

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington D.C. 20544

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JUN 24 2013

FCC Mail Room

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

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FCC-Competition Policy Division

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").<sup>1</sup> 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").<sup>2</sup> Cable One never filed a pole attachment complaint against Ameren and, for all it appears, has absolutely no intention of doing so.

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

<sup>2</sup> 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.<sup>3</sup>

### **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.

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<sup>3</sup> 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.<sup>4</sup> 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.

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<sup>4</sup> 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.<sup>5</sup>

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

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<sup>5</sup> 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. Pittsburgh 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”).<sup>6</sup>

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

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<sup>6</sup> 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.

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CONCLUSION

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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 Glauser 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

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UNION ELECTRIC COMPANY )  
d/b/a Ameren Missouri, )  
) )  
Plaintiff, )  
) )  
v. ) Cause No. )  
) )  
CABLE ONE, INC., )  
) )  
Defendant. )  
) )  
Serve: C T Corporation System )  
120 South Central Avenue )  
Clayton, MO 63105 )

Cause No.

3

11SL76000072

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.

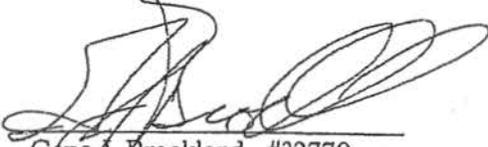
14. Ameren has fully performed all of its obligations under the Agreement.

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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Attorneys for Plaintiff Union Electric Co.  
d/b/a Ameren Missouri

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## Exhibit C

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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UNION ELECTRIC COMPANY )  
d/b/a AMEREN MISSOURI, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CABLE ONE, INC., )  
 )  
Defendant. )

JUN 24 2013  
FCC Mail Room

No. 4:11-CV-299 (CEJ)

**MEMORANDUM AND ORDER**

This matter is before the Court on defendant's motion to dismiss or, in the alternative, to stay proceedings in deference to the Federal Communications Commission's primary jurisdiction. Plaintiff opposes defendant's motion, and the issues have been fully briefed.

**I. Background**

Plaintiff owns utility poles throughout the State of Missouri. Defendant provides residential and commercial cable television and Internet services. Access to utilities poles by cable and telecommunications service providers is governed by the Pole Attachment Act, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 224. Section 224 confers upon the FCC regulatory authority over the access terms and rates in agreements between utility pole owners and cable and telecommunication service providers in the absence of state regulation.

Plaintiff and defendant are parties to a "Master Facilities Licensing Agreement," effective June 17, 2003, pursuant to § 224. The agreement allows defendant to install its network equipment on plaintiff's utility poles. In return, defendant pays fees to

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).<sup>1</sup>

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

---

<sup>1</sup> "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 access 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

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

Received & Inspected

JUN 24 2013

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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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Dated: February 22, 2011

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

Received & Inspected

JUN 24 2013

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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**

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 "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 \1 "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.<sup>1</sup> 47 U.S.C. § 224(b); *see also generally National Cable &*

<sup>1</sup> 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 \ 2" }

The FCC has determined that VoIP services<sup>2</sup> 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.<sup>3</sup> *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).

<sup>2</sup> 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.

<sup>3</sup> 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" \f C \l "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" \f C \ "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.<sup>4</sup> *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.

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<sup>4</sup> 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" \fC \ "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.

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

*Leland B. Curtis*

Dated: February 22, 2011

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CERTIFICATE OF SERVICE

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I hereby certify that, on this 22nd day of February, 2011, the above and foregoing 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 S Curtis

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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)
4	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)

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# Exhibit E

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

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UNION ELECTRIC COMPANY	)	
d/b/a Ameren Missouri,	)	
	)	
Plaintiff,	)	
	)	Case No. 4:11-CV-00299
v.	)	
	)	
CABLE ONE, INC.,	)	
	)	
Defendant.	)	

**PLAINTIFF'S MEMORANDUM  
IN SUPPORT OF ITS MOTION TO LIFT STAY**

**Introduction**

Plaintiff Union Electric Company d/b/a Ameren Missouri ("Ameren") has moved to lift the stay entered September 27, 2011. It has now been one year since the parties last filed Status Reports concerning this matter. Since then, there have been no developments at the FCC that impact this case in any way. This case is needlessly in limbo.

**Argument**

On September 27, 2011, this Court stayed this action at Cable One's request, and over Ameren's objection, on the grounds that the FCC has primary jurisdiction over the classification of services offered by Cable One. Clearly contemplated in the Court's Order was that a complaint would be filed with the FCC to determine the relevant issues. As Ameren explained in its April 3, 2012 Status Report (Doc. 23): (1) Cable One "has done nothing to invoke the FCC's jurisdiction by filing a pole attachment complaint or other action since this case was stayed at its request"; and (2) "[t]he FCC rules do not allow Ameren to file its breach of contract action at the FCC." Cable One has never disputed these facts, but instead has contended that this

Court's Memorandum and Order contemplated that *Ameren* might make such a filing. *Ameren* does not read this Court's Order in that manner and, in any event, such a command would be futile—pole owners such as *Ameren* cannot seek collection of unpaid pole attachment rentals at the FCC and cannot file FCC pole attachment complaints against individual attachers to seek peremptory declarations regarding the nature of their attachments. In fact, under the FCC's pole attachment rules, a utility's complaint right is awkwardly limited to contending "that a rate, term or condition for pole attachment is not just or reasonable." 47 C.F.R. § 1.1402(d)(2). As a practical matter, the FCC's pole attachment complaint process is for attachers, not pole owners such as *Ameren*.

Because of the stay, Cable One has been able thus far to invoke the doctrine of primary jurisdiction and, unless *it* chooses to initiate a proceeding at the FCC, indefinitely forestall *Ameren* from ever enforcing its state law contract rights. But as the Eighth Circuit has recognized, "the doctrine of primary jurisdiction is not a doctrine of futility." *Owner-Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778, 786 (8<sup>th</sup> Cir. 1999) (quoting *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965)). And that is exactly the result here: staying a case without requiring the only party who *can* invoke the FCC's jurisdiction do so renders the reference to the agency futile. The FCC cannot address an issue not before it; and *Ameren* cannot bring the issue to the FCC.

There is no issue implicated by this case that is before the FCC or the D.C. Circuit. Neither of the reconsideration petitions nor the appeal to the D.C. Circuit raises issues concerning the classification of services. According to the Statement of Issues filed at the D.C. Circuit (attached to Plaintiff's Status Report Reply (Doc. #25) as Exhibit A), the petitioners are raising issues concerning attachment rights of incumbent local exchange carriers, the new

formula for the telecom rate, and the "refund period" in complaint proceedings. The two reconsideration petitions (attached to Plaintiff's Status Report Reply (Doc. #25) as Exhibits B and C) raise issues related to operations and to the revised formula for the telecom rate, but neither implicates the classification of services.

There is no reason to continue the stay in this case. Cable One should not be permitted to invoke the doctrine of primary jurisdiction and then, as the sole party with standing to invoke the FCC's jurisdiction to resolve the issues it contends are within the FCC's primary jurisdiction, forestall further proceedings indefinitely. That result nullifies Ameren's state law contract rights and renders primary jurisdiction futile. Unless the stay is lifted, Ameren will be forever without a remedy.

WHEREFORE, Ameren requests that this Court dissolve its stay and allow this case to move forward on the merits.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was sent on this 4th day of April, 2013, electronically by ECF notification, to:

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# Exhibit F

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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,	)	
	)	Case No. 4:11-CV-00299
	)	
	)	
v.	)	
	)	JURY TRIAL DEMANDED
CABLE ONE, INC.,	)	
	)	
Defendant.	)	

**DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES  
IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE STAY**

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April 15, 2013

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

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JUN 24 2013

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UNION ELECTRIC COMPANY	)	
d/b/a Ameren Missouri,	)	
Plaintiff,	)	Case No. 4:11-CV-00299
	)	
v.	)	
	)	JURY TRIAL DEMANDED
CABLE ONE, INC.,	)	
Defendant.	)	

**DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES  
IN OPPOSITION TO PLAINTIFF’S MOTION TO VACATE STAY**

Defendant Cable One, Inc. (“Cable One”) submits this Memorandum of Points and Authorities in opposition to the Motion of Plaintiff Union Electric Company d/b/a Ameren Missouri (“Ameren”) to lift the stay entered by this Court on September 27, 2011.

**I. INTRODUCTION**

In its September 27, 2011 Memorandum and Order granting in part Cable One’s Motion to Dismiss, or in the Alternative for a Stay, in Deference to the Primary Jurisdiction of the FCC (“Order”), the Court determined that Ameren’s claims were best addressed by the Federal Communications Commission (“FCC”) pursuant to the doctrine of primary jurisdiction. *Order* at 9 (“the Court finds that referral under the primary jurisdiction doctrine is appropriate”). Specifically, the Court determined that the classification of the services offered by Cable One “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,” and thus the issues satisfied the factors to be considered in applying the primary jurisdiction doctrine. *Order* at 6, 8. The Court further ordered Ameren to “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.” *Order* at 10.

Ameren is able to seek a determination by the FCC on the classification issue by using the declaratory ruling process established under the FCC’s rules. *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.”). Ameren, however, has not exercised its opportunity under the primary jurisdiction doctrine to seek a determination from the FCC on the issue of how Cable One’s services should be classified. In its April 3, 2012 status report, Ameren reargued its opposition to the Court’s ruling that referral under the primary jurisdiction doctrine was appropriate. Ameren complained that Cable One had taken no action in response to the Court’s *Order* and predicted that the dispute would not be resolved unless the Court lifts the stay and allows the case to proceed on the merits.

Cable One filed a response to Ameren’s status report on April 4, 2012, in which it explained that the *Order* did not require or contemplate that Cable One would seek redress from the FCC. To the contrary, the *Order* specifically contemplated that Ameren would make such a filing, as is made clear in the Court’s direction to *Plaintiff* to file a status report within six months or “upon determination by the Federal Communications Commission of *its* petition, whichever is earlier.” *Order* at 10 (emphasis added).

Ameren then filed a reply to Cable One’s response on April 6, 2012, once again contending that the stay should be lifted because of Cable One’s failure to seek relief at the FCC. Ameren also asserted that it is unable to act on the Court’s primary jurisdiction referral because the FCC’s rules do not allow Ameren to file its breach of contract action at the FCC.

On April 4, 2013, more than 18 months after Court issued the *Order*, Ameren filed a motion to lift the stay. In its motion, Ameren reiterates its assertion that it is unable to act on the Court's primary jurisdiction referral and complains again that Cable One has taken no action in response to the Court's *Order*. Wholly disregarding its own inaction, Ameren argues that the continuance of the stay leaves it without a remedy. Plaintiff's Memorandum in Support of its Motion to Lift Stay at 2 ("Pl's Br.").

There is no legal or factual justification for lifting the stay in order to allow this case to move forward on the merits. Moreover, as explained in Cable One's Renewed Motion to Dismiss filed contemporaneously herewith, the Court should dismiss this proceeding without prejudice in light of Ameren's failure to comply with the Court's primary jurisdiction referral and recent legal pronouncements addressing the issues in this case. Accordingly, Ameren's motion to lift the stay should be denied.

**II. AMEREN MAY NOT USE ITS OWN FAILURE TO COMPLY WITH THE PRIMARY JURISDICTION REFERRAL TO JUSTIFY LIFTING THE STAY**

The factors the Court analyzed before applying the primary jurisdiction doctrine support continuing the stay in this case. Today, as much as in September 2011, the classification of the services offered by Cable One "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." *Order* at 8. Lifting the stay to permit the litigation to move forward on the merits, without first obtaining a determination from the FCC on the classification issue, would put the Court in precisely the situation it sought to avoid by referring the classification issue to the FCC under the primary jurisdiction doctrine. As this Court has found in response to similar requests, "all of the reasons for deferring to the primary jurisdiction of the FCC remain in place at this time." *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303

(CEJ), 2008 WL 4948475, at \*2 (E.D. Mo. Nov. 10, 2008) (denying motion to vacate stay); *Southwestern Bell Tel., L.P. v. Global Crossing Ltd.*, No. 4:04-CV-1573 (CEJ), 2008 WL 4938409, at \*2 (E.D. Mo. Nov. 10, 2008) (same). Ameren notes that “the doctrine of primary jurisdiction is not a doctrine of futility,” Pl’s Br. at 2 (internal quotation marks and citations omitted), but in this case it is only Ameren’s failure to comply with the Court’s *Order* that threatens to render the primary jurisdiction referral futile. Ameren should not be permitted to leverage its own inaction into a rationale for undoing this Court’s well-founded primary jurisdiction referral.

**A. Ameren Is Required to Seek a Determination from the FCC**

The doctrine of primary jurisdiction “requires the court to enable a ‘referral’ to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.” *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). As the Supreme Court has explained, the term “referral” is “loosely described as a process whereby a court refers an issue to an agency.” *Id.* at n.3. But as the Supreme Court recognizes, most statutes have no mechanism where a court can demand or request a determination from an agency. *Id.* Thus, it is up to the plaintiff to initiate the administrative process before the relevant agency. *Id.* A primary jurisdiction “referral” therefore allows “the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling as to the reasonableness of the practice.” *Id.* (citing *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U.S. 247, 267 (1913)). Thus, it is Ameren’s obligation, as the plaintiff, to seek a determination from the FCC on the classification of Cable One’s services.

Apparently seeking to divert attention from its own inaction, Ameren complains that Cable One “has done nothing to invoke the FCC’s jurisdiction by filing a pole attachment

complaint or other action since this case was stayed at its request.” Pl’s Br. at 1 (quoting Plaintiff’s April 3, 2012 Status Report). No support is given, or could be given, for Ameren’s assumption that Cable One is responsible for seeking FCC action. The Court’s *Order* did not require or even suggest that Cable One should file a petition with the FCC. Rather, it specifically contemplated that Ameren might make such a filing:

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.

*Order* at 10 (emphasis added). This is consistent with the Supreme Court’s description of primary jurisdiction referrals and with numerous other primary jurisdiction referrals in which the *plaintiff* is directed to seek a determination from the FCC. *Reiter*, 507 U.S. at n.3 (referral allows “the *plaintiff* a reasonable opportunity within which to apply to the Commission for a ruling as to the reasonableness of the practice”) (emphasis added); *see also Access Telecomm. v. Southwestern Bell Tel. Co.*, 137 F.3d 605 (8th Cir. 1998) (finding primary jurisdiction applied and stating plaintiff’s “next course of action regarding this claim will be to petition directly to the FCC”); *CenturyTel of Missouri, LLC v. Missouri Pub. Serv. Comm’n*, 2009 WL 82066, at \* (W.D. Mo. Jan. 12, 2009) (denying plaintiff’s motion for summary judgment, dismissing plaintiff’s claim without prejudice, referring the matter to the FCC, and directing plaintiff “to petition the FCC directly”); *DeBruce Grain, Inc. v. Union Pac. R.R. Co.*, 983 F. Supp. 1280, 1286 (W.D. Mo. 1997) (finding primary jurisdiction applied and dismissing the case without prejudice to plaintiff’s right to seek relief from the Surface Transportation Board); *Splitrock Properties, Inc. v. Qwest Commc’ns Corp.*, 2010 WL 2867126, at \*13 (D.S.D. July 20, 2010) (staying resolution of the dispute and directing plaintiff Splitrock to contact the FCC to obtain guidance on the appropriate method for bringing its matter before the FCC). Accordingly, it is

Ameren, not Cable One, that is the party with the obligation to invoke the FCC's primary jurisdiction to resolve the classification of Cable One's services.

**B. Ameren Will Not Be Deprived of a Remedy by Continuing the Stay**

Ameren argues that “[t]he FCC rules do not allow Ameren to file its breach of contract action at the FCC.” Pl’s Br. at 1 (quoting Plaintiff’s April 3, 2012 Status Report). Whether or not Ameren is permitted to file its contract claims at the FCC is a red herring. As this Court recognized in its *Order*, “[r]eferral under the primary jurisdiction doctrine is issue based, not claim based.” *Order* at 6. A primary jurisdiction referral seeks the FCC’s guidance on issues within its expertise. *Id.* (citing *Splitrock*, 2010 WL 2867126). Here, the issue for referral to the FCC is not the ultimate question of whether Ameren will prevail on its breach of contract claims, but the specific question of how the services Cable One provides through its pole attachments in Missouri are classified for regulatory purposes. Resolution of the service classification issue will determine whether Cable One’s pole attachments are subject to the contractual rate for telecommunications attachments or the rate for cable attachments. *Cf. Order* at 5 (stating Ameren’s “claim relies upon the classification of [Cable One]’s services”).

If it chose to do so, Ameren *is* able to seek a determination on the classification issue by using the declaratory ruling process established under the FCC’s rules. *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.”). Other utility companies have used this procedure in the past. *See, e.g., 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).<sup>1</sup> This proceeding was opened by the FCC in response to a petition filed by several utilities seeking a declaratory ruling that the telecommunications rate formula applies to pole attachments used by cable companies providing VoIP services. *See* 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).<sup>2</sup> Ameren could have participated in that proceeding by submitting a request that the FCC consider the specific services and/or the specific issues that require determination in this litigation, but it has not done so. Alternatively, Ameren also could have filed a separate petition for a declaratory ruling specific to the classification of the services offered by Cable One for purposes of applying the correct pole attachment rate under the FCC's rules, but it chose not to do so. Ameren has had and continues to have "a reasonable opportunity" to seek a determination from the FCC on the classification issues raised by this case. *Reiter*, 507 U.S. at 269.

**C. Ameren's Failure to Act Does Not Negate the Continued Appropriateness of the Primary Jurisdiction Referral**

Ameren contends that "no issue implicated by this case [ ] is before the FCC or the D.C. Circuit," Pl's Br. at 2, and thus asks this Court to allow the case to move forward on the merits. Passing on the fact that Ameren's own inaction has been a determining factor of what issues are before the FCC, Ameren is incorrect that no issues are pending before the FCC that are implicated by the classification question in this case. The classification of Cable One's services continues to be an "area of agency expertise" that would have "far-reaching consequences that

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<sup>1</sup> A copy is attached hereto as Ex. 1. In previous filings, this proceeding was described as the "VoIP Pole Attachment Proceeding." *See, e.g.*, 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, at 8 (filed Feb. 22, 2011) (hereinafter "Def's 2011 Br.>").

<sup>2</sup> A copy is attached hereto as Ex. 2.

concern the promotion of uniformity and consistency in the regulatory scheme promulgated by the FCC.” *Order* at 6-7 (citing *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934 (8th Cir. 2005)) (internal citations omitted).

The FCC’s exclusive jurisdiction over the classification and regulation of VoIP services has been reaffirmed on several occasions. *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); *New Mexico Pub. Regulation Comm’n v. Vonage Holdings Corp.*, 640 F. Supp. 2d 1359 (D.N.M. 2009). Both of the generic VoIP classification proceedings that were discussed in Cable One’s Motion to Dismiss, Def’s 2011 Br. at 6, remain pending before the FCC. Further, the 2009 declaratory ruling proceeding initiated by the utilities on the issue of how VoIP services should be treated for purposes of pole attachment rates (Def’s 2011 Br. at 8) remains open, although the issue presented in that proceeding has been effectively rendered moot as explained below. The existence of even one open proceeding in which the FCC is considering the classification of VoIP services means that a classification determination by this Court would still risk inconsistency with the regulatory scheme. *See, e.g., VarTec*, 2008 WL 4948475, at \*1 (noting the primary jurisdiction doctrine serves two main purposes - to “ensure desirable uniformity in determinations of certain administrative questions” and to “resort to agency experience and expertise where the court is presented with a question outside its conventional expertise”) (citing *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956)); *Access Telecomm.*, 137 F.3d at 608 (“Another reason is to promote uniformity and consistency within the particular field of regulation.”).

Ameren is also wrong about the relevance of the FCC’s April 7, 2011 decision to the classification issues present in this case. Pl’s Br. at 2-3. The FCC’s decision setting forth new

regulations governing pole attachments was recognized and discussed in the *Order* as further support for application of the primary jurisdiction doctrine.<sup>3</sup> *Order* at 8 (citing *Implementation of Section 224 of the Act*, 26 F.C.C.R. 5240 (2011) (“*April 7 FCC Order*”). In the *April 7 FCC Order*, the FCC reaffirmed that the law contemplates only two types of pole attachment rates – one for the provision of telecommunications services and one for the provision of cable services. *April 7 FCC Order* ¶ 154; see also 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*, 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).

In the *April 7 FCC Order*, the FCC recognized the parties’ concerns over what pole attachment rates are applicable in the context of commingled services, “where cable operators or telecommunications carriers also provide services, such as VoIP, that have not been classified.” *April 7 FCC Order* ¶ 154. While the FCC declined to “determine more precisely the specific rate (new telecom rate or cable rate) that should apply in the context of any particular commingled services scenario,” the FCC stated that the telecommunications rate could be applied only to those services that “ultimately are telecommunications services.” *Id.* at n.466. At the same time, the FCC reaffirmed that it “has expressly declined to address the statutory classification of VoIP services.” *Id.* at n.464; see also 47 U.S.C. § 153(1) (defining “interconnected VoIP service” to be an “advanced communications service”). In upholding the FCC’s determinations in the *April 7 FCC Order*, the United States Court of Appeals for the

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<sup>3</sup> A copy of the FCC’s April 7, 2011 Report and Order is attached hereto as Ex. 3.

District of Columbia Circuit confirmed that “telecommunications carriers equals providers of telecommunications services, and vice versa.” *American Electric Power Serv. Corp. v. FCC*, 708 F.3d 183, 187 (D.C. Cir. 2013).<sup>4</sup>

The FCC’s discussion of classification issues in the *April 7 FCC Order*, as further expanded by the D.C. Circuit, provides further support for denial of Ameren’s motion to lift the stay. The VoIP classification issue “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.” *Order* at 6, 8. Determining the appropriate classification of Cable One’s services involves the type of “technical or policy questions” primary jurisdiction was intended to address. *CenturyTel*, 2009 WL 82066, at \*8 (citing *Allnet Commc’n Serv., Inc. v. National Exchange Carrier Ass’n, Inc.*, 965 F.2d 1118, 1122 (D.C. Cir. 1992)). Accordingly, Ameren’s motion to lift the stay should be denied.<sup>5</sup>

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<sup>4</sup> A copy of the DC Circuit’s February 26, 2013 decision is attached hereto as Ex. 4.

<sup>5</sup> Given that the FCC has not “expressly classified” VoIP service as a telecommunications service, the cable rate is the only possible rate that can be applied to Cable One’s VoIP service. See *April 7 FCC Order* at n.466. As explained in Cable One’s Renewed Motion to Dismiss filed contemporaneously herewith, the issue of whether Cable One’s VoIP service is a telecommunications service requiring it to pay the telecommunications pole attachment rate has been resolved, and Ameren’s claims should be dismissed.

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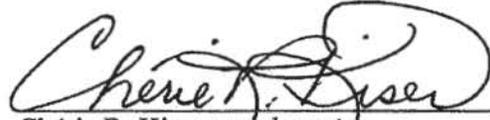
JUN 24 2013

**IV. CONCLUSION**

For the foregoing reasons, the Court should deny Plaintiff's motion to lift the stay. FCC Mail Room

Respectfully submitted,

**CABLE ONE, INC.**



Dated: April 15, 2013

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clumley@lawfirmemail.com

Attorneys for Defendant Cable One, Inc.

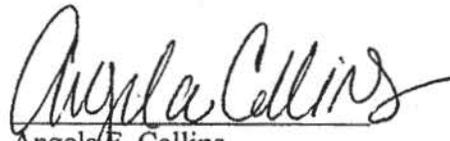
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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 15th day of April 2013, the above and foregoing Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Vacate Stay 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.

  
Angela F. Collins

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**LIST OF ATTACHMENTS**

1. *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)
2. 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)
3. *April 7 FCC Order - Implementation of Section 224 of the Act*, 26 F.C.C.R. 5240 (2011)
4. *American Electric Power Service Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013)

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# Exhibit G

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CABLE ONE, INC.

**CANCELLED**

Missouri P.S.C. Tariff No. 1  
Original Adoption Notice Page

OCT 22 2004

By TC-04-0311  
Public Service Commission  
MISSOURI  
ADOPTION NOTICE

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OCT 21 1997

MISSOURI  
Public Service Commission

Effective May 28, 1997, Post-Newsweek Cable, Inc. changed its corporate name to Cable One, Inc. Cable One, Inc. will continue to operate the public utility formerly named Post-Newsweek Cable, Inc.

Cable One, Inc. hereby adopts, ratifies, and makes its own, in every respect as if the same had been originally filed by it, all tariffs, schedules, rules, notices, contracts, authorities or other instruments whatsoever, filed with the Public Service Commission, State of Missouri, by the Post-Newsweek Cable, Inc. prior to May 28, 1997.

By this notice it also adopts and ratifies all supplements or amendments to any of the above schedules, etc., which the Post-Newsweek Cable, Inc. has filed with said Commission.

Issued: October 21, 1997

Effective: November 20, 1997

ISSUED BY: Thomas P. Basinger, Vice-President  
Post-Newsweek Cable, Inc.  
4742 North 24th Street  
Suite 220  
Phoenix, AZ 86016

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P.S.C. MO. No. 1

MAR 17 1997

Post-Newsweek Cable, Inc.

Original Sheet No. 1

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MO. PUBLIC SERVICE COMMISSION

CANCELLED

OCT 22 2004

By TC-04-0311  
Public Service Commission  
MISSOURI

TITLE SHEET

MISSOURI INTEREXCHANGE TELECOMMUNICATIONS TARIFF

OF

POST-NEWSWEEK CABLE, INC

This tariff contains the descriptions, regulations, and rates applicable to the furnishing of service and facilities for telecommunications services provided by Post-Newsweek Cable, Inc. ("Post-Newsweek" or the "Company") within the State of Missouri. This tariff is on file with the Missouri Public Service Commission. Copies may be inspected during normal business hours at the Company's principal place of business at 4743 North 24th Street, Suite 220, Phoenix, AZ 85016.

Post-Newsweek operates as a competitive telecommunications company as defined by Case No. TO-88-142 within the State of Missouri.

DATE OF ISSUE: March 17, 1997

Thomas P. Basinger, Vice-President  
Post-Newsweek Cable, Inc.  
4742 North 24th Street  
Suite 220  
Phoenix, AZ 85016

Public Service Commission  
MISSOURI  
EFFECTIVE: ~~March 17, 1997~~

MAY 29 1997

FILED  
97-388  
MAY 29 1997

MISSOURI  
Public Service Commission

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P.S.C. MO. No. 1

MAR 17 1997  
Original Sheet No. 2

Post-Newsweek Cable, Inc.

MO. PUBLIC SERVICE COM.

WAIVER OF RULES AND REGULATIONS

Pursuant to Case No. TA-97-\_\_\_\_\_, the following statutes and rules have been waived for purposes of offering telecommunications services as set forth herein:

STATUTES

Section 392.240(1)	Rates-reasonable average return on investment.
Section 392.270	Property valuation.
Section 392.280	Depreciation rates.
Section 392.290	Issuance of stocks and bonds.
Section 392.310	Issuance of stocks and bonds.
Section 392.320	Issuance of stocks and bonds.
Section 392.330	Issuance of stocks and bonds.
Section 392.340	Reorganization.

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COMMISSION RULES

4 CSR 240-10.020	Income on depreciation fund investments.
4 CSR 240-30.010(2)(C)	Posting exchange rates at central offices.
4 CSR 240-32.030(1)(B)	Exchange boundary maps.
4 CSR 240-32.030(1)(C)	Record of access lines.
4 CSR 240-32.030(2)	Records kept within state.
4 CSR 240-30.040	Uniform System of Accounts.
4 CSR 240-32.050(3-6)	Telephone directories.
4 CSR 240-32.070(4)	Coin telephones.
4 CSR 240-33.030	Inform customers of lowest priced service.
4 CSR 240-33.040(5)	Finance fee.

CANCELLED  
OCT 22 2004  
By TC-04-0311  
Public Service Commission  
MISSOURI

DATE OF ISSUE: March 17, 1997

DATE EFFECTIVE: ~~May 1, 1997~~

Thomas P. Basinger, Vice-President  
Post-Newsweek Cable, Inc.  
4742 North 24th Street  
Suite 220  
Phoenix, AZ 85016

MAY 29 1997

FILED  
97 - 388  
MAY 29 1997

MISSOURI  
Public Service Commission

P.S.C. MO. No. 1

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Post-Newsweek Cable, Inc.

MAR 17 1997  
Original Sheet No. 3

MO. PUBLIC SERVICE COMMISSION

CHECK SHEET

Sheets 1 through 25, inclusive, of this tariff are effective as of the date shown at the bottom of the respective sheet(s). Original and revised sheets as named below comprise all changes from the original tariff and are currently in effect as of the date on the bottom of this page.

SHEET	REVISION
1	Original
2	Original
3	Original
4	Original
5	Original
6	Original
7	Original
8	Original
9	Original
10	Original
11	Original
12	Original
13	Original
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SYMBOLS

The following are the only symbols used for the purpose indicated below:

- D - Delete or Discontinue
- I - Change Resulting In An Increase to a Customer's Bill
- M - Moved From Another Tariff Location
- N - New
- R - Change Resulting In A Reduction to A Customer's Bill
- T - Change In Text or Regulation But No Change In Rate or Charge

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## TARIFF FORMAT

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**A. Sheet Numbering** - Sheet numbers appear in the upper right corner of the page. Sheets are numbered sequentially. However, new sheets are occasionally added to the tariff. When a new sheet is added between sheets already in effect, a decimal is added. For example, a new sheet added between sheets 14 and 15 would be 14.1.

**B. Sheet Revision Numbers** - Revision numbers also appear in the upper right corner of each page. These numbers are used to determine the most current sheet version on file with the MPSC. For example, the 4th revised Sheet 14 cancels the 3rd revised sheet 14. Because of various suspension periods, deferrals, etc. the MPSC follows in its tariff approval process, the most current sheet number on file with the Commission is not always the tariff page in effect. Consult the Check Sheet for the sheet currently in effect.

**C. Paragraph Numbering Sequence** - There are nine levels of paragraph coding. Each level of coding is subservient to the next higher level:

- 2.
- 2.1
- 2.1.1
- 2.1.1.A.
- 2.1.1.A.1.
- 2.1.1.A.1.(a)
- 2.1.1.A.1.(a).I.
- 2.1.1.A.1.(a).I.(i).
- 2.1.1.A.1.(a).I.(i).(1).

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**D. Check Sheets** - When a tariff filing is made with the MPSC, an updated Check Sheet accompanies the tariff filing. The Check Sheet lists the sheets contained in the tariff, with a cross reference to the current revision number. When new pages are added, the Check Sheet is changed to reflect the revision. All revisions made in a given filing are designated by an asterisk (\*). There will be no other symbols used on this page if these are the only changes made to it (i.e., the format, etc. remain the same, just revised revision levels on some pages.) The tariff user should refer to the latest Check Sheet to find out if a particular sheet is the most current on file with the MPSC.

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SECTION 1 - TECHNICAL TERMS AND ABBREVIATIONS **MO PUBLIC SERVICE COMMISSION**

**Access Line** - An arrangement which connects the customer's location to Carrier.

**Account Codes** - Optional, customer defined digits that allow the customer to identify the individual user, department or client associated with a call.

**Off-Line** - service provided on a regular switched line.

**On-Line** - Service provided via a dedicated line.

**PNC** - Used throughout this tariff to mean POST-NEWSWEEK CABLE, INC. unless clearly indicated otherwise by the text.

**Authorization Code** - A numerical code, one or more of which are available to a customer to enable him/her to access the carrier, and which are used by the carrier both to prevent unauthorized access to its facilities and to identify the customer for billing purposes.

**Authorized User** - A person, firm, corporation, or any other entity authorized by the Customer to communicate utilizing the Carrier's service.

**Customer** - The person, firm, corporation, or other entity which orders, cancels, amends or uses service and is responsible for payment of charges and compliance with the Company's tariff.

**Company** - AIT unless otherwise clearly indicated by the context.

**Carrier** - Any authorized telecommunication carrier.

**Commission** - The Missouri Public Service Commission.

**Day** - From 8:00 a.m. up to but not including 5:00 p.m. local time Monday through Friday.

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**Evening** - From 5:00 p.m. up to but not including 11:00 p.m. local time Sunday through Friday.

**MO. PUBLIC SERVICE COMMISSION**

**SECTION 1 - TECHNICAL TERMS AND ABBREVIATIONS, CONT'D**

**Holidays** - The Company observes the following holidays: New Year's Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

**LDCS** - Long Distance Telephone Calling Services provided to a customer at his, her or its locations either switched or dedicated.

**LEC** - Local Exchange Company.

**MPSC** - Missouri Public Service Commission.

**Night/Weekend** - From 11:00 p.m. up to but not including 8:00 a.m. Sunday through Friday, and 8:00 a.m. Saturday up to but not including 5:00 p.m. Sunday.

**Special Access Origination** - Where originating access between the customer and the interexchange carrier is provided on dedicated circuits. The cost of these dedicated circuits is billed by the LEC or other access provider consistent with MPSC rules and orders directly to the end user.

**V & H Coordinates** - Geographic points which define the originating and terminating points of a call in mathematical terms so that the airline mileage of the call may be determined. Call mileage is used for the purpose of rating calls.

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SECTION 2 - RULES AND REGULATIONS

2.1 Undertaking of POST-NEWSWEEK CABLE, INC.

The Company is a facilities-based interexchange resale carrier that provides its services over the networks of major facilities-based carriers from whom it purchases transport services.

The Company's services are furnished for communications originating at specified points within the State of Missouri under terms of this tariff.

The Company operates the communications services provided herein in accordance with the terms and conditions set forth under this tariff. The Company may act as the Customer's agent for ordering access connection facilities provided by other carriers or entities as required in MPSC rules and orders, when authorized by the Customer, to allow connection of a Customer's location to the Company service. The Customer shall be responsible for all charges due for such service arrangement.

The Company's services are provided on a monthly basis unless otherwise provided, and are available twenty-four hours per day, seven days per week.

2.2 Limitations

2.2.1 Service is offered subject to the availability of the necessary facilities and subject to the provisions of this tariff.

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2.2 Limitations, CONT'D.

- 2.2.2 The Company reserves the right to discontinue or limit service when necessitated by conditions beyond its control, or when the Customer is using service in violation of provisions of this tariff, or in violation of the law.
- 2.2.3 The Company does not undertake to transmit messages, but offers the use of Carrier facilities when available, and the Company will not be liable for errors in transmission or for failure to establish connections.
- 2.2.4 All services provided under this tariff are directly controlled by the Company and the Customer may not transfer or assign the use of service without the express written consent of the Company.
- 2.2.5 Prior written permission from the Company is required before any assignment or transfer. All regulations and conditions contained in this tariff shall apply to all such permitted assignees or transferees, as well as all conditions of service.

2.3 Use

Services provided under this tariff may be used for any lawful purpose for which the service is technically suited.

2.4 Liabilities of the Company

- 2.4.1 The Company's liability for damages arising out of mistakes, interruptions, omissions, delays, errors, or defects in transmission which occur in the course of furnishing service or facilities, in no event shall exceed an amount equivalent to the proportionate charge to the Customer for the period during which the faults

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in transmission occur. The customer shall be credited for an interruption of two hours or more at the rate of 1/720th of the monthly charge for the facilities affected for each hour or major fraction thereof that the interruption continues.

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Credit formula: Credit =  $\frac{A}{720} \times B$

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A - Outage time in hours

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B - Total monthly charge for affected facility.

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2.4.2 The Company shall not be liable for claim or loss, expense or damage (including indirect, special or consequential damage), for any interruption, delay, error, omission, or defect in any service, facility or transmission provided under this tariff, if caused by any person or entity other than the Company, by any malfunction of any service or facility provided by any carrier, by an act of God, fire, war, civil disturbance, or act of government, or by any other cause beyond the Company's direct control.

2.4.3 The Company shall not be liable for, and shall be fully indemnified and held harmless by Customer against any claim or loss, expense, or damage (including indirect, special or consequential damage) for defamation, libel, slander, invasion, infringement or copy-right or patent, unauthorized use of any trademark, tradename, or service mark, unfair competition, interference with or misappropriation or violation of any contract, proprietary or creative right, or any other injury to any person, property or entity arising out of the material, data, information, or other content revealed to, transmitted, or used by the Company under this tariff; or for any act or mission of the Customer; or for any personal injury or death of any person caused directly or indirectly by the installation, maintenance, location, condition, operation, failure, presence, use or removal of equipment or wiring provided by the Company, if not directly caused by negligence of the Company.

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SECTION 2 - RULES AND REGULATIONS, CONT'D.

2.4.4 No agent or employee of any carrier shall be deemed to be an agent or employee of the Company.

2.4.5 The Company shall not be liable for any defacement of or damages to the premises of a Customer resulting from the furnishing of services which is not the direct result of the Company's negligence.

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2.5 Deposits

The Company may require deposits from Customers. In the event the Company deems it necessary to request a deposit from Customers, it will comply with Commission rules and regulations. The Company will not require deposits from residential customers.

2.6 Advance Payments

The Company may require an advancement payment from Customers. In the event the Company deems it necessary to request an advance payment, it will comply with Commission rules and regulations. In the event Customer's monthly statement is less than the advance payment, the remainder of the advance payment will be applied to Customer's next bill(s) until the total advance payment is expended.

2.7 Taxes

All state, local and federal taxes (i.e., gross receipts tax, sales tax, municipal utilities tax and federal excise taxes) are listed as separate line items and are not included in the quoted rates.

2.8 Installation and Termination

Service is installed upon mutual agreement between the Customer and the Company. The service agreement does not alter rates specified in this tariff.

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SECTION 2 - RULES AND REGULATIONS, CONT'D.

2.9 Payment for Service And Billing

The Customer is responsible for payment of all regulated charges for service furnished.

- (A) Service is provided and billed in arrears on a monthly (30 days) basis.
- (B) The customer shall have at least 21 days from the rendition of a bill to pay the charges at which time the charges become delinquent.
- (C) The Company may require a deposit if the Customer is unable to establish a good credit rating, or if the Customer has undisputed charges in two (2) out of the last twelve (12) billing periods which have become delinquent. The deposit shall not exceed estimated charges for two months' service based on the average bill during the preceding twelve months or in the case of new applicants, two months' average monthly bill for all subscribers within a customer class. The deposit shall bear interest at a rate of 9% simple interest per annum, and will be returned upon satisfactory payment of all undisputed charges during the last 12 billing periods, or discontinuance of service.
- (D) At the time an application for service is made, an applicant may be required to pay an amount equal to at least one month's service and/or service connection charges, which may be applicable to the customer's account on the first bill rendered.

2.10 Cancellation by Customer

Customer may cancel service by providing 30 days written notice to the Company.

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SECTION 2 - RULES AND REGULATIONS, CONT'D.

2.11 Interconnection

Service furnished by the Company may be connected with the services for facilities of other carriers. The customer is responsible for all charges billed by other carriers for use in connection with the Company's service. Any special interface equipment or facilities necessary to achieve compatibility between carriers is the responsibility of the customer.

2.12 Refusal or Discontinuance by Company

The Company may discontinue the service under the following circumstances, provided suitable notice has been given to the customer, as required:

- (A) Non-payment of any sum due to the Company for service for more than twenty-eight (28) days beyond the date of rendition of the bill for such service.
- (B) A violation of or failure to comply with any regulation governing the furnishing of service.
- (C) An order of a court or other government authority having jurisdiction which prohibits the Company from furnishing service.
- (D) Failure to post a required deposit.
- (E) Material misrepresentation of identity in obtaining service or the use of service in a manner that in the opinion of the Company constitutes fraud or abuse.

Service shall not be disconnected unless written notice by first class mail is sent or delivered to the Customer at least five (5) days prior to the date of the proposed discontinuance. At least twenty-four (24) hours preceding discontinuance, a reasonable effort shall be made to contact the Customer to advise him of the proposed discontinuance and what steps must be taken to avoid it.

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2.13 Interruption of Service

Credit allowances for interruptions of service which are not due to the Carrier's testing or adjusting, to the negligence of the Customer, or to the failure of channels, equipment or communications systems provided by the Customer, are subject to the general liability provisions set forth in Section 2.4 herein. It shall be the obligation of the Customer to notify Carrier immediately of any interruption in service for which a credit allowance is desired by Customer. Before giving such notice, Customer shall ascertain that the trouble is not within his or her control, or is not in wiring or equipment, if any furnished by Customer and connected to Carrier's terminal. Interruptions caused by Customer-provided or Carrier-provided automatic dialing equipment are not deemed an interruption of service as defined herein since the Customer has the option of using the long distance network via local exchange company access.

2.14 Inspection, Testing, and Adjustment

Upon reasonable notice, the facilities provided by the Carrier shall be made available to the Carrier for tests and adjustments as may be deemed necessary by the Carrier for maintenance. No interruption allowance will be granted for the time during which such tests and adjustments are made.

2.15 Tests, Pilots, Promotional Campaigns and Contests

The Company and/or the Carrier may conduct special tests or pilot programs and promotions at their discretion to demonstrate the ease of use, quality of service and to promote the sale of its services. The Company and/or the Carrier may also waive a portion or all processing fees or installation fees for winners of contests and other occasional promotional events sponsored or endorsed by either the Company and/or the Carrier. From time to time, the Company may waive all processing fees for a Customer.

These promotions will be approved by the MPSC with specific starting and ending dates with promotions running under no circumstances longer than 90 days in any 12 month period.

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**SECTION 2 - RULES AND REGULATIONS, CONT'D.**

**2.16 Cost of Collection and Repair**

The Customer is responsible for any and all costs incurred in the collection of monies due the Company and/or the Carrier including legal and accounting expenses. Customer is also responsible for recovery costs of Carrier-provided equipment and any expenses required for repair or replacement of damaged equipment.

**2.17 Late Fee**

A late fee of 1.5% monthly may be charged on any undisputed past due balances beginning 30 days from the mailing date of the bill.

**2.18 Return Check Charges**

A fee of \$15.00 or five percent of the amount of the check, whichever is greater, may be charged for each check returned for insufficient funds.

**2.19 Reconnection Charge**

A reconnection fee of \$50.00 per occurrence may be, at the discretion of the Company, charged when service is re-established for customers who have been disconnected for non-payment.

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SECTION 3 - DESCRIPTION OF SERVICE

3.1 Timing of Calls

- 3.1.1 Long distance usage charges are based on the actual usage of the Company's network services. The Company will determine that a call has been established when the called party's stations answers. When the station answers is determined by hardware answer supervision in which the local telephone company sends a signal to indicate an answer. A call is terminated when either party hangs up.
- 3.1.2 Unless otherwise specified in this tariff, the minimum call duration for billing purposes is eighteen seconds.
- 3.1.3 Unless otherwise specified in this tariff, usage is measured and rounded to the next higher six second increment for billing purposes.
- 3.1.4 There is no billing applied for incomplete calls.
- 3.1.5 The Company service is Accessed by dialing "1".

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3.2 Calculation of Distance

Usage charges for all mileage sensitive products are based on the airline distance between the servicing wire center locations associated with the originating and terminating points of the call.

The distance between the originating and terminating points is calculated by using the "V" and "H" coordinates of the serving wire centers as defined by BellCore (Bell Communications Research), in the following manner:

Step 1 - Obtain the "V" and "H" coordinates for the serving wire center of the customer's switch and the destination point.

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SECTION 3 - DESCRIPTION OF SERVICE, CONT'D.

Step 2 - Obtain the difference between the "V" coordinates of each of the Rate Centers. Obtain the Difference between the "H" coordinates.

Step 3 - Square the differences obtained in Step 2.

Step 4 - Add the squares of the "V" difference and "H" difference obtained in Step 3.

Step 5 - Divide the sum of the square obtained in Step 4 by ten. Round to the next higher whole number if any fraction results from the division.

Step 6 - Obtain the square root of the whole number obtained in Step 5. Round to the next higher whole number if any fraction is obtained. This is the distance between the originating and terminating serving wire centers of the call.

Formula:

Formula: 
$$\sqrt{\frac{(V_1 - V_2)^2 + (H_1 - H_2)^2}{10}}$$

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3.3 Minimum Call Completion Rate

Customers can expect a call completion rate of not less than 90% during peak use periods for all 1+ services. The call completion rate is calculated as the number of call completed (including calls completed to a busy line or to a line which remains unanswered by the called party) divided by the number of calls attempted.

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**SECTION 3 - DESCRIPTION OF SERVICE, CONT'D.**

**3.4 Service Offerings**

- 3.4.1 **Long Distance Calling Service** - is offered through LDDS and is a direct access dial "1" service.
- 3.4.2 **Telephone Calling Card Service Remote Access** service is offered either alone or in conjunction with LDCS service as an optional feature. Remote Access to LDCS service is utilized by Customers when off the network by dialing a 1-800 number and entering an authorization code and dialing the number for which the Customer desires to be connected.
- 3.4.3 **Prepaid Telephone Cards ("Prepaid Calling Cards")**. The Company offers Prepaid Calling Cards which are sold to Customers by retail outlets and utilized on any non-restricted telephone to place calls by dialing a 1-800 number and utilizing a pin number.

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SECTION 4 - RATES

4.0 Rates

4.1. General

Each Customer is charged individually for each call placed through the Carrier at the rates forth below.

Customers are billed based on their use of the long distance service.

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4.2 Rates and Charges

LDCS Usage Rates

Usage rates apply per time of day and day of week, including Holidays, as shown in the following chart.

Rate Period Chart

	MON	TUES	WED	THUR	FRI	SAT	SUN
8:00 AM to 5:00 PM*	DAY RATE PERIOD						
5:00 PM to 11:00 PM*	EVENING RATE PERIOD					EVENING RATE PERIOD	
11:00 PM* to 8:00 AM*	NIGHT RATE PERIOD						

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\* To, but not including. The rate for a call between stations whose access lines are associated with the same LDDS Central Office is the zero mileage rate.

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SECTION 4 - RATES, CONT'D.

4.3. Schedule of Rates

1. Schedule A (switched)

This schedule applies to calls between two on-network stations which use local exchange service access lines or between an on-network station which uses a local exchange service access line and an off-network station or between two off-network stations within the State of Missouri.

<u>Dollar volume of calls</u>	<u>Rates</u>		
	<u>Each</u>		
	<u>6 Seconds or Fraction</u>		
	<u>Day</u>	<u>Eve</u>	<u>Ngt</u>
\$0 - \$200	\$0.0212	\$0.0212	\$0.0212
\$201 - \$1500	\$0.0197	\$0.0197	\$0.0197
\$1501 - and above	\$0.0172	\$0.0172	\$0.0172

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2. Schedule B (dedicated)

This schedule applies to calls between an on-network station which uses a special access line (dedicated lines) and either an on-network station that uses a local exchange service access line or an off-network station in Missouri.

<u>Dollar volume of calls</u>	<u>Rates</u>		
	<u>Each</u>		
	<u>6 Seconds or Fraction</u>		
	<u>Day</u>	<u>Eve</u>	<u>Ngt</u>
\$0 - \$200	\$0.182	\$0.182	\$0.182
\$201 - \$1500	\$0.167	\$0.167	\$0.167
\$1501 - and above	\$0.142	\$0.142	\$0.142

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- 3. a) 800 Inbound (Switched) This schedule applies to calls between two on-network stations which use local exchange service access lines or between an on-network station which uses a local exchange service access line and an off-network station or between two off-network stations within the State of Missouri via a 1-800 number:

<u>Dollar volume of calls</u>	<u>Rates</u>		
	<u>Each</u>		
	<u>6 Seconds or Fraction</u>		
	<u>Day</u>	<u>Eve</u>	<u>Ngt</u>
\$0 - \$200	\$.0220	\$.0220	\$.0220
\$201 - \$1500	\$.0204	\$.0204	\$.0204
\$1501 - and above	\$.0179	\$.0179	\$.0179

- b) 800 Inbound (Dedicated) This schedule applies to calls between an on-network station which uses a special access line (dedicated lines) and either an on-network station that uses a local exchange service access line or an off-network station in Missouri via a 1-800 number:

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Rates  
Each  
6 Seconds or Fraction

<u>Dollar volume of calls</u>	<u>Day</u>	<u>Eve</u>	<u>Ngt</u>
\$0 - \$200	\$.0190	\$.0190	\$.0190
\$201 - \$1500	\$.0174	\$.0174	\$.0174
\$1501 - and above	\$.0149	\$.0149	\$.0149

4. Schedule C

Remote Access (Telephone Calling Card)

From an off-network station a caller dials a 1-800 telephone number which gives the caller access to the LDCS network, the caller then enters an authorization code which allows the dialing of the desired number.

Rates

Usage charges for intrastate calls are charged at a rate specified below per minute based upon the amount of monthly usage and are billed in 6-second increments with the exception of the first 30 seconds which is billed in 30-second increments:

<u>Dollar Rate</u>	<u>Volume of Calls</u>
\$.26	0 - 50
\$.25	51 - 100
\$.24	101 - 200
\$.23	201 +

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5. Prepaid Card Service Rates

The intrastate rate for prepaid calling cards is \$.25 for each minute for all intrastate calls. Charges for Prepaid Card Calling Service are in 60-second increments for completed calls. There are no charges for incomplete calls.

6. Private Line

Rates for private line services offered on an individual case basis (ICB) will be structured to recover the Company's cost of providing the services. Terms of specific ICB contracts will be made available to the Commission upon request on a proprietary basis.

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