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

BRIGHT HOUSE NETWORK'S REPLY TO TAMPA ELECTRIC COMPANY'S RESPONSE TO SUPPLEMENT TO POLE ATTACHMENT COMPLAINT

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EXECUTIVE SUMMARY

In its Supplement to its Pole Attachment Complaint ("Supplement"), Bright House explained that it had finally obtained information that TECO had previously refused to provide it, and that this new information made clear that TECO has overcharged – and continues to overcharge – Bright House for pole attachments. This information also shows that TECO has made critical misrepresentations to this Commission during the course of this proceeding.

Beneath the hyperbole and purple prose, TECO has little of substance to say in response. Indeed, TECO has no choice but to admit that its rate calculations are riddled with errors that significantly but improperly inflate its rates. TECO admits that:

- Beginning in 2002, it improperly used only a portion of FERC Account 369 in computing the maintenance element of the carrying charge.
- Beginning in 2002, it improperly used a rate of return of 12.25% in computing the Telecom Rate.
- It improperly included supervisory expenses from FERC Account 590 in the maintenance component of the carrying charge for the Cable Rate.
- In arriving at the average number of attachers on its poles, it incorrectly counted poles to which only it is attached.
- It improperly failed to phase-in its Telecom Rate.
- And, on top of all of these errors, it failed to provide Bright House required notice of its Telecom Rate and of annual changes in its Cable Rate.

Caught at using its poles as a profit center, TECO now strikes a conciliatory tone, offering that its errors were merely "honest mistakes honestly executed." Yet, TECO does not even attempt to explain how its numerous deviations

from clear Commission precedent were "mistakes." Instead, TECO surprisingly expresses disagreement with the very rules that it violated – the same sort of disregard for Commission process evident in its renegade effort to prejudice ongoing Commission proceedings by prodding a state court to classify communications services under Section 224.

TECO's effort to downplay its "honest" errors as essentially harmless oversights is also unconvincing. Bright House's rate calculations – which are the only accurate calculations now before the Commission – demonstrate that TECO's assorted errors collectively operated to significantly inflate its rates. Nor is it remotely true that TECO's improper Telecom Rate is merely "academic." TECO has retroactively invoiced Bright House charges at its Telecom Rate and continues to seek to collect those charges through the vehicle of a state court lawsuit.

TECO also continues to doggedly defend other errors with its rate calculations that serve to artificially increase its rates. TECO continues to defend its 2001 departure from its historic reliance on its property records for its pole count to rely, instead, on a flawed survey ,even though its property records are audited, accurate, and continue to be relied upon by TECO for related purposes.

TECO similarly defends its use of its return on equity – instead of its *overall* return on capital – in the carrying charge. But it is a fundamental rule of utility regulation – adhered to by this Commission and the Florida Public Service Commission – that a utility's revenue requirement is derived from multiplying its rate base by its overall rate of return on capital, including both its return on equity and its cost of debt. The Commission has indeed made clear that a utility that is regulated at the state level

is to use its overall rate of return in the carrying charge. TECO's arguments to the contrary are designed only to obscure this basic point.

TECO also maintains that it has an average of 2.6 attaching entities, and that the Commission should rely on this new and unsupported number in calculating its Telecom Rate. But TECO's new number – which it supports only with a bare affidavit from a person who previously offered a different number – is derived from the same unreliable survey that it uses for its number of poles. Because TECO has not offered valid data on its average number of attaching entities, the Commission's presumptive average of 5 controls, as reflected in Bright House's rate calculations.

TECO does not even argue that it provided Bright House adequate notice of its annual Cable and Telecom Rate increases. Nor could it. TECO has retroactively billed Bright House for years at the annual Cable Rate, and the only notice that it provided Bright House of its Telecom Rate was a back-dated invoice seeking millions in new fees. Instead, TECO puts forward a mistaken interpretation of the Commission's rules and precedent – an effort this Commission should reject.

Given that TECO admits that its calculated rates are inaccurate, the Commission cannot accept them. Rather, the Commission should look to the calculations that Bright House submitted with its Supplement, which correct for TECO's assorted errors. While TECO makes the improbable argument that its incorrect rates still control because the parties' contracts were "modified by law," Bright House's calculations of the maximum permissible rates properly govern the Commission's review.

TECO is fundamentally incorrect that the Commission cannot award Bright House any pre-complaint relief. The Commission has discretion to award such relief, and has done so in the past in appropriate circumstances. Such relief is warranted here. TECO's effort to retroactively impose its inflated Telecom Rate has put its past charges at issue. As such, Bright House should be permitted to challenge them, and be compensated for any overpayments.

Although TECO recognizes that Bright House is entitled to supplement its Complaint with new information, it nevertheless asks the Commission to disregard the information contained in its Supplement because Bright House did not come forward with it sooner. But Bright House could not have presented this information sooner because TECO refused to provide it; the information was only acquired as a result of recent discovery in the related state court litigation between the parties. While it is understandable that TECO would prefer to have newly-acquired information that undermines its rate calculations and demonstrates that it has made material misrepresentations kept out of this proceeding, its successful efforts to conceal that information until now cannot be a basis for doing so.

The information Bright House presented in the Supplement – which demonstrates that TECO's rates have been and continue to be excessive – contributes to a full and accurate record in this proceeding. TECO does not even contest much of this information on the merits; it fully concedes that its rates suffer from multiple errors. Accordingly, the Commission can and should rely on Bright House's Supplement to resolve its Complaint. In doing so, the Commission should grant Bright House the relief that it requests.

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I. INTRODUCTION

For all of its inflammatory rhetoric, TECO's Response to Bright House's Supplement to its Pole Attachment Complaint ("Supplement") lacks substance. TECO fully concedes many of the errors in its pole attachment rate calculations that Bright House's Supplement identified. TECO does not – indeed, cannot – disagree that:

- Beginning in 2002, it improperly used only a portion of FERC Account 369 in computing the maintenance element of the carrying charge (*see* Response at 7).
- Beginning in 2002, it improperly used a rate of return of 12.25% in computing the Telecom Rate (*see* Response at 10).
- It improperly included supervisory expenses from FERC Account 590 in the maintenance component of the carrying charge for the Cable Rate (*see* Response at 11).
- In arriving at the average number of attachers on its poles, it incorrectly counted poles to which only TECO is attached (*see* Response at 12).
- It improperly failed to phase-in its Telecom Rate (*see* Response at 13).

- It failed to provide Bright House required notice of its Telecom Rate and of annual changes in its Cable Rate (*see* Response at 14-16).

In the face of its transparent effort to turn its poles into a profit center by improperly manipulating its rates, TECO responds with a dizzying battery of excuses, recriminations, half-baked suppositions, and confusion. TECO asserts that its numerous admitted errors in its rate calculations were only "honest" – if completely unexplained (and unexplainable) – mistakes. Yet, there was no confusion about the Commission's rules when TECO's "mistakes" were made, and even today TECO continues to openly disagree with the very regulations that it violated – a disrespect for Commission process that is further apparent in its charge to unilaterally classify new services as telecommunications ahead of Commission rulings.

In the same vein, TECO argues that its "mistakes" individually only made a minor impact on the rates that it charged Bright House. But Bright House's rate calculations – which are now the only valid ones in the record – show otherwise. They demonstrate that collectively TECO's assorted errors significantly inflated its rates and produced serious overpayments. And TECO even argues that the errors in its Telecom Rate are "academic" because Bright House has refused to pay those rates, notwithstanding that it continues to seek to collect *millions* of dollars in pole attachment fees from Bright House under those very rates.

TECO still continues to defend certain other fundamental errors in its rate calculations. TECO clings to its 2001 survey as an appropriate basis for the number of distribution poles in Account 364, despite its obvious flaws. Counting the number of distribution poles was not one of the purposes of the survey when it was conducted; the contractors that performed the survey were not given any basis, such as circuit maps, to

find secondary or drop poles; neither the contractors nor TECO had any way to verify the number of poles that the contractors discovered (nor did they even attempt to do so); and the number of poles that the contractors found conflicted with the number of poles in TECO's audited property records that it continues to rely on today. While it may be possible for a utility to use "granular" data for its number of poles in cases where the accuracy of the continuing property records is itself questionable – although we are not aware of any instance in which the Commission has allowed it – TECO's survey data is facially unreliable and should not be accepted by the Commission.

TECO also maintains that it may use its authorized return on equity – rather than its overall return on capital – in the carrying charge. But the Commission has made clear in numerous cases that, like any other utility rates, pole attachment rates are based on a utility's overall return, not solely its return on equity. Not surprisingly, the Commission has never allowed a utility to apply its return on equity to its average pole investment. It is a fundamental rule of utility regulation that a utility's revenue requirement is determined by multiplying its rate base by its overall return on capital, including both its return on equity and its cost of debt. To apply a return on equity to its rate base would permit a substantial over-recovery for the utility's cost of money. The Commission therefore cannot accept TECO's rate of return figures.

TECO likewise has failed to rebut the presumptive number of attaching entities used by the Commission. It is TECO's, not Bright House's, obligation to come forward with valid data to rebut the presumption in the first instance. TECO's effort to do so founders, however, because its data, which are derived from the same defective

survey that it relies on for its number of poles, are hopelessly flawed. Accordingly, the Commission's presumptions control, as reflected in Bright House's rate calculations.

TECO makes little effort to defend its failure to provide Bright House notice of its rate increases. TECO does not affirmatively argue that it provided adequate notice; instead, it mischaracterizes the Commission's rule and misinterprets its precedent. TECO does not dispute that the only notice of its Telecom Rate that it provided to Bright House was in the form of a demand letter with back-dated invoices attached.

In light of all of the errors in TECO's rate calculations, including many that it has now admitted, its rates cannot be accepted. Bright House's calculations, which correct for these errors, should be credited by the Commission instead. TECO's last-ditch argument that Bright House is obligated to pay its invoiced Telecom Rate (errors notwithstanding) under its existing contracts is also incorrect. The parties' agreements were not modified by operation of law to incorporate the *maximum* Telecom Rate, even if TECO's calculations properly set forth that rate, which they do not.

TECO further maintains that Bright House is not entitled to credits or refunds of past overpayments. But the Commission does not have a rule against the award of pre-complaint damages; to the contrary, its rules afford it discretion to award such relief, and it has exercised that discretion in appropriate circumstances. This is just such a circumstance. TECO created this dispute with its demand for back-rental payments based on its unilateral and retroactive classification of telecommunications services. As such, TECO has opened up the issue of past charges and Bright House should be able to challenge them.

Although TECO did not oppose Bright House's Supplement, it nevertheless chastises Bright House for supplementing its Complaint with new information and essentially asks the Commission to ignore it. 1/ TECO cannot be serious. Bright House was required to supplement its Complaint because TECO earlier refused to provide it critical information that it sought to support the allegations of its Complaint. Indeed, the information that Bright House has uncovered in discovery makes clear that TECO has made a variety of critical misrepresentations to the Commission in the course of this proceeding. It is simply incredible for TECO now to criticize Bright House for not knowing the very information that TECO concealed.

With the benefit of the information that it has recently obtained in discovery in the state court litigation, Bright House can now demonstrate that TECO has seriously overcharged – and continues to overcharge – for its pole attachments. In resolving this dispute, the Commission should use the rate calculations Bright House provided with its Supplement, which correct for the many errors that inflated TECO's rates. The Commission should also grant all of the relief requested in Bright House's Complaint and Supplement.

II. TECO CANNOT USE INACCURATE SURVEY DATA THAT CONFLICTS WITH ITS AUDITED PROPERTY RECORDS AS THE SOURCE OF THE NUMBER OF POLES.

TECO argues that there is no Commission requirement that it use its continuing property records as the source of the number of poles for calculating the rental rate. *See* Response at 3. But, like Bright House, TECO is apparently unaware of

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1/ In seeking additional time to respond to Bright House's Supplement, TECO stated that "Tampa Electric has no objection to the filing of the Supplement." *See* Motion for Leave to File & Consent Motion For Extension of Time, filed July 31, 2009, at 1.

any Commission precedent where a utility has derived its number of poles from some other source. *See* BHN Supp. at 6; *see also Cox Cable Norfolk, Inc. v. Virginia Elec. & Power Co.*, File No. PA-83-0011, ¶18 (April 6, 1983) (explaining that utility failed to submit property records to enable Commission to verify pole count). The reason why the Commission would normally accept the number of poles reflected in a utility's continuing property records (at least subject to some demonstration that that number of poles is wholly unreliable) is that the investment for Account 364 finds its origins in the continuing property records as well. The annual FERC Report figures for the investment in Account 364 are derived directly from utility continuing property records. Relying on the number of poles in the same continuing property records maintains the essential link between the dollars of original cost reported for Account 364 in the FERC form and the quantity of poles related to that cost. Relying on a number of poles determined in some other way raises a substantial risk that this essential link between investment in poles and the number of those poles – the two sides of the equation – will be broken. If the number of poles does not relate to the amount of investment in poles, the proper pole rate cannot be determined.

In any case, the evidence here clearly shows that the continuing property record data are much more reliable than the survey data. On the one hand, TECO has admitted that its continuing property records are audited, "generally reliable" and actually relied on by the Company. *See* Supp. Ex. 9, at 80-81. On the other hand, TECO's pole count from its survey was not one of the intended uses of the survey, is not consistent with what the Company expected, was not based on any circuit route maps or other information about where the surveyors might find secondary and drop

poles, and was not subject to any quality control whatsoever. *See* Supp. Ex. 11, at 57-58, 62, 70-72, 81 & 129-30. The evidence overwhelming favors the greater reliability of the continuing property records. TECO has failed to justify its departure from its own prior, and continuing, reliance on these records.

TECO simply misses (or obscures) the fact that the Commission has made it abundantly clear that survey data must be reliable before the Commission can accept it. *See, e.g., Nevada State Cable Television Ass'n v. Nevada Bell*, 13 F.C.C.R. 16,774, ¶13 (1998) (rejecting reliance on survey because "Nevada Bell's pole data are incomplete and not a valid statistical survey from which to determine an average usable space for use in rate calculation"). 2/ As Bright House explained in its Supplement, TECO's proffered data are clearly not reliable. *See* BHN Supp. at 5-10. Among the shortcomings of TECO's survey are that:

- The survey was not designed or intended to determine the total number of TECO's poles. *See* BHN Supp. at 7.
- The survey did not find anywhere close to the number of poles that TECO expected. *See* BHN Supp. at 9.
- The contractors who carried out the survey were not provided any maps or other ways to be sure they had identified all of TECO's poles. *See* BHN Supp. at 7-8.
- There was no quality assurance procedure put in place to verify that the surveyors accurately identified all of the poles. *See* BHN Supp. at 8.
- TECO's survey found less than 90 percent of the poles in its continuing property records. *See* BHN Supp. at 7-9. 3/

2/ The Commission has made clear that any survey must meet the statistical reliability standards of Section 1.363(n) of its rules. *See* BHN Supp. at 14.

3/ The conclusions TECO draws from Ms. Anguili's deposition testimony are of a piece with its other misstatements of the record. TECO quotes from a portion of her testimony, then draws the wholly unsupported conclusions that the contractors did a

TECO declares that it is "a preposterous notion" and "mere idle speculation" that its survey did not accurately count all of its distribution poles, yet it has no evidence to support its position. Its argument that its surveyors had a financial incentive to identify all poles because they were paid on a per-pole basis ignores the cost side of the economic equation. *See* Response at 5-6. The contractors' incentive to find more poles is directly related to the effort (cost) required to find them. If the poles are hard to find – such as unmapped secondary and drop poles – identifying them may well cost more than the revenue derived from finding them. Obviously, the accuracy of the survey cannot be presumed based solely on TECO's speculation about the financial incentives of the surveyors.

TECO has little choice but to argue that the continuing property records are themselves not accurate. *See* Response at 4 ("[E]rrors in the continuing property records, accumulated over two decades, account for the discrepancy."). But that explanation is wholly unsupported, inconsistent with the evidence of record and simply incredible. In the same paragraph that TECO says that its records contain errors, it also admits that they are "generally accurate." *See* Response at 4. TECO's corporate representative testified as much, explaining that its continuing property records are audited by both outside auditors and the Florida Public Service Commission ("Florida Commission"). Moreover, TECO not only has made no effort to reconcile its survey data with the corresponding investment in Account 364, but it even continues to rely on

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better job of identifying secondary and drop poles than they would have with maps showing the routes of secondary circuits, that the contractors actually found all the poles, including the secondary poles, and that the survey's pole count was subject to quality assurance. *See* Response at 6. Those statements are simply not supported by the language quoted – or by any other evidence.

its continuing property records to reflect the number of poles added each year for purposes of its pole attachment rate calculations. 4/ *See* BHN Supp. at 9 & n.3. TECO cannot have it both ways – it cannot rely on its admittedly accurate continuing property records only when it is convenient for it to do so. Without any legitimate reason to question the accuracy of the continuing property records or reliable data to support a number of poles different from the number reflected in those records, neither TECO nor the Commission can rely on anything else.

III. TECO HAS IMPROPERLY DETERMINED THE RATE OF RETURN ELEMENT SINCE 2002.

Prior to 2002, TECO properly relied on an authorized overall return on capital, based on both the Florida Commission's authorized rate of return on equity and the TECO's cost of debt, weighted by the proportion of TECO's capital structure made up of equity and debt. 5/ But in 2002, TECO changed its methodology and multiplied the rate base in Account 364 by its authorized return on equity – or in some cases an even higher return.

TECO's contention that it is permitted to rely solely on its authorized *return on equity* in the carrying charge appears designed more to confuse than convince. It is true that the Commission has said that a utility is to use a default rate when a state has not prescribed its authorized rate of return. *See Amendment of Rules & Policies*

4/ On this issue, TECO advances an argument that we simply cannot understand. *See* Response at 7. The "logical extension" of an audit showing that the number of poles in TECO's continuing property records would presumably be a corresponding reduction in the investment in poles in Account 364. That TECO has never made any effort to reconcile its survey with the investment in Account 364 further undermines the reliability of its survey.

5/ TECO improperly, however, relied on the mid-point of its authorized overall return on capital, rather than the lower bound. *See* BHN Supp. at 12.

Governing Pole Attachments, 15 F.C.C.R. 6453, 6491, ¶76 (2000) ("2000 Fee Order") ("We believe that the use of the default rate of return is an equitable solution, *in those instances when a state has not prescribed a rate of return for a utility covering the period of time in which rates were in dispute.*") (emphasis added). But the Commission did not change the permitted return from the overall return on capital to the return on *equity* that a state allows. Nothing in any FCC order has suggested an intention to reverse its long-accepted practice of applying the utility's permitted overall return on capital to its pole investment rate base. Nor has it ever said that where a state has authorized a utility's rate of return, the utility may selectively use whatever part of its authorized return it likes. Rather, the Commission has consistently held that a utility must use its overall authorized rate of return. 6/ There is nothing unusual about that. It is a commonplace of utility regulation that the return a utility is permitted is a function of its entire capital structure, not just its equity. 7/ Because debt is cheaper to obtain than equity, were a utility allowed to apply its rate of return on equity to its entire rate base it would earn an excessive rate of return on that portion of its rate base funded by debt.

6/ *See, e.g., Multimedia Cablevision, Inc. v. Southwestern Bell Tel. Co.*, 11 F.C.C.R. 11,202, 11,215, ¶36 (1996) ("In prior pole attachment cases, we have required that parties employ the weighted average cost of debt and equity as announced by the appropriate state regulatory authority as the cost of capital component because that figure provides the best estimate of the costs incurred by a utility in attracting capital, including that invested in poles and conduit.")

7/ *See, e.g.*, 73B C.S.J. Pub. Utils. § 99 (" 'Capital structure refers to the mix of long-term debt and equity used to finance a utility's operations; it is used to determine the cost of capital, which in turn enables a public utility regulatory commission to ascertain fair rate of return on an investment allowable to the utility."); *Boise Water Corp. v. Idaho Public Utils. Comm'n*, 555 P. 2d 163, 172 (Idaho 1997) ("Capital structure' refers to the mix of long-term debt and equity (common and preferred stock) used to finance the utility' operations. It is used to determine the cost of capital, which in turn enables the Commission to ascertain the fair rate of return on investment allowable to Company.").

In this case, TECO has been operating during the entire relevant period under an overall rate of return set by the Florida Commission. It is thus the overall rate of return set by the Florida Commission that is to be applied, not the default rate of return that the FCC uses in the *absence* of such a state-set rate of return.

TECO's further contention that the rate of return contained in its pole attachment rate calculations has always been at or below its authorized rate is utterly disingenuous. Even a cursory review of the Florida Commission order that TECO cites confirms that it only dealt with adjustments to TECO's permitted return on equity – not the overall return that it is allowed. *See* Response, Ex. 2, at 2 & 5. And it is clear that the Florida Commission does not equate return on equity with an overall permitted return, but instead follows the historic practice of evaluating a utility's' entire capital structure to set a fair overall return on capital. TECO's own surveillance reports, which were attached as exhibits to Bright House's Supplement and which TECO makes no effort to explain, show that its permitted overall rate of return – as used by Bright House in its rate calculations – incorporates the cost of equity *and* debt. *See* Supp. Ex. 3 at TECO2 002862 & 002669-71; Ex. 4 at TECO2 002875 & 002882-84; Ex. 5 at TECO2 002888 & 002895-99; Ex. 6 at TECO2 at 002901 & 002908-11; Ex. 7 at TECO2 002914 & 002921-25; Ex. 8 at TECO02 008929 & 008936-40.

TECO's argument that it is entitled to use only its return on equity in the carrying charge is therefore thoroughly meritless. 8/ TECO should only be permitted to use the lower range of its permitted overall return, as Bright House explained in its Supplement. *See* BHN Supp. at 12. TECO does not dispute this point.

8/ TECO concedes that has it improperly used 12.25% as the rate of return element to calculate its Telecom Rate since 2002. *See* Response at 10.

IV. TECO HAS FAILED TO REBUT THE PRESUMPTIVE NUMBER OF ATTACHING ENTITIES.

TECO concedes that it calculated its number of attaching entities in violation of Commission rules. TECO nevertheless argues that, once this "honest mistake" is corrected, its average number of attachers is 2.62. *See* Response at 12. TECO's new average is still unacceptable.

TECO entirely fails to come to grips with the obvious errors in the survey on which it purports to base its average. It baldly asserts that the survey "did count all the poles." Response at 12. Yet, the record evidence is to the contrary. The survey, which was riddled with design flaws, identified substantially fewer poles than reflected in TECO's property records, even though TECO and its contractor both believed that many more poles should have been identified. *See* BHN Supp. at 14-15. Because the survey left out a significant number of poles from the database, TECO's effort to derive an average number of attachers from its survey data cannot be accepted. *See, e.g.*, *Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. 12,103, 12,139, ¶70 (2001) ("As with all our presumptions, either party may rebut this presumption with a *statistically valid survey or actual data*.") (emphasis added); *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 16 F.C.C.R. 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."). The survey data comprise neither the "actual data" nor any statistically reliable representation of the actual data.

TECO seems to think that it may shift the burden of proof to Bright House merely by coming forward with any survey data, regardless of overwhelming evidence that the data are not accurate. *See* Response at 12. TECO is wrong, and the very precedent it relies upon makes that clear. In *Georgia Power Co. v. Teleport*, 346 F.3d 1033 (11th Cir. 2003), the Eleventh Circuit held that it was reasonable for the Commission to use its presumptive number of attaching entities where the utility failed to meet its burden to "establish its own average number of attachers in compliance with the regulatory regime." *See id.* at 1041. TECO takes out of context the court's reference to the cable operator's ability to rebut the utility's average. *See id.* As the Court made clear, such a burden only comes into play when the utility has offered valid data to start with. *See id.* But as the Court explained there, the utility "did not come close to meeting its burden to explain the methodology and information underlying its pole attachment rate." *See id.* at 1040; *see also id.* ("FCC also found that Georgia Power supplied no explanation or documentation that supported its figure of 1.5922 average attachers."). The same goes here: Where TECO has failed to provide valid information supporting its average number of attachers, the Commission's presumptive averages apply.

TECO's proffer of a new average, derived from the same flawed survey, is therefore meaningless. TECO's new average number of attachers is no more accurate than the number it has relied on until now. Not only is it based on the very same flawed survey, but TECO offers no basis – no data, no analysis – for its new average other than a bare statement in an affidavit from the same person – Ms. Anguilli – who earlier said that the proper average was 2.08. *See* TECO Response, Ex. 3. Moreover, in

answer to Bright House's interrogatories, which were also verified by Ms. Anguilli, TECO stated that the average number of attaching entities on poles to which Bright House is attached is 2.8. *See* TECO's Response to Complainant's First Set of Interrogatories, filed Mar. 10, 2008, at 5.

TECO's suggestion, furthermore, that Bright House offered 2.8 as the "proper" average number of attachers can only be characterized as an intentional misstatement of Bright House's position. 9/ Given that TECO's survey data are not valid, there was no need for Bright House to demonstrate the number of attaching entities reflected by those data. Instead, Bright House simply sought to point out that, even if TECO's data were reliable (which they are not), TECO's calculation was in any case incorrect. Were the Commission to rely on TECO's survey data, the average number of attaching parties would be 2.8. But because the survey is not a reliable indicator of "actual data," the Commission should rely on its presumptive number of attachers, as shown in the calculations Bright House submitted with its Supplement. *See* BHN Supp. Ex. 16.

V. TECO FAILED TO PROVIDE BRIGHT HOUSE REQUIRED NOTICE OF RATE INCREASES.

TECO hardly disputes that it failed to provide Bright House the 60 days notice of rate increases required by the Commission's rules. TECO does not endeavor to explain how its retroactive billing, which is only preceded by a general notice that its rates will be revised (either up or down), remotely complies with the Commission's

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9/ TECO quotes Bright House's statement that "[t]he proper number of attaching parties in that case would be 2.8." Response at 13. But TECO fails to acknowledge the immediately prior and antecedent sentence: "Thus, even were TECO's data sufficient to rebut the presumption – which it is not – it still has improperly calculated the number of attaching entities." BHN Supp. at 16.

advance-notice requirement. *See* BHN Supp. at 17-18. Instead, TECO attempts to distinguish a case on which Bright House relies and offers a novel interpretation of the notice rule. Neither argument has any merit.

In *Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 F.C.C.R. 16,333, 16,347, ¶36 (2003), the Commission made clear that "notice of a *possible* rate increase is not equivalent to notice of an *actual* rate increase." That is precisely the kind of notice that TECO provided here. *See id.* TECO tries to dodge this holding by arguing, without explanation or analysis, that it only pertained to a provision in a pole attachment agreement, not "a specific prior written notice." Response at 14. But there is no reason why inadequate notice mandated in an agreement and inadequate notice in practice should be treated any differently. *See id.* Indeed, in explaining its holding, the Commission quoted the requirement that a "utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to ... [a]ny increase in pole attachment rates." *Id.* That requirement applies whether or not the utility's failure was "blanket" or not. Response at 14.

TECO's creative reinterpretation of the notice requirement is equally in vain. TECO is simply incorrect that the "purpose" of the notice requirement is to allow an attacher to seek to stay a rate increase where it would otherwise suffer "irreparable harm." The notice requirement is *mandatory*. *See* 47 C.F.R. § 1.1403(c) ("A utility *shall* provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to . . . [a]ny increase in pole attachment rates[.]") (emphasis added). But a cable operator is not required to seek a stay of a rate increase given without adequate notice; it is simply *permitted* to do so. *See id.* § 1.1403(d) ("A cable

television system operator or telecommunications carrier *may* file a 'Petition for Temporary Stay' of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice.") (emphasis added). TECO's assertion that Bright House does not allege that it could have demonstrated irreparable harm "had it known the magnitude of any increase" is therefore a pointless distraction. *See* Response at 15.

TECO also has little to say about the notice it provided to Bright House of its Telecom Rate. As Bright House explained in its Supplement, it only learned of TECO's Telecom Rates after TECO sought to impose them retroactively through a state-court lawsuit based on its unilateral determination that Bright House was providing telecommunications services. Although TECO previously told the Commission that it had provided Bright House notice of these rates, it does not deny now that its earlier representation was incorrect – which its own corporate representative confirmed at her deposition. 10/ Instead, TECO seeks to change the subject by arguing that Bright House failed to provide it notice that it was providing telecommunications services. But Bright House surely could not have been expected to provide TECO notice of services that the Commission has yet to classify as telecommunications. And, while Bright House has agreed voluntarily to pay the Telecom Rate for attachments used by two third parties (TW Telecom and Bright House Networks Information Services), Bright House is only obligated to provide TECO notice of telecommunications services that *it*

10/ With characteristic hyperbole, TECO asserts that Bright House's statement that Ms. Angiulli's deposition testimony contradicts her sworn declaration to this Commission was "reckless." Response at 15 n.6. We invite the Commission to compare her statements for itself. *Compare* BHN Supp. Ex. 11, at 33-35, *with* Declaration of K. Angiulli ¶ 12 (filed Mar. 29, 2006).

offers and *it* does not offer telecommunications services. *See* 47 C.F.R. § 1.1403(e) ("Cable operators must notify pole owners upon offering telecommunications services."). 11/

VI. BRIGHT HOUSE'S RATE CALCULATIONS ARE THE ONLY VALID CALCULATIONS IN THE RECORD FOR RESOLVING THIS DISPUTE.

TECO fully concedes that the Cable and Telecom Rates that it has charged (or attempted to charge) Bright House are erroneous. Yet, it attempts to downplay this reality with a variety of meritless arguments.

The Commission can hardly credit TECO's pronouncement that these errors were merely "honest mistakes honestly executed." *See* Response at 19. TECO offers no explanation for its mistakes, let alone a plausible one. That would be quite a feat given that each and every "honest mistake" was in derogation of clear Commission precedent. 12/

Nor is there anything to TECO's repeated claim that each of its errors is "relatively insignificant." Response at 16. Once all of TECO's errors are combined, their impact is not "insignificant" at all. The rate calculations that Bright House provided

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11/ Although it remains a constant refrain in TECO's pleadings, Bright House has not "concealed" anything from TECO. *See* Response at 15. Bright House believed that it provided notice to TECO of TW Telecom's use of attachments, and Bright House offered in good faith to cure any confusion by voluntarily paying back rental for the limited number of attachments that it used. *See* BHN Complaint ¶ 16, ¶ 25 & Ex. 5. TECO declined this offer out of hand. *See id.*

12/ Even while stating that it will correct errors in its calculations going forward, TECO surprisingly endeavors to defend its violations of the Commission's rules. *See, e.g.*, Response at 7 (stating "ruling is plainly contrary to common sense"); *id.* at 11 (stating that its inclusion of supervisory expenses was "reasonable" even though disallowed by the Commission). TECO's open hostility to the Commission's rules, even after its violations have been exposed, only makes its claims of "honest mistakes" more dubious.

with its Supplement, which corrected for all of TECO's errors, prove this point. *See* BHN Supp., Ex. 16. While TECO offers some analysis of individual components of its rates, it has failed to offer any new rate calculations correcting its errors.

TECO's attempt to downplay its improperly inflated Telecom Rate by arguing that Bright House has not paid that rate is incredible. *See, e.g.*, Response at 12 & 16-17. TECO's Telecom Rate only became an issue when TECO demanded that Bright House pay that rate retroactively based on its unilateral determination that Bright House provided telecommunications services subject to that rate. *See* BHN Supp. Ex. 14. TECO has in fact invoiced Bright House for years' worth of alleged outstanding back rental at the Telecom Rate it has calculated and is seeking to collect the invoiced amounts through a Florida court action.

Although Bright House has not paid the Telecom Rates that it believes TECO has unfairly demanded, the validity of the rates that it has attempted to charge are obviously relevant to this proceeding and the state court litigation. 13/ While TECO has recognized in the judicial proceeding that the Commission has exclusive jurisdiction to determine whether pole attachment rates in Florida have been properly calculated, it continues to press the court to subject Bright House's entire network to the Telecom Rate. *See* TECO Response to Motion to Dismiss or Stay, filed Sept. 7, 2006, at 3 ("Bright House is quite correct that the Commission has jurisdiction over the reasonableness of pole attachment rates . . . ."). That proceeding is nearing the close of discovery, and is set for trial in March of next year.

13/ Bright House notes the irony of TECO complaining that Bright House has "taken it upon itself to decide the telecom rate." TECO Response. At 17. This dispute arose because TECO took it upon itself to designate telecommunications services, as well as to calculate a Telecom Rate that violates numerous clear FCC precedents.

Furthermore, Bright House has volunteered to pay the Telecom Rate for attachments used by TW Telecom and has even sought (without success) to pay TECO the Telecom Rate for that limited number of attachments. And of course, if the Commission were to determine that Bright House's attachments are subject to the Telecom Rate in this proceeding, the correct rate would be critical. Thus, if the FCC were to conclude that Bright House must pay TECO's retroactive charges – which it should not – it should only require Bright House to pay the correct rates that Bright House has calculated. *See* BHN Supp. at 32. 14/ Bright House's challenge to TECO's Telecom Rates is accordingly far from an "academic exercise." *See* Response at 18.

TECO is also wrong that Bright House "is obligated" to pay the Telecom Rate under its existing pole attachment agreements. Response at 17. The parties' agreements were not "modified" by operation of law to incorporate the Telecom Rate. We agree that the parties' contractual relationship is regulated under Section 224, but that statute does not mandate any particular pole attachment rate for any particular pole attachment service. *See* 47 U.S.C. § 224(d)-(e). Rather, Section 224 and this Commission's regulations only establish formulas for setting *maximum* rates where the parties cannot resolve a dispute about rates themselves. *See* 47 U.S.C. § 224(d)-(e); 47 C.F.R. § 1.1409(e) ("When parties fail to resolve a dispute regarding charges for pole attachments . . . the Commission will apply the following formulas for determining a

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14/ TECO seems to misunderstand the purpose of Bright House's calculations of the Telecom Rate. To be clear, Bright House does not seek reimbursement of amounts that it has not paid. Rather, it offers correct Telecom Rate calculations for purposes of any payments required for Telecom attachments, such as those attachments used by TW Telecom for which Bright House has agreed to pay the appropriate Telecom Rate. Bright House also should receive credits or reimbursements for its overpayments at the Cable Rate during the same disputed period. *See infra* at 21-22.

maximum just and reasonable rate."). None of the cases that TECO invokes remotely support the notion that where a statute sets formulas for determining maximum permitted rates those formulas automatically supplant previously-negotiated rates to the extent that the negotiated rates do not exceed the statutory maximum. *See* Response at 17. 15/

The only precedent directly on point that we are aware of (but TECO declines to mention) squarely rejected that very idea. In *Georgia Power Co. v. Comcast Cable Communications, Inc.*, which also involved a dispute over the applicability of the Telecom Rate, Georgia Power asserted that the parties' contracts incorporated the Telecom Rate because "the Contract was modified by operation of law due to the passage of the Telecommunications Act and the surrounding history regarding pole attachment rates." *See Georgia Power Co. v. Comcast Cable Communications, Inc.*, Nos. 2006-CV-116060; 2007-CV-135617, Special Master's Proposed Findings of Fact & Conclusions of Law on Motions for Summary Judgment, at p. 10, ¶ 15 (Ga. Sup. Ct. Sept. 19, 2008). But the Special Master squarely rejected that argument: "Although the rates for pole attachments are overseen by a federal entity pursuant to the Telecommunications Act, unlike directly regulated areas, the FCC does not set rates in the first instance." *Id.* at p. 11, ¶ 19. He therefore "decline[d] the invitation to find that this additional category of rates can be modified by operation of law." *Id.* at p. 12, ¶ 22. The court subsequently adopted that conclusion of law. *See Georgia Power Co. v. Comcast Cable Communications, Inc.*, Nos. 2006-CV-116060; 2007-CV-135617, Order

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15/ One of TECO's authorities is not even good law: *Nationwide Mut. Fire Ins. Co. v. Bryar*, 349 So. 2d 1221 (Fla. 2nd DCA 1977), was quashed by the Florida Supreme Court. *See Bryar v. Nationwide Mut. Fire Ins. Co.*, 363 So. 2d 1082 (Fla. 1978).

Denying Motions for Summary Judgment, at 1 (Ga. Sup. Ct. Mar. 17, 2009) (adopting Special Master's findings in their entirety). TECO's argument that Bright House is obligated to pay the Telecom Rate, even though the parties' contracts do not require that it do so, is therefore pure fantasy. 16/

The rate calculations that Bright House provided with its Supplement – which are based on newly-obtained information that TECO refused to provide earlier – stand as the only correct rate calculations submitted by the Parties. They correct for a host of admitted errors embedded in TECO's own rate calculations. And TECO has not attempted to submit any new rate calculations of its own. The Commission should therefore use Bright House's calculations in resolving this dispute.

VII. BRIGHT HOUSE IS ENTITLED TO REFUNDS OR CREDITS FOR OVERPAYMENTS SINCE 2003.

TECO does not dispute that Bright House is entitled to challenge the rates that TECO has charged since it filed its Complaint on February 21, 2006. *See* 47 C.F.R. § 1.1410(c). However, TECO maintains, without much explanation, that Bright House cannot seek refunds for time periods prior to when it filed its Complaint because "rules is rules." Response at 19. But TECO's understanding of the Commission's rules is mistaken. The Commission does not have any hard-and-fast rule against granting refunds for periods pre-dating a pole attachment complaint. *See* BHN Supp. at 31-32. To the contrary, the Commission has "broad authority" to fashion appropriate remedies in these cases, and has in the past awarded pre-complaint relief where it was warranted.

16/ In this regard, TECO's interpretation of a November 21, 2005, letter signed by the parties is mistaken. *See* Response at 17 & Ex. 3. The letter says nothing about an agreement to pay the Telecom Rate, and, given the structure of the regulatory regime, no such agreement can be inferred from a simple agreement to consolidate the parties' existing agreements. *See* BHN Supp., Ex. 14.

See, e.g., Cable Texas, Inc. v. Entergy Serv., Inc., 14 F.C.C.R. 6647, 6653-54, ¶¶ 18-19 (1999) (allowing recovery of payments made before filing of complaint because "this is not the normal situation anticipated" by the rules and "reasons of justice" warranted a refund). TECO does not address – let alone attempt to distinguish – these precedents that make clear that the Commission has authority to grant the relief that Bright House has requested.

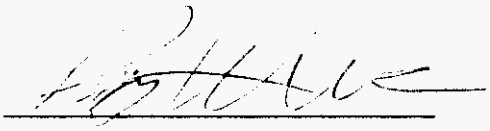
TECO's further contention that Bright House is not entitled to the relief that it seeks because it has "consciously created the circumstances that preclude relief" seriously mistakes the circumstances giving rise to Bright House's Complaint. It was TECO – not Bright House – that triggered this dispute by filing a state court complaint seeking millions of dollars in back rental based on its unilateral declaration that Bright House is providing telecommunications services and its baseless rate calculations. As such, it is only appropriate that Bright House is permitted to challenge the amounts that it paid for the same periods that TECO seeks additional rental. TECO should not even be heard to complain that it cannot. *See* BHN Supp. at 32.

VIII. CONCLUSION

Based on the discovery of information in the state court litigation that TECO had earlier refused to provide, it is now clear – and TECO admits – that the pole attachment rates that it charged Bright House since 2001 were improperly inflated. Bright House is entitled to refunds or credits for the pole attachment overpayments that it has made to TECO under the Cable Rate for all of the years involved in this dispute. And to the extent that the Telecom Rate applies to any of Bright House's attachments – such as those used by TW Telecom – Bright House should be permitted to challenge

the now admittedly excessive Telecom Rate charges that TECO has attempted to collect, both retroactively and from the date of Bright House's Complaint.

Respectfully submitted,



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September 28, 2009

Attorneys for Complainant

CERTIFICATE OF SERVICE

I, Paul Werner, hereby certify that on this 28th day of September, 2009, 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 BRIGHT HOUSE NETWORK'S REPLY TO TAMPA ELECTRIC COMPANY'S RESPONSE TO SUPPLEMENT TO POLE ATTACHMENT COMPLAINT, with sufficient postage (where necessary) affixed thereto, upon the following:

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Washington, D.C. 20554

Best Copy and Printing, Inc. (hand delivery)
Federal Communications Commission
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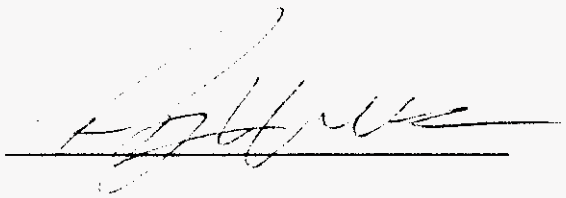

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

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 Bright House Network's Reply to Tampa Electric Company's Response to Supplement to Pole Attachment Complaint ("Reply").

2. I was responsible for and oversaw the preparation of the above-captioned Reply. I verify that the Reply is 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: 7/28/2009