

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Crown Castle Fiber LLC,
Complainant,
v.
Commonwealth Edison Company,
Defendant.
Proceeding Numbers 19-169
19-170
Bureau ID Numbers EB-19-MD-004
EB-19-MD-005

ORDER

Adopted: July 15, 2019

Released: July 15, 2019

By the Chief, Enforcement Bureau:

1. On June 19, 2019, Crown Castle Fiber LLC (Crown Castle) filed two pole attachment complaints against Commonwealth Edison Company (ComEd).1 The complaints allege that Crown Castle provides telecommunications services pursuant to authority issued by the Illinois Commerce Commission (ICC)2 and that ComEd is an electric utility that owns or controls poles in Illinois.3 Crown Castle asserts that ComEd violated section 224 of the Communications Act of 1934, as amended (Act), and the Commission’s rules by unlawfully denying Crown Castle access to ComEd’s poles4 and by charging unlawful rates for Crown Castle’s attachments.5

2. On June 28, 2019, ComEd filed a consolidated motion to dismiss both cases for lack of jurisdiction.6 ComEd also asks the Commission to hold both cases in abeyance pending a decision on its motion to dismiss.7 ComEd argues that the Commission lacks jurisdiction over Crown Castle’s

1 Pole Attachment Complaint for Denial of Access, Proceeding Number 19-169, Bureau ID Number EB-10-MD-004 (June 19, 2019) (Access Complaint); Pole Attachment Complaint – Unlawful Rates, Proceeding Number 19-170, Bureau ID Number EB-10-MD-005 (June 19, 2019) (Rate Complaint).

2 Access Complaint at 2, para. 5; Rate Complaint at 1-2, para. 3.

3 Access Complaint at 2, para. 8; Rate Complaint at 2, para. 6.

4 See, e.g., Access Complaint at 39-41, paras. 176-88.

5 See, e.g., Rate Complaint at 26-27, paras. 89-94.

6 Motion to Dismiss for Lack of Jurisdiction, Proceeding Numbers 19-169, 19-170, Bureau ID Numbers EB-10-MD-004, EB-19-MD-005 (June 28, 2019) (Motion to Dismiss). On July 8, 2019, Crown Castle filed identical oppositions to ComEd’s Motion to Dismiss in each proceeding. See Opposition to Motion to Dismiss, Proceeding Number 19-169, Bureau ID Number EB-10-MD-004 (July 8, 2019); Opposition to Motion to Dismiss, Proceeding Number 19-170, Bureau ID Number EB-10-MD-005 (July 8, 2019) (collectively Opposition).

7 Motion to Hold Proceedings in Abeyance, Proceeding Numbers 19-169, 19-170, Bureau ID Numbers EB-10-MD-004, EB-19-MD-005 (June 28, 2019) (Abeyance Motion). ComEd filed a consolidated Abeyance Motion in the

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complaints because the ICC has preempted Commission jurisdiction over *all* pole attachment disputes under section 224(c) of the Act.⁸ We disagree.

3. Section 224(c) allows a state to preempt Commission jurisdiction over rates, terms, and conditions, or access to poles by taking the actions specified in that section.⁹ Section 224(c)(3)(A) provides that “a State shall not be considered to regulate the rates, terms, and conditions for pole attachments . . . unless the State has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments.”¹⁰ Likewise, section 1.1405 of the Commission’s rules provides that it will be rebuttably presumed that a state is not regulating pole attachments if the Commission does not receive certification from the state that it “regulates rates, terms and conditions for pole attachments,”¹¹ and that it “has issued and made effective rules and regulations implementing the state’s regulatory authority over pole attachments.”¹²

4. A Notice that the ICC filed with the Commission on December 12, 2018, contradicts ComEd’s contention that the ICC has jurisdiction over all pole attachment disputes.¹³ The Notice “clarif[ies] that the [ICC] has not adopted any rules or regulations specifically governing rates, terms, or 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.”¹⁴ The Notice thus confirms that “the ICC is unable to comply with the requirements of Section 224(c)(2) and (c)(3) with respect to these specific transactions or entities.”¹⁵

5. We reject ComEd’s argument that a certification the ICC filed with the Commission in 1985 provides “conclusive proof” under Rule 1.1405 that the Commission lacks jurisdiction over this pole attachment dispute.¹⁶ Although the 1985 Certification states that the ICC “has issued and made effective rules” implementing the state’s “regulatory authority over pole attachments,”¹⁷ the 2018 Notice makes clear that these rules “do not specifically govern telecommunications companies’ attachments to poles owned by electric utilities.”¹⁸ Collectively, the 1985 Certification and the Notice demonstrate that the

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proceedings. Crown Castle filed identical oppositions to the Abeyance Motion in each proceeding on July 8, 2019. *See* Opposition to Motion to Hold Proceedings in Abeyance, Proceeding Number 19-169, Bureau ID Number EB-10-MD-004 (July 8, 2019); Opposition to Motion to Hold Proceedings in Abeyance, Proceeding Number 19-170, Bureau ID Number EB-10-MD-005 (July 8, 2019) (collectively Abeyance Opposition).

⁸ Motion to Dismiss at 2-10.

⁹ 47 U.S.C. § 224(c)(1).

¹⁰ *Id.* at § 224(c)(3).

¹¹ 47 CFR § 1.1405(b)(1).

¹² *Id.* at § 1.1405(b)(3).

¹³ Complaint, Exh. B, Dec. 12, 2018, Letter from Phillip Kosanovich, General Counsel, ICC, to Marlene Dortch, Secretary FCC, WC Docket 10-101, *States That Have Certified That They Regulate Pole Attachments* (attaching Oct. 25, 2018, Letter from Brian Sheahan, Chairman, ICC, to Federal Communications Commission (Notice)). The Notice was unanimously approved by the ICC at an open meeting on October 25, 2018, and was filed in the docket the Commission opened for reverse preemption certificates. *See* Complaint, Exh. C at CCF000120 and CCF000130. *See also* Opposition at 2-6.

¹⁴ Notice at CCF000117 (emphasis in original).

¹⁵ *Id.* at CCF000118.

¹⁶ Motion to Dismiss at 5 (citing 47 CFR § 1.1405).

¹⁷ *Id.*, Exh. B (1985 Certification).

¹⁸ Notice at CCF000118.

ICC has not exercised preemption jurisdiction over telecommunication attachments to electric utility poles—the very type of pole attachments at issue here. We therefore deny the Motion to Dismiss.¹⁹ We also deny the Abeyance Motion, finding no reason to suspend the schedule of this case.²⁰

6. Accordingly, **IT IS HEREBY ORDERED**, pursuant to sections 1, 4(i), 4(j), 208, and 224 of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 208, 224, and sections 1.3, 1.720-1.740 and 1.1401-1415 of the Commission’s Rules, 47 CFR §§ 1.720-1.740, 1.1401-1415, and the authority delegated in sections 0.111 and 0.311 of the Commission’s rules, 47 CFR §§ 0.111, 0.311, that ComEd’s Motion to Dismiss **IS DENIED**.

7. **IT IS FURTHER ORDERED**, pursuant to 1, 4(i), 4(j), 208, and 224 of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 208, 224, and sections 1.3, 1.720-1.740 and 1.1401-1415 of the Commission’s Rules, 47 CFR §§ 1.720-1.740, 1.1401-1415, and the authority delegated in sections 0.111 and 0.311 of the Commission’s rules, 47 CFR §§ 0.111, 0.311, that ComEd’s Motion to Hold Proceedings in Abeyance **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief
Enforcement Bureau

¹⁹ In any event, granting ComEd’s Motion to Dismiss would simply delay the inevitable result of jurisdiction reverting back to the Commission. The ICC has made it clear that it is “unable to comply with the requirements of Section 224(c)(2) and (3) with respect to [the attachments of telecommunications companies to electric utilities]”, and that in the absence of such compliance, “jurisdiction for pole attachments reverts to the FCC.” See Notice at CCF000117-118. See also 47 U.S.C. § 224(c)(3), 47 CFR § 1.1405(f).

²⁰ See 47 CFR § 1.729(d) (“The filing of a motion to dismiss does not suspend any other filing deadlines under the Commission’s rules, unless staff issues an order suspending such deadlines.”). See also Abeyance Opposition at 1-5.