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FROM: J. D. Thomas, Esq.

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Opposition
Bright House Networks, LLC

v.

Tampa Electric Company (EB-06-MD-003)

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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

OPPOSITION

Complainant Bright House Networks, LLC ("BHN") respectfully submits this Opposition in response to Tampa Electric Company's ("TECO's") August 30, 2006 Motion for Leave To Supplement The Record In Response To Bright House Networks LLC's Reply Brief. As explained more fully below, and for good cause shown, the Commission should deny TECO's Motion and reject its Supplement.

Operating under the dubious maxim that "more is less," TECO seeks to turn the Commission's streamlined, efficient three-stage pleading cycle into an open-ended filing free-for-all, in which it can "supplement" the record with staggering amounts of astoundingly irrelevant material. But the Commission's rules forbid such an effort. Even if they did not, the information that TECO claims supports its assertions fails, just like the rest of its (timely-filed) materials, to show that it (1) may collect a telecommunications pole attachment rate for cable attachments used to provide BHN's cable VoIP Digital Phone offering; (2) does not maintain detailed appurtenance data; and (3) has rebutted the Commission's five-entity presumption.

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I. TECO'S MOTION SHOULD BE DENIED AND ITS SUPPLEMENT REJECTED

TECO's curiously-timed and procedurally defective motion 1/ — submitted more than four months after the pleadings cycle closed — asks the Commission to allow it to "Supplement." This "Supplement" includes more briefing on the telecom rate methodology issues that BHN raised in the Complaint, which, of course, TECO should have and could have made in its response (if it were relevant at all, which it is not). It includes another declaration by Kristina Anguilli, which is no less cryptic or more illuminating than her first effort. It includes an agreement between Time Warner Telecom (TWT, a BHN customer) and TECO that tends only to support statements made by BHN declarant Eugene White. It includes Reply Comments of Advance-Newhouse Communications filed at the FCC in WC Docket No. 06-55 that shed no light on this case as they concern a wholly separate issue. And, most surprisingly, it includes a CD containing a Microsoft Access database that contains approximately 16 million different fields of pole-related data that do not confirm its claim that the number of attaching entities for the purposes of the telecom formula is somewhere around 2, let alone that TECO is entitled to charge BHN nearly $18.00 per pole for BHN's approximately 160,000 attachments on TECO poles. 2/

1/ TECO offers no explanation for relying on Commission rules that have no bearing on this proceeding and otherwise failing to adhere to the Commission's post-Complaint procedural order concerning who must be served (TECO served not the designated Commission contacts but others unconnected to this proceeding) and how (TECO served by mail rather than electronically). These procedural failings alone warrant rejecting TECO's motion and its supplement.

2/ To the extent that the parties have not agreed on a rate for the limited number of BHN attachments used by one of its customers (TWT) to provide

But not only are these various materials irrelevant, with the exception of the Reply Comments, they were all available ***before*** TECO filed its Response on March 29, 2006! – which begs the question why does TECO now seek to put them in the record, long after the pleading cycle ended? TECO gives the Commission no answer, and there exists absolutely no good cause to enter this material into the record.

A. TECO Has Failed To Meet The Standard For Supplementing The Record in Pole Attachment Proceedings

The Commission resolves pole attachment disputes according to a three-part pleading cycle. *See* 47 C.F.R. § 1.1407. In general, "*no other filings* and no motions other than for extension of time *will be considered* unless authorized by the Commission." *See* 47 C.F.R. § 1.1407(a) (emphases added). This is because the pole attachment process is designed to be efficient. Although the Commission has the authority to permit additional filings, the Commission routinely denies motions such as TECO's – particularly where, as is the case here, the supplemental information is neither new nor relevant. *See, e.g., Marcus Cable Assoc., LP, v. Texas Util. Elec. Co.*, 18 FCC Rcd. 15,932 (2003); *In re Cable Telecomm. Ass'n of Md., Del. and D.C. v. Baltimore Gas & Elec. Co.*, 16 FCC Rcd. 5447 (2001); *In re Kansas City Cable Partners v. Kansas City Power & Light Co.*, 14 FCC Rcd. 11,599, 11,600 (1999).

As was the case in *Marcus Cable*, TECO's attempt to supplement the record with voluminous but irrelevant materials must be rejected. *See* 18 FCC Rcd. 15,932 (2003). Both parties submitted extensive pleadings, affidavits, and exhibits to explain their respective positions. At that time, TECO had the materials that it seeks to

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telecommunications services, BHN remains amenable to negotiating a rate for such facilities, without conceding that is *required* to do so.

introduce (with the exception of the reply comments) and chose not to do so. Its change of heart now simply comes too late, and the materials do not fill the holes in its Response, as they are thoroughly beside the point.

1. The TWT – TECO Agreement

TECO deliberately twists the plain words of BHN's Eugene White's Reply Declaration. In that declaration, Mr. White explained as follows:

> [W]e 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 in fact they were active participants in business agreements with both parties is hard to understand.

White Reply Decl. at ¶ 13. Thus, Mr. White never indicated or implied that TWT had a *pole attachment agreement* with TECO. Rather, he states only that TWT had a fiber and conduit agreement with TECO, just as the agreement submitted now by TECO indicates. *See* Agreement at 20. And his point, as is obvious from his declaration, was simply that where the TECO fiber stopped, BHN fiber picked up in order for the TWT network to continue. As Mr. White indicates, TECO must surely have known that to be the case.

TECO's effort to put words into Mr. White's mouth now with the fiber agreement is entirely specious, 3/ comes close to failing the standard established by Commission Rules 1.17, 1.23, 1.24 and must be rejected.

2. The Advance-Newhouse Comments Support BHN's Position in this Case

TECO apparently believes that the comments that BHN's parent Advance-Newhouse Communications filed in another proceeding supporting a request that CLECs serving VoIP providers (like BHN) be given full interconnection rights under 47 U.S.C. § 251 is an admission that BHN itself is a telecommunications carrier providing telecommunications services. TECO already has explained that Bright House Networks Information Services lies dormant today, and does not provide interconnection for BHN. As Mr. White explained, "the wholesale and interconnection piece for which BHNIS was created is supplied by an unaffiliated third-party carrier." White Reply Decl. at ¶ 11. That company "sits empty and unused." *Id.* at ¶ 10.

As to the Advance-Newhouse comments, they merely state that however cable VoIP services are ultimately classified for regulatory purposes, those carriers (which are "telecommunications carriers") that provide transport to the cable VoIP providers (like BHN) should be afforded full interconnection rights. This view is irrelevant (and therefore uncontroversial) in this proceeding because there is no admission, or anything like an admission either, that BHN is a telecommunications carrier or that cable VoIP is a "telecommunications service," as TECO implies.

3/ "That [BHN] would stretch the truth so far to suggest notice of an opposite arrangement – Time Warner Telecom's fibers on Tampa Electric's Poles – only emphasizes the absence of any evidence of any notice that Time Warner Telecom was attaching its facilities." TECO Br. at 3.

3. Pole Rate Submission

There are two principal rate issues in dispute—one is the 15% appurtenance deduction—which BHN has shown is far too generous to TECO—and the other is the 5-entity presumption for calculating the telecommunications rate. TECO's Supplement adds nothing to either.

TECO argues that BHN raised new arguments and factual allegations in its Reply that were not raised in the Complaint and that BHN should not be permitted "to rectify any shortcomings in its compliant [sic] by considering issues for the first time raised in the Reply." Motion at 2; Supplemental Response at 2. TECO argues further that it had offered to provide BHN with the material that it has now asked to make a part of this record. TECO is mistaken on both counts. The data that BHN noted that TECO failed to provide, and that appears to be the subject of its latest filing, is supposed to support its contention that there are only something like 2 entities per pole.

First, BHN raised no new arguments or factual allegations in the Reply that were not in the Complaint. BHN merely pointed out that, under Commission precedent, the "support" that TECO offered for the number of attaching entities on its poles was deficient. Reply at 24 (citing *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.")). A single, albeit dispositive, citation is hardly sufficient to trigger a new round of pleadings—or indeed an entirely new phase to the litigation.

Second, TECO did ***not*** offer to supply this pole-count information to BHN. TECO points to Exhibit 23 of its Response, which is a letter dated March 20, 2006 (nine

days before TECO filed its Response) providing some source material regarding its rates sent by TECO's counsel to undersigned counsel inviting undersigned counsel to "discuss or elaborate on anything contained in this response" which is hardly the offer TECO proclaims. Indeed, in the material that TECO provided to BHN on March 20 and included in its Response next to the line item for attaching entities (2.00, 2.05 or 2.08, depending on the calculation and the year) in its telecom rate calculations, was the explanation "as provided in audit by Kris A." or "as provided in 05/20/02." The "Kris A." references apparently are to Kris Anguilli, but there was no additional explanation of this item and certainly no source data that supported this rock-bottom attaching entity element in the March 20, 2006 letter, or TECO's response or the Supplement, including Ms. Anguilli's latest declaration.

Moreover, and while BHN certainly has not had an opportunity to review in detail the CD that TECO has submitted, a quick glance reveals that it is a raw listing of poles, locations and perhaps attachments to those poles. What the listing is drawn from or what it's significance is—despite Ms. Anguilli's testimony that "all of the summaries of those data that I included in my initial Declaration were derived directly from the data [on the CD at Attachment 2] and are complete and accurate." Supplemental Anguilli Decl. ¶ 4. That's it. There is no discussion as to how the attaching parties numbers were derived, no work papers or other source material; and there was certainly no statistically-reliable survey, as the Commission requires. There is only this raw Access data base. Thus, if the Commission were even to make a modest inquiry into the substance of what TECO has impermissibly filed, it still reveals nothing about how

TECO came to conclude that the number of attaching entities on its poles are dramatically lower than the Commission's five-entity urban-area presumption.

Even if this data *were* offered to Complainant, TECO misses the point. It has an independent obligation under the Commission's rules to overcome the five-entity presumption with credible evidence that there are fewer entities on its poles. It utterly failed to do this when it filed its Response, and has failed to do so again now.

Finally, BHN attempted to negotiate with TECO over the pole rate in late 2005. TECO's response to that attempt was the filing of a state-court collections lawsuit. *See e.g.*, Complaint at ¶ 4.

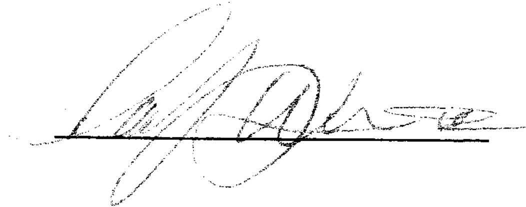
The best course simply is to reject this eleventh-hour clutter and rule that TECO has failed to overcome the five-entity presumption by failing to timely file the requisite materials with its reply.

As with the question of whether or not BHN is a telecommunications carrier providing telecommunications services, there is nothing new in the Supplement regarding the appurtenance deduction. TECO merely asserts, under cover of Ms. Anguilli's declaration and warmed-over citations to state law, that TECO does not keep the data that BHN seeks to prove that the 15% appurtenance deduction is unduly generous to TECO.

II. CONCLUSION

For all of the foregoing reasons, in addition to those in its Pole-Attachment Complaint and Reply, the Commission should grant BHN its requested relief and deny TECO's present motion and supplement to the record in this proceeding.

Respectfully submitted,



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September 13, 2006

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CERTIFICATE OF SERVICE

I, Christine Reilly, hereby certify that on this 13th day of September, 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 **OPPOSITION** with sufficient postage (*where necessary*) affixed thereto, upon the following:

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