

OFFICIAL COPY

1

1 PLACE: Dobbs Building

FILED

2 Raleigh, North Carolina

FEB 01 2018

3 DATE: December 18, 2017

Clerk's Office

4 DOCKET NO.: EC-23, Sub 50

N.C. Utilities Commission

5 TIME IN SESSION: 1:30 P.M. TO 4:48 P.M.

6 BEFORE: Chairman Edward S. Finley, Jr., Presiding

7 Commissioner Bryan E. Beatty

8 Commissioner ToNola D. Brown-Bland

9 Commissioner Jerry C. Dockham

10 Commissioner James G. Patterson

11 Commissioner Daniel G. Clodfelter

12

13 IN THE MATTER OF:

14 Blue Ridge Electric Membership Corporation,

15 Petitioner

16 v.

17 Charter Communications Properties, LLC

18 Respondent

19

20 Volume 5

21

22

23

24

NORTH CAROLINA UTILITIES COMMISSION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

A P P E A R A N C E S:

FOR BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION:

Pressly M. Millen, Esq.

Womble Bond Dickinson, LLP

555 Fayetteville Street, Suite 1100

Raleigh, North Carolina 27601

Charlotte Mitchell, Esq.

Law Office of Charlotte Mitchell

P.O. Box 25212

Raleigh, North Carolina 27611

Debbie W. Harden, Esq.

Matthew F. Tilley, Esq.

Womble Bond Dickinson, LLP

One Wells Fargo Center

Suite 3500, 301 South College Street

Charlotte, North Carolina 28202

A P P E A R A N C E S:

(Continued)

FOR CHARTER COMMUNICATIONS PROPERTIES, LLC:

Gardner F. Gillespie, Esq.

J. Aaron George, Esq.

Sheppard Mullin Richter & Hampton, LLP

2099 Pennsylvania Avenue, NW, Suite 100

Washington, D.C. 20006-6801

Marcus W. Trathen, Esq.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP

Wells Fargo Capital Center

150 Fayetteville Street, Suite 1700

Raleigh, North Carolina 27601

T A B L E O F C O N T E N T S

E X A M I N A T I O N

PATRICIA KRAVTIN

Cross Examination by Ms. Millen..... 6

Redirect Examination by Mr. George..... 113

Examination by Chairman Finley..... 126

CLOSING STATEMENT BY MR. GILLESPIE..... 130

CLOSING STATEMENT BY MR. MILLEN..... 142

E X H I B I T S

IDENTIFIED/ADMITTED

Charter Kravtin Redirect Exhibit 1..... 115/115

Exhibits PDK 1 - 15..... ---/128
(Confidential Exhibit PDK 4, filed under seal)

Exhibits LL-1-16..... ---/128
(Confidential Exhibits LL-3,7-9, filed under seal)

Rebuttal Exhibits LL-17-25..... ---/128
(Confidential Exhibit LL-17, filed under seal)

P R O C E E D I N G S

1
2 CHAIRMAN FINLEY: Let's come back on the
3 record. I believe, Ms. Kravtin, I think you are on
4 the witness stand, if you'll come on back up. You've
5 already been sworn, I believe.

6 Welcome back everybody. I hope everybody is
7 in the holiday spirit, feeling good about everything,
8 and agreeable about everything.

9 Cross examination of Ms. Kravtin.

10 MR. MILLEN: Thank you.

11 PATRICIA KRAVTIN; having previously been duly sworn,
12 . testifies as follows:

13 CROSS EXAMINATION BY MR. MILLEN:

14 Q Ms. Kravtin, would it be fair to say that in your
15 testimony you are recommending that this
16 Commission adopt the FCC cable rate and apply it
17 to the contract between Charter and Blue Ridge
18 EMC?

19 A Yes, that's correct.

20 Q But is it also the case that you're aware that
21 Congress in passing the Pole Attachment Act
22 explicitly exempted cooperatives from regulation
23 by the FCC?

24 A Yes. And I address that in my testimony that

1 that exemption was based on conditions existent
2 at the time, in the '70's, and that since then
3 cooperatives and municipals that had been
4 exempted have displayed the sort of monopoly
5 behavior that the law was intended to address;
6 and that the FCC, in fact, has recommended
7 Congress to harmonize those rules to apply to
8 munis and co-ops; and that many states also have
9 now regulated munis and co-ops.

10 Q Well, that really wasn't the question I asked
11 you. I asked you the question, simple question,
12 as whether you are aware that Congress in passing
13 that Act explicitly exempted cooperatives from
14 regulation by the FCC, and you would agree that
15 they did that, right?

16 A And I acknowledged that in my testimony and went
17 on to explain the context in which that exemption
18 should be viewed today.

19 Q And in any of the 40 years between then and now
20 Congress could have undone that exemption, right?

21 A Yes, they could.

22 Q But they didn't, right?

23 A That is correct as of now, but they've been
24 requested to do so. And states have stepped up

1 where Congress on -- as on many issues has not.

2 Q Okay. They've been requested to do so but
3 they've not done so, right?

4 A That is correct.

5 Q Now, so what you're telling this Commission is
6 that it should second guess that determination by
7 Congress and apply the FCC rate to cooperatives,
8 right?

9 A No, that is not my testimony.

10 Q Now you've reviewed the legislative history of
11 the Pole Attachment Act; is that correct?

12 A Yes, that is correct.

13 Q And that legislative history is found in Senate
14 Report 95-580; is that correct?

15 A Yes, that is.

16 Q And, in fact, we marked that legislative history
17 at your deposition last month. Do you remember
18 that?

19 A I do and I also cited that history in my
20 testimony.

21 Q Okay. Are you aware that in the legislative
22 history Congress discussed various principles and
23 rationales for why cooperatives should be exempt
24 from FCC regulation?

1 A Yes. And again that was addressed in my
2 testimony.

3 Q Okay. And your basic point, that is, that you
4 disagree with what Congress has done regarding
5 pole attachments, right?

6 A That is not correct. No.

7 Q For example, you disagreed with the statement in
8 Congress's legislative history that, quote,
9 *ultimately CATV pole attachment rate setting*
10 *involves equity considerations*; isn't that
11 correct?

12 A Well, if you're referring to the discussion we
13 had in my deposition where you were reading
14 statements, and I -- as I indicated you presented
15 those statements without a context for which I
16 could respond. And I said, without providing me
17 the context, it would be difficult for me to say
18 whether I agreed or not. The words on their face
19 which stress equity without the context
20 understand what was being balanced against the
21 use of those words and ultimately how those words
22 were used to produce. In this case it was
23 legislation but I had no idea what you were
24 referring to. So, if that's the discussion, then

1 I can't say that I disagreed based on that. I
2 disagreed based on the hypothetical in which you
3 presented those words.

4 Q I'm not asking you about any kind of
5 hypothetical, I'm asking do you remember being
6 asked this question at your deposition.

7 A As I just --

8 Q Question --

9 A Excuse me.

10 Q *Ms. Kravtin, do you agree with the statement that*
11 *ultimately cable television pole attachment rate*
12 *setting involves equity consideration? Do you*
13 *recall being asked that question?*

14 A I do. And I recall in the discussion that
15 followed that I indicated that, without a context
16 to understand how you were using those words,
17 because different people would use equity in
18 different ways, an economist would look at equity
19 through a lens of objective frameworks like how
20 it affected efficiency and public interest.
21 Someone else, a non-economist, might use that
22 word in a more colloquial 'it doesn't feel fair,
23 it doesn't seem fair', and so out of context I
24 could not agree with those words.

1 Q You understood, I asked you a question whether
2 you agreed with that and you said no. Isn't that
3 true?

4 A For the reasons I went on in my deposition to
5 explain because you weren't providing me a
6 context or a source that I then could have
7 understood and explained. I think in the context
8 now that I know, I didn't know at the time in my
9 deposition because you didn't reveal it in your
10 questioning, that's why I said it was
11 hypothetical. Understanding that it's from the
12 legislative history, if you go back and look at
13 that legislative history, you see that what
14 Congress was doing, as the FCC does because it's
15 embodied in Section 224, that the legislation is
16 suppose to balance the interests of all
17 stakeholders. That's why it's a public interest
18 statute. You know, looking at the subscribers of
19 both services balancing equity efficiency which,
20 for an economist they're in harmony because an
21 objective framework for looking at what's fair
22 and equitable would be looking at how it affects
23 the total public good and efficiency. So -- and
24 if you look at what 224 and how it's been

1 implemented, I think they're -- you -- in that
2 context, I agree and strongly endorse the outcome
3 of Section 224.

4 MR. MILLEN: Can I ask that her testimony
5 after "yes" be stricken?

6 CHAIRMAN FINLEY: No, you may not. But she
7 acknowledged your "yes" and then she went on to
8 explain. But let's be as brief as we can in your
9 answers, Ms. Kravtin, please. The lawyer on your
10 behalf can cross examine you if he needs to.

11 THE WITNESS: Thank you, sir.

12 BY MR. MILLEN:

13 Q You also disagreed with Congress's determination
14 as stated in the legislative history that, quote,
15 *another significant equity consideration is the*
16 *relative importance of each of the respective*
17 *services to the community served; isn't that*
18 *true?*

19 A Again, what I answered in deposition, very
20 similar to the previous quote, and I don't want
21 to belabor it because I've been asked not to be
22 expansive on that point again, is the same thing
23 that in the context of 224 that I now understand
24 we were referring to; then I agree with the

1 principles of balancing equity and efficiency,
2 and the outcome in Section 224 as has been
3 adopted by the FCC in states that emanated from
4 that.

5 Q But when you were asked the question at your
6 deposition you said you couldn't agree to that,
7 right?

8 A Because it was not provided in a context that I
9 could comment substantively on.

10 Q So your testimony is if you'd have known that I
11 had taken the statement out of the legislative
12 history you would have agreed with it?

13 A It wouldn't have affected the substance of my
14 answer, but it would have given me the context to
15 understand what those words meant, and in the
16 context of how it was applied by Congress and
17 what it resulted in, then I would agree with the
18 balancing of equity and efficiency underlying
19 Section 224.

20 Q In any event, when Congress talked about the
21 respective services, the respective services that
22 Congress was talking about was the provision of
23 electricity on the one hand and cable TV services
24 on the other, right?

1 A That is correct.

2 Q Okay. And, in fact, you wouldn't even agree that
3 the provision of electric power is relatively
4 more important than the provision of cable
5 television, would you?

6 A What I answered in deposition was again using
7 words like "important" without understanding the
8 context makes a difference. In some respects it
9 might be considered more important, in others
10 not.

11 From an economist standpoint, you
12 look at a measure called price elasticity of
13 demand which I explained in deposition, which in
14 that context would suggest because consumers are
15 less price elastic, less sensitive to changes in
16 the price of electricity, that would argue for a
17 policy that if it erred would want to keep down
18 the communications or broadband prices more so
19 than electricity because consumers purchase that.
20 So it depends on how it's used and that was the
21 basis of my answer to you.

22 Q You understood Congress said consider the
23 relative importance of these two services, right?

24 A Absolutely, and that's embodied in Section 224

1 and in the FCC's regulations.

2 Q And you also understand that without electric
3 power cable TV doesn't do you much good, right?

4 A Yes, I understand that power is required.

5 Q Okay. And you also testified at deposition that
6 anything that goes beyond what you consider a
7 pure cost-based formula to a consideration of
8 equity is not proper, right?

9 A I don't believe that's my testimony. Because
10 this is a public policy issue and if we were
11 dealing strictly on the economics we'd be talking
12 about a price for pole attachment set at marginal
13 cost. That is not my recommendation. That's not
14 the FCC's application of pole attachment
15 regulation. So it's not my testimony or my
16 recommendation that strict economics be applied.

17 Q Did you testify that anything that goes beyond
18 what would be in a cost-based formula to a
19 consideration of equity was not proper?

20 A I have testified that a cost-based formula is the
21 right approach for an economic regulation of a
22 service. But there is some leeway as to what is
23 cost-based, and that's embodied in Section 224
24 and in the cable rate. Between just and

1 reasonable being between a marginal cost, which
2 is the lowest cost that would be just and
3 reasonable and compensatory, with a fully
4 allocated, and there's a range in between that
5 would be part of a cost-based formula.

6 Q Is it also the case that at your deposition you
7 refused to agree with the statement of Congress
8 in its legislative history that quote,
9 *considerations of equity should turn on the needs*
10 *and interests of local constituents?*

11 A Once again, that line of questioning as I
12 indicated in my responses to you at my deposition
13 was that you were not providing the context or
14 source of those statements. Out of context I
15 couldn't agree based on those words.

16 Obviously, now I understand that
17 we were having a discussion, I didn't know at the
18 time, about the legislative history. Looking
19 back at that, the discussion of local and state
20 information and knowledge was in the specific
21 context of allowing states to reverse preempt the
22 FCC. So in that context I would agree because I
23 think there is value to states who want to
24 regulate at the local level and those states that

1 have stepped up to do so then that is what
2 Congress was allowing to occur and has occurred.

3 Q Well you know that Congress also said that
4 decisions regarding the allocation of pole costs
5 among users should reflect in some sense the
6 ability of cable subscribers and the utility's
7 customers to pay for the costs which are passed
8 along to them, right?

9 A Yes. That language was in the legislative
10 history. Correct.

11 Q Okay. And when I asked you at your deposition if
12 you agreed with that you said no. But is your
13 testimony now that you know it's in the
14 legislative history you do agree with it?

15 A Once again, it's not changing my opinions or what
16 I believe, but it's providing the context in
17 understanding how those words were applied and
18 meant that I'm clarifying now on the stand that
19 we're having a discussion on the legislative
20 history which I present and discussed in my
21 testimony.

22 Q Well, you also disagreed with Congress's
23 statement in the legislative history that rates
24 charged by cooperative utilities, quote, reflect

1 *what local authorities and managers of*
2 *customer-owned cooperatives regard as equitable*
3 *distribution of pole costs between utilities and*
4 *cable television systems. You also agreed*
5 *with -- disagreed with that, right?*

6 A For the same reason, because it was out of
7 context. I address this in my testimony. That
8 at the time in the '70's, in fact, co-op rates
9 were among the lowest in the nation. There was
10 no evidence of the problem of monopoly abuse that
11 the pole attachment regulation was designed to
12 address. So at that time, when Congress was
13 writing those words, then those reflected the
14 facts at the time. Now, 40 years later, that has
15 really changed. I don't think Congress would be
16 able to write those words now because what we've
17 seen is that co-ops and munis have, in fact, been
18 charging rates akin to what their IOUs had been
19 charging proportionately before they were
20 regulated.

21 Q But what we do know is in 40 years Congress has
22 done nothing to address what you contend what you
23 just said, right?

24 A Well, Congress hasn't but luckily states and

1 local authorities have stepped up and so these
2 issues are now before commissions such as this
3 one, as well as the number of states I've
4 identified in I believe it was Exhibit 7 in my
5 testimony, the states that have stepped up where
6 Congress has not, and the majority of those have
7 adopted the FCC cable formula or formulas very
8 akin to that.

9 Q Now, this FCC rate methodology that you contend
10 for was first promulgated only after Congress
11 made all these findings in support of exempting
12 cooperatives from FCC regulation, right?

13 A Well, the FCC pole attachment formula obviously
14 was implemented in response to the 1978 Pole
15 Attachment Act. It wasn't in response to the
16 language on state and local authorities. It was
17 developed in response to that Act.

18 Q But my point is Congress made all these findings,
19 Congress exempted the co-ops and only after that
20 did the FCC adopt this methodology, right?

21 A Well, if you're asking me if the FCC adopted its
22 methodology after Congress passed the Act, of
23 course. The history is just the history behind
24 the Act, not -- the history doesn't have a

1 meaning outside the context of the Act that it
2 developed.

3 Q But similarly, the history has to be
4 chronological, right? In other words, Congress
5 made the findings in the legislative history
6 before it passed the Act with the exemption and
7 only then did the FCC promulgate its rate
8 methodology, right?

9 A Of course, because the methodology came out of
10 the directives of that Act.

11 Q Now, it's the case, Ms. Kravtin, that both the
12 FCC and TVA methodologies utilize certain
13 presumptions; is that correct?

14 A That is correct.

15 Q And under your understanding of the TVA
16 methodology, it's the case that a different
17 number of attachers from the presumption of three
18 can be used if the actual number is in fact
19 different; is that right?

20 A That is correct subject to certain conditions
21 because it's not sufficient that a utility can
22 just come and say here's a number I want to use
23 instead. The FCC rules set out guidelines for
24 the standards that have to be met for the

1 presumptions to be rebutted.

2 Q My question is with regard to the TVA rates. The
3 TVA rate says if it's in -- if the actual number
4 is different, you can use a different actual
5 number than the presumption, right?

6 A My understanding of the TVA -- again, it really
7 hasn't been implemented or we haven't seen --
8 explaining rules. But from the materials I read
9 it still requires some sort of due diligence
10 reporting to staff of the TVA where data is
11 substituted for presumptions.

12 Q Well, in fact, one of the things you take issue
13 with in connection with the TVA methodology is
14 its willingness to depart from the presumptions,
15 right?

16 A I don't think that's my testimony.

17 Q Isn't it your testimony that the Commission,
18 *quote, should use the presumptions in order to*
19 *avoid the time and resources required to properly*
20 *scrutinize and independently validate actual*
21 *values?*

22 A Yes, that is correct. I think that when you do
23 vary from the presumptions it does create the
24 administrative burden that to a certain extent

1 flies in the face of the administrative ease of
2 using a formula, particularly where the
3 presumptions are so widely accepted and adopted.

4 Q Well, and you testified as I understand it that
5 this helps keep the formula streamlined; in other
6 words, to use presumptions rather than actual
7 numbers?

8 A Yes. But, of course, in the FCC cable formula
9 you don't need the number of attaching entities.
10 So that aspect of it, which often involves some
11 disagreements among parties, that evaporates from
12 the cable formula.

13 Q But in any event you've done no empirical
14 economic analysis of the time and resources
15 required to properly scrutinize actual values,
16 have you?

17 A Well, I haven't done an empirically -- empirical
18 analysis but I've been in many cases where the
19 issue of number of attaching enemies -- entities,
20 excuse me, has been under dispute and possibly
21 one of the most contested issues in the case.
22 And I know how much time and energy I've put into
23 addressing those issues in my testimony as well
24 as all the parties in the case, so I'm aware of

1 that, just haven't done a study. But in my
2 experience in this area over the past 10, 15
3 years a lot of time and energy in hearings and in
4 decisions has been dealing with that issue and
5 also before the FCC.

6 Q Well, let's talk about here. Here Mr. Arnett in
7 making his calculation uses an actual number of
8 attachers which is 2.35. Is that your
9 understanding?

10 A Yes.

11 Q And you've done no specific analysis that would
12 allow you to take issue with the derivation of
13 that number, correct?

14 A That is true. But Mr. Arnett also indicated that
15 he did not have data that would directly link
16 that count to the poles on which there were
17 third-party attachers. So he himself didn't have
18 the data that -- the first thing that I would
19 want to examine would be whether that number is
20 reflective of the subset of poles on which
21 third-party attachments were placed.

22 Q Now, in fact, was it the fact that you insisted
23 that the FCC three attacher per pole presumption
24 be used rather than actual data from the

1 operation of the electric utility; was that one
2 basis for a court finding in Washington state
3 that your testimony was not worthy of belief?

4 A The issue of number of attaching entities was one
5 issue that was raised in that decision. But,
6 again, we discussed this in deposition, the whole
7 basis of that case was based on a decision or a
8 finding that the deference would be given to the
9 local municipal utility. And anything that I
10 opined that differed from what the municipal
11 utility's deferential data showed was found
12 unreasonable, including I might add an adjustment
13 I made to the appurtenances to adjust for costs
14 that weren't related to poles. Again, because
15 that wasn't based on the municipal's own position
16 that was also found unreasonable.

17 So any of the adjustments that I
18 made consistent with my understanding of the FCC
19 cable formula, and I was recognized as creating
20 that formula appropriately, all of those
21 assumptions I made in calculating the formula
22 were found in that context as unreasonable
23 because it wasn't specifically specified in the
24 legislation and it wasn't deferential to the

1 utility which was the basis of that particular
2 law.

3 Q Ma'am, my question was far simpler than that. I
4 didn't ask anything about appurtenances. My
5 question was this --

6 CHAIRMAN FINLEY: She answered your question
7 yes. She answered your question yes.

8 BY MR. MILLEN:

9 Q Did the appellate court in Washington state that
10 your insistence that the FCC three attacher per
11 pole presumption be used rather than actual data
12 from the operation of the Pacific PUD appears to
13 be one basis for the trial courts finding that
14 your testimony was not worthy of belief?

15 A And I answered that question.

16 Q Is your answer yes?

17 A The answer is, yes, that is one of many findings
18 that the court cited to. It wasn't cited to
19 outside, other similar sort of findings. It
20 wasn't singled out. It was just anywhere that I
21 applied FCC formula rules or regulations that was
22 found inconsistent with that particular piece of
23 legislation.

24 Q Well, it was singled out in the quotation I read

1 to you, wasn't it?

2 A Well, because you singled out that particular
3 input, and I'd like to give the context that it
4 wasn't that input. It was everything that I did
5 that presumed the legislation in my opinion was
6 referring to the cable rate. And I also pointed
7 out in deposition that the judge had even less
8 favorable things to say about the municipal
9 utility's own expert because he similarly
10 interpreted language in the statute to mean a
11 certain formula.

12 Q He's not here though, right?

13 A No, but I think it's a complete finding, more
14 elucidating to the record to understand the
15 context of the quote that you're providing.

16 Q Now, the number of attachers used for the
17 calculation, particularly with the TVA rate, does
18 affect the pole attachment rate, correct?

19 A Yes.

20 Q Okay. And sometimes you would agree that it can
21 have a substantial impact on the rate; is that
22 correct?

23 A Yes. That's one of the problems of a per capita
24 formula is that a small change in the number of

1 attaching entities, something that a pole
2 attacher has no control over and actually can
3 have perverse effects as you go into rural areas
4 where you might want the lowest rate to promote
5 broadband and affordability. It can have very
6 significant effects on the rate that are divorced
7 from cost rationale.

8 Q Well to take, for example, you remember that you
9 were here this summer on the case for
10 Carteret-Craven EMC, right?

11 A Yes.

12 Q And you understood that Carteret-Craven EMC had
13 only one attacher to any of its poles and that
14 was Time Warner, right?

15 A That is my recollection.

16 Q And wouldn't you agree that if demonstrably and
17 uncontestably (sic), if it's demonstrably and
18 uncontestably true, that there's only one
19 communication attacher to a co-op's poles, then
20 the actual number two should be used rather than
21 the presumptive number of three, right?

22 A Yeah. And in that case that -- again, I have to
23 refresh my memory, but to the extent there was
24 that evidence that would meet the standards of

1 review of actual data or a statistically
2 significant sampling of the relevant population
3 of poles, then the FCC methodology allow -- would
4 allow, and I would endorse the use of those
5 actual numbers in the context of applying actual
6 numbers wherever they existed into the formula,
7 not any sort of selective or manipulative use.

8 Q In fact, in your direct testimony in the
9 proceeding here this summer you stated under oath
10 that, quote, *as with any presumptive value in the*
11 *formula to the extent there is actual or*
12 *statistically significant utility or attacher*
13 *specific data to support the use of alternative*
14 *space presumptions, those can be used in lieu of*
15 *the FCC's established space presumptions to*
16 *Commission oversight. Did you testify to that?*

17 A Yeah and I just testified it to this minute --

18 Q Okay.

19 A -- the very similar language.

20 Q Now, did the court in the Washington case also
21 reject your testimony based on your lack of local
22 information and the fact that you had never
23 visited the utility service area prior to the
24 trial of that case?

1 A Yes, consistent with my explanation a little
2 earlier. Anything that I deferred to national
3 policy or formulas that had been adopted
4 throughout pole attachment regulation, that court
5 out in a county in Washington State did not want
6 to have anything outside that local jurisdiction.
7 As an economist, I really -- the principles I
8 raised in the pole attachment history did not in
9 my opinion require a site visit out as it would
10 perhaps an engineer making certain findings about
11 the pole plant. So it is true I did not make a
12 local visit. I did not feel like that in any way
13 diminished my ability of my testimony, but in the
14 context of that legislation that was the finding.

15 Q Well, and when you say this was some court out in
16 some county somewhere, that was ultimately
17 determined by the Court of Appeals in Washington,
18 right?

19 A Subject to the constraints of that legislation,
20 which was all about municipal and local
21 deference.

22 Q Well, in terms of your local knowledge here, the
23 same is true because you didn't know whether
24 you'd even been to any of the service areas in

1 which Blue Ridge operates, right?

2 A Well, what I indicated, I'd been in North
3 Carolina many times. I wouldn't have known at
4 the time whether I was in Blue Ridge or not.
5 But, once again, what we hear today is not a
6 local deference -- it's not a local deference
7 statute. It's a very different statute that
8 we're operating under today --

9 Q Well, on the subject of local information --

10 A -- in this state.

11 Q -- you testified that you had no knowledge of the
12 overall density of Charter's cable customers in
13 the area served by Blue Ridge; is that true?

14 A Well, I think that's true generally of every
15 witness in this case. I think it came up in the
16 hearing that the information about --
17 specifically the density of the locations where
18 Charter has attachments is not known. I
19 certainly had information on density available to
20 the other witnesses and in the RUS reports for
21 the Blue Ridge territory.

22 Q My question wasn't about any witness other than
23 you. My question to you is you had no knowledge
24 of the overall density of Charter, on whose

1 behalf you're here, their cable customers in the
2 areas served by Blue Ridge, right?

3 A That is correct because it's not available to
4 have.

5 Q And why is that not available? Why can't Charter
6 tell you that?

7 A There are a number of pieces of information that
8 aren't gathered anymore than why can't Blue Ridge
9 say what the average number of attachers is on
10 poles on which Charter is attached. Again, the
11 accounting records and reporting systems weren't
12 necessarily designed for ligation. They're for
13 operations so --

14 Q So it's Blue Ridge's --

15 A -- it's not available.

16 CHAIRMAN FINLEY: Hold on. Hold on.

17 MR. MILLEN: I'm sorry.

18 CHAIRMAN FINLEY: Let's not talk over each
19 other.

20 MR. MILLEN: I'm sorry.

21 THE WITNESS: Thank you.

22 BY MR. MILLEN:

23 Q It's your testimony that it's Blue Ridge's fault
24 that you don't know what the density of Charter's

1 cable customers is?

2 A No, that's not my testimony. I'm just indicating
3 a number of points to be fair that the data that
4 one might like in asking, in evaluating these
5 issues is not available in a practical way.

6 Q You've also done no analysis of the density of
7 electric customers served by Duke Energy in the
8 county served by Blue Ridge. So you don't know
9 what these densities are in any of these local
10 areas, right?

11 A Well, what I can say is I have --

12 CHAIRMAN FINLEY: Ms. Kravtin, why don't
13 you -- he's looking for a yes or no first and then you
14 can elaborate if you --

15 THE WITNESS: Okay.

16 A Well then, as you've posed the question I'd have
17 to answer, no, I disagree with that.

18 BY MR. MILLEN:

19 Q Were you asked the question at your deposition,
20 *Do you know the overall density of electric*
21 *customers served by Duke Energy in counties in*
22 *which both it and Blue Ridge provide electric*
23 *service? And you answered, I have not done such*
24 *an analysis.*

1 A I recall that answer. But what I was gonna
2 explain was that I looked at the information
3 online through census and other materials that
4 provide general ideas of density in these areas.
5 What I do not know, pursuant to that question,
6 was exactly how the territories map, Census
7 provides countywide data so I have general ideas
8 of density. But, again, we don't have the data
9 to specifically superimpose on the county maps
10 exactly where the poles and attachments are
11 located.

12 Q You're familiar with the term "Communications
13 Worker Safety zone", correct?

14 A Yes, I am.

15 Q And understand that that's the 40 inches of
16 separation space between the lowest electric
17 attachment and the beginning of the communication
18 attachments, correct?

19 A I understand that that's the required clearance
20 of space.

21 Q Okay. In that concept of the Communications
22 Worker Safety Zone and that term come from the
23 National Electric Safety Code, correct?

24 A That is correct.

1 Q Now, until a communications attacher actually
2 attaches to a co-ops' pole there is no
3 Communications Worker Safety Zone on the pole; is
4 that correct?

5 A Well there's -- there's no need for those safety
6 clearances. Again I, as an economist, I view
7 this as a requirement for safety clearances, not
8 so much specific physical space. It's a concept
9 of safety and a required clearance.

10 Q But until there's a communications attacher,
11 under the National Electric Safety Code, there's
12 no Communications Worker Safety Zone on that
13 pole, right?

14 A There is no designated clearance that would need
15 to satisfy that standard is my understanding.

16 Q So would you agree with me that the cause of the
17 existence of the Communications Worker Safety
18 Zone in the first instance is the fact that a
19 cable company like Charter makes a decision to
20 attach to a Blue Ridge pole?

21 A Well, I don't see it as a cause. I think we're
22 sort of mixing standards. One is a safety
23 standard that requires where you have
24 communications and electricity, you need to have

1 clearance between the poles. As to a cause, from
2 a strictly economic standpoint, the cause is the
3 electrification of the danger from the wires.
4 So -- and we went through this in previous cases
5 as to chicken and egg. But none of that is
6 relevant from an economic or cost basis because
7 the clearances exist and can exist through make
8 ready; if the space is not there, it's created.

9 Q Ma'am, there's no chicken and egg problem here at
10 all, is there? There's always an electric pole
11 that's there first, right?

12 A No, the chicken and egg is that who is causing
13 the need for safety space. So I would argue and
14 I've testified that it's because people get
15 electrocuted. That's a cause of electricity not
16 of production of the communications, but it
17 requires clearance.

18 Q The people who we're concerned about are
19 communications workers, right?

20 A I think the safety codes are concerned about
21 everybody's safety. Not --

22 Q You don't understand that the Communications
23 Worker Safety Zone is for the communications
24 worker?

1 A I understand that the zone is created wherever
2 you have communications and electricity or -- you
3 need to have clearance between those wires.

4 Q Right. And if they were on the same pole you
5 have to have a Communications Worker Safety Zone
6 because you're going to have a communications
7 worker up that pole by virtue of the attachment,
8 right?

9 A I agree there's a zone of clearance that is
10 required under safety rules.

11 Q Now, it's your testimony that under the FCC rate
12 formula, if I understand what your testimony is,
13 that the fundamental economic principle is cost,
14 cause, or pays, right?

15 A Yes, that is correct. Those are embodied in the
16 FCC rules and in 224.

17 Q Which is the Pole Attachment Act, right?

18 A That is correct.

19 Q Okay. And you contend that cost, cause, or pays
20 is essentially synonymous with the economic
21 principles of cost causation, is it correct -- is
22 that correct?

23 A Yes. They're related concepts, yes.

24 Q And, in fact, in your summary statement to the

1 Commission last month you described the FCC
2 method of cost allocation as the one that quote,
3 *best aligns with widely accepted core economic*
4 *cost principles well-recognized in the economic*
5 *literature.* Isn't that how you put it?

6 A Yes, that is correct, or paraphrased.

7 Q I was actually quoting there. But in any event,
8 in your deposition last month, when I asked you
9 if you could identify a specific published
10 treatise in the economic literature that was
11 established as a reliable authority for the
12 definition of the economic principles of cost
13 causation, you could not do so; is that correct?

14 A I didn't do so because I interpreted your
15 question as asking me for one definitive treaty.
16 And what I believe I testified to in deposition,
17 because you asked me a series of questions
18 getting to that, that in economics there wasn't
19 one definitive treatise. I was building on core
20 concepts developed over hundreds of years in the
21 economic field and that one could go to a
22 textbook - I believe I cited Samuelson because
23 that was the textbook that I had undergrad and
24 then in graduate school - and you could find

1 citations that would be to the core development
2 of those concepts to the economic philosophers of
3 the time. And I also cited to the FCC 2011 Pole
4 Order that also summarized that in history that
5 the 224 and FCC regulations were based on the
6 cost causation principles.

7 Q None of these authorities are cited in your
8 written testimony, are they?

9 A Well, the FCC's 2011 Order is, and I believe I
10 have specific language tying that to what is the
11 definition of a subsidy where the rate covers
12 costs, so I have a reference to the 2011 Order.
13 I did not put for whatever reason the specific
14 cites to the literature. I believe I have them
15 in the Landis and Rutherford cases to Samuelson,
16 which I did identify in the deposition. I had
17 that specific cite in those filings and I did not
18 cite to Samuelson. He'd be mad at me. He just
19 passed away so may he forgive me. But certainly
20 those books are on my shelves and I indicated I
21 could go to any textbook and find cites to those
22 core concepts. These are core concepts
23 underlying the economic social science.

24 Q Well, I asked you a very specific question at

1 your deposition. I said, can you identify for me
2 a specific published treatise in the economic
3 literature that's established as a reliable
4 authority for a definition of, quote, the
5 economic principles of cost causation. And you
6 said, again, as before, I can't sitting here
7 today identify one specific authoritative source,
8 right?

9 A And I explained, I didn't believe there was one
10 specific authoritative source. It's the whole
11 body of economic science. If you'd like me, as
12 I'm on the stand today, to try to name you all
13 the textbooks I can think of that would have
14 those concepts I'm happy to do so. Again,
15 Samuelson is on my shelf so I cited to that. But
16 probably every university who has generally a
17 favorite text they use, usually one of their
18 professors identifies these concepts as the FCC's
19 2011 Order.

20 I didn't have at the time specific
21 paragraph numbers. I can now give you some
22 because that highlighted to me I didn't know
23 those paragraph numbers off the top of my head.
24 But if you look at paragraph, I believe it's

1 180 -- at 184, you will see a cite to that. If
2 you look at paragraphs in the 140 zone, 141 to
3 148, that whole decision, the 2011 Order, which I
4 cited numerous times in my testimony, was all a
5 discussion of cost causation because the FCC was
6 moving to reject the Telecom Formula which is a
7 per capita based formula and make adjustments to
8 it so effectively it was the cable formula. So
9 the whole concept of cost causation is core, key
10 and central to that decision. So there are
11 probably 40 paragraphs that deal with the linkage
12 between cost causation and the core principles of
13 cost, cause or pays in its connection to a
14 marginal cost rate, so look at those paragraphs.
15 Q And you didn't cite any treatise in your written
16 testimony, did you?
17 A No, and I've just explained why I didn't cite a
18 specific treatise and so --
19 Q Nor did the FCC in its 2011 Order cite any
20 treatise on cost causation --
21 A Actually, I disagree with that because in looking
22 back at those paragraphs of the 2011 Order, the
23 FCC does identify I believe a number of
24 textbooks. One of them I believe was Walter

1 Nicholson, and they also cited to Alfred Kahn,
2 Charles Phillips; they cited to Baumol, he's out
3 of Princeton; they also cited to -- oh, now the
4 name escapes me. But actually when I look back
5 at the 2011 Order I did see that that there were
6 a number of cites. I wouldn't say that
7 Nicholson's text was anymore authoritative than
8 Samuelson's or perhaps Mansfield's, or Mankiw,
9 Krugman. I can name professors I've thought of
10 since my deposition that wrote textbooks. It's a
11 way they supplement their income. But the point
12 is the FCC did actually cite what you would
13 perceive to be an authority. You know, economics
14 doesn't think about authorities the way lawyers
15 might, but the FCC did make citations to the
16 economic and also the Public Utility Regulation
17 literature.

18 Q Ma'am, when I asked you the question at your
19 deposition, you said that you were unaware of any
20 peer-reviewed economic or regulatory literature,
21 in other words, any sort of scholarly writing at
22 all on the subject of pole attachments; is that
23 correct?

24 A I answered that that I did not in terms of an

1 academic treatise because academics don't really
2 write articles on pole attachments. It's an
3 applied regulatory area. Most of the academic
4 literature is mathematical theoretical. So I
5 didn't at that time think that anyone could take
6 the applied area of public -- pole attachments -
7 I haven't seen it - and turn it into an academic
8 theoretical mathematical treatise. But certainly
9 I think I mentioned, and I can cite to articles,
10 the FCC cited to articles, on pole attachments.
11 I just wouldn't view them as academic literature.

12 Q By the same token, you're not aware of any
13 peer-reviewed academic literature that addresses
14 the FCC rate at all, 'are you?

15 A Well, again, in the 2011 Order I do believe the
16 FCC had one or two cites to journals. Whether
17 that would -- yeah, I wouldn't have thought to
18 have qualified those perhaps as academic. I
19 myself had cited to reports of Bridger Mitchell.
20 He worked for Rand.

21 (Clarification requested by the
22 Court Reporter.)

23 THE WITNESS: Bridger Mitchell.

24 A I know I cited that in my Landis report. Bridger

1 Mitchell, he was with Stanford but when he wrote
2 on pole attachments or cross subsidy in the
3 regulatory field, that was part of his work at
4 Rand and Charles River. So generally these are
5 applied areas. You're going to find reports
6 coming out of consulting houses and research
7 organizations like Rand and Charles River. I
8 don't know whether that would be considered
9 academic as -- such as what the work he might
10 have done when he was at Stanford.

11 Q Again, ma'am, my question was one, much simpler.
12 *Do you remember being asked this question at your*
13 *deposition just last month: Are you aware of any*
14 *peer-reviewed economic or regulatory literature*
15 *that discusses the FCC rate formula at all? And*
16 *you answered: Again, I'm not aware in the*
17 *academic, if you're referring to academic.*

18 A Correct. I have just explained my understanding
19 of your question. I answered it in the context
20 of academic as opposed to applied regulatory.

21 Q And that's fine --

22 CHAIRMAN FINLEY: Ms. Kravtin -- hold on.
23 Ms. Kravtin, you usually answer his question yes or no
24 about midway through your answer. If you could begin

1 your answer with a yes or no and then explain it I
2 think you two would have a better understanding of
3 each other.

4 THE WITNESS: Okay. I'll do -- I'll do my
5 best. Thank you.

6 CHAIRMAN FINLEY: Okay. Thank you.

7 BY MR. MILLEN:

8 Q Now, one of the primary differences between the
9 FCC methodology and the TVA methodology is the
10 manner in which the Communications Worker Safety
11 Zone is allocated; is that correct?

12 A That is correct.

13 Q So, for example, under the FCC methodology, the
14 direct allocator of 7.41 percent is applied to
15 the totality of the pole including the
16 Communications Worker Safety Zone, correct?

17 A That is correct.

18 Q Okay.

19 A Or the clear -- again, I want to qualify my
20 understanding. The clearance space that is
21 required under the safety regulations concerning
22 that zone.

23 Q 40 inches, right?

24 A Well, I think there's the 3.3 that's associated

1 with that space, yes.

2 Q But the TVA instead isolates that space and
3 divides it on a per capita basis to the
4 communication attachers only, correct?

5 A Again, we're talking about the cost of that
6 space. Yes, the TVA would allocate 100 percent
7 of the costs associated with that space to
8 communication attachers --

9 Q Okay.

10 A -- whether there be, you know, regardless of how
11 many. A hundred percent of those costs would go
12 to the attachers.

13 Q And it's your testimony that the methodology
14 reflected in the FCC formula is more consistent
15 with the underlying principles of cost causation,
16 right?

17 A That is correct because it's in proportion to the
18 use, to the actual physical occupancy.

19 Q But isn't it true that the actual, efficient, and
20 but for cause of the existence of the
21 Communications Worker Safety Zone is the
22 determination by Charter to attach to a pole in
23 the first place.

24 A I disagree with that.

1 Q Now, again, the court in Washington that rejected
2 your testimony also found that the communications
3 attachers used the safety space on the utility's
4 pole and that the safety space was primarily for
5 the benefit of the communications attachers,
6 right?

7 A I understand that was their finding.

8 Q But you're persisting with the position here
9 today that the Washington court rejected when you
10 put it forward in 2013, right?

11 A Well, the position that I'm adopting is a
12 position, as I've explained in my testimony,
13 consistent with the economics, consistent with
14 the practice of make ready where the attacher
15 will pay for those clearance spaces when it
16 doesn't exist, and also, I might say the position
17 that's embodied in the formulas used by the vast
18 majority of states. So you -- we can focus on
19 the one Washington County, but instead, as I've
20 testified, the position I'm taking regarding
21 safety space is one that's widely adopted and
22 held across this country.

23 Q Well, you say Washington County but that's what
24 the Washington Court of Appeals found, right?

1 A Based on a law that affected those local PUDs in
2 that one case in Washington County.

3 Q You're not just suggesting that this was some
4 yokel judge that ruled against you, are you?

5 A Well, with no disrespect to that judge, and I
6 wouldn't use those words, but it was a local
7 judge and who handled all matters of that county
8 including criminals, and it was the one pole case
9 where a man in shackles was brought into the
10 courtroom to contest an issue. So it just was
11 not a court that was an -- that was -- I would
12 say versed in any matters of economic regulation
13 prior to that case.

14 Q And ultimately the full Washington Court of
15 Appeals upheld that judge, right?

16 A Based on a strict local deference interpretation
17 of that law, not really based on the merits of
18 the decision. But in terms of that overriding
19 principle that the local municipal PUD had
20 deference.

21 Q What the Washington court, the appeals court
22 ruled was that you were wrong when you said that
23 the communications safety space was not primarily
24 for the benefit of the communications workers,

1 right?

2 A Well, that was the finding of the local court or
3 the finding or belief of the municipal utility.
4 That same court also found that the municipal
5 utility's own expert was also wrong.

6 Q Remember though he's not here, right?

7 A Well, I understand but I'm giving a context that
8 any discussion of any formula that went outside
9 the language of that law which did not have
10 formula language was deemed inappropriate on
11 both -- for all the witnesses.

12 Q I want to ask you about something else. In your
13 testimony you state that cable operators and
14 other communications attachers have no practical
15 alternative but to attach co-op poles; is that
16 correct?

17 A That is correct.

18 Q And you also call the co-op poles essential
19 facilities for Charter; is that correct?

20 A Yes, that is correct.

21 Q And you even accuse Blue Ridge of being a
22 monopolist, right?

23 A I did not accuse Blue Ridge. What I did in my
24 testimony as an economist was identify that they

1 had monopoly ownership. So it's a structure of
2 the market --

3 Q You said --

4 A -- that is factual structure of the market.

5 Q You said they are a monopolist, right?

6 A Yes. And they are -- they own -- sole owners of
7 an input.

8 Q And you know monopoly is illegal in this state,
9 right?

10 A I can't answer to the legal specification. My
11 testimony went as an economist. There are
12 different types of market structure independent
13 of what's legal or illegal in terms of monopoly,
14 oligopoly, competitive market. My testimony only
15 went to a structure -- identification of the
16 structure. It's well accepted in industrial
17 organization in any economic analysis of markets.
18 You have structure, conduct, performance. Those
19 are factual identifiers. It's not an accusation
20 or a -- it's just a factual observation of the
21 market.

22 Q One of the things though that you refuse to opine
23 about was whether Charter in the context of
24 communication services was also a monopolist. Do

1 you remember refusing to give that opinion?

2 A I don't remember refusing. I certainly answered
3 questions I was posed in deposition to the best
4 of my abilities.

5 Q You thought Charter was not a monopolist, right?

6 A Well, I can't recall the context in which you
7 asked me that question. I believe there was some
8 discussion about must-carry charges. I indicated
9 I had not done an analysis of that issue or
10 market. It wasn't an area I had particular
11 expertise in, if that's the discussion you asked
12 me to opine on.

13 Q That was your testimony was that even though Blue
14 Ridge is a not-for-profit member-owned entity
15 with annual revenues of about \$125 million, and
16 Charter is a public company with a market
17 capitalization of about \$100 billion, right?
18 One's a monopolist, one isn't.

19 A Well, the size and profit status of a company has
20 nothing to do with the structure of their
21 presence in the market.

22 Q Well, let me take you back to the subject of
23 alternatives then. Is it the case that in some
24 circumstances Charter buries its cables rather

1 than attaching them overhead?

2 A Yes, I'm aware that Charter does have facilities
3 in underground.

4 Q And you heard testimony from Mr. Layton last
5 month here of Blue Ridge that one of the
6 telephone companies in the Blue Ridge area,
7 Skyline, buries most of its facilities, right?

8 A I'm certainly aware of that. That doesn't in any
9 way diminish a finding that the aerial facilities
10 are essential facilities once a communication
11 company has attached and built a network around
12 that. That's where the monopoly control comes
13 in.

14 Q Well, you also may remember Mr. Layton testified
15 that Skyline had come off of about 1400 Blue
16 Ridge poles to which it had previously been
17 attached and gone underground. Do you remember
18 that testimony from Mr. Layton?

19 A I don't specifically recommend -- remember that,
20 but certainly companies have different business
21 models and strategies and if that's what he
22 testified to I wouldn't --

23 Q You also heard testimony --

24 A -- change my opinion.

1 Q -- from Mr. Martin of Charter itself last month
2 that 58 percent of Charter's facilities are
3 buried in North Carolina. Do you remember that
4 testimony?

5 A I don't remember specifically. I know there was
6 a discussion of that. Again, the issue
7 regarding their designation of essential
8 facilities is where, again, Charter's
9 communication company has built a network and has
10 presence on so many of the aerial poles and
11 that's where Blue Ridge has monopoly power and
12 leverage.

13 Q You heard Mr. Martin's testimony just last month
14 here in this room. Question: *What percentage of*
15 *Charter's facilities are buried versus overhead*
16 *in North Carolina?* He said, *approximately the*
17 *system average is 58 percent underground.* Do you
18 remember that testimony?

19 A Well, if that's the testimony that he gave. I
20 believe it was a smaller percentage in Blue
21 Ridge.

22 Q Do you know what the percentage was in Blue
23 Ridge?

24 A No, I don't recall.

1 Q And similar you don't know what percentage of
2 Charter's facilities that are buried versus
3 aerial in the county served by Blue Ridge either,
4 right?

5 A No.

6 Q Okay.

7 A But I do know the cost and it was -- also he
8 testified to that -- the cost of going
9 underground and what it would cost if they had to
10 relocate and displace all their existing aerial
11 attachments and move them over to underground if
12 they couldn't get a just and reasonable price
13 here, and I think it was somewhere north of fifty
14 million, fifty, sixty million based on forty-five
15 thousand, I believe, cost per mile to go
16 underground. So I remember that discussion.

17 Q Mr. Martin gave no testimony to that effect here,
18 did he?

19 A That must have been Mr. Mullin's then. Excuse
20 me, I misspoke.

21 Q No Charter witness gave any testimony to that
22 effect here, did they?

23 A No, that's not my recollection cause those --
24 those figures are in the record.

1 Q You yourself have done no empirical economic
2 analysis, any study at all, of the cost of
3 Charter attaching to poles versus burying its
4 facilities in the Blue Ridge service area, have
5 you?

6 A I've not -- I've not done that study but, again,
7 those numbers are in the record here. I've seen
8 that number, forty-five thousand. I also know
9 from other cases that I've been in that I've seen
10 numbers in the fifty to seventy thousand per mile
11 for going underground. And again, the thing
12 about pole technology and conduit technology,
13 it's pretty homogeneous so the ranges of cost are
14 going to be largely comparable, obviously subject
15 to changes for local topography and other labor
16 conditions.

17 Q I want to be clear, ma'am, none of that's in your
18 direct testimony, is it, what you saw in other
19 cases, cost or anything else?

20 A Well, it's in -- but it's in my expertise. It's
21 in my experience. It underlies in your asking me
22 about why I deem this an essential facility. So
23 it goes to the basis of the opinions that I did
24 express.

1 Q Let's be clear, it's not in your written
2 testimony, correct? You don't say anything about
3 that in your written testimony, correct?

4 A Well, I didn't -- I didn't put that information
5 in my testimony but I didn't put everything in my
6 brain and expertise in my testimony. My lawyers
7 would not have liked the length of that
8 testimony. But it underlies my conclusions that
9 are in my testimony about why poles -- pole
10 attachments are essential facilities.

11 Q And you didn't put anything about Charter's
12 alleged costs into your testimony, did you?

13 A No, but I do address aerial versus underground
14 and that to be an essential facility it doesn't
15 have to be a complete inability to provide
16 service in other manners. That doesn't affect
17 the ability to compete and provide service in a
18 fair and reasonable manner.

19 Q You did no empirical study on this issue of
20 essential facility, did you?

21 A Again, do you want to clarify what you mean by
22 study of essential facility because that is
23 something in my testimony.

24 Q I mean a calculation, a number, data; none of

1 that's in your testimony.

2 A The data is not in my testimony, but it's based
3 on knowledge I have of the relative costs of
4 underground and aerial, and also of the implied
5 costs and impact and disadvantages of having to
6 relocate a company's entire network, and what the
7 disruption that would be on its ability to offer
8 service.

9 Q Well --

10 A And I've -- and that would set the standard of
11 meeting for essential facility and a barrier to
12 entry created by an excessive rate.

13 Q Well, you would agree with me that for 58 percent
14 of Charter's North Carolina facilities poles are
15 not essential facilities, right?

16 A It doesn't work that way. You don't say because
17 there are other production options that another
18 production option isn't essential because it
19 really will depend on the disruption and relative
20 disadvantage of facing a monopoly price.

21 Q My question is really much simpler. For the
22 58 percent that they chose to bury, the poles are
23 not essential, right?

24 A Well, I mean, by definition if they're not on

1 poles but it doesn't -- for those particular
2 customers, but it doesn't mean the pole input is
3 not essential in terms of their operation and
4 ability to offer service. That's under Section
5 253 of the Telecom Act, goes into question how
6 does it affects a competitor's ability to compete
7 in a fair and neutral manner relative to other
8 competitors.

9 Q Which has no application in this proceeding,
10 right?

11 A I disagree. I think it's extremely on point.

12 Q You think the Telecom Act applies in here?

13 A No, but what I'm -- the concept of essential
14 facilities, which is essentially akin to barriers
15 to entry. So I'm saying the same concepts are
16 found in terms of the standard you apply to
17 determining whether its an essential facility is
18 very akin to the standards you apply in
19 determining whether something's a barrier to
20 entry. It doesn't have to be complete but it has
21 to affect that competitor's ability to compete in
22 a fair and balanced way without a disadvantage
23 relative to other competitors and its control by
24 another monopoly owner of those facilities.

1 Q Now, your basic testimony, as I understand it, is
2 that an appropriate just and reasonable rate in
3 North Carolina should be calculated using the FCC
4 rate methodology as implemented by the FCC
5 pursuant to Section 224(d) of the Communications
6 Act of 1934; is that correct?

7 A That is my testimony, yes.

8 Q Okay. You're also familiar with the fact that
9 the applicable statute here G.S. Section 62-350
10 was amended in 2015, right?

11 A Yes, I acknowledged that in my testimony.

12 Q And the General Assembly in that amendment to the
13 North Carolina Statute at issue here deleted an
14 express reference to the federal pole attachment
15 rate methodology. Is that your understanding?

16 A As I stated in my testimony, it's my
17 understanding that that specific reference was
18 deleted but another reference was put in that
19 allowed the Commission to look at previous
20 methodologies presented in the other cases.

21 Q But, in other words, the General Assembly
22 eliminated an express reference to the FCC rate
23 that you contend for, correct?

24 A It eliminated a specific reference but it then

1 put in a reference to the methodologies that were
2 presented by other parties in other cases which
3 included the FCC methodology.

4 Q You say that's in the statute?

5 A In the amended language it refers to other
6 methodologies previously supported.

7 Q It just refers generically to other
8 methodologies, right?

9 A Well, I don't think it was that generic because
10 it was -- the amendment came after the specific
11 cases in which the FCC cable methodology was, in
12 fact, considered and ultimately adopted by the
13 business court.

14 Q Now, in your direct testimony at page 3, note 2,
15 you indicate an understanding that you purport to
16 have of why the General Assembly deleted that
17 express reference; is that correct?

18 A I'm sorry. Could you repeat the question?

19 Q Yeah. On page 3 in note 2 of your direct
20 testimony, you purport to indicate your
21 understanding of why the General Assembly deleted
22 that express reference; is that correct?

23 A That is not my recollection of what I did in the
24 footnote. I think we had a discussion in my

1 deposition about that. But perhaps you'll want
2 to read the language in the footnote and that
3 will refresh my memory as to -- I just thought
4 I'd identified my awareness of that, that
5 amendment.

6 Q Well, you state in the -- in your --

7 CHAIRMAN FINLEY: Why don't you show her,
8 Mr. Millen, so we can --

9 MR. MILLEN: Okay. Sure.

10 THE WITNESS: Thank you.

11 BY MR. MILLEN:

12 Q Do you have a copy of your testimony?

13 A I do not.

14 Q And in footnote 2 there do you refer to your
15 understanding?

16 (Mr. Millen points to the
17 document.)

18 A Yes. *My understanding that Section 62-350 as*
19 *amended, "deleted an express reference to the*
20 *federal pole attachment methodology". However,*
21 *it's my further understanding it states the*
22 *Commission may consider any evidence presented by*
23 *a party, including any methodologies previously*
24 *applied". So I think that's exactly what I just*

1 testified to here today.

2 Q And on page 50 of your testimony, if you'd turn
3 to lines 6 and 7 on page 50, do you also express
4 your opinion regarding what you contend is quote,
5 *the ultimate purpose of effective pole regulation*
6 *embodies in Section 62-350?*

7 A I testified to *rates set any higher than the*
8 *maximum just and reasonable rates calculated*
9 *based on the widely accepted FCC rate in my*
10 *opinion would fail to serve the ultimate purposes*
11 *of effective pole rate regulation embodied in*
12 *Section 62-350.*

13 Q In other words, what you were saying there is you
14 understand what it was that the FCC or that the
15 General Assembly was purporting to do in --
16 embodied in Section 62-350, correct?

17 A Well, that -- that's not my testimony. What I
18 said is I, in my opinion, that the FCC rate or
19 rate higher than that would not serve the
20 ultimate purposes of effective pole rate
21 regulation. And my understanding of effective
22 pole rate regulation would be to adopt a rate
23 that is just, reasonable, and in the public
24 interest. So based on my knowledge of what those

1 phrases mean or in my opinion should mean then
2 that's a rate closer to the FCC cable rate.

3 Q Was it that sort of testimony, ma'am, purporting
4 to read the mind of legislators and regulators,
5 that got portions of your testimony stricken by a
6 federal judge in New York because it read more
7 like a legal brief than an expert opinion?

8 A No. I would disagree with that question. I'm
9 not trying to read the minds. I'm referring to
10 specific language and meaning over the past 40
11 years of what just, reasonable, and in the public
12 interest mean.

13 That particular case you're
14 referring to in Colony where I was qualified as
15 an expert in my testimony on structure, conduct
16 and performance, and other aspects of industrial
17 organization were accepted was that it was
18 referring to sections where I put in references
19 to pertinent FCC Orders that the court ruled were
20 more brief like, but I was requested to put those
21 cites in my testimony, but the judge felt that he
22 only wanted to rely on my strict economic
23 testimony and not those cites to the FCC Order
24 that has nothing to do with the cite we just

1 read.

2 Q The judge struck your testimony, is it not the
3 case, because your review of FCC rulings and
4 regulations impermissibly usurp the role of the
5 trial judge in determining the relevant law,
6 right?

7 A That is not correct. He struck just those pages
8 of my report that dealt with or listed FCC
9 decisions. The court did not strike my report
10 dealing with the fundamental economics.

11 Q That wasn't my question. My question was they
12 struck the portion of your report that read more
13 like a legal brief than an expert opinion and it
14 was the portion concerning your review of FCC
15 rulings and regulations, correct?

16 A Yes. But it had nothing to do with
17 interpretations. It was just citations to FCC
18 Orders.

19 Q In any event, the 2015 Amendment to the North
20 Carolina Statute specifically eliminated the
21 language from the statute that the decision maker
22 should take into consideration *quote, the rules*
23 *and regulations applicable to attachments by each*
24 *type of communications service provider under*

1 *Section 224 of the Communications Act of 1934.*

2 Is that your understanding?

3 A Well, you've now asked me that multiple times,
4 and it's in my testimony, so I am aware of that
5 amendment.

6 Q So, notwithstanding the elimination of that
7 language in 2015, you contend that this
8 Commission should find a just and reasonable rate
9 under the North Carolina Statute to be the
10 equivalent of the FCC rate methodology which was
11 written out of the statute, is that it?

12 A There are a lot of parts to that question. My
13 testimony is that this Commission should find the
14 FCC cable rate such as its peers across the
15 country have done in-over-welling majority to
16 produce a rate that is just, reasonable, and in
17 the public interest. The statute while it, as I
18 indicated, eliminated the express reference but
19 it then put in a general reference that referred
20 specifically to methodologies prior, prior
21 presented in prior cases which included the FCC
22 cable, which it was well aware because the
23 business court adopted the FCC cable.

24 Q It eliminated the specific reference, right?

1 A But it put in a specific reference to prior
2 methodologies, including those in the business
3 court cases where the business court found in
4 favor of the FCC cable.

5 Q There's no reference to the business court in the
6 statute as it's currently drafted, is there?

7 A No, but it's to methodologies previously
8 presented.

9 Q Now, this was another reason that your testimony
10 was rejected by the Washington Court of Appeals,
11 because you adopted essentially the same flawed
12 approach of saying that this Washington Statute
13 that doesn't refer to the FCC rate actually means
14 for the FCC rate to apply, right?

15 A No. It's a very different situation. The
16 Washington Statute was written to present a
17 formula. It gave specific directions even though
18 unfortunately it wasn't written as a formula but
19 it used English words that the court decided was
20 a formula. That's very different than my
21 understanding of the legislation here, which is
22 directing this Commission as it did originally
23 the business court to make findings on just,
24 reasonable, and a rate in the public interest.

1 Looking at -- looking at formulas and
2 methodologies, then Washington in that court case
3 in that county, no one was supposed to look at
4 other methodologies. All they were directing the
5 parties to do was to read language in a statute
6 and not make any references to formulas at all,
7 just come up with some math that was those words.
8 Unfortunately, the words weren't clear and so
9 there was a disconnect, but that is very
10 different than the situation here in my opinion.

11 Q What the Washington court did was actually give a
12 name to your approach which was switch and bait;
13 is that right?

14 A It used those words because what it said I
15 switched and bait from was the language, tortured
16 language in the legislation, and I interpreted
17 that to mean the FCC cable formula, because it
18 was the same words with one comma moved. And I
19 felt that was a very appropriate interpretation
20 of words that I found in Section 224 Section (d)
21 with the exception of a comma. That was the
22 language it used. Again, it used more colorful
23 negative language against the other expert, but
24 yes that is how it's described. And I'm giving

1 you the context because I interpreted language to
2 be the FCC cable.

3 Q Ma'am, the court rejected your approach, called
4 it switch and bait and said that there was no
5 equivalence between the Washington Statute and
6 the FCC rate you were advocating for, right?

7 A That is right.

8 Q Thank you. Now, another reason you give for
9 adoption of the FCC rate is that you say it's
10 used, quote, *will serve to bring pole rates*
11 *across the state into harmony thereby minimizing*
12 *market distortions and non-cost based rate*
13 *incongruities for access to utility poles.* Is
14 that your testimony?

15 A Yes, I believe so.

16 Q But at the same time you know, I think, that by
17 federal law the TVA rate will apply to at least
18 four co-ops operating in North Carolina, correct?

19 A I believe you mentioned that number in my
20 deposition. I know it's a very small number.
21 And what I answered in the deposition questioning
22 was that the FCC cable rate applies in North
23 Carolina to the IOUs and ILECs which cover many
24 more pole attachments than those few TVA

1 companies.

2 Q So the only way this Commission could create
3 harmony among co-ops is by adopting the TVA rate,
4 right?

5 A Well that -- my testimony went to harmony across
6 the state and across customers, and minimizing
7 distortions and situations where you had rates
8 out of sync. I don't see a difference in terms
9 of the issue of whether it's a co-op or an IOU or
10 an ILEC. The issue of the essential facility and
11 what the problem we're addressing, monopoly
12 ownership of pole attachments, does not vary by
13 ownership, that's found by the FCC, that's found
14 by NASUCA, and that's found by NARUC.

15 Q I'll get to that in a moment. Under the FCC
16 rate, if there are two attachers on a pole, here
17 Blue Ridge and Charter, the space allocation
18 factor to Charter is 7.41 percent, right?

19 A Well, under the FCC cable the allocation to
20 Charter is 7.41 percent based on its occupancy
21 regardless of number of attachers. That's why
22 it's a proportionate based formula. It does not
23 vary by number of attachers.

24 Q So my -- the answer to my question is yes. If

1 there are two attachers, Blue Ridge and Charter,
2 Charter's allocated 7.41 percent, correct?

3 A That is correct, as it would be for any number of
4 attachers on the pole.

5 Q And in your direct testimony you referred to that
6 space allocation factor as quote, *the defining*
7 *feature of the FCC rate methodology*; is that
8 correct?

9 A Well, in con- -- in context of the difference
10 with the TVA or other -- the per capita formulas
11 that this Commission's reviewing because I think
12 Mr. Arnett testified and I also that the other
13 costs, the net bare pole costs and the carrying
14 charges under the TVA largely mirror the FCC
15 cable, so the big defining difference is in the
16 space allocation factor.

17 Q Please turn to page 28 of your testimony that you
18 have there and let's see if we can answer this
19 question directly. You say there in response to
20 a question, 13, *the defining feature of the FCC*
21 *rate methodology is its third component, i.e.,*
22 *the space allocation factor.*

23 A Yes.

24 Q Okay. Would you agree that that's the defining

1 feature of the FCC rate methodology?

2 A Well, I agree that those are the words in my
3 question. I'm just telling you what I meant by
4 the defining feature in the context of the
5 formulas that have been presented in this case.

6 Q You answer that --

7 A There may be other possible formulas for which
8 may be totally different from the FCC, but in the
9 context of this industry formula in the TVA the
10 other two components basically mirror the FCC.

11 Q Ma'am, my question went only to the FCC rate
12 methodology which you answered yes to the
13 question that the space allocation factor was the
14 defining feature, correct?

15 A That's my testimony.

16 Q Okay. Under the TVA rate, if the three attacher
17 presumption is used, the allocation factor for
18 the cable company is 28.44 percent; is that
19 correct?

20 A Yes.

21 Q So that's still less than a third, right?

22 A You're asking me if 28.44 percent is less than 33
23 percent?

24 Q If it's less than a third, yeah.

1 A Yes. Well, I do know a third of what, but yes.

2 Q A third of the allocation.

3 A Okay.

4 Q And you understand here that Mr. Arnett is using
5 the actual attacher number of 2.35 and he
6 calculates a factor of 41.16 percent; is that
7 right?

8 A Yes, among other changes in presumptions that he
9 also applies.

10 Q But still well less than half, right?

11 A Well, 41.44 is less than half.

12 Q Okay. Now, because the space allocation factors
13 are by definition allocating space, those
14 percentages can be translated into specific
15 amounts of space on the pole, correct?

16 A I would disagree. The use of the space
17 allocation factor in the context of these
18 formulas is to determine a cost allocation. It's
19 not meant to say, you know, we're allocating the
20 cost of this space. It's a factor to use as a
21 cost allocation mechanism to allocate costs,
22 common costs, that cannot by definition be
23 allocated directly.

24 Q It's call the space allocation factor, right?

- 1 A Correct.
- 2 Q It has to do with space, right?
- 3 A Well, it's based on space but what I'm explaining
4 is that we're in the context of a cost allocation
5 problem, not an engineering space assignment.
6 These are concepts used in cost allocation
7 methodologies.
- 8 Q What amount of the standard used thirty-seven and
9 a half foot pole is reflected by an allocation of
10 7.41 percent?
- 11 A 7.41 percent. That's the point. It's a cost
12 allocation factor that determines that an
13 appropriate economic cost-causative percentage of
14 the total cost of the pole, or 7.41 percent.
- 15 Q Is it less than three feet of what you refer to
16 as the quote, *totality of the pole*.
- 17 A I don't translate it that way. We're not talking
18 about feet. The only -- the only space we can
19 talk about from an economic standpoint is the one
20 foot of space that is directly occupied. The one
21 foot of space for which other attachments are
22 excluded. That --
- 23 Q So are you --
- 24 A -- that percentage is used then as a mechanism,

1 as a cost allocation mechanism to allocate common
2 costs that by definition cannot be allocated.
3 It's a very common cost allocation methodology
4 both in regulatory and also in the market, like
5 allocating square footage of an apartment
6 building or a store front. It's not to say
7 space. It's to say how do we apply what we know
8 about direct space use to come up with a way to
9 allocate common costs that cannot be directly
10 allocated.

11 Q Well, you call it the space allocation factor.
12 You don't call it the cost allocation factor
13 based on etherial philosophical concepts of
14 space, right?

15 A Well, I don't call it anything. It's embodied in
16 the formula by the FCC as a space allocation
17 factor. Sometimes it's called the cost
18 allocation factor, but it's a factor to allocate
19 cost. It's not meant to translate into occupancy
20 of space other than the direct space. We cannot
21 talk about space other than directly occupied
22 space. The factor is simply used as a mechanism
23 to allocate common costs that cannot be directly
24 attributed.

1 Q So, as I understand it then, you will not give me
2 an answer to the question of the amount of space
3 on a standard use thirty-seven and a half foot
4 pole reflected by 7.41 percent?

5 A Well --

6 Q If you don't want to that's fine but --

7 A It's not that I don't want to, it's your question
8 doesn't make sense in a cost allocation
9 environment. We can do the math but it's not a
10 cost allocation question.

11 Q Okay. Similarly --

12 CHAIRMAN FINLEY: Do the math, Ms. Kravtin,
13 so we can move on, please.

14 A So 7.41 percent times thirty-seven and a half,
15 that's the math you'd like me to perform and
16 that's 2.78.

17 Q Feet, right?

18 A Yes.

19 Q Okay. Similarly, what amount of the 40-inch
20 Communications Worker Safety Zone is reflected by
21 7.41 percent?

22 A Again, we're doing math, 40 times 7.41 percent is
23 2.96.

24 Q Inches, right?

1 A Inches --

2 Q One of the reasons you say that such a tiny
3 portion of the Communications Worker Safety Zone
4 should be allocated to Charter is because Blue
5 Ridge can put streetlights in the Communications
6 Worker Safety Zone, right?

7 A Well, I don't think I testified that a portion of
8 that space. I talk about the costs associated
9 with the space. Because again the space on the
10 pole, the clearance space, the 40 inches of
11 space, is gonna exist on the pole because if it
12 doesn't presently exist Charter is going to be
13 required to pay to make it exist. So the space
14 is gonna exist on every pole that Charter or
15 another communication attacher is attached to.
16 The question is how to allocate the cost of it.

17 Q You talk in your report about the fact that Blue
18 Ridge could put streetlights in the
19 Communications Worker Safety Zone, correct?

20 A Yes and that's been testified to by Blue Ridge
21 also.

22 Q The fact is you have no idea what proportion of
23 Blue Ridge's streetlights are in the
24 Communications Worker Safety Zone, do you?

1 A No nor does it matter. From an economic
2 standpoint they are the only entity that can
3 place attachments in that space. It doesn't
4 matter how many they choose to that's up to --
5 that's up to them whether they place fiber or
6 streetlights. That's their decision.

7 Q I understand you say it doesn't matter but my
8 question was simpler. You don't know what
9 percentage it is, right?

10 A No nor do I need to know.

11 Q Okay. You made no --

12 A I need to know --

13 Q Okay.

14 A I need to know that they are able to make
15 attachments and that's been testified to by their
16 own engineers.

17 Q You made no effort to make that determination,
18 did you?

19 A No, because it wasn't necessary.

20 Q And you heard Mr. Layton's testimony here that
21 it's rare for Blue Ridge to place a streetlight
22 in that space; is that right?

23 A That was his testimony. But again the fact
24 they -- they can do it doesn't matter whether

1 it's rare -- they do it rarely or they do it on
2 more occasion. That doesn't get to the issue of
3 the cost allocation.

4 Q In any event, you have no basis to contend that
5 Mr. Layton was wrong about that, do you?

6 A No, I do not.

7 Q Okay. What portion of the six of the pole that
8 is buried to give it stability is reflected by
9 the 7.41 percent space allocation?

10 A Okay. Again, you're asking me to do math that I
11 think is unrelated to cost allocation, but 7.41
12 times 6, .44.

13 Q Inches right?

14 A Yes. Oh, no, that's feet. I'm sorry.

15 Q Feet.

16 A No, that was in feet.

17 Q .44?

18 A Yes, of 6.

19 Q Okay. So that's about six inches, a little less
20 than six inches, right, assuming a 12-inch foot?

21 A Yes. But again, the important thing from a cost
22 allocation standpoint is the same percentage --

23 CHAIRMAN FINLEY: I believe we all agree
24 that 12 inches is a foot. I think we can all agree on

1 that.

2 A Yeah. Yeah. But the issue is the same
3 percentage of the usable space occupied is used
4 to allocate the common as is done throughout the
5 economy, and rental apartments, office units,
6 malls. That same concept where we have a cost we
7 can't allocate directly, what's the right
8 percentage, and very common that it's
9 allocated -- those common costs are allocated in
10 the same percentage as the direct space. It's
11 not like we're saying one company needs one foot
12 of an elevator or two stairs of an escalator, you
13 get an allocation of these common costs and it's
14 proportionate or commensurate with your direct
15 space.

16 Q Well, we'll get to that. But as I understand
17 your testimony, you have done no empirical study
18 that shows that the FCC rate would be subsidy
19 free if applied in this case, have you?

20 A The study I've done is a study of findings, and
21 I've cited I believe to well the FCC 2011 Order,
22 findings that there is no subsidy where the rate
23 is in excess of marginal costs and the attachers
24 are required to pay make ready wherever they

1 cause a but for cost. In that situation there
2 can be no subsidy.

3 Q Do you remember being asked this question at your
4 deposition, quote, *my question is whether you've*
5 *undertaken any empirical study that shows that*
6 *the FCC rate would be subsidy free in your case.*
7 And you answered, quote, *not in the scope of my*
8 *testimony.*

9 A Yeah in terms of an empirical study --

10 Q Okay.

11 A -- I have I believe abundant qualitative analysis
12 and references to core economic principles that
13 establish that; that a rate as found by the
14 Supreme Court and the 11th Circuit Court, if the
15 rate exceeds marginal costs, which is a lower
16 bound of a subsidy, and on top of that they pay
17 make ready for all the but for capital costs on a
18 non-recurring basis, by definition it cannot be a
19 subsidy in an economic term, in an economic
20 sense.

21 Q I want to ask you this, is one of the assertions
22 of the TVA with which you disagree that pole
23 owners take the interests of attaching entities
24 into account in making their capital investment

1 decisions? Do you --

2 A That was language in the TVA memorandum which I
3 disagree with.

4 Q Okay.

5 A Because it's inconsistent with the way things
6 operate in practical reality and also with the
7 concept of make ready. So that was one of the
8 conditions I said the TVA had certain
9 presumptions that were incorrect.

10 Q And, in fact, you referred to that as a patently
11 false premise on the part of the TVA, correct?

12 A Yes, it is a false premise.

13 Q And you contend that this is, quote, *a common*
14 *anecdotal argument of pole owning utilities*, but
15 the evidence that you are aware of does not
16 support that claim, right?

17 A That's correct. It's been raised in many
18 proceedings.

19 Q But you were here last month when Mr. Layton
20 testified that Blue Ridge's agreements with its
21 joint users required it to set poles to which
22 communications attachments could be made. Do you
23 remember that testimony?

24 A Well, by joint users I believe he was referring

1 to the other joint -- the joint owners under the
2 telephone companies --

3 Q Right.

4 A -- that are joint owners. That's different than
5 a company like Charter that is a lessee that
6 doesn't have those joint ownership --

7 Q Well, that's evidence that Blue Ridge in fact and
8 by contract in the real world does take into
9 account the interests of attaching entities in
10 making capital investment decisions, right?

11 A Well, it may have in conjunction with those
12 telephone joint owner contracts at the time, but
13 not in response to the third party attachers.
14 Because for the third party attachers, unlike the
15 telephone companies they pay make -- they pay
16 make ready for any additional space that is
17 required that isn't surplus space. So all
18 Charter is allowed really to occupy is surplus
19 space. Where it's not surplus they're subject to
20 make-ready fees and other cost reimbursements.

21 Q Well, the teleco's to whom Blue Ridge obligated
22 itself in these contracts, they're attaching
23 entities, right?

24 A Not in the sense that Charter is. Different

1 rights, authorities, different payments; it's
2 very different. They're under parity ownership
3 agreements. It's not analogous to what the third
4 party attachers are subject to.

5 Q But the height of the pole is the issue, right?

6 A Well, the issue as regards the pole attachment
7 fee for third party attachers is what we're here
8 discussing, not the parity agreements with the
9 telephone companies. That's a different --
10 that's under a different set of contracts and
11 rules and that's not applicable to this
12 discussion.

13 Q Blue Ridge agreed by contract to set poles of a
14 particular height so that communications
15 attachers could attach, correct?

16 A Not as --

17 Q It didn't happen to be a contract with your
18 client but they did that by contract, right?

19 A Well, I just explained the situation with the
20 joint owners is very different subject to
21 different review standards and not the subject of
22 this proceeding which is dealing with what is the
23 correct third party attacher rate. We're not
24 talking before parity agreements with potential

1 joint owners.

2 Q Well, in the case of Blue Ridge what you contend
3 was a patently false premise of the TVA is
4 actually true, right?

5 A No, it's not true with regard to the rate that
6 the TVA is applying to which is --

7 Q The issue is not the rate. The issue is that --

8 MR. GEORGE: Objection. She wasn't done
9 with her answer.

10 CHAIRMAN FINLEY: I'll tell you what,
11 let's -- we're going to take -- objection sustained.
12 We're going to take a -- don't interrupt the witness.
13 We're going to take a 15-minute recess and come back
14 at 3:15.

15 (Recess at 2:59 p.m., until 3:15 p.m.)

16 CHAIRMAN FINLEY: I believe everybody is
17 back. Mr. Millen, go right ahead.

18 BY MR. MILLEN:

19 Q Ms. Kravtin, is it the case that you also state
20 in your written testimony that the FCC rate has
21 been endorsed by key national organizations
22 representing public utility commissioners
23 including NARUC?

24 A Yes, that is correct.

1 Q And NARUC is the National Association of
2 Regulatory Utility Commissioners; is that
3 correct?

4 A Yes.

5 Q And in your written testimony, in support of your
6 statement about the NARUC endorsement, you cite
7 to a 2001 Ad Hoc Committee Report on Pole
8 Attachments which you attach to your testimony as
9 Exhibit 11; is that correct?

10 A Let me just check the number. I know it was
11 attached, but yes that report is Exhibit 11.

12 Q Okay. But --

13 A As well as the Resolution. I also attached the
14 Resolution.

15 Q I want to ask you first about the report. That
16 2001 ad hoc report that you claim is an
17 endorsement by NARUC, in fact, does not reflect
18 the view, opinion, or policies of NARUC; isn't
19 that correct?

20 A Well, that is standard language for the NARUC
21 reports, yes. But I do believe it does reflect
22 the general consensus of the member agencies.

23 Q Okay. So it's your testimony that a report that
24 states that it was prepared by an ad hoc

1 committee and that the views and opinions
2 expressed herein do not state or reflect the
3 view, opinions, or policies of NARUC or any NARUC
4 member, commissions is, in fact, an endorsement
5 of the FCC rate methodology?

6 A Well, what I testified to is the report itself.
7 When you review the report itself, it reflects an
8 endorsement. I agree that's standard disclaimer
9 language because NARUC as an organization I think
10 does not want to as a matter of policy speak for
11 any one commission or commissioners. It's a body
12 of a collective so within the -- its purview, but
13 the report I cite.

14 Q What it says is it's not speaking for the group
15 as a whole or for any of its members, right?

16 A Well, that is the disclaimer language of the
17 report so I've just explained why that is to be.

18 Q So don't you think a disclaimer like that limits
19 your ability to call it an endorsement in the
20 context of your sworn testimony?

21 A No, not in the context of the Resolution I
22 attached and also other comments of NARUC over
23 the past 40 years in proceedings.

24 Q There's no other comments of NARUC and I'm not

1 asking about the Resolution, I'm asking you about
2 this report, 11, Exhibit 11 that you attached
3 that contains that disclaimer. Doesn't that
4 disclaimer mean that you oughtn't to represent it
5 as being an endorsement of NARUC?

6 A Well, I disagree with that for the reason I just
7 stated.

8 Q Let me ask you about the resolution that you
9 attached. That's Exhibit 12, right?

10 A Yes.

11 Q And that's a 2008 Resolution. It's about a page
12 and a half long; is that right?

13 A Yes.

14 Q And the Resolution itself, the one that comes
15 under the resolved paragraph, that's on page 2 of
16 Exhibit 12; is that right?

17 A Yes.

18 Q And there's nothing in that statement -- in that
19 Resolution but a statement directing NARUC staff
20 to prepare a report on best practices to advance
21 policies to facilitate deployment of advanced
22 communication services, right?

23 A That's in the resolved language.

24 Q Okay. There's nothing in there about the FCC or

1 an endorsement of the FCC rate methodology, is
2 there?

3 A The resolution has multiple references to the FCC
4 in the whereas clauses.

5 Q Well before we get to the whereas clauses, the
6 Resolution clause, what they resolve to do, has
7 nothing to do with the FCC rate methodology, does
8 it?

9 A The paragraph under resolved does not mention the
10 FCC.

11 Q And, in fact, there's not one word in this 2008
12 NARUC Resolution that endorses or even mentions
13 the FCC rate methodology, is there?

14 A I disagree, in a number of the whereas clauses
15 NARUC is referencing the FCC policy.

16 Q I understand they represent the FCC but they're
17 not saying anything about the FCC rate
18 methodology in this one and a half page
19 Resolution, are they?

20 A In my opinion they are by the language they've
21 used in terms of referencing FCC's policy to
22 facilitate the deployment of advanced services by
23 removing barriers and promoting technology
24 neutral solutions. When you go to the FCC's 2011

1 Order, for example, that language is directly
2 used by the FCC to support its endorsement of the
3 cable rate and its rejection of the telecom rate.

4 Q So it's your --

5 A So in the context -- if I may finish -- so in the
6 context of the regulatory history and the
7 language that this is referring to, I stand by my
8 opinion that it's an endorsement.

9 Q And I just want to make sure I understand because
10 if I heard you right what you were saying is that
11 in this 2008 Resolution NARUC was referring to a
12 2011 FCC Order.

13 A That is not what I testified to. I said --

14 Q Where is the FCC --

15 MR. GEORGE: Objection.

16 CHAIRMAN FINLEY: Let her finish,
17 Mr. Millen, please.

18 A What I'm saying is the terms, the language that
19 this Resolution refers to specifically has
20 meaning and stands behind the FCC's rate
21 methodology. I was just citing to the 2011
22 Order, I understand came after it because it's --
23 it can directly reference this language and why
24 this language was chosen as directive to its

1 member agencies because it's directing the member
2 agencies to consider policies that facilitate
3 advanced services by removing barriers, promoting
4 technology neutral solutions. The telecom
5 formula was recognized as not being technology
6 neutral. The cable formula has been recognized
7 as being technology neutral. So it's in the
8 context of the body of regulatory literature --

9 Q Where --

10 A -- that I stand by my opinion.

11 Q Where in this exhibit that you claim is an
12 endorsement of the FCC rate methodology is there
13 one word about the FCC rate methodology as
14 opposed to some ethereal concept that you say
15 relates to it in a 2011 Order?

16 A Well, I don't think it's ethereal. I think this
17 language of referencing the FCC was directed to
18 take action to accelerate deployment of
19 capability by removing barriers to infrastructure
20 investment, by promoting competition in the
21 telecommunications market. It's not ethereal.
22 That's language that literally populates the FCC
23 decisions and orders underwriting, underlying its
24 continued endorsement not only by the FCC but

1 states across the nation of the FCC cable
2 formula. That is language that is relied on to
3 support the FCC cable methodology.

4 Q You would agree with me that the words "rate",
5 "methodology", "cost", "price", "attachments" are
6 not mentioned anywhere in this Resolution, are
7 they?

8 A Well, attachments are mentioned. Once again,
9 *Whereas, states have had and continue to have*
10 *significant success with the adoption of*
11 *technology neutral pole attachment policy and in*
12 *effect the use of pole attachments to facilitate*
13 *the delivery of competitive products and services*
14 *to consumers.* That language is very akin to
15 language that I've used in my testimony to
16 support the FCC cable rate. It's language used
17 in state orders. It's language used in FCCC
18 (sic) orders.

19 Q Well, just as an example, the defining feature of
20 the FCC rate, the space allocation factor, it
21 appears no where in this NARUC what you claim as
22 an endorsement, does it?

23 A Again, you're also using twisted words. I
24 explained why my context of the word "defining"

1 was also in terms of differentiating the cable
2 from other formulas. But the language about
3 removing barriers to entry, promoting
4 competition, technology neutral, facilitating
5 deployment of advanced services, those are all
6 specifically associated with the FCC cable rate
7 and behind the rejection of the telecom or per
8 capita formulas by the FCC in states across the
9 nation.

10 Q You sure have to know a lot of extrinsic things
11 in order to understand that this is an
12 endorsement of the FCC cable rate, don't you?

13 A I disagree. For someone that is well-versed and
14 has followed the 40 years of pole attachment
15 regulation, I think these are very, very
16 understandable and not digging deep to make that
17 connection.

18 Q Did you testify in a pole attachment rate case on
19 behalf of Comcast Cable in Virginia that was
20 decided in 2014 by the Virginia Corporation
21 Commission?

22 A Yes.

23 Q And did Mr. Booth from here in North Carolina
24 testify on behalf of the co-op in that Virginia

1 case?

2 A Yes, he did.

3 Q And did you propose a rate in that case which was
4 calculated using the FCC rate and which came out
5 to \$7.16 per pole?

6 A Well, again, we talked about this in my
7 deposition. I calculated a number of rates
8 because there were a number of different
9 variations and numbers about inputs that were in
10 that record. But I do recall calculating a rate
11 in that vicinity but there were -- it would have
12 been a number of rates that I calculated
13 depending on number of poles, pole heights,
14 things of that nature.

15 Q Wasn't the final number that you calculated \$7.16
16 per pole?

17 A I can't recall what the final number was. If you
18 have a document that purports to say the final
19 number there just were a number of numbers that I
20 calculated.

21 Q Do you remember that we marked as a deposition
22 exhibit the final order in that case?

23 A Yes.

24 MR. MILLEN: May I approach?

1 CHAIRMAN FINLEY: Yes.

2 BY MR. MILLEN:

3 Q This was Exhibit 5 to your deposition, the final
4 order of the Virginia Commission.

5 MR. GEORGE: Press, do you have a copy?

6 MR. MILLEN: Yes.

7 BY MR. MILLEN:

8 Q You see on page 3 of the final order, in direct
9 testimony, Comcast stated that the appropriate
10 rate under this formula would be \$6.35 per
11 attachment but revised its recommended rate to
12 \$7.16 percent (sic) per attachment in the course
13 of the hearing.

14 A Yes.

15 Q And you were the one that did those calculations,
16 right?

17 A Well, I did a number of calculations. Again, I'm
18 not trying to be difficult I just want to give an
19 accurate answer. I recall calculating rates in
20 the \$6 to \$7 range. But if you look at the cite
21 it's citing to a number of exhibits. It's citing
22 to the Comcast post-hearing brief. So it's --
23 but again, we're talking about that range of
24 rate --

1 Q Okay.

2 A -- if we cut through this --

3 Q Did the Virginia Commission ultimately rule that
4 a just and reasonable rate was almost three times
5 your suggested rate, \$20.60 per pole?

6 A Yes. But as indicated in the deposition
7 questioning that also included several adders
8 that were specific to that -- what they
9 considered to be that test year that also
10 didn't -- wouldn't necessarily carry forward into
11 their calculation of ultimately what was an FCC
12 cable rate proportionate based allocator.

13 Q They concluded that a just and reasonable rate
14 under the Virginia Statute was \$20.60, about
15 three times your rate, right?

16 A That is correct.

17 Q Okay. Now, with respect to the issue of
18 broadband deployment that you've talked about,
19 did the Virginia Commission determine that the
20 pole attachment rate would have very little
21 impact on Comcast's ability or incentive to
22 extend broadband services to areas currently
23 without such service?

24 A Are you reading directly from the Order or is

1 that your --

2 Q Yep, page 11.

3 A I'm sorry. Is there a question?

4 Q Did the Virginia Commission determine the pole
5 attachment rate would have little impact on
6 Comcast's ability or incentive to extend
7 broadband services to areas currently without
8 such service?

9 A That was their finding. And as we discussed in
10 deposition it was also based on their deferring
11 to representations by co-op executives of their
12 experience, and they also didn't take into
13 account necessarily the impact on affordability
14 on the demand side.

15 Q So you say the Virginia Commission got it right
16 when they concluded that pole attachment rates
17 didn't matter that much --

18 A No, I don't. I don't think that that decision
19 was based on a full understanding of the record
20 or the impact on pole attachment rates. Not just
21 on deployment but also on accessibility and
22 affordability which is something that, as a
23 policy matter, affects the public interest as
24 well.

1 Q Did the Virginia Commission also hold that,
2 quote, *customer density appears to be the*
3 *overriding factor in broadband expansion?*

4 A I do believe that that was a finding and, again,
5 it's not inconsistent. Density certainly is a
6 factor but it's a factor that goes into the, I
7 believe the impact of the pole attachment rate
8 and why it's important to get it as low as
9 possible within a subsidy-free rate.

10 Q And was that determination made by the Virginia
11 Commission notwithstanding the fact that you did
12 an impact study in that case which concluded that
13 the rate sought by the co-op would increase
14 broadband rates by \$13 per month per customer?

15 A I did do an analysis in the record that presented
16 those numbers and there were -- again, it was
17 offset by their decision to listen to co-op
18 presidents' opinions as to what they believed
19 Comcast would do.

20 Q Irrespective of what they were listening to, they
21 didn't buy your report of that this would cost
22 consumers \$13 per month for broadband, right?

23 A Well, I don't know that. My report wasn't saying
24 that's exactly what it would cost. It was to

1 represent in a quantitative way, given the data I
2 had, as to why the impact of a pole attachment
3 rate has a multiplying effect, because you need
4 multiple poles to serve any given subscriber. So
5 it was an illustrative example to try to
6 demonstrate to them that the impact of the pole
7 attachment rate is multiplied. In that regard,
8 they weren't persuaded by that but in the end
9 they adopted a proportionate rate formula akin to
10 the FCC cable rate?

11 Q And three times what you said the FCC cable rate
12 was?

13 A Well, again, I indicated they added -- they put
14 in some adders that I think, if you read the
15 ALJ's Order, you'll see we're to take into
16 account costs that he felt weren't in the
17 accounting records but that he understood would
18 be in the rate formula going forward. So I think
19 it's not apples -- it's not an apples-to-apples
20 comparison because of the adders that were
21 allowed to be put onto that FCC cable rate. And
22 there also were some data issues that I think
23 they got wrong in terms of the population of
24 poles that they added. So when you make those

1 normalization adjustments the rate would actually
2 be much closer to the rate that I opined than
3 Mr. Booth or the other experts in their case.

4 Q Well, in fact, in addition to the Virginia
5 Commission, the FCC's National Broadband Plan
6 which you cite extensively in your testimony
7 recognize the same thing, namely that the -- the
8 problem of the broadband availability gap is based
9 on low population density and not pole attachment
10 rates, right?

11 A Well, they're related. They're related because
12 in lower density areas you might -- you'll have
13 by mathematical reality pole costs spread over
14 fewer subscribers per mile. So they're --
15 there's not a disharmony between them. They're
16 related. Of course, it's density but it's
17 density that's also driving the impact of the
18 higher pole attachment rate particularly in the
19 rural areas and particularly where you have fewer
20 attachers which is exactly where a per capita
21 formula does the opposite of what you want it to
22 do. It's going to set a high rate where it's
23 less dense and where you want to most encourage
24 not just deployment but also affordability on the

1 demand side.

2 Q Well, in fact, isn't what the FCC concluded was
3 that, quote, *because service providers in these*
4 *areas cannot earn enough revenue to cover the*
5 *cost of deploying and operating broadband*
6 *networks, there's no business case to offer*
7 *broadband services in these areas*, right?

8 A Well, it goes on to say, *as a result it's*
9 *unlikely that private investment alone will fill*
10 *the broadband availability gap*. But underlying
11 that is a policy that will try to make it as
12 likely or give the incentive to have the private
13 investment step in. So, there again, this
14 statement is only saying all the more reason for
15 a lower pole attachment rate to try to incent
16 private investment realizing we're going to need
17 private investment as well as government policies
18 to help bring this about.

19 Q Isn't what this is saying is private investment
20 ain't gonna do it and the pole attachment rate,
21 according to what the FCC says here could be zero
22 and the rural citizens of Caldwell County who are
23 Blue Ridge's members aren't getting broadband,
24 right?

1 A Well, I disagree with that because obviously --
2 and if you look at the actions of FCC,
3 consistently they take actions and reiterated why
4 the pole attachment rate should be as low as
5 possible, and they've eliminated or abandoned the
6 telecom rate, and they've also made adjustments
7 that over and over again in the broadband
8 environment say work on keeping those pole
9 attachment rates as local as possible subject to
10 obviously not creating a subsidy.

11 Q It says nothing about pole attachments, it says
12 broadband is a dead duck in un-dense rural areas
13 and the pole -- the pole rate could go to zero or
14 even a negative rate and these folks aren't going
15 to get broadband, right?

16 A Well, I disagree in the context of pole
17 attachment rates. When you look at what the FCC
18 policies have done, they've done everything
19 possible to support, and buttress, and encourage
20 the adoption of the FCC cable rate.

21 Q And that's, in fact, what you said is that one of
22 the advantages of the FCC rate is the promotion
23 of broadband competition and affordability,
24 right? You said that to the Commission here last

1 month.

2 A Of course, because it affects a major input to
3 broadband and communications.

4 Q But this Commission is dealing with a statute
5 that embodies no broadband public policy, does
6 it?

7 A Nor is it required to adopt -- it is -- a rate
8 that is just, reasonable, and in the public
9 interest. Being in the public interest, you look
10 at all the benefits of a lower cost-based rate.
11 Broadband deployment and affordability is one
12 thing but so is the advantage of an efficient
13 rate, a rate that doesn't distort the market, a
14 rate that promotes the efficient use of a shared
15 resource, a rate that promotes a win-win for all
16 of the industries and subscribers of both. So
17 it's just one more public interest benefit of a
18 lower cost-based rate like the FCC cable rate.

19 Q Okay. I'm going to ask you a question about that
20 and I'd like you to listen carefully. In fact,
21 in this case you have made no calculation, you've
22 done no empirical study that would bear out
23 anything that you just said. In other words, you
24 haven't calculated a specific number or range of

1 numbers reflecting the public interest benefit,
2 or detriment, or consumer surplus, or deficit
3 based on the competing rates here, right?

4 A I haven't done a overarching, quantitative,
5 social welfare analysis. That would be -- you
6 know, the data to do that -- the sort of
7 undertaking. But what I have done is laid out
8 all the components of why a low cost-based rate
9 encourages that to occur based on the fundamental
10 economic principles and all the concepts
11 underlying cost-based efficient rates.

12 Q I want to be sure we're clear here. Nowhere in
13 your testimony is there a specific calculation,
14 dollars and cents, of public interest benefits
15 associated with any pole attachment rate, is
16 there?

17 A There isn't one quantification, but I present a
18 number of pieces of data and evidence that
19 support why a low cost-based rate is in the
20 public interest.

21 Q Okay. At most what you've done is provide a
22 generic, qualitative statement that says as a
23 matter of elementary economics a lower attachment
24 rate will mean more broadband generally, right?

1 A Well, that generic analysis I believe is very
2 compelling. It's part of why I believe we're on
3 the eve of a very big, major tax overhaul. One
4 could argue that Congress hasn't done that
5 either. You don't have all the data to run
6 through all the multiplier effects of a public
7 interest analysis. But you put together all the
8 factors and you realize that this is the
9 incentives that are existent in the economy and
10 you see that that happens everywhere in the
11 economy where you can put in a lower rate verses
12 a higher rate, and where you let a monopoly set a
13 price, then you have -- you have
14 negative impacts.

15 Q Understood, but you've done no empirical study,
16 you haven't provided this Commission with any
17 data that there will be more or less broadband
18 depending on which pole attachment rate is chosen
19 here, right?

20 A But it's not just about broadband. That's the
21 point. Broadband is another positive externality
22 that comes from a lower pole rate. But the pole
23 rate attachment history began well before there
24 was even broadband. It's just about we have a

1 problem. We have a resource that is controlled
2 by a monopoly, is used by another firm or
3 companies in another industry, it can have
4 negative impacts on competition, and that's a
5 market failure. What is the way to price this
6 essential facility building on antitrust rulings
7 and statutes and trying to get the economy to
8 work in a more efficient way. That problem
9 predated broadband and the answers have been to
10 try get to get to a low rate that reflects what a
11 competitive market outcome would be, and those
12 are the principles that underlie the FCC cable
13 rate and that I am trying to explain in my
14 testimony.

15 Q What you're testifying to is words and not data,
16 right?

17 A Well, I believe -- I believe it's both. I
18 believe it's both.

19 Q If I understand your testimony, you also say that
20 the per capita rate like the TVA rate is, quote,
21 *at odds with key economic development goals in*
22 *the state and the overall wellbeing of its*
23 *citizens; is that correct?*

24 A Yes.

1 Q And in your opening statement before this
2 Commission you testified that from an economic
3 perspective what you call excessively high pole
4 attachment rates, quote, *distort the market to*
5 *the overall detriment of the public good.* Was
6 that your testimony?

7 A Yes, that is true as it is true of a monopoly
8 rate.

9 Q But again, there's no empirical economic study
10 that measures the degree to which the wellbeing
11 of North Carolina citizens would be affected by
12 the adoption of the TVA rate either in this case
13 or generally, right?

14 A No, but what I do explain is that the TVA rate
15 being five to six times an already high, fully
16 allocated rate, relative to the benchmark for a
17 monopoly power rate which is marginal cost. So
18 you build in those kind of multiples and then
19 it's very clear it's going to have a negative
20 impact. When you look at antitrust studies they
21 look at a ratio like what defines monopoly power
22 and generally it's something that's 5 percent
23 over a marginal cost; it starts to have impacts
24 and dead weight losses. I mean, this rate is so

1 in excess, so many multiples of that cost-based
2 rate that it clearly --

3 Q But you've done none of those --

4 A -- triggers that.

5 Q You've done none of those calculations. You
6 haven't calculated the dead weight loss, right?

7 A I have not done a specific social welfare
8 analysis.

9 Q And so when you testified last month about your
10 conclusions that you were, quote, *taking into*
11 *consideration the totality of impacts, both*
12 *direct economic and multiplier effects*, closed
13 quote, that doesn't represent any actual
14 empirical analysis or calculation on your part,
15 does it?

16 A No, but it's building on core economics, and it's
17 building on literature and studies where high
18 rates, high taxes, all these are the same
19 concepts that are applied in all these other
20 economic spheres. It's not unique to pole
21 attachments.

22 Q So, in other words, you say these things, there's
23 no calculation to back up your statement that
24 North Carolina citizens will be harmed if Charter

1 is charged the TVA rate rather than the FCC rate.
2 Would you concede that much?

3 A I can't concede it because I don't believe it to
4 be true. I believe there are negative effects of
5 charging monopoly rates.

6 Q I understand you believe it to be true but you
7 haven't done a calculation or empirical study --

8 CHAIRMAN FINLEY: She hasn't done an
9 empirical calculation. She's said that three times
10 and you've asked her about four times. Let's move on,
11 please.

12 BY MR. MILLEN:

13 Q As I understand it, Ms. Kravtin, your terminal
14 degree is a Bachelor of Arts in Economics that
15 you obtained in 1981; is that correct?

16 A 1980.

17 Q Okay.

18 A I indicated I did graduate study in the PhD
19 program at MIT but -- satisfied the requirements
20 of the PhD degree but did not get the terminal
21 degree.

22 Q Your terminal degree is a Bachelor of Arts
23 degree, right?

24 A That is correct. I have all but dissertation

1 status at the graduate level.

2 Q And you've published just one paper in a
3 peer-review publication, a 1982 working paper on
4 multi-product transportation cost function; is
5 that correct?

6 A That is correct while I was pursuing graduate
7 studies. After that I left for consulting where
8 I've published or presented hundreds of pieces of
9 reports and testimonies but those would not be
10 academic.

11 Q Okay. Those are mostly for cable companies,
12 right?

13 A That is not true. Over the course of my career I
14 would say it's a balance as to the clients and --
15 that would be represented, or engage my services
16 including public agencies as well.

17 Q No co-op ever engaged you, did they?

18 A I don't know. I would have to look back over my
19 history. I could have done work for telephone
20 co-ops. I can't say.

21 Q Is it the case that your testimony calculates an
22 amount of \$1,092,000 which Charter contends that
23 Blue Ridge should pay back to Charter for alleged
24 overcharges?

1 A I calculated overcharges, one based on the per
2 attachment billing and one based on per pole
3 billing, which I understood to be a condition of
4 the contract, but either of those calculations is
5 roughly in the range of a million dollars.

6 Q So the per attachment versus per pole calculation
7 that -- of the claimed overcharge that you did
8 that's based on the contract; is that correct?

9 A Comparing the just and reasonable rate to that
10 with a rate charged -- that was charged -- that
11 would be charged on a per pole basis. I'm just
12 saying I have two overcharged numbers.

13 Q Right. Right.

14 A They're roughly in the range of a million
15 dollars --

16 Q Each.

17 A It depends on the basis of which the calculation
18 was made.

19 Q They're each a million dollars, right?

20 A Well, it would be one or the other.

21 Q Okay.

22 A You'd calculate the overcharge based on what the
23 just and reasonable rate would be versus what
24 Charter was charged apparently on a per

1 attachment basis. And then it would be a
2 slightly greater level of overcharges if you
3 adjusted it for the fact that the contract said
4 they should have been paid per pole, and there is
5 some variation between those charges on a per
6 pole basis or a per attachment basis. Either way
7 they've been overcharged by approximately a
8 million dollars over the past -- in three rate
9 years.

10 Q Do you understand that because Blue Ridge is a
11 cooperative that any million dollar amount that
12 gets clawed back from Blue Ridge to pay to
13 Charter will ultimately be reflected in a higher
14 rate for electricity for Blue Ridge's members?

15 A I would disagree with that statement.

16 Q Do you understand that as a matter of elementary
17 economics that that amount would represent a
18 transfer payment from the members of Blue Ridge
19 to the shareholders of Charter?

20 A Well, I disagree, we're talking about
21 overcharges. We're talking about pursuant to the
22 applicable law. If Blue Ridge has been
23 overcharging then that's -- is not a --

24 Q I'm not asking --

1 A -- it's not money that would have been or should
2 have been reflected in their rates to begin with.
3 It's an overcharge for which presumably they were
4 aware given the legislation and presumably made
5 provisions in the patronage capital or however
6 their accounting is that they've been carrying on
7 their books. But either way as an overcharge you
8 never want to incent an entity to overcharge so
9 they can then keep the money because now it might
10 have an impact by overcharging. So it's kind of
11 a perverse incentive but --

12 Q So what you're --

13 A -- I don't think it's a transfer payment. If
14 anything, Charter overpaid so the transfer has
15 been going from Charter to the co-op if we view
16 it that way in terms of what an overcharge means.

17 Q And do you contend that Blue Ridge by paying that
18 amount to Charter will serve the public interest?

19 A Well, I think it serves the public interest if
20 there has been an illegal overcharge that it'd be
21 returned.

22 Q But one thing we know for sure is that if that
23 happens you haven't done any calculation that it
24 will result in broadband rates in the Blue Ridge

1 service area or in North Carolina generally going
2 down even one penny, right?

3 A Well, I can't make that claim. What I can say is
4 that it's -- to the extent that an entity was
5 overcharged pursuant to applicable law and the
6 applicable law allows and provides for those
7 monies to be returned, then that is ultimately
8 serving the public interest in terms of
9 conditions of applying to applicable law.

10 Q May serve the applicable law with respect to what
11 you just said, but you're not making any claim
12 that it's going to increase the deployment of
13 broadband, are you?

14 A I'm not making any connection in my calculation
15 of overcharges with the broadband policy.

16 Q Nor are you making any claim that it will result
17 in more broadband, are you?

18 A I think it's an unrelated argument.

19 MR. MILLEN: Okay. That's all I have for
20 this witness.

21 CHAIRMAN FINLEY: Redirect.

22 REDIRECT EXAMINATION BY MR. GEORGE:

23 Q Ms. Kravtin, do you recall Mr. Millen asking you
24 questions about the 2015 legislation in North

1 Carolina?

2 A Yes.

3 MR. GEORGE: I'm going to hand the witness a
4 document.

5 BY MR. GEORGE:

6 Q Ms. Kravtin, do you recognize this document?

7 A Yes, I do.

8 Q What is it?

9 A It is the Senate Bill 88 from Session Law
10 2015-119, so the revised or amended legislation.

11 Q And, if you look at Section 2(c), it shows a
12 series of underlying language and some language
13 that has strike-throughs. Do you see that?

14 A That's correct. I see that.

15 Q And what do you understand those notations to
16 mean?

17 A Well, the strikethrough would be the language
18 that is being deleted and the underlying language
19 would be the language that is being added in the
20 rewrite.

21 Q And is it this language that you were referencing
22 when you were discussing with Mr. Millen the
23 deletions and additions that were made to Section
24 62-350?

1 A That is correct and to which my testimony cited.

2 Q I'll ask you to turn the page to page 2. What is
3 the -- if you could read for us the language in
4 Section 7.

5 A Section 7 reads *notwithstanding the deletion of*
6 *language referencing the factors or evidence that*
7 *may be presented by a party in Section 2 of this*
8 *Act, the Commission may consider any evidence*
9 *presented by a party, including any methodologies*
10 *previously applied.*

11 Q What do you understand that to be saying?

12 A Yes. As discussed in the cross examination, that
13 while the specific reference to the FCC
14 methodology was deleted this language
15 specifically allows consideration of
16 methodologies previously applied, and I believe
17 that to be referring to previously applied in
18 prior litigation pursuant to this Act, including
19 those in the Landis and Rutherford matters before
20 the business court.

21 Q And what were the holdings of those cases before
22 the business court?

23 A Yes. Those holdings clearly endorse the FCC
24 cable formula for reasons of being a just and

1 reasonable rate in the public interest and
2 subsidy free.

3 MR. GEORGE: Your Honor, we would move this
4 into evidence as Charter Kravtin Redirect Exhibit
5 Number 1.

6 CHAIRMAN FINLEY: We'll mark it as Charter
7 Kravtin Redirect Exhibit Number 1.

8 (WHEREUPON, Charter Kravtin
9 Redirect Exhibit Number 1 is
10 marked for identification.)

11 CHAIRMAN FINLEY: You're moving it into
12 evidence?

13 MR. GEORGE: Yes, Your Honor.

14 CHAIRMAN FINLEY: Without objection, it
15 shall be admitted.

16 (WHEREUPON, Charter Kravtin
17 Redirect Exhibit Number 1,
18 admitted into evidence.)

19 BY MR. GEORGE:

20 Q Did you provide a -- or can you tell me did you
21 have a role in the North Carolina court cases
22 that use this reference in Landis and Rutherford?

23 A Yes. I served as an expert witness for Time
24 Warner in that case.

1 Q And was your testimony accepted by the court in
2 those cases?

3 A Yes. Yes, it was.

4 Q And do you know whether the North Carolina Court
5 of Appeals reviewed the North Carolina business
6 court decisions?

7 A Yes. It's my understanding the Court of Appeals
8 reviewed it and it was upheld.

9 Q Mr. Millen asked you some questions about the
10 safety space on a pole and you said -- well, let
11 me ask you this, what did you mean when you said
12 that the clearances did not have any bearing on a
13 cost causation from an economic perspective?

14 A Yes. What I was referring to there for a matter
15 of economics and cost allocation is that the
16 clearances which are required to meet safety
17 requirements, those are always available to the
18 utility. It's never precluded to the utility
19 because to the extent that those clearances do
20 not exist, then Charter is required to move its
21 facilities to achieve the required clearances or
22 to pay for a taller pole that would allow those
23 clearances to be met. So there would be no
24 economic reason to allocate more than a

1 proportionate share of the costs of creating
2 those clearances because those are always
3 recaptured and can be recaptured and make ready,
4 otherwise they're there on the pole. So there's
5 no preclusion of that safety space and no reason
6 to isolate that space any different than other
7 space on the pole. As it stands, it either
8 exists or Charter is required to make it exist on
9 a pole-by-pole basis and to incur the cost of
10 doing so outside the regulated rate. It really
11 would be a double recovery and an uneconomic
12 recovery to allocate directly the cost of that
13 space in addition to the requirements that
14 already exist that Charter must make that space
15 available if it's not available. So we are
16 talking about space that is surplus or, if not,
17 Charter pays separately through make ready to
18 make that space exist. So the space is not
19 precluded on any given pole that Charter is
20 attached to.

21 Q And did the North Carolina business court accept
22 your testimony with respect to how safety space
23 should be treated from a cost causation
24 perspective?

1 A Yes. The business court accepted the methodology
2 I recommended, which is essentially the FCC cable
3 methodology which does not seek to differentiate
4 the cost allocation of the safety space differ
5 from the cost of the entirety of the space which
6 is to allocate a proportionate cost space
7 allocation based on space occupied and used by
8 the attacher.

9 I would add to that I'm not aware
10 of actually any, any state that has done what the
11 TVA formula seeks to do which was allocate the
12 cost of the safety space entirely to the
13 attachers, notwithstanding the fact the attachers
14 already have to pay to make that clearance
15 available on any pole to which they attach
16 through make ready.

17 Q And so Mr. Millen also asked you questions about
18 the per capita allocation of common costs. Do
19 you recall that line of questions?

20 A Yes.

21 Q And what is wrong, from an economic perspective,
22 with that type of allocation?

23 A Yes. So as I testified, the per capita approach
24 of dividing costs up according to the number of

1 attachers, it doesn't reflect the way the costs
2 are incurred. There's no cost causative linkage.
3 Regardless of the number of attachers on a pole
4 it doesn't change the underlying cost of the
5 input. So it doesn't make sense and, if
6 anything, it runs counter to other public policy
7 goals that might look to try to encourage
8 broadband or other availability of services at
9 affordable rates. But the main reason, aside
10 from that, is that it doesn't reflect cost
11 causation principles because there is no cost
12 causative linkage between the cost of the input
13 of the product and the number of attachers. It
14 doesn't make sense to do so.

15 Q And Mr. Millen also asked you questions about the
16 various presumptions that exists in the TVA
17 formula and rebutting those presumptions
18 specifically. What are problems that arise from
19 efforts to rebut presumptions like those in the
20 TVA formula?

21 A Right. So the problems, the presumptions have
22 been developed over decades of data and
23 statistics gathered on all sorts of utilities and
24 they've been widely accepted and used and they

1 provide a way of just streamlining the cost of
2 running these formulas. Every time you
3 substitute a utility-specific number it does
4 require a level of review and diligence because
5 obviously the utility is in control of this data.
6 There's going to be a bias. It's only going to
7 present data where it works to its advantage.
8 It's not going to necessarily provide data where
9 it doesn't. And I provide an example of this
10 because Mr. Arnett had data on appurtenances,
11 actual appurtenances that he could have used and
12 presented in the calculation of the rates in the
13 prior set of co-ops, but he didn't do so then.
14 But in this case where the underlying cost number
15 was a little lower he chose to then use specific
16 data so that suggests that there is an inherent
17 basis or a concern that the utility may only
18 provide actual data where it works to its benefit
19 and not to where it doesn't. So you have to
20 really scrutinize that data in the FCC rules set
21 for that. It's got to be based on and meets
22 certain standards of statistical significance or
23 actual survey data, lest you afford one party
24 who's in control of the data the opportunity to

1 manipulate that data, as well as raise the
2 administrative cost of implementing a formula
3 where it just raises the cost to all.

4 And the other point is, again, you
5 don't want the utility to be in a position to
6 substitute certain presumptions and then others
7 not. Like for in this example, I point out in my
8 testimony also, that we had utility-specific
9 information on the cost of capital then
10 Mr. Arnett chose not to use and to use a higher
11 presumptive value set in the TVA. So it just
12 leads to those problems that on balance will
13 result in a higher rate for the utility where
14 it's in control of the data.

15 Q I want to make sure I understood something. You
16 mentioned in the prior cases Mr. Arnett had some
17 appurtenance data that he did not use. What
18 would have been the effect of using that actual
19 data in those cases had Mr. Arnett used it?

20 A Yes, well I --

21 MR. MILLEN: I object to testimony about
22 what would have happened in a different case.

23 CHAIRMAN FINLEY: Overruled.

24 A Yeah. So I looked at that data, except I was a

1 little puzzled Mr. Arnett said he didn't have it,
2 it was provided because I -- it was provided to
3 me, and when I ran those numbers it looked like
4 there were a set of four co-ops. One did not
5 have the data so there were three that had the
6 data available to me. Two of the three, when you
7 use the actual appurtenance number such as he
8 used for Blue Ridge here, you actually got a
9 lower rate.

10 Q And Mr. Arnett didn't use that data in those
11 calculations?

12 A No, he didn't. He testified it wasn't available.
13 But again, it was in data provided to me.

14 Q In all the cases that you've participated in have
15 you ever seen a utility rebut a presumption that
16 would lead to a lower pole attachment rate?

17 A No, I have not.

18 Q Mr. Millen asked you some questions about the
19 legislative history to the 1978 Pole Attachment
20 Act; do you recall that?

21 A I do.

22 Q And at the time of your deposition Mr. Millen
23 didn't tell you that he was reading to you from
24 the legislative history, did he?

1 A No, he did not.

2 Q And what -- do you know what sections of the
3 legislative history -- I'm sorry, what section of
4 the Pole Attachment Act those portions of the
5 legislative history were referencing?

6 A Yes, I subsequently understood when I looked back
7 to look at the exhibits that it was coming from
8 the section on the reverse preemption where state
9 and local authorities could opt to regulate pole
10 attachments directly and, therefore, not leave it
11 to the FCC to regulate.

12 Q So, in other words, did Congress allow for state
13 regulation of pole attachment rates?

14 A Yes, Congress -- Congress did invite the state
15 and local authorities to step up where they could
16 and to regulate pole attachments in their areas.

17 Q So thinking about the IOU rates that are
18 regulated by the FCC, what rate applies for those
19 IOU pole attachments?

20 A Where the FCC has not been reversed preempted by
21 the states the FCC cable rate applies to the
22 IOUs.

23 Q So has the State of North Carolina reverse
24 preempted the FCC for those IOU pole attachment

1 rates?

2 A No, it has not. For IOUs in this state, North
3 Carolina has allowed and continue to permit the
4 FCC cable rate to govern.

5 Q And is it fair to say that, if the North Carolina
6 legislature wanted some other rate to govern for
7 IOUs it could have done so in the last 40 years?

8 A That is correct.

9 Q And has North Carolina taken any effort to
10 regulate the co-op pole attachment rates?

11 A Yes, it has and that is the applicable law,
12 62-350, that we are here litigating this case
13 under.

14 Q And do you have an understanding of why North
15 Carolina chose to regulate co-op pole attachment
16 rates?

17 A Yes. Well, my understanding based on the history
18 is that there was an effort. There was a dispute
19 between Time Warner and a co-op and the federal
20 court ruled that there was no standing to bring a
21 complaint unless there was regulation at the
22 state level. And from that the legislators --
23 legislature stepped up and developed this
24 applicable law in response to a specific

1 complaint about a situation where there was a
2 complaint against a monopoly level rate that was
3 being contested by an attacher.

4 Q And you and Mr. Millen also discussed your
5 Exhibit 12, which is the NARUC Resolution, is
6 that -- do you recall that?

7 A Yes, I do.

8 Q And in your answers to some of his questions you
9 mentioned the 2011 -- the FCC's 2011 Pole
10 Attachment Order.

11 A Yes.

12 Q Did -- what process did the FCC follow in leading
13 up to that 2011 Order?

14 A Yes. There were a series of rule makings prior
15 to the 2011 Order. So that the proceeding
16 actually, looking at pole attachment policies,
17 started back in the mid 2000's. And so that that
18 2011 Order culminated a series of investigations
19 and proceedings where these matters were being
20 addressed and where parties would have had
21 opportunities to weigh in on their views, and for
22 the FCC to take those comments into account.

23 Q And you understand that this Resolution was part
24 of those proceedings; is that correct?

1 A Yes, that really span I think between 2007 to
2 2010, prior to the culmination of the broadband
3 report and the 2011 Order.

4 MR. GEORGE: No further questions.

5 CHAIRMAN FINLEY: Questions by the
6 Commission? Just one to this line of questioning.

7 EXAMINATION BY CHAIRMAN FINLEY:

8 Q Ms. Kravtin, if you'll look at this Charter
9 Kravtin Exhibit Number 1, which is the revised
10 copy of 62-350.

11 A Yes.

12 Q Look at the first sentence under A. A
13 *municipality, or a membership corporation*
14 *organized under Chapter 117 of the General*
15 *Statutes that owns or control poles, ducts or*
16 *conduits, but which is exempt from regulation*
17 *under section 224 of the Communications Act of*
18 *1934, as amended, shall allow any*
19 *communications -- any communications service*
20 *provider to utilize its poles, ducts, and*
21 *conduits at just, reasonable, and*
22 *nondiscriminatory rates, the terms, and*
23 *conditions adopted pursuant to negotiated or*
24 *adjudicated agreements.*

1 We've had a fair amount of
2 discussion about essential facilities in the
3 context of antitrust law and economic principles.
4 What, if any, impact has the legislature's use of
5 the words "shall allow" in that first section
6 have to do with implicating essential facilities
7 definitions in this case?

8 A Well, I think it's directly pertinent to that
9 because it does -- the concept of essential
10 facilities is trying to set in regulations to
11 govern where there could be a market failure in
12 terms of a monopoly owner refusing to allow the
13 occupancy on plant that it controls by another
14 industry or another firm. And so I think this is
15 consistent with what you see underlying the
16 recognition that these are facilities that
17 warrant a directive to correct a market failure
18 that otherwise the owners would not permit the
19 attachments or at just and reasonable rates
20 because that might be the incentive as we've seen
21 of a monopoly owner that would not want to allow
22 access for a variety of reasons that would serve
23 the monopolist interest but not the public
24 interest.

1 CHAIRMAN FINLEY: Those are all the
2 questions I have. Questions on the Commission's
3 questions?

4 (No response.)

5 All right. Ms. Kravtin, you may be excused.

6 THE WITNESS: Thank you so much.

7 (The witness is excused.)

8 CHAIRMAN FINLEY: We will accept
9 Ms. Kravtin's exhibits into evidence. And to the
10 extent that I have failed to accept other exhibits
11 that have not been objected to in the course of this
12 proceeding, they shall be accepted into evidence, both
13 the direct exhibits and the cross examination
14 exhibits.

15 (WHEREUPON, Exhibits PDK 1-15,
16 admitted into evidence.)

17 (Exhibit PDK 4 is confidential, filed under seal.)

18 (WHEREUPON, Exhibits LL-1-16,
19 admitted into evidence.)

20 (Confidential Exhibits LL-3, 7-9, filed under seal.)

21 (WHEREUPON, Rebuttal Exhibits
22 LL-17-25, admitted into evidence.)

23 (Confidential Rebuttal Exhibit LL-17,
24 filed under seal.)

1 CHAIRMAN FINLEY: And so we will bring the
2 evidentiary part of this proceeding to a close. We're
3 all through I think, I take it, right? Nobody has any
4 other --

5 MR. TRATHEN: I just, Mr. Chairman, as a
6 housekeeping matter, if the -- what the appetite of
7 the Commission would be for --

8 (WHEREUPON, the Court Reporter
9 requested Mr. Trathen to speak
10 into the microphone.)

11 MR. TRATHEN: -- what the appetite of the
12 Commission would be for closing -- hearing closing
13 arguments in this matter? We had conferred prior to
14 the proceeding with opposing counsel. I'd understood
15 that they were amenable to that. Obviously it's
16 getting late in the day. We're prepared if the
17 Commission believes it to be helpful.

18 CHAIRMAN FINLEY: It's certainly not
19 necessary. We've heard you and I think we've got a
20 pretty good -- we've sort of been through this twice
21 now for the most part. But I'll let the lawyers try
22 their cases if you -- both sides want to make a brief
23 closing statement that's completely up to you, but we
24 want to get out of here by 5:00 o'clock.

1 MR. MILLEN: I can do it in 12 minutes.

2 CHAIRMAN FINLEY: Go right ahead. All
3 right, go ahead both of you, make your closing
4 statements.

5 MR. MILLEN: As the Petitioner, I think we
6 would prefer to defer to go last if the party --

7 CHAIRMAN FINLEY: All right. Charter, you
8 may go first.

9 MR. GILLESPIE: Mr. Chairman, Members of the
10 Commission, let's start with rates. The --

11 CHAIRMAN FINLEY: You can sit down if you
12 want to, Mr. Gillespie, and get close to that
13 microphone or you can stand up, whichever you prefer.

14 MR. GILLESPIE: This might be easier.

15 CLOSING STATEMENT BY MR. GILLESPIE:

16 As you know, Charter recommends the FCC rate
17 method and that is a method that has been used across
18 the nation. It's tested. It's judicially approved.
19 It's already used in North Carolina for the majority
20 of the poles which are owned by the ILECs and the
21 IOUs. It's used in 45 states and these are states
22 that either have simply deferred to the FCC or where
23 they have affirmatively adopted the FCC. It's used in
24 the vast majority of states that regulate the rates

1 for cooperative and municipal poles. Numerous courts,
2 including the United States Supreme Court, have held
3 that the FCC rate does not create any kind of a
4 subsidy. The North Carolina business court in two
5 decisions that have been referred to extensively today
6 found the FCC rate to be reasonable and cost justified
7 and that was approved -- affirmed by the Court of
8 Appeals in North Carolina.

9 You've heard testimony about the fact that
10 it's been recommended for co-ops by NARUC and NASUCA,
11 and also the NRECA, the national organization of
12 cooperative utilities, and they have stated that the
13 FCC methodology is, quote, *unimpeachable*, closed
14 quote.

15 Well, Blue Ridge has chosen in this
16 proceeding not to present an economist as an expert.
17 Instead, they have presented Mr. Arnett and Mr. Arnett
18 really has no business in opining on rate theory
19 before this Commission. He has no background in
20 ratemaking. He has no experience in ratemaking
21 theory. He has no economic background. He doesn't
22 have a college degree. He had no knowledge of any
23 cost allocation methods used by this Commission in
24 ratemaking. He's never been accepted as a rate expert

1 in any judicial case. And, although he has
2 recommended pole attachment rates before two state
3 commissions in Louisiana and Arkansas, his
4 recommendations were not accepted in those
5 proceedings. And, in fact, the methodology that he
6 recommended to those commissions he now says is
7 unreasonable. And he couldn't tell us at his
8 deposition how that methodology applied the cost of
9 the safety space. And other than knowing that the
10 business court generally adopted the FCC methodology
11 in the Rutherford and Landis cases, he had no
12 knowledge about anything about the court's analysis
13 and he never even bothered to read those decisions.

14 Now, nevertheless, Mr. Arnett has
15 recommended the TVA rate to this Commission. And that
16 rate was adopted by TVA in a proceeding that had no
17 public participation. The only parties that
18 participated in that proceeding before TVA were those
19 that were going to be regulated, the pole owners, and
20 those pole owners are the wholesale customers --
21 wholesale electric customers of TVA.

22 TVA has never explained what the basis was
23 for the cost allocations that it has included in its
24 methodology except its recognition that its statutory

1 mandate is to keep electric rates as low as possible.
2 So TVA has never provided any economic or
3 philosophical underpinnings for its methodology. And
4 Mr. Arnett's apparent belief that the TVA method is
5 premised on a theory of equal benefits from the pole's
6 common space find zero support in the writings of the
7 TVA. And if you haven't yet had an opportunity to
8 review the Resolution of the TVA and the staff
9 recommendations that are included in Exhibit 3 to
10 Mr. Arnett's testimony, I urge you to do so and I
11 think you'll be astonished. It's not that the
12 analysis is thin, there is no analysis. Certainly
13 nothing like this Commission does in terms of its
14 determination of how costs should be allocated in
15 ratemaking.

16 The TVA methodology has never been tested in
17 court and it's never been used by a regulator with an
18 obligation to serve the public interest other than the
19 interest of a specific single group of constituents.

20 So let's compare the FCC methodology and the
21 TVA's. The FCC allocates all costs on the pole
22 according to how the direct costs are allocated, and
23 that's the amount of usable space that's occupied by
24 the attachment. TVA, the FCC, Mr. Arnett and

1 Ms. Kravtin, they all agree that a reasonable way to
2 allocate the cost of usable space is according to the
3 amount of usable space that's used by the attacher.
4 So we have an agreement among every one that that's a
5 reasonable allocation method.

6 Now, there is a disagreement as to whether
7 that is the method that should also be used for the
8 allocation of the common space, and that is the way
9 the FCC's allocation of the cost of the common space,
10 that's the way that costs are allocated in the
11 economies, the way that costs are allocated in real
12 estate and commercial areas. And so let me give you a
13 slightly different example than what we've talked
14 about but it illustrates the same point.

15 Consider a shopping mall with a big anchor
16 tenant, and the anchor tenant uses 90 percent of the
17 space in that shopping mall. It has 90 percent of the
18 sale space. And there is another tenant that occupies
19 10 percent of the sales space. And the question is
20 how do we allocate the cost of the escalators in the
21 mall. Well, you would never allocate the cost of the
22 escalators equally on a per capita basis between the
23 90 percent user and the 10 percent user of the sales
24 space. That's never the way that it would be done.

1 And where direct costs are incurred unevenly, as in
2 this case, utility commissions like this one allocate
3 costs based on the percentage of the direct cost
4 generated by the parties. And Ms. Kravtin has
5 referenced in her testimony the co-location proceeding
6 decided by this Commission dealing with the security
7 costs between ILECs and CLECs, and it was specifically
8 because of the uneven usage of the security costs that
9 this Commission refused to accept that.

10 So Mr. Arnett though complains that the FCC
11 method to allocate only 7.4 percent of pole cost to
12 Charter is somehow unfair. It violates his intuitive
13 view of fairness. And we hear that continuously from
14 Blue Ridge, they're focusing on this 7.4 percent and
15 they're trying to turn it into a space allocation.
16 But it's completely fair to allocate 7.4 percent of
17 the pole costs to Charter because that is -- that's
18 the percentage of the usable space, the sale space if
19 you will, that Charter uses. It's the revenue
20 generating space on the pole. And the entire purpose
21 of the common costs -- the common space on the pole is
22 simply to make the usable space actually usable for
23 the attachment of conductors and cables, and it's the
24 same with risers that have been referred to. Risers

1 are not economically significant. They are simply a
2 way to transition between underground and aerial
3 plant. They don't use the pole in any economic sense.
4 And the cost of the common or the unusable space on a
5 pole, it's no different, if you think about it, than
6 the cost of installing the pole to begin with. So you
7 have a pole and you have to install it in the ground.

8 Now nobody is arguing here that that cost
9 should be allocated on a per capita basis. No, that
10 is simply a way to get the pole installed so that it
11 can perform its purpose. And those costs are properly
12 allocated in the way that the direct costs are
13 allocated which is the one foot used by cable out of
14 thirteen and a half feet of the usable space.

15 Well, Mr. Arnett says that the parties get
16 equal benefit from a common space, but that is clearly
17 not the case. Charter makes much less use of the
18 portion of the pole that actually carries the
19 attachments; again, like the sales space in the mall.
20 And fundamental to this entire analysis is the fact
21 that Charter doesn't foreclose Blue Ridge from using
22 any space on the pole that Blue Ridge needs.
23 Charter's right to occupy space is completely
24 conditional, potentially temporary. So not only does

1 Blue Ridge not construct poles with an investment to
2 serve Charter, and Mr. Layton said that explicitly in
3 his testimony, but Blue Ridge can reclaim the space
4 used by Charter at any time. So it's really similar
5 to interruptible electric service which would justify
6 here a rate considerably lower than the fully
7 allocated rate that is calculated using the FCC
8 method.

9 Let me briefly touch on this question of
10 safety space which was brought up again today. The --
11 TVA allocates that safety space only to the
12 communications users, and we know that the only party
13 that can actually use the safety space is the pole
14 owner, the electric utility. But -- and so understand
15 that Mr. Arnett recommends that allocation here, but
16 in those two prior cases I referred to he did not
17 recommend that allocation of the safety space. He
18 recommended to those utility commissions that they
19 treat the safety space as unusable space.

20 But most importantly, most importantly, the
21 safety space issue is a complete Red Herring because
22 the fact that Charter cannot attach closer than
23 40 inches to a neutral or 30 inches to a grounded
24 transformer, none of that prevents Blue Ridge from

1 using any of the portion of the pole it needs. So if
2 Blue Ridge wants to place or needs to place a neutral
3 lower on the pole, or needs to add a transformer to a
4 pole, what happens to the safety space, it moves down
5 on the pole. That 40 inches then goes from the
6 neutral as it's moved, or it goes from the 30 inches
7 from the transformer as it's placed. So the safety
8 space, the clearance, goes down on the pole and, if
9 there's not sufficient space on the pole to allow
10 Charter to attach consistent with all clearance
11 requirements, then Charter is obligated to take its
12 attachment off the pole or to pay for a new one. So
13 the safety space is completely irrelevant to Blue
14 Ridge from an economic standpoint, if Blue Ridge
15 doesn't incur a nickel of cost to maintain -- to have
16 or maintain the safety space.

17 And I would say this, if this Commission
18 still struggles with this issue about safety space,
19 and I don't think it should but if it does, the way to
20 handle it would be to simply take the safety space out
21 of the usable space, and the usable space then on
22 average would be, instead of 13.5 feet, it would be
23 10 feet 2 inches. So if the Commission continues to
24 struggle with that, that would be the way it should be

1 handled.

2 The last point with respect to rates is that
3 the TVA method that is used by Mr. Arnett is simply
4 too malleable and uncertain. Mr. Arnett's increased
5 the TVA rate by 45 percent by rebutting the
6 presumptions. Now we don't know whether the TVA would
7 accept the way that he has rebutted the presumptions
8 because TVA hasn't had an opportunity to deal with
9 those specific issues. But more than that, it would
10 allow Blue Ridge and other cooperatives to manipulate
11 rates according to their whim. And as Ms. Kravtin
12 just testified, the cooperatives in the June case did
13 not rebut the presumptions except for the three-party
14 energy presumption and allowing the FC- -- allowing
15 the TVA rate as implemented by Mr. Arnett would allow
16 the utilities to determine how high they wanted to
17 make the rate basically between some high number and
18 some astronomical number, and it would be completely
19 at the pole owners whim. And understand that
20 Mr. Arnett's method, the way that he has rebutted the
21 presumptions or attempted to, would allocate 41.2
22 percent of the cost of the pole to Charter and would
23 allocate only 43.6 percent of the pole cost to Blue
24 Ridge. And I would ask you, based on the different

1 rights of the parties, based on the different usage of
2 the pole, how could that conceivably pass the smell
3 test.

4 Now much of the proceeding had to do with
5 terms and conditions and I'm going to address these
6 briefly. Here the -- Blue Ridge has used the same
7 playbook that the cooperatives used in the June
8 proceeding. Again, Blue Ridge has conducted a last
9 minute safety inspection after discovery. It accused
10 the cable operator of all kinds of safety violations.
11 And like the June proceedings, Blue Ridge's expert
12 here, Mr. Booth, the same expert has blamed Charter
13 for violations where it's clear that a significant
14 portion of those violations lie at the feet of Blue
15 Ridge. And like the June proceedings, the inspection
16 here found violations by numerous parties including
17 the pole owner, but Mr. Booth ignored all violations
18 except for those for which he blames Charter.

19 Now, without question, Mr. Booth has
20 extensive experience testifying as an expert. These
21 are just decisions, of course, that you will have to
22 make, but to us he seemed neither candid nor
23 objective. He's represented cooperatives for decades.
24 And he had no basis for the interpretation that he

1 gave for his wild interpretations of the NESC and RUS
2 requirements. He said he relied on writings. He
3 produced those writings that are exhibits now, and if
4 you look at those writings you will see that they do
5 not support at all the arguments that he was making.
6 So we believe his testimony should be rejected as the
7 judge in the Rutherford case did. And the Commission
8 should reject his arrogant reliance on his years of
9 experience to total -- to justify totally unreasonable
10 and unsupported positions.

11 The -- like the June proceedings, the -- an
12 inspection that was conducted by Blue Ridge here has
13 triggered a need under 62-350 to jointly determine
14 fault. That's what the statute says the parties need
15 to do when there are safety violations that are found.
16 And until that analysis is complete, which would allow
17 a determination on a pole-by-pole basis, there's no
18 basis for any action by this Commission. And we don't
19 think that the Commission should or can make any
20 findings related to the need for contractual terms
21 that have any relationship to that inspection until
22 what the statute calls for in terms of dealing with
23 those violations has been completed.

24 And, finally, it's important to understand

1 that Charter competes directly with the other users of
2 Blue Ridge's poles who have none of the obligations
3 that Blue Ridge would impose on Charter such as
4 permitting -- a permitting process for over-lashing or
5 a certification by professional engineers. Now, we
6 will address these issues in considerably more detail
7 in our briefing, but I think I've taxed your patience
8 enough. Thank you very much.

9 MR. MILLEN: If it's okay, I'd like to
10 stand.

11 CLOSING STATEMENT BY MR. MILLEN:

12 So, first of all, on behalf of Blue Ridge, I
13 do want to thank you for your time and attention over
14 the course of this lengthy proceeding. I want to take
15 just the few minutes of my time to highlight a handful
16 of salient points, particularly points of difference
17 between Blue Ridge on one hand and Charter on the
18 other. I'll add, parenthetically, I think there are a
19 few areas of complexity, not necessarily the key
20 issues in this case, but the areas of complexity that
21 would benefit as Mr. Gillespie said from some
22 post-trial briefing, especially the particulars of the
23 contract provisions, which I'm not going to talk about
24 at length.

1 I would note though that with respect to the
2 so-called last minute safety inspection, this is
3 something that was going on for quite some time. The
4 testimony here of Mr. Mullins was that he was invited
5 to send someone from Charter to ride along in the
6 context of the safety inspection and determine
7 whether, in fact, these were Charter's violations or
8 had somehow arose in some other context, and
9 Mr. Mullins testified to two things: First, that he
10 didn't take up the opportunity to ride along; second,
11 that the reason he didn't is because the reports that
12 he always gotten from Blue Ridge concerning violations
13 were accurate. So that's a choice they made. I don't
14 think they should now be able to come back here and
15 say well we turned down the opportunity to be involved
16 in this process, but we want to have another process
17 in addition to that. But I think that can be handled
18 probably more clearly in the briefing.

19 Before I get into some of the specific
20 disagreements, I do want to note one thing I think
21 both sides do agree on, which is that there is a cost
22 associated with building and maintaining pole
23 infrastructure, and a cost associated with the cable
24 company attaching to a cooperative's poles. The

1 parties agree on that.

2 And so the primary issue in this case and in
3 last summer's case with Time Warner is the choice
4 between the two rate methodologies seeking to allocate
5 those costs. Both methodologies have been adopted by
6 different arms of the federal government, the FCC and
7 the Tennessee Valley Authority. The FCC rate as every
8 one has pointed out all things equal, generally
9 results in a lower rate. The TVA rate generally
10 results in a higher rate. And this Commission's role,
11 as I understand it at least, is outlined in
12 G.S 62-350, is to determine which of those
13 methodologies is just and reasonable in accordance
14 with that North Carolina Statute. And that statute,
15 despite Charter's claims to the contrary, is a two-way
16 statute. It not only protects the cable company that
17 wants to attach to the poles but it's intended to
18 protect the cooperative and the members of the
19 cooperative and protect them as well.

20 Now, there were questions during the course
21 of this proceeding last month from the Commission,
22 appropriate questions, about whether there were
23 subjective elements that found their way into these
24 allocation methods even though the proponents always

1 contend that they're purely objective. And we've
2 looked at the pictures and the models of the poles and
3 all that at some level. I think it's natural to start
4 maybe with common sense, and so the starting point
5 could be what is the answer to a -- to the question.
6 What could one expect to be the proper share of cost
7 for a pole with the presumed number of three
8 attachers? And the first answer, the intuitive
9 answer, which Mr. Gillespie denigrates to some degree,
10 might be one-third each. So we can begin by looking
11 at how the FCC rate stacks up with that. And as
12 Ms. Kravtin testified, and this is her slide that she
13 presented when we were here last month, the space
14 allocation factor of the FCC rate -- and I didn't make
15 up that term "space allocation factor", that's the
16 term they use -- the space allocation factor, she
17 called it today the defining feature of the FCC rate
18 methodology, allocates just 7.41 percent of the pole
19 space to the cable company. And that would be true
20 even if you took the teleco out of there and it's just
21 two attachers.

22 Now, on a model thirty-seven and a half foot
23 pole, we went through this today -- and again they
24 call this the space allocation factor, we didn't make

1 that up -- that represents only 2.8 feet of the space
2 being allocated to the cable company. That's the one
3 foot for where the cable company actually attaches.
4 It's less than six inches for the six feet of the pole
5 that are required to provide stability; it's only 16
6 inches for the 18 feet of the pole above ground that
7 are required by every attacher to achieve clearance;
8 and it's just three inches of that Communications
9 Worker Safety Zone that only exists at all because
10 Charter attaches to the pole.

11 So, for the FCC rate, we're talking about a
12 miniscule amount of space in the space allocation, and
13 I think some skepticism as to whether that could ever
14 be just and reasonable is appropriately warranted.
15 Now, Ms. Kravtin for her part - Mr. Gillespie repeated
16 it here today - she says well that's how common areas
17 are allocated in shopping centers and apartment
18 buildings. But remember a utility pole is not like a
19 standard apartment building. It's more like an
20 apartment building where every tenant has to be on the
21 18th floor or above. An attachment at the 12-foot
22 level of the pole is worthless to Charter. But
23 Charter only wants to pay 7.41 percent of the cost
24 required to get that pole 18 feet in the air where

1 everybody needs to be.

2 Now, the TVA rate as you've heard for its
3 part allocates 28 percent to the Commission's attacher
4 when it uses the presumption of three. In this case,
5 where there are only 2.35 attachers per pole
6 uncontested, TVA allocates about 41 percent to
7 Charter.

8 So putting aside these sort of facial
9 implausibilities of the FCC space allocation, I would
10 like to discuss six reasons very briefly why the FCC
11 rate should not be applied and the TVA rate is the
12 more appropriate of the two.

13 First, and Charter doesn't like to discuss
14 this fact, but as we heard today when Congress
15 authorized the FCC to regulate in this area it
16 explicitly carved out cooperatives from FCC
17 jurisdiction and that remains the case to this day.
18 That's the law. The FCC has no jurisdiction here.
19 When Congress did so, and you heard it again today,
20 its legislative history made it clear that rate
21 setting for cooperatives involves equity
22 considerations, turning on, quote, *the needs and*
23 *interest of local constituents*, closed quote, and
24 including the relative ability of cable subscribers

1 and co-op members to pay for the costs passed onto
2 them. In other words, what Charter likes here is the
3 regulatory result of the FCC rate but it wants you all
4 to ignore the regulatory context which is that
5 Congress says the FCC rate doesn't and shouldn't apply
6 to co-ops for very good reasons.

7 Second, when the General Assembly amended
8 the controlling statute here in 2015, it eliminated
9 any reference to any FCC methodology. I think we
10 heard Ms. Kravtin's testimony here that they
11 specifically generally referred to these other things
12 and we went through that but what was in there about
13 the federal methodologies is gone now.

14 Third, and this is related, the FCC says its
15 rate methodology is designed to provide low and
16 uniform rates in order to encourage broadband
17 deployment. North Carolina Statute says nothing about
18 broadband deployment. There is no North Carolina
19 policy in the statute or anywhere else, no public
20 policy in favor of broadband for this Commission to
21 defer to in choosing between the FCC and the TVA. If
22 North Carolina had an explicit broadband policy that
23 it wanted you all to implement, that could have been
24 written into the statute in the 2015 amendment; it

1 wasn't.

2 Fourth, cooperatives like Blue Ridge are
3 fundamentally different from investor-owned utilities.
4 As you know, cooperatives are owned by their members.
5 They're not-for-profit with all of their capital being
6 members' capital deployed solely for the benefit of
7 members. Two, they're charged with providing reliable
8 and safe electricity in their service areas at the
9 lowest possible cost. That's what the cooperatives
10 are told in the statute to do. Three, they're
11 required by the statute, again, to serve every one in
12 their service areas in a non-discriminatory manner.

13 Investor-owned utilities which are regulated
14 by the FCC as Mr. Gillespie pointed out, they have a
15 business model that's closer to Charter's business
16 model. They are for-profit. They choose who they
17 will serve based on profitability. The cooperatives
18 exist in the first place because investor-owned
19 utilities aren't interested in serving the rural
20 communities. Similarly, Charter has zero interest in
21 providing broadband to rural customers of Blue Ridge,
22 and all their talk about broadband here is just talk.

23 Blue Ridge's average density per mile
24 according to the record in this case per mile of line

1 is nine electricity meters. Charter's discovery
2 responses here, also part of the record, indicated a
3 much more dense 53 customers per mile in Blue Ridge
4 territory. And as this map shows, Charter serves only
5 the most densely populated areas, these areas of blue
6 and this one outlying area in Roaring Gap.

7 (Indicating) It has no interest in the balance of the
8 Blue Ridge system that is represented in all this
9 remaining infrastructure.

10 Fifth, there is no study, and Ms. Kravtin
11 said it over and over again she had to concede in any
12 event, no study by Charter showing that a low pole
13 attachment rate will increase broadband, or a high
14 pole attachment rate will impede broadband. Charter
15 will not commit to expand service if it receives a
16 particular rate from this Commission. Charter won't
17 even tell us what its criteria are for providing
18 service. Broadband really is nothing more than a
19 shiny object that Charter likes to talk about without
20 doing anything about it. They talk about all the
21 wonderful things that broadband can do, including
22 providing what Ms. Kravtin was referring to today as
23 these indirect benefits to these rural folk who will
24 never see broadband themselves. Charter has done

1 precisely nothing to calculate those benefits or even
2 show that they exist in the real world.

3 What Charter is really saying in sum and
4 substance here is that what this Commission should
5 adopt a rate methodology that requires Blue Ridge's
6 members to subsidize Charter's broadband deployment
7 even though those members will never have access to
8 broadband themselves. That's all those people in the
9 green there. No matter how theoretically wonderful
10 broadband may be, Blue Ridge's members will be
11 subsidizing broadband service they won't receive.

12 In other words, what we're really lacking
13 here is any sort of regulatory compact. Charter is
14 entirely unregulated with regard to who and how it
15 provides its broadband service. It does it where it
16 wants to. It's entirely regulated. But it wants to
17 glom onto this sort of singular piece of the North
18 Carolina regulatory apparatus to force itself onto
19 co-op poles in order to subsidize its communication
20 services.

21 Sixth, TVA, like this Commission, like Blue
22 Ridge, has a mission concerning electricity and the
23 integrity of the electrical system. In its service
24 commitment TVA states, *we will work to improve lives*

1 by providing safe, clean, reliable and affordable
2 electricity. That's almost exactly the same mission
3 that is outlined in the North Carolina General
4 Statutes Article 2, Chapter 117 for the electric
5 co-ops. We agree with TVA's rate methodology which
6 was promulgated as TVA says, and he said read what TVA
7 wrote and I would commend that, read what TVA wrote
8 because what TVA said is we want to have a rate
9 methodology which ensures that electric cooperatives
10 in seven states, including North Carolina, are not
11 subsidizing for-profit cable TV providers, and there's
12 nothing astonishing about that.

13 So, in summary, I want to suggest that in
14 seeking to determine the right methodology here, one
15 appropriate consideration for this Commission would be
16 to consider the consequences of being wrong.
17 Conceptually this Commission obviously could be wrong
18 in one of two ways, i.e., by choosing a methodology
19 that results in a pole attachment rate which is too
20 low or a methodology that results in a pole attachment
21 rate which is too high.

22 In assessing the risk of making the wrong
23 choice, it's appropriate to consider the size, nature,
24 and structure of the entities involved, Blue Ridge and

1 Charter. If the rate methodology choice here is a
2 rate which is too low, what happens is the relatively
3 small, nonprofit Blue Ridge, which has no choice about
4 whom it serves and who its members are, they are the
5 ones that will be harmed. That harm, because of the
6 structure of electric cooperatives under North
7 Carolina law, Article 2 of Chapter 117, will be
8 directly passed onto those members in the form of
9 higher costs for electricity. If the rate methodology
10 choice here results in a rate which is too high, the
11 large for-profit entity Charter and its shareholders
12 will be harmed. Charter also contends that a too high
13 rate will impede utilization and expansion of
14 broadband but, as we've discussed, they've offered no
15 evidence as to how a higher or lower pole attachment
16 rate will affect deployment of broadband in the Blue
17 Ridge service area or anywhere else in North Carolina.
18 That is the policy that's embodied in the TVA
19 methodology, to protect rural electric customers from
20 having to subsidize for-profit communications
21 companies. I would also contend that is the policy
22 implemented by Congress in 1978 when they excluded
23 cooperatives from FCC rate regulation and continue to
24 exclude them.

1 In other words, FCC rate regulation
2 between -- of pole attachment rates between large
3 investor-owned entities at worst results in a transfer
4 payment from a Charter shareholder to a Duke Energy
5 shareholder or vice versa. Regulation of pole
6 attachment rates between asymmetric entities though
7 like Charter and co-ops like Blue Ridge has the
8 potential to harm the cooperatives and their members
9 in ways that far outweigh any benefits that could flow
10 to a Charter, the for-profit entity.

11 Another way to think about this is if the
12 rate set is too low that will immediately result in
13 higher electricity costs to Blue Ridge's rural members
14 in seven relatively poorer North Carolina counties:
15 Alexander, Alleghany, Ashe, Avery, Caldwell, Watauga,
16 and Wilkes. On the other hand, the only conceivable
17 benefit of that too low rate will be more empty
18 promises of broadband from an otherwise unregulated
19 entity, Charter, who has no intention of providing
20 broadband to those members, and there's nothing just
21 and reasonable about that.

22 Thank you. I'd be happy to answer any
23 questions the Commission might have.

24 CHAIRMAN FINLEY: Questions by the

1 Commission?

2 (No response)

3 Thank you, ladies and gentlemen. We
4 appreciate your hard work in putting this case
5 together and your presentations.

6 What is your pleasure about post-hearing
7 filings? Our usual practice is 30 days from the last
8 transcript.

9 MR. MILLEN: I think that will be fine from
10 our standpoint. And we've got most of the transcripts
11 already so we're up from where we were.

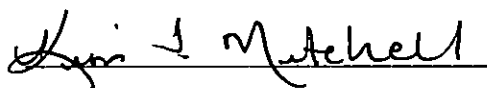
12 MR. TRATHEN: We're fine with that.

13 CHAIRMAN FINLEY: Very well. Thank you all.
14 We will be adjourned.

15 (WHEREUPON, the proceedings were adjourned.)
16
17
18
19
20
21
22
23
24

C E R T I F I C A T E

I, KIM T. MITCHELL, DO HEREBY CERTIFY that
the Proceedings in the above-captioned matter were
taken before me, that I did report in stenographic
shorthand the Proceedings set forth herein, and the
foregoing pages are a true and correct transcription
to the best of my ability.



Kim T. Mitchell
Court Reporter II

FILED

FEB 01 2018

**Clerk's Office
N.C. Utilities Commission**