ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Bright House Networks, LLC, *Complainant* v. **Tampa Electric Company,** *Respondent.*	File No. EB-06-MD-003

REPLY

Bright House Networks, LLC (BHN) hereby submits this Reply to the Tampa Electric Company (TECO)'s Response to BHN's Pole-Attachment Complaint filed on March 9, 2006.

CMP ____
COM ____
CTR ____
ECR ____
GCL ____
OPC ____
RCA ____
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SGA ____
SEC ____
OTH ____

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SUMMARY

Bright House Networks, LLC ("BHN") respectfully submits this Reply to the March 29, 2006 Response of Tampa Electric Company ("TECO").

Complainant BHN is not "a telecommunications carrier [providing] telecommunications services." 47 U.S.C. § 224(e)(1). That, however, is what TECO must prove to charge BHN a "telecommunications" pole rate. The relief that BHN requests in this proceeding is simple and contains two parts. First, BHN requests that unless and until the Commission specifically declares that cable system attachments to provide VoIP services by a cable operator are subject to the Section 224(e) telecommunications rate, the Section 224(d) "video" rate should apply and that TECO's efforts to impose any rate higher than a lawfully calculated 224(d) rate is an unjust and unreasonable term and condition of attachment. Second, BHN requests the Commission to adjust – or order TECO to produce information that would allow for the adjustment of – the rates that TECO is imposing on BHN.

This case was precipitated by TECO's initiation of a state-court "collections" lawsuit which was designed not only to shakedown BHN for nearly $7 million in unlawful rental fees, but to end-run and pre-judge this Commission's vital national policy-making function. To advance its cause, TECO's Response attempts to convert this case from a cut-and-dried dispute about the legal status of what pole rental rate should apply to attachments used for the delivery of Voice over Internet Protocol ("VoIP") telephony services by a cable system into a melodrama. TECO sought to manufacture and then exploit regulatory ambiguity and unilaterally declare cable attachments used for VoIP "telecommunications

attachments" for pole-rate purposes. TECO proceeded to apply its inflated take on the telecommunications rate to all 160,000 BHN attachments in the greater Tampa metro area. TECO, moreover, seeks not to apply its rate on a prospective basis only, but seeks retroactive payments too. When BHN resisted and sought to negotiate a resolution, TECO responded with a state-court collections lawsuit.

TECO dubs its state-court case a "collections" lawsuit and calls this case, which seeks protection against precisely this sort of utility over-reaching, a "red herring" and a "procedural gambit." Before the state court, TECO has concocted claims under state contract law, as well as under other state common law theories such as unjust enrichment and breach of implied covenant of good faith and fair dealing.

In its Response, TECO attempts to transform the clinical and policy-laden dispute over the proper pole rate that should be applied to cable VoIP attachments into a morality play placing BHN's candor, integrity and honor on trial. With that, TECO seeks to divert the Commission from the real issue and the express policy that the Commission is working to solidify – a policy that has far greater implications than merely what pole rate should be applied to VoIP attachments.

This Commission is still working out these complex regulatory questions. The State of Florida, however, in significant part already has. The Florida Legislature has concluded that cable VoIP is not a telecommunications service and should not be regulated as such. The Legislature's conclusion is four-square consistent with BHN's position in this case – that innovative services such

as cable VoIP must be freighted with as little regulatory and similar baggage as possible. This is necessary so that such innovations can achieve first a foothold and then ultimately ongoing marketplace success. Whether through unnecessary government regulation, or through utility assessment of a pole-attachment rate that exceeds standard rates five-fold because the human voice is carried in the same kind of data packets that are used to provide cable-modem service, the conclusion is the same: BHN would be penalized for innovation. The difference in this case is that penalty revenues would flow straight to TECO's corporate fisc, a circumstance made possible only by its ownership and control of essential pole facilities and its bid to overrun established state and developing federal communications policy.

Notwithstanding TECO's efforts to exact unlawful tribute, BHN's successful launch of Digital Phone is the culmination of a multi-year effort to bring *facilities-based* voice competition to incumbent providers using new technologies. BHN is continuing to do so notwithstanding some unresolved federal regulatory issues concerning VoIP and other IP-enabled services. BHN has succeeded in that launch not only while assuming day-to-day control of management and operations of the Tampa metro cable franchises, but while facing competition from satellite providers and from others.

The Commission should take jurisdiction over this Complaint and put an end to TECO's attempt to extract a VoIP pole-attachment surcharge through a state court "collections" lawsuit. Adopting the approach first implemented in *Heritage*, the Commission should hold that pole attachments used to provide VoIP services, such as Digital Phone, are properly subject only to the Cable Rate unless

and until this Commission concludes otherwise. It should likewise conclude that the Telecom Rate that TECO seeks to impose on all of BHN's pole attachments is itself unjust and unlawful and – to the extent it applies at all – applies only to those discrete pole attachments used by a BHN customer to provide telecommunications services. Moreover, just as TECO seeks to impose its VoIP Telecom Rate surcharge retroactively, the Commission should recognize that, so, too, may BHN challenge the imposition of that rate both retroactively and prospectively. Additionally, the Commission should reject TECO's effort to stack Commission sanctions on top of its surcharge because BHN has not run afoul of any Commission notice of apparent liability or otherwise consciously or deliberately disregarded any law or regulation. Finally, the Commission should provide BHN the relief it requests solely on the extensive record developed in this Complaint pleading cycle. No evidentiary hearing is warranted for delving into the intricacies of the technology underlying BHN's Digital Phone offering, which intricacies the Commission is addressing elsewhere.

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Exhibit 1: Letter from Michael S. Hooker to J. D. Thomas, Apr. 5, 2006.

I. THE COMMISSION HERE SHOULD ADOPT ITS *HERITAGE* APPROACH TO PREVENT TECO'S ATTEMPT TO PENALIZE BHN FOR PROVIDING VOIP AND TECO'S END RUN OF THIS COMMISSION'S JURISDICTION

TECO is seeking to apply the telecommunications rate as a surcharge to BHN attachments used to provide innovative VoIP services in much the way Texas Utilities sought to penalize Heritage Cable more than 15 years ago for putting its fiber-optic platform to vital non-video uses. 1/ The Commission did not permit such a penalty then and it must not permit it today. *Heritage* stands for the basic principal that innovative uses of cable networks should not be subject to pole-owner penalties. BHN's position here is simple. Unless and until this Commission declares that cable system attachments used for VoIP services are subject to the Section 224(e) telecommunications rate, the Section 224(d) "video" rate should apply.

TECO, for its part, steadfastly maintains that it seeks no regulatory classification of BHN's VoIP service – but only seeks to collect back rental – and that BHN's attempt to turn its "collections" lawsuit into a "VoIP policy issue is a red herring." Response at 4. In service of this theory, TECO turns moralist to try to create the impression that BHN "lacks candor," has "concealed" facts and has otherwise behaved in an untrustworthy manner. This is all not just to sustain a state-court lawsuit involving claims premised on notions of "honor" – according to TECO BHN breached its agreement with TECO; unjustly enriched itself by not paying the telecommunications rate for its unclassified VoIP attachments; and

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1/ *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Util. Elec. Co.*, 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Util. Elec. Co. v. FCC*, 977 F.2d 925 (D.C. Cir. 1993) (hereinafter "*Heritage*").

breached its duty of good faith and fair dealing. It is also to distract the Commission from the essence of this dispute – a dispute that TECO has manufactured by asserting an aggressive and ill-founded position that other pole owners in the greater Tampa area want no part of. 2/

TECO's Response, however, confirms that the red herring here is TECO's attempt to mask its effort to generate and exploit regulatory uncertainty at BHN's expense as nothing more exotic than a run-of-the-mill debt collection. TECO has proceeded with complete good faith in rolling out its VoIP services and is doing so in a way that is consistent with both applicable (albeit rapidly changing) law, as well as its social obligations as a corporate citizen. The Commission must weigh TECO's unfounded allegations concerning BHN's corporate "character," which are in service of a naked pecuniary end, against what BHN has striven to achieve in the last year or two (and in a constantly changing regulatory environment) in providing a true broadband alternative – and real competition in previously-captive residential voice markets. In addition to granting BHN the requested relief, the Commission must reject the inappropriate character issues that TECO has attempted to inject into this proceeding.

At bottom, and despite repeated assurances that the Commission need not classify BHN's "Digital Phone" offering, that is in fact precisely what TECO

2/ *See* Louis Hau, *Utility Sues Over Digital Phone Fees; Tampa Electric says Bright House's phone service is telecom and thus subject to charges more than triple those for information services*, ST. PETERSBURG TIMES ONLINE, Apr. 20, 2006, *at* www.sptimes.com/2006/04/20/news_pf/Business/Utility_sues_over_dig.shtml ("Progress Energy Florida has adopted a more conservative approach" and is " 'awaiting further clarification on the matter from the FCC.' ").

requests the Commission to do here – it says one thing, but emphatically wants another. TECO indirectly, but persistently, asks the Commission to conclude that "Digital Phone" is a telecommunications service in reliance on "evidence created by Bright House itself." Response at 4 (emphasis omitted). The Commission should deny this request for multiple reasons.

A. VoIP Is Fundamentally Different From POTS

BHN's Vice-President for Engineering explained how Digital Phone works. *See* Declaration of E. White at ¶¶17-19. He explained that Digital Phone necessarily uses Internet Protocol technology.

> Originally developed for the transmission of data over the Internet, the customer's voice is converted to data packets, and transported over the same infrastructure as information traveling between customer computers. . . . Instead of traveling from the handset over a dedicated circuit utilizing telephone companies' switches and wires in the public-switched telephone network ("PSTN"), software utilizing IP technology (itself originally developed to transport data across the Internet) digitally encapsulates (or "packetizes") the caller's voice information, whereupon it is transported from point A (the calling phone) to point B (the receiving phone) over a private network, rather than the PSTN.

Id. at ¶18. He further explained that this service is provided over BHN's proprietary cable system, as are the rest of its video and data services.

> While a "Digital Phone" customer's transmission may ultimately terminate in the PSTN to reach a destination that can only be reached via the network of a local telephone carrier, it takes an entirely different route to get there, using an infrastructure that has no facilities specifically dedicated for providing "Digital Phone" VoIP service. BHN's "Digital Phone" service indeed travels to subscribers over its proprietary network – the same broadband fiber/coaxial network used to provide the rest of its communications services, including cable television.

Id. at ¶19. As to arguments that VoIP service can be received by a customer using a POTS phone, *see* Response at 7, what handset the customer uses is largely irrelevant to the inquiry.* The important point is what happens at the demarcation point outside of the subscriber premises; that is where BHN's Digital Phone is connected to a device that in turn is connected to BHN's IP network – not the PSTN. As discussed in Section I.D.4, below, where a VoIP call is destined for the PSTN (for example, to reach a non-BHN subscriber next door, across town or around the world), there must be interconnection and transport, else Digital Phone and like services would have limited utility. None of this changes the fact, however, that BHN's Digital Phone provides its voice function in a way fundamentally different from how voice telecommunications services are provided by traditional circuit-switched carriers and that the Commission has not characterized cable VoIP as a "telecommunications service."

B. The Commission Should Reject TECO's Invitation To Distort And Misapply *Brand X*

For its part, TECO seeks to impose a simplistic and superficial "end-user-perception" analytical model to this case that is tantamount to arguing that video content on a PC or video I-Pod should be subject to Part 73 broadcast regulations. This model is premised on a gross distortion of the United States Supreme Court's recent decision in *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Serv.*, -- U.S. --, 125 S. Ct. 2688 (2005). Even if TECO's gloss were correct – which it is not – the Commission is not bound by it here. *See, e.g., Chevron U.S.A. Inc. v Natural Res. Def. Council*, 467 U.S. 837, 838 (1984) ("An agency, to

engage in informed rulemaking, must consider varying [statutory] interpretations and the wisdom of its policy on a continuing basis.").

In *Brand X* the Court upheld, under step two of the familiar *Chevron* framework 3/ used for evaluating an agency's construction of the statute it administers, the Commission's determination that cable modem broadband internet service does not constitute "telecommunications service." *See id.* at 2703-04. Applying that analysis, the Court credited the Commission's decision to look at the "functions the end user is offered" to determine whether cable modem service included a telecommunications service "offering" under the Communications Act. *Id.* It further credited the Commission's determination that, as "[s]een from the consumer's point of view . . . cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet Access." *Id.* at 2703. *Brand X*, of course, is a prime example of judicial deference to agency decisions that foster, not inhibit, technology deployment.

TECO would like the Commission to use this bit of *Brand X* to hold that BHN's Digital Phone Service is a telecommunications service because, *ipso facto,* BHN says it is. TECO summarizes its *Brand X* fantasy: "Because the targeted consumer necessarily must perceive Bright House's digital telephone service in the same manner as it is being marketed or presented, and because the

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3/ *See Chevron U.S.A. Inc. v Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

regulatory classification of such service turns again on how the product is perceived by this consumer, Bright House's own marketing characterization of its digital telephone offering as routine telephone service *necessarily casts this product for regulatory purposes* as a 'telecommunications service.' " TECO Response Brief at 6 (emphases added). These contortions can hardly be squared with a mere collections case or the non-VoIP-classification that TECO proclaims is all that is called for here.

Every step of TECO's proposed analysis either is fatally flawed or irrelevant. First, TECO mischaracterizes the Commission's *Brand X* analysis in suggesting that it is keyed simply to BHN's representations rather than the "the nature of the *functions* the *end user* is offered." *Brand X*, 125 S. Ct. at 2703. Just as in *Brand X*, the protocols, electronic components and other functional characteristics of BHN's Digital Phone VoIP service differ substantially from traditional POTS. *See* discussion *supra* I.A.; BHN Complaint at ¶ 28. Were this not the case, and were the matter as simple as TECO asserts, why has the Commission gone to the trouble of initiating a rulemaking proceeding to determine the regulatory classification applicable to all VoIP services, including services such as BHN's Digital Phone service? *See In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004). Rather than expend valuable Commission resources with a rulemaking proceeding, the Commission could simply consult some TV, radio and print advertisements for cable companies' VoIP phone services and issue a proclamation. In any event, the Commission need not rigidly adhere to the approach approved by the Supreme Court in *Brand X*. *See, e.g.,*

Chevron, 467 U.S. at 838 ("An agency, to engage in informed rulemaking, must consider varying [statutory] interpretations and the wisdom of its policy on a continuing basis.").

C. The BHN Marketing Materials That TECO Cites Prove That VoIP Is Not A Telecommunications Service

Second, even were the Commission to accept TECO's analysis at face value (which it should not), the materials upon which TECO relies are hardly the damning stuff that TECO asserts. TECO points to a number of items it argues show that BHN admits to being a telecommunications carrier providing telecommunications services, thus warranting application of the telecommunications rate. Neither individually, nor in the aggregate, however, do these items prove TECO's case. This becomes immediately obvious once the ingredient missing from TECO's papers is added: context.

BHN assumed management and control of the Tampa metro cable properties in or about 2003. Immediately, BHN vigorously began to pursue ways to use its existing cable platform to provide the best and most advanced services to its customers. IP clearly was the advance to open the floodgates of competition and innovation, and BHN began early testing of its cable VoIP product in 2004. 4/ BHN

4/ TECO attempts to exploit an apparent inconsistency between certain BHN FCC E911 Compliance Letters and the statement in Mr. Eugene White's declaration that BHN began offering its subscribers a VoIP service in TECO's service area in January 2005. However, that purported inconsistency is only apparent not actual. As Mr. White explains in his reply declaration, the representations made in the E911 Compliance Letters refer to the provision of VoIP service across BHN's *entire* Florida network, including areas where BHN's facilities are not attached to *TECO*'s poles. *See* White Decl. ¶7. He states that, while BHN

– along with many others in the cable industry – planned its launch into voice services, using IP. For years, before IP was truly ready for prime time and traditional circuit-switching services still were dominant, cable operators explored becoming "telecommunications carriers providing telecommunications services." BHN's Tampa predecessor, Time Warner Cable, was one such operator, and began taking steps to compete by obtaining state certifications and filing service tariffs. It recognized, however, that, despite broad federal 5/ and state 6/ deregulatory

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used employees, half-price customers and others to beta-test BHN's Digital Phone product in areas where its facilities are attached to TECO's poles prior to January 2005, BHN did not start a major (subscribing public) launch of its Digital Phone product until January 2005 once it had qualified sufficient rate centers for a major marketing launch campaign. *Id.* ¶8. Beta testing even continued after this date in Hillsboro, Pasco and Polk counties. *Id.* In fact, BHN, was still beta testing well into the first quarter of 2006 in Pasco County and outlying areas of Hillsborough County and Polk County. *Id.* In any event, TECO cannot possibly rely on letters BHN submitted to comply with a Commission Order, *see In the Matter of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report & Order & Notice of Proposed Rulemaking, 20 FCC Rcd 10,245 (2005); *Enforcement Bureau Outlines Requirements of November 28, 2005 Interconnected Voice Over Internet Protocol 911 Compliance Letters*, Public Notice, DA 05-2945 (rel. Nov. 7, 2005), as an affirmative representation on BHN's part that it provides telecommunications service.

5/ *See, e.g., In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4865, ¶ 2 (2004) ("This Commission must necessarily examine what its role should be in this new environment of increased consumer choice and power, and ask whether it can best meet its role of safeguarding the public interest *by continuing its established policy of minimal regulation of the Internet and the services provided over it.* (emphasis added)); *id.* at 4868, ¶ 2 ("[T]his proceeding is designed to seek public comment on future decisions that would *start from the premise that IP-enabled services are minimally regulated.*" (emphasis added)).

6/ *See* FLA. STAT. § 364.001(3) ("Communications activities that are not regulated by the Florida Public Service Commission, including, but not limited to, VoIP . . . are subject to this state's generally applicable business regulation . . . .

initiatives, there were certain regulatory requirements attendant to offering certain kinds of services. BHN's federal and state submissions, as explained in the following subsections, are not the corporate double-talk that TECO imagines, but are the representations of a company committed to providing attractive, innovative customer alternatives in an era of outmoded, ill-fitting and uncertain regulatory constructs. While the precise federal VoIP regulatory paradigm has yet to be decided (and must not be decided here), 7/ the State of Florida unambiguously has concluded that cable VoIP is not a "telecommunications service." 8/ In any event, the regulatory submissions that TECO relies upon to prove that BHN is a "telecommunications carrier [providing] telecommunications service," 47 U.S.C. § 224(e)(1), fail utterly in that regard.

The Legislature further finds that the provision of voice-over-Internet protocol (VOIP) free of unnecessary regulation, regardless of the provider, is in the public interest."); *see also id.* § 364.011 ("The following services are exempt from oversight by the commission, except to the extent delineated in this chapter or specifically authorized by federal law: . . . VoIP."); *id.* § 364.013 ("Broadband service and the provision of voice-over-Internet-protocol (VoIP) shall be free of state regulation, except as delineated in this chapter or as specifically authorized by federal law, regardless of the provider, platform, or protocol.").

7/ *See, e.g. IP-Enabled Services NPRM*, 9 FCC Rcd at 4865; *In the Matter of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report & Order & Notice of Proposed Rulemaking, 20 FCC Rcd 10,245, 10,256, ¶22 (2005) ("[W]e have not decided whether interconnected VoIP services are telecommunications services or information services."); *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report & Order & Further Notice of Proposed Rulemaking, 20 FCC Rcd 14,989, 2005 WL 2347765, ¶45 (2005) ("[T]he Commission has yet to determine the statutory classification of providers of interconnected VoIP for purposes of the Communications Act.").

8/ *See* FLA. STAT. § 364.001(3); *see also id.* § 364.011; *id.* § 364.013.

Like picking friends out in a crowd, TECO just points the Commission to statements that, it argues, support its favored analysis. In fact, TECO's "friends" are so few and far between it is a wonder that TECO even included these BHN marketing materials as exhibits given the large number of "enemies" of TECO's position in those materials.

Specifically, BHN's marketing materials consistently strive to differentiate digital phone service from traditional POTS service. Those materials note that digital phone is "even better" than traditional phone service, because, among other things, it "offers unlimited local and long distance calling" and "the most popular features and benefits at no extra charge." TECO Ex. 17 at 1. The materials also point out that the technology BHN uses differs from that used by a traditional telecommunications provider. *See* TECO Ex. 18 at 5 ("Digital Phone requires . . . the Bright House Networks modem."); *see id.* ("Digital Phone uses a separate connection to the Digital Phone modem."). The materials also provide a privacy statement pursuant to Title VI of the Communications Act (*i.e.*, the *Cable Act*), *see id.* at 8, and *not* any reference to Title II or any rule adopted thereunder in the Commission's regulations. 9/

9/ Nor is TECO's reliance on BHN's CLEC transport all that TECO cracks it up to be. *See* discussion *infra* at 14-16.

D. BHN's Regulatory Filings Do Not Support TECO's Assertions That VoIP Is A Telecommunications Service

While TECO's further reliance on other representations that BHN made to regulatory agencies does not even logically fit within its end-user-perception analysis, its reliance is also wrong for additional reasons.

1. The Representations Of Other Entities Are Irrelevant To This Proceeding

The representations in two FCC filings on which it principally relies – Time Warner Telecom's Comments in the IP-Enabled Docket and Time Warner Cable's Petition for Preemption – are, in fact, not those of *BHN*, but rather those of other, juridically-distinct entities. *See* TECO Response at 8-9 (citing and quoting *In the Matter of IP-Enabled Services*, Comments of Time Warner Telecom, WC Docket No. 04-36 (filed May 28, 2004) & *In the Matter of Petition of Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act*, WC Docket No. 06-54 (filed Mar. 1, 2006). Those positions and representations cannot logically be taken as BHN's position in this proceeding or otherwise, as they are the positions and representations of entities that are not only distinct from BHN but have business plans, objectives and issues different from BHN. Accordingly, what Time Warner Telecom had to say in the IP-Enabled Docket and what Time Warner Cable had to say in a Petition for Preemption cannot be imputed to BHN.

Perhaps more to the point, neither Time Warner Cable nor Time Warner Telecom advocates, in their respective filing, assessing pole attachments used to provide VoIP service under the applicable telecommunications service rental formula. Rather, while Time Warner Telecom urges the Commission to classify

VoIP services "that offer customers the capability to exchange voice communications in real-time in a manner that is transparent to the end user" as telecommunications services under the 1996 Act, it also urges the Commission not to "doom VoIP to entanglement in regulatory red tape." TWT Comments at 17. Time Warner Telecom requests the Commission instead to "exercise its broad forbearance powers *to avoid any regulation that does not promote a clear and justified policy objective.*" *Id.* (emphasis added). Time Warner Cable likewise recognizes that the Commission has yet to "determine[ ] that VoIP-based services . . . are telecommunications services" for any regulatory purpose. Time Warner Cable Petition for Preemption at 18. Indeed, Advance-Newhouse Communications, which manages BHN, agrees with Time Warner Cable that the fact that a telecommunications transport company, *i.e.*, a CLEC, carries non-telecommunications traffic, such as VoIP traffic, is not a legal basis for denying interconnection rights. *See* Comments of Advance-Newhouse Communications, WC Docket No. 06-55 (filed Apr. 10, 2006). But that point is not the subject of dispute here; accordingly, it is of no import. Thus, taken together, the representations made by these other entities are hardly inconsistent with BHN's (and other cable operators') longstanding position that pole attachments used to provide VoIP service are not subject to the Telecom Rate. *See, e.g.*, Reply Comments of American Cable Ass'n, WC Docket No. 04-36; 05-196, at 1-2, 5 (Aug. 15, 2005).

2. BHN's USF Contributions Do Not Dictate The Applicable Pole Attachment Rate

TECO's attempt to make much of the fact that BHN collects Universal Service contributions from its Digital Phone subscribers also falls flat. Like other cable operators, BHN's contributions to the Universal Service Fund (USF) are not motivated by any regulatory obligation, but by a sense of social responsibility not to undermine certain universal service mechanisms that continue to support telephone service in high-cost areas. In attempting to bring much-needed facilities-based voice competition to its franchise areas despite the unclear regulatory obligations of VoIP service providers, BHN simply decided, as a matter of corporate policy, that it would voluntarily make contributions to USF in order to support the important social policy objectives that the USF serves. *See, e.g.,* National Cable Television Association, *Balancing Responsibilities & Rights: A Regulatory Model for Facilities-Based VoIP Competition* at 27-30 (Feb. 2004). That TECO would now use BHN's best intentions as it moves forward in this developing regulatory environment to bring the undisputed benefits of competition to consumers so that TECO can extract additional monopoly profits from its poles marks a stark contrast to BHN's socially-conscious decision to support USF.

3. BHN's FCC Form 477 Filings Do Not Dictate The Appropriate Pole Attachment Rate

TECO also cites BHN's filing of an FCC Form 477, the Commission's Local Competition and Broadband Reporting form, as evidence that BHN is a telecommunications carrier. BHN's completion of that form was not an admission that it was a telecommunications carrier for this or any purpose; it provided the

number of VoIP customers that it had at the time in order to assist the Commission with its efforts at gathering data on the state of broadband competition. Reporting the number of voice telephone "lines" when in fact speaking of VoIP end customers (because there is no dedicated "line" for voice, but use of the same fiber and coaxial cable used to deliver video and high-speed modem service) was the placing of the proverbial round peg into the square hole. While it was an accurate report of the number of VoIP customers that BHN had at the time, it was offered to assist the Commission in gathering the state of the broadband competitive play, nothing more.

4. BHN's State Regulatory Filings Do Not Dictate Which Pole Rate Should Apply

TECO cites a number of state PSC filings including the certificate and tariffs of Bright House Networks Information Services ("BHNIS") to attempt to show that Complainant BHN is a "telecommunications carrier providing telecommunications services." TECO's arguments are unavailing. First, care was taken even in the naming and establishment of BHNIS. Note that the name of this entity is not "Bright House Networks *Telecommunications* Services," but Bright House Networks ***Information*** Services. At a minimum (and while perhaps not legally dispositive) it demonstrates Bright House Networks' clear intention to define its business as something other than telecommunications services, traditional or otherwise. BHNIS was created for the sole purpose of providing wholesale transport of BHN voice services and to provide a vehicle for interconnection with telecommunications carriers. *See* White Reply Decl. ¶10. Even though it is true that the VoIP packets traveling over BHN's Tampa network do not amount to

telecommunications services, to be useful and a true competitive alternative, BHN still must interconnect with telecommunications carriers. This was why BHNIS was created. 10/

Ultimately, however, TECO's citation to the BHNIS certification and tariffs (which are standard form filings) is irrelevant. BHNIS for all practical purposes is dormant now. All retail voice services that BHN is offering and providing in Tampa are offered directly by BHN – the cable operator. Similarly, all the network facilities used to provide such services are owned by BHN – the cable operator. Finally, the wholesale and interconnection piece for which BHNIS was created is now supplied by an unaffiliated third-party carrier.

Thus, BHN is a cable operator and not a "telecommunications carrier." Even if BHN's VoIP services were telecommunications (which we show in Section I that they are not), the statute only allows application of a lawful telecommunications rate for "attachments used by a telecommunications carrier to offer telecommunications services" ***not*** attachments used by a ***cable operator*** to provide such services. As to TECO's insinuation that BHNIS is being used to provide wholesale transport to other carriers, this is simply not the case. White

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10/ The notion that, because VoIP traffic at some point interconnects with the PSTN, BHN's entire cable system becomes a telecommunications network is nonsense. Like other cable operators' systems, BHN's handles VoIP traffic no differently than other information services that it provides. If, at the moment of PSTN interconnection a cable system becomes a telecommunications network, once cable companies like BHN move to provide consumers a facilities-based alternative to traditional telecommunications service, the Commission's careful regulation of video and information services would be rendered a dead letter. Such an approach would stymie investment in and development of innovative services that *replace* legacy telecommunications services.

Reply Decl. ¶10. As indicated, BHNIS today sits empty and unused. And regardless of how the communications traffic is *transported*, the pole attachments are used for an unclassified IP *service*, and the transport function has no regulatory bearing on the IP *service* or implicate BHN as a carrier.

TECO also makes much of certain regulatory filings that BHN has made concerning state regulatory fee assessments. For example, at Exhibit 22 of its Response, TECO included two recent forms filed with the Florida Public Service Commission accompanying payment of certain regulatory fees. Far from an admission that BHN's voice services are telecommunications services, this filing and the accompanying payments were made out of an abundance of caution (that continued even after the June 2005 effective date of Florida Chapter 2005-132, which made clear that VoIP does not constitute a telecommunications service). 11/ Voluntary payments of regulatory fees in the amount of approximately $57,000 to the state of Florida is hardly reason to justify payment of approximately $7 million in pole rentals.

E. This Proceeding Is Not The Place To Decide The Regulatory Classification of VoIP

More important, TECO's analysis cannot be applied in this proceeding and is therefore irrelevant. The Commission's task here is limited: To decide whether it is reasonable for TECO to demand a telecommunications rate for poles with attachments used for cable VoIP. The Commission already has initiated a rulemaking proceeding to address the precise question that TECO invites it and a

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11/ *See* FLA. STAT. § 364.001(3); *id.* § 364.011; *id.* § 364.013.

Florida state court to answer now. Whether the Commission should adopt TECO's end-user perception analysis or some other framework for classifying IP services must be resolved in that rulemaking, not this enforcement action. As a mater of federal law, it is certainly not and should not ever be resolved by a Florida state court. *See IP-Enabled Services NPRM*, 19 FCC Rcd at 4868. Either of TECO's choices (resolution here or in a Florida court) would subvert entirely the Commission proceeding *designed specifically for formulating the relevant national policy* as well as ongoing, active Congressional consideration of federal communications policy and possible amendments to the Communications Act.

F. *Heritage* And Pro-Competitive Policy Control

All this brings us back to this Commission's unique enforcement and policy-making function as well as the well-worn and secure path the Commission has taken on near-identical issues in the past. Instead of accepting TECO's invitation to venture into territory hostile to its essential role of promoting – not penalizing facilities-based innovation – the Commission should rely on its time-tested, Supreme Court-approved discretion under Section 224(b)(1) of the Communications Act and hold that – whatever regulatory classification is ultimately ascribed to VoIP services – the present just and reasonable rental rate applicable to BHN's pole attachments is the Section 224(d) Cable Rate, not the Section 224(e) Telecom Rate.

As BHN already explained in its Complaint, the Commission at least twice successfully implemented this very pro-competitive approach. It should do so again now.

First, in *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Util. Elec. Co.*, 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Util. Elec. Co. v. FCC*, 977 F.2d 925 (D.C. Cir. 1993) (hereinafter "*Heritage*"), the Commission addressed Texas Electric Company's imposition of a $50-100 per-pole surcharge on Heritage's attachments used to provide data transmission services in addition to traditional cable services on the theory that the Commission lacked jurisdiction over such non-traditional services. *See Heritage* at ¶¶ 11, 16. The Commission rejected this theory – concluding that it has jurisdiction over "any attachment by a cable system" – as well as its application – explaining that the utility could not impose a surcharge above the Cable Rate based on "the type of service being provided over the equipment attached to its poles." *Heritage* at ¶ 32. The Commission therefore held that the utility's "imposition of a separate charge for so-called 'non-cable television pole attachments' is unjust and unreasonable under Section 224." *Heritage* at ¶ 32.

Years later, the Commission followed the approach it first adopted in *Heritage* again in its Report and Order on the *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, ¶¶ 30-31 (1998) (hereinafter "*1998 Order*"). In the *1998 Order*, which addressed the appropriate rate for pole attachments used to provide cable modem services, the Commission concluded that

it had the authority under Section 224(b)(1) of the Pole Attachment Act to apply the Cable Rate – rather than the Telecom Rate – to pole attachments used to provide traditional cable service "commingled" with Internet services. The Commission explained that it is "obligated under Section 224(b)(1) to ensure that the 'rates, terms and conditions [for any pole attachments] are just and reasonable,' " and decided that, in exercise of the discretion that Section afforded it, to "apply the [Cable Rate] as a 'just and reasonable' rate for . . . pro-competitive reasons." *Id.* at ¶ 34. In reaching this conclusion, the Commission "emphasize[d] the pervasive purpose of the 1996 Act and the premise of the Commission's *Heritage* decision, to encourage expanded services, and that a higher or unregulated rate deters this purpose." *Id.* The Cable Rate, the Commission explained, would serve this purpose by "encouraging greater competition in the provision of Internet service" and carrying "greater benefits to consumers." *1998 Order*, 13 FCC Rcd at ¶¶ 30-32.

That the Commission had not classified cable modem service as either a "telecommunications service" or an "information service" proved no obstacle to the Commission's *1998 Order*. The fact that the Commission similarly has not classified VoIP service should not compel it to do so here either. Indeed, the Commission's earlier decision earned the Supreme Court's stamp of approval: It characterized the order under review as "both logical and unequivocal." *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002). In upholding the *1998 Order*, the Court went so far as to observe that the Commission's choice of the Cable Rate would be "sensible," even if the Commission eventually classified cable

modem services as "telecommunications services." *Id.* at 333; *see also id.* at 339 ("We note that the FCC . . . has reiterated that it has not yet categorized Internet service."). It explained that "decisionmakers sometimes dodge hard questions when easier ones are dispositive; and we cannot fault the FCC for taking this approach." *Id.* at 339.

Likewise, it would be "sensible" here for the Commission to prevent TECO from imposing a VoIP surcharge on all of its pole attachments whether or not the Commission determines that VoIP service constitutes a telecommunications service under the Communications Act. Just as in *Heritage* and the *1996 Order*, the Commission need not presently address a "hard question[ ]" – the classification of VoIP services – because a much "easier one[is] dispositive" – the just and reasonable rate applicable to such services. *See id.* After all, that "hard question[ ]" is not even the logical/legal antecedent of the "easier one[ ]," as *Gulf Power* makes clear. 12/ Accordingly, whether or not the Commission adopts TECO's end-user-perception analysis – BHN thinks it should not – that approach is simply irrelevant for present purposes and is better made in the broad-based *IP-Enabled Services* inquiry not here and now in the context of TECO's supposed "collections" action.

12/ Even if the Commission does ultimately classify VoIP service as a "telecommunications service," it nevertheless may conclude that the Cable Rate is applicable to pole attachments used to provide that service together with other services, including cable and internet services. *See id.* at 339 ("Congress may well have chosen to define a just and reasonable rate for pure cable television service, yet declined to produce a prospective formula for commingled cable service . . . . It might have been thought prudent to provide set formulas for telecommunications service and solely cable service, and leave unmodified the FCC's customary discretion in calculating a just and reasonable rate for commingled services.").

II. THE RATE THAT TECO IS ATTEMPTING TO IMPOSE IS EXCESSIVE

There are essentially two points of disagreement over the rate that TECO is attempting to charge. First, TECO has calculated a telecommunications rate that is far too high because it has proffered an artificially low number of attaching entities among whom the "other than usable space" on the poles is shared. Second, TECO clings to the presumptive 15 percent appurtenance deduction which BHN has reason to believe does not begin to accurately reveal the amount of non-pole appurtenances that are properly chargeable to BHN. Not coincidentally, where TECO can support a higher rate with actual "evidence" it has pole attachment data at the "granular level" to support that higher rate. But where that data would result in a lower rate, it is, mysteriously, unavailable. 13/

A. TECO Fails To Offer Evidence To Overcome The Commission's Five-Entity Presumption For Urbanized Areas

TECO admits that its service area falls entirely within an urbanized area. Under the Commission's rules, in the absence of credible, verifiable and actual data of entities, the Commission will presume that there are five entities on

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13/ In order to streamline resolution of the appropriate rate that should be applied here—subject to our objections as to the inadequacy of the presumptive 15% Account 364 deductions addressed in Section II.B as to both the cable and telecommunications rate, and the attachment entity presumption that TECO seeks to overcome as to the telecommunications rate addressed in Section II.A— BHN is willing to accept TECO's calculation yielding the $5.63 Cable Rate for 2005. *See* Response at 20. Acceptance of TECO's calculation in this regard will not have a material impact on the outcome of this rate dispute, and BHN continues to stand by its position as to the maximum telecommunications rate set forth at Paragraphs 43 through 52 of the Complaint.

the pole across which the "other than usable space" costs are spread. 14/ The "data" that TECO offers are the unadorned assertions of its solitary declarant that the correct number of entities is 2.08. *See* Anguilli Decl. ¶23. There is no other support for this "data" except numbers in Paragraph 23. This fails utterly to meet Commission standards for overcoming presumptions. 15/

Moreover, there are problems with the way in which TECO applies the data, even if it were both sufficient and accurate. For example, TECO arrives at its 2.08 figure by dividing all the 633,198 attachments into all the 303,837 poles it claims to have found in a plant survey. The 2.08 entity number is – interestingly – just 8/100th of an entity greater than what the Commission has established as the

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14/ *See In the Matter of Amendment of the Commission's Rules & Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order On Reconsideration, 16 FCC Rcd 12103, 12140, ¶ 72 (2001) ("[W]e set a presumptive average number of attaching entities at five (5) to reflect the inclusion of, but not limited to, the following possible attaching entities: electric, telephone, cable, competitive telecommunications service providers and governmental agencies.").

15/ *See, e.g., See Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 FCC Rcd at 12,139, ¶70 ("As with all our presumptions, either party may rebut this presumption with a statistically valid survey or actual data."); *Cable Information Servs., Inc. v. Appalachian Power Co.*, Memorandum Opinion & Order, 81 FCC 2d 383, ¶¶6-7 (1980) ("Appalachian's study of usable space on its poles fails to meet our requirements" because it "offers no support for its usable space figure of 12.3 feet"); *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 16 FCC 20,238, 20,242-43, ¶11 (Cable Serv. Bur. 2001) ("Respondent departs from our established presumptions about the height of, and usable space on, poles, but fails to include any evidence that our presumptions are not reasonable in this case.").

absolute bare minimum number of entities that can be considered. 16/ In arriving at this number, however, TECO included those poles which contain only electric attachments. But under long-standing Commission precedent, those poles cannot be included in the population; only poles that actually contain cable television attachments can be used in developing pole rates. 17/

Taking those poles which contain electric-only attachments out of the mix, the number of entities climbs immediately to 2.57 (522,879/203,538 = 2.57). But even *that* number undersells the number of utilities on the poles to which BHN attaches and that TECO owns. As set forth in the attached declarations of Gene White and State McGinnis, many, if not most, of the TECO poles to which BHN attaches contain at least three entities, and many may contain more. *See* McGinnis Decl. ¶12; White Decl. ¶14. Those entities are TECO, BHN and the ILEC (Verizon or Sprint). *See* McGinnis Decl. ¶12; White Reply Decl. ¶14. In addition to these three entities, there are government-owned facilities attached to these poles, including for traffic signalization. *See* McGinnis Decl. ¶12; White Reply Decl. ¶14.

16/ *See Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 FCC Rcd at 12,134, ¶60 ("[W]e include the utility pole owner in the count, resulting in a *minimum of two attaching entities being counted.*" (emphasis added)); *see also Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 16 FCC 20,238, 20,242-43, ¶11 (Cable Serv. Bur. 2001) ("We have already concluded that the minimum possible number of attachers to be used in the Telecom Formula is two.").

17/ *See, e.g., In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion & Second Report & Order, 72 FCC 2d 59, ¶21 (1979).

The actual number of entities on the poles to which BHN actually attaches is a moot question, however, because TECO has failed to come forward with credible, verifiable data to overcome the Commission's five-entity presumption. *See Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 FCC Rcd at 12139, ¶70 ("As with all our presumptions, either party may rebut this presumption with a statistically valid survey or actual data."). The five-entity presumption must apply.

B. TECO's Refusal To Provide Requested Data Concerning Its Appurtenance Deductions In Account 364 Should Not Be Rewarded With A Default To The Presumptive 15% Deduction

Next, TECO advances a number of specious and just plain wrong arguments to justify its refusal to provide documentation showing actual appurtenance investment.

The basic idea behind the 15% appurtenance deduction presumption for utility pole owners is that there are certain non-pole costs that, as a matter of utility practice and FERC accounting, a utility books into Account 364, but that should not be allocated to attaching parties. In the years between the passage of the Pole Attachment Act in 1978 and the 1987 Order, where the appurtenance deduction was addressed in some detail, 18/ the issue of what costs from Account

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18/ *See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report & Order, 2 FCC Rcd 4387, 4390, ¶17 (1987) ("[C]ertain appurtenances, although included in the pole line account, are not part of the pole plant itself, but are required for the specific use of the utility. Therefore, a determination must be made as to the proper appurtenance ratio which

364 should be included in the rate formula was hotly disputed. 19/ The *Alabama Power* case clarified that guys and anchors could be included in the rate. *See Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985). But there are a host of other items that are not related to poles, but are booked nonetheless to Account 364. *See 1987 Order*, ¶17.

The *1987 Order*, however, did not provide much guidance on how to proceed with securing this information. *See, e.g., 1987 Order*, ¶82. The Commission said that the 15% presumption (5% for telephone companies) "shall be [a] rebuttable presumption[ ] to be utilized in the event no party chooses to present probative, direct evidence on the actual investment in non-pole-related appurtenances." *Id.* ¶19. The basic problem is that the "probative, direct evidence" needed to eliminate excessive non-pole costs booked to Account 364 rests in the hands of a pole owner that is in no hurry to disclose it. Almost certainly if the 15% presumption were, in the utility's eyes, too steep, pole owners would have come forward with such "probative, direct evidence" long ago. But, to BHN's knowledge, they have not – either in litigated cases or in rulemaking. Indeed, and as discussed below, when in 2001 pole owners sought to alter the formula to provide for even more inflated rates, they did so in part by trying to include additional asset accounts in the formula, *not* by trying to show that the 15% presumption in any way overstated the actual

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reflects the utility's investment in crossarms and other user-specific items which do not reflect the cost of owning and maintaining poles.") ("*1987 Order*").

19/ *See In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report & Order, 68 FCC 2d 1585 (1978); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion & Second Report & Order, 72 FCC 2d 59 (1979).

amount. 20/ The inference is clear: the 15% presumption is extremely favorable to the pole owner.

So, we are left with the fundamental problem: Where, as here, an attaching entity believes that the 15% presumption is allowing the pole owner to over-recover, that entity is at the mercy of the utility to provide it with the very data needed to prove that over-recovery. *See Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 FCC Rcd at 12138, ¶67 ("The utility shall make available its data, information and methodology upon which the averages were developed, unless the default averages are used."). BHN has sought that data, and TECO has twice refused to provide it – first in its March 20, 2006 letter and then with its Response – violating section 1.1404(j) in the process. The Commission should thus compel TECO to provide this data. Otherwise the 15% presumption is a sham and the Commission is virtually guaranteeing utility over-recovery in violation of its statutory obligation to provide for just and reasonable pole attachment rates.

For its part, TECO goes to great lengths to avoid producing the data necessary to determine just how much more than 15% of Account 364 has non-pole items (other than anchors and guys). Look no farther than the carefully chosen words in the Declaration of Kristina Anguilli, which closely mirror both counsel's

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20/ *See In the Matter of Amendment of the Commission's Rules & Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order On Reconsideration, 16 FCC Rcd 12,103, 12,161-64, ¶¶ 120-28 (2001).

response to BHN's request for information, *see* Response Exhibit 23, and its Response itself. *See* Response at 23.

With respect to BHN's request for detailed information on appurtenance investment to Account 364, Ms. Anguilli states that "we determined that such data is not available." She does not say categorically that it does not exist, only that TECO has "determined" that it is not "available." This, in turn, raises the next question: "available" where and to whom? It is obviously not – yet – available to BHN because TECO is not producing it. Is it not available to Ms. Anguilli, but available elsewhere within TECO? And has TECO simply "determined" that it is not "available" to BHN or not "available" for the purposes of BHN's request and this dispute (but available to TECO's accountants)?

But assuming, as TECO wishes that we would accept, that "such data" is not available at all, that raises the question *what* data are not available? A "breakout" (or "breakdown"), *see* Anguilli Decl. ¶ 25, of the data of the cross-arm and appurtenant investment? The source or primary data? TECO congratulates itself for having "pole data at a granular level," *see discussion supra* Section II, when it drives the pole rate higher, but when it would produce a lower rate, TECO has "determined that it is not available." Again, TECO's failure to produce this data has produced two clear violations of 47 C.F.R. § 1404(j): (1) the failure to produce the information pursuant to BHN's February 17, 2006 letter request; and (2) the failure to include this information with its response to the Complaint, as the rule clearly requires. *See* 47 C.F.R. § 1.1404(j).

1. FERC Account 364 Provides For The Easy Segregation Of Cross Arm And Appurtenance Costs

The very structure of Account 364 as set forth in 18 C.F.R. Ch. 1 facilitates the segregation of cross arms and appurtenances, making TECO's arguments that such data are not "available" particularly difficult to understand. The description of Account 364 as contained in FERC regulations state:

> **364 Poles, towers and fixtures.**
>
> This account shall include the cost installed of poles, towers and appurtenant fixtures used for supporting overhead distribution conductors and services wires.
>
> Items
>
> 1. Anchors, head arm, and other guys, including guy guards, guy clamps, strain insulators, pole plates, etc.
> 2. Brackets
> 3. Crossarms and braces.
> 4. Excavation and backfill, including disposal of excess excavated material.
> 5. Extension arms.
> 6. Foundations.
> 7. Guards.
> 8. Insulator pins and extension bolts.
> 9. Paving.
> 10. Permits for construction.
> 11. Pole steps and ladders.
> 12. Poles, wood, steel, concrete or other material.
> 13. Racks complete with insulators.
> 14. Railings.
> 15. Reinforcing and stubbing.
> 16. Settings.
> 17. Shaving, painting, gaining, roofing, stenciling, and tagging.
> 18. Towers.
> 19. Transformer racks and platforms.

At its core, TECO appears to be arguing that all of these items are simply lumped into one cost pile and that these separately numbered and itemized account

elements cannot be backed out at the sub-account level. Charitably, this is difficult to believe, again, particularly given that TECO maintains "pole data at the granular level."

BHN here renews its request for this data, or failing that, seeks the Commission's assistance in compelling the production of the following items from Account 364 which would represent a good start toward TECO's fulfilling its obligations under 47 C.F.R. § 1.1404(j): 2, 3, 5, 7, 8, 13, 14, 18 and 19. These nine items represent 47% of the 19 items listed in Account 364 which clearly are *not* pole related. BHN submits that should TECO not provide the data necessary to ascertain the accuracy of the 15% presumption that 47% could be used as a surrogate appurtenance deduction.

2. The Commission Has Not Repealed The Presumptive Element From The 15% Crossarm Deduction

TECO has asserted that "the rebuttable nature of the 15% reduction has effectively been repealed by the Commission." Response at 21. In support of this statement, TECO points to the Commission *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd. 12103. TECO's view is as novel as it is unconvincing. One need look no farther than the rules themselves. Rule 1.1404(j) requires a pole owner to provide a cable operator "upon reasonable request" the data necessary to calculate the pole attachment rate. 47 C.F.R. § 1.1404(j). Those data needed to calculate pole rents, and the data that a complainant must file with a pole attachment complaint, are specified in detail in subsection (g) of that rule. Rule 1.1404(g)(ii) states that the complaint shall contain "[t]he investment in crossarms

and other items which do not reflect the cost of owning and maintaining poles, if available." 47 C.F.R. § 1.1404(g)(ii). Subsections (j) and (g) of this rule oblige the complainant to make a reasonable request from the utility for the specified data and to include that information with the complaint, if it is available.

TECO, however, cites the subsection's "if available" qualifier as absolving *it* (TECO) from producing the data. But subsection (g) does not apply to the pole owner at all, but to the entity filing the complaint. In other words, if the utility does not produce the cross-arm and appurtenance data to the cable operator, how can the cable operator possibly file that data? And, as indicated, if it is not available at the time of the filing of the complaint, the pole owner is required to file it with its response. *See* 47 C.F.R. § 1.1404(j).

But TECO twists the clear language and intent of subsection (g) to mean something altogether different. First, TECO takes the position that the subsection applies to it (the pole owner), and not to the complaining cable operator. Second, TECO asserts, in essence, that the rule allows it the discretion to decide what is meant by the term "available" to BHN, the requesting cable operator.

Moreover, were the Commission to take an action as dramatic as reversing 20 or more years of pole-rate precedent, it is hard to imagine its doing so without explicitly saying that this was its intent, and why. But of course the Commission did or said nothing of the kind. What TECO has done is spin a Commission decision that unequivocally beat back utility efforts to inflate pole rentals to include even more costs and made it seem as though the Commission

would not seek rate adjustments where it could be shown that even within the generally allowable accounts recovery was generous – in BHN's view, overly so. In other words, it did not lock cable operators and others into paying any cost that a pole owner could conceivably shove into Account 364. The ability to go beyond the basic 15% presumption was designed to keep exactly this circumstance from occurring. As indicated elsewhere, a self-serving and unexamined statement that this data is not "available," in instances like this, where the non-pole appurtenances are likely far greater than 15% of the asset account, is simply not sufficient.

Returning to the passage that TECO has quoted from the 2001 *Partial Order on Reconsideration,* that order is four-square *against* TECO. The Commission states: "[e]ven with the 15% reduction for non-pole appurtenances such as cross-arms, this is still a very generous account, including the costs of towers, transformer racks and platforms." *Partial Order on Reconsideration* at 12,161; *see also id.* at n.138 ("These adjustment factors are rebuttable."). Far from saying "presumption no more" as TECO would have us believe, the very pregnant implication here is that there may be things in this "very generous account" which should not be included at all. *See id.* This makes sense. Why would the Commission forbid itself from confronting bloat and considering reductions beyond the 15% when it is statutorily-mandated to ensure that rates of pole attachments are just and reasonable?

Finally, the Commission need look no further than TECO's refusal to produce this information as evidence that the 15% presumption should not obtain in

this case and the Commission should compel TECO to come forward with the data necessary to review its non-pole investment in Account 364. As indicated above, if TECO (or any other utility) believed that 15% was confiscatory, the Commission would have heard about it long ago. If TECO no longer maintains this data, TECO should inform the Commission when it stopped maintaining it and immediately should produce the most current data it has.

3. Florida State Law Does Not Absolve TECO From Producing Its Crossarm Investment

TECO's refusal to provide the appurtenance data as BHN has requested and as the rules themselves require should be sufficient evidence to overturn the presumption and compel the Commission to order TECO to produce the data. But TECO continues by saying that Florida law provides it with additional cover for not producing the investment in crossarms and other data as Rule 1.1404(g)(ii) requires. Its position appears to be that Florida law deals in "retirement units" and that fixtures (presumably cross arms and other appurtenances) are reported together as a single retirement unit. Assuming that this indeed is TECO's position, just because Florida law directs that poles and fixtures be reported as a single unit, this does not mean that TECO's own accounting methodologies require the aggregation of all the bare pole costs on the one hand and all fixtures on the other. Indeed, disaggregating the pole costs from the fixtures and then identifying the cross arms and other fixtures to be backed out of 364 to comply with Section 1.1404(g)(ii) is – or should be – a relatively straight-forward process.

Equally compelling, TECO clearly intends to create the impression (although does not directly express it), that Florida accounting treatment of its regulated assets is both entirely different and supersedes FERC accounting, which, of course, is the basis for the FCC's pole formula. Florida, however, while perhaps stating that poles and appurtenances can be filed with the state in an aggregate unit, follows the same chart of accounts as FERC. Specifically, just as with the FERC, Account 364 in the Florida PSC's List of Retirement Units is entitled "Poles, Towers and Fixtures" and includes the cost of such items as "enclosures, pole steps, pole caps, push braces." Indeed, Section 25-6.0142 of the Florida Administrative Code states in no uncertain terms that the existence of the rules and definitions or the state's retirement units "do not relieve any utility from maintaining its accounts and records in conformity with the [FERC] Uniform System of Accounts. . . except as provided in subsections (2) through (11) of this rule." In other words, with only some modification, Florida adopts FERC accounting for state applications, but for federal purposes, including for pole rate purposes, FERC accounts apply. And while the state list of items in Account 364 is not identical to FERC Account 364, there is certainly a generous complement of costs that are not related or useful to cable-system attachments.

III. THE TELECOM RATE AT MOST SHOULD ONLY APPLY TO THE DISCRETE NUMBER OF ATTACHMENTS USED BY BHN'S SOLE TELECOMMUNICATIONS CUSTOMER

TECO maintains that BHN "must pay the telecommunications rate for its entire network of pole attachments" because "[b]oth in terms of common sense

and practical reality, as well as in technological terms, Bright House uses all of its attachments in the relevant areas to provide or offer telecommunications." Response at 31. This is incorrect. Because only a clearly-defined number – 7,375 – of BHN's pole attachments are used by a BHN customer to provide telecommunications service, those are, at most, the attachments that can be subject to the Telecom Rate. 21/

The premise of TECO's argument is the same incorrect one on which it bases all of its claims – that BHN's Digital Phone VoIP service is a telecommunications service subject to the Telecom Rate. As repeatedly explained throughout this Reply and BHN's Complaint, the Commission has not, and should not, designate VoIP services like BNH's digital phone as a telecommunications service subject to the Telecom Rate. And, unless and until the Commission does so, TECO cannot assess any of BHN's attachments to provide Digital Phone under the Telecom Rate. Thus, whether one counts attachments used to provide VoIP services like Digital Phone on a "per customer," rather than "network basis," is a question that has no relevance to this proceeding – a proceeding focused simply on the issue whether TECO can retroactively impose the Telecom Rate on all of BHN's attachments and enforce that unilateral and unsanctioned policy choice through a state court "debt" "collection" action.

21/ While BHN does not contest that the telecommunications rate applies to these attachments, it does not concede that it does either. *See* 47 C.F.R. §1.1403(e) ("*Cable operators* must notify pole owners upon *offering* telecommunications service." (emphases added)).

TECO is additionally incorrect in so far as it relies on the 7,375 attachments used by a BHN customer to provide telecommunications service to contend that, because "some of its attachments carry telecommunications traffic," "its entire network of attachments is subject to the telecommunications rate." Response at 33. While these discrete attachments may properly be subject to the Telecom Rate under certain conditions, they do not – technologically or otherwise – "contaminate" the rest of BHN's network. BHN's customer uses dedicated fiber attached to these poles, which does not travel over all of BHN's network facilities through a common path, but is limited to point-to-point connections on these poles only. *See* White Reply Decl. at 6.

Accordingly, because BHN's customer's telecommunications services travel over dedicated point-to-point fiber connections, this telecommunications traffic does not travel over all of BHN's system. TECO therefore cannot assess pole rental as if it does. It instead is limited at most to assessing only these discrete 7,375 pole attachments at a properly calculated and lawful Telecom Rate.

IV. BHN IS ENTITLED TO RECOVER ANY PAST AND FUTURE OVERPAYMENTS UNDER THE TELECOMMUNICATIONS RATE

TECO contends that, while the Commission "clearly has jurisdiction to review the reasonableness of [its] rates," BHN waived any right to challenge rates for periods preceding the filing of its Pole-Attachment Complaint because its hands are unclean. The Commission should, however, reject TECO's effort to pocket overcharges for rates that should not even apply in the first place.

TECO is correct that the Commission generally has limited refunds in pole attachment proceedings to amounts paid after the complaint was filed. *See* 47 C.F.R. § 1.1410(c); *see also, e.g., Texas Cable & Telecommunications Ass'n v. GTE Southwest Inc.*, 14 FCC Rcd 2975, 2985, ¶34 (1999). But the Commission has, on occasion, departed from this "general rule" and ordered "more expansive remedies" in reliance on its "broad authority to fashion remedies in pole attachment complaint proceedings." *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion & Order, 18 FCC Rcd 24,615, 24,640, ¶¶ 54-57 (2003). 22/ These departures are consistent with the Commission's governing regulations. *See* 47 C.F.R. § 1.1410(c) ("The refund or payment will *normally* be the difference between the amount paid . . . and the amount that would have been paid . . . ." (emphasis added)); *see also id.* § 1.145 ("Commission may issue such other orders . . . as will best conduce to . . . the ends of justice."). In light of the unusual circumstances of this case, the Commission should depart from its "general rule" and exercise its "broad authority" to order "more expansive remedies" instead.

TECO's contention that BHN's hands are unclean is just more of the background noise of supposed bad faith that suffuses TECO's Response. The facts of the sole Commission order upon which it relies to advance this argument – *In re Am. Tel & Tel. Co.*, Notice of Apparent Liability & Orders, 95 FCC Rcd 1097 (1983)

22/ *See also Cavalier Telephone, LLC v. Virginia Elec. & Power Co.*, Order & Request for Information, 15 FCC Rcd 9563, 9579, ¶42 (Cable Serv. Bur. 2000) *vacated by settlement* 2002 FCC LEXIS 6385 (Dec. 3, 2002) (stating the vacatur did "not reflect any disagreement with or reconsideration of any of the findings or conclusions contained" in the original order issued in 2000); *Cable Tex., Inc. v. Entergy Serv., Inc.*, Order, 14 FCC Rcd 6647, 6653, ¶¶ 18-19 (Cable Serv. Bur. 1999).

– are nothing like those involved in the present one. There, the Commission denied a waiver request because it "is improper . . . either to violate the rules and then request a waiver afterwards or to continue to violate the rules pending a decision with respect to a waiver." *Id.* at ¶17. Here, however, with respect to VoIP, BHN has violated no law or regulation. BHN has not concealed or otherwise failed to give TECO notice of its provision of telecommunications service. BHN has consistently maintained that it is *not* providing such service. And, unless and until this Commission concludes otherwise, it will continue to maintain that the VoIP service it offers subscribers is not a telecommunications service properly subject to the Telecom Rate. In claiming otherwise, TECO just takes advantage of the regulatory uncertainty surrounding the classification of VoIP under the Communications Act.

As far as the 7,375 poles used by a BHN customer to provide "telecommunications service" are concerned, TECO points to no evidence that BHN made any effort to conceal this pole use. BHN in fact provided TECO notice of this leased capacity arrangement in 1998. *See* White Decl. ¶12; *see also* White Reply Decl. ¶13, attached to Complaint. While, due to an administrative oversight, BHN failed to pay pole rental properly assessed according to the Telecom Rate for this discrete number of poles, it promptly acted to correct this error once it was discovered, which occurred before TECO filed suit in state court.

TECO's attempt to retroactively impose the Telecom Rate on all of BHN's pole attachments going back to 2001 – on the theory that VoIP is a

telecommunications service – is itself an unjust and unreasonable term and condition of attachment and warrants a departure from the Commission's "normal[]" way of calculating refunds. Far from being the normal situation contemplated by the Commission's rules, in this instance, TECO has unilaterally imposed a retroactive Telecom Rate surcharge on BHN's attachments used to provide a lawful, unclassified service. Before now, BHN had no reason to (and it still does not) think it needed to "take issue with the telecommunications rate for those years" because VoIP has never been, as is not today, classified as a telecommunications service for pole attachment or any other regulatory purpose. Response at 15. The Commission has found that a departure from the normal course in circumstances such as these serve the interests of justice. *See Cable Tex., Inc. v. Entergy Serv., Inc.*, Order, 14 FCC Rcd 6647, 6653, ¶¶ 18-19 (Cable Serv. Bur. 1999).

V. NO SANCTIONS AGAINST BHN ARE WARRANTED

Not satisfied with prosecuting a state court lawsuit aimed at extracting a VoIP surcharge from BHN, TECO also requests the Commission to sanction BHN for use of pole attachments to provide VoIP service. Such a drastic measure is inappropriate in this case, as neither the law nor facts warrant it.

Under Section 503(b) of the Communications Act, the Commission may not, except following a hearing, impose monetary forfeitures absent issuance of a written notice of apparent liability "identify[ing] each specific provision" that the person allegedly violated or with which he allegedly failed to comply. 47 U.S.C.

§ 503(b)(3)-(4). The statute additionally requires the Commission, in making forfeiture determinations, to take into consideration "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offense, ability to pay, and such other matters as justice may require." *Id.* § 503(b)(2)(D).

TECO cites no Commission notice of apparent liability that BHN has allegedly run afoul of – and there is none – but grounds its sanctions plea instead on it allegedly "doing its best to keep Tampa Electric in the dark." *See* Response at 34. The marketing materials that TECO finds so provocative elsewhere belie any claim that BHN has attempted to obfuscate its provision of Digital Phone. BHN is not under any legal obligation to notify TECO that it is providing VoIP, as it contends. BHN may provide any lawful communications service, including VoIP service, over its facilities irrespective of TECO's "approval." Indeed, despite the fact that it has notified TECO that it provides VoIP service over facilities attached to its poles, the Communications Act does not require notification because VoIP service has yet to be classified as a "telecommunications service." *See* 47 C.F.R. §1.1403(e) ("Cable operators must notify pole owners upon offering *telecommunications service*." (emphasis added)). In circumstances like these, where a regulatee such as BHN is wrongly charged with a misstep in a regulatory field fraught with uncertainty and

open questions, the Commission has consistently found the imposition of monetary forfeitures inappropriate. 23/

Furthermore, no sanctions are warranted with regard to BHN's oversight on paying the Telecom Rate for the 7,375 poles used by a BHN customer to provide "telecommunications service," despite the fact that BHN made TECO aware of this arrangement as early as 1998. *See* White Declaration, attached to Complaint, at ¶13; *see also* White Reply Decl. ¶13. However, once BHN became aware of this payment oversight, it acted promptly to cure it, both before TECO filed its lawsuit, in December 2005, and thereafter. BHN offered to pay TECO an amount ($67,791.29) equal to the difference between the Cable Rate and Telecom Rate for the periods that BHN's customer has used 7,375 poles to provide telecommunications service. *See* Complaint at Ex. 5, p. 1-2. (BHN even agreed to pay more if a tribunal of competent jurisdiction found an additional amount appropriate.) For reasons of its own, however, TECO declined to accept BHN's tender of back rental. *See* Letter from Michael S. Hooker to J.D. Thomas, Apr. 5, 2006, reproduced at Ex. 1. Under such circumstances, BHN's oversight cannot

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23/ *See, e.g., Lorilei Communications, Inc., d/b/a The Firm v. Harmon Cable Communications, St. Albans, W. Va.*, Memorandum Opinion & Order, 12 FCC Rcd. 13,279, 13,284, ¶13 (Cable Serv. Bur. 1997) ("[B]ecause the leased access rules in effect at the time these matters initially arose were somewhat in flux and not completely familiar to most cable operators as well as to programmers, we believe it would be inappropriate to impose monetary or administrative sanctions in this matter."); *In re Complaint of Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith Against Station WCIX-TV Miami, Fl.*, Memorandum Opinion & Order, 12 FCC Rcd. 12,248, 12,250, ¶9 (1997) ("[W]e believe that it would be unfair to hold licensees responsible for the failure to affirmatively disclose rates before we specifically articulated the requirement to do so.").

properly be characterized as "conscious" or "deliberate," and therefore no monetary forfeiture is warranted as to these poles either. *See* 47 U.S.C. 312(f)(1); *Nextar Broad., Inc.*, 20 FCC Rcd 18,160, at *6 (2005). Accordingly, the Commission should reject TECO's request for any sanctions, including upward adjustments thereof.

VI. BHN IS ENTITLED TO ALL THE RELIEF REQUESTED IN THE COMPLAINT ON THE SUBMISSIONS BEFORE THE COMMISSION, AND THIS CASE DOES NOT WARRANT A HEARING

No hearing is required to resolve this Complaint. *See* Response at 12. The Commission need not delve into the technical functioning of BHN's Digital Phone offering, its marketing materials, or its Commission filings in order to hold that TECO cannot impose a VoIP surcharge on pole attachments used to provide that offering to customers. It need look no further than BHN's representations in this proceeding to confirm that BHN is offering a VoIP service over its cable system in order to grant BHN all the relief it requests in its Complaint. And the relief is simple: Unless and until the Commission affirmatively declares that cable system attachments used for VoIP are subject to the higher Section 224(e) telecommunications rate, the Section 224(d) (video rate) should apply.

In its Complaint, BHN declared, under penalty of perjury, that its Digital Phone offering is a VoIP service. *See* White Decl. ¶¶17-19. This declaration, as well as BHN's representations in its Complaint, therefore make abundantly clear that Digital Phone is a VoIP service necessarily reliant on IP technology. No further technical analysis is called for to confirm this fact.

TECO nevertheless asserts that, before reaching such a conclusion, the Commission must hold an evidentiary hearing – replete with "full" discovery privileges – to further explore the "true nature" of Digital Phone before the Commission may conclude that it is in fact a VoIP service. *See* Response at 13. Such a hearing would prove a colossal waste of time and valuable agency resources because TECO has not "identify[ied] a material question of fact that warrants a hearing." *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd 24,615, 24,640, ¶ 58 (2003) (internal quotation marks omitted); *see also Alabama Power v. FCC*, 311 F.3d 1357, 1372 (11th Cir. 2002) (stating party "must identify a material question of fact that warrants a hearing" and holding that present "dispute is only over the methodology that should be used to calculated the level of just compensation – a legal issue that hardly warrants an evidentiary hearing since no material facts are disputed"). At the heart of this proceeding lies a policy not a factual issue – and no hearing is needed to resolve the policy issue in view of the parties extensive submissions elaborating their respective positions on it. *See Knology*, 18 FCC Rcd at 24,641, ¶ 58.

Moreover, such a drawn-out proceeding would serve only to provide TECO an opportunity to advance arguments concerning VoIP that it has not made in the proceeding the Commission specifically initiated to consider the regulatory classification of VoIP services. *See IP-Enabled Services NPRM*, 9 FCC Rcd at 4868. Given the existence of that ongoing, broad-based proceeding, the Commission should reject TECO's request for a separate VoIP trial in this one. The Commission,

of course, may make policy through adjudication or rulemaking. *See Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 203 (U.S. 1947) ("And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.") (citing *Columbia Broad. Sys. v. United States,* 316 U.S. 407, 421 (1942)). But, having opted to make policy through a rulemaking proceeding, the Commission must require that TECO submit any technical arguments it may have regarding VoIP in that proceeding – not this one.

TECO contends that such a hearing is necessary, however, because BHN has "shielded" the technology underlying its Digital Phone service from public view, TECO and this Commission. *See* Response at 12. But it has done no such thing, as the marketing materials on which TECO relies amply demonstrate. Any reasonably savvy consumer that reviews BHN's marketing materials would inevitable recognize that a phone service that requires a cable modem is not like POTS. *See* TECO Ex. 18 at 5 ("Digital Phone requires . . . the Bright House Networks modem."); *see id.* ("Digital Phone uses a separate connection to the Digital Phone modem."). TECO is therefore wrong to suggest, based on its selective perusal of BHN's marketing materials, that BHN avoids "technical specifics." *See* Response at 12.

BHN, however, has not shielded the technical nature of its VoIP service from TECO or this Commission. Prior to initiation of this Complaint proceeding (where BHN has included ample descriptions of its VoIP service) or

TECO's state-court action, BHN apprised TECO that, what it perceived as telecommunications service, is in fact something quite different – VoIP service. In a letter dated December 8, 2005, BHN's Vice President of Finance, Dick Rose, explained to TECO that "[c]ontrary to [the] claim that BHN uses its attachments to offer 'telecommunications service,' BHN's Digital Phone service utilizes Voice over Internet Protocol technology (VoIP) over a proprietary network." *See* Ex. 3 to Complaint, at 1. BHN's good-faith effort to seek dismissal of TECO's state court lawsuit is also not an attempt to shield its technology but is instead a thoroughly legitimate effort to keep these issues before this Commission, where they belong.

CONCLUSION

For all of the foregoing reasons, in addition to those in its Pole-Attachment Complaint, the Commission should grant BHN its requested relief.

Respectfully submitted,

Gardner F. Gillespie
J. D. Thomas
Paul A. Werner III
HOGAN & HARTSON LLP
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Washington, D.C. 20004
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Attorneys for Complainant

April 25, 2006

Verification of Paul Werner

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Bright House Networks, LLC, *Complainant* v. **Tampa Electric Company** *Respondent.*	File No. EB-06-MD-003

VERIFICATION OF PAUL WERNER

I, Paul Werner, hereby declare under the penalty of perjury of the laws of the United States:

1. As counsel to Bright House Networks, LLC, Complainant in this proceeding, I am familiar with the factual matters included in the Reply.

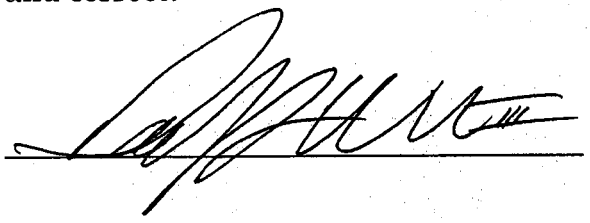
2. I was responsible for and oversaw the preparation of the above-captioned Reply. I verify that the Reply and all exhibits and declarations thereto are true and accurate to the best of my knowledge, information and belief.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Bright House Networks, LLC, *Complainant* v. **Tampa Electric Company** *Respondent.*	File No. EB-06-MD-003

VERIFICATION OF PAUL WERNER

I declare, under the penalty of perjury, that the foregoing verification is true and correct.



dated: 4/25/06

Declaration of Barry Beatty

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Bright House Networks, LLC, *Complainant* v. **Tampa Electric Company** *Respondent.*	File No. EB-06-MD-003

DECLARATION OF BARRY BEATTY

I, Barry Beatty, hereby declare under the penalty of perjury of the laws of the United States:

1. I am over the age of 18, competent to give this Declaration, and have personal knowledge of the facts set forth herein.

2. I have been employed for Bright House Networks, LLC (BHN), and its predecessors, for 35 years.

3. I currently serve as the Construction Manager and have held this position since 20 years.

4. I have reviewed the Declaration of Kristina Anguilli filed in connection with the Tampa Electric Company (TECO)'s Response to the pole attachment complaint filed by BHN.

5. In my capacity as Construction Manager, I interact with Ms. Anguilli on a nearly daily basis. In my view, we have an amicable working relationship.

6. In her declaration, Ms. Anguilli states that, "at various times between 1998 and 2004," I assured her that BHN's attachments were not being used for telecommunications services. That does not tell the whole story. During the timeframe to which she refers, I represented to her that BHN did not use its facilities attached to TECO's poles to provide telecommunications service. I never denied, however, that BHN provided its subscribers a VoIP service, which it began doing in 2005. BHN has consistently maintained – and continues to do so today – that its VoIP service is *not* a telecommunications service.

7. Later in her declaration, Ms. Anguilli again states that I "explicitly" represented to her in 1998 that BHN's pole attachments were not then used for telecommunications services. BHN was not offering any VoIP service to its customers at that time.

8. To the extent that any assurances I provided to Ms. Anguilli during the timeframe she references failed to acknowledge BHN's leased capacity arrangement with Time Warner Telecom, that oversight was unintentional and, once BHN became aware of it, BHN quickly moved to cure it by tendering payment of back rental under the Telecom Rate to TECO. To date, and for reasons of its own, TECO has refused to accept BHN's offer of payment under the Telecom Rate for the poles used by Time Warner Telecom to provide telecommunications service.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BHN Networks, LLC, *Complainant* **v.** **Tampa Electric Company** *Respondent.*	File No. EB-06-MD-003

DECLARATION OF BARRY BEATTY

I declare, under the penalty of perjury, that the foregoing Declaration is true and correct.

/s/ Barry J. Beatty dated: 4-25-2006

Declaration of Stanley McGinnis

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Bright House Networks, LLC, *Complainant* v. **Tampa Electric Company** *Respondent.*	File No. EB-06-MD-003

DECLARATION OF STANLEY MCGINNIS

I, Stanley McGinnis, hereby declare under the penalty of perjury of the laws of the United States:

1. I am over the age of 18, competent to give this Declaration, and have personal knowledge of the facts set forth herein.

2. I have been employed by Bright House Networks, LLC (BHN) and its predecessors for 29 years.

3. I currently serve as the Director of Design and Construction and have held this position since 2003.

4. I have reviewed the Declaration of Kristina Anguilli filed in connection with the Tampa Electric Company (TECO)'s Response to the pole attachment complaint filed by BHN.

5. In her declaration, Ms. Anguilli states that, "at various times between 1998 and 2004," I provided her assurances that BHN's attachments were not being used for telecommunications services. Her statement is only partially correct. During the timeframe that she identifies, I did represented that BHN is not providing telecommunications service. I believed then and I believe now that this is the case because BHN provides VoIP services over facilities attached to TECO's poles, a service that BHN has consistently maintained does not currently constitute a telecommunications service under state or federal law.

6. In a similar vein, Ms. Anguilli states later in her declaration that I "explicitly" told TECO in 2003 and 2004 that BHN's pole attachments were not then used for telecommunications services. Again, she is partially correct. In view of the unsettled regulatory status of VoIP, I represented that BHN was not providing a telecommunications service. I continue to believe that its VoIP offering does not constitute a telecommunications service. I did not then, and have never, denied that BHN provides a VoIP service to its subscribers.

7. To the extent that any assurances I provided to Ms. Anguilli during the timeframe she references failed to acknowledge BHN's leased capacity arrangement with its customer Time Warner Telecom, that oversight was unintentional and, once BHN became aware of it, BHN quickly moved to cure it by tendering payment of back rental under the Telecom Rate to TECO. To date, and for reasons of its own, TECO has refused to accept BHN's offer of payment under

the Telecom Rate for the poles used by Time Warner Telecom to provide telecommunications service.

8. Ms. Anguilli additionally states that I did not respond to the electronic version of TECO's standard pole attachment agreement that she sent me on October 21, 2003. However, in her electronic communication, she did not request action on the draft agreement, but only presented the draft agreement, advised me that the draft had not been fully reviewed by TECO's in-house legal department and that TECO reserved the right to have its legal department fully review the draft agreement.

9. In fact, contemporaneously with her electronic communication, Ms. Anguilli represented orally over the telephone that the draft did not necessarily represent the position that TECO would ultimately take in subsequent negotiations. Based on Ms. Anguilli's representations, both written and oral, I reasonably concluded that no action on the draft agreement was requested or required by me.

10. Nevertheless, I forwarded Ms. Anguilli's draft internally to the appropriate BHN contact on October 22, 2003.

11. In her October 21, 2003 e-mail, Ms. Anguilli requested that BHN answer specific questions pertaining to its corporate status. I responded to those questions in an e-mail on November 18, 2003, less than one month after receiving her inquiry. In that response, I represented that Bright House Networks is authorized to provide any lawful communications service and that, upon providing telecommunications service, BHN would notify it accordingly.

12. Ms. Anguilli additionally concludes that TECO has a "system-wide" average of 2.08 attachers to its poles. I believe she is incorrect. Many, if not most, of the TECO poles to which BHN is attached contain at least three separate entities, and may contain more. Those entities are TECO, BHN and the ILEC (Verizon or Sprint). In addition to these ***three*** entities there are government-owned facilities attached to these poles, including for traffic signalization, as well as another cable company in some areas.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BHN Networks, LLC, *Complainant* **v.** **Tampa Electric Company** *Respondent.*	File No. EB-06-MD-003

DECLARATION OF STANLEY MCGINNIS

I declare, under the penalty of perjury, that the foregoing Declaration is true and correct.

Stanley L. McGinnis dated: 4-25-2006

Declaration of Eugene White

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Bright House Networks, LLC, *Complainant* v. **Tampa Electric Company** *Respondent.*	File No. EB-06-MD-003

REPLY DECLARATION OF EUGENE WHITE

I, Eugene White, hereby declare under the penalty of perjury of the laws of the United States:

1. I am over the age of 18, competent to give this Declaration, and have personal knowledge of the facts set forth herein.

2. I am Vice President for Engineering for Bright House Networks, LLC ("BHN"), in the Tampa, Florida area. Part of my management and executive responsibilities include addressing pole attachment issues for BHN with utility companies in and around Tampa and surrounding areas of Hillsborough, Hernando, Pasco and Polk counties. In particular, I have had significant dealings with Tampa Electric ("TECO") over the years.

3. I have worked in the cable television industry for more than 34 years. I have worked in and around the greater Tampa area in cable television engineering (and construction) for more than 19 years.

4. I have reviewed TECO's Response to BHN's Pole-Attachment Complaint and the declaration of Kristina Anguilli that is attached to it. There are several points made in those filings that are in need of correction and explanation.

5. TECO makes much of BHN's relationship with Time Warner Telecom. However, Time Warner Telecom is not an affiliate of Bright House Networks, LLC. It is presently a customer, although before BHN assumed control of the BHN Tampa-area cable franchises, Time Warner Telecom was an affiliate of BHN's predecessor, Time Warner Cable.

6. Moreover, the dedicated fiber used by Time Warner Telecom for telecommunications services does not travel over all of BHN's poles through a common path but through point-to-point (dedicated fiber) connections on 7,375 pole attachments only.

7. TECO also attempts to exploit an apparent inconsistency between certain BHN FCC E911 Compliance Letters and the statement in my previous declaration in this proceeding that BHN began offering its subscribers a VoIP service in TECO's service area in January 2005 to discredit my statement and otherwise highlight BHN's alleged "difficulty with basic facts." *See* Response at 5 & Ex. 12. The inconsistency between these representations, however, is only apparent not actual.

8. As an initial matter, the representations made in the E911 Compliance Letters refer to the provision of VoIP service across BHN's entire Florida network, including areas where BHN's facilities are not attached to *TECO*'s poles. Furthermore, while BHN used employees, half-price customers and others to beta-test BHN's Digital Phone product in areas where its facilities are attached to TECO's poles prior to January 2005, BHN did not start a major (subscribing public) launch of its Digital Phone product until January 2005 once it had qualified sufficient rate centers for a major marketing launch campaign. Beta testing even continued after this date in Hillsboro, Pasco and Polk counties. In fact, BHN, was still beta testing well into the first quarter of 2006 in Pasco County and outlying areas of Hillsborough County and Polk County.

9. TECO also relies on certain state regulatory filings pertaining to Bright House Networks Information Services (BHNIS) to "further compound[]" the apparent "contradiction" addressed above. Response at 5. To the extent that it relies on state-wide filings by that entity to suggest that BHN was providing VoIP service through facilities attached to TECO's poles it is incorrect. As stated above, BHN did not offer its Digital Phone product to the public in TECO's service area until January 2005. To the extent that those filings bear on telecommunications traffic provided by Time Warner Telecom, BHN has already noted and attempted to cure that issue. TECO has rejected, for reasons of its own, BHN's tender of back rental at the Telecom Rate for attachments used by Time Warner Telecom to provide telecommunications service to its customers.

10. Related to this point, TECO also contends that BHNIS is used to provide wholesale transport to other carriers. This is not so. BHNIS was created during a time of regulatory uncertainty for the sole purpose of providing wholesale transport of BHN voice services and to provide a vehicle for interconnection with telecommunications carriers. Even though it is true that the VoIP packets traveling over BHN's Tampa network do not amount to telecommunications services, to be useful and a true competitive alternative, it still must interconnect with telecommunications carriers. This was why BHNIS was created. It now sits empty and unused, however.

11. All retail voice services that BHN is offering and providing in Tampa are being offered directly by BHN—the cable operator. All the network facilities being used to provide such services are owned by BHN—the cable operator. And the wholesale and interconnection piece for which BHNIS was created is supplied by an unaffiliated third-party carrier.

12. Similarly, TECO relies on BHN's completion of FCC Form 477 to suggest that BHN provided VoIP service in its service area prior to January 2005. BHN completed this form to assist the Commission with its efforts at gathering data on the state of broadband competition. As stated above, BHN did not offer its Digital Phone product to the public in TECO's service area until January 2005, but, before that time, was testing this offering on non-subscribers.

13. Ms. Anguilli, in her declaration, states that she is convinced that I am incorrect in stating that BHN provided TECO notice of its leased-access

arrangement with Time Warner Telecom in 1998. I stand by my earlier statement. BHN first made TECO aware of this arrangement in 1998 when Time Warner Telecom began providing service. In fact we know TECO had a fiber lease agreement and still has conduit agreements with Time Warner Telecom and are certainly aware of their existence and our relationship during this period when BHN's Tampa area systems were owned by Time Warner Cable (TWC). To illustrate this point, TECO and Time Warner Telecom had a tie point and a fiber lease on State Road 60 and Parson in Brandon to TECO'S Silver Lake substation in Winter Haven. This tie point was on a TECO pole with TECO and TWC (now BHN) fiber being leased by Time Warner Telecom from TWC. To claim they were not aware of the leased-access arrangement between Time Warner Telecom and TWC (BHN) when if fact they were active participants in business agreements with both parties is hard to understand.

14. I also believe TECO's contention that it has a "system-wide" average of 2.08 attachers to its poles is incorrect. Many of TECO poles to which BHN is attached contain at least three entities, and many of those contain more. Those entities are TECO, BHN and the ILEC (Verizon or Sprint). In addition to these three entities there are government-run facilities attached to these poles, including for traffic signalization and other uses.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BHN Networks, LLC, *Complainant* v. **Tampa Electric Company** *Respondent.*	File No. EB-06-MD-003

DECLARATION OF EUGENE WHITE

I declare, under the penalty of perjury, that the foregoing Declaration is true and correct.

Eugene M White dated: April 25, 2006

Exhibit 1

GLENN RASMUSSEN FOGARTY & HOOKER, P.A.

MERITAS LAW FIRMS WORLDWIDE

100 South Ashley Drive, Suite 1300, Tampa, Florida 33602
P.O. Box 3333, Tampa, Florida 33601-3333
(813) 229-3333; Fax (813) 229-5946
www.glennrasmussen.com

April 5, 2006

J. D. Thomas
Hogan & Hartson L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

RE: POLE ATTACHMENT RENTAL INVOICES JANUARY – JUNE, 2006

Dear Mr. Thomas:

This letter responds to the offer set forth in your February 17, 2006, letter in which your client, Bright House Networks, LLC ("Bright House"), expressed its willingness to pay Tampa Electric Company ("Tampa Electric") $67,791.20 based on Time Warner Telecom's alleged use of 7,375 poles for the period 2001-2005 at the rates shown in your schedule A.

I have discussed your offer with my client, Tampa Electric. Tampa Electric cannot accept your offer as a settlement or satisfaction of any part this dispute. However, Tampa Electric would be willing to receive that amount or any additional amount Bright House wishes to tender as a partial payment to be credited against the actual amounts owed as may ultimately be agreed by the parties or determined by the court in *Tampa Electric Company v. Bright House Networks LLC*, Case No. 06-00819, Division B, Hillsborough County, Florida (the "Litigation"), or any other legal or administrative proceeding between the parties. Of course, Tampa Electric's acceptance of such partial payment would have to be conditional on Bright House's acknowledgment that both parties are reserving all their respective rights and defenses with respect to the tender and receipt of such payment. In particular, Bright House would have to accept and acknowledge Tampa Electric's position that its acceptance of the $67,791.20 payment would not constitute an accord and satisfaction, or otherwise effect a waiver or release of Tampa Electric's rights to claim and recover additional amounts due from Bright House, as alleged in the Litigation. Accordingly, the effect of Bright House's tender of a partial $67,791.20 payment now would be simply to avoid the continued accrual of pre-judgment interest on this portion of the total amount claimed by Tampa Electric in the Litigation to be due and owing from Bright House.

As explained in Tampa Electric's recent Response to Bright House's FCC complaint, Bright House's historical non-disclosure of the telecommunications use of its

attachments and refusal to cooperate with discovery gives Tampa Electric great discomfort regarding Bright House's latest representations about numbers of attachments and the scope of their use. Based on the Bright House documents uncovered to date from sources other than Bright House, it appears likely that entities other than Time Warner Telecom are also using Bright House's attachments for telecommunications. Until Tampa Electric receives complete, verifiable information regarding the use of Bright House's attachments, Tampa Electric could not agree to treat any payments Bright House may choose to make as anything more than partial payments against the amounts Tampa Electric has claimed.

If you wish to discuss this matter further, please do not hesitate to call me or Bob Williams.

Sincerely,

GLENN RASMUSSEN FOGARTY & HOOKER, P.A.

Michael S. Hooker

MSH:dlj

00004-071^X Language re Settlement Offer

CERTIFICATE OF SERVICE

I, Joseph C. Fezie, hereby certify that on this 25th day of April, 2006, I have had hand-delivered, and/or placed in the United States mail, and/or sent via electronic mail, a copy or copies of the foregoing **REPLY** with sufficient postage (*where necessary*) affixed thereto, upon the following:

Marlene H. Dortch **(Orig. & 4 copies)** (hand delivery)
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Best Copy and Printing, Inc. (hand delivery)
Federal Communications Commission
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554

Alexander P. Starr (hand delivery, email, fax)
Rosemary McEnery
Suzanne M. Tetreault
Federal Communications Commission
Enforcement Bureau
Market Disputes Division
445 12th Street, S.W.
Washington, D.C. 20554

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