

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

DISTRICT CENTER
07 OCT -1 AM 7:14

Bright House Networks, LLC,
Complainant
v.
Tampa Electric Company,
Respondent.

File No. EB-06-MD-003

To: Enforcement Bureau
Market Disputes Resolution Division

RECEIVED - FPSC
07 OCT -1 AM 9:16
COMMISSION
CLERK

**MOTION FOR LEAVE TO FILE REPLY TO RESPONSE TO SUPPLEMENT
TO POLE ATTACHMENT COMPLAINT**

Bright House Networks, LLC, hereby moves for leave to file the accompanying **REPLY TO RESPONSE TO SUPPLEMENT TO POLE ATTACHMENT COMPLAINT**. Good cause exists to grant Bright House Networks' ("BHN's") motion, including the establishment of a complete and accurate record, and Tampa Electric Company ("TECO") will suffer no prejudice as a result of granting it. This

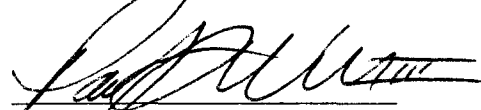
DOCUMENT NUMBER - DATE

08949 OCT-1 5

FPSC-COMMISSION CLERK

Reply responds to TECO's Response to ensure that the record in this proceeding is complete and accurate.

Respectfully submitted,



Gardner F. Gillespie

J. D. Thomas

Paul A. Werner III

HOGAN & HARTSON LLP

Columbia Square

555 Thirteenth Street, N.W.

Washington, D.C. 20004

T: 202.637.5600

F: 202.637.5910

gfgillespie@hhlaw.com

jdthomas@hhlaw.com

pawerner@hhlaw.com

September 26, 2007

Attorneys for Complainant

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

To: Enforcement Bureau
Market Disputes Resolution Division

**REPLY TO RESPONSE TO SUPPLEMENT TO
POLE ATTACHMENT COMPLAINT**

Gardner F. Gillespie
J. D. Thomas
Paul A. Werner
HOGAN & HARTSON LLP
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004
T: 202.637.5600
F: 202.637.5910
gfgillespie@hhlaw.com
jdthomas@hhlaw.com
pawerner@hhlaw.com

September 26, 2007

Attorneys for Complainant

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION & SUMMARY	1
DISCUSSION	3
CONCLUSION	8
CERTIFICATE OF SERVICE	

ATTACHMENT LIST

Verification of Paul Werner

Declaration of Cody Harrison

INTRODUCTION & SUMMARY

From the beginning, this complaint case has been about a utility – Tampa Electric Company (“TECO”) – attempting to leverage deep regulatory uncertainties into additional pole attachment rental fee payments from a cable operator – Bright House Networks, LLC (“BHN”).^{1/} TECO’s latest filing demonstrates that this remains true.

On August 7, 2007, BHN supplemented its earlier-filed pole attachment complaint against TECO concerning TECO’s effort to apply (through the vehicle of a state court “collections” action) the higher telecom rate to pole attachments used by BHN to provide a Voice over Internet Protocol (“VoIP”) Digital Phone service to its subscribers. In that supplement, BHN explained that, once the state court stayed the bulk of TECO’s lawsuit, TECO tried a somewhat different approach: TECO amended its complaint to specifically allege that all of BHN’s 160,000 attachments to its poles were (and are) used to provide telecommunications services subject to the telecom rate because of the transport and interconnection services allegedly provided to it by Bright House Information Services, LLC (“BHNIS”). The purpose of BHN’s filing was to ensure that TECO’s new claim, which, as with its old claims, is unjust, unreasonable and

^{1/} Cf. 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”) (internal quotation marks omitted).

unlawful under Section 224 of the Communications Act is before this Commission.

With its Response, TECO does not contend that BHN's additional allegation is somehow inappropriate for this Commission to resolve (*i.e.*, that it should be resolved instead by a state court). To the contrary, TECO argues to the Commission that its new theory is valid.

BHN has already explained why TECO's theory is misguided and wrong. ^{2/} Rather than restate those points here, BHN offers this Reply to clarify the underlying facts of this case and resolve apparent inconsistencies in certain representations by BHN that TECO seizes upon to argue that all of BHN's pole attachments are used for telecommunications services subject to the higher telecom rate. As explained below, the apparent inconsistencies that TECO relies upon do not stem from any illicit motives – as TECO repeatedly contends – but are a byproduct of the regulatory uncertainties on which TECO's entire state court lawsuit is built. Indeed, BHN has largely resolved all of these inconsistencies before; it briefly does so again now simply to preserve an accurate and complete record. See BHN Reply (filed April 25, 2006).

^{2/} In addition to advancing its new transport-and-interconnection theory, TECO also falls back on an old theory. But while TECO cites a number of Commission orders that it says hold that VoIP is a telecommunications service subject to the telecom pole attachment formula, it is ultimately forced to concede that "each of the Commission's VoIP-related decisions *clearly provides that it is not intended as a classification ruling.*" TECO Response at 17 (emphasis added).

DISCUSSION

Throughout its Response, TECO is at pains to argue that “publicly available documents in other proceedings and forums confirm that all of BHN’s pole attachments have . . . been used by telecommunications carriers for the provision of telecommunications services.” TECO Response at 1. This is not so: Once the documents that TECO invokes are understood in their proper context and against the evolving regulatory environment for VoIP, it becomes clear that they do not support the conclusion that TECO would have this Commission draw from them. Nor do they support TECO’s oft-repeated refrain that BHN has not been forthright with regulators – including this Commission – or the public.

First, in claiming that BHN’s own representations show that “BHNIS was used to provide a variety of traditional telecommunications services over BHN’s pole attachments to facilitate BHN’s efforts to market a voice service,” TECO simply misunderstands the facts. See TECO Response at 6. At the outset, it must be remembered that BHN first took over management responsibility from Time Warner Cable (“TWC”) for the Time Warner Entertainment/Advance-Newhouse Partnership cable systems in Central Florida and Tampa Bay in January 2003. See Decl. of Cody Harrison (“Decl.”) ¶ 3; see *also* BHN Reply at 7. Along with management responsibilities, BHN at that time inherited a certificate for a competitive local exchange carrier (“CLEC”) to operate in Florida in the name of Time Warner Cable Information Services/Florida LLC (“TWCIS”), and renamed it BHNIS. See Decl. ¶ 3. That certificate had been obtained to assist in any way necessary in the provision of VoIP Digital Phone

service to subscribers of the cable system in Florida in the event that such service was subject to state regulation. See Decl. ¶ 3; see also BHN Reply at 7.

In or around April 2004, BHN first began “beta testing” its VoIP Digital Phone service in St. Petersburg and Clearwater, Florida. See Decl. ¶ 4. As BHN has already explained, it did so principally with employees and some targeted non-paying subscribers. See Decl. ¶ 5. BHN began to provide its VoIP Digital Phone service to paying subscribers in July 2004, but did so at that time only on a limited basis in some neighborhoods. ^{3/} See Decl. ¶ 5. And because BHN phased in its new VoIP Digital Phone service one neighborhood at a time, it did not undertake a full-scale commercial launch of its Digital Phone service until January 2005, when the majority of its subscribers in all the neighborhoods that it serves could obtain Digital Phone service. ^{4/} See Decl. ¶ 5.

When BHN first began testing and offering its VoIP Digital Phone service, BHN entered into an agreement with MCI on April 7, 2004. See Decl. ¶ 6. Under that agreement, MCI agreed to provide BHN with wholesale transport and interconnection to the PSTN. See Decl. ¶ 6. MCI did not, however, use any

^{3/} TECO’s attempt to locate an earlier launch date in certain BHN statements (and undermine Mr. Eugene White’s earlier testimony in the process) misses the mark. See TECO Response at 12. Mr. White has already explained that BHN began to roll out its Digital Phone service commercially before January 2005; BHN did not, however, undertake a full-scale commercial launch until that time. See Reply Decl. of Eugene White ¶ 8. TECO points to no contrary evidence because there is none.

^{4/} In attempting to demonstrate an earlier launch date for Digital Phone, TECO strangely cites an article about Volo Communications contained in an Orlando newspaper. See TECO Response at 12-13. Whatever arrangement BHN had with Volo Communications concerns BHN’s operations in Orlando – not Tampa – and thus has no bearing on any activity on TECO’s poles. See TECO Response (referencing “[a]n article in the *Orlando Sentinel* . . .”) (emphasis added); see *id.* at Ex. 9.

of BHN's pole attachments to deliver these services to BHN; MCI had its own network with its own pole and conduit rights. See Decl. ¶ 6. As a result, MCI picked up BHN's VoIP Digital Phone traffic destined for the PSTN directly from BHN's cable system and used its own network, without relying on any of BHN's pole attachments, to transport the communications to the ILECs for interconnection to the PSTN. ^{5/} See Decl. ¶ 6. Although BHN referred to this arrangement informally as a "partnership," it was not a formal partnership and the companies in fact had no relationship other than a contractual relationship. See Decl. ¶ 6. TECO is thus incorrect that BHNIS, BHN and MCI acted jointly as partners to provide BHN's Digital Phone Service. See TECO Response at 12.

When BHN began offering its VoIP Digital Phone service commercially, the regulatory status of VoIP was in flux. See Decl. ¶ 7. Importantly, at this time, the extent to which VoIP service would be subject to state regulation remained uncertain. As a result, BHN initially rolled the service out under the auspices of its certificated CLEC subsidiary – BHNIS. ^{6/} See Decl. ¶ 7. Accordingly, the subscriber agreements were initially in the name of BHNIS, and regulatory fees were paid to the Florida PSC by BHNIS, the certificated

^{5/} Because MCI used its own network to transport BHN's communications to the PSTN, TECO is quite wrong that MCI's "activities constitute yet another undisclosed use of BHN's attachments." See TECO Response at 11 n.7.

^{6/} Thus, as TECO points out, BHN filed a complaint against Verizon in 2004 with the Florida Public Service Commission ("PSC") under the auspices of BHNIS. See TECO Response at 3. And as TECO has pointed out before, but points out again in its Response, BHN's early customer contracts referred to BHNIS. See TECO Response at 3.

entity. ^{7/} See Decl. ¶ 7. At that time, MCI – not BHNIS – provided wholesale transport and interconnection with the PSTN. See Decl. ¶ 7. ^{8/}

But that state of affairs did not last long. Following a series of rulings by this Commission, ^{9/} as well as the passage of Florida laws addressing VoIP, ^{10/} in 2005 BHN ultimately determined that there was no regulatory need

^{7/} TECO's reliance on state regulatory forms related to BHNIS is not new. In response to TECO's earlier reliance on these same forms, BHN explained that it paid certain regulatory fees out of an abundance of caution and even after Florida law was amended to make clear that VoIP does not constitute a telecommunications service subject to the telecom rate. See BHN Reply at 16. The same is true for TECO's reliance on a 2005 CLEC Data Request filed by BHNIS with the Florida PSC: BHN completed this form out of an abundance of caution, not out of a sense of clear legal duty. In any event, TECO (again) ignores that the *state-wide* regulatory filings that it puts so much weight on do not provide much insight into BHNIS's specific activities in Tampa during the disputed period. See Reply Decl. of Eugene White ¶ 9.

^{8/} In its quest to show that BHNIS was providing BHN with some service during 2004 and 2005, TECO ignores specific references to BHN in the documents it invokes (claiming only, and without support, that those references must really be references to BHNIS) and also overlooks that MCI was providing BHN with wholesale transport to and interconnection with the PSTN. See TECO Response at 4, 11.

^{9/} *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Util. Comm'n*, 19 FCC Rcd 22,404 (2004); *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).

^{10/} As BHN has previously explained, see Reply at 9, through legislative action in 2005, Florida made clear that VoIP service was not subject to regulation as a telecommunications service. 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 The Legislature further finds that the provision of voice-over-Internet protocol (VOIP) free of unnecessary

for it to provide its VoIP Digital Phone service under the auspices of a certificated CLEC. See Decl. ¶ 8. Accordingly, BHN decided to provide its VoIP Digital Phone service directly via BHN, rather than BHNIS. See Decl. ¶ 8. And, as BHN has consistently explained, without the need to offer VoIP under the auspices of a certificated CLEC, BHNIS at that point became entirely dormant. See Reply at 15.

Nevertheless, during BHNIS's dormancy, BHN began to make plans to use BHNIS to replace MCI to provide wholesale transport and interconnection services and negotiated interconnection agreements with ILECs for that purpose. ^{11/} At that time, BHNIS entered into interconnection agreements with ILECs, in anticipation of a time when they would be needed. When MCI merged with Verizon in January 2006, it became especially important for BHN to limit MCI's responsibilities, which would henceforth be performed by one of BHN's principal competitors. ^{12/} See Decl. ¶ 9. Thus, beginning in the spring of 2007, BHN began slowly transitioning the wholesale transport and interconnection responsibilities away from MCI to BHNIS. See Decl. ¶ 9. BHN

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.").

^{11/} TECO mistakenly sees this effort as evidence that BHNIS's dormancy was a "fiction," see TECO Response 5-6 & Ex. 5, but the fact remains that MCI, not BHNIS, provided wholesale and interconnection services until earlier this year.

^{12/} BHN was so concerned about the effects of this merger on its business that, as TECO points out, BHN filed comments on the merger with this Commission. See TECO Response at 4-5 & Ex. 4.

promptly notified the Commission of this change through a supplemental filing in this docket. See BHN Supplement to Pole Attachment Reply Brief And Reply Declaration of Eugene White (filed Apr. 23, 2007).

CONCLUSION

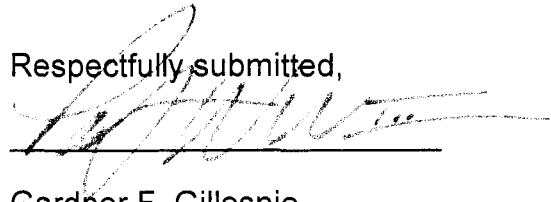
BHN supplemented its pole attachment complaint to ensure that this Commission assumes jurisdiction over TECO's new theory, advanced in a state court lawsuit, for why all of BHN's attachments to its poles are used to provide telecommunications services subject to the higher telecommunications pole attachment rate formula. Pursuing that untested theory in a state-court collections action constitutes an unreasonable, unjust and unlawful term and condition of attachment that is within this Commission's power to address.

Relying largely on a stale pastiche of regulatory filings and statements divorced from their proper context, TECO only responds that the claim should be resolved in its favor. But, when viewed in its proper historical light, the "evidence" that TECO relies upon shows only that, for a short time in 2004-2005, BHN provided residential VoIP service under the auspices of BHNIS. BHN did so, however, only because of the grave uncertainties surrounding the regulatory obligations of a cable system offering VoIP service to its subscribers, and not in order to fool anyone, including the regulators. And during this period, MCI, not BHNIS, provided BHN with wholesale transport and interconnection services under contract.

Once it became clear in 2005 that VoIP would not be subject to state regulation, however, BHNIS became dormant. BHNIS remained so until

the spring of 2007, when it began to provide the wholesale transport and interconnection services once provided by MCI. But, importantly, at no time did BHNIS (or BHN) provide both the residential VoIP service as well as wholesale transport and interconnection to the PSTN. ^{13/} Thus, for reasons that BHN has already explained, TECO's new theory for establishing that all of BHN's 160,000 attachments to TECO's poles are used for telecommunications fails and should be rejected by the Commission. See BHN Supplement to Pole Attachment Complaint (filed Aug. 7, 2007).

Respectfully submitted,



Gardner F. Gillespie
J. D. Thomas
Paul A. Werner
HOGAN & HARTSON LLP
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004
T: 202.637.5600
F: 202.637.5910
gfgillespie@hhlaw.com
jdthomas@hhlaw.com
pawerner@hhlaw.com

September 26, 2007

Attorneys for Complainant

^{13/} TECO's renewed request for the Commission to impose sanctions on BHN remains unjustified. BHN has already explained that sanctions are clearly inappropriate in this case and none of TECO's contentions warrant a rehash of those reasons here. See BHN Reply (filed Apr. 25, 2006) at 38-40.

CERTIFICATE OF SERVICE

I, June Carter-Hall, hereby certify that on this 26th day of September, 2007, 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 TO RESPONSE TO SUPPLEMENT TO POLE ATTACHMENT COMPLAINT**, 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
Room CY-B402
445 12th Street, SW
Washington, D.C. 20554

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

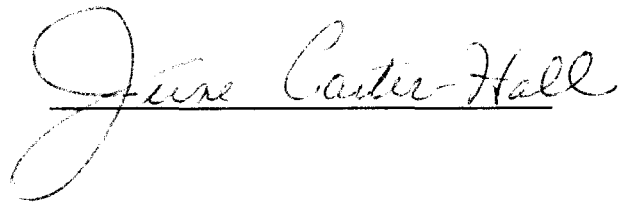
General Counsel
Tampa Electric Company
P.O. Box 111
Tampa, FL 33601-0111

Michael S. Hooker
Glenn Rasmussen Fogarty & Hooker, P.A.
100 S. Ashley Drive, Suite 1300
Tampa, FL 33602

Robert Williams
Troutman Sanders LLP
Bank of America Plaza
600 Peachtree Street, N.E.
Suite 5200
Atlanta, GA 30308-2216

Federal Energy Regulatory Commission (U.S. mail)
888 First Street, NW
Washington, D.C. 20426

Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

A handwritten signature in cursive script that reads "June Carter-Hall". The signature is written in black ink and is positioned above a horizontal line.

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 to Response to Supplement to Pole Attachment Complaint.

2. I was responsible for and oversaw the preparation of the above-captioned Reply to Response to Supplement to Pole Attachment Complaint. I verify that the Reply to Response to Supplement to Pole Attachment Complaint and all exhibits 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: 9/26/07

**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 CODY HARRISON

I, Cody Harrison, hereby declare under the penalty of perjury of the laws of the United States:

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

2. I serve as Bright House Networks' ("BHN's") corporate counsel, a position that I have held since 2003.

3. BHN inherited a certificate for a competitive local exchange carrier to operate in Florida in the name of Time Warner Cable Information Services ("TWCIS") when it took over the management of the cable system from its predecessor Time Warner Cable ("TWC") in January 2003. BHN subsequently gave the certificated entity a new name: Bright House Networks Information Services ("BHNIS").

4. TWCIS was created during a time when the regulatory environment applicable to Voice over Internet Protocol ("VoIP") service provided by a cable operator was fraught with uncertainty. Thus, TWCIS's certificate of public convenience and

necessity was obtained from the Florida Public Service Commission to assist in any way necessary in the provision of VoIP service in the event that such service provided by a cable system was subject to state regulation.

5. In or around April 2004, BHN began beta testing of its cable VoIP Digital Phone service in St. Petersburg and Clearwater, Florida, principally with employees and some targeted subscribers (who were not charged for the service). Beginning in July 2004, BHN began to provide its Digital Phone service to a limited number of paying subscribers in some neighborhoods. Because BHN phased in its Digital Phone service on a neighborhood by neighborhood basis, however, BHN did not undertake a full commercial launch of its Digital Phone service until a majority of its subscribers in all the neighborhoods that it serves could actually obtain Digital Phone service. That did not occur until January 2005.

6. In connection with testing and phasing in its VoIP service, BHN entered into an agreement with MCI on April 7, 2004, pursuant to which MCI agreed to provide wholesale transport to and interconnection with the PSTN. To provide these services, however, MCI did not use any of BHN's pole attachments; MCI had its own network with its own pole and conduit rights. As a result, MCI picked up BHN's VoIP Digital Phone traffic destined for the PSTN directly from BHN's cable system and used MCI's network to transport the signals to the PSTN. While BHN may have informally referred to this arrangement as a "partnership," it was in fact a purely contractual relationship.

7. Because the regulatory status of VoIP remained unclear during this phase-in and launch period, BHN initially provided its Digital Phone service under the

auspices of BHNIS, its certificated CLEC subsidiary. Thus, BHN's subscriber agreements were initially in the name of BHNIS and regulatory fees were paid to the Florida PSC by BHNIS, the certificated entity. Nevertheless, BHN's cable system was used to provide Digital Phone service to its subscribers and MCI – not BHNIS – provided wholesale transport to and interconnection with the PSTN.

8. Following a series of rulings by the Federal Communications Commission, as well as the passage of a Florida statute in 2005 making clear that VoIP was not subject to state regulation, BHN ultimately determined in 2005 that there was no regulatory need for it to provide cable VoIP service to cable system subscribers under the auspices of a certificated CLEC. Accordingly, BHN ultimately stopped paying regulatory fees for BHNIS, stopped referring to BHNIS in the provision of its Digital Phone service, and BHNIS effectively went dormant.

9. BHNIS, however, became active earlier this year. Following Verizon's acquisition of MCI, and in light of the competitive concerns that acquisition raised for BHN, BHN began in May 2007 to migrate the transport and interconnection services once provided by MCI to BHNIS on a phased basis.

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

Bright House Networks, LLC,

Complainant

v.

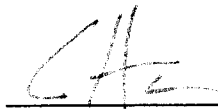
Tampa Electric Company

Respondent.

File No. EB-06-MD-003

DECLARATION OF CODY HARRISON

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



dated: September 25, 2007