ***therefore lacks regulatory authority over attachments by telecommunications companies to poles owned by electric utilities***."[4] The ICC 2018 Notice is an official statement by the ICC to the FCC confirming that it does not have rules and does not have jurisdiction over precisely the types of attachments at issue in this dispute. Thus, even if the ICC has certified as to cable television attachments, it has notified the Commission that its certification does not extend to telecommunications attachments. ComEd argues that the ICC's 1985 certification is "conclusive proof" that the FCC lacks jurisdiction, but fundamentally ignores that the ICC's 2018 Notice must also then be "conclusive proof" that the ICC does not have jurisdiction. ComEd cannot and

[3] Indeed, the Illinois rules still use the antiquated "CATV" terminology.

[4] A copy of the ICC 2018 Notice was attached to *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-169, Complaint Exhibit B; *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-170, Complaint Attachment C (emphasis added) (hereinafter "ICC 2018 Notice").

does not rebut the ICC's statement. Rather, ComEd's Motion to Dismiss, on a fundamental level, is asking the FCC to determine that the ICC's declaration is incorrect.

ComEd's Motion, which would lead to neither the ICC nor the FCC having jurisdiction over ComEd's attachment rates, terms, and conditions, would leave Crown Castle without an appropriate venue to resolve its complaint. That outcome also conflicts with the statute and with the Commission's Rules and precedent. Accordingly, the FCC has jurisdiction to resolve this complaint and should deny ComEd's Motion to Dismiss For Lack of Jurisdiction.

II. THE FCC HAS JURISDICTION OVER POLE ATTACHMENTS MADE BY TELECOMMUNICATIONS PROVIDERS TO POLES OWNED BY ELECTRIC UTILITIES IN ILLINOIS BECAUSE THE ICC HAS NOT ADOPTED REGULATIONS GOVERNING SUCH ATTACHMENTS.

A. The ICC's Pole Attachment Rules Apply Only to Cable Television Companies.

As the ICC unambiguously confirmed in its 2018 Notice, the ICC has never adopted any rule governing rates, terms, or conditions for attachments by telecommunications companies to poles owned by electric utilities. The ICC's pole attachment rules, which are codified in Sections 315.10 through 315.70 of Title 83 of the Illinois Administrative Code, explicitly apply only to attachments by cable television ("CATV") companies. Section 315.10 specifically states that "[t]he 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."[5] Indeed, nearly every other section of the ICC's pole attachment rules explicitly refers only to CATV companies:

[5] 83 Ill. Adm. Code 315.10 (emphasis added).

- 83 Ill. Adm. Code 315.20 ("Subject to the provisions of Section 315.30 below, an annual pole attachment rental rate included in a pole attachment agreement between a ***CATV*** company and a regulated entity. . . .") (emphasis added).
- 83 Ill. Adm. Code 315.40 ("After the 'post-construction' inspection, further inspection of ***CATV*** pole plant, at ***CATV's*** cost, is prohibited except when the regulated entity submits to the ***CATV*** operator a statistically reliable survey evidencing the fact that the ***CATV*** has failed to report more than 5% of his attachments or is in noncompliance on 5% or more of the poles to which it is attached.") (emphasis added).
- 83 Ill. Adm. Code 315.50 ("Detailed itemization for make-ready work shall be provided to each ***CATV*** operator with each billing for make-ready work.") (emphasis added).
- 83 Ill. Adm. Code 315.60 ("***CATV*** operators cannot be required in any pole attachment agreements to indemnify the electric utilities or telecommunications carriers from the negligence of electric utilities or telecommunications carriers.") (emphasis added).

None of the ICC's pole attachment rules reference attachments by *telecommunications companies* to poles owned by electric companies. Therefore, Sections 315.10 through 315.70 of Title 83 of the Illinois Administrative Code do not apply to attachments made by telecommunications companies. That is the ICC's view, as stated in its October 25 Notice.[6]

[6] *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-169, Complaint Exhibit B; *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-170, Complaint Attachment C.

ComEd asserts that Section 315.30 of the ICC's pole attachment rules provides a "mechanism" for bringing a pole attachment dispute before the ICC and is "broad enough to cover telecommunications companies" because the section generally references the term "pole attachments."[7] ComEd further contends that the federal definition of "pole attachment," which includes attachments made by cable operators and telecommunications companies,[8] should apply to Section 315.30.[9]

ComEd's argument regarding Section 315.30 is fundamentally flawed for four reasons. First, ComEd disregards the ICC's declaration that it "has not adopted any rules or regulations specifically governing rates, terms, and conditions for attachments by *telecommunications* companies to poles owned by electric utilities."[10] ComEd is fundamentally asking this Commission to reject the ICC's own conclusion that its rules do not cover telecommunications attachments.

Second, ComEd's argument ignores the fact that all of the other sections of the ICC's pole attachment rules narrowly apply only to CATV companies and CATV attachments. Third, contrary to ComEd's assertion, Section 315.30 of the ICC's Rules, at most, provides a "mechanism" for resolving disputes related to *CATV attachment rates* that were derived pursuant to Section 315.20 of the ICC's pole attachment rules. Specifically, Section 315.30 provides that in the event of a rate dispute, the petition for approval "shall be accompanied by an exhibit or exhibits showing that the rate proposed by the utility is equal to the rate resulting from the

[7] ComEd Motion to Dismiss p. 6.

[8] 47 U.S.C. 224(a)(4).

[9] ComEd Motion to Dismiss p. 6.

[10] *Crown Castle Fiber LLC v. ComEd,* Proceeding No. 19-169, Complaint Exhibit B; *Crown Castle Fiber LLC v. ComEd,* Proceeding No. 19-170, Complaint Attachment C.

formula set forth in Section 315.20 . . .” and “[a] rate equal to the rate resulting from the formula set forth in Section 315.20 shall be presumed just and reasonable.”[11] As noted above, Section 315.20 explicitly governs only rates for pole attachment agreements “between a CATV company and a regulated entity.”[12] Thus, Section 315.30 at most creates a mechanism for submission of rate disputes between cable operators and utilities. Yet, Section 315.30 *does not* provide a mechanism for resolving (a) access disputes or (b) rate disputes related to attachments made by telecommunications companies. Moreover, and ironically, while ComEd argues that 83 Ill. Admin. Code 315.30 refers “to *all* situations ‘[w]here consent and approval of the Commission to a pole attachment or conduit agreement is required by Section 7-102 of the Act,’” ComEd admits *in a footnote* that “***[d]ue to an exemption in the Illinois PUA, the utility is not required to affirmatively file the leases for approval***.”[13] Under 220 ILCS 5/7-102(E), consent and approval is only required for leases with annual compensation of over $5,000,000.[14] Thus, its entire argument is premised on a Section of the ICC’s Rules that ComEd admits does not even apply.

Finally, ComEd’s argument that the federal definition of “pole attachment” should be grafted into Section 315.30 is unpersuasive. The federal definition of “pole attachment” was amended by the 1996 Act to include attachments made by telecommunications companies.[15] The ICC pole attachment rules were adopted and subsequently amended *prior* to the enactment of the

[11] 83 Ill. Adm. Code 315.30(b). Notably, this provision also creates a mechanism for submission *by the utility*—not the attaching party. *Id.* (“***the regulated entity's petition*** for consent to and approval of the agreement shall be accompanied by. . . .” (emphasis added)).

[12] 83 Ill. Adm. Code 315.20.

[13] ComEd Motion to Dismiss p. 6 n.17 (citing 220 ILCS 5/7-102(E)) (emphasis added).

[14] 220 ILCS 5/7-102(E).

[15] *See e.g.*, S. CONF. REP. 104-230, 206.

1996 Act.[16] After the 1996 Act was implemented, the ICC's pole attachment rules were not extended to attachments made by telecommunications companies. Therefore, applying the post-1996 Act federal definition of "pole attachment" to Section 315.30 would improperly amend the Illinois Rules.

B. Certification To Regulate Pole Attachments By Itself Does Not Satisfy Section 224(c) of the Communications Act and Commission Rule 1.1405

ComEd primarily relies on an argument that says that Illinois certified once upon a time, and that is all it needs to do. But to exercise reverse preemption, a State must do more than simply certify that it regulates rates, terms, and conditions for pole attachments. Under Section 224(c)(1) of the Communications Act, the FCC does not have jurisdiction over rates, terms, and conditions of pole attachments only "where such matters ***are regulated*** by a State."[17] And the statute requires that the State actually adopt, issue, and make effective rules. Indeed, Section 224(c)(3) provides that "a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—(A) ***unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments***. . . ."[18] Implementing the plain language of the statute, Section 1.1405 of the Commission's Rules require a State to certify that "(1) It regulates rates, terms and conditions for pole attachments; . . . and (3) ***It has issued and made effective rules and regulations*** implementing the state's regulatory authority over pole attachments (***including a specific methodology for such regulation*** which has been made publicly available in the state). . . ."[19]

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[16] The ICC's pole attachment rules were adopted in 1985 and were amended in 1994. *See e.g.*, 83 Ill. Adm. Code 315.10.

[17] 47 U.S.C. § 224(c)(1) (emphasis added).

[18] 47 U.S.C. § 224(c)(3) (emphasis added).

[19] 47 C.F.R. § 1.1405(a)-(b) (emphasis added).

The current versions of Section 224 and Rule 1.1405 reflect Congressional recognition that mere "certification" by a State is inadequate. As originally enacted in 1978, Section 224(c) allowed for jurisdiction to revert to states based solely on "certification."[20] In 1984, Congress amended Section 224(c) to add, in pertinent part, that a state will not be considered to be regulating the rates, terms, and conditions for pole attachments for Section 224(c)(1) unless it has issued and made effective rules and regulations.[21] The Commission explained that Section 224(c) was amended

> by adding a new paragraph Section 224(c)(3). This addition provides that a state will not be considered to be regulating the rates, terms and conditions for pole attachments for Section 224(c)(1) purposes unless it has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments and takes final action on individual complaints within the time limits specified in [Section 224].[22]

After the 1996 Act extended Section 224 to govern attachments by telecommunications providers, the FCC repeatedly confirmed that "Section 224(c)(3) directs that jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments."[23]

Based on the plain language of Section 224 of the Act and Section 1.1405 of the Commission's Rules, the FCC lacks jurisdiction over Crown Castle's Pole Attachment Complaints against ComEd only if Illinois has issued and made effective rules and regulations

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[20] PL 95–234 (HR 7442), February 21, 1978, 92 Stat 33.

[21] *See In the Matter of Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, MM Docket No. 84-1296, 1985 FCC LEXIS 3475, ¶ 140 (Apr. 19, 1985).

[22] *Id.*

[23] *See, e.g., In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-151, 13 FCC Rcd 6777, 6781 ¶ 6 n.20 (Feb. 6, 1998); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CS Docket No. 97-151, 12 FCC Rcd 11725, 11727 ¶ 5 n.13 (Aug. 12, 1997).

governing access and the rates, terms, and conditions of attachment by telecommunications providers.[24] As the ICC has confirmed, it has not adopted rules to regulate attachments made by telecommunications providers to poles owned by electric utilities, and therefore, does not have jurisdiction over disputes regarding such attachments.[25] Because the ICC has not issued applicable regulations, jurisdiction over Crown Castle's Pole Attachment Complaints against ComEd reverts to the FCC.

ComEd assumes that the reverse preemption requirements set forth in Section 224(c)(3) and Rule 1.1405 are satisfied here because (1) the State of Illinois has merely certified that it regulates pole attachments and (2) Section 702 of the Illinois Public Utilities Act,[26] according to ComEd, gives "the ICC authority over all pole attachments."[27] However, merely filing a certificate, before the 1996 Act, or possessing authority, in general, broad enough to allow regulation of attachments to an electric utility company's poles is insufficient under the language of Section 224 and Rule 1.1405.

First, contrary to ComEd's assertion, the ICC's Notice does effectively limit the scope of Illinois' certification. It does not withdraw the certification completely, but it tells the FCC that the certification currently does not extend to telecommunications attachments to electric utility poles.

Second, merely possessing potential statutory authority over utility company leases of facilities does not equate to adopting rules that regulate the rates, terms, and conditions of pole

[24] 47 U.S.C. § 224(c)(3); 47 C.F.R. § 1.1405(a)-(b).

[25] *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-169, Complaint Exhibit B; *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-170, Complaint Attachment C.

[26] 220 ILCS 5/7-102.

[27] ComEd Motion to Dismiss p. 9.

attachments. It is extremely common for state regulatory agencies to have the same type of broad grant of authority over electric utility facilities to allow them to regulate those companies' poles, in theory. For example, Arizona, Tennessee, and Wisconsin have not certified that they regulate pole attachments.[28] Yet, each state has a statute nearly identical to Section 702(A) of the Illinois Public Utilities Act that requires the state's utility commission to approve a contract leasing part of a utility company's facilities.[29] Having potentially broad authority does not equate to actually regulating pole attachments. Moreover, as noted above, ComEd ultimately admits that Section 702(E) of the Illinois Public Utilities Act exempts ComEd from Section 702(A).[30]

Section 224(c) of the Act and Section 1.1405 of the Commission's Rules require more than mere potential authority or generic certification – they require the ICC to *issue regulations* governing pole attachments by telecommunications providers. Whether the ICC has sufficiently broad regulatory authority over ComEd to hypothetically regulate is not the issue, nor is the ICC's cable television-era certification.

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[28] *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA No. 10-893, 25 FCC Rcd. 5541 (2010).

[29] Ariz. Rev. Stat. Ann. § 40-285 ("A public service corporation shall not sell, ***lease***, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad, line, ***plant*** or system necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder . . . ***without first having secured from the commission an order authorizing it so to do***.")(emphasis added); Tenn. Code Ann. § 65-4-112 ("No ***lease*** of its ***property***, rights, or franchises, by any such public utility . . . ***shall be valid until approved by the commission***, even though power to take such action has been conferred on such public utility by the state or by any political subdivision of the state.") (emphasis added); Wisc. Stat. § 196.80 ("***With the consent and approval of the commission*** but not otherwise a public utility may: . . . Sell, acquire, ***lease or rent*** any public utility plant or property constituting an operating unit or system") (emphasis added).

[30] ComEd Motion to Dismiss p. 6 n.17 (citing 220 ILCS 5/7-102(E)).

C. ComEd Has Failed to Show That Illinois Regulates Pole Attachments By Telecommunications Providers

Indeed, ComEd's reliance on the second sentence in Section 1.1405(a) of the Commission's Rules ("Such certificate shall be conclusive proof of lack of jurisdiction of this Commission") ignores the very next sentence of the same Rule, which provides a mechanism for filing a complaint before this Commission when an otherwise "certified" state has failed to adopt new rules after the 1996 Act.[31]

After the 1996 Act expanded the scope of Section 224 to include mandatory access to poles and to govern attachments by telecommunications carriers, the FCC recognized that States that had previously certified regarding regulation of pole attachment rates, terms, and conditions by cable operators may not have adopted regulations governing access or telecommunications attachments. In addressing the mandatory access provisions added in 1996, the FCC stated that such States are not required to re-certify "in order to assert their jurisdiction over access."[32] But that does not mean that all states that had certified prior to the 1996 Act satisfied the Section 224 requirements to retain jurisdiction over telecommunications pole attachments. Rather, the FCC adopted a process that allowed an attaching party to file a complaint involving a certified State that has not adopted new regulations to govern the issues added by the 1996 Act:

> upon the filing of an access complaint with the Commission, the ***defending party or the state itself should come forward to apprise us whether the state is regulating such matters***. If so, we shall dismiss the complaint without prejudice to it being brought in the appropriate state forum***. A party seeking to show that a state regulates access issues should cite to state laws and regulations governing access and establishing a procedure for resolving***

[31] 47 C.F.R. § 1.1405(a).

[32] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection Between Local Exch. Carriers & Commercial Mobile Radio Serv. Providers*, Order on Reconsideration, CC Docket Nos. 96-98; 95-185, 14 FCC Rcd. 18049, ¶¶ 115-116 (Oct. 26, 1999).

> ***access complaints in a state forum***. Especially probative will be a requirement that the relevant state authority resolve an access complaint within a set period of time following the filing of the complaint.[33]

As a threshold matter that should resolve ComEd's Motion. The State has "come forward to apprise [the Commission] whether the state is regulating such matters," and the ICC said it is not regulating these matters. Thus, Illinois' 1985 certification is not "conclusive proof" that it regulates and has implemented rules regulating telecommunications attachments. Rather, the ICC 2018 Notice is conclusive proof that Illinois does not.

Even if that were not definitive, without question, ComEd has not met its burden to cite the Illinois regulations that regulate telecommunications attachments.[34] ComEd simply cites to Section 315.30 of the ICC's pole attachment rules, asserting that it applies to telecommunication companies because it generally refers to the term "pole attachments."[35] As discussed above, ComEd's argument is without merit. ComEd completely ignores (a) that all other sections of the ICC's pole attachment rules that expressly reference only CATV companies and, *most importantly*, and (b) the ICC's own statement to the Commission that Sections 315.10 through 315.70 apply to attachments

[33] *Implementation of Section 703(e) of the Telecommunications Act of 1996,* First Report and Order, CC Docket Nos. 96-98; 95-185, 11 FCC Rcd 15499, ¶ 1240 (Aug. 8, 1996) (emphasis added).

[34] *Id.*

[35] ComEd Motion to Dismiss pp. 6, 9.

by cable television companies and "***do not specifically govern telecommunications companies' attachments to poles owned by electric utilities***."[36]

Moreover, the FCC's precedent makes clear that the procedure is for Crown Castle to file with the FCC, not the ICC, as ComEd's Motion argues.[37] As addressed in Crown Castle's response to ComEd's Motion to Hold Proceedings In Abeyance, the Commission has for many years repeatedly recognized the importance of facilitating prompt deployment.[38] Forcing a party to file a complaint knowing that the ICC lacks jurisdiction would be a pointless waste of time.

Crown Castle also emphasizes that the ICC's failure to adopt regulations governing telecommunications attachments to electric utility poles does not deprive the ICC of jurisdiction over cable television attachments. It is possible for the ICC to have exercised its regulatory authority over one type of attachment but still have jurisdiction over other attachments that remain with the FCC.[39]

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[36] *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-169, Complaint Exhibit B; *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-170, Complaint Attachment C (emphasis added).

[37] ComEd Motion to Dismiss pp. 9-10.

[38] *See, e.g., Matter of 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 FCC Rcd. 5240, ¶¶ 3, 6 (2011); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; WT Docket No. 17-79, 33 FCC Rcd. 7705,¶ 1 (Aug 3. 2018).

[39] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-217, 15 FCC Rcd. 22983, n.239 (Oct. 25, 2000) ("We note that *if it is shown in a complaint proceeding* that a state does not regulate access to ducts or conduits within buildings, for example, that state's regulation of pole attachments on public rights-of-way, and its certification to such regulation, would not defeat the Commission's jurisdiction over access to ducts or conduits within buildings. In such a case, *we would decide the complaint regarding in-building*

D. Re-Certification Is Not A Relevant Factor In Determining Whether A State Has Met the Requirements Set Forth in Section 224(c).

ComEd's extensive arguments regarding "re-certification" are red herrings. According to ComEd, the lack of a federal mandate to re-certify after the 1996 Act and the fact that no other state re-certified after the enactment of the Act means that Illinois' original certification to the Commission "has the effect of occupying the entire field of pole attachment regulation."[40]

Re-certification is *irrelevant* in determining if a State has jurisdiction over attachments made by telecommunications companies. Crown Castle does not argue that the State of Illinois must re-certify to perfect its jurisdiction over pole attachments made by telecommunications companies. However, as the plain language of Section 224(c)(3)(A) and the Commission's Rules require, the ICC must adopt rules governing telecommunications attachments or extending its current pole attachment rules to attachments made by telecommunications companies.[41] The ICC has not done so.

Nonetheless, the fundamental flaw in ComEd's Motion is that it ignores the fact that the ICC did "re-certify" with its 2018 Notice. The ICC informed this Commission that the ICC "has not adopted any rules or regulations specifically governing rates, terms, and conditions for attachments by *telecommunications* companies to poles owned by electric utilities and ***therefore lacks regulatory authority over attachments by***

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attachments, while continuing to respect the state's authority over those pole attachments that it does regulate" (emphasis added)).

[40] ComEd Motion to Dismiss pp. 7-9.

[41] 47 U.S.C. § 224(c)(3); 47 C.F.R. § 1.1405(a)-(b).

telecommunications companies to poles owned by electric utilities."[42] If there is a certification that is conclusive, it is the ICC's 2018 Notice. Consequently, jurisdiction over attachments by telecommunications companies reverts to the FCC.

III. CONCLUSION

As the ICC has notified the Commission, because the ICC has not issued regulations that govern attachments by telecommunications companies, the FCC has jurisdiction over Crown Castle's Pole Attachments Complaints against ComEd. Accordingly, the FCC should promptly deny ComEd's Motion to Dismiss for Lack of Jurisdiction.

Respectfully submitted,

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Date submitted: July 8, 2019

[42] *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-169, Complaint Exhibit B; *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-170, Complaint Attachment C (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2019, I caused a copy of the foregoing Opposition to Respondent's Motion to Dismiss For Lack of Jurisdiction to be served on the following (service method indicated):

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OPPOSITION TO RESPONDENT'S MOTION TO HOLD PROCEEDINGS IN ABEYANCE

Crown Castle Fiber LLC ("Crown Castle"), by and through undersigned counsel, and pursuant to 47 C.F.R. § 1.729(e), opposes Respondent Commonwealth Edison Company's ("ComEd") Motion to Hold Proceedings in Abeyance.

I. COMED'S MERITLESS MOTION TO DISMISS IS NOT GROUNDS TO HOLD THESE CASES IN ABEYANCE

Fundamentally, the sole basis for ComEd's Motion is its assertion that the Commission lacks jurisdiction, and as a result, that ComEd will succeed on its parallel Motion To Dismiss. Even ComEd's sole "public interest" argument in support of its Motion is a single, conclusory sentence that holding the matters in abeyance would be in the public interest because the parties and the Commission will not have to expend resources in a proceeding that ComEd incorrectly believes will be dismissed.[1] To the contrary, the Commission has jurisdiction over these cases,

[1] ComEd Motion to Hold Proceedings in Abeyance p. 2.

and a delay in the above-referenced proceeding would *harm* the public interest and irreparably harm Crown Castle.

First, ComEd's essentially sole reliance on the fact that it has filed a Motion to Dismiss as support for its Motion to Hold Proceedings in Abeyance is misplaced. The Commission has explicitly rejected the proposition that filing a motion to dismiss, by itself, is grounds to suspend the case. In the Rules Consolidation Order, although the Commission ultimately allowed for motions to dismiss, it stated, "[w]e *emphasize*, however, that *the mere filing of a motion to dismiss all or part of a complaint does not serve to suspend the pleading requirements under the rules*."[2] As a result, ComEd cannot simply point to its Motion to Dismiss as grounds for abeyance.

In this case, that point is particularly critical because ComEd's Motion to Dismiss is meritless. Crown Castle will not repeat all of the points in its simultaneously-filed Opposition to ComEd's Motion to Dismiss, but incorporates them by reference. In summary, the Illinois Commerce Commission ("ICC") has *not* "issued and made effective rules" governing attachments by telecommunications providers to electric company poles, as required by 47 U.S.C. § 224(c)(3). Recognizing that, the ICC has effectively amended its certification by informing the Commission in writing that the ICC has not adopted such rules, and "therefore lacks regulatory authority over attachments by telecommunications companies to poles owned by electric utilities."[3] Accordingly, under Section 224(c)(3) and as repeatedly recognized by the

[2] *In re Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, EB Docket No. 17-245, 33 FCC Rcd. 7178, ¶ 14 (July 18, 2018) (emphasis added).

[3] A copy of the ICC 2018 Notice was attached to *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-169, Complaint Exhibit B; *Crown Castle Fiber LLC v. ComEd*, Proceeding No. 19-170, Complaint Attachment C.

Commission, jurisdiction over this dispute reverts to this Commission.[4]

II. HOLDING THE CASES IN ABEYANCE WILL HARM THE PUBLIC INTEREST

ComEd's "public interest" grounds for holding these cases in abeyance is particularly erroneous. Further delay of Crown Castle's ability to deploy its facilities will significantly and irreparably harm the public. The Commission has recognized that "[o]btaining access to poles and other infrastructure is critical to deployment of telecommunications and broadband services. Therefore, to the extent that access to poles is more burdensome or expensive than necessary, ***it creates a significant obstacle to making service available and affordable.***"[5] In 2011, the Commission adopted the timeline rules that are the basis of one of Crown Castle's claims precisely because "lack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying wireline and wireless services."[6]

As recently as its August 2018 One Touch Make Ready Order, the Commission also recognized that "[p]ole access . . . is essential to the race for 5G because mobile and fixed wireless providers are increasingly deploying innovative small cells on poles and because these

[4] *See, e.g.,, Implementation of Section 703(e) of the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499, ¶ 1240 (Aug. 8, 1996); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996,* Report and Order, CS Docket No. 97-151, 13 FCC Rcd 6777, 6781 ¶ 6 n.20 (Feb. 6, 1998); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CS Docket No. 97-151, 12 FCC Rcd 11725, 11727 ¶ 5 n.13 (Aug. 12, 1997)

[5] *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, ¶ 6 (Apr. 7, 2011) (emphasis added).

[6] *Id.* ¶ 3.

wireless services depend on wireline backhaul."[7] It is clear that 5G infrastructure deployment will undoubtedly benefit the public:

> Supporting the deployment of 5G and other next-generation wireless services through smart infrastructure policy is critical. Indeed, upgrading to these new services will, in many ways, represent a more fundamental change than the transition to prior generations of wireless service. 5G can enable increased competition for a range of services--including broadband--support new healthcare and Internet of Things applications, speed the transition to life-saving connected car technologies, and create jobs. It is estimated that wireless providers will invest $ 275 billion over the next decade in next-generation wireless infrastructure deployments, which should generate an expected three million new jobs and boost our nation's GDP by half a trillion dollars. ***Moving quickly to enable this transition is important***, as a new report forecasts that speeding 5G infrastructure deployment by even one year would unleash an additional $ 100 billion to the U.S. economy. Removing barriers can also ensure that every community gets a fair shot at these deployments and the opportunities they enable. [8]

In the One Touch Make Ready Order, the Commission recognized that "[n]ow, more than ever, access to this vital infrastructure ***must be swift***, predictable, safe, and affordable. . . ."[9]

Unimpeded pole access is critical for Crown Castle (a) to make telecommunications services affordable and (b) to support competitive, next-generation deployment. ComEd's "red tag" practice, its inability to process pole attachment applications within the Commission's timeframes, and its excessive pole attachments rates have all made pole access "more

[7] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; WT Docket No. 17-79, 33 FCC Rcd. 7705, ¶ 1 (Aug 3. 2018) ("*One Touch Make Ready Order*").

[8] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, Declaratory Ruling and Third Report and Order, WT Docket Nos. 17-79; 17-84, 33 FCC Rcd. 9088, ¶ 2 (Sep. 27, 2018) (emphasis added).

[9] *One Touch Make Ready Order* ¶ 1 (emphasis added).

burdensome or expensive than necessary" and have been a "significant obstacle to making service available and affordable." ComEd's unlawful behavior has, without question, hindered Crown Castle's pole access, and, therefore, thwarted its ability to provide services that benefit the public. ComEd's practices must end as soon as possible.

Not only have ComEd's practices harmed the public interest, but they have irreparably harmed Crown Castle. These practices have not only imposed a significant financial burden Crown Castle, they have jeopardized and irreparably harmed Crown Castle's goodwill and relationships with its customers.[10] Until Crown Castle's claims are resolved, the delays and unjust and unlawful costs will continue to thwart Crown Castle's timely deployment of its network in the Chicago area.

III. CONCLUSION

Accordingly, the Commission should deny ComEd's Motion to Hold Proceedings in Abeyance and should not alter the existing schedule for Proceedings 19-169 and 19-170. Indeed, Crown Castle supports prompt resolution of ComEd's Motion to Dismiss.

[10] It is well recognized that injuries to a company's competitive position and customer goodwill are intangible and irreparable by monetary damages. *See, e.g., General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 625 (8th Cir. 1987); *Brennan Petroleum Prods. Co. v. Pasco Petroleum Co.*, 373 F. Supp. 1312, 1316 (D. Ariz. 1974); *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621 (2d Cir. 1969); *Continental Cablevision of Cook County, Inc. v. Miller*, 606 N.E.2d 587, 596 (Ill. App. Ct. 1992), *appeal denied*, 612 N.E.2d 512 (Ill. 1993); *American Tel. and Tel. Co. v. Village of Arlington Heights*, 528 N.E.2d 1000, 1004 (Ill. App. Ct. 1988), *appeal denied*, 535 N.E.2d 398 (Ill. 1988); *Allied Mktg. Group, Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 810 (5th Cir. 1989); *Body Support Sys., Inc. v. Blue Ridge Tables, Inc*, 934 F. Supp. 749, 757-58 (N.D. Miss. 1996) (citing *Allied Marketing*); *Air Transp. Int'l LLC v. Aerolease Fin. Group, Inc.*, 993 F. Supp. 118, 123 (D. Conn. 1998); *Dunkin' Donuts, Inc. v. Dowco, Inc.*, 1998 U.S. Dist. Lexis 4526, *6-7 (N.D.N.Y. Mar. 31, 1998); *Ahava (USA), Inc. v. J.W.G., Ltd.*, 250 F. Supp.2d 366, 371 (S.D.N.Y. 2003).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2019, I caused a copy of the foregoing Opposition to Respondent's Motion to Hold Proceedings In Abeyance to be served on the following (service method indicated):

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