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March 17, 2011

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Implementation of Section 224 of the Act; WC Docket No. 07-245
A National Broadband Plan for Our Future; GN Docket No. 09-51

Dear Ms. Dortch:

On March 17, 2011, on behalf of Bright House Networks, I met with Christine D. Kurth, Policy Director and Wireline Counsel of the Office of Commissioner Robert M. McDowell. This meeting was held to discuss Bright House Networks' filings in the above captioned dockets. Attached is a copy of the presentation made at the meeting.

During the meeting, I emphasized the importance of applying the rate approach proposed in the *Future Notice of Proposed Rulemaking (FNPRM)* in these dockets to all pole attachments of commingled services, whether those services have been classified or not. This follows the approach taken by the Commission in the *Gulf Power* case. This approach will help facilities-based providers like Bright House Networks offer innovative and competitive broadband services to private and public institutions seeking lower-cost, higher capacity communications services.

I also provided a statutory analysis, as discussed in Bright House Network filings and summarized in the attached presentation, demonstrating how the *FNPRM's* proposed rate approach is *more* faithful to the statutory requirements of Section 224, which governs pole attachment rates. In particular, the proposed approach fully implements Congress's directives in Sections 224(e)(2) and (e)(3) concerning apportionment of the costs of unusable and usable space assigned to attachers to compute the telecommunications service attachment rate. At the same time, it satisfies the overarching "just and reasonable" rate requirement in Section 224(b) and defined by Congress in Section 224(d)(1).

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Should you have any questions, please contact the undersigned.

Respectfully submitted,

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cc: Christine D. Kurth

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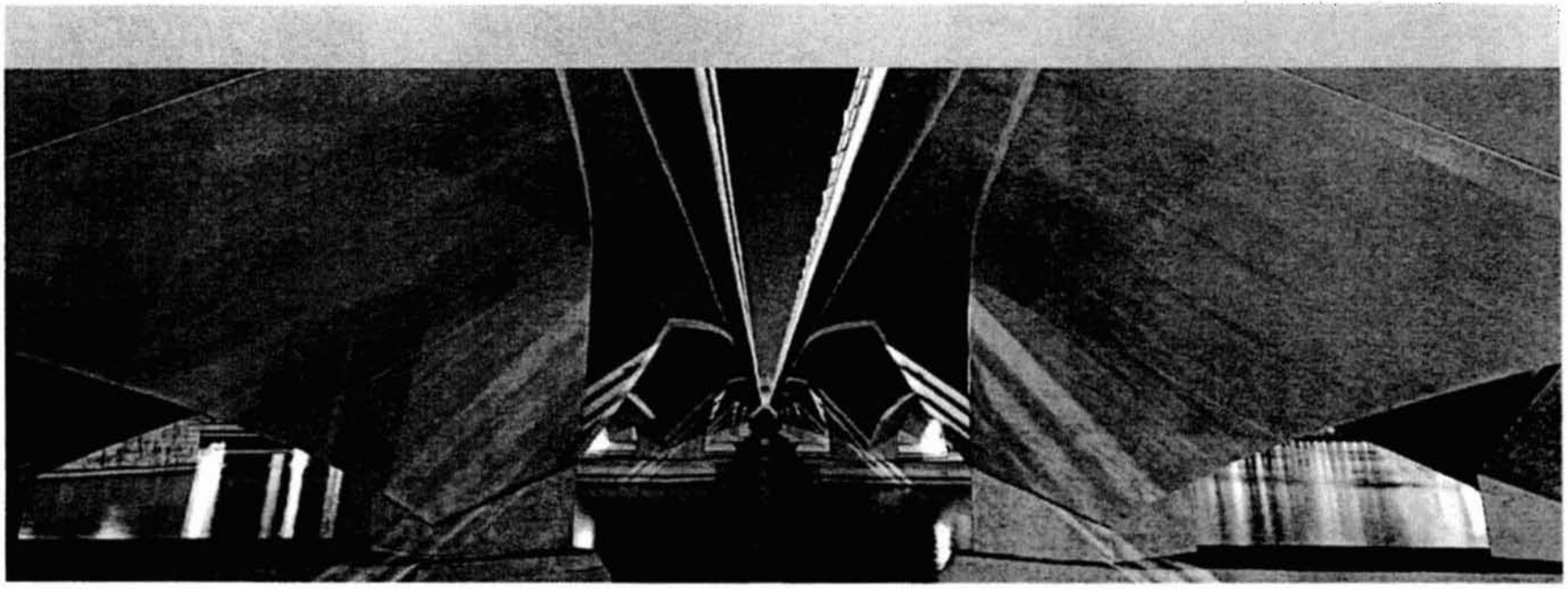
Bright House Networks
FCC Pole Attachment *FNRPM*
Ex Parte Presentation

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

Daniel Brenner *Hogan Lovells*



ADOPT UNIFORM LOW RATE FOR ALL COMMINGLED ATTACHMENTS

- *National Broadband Plan*: lower inputs allows for greater broadband penetration, adoption
- Bright House filings: lower rates made competitive broadband offerings possible in areas traditionally served only by incumbents
  - Innovative unclassified services like Metro Ethernet, VoIP don't fit under Section 224's "telecom" or "cable" definitions
  - Lower "cable service" rate spurs deployment and follows from *Gulf Power* decision
  - Pole owners have incentive to litigate anyway

ADOPT UNIFORM LOW RATE FOR ALL COMMINGLED ATTACHMENTS

- *Gulf Power* (S. Ct. 2002) case: FCC has authority to determine cable rate applies to attachments that carry commingled services, not yet defined
  - In that case, commingled service – cable modem service – was still undefined; remained so until 2005
- Order should extend cable rate to all commingled services, defined or not
- Real world consequences: TECO case

FNPRM RATE APPROACH SHOULD BE ADOPTED

- *FNPRM*: telecom rate to be higher of cable rate or the current low-end telecom rate (which excludes capital costs and taxes)(¶ 141)
- Cable rate parameters are established in Sec. 224(d)(1):

"the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way"

- In 1987 FCC established cable rate at the upper bound of Sec. 224(d)(1) (see underscored words)

STATUTE FULLY SUPPORTS PROPOSED RATE, WHICH IS MORE FAITHFUL TO § 224

- Any analysis of telecom pole rates must start with Sec. 224(b)'s "just and reasonable" standard
  - As *Gulf Power* held, Sec. 224(b)'s "just and reasonable" language governs entirety of Sec. 224
- Here's the key: Sec. 224(d)(1) states: *"For purposes of subsection (b) of this section, a rate is just and reasonable if"* … it satisfies the definition of the cable service rate
- Upshot: any rate *under all of Sec. 224* that exceeds upper bound of Sec. 224(d)(1) would not be "just and reasonable"

ACT DOES NOT MANDATE TELECOM RATE AS NECESSARILY HIGHER THAN CABLE RATE

- FCC's 1998 Telecom Rate *Implementation* of Sec. 224(e) included capital costs and taxes in formula, leading to a generally higher rate, depending on # of attachers
- *FNPRM* defines "costs" differently, but consistent with Act (¶ 130)
  - And it's logical: make-ready charges already require attacher to bear capital costs, so no double recovery

ACT: NO MANDATE THAT TELECOM RATE EXCEED CABLE RATE

- Nothing in Act or legislative history required the telecom rate to exceed the cable rate, or that the telecom rate calculation of "costs" include "capital costs"
  - It only requires that rates be "just, reasonable, and nondiscriminatory" (§ 224(e)(1))
- The 1996 Act rejected the fully-allocated cost approach in the House version, as Conference Report shows (excerpt follows)

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

The new provision directs the Commission to regulate pole attachment rates based on a "fully allocated cost" formula. In pre

Conference agreement

The conference agreement adopts the Senate provision with modifications. The conference agreement amends section 224 of the

ACT: NO MANDATE THAT TELECOM RATE EXCEED CABLE RATE

- What *does* 224(e) mandate on rates? It establishes cost apportionment rules for usable and unusable space on a utility pole (§§ 224(e)(2)-(3)), but doesn't define "costs"
- *FNPRM* changes def'n of costs but still follows the statute, and the 1998 *Implementation* in computing the lower-bound telecom rate

FCC'S 1998 ACT *IMPLEMENTATION/FNPRM* COMPARED

- 1998 *Implementation* defined telecom rate formula as:

  Telecommunications service rate = Unusable Space Factor [224(e)(2)] + Usable Space Factor [224(e)(3)].

- This translates into the following formulas for computation:
  - Unusable Space Factor = 2/3 X [Unusable Space/Pole Height] X [net cost of bare pole/# of Attachers] X **[Carrying Charge Rate]**
  - Usable Space factor = [Space occupied by Attachment/Total usable Space] x [total usable space/Pole Height] X [net cost of Bare Pole] x **[Carrying Charge Rate]**
- **1998 Carrying Charge Rate** included Capital Costs and Operating Expenses [maintenance and administrative expenses]

FCC'S 1998 ACT IMPLEMENTATION/*FNPRM* COMPARED

- *FNPRM d*eletes capital costs and taxes from **Carrying Charge Rate**; leaves only Maintenance and Administrative Expenses in **Carrying Charge Rate**
- <u>But</u> *FNPRM* applies both 224(e)(2) and 224(e)(3)
- And it assigns cable rate to attachment if it is higher than the amount derived from Sec. 224(e)(2) and (3)

ACT: NO MANDATE THAT TELECOM RATE EXCEED CABLE RATE

- What about Sec. 224(e)(4)'s mandate to phase in "[a]ny increase" in pole attachment rates from telecom rate implementation?
  - This language doesn't mandate higher rate
  - FCC's 1998 *Implementation* specifically contemplated that rates could *decrease*, even under its formula
  - Nothing prevents the FCC from lowering the cable rate from the upper bound under Sec. 224(d)(1). That would mean that a telecom rate can rise to the upper bound of Sec. 224(d)(1), but not to current telecom rate

HOW RATES RELATE TO EACH OTHER

A revised cable rate could be anywhere between (2) and (4)

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1 Current Upper-End telecom rate, typically

2 Cable Upper Bound

224(d)(1) ["*nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole*"]

3 Low-End Telecom Rate (with reduced Carrying Charge Rate)

4 Cable Lower Bound under 224(d)(1) ["*the additional costs of providing pole attachments*"]

In Conclusion …

- *FNPRM's* approach bolsters conclusions of Broadband Plan
- To avoid unnecessary litigation, the FCC's decision should explicitly state that all commingled attachments, whether for information services, telecom services or undefined services, should use the cable service rate
- The *FNPRM*'s rate approach is more consistent with the structure and words of Sec. 224