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<b>Crown Castle Fiber LLC,</b>	)	
<i>Complainant,</i>	)	
	)	<b>Proceeding Number 19-169</b>
<b>v.</b>	)	<b>Bureau ID Number EB-19-MD-004</b>
	)	
<b>Commonwealth Edison Company,</b>	)	
<i>Defendant</i>	)	
	)	
	)	

Pursuant to Section 1.729 of the Commission’s rules,<sup>1</sup> Commonwealth Edison Company (“ComEd”) respectfully requests leave to respond to new allegations made in the August 5, 2019 “Reply to Respondent’s Answer to Complainant’s Pole Attachment Complaint for Denial of Access” (“Reply”) filed by Crown Castle Fiber LLC (“Crown Castle”) in the above-captioned proceeding. In support of the foregoing, ComEd states as follows:

<sup>1</sup> 47 C.F.R. §1.729.

<sup>2</sup> Reply at 44-45.

(2002),<sup>3</sup> and raises the additional question whether an attachment to be operated by another entity requires that other entity to file an attachment application. It is thus a critical issue of first impression for the Commission that requires full analysis.

Second, in response to issues raised by ComEd's Answer, the Reply for the first time fully explained Crown Castle's "RF transport service," and that explanation raises additional important issues to which ComEd has had no chance to respond. For example, although Crown Castle's Complaint suggested that Crown Castle was already using its wireless attachments to provide this RF transport service,<sup>4</sup> the Reply states that Crown Castle only "plans to provide" RF transport service.<sup>5</sup> Thus, all of the numerous antennas and other wireless attachments that are the subject to this Complaint proceeding apparently are not being used at this time to provide RF transport service or any service at all. Furthermore, while Crown Castle cites caselaw that it can provide service on a wholesale basis and still potentially qualify as a common carrier with attachment rights, Crown Castle fails to establish that it "holds [itself] out to service indifferently all potential users," which is the other common carriage prerequisite specified in this ruling.<sup>6</sup> It

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<sup>3</sup> At page 342, the Court states:

Respondents insist that "any attachment" cannot mean "any attachment." Surely, they say, the Act cannot cover billboards, or clotheslines, or anything else that a cable television system or provider of telecommunications service should fancy attaching to a pole. Since the literal reading is absurd, they contend, there must be a limiting principle.

The FCC did not purport either to enunciate or to dis-claim a specific limiting principle, presumably because, in its view, the attachments at issue here did not test the margins of the Act. The term "any attachment by a cable television system" covers at least those attachments which do in fact provide cable television service, and "any attachment by a . . . provider of telecommunications service" covers at least those which in fact provide telecommunications. Attachments of other sorts may be examined by the agency in the first instance.

*Gulf Power Co.*, 534 U.S. at 342.

<sup>4</sup> June 19, 2019 Complaint at ¶7.

<sup>5</sup> Reply at 42.

<sup>6</sup> Reply at 41-42, quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976).

is impossible to determine whether a service that is provided to a limited class of customers is a telecommunications service or a private carrier service offering without examining the contracts underlying Crown Castle's offering of this service. Crown Castle's RF transport service agreements with wireless carriers for dedicated connectivity between cell sites and switching centers appear to be private carrier arrangements, as Crown Castle has not posted its standard terms and conditions on a readily accessible public web site.<sup>7</sup> ComEd intends to request further discovery to review Crown Castle's agreements with the wireless carriers for these services and to review Crown Castle's FCC Forms 499A filed with the Universal Service Administrative Company (USAC). In any event, ComEd has not had a chance to respond to the very important threshold issues raised by these new allegations.

Third, Crown Castle's Reply claims for the first time that the term "insufficient capacity," which is one of the four reasons ComEd may use to deny access to ComEd's poles, refers only to a lack of physical space on the pole.<sup>8</sup> This novel and dangerous interpretation is subject to numerous rebuttals, including that it would entitle attachers to add load to already overloaded poles and create safety violations, that it is inconstant with Commission precedent, and that it is inconsistent with the revised opinion of Crown Castle's expert witness Nelson Bingel that pole loading analyses after all should not be performed to determine whether new attachments should be added to Non-Priority Red Tagged poles.<sup>9</sup>

Fourth, ComEd has had no opportunity to respond to new statements made in Mr. Bingel's Reply Declaration, which was substantially revised after ComEd's Answer pointed out that it was based on the wrong version of the NESC and on the mistaken assumptions that

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<sup>7</sup> See 47 CFR § 42.10 (interexchange, interstate carriers must post their rates, terms and conditions on a readily accessible web site).

<sup>8</sup> Reply at 13-15.

<sup>9</sup> Reply Declaration of Nelson Bingel at ¶45.

ComEd does not replace poles right away that endanger life or property and that the poles ComEd designates as “Priority” poles actually include poles that endanger life or property.<sup>10</sup> New, objectionable Crown Castle allegations stem from the correction of these mistakes, including the contention that the 2002 and 2017 versions of the Code are not substantially different.<sup>11</sup> Mr. Bingel adds new allegations about poles that have lost 80% or more of their original strength and about the “intent” of the NESC, and Mr. Bingel and Crown Castle misstate significant parts of ComEd’s Answer regarding pole treatments.<sup>12</sup> Mr. Bingel also reverses himself in a way that contradicts his earlier statements and handicaps Crown Castle’s requested relief “to temporarily attach to red tagged poles.”<sup>13</sup> Explaining he was “unclear” about the question when he wrote his initial Declaration, Mr. Bingel states: “I did not intend to encourage ComEd to use the load estimate to determine whether a Non-Priority Red Tag pole could still accommodate an additional attachment and indicated that by stating that the process ‘is not widely used in the industry.’”<sup>14</sup>

Fifth, the Reply requests self-help remedies that inappropriately appear to include pole replacements, thus asking the Enforcement Bureau on delegated authority to grant relief that the full Commission refused to grant in the OTMR Order.<sup>15</sup>

Sixth, Crown Castle’s Reply for the first time fully explains the connections between the entities that signed the three agreements at issue and complainant Crown Castle, and explains for

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<sup>10</sup> See, e.g., ComEd Answer at 103-104, responding to Complaint ¶116.

<sup>11</sup> Reply at 9-12.

<sup>12</sup> Reply Declaration of Nelson Bingel at ¶¶8, 9, 13, 14, 18, 29, and 39-43 attached to Reply at Attachment B, CCF 397-410; Reply at 22.

<sup>13</sup> Crown Castle requested relief at Complaint, ¶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)”).

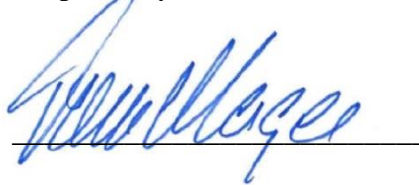
<sup>14</sup> Bingel Reply Declaration at ¶45, CCF 410.

<sup>15</sup> See OTMR Order at ¶101 (“We agree with parties that argue that the self-help remedy should not be available when pole replacements are required as part of make-ready. The record shows that pole replacements can be complicated to execute and are more likely to cause service outages or facilities damage. Given the particularly disruptive nature of this type of work, we make clear that pole replacements are not eligible for self-help.”)

the first time the authority these intermediate entities had through the years to provide services in Illinois.<sup>16</sup> The Reply explained these connections only because ComEd's Answer noted the numerous deficiencies in Crown Castle's Complaint.<sup>17</sup> ComEd should be entitled to respond to these new allegations, which should have been included in Crown Castle's Complaint in the first place.

It would be unfair and prejudicial not to provide ComEd an opportunity to respond to these new allegations. Permitting ComEd to respond would also supplement the record and legal analysis of these important issues. ComEd therefore respectfully requests leave to file a response to these new allegations in Crown Castle's Reply.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "T. Magee", is written over a horizontal line.

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<sup>16</sup> Reply at 47-57.

<sup>17</sup> See July 22, 2019 ComEd Answer at 6-14, Affirmative Defenses ¶¶15-33.