

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Wireline Competition Bureau Seeks Comment on	)	WC Docket No. 13-307
Petition of Union Electric Company d/b/a Ameren)	
Missouri for Declaratory Ruling Concerning VoIP)	
Service Offered Using Cable One's Pole Attachments)	
_____)	

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Cable One, Inc. (“Cable One”), by its attorneys and in accordance with the Public Notice issued on December 20, 2013 in the above-referenced docket,¹ respectfully submits its comments on the petition filed by Union Electric Company d/b/a Ameren Missouri (“Ameren”).²

INTRODUCTION AND SUMMARY

The Federal Communications Commission (“Commission” or “FCC”) should deny the declaratory ruling requested by Ameren because it is contrary to law. Instead, the Commission should reaffirm its existing rules and policies on the application of pole attachment rates, which already address the issues raised by Ameren’s Petition.

BACKGROUND

Cable One is a cable television company offering cable television, Internet access (cable modem), and interconnected Voice over Internet Protocol (“VoIP”) services over its cable television broadband network in 18 states, including Missouri. Cable One is registered with the

¹ WC Docket No. 13-307, *Wireline Competition Bureau Seeks Comment on Petition of Union Electric Company d/b/a Ameren Missouri for Declaratory Ruling Concerning VoIP Service Offered Using Cable One’s Pole Attachments*, Public Notice, DA 13-2453 (rel. Dec. 20, 2013) (“Public Notice”).

² Motion for Declaratory Ruling of Union Electric Company d/b/a Ameren Missouri (filed June 24, 2013) (“Ameren Petition”).

Commission as an interconnected VoIP service provider.³ Cable One does not provide telecommunications services, and it is not authorized by the FCC, the Missouri Public Service Commission (“PSC”), or any other state commission to provide telecommunications service.⁴ The voice service provided by Cable One in Missouri⁵ (and all other states in which Cable One operates) is interconnected VoIP service as that service has been defined by the FCC and Congress.⁶

Ameren asks the Commission to issue a declaratory ruling that, under Section 224 of the Communications Act of 1934, as amended (the “Act”), the VoIP service offered over Cable One’s attachments is a “telecommunications service” for purposes of determining the appropriate pole attachment rate.⁷ Ameren filed its Petition in response to referral orders from the United States District Court for the Eastern District of Missouri (“District Court”), which directed

³ 499 Filer Database, available at: <http://fjallfoss.fcc.gov/cgb/form499/499detail.cfm?FilerNum=825949>; see also *Universal Service Contribution Methodology; et al.*, 21 FCC Rcd 7518, ¶ 61, n.205 (2006) (requiring “providers of interconnected VoIP services” to register with the FCC).

⁴ A provider of telecommunications service in Missouri is required to obtain a certificate of public convenience and necessity from the Missouri PSC to operate as a telecommunications company in Missouri. Mo. Rev. Stat. § 392.410; see also Mo. Rev. Stat. § 386.020(52) (defining “telecommunications company” as an entity “owning, operating, controlling or managing any facilities used to provide telecommunications service for hire, sale or resale within [Missouri]”). The definition of “telecommunications service” under Missouri law specifically excludes “interconnected voice over Internet protocol service” from inclusion in the “telecommunications service” category. Mo. Rev. Stat. §§ 386.020(54)(j) (defining “telecommunications service”), 386.020(23) (defining “interconnected voice over Internet protocol service” consistent with the FCC’s definition for interconnected VoIP service).

⁵ A decision by the State Tax Commission of Missouri confirms that Cable One’s VoIP service is not a telecommunications service under Missouri law. See Case Nos. 009-02 & 010-01, *Cable One, Inc. v. Marilyn Baumhoer*, Decision and Order (Mo. St. Tx. Comm’n Aug. 17, 2011), available at <http://168.166.72.65/2011/20111110092351153.pdf>.

⁶ 47 U.S.C. § 153(25) (defining “interconnected VoIP service” with reference to the FCC’s regulations); 47 C.F.R. § 9.3 (defining “interconnected VoIP service”); see also *Union Elec. Co. d/b/a Ameren Mo. v. Cable One, Inc.*, No. 4:11-CV-299 (CEJ), Cable One, Inc. Reply 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, 10-15 (E.D. Mo. April 15, 2013) (attached hereto).

⁷ Ameren Petition at 9; see also Public Notice at 1.

Ameren to seek “a determination by the FCC of the issues raised in [Ameren]’s complaint”⁸ because the FCC is the proper entity to determine “issues of a highly technical nature” in the “regulatory scheme overseen by the FCC” and “in this rapidly changing area of regulation.”⁹ The District Court correctly found that Ameren’s court claims could not avoid “issues that implicate the FCC’s primary jurisdiction.”¹⁰

Since 2003, the relationship between Cable One and Ameren has been governed by a Master Facilities License Agreement (“Agreement”),¹¹ which allows Cable One to obtain pole attachments from Ameren in the state of Missouri.¹² For each attachment request, the Agreement requires Cable One to identify the attachment as a “cable television attachment” or “telecommunications attachment” as those terms are defined in Section 224 of the Act.¹³ Consistent with the statute and the Commission’s rules,¹⁴ the identification of the attachment by Cable One as a “cable television attachment” or a “telecommunications attachment” triggers the amount of rent to be charged for the attachment. Each attachment Cable One has requested

⁸ *Union Elec. Co. d/b/a Ameren Mo. v. Cable One, Inc.*, No. 4:11-CV-299 (CEJ), Memorandum Opinion and Order, 2 (E.D. Mo. May 23, 2013) (“*District Court 2013 Order*”).

⁹ *Union Electric Company d/b/a Ameren Missouri v. Cable One, Inc.*, No. 4:11-CV-299 (CEJ), Memorandum Opinion and Order, 8 (E.D. Mo. Sept. 27, 2011) (“*District Court 2011 Order*”).

¹⁰ *District Court 2011 Order* at 6. Cable One attaches copies of the following pleadings filed by Cable One in the Missouri District Court: (1) Cable One, Inc. Motion to Dismiss and 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 (excluding attachments) (Exhibit 1); (2) Cable One, Inc. Reply 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 (Exhibit 2); (3) Defendant’s Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion to Vacate Stay (excluding attachments) (Exhibit 3); (4) Defendant’s Renewed Motion to Dismiss and Defendant’s Memorandum of Points and Authorities in Support of its Renewed Motion to Dismiss (excluding attachments) (Exhibit 4); and (5) Defendant’s Reply in Support of Its Renewed Motion to Dismiss (Exhibit 5).

¹¹ *See Union Electric Company d/b/a Ameren Missouri v. Cable One, Inc.*, No. 4:11-CV-299 (CEJ), Memorandum in Opposition to Defendant’s Motion to Dismiss or in the Alternative to Stay Proceedings, Exhibit A (E.D. Mo. March 11, 2011).

¹² The regulation and pricing of pole attachments in Missouri is under the Commission’s jurisdiction. *See States that Have Certified that They Regulate Pole Attachments*, 25 FCC Rcd 5541 (2010).

¹³ Agreement at 4.

¹⁴ 47 U.S.C. § 224(d), (e); 47 C.F.R. § 1.1401(e)(1), (2).

under the Agreement has been identified by Cable One as a “cable television attachment.” The Agreement also requires Cable One to notify Ameren if any of its attachments later become “telecommunications attachments.”¹⁵

Ameren accepted Cable One’s attachment application designations as “cable television attachments” for seven (7) years consistent with the parties’ contract and applied the cable attachment rate. In June 2010, Ameren unilaterally re-classified Cable One’s “cable television attachments” as “telecommunications attachments” and invoiced Cable One for those attachments at the then-higher telecom rate. When Cable One disputed the invoice, Ameren claimed that Cable One was now subject to the telecom rate for its attachments in light of Cable One’s provision of VoIP service in Missouri. Ameren initiated its court case when Cable One refused to pay the then-higher telecom rate for its cable television attachments.¹⁶

The timing of Ameren’s actions coincided with the Commission’s May 2010 decision clarifying that attaching entities have a statutory right to use space and cost-saving techniques that are consistent with those used by the pole owners, and a statutory right to timely access to poles.¹⁷ Along with that decision, the Commission also sought comment on its proposal to make pole attachment rates more uniform “to minimize the distortionary effects arising from the differences in current pole rental rates, consistent with the objectives of the National Broadband Plan and the existing statutory framework.”¹⁸ Ameren’s unjustified re-classification of Cable One’s attachments occurred less than a month after the Commission’s notice that it would consider lowering the telecom rate to more closely align with the cable rate.

¹⁵ Agreement at 5, 7.

¹⁶ Cable One has paid, and continues to pay, the cable attachment rate per the terms of the parties’ Agreement.

¹⁷ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 25 FCC Rcd 11864, ¶ 1 (2010) (“2010 Order and FNPRM”).

¹⁸ *2010 Order and FNPRM* ¶¶ 110, 115.

ARGUMENT

I. THE COMMISSION'S DECLARATORY RULING PROCESS IS THE APPROPRIATE PROCEDURE TO ADDRESS THE DISTRICT COURT'S PRIMARY JURISDICTION REFERRAL

The pole attachment rates to be applied under the law (and under the Agreement between Cable One and Ameren) are dependent on the nature of the attacher and the services being provided. The Missouri District Court correctly recognized that such questions “involve[] a technical factual inquiry that is outside of the traditional expertise” of courts, and have “far-reaching consequences that concern the promotion of uniformity and consistency in the regulatory scheme promulgated by the FCC.”¹⁹ This is an area in which the “FCC has far more expertise than the courts.”²⁰ As the Missouri District Court found:

The classification of 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. 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.²¹

The issues raised by Ameren's court complaint go beyond a simple “breach of contract collection lawsuit,”²² and are precisely the types of issues the primary jurisdiction doctrine was intended to address.

The vast majority of primary jurisdiction referrals are brought to the FCC via the declaratory ruling process²³ and involve “party-specific” issues that affect larger regulatory

¹⁹ *District Court 2011 Order* at 6-7 (internal quotations omitted).

²⁰ *Access Telecomms. v. Sw. Bell Tel. Co.*, 137 F.3d 605, 609 (8th Cir. 1998).

²¹ *District Court 2011 Order* at 8.

²² Ameren Petition at 1.

issues within the Commission's expertise.²⁴ The Commission has broad authority to "issue a declaratory order to terminate a controversy or remove uncertainty."²⁵ The purpose of the declaratory ruling process "is to give guidance to affected persons in areas where uncertainty or confusion exists" such that a "case or controversy in the judicial sense is not required."²⁶

When "a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission will seek, in exercising its discretion, to resolve issues arising under the Act that are necessary to assist the referring court."²⁷ The Commission's goal is "to assist the referring court by resolving issues arising under the Act,"²⁸ by "addressing a pending dispute through a declaratory ruling based on existing rules and policies."²⁹ The Commission consistently has

²³ See, e.g., *Petition of GCB Communications, Inc. d/b/a Pacific Communications and Lake Country Communications, Inc. for Declaratory Ruling*, 27 FCC Rcd 7361 (2012) (declaratory ruling in response to primary jurisdiction referral from the U.S. District Court for Arizona); *Petition for Declaratory Ruling on Issues Contained in Thorpe v. GTE*, 23 FCC Rcd 6371 (2008) (order in response to primary jurisdiction referral from U.S. District Court for Middle District of Florida); *Digital Cellular, Inc., Petition for Declaratory Ruling*, 20 FCC Rcd 8723 (2005) (order in response to primary jurisdiction referral from the U.S. District Court for the Central District of California); *Flying J, Inc. and TON Services, Inc., Petition for Expedited Declaratory Ruling*, 18 FCC Rcd 10311 (2003) (order in response to primary jurisdiction from the U.S. District Court for the District of Utah); *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192 (2002) (declaratory ruling in response to a primary jurisdiction referral from the U.S. District Court for the Western District of Missouri); *Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., Inc.*, 10 FCC Rcd 13639 (1995) (declaratory ruling in response to primary jurisdiction referral from U.S. District Court for the District of New Jersey).

²⁴ *District Court 2011 Order* at 7 (recognizing that resolution of these issues have "far-reaching consequences that concern the promotion of uniformity and consistency in the regulatory scheme promulgated by the FCC"); cf. *Ameren Petition* at 2 (claiming declaratory rulings are not appropriate for party-specific issues).

²⁵ 5 U.S.C. § 554(e); see also 47 C.F.R. § 1.2.

²⁶ *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, et al.*, 92 F.C.C.2d 864, ¶ 43 (1983) (subsequent history omitted).

²⁷ *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) without the Associated CSTP III Plans under AT&T Tariff F.C.C. No. 2, et al.*, 18 FCC Rcd 21813, ¶ 15 (2003) (subsequent history omitted).

²⁸ *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) without the Associated CSTP III Plans under AT&T Tariff F.C.C. No. 2, et al.*, 22 FCC Rcd 300, ¶ 3 (2007).

²⁹ *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, n.51 (2002); see also *Application of Kaiser Broad. Corp. and Oak Broad. Systems, Inc.*, 60 F.C.C.2d 961, ¶ 16 (1976) ("Declaratory rulings are issued for the purpose of terminating a controversy or removing uncertainty. Implicit in the purpose of this device is the existence of contrasting points of view. That the Commission, in its interpretation, selects a viewpoint not held by a party does not establish that the rule has been changed.") (internal citations omitted).

indicated its willingness “to provide guidance” to courts in the form of a declaratory ruling “where necessary to remove uncertainty or eliminate a controversy.”³⁰

There is no question that the declaratory ruling process is the appropriate procedure to address the District Court’s primary jurisdiction referral.³¹ The narrow issue on which the District Court seeks guidance can be addressed based on existing Commission rules and policies. This is precisely the type of situation declaratory rulings were intended to encompass.³² Accordingly, the Commission should issue a declaratory ruling affirming its prior determinations that the telecom rate for pole attachments only applies to telecommunications carriers or providers of telecommunications services.

II. THE TELECOM POLE ATTACHMENT RATE DOES NOT APPLY TO VOIP SERVICES AND VOIP SERVICE PROVIDERS

A. The Telecom Rate Applies Only to Telecommunications Carriers or Providers of Telecommunications Services

As early as 1991, the Commission ruled that “a cable operator may seek Commission-regulated rates for all pole attachments within its system, regardless of the type of service provided over the equipment attached to the poles.”³³ In the *Heritage* case, a pole owner

³⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 125 (1996) (subsequent history omitted).

³¹ Ameren Petition at 2. This is not the type of dispute the Commission’s pole attachment complaint procedures were intended to address as Ameren claims. *Id.* at 3 (claiming Cable One never filed a pole attachment complaint under 47 U.S.C. § 1.1401). Those procedures allow cable operators, utilities, or telecommunications carriers (with some exceptions) to file a complaint alleging that (1) the entity “has been denied access to a utility pole, duct, conduit, or right-of-way” in violation of the Commission’s rules and/or (2) “that a rate, term, or condition for a pole attachment is not just and reasonable.” 47 C.F.R. § 1.1402(d) (defining “complaint”). Neither of those situations is present here.

³² *See, e.g., Emergency Vessel Location System Requests that a Synthesized Voice Used for Emergency Messages Be Interpreted as Complying with Part 80 of the Commission Rules*, 5 FCC Rcd 6378 (1990) (“a declaratory ruling is appropriate when the Commission interprets an existing rule”); *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, ¶ 20 (2002) (“Our order today clarifies requirements under our *existing* rules.”) (emphasis in original).

³³ *Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company*, 6 FCC Rcd 7099, ¶ 12 (1991) (“*Heritage*”), *aff’d sub nom. Tex. Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

attempted to apply an additional, unregulated rate for pole attachments used by a cable operator to provide “nontraditional” or “nonvideo broadband communications services.”³⁴ The Commission rejected this, finding that the pole owner could not charge the cable operator “different pole attachment rates depending on the type of service being provided over the equipment attached to its poles.”³⁵ The Commission reasoned that “cable might not evolve beyond its traditional video offerings if utilities were able to employ overly restrictive pole attachment agreements to frustrate these potential competitors in the provision of nonvideo services.”³⁶

As part of the Telecommunications Act of 1996 (“1996 Act”),³⁷ Section 224 was amended to extend the pole attachment provisions to telecommunications carriers, and to apply different pole attachment rates based on the nature of the attacher and the service provided by the attacher.³⁸ Under the revised statute (and as it has existed since the 1996 amendments), a “pole attachment” is any attachment “by a cable television system or provider of telecommunications service,”³⁹ and the applicable pole attachment rate is determined by whether the pole attachment is “used by a cable television system” or “used by telecommunications carriers to provide telecommunications services.”⁴⁰ In its implementing regulations, the Commission determined that the new telecom rate would apply to “pole attachments used in the provision of

³⁴ *Heritage* ¶¶ 8, 29.

³⁵ *Heritage* ¶ 32.

³⁶ *Heritage* ¶ 18.

³⁷ Prior to the 1996 Act, only cable operators had a statutory right under Section 224 to access poles. The 1996 Act extended the protections of Section 224 to telecommunications carriers. *See 2010 Order and FNPRM* ¶ 2.

³⁸ 47 U.S.C. § 224(d)(3), (e)(1); *see also* 47 U.S.C. § 224(f) (“A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or rights-of-way owned or controlled by it.”).

³⁹ 47 U.S.C. § 224(a)(4).

⁴⁰ 47 U.S.C. § 224(d)(3), (e)(1).

telecommunications services, including single attachments used jointly to provide both cable and telecommunications service.”⁴¹

In 1998, the Commission reviewed whether and how the provisions of Section 224 applied when cable operators offered commingled Internet access service and traditional cable service over a pole attachment in light of the 1996 Act amendments.⁴² In its *1998 Order*, the Commission determined that the “rates, terms and conditions for all pole attachments by a cable television system” are subject to the provisions of Section 224.⁴³ Whether an attachment is subject to the provisions of Section 224 “does not turn on what type of service the attachment is used to provide,” because Section 224 is applicable to “any attachment by a ‘cable television system.’”⁴⁴ Any other result “would penalize cable entities that choose to expand their services in a way that will contribute ‘to promoting competition in every sector of the communications industry,’ as Congress intended in the 1996 Act.”⁴⁵

In determining the rate to be applied to an attachment providing commingled Internet access service and traditional cable service under Section 224, the Commission concluded it did not need to decide “the precise category into which Internet services fit.”⁴⁶ The Commission already had determined that Internet access service “is not the provision of a telecommunications

⁴¹ *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, ¶ 7 (1998) (“1998 Order”), *aff’d National Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) (intervening history omitted); see also 47 C.F.R. § 1.1409(e)(2) (governing “attachments to poles by any telecommunications carrier or cable operator providing telecommunications services”).

⁴² *1998 Order* ¶ 26. In doing so, the Commission rejected arguments that its *Heritage* decision was “overruled” by the 1996 Act finding that there is “nothing on the face of Section 224 to support the contention that pole owners may charge any fee they wish for Internet and traditional cable services commingled on one transmission facility.” *Id.* ¶ 30.

⁴³ *1998 Order* ¶ 30.

⁴⁴ *1998 Order* ¶ 30.

⁴⁵ *1998 Order* ¶ 31.

⁴⁶ *1998 Order* ¶ 34.

service,” and thus “a cable television system providing Internet service over a commingled facility is not a telecommunications carrier subject to the revised rate mandated by Section 224(e) by virtue of providing Internet service.”⁴⁷ The Commission found that, “[e]ven if the provision of Internet service over a cable television system is deemed to be neither ‘cable service’ nor ‘telecommunications service’ under the existing definitions,” the cable rate was the appropriate rate based on the language of the statute addressing “any attachments by a cable television system” and the Commission’s obligation under Section 224 to ensure just and reasonable pole attachment rates.⁴⁸ On review, the Supreme Court agreed:

No one disputes that a cable attached by a cable television company, which provides only cable television service, is an attachment “by a cable television system.” If one day its cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment “by a cable television system.” The addition of a service does not change the character of the attaching entity - the entity the attachment is “by.” And this is what matters under the statute. . . . The word “by” still limits pole attachments by who is doing the attaching, not by what is attached. So even if a cable television system is only a cable television system “to the extent” it provides cable television, an “attachment . . . by a cable television system” is still (entirely) an attachment “by” a cable television system whether or not it does other things as well.⁴⁹

In 2011, the Commission once more reaffirmed that the law only contemplates two types of pole attachment rates – one for attachments used by telecommunications carriers or providers of telecommunications services and one for attachments used by cable operators.⁵⁰ In doing so, the Commission noted cable operators’ concerns regarding attempts by utilities to “impose rates

⁴⁷ 1998 Order ¶ 33.

⁴⁸ 1998 Order ¶ 34; see also 47 U.S.C. § 224(a)(4) (defining “pole attachment” to mean “any attachment by a cable television system”); (b)(1) (“the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable”).

⁴⁹ *National Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333, 335 (2001).

⁵⁰ *Implementation of Section 224 of the Act*, 26 FCC Rcd 5240, ¶ 154 (2011) (“2011 Order”), *aff’d by American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied* 134 S. Ct. 118 (U.S. Oct. 7, 2013); see also 47 U.S.C. § 224(d), (e); 47 C.F.R. § 1.1409(e).

higher than both the cable rate and the new telecom rate where cable operators or telecommunications carriers also provide services, such as VoIP, that have not been classified.”⁵¹ In response, the Commission made “clear that the use of pole attachments by providers of telecommunications services or cable operators to provide commingled services does not remove them from the pole attachment rate regulation framework under section 224.”⁵² There is no third rate for entities providing VoIP and other broadband services, and the Commission routinely has rejected pole owners’ attempts to impose pole attachment rates outside the structure established by Section 224.⁵³ The Commission concluded that the telecommunications rate can be applied only to those services that “ultimately are telecommunications services.”⁵⁴

In upholding the *2011 Order*, the D.C. Circuit noted the distinction in Section 224 between pole attachments made “by the operators of cable television systems” and “by any ‘provider of telecommunications services.’”⁵⁵ The court recognized that the telecom rate provisions of Section 224 “apply only to telecommunications carriers as defined” in 47 U.S.C. § 153 (excluding incumbent local exchange carriers).⁵⁶ The court further found that, under the Act’s general definitions in 47 U.S.C. § 153, the term “telecommunications carrier equals provider of telecommunications services, and thus vice versa.”⁵⁷ The court’s decision further

⁵¹ *2011 Order* ¶ 154.

⁵² *2011 Order* ¶ 154.

⁵³ *See, e.g., Heritage* ¶ 32 (rejecting pole owner’s attempt to charge a cable operator an additional, unregulated rate for those poles with pole attachments supporting the provision of both video signals and data); *1998 Order* ¶¶ 32-34 (rejecting utilities’ attempt to impose a different rate on cable attachments also used to provide Internet access service).

⁵⁴ *2011 Order* at n.466.

⁵⁵ *American Electric Power Serv. Corp. v. FCC*, 708 F.3d 183, 186 (D.C. Cir. 2013).

⁵⁶ *American Electric Power*, 708 F.3d at 188.

⁵⁷ *American Electric Power*, 708 F.3d at 187.

confirms that an entity must be a “telecommunications carrier” or “provider of telecommunications service” to be subject to the telecommunications pole attachment rate.

Accordingly, the telecom rate applies only to telecommunications carriers or providers of telecommunications services, and the cable rate applies to all other services provided by cable operators. The Commission consistently has rejected attempts by pole owners to require “cable operators to certify that they are *not* providing telecommunications service” as such a requirement “would impose unnecessary administrative burdens on cable operators, utilities, and the Commission.”⁵⁸ Cable operators are not “presumed to be telecommunications carriers,”⁵⁹ and are required to notify a utility only “when the cable operator begins providing telecommunications itself or via third party overloading.”⁶⁰ Ameren and other pole owners are not permitted to exercise their “monopoly power”⁶¹ to ignore a cable operator’s request for a “cable television attachment” and instead apply the telecom attachment rate.

B. VoIP Service Providers and VoIP Services Are Not Subject to the Telecom Pole Attachment Rate

VoIP service is a part of a larger category of “services and applications making use of Internet Protocol (IP),” which are called “IP-enabled services.”⁶² VoIP service is not a telecommunications service, and VoIP service providers are not telecommunications carriers.⁶³

⁵⁸ *Amendment of Commission’s Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, ¶ 84 (2001) (“*2001 Order*”) (emphasis in original).

⁵⁹ *1998 Order* ¶ 35 (“We also disagree with utility pole owners that submit that all cable operators should be ‘presumed to be telecommunications carriers’ and therefore charged at the higher rate unless the cable operator certifies to the Commission that it is not ‘offering’ telecommunications service.”).

⁶⁰ *2001 Order* ¶ 84; *see also 1998 Order* ¶ 35 (“We also reject the suggestions of utility pole owners that the Commission should be responsible for monitoring and enforcing a certification of cable operators regarding their status. The record does not demonstrate that cable operators will not meet their responsibilities.”).

⁶¹ *2011 Order* ¶ 119.

⁶² *IP-Enabled Services*, 19 FCC Rcd 4863, ¶ 1 (2004).

⁶³ *See, e.g., Connect America Fund, et al.*, 26 FCC Rcd 4554, ¶ 73 (2011) (“To date, the Commission has not classified interconnected VoIP service as either an information service or a telecommunications service.”).

The Commission has further defined a subset of VoIP service known as “interconnected VoIP service.”⁶⁴ Congress codified the Commission’s definition of interconnected VoIP service⁶⁵ and further defined interconnected VoIP service as an “advanced communications service.”⁶⁶

In the context of pole attachment rates, if an entity provides a service that is not “expressly classified” as a telecommunications service, the entity is subject to the cable rate.⁶⁷ VoIP service providers and VoIP services are not subject to the telecom rate for pole attachments given that the FCC has not “expressly classified” VoIP service as a telecommunications service.⁶⁸ By contrast, the Commission “has expressly declined to address the statutory classification of VoIP services.”⁶⁹ Such a decision is not necessary for the Commission to reaffirm that the telecom rate for pole attachments only applies to telecommunications carriers or providers of telecommunications services.⁷⁰

C. The Application of the Cable Attachment Rate to VoIP Service Is Consistent with the Commission’s Broadband Deployment Goals

Each of the prior Commission determinations discussed above have one thing in common - the Commission’s recognition that allowing utilities to exercise their “monopoly power over pole access” deters and undermines the deployment of new and innovative broadband services.⁷¹

⁶⁴ 47 C.F.R. § 9.3.

⁶⁵ 47 U.S.C. § 153(25) (defining “interconnected VoIP service” with reference to the FCC’s regulations).

⁶⁶ 47 U.S.C. § 153(1) (defining “interconnected VoIP service” to be an “advanced communications service”).

⁶⁷ 2011 Order at n.466.

⁶⁸ 2011 Order at n.466.

⁶⁹ 2011 Order at n.464.

⁷⁰ Cf. 1998 Order ¶¶ 33-34.

⁷¹ 2010 Order and FNPRM ¶ 104; see also Heritage ¶ 16 (“we reject the notion that Congress intended Section 224 to reach only those pole attachments supporting equipment employed exclusively to distribute television broadcast signals and other video programming”); 1998 Order ¶ 32 (“In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest.”); 2011 Order ¶ 172 (“We are unpersuaded by electric utilities’ claims that the new telecom rate will not promote broadband deployment and is not good public policy.”).

The purpose of Section 224 is “to remedy the inequitable position between pole owners and those seeking pole attachments” and “[t]he nature of this relationship is not altered when the cable operator seeks to provide additional service.”⁷²

Allowing pole owners like Ameren to ignore the attacher’s identification of a pole attachment and unilaterally determine the applicable rate for the attachment only serves to frustrate and undermine the Commission’s “goals of promoting broadband and other communications services.”⁷³ This was the driving force behind the Commission’s decision “to establish [pole rental] rates ‘as low and close to uniform as possible’” given that “pole rental rates play a significant role in the deployment and availability of voice, video, and data networks.”⁷⁴ Arbitrary “distortions” between the telecom rate and the cable rate and “the uncertainty regarding the applicable rate” for broadband services ultimately deters broadband deployment.⁷⁵ Indeed, the Commission noted that cable operators especially were concerned about the “negative effects that a higher pole attachment rate would have on deploying new, advanced services.”⁷⁶ Cable operators feared “that, by offering services that potentially could be classified as ‘telecommunications services,’ a higher telecom rental rate might then be applied to the broadband provider’s entire network.”⁷⁷ The Commission concluded that lowering the telecom rate would “more effectively achieve Congress’ goals under the 1996 Act to promote competition and ‘advanced telecommunications capability’ by both wired and wireless providers

⁷² 1998 Order ¶ 31.

⁷³ 2011 Order ¶ 135.

⁷⁴ 2011 Order ¶¶ 134, 172. The Commission also reasoned that the new telecom rate would “reduce disputes and costly litigation about” the rate formula that applies to “broadband, voice over Internet protocol, and wireless services that distort attachers’ deployment decisions.” *See id.* ¶ 174.

⁷⁵ 2011 Order ¶ 134.

⁷⁶ 2011 Order at n.409.

⁷⁷ 2011 Order ¶ 134.

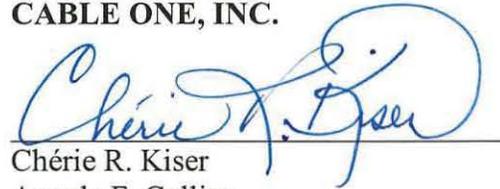
by ‘removing barriers to infrastructure investment.’”⁷⁸ The Commission’s broadband deployment policies and existing rules therefore support denial of Ameren’s requested declaratory ruling.

CONCLUSION

For the foregoing reasons, Cable One urges the Commission to deny the declaratory ruling requested by Ameren and reaffirm the Commission’s long-standing precedent that: (1) there are only two applicable rates for pole attachments - the telecom rate and the cable rate; and (2) the telecom rate for pole attachments applies only to telecommunications carriers or providers of telecommunications services.

Respectfully submitted,

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⁷⁸ 2011 Order ¶ 136.

EXHIBIT 1

Section 224 of the federal Communications Act of 1934, as amended (“Communications Act”), to “provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” 47 U.S.C. § 224(f)(1).

3. The Agreement sets forth the rates, terms, and conditions applicable to Cable One’s use of Ameren’s poles. As required by Section 224 of the Communications Act and the FCC’s rules, the Agreement contains varying rates 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); *see also* Agreement §C.2 (requiring Cable One to “identify each new Attachment as a ‘cable television attachment’ or ‘telecommunications attachment’ as those terms are defined in 47 U.S.C. § 224, for purposes of assessing Pole rent”).

4. The key issue in this case is whether Cable One’s provision of VoIP service permits Ameren to unilaterally re-classify Cable One’s “cable television attachments” as “telecommunications attachments.” Petition ¶¶ 6, 7. Resolution of this issue would require the Court to determine that Cable One’s VoIP service should be classified as a “telecommunications service” subject to the rate for “telecommunications attachments.”

5. The classification of VoIP services is a matter within the expertise, experience, and exclusive jurisdiction of the FCC. *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). To that end, the FCC currently is reviewing the regulatory framework applicable to VoIP

services, including whether those services should be classified as “telecommunications services” for regulatory purposes. *See, e.g., IP-Enabled Services*, 19 F.C.C.R. 4863 (2004) (initiating a rulemaking proceeding on the classification and regulation of VoIP services).

6. Further, the exact issue to be resolved in this case - what pole attachment rate should apply for VoIP services - is currently pending before the FCC in response to a request from several utilities asking the FCC to make such a determination. *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). In addition, the FCC has initiated a broader rulemaking proceeding in which it has proposed changes to the way in which pole attachment rates are calculated for all services, including VoIP services. *See generally Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 25 F.C.C.R. 11864 (2010).

7. 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.” *Southwestern Bell Tel Co. v. Allnet Communications Servs., Inc.*, 789 F. Supp. 302, 304 (E.D. Mo. 1992). Courts typically determine that the doctrine applies for one of two reasons: “1) to secure uniformity and consistency in the regulation of businesses entrusted to a particular agency; and 2) to obtain the benefit of the expertise and experience of the particular agency.” *Id.* An agency’s expertise “is not merely technical but extends to the policy judgments needed to implement an agency’s mandate.” *Allnet Communication Serv., Inc. v. National Exchange Carrier Ass’n, Inc.*, 965 F.2d 1118, 1120 (D.C. Cir. 1992).

8. The FCC has not yet addressed the determination Ameren asks the Court to make here, and a primary jurisdiction referral is therefore appropriate in this case. Resolution of Ameren's Petition would require the Court to resolve legal, technical, and policy disputes that lie within the FCC's particular expertise, and that are the subject of several ongoing FCC proceedings. The FCC's rulings in those pending matters "will be directly applicable to the present dispute," *Southwestern Bell Tel 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), and thus the judicial resolution that Ameren seeks would create the risk of inconsistent decisions. *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) (finding primary jurisdiction appropriate when "the issue is not unique" and "its resolution will impact carriers nationwide").

For these reasons, and as explained in greater detail in the accompanying Memorandum of Points and Authorities, 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 to allow the FCC to resolve the core issues that lie within its particular expertise.

Respectfully submitted,

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Leland B. Curtis

Dated: February 22, 2011

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of February, 2011, the above and foregoing 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/ Lelana B. Curtes

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

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

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

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American Auto. Mfrs. Ass'n v. Massachusetts Dep't of Env'tl. Prot., 163 F.3d 74
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Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000)5

Iowa Beef Processors, Inc. v. Illinois Cent. Gulf R.R. Co., 685 F.2d 255 (8th Cir. 1982)9

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National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002)2-3

N.M. Pub. Regulation Comm'n v. Vonage Holdings Corp., 640 F. Supp. 2d 1359
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Southwestern Bell Tel. Co. v. Allnet Comm. Servs., Inc., 789 F. Supp. 302
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Southwestern Bell Tel. L.P. v. Global Crossing Ltd., No. 4:04-CV-1573 (CEJ),
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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

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

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

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 \i "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 \l "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 \l "2" }

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ARGUMENT{ TC "III. ARGUMENT" \f C \l "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 \l "2" }

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION{ TC "IV. CONCLUSION" \f C \l "1" }

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

Respectfully submitted,

CABLE ONE, INC.



Dated: February 22, 2011

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CERTIFICATE OF SERVICE

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 B Curtis

LIST OF ATTACHMENTS

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

EXHIBIT 2

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Court first must determine that Cable One uses its attachments to Ameren's poles to provide "telecommunications service" as that term is defined in the federal Communications Act of 1934, as amended (the "Communications Act") before it can decide whether Cable One has breached the parties' Master Facilities License Agreement ("Agreement"). If Cable One does not use its attachments to Ameren's poles to provide telecommunications service, then no breach of the contract has occurred. Resolving this essential, threshold question requires the Court to undertake a technical and legal inquiry to determine whether Cable One's Voice over Internet Protocol ("VoIP") service² is telecommunications service,³ which is an area in which the "FCC has far more expertise than the courts" consistent with the doctrine of primary jurisdiction. *Access Telecomms. v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 609 (8th Cir. 1998).⁴ Accordingly, the Court should recognize the primary jurisdiction of the FCC, dismiss Ameren's claims, and require Ameren to seek resolution of this preliminary issue before the FCC. In the alternative, the Court should stay Ameren's claims in their entirety pending the FCC's resolution of its pending proceedings.

² Cable One offers "interconnected VoIP service" as defined by the FCC. 47 C.F.R. § 9.3; 47 U.S.C. § 153(25); *see also* FCC Form 499 Filer Database, *available at* <http://fjallfoss.fcc.gov/cgb/form499/499detail.cfm?FilerNum=825949> (indicating that Cable One is an "Interconnected VoIP" provider).

³ The term "telecommunications service" is defined by the Communications Act. 47 U.S.C. § 153(53).

⁴ Ameren is wrong when it claims Cable One's reliance on *Access Telecomms.* is "misplaced." Pl. Opp'n at 10-11. *Access Telecomms.* sets forth the predicate under which the Court may utilize the primary jurisdiction doctrine to refer this case to the FCC, including a consideration of whether the matter is under the "expertise and experience" of the FCC. *Access Telecomms.*, 137 F.3d at 608. Cable One did not "grossly misstate[]" the holding in the case, Pl. Opp'n at 11, and referred to it only to provide the relevant factors for the primary jurisdiction doctrine. Def. Mem. at 2.

I. RESOLUTION OF THIS CASE REQUIRES A DETERMINATION OF WHETHER CABLE ONE OFFERS TELECOMMUNICATIONS SERVICE, WHICH IS A MATTER WITHIN THE FCC'S EXPERTISE AND EXPERIENCE

This is not “a straightforward breach of contract action” as Ameren claims. Pl. Opp’n at 2. Ameren itself admits that the case involves the Court’s review of relevant statutes and FCC rulings to “determine whether Cable One’s transmissions fall within the classification of telecommunications services subject to the telecom rate under the Agreement.” Pl. Opp’n at 8. The FCC is the appropriate entity to make that determination under the doctrine of primary jurisdiction. *Southwestern Bell Tel. Co. v. Allnet Comm. Servs., Inc.*, 789 F. Supp. 302 (E.D. Mo. 1992); *see also* Def. Mot. ¶ 4; Def. Mem. at 2. The FCC has both the “experience and expertise” to make this determination, *Access Telecomms.*, 137 F.3d at 608, and its numerous pending matters “will be directly applicable to the present dispute.” *Southwestern Bell Tel. 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).

A. Resolution of Ameren’s Claims Goes Well Beyond Asking the Court to Enforce the Terms of a Pole Attachment Agreement

Ameren cannot defeat the FCC’s primary jurisdiction over this matter by claiming that it is a simple dispute involving breach of contract and non-payment of pole attachment fees. Pl. Opp’n at 5. Cable One acknowledges that the FCC has declined to adjudicate pole attachment contract claims relating to “the failure of a party to fulfill its contractual obligations.” *Appalachian Power Co. v. Capitol Cablevision Corp.*, 48 R.R. 2d 574, ¶ 7 (1981). Cable One’s Motion, however, is not asking the FCC to decide whether Cable One has breached the parties’ Agreement, and thus does not run afoul of the FCC’s rulings. Rather, Cable One’s Motion asks the Court to refer to the FCC the determination of whether Cable One’s provision of VoIP services permits Ameren to unilaterally re-classify Cable One’s cable television attachments as

telecommunications attachments. As Ameren admits, whether Cable One has breached the Agreement by failing to pay the telecommunications attachment rate is dependent on the threshold question of whether Cable One offers telecommunications services.. Pl. Opp'n at 8. This is a matter uniquely within the purview of the FCC's primary jurisdiction and "sole regulatory control." *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 564 F.3d 900, 905 (8th Cir. 2009). Indeed, as this Court has determined:

There appears to be no disagreement that traditional telephone service should be classified as a telecom attachment. If a pole attachment involves VoIP, then plaintiff would be entitled to compensation for the attachment only if VoIP is classified as telecommunication. The FCC has not determined whether VoIP should be classified as a telecommunication service, and it is the FCC that has exclusive authority to make this classification decision. To the extent that any of the pole attachments involve VoIP transmissions, the claims asserted in the complaint cannot be resolved without an FCC classification of the technology.

Union Electric Co., d/b/a AmerenUE v. Charter Communications, Inc., No. 4:05-CV-2256 (CEJ), Memorandum and Order, at 7 (Aug. 22, 2006).

This Court's statements in *Charter* support grant of Cable One's Motion despite Ameren's claim otherwise. Pl. Opp'n at 7. Unlike the instant Motion, the *Charter* decision dealt with a motion to remand the case back to state court. *Charter*, No. 4:05-CV-2256, at 1.⁵ While the Court granted the remand motion based on a determination that it did not have federal question jurisdiction over the disputes raised by Ameren, the case also makes clear that the FCC has exclusive jurisdiction over the determination of whether Cable One's VoIP services are

⁵ It makes no difference that a Missouri state court, after the case was remanded, later denied Charter's motion to dismiss or stay. Pl. Opp'n at 9. This state court decision is not binding authority on this Court, especially in light of the Court's own statements that the FCC "has exclusive authority to make [the] classification decision" on which Ameren's claims rest. *Charter*, No. 4:05-CV-2256 (CEJ), at 7; *see also, e.g., U.S. v. Greenberg*, 204 F. Supp. 400, 402 (S.D.N.Y. 1962) ("The sole authority which Schwebel cites for such a proposition is *State v. Owen*, 156 Miss. 487 That case is entirely different on its facts from the case at bar. In any event, it is neither a binding nor persuasive authority in the federal courts.").

appropriately classified as telecommunications services. *Charter*, No. 4:05-CV-2256, at 7-8; *Cf.* Pl. Opp'n at 9.⁶ Thus, regardless of the Court's ultimate decision on the jurisdictional issue in *Charter*, this Court's *Charter* decision stands for the proposition that a decision on the classification of VoIP services is a necessary first step in resolution of Ameren's claims and the FCC is the appropriate entity to make such a classification decision. *Charter*, No. 4:05-CV-2256, at 7.

Moreover, the factual predicate in the *Charter* case can easily be distinguished from the instant matter. As the Court recognized, Charter had "sought and obtained a Certificate of Service Authority from the Missouri Public Service Commission [(“PSC”)] and the [PSC]'s certification as a competitive telecommunications provider." *Charter*, No. 4:05-CV-2256, at 3. Thus, Charter was offering telecommunications services. Further, Charter's advertising stated that its voice service did "not require a computer connection or Internet service to make or

⁶ Ameren is also wrong when it claims that the preemptive effect of the FCC's *Vonage Order* is limited to services "like Vonage's nomadic VoIP service [that] cannot be separated into an intrastate component." Pl. Opp'n at 9 (citing *Vonage Holding Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 F.C.C.R. 22404 (2004) ("*Vonage Order*"), *aff'd*, *Minn. Pub. Utils. Comm'n v. F.C.C.*, 483 F.3d 570 (8th Cir. 2007)). The *Vonage Order* specifically states that "other types of IP-enabled services having basic characteristics similar to DigitalVoice would likewise preclude state regulation to the same extent as described herein. Specifically, these basic characteristics include: a requirement for a broadband connection from the user's location; a need for IP-compatible [customer premises equipment]; and a service offering that includes a suite of integrated capabilities and features Accordingly, to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order." *Vonage Order* ¶ 32; *see also Minn. Pub. Utils. Comm'n*, 483 F.3d at 582-83 (rejecting attempts by state commissions to argue that the *Vonage Order* did not address so-called "fixed" VoIP services). The FCC makes no determination that its exclusive jurisdiction over "other types of IP-enabled services" is based only on whether the service is "nomadic" or inseverable as Ameren claims. Pl. Opp'n at 10. Instead, it is based on the three basic characteristics set forth in the decision. *Vonage Order* ¶ 32; *see also Universal Service Contribution Methodology; et al.*, 25 F.C.C.R. 15651, ¶ 4 (2010) ("Interconnected VoIP services may be fixed or nomadic."). The FCC has never singled out any particular type of interconnected VoIP service (such as "fixed" or "nomadic") for the purposes of preemption or for determining whether and how those services may be subject to regulation, and has consistently applied regulation to interconnected VoIP services uniformly. The only consideration, in the FCC's view, is whether a VoIP service is an "interconnected" VoIP service or not. *See, e.g., IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, 20 F.C.C.R. 10245, ¶ 26 (2005) ("The instant Order does not apply to providers of other IP-based services such as instant messaging or Internet gaming because although such services may contain a voice component, customers of these services cannot place calls to and receive calls from the [public switched telephone network].").

receive phone calls like other VOIP (Voice Over Internet Protocol) providers.” *Charter*, No. 4:05-CV-2256, at 7. In stark contrast, Cable One is not in the business of providing “telecommunications services.” It has not been certified by the Missouri PSC as a competitive telecommunications provider (as discussed further in Section II. below), and Cable One’s advertising materials specify that a customer seeking to use Cable One’s voice service must purchase or lease a Cable One certified modem or embedded multimedia terminal adapter (“eMTA”) in order to receive the service, which provides the customer with the broadband connectivity needed for Cable One’s VoIP service to operate.⁷ The *Charter* case therefore provides no factual or legal support for Ameren’s claims.⁸

B. The FCC Is Poised to Decide Issues Directly Relevant to this Case

As discussed at length in Cable One’s Memorandum, the FCC has numerous ongoing proceedings relevant to the classification of VoIP services generally and to VoIP service providers’ use of pole attachments specifically. Def. Mem. at 5-8. 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; *Southwestern Bell Tel, L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303 (CEJ),

⁷ These materials can be found under Learn More at the following website using service address 1111 for the street number and 63501 for the zip code: <https://www.cableone.net/FYH/Pages/ServiceCheck.aspx>; *see also* <https://www.cableone.net/FYH/Pages/SelectCustomizations.aspx> (discussing eMTA requirement).

⁸ Nor does the *Comcast Virginia* case cited by Ameren support its claims. *See* Pl. Opp’n at 10 (citing *Virginia Elec. & Power Co. v. Comcast*, No. 1:09-CV-01149 (E.D. Va. March 8, 2010)). In *Comcast Virginia*, the court determined that it did not have jurisdiction to address the utility’s federal law claims because the statutes and FCC rules under which those claims were made did not create a private right of action. *Comcast Virginia*, No. 1:09-CV-01149, at 20. The court also declined to utilize its discretion to exercise supplemental jurisdiction over the state law claims because the complaint did not provide specific allegations with respect to those claims. *Id.* at 22-23. On the federal law claims, the Court analyzed its jurisdiction without regard to allegations regarding VoIP after it was conceded that the case did not relate to VoIP service. *Id.* at 3. Thus, the court never reached the defendants’ request for a stay and primary jurisdiction referral “pending a ruling by the FCC on several related matters,” *id.* at 37-38, and never discussed whether a primary jurisdiction referral would have been appropriate.

2005 WL 2033416, at *4 (E.D. Mo. Aug. 23, 2005). The same reasoning applies here. Ameren, however, appears to argue that the Court should not utilize the primary jurisdiction doctrine because the FCC may never rule on these pending proceedings. Pl. Opp'n at n.9. Ameren's argument is both factually incorrect and inapplicable to the issue of a primary jurisdiction referral.⁹

For example, with respect to the FCC's VoIP classification proceedings, Ameren contends that the FCC's latest proceeding to raise the classification of interconnected VoIP service has "only one paragraph of which even mentions VoIP" and will not result a classification of VoIP services. Pl. Opp'n at 9. Ameren is wrong. The FCC's February 2011 notice of proposed rulemaking is replete with citations to the regulatory treatment of interconnected VoIP service traffic. *See, e.g.,* 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, ¶¶ 608-619 (rel. Feb. 9, 2011) ("*FCC 2011 NPRM*"), available at 2011 WL 466775. The classification of interconnected VoIP services has been raised in this context because under current FCC rules, certain intercarrier compensation obligations apply only to telecommunications services provided by telecommunications carriers. 47 U.S.C. § 251(b)(5) (governing reciprocal compensation); 47 C.F.R. § 69.4 (governing access charges); *see also VarTec*, 2005 WL 2033416, at *1 (discussing the "different compensation regimes" applicable to "providers of 'telecommunication services,' and 'enhanced' or 'information services'"). Thus, the issue of what intercarrier compensation regime should apply to interconnected VoIP service traffic is intertwined with the classification of those services. Also incorrect is Ameren's claim

⁹ Moreover, Ameren never addresses its own continued participation in these pending FCC proceedings. *Cf.* Def. Mem. at 7, n.4.

that there is “no sign[] of resolution on the horizon” of VoIP classification issues. Pl. Opp’n at n.9. All five Commissioners of the FCC have announced that the FCC plans to take action on the *FCC 2011 NPRM* “within a few months” after the record is complete in late May 2011. See CC Docket Nos. 96-45, 01-92, *et al.*, *FCC Announces First in a Series of Workshops on Intercarrier Compensation/Universal Service Fund Reform*, DA 11-502 (rel. Mar. 15, 2011).

In addition, Cable One never claimed the FCC’s pending pole attachment proceedings would address the classification of VoIP services. *Cf.* Pl. Opp’n at n.9(3). Cable One instead noted that those proceedings address issues that go to the heart of Ameren’s claims in this case, including the appropriate treatment of pole attachments used to provide VoIP services. Def. Mem. at 7-9 (citing *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*”); *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) (“*2009 VoIP Pole Attachment Case*”)). The FCC has publicly announced its intention to issue an order in the *FCC 2010 Pole Attachment NPRM* proceeding in April 2011, and the item appears on the FCC’s tentative agenda for its April 2011 meeting. See *FCC Announces Tentative Agenda for April 7th Open Meeting* (rel. Mar. 17, 2011), available at <http://www.fcc.gov/fccmeetings.html>; see also The FCC’s Broadband Acceleration Initiative *Reducing Regulatory Barriers to Spur Broadband Buildout* (Feb. 9, 2011) (“In April, the FCC will vote on an Order that streamlines access to pole attachments and reduces the cost while protecting the vital electric power grid.”).¹⁰ That

¹⁰ This document is available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A2.pdf.

decision is expected to rationalize pole attachment rates by creating a uniform rate for all pole attachments notwithstanding the services provided using the pole attachment. *FCC 2010 Pole Attachment NPRM* ¶ 115. Such a decision by the FCC would render moot the *2009 VoIP Pole Attachment Case*, and thus Ameren's claim that "there is no hint of a [FCC] ruling" in the *2009 VoIP Pole Attachment Case* is misleading. Pl. Opp'n at n.9.

Finally, proper use of the primary jurisdiction doctrine does not hinge on when the FCC is expected to make a decision in its pending proceedings; rather, the inquiry is whether 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). In fact, this Court repeatedly has rejected other plaintiffs' claims "that the FCC's failure to act" was a valid basis for "the Court to withdraw the referral to the agency and vacate its stay." *Southwestern Bell Tel. L.P. v. Global Crossing Ltd.*, No. 4:04-CV-1573 (CEJ), 2008 WL 4938409 (E.D. Mo. Nov. 14, 2008); *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303 (CEJ), 2008 WL 4948475 (E.D. Mo. Nov. 10, 2008). In both cases, the Court determined that, even though the cases had been *stayed for 2-3 years*, the primary jurisdiction referral continued to be appropriate because the FCC was continuing to take comments on issues related to the cases and had indicated its intent to address the issues in the near future. *Global Crossing*, 2008 WL 4938409, at *2; *VarTec Telecom*, 2008 WL 4948475, at *2.¹¹ Accordingly, Ameren's unfounded concerns about the potential timing of related FCC decisions have no bearing on the primary jurisdiction analysis.

¹¹ In fact, the *Global Crossing* case was stayed until January 2011 when the plaintiffs voluntarily dismissed it, see generally Civil Docket for Case 4:04-CV-01573-CEJ, and the *VarTec Telecom* case remains stayed today. See generally Civil Docket for Case 4:04-CV-1303-CEJ.

II. PUBLIC RECORDS CONTRADICT AMEREN'S CLAIMS THAT CABLE ONE PROVIDES TELECOMMUNICATIONS SERVICE

As discussed above, the determination of whether Cable One's VoIP service is a telecommunications service is a matter suited for the FCC because 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. While Ameren accuses Cable One of engaging in "diversionary tactic[s]," Pl. Opp'n at 4, it is Ameren that cites Cable One's website and marketing materials to draw inaccurate conclusions to support its claim that Cable One offers telecommunications service. Indeed, Ameren first claims that there is so-called "clear evidence" of Cable One's service offerings while at the same time advocating for "discovery and contractual inspection of Cable One's records" to support its claims. Pl. Opp'n at 4. Ameren cannot have it both ways. While a determination of whether Cable One offers telecommunications service via its attachments to Ameren's utility poles is best left to the FCC as discussed above, Cable One provides the following to refute Ameren's purported evidence that Cable One "indisputably offers" telecommunications service. Pl. Opp'n at 4.¹²

First, as stated in Securities and Exchange Commission ("SEC") documents, Cable One owns and operates a cable television system through which it provides video, Internet access (cable modem), and VoIP services. *See generally* Washington Post Form 10-K (filed Mar. 2,

¹² Interconnected VoIP service is the only voice service Cable One offers. Cable One does not offer voice service "by way of VoIP," nor is VoIP a "method" by which Cable One offers service. Pl. Opp'n at 3, 4. VoIP is the service Cable One offers. 47 C.F.R. § 9.3 (defining "interconnected VoIP service"); 47 U.S.C. § 153(25) (defining "interconnected VoIP service"); *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"). Interconnected VoIP service is a distinctly different service from a telecommunications service that utilizes Internet Protocol to provide the service. *Compare Regulation of Prepaid Calling Card Services*, 21 F.C.C.R. 7290, ¶ 43 (2006) (finding prepaid calling cards "that use IP transport functionality. . . . are just like basic prepaid calling cards that the Commission always has treated as telecommunications services"), *vacated in part, Qwest Servs. Corp. v. F.C.C.*, 509 F.3d 531 (2007) with *Universal Service Contribution Methodology; et al.*, 25 F.C.C.R. 15651, n. 63 (2010) ("We have not determined whether interconnected VoIP services should be classified as telecommunications services or information services under the Communications Act.").

2011) (“10-K”).¹³ The SEC filings of Cable One’s parent contain numerous discussions of Cable One’s provision of VoIP service, including how the regulatory requirements for VoIP service differs from those imposed on the provision of telecommunications service. 10-K at 17-18. These statements deserve substantial weight given the grievous consequences of misstatement or omission. *See, e.g.*, 17 C.F.R. § 240.10b-5(b) (deeming it unlawful “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading” in connection with the purchase or sale of any security); *see also, e.g., TSR Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) (establishing test for materially misleading disclosure statements).

Second, contrary to Ameren’s misrepresentations of Cable One’s website information, Cable One’s website does support the claim that Cable One offers “dedicated private line and business transport services.” Pl. Opp’n at 3, n.3. As reflected on Cable One’s website, the services referenced by Ameren are Internet access services, not telecommunications services. *See Fiber Based Solutions - Cost-Effective Internet & Data Solutions, available at:* <http://www.cableone.net/FYB/Pages/fiberbased.aspx>. Internet access services, regardless of whether they have a purported “transport” component, have been deemed to be information services, not telecommunications services. *See, e.g., Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, et al.*, 17 F.C.C.R. 4798, ¶ 38 (2002) (“Accordingly, we find that cable modem service, an Internet access service, is an information service.”), *aff’d National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967

¹³ This document is available at: <http://www.sec.gov/Archives/edgar/data/104889/000119312511053497/d10k.htm>.

(2005) (intervening history omitted); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, 20 F.C.C.R. 14853, ¶ 14 (2005) (“wireline broadband Internet access service provided over a provider’s own facilities is appropriately classified as an information service because its providers offer a single, integrated service (*i.e.*, Internet access) to end users”) (“*Wireline Broadband Order*”), *aff’d Time Warner Telecom, Inc. v. F.C.C.*, 507 F.3d 205 (3rd Cir. 2007). Thus, Ameren has no legal basis for arguing that Cable One’s provision of Internet access services somehow converts Cable One into a provider of telecommunications service.

Third, the fact that Cable One may offer “E-rate” services to public schools and libraries, Pl. Opp’n at 3, n.4, does not mean Cable One offers telecommunications services. The language referenced by Ameren relates to Cable One’s Internet access services discussed above, which have been determined to be information services, not telecommunications services. *See supra*. More importantly, Ameren is simply wrong on the law when it claims that “[o]nly bona fide providers of telecommunications services” are permitted to offer E-rate services. Pl. Opp’n at n.3. Under the FCC’s E-rate program, schools and libraries are eligible to obtain certain services, including Internet access, at a discounted rate. *See generally Schools and Libraries Universal Service Support Mechanism, et al.*, 25 F.C.C.R. 18762 (2010). The FCC has specifically stated that E-rate support applies to “non-telecommunications services, particularly Internet access, email, and internal connections, provided by both telecommunications carriers and non-telecommunications carriers.” *Id.* ¶ 10. Further, the FCC has stated that interconnected VoIP services are eligible for E-rate funding even though they are provided by non-telecommunications carriers. 47 C.F.R. § 54.517 (“Non-telecommunications carriers shall be eligible for [E-rate] support under this subpart for providing interconnected voice over Internet

protocol (VoIP), voice mail, Internet access, and installation and maintenance of internal connections.”); *see also Requests for Review of Decisions of the Universal Service Administrator by Hancock County School District New Cumberland, West Virginia, et al.*, 24 F.C.C.R. 12730, ¶ 2 (2009) (“Applicants may obtain discounts on Internet access and internal connections irrespective of whether they purchase those offerings from telecommunications or non-telecommunications carriers.”). Thus, Ameren is wrong that Cable One’s provision of E-rate eligible services equates to the provision of telecommunications service.

Fourth, as noted above, Cable One is not authorized by the Missouri PSC to provide telecommunications service in the state of Missouri. *See Missouri PSC, Telecommunications Service Provider Information*.¹⁴ If Cable One were offering any type of telecommunications service in Missouri, it would be required to obtain a certificate of public convenience and necessity from the Missouri PSC to operate as a telecommunications company in Missouri. MO. REV. STAT. § 392.410; *see also* MO. REV. STAT. § 386.020(52) (defining “telecommunications company” as an entity “owning, operating, controlling or managing any facilities used to provide telecommunications service for hire, sale or resale within [Missouri]”). Cable One has not obtained such a certificate, nor is it required to given that the definition of “telecommunications service” under Missouri law specifically excludes “interconnected voice over Internet protocol service” from inclusion in the “telecommunications service” category. MO. REV. STAT. §§ 386.20(54) (defining “telecommunications service”), 386.20(23) (defining “interconnected voice over Internet protocol service” consistent with the FCC’s definition for interconnected VoIP service); *see also* 47 C.F.R. § 9.3 (defining “interconnected VoIP service”).

¹⁴ Available at: <http://www.psc.mo.gov/telecommunications/consumer-information/telecommunications-service-provider-information/telecommunications-service-provider-information>.

Fifth, Cable One is registered with the FCC as an interconnected VoIP service provider, and is not authorized by the FCC to provide telecommunications service. *See* FCC Form 499 Filer Database;¹⁵ *see also Universal Service Contribution Methodology; et al.*, 21 F.C.C.R. 7518, ¶ 61, n.205 (2006) (requiring “providers of interconnected VoIP services” to register with the FCC). If Cable One were offering any type of telecommunications service, it would be required to (1) register with the FCC as an interstate telecommunications carrier to offer domestic long distance telecommunications service and (2) obtain approval to offer international long distance telecommunications service. 47 U.S.C. § 214; 47 C.F.R. §§ 63.18, 64.1195. Cable One is not regulated by the FCC as a telecommunications service provider. This is not a distinction without meaning as Cable One could be subject to significant penalties for its failure to properly classify itself and its service offerings. *See, e.g., AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, et al.*, 20 F.C.C.R. 4826, ¶¶ 30-33 (2005) (subjecting AT&T to retroactive liability for “unilaterally deciding” to reclassify its regulated prepaid calling card offering as an unregulated service), *aff’d and pet. for review denied, Am. Tel. and Tel. Co. v. F.C.C.*, 454 F.3d 329, 334 (D.C. Cir. 2006).

Sixth, Cable One’s use of the marketing brand “Standard Phone” has no bearing on whether Cable One provides telecommunications service. Pl. Opp’n at 3. Cable One’s advertising and marketing materials concerning its VoIP service are in no way material to the classification of that service under the law. As the FCC has recognized, absent any legal compulsion to operate as a telecommunications carrier (*i.e.*, entity that provides telecommunications service), it is ultimately up to the service provider to determine how it will offer service based on “the manner that makes the most sense as a business matter” for that

¹⁵ Available at: <http://fjallfoss.fcc.gov/cgb/form499/499detail.cfm?FilerNum=825949>.

provider. *Wireline Broadband Order* ¶ 89.¹⁶ As discussed above, Cable One repeatedly has “self-certified” and given “public notice” that it provides VoIP service, not telecommunications service, which deserves “significant weight.” *Iowa Telecomm. Servs. v. Iowa Utils. Bd.*, 563 F.3d 743, 749 (8th Cir. 2009) (citing *Verizon California, Inc. v. FCC*, 555 F.3d 270, 275 (D.C. Cir. 2009) (concluding that facts such as self-certification and public notice of intent were “compelling” in the aggregate)). Accordingly, Cable One’s generic use of the term “phone” on its website does not somehow transform Cable One’s voice service into a telecommunications service. *See, e.g., Bright House Networks, LLC et al. v. Verizon California, Inc., et al.*, 23 F.C.C.R. 10704, ¶ 40 (2008) (rejecting Verizon’s claim that a lack of “website posting or any other advertisement regarding the telecommunications at issue” meant that the entities were not telecommunications carriers based on the FCC’s finding that the carriers had “given notice” in other ways such as “obtaining publicly available state certificates and interconnection agreements”), *aff’d Verizon California, Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009).

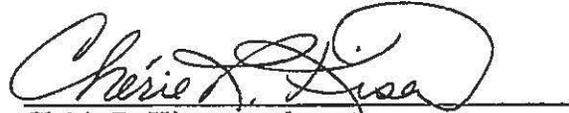
III. CONCLUSION

For these reasons and those stated in Cable One’s Motion and Memorandum in Support, 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.

¹⁶ The key to determining whether an entity is functioning as a telecommunications carrier is how the entity holds itself out to the public. *NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) (“*NARUC I*”); *NARUC v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (“*NARUC II*”). Cable One has never held itself out as a provider of “telecommunications service” or as a “telecommunications carrier” as those terms are defined in the Communications Act. *See* 47 U.S.C. § 153(51), (53).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of March 2011, the above and foregoing Cable One, Inc. Reply 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 for Plaintiff Union Electric Company d/b/a Ameren Missouri: Gene J. Brockland and Brian M. Wacker, HERZOG CREBS LLP.


Angela E. Collins

EXHIBIT 3

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

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

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

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

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

**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).¹ 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).² 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

¹ 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.").

² 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.³ *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

³ 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).⁴

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.⁵

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

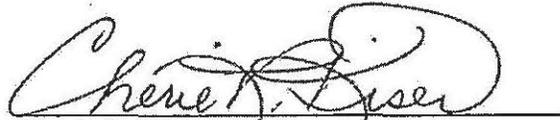
⁵ Given that the FCC has not “expressly classified” VoIP service as a telecommunications service, the cable rate is the only possible rate that can be applied to Cable One’s VoIP service. *See April 7 FCC Order* at n.466. As explained in Cable One’s Renewed Motion to Dismiss filed contemporaneously herewith, 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.

IV. CONCLUSION

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

Respectfully submitted,

CABLE ONE, INC.



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Attorneys for Defendant Cable One, Inc.

Dated: April 15, 2013

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

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)

EXHIBIT 4

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

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

DEFENDANT’S RENEWED MOTION TO DISMISS

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 to renew its motion to dismiss this proceeding without prejudice.¹ In support of this Motion, Cable One states as follows:

1. On September 27, 2011, this Court issued a 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*”). Specifically, the Court found that “referral under the primary jurisdiction doctrine is appropriate” and ordered the matter to be “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 of the Court.” *Order* at 9. The Court further ordered Plaintiff Union Electric Company d/b/a Ameren Missouri (“Ameren”) to “file a status report within six months of the date of this order or upon

¹ Defendant’s Renewed Motion to Dismiss is a continuation of the Motion to Dismiss, or in the Alternative for a Stay, in Deference to the Primary Jurisdiction of the FCC, that Cable One filed on February 22, 2011 (“Motion to Dismiss”). Copies of the Motion to Dismiss and the supporting Memorandum of Points and Authorities (“Def’s 2011 Br.”) are attached as Exs. 1 and 2, respectively, to the Memorandum of Points and Authorities in Support of Cable One, Inc.’s Renewed Motion to Dismiss filed herewith, and are incorporated by reference herein. The Renewed Motion to Dismiss relies on information not available when the original Motion to Dismiss was filed and, in any event, interlocutory orders, including denials of motions to dismiss, “can always be reconsidered and modified by a district court prior to entry of a final judgment.” *First Union Nat’l Bank v. Pictet Overseas Trust Corp., Ltd.*, 477 F.3d 616, 620 (8th Cir. 2007) (quoting *United States v. Hivley*, 437 F.3d 752, 766 (8th Cir. 2006)).

determination by the Federal Communications Commission of its petition, whichever is earlier.” *Order* at 10.

2. Ameren filed a status report on April 3, 2012. In its status report, Ameren reargued its opposition to the Court’s ruling that referral under the primary jurisdiction doctrine was appropriate. Ameren asserted that Cable One had taken no action in response to the Court’s *Order* and predicted that the dispute will not be resolved unless the Court lifts the stay and allows the case to proceed on the merits.

3. On April 4, 2012, Cable One filed a response to Ameren’s status report, in which it explained that the *Order* did not require or contemplate that Cable One would seek redress from the Federal Communications Commission (“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).

4. On April 6, 2012, Ameren filed a reply to Cable One’s response, in which it once again contended 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.

5. On April 4, 2013, Ameren filed a motion to lift the stay, reiterating its assertions that it is unable to act on the Court’s primary jurisdiction referral and that Cable One has taken no action in response to the Court’s *Order*, and arguing that the continuance of the stay leaves Ameren without a remedy.

6. In its Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion

to Vacate Stay, submitted simultaneously with this Motion, Cable One opposes Ameren's motion to lift the stay.

7. Cable One hereby renews its motion to dismiss the complaint based on Ameren's failure to comply with the *Order's* primary jurisdiction referral and, consequently, its continued failure to state a claim upon which relief may be granted. As explained in more detail in the attached Memorandum of Points and Authorities, the stay gave Ameren "a reasonable opportunity" to seek a determination from the FCC regarding the issues of this case. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U.S. 247, 267 (1913). Ameren has failed to exercise its "opportunity to seek an administrative ruling" from the FCC. *Jackson v. Eckrich, Inc.*, 53 F.3d 1452, 1456 (8th Cir. 1995) ("The doctrine of primary jurisdiction requires a court to enable a referral to an agency, staying further proceedings so as to give the parties a reasonable opportunity to seek an administrative ruling.").

8. Despite Ameren's unsupported assertions to the contrary, Ameren is able to seek redress from the FCC through 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."). This procedure has been used by other utility companies 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).² The FCC initiated the VoIP Pole Attachment Proceeding in response to a petition for declaratory ruling filed by several utilities seeking a ruling that the

² Attached to the accompanying Memorandum of Points and Authorities as Ex. 3. In Cable One's previous filings, this proceeding was described as the "VoIP Pole Attachment Proceeding." *See* Def's 2011 Br. at 8.

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).³ Ameren could have participated in the VoIP Pole Attachment Proceeding by submitting a request that the FCC consider the specific services and specific issues that Ameren claims require determination in this litigation, but Ameren chose not to participate in the FCC's proceeding.

9. 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. Instead, Ameren has elected to continue to claim its only option is a breach of contract action that cannot be filed with the FCC. Ameren is wrong. As the Court's *Order* found, the classification of Cable One's services is issue based and squarely within the expertise of the FCC. *Order* at 6-9.

10. In further support of the Renewed Motion to Dismiss, Cable One submits supplemental authority that is relevant to the issues in this case. Specifically, Cable One provides the Court with a copy of the decision issued by the State Tax Commission ("STC") of Missouri, which addresses whether Cable One's Missouri property tax classification should be modified due to its provision of VoIP service in Missouri. Case Nos. 009-02 & 010-01, *Cable One, Inc. v. Marilyn Baumhoer*, Decision and Order (Mo. St. Tx. Comm'n Aug. 17, 2011).⁴ Noting that this was a case of first impression before the STC, the STC found that Cable One's provision of VoIP service did not classify Cable One as a provider of "telecommunications service" (or a "public utility") under Missouri law because the definition of "telecommunications

³ Attached to the accompanying Memorandum of Points and Authorities as Ex. 4.

⁴ Attached to the accompanying Memorandum of Points and Authorities as Ex. 5.

service,” as defined in Missouri Revised Statutes Chapter 386, specifically excludes “Interconnected voice over Internet protocol service,” or VoIP. *Id.* at 7.

11. In addition, Cable One provides the Court with a copy of the decision issued by the United States Court of Appeals for the District of Columbia Circuit in the case *American Electric Power Serv. Corp., v. FCC* on February 26, 2013.⁵ That decision denied the petitions for review of the FCC’s April 7, 2011 decision issuing new regulations governing pole attachments, *Implementation of Section 224 of the Act*, 26 F.C.C.R. 5240 (2011) (“*April 7 FCC Order*”).⁶ Both the *April 7 FCC Order* and the D.C. Circuit’s decision provide further support for dismissal of Ameren’s claims.

12. Ameren’s claims should be dismissed for its failure to comply with the Court’s *Order* to seek a determination from the FCC. Further, Ameren’s claims should be dismissed because the issue of whether Cable One’s VoIP service requires Cable One to pay the telecommunications pole attachment rate has been resolved by the *April 7 FCC Order*, the D.C. Circuit’s decision upholding the *April 7 FCC Order*, and the classification of Cable One’s VoIP service by the Missouri STC.

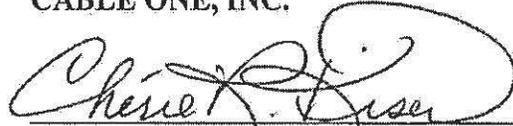
⁵ Attached to the accompanying Memorandum of Points and Authorities as Ex. 7.

⁶ Attached to the accompanying Memorandum of Points and Authorities as Ex. 6.

For these reasons, and as explained in greater detail in the accompanying Memorandum of Points and Authorities, the Court should dismiss Ameren's claims without prejudice.

Respectfully submitted,

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Dated: April 15, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of April 2013, the above and foregoing Renewed Motion to Dismiss 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 R. Collins

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

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

**DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS RENEWED MOTION TO DISMISS**

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

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

**DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS RENEWED MOTION TO DISMISS**

Defendant Cable One, Inc. (“Cable One”) submits this Memorandum of Points and Authorities in support of its renewed motion to dismiss this proceeding without prejudice in light of Plaintiff Union Electric Company d/b/a Ameren Missouri’s (“Ameren”) failure to comply with the Court’s primary jurisdiction referral.¹

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 held 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”). The Court granted Cable One’s motion to stay the proceedings, but denied its motion to dismiss the

¹ Defendant’s Renewed Motion to Dismiss is a continuation of the Motion to Dismiss, or in the Alternative for a Stay, in Deference to the Primary Jurisdiction of the FCC that Cable One filed on February 22, 2011 (“Motion to Dismiss”). Copies of the Motion to Dismiss and the supporting Memorandum of Points and Authorities (Def’s 2011 Br.) are attached hereto as Exhibits 1 and 2, respectively, and are incorporated by reference herein. The Renewed Motion to Dismiss relies on information not available when the Motion to Dismiss was filed and, in any event, interlocutory orders, including denials of motions to dismiss, “can always be reconsidered and modified by a district court prior to entry of a final judgment.” *First Union Nat’l Bank v. Pictet Overseas Trust Corp., Ltd.*, 477 F.3d 616, 620 (8th Cir. 2007) (quoting *United States v. Hivley*, 437 F.3d 752, 766 (8th Cir. 2006)).

complaint. *Id.* 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 issue 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 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. With no activity to recount in its status report on April 3, 2012, Ameren instead reargued its opposition to the Court’s ruling that referral under the primary jurisdiction doctrine was appropriate. Ameren also complained that Cable One had taken no action in response to the Court’s *Order* and predicted that this dispute will 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 Court should reverse itself and lift the stay 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 the Court issued the *Order*, Ameren filed a motion to lift the stay. In the instant 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. Ameren, however, 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.").

As explained in Cable One's Opposition to Plaintiff's Motion to Vacate Stay filed contemporaneously herewith, there is no legal or factual basis for lifting the stay and allowing the case to proceed on the merits. Ameren's motion to lift the stay should be denied.

There is, however, justification for this Court to dismiss this proceeding without prejudice in light of Ameren's failure to comply with Court's primary jurisdiction referral. Ameren has had every opportunity over the past 18 months to seek a determination from the FCC as directed by the Court, but has failed to do so. Moreover, recent legal pronouncements addressing the issues in this case provide further support for dismissal of Ameren's claims. Accordingly, Cable One's renewed motion to dismiss should be granted.

II. THE COURT SHOULD EXERCISE ITS DISCRETION TO DISMISS THIS ACTION WITHOUT PREJUDICE

In the *Order*, the Court observed that "Plaintiff claims that defendant is offering telecommunication services, but has not alleged any specific facts that would establish this."

Order at 5. Ameren’s conclusory allegation that Cable One is offering telecommunications services through pole attachments it has reported to be cable television attachments, and for which it pays the pole attachment rate for cable television services, is the essential footing for Ameren’s entire claim in this case. The Court also held that discovery will not dissipate the need to resolve the classification issue. *Id.* at 6. Thus, absent a determination by the FCC that the challenged services are classified as telecommunications services, Ameren’s complaint is fatally flawed.

A. Ameren Has Failed to Comply with the Court’s Order to Pursue a Determination from the FCC Despite Its Opportunity to Do So

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). The referral to an administrative agency under the primary jurisdiction doctrine does not, however, deprive the court of jurisdiction; the court “has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice.” *Id.* 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.* It is up to the plaintiff to initiate the administrative process before the relevant agency. *Id.* A primary jurisdiction “referral” 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)); see also *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1456 (8th Cir. 1995) (“The doctrine of primary jurisdiction requires a court to enable a referral to an agency, staying further proceedings so as to give the parties a reasonable

opportunity to seek an administrative ruling.”). 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.” Plaintiff’s Memorandum in Support of its Motion to Lift Stay at 1 (“Pl’s Br.”) (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 or other appropriate agency. *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, e.g., 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). It is Ameren, not Cable One, that is the party with the obligation to invoke the FCC's primary jurisdiction to resolve any issue it has regarding the classification of Cable One's services.

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. This in turn will determine whether those pole attachments are subject to the contractual rate for telecommunications service attachments or the rate for cable service attachments.

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).² 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).³

Ameren could have participated in the VoIP Pole Attachment 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 could have filed a separate petition with the FCC seeking a declaratory ruling specific to the classification of Cable One’s services for purposes of applying pole attachment rates, but it chose not to take that path either. 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.

B. It Is All But Certain that Ameren Will Not Be Able to Cure the Defects in Its Pleading

Recent legal pronouncements addressing the classification issues in this case demonstrate that Ameren will not be able to cure the defects in its pleading and provide further support for dismissal of Ameren’s claims. In an August 17, 2011 decision issued by the State Tax

² A copy is attached hereto as Ex. 3. In Cable One’s previous filings, this proceeding was described as the “VoIP Pole Attachment Proceeding.” *See* Def’s 2011 Br. at 8.

³ A copy is attached hereto as Ex. 4.

Commission (“STC”) of Missouri, the STC determined that Cable One’s VoIP service is *not* a telecommunications service under Missouri law. Case Nos. 009-02 & 010-01, *Cable One, Inc. v. Marilyn Baumhoer*, Decision and Order (Mo. St. Tx. Comm’n Aug. 17, 2011).⁴ The case before the STC addressed whether Cable One could be re-classified as a public utility for property tax purposes based on its provision of VoIP service in Missouri. The term “public utility,” however, was not defined in Missouri tax statutes, which required the STC to look to other Missouri law to determine whether Cable One qualified as a public utility.

Under Missouri statutes governing communications providers, the term “public utility” is defined to include telecommunications service, and thus the STC had to determine whether Cable One’s VoIP service qualified as telecommunications service. Relying on the definition of VoIP service adopted by the FCC, the Missouri legislature had specifically excluded VoIP service from the definition of telecommunications service. MO. REV. STAT. § 386.020(23), (43), (54) (defining “interconnected voice over Internet protocol service,” “public utility,” and “telecommunications service”); *see also* 47 C.F.R. § 9.3 (defining “interconnected VoIP service” in the same manner for federal purposes); 47 U.S.C. § 153(25) (defining “interconnected VoIP service” with reference to the FCC’s rules). The Missouri legislature’s decision to exclude VoIP service from the “telecommunications service” classification was a direct response to an earlier order from the Missouri Public Service Commission (“PSC”) holding a cable company offering VoIP service over its cable system should be subjected to traditional regulation as a public utility offering telephone service. *See* Case No. TC-2007-0111, *Staff of the Public Service Commission of the State of Missouri, Complainant, v. Comcast IP Phone, LLC, Respondent*, Report and Order

⁴ A copy is attached as Ex. 5.

(Mo. P.S.C. Nov. 1, 2007).⁵ In that decision, the Missouri PSC claimed regulatory authority over Comcast, holding that the corporation should be treated as a public utility or telecommunications company per Missouri statutes. *Id.* at 6. The Missouri legislature, however, rejected that conclusion and opted to legislatively overrule the PSC by adopting revisions to the statute that specifically excluded VoIP services from the definition of “telecommunications service.” *See, e.g., Medicine Shoppe Intern., Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 334 (Mo. 2005) (en banc) (“An incorrect or otherwise undesirable interpretation of a statute can be changed by the General Assembly.”). The STC therefore concluded that Cable One does not offer telecommunications service under Missouri law, and thus could not be classified as a public utility under Missouri tax law.

Ameren is also wrong about the relevance of the FCC’s April 7, 2011 decision adopting new pole attachment regulations (*Implementation of Section 224 of the Act*, 26 F.C.C.R. 5240 (2011) (“*April 7 FCC Order*”))⁶ to the classification issues present in this case. Pl’s Br. at 2-3. In the *April 7 FCC Order*, the FCC recognized cable operators’ concerns regarding attempts by utilities to apply a different rate to commingled services, such as efforts by utilities to “impose rates higher than both the cable rate and the new telecom rate where cable operators or telecommunications carriers also provide services, such as VoIP, that have not been classified.” *April 7 FCC Order* ¶ 154. In response, the FCC reaffirmed that the law only contemplates 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). While the FCC declined to “determine more precisely the specific rate (new

⁵ A copy of this decision is available at https://www.efis.psc.mo.gov/mpsc/commoncomponents/view_itemno_details.asp?caseno=TC-2007-0111&attach_id=2008006506.

⁶ A copy of the April 7, 2011 Report and Order is attached hereto as Ex. 6.

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; *see also 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) (finding cable attachments used to offer commingled cable television and Internet access (cable modem) services are subject to the rate for cable attachments), *aff’d National Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) (intervening history omitted).

In upholding the FCC’s determinations in the *April 7 FCC Order*, the United States Court of Appeals for the District of Columbia Circuit confirmed that the provisions of Section 224 apply to attachments made by a “cable television system” or by a “provider of telecommunications service.” *American Electric Power Serv. Corp. v. FCC*, 708 F.3d 183, 187-88 (D.C. Cir. 2013).⁷ The D.C. Circuit further found that the term “telecommunications carrier equals provider of telecommunications services, and vice versa.” *Id.* at 187. Thus, an entity must be a “provider of telecommunications service” or a “telecommunications carrier” to be subject to the telecommunications pole attachment rate.

The FCC, however, has not determined VoIP service to be a “telecommunications service” and has not found a VoIP service provider to be a “telecommunications carrier.”⁸ *See*,

⁷ A copy of the DC Circuit’s February 26, 2013 decision is attached hereto as Ex. 7.

⁸ The FCC has determined that VoIP services are interstate 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), *aff’d, Minn. Pub. Utils. Comm’n v. F.C.C.*, 483 F.3d 570 (8th Cir. 2007). 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-

e.g., *Connect America Fund, et al.*, 26 F.C.C.R. 4554, ¶ 73 (2011) (“To date, the [FCC] has not classified interconnected VoIP service as either an information service or a telecommunications service.”); *see also* 47 U.S.C. § 153(1) (defining “interconnected VoIP service” to be an “advanced communications service”). The FCC reaffirmed this in the *April 7 FCC Order* stating that it “has expressly declined to address the statutory classification of VoIP services.” *April 7 FCC Order* at n.464. In the context of pole attachment rates, if a service is not classified as a “telecommunications service,” it must be subject to the cable rate. *Id.* at n.466. 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. *Id.* at n.466.

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 by the Missouri STC decision, the *April 7 FCC Order*, and the D.C. Circuit’s *American Electric Power* decision. Cable One is not subject to the pole attachment rate for telecommunications services. Cable One is not a telecommunications carrier and it does not provide telecommunications services; Cable One provides VoIP services. Given Ameren’s failure to comply with the Court’s primary jurisdiction referral, Missouri law, and the pronouncements of the FCC and D.C. Circuit regarding the *April 7 FCC Order*, the Court should dismiss Ameren’s claims without prejudice. If, however, the Court determines that Ameren’s claims cannot be dismissed, continuing to defer to the primary jurisdiction of the FCC would be appropriate as explained in Cable One’s Opposition to Plaintiff’s Motion to Vacate Stay filed contemporaneously herewith.

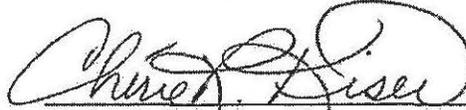
compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network”).

III. CONCLUSION

For the foregoing reasons, the Court should grant Defendant's renewed motion to dismiss without prejudice.

Respectfully submitted,

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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 Support of Its Renewed Motion to Dismiss 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

LIST OF ATTACHMENTS

1. Cable One Motion to Dismiss, or in the Alternative for a Stay, in Deference to the Primary Jurisdiction of the FCC (filed February 22, 2011)
2. Memorandum of Points and Authorities in Support of Motion to Dismiss, or in the Alternative for a Stay, in Deference to the Primary Jurisdiction of the FCC (filed February 22, 2011)
3. *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)
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)
5. Case Nos. 009-02 & 010-01, *Cable One, Inc. v. Marilyn Baumhoer*, Decision and Order (Mo. St. Tax. Comm'n Aug. 17, 2011)
6. *April 7 FCC Order - Implementation of Section 224 of the Act*, 26 F.C.C.R. 5240 (2011)
7. *American Electric Power Service Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013)

EXHIBIT 5

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

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

DEFENDANT'S REPLY IN SUPPORT OF ITS RENEWED MOTION TO DISMISS

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
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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 REPLY IN SUPPORT OF ITS RENEWED MOTION TO DISMISS

Defendant Cable One, Inc. (“Cable One”) submits this Reply in support of its Renewed Motion to Dismiss the complaint filed by Plaintiff Union Electric Company d/b/a Ameren Missouri (“Ameren”).

INTRODUCTION

It has been more than 18 months since the Court issued its September 27, 2011 Memorandum and Order (“*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 Federal Communications Commission (“FCC”), in which the Court determined that the classification of Cable One’s services must be determined prior to any further action on Ameren’s claims. In accordance with the doctrine of primary jurisdiction, the Court found that the FCC is the entity best-suited to provide the guidance needed on the essential classification issue. The Court stayed the proceeding and directed Ameren to seek such guidance from the FCC. Ameren is not entitled to re-litigate the Court’s decision.

Ameren’s claims should be dismissed without prejudice as permitted under the doctrine of primary jurisdiction. As the plaintiff, and pursuant to the Court’s specific direction, Ameren was required to seek guidance from the FCC pursuant to the primary jurisdiction referral, which

it could have pursued under well-established FCC procedural processes commonly used for such referrals. Ameren, however, has taken no such action. Dismissal of Ameren's claims without prejudice is therefore appropriate. There is no evidence that Ameren would be unfairly disadvantaged by dismissal without prejudice especially when it is Ameren that has delayed action in this proceeding.

If the Court determines that Ameren's claims cannot be dismissed, the Court should continue to defer to the primary jurisdiction of the FCC with respect to the technical and regulatory issues raised by the classification of Cable One's services. Ameren has provided no justification for overturning the Court's well-reasoned *Order*. The classification of Cable One's services continues to be an "area of agency expertise" that would have "far-reaching consequences that concern the 'promot[ion] of uniformity and consistency' in the regulatory scheme promulgated by the FCC." *Order* at 6-7 (quoting *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934 (8th Cir. 2005)).

ARGUMENT

I. AMEREN'S CLAIMS SHOULD BE DISMISSED WITHOUT PREJUDICE

This Court has ample authority to dismiss Ameren's claims without prejudice. Under controlling precedent, the Court "has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993); *see also Access Telecomms. v. Southwestern Bell Tel. Co.*, 137 F.3d 605 (8th Cir. 1998). A stay is not automatic, but is within the discretion of this Court despite Ameren's arguments to the contrary. Pl. Opp'n at 2-3. As discussed below, dismissal without prejudice is appropriate in this case.

A. Ameren Has Failed to Act on the Primary Jurisdiction Referral

Ameren again claims it was under no obligation to act on the Court's primary jurisdiction referral. Pl. Opp'n at 3. The Court's *Order* was clear that Ameren was the party to petition the FCC pursuant to the primary jurisdiction referral:

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.

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 9, 10 (emphasis added). The *Order*'s direction to Ameren, as the plaintiff, is consistent with the United States 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 applicable administrative agency. *Reiter v. Cooper*, 507 U.S. 258, n.3 (1993) (referral allows "the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling") (citing *Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co.*, 230 U.S. 247, 267 (1913)); *Sprint Commc'ns Co., L.P. v. Native American Telecom, LLC*, 2012 WL 591674, *11 (D.S.D. Feb. 22, 2012) (ordering plaintiff Sprint to contact the FCC "to obtain guidance regarding the appropriate method for bringing this matter before the FCC"); *see also* Def. Mem. at 5-6 (listing numerous cases in which the plaintiff was directed to act on the primary jurisdiction referral).¹

Ameren's claim that the word "its" in the second quotation above "refer[s] to the FCC's pending proceeding in Docket No. 09-154" is nonsensical. Pl. Opp'n at n.1. Nowhere in the

¹ Defendant's Memorandum of Points and Authorities in Support of Its Renewed Motion to Dismiss, Doc. #30 (filed Apr. 15, 2013) (hereinafter "Def. Mem.").

Order does the Court refer to Docket No. 09-154 or tie its primary jurisdiction referral to that proceeding. The Court's primary jurisdiction referral is premised on the classification of Cable One's services falling within an "area of agency expertise" and the "promotion of uniformity and consistency," not on the existence of a pending FCC proceeding. *Order* at 6. As the Court acknowledges, the FCC's proceedings involving pole attachment issues provide "further support for application of the primary jurisdiction doctrine," but do not serve as the entire basis for the Court's referral. *Order* at 8; *see also id.* at 9 (noting the FCC's pole attachment decision demonstrates "the need for consistent interpretation and application of these newly issued rules").

Federal courts often consider dismissal when a plaintiff has failed to take any action in response to a primary jurisdiction referral. *See, e.g., All American Tel. Co. v. AT&T, Inc.*, 2009 WL 691325, at *4 (S.D.N.Y. Mar. 16, 2009) (referring AT&T's counterclaims to FCC and stating that the "Court will dismiss the sham entity claim for failure to prosecute if AT&T does not file a complaint with the FCC within thirty days of this Order"); *see also Haxtun Tel. Co. v. AT&T Corp.*, 15 F.C.C.R. 14895, ¶ 9 (2000) ("For nearly fifteen months, Haxtun took no action to implement the district court's primary jurisdiction referral. Ultimately, the district court informed Haxtun that it would dismiss Haxtun's lawsuit with prejudice for failure to prosecute if Haxtun did not initiate promptly a proceeding before the Commission."). In *United Shipping*, the court declined to dismiss based on its finding that, while the plaintiff had not "diligently prosecuted its cases before the ICC, its delay was substantially justified" by other factors, such as waiting for a relevant Supreme Court decision and other state court proceedings, a change in counsel, and changing policies at the agency level. *In re United Shipping Co.*, 134 B.R. 359, 363 (D. Minn. 1991). No similar circumstances apply here. Ameren's flagrant disregard of this

Court's primary jurisdiction referral supports the dismissal of Ameren's claims. See Fed. R. Civ. P. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it."); *Arnold v. ADT Sec. Servs., Inc.*, 627 F.3d 716, 722 (8th Cir. 2010) (affirming Rule 41(b) dismissal where plaintiff acted with "persistent pattern of delay and failure to comply" with court orders); *Miller v. Benson*, 51 F.3d 166, 168 (8th Cir. 1995) (cases should be dismissed with prejudice "where the plaintiff has intentionally delayed the action or where the plaintiff has consistently and willfully failed to prosecute his [or her] claim") (quoting *Sterling v. United States*, 985 F.2d 411, 412 (8th Cir. 1993)); *Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994) ("An action may be dismissed pursuant to Rule 41(b) if a plaintiff has failed to comply with any order of the court.").

Ameren attempts to shield itself from its obligations under the *Order* by arguing Cable One "mistakes the doctrine of primary jurisdiction for the exhaustion of remedies doctrine." Pl. Opp'n at 3. There is no support for Ameren's argument. The United States Supreme Court has explained the difference between the two doctrines:

'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, 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; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-64 (1956). This Court clearly understands the difference between the two doctrines. "Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making." *Order* at 3 (citing *Access Telecomms. v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998)).

Elaborating further, the Court explained “[t]he 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.’” *Order* at 3 (citing *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005)); *see also, e.g., Wofford v. Public Comm. Servs.*, 2012 WL 550134, at *3 (E.D. Mo. Feb. 19, 2012) (“The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with ‘promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.’”) (citing *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)). The Court’s *Order* specifically acknowledges that it would be inappropriate to invoke primary jurisdiction “in a case in which Congress, by statute, has decided that the courts should consider the issue in the first instance.” *Order* at 3-4 (citing *United States v. McDonnell Douglas Corp.*, 751 F.2d 220 (8th Cir. 1984)). Neither the Court nor Cable One is requiring Ameren to exhaust its administrative remedies before initiating its complaint action. Pl. Opp’n at 4. Ameren is required only to comply with this Court’s *Order* to seek a ruling from the FCC pursuant to the doctrine of primary jurisdiction on the classification issues raised by Ameren’s claims prior to the case moving forward. Ameren’s failure to do so is justification for dismissing its claims without prejudice.

The cases cited by Ameren provide no basis for Ameren to ignore this Court’s primary jurisdiction referral. Pl. Opp’n at 4-5 (citing *Lipton v. MCI Worldcom, Inc.*, 135 F. Supp. 2d 182 (D.D.C. 2001), *Central Tel. Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, 759 F. Supp. 2d 772 (E.D. Va. 2011), and *Global NAPS North Carolina, Inc. v. BellSouth Telecomms., Inc.*, 455 F. Supp. 2d 447 (E.D.N.C. 2006)). Those cases rely on a four-factor test

for determining whether a primary jurisdiction referral is appropriate, one of which is whether a prior application to the agency has been made.² The question before this Court is not whether a primary jurisdiction referral is appropriate - the Court has already correctly answered that question. Ameren did not seek review of that determination and cannot attempt to do so now. Ameren's citations have no bearing on whether Ameren's claims should be dismissed for its failure to comply with this Court's primary jurisdiction referral.

B. Dismissal Would Not Unfairly Disadvantage Ameren

The Court determined that Ameren would be unfairly disadvantaged by dismissal of its complaint while its FCC petition is pending. *Order* at 9-10. Ameren's decision to disregard this Court's primary jurisdiction referral for the past 18 months, however, strongly militates against continuation of that finding. There is no evidence that Ameren would be unfairly disadvantaged by dismissal without prejudice. Ameren does not raise any concern about the applicable statute of limitations or its ability to seek further relief from the Court after resolution of the FCC proceeding. *Cf. Frisby v. Milbank Mfg. Co.*, 688 F.3d 540, 543 (8th Cir. 2012) (stating statute of limitations concerns might be one reason to stay a case rather than dismiss); *but see Access*, 137 F.3d at 609 (dismissing despite plaintiff's statute of limitations concerns). Instead, Ameren claims that "the circumstances have not changed" since the issuance of the Court's *Order*. Pl. Opp'n at 3.³ It is disingenuous for Ameren to now claim that it will be unfairly disadvantaged

² The four-factor test for determining whether primary jurisdiction is appropriate has been used sparingly in this district in the past. *See Southwestern Bell Tel. Co. v. Allnet Commc'ns Servs., Inc.*, 789 F. Supp. 302 (E.D. Mo. 1992). The majority of the cases originating from this district rely on the primary jurisdiction standards established under the more recent *Access* and *Alpharma* cases, neither of which looks at whether a prior application to the agency has been made. *See Access Telecomms. v. Southwestern Bell Tel. Co.*, 137 F.3d 605 (8th Cir. 1998); *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934 (8th Cir. 2005). This Court relied upon both of these cases in determining the doctrine of primary jurisdiction applies to this case. *See Order* at 3-4.

³ This too is incorrect as circumstances have changed since the issuance of the Court's *Order*. *See* Def. Mem. at 7-11 (explaining how recent legal pronouncements provide further support for dismissal of Ameren's claims).

when Ameren is the entity that was required by the *Order* to act and has failed to take that action. *Cf. Midwestern Mach. Co. v. Northwest Airlines, Inc.*, 392 F.3d 265, 277 (8th Cir. 2004) (finding the equitable doctrine of laches applies when a plaintiff is “guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant.”) (quoting *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979)). Ameren has had a “reasonable opportunity” to act on the primary jurisdiction referral in the more than 18 months since the Court’s *Order* was issued. *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

Ameren does not dispute that it has the ability to utilize the FCC’s declaratory ruling process to act on the primary jurisdiction referral. Pl. Opp’n at 5. This is not surprising given that the declaratory ruling process is a commonly used procedural vehicle for resolution of primary jurisdiction referrals.⁴ When “a petition for declaratory ruling derives from a primary jurisdiction referral, the [FCC] will seek, in exercising its discretion, to resolve issues arising under the Act that are necessary to assist the referring court.”⁵ *Joint Petition for Declaratory Ruling on the Assignments of Accounts (Traffic) without the Associated CSTP III Plans under AT&T Tariff F.C.C. No. 2, et al.*, 18 F.C.C.R. 21813, ¶ 15 (2003) (subsequent history omitted). The FCC relies on existing rules and policies to address declaratory rulings arising out of primary jurisdiction referrals. *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 F.C.C.R. 13192, n.51 (2002); *see also Application of*

⁴ Petitions for declaratory ruling are filed at the FCC by various types of parties in response to primary jurisdiction referrals. *See, e.g., Entities file Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming*, 24 F.C.C.R. 1340 (2009) (stating petitions were filed by various media associations and local jurisdictions in response to primary jurisdiction referral from U.S. District Court for Eastern District of Michigan); *Comment Sought on Petition filed by Kansas Corporation Commission for Declaratory Ruling*, 23 F.C.C.R. 7203 (2008) (noting petition was filed by state public utility commission in response to primary jurisdiction referral from U.S. District Court for Kansas).

⁵ The FCC has broad authority to “issue a declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e); *see also* 47 C.F.R. § 1.2. The purpose of the FCC’s declaratory ruling process “is to give guidance to affected persons in areas where uncertainty or confusion exists” such that a “case or controversy in the judicial sense is not required.” *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, et al.*, 92 F.C.C.2d 864, ¶ 43 (1983) (subsequent history omitted).

Kaiser Broad. Corp. and Oak Broad. Systems, Inc., 60 F.C.C.2d 961, ¶ 16 (1976) (“Declaratory rulings are issued for the purpose of terminating a controversy or removing uncertainty. Implicit in the purpose of this device is the existence of contrasting points of view. That the Commission, in its interpretation, selects a viewpoint not held by a party does not establish that the rule has been changed.”) (internal citations omitted).

When a plaintiff actually approaches the FCC in response to a primary jurisdiction referral - a step Ameren has not taken in this case - the FCC’s goal is “to assist the referring court by resolving issues arising under the Act.” *Joint Petition for Declaratory Ruling on the Assignments of Accounts (Traffic) without the Associated CSTP III Plans under AT&T Tariff F.C.C. No. 2, et al.*, 22 F.C.C.R. 300, ¶ 3 (2007). In this vein, the FCC has responded to numerous primary jurisdiction referrals made via the declaratory ruling process.⁶ The FCC takes its responsibility seriously. For example, when the FCC was compelled to dismiss a primary jurisdiction referral due to “substantial changes” between the referral order and the filing made with the FCC, it stated:

We take this course reluctantly, recognizing that the court initially requested the Commission to resolve certain matters falling within the agency’s special competence. The Commission stands ready to do so. However, in light of the substantial changes in Haxtun’s case, we believe it is appropriate first to seek guidance from the court with respect to the continuing propriety or need for the referral. In the event the district court determines that the substantive matters in this proceeding continue

⁶ See, e.g., *Petition of GCB Communications, Inc. d/b/a Pacific Communications and Lake Country Communications, Inc. for Declaratory Ruling*, 27 F.C.C.R. 7361 (2012) (declaratory ruling in response to primary jurisdiction referral from the U.S. District Court for Arizona); *Petition for Declaratory Ruling on Issues Contained in Thorpe v. GTE*, 23 F.C.C.R. 6371 (2008) (order in response to primary jurisdiction referral from U.S. District Court for Middle District of Florida); *Digital Cellular, Inc. Petition for Declaratory Ruling*, 20 F.C.C.R. 8723 (2005) (order in response to primary jurisdiction referral from the U.S. District Court for the Central District of Florida); *Flying J, Inc. and TON Services, Inc., Petition for Expedited Declaratory Ruling*, 18 F.C.C.R. 10311 (2003) (order in response to primary jurisdiction from the U.S. District Court for Utah); *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 F.C.C.R. 13192 (2002) (declaratory ruling in response to a primary jurisdiction referral from the U.S. District Court for the Western District of Missouri); *Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., Inc.*, 10 F.C.C.R. 13639 (1995) (declaratory ruling in response to primary jurisdiction referral from U.S. District Court for New Jersey).

to warrant the Commission's attention, we will, upon the filing of a new complaint, make every effort to decide them expeditiously.

Haxtun Tel. Co. v. AT&T Corp., 15 F.C.C.R. 14895, ¶ 23 (2000). There is nothing to suggest the FCC would not be "ready" to "expeditiously" address this Court's primary jurisdiction referral in response to a request from Ameren.

Ameren also claims that dismissal would deprive it of a remedy because following this Court's *Order* to petition the FCC "would do nothing to move this case along." Pl. Opp'n at 5.⁷ Ameren's assertion is apparently based on its view that "a decision from the FCC" is unlikely to be issued. Pl. Reply at 8. Ameren has no basis for making such a claim.

Courts have recognized that primary jurisdiction referrals often take time to be resolved. *See, e.g., Cox Okla. Telecom, LLC v. Corporation Comm'n of the State of Okla.*, 2007 WL 895227, at *2 (W.D. Okla. Mar. 22, 2007) ("simply due to the nature of stays entered on the basis of primary jurisdiction and due to the purpose behind the doctrine of primary jurisdiction, the Court finds that stays on this basis often are of indefinite length and are not inherently unlawful"). The cases Ameren cites to demonstrate a FCC decision is an "impractical remedy" are easily distinguishable from the case at bar. Pl. Opp'n at 5-6 (citing Pl. Reply at 8-9). In *Verizon New York*, the court determined that the dispute between the parties was nothing more than a billing dispute, which did not hinge on the classification of VoIP services, and thus there was no reason to wait for the FCC to determine the regulatory regime applicable to VoIP services. *Verizon New York, Inc. v. Global NAPS, Inc.*, 463 F. Supp. 2d 330, 342 (E.D.N.Y. 2006).⁸ By contrast, this Court has specifically (and correctly) determined that Ameren's "claim

⁷ In support of this contention, Ameren cites to its Reply in Support of Motion to Lift Stay, Doc. #31 (filed Apr. 25, 2013) (hereinafter "Pl. Reply").

⁸ Ameren's citation to *Central Tel. Co. of Virginia* also is distinguishable. Pl. Reply at 10 (citing *Central Tel. Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, 759 F. Supp. 2d 772 (E.D. Va. 2011)). Unlike

relies upon the classification of [Cable One]’s services.” *Order* at 5. Moreover, the parties in *Verizon New York* had already sought FCC guidance on their billing dispute through the FCC’s informal complaint process (and the FCC declined to review the dispute), which the court determined was further evidence that the dispute was not appropriate for a primary jurisdiction referral. *Verizon New York*, 463 F. Supp. 2d at 342. Ameren therefore has no basis on which to claim petitioning the FCC is “an unavailable and impractical remedy.” Pl. Opp’n at 6.

II. AMEREN UNLAWFULLY SEEKS TO RE-LITIGATE THE COURT’S WELL-REASONED PRIMARY JURISDICTION REFERRAL

This is not simply “a case about unpaid pole attachments.” Pl. Opp’n at 5. As the Court correctly found, Ameren’s “claim relies upon the classification of [Cable One]’s services.” *Order* at 5. The Court did not apply primary jurisdiction because Cable One said “VoIP services are unclassified.” Pl. Opp’n at 8. The Court understands that classification issues “often serve[] 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.” *Order* at 7 (citing *Southwestern Bell Tel. Co. L.P. v. Vartec Telecom, Inc.*, 2005 WL 2033416 (E.D. Mo. Aug. 23, 2005) and *Splitrock Properties, Inc. v. Qwest Commc’ns Corp.*, 2010 WL 2867126 (D.S.D. July 20, 2010)).⁹

Ameren’s unilateral labeling of Cable One’s services as “telecommunications services” does not change the need for the Court to seek guidance from the FCC in the first instance. “The classification of services, *i.e.* whether they are telecommunications service or information services, raises issues of a technical nature that are often decided under the FCC’s agency

here, the *Central Tel.* court determined that a primary jurisdiction referral was not necessary because the central issue in the case involved interpretation of a contract.

⁹ Rearguing issues already addressed by this Court, Ameren claims it needs discovery to determine “whether (and to what extent) Cable One’s attachments to Ameren’s poles are (or were) used to provide telecommunications services.” Pl. Opp’n at 6. This Court has already rejected Ameren’s “reliance upon the uncertain results of discovery” finding that “discovery will not dissipate the need to resolve [the classification] issue.” *Order* at 5-6. Ameren’s request should be rejected again.

complaint process.” *Order* at 4 (citing *Minnesota Pub. Utils. Comm’n v. Federal Commc’ns Comm’n*, 483 F.3d 570 (8th Cir. 2007)). The Court has already rejected the arguments made by Ameren in its opposition, finding that none of Cable One’s services claimed by Ameren to be telecommunications services “can be easily classified under prior FCC precedent.” *Order* at 7; *see also* Pl. Opp’n at 6-7. Thus, it does not matter that some services offered by other cable operators may have been classified as telecommunications services. Pl. Opp’n at 7. It is not within the Court’s expertise to “examine the case law and precedent as it relates to the classification of each of these types of services.” *Order* at 7. It is within the FCC’s “expertise and experience” to address issues such as the classification of communications services. *Access Telecomms. v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (“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.”) (quoting *Far East Conference v. United States*, 342 U.S. 570, 574 (1952)) (intervening citations omitted).

The issue to be resolved pursuant to primary jurisdiction is whether Cable One has correctly classified its services for purposes of applying pole attachment rates. There can be no determination of whether Cable One owes the telecommunications attachment rate under the parties’ contract unless and until there is a finding that Cable One’s services are appropriately classified as telecommunications services.¹⁰ *See Implementation of Section 224 of the Act*, 26

¹⁰ Cable One is not seeking to have “any adjudicative body other than this Court decide the merits of this action.” Pl. Opp’n at 9. Cable One offered the Missouri State Tax Commission decision as further evidence that Cable One’s services are not telecommunications services and therefore are not subject to the telecommunications service pole attachment rate under the law or under the parties’ contract.

F.C.C.R. 5240, n.466 (2011) (“*April 7 FCC Order*”) (stating the telecommunications pole attachment rate could be applied only to those services that “ultimately are telecommunications services”), *aff’d by American Elec. Power Serv. Corp. v. Federal Commc’ns Comm’n*, 708 F.3d 183 (D.C. Cir. 2013).¹¹ The classification of Cable One’s services is not an issue that “*might be presented*” (Pl. Opp’n at 9 (emphasis in original)), it is an issue that directly “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. Ameren’s attempts to argue otherwise or re-litigate this Court’s findings should be rejected.

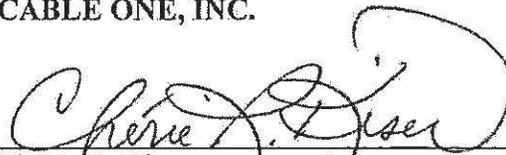
¹¹ The *April 7 FCC Order* therefore is “of consequence” to Cable One’s position because it makes clear that Cable One can only be charged the telecommunications rate for pole attachments if its services have been classified as telecommunications services. *Cf.* Pl. Opp’n at 9; *see also* Def. Mem. at 9-11 (discussing the *April 7 FCC Order*). Cable One’s services have not been classified as telecommunications services at the FCC or under Missouri law. *See April 7 FCC Order* at n.464 (stating the FCC “has expressly declined to address the statutory classification of VoIP services”); *see also* Case Nos. 009-02 & 010-01, *Cable One, Inc. v. Marilyn Baumhoer*, Decision and Order (Mo. St. Tx. Comm’n Aug. 17, 2011) (finding Cable One does not offer “telecommunications service” under Missouri law, and thus could not be classified as a public utility under Missouri tax law).

CONCLUSION

For the foregoing reasons, and those set forth in Cable One's Memorandum of Points and Authorities in Support of Its Renewed Motion to Dismiss, Ameren's claims should be dismissed without prejudice. If, however, the Court determines that Ameren's claims cannot be dismissed, the Court should continue to defer to the primary jurisdiction of the FCC with respect to the technical and regulatory issues raised by the classification of Cable One's services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of May 2013, the above and foregoing Defendant's Reply in Support of Its Renewed Motion to Dismiss 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