

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20544**

Ameren Missouri Petition for Declaratory)
Ruling Pursuant to Section 1.2(a) of) WC Docket No. 13-307
the Commission's Rules)

**OPPOSITION OF AMERICAN CABLE ASSOCIATION
TO THE MOTION FOR DECLARATORY RULING OF
AMEREN MISSOURI**

The American Cable Association (“ACA”) hereby files comments in response to the Commission’s Public Notice in the above-referenced docket, in which Union Electric Company d/b/a Ameren Missouri (“Ameren”) filed a petition for declaratory ruling ostensibly requesting a ruling to the effect that 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 For the reasons explained herein, the Commission should not issue the declaratory ruling sought by Ameren. First, the issue raised by the Federal District Court of the Eastern District of Missouri (“District Court”) that prompted the *Ameren Petition* is not even properly presented in that *Petition*, such that there is no basis for a decision in Ameren’s favor. Second, a general regulatory classification is not ripe for decision in this proceeding. The Commission has never found VoIP services to be telecommunications services, and it should not do so here, as the proper regulatory treatment of VoIP and other IP-based services is pending in, and more appropriately addressed in, a generic rulemaking. Finally, a ruling that VoIP services constitute

¹ Public Notice DA-2453 (Dec. 20, 2013). The *Public Notice* set January 21, 2014, as the date to respond to the Motion for Declaratory Ruling of Union Electric Company d/b/a Ameren Missouri (filed June 24, 2013) (“Ameren Petition”). Due to the closing of the Federal Communications Commission and other federal government offices on January 21, these comments are timely filed on January 22, 2014.

telecommunications services for purposes of pole attachment rates would be contrary to the Commission's general policies promoting the deployment of broadband networks and services.

As a trade association, ACA represents more than 800 small and mid-sized cable television operators, most of whom also offer voice services and broadband Internet access services. A majority of ACA's members have fewer than 5000 subscribers and many serve areas where the density of subscribers is low resulting in the total cost of pole attachments per subscriber being significantly higher than for cable operators serving more densely populated urban and semi-urban communities. Accordingly, ACA members have a vital interest in obtaining access to poles, conduits, and other rights-of-way controlled or owned by utilities under just, reasonable, and nondiscriminatory terms, as provided for under Section 224 of the Communications Act of 1934, as amended. ACA's members, which pay the cable operator attachment rates under the Commission's cable rate formula, already provide adequate compensation to pole owners.²

The *Ameren Petition* arises out of a collection action brought by Ameren in the District Court against Cable One, Inc. ("Cable One"). The District Court directed Ameren to file a petition with the Commission to obtain a determination if the service provided by Cable One is a "telecommunications service."³ Yet the *Ameren Petition* barely makes reference to this issue, let alone argues its position in the context of the specific VoIP services Cable One provides. Instead, Ameren fills the *Petition* with complaints about the procedural handling of the litigation by the District Court. Further, Ameren states plainly that the regulatory classification of Cable One's VoIP service "is neither

² The Supreme Court found over twenty-five years ago that the Commission's cable rate formula adopted under Section 224 provides pole owners with adequate compensation, and does not result in an unconstitutional "taking." *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); see *Alabama Cable Telecomm. Ass'n v. Alabama Power Co.*, *Application for Review*, File No. PA 00-003, Order, 16 FCC Rcd 12209 (2001) (*Alabama Cable Order*), review denied sub nom *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), cert. denied, *Alabama Power Co. v. FCC*, 540 U.S. 937 (2003).

³ See *Union Electric Company d/b/a Ameren Missouri v. Cable One, Inc.*, Memorandum and Order, No. 4:11-CV-299 (CEJ) at 3, 5 (E.D. Mo. May 23, 2013) appended to *Ameren Petition*.

central to resolution of Ameren's collection lawsuit, nor an issue Ameren sought to adjudicate through its collection lawsuit. Moreover, this is not an issue Ameren is inclined to raise, or believes it should raise with the Commission.”⁴ Although Ameren goes on to claim that it nevertheless “squarely raises [the regulatory classification] issue out of deference to the Court’s unmistakable expectation that Ameren would, indeed, raise this issue through a motion for declaratory ruling,”⁵ Ameren never argues the merits of the issue, however, and actually concludes that the Commission should not resolve the issue in this proceeding but rather in one of its pending proceedings. Specifically, Ameren states that, “[i]f the Commission is inclined to address this issue, there is ample basis outside this proceeding or the underlying collection lawsuit to do so.”⁶

Because the *Ameren Petition* fails to provide any basis for why Cable One’s VoIP services should be treated as telecommunications services – let alone why VoIP services in general should be treated as telecommunications services – the Commission should simply deny the *Ameren Petition*. As the movant, Ameren has the burden of proof, and it has failed spectacularly to make a *prima facie* case.⁷

In any event, the Commission should not consider the question of whether VoIP services as a whole, or even whether interconnected VoIP services as a general matter, should be classified as

⁴ *Ameren Petition* at 5.

⁵ *Id.*

⁶ *Id.*

⁷ ACA submits that any VoIP service that originates or terminates in Internet protocol and which requires IP-compatible terminal equipment is not a telecommunications services. Were the Commission, nonetheless, to consider whether the telecommunications rate applies to Cable One’s services or any other VoIP service, administrative fairness dictates any such determination should be applied prospectively only. The Commission has a long track record of declining to categorize VoIP services as telecommunications services, and it has created a reasonable basis for an expectation that VoIP services would not be considered telecommunications services. Furthermore, were any such determination to apply retroactively, in addition to frustrating reasonable expectations, the resulting collection lawsuits could have a potentially devastating impact on the promotion of competitive broadband services by cable operators, hindering the Commission’s broadband policies.

telecommunications services in this declaratory ruling proceeding. In the past, when faced with questions in declaratory rulings regarding the regulatory classification of IP-enabled services, the Commission has limited itself to the specific services of specific providers presented by the petitions.⁸ More general classification issues are appropriately addressed in generic rulemakings where a full record can be properly developed. The Commission has for almost a decade had the issue before it of whether IP-enabled services, including IP-based telephony services, should be classified as telecommunications services in its *IP-Enabled Services* proceeding.⁹ Any such classifications should be considered in that docket or in a new rulemaking proceeding initiated by the Commission pursuant to the Administrative Procedure Act.

Indeed, when the Commission has made decisions under its ancillary jurisdiction to impose telecommunications carrier-like social obligations on interconnected VoIP providers, it has done so only through rulemakings.¹⁰ Notably, neither in those proceedings nor on any other occasion where the issue presented itself has the Commission concluded that interconnected

⁸ See, e.g., *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, FCC 04-97, WC Docket No. 02-361, ¶ 13 (Apr. 21, 2004) ("This order, however, addresses only AT&T's specific service, . . ."); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004).

⁹ See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004). See also *Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, and NPRM, FCC 07-188, 22 FCC Rcd 19531 n. 50 (2007) ("We continue to consider whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, and we do not make that determination today."), *pet. for review denied sub nom. National Telephone Cooperative Association v. FCC*, 563 F.3d 536 (D.C. Cir. 2009).

¹⁰ See, e.g., *IP-Enabled Services; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, WC Docket Nos. 04-36, 03-123, Report and Order, 22 FCC Rcd 11275 (2007); *Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006); *IP-Enabled Services; E-911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005).

VoIP services are telecommunications services. Thus, these decisions, taken as whole, manifest an intention by the Commission to not subject VoIP providers to the full panoply of common carrier regulation to which telecommunications carriers are subject under the Communications Act of 1934, as amended. Rather, the Commission has addressed the issue of regulating VoIP on an incremental basis and when necessary to advance important social public policy objectives, such as access of end users to emergency communications, consumer protection, assistance to law enforcement, or universal service. The Commission has never subjected VoIP providers to economic regulatory obligations that apply to telecommunications carriers and has created an expectation in the industry that it would not do so as a categorical matter.

Furthermore, subjecting cable operators to the telecommunications carrier pole attachment rate when they provide VoIP services as well would promote no important social public policy objective. In fact, the opposite is true. As noted above, the courts have already determined that pole owners are adequately compensated for attachments when they receive the cable rate. Moreover, the Commission determined in its *2011 Pole Attachment Order* that promoting broadband build out is an important national policy that should be advanced by rational pole attachment regulations. In that *Order*, the Commission concluded that, in order to better promote broadband deployment, the rules should be modified to bring the telecommunications carrier attachment rate closer to parity with the cable rate.¹¹ However, in the aftermath of that decision, when pole owners calculate the telecommunications carrier attachment rate based on actual average numbers of attachers that are less than the Commission's

¹¹ See *In the Matters of Implementation of Section 224 of the Act and A National Broadband Plan for Our Future* Report and Order and Order on Reconsideration, FCC 11-50, WC Docket No. 07-245 and GN Docket No. 09-51, ¶¶ 172-181 (Apr. 7, 2011) (“2011 Pole Attachment Order”) *aff’d sub nom American Electric Power Service Corporation v. FCC*, No. 11-1146 (D.C. Cir. Feb. 26, 2013).

default values, the telecommunications rate can still be considerably higher than the cable rate.¹² Accordingly, given the Commission's policy objectives of promoting broadband deployment, it makes no public policy sense at this time to subject cable operators for the first time to higher, super compensatory attachment rates when they begin to provide VoIP services. Rather, the Commission should be looking for ways to lower the rate for telecommunications carriers in all instances.

For the foregoing reasons, the Commission should deny the *Ameren Petition*.

Respectfully submitted,



AMERICAN CABLE ASSOCIATION

Matthew M. Polka
President and Chief Executive Officer
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

Thomas Cohen
Edward A. Yorkgitis, Jr.
Joshua Guyan
Kelley Drye & Warren LLP
3050 K Street, NW
Suite 400
Washington, DC 20007
Tel. (202) 342-8518
Fax (202) 342-8451
tcohen@kelleydrye.com
Counsel to the
American Cable Association

January 22, 2014

¹² See, e.g., Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, *et al.*, WC Docket No. 07-245 and GN Docket No. 09-51, at 5-6 and Attachment A, filed June 8, 2011 (telecom attachment rate using the formula adopted in the *2011 Pole Attachment Order* is 70% higher than the cable rate if the actual average number of attachers is 2.6 in an urban setting).