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

Petition for Declaratory Ruling of Union Electric Company d/b/a Ameren Missouri Regarding the Rate for Cable System Pole Attachments Used to Provide Voice Over Internet Protocol	)))))	WC Docket No. 13-307

COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") encourages the Commission to reject the request of Union Electric Company d/b/a Ameren Missouri ("Ameren")[1] for a declaratory ruling that the Commission declare voice over Internet protocol ("VoIP") service offered by cable television attachers to be a telecommunications service for pole attachment rate purposes.[2] Such a ruling would reverse important Commission policies promoting broadband deployment and competition through lower pole attachment rates as reflected in the *2011 Pole Order*.[3] Because VoIP remains an "unclassified" service, and because there is no need to classify it in this proceeding, the Commission can and should designate the cable rate as the pole attachment formula applicable to cable VoIP service.

INTRODUCTION AND SUMMARY

Less than one year ago, the D.C. Circuit unanimously affirmed the *2011 Pole Order* aimed at eliminating the disparity between pole attachment rates for telecommunications services

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1 Motion for Declaratory Ruling of Union Electric Company d/b/a Ameren Missouri, WC Docket No. 13-307 (filed June 24, 2013) ("Ameren Petition").

2 *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*, WC Docket No. 13-307, Public Notice, DA 13-2453 (rel. Dec. 20, 2013).

3 *Implementation of Section 224 of the Act*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order on Reconsideration, 26 FCC Rcd 5240, ¶ 151 (2011) ("*2011 Pole Order*"), *aff'd, American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 118 (2013).

("Telecom Rate") and cable services ("Cable Rate").[4] By generally lowering the "old" Telecom Rate to the Cable Rate, the Commission largely achieved a key policy objective of "reduc[ing] marketplace distortions and barriers to the availability of new broadband facilities and services that arose from disparate rates."[5] Notwithstanding these efforts, Ameren's request demonstrates that there remain important reasons for the Commission to explicitly confirm that the Cable Rate applies to cable VoIP services and to take further action (as described herein) to minimize the potential for retroactive and other pole attachment rate disparities that could undermine Commission broadband policies.

As the Ameren Petition illustrates, pole owners continue their efforts to extract super-compensatory pole rates from cable operators.[6] In the local lawsuit underlying the Ameren Petition, Ameren seeks to apply retroactively a "significantly higher" Telecom Rate on Cable One's VoIP service and $25 per attachment penalties for failing to report the services at a higher attachment rate.[7] Granting Ameren's request to classify VoIP as a telecommunications service would expose all broadband cable networks that transmit VoIP services to millions of dollars in

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4 *American Elec. Power*, 708 F.3d at 191.

5 *2011 Pole Order* ¶ 151. Unfortunately, the Commission's *2011 Pole Order* Telecom Rate formula can still produce a substantially higher rate than the Cable Rate formula. To the extent pole owners rebut the attaching entity presumptions in the Commission's 2011 rules, cable operators and other broadband providers will be subject to potential pole attachment fee liability, disputes, and ongoing uncertainty that undermines the policy objectives the Commission was trying to achieve in the *2011 Pole Order*. The Commission can and should resolve this problem by granting the Petition for Reconsideration filed jointly by NCTA, COMPTEL, and tw telecom. *See* Petition for Reconsideration or Clarification filed by NCTA, COMPTEL, and tw telecom, WC Docket No. 07-245 (filed June 8, 2011).

6 As the Supreme Court observed: "Since the inception of cable television, cable companies . . . have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities in turn have found it convenient to charge monopoly rents." *NCTA v. Gulf Power Co*., 534 U.S. 327, 330 (2002).

7 Ameren Petition at 3, 5-7. *See also* Ameren Petition Ex. B, ¶¶ 6, 11 (Ameren's state court complaint filed Feb. 11, 2011). Ameren's complaint apparently also seeks additional pole rent for other "telecommunications services" allegedly carried by Cable One over its cable network including "dedicated line data transport services" and "E-rate services." *Union Elec. Co. v. Cable One, Inc*., No. 4:11-CV-299-CEJ, 2011 WL 4478923, at *1 (E.D. Mo. Sept. 27, 2011) (attached as Exhibit C to Ameren Petition).

excessive, retroactive Telecom Rate fees.[8] This would penalize past investments in broadband by companies whose deployment of competitive VoIP services has brought wide-scale competition to the residential voice market and helped to ignite the dramatic expansion of broadband.

The requested reclassification would also trigger the very disputes and litigation that the *2011 Pole Order* sought to eliminate in order to spur broadband deployment, particularly in rural areas. All of these resources would be far better invested in broadband deployment. The Commission should continue its well established practice of applying pro-broadband deployment policies to unclassified VoIP on a case-by-case basis. Under this approach, and consistent with the substantial record in the 2009 VoIP declaratory ruling proceeding,[9] the Commission should apply the Cable Rate to unclassified VoIP service.

APPLICATION OF THE CABLE RATE TO CABLE VOIP SERVICE PROMOTES THE COMMISSION'S BROADBAND POLICY OBJECTIVES

A. The *2009 VoIP Proceeding* and *2011 Pole Order* Support Application of the Cable Rate.

As acknowledged in the Ameren Petition, there is a dormant declaratory ruling request that was filed by power companies in 2009 seeking essentially the same misguided outcome that is requested here.[10] The record in the *2009 VoIP Proceeding* establishes overwhelmingly that the appropriate pole rate for VoIP attachments is the Cable Rate, not the Telecom Rate. Cable

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[8] Since all broadband cable networks transmit VoIP services either directly by the cable operator or "over the top" through applications like Vonage, virtually every cable pole attachment would be exposed to old Telecom Rate liability if Ameren's request is granted. NCTA Comments, WC Docket No. 07-245 at 4 n.11 (filed Sept. 24, 2009).

[9] *Pleading Cycle Established For Comments On Petition For Declaratory Ruling of American Electric Power Service Corp., et al. Regarding the Rate For Cable System Pole Attachments Used To Provide Voice Over Internet Protocol Services*, WC Docket No. 09-154, Public Notice, DA 09-1879 (rel. Aug. 25, 2009) ("*2009 VoIP Proceeding*").

[10] *Id.* Notably, although the Petitioner references the *2009 VoIP Proceeding* as providing a basis for the relief requested, no analysis of that record is provided and nothing new is added to justify Petitioner's request that cable VoIP be classified as telecommunications service for pole purposes.

attachers, competitive local exchange carriers ("LECs"), and even pole-owning incumbent LECs all agreed that the Cable Rate, which fully compensates utilities for pole attachments, would best promote national broadband policies and that imposing a higher rate for VoIP (which creates no additional burden on the poles) would undermine those same broadband goals.[11]

The subsequent National Broadband Plan[12] and *2011 Pole Order* provide substantial additional grounds for applying the Cable Rate to VoIP services offered by cable operators. The Broadband Plan identified the cost of pole attachments as a material obstacle to broadband deployment, particularly in rural areas.[13] Moreover, the Broadband Plan noted that the potential for substantially higher pole attachment rates for telecommunications services as compared to cable service attachments "for virtually the same resource (space on a pole) based solely on regulatory classification . . . has led to near-constant litigation about the applicability of the 'cable' or 'telecommunications' rates to broadband, voice over Internet Protocol and wireless

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[11] *See* briefing in WC Docket No. 09-154 (all filed Sept. 24, 2009 unless otherwise noted), *e.g.*, NCTA Comments at 4-5, 14-17 ("[R]aising pole attachment rates for any broadband provider runs counter to the Commission's goal of increasing broadband deployment and adoption. . . . [T]he impact of increased pole attachment fees would be particularly onerous in rural areas . . . ."); NCTA Reply Comments at 2 (filed Oct. 9, 2009) (Cable Rate "facilitates the ability of broadband providers to keep retail rates at reasonable levels"); Verizon Comments at 1-2 (the power companies' proposal to impose the Telecom Rate on VoIP attachments "does not make sense."); Qwest Communications International Inc. Comments at 5 (the Commission need *not* "require cable companies to move to the Telco rate as the Electric Companies suggest"); United States Telecom Association Comments at 3-4 ("[T]he obvious policy implication of this analysis leads to precisely the opposite end-result urged by [the power companies]."); tw telecom Comments at 2 (establishing uniform rates at the telecom rate "is self-serving and would result in bad policy . . . [and] in an arbitrary and entirely unnecessary wealth transfer from telecommunications carriers and cable companies to pole owners"); Sunesys, LLC Comments at 7 (raising VoIP rent to telecom rate "will lead to less broadband deployment – not more"); Comcast Comments at 4-9; Comcast Reply Comments at 3-6 (filed Oct. 9, 2009) ("The task of providing these benefits [consumer savings from competitive VoIP] to all Americans is not yet complete, but the record shows that . . . raising broadband/VoIP rates will frustrate that same goal."); American Cable Association Opposition at 3-4; Charter Communications, Inc. Comments at 3-4, 9-14; Time Warner Cable Comments at 9-12.

[12] *Connecting America: The National Broadband Plan*, GN Docket No. 09-51, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf (Omnibus Broadband Initiative, Mar. 16, 2010) ("Broadband Plan").

[13] *Id*. at 109-110 ("Collectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber deployment. . . . If the lower rates were applied [i.e. the Cable Rate], and if the cost differential were passed along to consumers, the typical monthly price of broadband for some rural consumers could fall materially. That could have the added effect of generating an increase—possibly a significant increase—in rural broadband adoption.")

services."[14] Accordingly, the Broadband Plan recommended that the Commission "establish rental rates for pole attachments that are as low and close to uniform as possible . . . to promote broadband deployment."[15]

The *2011 Pole Order* sought to implement the recommendations in the Broadband Plan. Finding that pole rates "play a significant role in the deployment and availability of voice, video and data networks,"[16] the Commission determined that low, unified rates will advance important public interest goals by:

- Minimizing distortion of broadband investment and deployment choices caused by rate disparities based on arbitrary regulatory classifications;
- Encouraging more broadband investment by lowering pole input costs and improving the business case for broadband deployment at the margin;
- Reducing the uncertainty facing cable operators as to what attachment charges will be imposed when they provide advanced new services; and
- Lowering the incentives for costly litigation "by substantially reducing the potential gains that a party can claim by arguing for a favorable attachment definition."[17]

The *2011 Pole Order* generally unifies rates at the Cable Rate going forward and reaffirms the Commission's longstanding determination that cable attachments used for both video and Internet access service are accorded the Cable Rate.[18] That 1998 decision to apply the Cable Rate to commingled video and Internet access attachments "spurred investment by cable

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[14] *Id.* at 110.

[15] *Id.* (Recommendation 6.1).

[16] *2011 Pole Order* ¶ 172.

[17] *Id.* ¶¶ 147, 179 and 181.

[18] *Id.* ¶ 175. *See Implementation of Section 703(3) of the Telecommunications Act,* CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777, 6794 ¶ 32 (1998) ("*1998 Pole Order*"), *rev'd, Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev'd, NCTA v. Gulf Power Co*., 534 U.S. 327, 335-36, 338-39 (2002), *pet. for review denied, Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

operators in networks capable of delivering advanced communications services and the growth of facilities based competition, both to the benefit of consumers."[19]

The underlying policies of the Communications Act and the Commission's findings confirm that the Cable Rate should be applied to cable VoIP service unless it is affirmatively classified as a telecommunications service. The Commission has frequently noted the "nexus" between the success of broadband deployment and adoption and the popularity of advanced new services such as VoIP.[20] The *2011 Pole Order* acknowledges the underlying practice of applying the Cable Rate to VoIP in justifying the Commission's decision to eliminate the disparities in the two pole attachment rates:

> [W]e note that for many years the majority of third-party pole attachments subject to the Commission's regulation have been priced at the cable rate, and there is nothing in the record to suggest that there is, or ever has been, a shortage of pole capacity arising from the utilities' cost recovery level. In addition, because there are far more attachments by cable operators than by telecommunications carriers paying the telecom rate, the number of attachments for which there is an actual change in utilities' current pole attachment cost recovery by virtue of the new telecom rate is likely to be relatively modest.[21]

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[19] *2011 Pole Order* ¶ 176. In its 1998 decision, the Commission reasoned that: "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. . . . Rather we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers." *1998 Pole Order* ¶ 32.

[20] *See IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 5 (2004) ("*IP-Enabled Services NPRM*") ("IP-enabled services generally – and VoIP in particular – will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services."); *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, 19 FCC Rcd 20540, 20577 (2004) ("[S]ubscribership to broadband services will increase in the future as new applications that require broadband access, such as VoIP, are introduced into the marketplace, and consumers become more aware of such applications."); *Numbering Policies for Modern Communications*, WC Docket No. 13-97 *et al.*, Notice of Proposed Rulemaking, Order, and Notice of Inquiry, 28 FCC Rcd 5842, ¶ 86 (2013) ("*2013 Numbering NPRM*") ("Permitting interconnected VoIP providers to obtain direct access to telephone numbers may encourage more VoIP providers to enter the market, enabling consumers to enjoy more competitive service offerings. This will in turn spur consumer demand for these services, thereby increasing demand for broadband connections and consequently encouraging more broadband investment and deployment consistent with the goals of section 706.").

[21] *2011 Pole Order* ¶151 (footnote omitted).

At the time of this Commission finding, the cable industry had been deploying VoIP for roughly a decade and had always regarded VoIP attachments as non-telecommunications service attachments entitled to the Cable Rate consistent with the treatment of Internet access service and the Commission's broadband deployment policies. By reconfirming now that cable VoIP attachments should be charged at the Cable Rate, the Commission will validate these settled expectations which helped justify the cable industry's massive broadband investment.[22] Conversely, retroactively imposing massive old Telecom Rate pole rents on cable operators in the local lawsuit, as Ameren is requesting, would substantially undermine this economic principle, unnecessarily transfer wealth to pole owners that could otherwise be applied prospectively to deploy broadband, and deter similar investments by broadband providers in the future.

B. The Commission Is Authorized to Apply the Cable Rate to Unclassified VoIP Services.

The Commission has established a deliberate approach for applying specific regulatory requirements to VoIP "to ensure a full and complete record upon which we can arrive at sound legal and policy conclusions. . . ."[23] While declining to classify VoIP's regulatory status under the Communications Act, the Commission has applied specific requirements to VoIP that promote key public policies such as consumer protection, public safety, and the encouragement of new technologies.[24] This case-by-case approach has proven to be sound public policy.

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[22] As observed by the Commission, "[b]ased on well-established economic principles, investment in offering a product or service is likely to be undertaken if the present value of the expected incremental cash inflows exceeds the present value of the expected incremental cash outflows . . . ." *2011 Pole Order* ¶ 147 n.439.

[23] *IP-Enabled Services NPRM* ¶ 5.

[24] *2011 Pole Order* ¶ 154 n.464 ("[T]he Commission thus far has expressly declined to address the statutory classification of VoIP services."); *2013 Numbering NPRM* ¶ 6 ("The Commission has acted to ensure consumer protection, public safety, and other important policy goals in orders addressing interconnected VoIP services, without classifying those services as telecommunications services or information services under the Communications Act."); *see, e.g.*, *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, 24 FCC Rcd

Consistent with this established precedent, the Commission need not classify VoIP in this proceeding, and instead should order that the Cable Rate pole attachment formula is applicable to cable VoIP.

The Commission clearly has the legal authority to reach such a determination. As the *2011 Pole Order* explained, "Congress intended to give the Commission considerable flexibility in determining just and reasonable rates" for pole attachments.[25] The Supreme Court has stated that under sections 224(d) and (e) of the Communications Act, Congress might have considered it "prudent to provide set formulas for telecommunications service and 'solely cable service' and to leave unmodified the FCC's customary discretion in calculating a 'just and reasonable' rate for commingled services."[26] The Court further found that this discretion made sense because such services "might be expected to evolve in directions Congress knew it could not anticipate."[27]

6039, ¶¶ 3, 13 (2009) ("The assurance that providers of interconnected VoIP services are subject to service-discontinuance procedures comparable to those that apply to non-dominant carriers may spur consumer demand for those services, in turn driving demand for broadband connections, and consequently encouraging more broadband investment and deployment consistent with the goals of section 706."); *E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36 and 05-196, First Report and Order and NPRM, 20 FCC Rcd 10245, ¶ 31 (2005) ("The uniform availability of E911 services may spur consumer demand for interconnected VoIP services [and promote goals of section 706]."); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, First Report and Order and Further NPRM, 20 FCC Rcd 14989, ¶ 43 (2005) (applying "three prong" public interest test – "promotion of competition, encouragement of the development of new technologies and the protection of public safety and national security"); *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, ¶ 54 (2007), *aff'd*, *NCTA v. FCC*, 555 F.3d 996 (D.C. Cir. 2009); *Telecommunications Relay Services and Speech to-Speech Services for Individuals with Hearing and Speech Disabilities*, WC Docket No. 04-36 *et al.*, Report and Order, 22 FCC Rcd 11275, ¶ 10 n.50 (2007); *Telephone Number Requirements for IP-Enabled Services Providers*, WC Docket No. 07-243 *et al.*, Report and Order, Declaratory Ruling, Order on Remand, and NPRM, 22 FCC Rcd 19531, ¶ 18 n.50 (2007), *pet. for review denied, National Tel. Coop. Ass'n v. FCC*, 563 F.3d 536 (D.C. Cir. 2009); *Universal Service Contribution Methodology*, WC Docket No. 06-122 *et al.*, Report and Order and NPRM, 21 FCC Rcd 7518, ¶ 35 (2006), *aff'd in part, vacated in part sub nom.*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

[25] *2011 Pole Order* ¶ 155.

[26] *NCTA v. Gulf Power*, 534 U.S. at 339.

[27] *Id*. at 339.

Because cable VoIP has not been classified by the Commission as a telecommunications service for purposes of section 224, the Commission's general authority to establish just and reasonable rates under section 224(b)(1) applies to such attachments.[28] Significantly, Congress has been well aware that VoIP remains unclassified by the Commission and has itself enacted amendments to the Communications Act acknowledging that unclassified VoIP does not fall within established service definitions.[29] Consistent with the rationale and policies of its 1998 decision on pole rates for Internet access services, and its *2011 Pole Order*, the Commission should rule that the Cable Rate formula applies to unclassified cable VoIP service attachments.

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[28] Such unclassified attachments are subject to the Commission's "pole attachment" authority under sections 224(a)(4) and 224(b) because they are an "attachment by a cable system." *Id*. at 341-42. The litigation that utilities style as "collections" actions invariably seeks judicial classification of communications services for pole attachment rate purposes. In resolving the Ameren Petition, the Commission should clarify that communications services that have not been expressly classified as telecommunications services for pole attachment rate purposes under section 224(e), or as cable services under section 224(d), properly receive the cable rate as "unclassified" services. This approach is consistent with the Commission's precedent and practice and preserves the Commission's jurisdiction to classify communications services according to federal law and policy. *See1998 Pole Order*, 13 FCC Rcd at 6792-6796,¶¶ 26-34; *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, File No. PA-89-002, Memorandum Opinion and Order, 6 FCC Rcd 7099, 7105, ¶30 (1991).

[29] For example, in 2008, Congress enacted legislation requiring interconnected VoIP providers to provide 911 services, although telecommunications service providers were already obligated to do so under existing law. *See* New and Emerging Technologies 911 Improvement Act of 2008, Pub. L. No. 110-283, 122 Stat. 2620 (2008), codified at 47 U.S.C. §§ 615, 615a-1, and 615a-1(f)(1) ("For each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services."). Similarly, in 2010 Congress amended the Communications Act by adding a statutory definition of "interconnected VoIP service" reflecting Congress' knowledge that the Commission has not classified VoIP as telecom or otherwise. 47 U.S.C. § 153(25); *see* Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010). More generally, the Supreme Court presumes that "Congress is aware of 'settled judicial and administrative interpretations' of terms when it enacts a statute." *NCTA v. Brand X Internet Servs*., 545 U.S. 967, 993 (2005), quoting *Commissioner v. Key-stone Consol. Indus., Inc*., 508 U.S. 152, 159 (1993).

CONCLUSION

For the forgoing reasons, the Commission should rule that the Cable Rate formula applies to unclassified cable VoIP service attachments.

Respectfully submitted,

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January 22, 2014