

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

In the Matter of)	
)	
Motion 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
UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI**

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Union Electric Company d/b/a Ameren Missouri (“Ameren”), respectfully submits these Reply Comments in support of its request for a declaratory ruling.

I. This is not the proper context for the Commission to decide the VoIP classification issue.

To be clear, Ameren does not believe that its motion for declaratory ruling is an appropriate use of 47 C.F.R. § 1.2; Ameren filed the motion because it was required to do so by a federal court. Nor does Ameren believe that the Commission should regularly decide party-specific issues through a motion for declaratory ruling, particularly where (as here) those issues are non-dispositive in pending litigation.

The majority of the comments filed in this proceeding fail to address the procedural issue that is squarely before the Commission: whether utilities should be required to seek a declaratory ruling pursuant to 47 C.F.R. §1.2 on the classification of certain communications services offered over attachments to their poles before proceeding with a breach of contract action to collect unpaid pole attachment rentals, or whether the proper means of invoking the Commission’s jurisdiction is, as has been the case historically, through a pole attachment

complaint filed by a cable television system or provider of telecommunications services pursuant to 47 C.F.R. § 1.1401, *et seq.*

Most of the comments that do address the procedural issue seem to agree on one specific point: this is not the appropriate proceeding to decide the VoIP classification question. *See* American Cable Association Comments at 1 (“a generic regulatory classification is not ripe for decision in this proceeding...the proper regulatory treatment of VoIP and other IP-based services is pending in, and more appropriately addressed in, a generic rulemaking”)¹; AT&T Comments at 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 Ameren and Cable One...”); Electric Utilities Comments at 5 (“Because of the broad and far-reaching impacts any decision to classify VoIP service will have, we contend that it ought not be decided in the context of a contractual dispute between individual litigants.”); Electric Utilities Comments at 5 (“The Commission should make clear that the pole attachment complaint process, and not 47 C.F.R. § 1.2, is the proper means of invoking the Commission’s jurisdiction over a pole attachment rate dispute between two parties.”).

¹ Upon information and belief, Cable One, Inc.—the party in the underlying federal court proceeding which took the position that it was Ameren’s responsibility to seek a declaratory ruling before proceeding with its collection action—is a member of the American Cable Association (“ACA”). *See* List of ACA Board of Directors *available at* http://www.americancable.org/about_us/aca_overview/list_aca_board_directors (identifying Tom Might, President and CEO of Cable One, as an ACA board member) (last visited February 3, 2014).

II. Cable One's comments are inconsistent with its positions in the underlying federal court proceeding and embrace a peculiar position regarding the scope of pole attachment complaints.

A. Despite its position in the underlying proceeding, Cable One does not request a VoIP classification from the Commission.

Ameren and Cable One are before the Commission because Cable One successfully represented to the Eastern District of Missouri that classification of the VoIP issue was necessary for disposition of Ameren's contract action. Cable One also successfully represented that 47 C.F.R. § 1.2 is the proper means of initiating a Commission proceeding to answer questions that *might* prove helpful in a pending contract dispute. Cable One's representations to the Commission in this proceeding, though, are not the same.

Here, Cable One expressly asks the Commission *not* to decide the VoIP classification issue. *See* Cable One Comments at 13 (“By contrast, the Commission ‘has expressly declined to address the statutory classification of VoIP services. *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.*”) (emphasis added).² The requested relief in Cable One's comments makes no mention of the VoIP issue. Rather, it asks for a declaration that “(1) there are only two applicable rates for pole attachments – the telecom rate and cable rate; and (2) the telecom rate for pole attachments applies only to telecommunications carriers or providers of telecommunications services.” *See* Comments of Cable One at 15. Even if the Commission grants both requests, the Eastern District of Missouri

² Cable One's specific request to the Eastern District of Missouri was to defer to the FCC and its pending determination of “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* Cable One's February 22, 2011 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 at 5.

will have no more guidance than it already does. Indeed, these requests seek a declaration regarding issues not in dispute.³

B. Cable One does not believe rate disputes are proper issues for pole attachment complaints.

In the underlying federal court breach of contract action, Cable One disputes the applicable pole attachment rate under the Master Facilities Licensing Agreement. In essence, Cable One contends that Ameren is charging “unjust or unreasonable” rates by allegedly subjecting attachments used to provide VoIP services to the telecom rate.⁴ The proper vehicle for making this argument is a pole attachment complaint filed through 47 C.F.R. 1.1401 *et seq.*⁵

Yet, Cable One claims that the “situations” contemplated by the pole attachment complaint procedures are not “present here” and therefore, a pole attachment complaint is

³ Ameren agrees that the telecom rate for pole attachments applies only to attachments used to provide “telecommunications services.” That is not the issue; the issue, as framed in Ameren’s breach of contract action, is whether Cable One is providing “telecommunications services” over attachments to Ameren’s poles.

⁴ Ameren takes exception to the notion that its right of recovery is based on the classification of VOIP telephone services. As Ameren noted in its filings in the underlying federal court proceeding and in its motion for declaratory ruling, Cable One is (or may be) offering other services that unquestionably constitute “telecommunications service” under the Commission’s existing precedent. *See* Ameren’s Motion for Declaratory Ruling at 5-6 (“even if VoIP service itself does not subject pole attachments to the telecom rate, the provision of other telecommunications services (including those commonly offered by cable companies within their suite of ‘business’ services) over these same attachments does.”); Ameren’s Reply in Support of Motion to Lift Stay (attached as Exhibit A), at 2, (“As Cable One well knows, there are numerous other services that indisputably trigger the applicability of the telecom rate. The FCC has specifically determined that numerous other services provided by cable operators are telecommunications services, including data transport, virtual private network, gigabit Ethernet services, and private line services.”)

⁵ The Commission itself recognized as much in its January 30, 2014 Public Notice. *See* DA-14-99 (Jan. 30, 2014) *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0130/DA-14-99A1.pdf (“Primary jurisdiction referrals in cases involving common carriers or utilities generally are appropriately filed as complaints with the Enforcement Bureau pursuant to Sections 208 or 224 of the Act.”)

unwarranted. *See* Cable One Comments at 7 n.31. This is an interesting position, indeed, for a cable television system to take. Respectfully, Ameren submits that Cable One’s opportunism may have outpaced its perspective. Though the notion of cable television systems being procedurally barred from filing pole attachment complaints under these circumstances is intriguing to say the least, it is inconsistent with the law and Ameren cannot support it.

III. VoIP services should be classified as telecommunications services subject to the telecom rate.

The parties are before the Commission because the Eastern District of Missouri seeks clarity on the regulatory classification of VoIP services. As the comments here explain, there is a substantial basis for classifying VoIP services as “telecommunications services.” *See* Comptel Comments at 1 (“The service at issue in this proceeding clearly falls within the statutory definition of a ‘telecommunications service’”); Electric Utilities Comments at 3 (“Because VoIP is functionally indistinguishable from traditional telephone service, the Commission already subjects VoIP service to many of the same regulations that apply to telephone service provided by telecommunications carriers.”)

The notion that Ameren’s motion for declaratory ruling was filed as part of a “sly litigation strategy” aimed at “convincing a non-expert court to apply the defunct, pre-2011 telecommunications rate”, *see* Mediacom Comments at 2, is flawed for at least three reasons. First, it fails to acknowledge the procedural history of the underlying lawsuit; second, it fails to appreciate that, even after the Commission’s 2011 Pole Attachment Order, telecommunications attachments are indeed subject to a different (and potentially higher) pole attachment rate. Third, it fails to recognize that Ameren seeks telecom rates only for attachments used to provide telecommunications services. Moreover, Ameren’s suit to recover unpaid telecom pole

attachment fees is hardly as “sly” as filing a motion for primary jurisdiction referral and then subsequently requesting that the agency not address the referred issue.

CONCLUSION

Ameren reiterates the requests included in its initial Motion and respectfully seeks a declaratory ruling that:

- the VoIP service offered over Cable One’s attachments is a “telecommunications service” for purposes of determining the appropriate pole attachment rental;

Or, alternatively, that:

- Ameren is not required under Commission rules to seek a declaratory ruling on the classification of Cable One’s services prior to seeking collection under contract in state or federal court;
- The Commission does not intend to adjudicate the classification of Cable One’s specific services through a motion for declaratory ruling filed by Ameren pursuant to 47 C.F.R. § 1.2; and/or
- The appropriate avenue for presenting the substance of the pole attachment dispute between Ameren and Cable One to the Commission is through a pole attachment complaint, filed by Cable One, pursuant to 47 C.F.R. §1.1401, *et seq.*

Respectfully submitted,

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