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

In the Matter of	)	
	)	
Petition of Union Electric Company D/B/A	)	WC Docket No. 13-307
Ameren Missouri for Declaratory Ruling	)	
Concerning VOIP Service Offered Using Cable	)	
One's Pole Attachments	)	
	)	

REPLY COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net Coalition (VON)[1] hereby submits this reply to the comments filed in response to Wireline Competition Bureau Public Notice seeking comment on a petition for declaratory ruling concerning the regulatory classification of voice over Internet Protocol (VoIP)[2] in the context of pole attachments. VON agrees with those comments that this is not the appropriate proceeding for the Commission to resolve the longstanding question regarding the classification of VoIP. However, should the Commission determine that a ruling is necessary, VON urges the Commission to find that VoIP is an information service. Such a decision is supported by decisions from three federal courts, is consistent with the statutory definition of information services, and respects the diversity of capabilities provided by IP-enabled services.

This proceeding arises from a dispute over pole attachment fees owed by Cable One, Inc. ("Cable One") to Union Electric Company d/b/a Ameren Missouri ("Ameren"). See *Motion for Declaratory Ruling of Union Electric Company d/b/a Ameren Missouri*, at 1 (Nov. 12, 2013) ("*Ameren Petition*"). In a case before the Federal District Court for the Eastern District of

[1] The VON Coalition works to advance regulatory policies that enable Americans to take advantage of the promise and potential of IP enabled communications. Its members – including AT&T, Broadvox, the Cloud Communications Alliance, Google, Microsoft/Skype, Nextiva, RingCentral, and Vonage/Vocalocity – are developing and delivering voice and other communications applications over the Internet.
[2] VoIP encompasses a broad and expanding suite of functionalities and capabilities that includes, in addition to voice calls, voice mail, translation of voicemail into email or texts; file transfers; integration with softphones and mobile devices; call recording; video chats, messaging, call-back number selection, call blocking and encryption.

Missouri, Ameren alleges that Cable One, by offering VoIP and other services via its attachments to Ameren poles, offered telecommunication services, and must pay the corresponding pole attachment rate. *Id*. Cable One disagrees. *Id*.

At the direction of the Court, Ameren has asked the Commission to find that Cable One's pole attachments are telecommunications services "for purposes of determining the appropriate pole attachment rental." *Id*. at 9. Ameren disputes the necessity of involving the Commission, and questions whether the resolution of a "party-specific, and potentially non-dispositive issue,"[3] is an "appropriate," use of 47 C.F.R. § 1.2(a). *Id*. at 2.

Commenters focused in part on whether the Commission must or should classify VoIP in this proceeding, how VoIP services should be classified by the Commission, and whether such a classification would be consistent with the goals and processes that the Commission has used in the past to promulgate rules relating to VoIP. AT&T Services, Inc. commented that the current matter, involving a fact-specific inquiry for specific parties, is not appropriate for determining VoIP's classification. See Comments of AT&T Services, Inc., p. 4; see also Comments of American Cable Association, p. 3. Similarly, commenters questioned whether classifying VoIP in this proceeding would be consistent with the FCC's goals of promoting broadband investment and development, and may instead expose providers to new costs. See Comments of National Cable & Telecommunications Association, p. 1-2; Comments of MediaCom Communications Corp., p. 2-3. However, Southern Electric Co., and Comptel encouraged the Commission to affirmatively determine that VoIP is a telecommunication service, at least for pole attachment purposes. Comments of Southern Electric Co., et al., p. 3; Comments of Comptel, p. 4.

[3] Ameren states that if the Commission finds VoIP is not a telecommunication service, the issue of whether telecommunication services are provided by Cable One for pole attachment purposes will not be decided. This is because Ameren does not know the full nature of the use to which Cable One has put its pole attachments. *Ameren Petition* at 5-6. Ameren suggests that Cable One may offer pure transmission services to its business customers. *Id*.

DISCUSSION

The Commission should not classify VoIP in this proceeding; particularly if classification will not necessarily resolve the dispute, as suggested by Ameren. See note 3. VoIP classification is a major legal and policy issue that should be addressed in a proceeding that enables the Commission to consider all aspects of the question, rather than in a proceeding that involves only the narrow issue of pole attachments. This dispute also involves the specific facts of parties that do not and cannot represent the wide diversity of VoIP services and VoIP service providers. See note 2, infra. With this in mind it would be better to resolve the classification issue in proceedings that take the full scope of facts and issues into account, and have received widespread public comment (e.g., the IP-Enabled Services Proceeding, WC Docket 04-36).

If the Commission believes it must issue a decision in this proceeding then it must find that VoIP is an information service.

First and most importantly, three federal courts have already determined that VoIP is an information service under federal law. *See PAETEC Communications, Inc. v. CommPartners, LLC*, Civil Action No. 08-0397(JR), 2010 WL 1767193, at *2-*3 (D.D.C. Feb 18, 2010); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1081-83 (E.D. Mo. 2006), aff'd, 530 F.3d 676 (8th Cir. 2008); *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003). The Courts in *PAETEC* and *Southwestern Bell* both found that interconnected VoIP was an information service for the purposes of determining whether VoIP providers were required to pay access fees for calls terminating on another carrier's network. *See PAETEC*, WL 1767193 at *3; *Southwestern Bell*, 461 F. Supp. 2d at 1081.In *Southwestern Bell*, the court noted that non-interconnected VoIP is an

information service as well, because it offers capabilities to users (e.g., "…transforming, processing, receiving…") that are the hallmark of information services. *Southwestern Bell*, 416 F. Supp. 2d at 1082.

In *Vonage v. Minnesota*, Vonage sought relief from regulation by the Minnesota Public Utilities Commission. *See Vonage*, 290 F. Supp. 2d at 999. Vonage argued that its services are information services and that federal regulation preempted state regulation of such services. *Id*. at 1002. The Court found for Vonage, determining that VoIP is an information service, whether or not it connects to the Public Switched Telephone Network. *Id*. (citing *Universal Service Report*, 13 FCC Rcd. ¶ 46, at 11524).

In addition to the judicial precedent, VoIP should be classified as an "information service" based on a reasonable interpretation of the Communications Act. The Act defines "information service" as:

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(24). VoIP meets this definition because it offers the capability to perform a "net protocol conversion," specifically, conversion from IP to TDM, or *vice versa*. *See Southwestern Bell*, 461 F. Supp. 2d at 1082 (explaining that VoIP "involves a net protocol conversion from the digitized packets of the IP protocol to the TDM technology used on the [public switched telephone network]," and that therefore VoIP "is an information service").

In addition to the net protocol conversion, the Supreme Court has determined that services offering consumers a suite of capabilities that includes data transport integrated with features that "generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or ma[ke] available [information via telecommunications]," are information services. *National Cable &*

Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005) ("*Brand X*") (alluding to 47 U.S.C. § 153(24)).

In *Brand X*, the FCC concluded that cable modem service is a *single* integrated information service, although that service includes "data transport elements" as well as "information-service capabilities." *See Brand X*, 545 U.S. at 977-79. Reviewing that decision, the Court explained that the test for determining whether such a service is a single information service, and not two distinct services, is to look at what the customers perceives as the finished product. If the various features are offered as a single, integrated service, without a "transparent transmission path," to provide a telecommunications service separate from any information processing, the service is properly classified as an information service. *Id*. at 990-90, 998-1000.

As the FCC recognized in the *Vonage Order*,[4] the integrated features described above "are not unique" to any one VoIP service, but "are inherent features," of virtually all VoIP services, including those offered by "cable companies," and other "facilities-based provider." Vonage Order ¶¶25 n.93, 32. VoIP providers, moreover, offer these information-processing capabilities and features as part of a single, integrated service. There can be no separate offering of "telecommunications" to consumers of VoIP services.[5]

The Commission should dismiss arguments that VoIP is the functional equivalent of legacy phone services, and must therefore be classified as a telecommunication service. While some features of interconnected VoIP may bear similarities to certain features of legacy phone services, interconnected VoIP also includes a broad range of capabilities and functionalities that

[4] Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"), *available at* http://goo.gl/Rv11Y.

[5] The Commission to date has focused its regulation of interconnected VoIP on matters related to public safety and consumer protection. This light regulatory touch has been successful, resulting in a compound annual growth rate of 17 percent, with more than 40 million reported users of interconnected VoIP. Competition among interconnected VoIP providers (there are estimates of more than 500 operating in the United States) creates incentives to keep prices low and to continue developing new products and features.

are not similar to legacy services. These VoIP features and functionalities can transform, process and store information from customers, and include the capability to translate voicemail into email or texts; file transfers; integration with softphones and mobile devices; video chats, messaging, call-back number selection, call blocking, encryption and other capabilities. Because there is such a diversity of service offerings and capabilities, VoIP fits comfortably only in the broad category of information services, not as telecommunications.

CONCLUSION

The Commission should not classify VoIP in this proceeding; however, if it does, it should classify VoIP as an information service.

Respectfully submitted

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