EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNION ELECTRIC COMPANY	)	
d/b/a Ameren Missouri,	)	
	)	
Plaintiff,	)	
	)	**Case No.: 4:11-CV-00299**
v.	)	
	)	
CABLE ONE, INC.,	)	
	)	
Defendant.	)	

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO LIFT STAY

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CABLE ONE, INC.,	)	
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PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO LIFT STAY

Plaintiff Union Electric Company d/b/a Ameren Missouri ("Ameren") submits the following Reply in Support of its Motion to Lift Stay:

I. INTRODUCTION

This is a breach of contract lawsuit. Cable One's Opposition to Ameren's Motion to Lift Stay rests upon at least three flawed premises:

- That Cable One's obligation to pay the telecom pole attachment rate depends exclusively upon the regulatory classification of VOIP telephone service;
- That Ameren bears the burden of seeking some sort of declaratory relief from the FCC prior to seeking to enforce its rights under the Master Facilities License Agreement ("MFLA") between the parties; and
- That FCC procedures provide Ameren an efficient means of resolving the issue, as unilaterally framed by Cable One.

No party disputes that Cable One is obligated to pay Ameren the telecom rate for pole attachments used to provide telecommunications services. That much is certain under the MFLA

and the law. In its complaint, Ameren seeks only to recover underpaid telecom rate back rents for those Cable One attachments used (by Cable One itself or a third-party fiber lessee) to provide telecommunications services. By virtue of the stay in this case, no discovery has been completed to allow Ameren to determine what portion of Cable One's system is properly subject to the telecom pole attachment rate (and during what period of time).

It is both presumptuous and premature for Cable One to suggest that Ameren's entitlement to the telecom pole attachment rate rests exclusively upon the regulatory classification of Cable One's VOIP telephone service. 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 commonly provided by cable operators are telecommunications services, including data transport, virtual private network, gigabit Ethernet services, and private line services. *See Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.*, 22 FCC Rcd 9285, at ¶ 18 (2007) ("Salsvier Telecom's tariffed private line services are clearly 'telecommunications services'"); *DQE Comms. Network Svs., LLC v. N. Pittsburg Tel. Co.*, 22 FCC Rcd 2112, at ¶¶ 15-17 (2007) ("DQE CNS's tarried private line services are 'telecommunications services' within the meaning of section 153(46) of the Act.") ; *Fiber Techs. Networks, LLC v. N. Pittsburgh Tel. Co.*, 22 FCC Rcd 3392, at ¶¶ 21-26 (2007) ("Carriers can choose to offer the transmission component (of internet service) as a telecommunications service on a stand-alone, wholesale common carrier basis…"; *see also* 47 C.F.R. Pt. 211, sec. 211.0, *et seq.* (providing that restoration of "private line" telecommunications services would be a restoration priority in cases of national emergency or international crisis); *In re Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC

Rcd 14853 ¶ 9 (2005) (noting "gigabit Ethernet service" is a telecommunications service subject to Title II requirements).

In the event Cable One believes that Ameren is seeking (or the Court is imposing) the telecom rate on pole attachments over which no telecommunications services are provided, Cable One can seek relief—as cable operators often do under similar circumstances—through the FCC's specific pole attachment complaint procedures. *See* 47 C.F.R. § 1.1401 *et seq*. The solution Cable One urges—that Ameren seek regulatory relief before pursuing its contract rights—is unorthodox, to say the least. But even if the procedure Cable One urges was technically proper, it would be a huge waste of time. As Cable One itself notes in its Opposition, the FCC has been sitting for nearly four years on the very petition for declaratory ruling that Cable One argues Ameren should have joined. Even if Ameren's breach of contract lawsuit depended upon the regulatory classification of VOIP telephone service (and it does not), surely interminable delay is not what Cable One views as meeting the goals of judicial economy or the ends of justice.

II. ARGUMENT

A. Cable One's reliance on the VoIP issue is a red herring.

In its September 27, 2011 Order the Court wrote: "Despite plaintiff's representations, the Court does not believe that any of the specific services plaintiff points to on defendant's website – VoIP, dedicated line business data transport, and E-rate services – can be easily classified under prior FCC precedent." *See* ORDER September 27, 2011 at p.7. The Court also wrote, "it is enough that one service addressed by plaintiff's complaint implicates the primary jurisdiction doctrine." *Id.*

As described above, the additional services referenced in the Court's September 2011 Order *have* been classified by the FCC and can be easily addressed by this Court. If a pole attachment is used to provide telecommunications service—whether in whole or in part—it is subject to the telecommunications rate, regardless of whether another service offered over the same attachment would, standing alone, be subject to the cable rate. *See In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 F.C.C.R. 12103, ¶ 86 ("We affirm our holding in the Telecom Order that if an attachment previously used for providing solely cable services would, as a result of the leasing of dark fiber, also be used for providing telecommunications services, the rate for the attachment would be determined using the Telecom Formula.") (May 25, 2001)*; see also NCTA v. Gulf Power Co.*, 534 U.S. 327, at 357 n.7 (2002) (Thomas, J., concurring in part) ("Rates for attachments used to provide telecommunications service are covered by § 224(e)'s rate methodology regardless of whether these attachments are also used to provide cable service and/or other types of service as well."). In other words, so long as at least one of the services offered over an attachment is a telecommunications service, it does not matter whether some or all of the other services are unclassified or otherwise classified. The telecom rate still applies. Discovery of the actual services offered over Cable One's attachments, where those services are offered, and how those services are offered will resolve this dispute.

B. Neither the September 27, 2011 Order nor the primary jurisdiction doctrine require Ameren to seek relief from the FCC.

Cable One repeatedly argues that, pursuant to the September 27, 2011 Order, Ameren was required to petition the FCC to resolve the VoIP classification issue. As an initial matter,

Ameren disagrees with Cable One's interpretation of the Court's Order.[1] But perhaps more importantly, to the extent Cable One's argument implies that this issue must be resolved by an agency before Ameren can pursue its legal rights under the MFLA, it mistakes the doctrine of primary jurisdiction for the exhaustion of remedies doctrine. The two are not the same and Ameren is not required to exhaust administrative remedies before initiating this action. *See Rogers v. Columbia/HCA of Central Louisiana, Inc.*, 961 F.Supp. 960, 965 (W.D. La. 1997) (stating "Courts and counsel have frequently confused the closely related judicial doctrines of administrative exhaustion and primary jurisdiction," and "[e]xhaustion applies where a claim is cognizable in the first instance by an administrative agency alone."); *Maryland-National Capital Park and Planning Commission v. Washington Nat. Arena*, 386 A.2d 1216, 1226 (Md. Ct. App. 1978) (contrasting exclusive administrative remedies under the exhaustion of remedies doctrine and the doctrine of primary jurisdiction which requires a Court to retain jurisdiction while referral takes place).

The doctrine of primary jurisdiction does not require a plaintiff to seek relief before the relevant agency. And unless a defendant presents a valid failure-to-exhaust-administrative-remedies defense, the failure to pursue administrative relief cannot serve as an indefinite bar to a plaintiff's right to legal recourse. In fact, at least one court recognized that where neither party had sought relief from the FCC, it would be improper to apply the primary jurisdiction doctrine. *See Lipton v. MCI Worldcom, Inc.*, 135 F.Supp.2d 182, 191-192 (D.D.C. 2001) ("Finally, the court must consider whether a prior application has been made to a particular agency. There is no indication that the plaintiff made a prior application to the FCC. Accordingly, the court will decline the defendants' invitation to refer this matter to the FCC under the doctrine of primary

[1] Specifically, Ameren does not read the word "its" in the final line of the Court's Order to refer to Ameren. Rather, Ameren interprets this line to refer to the FCC's pending proceeding in *Docket 09-154*

jurisdiction.") Furthermore, at least one court has held that where the party seeking to impose the stay has not filed a petition to resolve the issue, the exercise of primary jurisdiction is improper. *See Central Telephone Co. of Virginia*, 759 F.Supp.2d at 788 (declining to exercise primary jurisdiction and noting: "Curiously though, none of the pending matters, which Sprint highlights as 'fundamental' to the action at bar, were brought by Sprint itself. The fourth prong of the four-factor test outlined above contemplates that a *party* to the present suit made prior application to the FCC.") (emphasis in original); *Global Naps North Carolina, Inc. v. Bellsouth Telecommunications, Inc.*, 455 F.Supp.2d 447, 449 (E.D.N.C. 2006) (where party requested stay to allow FCC to determine status of VoIP service, court held doctrine of primary jurisdiction inapplicable because "no prior application to the agency has been made by [plaintiff] or [defendant]").

C. Even if Ameren were required to petition the FCC it would be a wasted effort.

Cable One repeatedly argues that Ameren is a victim of its own failure to seek relief from the FCC. *See* Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Vacate Stay at p. 7. This argument glosses-over two important points.

First, this is a case about unpaid pole attachment rentals. There are specific FCC complaint procedures governing pole attachments. 47 C.F.R. §1.1401 *et seq.* Yet, Cable One implicitly concedes (as it must) that Ameren cannot seek relief from the FCC under the pole attachment complaint procedures. Instead, Cable One argues that Ameren can petition the FCC pursuant to the generic FCC petition process under 47 C.F.R. § 1.2(a) which states "[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2(a).

Second, although the dispute in this case does not require a resolution of a VoIP issue, the solution offered by Cable One would actually do nothing to move this case along. Cable One cites FCC Wireline Competition Bureau Docket 09-154, Petition of American Electric Power Service Corporation, et. al for a Declaratory Ruling (Aug. 17, 2009) (hereafter, "*Docket 09-154"*) as evidence of an FCC proceeding where other public utilities utilized the generic FCC petition process to resolve the VoIP issue. Electric utilities filed this petition in August 2009, and the FCC established a pleadings cycle that same month. Since that time, the FCC has done absolutely nothing with the petition. And, as Cable One seems to concede, the FCC has no intention of taking action on the petition for all it appears. *See* Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Vacate Stay at 8. ("Further, the 2009 declaratory ruling proceeding initiated by the utilities on the issue of how VoIP services should be treated for purposes of pole attachment rates remains open, although the issue presented in that proceeding has been effectively rendered moot as explained below.")

If the Court declines to lift this stay based on the expectation that the FCC will categorize VoIP telephone services, then the doctrine of primary jurisdiction will become an exercise in futility.

D. This Court has jurisdiction and should lift the stay because the FCC will not take action.

The federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them." *City of Stamps, Arkansas v. Alcoa, Inc.*, No. 05-1049, 2006 WL 2254406, at *13 (W.D. Ark. 2006). A court "may refer a matter to a regulatory agency or dismiss the case in deference to an agency's expertise under the primary jurisdiction doctrine only where a 'strong possibility' exists that an agency decision would put an end to the dispute or at least would serve as a material aid in ultimately deciding the issues presented to the district court." *Gamble v.*

Pinnoak Resources, LLC, 511 F.Supp.2d 1111, 1126-127 (N.D. Ala. 2007). "Additionally, the court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in administrative proceedings." *Verizon New York, Inc. v. Global NAPS, Inc.*, 463 F.Supp.2d 330, 340 (E.D.N.Y. 2006).

There is not a "strong possibility" that an FCC decision will resolve this dispute because (1) a decision from the FCC is both unlikely and unnecessary, and (2) even if the FCC rendered a decision on the VOIP issue, it would not resolve the dispute. As noted above, FCC classification of Cable One's VOIP telephone service is unnecessary to resolve this case. Further, given the fact that the specific question of whether VOIP telephone service triggers the telecom pole attachment rate has been before the FCC for nearly four years now, an actual decision on the question is highly unlikely. Even assuming the FCC reached a decision, that decision would only "materially aid" this Court if the FCC determined that VoIP telephone service is indeed a telecommunications service. If the FCC classified VoIP telephone service as some other type of service, discovery would still be required to determine what other services are offered over Cable One's attachments and whether those attachments are subject to the telecom rate. Given the unlikelihood of FCC action, the "costs resulting from complications and delay in administrative proceedings" does not "balance" with "the advantages of applying the primary jurisdiction doctrine."

At least two courts have recognized that asking the FCC to decide the VoIP issue is like "waiting for Godot." In *Verizon New York, Inc. v. Global NAPS, Inc.*, 463 F.Supp.2d 330 (E.D.N.Y. 2006) two telecommunications providers disputed the rates owed for services provided on a shared telecommunications network. Just as Cable One has done here, the defendant asked the Court to exercise the doctrine of primary jurisdiction to allow the FCC to

categorize VoIP services, and the Court declined. *Verizon New York, Inc.*, 463 F.Supp.2d at 344. The Court noted that the action was actually just a breach of contract dispute and that the FCC was in no hurry to resolve issues surrounding VoIP services:

> Ultimately, Verizon is correct: at its essence, the dispute is a billing dispute. There is no reason to wait for Godot or the adoption of a regulatory scheme for VoIP traffic by the FCC. The determination of disputed contractual obligations is well within the conventional experience of the district court.

Verizon New York, Inc., 463 F.Supp.2d at 342**.** This decision was issued five years before this Court ordered a stay in this action. In other words, seven years ago, a federal district court recognized that the FCC was unlikely to resolve the issue.

Cable One, like the defendant in *Verizon New York v. Global NAPS*, would prefer to wait on the FCC even though the FCC has demonstrated that it is unwilling to definitely answer VoIP issues that arise in private contract disputes.[2] *See generally* Defendant's Opposition to Plaintiff's Motion to Vacate Stay and *Verizon New York, Inc.*, 463 F.Supp.2d at 342. ("Obviously, the FCC had to be well aware of the existence of substantial VoIP traffic in the telecommunications marketplace otherwise it would not be pondering overall regulation. Equally obvious, the FCC had to be aware also that the existing VoIP traffic was moving at someone's expense.") The Court considered the fact that the FCC had not taken action on existing proceedings and concluded that the FCC's failure to take action demonstrated the FCC's comfort with federal

[2] To the extent the Court requests guidance on whether VoIP services are subject to the telecom rate , the FCC actually treats such service as a telecommunications service for numerous purposes. *See, e.g., IP-Enabled Services: E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 25 (2005) (requiring 911 emergency calling capabilities); *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538-43, ¶¶ 38-49 (2006), *aff'd in part, vacated in part sub nom. Vonage Holdings Corp. v.* FCC, 489 F.3d 1232, 1244 (D.C.Cir. 2007) (addressing universal service contribution obligations); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, 22 FCC Rcd 11275, 11291-97 (2007) (addressing disability access obligations and Telecommunications Relay Service).

courts answering these questions. *See id*; *see also Central Telephone Co. of Virginia*, 759 F.Supp.2d at 787-88 ("Notwithstanding Sprint's protestations to the contrary, the central issue in this action involves interpretation of a contract, a task well within the conventional experience of judges.")

Other courts have also recognized that referring issues to agencies in hopes of resolving disputes in pending litigation is often an unfruitful exercise. *See Swartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 857 F.Supp. 838, 842-843 (D.N.M. 1994) ("Administrative delay constitutes reason to retain jurisdiction."); *Gamble v. Pinnoak Resources, LLC*, 511 F.Supp.2d 1111, 1127 (N.D. Ala. 2007) ("Because the MSHA's jurisdiction and willingness to pursue remedial action are dubious, this court doubts that Plaintiffs' claim could be resolved before the agency.") This Court has the expertise necessary to resolve this dispute; there is no need to wait for an FCC resolution that is never going to come.

The key issue in this case is whether (and to what extent) Cable One's attachments to Ameren's poles are (or were) used to provide telecommunications services. Without discovery, there is no way to resolve this issue. It is not enough for Cable One to simply say "VOIP is an unclassified service, the classification of which belongs at the FCC." Even if true, this fails to address the broader questions presented in Ameren's complaint. The mere fact that this case touches on the issue of regulatory classification of certain communications services does not mean the Court should indefinitely suspend this proceeding and wait for the FCC to act. *See Verizon Wireless (VAW) LLC v. City of Rio Rancho, NM*, 476 F. Supp. 2d 1325, 1340 (D. N.M. 2007) ("The primary jurisdiction doctrine does not require that all claims within an agency's purview be decided by the agency. Nor is it intended to secure expert advice for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's

ambit."); *Lipton v. MCI Worldcom, Inc.*, 135 F. Supp. 2d 182, 190 (D.D.C. 2001) ("Although resolving this dispute may require the court to read and understand the tariff, the defendants have not demonstrated that this will pose any insurmountable technical or intellectual hurdles.")

III. CONCLUSION

Ameren respectfully requests that the Court lift the stay in this action and allow the parties to begin discovery. To the extent Cable One actually believes there is an issue that requires FCC intervention, it is free to seek relief under the FCC's pole attachment complaint procedures. The fact that Cable One has not yet done so demonstrates that it either does not believe there is an issue for FCC resolution or that it seeks only to entangle this case in a procedural black hole.

Ameren respectfully requests that this Court lift the stay entered on September 27, 2011 and allow the parties to proceed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was sent on the 25th day of April, 2013, electronically by ECF notification, to:

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