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August 20, 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 the Commission's August 14, 2019 Letter Order and 47 C.F.R. 1.733(b), Crown Castle Fiber LLC and Commonwealth Edison Company submit the attached Supplemental Joint Statement filed in the above-referenced proceeding.

Sincerely,

Davis Wright Tremaine LLP

A handwritten signature in blue ink, reading "Ryan Appel", written over a horizontal line.

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

**SUPPLEMENTAL JOINT STATEMENT OF STIPULATED FACTS, DISPUTED  
FACTS, AND KEY LEGAL ISSUES**

Pursuant to the Commission’s June 25, 2019 Notice of Formal Complaint, 47 C.F.R. 1.733(b), and August 14, 2019 letter Order, Crown Castle Fiber LLC (“Crown Castle”) and Commonwealth Edison Company (“ComEd”), through undersigned counsel, submit the following Supplemental Joint Statement Of Stipulated Facts, Disputed Facts, and Key Legal Issues.

The parties incorporate herein by reference the Joint Statement submitted on August 12, 2019, and set forth below only the supplemental materials identified by the Commission in its August 14, 2019 letter.

**JOINT STATEMENT OF ALL PROPOSALS AGREED TO AND REMAINING  
DISPUTES**

Pursuant to the Commission’s June 25, 2019 Notice of Formal Complaint and 47 C.F.R. 1.733(b), Crown Castle Fiber LLC (“Crown Castle”) and Commonwealth Edison Company

(“ComEd”), through undersigned counsel, submit the following Joint Statement Of All Proposals Agreed To And Remaining Disputes.

## **I. PROPOSALS AGREED TO**

Crown Castle and ComEd have not agreed to any proposals.

## **II. REMAINING DISPUTES**

The Parties have resolved none of their disputes, and other than the agreed to facts identified above, represent that all factual and legal issues set forth in their pleadings remain in dispute.

Although the Parties have discussed settlement in the past, they have not been able to reach a mutually satisfactory resolution of the dispute. The Parties are both amenable to mediation led by Commission Staff.

## **III. DISCOVERY MATTERS**

### **A. ComEd Response To Crown Castle Discovery**

#### **i. Crown Castle’s Assertions**

As explained below, Crown Castle has identified what it contends are certain deficiencies in ComEd’s responses to Crown Castle First Set of Interrogatories in Docket 19-170, and anticipates filing a motion to compel. The following is Crown Castle’s summary of the dispute:

Specifically, Crown Castle counsel sent a letter to ComEd counsel on July 26, 2019 concerning ComEd’s deficient responses to Crown Castle’s First Set of Interrogatories 1-3, which pertain to ComEd’s treatment of excess ADIT.<sup>1</sup> ComEd has refused to answer

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<sup>1</sup> Letter from T. Scott Thompson to Thomas B. Magee, July 26, 2019. A copy of the letter is attached hereto as Exhibit A.

Interrogatories 1-3 based on objections stated in its June 26, 2019 objections; namely, that the requested information is “irrelevant to the FCC’s pole attachment calculations.”<sup>2</sup> In the July 26 letter, Crown Castle requested to discuss the matter at the parties’ July 30 meet and confer regarding this Joint Statement;<sup>3</sup> at the July 30 meeting, however, ComEd continued to refuse to provide responses to Interrogatories 1-3. For the reasons stated below, ComEd should be ordered to respond to Crown Castle’s Interrogatories 1-3.

*Interrogatory 1.* The information sought in Crown Castle’s Interrogatory 1 is relevant to the FCC’s pole attachment rate calculation for the reasons set forth in the Complaint at paragraphs 38 to 42. In summary, ComEd appears to have made certain accounting adjustments to reflect its over-collection of accumulated deferred income taxes resulting from the significant reductions in corporate taxes occasioned by the Tax Cuts and Jobs Act of 2017 (TCJA). Based on information made available in other regulatory proceedings, Crown Castle believes that ComEd transferred certain accumulated deferred taxes ordinarily captured in FERC accounts used to calculate the pole attachment rental rate (typically, FERC Accounts 282, 283, 190 and 411) to one or more other FERC accounts not captured in the FCC formula (typically Account 254). As recognized by two public utility commissions applying the FCC cable formula, until such revenues are actually returned to rate payers, it would be inappropriate to remove the excess ADIT for purposes of the pole attachment rate calculation. This information is necessary so that the costs can be added back into the pool of costs captured by the FCC cable formula.

*Interrogatory 2.* The information sought in Crown Castle’s Interrogatory 2 is relevant to the FCC’s pole attachment rate calculation for the reasons set forth in the Complaint at

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<sup>2</sup> See Exhibit A at 1.

<sup>3</sup> See Exhibit A at 1.

paragraphs 39, 41, 79 and 80, and in Crown Castle's response to ComEd's objection to Interrogatory No. 1. Pursuant to the TCJA, most of the excess revenue relating to so-called normalized ADIT is to be returned over a very extended amortization schedule. Until such revenues are returned, they should be included in the revenues used to calculate the FCC pole attachment rates.

*Interrogatory 3.* The information sought in Crown Castle's Interrogatory 3 is relevant to the FCC's pole attachment rate calculation for the reasons set forth in the Complaint at paragraphs 38 to 42. To the extent that ComEd has projected a cost impact of the TCJA on future pole attachment rates that is relevant to the maximum permitted rates allowed by the FCC.

*Interrogatories 7 and 8*

In addition, Crown Castle contends that ComEd has failed to fully respond to Interrogatories 7 and 8 of Crown Castle's First Set of Interrogatories in Docket 19-170.

Interrogatory 7 seeks the number of poles included by ComEd in FERC Account 364 broken down by pole height for the years 2012 to 2018. Interrogatory 8 seeks the aggregated total of ComEd's capital costs and associated depreciation reserve for appurtenances included in FERC Account 364 for the years 2012 to 2018. While ComEd has provided responses to Interrogatories 7 and 8 for the years 2017 and 2018, it has not provided responses to these Interrogatories for the years 2012 to 2016. Crown Castle raised this issue with counsel for ComEd during their July 30, 2019 meet and confer, and ComEd maintains its objection to providing the requested information for years prior to 2017.

Crown Castle contends that pursuant to 47 C.F.R. § 1.1407(a)(3), the Commission may order a refund "consistent with the applicable statute of limitations." The information sought in Interrogatories 7 and 8 concerns periods of time that are subject to FCC refunds. As addressed in

Crown Castle's Complaint and Reply in docket 19-170, the Illinois statute of limitations for actions on written contract is 10 years. *See* 735 ILCS 5/13-206. The statute of limitations for actions on written contracts is the relevant and applicable statute of limitations in this case. The information sought in Interrogatories 7 and 8 (billing periods since 2013) falls well within the Illinois statute of limitations for actions on written contract, which is the "applicable statute of limitations" in this proceeding.

ComEd contends that the information sought in Interrogatories 7 and 8 for years prior to 2017 is irrelevant. ComEd contends that the applicable statute of limitations is 2 years, citing to 47 USC § 415(b) and 220 ILCS 5/9-252.

Crown Castle anticipates filing a motion to compel no later than five days after ComEd responds to Crown Castle's Second Set of Interrogatories, or August 30, 2019.

## **ii. ComEd's Response**

### *Interrogatories 1, 2 and 3*

The information sought in these interrogatories is irrelevant to the FCC's pole attachment rate calculation for the reasons set forth in the Answer to Crown Castle paragraphs 28, 38, 42, 43, 47, 51, 56, 72, 78, and 80.

The FCC pole attachment rental rate formula rate should not be reduced due to the "EDIT issue." The use of dollar amounts from FERC accounts other than those specified by the Commission are disfavored. While there might or might not be limited exceptions, the change Crown Castle proposes is not a simple request to change one electric utility's accounts. This is a request to change the intent of the Tax Cuts and Jobs Act to favor Crown Castle, which would have an effect on every electric utility and ILEC pole owner in the country that is subject to FCC regulations. FCC rules currently require utilities to calculate ADIT using Accounts 190, 281,

282 and 283, and ComEd properly applied income tax accounting guidelines regarding the treatment of the Tax Cuts and Jobs Act. If Crown Castle wants to change those rules nationwide to revise the calculation, it can request that the Commission open up a rulemaking proceeding so that the entire public can weigh in on why this Crown Castle proposal should not be adopted. In any event, ComEd properly applied income tax accounting guidelines regarding the treatment of the Tax Cuts and Jobs Act.*Interrogatories 7 and 8*

The 2012-2016 information sought in these interrogatories is overbroad, as it goes beyond the applicable statute of limitations in Illinois, for the reasons set forth in the Answer's Affirmative Defenses at paragraphs 50-51.

Section 224 itself does not require the FCC to award any damages; the statute mentions as its only example of a remedy a "cease and desist order." The regulations similarly do not require refunds, saying that they will be awarded "if appropriate." And although Crown Castle has recently raised issues with ComEd, Crown Castle's seeking more than five years' worth of refunds demonstrates unreasonable delay in bringing this complaint. In adopting the current form of 47 CFR § 1.1410, the FCC noted concerns that a rule permitting refunds from periods prior to the date of the complaint "creates an incentive for attaching entities to attempt to maximize their monetary recovery by waiting until shortly before the statute of limitations has expired to bring a dispute over rates to the Commission." The Commission thought such delays would be unlikely, but this appears to be such a case. The delay certainly is contrary to the Commission's "encourage[ment]" to "attachers to provide early notice to utilities of any alleged overcharges."

If the Commission were inclined to award a refund or payment, Crown Castle's request for five years is both unexplained and incorrect. The regulation allows an award "consistent with

the applicable statute of limitations.” But, as the D.C. Circuit noted, the regulation “does not appear to specify what makes a limitations period applicable.” The federal Communications Act itself provides no applicable limitations period, as its provisions cover complaints against carriers, or Commission forfeiture actions, e.g., 47 U.S.C. § 503(b) – although it is worth noting that § 415(b), the most analogous provision because it governs private complaints against carriers, sets a two-year limitations period. Similarly, the most analogous provision of Illinois state law provides a two-year limitations period. In *Verizon Virginia v. Virginia Elec. Power Co.* the complaining party suggested a state contract-action statute of limitations and the defendant did “not dispute” that statute. But this is not an action for breach of contract; it is an action contending that the rate is excessive or unjust and unreasonable. The FCC regulation uses that exact language in the remedies regulation: “The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations.” The most analogous provision of state law is a provision of the Illinois Public Utilities Act, which provides for a two-year limitations period for cases in which a consumer alleges that any “public utility” has made an “excessive charge.” Thus, even if Crown Castle were entitled to any refunds at all, Crown Castle, at most, might recover two years’ worth of refunds.

**B. Crown Castle’s Response to ComEd’s Discovery**

**i. ComEd’s Assertions**

In its first set of interrogatories in both proceedings, ComEd asked Crown Castle to “Identify every correspondence Crown Castle has had with the Illinois Commerce Commission regarding the issues raised in the Complaint.” Crown Castle objected to these



interrogatories. The parties met and conferred to discuss this issue on August 19, 2019. ComEd believes these interrogatories are relevant to determine the extent to which Crown Castle, like ComEd, believed the ICC had jurisdiction to resolve this matter, which in turn is relevant to determine the extent of any refunds, if any, might be appropriate for ComEd to pay based on FCC regulation.

**ii. Crown Castle's Response**

Crown Castle objects to the interrogatories on the grounds that Crown Castle's communications with the ICC are not relevant to the ICC's jurisdiction or the extent of any refunds due to Crown Castle. Crown Castle's potential subjective belief regarding the ICC's jurisdiction at any given time does not define the ICC's jurisdiction nor, critically, the obligations of ComEd under the law. ComEd's argument assumes that if Crown Castle at some point in time may have suggested that the ICC had jurisdiction, that ComEd would not be subject to the same liability. But that fundamental premise—that ComEd's liability would not exist if the ICC had jurisdiction—is a legal argument that is both incorrect and irrelevant given that the ICC does not have jurisdiction. Indeed, Crown Castle's pole attachment agreement with ComEd that was initially in the name of NextG Networks of Illinois explicitly provided that pole attachment rates be calculated based on the FCC's formula.

**C. ComEd Motion To Allow Additional Discovery**

**i. ComEd Motion**

ComEd filed a Motion to Allow Additional Discovery on August 16, 2019. ComEd set forth its grounds for its Motion in the Motion.

**ii. Crown Castle Response**

Crown Castle opposes any such additional discovery and will respond to ComEd's Motion on August 23, 2019, pursuant to the Commission's rules. Without waiving its right to

file a full opposition to ComEd's Discovery Motion, Crown Castle briefly summarizes its grounds for why ComEd's Motion for additional discovery should be denied.

Like ComEd's motion to file a surreply, addressed below, ComEd's Discovery Motion should be denied because it exceeds the scope of the Commission's rules and seeks information that is both irrelevant and, even if it were relevant, should have been raised by ComEd with its Answer, if at all.

ComEd now seeks document discovery that apparently seeks to litigate Crown Castle's regulatory status. Despite the clear CPCN granted by the ICC establishing that Crown Castle is a provider of telecommunications services, ComEd seeks discovery of Crown Castle's customer agreements. Indeed, it seeks all of Crown Castle's customer agreements beyond Illinois. ComEd's arguments reflect a fundamental misunderstanding of telecommunications regulation, for example, complaining that Crown Castle has not filed its standard terms and conditions on a readily accessible website, but citing as the source for that requirement 47 C.F.R. § 42.10, which applies to *interstate*, interexchange carriers. As its CPCN demonstrates, Crown Castle's RF transport and other telecommunications services are *intrastate* and not subject to 47 C.F.R. § 42.10. This same strategy of attempting to litigate a pole complainant's service offerings has been rejected by the Commission repeatedly and should be rejected again here.

#### **IV. SCHEDULES FOR PLEADINGS**

##### **A. ComEd Motion For Leave To Respond To Reply**

On August 16, 2019, ComEd filed a "Motion For Leave To Respond To Reply" ("Surreply Motion"). ComEd set forth the grounds for the relief sought in the Surreply Motion.

##### **B. Crown Castle's Response**

Crown Castle will file its opposition to ComEd's Surreply Motion on August 23, 2019, pursuant to the Commission's Rules. Without waiving its right to file a complete opposition to

ComEd's Surreply Motion, Crown Castle briefly sets forth its anticipated grounds for opposition to the Surreply Motion.

First, the Commission's Rules do not contemplate a sur-reply by the defendant. The Rules allow for a complaint, an answer by the defendant, and a reply by the complainant. And the Rules specifically contemplate that the reply will contain assertions of fact and law "that respond to the factual allegations and legal arguments made by the defendant."<sup>4</sup> The defendant does not get another "bite at the apple" to bolster arguments raised in its answer. Crown Castle's reply specifically responded to arguments and facts raised by ComEd's answer and was, therefore, proper, and ComEd is not entitled to additional pleadings.

Second, as to ComEd's particular allegations, it is clear that ComEd seeks to distract the Commission with collateral issues that will delay the case and detour the analysis into irrelevant topics. The fact that Crown Castle responded to the new arguments raised by ComEd in its Answer, does not mean that Crown Castle's Reply introduced new material to justify a sur-reply by ComEd.

Crown Castle's Reply did not raise questions that amount to a "billboard" issue. ComEd argued in the Answer that Crown Castle's antenna attachments are not protected under Section 224 and the Commission's Rules because Crown Castle does not, itself, provide wireless services. Crown Castle's argument noted that the definition of a pole attachment included "any" attachment by a provider of telecommunications service. Crown Castle's Reply does not raise issues of attaching wholly unrelated equipment, nor does it raise any other issues that ComEd now tries to generate. Likewise, there is no legitimate issue regarding Crown Castle's telecommunications services that justify a sur-reply. Crown Castle responded to ComEd's

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<sup>4</sup> 47 C.F.R. § 1.728(a).

arguments and allegations, which are without any factual support and entirely based on changing theories and speculations. Doing so did not raise “new allegations.” Crown Castle’s discussion in its Reply regarding the fact that the Commission has defined “insufficient capacity” to mean lack of physical space on the pole, was submitted in direct response to ComEd’s assertion in its Answer that it could deny access and demand payment because repairing its deteriorated poles was “expanding capacity.” ComEd could have addressed these legal issues when it raised them in its Answer. Mr. Bingel’s reply declaration, likewise, responds directly to assertions made against him by ComEd. It did not substantially revise his original declaration. Rather, it responded to arguments by ComEd, as well as responding to new information about ComEd’s red tagging program that had not been made available to Crown Castle prior to the Answer. Finally, Crown Castle’s discussion of the corporate transactions that show how Crown Castle is the proper party to these Complaints and the pole attachment agreements was also directly responsive to allegations raised by ComEd in its Answer. Indeed, the fundamentals were submitted with the Complaint.

In addition, in ComEd’s motion for surreply, it argues that Crown Castle’s appurtenance and pole height calculations require further scrutiny, stating by way of example that Crown used the wrong pole universe in calculating the pole height. While Crown Castle disagrees with ComEd’s argument, as an attempt to compromise, on August 18, 2019, counsel for Crown Castle asked counsel for ComEd if ComEd was interested in sharing its basis for its position because if so, the parties may be able to stipulate to pole height and appurtenance figures, thus eliminating the need for dispute and discovery. ComEd counsel responded “Let’s just follow the usual filing process,” and indicated that “ComEd might be willing to discuss stipulations following the usual filing process.”

Finally, even if the Commission were to grant ComEd's request, the Commission should clearly define the precise issue(s) that it believes warrants a response and ComEd should be instructed to limit its response to such issue(s). And, Crown Castle should be given an opportunity to then respond to whatever sur-reply ComEd files. The Commission's Rules clearly contemplate that the complainant is entitled to the final reply addressing whatever answering material the defendant submits.

Respectfully submitted,

**Crown Castle Fiber LLC**

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August 20, 2019

**RULE 1.721(m) CERTIFICATIONS**

I, T. Scott Thompson, Complainant Crown Castle Fiber LLC verify that I have read this Supplemental Joint Statement and to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law; and it is not interposed for any improper purpose.

/s/ T. Scott Thompson

Further, I, Thomas B. Magee, counsel for Respondent Commonwealth Edison Company verify that I have read this Supplemental Joint Statement and to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law; and it is not interposed for any improper purpose.

/s/ Thomas Magee

## **CERTIFICATE OF SERVICE**

I hereby certify that on August 20, 2019, I caused a copy of the foregoing Supplemental Joint Statement to be served on the following (service method indicated):

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