

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Implementation of Section 224 of the Act)
A National Broadband Plan for Our Future)

WC Docket No. 07-245
GN Docket No. 09-51

REPLY COMMENTS OF BRIGHT HOUSE NETWORKS

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SUMMARY

The Commission should extend the cable service rate to all commingled services, even where the services are yet to be classified by the agency. In this way, the proposed rate for telecom services – the higher of the cable rate or the existing telecom rate (but not including capital costs and taxes) – will become *the* rate for attachments by all eligible attachers on all regulated poles. Commingled services impose no greater burden on an attachment, and it makes no sense to maintain different rates depending on what service is passing through an attachment at a given moment. Furthermore, there is no way to tell by looking what services are passing through a wire attachment at a particular point in time. The FCC's proposal, if expanded to all commingled services, will end this nonsensical exercise.

This result will also lower one of the significant inputs for broadband providers. And it will promote innovative broadband services and foster competition for telecom and other, as yet undefined services currently offered by incumbent providers.

The proposal in the FCC's *Further Notice* is in fact more faithful to the words of the statute than the current administration of the telecommunications service rate formula. Nothing in Section 224, and in particular Section 224(e), leads to a different conclusion. Contrary to the opponents of the FCC's proposed telecom rate approach, neither the words of the statute nor Congress's conference agreement accompanying the legislation mandate that the telecommunications service rate be higher than the cable service rate.

And the mischief under the current telecommunications service formula, detailed by Level 3 in discovering overcharging by a Florida utility (simply by reading the *Further Notice's* Appendix A), is real-time evidence that change is needed. Finally, the utilities have failed to show any further steps need to be taken to penalize unauthorized attachments. Indeed, the extent of this problem has been exaggerated by pole owners.

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Bright House Networks (“Bright House”), by its counsel, hereby submits its reply comments regarding the FCC’s Further Notice of Proposed Rulemaking (“*FNPRM*”) released May 20, 2010, in the above-captioned matter regarding changes to the pole attachment rules.

I. THE COMMENTS SUPPORT EXTENDING THE CABLE SERVICE RATE TO COMMINGLED SERVICE, EVEN WHERE SERVICES HAVE NOT BEEN DEFINED.

In its comments Bright House demonstrated that the Commission has consistently applied the cable service rate to innovative commingled services that ride along the same attachment as video services.¹ The approach, nearly 20 years old and explicitly adopted in the *Heritage* case, was confirmed as within the authority of the Commission by the Supreme Court in the *Gulf Power*² decision. As the Supreme Court noted, there exists “the FCC’s customary discretion in calculating a ‘just and reasonable’ rate for commingled services” because such services “might be expected to evolve in directions Congress knew it could not anticipate.”³

¹ See Bright House Comments pp. 6-14.

² National Cable & Telecommunications Ass’n v. Gulf Power, 534 U.S. 327 (2002).

³ *Id.* at 339.

The innovations in commingled services presaged in *Heritage* and *Gulf Power* have come about, as detailed in the *National Broadband Plan* (“*NBP*”).⁴ Bright House and others offer a range of unclassified services through broadband attachments. These innovative services have fulfilled the expectation of the Commission in 1991, when it concluded in *Heritage* that applying the cable service rate to such commingled attachments will “enhance[] cable operators’ ability to compete against utility companies in the provision of data services.”

The *FNPRM* addresses those commingled attachments that have been classified as telecommunications services. But it is equally important, in the forthcoming Order adopting the proposed rules, to reaffirm that commingled services, whether or not classified as telecommunications services, attach at the cable service rate.

The *NBP* pointed out that differential rates, based on an attachers’ classification as either a “cable” or “telecommunications” company, can distort deployment decisions. The same harms would result if pole owners could claim any rate they wish for other, unclassified services that are added by a cable operator, even after the FCC adopted the unitary rate approach for telecom services proposed in the *FNPRM*. The result would be costly, time-draining appeals to the FCC to clarify the appropriate rate under the authority recognized in *Gulf Power*. Worse, in the meantime the “uncertainty may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities,” as the *NBP* observed⁵. This is because, as the *NBP* explained, providers risk higher pole fees applying to their networks. By restating the *Gulf Power* approach to commingled attachments in this proceeding, the FCC will “greatly reduce complexity and risk for those deploying broadband”⁶ and thereby fulfill one of the important recommendations of the *NBP* to expand broadband deployment, use and innovation.

⁴ Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan (2010) (“*NBP*”).

⁵ *Id.* at 110.

⁶ *Id.* at 111.

This pronouncement will, as Bright House noted earlier, make it unnecessary to decide complicated statutory classification questions that do not bear at all on the costs associated with an attachment. There are no additional costs associated with using a pole attachment to provide these commingled unclassified services. Nor is there any way to tell by looking what services are passing through a cable operator's attachment at any particular time. Bits are bits. Bits that combine to form one communications impose no new burden on the pole owner than bits that lead to a different combination. So there is no policy reason for the pole owner to seek a higher rent because of the addition of the service.

This wisdom of avoiding raising pole rates intensifies once the proposed revised telecommunications service rate ("telecom rate") formula – the higher of the lower-bound telecommunications rate or the cable service rate – is adopted, as proposed in the *FNPRM*. In most cases this approach means that pole rates for attachments carrying combined cable services and telecommunications services will likely be set at the cable service rate, as even the utilities concede.⁷

It would be a mistake to fail to reiterate that unclassified commingled services are part of this important unifying streamlining of the pole attachment rate process. To avoid unnecessary uncertainty going forward, Bright House again urges the FCC to reaffirm the *Gulf Power* principle regarding all commingled services.

II. COMMENTERS BROADLY SUPPORT THE FCC'S PROPOSED CHANGES TO THE TELECOM RATE FORMULA; POLE OWNERS MISQUOTE LEGISLATIVE HISTORY IN ADVANCING AN ERRONEOUS STATUTORY INTERPRETATION

⁷ See Comments of Edison Electric Institute and The Utilities Telecom Council at 73 ("Edison Comments").

Comments from many attachers, both those historically in the cable service business⁸ as well as telecommunications providers,⁹ support the FCC's recommendation to adopt a unified rate for attachments and the *FNPRM's* formulation of the rate as generally defaulting to the cable rate. The *FNPRM's* recommendations follow from the *NBP's* recommendation that the FCC "establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, to promote broadband deployment."¹⁰ Even utility commenters describe this goal for low and uniform rates as "laudable."¹¹ Predictably, they object to the "low" part of the recommendation and seek, unsuccessfully, to claim that the statute does not support the *FNPRM's* approach.

As Bright House noted in extensive detail in its comments, the FCC's proposed approach to setting pole attachment telecom rates is *even more faithful* to the structure and words of Section 224. Nothing filed by the interests representing pole owners contradicts this.

The statutory analysis in our Comments explained that Section 224(b) governs all rates under the Section with its mandate that such rates be "just and reasonable." Section 224(d)(1) goes on to explain what just and reasonable rates are "[f]or purposes of subsection [224](b)."¹² Neither (b) nor (d)(1)'s use of "just and reasonable" is limited to a particular type of attachment. Thus, they apply to all types of attachments, including telecom attachments.

Sections 224(e)(2) and (3) specify a particular methodology as to how the FCC should apportion usable and unusable space when developing the telecom rate formula. They do not mandate a "higher" rate – or any rate in particular, for that matter. Rather, they express

⁸ See Time Warner Cable Inc. Comments at 25-47; Comcast Comments at 3-21; NCTA Comments at 3-9; American Cable Association Comments 2-7.

⁹ See, e.g., Comments of TW Telecom and Comptel at 4-10; T-Mobile USA, Inc. Comments at 16.

¹⁰ *NBP* at 110.

¹¹ Edison Comments at 63.

¹² 47 U.S.C. § 224(d)(1).

Congress's view of how to apportion costs of providing unusable and usable space in devising a "just and reasonable" rate.

Thus, these subsections state that the pole owner shall apportion the cost of the unusable space on a pole so that the apportionment equals two-thirds of the costs of providing the unusable space that would be allocated to each entity under an equal apportionment among all attachers. Congress could have determined that the apportionment factor was a different coefficient -- one-half or three-fourths -- but it directed it to be two-thirds¹³. Usable space, in contrast, is apportioned according to the percentage of useable space required for each entity.¹⁴

The FCC adopted these statutory factors as the leading coefficients in each part of the formula when it implemented the telecom rate rules in 1998. And these coefficients remain in the FNPRM's proposed telecom rate formula, where the carrying charges exclude capital costs and taxes, as we detailed in our Comments.¹⁵ In other words, the *FNPRM* proposal continues to apply for the benefit of pole owners the apportionment rules contained in Subsections 224(e)(2) and (e)(3). Pole owners can collect no less than permitted by the resulting formula using those coefficients. But if that number is lower than the cable service rate, the latter prevails, giving pole owners a higher attachment rate for the policy reasons animating the *FNPRM's* approach.

What Congress did not decree in Section 224(e) was that the telecom rate was to be always higher than the cable service rate. Thus, Edison Electric's claims that "Congress *specifically* recognized that the telcom rate would be substantially higher than the cable rate" or that "Congress explicitly contemplated"¹⁶ higher rates for telecom attachers are simply untrue.

¹³*Id.*, § 224(e)(2).

¹⁴*Id.*, § 224(e)(3).

¹⁵Bright House Comments at 17-18, n.24.

¹⁶Edison Comments at 73. If Congress "explicitly" contemplated a higher rate, there should be some "explicit" expression of it. No such evidence is provided by Edison Electric, because none exists.

There is nothing in the words of the statute that state this. Section 224(e), as just noted, establishes two apportionment rules to apply to the rate of a telecom service attacher, no more and no less.

Nor did the five-year phase-in for telecom rates mean that such rates would inevitably be higher than the cable rate. As Bright House noted in our Comments, the FCC implementation of that provision and the adopted rule¹⁷ “explicitly” anticipated that rates could decline, and in that case, the reduction was to take effect immediately.¹⁸

The utilities’ recitation of Section 224(e)’s legislative history provides zero support for claims about an “explicit” or even implicit view by Congress that telecom rates would exceed the cable rate. Just the opposite. In a shocking misrepresentation of the legislative history, the Comments of Florida Investor-Owned Utilities (“IOUs”) cite the Conference Report on S. 652, which contained the 1996 Communications Act amendments including Section 224(e). The term “Conference Report” refers to the output of a conference of designated House and Senate members working through different language in bills originating in each house regarding, in this instance, telecom pole rates. Florida IOUs claim that this report required that telecom rate attachments be based on a “fully allocated cost” formula. Twice, the Florida IOUs cite the Conference Report for this proposition.¹⁹

¹⁷ 47 C.F.R. § 1.1409(f).

¹⁸ Bright House Comments at 21 n.32. Thus Florida Investor-Owned Utilities Comments at 59 (“Florida IOUs Comments”) (emphasis added), quotes Section 224(e)(4) to show that the “Act *expressly* contemplates that the section 224(e) rate formula would yield higher rates than section 224(d).” The words of the statute say no such thing. The rates could be higher or lower; higher rates are not mandated. What it does say is that if higher rates result, they must be phased in.

¹⁹: See Florida IOUs Comments at 61: “Commenting on the language ultimately included as section 224(e), the Conference Report states: ‘The new provision directs the Commission to regulate pole attachment rates based on a “fully allocated cost” formula.’” The import of this sentence is that it represents the “Conference Report” view of the issue. Surely Florida IOUs cannot be arguing that because the language appears in the Conference Report, even though it is *quoting* the House Report, that it is legitimate to represent the Conference Report as support for the statement. This topsy-turvy logic would turn every dissent into a majority opinion because it appears in the same location as the majority opinion.

But what the Florida IOUs cite as the “Conference Report” language is, in fact, the *House Report* language addressing Section 105 of the House Bill. The Senate Bill amending Section 224 (in Section 204), did not require a fully allocated cost formula as the House Bill had done. As the Conference Report stated, “The conference agreement adopts the *Senate* provision with modifications.”²⁰ None of those modifications changed the Senate’s conclusion to not include a fully allocated cost formula. (We attach as an Appendix to these Reply Comments the relevant pages from the Jan. 31, 1996 Conference Report containing the Senate, House and Conference Agreement summaries.)

The Florida IOUs’ argument that the *FNPRM*’s proposal is “contrary to legislative intent”²¹ is entirely based on citation of legislative history that was specifically *rejected* when the House and Senate bills went to conference. With due respect, this error is a whopper, given that this difference between the House and Senate versions is considerable and central to understanding the FCC’s implementation of Section 224(e) in 1998 and the *FNPRM* today.

Far from being an obscure part of the pole attachment debate, this difference between requiring a “fully allocated cost” approach and not requiring one must be well-known to companies constituting the Florida IOUs such as Florida Power & Light Co., Gulf Power Co., and Tampa Electric Co (TECO). These companies are among the most litigious pole owners in the United States, against one of whom Bright House has been involved in costly and protracted legal fights over pole rates. These active participants in the pole attachment debates in this proceeding and in individual rate disputes have studied the legislative texts for years; they know better than to misrepresent to this agency the rejected House Report language as the conference agreement on this crucial point. Arguments based on this misrepresentation should be given no weight in this rulemaking.

²⁰Conference Report No. 104-458, 104th Cong., 2d Sess. pp. 206 (1996) (emphasis added).

²¹Florida IOUs Comments at 61.

III. THE COMMENTS DEMONSTRATE THAT THE CURRENT FORMULA LEADS TO OVERCHARGING, EVEN WHEN THERE IS AGREEMENT ON THE CHARACTER OF THE SERVICE.

Apart from the documented adverse impact on broadband deployment and innovation caused by the current telecom formula, the formula can be manipulated by utilities. It is an arcane and litigation-spawning formulation in part because pole owners have every incentive to try to claim as many attachments as possible as being subject to the higher telecom rate, leading to disputes, such as Bright House's litigation with TECO in Florida over the characterization of the attachment and the number of poles involved.²²

TECO's behavior in particular in this proceeding demonstrates the pitfalls of the current formula as applied by utilities against attachers. Level 3's Comments in this regard are instructive. It has pole attachment agreements with utilities in several jurisdictions, including those areas served by TECO and others, whose rates are presented in Appendix A to the *FNPRM*. Appendix A was prepared to show the differences in rates charged under the cable rate formula, the existing telecom formula, and the telecom formula including operating expenses but no capital costs. The Appendix separated rates for urbanized and non-urbanized attachers.

Upon reviewing Appendix A, Level 3 discovered, lo and behold, that three of the utilities, including TECO, had charged Level 3 "substantially more than the maximum rate calculated by the staff."²³ Indeed, it was only because the FCC decided to illustrate these comparative rates – to demonstrate how the proposed rate rule would work, not to illustrate rate-setting abuses by pole owners -- that Level 3 discovered that TECO's rates exceeded even the allowable maximum rate of the current telecom formula!

²² See Bright House Comments at 28-32.

²³ Level 3 Comments at 9.

Part of the large discrepancy, Level 3 stated, may be attributed to pole owners' practice of conducting their own pole surveys and calculating the average number of attaching entities rather than using the FCC's presumptive averages.²⁴ In conducting these surveys pole owners combine their urban and non-urban pole data to develop a single rate. The low number of attaching entities in rural areas lower the overall average, which increases an attacher's proportional share of the allocated cost of unusable space, which in turn increases the attachment rate.

But even this practice – which Level 3 “considers ... to be a violation of the Commission's rules” -- could not explain to the attacher the full amount that that company believes TECO overcharged them.²⁵ Level 3's conclusion is that the FCC should “initiate an investigation of overcharging by utilities.”²⁶ The telcom rate setting process tuned out to be fertile ground for overcharging by utilities such as TECO, as Level 3 discovered to its dismay by reviewing the calculations in Appendix A.

Overcharging for pole attachments by TECO comes as no news to Bright House. In its recently concluded two-week trial²⁷ over rates with the Florida utility, Bright House demonstrated that TECO engaged in massive manipulation of its pole rates for years. Among other failings, Bright House demonstrated that TECO: (i) improperly relied on a flawed audit instead of the audited number of poles in its continuing property records; (ii) used an improper number of attaching entities in its rate calculations; (iii) used an improper rate of return in calculating its telecom rate; and (iv) erred by including only part of one FERC account and including another that it should not have included. TECO has admitted to this Commission that the pole

²⁴These presumptive averages are found at 47 C.F.R. § 1.1417.

²⁵The overcharges that Level 3 actually paid to TECO were redacted from Level 3's Comments that were made available for public inspection.

²⁶Level 3 Comments at 11.

²⁷See Bright House Comments at 3-4.

attachment rates that it charged Bright House (and presumably other attachers) violated its rules and regulations.²⁸ These errors, as Bright House demonstrated at trial, improperly inflated TECO's pole attachment rates by over 100 percent. Thus, Level 3's experience of being overcharged by TECO, recounted in its Comments, sounds all too familiar.

For these reasons a unified rate for all commingled attachments that follows the well-settled cable rate formula will curb the game-playing that has ensued by pole owners under administration of the current formula. It will not eliminate the incentives to overcharge that is demonstrated by the utilities in Level 3's submission. But it will lower the upper bound for doing so and thereby may convince entities like TECO to focus company resources on more legitimate and socially useful ways to increase revenues than trying to bilk pole attachers.

IV. THE RECORD POINTS OUT THERE IS NO NEED TO INCREASE THE PENALTIES FOR "UNAUTHORIZED" ATTACHMENTS.

In our Comments Bright House showed that claims regarding the seriousness of unauthorized attachments, were, at least in its experience, overstated and based on erroneous information assumed to be correct by the pole owner. The range of contested practices with the utility's audit in one case were legion:

- ⊗ counting the same attachment multiple times,
- ⊗ counting empty space on the pole as an attachment,
- ⊗ counting arm brackets and cables three feet away from a pole as separate attachments,
- ⊗ counting authorized attachments as unauthorized,

²⁸ See, e.g., Tampa Electric Company's Response to the Supplement to Pole Attachment Complaint of Bright House Networks, LLC, File No. EB-06-MD-003 (filed Sep. 4, 2009) at 11 ("Tampa Electric concedes that inclusion of [FERC Account 590] supervisory expenses . . . has been disallowed by the Commission. . . . Going forward, Tampa Electric will revise its methodology."); *id.* at 12 ("Tampa Electric does not dispute that it included in its determination of the average number of attaching entities poles to which only Tampa Electric is attached. . . . Going forward, Tampa Electric will revise its methodology . . . by excluding from the pole count poles to which only Tampa Electric is attached.").

⊙ attributing attachments to Bright House where it doesn't even operate.²⁹

In their Comments the utilities insist that their audits result in a significant percentage unauthorized pole attachments, although they recognize the *FNPRM*'s characterization of reported percentages as low or insignificant.³⁰ Instead, they shift gears and reject the multiple instances where utilities have tried, and failed, to enforce unfair unauthorized attachment fees before the FCC as a “worn-out song and dance”³¹ rather than recognizing their pattern of losses for what it is: the consistent precedent of being proved wrong before an impartial decision-maker.

In any case, given Bright House's experience with TECO's “audit” practices, it is doubtful that even the low reported numbers of claimed unauthorized attachments in the *FNPRM* reflect reality. As such they form no basis for enhanced penalties.

²⁹ See Bright House Comments at 28-32.

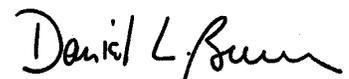
³⁰ *FNPRM* at ¶ 89.

³¹ Florida IOUs Comments at 51.

CONCLUSION

This proceeding offers an unparalleled opportunity to streamline procedures associated with and reduce the costs of a significant input to broadband deployment and development. The FCC should declare its uniform rate applies to all commingled attachments, based on the statutory and policy arguments presented in the *FNPRM* and developed in this record. Including all commingled attachments, whether classified as telecommunications service or not, will eliminate unnecessary disputes down the road and promote the continued introduction of competitive, innovative communications services by Bright House and others.

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APPENDIX

SECTION 703—POLE ATTACHMENTS

Senate bill

Section 204 of the Senate bill amends section 224 of the Communications Act. Section 204 requires that poles, ducts, conduits and rights-of-way controlled by utilities are made available to cable television systems at the rates, terms and conditions that are just and reasonable regardless of whether the cable system is providing cable television services or telecommunications services. Section 204 further requires the Commission to prescribe additional regulations to establish rates for attachments by telecommunications carriers. Such rates will take effect five years from date of enactment and be phased in over a five year period.

House amendment

Section 105 of the House amendment is intended to remedy the inequity of charges for pole attachments among providers of telecommunications services. First, it expands the scope of the coverage of section 224 of the Communications Act. Under current law, section 224(a)(4) currently defines "pole attachment" to mean any attachment by a cable television system to a pole, conduit, or right of way owned or controlled by a utility. This section expands the definition of "pole attachment" to include attachments by all providers of telecommunications services.

Second, it amends section 224 to direct the Commission, no later than one year after the date of enactment of the Communications Act of 1995, to prescribe regulations for ensuring that utilities charge just and reasonable and nondiscriminatory rates for pole attachments to all providers of telecommunications services, including such attachments used by cable television systems to provide telecommunications services.

The new provision directs the Commission to regulate pole attachment rates based on a "fully allocated cost" formula. In prescribing pole attachment rates, the Commission shall: (1) recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments; (2) recognize that the usable space is of proportional benefit to all entities attaching to the pole, duct, conduit, or right-of-way and therefore apportion the cost of the usable space according to the percentage of usable space required for each entity; and (3) allow for reasonable terms and conditions relating to health, safety, and the provision of reliable utility service.

This new provision further provides that, to the extent that a company seeks pole attachment for a wire used solely to provide cable television services (as defined by section 602(6) of the Communications Act), that cable company will continue to pay the rate authorized under current law (as set forth in subparagraph (d)(1) of the 1978 Act). If, however, a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the Commission pursuant to the fully allocated cost formula.

Finally, the new provision requires that whenever the owner of a conduit or right-of-way intends to modify or to alter such conduit or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a pro

portionate share of the costs incurred by the owner in making such conduit or right-of-way accessible.

Conference agreement

The conference agreement adopts the Senate provision with modifications. The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to poles, ducts, conduits, and rights-of-way owned or controlled by utilities. New subsection 224(e)(2) establishes a new rate formula charged to telecommunications carriers for the non-useable space of each pole. Such rate shall be based upon the number of attaching entities. The conferees also agree to three additional provisions from the House amendment. First, subsection (g) requires utilities that engage in the provision of telecommunications services or cable services to impute to its costs of providing such service an equal amount to the pole attachment rate for which such company would be liable under section 224. Second, new subsection 224(h) requires utilities to provide written notification to attaching entities of any plans to modify or alter its poles, ducts, conduit, or rights-of-way. New subsection 224(h) also requires any attaching entity that takes advantage of such opportunity to modify its own attachments shall bear a proportionate share of the costs of such alterations. Third, new subsection 224(i) prevents a utility from imposing the cost of rearrangements to other attaching entities if done solely for the benefit of the utility.