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August 23, 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 Numbers 19-169 and 19-170
Bureau ID Numbers EB-19-MD-004 and EB-19-MD-005**

Ms. Dortch:

Pursuant to the Commission Notices of Formal Complaint and 47 C.F.R. 1.729(e), Crown Castle Fiber LLC submits the attached Opposition To Respondent's Motion To Allow Additional Discovery filed in the above-referenced proceeding.

Sincerely,

Davis Wright Tremaine LLP

A handwritten signature in blue ink, appearing to read 'Ryan Appel'.

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 Numbers 19-169; 19-170

Bureau ID Number EB-19-MD-004; EB-
19-MD-005

**OPPOSITION TO RESPONDENT'S
MOTION TO ALLOW ADDITIONAL DISCOVERY**

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 Allow Additional Discovery.

I. INTRODUCTION

ComEd’s Motion is seeking discovery to undertake a fishing expedition intended to derail this proceeding by attempting to raise irrelevant issues regarding Crown Castle’s service offerings and status as a telecommunications carrier. As discussed below and as set forth in its Complaint, Crown Castle has clearly satisfied its burden to establish a *prima facie* case that it is a provider of telecommunications service and telecommunications carrier as defined in 47 U.S.C §153. The Commission has held the issuance of a Certificate by a state expert agency satisfies an attaching party’s burden to establish *prima facie* evidence that it is a telecommunications provider for purposes of the Act, and companies are entitled to rely on expert agency decisions to

establish their status for pole attachment complaints.¹ Crown Castle’s status as a provider of telecommunications service has been confirmed by the Illinois Commerce Commission (“ICC”) through its issuance of a Certificate of Service Authority.² In addition, Crown Castle has submitted declarations from Crown Castle executives that support this position.³

ComEd’s Motion is an attempt to create issues where none exist. The issues ComEd attempts to raise are the same as the Commission has rejected in past cases, and the Commission should do so again now to send a clear message that pole owners cannot derail pole attachment complaints by creating meritless collateral attacks on the attaching party’s status by advancing speculative accusations and theories. Pole attachment complaint proceedings are not the forum for litigating the regulatory status of various telecommunications services.

II. ARGUMENT

ComEd’s Motion alleges that Crown Castle “for the first time” described its RF Transport service in the Reply. It also alleges that Crown Castle’s Reply conflicts with its Complaint on whether Crown Castle is currently providing service via its attachments. Finally, ComEd claims it needs discovery to determine whether Crown Castle holds itself out to all users to qualify as a common carrier, and as a result, ComEd claims it needs to see Crown Castle’s customer contracts from not only Illinois but across the country as well as Crown Castle’s federal Form 499 regulatory filings. None of the grounds identified by ComEd are a legitimate basis for additional discovery.

¹ *Fiber Techs. Networks v. N. Pittsburgh Tel. Co.*, 22 FCC Rcd. 3392 ¶ 16 (2007).

² Complaint ¶ 3 (Proceeding 19-169); Complaint ¶ 4 (Proceeding 19-170).

³ Complaint, Attachment A, Declaration of Rebecca Hussey, CCF4-CCF4 (Proceedings 19-169 and 19-170); Reply, Attachment D, Declaration of Donald, CCF439-CCF443 (Proceeding 19-169); Reply, Attachment D, Declaration of Donald Russell, CCF521-CCF525 (Proceeding 19-170).

The issue of whether Crown Castle is a provider of telecommunications services for purposes of Section 224 is already established. Even if ComEd were correct about any of its speculative theories, they would be irrelevant. ComEd’s strategy of attempting to litigate a pole complainant’s service offerings has been rejected by the Commission repeatedly and should be rejected again here.⁴

The Commission has established that pole attachers are “attachers are entitled to rely on decisions by responsible regulatory agencies, such as franchise authorities in the case of cable system attachers, and public utility commissions in the case of telecommunications carriers, in establishing their status as entities entitled to pole access under section 224(f) of the Act.”⁵ Crown Castle has met that burden. It has submitted evidence of its Certificate of Authority issued by the ICC authorizing it to provide telecommunications services.⁶ Crown Castle has also submitted sworn declarations testifying that it offers telecommunications services in Illinois using the facilities attached to or planned to be attached to ComEd’s poles.⁷ That satisfies Crown Castle’s burden of proof.

⁴ See e.g. *Fiber Techs. Networks* ¶¶19-23.

⁵ *Fiber Technologies*, ¶ 15; see also *MAW Communications, Inc. v. PPL Electric Utilities Corp.*, Memorandum Opinion and Order, EB Docket 19-29, EB-19-MD-001, ¶13 (Aug. 12, 2019) (complainant established as telecommunications provider based on CPCN and affidavit from executive); *Salsgiver Telecom, Inc. v. North Pittsburgh Telephone*, Memorandum Opinion and Order, 22 FCC Rcd 9285, 9289-91, ¶¶9-12 (EB 2007) (holding that the complainant established a *prima facie* case that it is a “telecommunications carrier” with pole attachment rights under section 224(f) by submitting a certificate of public convenience and necessity and tariffs); *Paragon Cable Television Inc. v. FCC*, 822 F.2d 152, 153-54 (D.C. Cir. 1987) (upholding the FCC’s “ruling that possession of a valid franchise is a reasonable pre-condition for pole attachment” and that it is appropriate for the FCC to “employ a presumption of validity with respect to the franchising authority’s actions vis-a-vis the franchise”).

⁶ Complaint, Attachment A, Exhibit 6 (Proceedings 19-169 and 19-170).

⁷ Complaint Attachment A, R. Hussey Decl. ¶¶10, 12 (Proceedings 19-169 and 19-170); Reply Attachment D, D. Russell Decl. ¶¶4-14 (Proceedings 19-169 and 19-170).

The same arguments that ComEd now seeks to perpetuate as grounds for further briefing were rejected as irrelevant by the Commission in past cases. For example, whether Crown Castle may provide some services on a private carriage basis is irrelevant, as the Commission recognized in the *Fiber Technologies* decision.⁸ Indeed, ComEd’s strategy is identical to the rejected strategy employed by the pole owner in *Fiber Technologies*. For example, in *Fiber Technologies*, the pole owner, North Pittsburgh Telephone Company (“NPTC”), contended that the attacher “must show that it is actually supplying telecommunications service to a customer in NPTC’s territory to qualify as a ‘telecommunications carrier’ with a with a right of attachment under section 224 of the Act.”⁹ The Commission rejected this assertion, holding that a “‘telecommunications carrier’ is a carrier that *offers to provide* telecommunications on a common carrier basis, regardless of whether the carrier has actually supplied such service to a customer in the past.”¹⁰ ComEd’s argument here that it must obtain discovery of whether Crown Castle is actually supplying telecommunications service is indistinguishable from NPTC’s rejected argument. The Commission’s holding clearly demonstrates that the identification of Crown Castle’s customers and the production of agreements with customers are irrelevant in determining Crown Castle’s regulatory status.¹¹

⁸ *Id.* ¶ 16.

⁹ *Id.* ¶ 19.

¹⁰ *Id.* (emphasis in original).

¹¹ Moreover, there is no logic to ComEd’s theory that reviewing any particular customer contract will reveal whether Crown Castle holds itself out to the potentially relevant “public” that would be interested in the service. A particular customer agreement may or may not reflect Crown Castle’s general offering of the service to others. This further suggests that ComEd is inappropriately seeking highly confidential information for purposes unrelated to the relevant issues in this case. This fact is further amplified by the fact that ComEd seeks all customer agreements, even beyond Illinois. Motion at 2 (“in Illinois and elsewhere”).

The Commission has also made clear that whether an attacher provides private carriage in addition to telecommunications service is not relevant. In *Fiber Technologies*, the pole owner argued that the attacher was providing non-telecommunications service (in that case, dark fiber). The Commission rejected that attack, holding that the fact the attacher was authorized to and did offer telecommunications services satisfied the attaching party's burden.¹² The Commission held that "[a]s long as [the attaching party] is offering to provide at least one telecommunications service via its pole attachments, its additional offering of an alleged non-telecommunications service has no impact on its pole attachment rights."¹³ Thus, whether Crown Castle may or does provide some services on a private carriage basis is irrelevant.

Notably, ComEd cannot even assert that Crown Castle provides "private carriage." Rather, it alleges that Crown Castle's RF transport services "*appear* to be private carrier arrangements,"¹⁴ and the only basis for that "appearance" is that "Crown Castle has not posted its standard terms and conditions on a readily accessible public web site" (citing 47 C.F.R. § 42.10).¹⁵ Yet, Crown Castle is not required to post its standard terms and conditions. Thus, ComEd's premise for the "appearance" of private carriage is false.

Indeed, this is a continuation of the speculative theory advanced by ComEd in its Answer. In its Answer, ComEd argued that Crown Castle has not filed a tariff with the Illinois Commerce Commission.¹⁶ In its Reply, Crown Castle explained that it previously had tariffs on

¹² *Id.* ¶¶ 22-23

¹³ *Id.* ¶ 23.

¹⁴ Motion at 2.

¹⁵ Motion at 2.

¹⁶ Answer ¶24 (19-169); Answer ¶24 (19-170)

file, but that under Illinois law, Crown Castle was allowed to and did withdraw its tariffs.¹⁷ Now, ComEd accuses Crown Castle of having failed to post its terms, and conditions on a website, citing 47 C.F.R. § 42.10.¹⁸ However, 47 C.F.R. §42.10 applies only to *interstate* interexchange providers. Crown Castle has a Certificate of Authority to provide *intrastate* telecommunications services, and thus 47 C.F.R. § 42.10 is inapplicable. Thus, having failed with its theory that Crown Castle is not a telecommunications provider because it has no tariff in Illinois, ComEd is now citing wholly inapplicable regulations in an attempt to create the appearance of an issue that does not exist.

Finally, the premise for ComEd's Motion is a series of inaccurate assertions about Crown Castle's Reply. For example, ComEd asserts that Crown Castle made several new allegations regarding Crown Castle's "RF Transport Service" in the Replies.¹⁹ Crown Castle did not "for the first time" describe its RF Transport service in the Replies. Crown Castle explained "RF transport service" in its Complaints to the extent required to meet its burden.²⁰ Only because ComEd challenged Crown Castle's telecommunications service in its Answers did Crown Castle provide further clarification in the Replies to respond to specific arguments by ComEd.²¹ ComEd stretches even further, asserting that "[a]lthough Crown Castle's Complaint suggested that Crown Castle was already using its wireless attachments to provide this RF transport service, the Replies state that Crown Castle only 'plans to provide' RF transport service."²²

¹⁷ Reply at 47 (Proceeding 19-169); Reply at 26 (Proceeding 19-170).

¹⁸ Motion at 3.

¹⁹ Motion at 1.

²⁰ Complaint ¶4.

²¹ Reply at 39-47; (Proceeding 19-169); Reply at 19-26 (Proceeding 19-170).

²² Motion at 2.

ComEd is essentially making a mountain of a mole hill. Crown Castle clearly has been providing service using the fiber and wireless equipment attached to ComEd's poles since as early as 2013, as ComEd recognizes the Complaints set forth.²³ ComEd is attempting to take two words from the Reply, used in the context of discussing how Crown Castle's antennas are an integral part of its network and service,²⁴ to create an issue about whether Crown Castle actually provides service. This was, at most, a minor statement that did not further describe the fact that Crown Castle's existing attachments are used to provide service because that was not the focus of discussion in that part of the Reply. It is not grounds for broad new discovery. Indeed, as discussed above, the issue is irrelevant. To qualify as a provider of telecommunications services, whose attachments are protected by Section 224, Crown Castle only needs to "offer" telecommunications services.²⁵ A telecommunications provider is not required to currently have customers. Thus, ComEd's proposed discovery is inappropriate.

III. CONCLUSION

Accordingly, the Commission should deny ComEd's Motion for Additional Discovery in Proceedings 19-169 and 19-170.

²³ Complaint ¶ 27 (Proceeding 19-169); Complaint ¶¶25, 27-70 (Proceeding 19-170).

²⁴ Reply ¶¶ 42-47 (Proceeding 19-169); Reply ¶¶ 21-26 (Proceeding 19-170).

²⁵ 47 USC 153(53) (The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."); *see also Fiber Technologies Network*, 22 FCC Rcd. 3392, ¶ 19.

Respectfully submitted,

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Date submitted: August 23, 2019

RULE 1.721(m) VERIFICATION

I have read Complainant's Opposition to Respondent's Motion to Allow for Additional Discovery filed by Crown Castle Fiber LLC on August 23, 2019 in the above-referenced proceeding. To the best of my knowledge, information, and belief formed after reasonable inquiry, the Opposition is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. The Opposition is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

Respectfully submitted,

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Date submitted: August 23, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2019, I caused a copy of the foregoing Opposition to Respondent's Motion to Allow Additional Discovery to be served on the following (service method indicated):

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