Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of 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

COMMENTS OF AT&T

By Public Notice released December 20, 2013, the Commission has invited comments on the Petition of Union Electric Company d/b/a Ameren Missouri for Declaratory Ruling (Petition), on the question of whether, "under Section 224 of the Communications Act of 1934, as amended, the VoIP service offered using Cable One, Inc.'s pole attachments is a 'telecommunications service' for purposes of determining the appropriate pole attachment rental."[1] Because we believe that this is an inappropriate forum for determining the classification of VoIP services and that, under existing law, the Commission need not classify Cable One's VoIP service in order "to terminate a controversy and remove uncertainty" with respect to the license agreement between Union Electric Company (Ameren) and Cable One, Inc. (Cable One), AT&T Services, Inc. (AT&T) submits these comments.

A. Facts[2]

Cable One was formerly known as "Post-Newsweek Cable, Inc." (PNC). As PNC, Cable One filed a tariff, which was issued on March 17, 1997, with the Missouri Public Service Commission (MPSC) for an interexchange telecommunications service.[3]

[1] Public Notice, WC Docket No. 13-307, DA 13-2453 (rel. Dec. 20, 2013) (Public Notice).

[2] This recitation of the "Facts" is derived from records provided and/or statements made by Ameren and/or Cable One or documents otherwise publically available.

[3] See Exhibit "G" to Petition. By means of Exhibit "G," Cable One notified the MPSC that it had changed its name to Cable One and that, effective May 28, 1997, it would adopt, ratify, and make its own the PNC tariff.

Effective June 17, 2003, Ameren and Cable One entered into a license agreement, called the "Master Facilities License Agreement" (Agreement), setting out the terms and conditions and the rental rates for Cable One's "Attachments" to Ameren's "Facilities" (*e.g.*, poles, ducts, and conduits). The Agreement unambiguously allows

> [a]ttachment to Licensor's [Ameren's] Facilities of Attachments solely for those entities and those services for which Licensor is required under 47 U.S.C. § 224 to permit attachment. If either the services or Licensee [Cable One] is not covered by 47 U.S.C. § 224, Licensor may in its sole discretion terminate this Agreement. In addition, Licensee may not use Attachments for any services not covered by 47 U.S.C. § 224.[4]

The Agreement appears to contemplate that Cable One could attach facilities both as a cable television system and as a telecommunications carrier, because the Agreement sets out two distinct "Attachment and Use Fee[s]"—one for a cable television system (CATV Rate) at $9.80; one for telecommunications services (Telecom Rate) at $30.81.[5] The Agreement requires Cable One both to notify and to certify to Ameren the existence of "Attachments used to provide telecommunications services as defined in 47 U.S.C. § 224."[6]

Effective October 22, 2004, Cable One's tariff for interexchange telecommunications services was "cancelled."[7] Cable One claims that it is not in the business of providing "telecommunications services" and that it is not certified by the MPSC as a competitive telecommunications provider.[8]

In 2011, Ameren filed suit in the Circuit Court of the County of St. Louis, Missouri, against Cable One for an alleged breach of the Agreement. Ameren accused Cable One of (1)

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[4] Agreement, para. 8.

[5] Exhibit "A" to Agreement.

[6] Agreement, para. 9.

[7] See Exhibit "G" to Petition.

[8] "Cable One, Inc. Reply in Support of Cable One, Inc. Motion to Dismiss, or in the Alternative for a Stay, in Difference to the Primary Jurisdiction of the FCC," Case No. 4:11-CV-00299, United States District Court for the Eastern District of Missouri, Eastern Division, p. 6 (filed March 21, 2011) (Cable One Reply Memorandum). Our own research on the MPSC web site would appear to confirm this assertion, because Cable One is not identified there by the MPSC as a telecommunications carrier.

failing to notify Ameren when Cable One's CATV Attachments "became telecom attachments"; (2) failing to accurately report or certify the number of telecom attachments in Missouri; and (3) failing to pay the correct rental rate for attachments that Cable One failed to identify as telecom attachments.[9] Reading between the lines, it appears that Cable One may have made timely CATV Rate payments on its attachments, but Ameren is claiming that Cable One should have paid the Telecom Rate on at least some of those attachments. Ameren seems to be seeking the difference between the CATV Rate Cable One paid on attachments, which Ameren claims should have been identified as telecom attachments, and the Telecom Rate.[10]

On February 16, 2011, Cable One removed the state-court action to federal court. On February 22, 2011, Cable One filed its "Motion to Dismiss Case or, In the Alternative, for a Stay in Deference to the Primary Jurisdiction of the FCC." In support of its motion, Cable One argued that the issue in the Ameren-Cable One dispute 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.'"[11] Cable One also asserted that "[t]he determination of whether Cable One should be subject to the rate for cable attachments or the rate for telecommunications attachments is thus *dependent on the regulatory classification of Cable One's VoIP services*," which Cable One contended fell "squarely within the FCC's 'expertise and experience.'"[12]

For its part, Ameren hotly disputed the assertion that the resolution of its breach of contract case depended on the FCC's classification of VoIP services. In the Trial Court, Ameren contended that "Cable One [sought] to complicate this action with a fairly detailed—and

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[9] Petition of Union Electric Company, Circuit Court, St. Louis County, Missouri, Case No. 11SL-CC00072 (State Court Petition).

[10] There would be a $21.01 difference between the rates for each such attachment.

[11] See Exhibit "D" to Petition: "Memorandum of Points and Authorities in Support of Cable One, Inc.'s Motion to Dismiss, or in the Alternative for a Stay, in Deference to the Primary Jurisdiction of the FCC," p. 2 (Cable One's Trial Memorandum).

[12] *Id.* (emphasis added).

thoroughly irrelevant—explanation of VoIP, using mainly facts which are not evident from the pleadings."[13] Ameren didn't want the case stayed to seek a Commission ruling, it wanted to conduct discovery "to determine the extent of Cable One's telecommunications services in Missouri."[14] Unfortunately for Ameren, the Trial Court agreed with Cable One and compelled Ameren to file the Petition made the subject of these proceedings.

B. Discussion

1. This private dispute between litigants is not the appropriate forum in which to decide the classification of VoIP—a classification which will have profound policy and market ramifications.

The Commission has been considering whether, when, and how to classify VoIP service since at least 2004.[15] The decision to classify VoIP will have significant ramifications for providers of VoIP services and their competitors. Like other interested parties, AT&T has opined on the topic of VoIP classification and has asserted that, because VoIP service is an information service, "VoIP providers—like other providers of IP-based services—are not 'telecommunications carriers' . . . ."[16] VoIP service is an information service because it involves

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[13] Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss or in the Alternative to Stay Proceedings, p. 2.

[14] *Id.*

[15] *See IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (*IP-Enabled Service Notice*).

[16] Comments of AT&T Inc., *Connect America Fund; etc*., WC Docket No. 10-90, *et al*., p. 36 (filed Feb. 24, 2012). *See also* Opposition of AT&T, *tw telecom inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act*, WC Docket No. 11-119, at 3-8 (filed Aug. 15, 2011) ("*AT&T tw telecom Opposition*"); Comments of SBC Communications Inc., *IP-Enabled Services*, WC Docket No. 04-36, at 33-42 (filed May 28, 2004) (discussing IP-enabled services and VoIP); Reply Comments of SBC Communications Inc., *IP-Enabled Services*, WC Docket No. 04-36, at 22-26 (filed July 14, 2004) (same); *see also* Comments of Verizon and Verizon Wireless, *tw telecom inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act, As Amended, for the Transmission and Routing of tw telecom's Facilities-Based VoIP Services and IP-In-The-Middle Voice Services*, WC Docket No. 11-119, at 14-20 (filed Aug. 15, 2011) ("*Verizon tw telecom Comments*"); Comments of Alcatel-Lucent, *tw telecom inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act*, WC Docket No. 11-119, at 6-8 (filed Aug. 15, 2011) ("*Alcatel-Lucent tw telecom Comments*"). AT&T incorporates these filings by reference here.

net protocol conversion and is tightly integrated with other functionalities that allow end users to "generat[e], acquir[e], stor[e], transform[], process[], receive[e], utilize[e], or mak[e] available information via telecommunications."[17] Because of the broad and far-reaching impacts any decision to classify VoIP service will have, we contend that it ought not to be decided in the context of a contractual dispute between individual litigants. Rather, given the policy and market implications, the decision should remain part of the pending IP-Enabled Services Docket or other appropriate rulemaking proceeding.

2. The Commission need not classify Cable One's VoIP service in order to terminate the controversy and remove uncertainty.

Happily for the individual litigants in this dispute, however, the Commission needn't classify VoIP services in order to "terminate a controversy and remove uncertainty"[18] because, in spite of Cable One's claim to the contrary, the determination of whether Cable One should be subject to the rate for cable television attachments or the rate for telecommunications attachments is not dependent on the regulatory classification of Cable One's VoIP services.[19] This is so because application of the Commission's prior ruling, and underlying rationale for it, in the *1998 Implementation Order*[20] on commingled services makes such a determination unnecessary.

Cable One claims that the VoIP services in question are provided by means of a broadband connectivity that employs Cable One's certified modem or embedded multimedia terminal adapter.[21] That is, the service is provided by means of Cable One's cable television system or, said another way, Cable One is comingling its VoIP service with its traditional cable television service. In the *1998 Implementation* Order, the Commission previously tackled a

[17] 47 U.S.C. § 153(24).

[18] See Petition, p. 1.

[19] Exhibit "D" to Petition: Cable One's Trial Memorandum, p. 2.

[20] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6793-94 (1998) (*1998 Implementation Order*).

[21] Cable One Reply Memorandum, p. 6.

similar issue when it addressed (1) whether cable television providers can attach to utility poles under Section 224 when they comingle traditional cable service with Internet access services and (2) whether such comingled services are subject to the cable rate of Section 224(d)(3).

First, in paragraph 30 of the *1998 Implementation Order*, the Commission began by recognizing that Section 224 applied to *any* attachments by a cable television system and that cable providers' attachments providing non-traditional cable services, like Internet access, were not excluded from the scope of the Pole Attachment Act (47 U.S.C. § 224):

> The definition of "pole attachment" does not turn on what type of service the attachment is used to provide. Rather, a "pole attachment" is defined to include any attachment by a "cable television system." Thus, the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act. Under Section 224(b)(1), the Commission has a duty to ensure that such rates, terms, and conditions are just and reasonable. We see 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.[22]

Second, the Commission reasoned that, to hold otherwise, would be contrary to the intent of Congress in enacting the Pole Attachment Act and would effectively punish cable providers for fulfilling the objectives of the Federal Telecommunications Act of 1996:

> The history of Section 224 further supports our conclusion. The purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments**.** The nature of this relationship is not altered when the cable operator seeks to provide additional service. Thus, it would make little sense to conclude that a cable operator should lose its rights under Section 224 by commingling Internet and traditional cable services. Indeed, to accept contentions that cable operators expanding their services to include Internet access no longer are entitled to the benefits of Section 224 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.[23]

Then *third,* the Commission concluded that cable television system attachments that provide commingled services were entitled to the Section 224 (d) cable rate formula:

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[22] *1998 Implementation Order*, 13 FCC Rcd at 6793-94 (1998).

[23] *Id.* at 6794.

> Having decided that cable operators are entitled to the benefits of Section 224 when providing commingled Internet and traditional cable services, we next turn to the appropriate rate to be applied. We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate. 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. 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.[24]

The United States Supreme Court upheld the *1998 Implementation Order* ruling on the Pole Attachment Act; *i.e*., the Court upheld the Commission's finding that attachments by a cable television system that commingled non-traditional services were still covered by Section 224(b) and that the Commission's decision to apply the prescribed cable rate formula of subsection (d) to such attachments was "logical and unequivocal."[25] In doing so, the Court noted, among other things, that the two prescribed formulas in the Pole Attachment Act—one in subsection (d) for cable television system attachments and one in subsection (e) for telecommunications carrier attachments—were not exclusive. To the Court this meant that, even if the Commission had found that attachments by a cable television system with commingled non-traditional services were excluded from the subsection (d) prescribed cable-rate formula, Section 224(b) still empowered the Commission to determine whether an attachment rate for those facilities was just and reasonable without reliance upon a "specific statutory formula devised by Congress."[26] In short, in the case of attachments with comingled services, the Pole Attachment Act authorizes the Commission to approve either one of the specified rates devised by Congress or some other unspecified rate as long as the rate was just and reasonable.

In *Gulf Power*, the appellants did not challenge the Commission's choice of rates; therefore, that issue wasn't presented to the Court. Nevertheless, the regulatory writing was on the wall and potential challengers realized that whether the Commission chose the prescribed

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[24] *Id.*

[25] *NCTA v. Gulf Power Co.*, 534 U.S. 327, 338; 122 S.Ct. 782, 788; 151 L.Ed.2d 794, 805 (2002).

[26] *Id.* at 336, 122 S.Ct. at 788, 151 L.Ed.2d at 804.

cable rate or a rate not "devised by Congress," it was highly unlikely that the Commission would select the telecom rate of subsection (e). Consequently, this effectively ended any challenge to the Commission's holding on cable television system attachments with commingled services.

In our view, the rationale of the *1998 Implementation Order* applies equally to cable systems used to provide commingled video and VoIP. *First*, under Section 224(b), the Commission is empowered to ensure that *any* attachments by a cable television system are subject to just and reasonable rates, terms, and conditions. *Second*, it would make no sense for cable providers lose the protections and benefits afforded them under the Pole Attachment Act just because they chose to commingle non-traditional services (here, VoIP) with traditional cable television services, especially services that contribute to promoting competition in every sector of the communications industry. *Third*, whether the service is Internet access or VoIP, requiring cable providers to pay a higher rate for commingling the service would not serve the public interest because it might deter providers from offering non-traditional services and, expressly contrary to the aim of the Federal Telecommunications Act of 1996, thereby harm competition.

Just as the Commission did not have to "categorize Internet services" for purposes of Section 224(b) and (d), the Commission does not have to classify VoIP services either.[27] The Court made it clear in *Gulf Power* that the Commission is free to "dodge [the] hard question[] when [an] easier one[is] dispositive."[28] Finding that cable television system attachments with commingled services, like data and VoIP, are subject to a Section 224(b) just and reasonable rate and that, all things considered, it is better policy to apply the cable rate than the telecom rate is within the Commission's power—all without having to classify the other services commingled with cable television.

For the Trial Court, this means that (1) the Commission does not need to classify VoIP before the Trial Court can resolve the breach of contract dispute between Ameren and Cable

[27] *Gulf Power,* 534 U.S. at 328, 122 S.Ct. at 788, 151 L.Ed.2d at 805.

[28] *Id.*

One; (2) the existence of VoIP services commingled with Cable One's traditional cable television service does not entitle Ameren to the Telecom Rate—*i.e.*, the presence of VoIP commingled with cable television doesn't transform the attachment into a telecommunications attachment; and, (3) in light of Cable One's prior interexchange tariff on file with the MPSC, Ameren should be free to explore through discovery whether Cable One offered telecommunications services and placed actual telecommunications attachments on its poles, entitling it to the higher Telecom Rate.

C. Conclusion

The Agreement between Ameren and Cable One implies a pole-attachment world neatly divided between pure cable television system and pure telecommunications carriers' facilities. Correspondingly it also appears to presume that there are only two Pole Attachment Act rates possible—the cable rate of Section 224(d) and the telecom rate of Section 224(e). In fact it is not quite that neat.

As a cable television system, Cable One has a right of access to utility poles at a just and reasonable rate.[29] The Pole Attachment Act, as interpreted by the Commission in the *1998 Implementation Order* and upheld on appeal by the United States Supreme Court, allows cable television systems, like Cable One, to commingle non-traditional services, like Internet access, with cable television service. It makes sense then that Cable One would be permitted to commingle other non-traditional services, such as VoIP, when attaching to utility poles. As in the case of Internet access in the *1998 Implementation Order*, the Commission doesn't need to classify the comingled service in order to establish a just and reasonable rate for attachments by a cable television system. Therefore, the Commission should advise the Trial Court that, under the Pole Attachment Act, the presence of a non-traditional comingled service, like VoIP service, on Cable One's attachments on Ameren's poles does not transform Cable One's cable television

[29] 47 U.S.C. § 224(f)(1)

system attachments into pole attachments used by a telecommunications carrier or obligate Cable One to pay the Section 224(e) telecom rate.

In any case, the Commission shouldn't undertake the task of classifying VoIP service in this proceeding when the policy and market ramifications are so far-reaching and momentous. This is especially true in this case, because there is no need to classify VoIP in order "to terminate a controversy and remove uncertainty" and to resolve the dispute between Ameren and Cable One.

AT&T

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