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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20544

Motion for Declaratory Ruling)
Pursuant to Section 1.2(a) of)
The Commission's Rules)

**MOTION FOR DECLARATORY RULING OF
UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI**

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MOTION FOR DECLARATORY RULING

Union Electric Company d/b/a Ameren Missouri ("Ameren"), pursuant to 47 C.F.R. § 1.2(a), respectfully requests the Commission to issue a declaratory ruling to terminate a controversy and remove uncertainty in connection with a recent order entered by the Eastern District of Missouri in *Union Elec. Co. v. Cable One, Inc.*, No. 4:11-CV-299 CEJ, 2013 WL 2286055 (E.D. Mo. May 23, 2013) ("May 23, 2013 Order").¹ In support of this motion, Ameren says the following:

INTRODUCTION

Ameren is in a procedural pickle. In February 2011, Ameren filed a state court breach of contract collection lawsuit against Cable One, Inc. ("Cable One") to recover unpaid pole attachment fees. See Petition, attached as Exhibit B. Cable One then removed the case to federal court. In September 2011, at the request of Cable One, the Eastern District of Missouri stayed the case based on the doctrine of primary jurisdiction. See *Union Elec. Co. v. Cable One, Inc.*, No. 4:11-CV-299 CEJ, 2011 WL 4478923 (E.D. Mo. Sept. 27, 2011) ("September 27, 2011 Order").² Cable One never filed a pole attachment complaint against Ameren and, for all it appears, has absolutely no intention of doing so.

¹ A copy of the May 23, 2013 Order is attached hereto as Exhibit A to this motion.

² A copy of the Court's September 27, 2011 Order is attached to this motion as Exhibit C.

On recent cross-motions to the lift the stay and dismiss filed by Ameren and Cable One, respectfully, the Court refused to lift the stay and directed Ameren to file a petition with the Commission, pursuant to 47 C.F.R. § 1.2, or else Ameren's collection action would be dismissed. See May 23, 2013 Order at 6. The Court is of the opinion that it cannot resolve the contract dispute between the parties until the Commission classifies the VoIP services offered over Cable One's attachments to Ameren poles. See May 23, 2013 Order at 3. Though Ameren disagrees that classification of the VoIP services offered over Cable One's attachments is necessary to a resolution of the breach of contract lawsuit, and questions whether seeking a declaratory ruling on such a party-specific, and potentially non-dispositive issue is an appropriate use of 47 C.F.R. § 1.2(a), Ameren is filing this motion to comply with the Court's May 23, 2013 Order.³

BACKGROUND AND FACTS

Ameren is an electric utility that provides electricity to customers in Missouri. Cable One is a Delaware corporation that provides cable television, telecommunications and other services to customers in Missouri and elsewhere. Ameren and Cable One are parties to a Master Facilities Licensing Agreement ("the Agreement") under which Cable One makes attachments to Ameren's utility poles in Missouri. Under the Agreement, Cable One makes payments to Ameren based on the number of pole attachments and the type of services provided over these attachments. Cable One is required to notify Ameren when the rate applicable to any existing attachment changes based on changes in the types of services offered over those attachments.

³ A dismissal of Ameren's collection complaint would have the effect of reducing Ameren's recoverable damages due to Missouri's statute of limitations for contract actions (five-years for general breach and ten-years for failure to pay).

Ameren's collection complaint claims that Cable One breached the Agreement by "a) failing to notify Ameren when CATV attachments in Missouri became telecom attachments; b) failing to accurately report the number of its telecom attachments in Missouri; c) failing to pay Ameren all sums rightfully due Ameren under the Agreement." See Petition, attached as Exhibit B, ¶ 13. Cable One responded to the Complaint by filing a Motion to Dismiss or, in Alternative, to Stay the action. See Cable One's Motion to Dismiss attached as Exhibit D.

The thrust of Cable One's request for a stay was that there is no way to determine the applicable rate for its attachments until the Commission classifies VoIP services. As Cable One framed it, the key issue in the case was "whether Cable One's provision of Voice over Internet Protocol ("VoIP") services permits Ameren to unilaterally re-classify Cable One's 'cable television attachments' as 'telecommunications attachments.'" See Cable One's Motion to Dismiss at 2.⁴ Cable One argued to the Court that "issues concerning the classification of VoIP services, including how pole attachments used by VoIP service providers should be classified, are squarely within the FCC's expertise and experience." See Cable One's Motion to Dismiss at 2. On these grounds, Cable One asked the Court to invoke the doctrine of primary jurisdiction and stay the action until the Commission could answer this question. See generally Cable One's Motion to Dismiss.

The Court granted the motion to stay on Sept. 27, 2011. See *Union Elec. Co.*, No. 4:11-CV-299 CEJ, 2011 WL 4478923. Cable One never filed a pole attachment complaint under 47 C.F.R. §1.1401, *et seq.*, of the Commission's rules and never otherwise invoked the Commission's guidance on this issue.

⁴ To be clear, this is *not* the key issue in the case from Ameren's perspective. Even if the answer is "no," Cable One's attachments are still subject to the telecom pole attachment rate if, as alleged in the complaint, other telecom services are offered over Cable One's attachments.

In April 2013, with Cable One never having invoked the Commission's alleged primary jurisdiction, Ameren moved to lift the stay so its collection action could proceed. See generally Ameren's Motion to Lift Stay attached as Exhibit E. Cable One opposed the motion, arguing principally that lifting the stay would be improper because Ameren had failed to petition the Commission to resolve the VoIP classification issue. In response to Ameren's argument that the appropriate manner of invoking the Commission's jurisdiction over pole attachment rate disputes was through a pole attachment complaint filed by Cable One pursuant to 47 C.F.R. § 1.1401, *et seq.*, Cable One argued that it was in fact Ameren's responsibility to invoke the Commission's jurisdiction, citing to WC Docket 09-154, *Petition of American Electric Power Service Corporation, et. al. for a Declaratory Ruling* (Aug. 17, 2009) (hereafter "Docket 09-154") as an example of an electric utility's use of 47 C.F.R. § 1.2 to address the VoIP classification issue with the FCC. See Cable One's Memorandum in Opposition to Motion to Vacate Stay attached as Exhibit F at 6.⁵

In reliance on Cable One's representations, the language of 47 C.F.R. § 1.2, and the existence of *Docket 09-154*, the Court refused to lift the stay and directed Ameren to file this motion with the Commission or face a dismissal of its collection lawsuit. Cable One, in essence, convinced the Court that it is Ameren's responsibility to seek Commission resolution of the VoIP classification issue before proceeding with its claim for breach of contract. See May 23, 2013 Order at *5 ("Plaintiff is the party that initiated suit, that seeks compensation for defendant's alleged underreporting of telecommunication attachments, and who has the greatest interest in

⁵ The petition in *Docket 09-154* asked the Commission to decide, generally, whether "the telecommunications rate formula, which applies to jurisdictional pole attachments used for traditional telephone service, also applies to cable system pole attached used to provide interconnected voice over internet protocol service." See *id.* at 1. A pleading cycle was set for *Docket 09-154*, and the comment period closed on October 9, 2009; the proceeding has not yet been resolved.

resolving this issue. . . . [U]nder the circumstances it is not unreasonable to expect plaintiff to take on the responsibility of moving the case forward by filing a petition.”). The Court stated:

[Ameren] shall have until June 24, 2013 to file a petition with the FCC. If [Ameren] fails to comply with this order, the Court will dismiss this action without prejudice.

See id. at *6.

ARGUMENT

I. ANY CABLE ONE POLE ATTACHMENT USED TO PROVIDE VOIP TELEPHONE SERVICE SHOULD BE SUBJECT TO THE TELECOM POLE ATTACHMENT RATE.

A. Ameren stands on the prior submissions from various stakeholders on this issue.

This issue is neither central to resolution of Ameren’s collection lawsuit, nor an issue Ameren sought to adjudicate through its collection lawsuit. Moreover, this is not an issue Ameren is inclined to raise, or believes it should raise with the Commission. But Ameren squarely raises this issue out of deference to the Court’s unmistakable expectation that Ameren would, indeed, raise this issue through a motion for declaratory ruling under 47 C.F.R. § 1.2. The classification of VoIP services in the specific context of pole attachment rates has been raised by numerous parties in various proceedings, including but not limited to *WC Docket 09-154*. If the Commission is inclined to address this issue, there is ample basis outside this proceeding or the underlying collection lawsuit to do so.

B. Resolution of the VoIP issue will not necessarily resolve the underlying collection lawsuit.

If the Commission declares that the provision of VoIP telephone service over Cable One’s attachments subjects these attachments to the telecom rate, it *will* resolve the underlying collection lawsuit. The converse, though, is not true because even if VoIP service itself does not subject pole attachments to the telecom rate, the provision of other telecommunications services

(including those commonly offered by cable companies within their suite of “business” services) over these same attachments does. See, e.g., *Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.*, 22 FCC Rcd 9285 at ¶¶ 18 (2007) (“Salsgiver Telecom’s tariffed private line services are clearly ‘telecommunications services’”); *Fiber Techs. Networks, LLC v. N. Pittsburg Tel. Co.*, 22 FCC Rcd 3392, at ¶¶ 21-26 (2007) (“Carriers can choose to offer the transmission component (of internet service) as a telecommunications service on a stand-alone, wholesale common carrier basis...”); *In re: Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 ¶ 9 (2005) (noting “gigabit Ethernet service” is a telecommunications service subject to Title II requirements); *In the Matter of Request for Review of a Decision of the Universal Service Administration by Billings School District 2 Billings, Montana*, 27 F.C.C.R. 5032 ¶ 3 (2012) (noting that school district sought E-rate support to lease “fiber optic WAN telecommunications services”).⁶

Further, Ameren does not know whether Cable One itself is the provider of the VoIP telephone service at issue, or whether Cable One simply transports the service for an affiliate, in which case the transport itself would subject the attachments to the telecom pole attachment rate. See e.g. *In the matter of Connect America Fund*, 26 F.C.C.R. 4554 ¶ 615 (2011) (“We note that section 251(b)(5) requires LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications, and that interconnected VoIP traffic is ‘telecommunications’ traffic, regardless of whether interconnected VoIP service were to be classified as a telecommunications service or information service.”)

Unless the Commission is prepared to declare that pole attachments used to provide VoIP telephone service are subject to the telecom pole attachment rate, Ameren believes that seeking a

⁶ Through at least late 2004, Cable One was a tariffed provider of telecommunications services in Missouri. See Tariff attached as Exhibit G.

resolution of this issue through the present motion is inefficient, duplicative, and procedurally improper. Ameren is raising this issue through this motion for declaratory ruling only because it believes it must.

II. THE PROPER MEANS OF INVOKING THE COMMISSION'S JURISDICTION OVER THE DISPUTE BETWEEN CABLE ONE AND AMEREN IS THROUGH A POLE ATTACHMENT COMPLAINT BY CABLE ONE.

A. Seeking Commission guidance on any potential regulatory issue cannot be a prerequisite to enforcing rights under a contract.

The notion that parties are required to resolve potential regulatory issues with the Commission before filing a breach of contract action that might touch on those issues is problematic well beyond the specific dispute between Ameren and Cable One. Moreover, even if regulatory resolution was an appropriate prerequisite to enforcing contract rights, it is premature at this stage because Cable One could raise a panoply of issues depending on what facts are ultimately revealed through discovery. For example, if discovery reveals that Cable One offered fiber optic WAN or some other form of telecommunications, Cable One might still contend that the nature of its offering (such as on an individualized business contract basis) somehow extracted the service from the technical definition of "telecommunications service," and that Ameren was required to seek a declaratory ruling on this issue as well. This process could conceivably continue indefinitely.

On a broader scale, the effects of Cable One's argument (that primary jurisdiction should be invoked until a classification issue is resolved) are much worse. Based on Cable One's theory, any lawsuit that touches on an unresolved issue within the Commission's sphere could result in stalled litigation. There are numerous entities subject, in various forms and degrees, to the Commission's jurisdiction. Disputes involving these entities regularly touch on regulatory issues within the Commission's jurisdiction and expertise. However, the Commission cannot be

expected to resolve non-dispositive issues in state or federal litigation merely because the Commission might one-day answer a question that could be raised by the parties in an administrative action.

Ameren believes that asking the Commission to repeatedly resolve party-specific issues through motions for declaratory ruling would be highly inefficient and place a heavy burden on the Commission. Ameren also believes that the declaratory ruling process is better employed on issues more generic in scope (a position the Court apparently does not share; by citing *Docket 09-154*, the Court knew a generic motion already was pending on the same issue but nonetheless also required Ameren to present the issue to the Commission).

B. The Commission's pole attachment complaint procedures are there for a reason.

The Commission's pole attachment complaint procedures, 47 C.F.R. § 1.1401, *et seq.*, provide Cable One a specific vehicle for seeking protection from allegedly unjust or unreasonable rates, terms and conditions for pole attachments, and for obtaining a refund of overpayments. Cable One, even though it sought and obtained a stay of the collection action based on the doctrine of primary jurisdiction, has not availed itself of this right. Cable One seeks to delay resolution of the dispute with Ameren by turning 47 C.F.R. § 1.2 into a pseudo-complaint procedure by which electric utilities must justify pole attachment rental fees before pursuing recovery for nonpayment. This cannot be what the Commission intended given the specificity of the Commission's pole attachment procedures. If the current posture of the dispute between Ameren and Cable One is not righted, it could have drastic precedential effect in pole attachment disputes, and beyond.

CONCLUSION

For all of the reasons set forth above, Ameren respectfully requests that the Commission issue a declaratory ruling that:

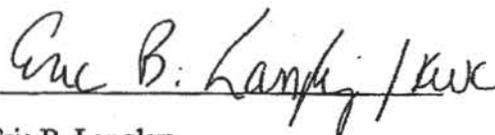
- the VoIP service offered over Cable One's attachments is a "telecommunications service" for purposes of determining the appropriate pole attachment rental;

Or, alternatively, that:

- Ameren is not required under Commission rules to seek a declaratory ruling on the classification of Cable One's services prior to seeking collection under contract in state or federal court;
- The Commission does not intend to adjudicate the classification of Cable One's specific services through a motion for declaratory ruling filed by Ameren pursuant to 47 C.F.R. § 1.2; and/or
- The appropriate avenue for presenting the substance of the pole attachment dispute between Ameren and Cable One to the Commission is through a pole attachment complaint, filed by Cable One, pursuant to 47 C.F.R. §1.1401, *et seq.*

Respectfully submitted,

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Exhibit A

defendant to be CATV attachments. Because the rate for telecommunication attachments are higher, plaintiff claims that defendant owes additional fees for each improperly designated attachment.

In defendant's original motion to dismiss or stay, filed on February 22, 2011, defendant argued that the key issue in this case is whether defendant's provision of VoIP service permits plaintiff to unilaterally re-classify defendant's cable television attachments as telecommunication attachments. The defendant reasoned that the classification of VoIP is a matter within the expertise and experience of the FCC and, as such, the issue should be referred to the FCC under the primary jurisdiction doctrine. (Doc. #10).

On September 27, 2011, the Court granted defendant's motion to stay proceedings. The Court ordered that this matter be stayed until a determination by the FCC of the issues raised in plaintiff's complaint. The Court declined to dismiss the case without prejudice, because during the FCC proceedings the statute of limitations would continue to run and that could prevent plaintiff from seeking judicial relief on its underlying breach of contract claim. (Doc. #20).

II. Discussion

In support of the motion to lift stay, plaintiff contends that defendant is the only party who can invoke the FCC's jurisdiction by filing a pole attachment complaint and that defendant's failure to do so has forestalled plaintiff from enforcing its state law contract rights. Plaintiff additionally argues that the Court should lift the stay because this action is not dependant upon the FCC's classification of VoIP services.

"When a district court determines that primary jurisdiction applies, it enables a 'referral' of the issue to the relevant agency." Clark v. Time Warner Cable, 523 F.3d 1110, 1115 (9th Cir. 2008) (citing Reiter v. Cooper, 507 U.S. 258, 268 (1993)). "In practice, this means that the court either stays the proceedings or dismisses the case without prejudice, so that the parties may seek an administrative ruling." *Id.* (citing Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc., 307 F. 3d 775, 782 n.3 (9th Cir. 2002)). Primary jurisdiction is typically invoked in situations that involve "resolution of an issue of first impression, or of a particularly complicated issue best resolved by the administrative agency." Pimental v. Google, Inc., 2012 WL 1458179, *3 (N.D. Cal. Apr. 26, 2012); see also Clark, 523 F.3d at 1114 (whether VoIP services should be classified as telecommunication or information services is an issue of first impression justifying primary jurisdiction).

Many of the arguments raised by plaintiff in its motion to lift stay have already been addressed in the September 9, 2011 Memorandum and Order. For example, plaintiff once again argues that discovery of the actual services offered over defendant's attachments will resolve the dispute and that FCC classification is unnecessary. However, the Court has already stated that this "reliance upon the uncertain results of discovery is misplaced" because discovery will not determine the proper classification of VoIP services, and without a proper classification, the Court will be unable to properly assess damages. (Doc. #20 at 5-6); *cf.* Northern Valley Communications, LLC v. Sprint, 2012 WL 997000, *9 (D.S.D. Mar. 23, 2012) ("Determining how, if at all, [plaintiff] should be compensated will likely require a determination of what rate applies to access charges incurred with VoIP technology,

which is solely with the FCC's expertise."). The plaintiff has presented no information that causes the Court to reconsider its previously-expressed reasons for deferring to the primary jurisdiction of the FCC. The Court acknowledges plaintiff's concern that this referral will cause a delay in proceedings. Indeed, at the time the stay was entered, the Court did not contemplate that plaintiff would fail to pursue a determination from the FCC, thereby causing further delay. Nevertheless, the Court finds that this detriment is outweighed by the FCC's expertise in classifying services along with the need for uniformity and consistency. See Glaiser v. Twilio, Inc., 2012 WL 259426, *3 (N.D. Cal. Jan. 27, 2012).

Plaintiff's contention that only the defendant can invoke the FCC's determination is inaccurate. See 47 C.F.R. § 1.2(a) ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."). Either a plaintiff or a defendant has the ability to submit claims before the FCC. See e.g. Pleading Cycle Established for Comments on Petition for Declaratory Ruling of American Electric Power Service et. al Regarding the Rate for Cable System Pole Attachments used to Provide Voice over Internet Protocol Service, available at <http://apps.fcc.gov/ecfs/proceeding/view?z=37pih&name=09-154> (last visited May 9, 2013) (plaintiff brought a petition for a declaratory ruling before the FCC); LO/AD Communications, B.V.I., Ltd. v. MCI WorldCom, 2001 WL 64741 (S.D.N.Y. Jan. 24, 2001) (plaintiff was instructed to submit claim to FCC); Sprint Corp. v. Evans, 846 F. Supp. 1497, 1510 (M.D. Ala. 1994) (defendant was instructed to submit claim to FCC).

Plaintiff is the party that initiated suit, that seeks compensation for defendant's alleged underreporting of telecommunication attachments, and who has the greatest interest in resolving this issue. Although the stay order did not specifically require plaintiff to submit the VoIP issue to the FCC, under the circumstances it is not unreasonable to expect plaintiff to take on the responsibility of moving the case forward by filing a petition. See Reiter, 507 U.S. at 258, n.3 (a primary jurisdiction referral allows "the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling."). Therefore, plaintiff will be directed to file a petition with the FCC within thirty days. If plaintiff does not file within the allotted time, the Court will lift the stay and dismiss this case for failure to prosecute. See All American Telephone Co., Inc. v. AT&T, Inc., 2009 WL 691325, at *4 (S.D.N.Y. 2009) (court may dismiss claim for failure to prosecute if the party bringing the claim does not timely file a petition with the administrative agency).

Lastly, defendant argues that this case should be dismissed because "recent legal pronouncements addressing the classification issues in this case demonstrate that [plaintiff] will not be able to cure the defects in its pleading." As the Court has previously stated, the FCC is in the best position to determine the categorization of the VoIP service. None of the pronouncements that defendant cites are determinations by the FCC declaring that VoIP is a cable service. The Court finds that plaintiff's complaint includes enough facts to state a claim for relief that is plausible on its face. See Bell Atlantic Corp., Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)

* * *

For the foregoing reasons,

IT IS HEREBY ORDERED that plaintiff's motion to lift stay [Doc. # 26] is **denied**.

IT IS FURTHER ORDERED that defendant's renewed motion to dismiss [Doc. # 29] is **denied**.

IT IS FURTHER ORDERED that plaintiff shall have until **June 24, 2013** to file a petition with the FCC. If plaintiff fails to comply with this order, the Court will dismiss this action without prejudice.



CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 23rd day of May, 2013.

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Exhibit B

CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

UNION ELECTRIC COMPANY
d/b/a Ameren Missouri,

Plaintiff,

v.

CABLE ONE, INC.,

Defendant.

Serve: CT Corporation System
.120 South Central Avenue
Clayton, MO 63105

Cause No.

3

11SL7605072

PETITION

COMES NOW Plaintiff, Union Electric Company d/b/a Ameren Missouri, and for
its cause of action against Defendant Cable One, Inc., alleges as follows:

COUNT I - BREACH OF CONTRACT

1. Plaintiff Union Electric Company d/b/a Ameren Missouri ("Ameren") is a Missouri corporation with its principal place of business in the City of St. Louis, Missouri.
2. Defendant Cable One, Inc. ("Cable One") is a Delaware corporation with its principal place of business in Phoenix, Arizona. Cable One provides cable TV and telecommunications services to subscribers in central Missouri and elsewhere.
3. Cable One holds itself out to the public as providing telephone service.
4. Venue is appropriate in this Court because Cable One's registered agent resides in St. Louis County.

5. As of June 17, 2003, Ameren and Cable One entered into a Master Facilities License Agreement (the "Agreement") for the purpose of providing Cable One access to Ameren's utility poles and related facilities in Missouri. In summary, under the Agreement, Ameren facilitated Cable One's placing of its communications lines and equipment on Ameren's utility poles, in exchange for payments based on the number of pole attachments and the type of service provided over those attachments.

6. Pursuant to the Agreement, the annual rate to be paid by Cable One for attachments used to provide telecommunications service ("telecom attachments") is significantly higher than the rate to be paid for attachments used to provide only cable television services ("CATV attachments").

7. Pursuant to §D.9(a) of the Agreement, Cable One must notify Ameren within thirty (30) days after an attachment becomes a telecom attachment due to Cable One's actions. Contemporaneous with such notice, Cable One must pay Ameren the difference between the telecom attachment rate and the CATV attachment rate, for each attachment, for the calendar year in question, pro rated for the amount of time in question.

8. Upon information and belief, Cable One has failed to timely notify Ameren that thousands of attachments in Missouri have become telecom attachments and has failed to pay Ameren thousands of dollars rightfully due Ameren.

9. Pursuant to §D.9(b) of the Agreement, within forty-five (45) days of the end of each calendar year, Cable One is to provide Ameren a certification of the number of telecom attachments it had as of the end of the prior calendar year; indicating how

many CATV attachments became telecom attachments during the prior calendar year and how many were telecom attachments prior to the start of the prior calendar year.

10. Upon information and belief, the certifications provided by Cable One have been false and/or non-existent, with Cable One significantly underreporting the number of telecom attachments in Missouri, resulting in Cable One failing to pay Ameren thousands of dollars rightfully due Ameren.

11. Also pursuant to §D.9(b), Cable One must pay Ameren the amount determined pursuant to §D.9(a) plus interest. In addition, to the extent telecom attachments were underreported in the prior calendar year, Cable One must pay Ameren the amount set forth in §D.9(b), plus Twenty-Five Dollars (\$25.00) annually for each telecom attachment that was underreported.

12. Pursuant to §D.9(b) of the Agreement, Cable One is required to give Ameren access to its records to the extent necessary to verify the accuracy of Cable One's reporting and certifications.

13. Cable One has breached the Agreement by:

- a) failing to notify Ameren when CATV attachments in Missouri became telecom attachments;
- b) failing to accurately report the number of its telecom attachments in Missouri;
- c) failing to pay Ameren all sums rightfully due Ameren under the Agreement.

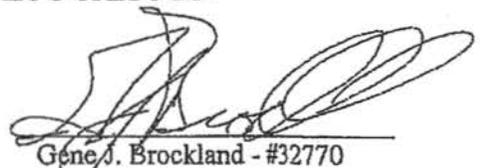
14. Ameren has fully performed all of its obligations under the Agreement.

15. As a direct and proximate result of Cable One's breach of the Agreement, Ameren has been damaged in the amount of approximately One Hundred Thousand Dollars (\$100,000), the exact amount to be determined at trial.

WHEREFORE, Plaintiff Union Electric Company d/b/a Ameren Missouri prays for a judgment against Defendant Cable One, Inc. in the amount of its actual damages approximating One Hundred Thousand Dollars (\$100,000), the exact amount to be determined at trial, plus prejudgment interest, costs of suit, and for such other relief as the Court deems just and proper under these circumstances.

Respectfully submitted,

HERZOG CREBS LLP

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plaintiff based upon the number and classification of each pole attachment it installs. Under the agreement, an attachment is classified as either a cable television (CATV) attachment or a telecommunications attachment, depending on the type of service provided through the attachment. The rate the defendant is required to pay for a telecommunications attachment is substantially higher than the rate it pays for attachments classified as for CATV use.

Plaintiff's complaint alleges that defendant breached the parties' agreement by providing telecommunication services through attachments that were reported by defendant to be CATV attachments. Plaintiff claims that defendant owes additional fees for each improperly designated attachment and penalties, as provided in the agreement, for failing to notify plaintiff of the improperly reported attachments. Specifically, plaintiff claims that defendant is offering voice over internet protocol (VoIP) telephone service, dedicated line data transport services, and E-rate services through attachments reported as for CATV use. Plaintiff claims that at least some of these services meet the definition of telecommunications services based on the FCC's interpretation of Sections 224 and 153. See 47 U.S.C. § 153(50).¹

In the instant motion, defendant asks that the Court dismiss or stay proceedings in this matter under the doctrine of primary jurisdiction, in deference to the FCC's regulatory authority under 47 U.S.C. § 224. Defendant disputes that the services it offers are telecommunications services as defined in Section 224 and states that the issue of service classification should be referred to the FCC. Plaintiff argues that this

¹ "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(50).

matter is a simple contract dispute that does not raise technical issues that warrant consideration by the FCC or the application of the primary jurisdiction doctrine.

II. Legal Standard

Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making. Access Telecommunications v. Southwestern Bell Telephone Co., 137 F.3d 605, 608 (8th Cir. 1998). The doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005) (internal citation omitted).

There is no fixed formula for deciding whether to apply the doctrine of primary jurisdiction. Access, 137 F.3d at 608. Rather, the applicability of the doctrine in any given case depends on "whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes for which the doctrine was created." Id. Deferral to an agency determination is appropriate where (1) "the use of agency expertise in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion" and (2) the "promot[ion] of uniformity and consistency within the particular field of regulation." Alpharma, 411 F.3d at 938 (internal quotation omitted); Access, 137 F.3d at 608. The Eighth Circuit warns that the doctrine "is to be 'invoked sparingly, as it often results in added expense and delay.'" Alpharma, 411 F.3d at 938 (*quoting Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 477 (8th Cir.1988)). Finally, "[i]t is inappropriate to invoke the doctrine of primary jurisdiction in a case in which Congress,

by statute, has decided that the courts should consider the issue in the first instance." United States v. McDonnell Douglas Corp., 751 F.2d 220 (8th Cir. 1984) (internal citation omitted).

When the primary jurisdiction doctrine applies, the "district court has discretion either to [stay the case and] retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." Access, 137 F.3d at 609 (citing Reiter v. Cooper, 507 U.S. 258, 269 (1993)).

III. Discussion

The rules promulgated by the FCC under Section 224 "regulate the rates, terms, and conditions for pole attachments" and the FCC has jurisdiction to determine whether an agreement provides for "just, reasonable, and nondiscriminatory rates for such pole attachments." 47 U.S.C. § 224; Virginia Electric and Power Co. v. Comcast of Virginia, Inc., Slip Copy, 2010 WL 916953 (E.D. Va. 2010). Section 224 does not preempt state law and will govern utility pole access only in the absence of a state regulatory scheme. 47 U.S.C. § 244(b) and (c). Missouri has declined to provide a regulatory scheme governing utility pole access. See States That Have Certified that They Regulate Pole Attachments, 25 FCCR 5541, 5541-42 (2010). As such, the parties' agreement is subject to regulation by the FCC under Section 224. 47 U.S.C. § 224.

The terms "telecommunications" and "telecommunications services," as used in Section 224, are defined in 47 U.S.C. § 153. The classification of services, *i.e.* whether they are telecommunications services or information services, raises issues of a technical nature that are often decided under the FCC's agency complaint process. See Minnesota Public Utilities Commission v. FCC, 483 F.3d 570 (8th Cir. 2007). For

example, cable broadband internet has been classified as an information service, not a telecommunications service or cable service as defined in 47 U.S.C. § 153. National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) (upholding the FCC's service classification determination as reasonable under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). "Nomadic" VoIP has also been deemed an information service. Public Service Co. of Colorado v. F.C.C., 328 F.3d 675 (D.C. Cir. 2003). However, an IP-based prepaid calling card service is considered a telecommunications service. American Telephone and Telegraph Co. v. F.C.C., 454 F.3d 329, 372 (D.C. Cir. 2006). It is also notable that the FCC's regulatory jurisdiction over pole attachments extends to attachments that are not considered for CATV or telecommunications services (e.g., information services) so long as the entity attaching the equipment is considered a CATV or telecommunications service provider. National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002).

Despite the fact that its claim relies upon the classification of defendant's services, plaintiff maintains that its claim is not the type of dispute subject to the FCC's primary jurisdiction. Plaintiff claims that defendant is offering telecommunications services, but has not alleged any specific facts that would establish this. Indeed, plaintiff admits that it does not know what specific services are offered by defendant, but claims that it will become apparent, after formal discovery, that telecommunications services are being offered. Plaintiff's reliance upon the uncertain results of discovery is misplaced. "[I]f ... the primary jurisdiction doctrine applies on any set of facts that could be developed by the parties, there is no reason to await discovery, summary judgment, or trial and the application of the doctrine properly may

be determined on the pleadings." Davel Communications, Inc. v. Qwest Corp., 460 F.3d 1075, 1089 (9th Cir.2006). The classification of the disputed services offered by defendant has already been raised and discovery will not dissipate the need to resolve this issue.

Plaintiff's reliance on the possibility that it will be able to recover on its claim while avoiding any issues that implicate the FCC's primary jurisdiction is also misplaced. Referral under the primary jurisdiction doctrine is issue based, not claim based. See Alpharma, Inc., 411 F.3d 934; Verizon Northwest, Inc. v. Portland General Elec. Co., 2004 WL 97615 (D. Or. 2004); Splitrock Properties, Inc. v. Qwest Communications Corp., Slip Copy, 2010 WL 2867126 (D. S.D. 2010) ("[P]rimary jurisdiction referral does not refer entire *claims* to the FCC. Rather, such a referral seeks the FCC's guidance on *issues* within its expertise." Id. at *9 (emphasis in original)). Moreover, even if one or more of defendant's services satisfies the definition of telecommunications services, the Court will be unable to assess total damages without first determining specifically what services, and what mis-reported attachments, should be included. This is an instance where "[a]ffording the opportunity for administrative action will 'prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court..." Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 305 (1973) (quoting Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 498 (1958)).

The classification of the services offered by defendant satisfies the two factors to be considered in applying the primary jurisdiction doctrine: (1) area of agency expertise and (2) promotion of uniformity and consistency. See Alpharma, 411 F.3d at 938. First, the classification of cable based information or telecommunications

services involves a technical factual inquiry that is outside of the traditional expertise of this Court. Cf. American Telephone and Telegraph Co. v. F.C.C., 454 F.3d 329, 372 (D.C. Cir. 2006) (upholding FCC determination that IP-based prepaid calling card service was telecommunications; FCC could make its rules retroactive). This classification issue has often served as a basis for invoking the primary jurisdiction doctrine and cannot be determined merely by the label affixed by either party to the disputed service. See Southwestern Bell Telephone, L.P. v. VarTec Telecom, Inc., 2005 WL 2033416 (E.D.Mo., August 23, 2005) (Not Reported in F.Supp.2d); Splitrock Properties, Inc., 2010 WL 2867126. Despite plaintiff's representations, the Court does not believe that any of the specific services plaintiff points to on defendant's website ---VoIP, dedicated line business data transport, and E-rate services---can be easily classified under prior FCC precedent. See Judith A. Endejan, Will the FCC Ever Make the Call on VOIP SERVICE?, 25-FALL COMM. LAW. 4 (2008). The Court need not examine the case law and precedent as it relates to the classification of each of these types of service. It is enough that one service addressed by plaintiff's complaint implicates the primary jurisdiction doctrine. Splitrock Properties, Inc., 2010 WL 2867126; Davel Communications, 460 F.3d 1075.

Second, the classification of the services offered by defendant has far-reaching consequences that concern the "promot[ion] of uniformity and consistency" in the regulatory scheme promulgated by the FCC. Alpharma, 411 F.3d at 938; See also Endejan, 25-FALL COMM. LAW. 4 (discussing the implications of FCC classification of emerging IP-enabled services). As recently noted by the FCC,

The Commission is considering the appropriate regulatory treatment of IP-based services . . . in a number of open proceedings.[FN15] The requested waiver will serve the public interest by permitting the

Commission to address the appropriate regulatory treatment of IP-originated traffic in a more comprehensive manner before addressing more detailed issues . . .

Federal Communications Commission, In the Matter of At&T Inc. Petition for Waiver of Section 61.42(G) of the Commission's Rules, 26 F.C.C.R. 7798, 2011 WL 2169125 (June 2, 2011). The classification of services offered by defendant affects not only the parties' obligations under their agreement, but also the treatment of the services and parties throughout the entire regulatory scheme overseen by the FCC. The FCC considers many competing policy goals and issues of a highly technical nature in determining where a specific service fits within this regulatory scheme. A classification determination in this Court would risk inconsistency within in this rapidly changing area of regulation.

The FCC's issuance of new regulations governing pole attachments on April 7, 2011 provides further support for application of the primary jurisdiction doctrine. Federal Communications Commission, In the Matter of Implementation of Section 224 of the Act, 26 F.C.C.R. 5240, 2011 WL 1341351, (F.C.C. 2011) ("April 7th order"). In the April 7th order, the FCC revised the telecommunications rate formula to substantially eliminate the difference between the cable and telecommunications maximum reasonable rates. While the order did not make the rate change retroactive, it affirmed the FCC's "sign and sue" policy of encouraging the parties to sign an agreement then challenge the specific terms for reasonableness in a complaint to the FCC. Id. The April 7th order also bolstered the pre-complaint dispute resolution requirements, "revising Commission rule 1.1404(k) to require that there be 'executive-level discussions' (i.e., discussions among individuals who have sufficient authority to make binding decisions on behalf of the company they represent) prior to

the filing of a complaint at the Commission.” 26 F.C.C.R. at 5286; 47 C.F.R. § 1.1404(K). While the April 7th order does not directly address the service classification issue raised here, it demonstrates the FCC’s increasing involvement in pole attachment disputes and the need for consistent interpretation and application of these newly issued rules.

Finally, the Court finds that a stay of proceedings, as opposed to dismissal without prejudice, is appropriate. Plaintiff would be “unfairly disadvantaged” by the dismissal of its complaint because it may need to seek further relief from this Court on its underlying breach of contract claim and a dismissal without prejudice will not toll the statute of limitations while its FCC complaint is pending. Access, 137 F.3d at 609 (citing Reiter v. Cooper, 507 U.S. 258, 269 (1993)); Southwestern Bell Telephone, L.P. v. Vartec Telecom, Inc., 2008 WL 4948475 (E.D.Mo. 2008).

IV. Conclusion

For the reasons discussed above, the Court finds that referral under the primary jurisdiction doctrine is appropriate.

Accordingly,

IT IS HEREBY ORDERED the defendant’s motion to stay proceedings in this matter [Doc. #10] is **granted**.

IT IS FURTHER ORDERED that defendant’s motion to dismiss the complaint [Doc. #10] is **denied**.

IT IS FURTHER ORDERED that this matter is stayed pending (1) a determination by the Federal Communications Commission of the issues raised in plaintiff’s complaint; (2) resolution of the dispute by agreement of the parties; or (3) further order the Court.

IT IS FURTHER ORDERED that plaintiff shall file a status report within six months of the date of this order or upon determination by the Federal Communications Commission of its petition, whichever is earlier.


CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 27th day of September, 2011.

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Exhibit D

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNION ELECTRIC COMPANY)
d/b/a Ameren Missouri,)
Plaintiff,)

Case No. 4:11-CV-00299

v.)

JURY TRIAL DEMANDED

CABLE ONE, INC.,)
Defendant.)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
CABLE ONE, INC. MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR A STAY,
IN DEFERENCE TO THE PRIMARY JURISDICTION OF THE FCC

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Received & Inspected

NOV 12 2013

UNION ELECTRIC COMPANY)
d/b/a Ameren Missouri,)
Plaintiff,)
v.)
CABLE ONE, INC.,)
Defendant.)

FCC Mail Room
Case No. 4:11-CV-00299
JURY TRIAL DEMANDED

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
CABLE ONE, INC. MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR A STAY,
IN DEFERENCE TO THE PRIMARY JURISDICTION OF THE FCC

Defendant, Cable One, Inc. ("Cable One"), by its undersigned attorneys and pursuant to Fed. R. Civ. P. 12(b)(6) and 81(c) and Local Rule 4.01, hereby moves this Court to dismiss this proceeding because the Federal Communications Commission ("FCC") has primary jurisdiction over the claims raised by Plaintiff Union Electric Company d/b/a Ameren Missouri ("Ameren") in its Petition filed January 3, 2011 ("Petition"). Alternatively, the Court should stay this proceeding to allow the FCC to resolve matters currently pending before it that directly relate to Ameren's claims.

I. INTRODUCTION { TC "INTRODUCTION" \f C \l "1" }

Ameren's Petition seeks resolution of legal, technical, and policy issues that fall within the special expertise and competence of the FCC. *Southwestern Bell Tel. Co. v. Allnet Comm. Servs., Inc.*, 789 F. Supp. 302, 304 (E.D. Mo. 1992). The FCC currently is considering the same matters raised by Ameren's Petition in several ongoing proceedings, and the judicial resolution sought by Ameren risks inconsistent outcomes. *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303 (CEJ), 2005 WL 2033416, at *4 (E.D. Mo. Aug. 23, 2005) ("The Court's entrance into these determinations would create a risk of inconsistent results among

courts and with the [FCC].”). Accordingly, the Court should recognize the primary jurisdiction of the FCC, dismiss Ameren’s claims, and require Ameren to seek resolution of these questions before the FCC. In the alternative, the Court should stay Ameren’s claims in their entirety pending the FCC’s resolution of its ongoing, pending proceedings.

II. BACKGROUND OF FCC EXPERTISE AND PENDING PROCEEDINGS { TC "II. BACKGROUND OF FCC EXPERTISE AND PENDING PROCEEDINGS" \f C \ "1" }

The key issue in this case is whether Cable One’s provision of Voice over Internet Protocol (“VoIP”) services permits Ameren to unilaterally re-classify Cable One’s “cable television attachments” as “telecommunications attachments.” Petition ¶¶ 6, 7. The determination of whether Cable One should be subject to the rate for cable television attachments or the rate for telecommunications attachments is thus dependent on the regulatory classification of Cable One’s VoIP services. Issues concerning the classification of VoIP services, including how pole attachments used by VoIP service providers should be classified, are squarely within the FCC’s “expertise and experience.” *Access Telecomms. v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998).

A. The FCC Regulates the Provision of Pole Attachments and the Rates to Be Charged { TC "A. The FCC Regulates the Provision of Pole Attachments and the Rates to Be Charged" \f C \ "2" }

Section 224 of the federal Communications Act of 1934, as amended (“Communications Act”), requires the FCC to “regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable” as well as adjudicate complaints regarding such rates.¹ 47 U.S.C. § 224(b); *see also generally National Cable &*

¹ Cable One obtains pole attachments from Ameren pursuant to a Master Facilities License Agreement (the “Agreement”), which is a product of Ameren’s obligations under 47 U.S.C. § 224. *See* Petition ¶ 5; *see also* Agreement §B.8 (stating the Agreement allows attachments “solely for those entities and those services for which

Telecomms. Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002) (providing overview of Section 224 and interpreting what constitutes a "pole attachment" under that section). The FCC, however, cannot exercise jurisdiction where such matters are regulated by the state, and the state has certified that it regulates the rates, terms, and conditions for pole attachments. 47 U.S.C. § 224(c). Notably, Missouri has not made such a certification. *See States that Have Certified that They Regulate Pole Attachments*, 25 F.C.C.R. 5541 (2010). Thus, the regulation and pricing of pole attachments in Missouri is under the jurisdiction of the FCC.

Pursuant to the statutory mandate, the FCC has adopted rules to implement and enforce Section 224 of the Communications Act, including the establishment of the appropriate pole attachment rates to be applied to "telecommunications carriers" and those to be applied to "cable television systems." *See, e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777 (1998), 15 F.C.C.R. 6453 (2000), 16 F.C.C.R. 12103 (2001) (subsequent and intervening history omitted); *see also* 47 C.F.R. §§ 1.1401-1.1418. As reflected in federal law, the pole attachment rate differs depending on whether the pole attachment is used by a telecommunications carrier or cable operator providing telecommunications services, or a cable operator providing cable services, as each of those terms is defined in the Communications Act. 47 U.S.C. § 224(d), (e); 47 C.F.R. § 1.1409(e). Cable attachments used to offer commingled cable television and Internet access (cable modem) services are subject to the rate for cable television attachments. *See, e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*,

[Ameren] is required under 47 U.S.C. § 224 to permit attachment"); Agreement at 2nd Whereas Clause (stating that Ameren shall allow Cable One to install pole attachments on Plaintiff's facilities "subject in all instances to 47 U.S.C. § 224").

13 F.C.C.R. 6777, ¶ 34 (1998), *aff'd National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) (intervening history omitted). As discussed further below, the FCC currently is reviewing changes to the rates for all types of pole attachments, and how its pole attachment rules will be applied to VoIP services.

B. The FCC Has Exclusive Jurisdiction to Determine the Classification of VoIP Services { TC "B. The FCC Has Exclusive Jurisdiction to Determine the Classification of VoIP Services" \f C \l "2" }

The FCC has determined that VoIP services² are interstate services that fall under exclusive federal jurisdiction, and thus, only the FCC has the right to regulate or classify VoIP services. *See Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 F.C.C.R. 22404, ¶ 1 (2004) ("*Vonage Order*"), *aff'd, Minn. Pub. Utils. Comm'n v. F.C.C.*, 483 F.3d 570 (8th Cir. 2007). The FCC ruled that VoIP service cannot be regulated by a state "without negating valid federal policies and rules." *Id.* Thus, the FCC has the sole "responsibility and obligation to decide whether certain regulations apply to [VoIP service] and other IP-enabled services having the same capabilities," including the proper classification of such services.³ *Vonage Order* ¶ 1; *see also Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11501, ¶ 21 (1998) (finding that regulatory mandates "depend on application of the statutory categories" and established definitions).

² VoIP service is a type of IP-enabled service. *See IP-Enabled Services*, 19 F.C.C.R. 4863, ¶ 1 (2004) (including VoIP services in the larger category of "services and applications making use of Internet Protocol (IP)," which are called "IP-enabled services"). A further subset of VoIP services is a service defined as an "interconnected VoIP service," which permits VoIP service subscribers to send calls to and receive calls from the public switched telephone network. *See* 47 C.F.R. § 9.3 (defining "interconnected VoIP service" as "a service that: (1) Enables real-time, two way voice communications; (2) Requires a broadband connection from the user's location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network"). Cable One's voice service is deemed to be an interconnected VoIP service.

³ The same applies to VoIP services offered by cable companies. *See Vonage Order* ¶ 32.

On review, the Eighth Circuit affirmed the FCC's stated need for regulation of VoIP services on a national level, and found the FCC's conclusions deserved "'weight'" because the FCC "has a 'thorough understanding of its own [regulatory framework] and its objectives and is uniquely qualified to comprehend the likely impact of state requirements.'" See *Minn. Pub. Utils. Comm'n*, 483 F.3d at 580 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000)). The FCC's exclusive jurisdiction over the classification and regulation of VoIP services has been reaffirmed on several other occasions as well. See, e.g., *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 543 F. Supp. 2d 1062 (D. Neb. 2008), *aff'd*, 564 F.3d 900 (8th Cir. 2009); *N.M. Pub. Regulation Comm'n v. Vonage Holdings Corp.*, 640 F. Supp. 2d 1359 (D.N.M. 2009).

C. The FCC Currently Is Reviewing the Appropriate Classification of VoIP Services { TC "C. The FCC Currently Is Reviewing the Appropriate Classification of VoIP Services" \FC \ "2" }

While the FCC has determined that it has the exclusive jurisdiction to classify and regulate VoIP services as discussed above, the FCC has not yet determined how VoIP services should be classified, including whether VoIP services fall within the definition of "telecommunications service" or whether providers of such services are considered "telecommunications carriers" as those terms are defined in the Communications Act. See, e.g., WC Docket No. 06-122, *Universal Service Contribution Methodology; et al.*, Declaratory Ruling, FCC 10-185, n.63 (rel. Nov. 5, 2010) ("We have not determined whether interconnected VoIP services should be classified as telecommunications services or information services under the Communications Act."), available at 2010 WL 4411035; WC Docket No. 10-90, *et al.*, *Connect America Fund, et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, ¶ 73 (rel. Feb. 9, 2011) ("*FCC 2011 NPRM*") ("To date, the [FCC] has

not classified interconnected VoIP service as either an information service or a telecommunications service.”), available at 2011 WL 466775.

IP-Enabled Services Rulemaking. In February 2004, the FCC initiated a rulemaking proceeding to investigate the appropriate regulatory treatment of VoIP and other IP-enabled services. *IP-Enabled Services*, 19 F.C.C.R. 4863, ¶ 1 (2004) (“*IP-Enabled Services NPRM*”). The FCC highlighted the importance of regulating VoIP services appropriately, including applying the correct regulatory classification to the services. *IP-Enabled Services NPRM* ¶ 42 (noting the importance of classifying a service and discussing how regulatory treatment flows from classification of services). This pending rulemaking addresses the issue that is at the core of this case - whether VoIP service, or a particular subset of VoIP service, should be classified as a “telecommunications service” or an “information service,” and the regulatory obligations that would flow from each classification. *IP-Enabled Services NPRM* ¶¶ 42-44.

February 2011 NPRM. In February 2011, the FCC issued a notice of proposed rulemaking seeking comment on various proposed rule changes to the FCC’s intercarrier compensation and universal service regimes. *See generally FCC 2011 NPRM.* The appropriate regulatory classification of VoIP services is among the issues raised in the proceeding. *FCC 2011 NPRM* ¶ 73 (“We also invite comment on whether we should consider classifying interconnected voice over Internet protocol as a telecommunications service or an information service.”). Thus, in addition to the broader rulemaking discussed above, the issue of how to classify Cable One’s VoIP service also is squarely before the FCC in the *FCC 2011 NPRM* proceeding.

- D. **The FCC Is Currently Reviewing the Appropriate Classification of Pole Attachments Used by VoIP Service Providers and the Rates to Be Applied to Such Attachments** TC "D. The FCC Is Currently Reviewing the

Appropriate Classification of Pole Attachments Used by VoIP Service Providers and the Rates to Be Applied to Such Attachments" (FC ¶ 2" }

In addition to its decisions and proceedings regarding its exclusive jurisdiction over the classification of VoIP services, there are several pending proceedings before the FCC addressing pole attachment issues that go to the heart of Ameren's claims in this case. The FCC currently is considering the exact issue Ameren asks the Court to resolve here, and Ameren has been an active participant in those pending FCC proceedings, which is critical to the primary jurisdiction analysis.⁴ *See, e.g.*, WC Docket No. 09-154, Letter from Thomas B. Magee, to Marlene H. Dortch, Secretary, FCC (filed May 7, 2010) (discussing a meeting between representatives of Ameren Service Company and FCC staff regarding the "serious concerns of the electric utility industry" regarding the FCC's ongoing pole attachment proceedings), Ex. 1; WC Docket No. 07-245, Letter from Raymond A. Kowalski, to Marlene H. Dortch, Secretary, FCC (filed Feb. 15, 2011) (providing information from Ameren Services Company on pole attachment pricing information), Ex. 2. The existence of these ongoing proceedings before the FCC makes a primary jurisdiction "deferral particularly appropriate in this instance." *VarTec*, 2005 WL 2033416, at *4.

⁴ Ameren participated in the FCC proceedings through its affiliate, Ameren Service Company. According to documents filed with the Securities and Exchange Commission, both Ameren and Ameren Service Company are subsidiaries of Ameren Corporation. *See* Ameren Corporation Form 10-K, at Exhibit 21.1 (filed Feb. 26, 2010), available at <http://www.sec.gov/Archives/edgar/data/1002910/000119312510043155/0001193125-10-043155-index.htm>. Ameren also participated in the FCC proceedings through the Utilities Telecom Council, of which Ameren is a member. Ameren's participation in these proceedings clearly demonstrates its understanding that the resolution of what pole attachment rate is required to be paid by cable companies or others offering VoIP services lies with the FCC. *See, e.g.*, WC Docket No. 09-154, Reply Comments of the Edison Electric Institute and Utilities Telecom Council in Support of Petition for Declaratory Ruling (filed Oct. 9, 2009) (supporting the request by the utilities for the FCC to find that VoIP pole attachments are subject to the rate for telecommunications attachments), Ex. 3. Despite Ameren's understanding of the FCC's exclusive jurisdiction, it apparently has sought to waste judicial resources in hope that a less technically informed body will produce a quicker and possibly more favorable result. As discussed below, the legal doctrine of primary jurisdiction is designed to prevent such unnecessary and wasteful efforts.

VoIP Pole Attachment Proceeding. In August 2009, the FCC initiated a proceeding to determine the appropriate rate for pole attachments when a cable company uses the pole attachment to provide VoIP service. *See Pleading Cycle Established for Comments on Petition for Declaratory Ruling of American Electric Power Service Corporation et al. Regarding the Rate for Cable System Pole Attachments Used to Provide Voice over Internet Protocol Service*, 24 F.C.C.R. 11001 (2009). The FCC opened this proceeding in response to a request filed by several utilities, which argued that a FCC ruling was necessary to settle the ongoing controversy between utilities and cable operators regarding the proper pole attachment rate to be applied when a cable operator uses pole attachments to provide VoIP service. *See generally* WC Docket No. 09-154, Petition of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc. for a Declaratory Ruling (filed Aug. 17, 2009), Ex. 4. The utilities ask the FCC to rule that the telecommunications rate formula applies to pole attachments used by cable companies providing VoIP services. *Id.* Notwithstanding the FCC proceeding, Ameren asks the Court to address the same issue here.

Pole Attachment Rate Proceeding. In May 2010, the FCC opened a rulemaking proceeding to revise its pole attachment rules, which included a proposal to establish a uniform pole attachment rate based on the current “cable” rate for all pole attachments. *See generally Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 25 F.C.C.R. 11864 (2010) (“*FCC 2010 Pole Attachment NPRM*”). The FCC’s May 2010 action was a continuation of a rulemaking proceeding it had opened in 2007 and was precipitated by the FCC’s findings in its National Broadband Plan that the current rules governing pole attachments should be modified to promote broadband deployment. *See Connecting America: The National Broadband Plan*, 127 (Mar. 16, 2010) (recommending that the FCC “establish rental rates for

pole attachments that are as low and close to uniform as possible, consistent with Section 224” in order “to promote broadband deployment”), available at 2010 WL 972375; see also *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, 22 F.C.C.R. 20195 (2007). Importantly, the FCC specifically cited to comments filed by Ameren when it acknowledged that disputes over the application of the “cable” or “telecommunications” rates to broadband, VoIP, and wireless services, among other things, was a driving force supporting changes in the current rules and the creation of a uniform pole attachment rate. *FCC 2010 Pole Attachment NPRM* ¶ 115, n.312.

III. ARGUMENT { TC "III. ARGUMENT" \f C \ "1" }

As explained below, the primary jurisdiction doctrine applies with particular force in this case. Ameren’s Petition raises issues that would entangle the Court in technical and policy matters that are currently under review at the FCC. Among other things, Ameren’s allegations would force the Court first to classify Cable One’s VoIP service and then to determine the appropriate rate classification for pole attachments used by VoIP service providers. These determinations are within the FCC’s experience and expertise, and lie at the core of several ongoing FCC proceedings that cover precisely the same matters raised in Ameren’s Petition. Accordingly, this case is uniquely suited for a primary jurisdiction referral to the FCC.

A. The Doctrine of Primary Jurisdiction { TC "A. The Doctrine of Primary Jurisdiction" \f C \ "2" }

The primary jurisdiction doctrine “applies where enforcement of a claim originally cognizable in a court requires the resolution of issues which, under a regulatory scheme, have been placed within the special expertise and competence of an administrative agency.” *Allnet*, 789 F. Supp. at 304. At its core, primary jurisdiction is a common-law doctrine that “is utilized

to coordinate judicial and administrative decision making,” *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303 (CEJ), 2008 WL 4948475, at *1 (E.D. Mo. Nov. 10, 2008), which allows the Court “to refer a matter to the appropriate administrative agency for a ruling in the first instance, even when the matter is initially cognizable by the district court.” *Access Telecomm.*, 137 F.3d at 608 (citing *Iowa Beef Processors, Inc. v. Illinois Cent. Gulf R.R. Co.*, 685 F.2d 255, 259 (8th Cir. 1982)). The doctrine serves two main purposes - the first is to “ensure desirable uniformity in determinations of certain administrative questions” and the second is to “promote resort to agency experience and expertise where the court is presented with a question outside its conventional expertise.” *VarTec Telecom*, 2008 WL 4948475, at *1 (citing *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956)); see also *Access Telecomm.*, 137 F.3d at 608 (“One reason courts apply the doctrine of primary jurisdiction is to obtain the benefit of an agency’s expertise and experience. The principle is firmly established that ‘in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.’ In fact, agency expertise is the most common reason for applying the doctrine. Another reason is to promote uniformity and consistency within the particular field of regulation.”) (quoting *Far East Conference v. United States*, 342 U.S. 570, 574 (1952)) (intervening citations omitted). Use of the doctrine ensures “national uniformity in the interpretation and application of a federal regulatory regime” by permitting the appropriate agency “to have a first look at the problem.” *VarTec Telecom*, 2008 WL 4948475, at *1 (quoting *American Auto. Mfrs. Ass’n v. Massachusetts Dep’t of Env’tl. Prot.*, 163 F.3d 74, 91 (1st Cir. 1998)).

While there is no fixed formula for applying the doctrine of primary jurisdiction, this

Court has enunciated four general factors to be considered when determining if application of the primary jurisdiction doctrine is appropriate. *Allnet*, 789 F. Supp. at 304. These factors are: “1) Whether the question at issue is within the conventional experience of the judge; 2) Whether the question at issue lies peculiarly within the agency’s discretion or requires the exercise of agency expertise; 3) Whether there exists a danger of inconsistent rulings disruptive of a statutory scheme; and 4) Whether a prior application to the agency has been made.” *Id.*; see also *Sprint Spectrum, L.P. v. AT&T Corp.*, 168 F. Supp. 2d 1095, 1098 (W.D. Mo. 2001) (“[I]n considering the propriety of a primary jurisdiction referral, courts focus particularly on two questions: whether the issues raised in a case ‘have been placed within the special competence of an administrative body’ and whether a case poses the possibility of inconsistent outcomes between courts and the agency on issues of regulatory policy.”) (internal citation omitted) (subsequent history omitted).

In the communications arena, primary jurisdiction referrals are appropriate “where judicial resolution of a dispute would preempt the FCC from implementing policy decisions about programs and technical questions.” *Century Tel of Missouri, LLC v. Missouri Pub. Serv. Comm’n*, No. 08-4106-CV-C-NKL, 2009 WL 82066, at *8 (W.D. Mo. Jan. 12, 2009) (citing *Allnet Commc’n Serv., Inc. v. National Exchange Carrier Ass’n, Inc.*, 965 F.2d 1118, 1120-21 (D.C. Cir. 1992)). This is particularly true when a related matter or policy determination is pending before the FCC. *VarTec*, 2005 WL 2033416, at *4; *Southwestern Bell Telephone, L.P. v. Global Crossing Ltd.*, No. 4:04-CV-1573 (CEJ), Memorandum and Order, at 11 (E.D. Mo. Feb. 7, 2006), *recon denied*, 2006 WL 1548832 (E.D. Mo. May 31, 2006). Courts may thus invoke primary jurisdiction “until the FCC has spoken on the technical or policy questions that would determine the outcome.” *CenturyTel*, 2009 WL 82066, at *8 (citing *Allnet Commc’n*

Serv., 965 F.2d at 1122).

B. This Case Is Appropriate for a Primary Jurisdiction Referral { TC "B. This Case Is Appropriate for a Primary Jurisdiction Referral" \f C \ 2" }

Applying the four factors articulated in *Allnet* demonstrates that referral to the FCC in this case would "promote the goals of uniformity, consistency, and utilization of expert knowledge." *Allnet*, 789 F. Supp. at 304.

First, the question at issue in this case is not within the conventional experience of the Court. *Allnet*, 789 F. Supp. at 304. This is not a case of mere enforcement of a pole attachment agreement, which would otherwise be within the Court's jurisdiction. *Cf. Union Electric Co. v. Charter Communications*, No. 4:01CV50 SNL, Memorandum and Order (E.D. Mo. Mar. 12, 2001). In order for the Court to determine whether Cable One has breached the parties' Agreement, the Court would be required to determine the appropriate classification of Cable One's VoIP services, which "is a technical determination far beyond the Court's expertise." *VarTec*, 2005 WL 2033416, at *4. Resolution of this issue would require the Court "to become embroiled in the technical aspects" of Cable One's VoIP service, an area in which the "FCC has far more expertise than the courts." *Access Telecomms.*, 137 F.3d at 609.

Second, the question at issue in this case lies within the FCC's jurisdiction and requires the FCC's expertise. *Allnet*, 789 F. Supp. at 304. Agency expertise is the most common reason for applying the primary jurisdiction doctrine, and "the need to draw upon the FCC's expertise and experience is present here." *Access*, 137 F.3d at 608-609. The FCC is the sole entity tasked with classifying and regulating VoIP services, and it is the FCC that has "sole regulatory control" over the VoIP services offered by Cable One. *Neb. Pub. Serv. Comm'n*, 564 F.3d at 905. Further, the Communications Act specifically tasks the FCC with the regulation of pole

attachments in Missouri, including the rates that may be charged for such attachments. See generally 47 U.S.C. § 224. Judicial resolution of this dispute would therefore “preempt the FCC from implementing policy decisions about programs and technical questions” and “interfere with the FCC’s apparent intent to render its own related policy decisions.” *Century Tel*, 2009 WL 82006, at *8.

Third, there exists a danger of inconsistent rulings that could be disruptive of the statutory and regulatory scheme governing VoIP services and pole attachments. *Allnet*, 789 F. Supp. at 304. The present action involves questions currently under consideration by the FCC, and thus “[t]here is plainly a risk of inconsistent rulings with regard to each of these questions.” *Global Crossing*, No. 4:04-CV-1573, at 11. On several occasions this Court has applied the primary jurisdiction doctrine in cases where there was a related matter or policy determination pending before the FCC. See, e.g., *Global Crossing Ltd.*, No. 4:04-CV-1573, at 11; *VarTec*, 2005 WL 2033416, at *4. The same reasoning applies here as the Court’s “entrance into these determinations would create a risk of inconsistent results among courts and with the [FCC].” *Global Crossing*, No. 4:04-CV-1573, at 9-10 (citing *VarTec Telecom*, 2005 WL 2033416, at *4). Further, the determination to be made by the Court in this case is not unique to Cable One and its resolution will impact VoIP service providers nationwide. *CenturyTel*, 2009 WL 82066, at *8. Therefore, the FCC’s pending proceedings regarding the classification of pole attachments utilized by VoIP service providers as well as the “FCC’s ongoing Rulemaking proceedings concerning VoIP and IP-enabled services make deferral particularly appropriate in this instance.” *VarTec*, 2005 WL 2033416, at *4.

Fourth, the FCC has already been tasked with resolving the key issue in this case. *Allnet*, 789 F. Supp. at 304. As discussed above, a group of utilities has asked the FCC to resolve the

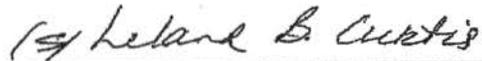
exact issue raised by Ameren here, *i.e.*, what pole attachment rate should be paid by VoIP service providers. Ameren has participated in that pending FCC proceeding, and the FCC's ruling in that matter "will be directly applicable to the present dispute." *Global Crossing*, No. 4:04-CV-1573, at 11.

IV. CONCLUSION { TC "IV. CONCLUSION" \FC \ "1" }

For these reasons, the Court should defer to the FCC's primary jurisdiction and dismiss Ameren's claims. In the alternative, the Court should stay Ameren's claims in their entirety in order to allow the FCC to resolve the core issues that lie within its particular expertise.

Respectfully submitted,

CABLE ONE, INC.



Dated: February 22, 2011

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Received & Inspected

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of February, 2011, the above and foregoing FCC Mail Room Memorandum of Points and Authorities in Support of Cable One, Inc. Motion to Dismiss, or in the Alternative for a Stay, in Deference to the Primary Jurisdiction of the FCC was electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record: Gene J. Brockland and Brian M. Wacker, HERZOG CREBS LLP, Attorneys for Plaintiff Union Electric Company d/b/a Ameren Missouri.

/s/ Leland B Curtis

LIST OF ATTACHMENTS

Number	Attachment
1	WC Docket No. 09-154, Letter from Thomas B. Magee, to Marlene H. Dortch, Secretary, FCC (filed May 7, 2010)
2	WC Docket No. 07-245, Letter from Raymond A. Kowalski, to Marlene H. Dortch, Secretary, FCC (filed Feb. 15, 2011)
3	WC Docket No. 09-154, Reply Comments of the Edison Electric Institute and Utilities Telecom Council in Support of Petition for Declaratory Ruling (filed Oct. 9, 2009)
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