

FILED

DEC 15 2017

Clerk's Office
N.C. Utilities Commission

1 PLACE: Dobbs Building
2 Raleigh, North Carolina
3 PLACE: Dobbs Building, Raleigh, North Carolina
4 DATE: November 9, 2017
5 DOCKET NO.: EC-23, Sub 50
6 TIME IN SESSION: 2:00 P.M. TO 5:00 P.M.
7 BEFORE: Chairman Edward S. Finley, Jr., Presiding
8 Commissioner Bryan E. Beatty
9 Commissioner ToNola D. Brown-Bland
10 Commissioner Jerry C. Dockham
11 Commissioner James G. Patterson
12 Commissioner Daniel G. Clodfelter
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IN THE MATTER OF:

Blue Ridge Electric Membership Corporation,

Petitioner

v.

Charter Communications Properties, LLC

Respondent

Volume 4

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

2

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1 P R O C E E D I N G S

2 CHAIRMAN FINLEY: Let's come back on the
3 record, please. Ms. Harden?

4 MS. HARDEN: Yes, sir.

5 MICHEAL MULLINS; Having previously been duly sworn,
6 testified as follows:

7 CONTINUED CROSS EXAMINATION BY MS. HARDEN:

8 Q Mr. Mullin (sic), before lunch I had asked you
9 if you recall testifying in deposition that Blue Ridge or
10 Brad Shields had first contacted you about negotiating a
11 new agreement. Do you recall that?

12 A I do recall that. Can you show me that
13 information?

14 Q I can show you, but on deposition, you
15 testified that you remembered that, right?

16 A Can you show me that -- where I can find that
17 information? I just want --

18 Q I'll just --

19 A I don't -- I've had a lot of information to
20 review and I just --

21 Q Okay.

22 A -- want to make sure.

23 Q We certainly will.

24 MS. HARDEN: In fact, have you got a copy to

1 hand to him? And we'll put it on the overhead so
2 everybody can look at it.

3 Q You are looking at Exhibit Lee Layton 14, and I
4 have used the exhibit that has several emails with you to
5 make this go faster. Let's start at the bottom because
6 emails run from the bottom.

7 On the third page of -- if you count the
8 exhibit, it's the very bottom email. Brad Shields sends
9 you an email on July 8, 2014, that says, "Here is the new
10 agreement. There is no change" -- to the -- "in the
11 existing rate," only a CPI. Let me know if you've got
12 any questions. "We appreciate your business." Does that
13 refresh your recollection that he sent it to you in 2014?

14 A Yes, ma'am.

15 Q And, in fact, if you look at the bottom of the
16 next page, you respond to him on the same day and tell
17 him you've -- you have received it, right, you'll put it
18 up the chain to Ronnie McWhorter?

19 A That is correct. I did forward that to Ronnie
20 McWhorter.

21 Q Okay. And then you see we've got a break, and
22 the next email is in March of 2015?

23 A Yes, ma'am. That is correct.

24 Q So from July of 2014 to March of 2015, Charter

1 did not respond to Blue Ridge, correct?

2 A I am not aware that Charter made a response. I
3 did not respond back to Mr. Shields back within that
4 time, but I'm not aware if Charter had made any response
5 or not.

6 Q And, in fact, didn't you ask Mr. Shields to
7 send it to you again --

8 A I do not reca---

9 Q -- in 2015?

10 A I do not recall.

11 Q You just don't recall?

12 A No, ma'am.

13 Q But you don't deny that you might have?

14 A It's possible --

15 Q Okay.

16 A -- but I do not recall that information.

17 Q All right. And in March of 2015, Brad tells
18 you we're going to do an audit and we're not in Charter's
19 territory, right? We're going to do -- we're going to
20 count the poles, count the attachments.

21 A That was September of 2015?

22 Q March of 2015 first. He gave you notice first
23 in March. We're in the process of doing a pole
24 attachment count. Do you see it?

1 MS. HARDEN: Can you point to it on --

2 A Oh, yes, ma'am. I see that now.

3 MS. HARDEN: -- the screen? We'll just help
4 you there.

5 A No. I see it.

6 Q Okay. And then again in April you respond to
7 him and say I've been back in the office. I'll get back
8 to you shortly. And then in September of 2015, Mr.
9 Shields contacts you again, right?

10 A Yes, ma'am.

11 Q And he tells you we're approaching Charter's
12 territory in a couple of months. That's to do the
13 2015/'16 audit or inventory, right?

14 A Yes, ma'am.

15 Q And he invited you -- he told you he was going
16 to be doing it, and he invited you with two months notice
17 if you wanted to ride along with the auditor.

18 A That is correct.

19 Q And you told him in response that you did not
20 have the manpower or the budget to do that, didn't you?

21 A Do you have that information?

22 Q Sir, do you remember whether or not you told
23 him you didn't have the manpower or the budget?

24 A I do not. My inventory -- or my inventory. My

1 emails, I get anywhere, you know, from 200, 250 emails a
2 day, and I do not recall each and every one of them.

3 Q Sir, I didn't ask you if you sent him an email.
4 I asked you if sitting here today, do you recall telling
5 Blue Ridge that you didn't have the manpower to ride
6 along in the audit?

7 MR. GEORGE: Objection. He's answered the
8 question.

9 CHAIRMAN FINLEY: Overruled. If you can
10 answer.

11 A I do not recall that conversation.

12 Q Did you have anything in your budget to cover
13 riding with Blue Ridge in the audit through the portion
14 of the territory in which Charter is attached?

15 A I would not -- I would not have been a part of
16 that budget creation process, so I'm not sure if anything
17 would have been budgeted for that or not.

18 Q Did you ride along with the auditor when he
19 went through the Blue Ridge territory on the portions
20 that Charter attached?

21 A We did not.

22 Q Do you think it might have been helpful to do
23 so to see how the inventory was being conducted, and what
24 was counted, and what the violations were that were being

1 noted?

2 A In the past, when we've participated with Blue
3 Ridge on these audits, we found that their information is
4 accurate. I do not recall any disputes that we've had
5 with their people that have conducted these audits.

6 Q And are you aware that the same inspector
7 reviewed it in 2015 and 2016 that did the 2010 review?

8 CHAIRMAN FINLEY: Talk into the microphone
9 there, and speak up --

10 THE WITNESS: Sorry.

11 CHAIRMAN FINLEY: -- so the court reporter and
12 everybody can catch your answers, please.

13 A I'm not aware if it was the same inspector or
14 not.

15 Q Okay. Are you aware that other third-party
16 attachers did ride along and had the budget to ride along
17 with Blue Ridge in the 2015 inventory?

18 A No. I'm not aware if they had other
19 participants in the audit.

20 Q Okay. But your experience was that that audit
21 had been reliable, and so you didn't feel you needed to
22 do it, to ride along?

23 A That was our previous experience with ride-
24 alongs.

1 Q Okay. Now, in your testimony before this
2 Commission, you failed to mention that Blue Ridge
3 contacted you at least twice before Charter responded in
4 2015 with a redline proposal; is that correct? You can
5 look on testimony, page 16, and see that, in fact, in
6 response to a question, "How did the negotiations
7 unfold," you began your testimony by saying, "In May of
8 2015, Charter sent a redline agreement to Blue Ridge."

9 MR. GEORGE: What page are you on?

10 MS. HARDEN: Testimony, page 16.

11 THE WITNESS: Is that my direct testimony?

12 MS. HARDEN: Yes, sir.

13 CHAIRMAN FINLEY: You might direct him to a
14 line, please.

15 MR. TILLEY: Line 10.

16 MS. HARDEN: Would you just put it up? We can
17 all see it together. It's pretty clear.

18 Q "How did the negotiations unfold?" "Charter
19 sent a redline of a proposed Blue Ridge agreement in May
20 2015." You failed to tell the Commission that Blue Ridge
21 had sent you one a year earlier, correct? You don't see
22 anything in your testimony that says that Blue Ridge
23 contacted you in 2014 and sent you an agreement, do you,
24 sir?

1 A No, I do not.

2 Q And you don't see anything in your testimony
3 that says that Charter waited almost a year, and after
4 Brad contacted you again, to finally respond?

5 A No, ma'am. I do not.

6 Q Okay. Also, in your testimony, you talk about
7 the Blue Ridge responses and the meetings in October,
8 November, and December of 2015, but Blue Ridge also sent
9 a redline back in December of 2015 to Charter, did it
10 not?

11 A What was that date?

12 Q December 2015.

13 A I know there were several redlines that were
14 exchanged, but I do not recall the exact dates.

15 Q Okay. You mention in your testimony that
16 Charter responded on September 29th, 2016, with a
17 redline. That's the first redline Charter sent back
18 after the December 2015 redline, right? They waited over
19 nine months to respond to Blue Ridge.

20 A Again, I can't tell specific dates. I just do
21 recall that there were several redlines exchanged.

22 Q Okay. And you can't tell specific dates
23 because you failed to put that in your testimony, didn't
24 you?

1 A If I didn't recall it, I wouldn't have included
2 it in my testimony.

3 Q Well, in fact, you weren't even involved in
4 these negotiations at this time, were you?

5 A I was involved up to the point that -- when we
6 met with Blue Ridge in November of 2015, I was involved
7 with the meeting with Mr. Shields and Mr. McWhorter where
8 we did discuss existing practices, current practices.

9 Q Okay. And as to those current practices that
10 you discussed in November of 2015 with Mr. Shields, you
11 told him during that meeting that for your installers
12 group -- because you're in the construction group, right
13 -- but that your installers group and the secondary pole
14 attachments that Charter makes, that Charter had no way
15 whatsoever to track the number of attachments it was
16 making to Blue Ridge's secondary poles. Didn't you tell
17 him that?

18 A That is a difficult process that we have in
19 trying to -- because of the volume of the installation
20 work that occurs on a monthly basis, that is an issue
21 that we have in trying to track our service drop
22 attachments.

23 Q I appreciate your testimony there. My question
24 is, didn't you tell him you had no process to track

1 secondary -- attachments to secondary poles?

2 A And we also said that we were agreeable to the
3 terms that -- on the five years of back rent, that we
4 would pay back to the last audit on those service drop
5 attachments.

6 CHAIRMAN FINLEY: I think that's a yes.

7 MS. HARDEN: We'll let the record reflect a
8 yes, then.

9 Q Now, the audit revealed almost 1,400
10 unauthorized attachments, correct?

11 A That's the numbers I've seen, yes.

12 Q 1,370-something, two or three, right, somewhere
13 in there?

14 A That's the number I've seen, yes.

15 Q And in deposition, didn't you tell me that you
16 would expect that a great many of those were to secondary
17 poles?

18 A That would be my assumption, yes, that the
19 majority of those would be service drop attachments.

20 Q Okay. And those service drop attachments,
21 which are secondary poles, your installers do not contact
22 Blue Ridge or let them know they're attaching, correct?

23 A We have a seven-day period and from the time --

24 Q Sir --

1 CHAIRMAN FINLEY: If you can answer the
2 question yes or no and then elaborate on it, I think we'd
3 -- if you'd do that, I'd appreciate it.

4 THE WITNESS: Okay. Yes, sir.

5 A Could you repeat the question, please?

6 Q Okay. In your installment group, nobody in
7 your installment group contacts Blue Ridge and tells them
8 when they're attaching to a secondary pole, correct?

9 A That is correct. We do have a seven-day period
10 from the time that we are contacted by the customer. Per
11 the FCC we have seven days that we need to get that
12 customer installed.

13 Q Okay. But that's the lucky customer that
14 you're willing to attach, correct, because you don't
15 attach every customer that asks for service in Blue
16 Ridge's territory, do you?

17 A If that customer is within 250 feet of our
18 service tap, that customer gets connected.

19 Q Okay. Let's talk about that. Two hundred and
20 fifty (250) feet of a service tap, and I believe you said
21 or a main line, right?

22 A Yes, ma'am.

23 Q Two hundred and fifty (250) feet. Well, a
24 football field is 100 yards, right?

1 A Yes, ma'am.

2 Q That's 300 feet, right?

3 A That is correct.

4 Q So the only person that you will automatically
5 connect under Charter's rules has to be within 250 feet,
6 less than a football field, from a tap or main line?

7 A That is --

8 MR. GEORGE: Objection. Mischaracterizes the
9 testimony.

10 MS. HARDEN: Oh, would you -- we can look in
11 the deposition, but, please, we'll try to move along.

12 CHAIRMAN FINLEY: Please answer the question.
13 Next. Move ahead.

14 A That is correct. Because of the signal levels
15 that our equipment operates at, we have found that if we
16 extend beyond the 250 feet, that the services are not as
17 -- do not -- the services do not work the way we
18 anticipate them or up to the customers' expectation
19 levels.

20 Q Well, just so we're clear, you mention seven
21 days, but you don't have to attach customers for which
22 Charter chooses not to serve, right? You don't have to
23 -- you don't have to connect them?

24 A We do not have to. Each situation is evaluated

1 on a case-by-case basis as to which customers we are able
2 to extend services to.

3 Q And in deposition, you explained to me that if
4 you were not within 250 feet of a Charter tap, that you
5 send one of your construction coordinators out to the
6 service request and evaluate how much it would cost to
7 connect, right?

8 A That is correct. We do an estimate. We
9 calculate the distance from our existing service location
10 to get service to that home. At that point we do a cost
11 assessment and submit that.

12 Q Okay. Do you also look and see how many other
13 people are adjacent to the person requesting service to
14 see how many people would come on the line for you as
15 potential customers?

16 A Each situation is separate. If there are more
17 homes in the area, then, yes, we will include those
18 homes. If it -- this is only an extension to one home,
19 then obviously there are no more homes there to consider.

20 Q And you certainly consider how many people
21 there are to connect before you extend a line, don't you,
22 sir?

23 A Yes, we do.

24 Q Okay. Now, are you aware in Blue Ridge's

1 territory that Blue Ridge serves 9.3 members on average
2 throughout every mile of its system, so there are only
3 nine customers per mile on Blue Ridge's system on
4 average?

5 A That number I was not aware of.

6 Q You're not aware of. But in your data
7 responses, which you were overseeing as one of those
8 30(b)(6) deponents, and we talked about those in your
9 deposition, Charter said that it passes an average of 53
10 homes per mile in -- with its distribution plant in areas
11 that include Blue Ridge's service territory, right?

12 A That is correct. That 53 homes per mile
13 encompasses very dense locations, multi-family housing,
14 the Town of Boone where we have an abundance of student
15 housing, towns such as Hickory which are very dense, even
16 the City of Lenoir. The homes per mile there are -- I'm
17 not sure exact numbers, but the numbers there are very
18 high. So that's a total number for the Charter service
19 area, not just the Blue Ridge area.

20 Q Yeah. So -- but we asked you if you could
21 calculate what the number of customers were per mile you
22 served in Blue Ridge's territory, and Charter said it
23 could not, right?

24 A That is correct.

1 Q And that was the information you provided,
2 correct?

3 A The information we provided was what we had
4 based on our database.

5 Q Okay. I have Lee Layton Exhibit --

6 MS. HARDEN: I can't read your writing.

7 MR. TILLEY: Two (2).

8 Q -- 2, okay, Lee Layton Exhibit 2. Mr. Layton
9 referred to this in his opening, in his summary, when he
10 had it on the screen. The green dots are every meter in
11 Blue Ridge's system. The blues are where Charter has
12 chosen to serve. Those are your locations. Is -- based
13 on your information, let's review this and see if you
14 believe this accurately depicts where Charter is choosing
15 to serve in Blue Ridge's area. We have Granite Falls
16 down here. Now, Granite Falls is carved out, Blue Ridge
17 doesn't serve it, but Charter starts service along 321,
18 up through Granite Falls and into Lenoir, right?

19 A That is correct. We do serve those areas.

20 Q And you do serve those. And so we've got
21 Granite Falls carved out, we've got Hudson, and then this
22 open area here is Lenoir, right?

23 A If the map is correct, yes.

24 Q If the map is correct, yeah.

1 A I'll accept that, yes.

2 Q Okay. And Blue Ridge doesn't actually serve
3 most of the City of Lenoir because Duke serves it, right?

4 A That is correct.

5 Q But Charter does serve some of the areas right
6 outside Lenoir that Blue Ridge serves, right?

7 A Yes, ma'am.

8 Q Okay. And then we go up the mountain, up 321,
9 but Charter is not serving anybody on 321 until you get
10 to Blowing Rock, right?

11 A We serve up Highway 321, beyond Rowee (ph)
12 Mountain Road. We go out Highway 268 towards the Wilkes
13 County line.

14 Q Okay. Up in here?

15 A So, yeah. I couldn't tell --

16 Q So, yeah. That's it.

17 A Okay.

18 Q Right there. That's where you're going out,
19 right?

20 A If that's Highway 268, that's correct.

21 Q Right. And then we have Blowing Rock. You've
22 got a lot of service in Blowing Rock, right?

23 A Yes, ma'am.

24 Q Okay. And then we go outside Blowing Rock up

1 to Boone, correct?

2 A Okay.

3 Q Well, you do serve that, right?

4 A Yes, ma'am.

5 Q Okay. Just want to make sure it's fair. And
6 then Boone's carved out because Blue Ridge doesn't serve
7 the Town of Boone or Appalachian State, right?

8 A That is correct.

9 Q Okay. But you serve around Boone, just like
10 Blue Ridge?

11 A Yes.

12 Q And then if we go out 105 over toward
13 Grandfather Mountain, you serve in that area as well,
14 right?

15 A That is correct. We do go to Avery County.

16 Q Right. You go into Avery. And then we go out
17 toward Deep Gap, right, when you're going east of Boone?

18 A Yes, ma'am. Down 421.

19 Q Okay. But except for these areas right on the
20 fringe here, around Deep Gap and all, you don't serve
21 anybody else in Ashe County, do you?

22 A Not that I'm aware of.

23 Q Okay. And in Alleghany County and the Wilkes
24 territory over here, the only place you serve is Roaring

1 Gap, right?

2 A My understanding -- and that is correct,
3 Roaring Gap. And my understanding is there's another
4 service provider that feeds out of Sparta for the rest of
5 that area.

6 Q But you have the right to serve this area,
7 right, all of it?

8 A If we chose to, yes.

9 Q If you chose to. And you're not trying --
10 you're not telling this Commission that if somebody lives
11 more than 250 feet off of any of these lines, and a Blue
12 Ridge member asks you to serve them, that you
13 automatically serve them?

14 A Not auto -- not automatically. As I stated,
15 each -- each extension is evaluated based on its own
16 merit.

17 Q Okay. Now, you don't make that decision as to
18 who -- whether or not to extend, do you?

19 A No, I do not.

20 Q And you wouldn't deny, would you, that people
21 come in, Blue Ridge members, and ask Charter to extend
22 service when they are 800, 900, 1,000 feet from a Charter
23 line, and the answer is no because there's only one or
24 two neighbors who might join with them and get service?

1 A We offer them the option to serve them. What
2 we will do, would consider a copay, if they would be
3 interested in that.

4 Q Well, are you aware, Mr. Mullin, that your
5 office stopped offering copays about four years ago in
6 Lenoir?

7 A That is not true.

8 Q That is not true.

9 A No, ma'am.

10 Q So if -- so if consumers -- consumer service
11 reps are telling people -- I know of one in particular, a
12 Blue Ridge employee four years ago, that they would not
13 extend service to his home that was in 1,000 feet of a
14 Charter line -- and you know what, he's a professional
15 engineer. He offered to dig the trench, buy the cable,
16 and do everything but connect it.

17 CHAIRMAN FINLEY: Is this a question or
18 testifying?

19 MR. GEORGE: Objection. There's no foundation.

20 CHAIRMAN FINLEY: Let's not testify, Ms.
21 Harden. You can ask questions, but let's not testify.

22 MR. HARDEN: Okay. All right.

23 Q Just to be clear, is it your testimony that you
24 connect every person who comes in from -- as a Blue Ridge

1 member that wants to be served?

2 A We connect every customer that is within 250
3 feet of our service -- our plant-- our main line plant.
4 Those that are beyond that, we evaluate those projects
5 and we submit them for approval, or they get submitted
6 for a copay. This is a process that Charter has had in
7 place since mid-2013. They standardized across the
8 company to -- so everybody has the same response, whether
9 you're calling in from North Carolina, you're calling in
10 from Michigan, you're calling in from Wisconsin.

11 Wherever you are within Charter, you're going to get the
12 same consistent response to whether or not your home is
13 serviceable and what the options are to serve you.

14 Q Mr. Mullin, you claim in your testimony that
15 Blue Ridge has singled out Charter and is trying to
16 impose more burdensome terms on Charter than it has in
17 other agreements with pole attachers. Do you recall
18 that?

19 A Yes, ma'am. If you can direct me to where that
20 is in my testimony.

21 Q Well, sir, if you recall it, I don't need to
22 direct you. We'll just move on. You do recall it,
23 right?

24 A I do recall that from reviewing the other

1 attachers' agreements, from looking at the pole rate.

2 There are -- there's evidence there that the

3 requirements --

4 Q To what questions are you responding, sir?

5 CHAIRMAN FINLEY: Don't interrupt him. Let him

6 finish.

7 A There is evidence there that there are

8 conditions being asked of Charter that are not imposed on

9 other attachers.

10 Q Okay. So, sir, when did you review these other

11 Pole Attachment Agreements?

12 A That has been in preparation for this hearing.

13 Q How many hours did you spend reviewing those

14 agreements?

15 A I couldn't put a number on it, but -- and I'm

16 not a contract expert. I don't claim to be a contract

17 expert, but I'm looking at -- you know, I probably spent

18 a couple hours -- a couple or four hours reviewing these

19 agreements.

20 Q Okay. Reviewing all seven of them, or just

21 six?

22 MR. GEORGE: Objection. Foundation.

23 A I can't remember the exact number that I

24 reviewed.

1 Q Okay. Well, if we look in your testimony, you
2 talk about ACTV, Wilkes, SkyBest, CenturyLink, SkyLine,
3 and Bellsouth or AT&T, right? That's six.

4 A Yes, ma'am.

5 Q And you mention those six agreements, and you
6 attach those as Mullin 10 -- no -- Mullin 9 through 14 of
7 your testimony, correct? And as long as you're right
8 there, we'll just flip through them really fast.

9 A Okay.

10 Q They start --

11 CHAIRMAN FINLEY: One -- one question at a
12 time. Let's finish the --

13 MS. HARDEN: Okay.

14 CHAIRMAN FINLEY: -- correct, I think was the
15 last question.

16 MS. HARDEN: I do -- Chairman Finley, I'm being
17 reminded that I am pulling confidential information or
18 documents marked others. I don't know if we've been in a
19 confidential status all day or not, but I do need to call
20 that attention on the agreements that Blue Ridge has with
21 other providers --

22 CHAIRMAN FINLEY: Well --

23 MS. HARDEN: -- other attachers.

24 CHAIRMAN FINLEY: -- I don't think we've got

1 anybody in the room here --

2 MS. HARDEN: Okay.

3 CHAIRMAN FINLEY: -- who has not signed a
4 confidentiality agreement, but we do need to be careful
5 in the transcript. It's put on the webpage and that type
6 of thing. So you all need to help us so we don't put
7 something on the webpage that you deem to be
8 confidential.

9 MS. HARDEN: Yes. Thank you, sir. Well, we're
10 going into confidential material now of agreements with
11 others.

12 CHAIRMAN FINLEY: All right. Madam court
13 reporter, if you'll --

14 MS. HARDEN: Okay.

15 Q Mr. Mullin --

16 CHAIRMAN FINLEY: Hold on. Hold on. Madam
17 court reporter, if you will note in the transcript that
18 we're going into confidential cross examination, please.
19 Go ahead.

20 (Because of the proprietary nature
21 of the testimony found on pages 29
22 through 37, it was filed under
23 seal.)

24

1 (Due to the proprietary nature of
2 the following testimony, it was
3 filed under seal.)

4 Q Mr. Mullin, your Exhibit Number 9 is the
5 BellSouth/AT&T agreement, correct?

6 A Yes, ma'am. That is correct.

7 Q Okay. And it's dated 1996, right, in the first
8 line?

9 A Yes.

10 Q Okay. I don't want to take the time for you to
11 personally flip through and look at these, but will you
12 agree with me that the best evidence of the effective
13 date of each of the contracts you attached to your
14 testimony is the date stated in the document that you've
15 attached?

16 A That is the only information that I was given
17 to review as part of this process. So whatever the dates
18 are, that's the dates that I had -- that's the dates of
19 the agreements that I had to work with.

20 Q Okay. So if the documents themselves
21 establish, and I'm going to ask you to assume that
22 because it can be determined by flipping through, that
23 these agreements were entered into, ACTV in 1996,
24 effective date for Wilkes 1996, SkyBest 2002, CenturyLink

1 2004, SkyLine 2005, the AT&T amendment we just looked as
2 Exhibit 9, 2005, 1996 through 2005 are all before 2008,
3 aren't they, sir?

4 A That would be correct.

5 Q And so all of the agreements that you attached
6 to your testimony or mentioned were prior to the
7 Charter/Blue Ridge agreement in 2008, correct?

8 A That would be correct.

9 Q And are you aware that there is one other
10 written agreement between Blue Ridge and a pole attacher
11 that was entered into after the Charter/Blue Ridge
12 agreement in 2008?

13 A May I ask who that agreement would be with?

14 Q Morris Broadband, November 29th, 2016.

15 A Yes, ma'am. I did see some information
16 regarding the Morris Broadband.

17 Q Okay. You didn't attach the Morris Broadband
18 agreement to your testimony, did you?

19 A I do not believe I was provided that
20 information.

21 Q So you didn't get the only agreement that Blue
22 Ridge had executed with another pole attacher since 2008
23 when you were preparing your testimony to compare the
24 terms of Blue Ridge's agreements with others?

1 A That is correct. I was not aware of all of the
2 agreements that had been provided, so I went with the
3 information I was given.

4 Q So you went with what Charter's lawyers gave
5 you to review, correct?

6 A I reviewed the information that I was given.

7 Q Okay. And Morris Broadband -- do you know
8 whether or not Morris Broadband is based upon the Charter
9 2000 in agreement form?

10 A I haven't seen that agreement, so I cannot
11 state that.

12 Q So when you made your comparison in the
13 testimony, you selected only the ones that Charter's
14 lawyers gave you and didn't ask for all of them?

15 A I did not know that there were more to ask for.

16 Q Okay. And in your summary this morning -- I
17 mean this -- before lunch, I guess that was still morning
18 -- before lunch and in your testimony, you have stated
19 that Blue Ridge only requires an overlashing permit from
20 Charter. Do you remember that?

21 A That is correct.

22 Q So if the Morris Broadband agreement, in
23 itself, and in particular Exhibit B5 of that agreement in
24 section 5.9, include -- I'm sorry. I gave you the wrong

1 sections. Article 7. If Article 7 of the Morris
2 Broadband agreement with Blue Ridge from 2016 requires an
3 overlashing permit, just like the one in the Charter
4 2008, then you would be wrong when you said that
5 Charter's been singled out and that Blue Ridge doesn't
6 require an overlashing permit from anybody else?

7 A If that information was in the Morris Broadband
8 agreement, that would be correct.

9 Q Okay. And if Morris -- the Morris Broadband
10 agreement requires a PE certification, just like the
11 Charter Exhibit B5 requires an engineer to sign off after
12 completion, then your analysis would be incorrect,
13 wouldn't it?

14 A In regards to Morris Broadband, it would be
15 incorrect.

16 Q Well, it would also be incorrect in that
17 Charter is the only one that's been singled out over this
18 requirement, wouldn't it?

19 A Yeah. It would appear that Morris Broadband
20 also was -- had those conditions put on them.

21 Q Okay. Now, you reviewed the Pole Attachment
22 Agreements, you said, and the Joint Use Agreements for
23 your comparison testimony, right?

24 A That is correct.

1 Q Have you ever negotiated a Joint Use Agreement?

2 A The negotiation with Blue Ridge is probably the
3 most extensive involvement I've had with any contract
4 agreements. Prior would have just been involvement as
5 far as providing details on our current processes.

6 Q Okay. But the Blue Ridge agreement is a Pole
7 Attachment Agreement, right?

8 A That is correct.

9 Q And four of the agreements you reviewed are
10 Joint Use Agreements, right, or do you not know the
11 difference, sir?

12 A I do understand the difference. That is
13 correct.

14 Q Because a Joint Use Agreement means that the --
15 both entities own poles, right?

16 A That's my understanding.

17 Q Okay. And when you -- when we were talking on
18 deposition, when we went over Charter's territory -- the
19 Charter attachments in Blue Ridge's territory, you said
20 there's only one pole that Charter owns in this area, and
21 that's in Granite Falls, and it may even be in Duke's
22 territory and not Blue Ridge, right?

23 A That is correct. It is in Granite Falls, and I
24 believe it is actually in the Town of Granite service

1 area.

2 Q Okay.

3 A Granite Falls municipal.

4 Q So for the Blue Ridge service area, Charter
5 doesn't own a single pole?

6 A That would be correct.

7 Q Okay. In your testimony, sir, you stated that
8 virtually every other attacher is required to allow only
9 40 inches of separation from Blue Ridge's neutral, but
10 Charter must allow 72 inches. That's on page 4 of your
11 testimony. That's accurate. I read it accurately,
12 right?

13 A Let me please turn to that just to verify.

14 Q Testimony, page 4, line 8-9.

15 A I think our numbers are off by one. I'm
16 looking at that on page 5.

17 Q If you actually look at the bottom of the page,
18 it says page 4.

19 A I'm looking, and it's --

20 Q So yours paginated differently when you
21 reprinted?

22 A Mine is showing page 5.

23 Q Yours is showing page 5. But you agree that's
24 what it says, right?

1 A That was line 8 -- line 8 you had asked about?

2 CHAIRMAN FINLEY: "So, for example, what --
3 virtually every other attacher is required to allow only
4 40 inches of separation from Blue Ridge's neutral.
5 Charter must allow 72 inches of separation." Is that
6 correct, what you said there?

7 THE WITNESS: That is correct. And that is
8 showing on page 5 of my document.

9 Q Okay. And you didn't review the Morris
10 Broadband document, right?

11 A No, ma'am.

12 Q So if Morris Broadband, just like Charter,
13 includes the 72 inches in Exhibit B in the Rules for
14 Practice, and D, the Supplemental Rules, number 12, then
15 you would not have considered that when you were doing
16 your comparison for your testimony, right?

17 A I would have considered it, and I would have
18 noted that, that in addition to Charter -- I'm sure I
19 would have stipulated that in addition to Charter, Morris
20 Broadband is the only other provider with these
21 requirements.

22 Q So are -- so you reviewed the agreement for
23 that one thing, but not for any of the others we talked
24 about, professional engineering or overlashing?

1 MR. GEORGE: Objection. I think there's a
2 mischaracterization of the testimony. The page we just
3 looked at, Mr. Mullins talks about Morris Broadband. And
4 I think it's possible that we just have a
5 miscommunication here.

6 Q Well, in any event, if Morris Broadband is --
7 has the 72-inch clearance, then it would not be accurate
8 that Charter is the only person that Blue Ridge asked to
9 leave 72 inches below its neutral, correct?

10 A That is correct. It would be Charter and
11 Morris Broadband.

12 Q And under the joint use specifications that we
13 looked at yesterday in Mr. Layton's testimony and the
14 training session in 2006, which at least two Charter
15 employees attended, that 72-inch specification was
16 distributed to pole attachers like Charter, right?

17 A That is what Blue Ridge asserts. I do not know
18 that with any certainty, but that's what they say.

19 Q And Mr. Mullin, when you were in deposition --
20 CHAIRMAN FINLEY: Ms. Harden, I think he's got
21 an "s" on the end of his name.

22 MR. GEORGE: He does.

23 CHAIRMAN FINLEY: It's Mullins.

24 MS. HARDEN: I apologize.

1 THE WITNESS: That's okay.

2 MS. HARDEN: I did not mean to mispronounce
3 your name.

4 THE WITNESS: Thank you, sir.

5 Q Okay. Mr. Mullins, on deposition, when I asked
6 -- when we asked you what the clearance requirements were
7 on Blue Ridge's system, you said 72 inches, right?

8 A Can you show me where that is?

9 Q You don't remember testifying to that at all?

10 A I do remember, but there has been a lot of
11 information that I've reviewed in preparing for this, and
12 I just want to make sure that I agree to what I said.

13 Q Okay. Forget about the testimony, forget about
14 the deposition. You are the Construction Supervisor for
15 Charter over all of Blue Ridge's territory, correct?

16 A That is correct.

17 Q What clearances do your Construction
18 Coordinators tell the contractors to use when attaching
19 to Blue Ridge's system?

20 A Seventy-two (72) inches, unless we have
21 approval to attach at 40.

22 (Testimony on the open record
23 resumed.)

24

1 BY MS. HARDEN:

2 Q Okay. Mr. Mullins, do you have any associate
3 degrees or bachelor degree or anything?

4 A No, ma'am. I do not.

5 Q You're not an engineer, are you?

6 A I am not an engineer.

7 Q And, of course, then you can't be licensed as a
8 professional engineer, can you?

9 A That would be correct.

10 Q And, sir, no one you supervise is an engineer,
11 correct?

12 A We do not have engineers, but as stated before,
13 I do have 29 years experience within the cable industry
14 and have been supervisor for the past 11 years.

15 Q Right. And when we asked you in deposition
16 what clearances were required by the National Electric
17 Safety Code, didn't you say you didn't remember?

18 A I do not recall that conversation.

19 Q Well, let's look at your deposition. Do you
20 have it in front of you, sir? Let's hope the numbers
21 line up this time. Let's go all the way to the back. Do
22 you not have your deposition?

23 MS. HARDEN: Do we have a copy? Just hand him
24 a copy.

1 THE WITNESS: I'm not sure if it's in this.

2 MR. GEORGE: It's not.

3 THE WITNESS: It's not.

4 Q I tell you what, let me back up one question,
5 then we'll do two at once so it'll take shorter time. In
6 your deposition you were asked and you were not familiar
7 with the term construction workers -- excuse me. Are you
8 ready, sir?

9 A Yes, ma'am.

10 Q In your deposition you testified under oath
11 that you were not familiar with the term communications
12 workers safety zone, correct?

13 A That was correct. That is the -- we've
14 considered that area the power space. That's how we
15 refer to it. We didn't refer to it as the communications
16 workers safety zone.

17 Q So you refer to it as the power space?

18 A Power space or the safety space.

19 Q Okay. And you also testified in your
20 deposition that you have never had any formal training on
21 the National Electric Safety Code, correct?

22 A That is correct. Not formal training, but we
23 do have training where we're instructed on principles and
24 guidelines directed by the NESC.

1 Q Okay. When we asked you in deposition what
2 topics you had informal training on, on the National
3 Electric Safety Code, you identified defensive driving,
4 power supplies, handling temporary cables, office safety,
5 and proper lifting. Those were the only five topics you
6 could recall where you had informal training on the
7 National Electric Safety Code, correct?

8 A That was not in response to the National
9 Electric Safety Code; that was in response to our Charter
10 safety training program and examples of topics that are
11 covered within our safety program.

12 Q Okay. Let's look at page 25 of your
13 deposition. We'll put it up on the screen. Question
14 starts line 3. We'll work into it so it'll be in
15 context. Are any of Charter's employees that perform
16 construction or maintenance work on its aerial facilities
17 professional engineers?

18 MR. GEORGE: Objection. That's not the
19 question.

20 MS. HARDEN: Okay. We'll go right down. The
21 next one's right here.

22 Q "No, they're not." "Does Charter provide its
23 employees training on the National Electric Safety Code?"
24 You said, "We train on topics," right?

1 A That is correct.

2 Q Okay. And in response to the question, you
3 said that Charter performs training on portions, and we
4 ask about that, you said primarily on the job. And
5 that's correct, right?

6 MR. GEORGE: Are you reading the questions and
7 answers?

8 MS. HARDEN: Would you keep on? Just move it
9 down. I can't see it.

10 Q Line 18, "To the extent Charter provides formal
11 training, what is that formal training?" You say, "They
12 range anywhere from defensive driving, to power supplies,
13 handling temporary cables, office safety, proper lifting,
14 and just safety," right, safety training. That was in
15 relation to the question on what is your formal training
16 under the NESC, was it not, sir?

17 A Then that would have been a misunderstanding on
18 my -- my misunderstanding to the question to the extent
19 Charter provides formal training. If it had said Charter
20 provides formal NESC training, that would not have been
21 my answer, but this was an answer to training that
22 Charter -- formal training that Charter -- safety
23 training that Charter provides.

24 Q Okay. While you've got your deposition in

1 front of you, I had asked you about the construction
2 workers safety zone earlier, correct?

3 A Yes, ma'am.

4 Q Okay. Communications workers. I apologize.

5 And on page 54, line 1 of your deposition, it says -- you
6 said in your deposition you weren't sure whether or not
7 you remembered --

8 MR. GEORGE: Object --

9 Q -- or you did?

10 MR. GEORGE: Objection. I think he answered
11 this question.

12 CHAIRMAN FINLEY: I think he has.

13 Q Okay. It was the clearance question. Let's go
14 to the end of your deposition.

15 MR. GEORGE: What is the end? What page
16 number, Ms. Harden?

17 MS. HARDEN: It's your redirect of the witness,
18 Mr. George.

19 MR. GEORGE: What page number?

20 MS. HARDEN: It is page number 153, line 14.

21 Q Do you see, sir, Mr. George asks you, "What are
22 those clearance requirements for Charter's new main line
23 attachments to Blue Ridge's poles?" And you said, "72
24 inches," correct?

1 MR. GEORGE: Objection. I believe he also
2 answered this question.

3 MS. HARDEN: Yes. And I'm going to tie it to
4 the follow-up redirect, sir, on the next page.

5 CHAIRMAN FINLEY: Overruled. Keep going.

6 Q If you go to page 154, Mr. Tilley followed up
7 on that answer about clearances, and said on line 17,
8 "Are you familiar with any clearances required by the
9 National Electric Safety Code?" And what was your answer
10 in deposition, sir?

11 A "Not that I can recall from memory."

12 Q Okay. Now, in your testimony, not only do you
13 discuss the clearances of the National Electric Safety
14 Code, but you even opine as to the purpose of the
15 communications workers safety zone, correct?

16 A Where is that addressed in my testimony, ma'am?

17 Q Sir, do you not remember your testimony? Did
18 you write your testimony?

19 MR. GEORGE: Objection. She's harassing the
20 witness, and she's also just constantly mischaracterizing
21 his testimony.

22 CHAIRMAN FINLEY: Well, I'll let him answer
23 whether or not he wrote the testimony.

24 A I reviewed the testimony.

1 Q So you didn't write your testimony, did you?

2 CHAIRMAN FINLEY: He reviewed it. Let's go.

3 It wouldn't be the first time we had a lawyer writing
4 testimony out here. I know that.

5 (Laughter.)

6 Q Okay. You asked me where. Testimony, page 24.

7 And, of course, I need a version, I guess, that has the
8 page numbers yours do. We'll put it up on the screen.

9 Okay. In response to the question on page 24, "Who does
10 the safety space protect," because you call the
11 communication worker safety zone the safety space, right?

12 A That is correct.

13 Q So we're referring to the same thing.

14 A Yes, ma'am.

15 Q So did you provide testimony as to who the
16 communication workers safety zone protects in this
17 proceeding?

18 A Both -- the answer was, "Both the communication
19 workers and the Cooperative's workers."

20 Q How does the communication workers safety zone
21 protect Cooperative workers?

22 A It provides them with the space to work on
23 their facilities without being impeded by other
24 equipment.

1 Q And, sir, are you aware that Blue Ridge's
2 electrical workers wear fully protective gear when they
3 work on high voltage lines?

4 A I'm sure they do.

5 Q And, in fact, they have to climb over your
6 communications equipment to get into the electric space,
7 correct?

8 A That would be correct. They have to climb
9 across our equipment. They have to go across the
10 equipment of other attachers, which I'm familiar with
11 because my earlier days in the -- the industry I climbed
12 poles for a living. I understand the hazards. I
13 understand the difficulties that some of these climbers
14 have with ascending these poles.

15 Q Have you ever been trained to work in the
16 electric space?

17 A No, ma'am. I have not.

18 Q Have you ever climbed a pole with the fully
19 insulated protective gear that an electrical worker is
20 required to wear?

21 A I have not.

22 Q And are you aware that the National Electric
23 Safety Code provides for the communication workers safety
24 zone only if there are communication attachers on the

1 pole?

2 A No. I was not aware of that.

3 MS. HARDEN: May I pull a model over to
4 hopefully make this go faster, Chairman Finley?

5 CHAIRMAN FINLEY: Yes, ma'am. You may.

6 MS. HARDEN: Would you pull one of those poles,
7 both of those poles? Testimony page 3, line 17.

8 CHAIRMAN FINLEY: But you can't put that pole
9 in the record, but you can talk about it.

10 MS. HARDEN: Actually, this pole is already in
11 the record as an exhibit to Mr. Arnett's testimony by
12 picture, sir, but we won't put the whole thing in there.
13 Okay.

14 Q Using this pole as an example, in your
15 testimony on page 3 you say that you put a bolt of 1 inch
16 in the communication workers safety -- in the
17 communication space, right, Charter's attachment space,
18 the blue one on this pole?

19 A The bolt is a 5/8-inch bolt with a straight
20 clamp attached to it.

21 Q Okay.

22 A That is about 1 inch wide.

23 Q It's about 1 inch wide. And when you do that,
24 you run a messenger from that bolt, right, that steel

1 wire like that?

2 A The steel strand. That goes through the clamp,
3 not the bolt.

4 Q It goes through the clamp and attaches to the
5 pole, right?

6 A Yes, ma'am.

7 Q And this hangs off -- or this is a strand,
8 because you need steel, because these aren't strong
9 enough to stand up by themselves, right? You've got to
10 attach them to the steel cable or messenger.

11 A For support.

12 Q Right. And you recognize that the National
13 Electric Safety Code, that you've got to have 6 inches
14 above and 6 inches below your bolt or attachment, right?

15 A Yes.

16 Q So there's a foot there, at least?

17 A Twelve (12) inches.

18 Q Right. Okay. In addition to the messenger and
19 your coaxial cable -- and I don't know if you were --
20 could see when Mr. Booth was up, but this big strand is
21 coaxial cable, right?

22 A Yes.

23 Q And the small strand is fiber, right?

24 A That would be a fiber strand, right.

1 Q Okay. So what I'm holding that's coming off
2 the pole is your messenger or your steel -- steel cable,
3 your coax cable, and your coax cable has been lashed to
4 the messenger to hold it up, right?

5 A That is correct.

6 Q Okay. And on this example, there's a fiber,
7 right?

8 A Yes, ma'am.

9 Q So the fiber has been overlashed, correct?

10 A Yes, ma'am.

11 Q So that's overlashing, right?

12 A That's one --

13 Q That's an example.

14 A That's one example of overlash.

15 Q Okay. Now, when you're out in the field,
16 Charter overlashes other coaxial cable and fiber to the
17 existing steel strands, right?

18 A Yes, we do.

19 Q Okay. And in certain instances, this one only
20 has one overlashing, but you would add more, right, two,
21 three different coaxial cables or fiber to this?

22 A It's not that often, but, yes, we do.

23 Q Oh, it's not that often that you overlash more
24 than one?

1 A If we're overlashing, there's already one
2 there.

3 Q Okay. And overlashing --

4 A So we will add --

5 Q You overlash one.

6 A -- a second, but it's not as often that we get
7 two, three, four, and five different cables as it is as
8 we add a second cable.

9 Q Okay. So it's more often that you would add a
10 second cable?

11 A Yes, ma'am.

12 Q You would agree with me that every time you add
13 a cable and overlash it, that you've increased this
14 surface area, correct?

15 A The area is increased.

16 Q Right.

17 A That is correct.

18 Q And while you said it's not that often that you
19 would add three or four, you do in instances add three or
20 four overlashed cables, do you not?

21 A It has happened, yes.

22 Q It has happened, and it has happened on Blue
23 Ridge's system, right?

24 A Yes. We have those situations --

1 Q Okay.

2 A --- on Blue Ridge poles.

3 Q So do you know what the wind factor is in Blue
4 Ridge's system?

5 A I'm not aware of the wind rating or the load
6 rating or ice rating. I do know that as far as weight
7 goes, that we're adding to the pole. A 48-count fiber is
8 our common fiber that we use, and that fiber, per the
9 manufacturer, weighs about 72 pounds per 1,000 feet. So
10 if we are overlashing one span of fiber for 250 feet,
11 we're adding, basically, about 18 pounds of weight to
12 that pole.

13 Q So you're adding 18 pounds per cable you've
14 overlashed?

15 A Yes.

16 Q Okay.

17 A For a fiber cable, yes.

18 Q For a fiber cable. And it would be more --
19 because coaxial is heavier, right?

20 A It is a little bit more, yes.

21 Q Right. Okay. Now, you will agree with me that
22 every time you do that, you just said that you increased
23 the surface area, right?

24 A I would consider it more the diameter, but yes.

1 Q Okay.

2 A It increases --

3 Q But there's more space there for wind to catch,
4 right? That surface area is a larger surface area
5 exposed to the wind.

6 A That is true.

7 Q And in Blue Ridge's territory we have ice,
8 don't we? You've seen ice on your messengers, cables,
9 and coaxial, haven't you?

10 A Oh, yes.

11 Q And this is a -- the equivalent of 1/4 of an
12 inch of ice.

13 A I will --

14 MR. GEORGE: Objection. Foundation.

15 Q Is that about right? Is that what you'd say?

16 A I don't know if I would say it was 1/4, but --

17 Q It's there.

18 A -- for -- for our example, let's say it is.

19 Q You've been there 29 years. You've seen more
20 than 1/4 of an inch of ice on Charter's cables in 49
21 years -- I mean 29 years?

22 A Not in the Lenoir area.

23 Q Well, yeah. I can --

24 A The Lenoir area -- I've worked in the Boone

1 area for about 13 years, so -- and we've been fortunate.
2 I've heard that ice -- I've heard bad stories about ice,
3 but in the time that I've been working the Boone system,
4 I have not seen ice issues that bad.

5 Q So you didn't see ice issues that bad with the
6 Christmas storm in 2010 that took out huge portions of
7 both Blue Ridge and Mountain Electric's system?

8 A I can recall that storm, but I do not recall.
9 And from memory, I want to say that I was on vacation at
10 that time and I did not do any of the ride-outs, so I
11 don't recall.

12 Q That was a good time to take vacation.

13 A I was fortunate that time.

14 Q Okay. But weight is not the only consideration
15 in a loading analysis, is it, sir?

16 A There would be other. I agree with that.

17 Q And wind and ice loading would be a
18 consideration, wouldn't it?

19 A Yes.

20 Q And when ice accumulates and strong winds
21 occur, it adds load to the messenger and to the poles,
22 doesn't it?

23 A I agree with that.

24 Q And --

1 MS. HARDEN: I'll just lay them down.

2 Q And Charter does not do any loading analysis on
3 any facilities it adds to Blue Ridge's poles, correct?

4 A Charter does not have any PEs on staff. In our
5 agreement with Duke Energy, the way that process works is
6 Duke Energy contracts a third-party engineering group
7 that reviews all of our attachments. They tell us where
8 to attach on the pole, they do all the loading analysis,
9 and they approve the permits for us to attach. So there
10 is some engineering review -- though it's not necessarily
11 completed by Charter, there is some engineering review
12 done on our attachments.

13 Q Okay. But that was attachments to the Duke
14 system, right?

15 A That is correct.

16 Q Not to the Blue Ridge system.

17 A That is correct.

18 Q And Duke is doing it, right?

19 A Duke is doing that, and that is something that,
20 you know, we would be very happy to do with Blue Ridge
21 and not at Blue Ridge's cost. Charter incurs all those
22 costs from the engineering company. That is a pass
23 through for the power company. And Charter does incur
24 the costs of those engineering fees.

1 Q Let me ask you this, when you attach to Duke's
2 system, do you pay substantially more in reimbursement
3 cost than you do Blue Ridge's?

4 A Each situation would be different based on make
5 ready. If it is only engineering fees, then I would not
6 say that those fees are a lot more, but if it is -- if
7 make ready is involved, then you'd have additional
8 engineering time with the make ready, you have the
9 additional cost associated to the pole replacement, and
10 then you have additional cost involved with the review.
11 So each individual -- you can't just sit here and say
12 that each situation is the same. Each one is going to be
13 different because each attachment that we make is going
14 to be different to each pole.

15 Q I want to follow up -- I want to use this one
16 more time, then I'll sit down. So you're asking this
17 Commission to put in place a term that takes into account
18 the loading analysis and require Blue Ridge to do it in
19 the agreement for your system?

20 A The reason that we -- we like the way that
21 Duke --

22 CHAIRMAN FINLEY: Let's see if you can answer
23 the question, then --

24 THE WITNESS: Oh.

1 CHAIRMAN FINLEY: -- then expound on your
2 answer, if you'd like to.

3 THE WITNESS: I'm sorry.

4 A Yes. That is what we would like. The reason
5 that we like the agreement, the way this works with Duke
6 Energy, is because that third-party engineer answers to
7 Duke Energy, not Charter. So if there are any disputes,
8 if there's any issues that arise, you know, then it
9 doesn't come down to Charter's engineers saying we can
10 built it this way, and then you have a different engineer
11 from the power company saying, no, you need to do it that
12 way. This -- this third-party engineering company
13 reports to Duke Energy. They have Duke Energy's
14 requirements, their specifications, so this works well
15 for us in the fact that we don't get into a situation
16 where we've got two engineers that disagree.

17 I'm sure -- you know, I've seen it with my own
18 coordinators sometimes -- we can both -- we can have two
19 people look at the same job and have different
20 conclusions on what's the best way to build it. So
21 that's the reason we don't want to have that situation
22 where our -- if we have an engineer that had done this
23 work and we submit that proposal to Blue Ridge, Blue
24 Ridge may have an engineer that thinks, you know, a

1 little bit differently, or Blue Ridge's engineer may have
2 more insight into that pole as to what the future use is
3 going to be. And they can tell us this proposal would
4 work, but we need to do additional work because we've got
5 a different idea for that pole down the road.

6 So that's why we prefer -- we don't expect that
7 cost to be passed on to Blue Ridge. That is something
8 that Charter would incur, and we're okay with that.

9 Q Okay. So you acknowledge that the new
10 agreement between Charter and Blue Ridge and Charter and
11 any co-op in North Carolina should require a loading
12 analysis that is paid for by Charter?

13 A If that is put into the agreement, Charter
14 would incur those costs.

15 Q And -- and are you also suggesting that you
16 would have -- well, let me start again. Wouldn't you
17 have to notify Blue Ridge and let Blue Ridge know you're
18 going to make an attachment to the pole in order for all
19 that to happen?

20 A If we are talking about a main line attachment,
21 yes.

22 Q You don't think you should have to notify Blue
23 Ridge of a secondary pole attachment?

24 A Well, we do have to notify them on a secondary

1 attachment pole, and we should be. That is a different
2 situation from main line construction, and that is
3 something that needs to be looked at under a different
4 set of guidelines because we're attaching a drop wire,
5 not strand, cable, fiber cables. You know, it's just a
6 service drop going to a home.

7 Q But it has the same clearances, right, same
8 National Electric Safety Code clearances?

9 A From power, yes.

10 Q Yes. Okay. Looking at this pole, this plastic
11 tube or whatever -- this white thing represents a riser.
12 You okay with that? You can use that?

13 A I'm good with that.

14 Q Okay. Twenty-five (25) percent of Charter's
15 system is underground connection to customers, right?

16 A That is accurate, yes.

17 Q So on -- so you are able to go underground and
18 have provided service at least 25 percent of the time in
19 Blue Ridge's territory?

20 MR. GEORGE: Objection. Characterization.

21 CHAIRMAN FINLEY: Overruled.

22 A That 25 percent covers all of Charter's
23 territory, not just Blue Ridge, so I cannot stipulate
24 that it's exactly 25 percent in Blue Ridge. It may be

1 more; it may be less. My guess actually would be because
2 of the terrain in the Blue Ridge area, that number may
3 actually be a little bit lower because we do prefer to go
4 aerial whenever possible just because of the terrain
5 conditions. If Blue Ridge has a pole line there, that is
6 obviously our preferred method to serve that area.

7 Q This is called a riser, right?

8 A Yes, ma'am.

9 Q And your cable would come up through the riser,
10 right?

11 A Yes, ma'am.

12 Q And it would come up any time you've been
13 underground?

14 A That is correct.

15 Q Whether you're connecting service or whether
16 you're following the utility and going under -- under a
17 road or an obstacle, right?

18 A Or to get service to a subdivision, whatever it
19 may be, yes.

20 Q So you have -- so the riser -- and the riser,
21 when you would put it on, runs from the bottom of the
22 pole all the way up to your communication space, doesn't
23 it, sir?

24 A It would run all the way up to our strand.

1 Q All the way up to your messenger, right?

2 A That is correct.

3 Q Okay. And so your risers use the support space
4 and run up the full length of the pole to your
5 attachment, right?

6 A The same as the power company risers, the same
7 as any other attacher's risers, yes.

8 Q Yes, but you're using the pole, too, aren't
9 you? If your riser is coming up, you're certainly using
10 it, aren't you, sir?

11 A Yes.

12 Q Okay. And you also have amplifiers that you
13 attach to the support space, right?

14 A That is not correct.

15 Q Where do you attach your amplifiers?

16 A Our amplifiers are attached to the strand. We
17 have power supplies --

18 Q Okay.

19 A -- that we attach to the poles.

20 Q And -- or communication boxes that you attach
21 to the poles, correct?

22 A That's -- well, it's a power supply. It
23 provides power from -- power that we pay for from Blue
24 Ridge Electric. It provides that power to our system to

1 power our electronics.

2 Q Does Charter conduct regular safety inspections
3 of its aerial plant in Blue Ridge's system?

4 A No. Charter does not have what you would call
5 a safety inspection program. But Charter does have
6 technicians. We have coordinators that are in the field
7 every day riding our system. We are looking for safety
8 infractions. If we find discretions within the plant,
9 those are reported and we address them, but we have, you
10 know, 100 or more. I'm not sure what the exact number of
11 technicians we have now, but, you know, possibly 100 or
12 more technicians in the field every day that are riding
13 our plant, looking at it as they're riding.

14 Q Sir, you said in your testimony and in
15 deposition that you do not do regular and routine safety
16 inspections, correct?

17 MR. GEORGE: Objection. That's -- he's already
18 answered that question.

19 CHAIRMAN FINLEY: Overruled.

20 Q Yes --

21 A I thought that's what I just answered. I'm
22 sorry.

23 Q Okay. You talked on about -- when you see them
24 -- you said if your people spot them in the field by

1 chance, they report them, right?

2 MR. GEORGE: Objection. Characterization.

3 CHAIRMAN FINLEY: Reask your question, please,
4 Ms. Harden.

5 MS. HARDEN: I couldn't hear you, sir.

6 CHAIRMAN FINLEY: Repeat your question, please.

7 Q In your testimony on page 36 -- let me look at
8 it for what line -- in mine it's lines 10 through 14 --
9 you testified that you rely upon the pole owner to
10 conduct inspections for safety and for violations,
11 correct? That's what you said.

12 A And that is part of the agreement that we have,
13 and Charter agrees to fund its portion of that
14 inspection, as our agreement with Blue Ridge.

15 Q So when you say the agreement, you're talking
16 about the inventory, aren't you, sir, the pole inventory?

17 A That's at the same time, is my understanding.

18 Q But do you understand the difference between a
19 safety inspection and a pole -- well, and an auditor on a
20 pole inventory counting poles?

21 A Well, based on the 2015 audit, it seems that
22 they were both the same. They were -- they were
23 performed at the same time, and that's what I was basing
24 this information on, was the pole audit and the safety

1 inspection occurred at the same time.

2 Q Okay. And that safety inspection did not
3 include measurements. It was what was readily apparent,
4 right? Oh --

5 A I think that was based on Mr. Booth or Mr.
6 Layton's testimony.

7 Q Yeah.

8 A I believe that's correct.

9 Q Because Charter didn't ride along, right --

10 A Right.

11 Q -- you don't know? Okay. You're the
12 supervisor of the construction group, sir, but your
13 construction employees do not actually do the
14 construction or placement of attachments on Blue Ridge's
15 poles except in emergency situations or in occasional one
16 off transfer, right?

17 A That is correct.

18 Q You use contractors to do virtually 100 percent
19 of the attachments to Blue Ridge's poles?

20 A If you're discussing main line attachments,
21 that is correct. For service drop attachments, we do
22 have in-house people that install service drops.

23 Q And you also use contractors, correct?

24 A And we do use contractors for that work as

1 well.

2 Q Okay. And your group is responsible for
3 supervising the construction coord--- the construction
4 contractors, right?

5 A That is correct.

6 Q And your construction coordinators provide all
7 clearance information and specs orally to contractors,
8 right?

9 A That's how we've discussed them in the past.
10 We've -- we have multiple pole owners within our system,
11 and we discuss those different -- as with Blue Ridge
12 where it may be 72 or it may be 40 -- with Duke Energy
13 it's 40 from neutral. They mount their transformer above
14 the neutral, so it's pretty much always 40 from neutral.
15 But, yeah, we do have those discussions, so they
16 understand when they go into a new area or when they know
17 -- they know which power company they're working with,
18 and they understand what the specifications are.

19 Q And you have no documentation which you provide
20 a contractor of Blue Ridge's specifications on its
21 system, correct?

22 A Not at this time, we do not.

23 Q Okay. And, in fact, your contractors have the
24 right to sub out the work to somebody else, right?

1 A They do use subcontractors on a limited basis.

2 Q Okay. And you have never exercised any right
3 of approval of those subcontractors, correct?

4 A Not on a preapproval. We do if we -- if
5 someone comes in and we find their workmanship is not up
6 to our standards, then we will ask that contractor to be
7 -- or that subcontractor to be released.

8 Q Okay. And you pay your contractors on a per-
9 job basis, right? You have a -- you say for this job
10 you're going to get "x" dollars and it's a set amount?

11 A There are -- yes. That is the case for
12 probably the majority of our work. There are one offs
13 where we may have to pay hourly if there's not an exact
14 job that we asked them to do that is not within the scope
15 of work that we've provided them. Sometimes we run into
16 things that doesn't -- there's just not a line item in
17 the agreement that covers the work they're doing, so we
18 will pay them hourly for some of that work.

19 Q But for the vast majority of your work, you pay
20 them on a per job, correct?

21 A For the majority of the work, yes, that would
22 be correct.

23 Q And what that means is if the contractor takes
24 one week to do the job or two weeks to do the job, they

1 get paid the same amount?

2 A That is correct.

3 Q And the contractor has the right to hire a
4 cheaper sub to actually do the work?

5 A They are allowed to employ subcontractors if
6 they are needed. And that would be the case with power
7 companies use contractors, the phone companies use
8 contractors --

9 Q Sir, there's no question pending.

10 A I was --

11 CHAIRMAN FINLEY: He's elaborating on his
12 answer. He may finish.

13 A I apologize. I was continuing my answer. I
14 just had a delay. But it's not just Charter that uses
15 contractors for this work. As I was saying, the power
16 companies use contractors for a lot of their work. The
17 phone companies just use contractors for a lot of their
18 work. I'm sure Blue Ridge probably employs contractors to
19 do some of their work. So it's not just Charter that has
20 the use of contractors.

21 Q But Charter doesn't employ any electrical
22 contractors to do its work, correct?

23 A Within my area I'm not aware of any electrical
24 contractors that do work.

1 MS. HARDEN: Nothing further at this time.

2 CHAIRMAN FINLEY: Redirect?

3 MR. GEORGE: A few questions.

4 REDIRECT EXAMINATION BY MR. GEORGE:

5 Q Mr. Mullins, can you please turn to page 5 of
6 your testimony?

7 MR. GEORGE: I think it's page 4 in your copy,
8 Ms. Harden.

9 Q And you recall Ms. Harden asked you to read
10 lines 7 through 9?

11 A Yes.

12 Q And that was talking about, you know, virtually
13 every other attacher is required to allow only 40 inches
14 of separation?

15 A Yes.

16 Q Can you read from line 9 through line 13 out
17 loud?

18 A Starting at, "Charter is"?

19 Q Yes.

20 A "Charter is only one of two attachers required
21 to obtain certifications from a professional engineer for
22 every attachment. The other is Morris Broadband, who has
23 only a small number of attachments, but Blue Ridge
24 apparently is not enforcing that requirement on it.

1 Charter" --

2 Q That's it. So when Charter performs -- you
3 talked about overlashing a little bit with Ms. Harden.

4 A Yes.

5 Q Is it always the case that when Charter goes to
6 a pole, that it's adding a wire, or are there other
7 things that it does when it's lashing wires to the pole
8 -- or to the -- its existing facilities?

9 A I'm sorry. Can you ask that again?

10 Q Yes. That was a terrible question.

11 A I'm sorry.

12 Q What other activities does Charter perform on
13 its attachments related to adding or removing fibers?

14 A If it is a maintenance situation, we will
15 remove the bad cable that we're replacing and then we
16 will lash the new cable up. So we're not adding weight
17 in those situations; we're merely replacing one cable
18 with another.

19 MR. GEORGE: No further questions.

20 CHAIRMAN FINLEY: Questions by the Commission?
21 Commissioner Clodfelter.

22 EXAMINATION BY COMMISSIONER CLODFELTER:

23 Q Mr. Mullins, its page 4 in my -- in my copy. I
24 understand its page 5 in yours. But I want to go back to

1 the lines you were just asked about on the redirect, and
2 I want to focus on the sentence that begins on line 11.
3 It says the other is required to obtain certification,
4 Morris Broadband, but Blue Ridge apparently is not
5 enforcing that requirement on it. Where did you come by
6 the information that Blue Ridge is not enforcing the
7 requirement?

8 A That was in some of the information. I -- I
9 probably cannot direct you exactly where I received that,
10 but that was in -- somewhere in the information I read
11 that, but I -- I do not recall exactly where, so...

12 Q Did you see it in writing or did you see it in
13 someone else's testimony? Or did you see it in
14 documents, I guess is the clearer question? Did you see
15 it in documents or in somebody else's testimony?

16 A I can't put my finger on where I found that
17 information. I'm sorry.

18 Q But in any event, it's --

19 A It should be --

20 Q -- second-hand information. You don't know
21 that yourself, personally?

22 A Correct.

23 Q You saw it somewhere else?

24 A I saw that somewhere, yes.

1 Q Thank you. I want to ask about this curious
2 pole that Charter owns in Granite Falls.

3 (Laughter.)

4 Q How did you come by that pole?

5 A That is an unusual situation. There's a
6 crossing at a pond, and we did not have any other means
7 to get across there following the power company's lines,
8 so in lieu of constructing miles of underground cable to
9 get to this subdivision, we opted to place our own pole,
10 which is on the city of -- or the Town of Granite Falls'
11 property, with their permission, to place this one pole
12 to get across this pond.

13 Q So you -- you constructed a pole -- Charter
14 constructed the pole --

15 A Yes, sir. That is correct.

16 Q -- on land that they were given permission to
17 construct it on?

18 A Yes, sir. That is correct.

19 Q They didn't buy the pole from somebody else or
20 inherit it or win it in a lottery or anything. They
21 built it -- Charter built it?

22 A Yes. That is correct.

23 Q I asked the question because in your summary,
24 you state, the first page of your summary, that cable

1 operators are not allowed to build their own poles. And
2 I was wondering, what's the source of your information
3 that cable operators are not allowed to build their own
4 poles?

5 A That goes back to -- generally, we're not.

6 Q Well --

7 A I'm -- I'm getting there. I'm sorry.

8 Q Okay. Go ahead.

9 A Specifically, we've been asked, the City of
10 Hickory, the Town of Blowing Rock, the City of Lenoir,
11 we've had several municipalities come to us actually
12 asking us to place our facilities underground. So, you
13 know, they're not going to allow us within their limits
14 to build additional poles. Right-of-way space is getting
15 more and more crowded. There's a lot less room for us to
16 be able to do anything within right-of-way space. So
17 that's another issue that, you know, if we wanted to
18 build our own poles, the -- the land availability just
19 isn't there.

20 Q But that's a -- am I correct, though, that's a
21 jurisdiction-by-jurisdiction issue for you?

22 A That -- I guess that would be correct, yes.

23 Q If -- if a jurisdiction like Granite Falls
24 gives you permission to put poles in their right-of-way,

1 you can do it. There's no other law or regulation that
2 you're aware of that prevents you from doing it?

3 A Not that I'm aware of, no.

4 COMMISSIONER CLODFELTER: Thank you for the
5 clarification, sir.

6 THE WITNESS: You're welcome, sir.

7 CHAIRMAN FINLEY: Other questions from the
8 Commission?

9 (No response.)

10 CHAIRMAN FINLEY: Questions on the Commission's
11 questions?

12 MR. GEORGE: I just have one question.

13 EXAMINATION BY MR. GEORGE:

14 Q Commissioner Clodfelter was asking you about
15 the testimony on page 5 of your version and 4 of the
16 Commissioners' version. Did you read Mr. Layton's
17 deposition testimony?

18 A I did.

19 Q Is that possibly the source of that
20 information?

21 MS. HARDEN: Objection.

22 CHAIRMAN FINLEY: Overruled.

23 MS. HARDEN: Leading.

24 CHAIRMAN FINLEY: Overruled.

1 A It is very possible.

2 MR. GEORGE: No further questions.

3 CHAIRMAN FINLEY: All right. Without
4 objection, we're going to receive into evidence Mr.
5 Mullins' exhibits.

6 (Whereupon, Exhibits MM 1-18
7 were admitted into evidence.)
8 Exhibits MM 1-17 were filed
9 under seal.)

10 CHAIRMAN FINLEY: And you may be excused, Mr.
11 Mullins.

12 THE WITNESS: Thank you.

13 (Witness excused.)

14 MR. GEORGE: Charter will call Nestor Martin.

15 NESTOR MARTIN; Having been duly sworn,
16 testified as follows:

17 DIRECT EXAMINATION BY MR. GEORGE:

18 Q Good afternoon, Mr. Martin.

19 A Good afternoon.

20 Q Please state your name and business address for
21 the record.

22 A Nestor Martin, 7910 Crescent Executive Drive,
23 Charlotte, North Carolina.

24 Q And you understand -- I'm sorry. Did you cause

1 to be filed responsive testimony in this docket
2 consisting of 37 pages and five exhibits?

3 A Yes.

4 Q And if I asked you the questions in your
5 prefiled submission today, would your answers be the
6 same?

7 A Yes.

8 Q Do you have any corrections to your testimony?

9 A No.

10 MR. GEORGE: I would ask that Mr. Martin's
11 responsive testimony be entered into the record and the
12 corresponding exhibits be marked for identification.

13 CHAIRMAN FINLEY: Mr. Martin's 35 pages of
14 responsive testimony, filed on October 31, 2017, is
15 copied into the record as though given orally from the
16 stand, and his five exhibits are marked for
17 identification as premarked in the filing.

18 (Whereupon, the prefiled responsive
19 testimony of Nestor Martin was
20 copied into the record as if given
21 orally from the stand.)

22

23

24

I. INTRODUCTION AND SUMMARY

Q. Please state your name, business address, and occupation.

A. My name is Nestor M. Martin. My business address is 7910 Crescent Executive Drive, 5th Floor, Charlotte, North Carolina 28217. I am the Senior Director of Construction, Carolina Region, for Charter Communications Properties, LLC ("Charter").

Q. On whose behalf is this testimony being presented?

A. My testimony is offered on behalf of Charter.

Q. What business is Charter engaged in?

A. Charter and its affiliates operate cable systems in North Carolina and in 40 other states across the country. Charter provides video, broadband, and digital phone services to commercial and residential customers.

Q. Please describe your professional experience and current role at Charter.

A. I have worked in the cable industry for nearly 40 years. I have been employed by Charter for about a year-and-a-half, since it merged with Time Warner Cable and acquired Time Warner Cable Southeast LLC ("TWC") in 2016. Prior to the merger, I had worked with TWC for about 10 years. I held various positions with TWC, including Senior Director of Network Engineering, Senior Director of Construction for the East Region, and Senior Director of Construction for the Carolinas. After the merger, I have continued to work with TWC in the Carolina Region in my current role, in addition to acquiring additional responsibilities related to Charter's operations in its Carolina Region. I have responsibilities for planning, budgeting and directing of outside plant construction operations for the combined companies in the Carolina Region.

1 **Q. Have you ever submitted testimony in a North Carolina Utilities Commission**
2 **Proceeding?**

3 A. Yes. I submitted testimony on behalf of TWC in four proceedings arising under
4 North Carolina General Statute Section 62-350 that were the subject of hearings
5 in June of this year.¹ I also have testified in open court in two trials conducted
6 before the North Carolina Business Court related to pole attachment rates under
7 Section 62-350.²

8 **Q. What is the purpose of your testimony?**

9 A. I am submitting testimony in this proceeding to respond to testimony provided by
10 Mr. Lee Layton, a representative of Blue Ridge Electric Membership Corporation
11 ("Blue Ridge"), as well as testimony submitted on behalf of Blue Ridge by
12 Gregory Booth and Wilfred Arnett, as they pertain to the rates, terms, and
13 conditions governing attachments to poles owned by the Cooperative.

14 **Q. Please summarize your testimony.**

15 A. My testimony addresses the rates Charter has paid to make attachments to Blue
16 Ridge's poles. Going forward, Charter is willing to pay an annual pole
17 attachment rate that compensates the utility for Charter's fair share of the utility's
18 costs of owning and maintaining poles. Given the minimal amount of surplus
19 space Charter uses on Blue Ridge's poles described by Charter's witness Micheal
20 Mullins, and the economic principles described by Charter's expert witness

¹ See *Time Warner Cable Southeast LLC v. Jones-Onslow Electric Membership Corp.*, Docket No. EC-43, Sub-88; *Time Warner Cable Southeast LLC v. Carteret-Craven Electric Membership Corp.*, Docket No. EC-55, Sub-70; *Time Warner Cable Southeast LLC v. Surry-Yadkin Electric Membership Corp.*, Docket No. EC-49, Sub-55; *Union Electric Membership Corp. v. Time Warner Cable Southeast LLC*, Docket No. EC-39, Sub-44.

² See *Time Warner Entertainment – Advance/Newhouse P'ship vs. Town of Landis*, No.10 CVS 1172, 2014 WL 2921723 (N.C. Sup. Ct. June 24, 2014, and *Rutherford Elec. Membership Corp. v. Time Warner*

1 Patricia Kravtin, Charter believes its fair share is best represented by an allocation
2 of those costs based on the proportion actually used by Charter of the space on the
3 pole than can be used to suspend wires and cables above the streets. This
4 approach is consistent with the pole rates Charter pays to investor-owned utilities
5 ("IOUs") and incumbent local exchange companies ("ILECs"), whose poles are
6 distributed around and throughout the service territory served by Blue Ridge and
7 are functionally identical to the Cooperative's poles. I will also propose just and
8 reasonable terms and conditions to govern Charter's attachment to Blue Ridge's
9 poles, general industry standards, and how these proposals differ from that offered
10 by Blue Ridge.

11 **II. CHARTER'S ATTACHMENTS TO BLUE RIDGE POLES**

12 **Q. Can you describe Charter's cable systems in North Carolina?**

13 A. Charter constructs, operates, and maintains hybrid fiber-coaxial cable systems in
14 North Carolina, including in areas where Blue Ridge provides electric service.
15 Charter's communications facilities are installed overhead and underground.

16 **Q. Why does Charter attach to Blue Ridge's utility poles?**

17 A. Charter attaches its fiber optic and coaxial cable wires to Blue Ridge's poles in
18 order to provide its competitive communications services to subscribers within
19 Blue Ridge's service area. As Mr. Mullins explains in his testimony, Charter is
20 reliant on access to Blue Ridge's poles to provide its services.

Entertainment – Advance/Newhouse P'ship, No. 13-CVS-231, 2014 WL 2159382 (N.C. Super. Ct. May 22, 2014), *aff'd* 771 S.E.2d 768 (N.C. Ct. App. 2015).

77

1 Q. For how many poles has Blue Ridge invoiced Charter each year since 2015?

2 A. Charter was invoiced by Blue Ridge, and paid for, attachments on the following
3 number of poles for each year since 2015:

- 4 • In 2015, 26,301 poles.
- 5 • In 2016, 26,301 poles.
- 6 • In 2017, 27,674 poles.

7 Q. What has Blue Ridge charged for Charter's attachments, and what has Charter
8 paid since 2015?

9 A. Blue Ridge has invoiced Charter at \$2.22 per month, or \$26.64 per year, since
10 2015. Charter has paid the monthly invoices through August 2017.

11 **III. CHARTER'S ATTACHMENTS TO UTILITY POLES**
12 **THROUGHOUT NORTH CAROLINA**

13 Q. Does Charter attach to poles owned by other pole owners in North Carolina?

14 A. Yes. Charter has arrangements with dozens of pole owners in North Carolina to
15 attach to their utility poles, including IOUs, ILECs, municipally owned utilities,
16 and other electric cooperatives like Blue Ridge.

17 Q. Are poles owned by other utilities similar to the poles owned by Blue Ridge, and
18 are Charter's attachments similar as well?

19 A. Yes. IOUs like Duke Energy, telephone companies like AT&T and CenturyLink,
20 municipal utilities, and cooperatives (both electric and telephone) own poles
21 throughout North Carolina—including in and around Blue Ridge's service
22 territory—and those poles are very similar, if not indistinguishable from Blue
23 Ridge's poles. Because most utility poles are similar, Charter's attachments are
24 generally the same no matter whose pole is being used.

1 **Q. Do these similarities give rise to industry standards?**

2 A. Yes. In my years of experience in the cable business and the construction of cable
3 systems, I have seen hundreds of pole attachment agreements. Because the
4 parties all face the same pole-attachment related issues, the pole attachment
5 agreements are often similar as well. A collection of agreements across many
6 pole owners in a region, such as North Carolina, can serve as a barometer of what
7 terms and conditions are just and reasonable to address the utility's safety
8 concerns in a commercially reasonable manner.

9 But consideration of these agreements should account for the legal and regulatory
10 backdrop against which they are negotiated. Agreements with IOUs and ILECs,
11 for example, have long been subject to regulation, which means the parties to
12 them are generally on equal footing at the negotiating table. Agreements with
13 electric cooperatives and municipally owned utilities, however, often have been
14 negotiated in the absence of any legal or regulatory backstop. As a result, those
15 agreements can result in outliers, particularly when it comes to the annual pole
16 attachment rate.

17 **Q. Why is that?**

18 A. The existence of pole attachment regulation affects the parties' leverage in the
19 negotiations. Charter often has not had an alternative to attaching to utility poles
20 when building its cable system. This means Charter has had to gain access to the
21 utility's poles to build its network or extend service to new customers in the
22 utility's service area. Where pole attachment rates, terms, and conditions are not
23 regulated, the utility enjoys all of the leverage in the negotiation. While some
24 unregulated utilities hew closely to industry standards, others leverage their

1 superior bargaining position to extract exorbitant rates and excessive terms from
2 the cable operator. Even where a complaint process exists, some cable operators
3 will feel compelled to bend to the utilities' excessive demands to meet customer
4 demand, rather than incur the costs, uncertainties, and delays associated with
5 litigation.

6 **Q. Do the respective size of the companies matter in these negotiations with**
7 **unregulated entities?**

8 **A.** Not really. The issue is that the attaching party generally has no alternative to
9 attaching on the pole owner's poles. The owner has a monopoly on critical
10 infrastructure that is needed to deploy service and, therefore, has the ability to
11 dictate the terms of attachment regardless of the respective size of the entities
12 negotiating.

13 **Q. Do Charter's agreements in North Carolina reflect industry standards?**

14 **A.** Generally, yes, with respect to terms and conditions in attachment agreements,
15 where only a few unregulated utilities have attempted to impose unreasonable
16 demands. But a number of previously unregulated cooperatives and municipal
17 utilities have imposed excessive annual pole attachment rates. TWC litigated a
18 few cases under Section 62-350, and was able to negotiate a resolution after the
19 North Carolina Business Court entered its orders in the Rutherford and Landis
20 cases, and those decisions either became final or were affirmed on appeal. We
21 hope the resolution of this case and the others the Commission is considering will
22 give clarity to the parties and allow Charter and the other pole owners to avoid
23 these disputes in the future.

1 **Q. What does Charter pay for its attachments to poles in North Carolina?**

2 A. Attached as NM Exhibits 1 and 2 are charts documenting the annual pole
3 attachment rates paid by Charter and TWC to pole owners across the state in
4 recent years. The rates in the TWC table marked with an asterisk are being paid
5 under protest and/or subject to true-up.

6 **Q. How does each pole owner set its pole attachment rate?**

7 A. The rates of IOUs and ILECs have been limited to the maximum rate calculated
8 under the rules of the Federal Communications Commission ("FCC"), so we are
9 able to ensure that their rates are set according to FCC standards. Cooperatives
10 and municipal utilities, however, have generally charged a rate dictated
11 unilaterally by the pole owner. Sometimes, pole agreements with coops and
12 municipal utilities specify a formula, but even in those cases, the formula has
13 typically been imposed by the pole owner. While we attempt to negotiate these
14 rates, the pole owners have often been unwilling to negotiate, and we often have
15 had no choice but to pay the rate the utility demands.

16 **Q. What are the average rates paid in North Carolina to IOUs and ILECs under**
17 **the FCC formula?**

18 A. The rates charged under the FCC formula change from year to year based upon
19 the pole owner's costs. But we can verify whether it complies with the FCC's
20 formula largely by using the utility's publicly reported data. The table below
21 shows the rates Charter paid to IOUs and ILECs in North Carolina from 2015
22 through 2017, and the average of those rates for each year.

1

Table 1: Rates Paid By Charter To IOUs In North Carolina

Investor-Owned Electric Utility	2015	2016	2017
Dominion Power	\$5.30	\$6.64	\$6.94
Duke Energy	\$4.96	\$5.21	\$5.08
Progress Energy*	\$9.75	\$9.75	\$9.75
Average IOU Rates	\$6.64	\$7.20	\$7.26

2

3

*Charter's rates to Progress Energy are based on a settlement and are higher than calculated FCC rates.

4

Table 2: Rates Paid By Charter To ILECs in North Carolina

Incumbent Local Telephone Co.	2015	2016	2017
AT&T	\$2.17	\$2.48	\$2.78
CenturyLink*	\$5.00	\$4.25	\$4.00
Frontier	\$3.05	\$2.98	\$2.75
Verizon	\$4.83	\$4.89	\$1.13
Windstream	\$1.89	\$1.59	\$1.96
Average ILEC Rates	\$3.38	\$3.24	\$2.52

5

*Reflects highest rate charged in North Carolina.

**IV. REASONABLE AND INDUSTRY-STANDARD
TERMS AND CONDITIONS OF ATTACHMENT**

1 **Q. How does Charter believe the Commission should resolve the parties' disputes**
2 **about just and reasonable terms and conditions of attachment?**

3 **A.** Charter believes that the best measure of reasonableness is the industry standard
4
5 terms and conditions found across pole attachment agreements in North Carolina,
6
7 between Charter and all types of pole owners (IOU, ILEC, municipal, or cooperative)
8
9 and between Blue Ridge and its joint users and other third-party attachers. In doing
10 so, the Commission should take into account the legal and regulatory conditions that
11 existed at the time the agreements were negotiated, including the fact that agreements
12 with municipal and cooperative utilities pre-dating G.S. § 62-350 were negotiated
13 without any legal or regulatory backstop on which Charter could rely.

14 **Q. How should the Commission weigh the reasonableness of rates, terms, and**
15 **conditions in agreements with municipal and cooperative utilities pre-dating**
16 **G.S. § 62-350?**

17 **A.** On the one hand, these "unregulated" agreements, like the 2003 and 2008 agreements
18 between Charter and Blue Ridge, may contain burdensome and unreasonable rates,
19 terms, and conditions as a result of the parties' unequal bargaining power. That
20 Charter or some entity agreed to these terms and conditions when it believed it had no
21 other choice (or adequate recourse) does not mean they are or ever were reasonable,
22 especially where they depart radically from the standard terms and conditions found
23 in the majority of other pole agreements in the state. On the other hand, these
24 agreements may contain rates, terms, and conditions that are squarely in-line with the
25 industry standard. This fact strongly supports the reasonableness of these terms. It
26 also undermines Blue Ridge's attempts to leverage this dispute to impose non-
standard and punitive terms and conditions on Charter as punishment for Charter's

1 decision to dispute the pole attachment rate. Blue Ridge's acceptance of industry
2 standard terms and conditions for the majority of the other communications attachers
3 on its poles also undercuts its assertions that these terms are somehow no longer
4 reasonable.

5 **Q. What do you believe the Commission should take from Blue Ridge's agreements**
6 **with its joint users and other third party attachers ?**

7 **A.** These agreements are also strong indicators of reasonable terms and conditions for a
8 new agreement with Charter. Blue Ridge has extended reasonable terms and
9 conditions of attachment to several third-party attachers other than Charter, including
10 Charter's competitor Skybest. And all of Blue Ridge's joint use agreements contain
11 reasonable terms and conditions that are consistent with the industry standard. Blue
12 Ridge has not indicated any need or current intent to renegotiate these agreements, or
13 any legitimate reason why these terms would be unreasonable for Charter but
14 reasonable for these other companies. To the extent Blue Ridge asserts that its joint
15 users are different because they share poles, information Blue Ridge provided in
16 response to Charter's discovery requests show that Blue Ridge maintains very few
17 attachments on its joint users poles, particularly compared to the number of
18 attachments its joint users make on Blue Ridge poles. Its joint users are thus situated
19 very similarly to Charter. And Blue Ridge cannot credibly assert that a term that is
20 reasonable for other communications attachers is not reasonable for Charter.

21 **Q. Can you summarize the reasonable, industry-standard terms and conditions you**
22 **believe should be included in the parties' new agreement?**

23 **A.** Yes. For the issues in dispute, I summarize the industry-standard terms and
24 conditions that emerge from Charter's North Carolina agreements and Blue Ridge's
25 agreements with other attachers to its poles. My summary includes the TWC

1 agreements I analyzed in the June proceedings, and adds to the analysis the Charter
2 agreements in North Carolina that we collected in response to Blue Ridge's discovery
3 requests. Extensive detail about these industry-standards can be found in NM Exhibit
4 3, attached to my testimony. I also note where I do not believe Charter and Blue
5 Ridge have a dispute. Finally, while Blue Ridge has not proposed specific language
6 for the Commission to approve as reasonable, I have proposed language that is
7 consistent with the industry-standard terms I summarize.

8 **A. DIRECT CHARGES FOR POLE ATTACHMENTS**

9 **Q. Blue Ridge has asked the Commission to clarify that it may charge separately**
10 **for costs related to processing Charter's attachments, performing necessary**
11 **make-ready and transfer work for Charter, auditing and inspecting Charter's**
12 **attachments, and to perform "other activities" directly related to Charter's**
13 **attachments. Does Charter dispute this?**

14 **A.** As a general matter, no. Charter is willing to pay for the reasonable, verifiable,
15 actual costs incurred by Blue Ridge for work directly (and solely) related to
16 Charter's attachments. Charter's agreements with Blue Ridge have always
17 contained provisions that require Charter to pay the Cooperative application fees
18 and make-ready charges. And Charter is willing to pay for work associated with
19 auditing and inspecting its attachments. These provisions are more directly
20 implicated by other terms and are discussed elsewhere in my testimony. Charter
21 also proposes a pole attachment rate methodology that is designed to recover from
22 Charter its appropriate share of the Cooperative's costs of owning and
23 maintaining poles, including a portion of Blue Ridge's maintenance, operations,
24 and administrative expenses. Charter's rate methodology will ensure the recovery
25 of any unspecified costs Blue Ridge believes it incurs as a result of Charter's
26 attachments.

1

2 **Q. Is Blue Ridge's proposal just and reasonable?**

3 A. No. Mr. Arnett proposes an ambiguous provision for the recovery of "but-for"
4 costs on pages 46-47 of his pre-filed testimony. But he does not propose any
5 language for the Commission to adopt. As I mentioned above and explain in
6 detail below, Charter will agree to pay for the verifiable direct costs Blue Ridge
7 incurs for processing our attachment applications, make-ready work necessary to
8 accommodate our attachments, audits, and inspections of our attachments to its
9 poles. Including a vague provision related to these costs—which the agreement
10 already will address—will only create confusion.

11 Additionally, it is not clear to me what the "but-for" costs actually are
12 beyond these costs, and those that are otherwise recovered through the
13 administrative and maintenance charges built into the annual attachment fee that
14 Ms. Kravtin proposes. Neither Blue Ridge nor its experts have actually quantified
15 these or any other so-called "but-for" costs. That the "but-for" costs cannot be
16 quantified illustrates the ambiguity and breadth of Blue Ridge's proposal. It
17 seems to be subject to whatever interpretation (and dollar amounts) Blue Ridge
18 wants to pass through to Charter. Blue Ridge's vague proposal would give it
19 carte blanche to increase the burden on Charter—including through double
20 charging for costs it already recovers—until Blue Ridge achieves its stated
21 preference of kicking us off the poles. Blue Ridge's proposal will lead only to
22 more disputes before the Commission because it undermines our statutory right to
23 be on the poles and the deployment of our facilities in North Carolina.

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1 Q. How does Charter propose the Commission should address the application
2 process, application fees and make-ready expenses?

3 A. Blue Ridge seems to believe that Charter disputes that it should be required to
4 submit applications for all new attachments and that it disputes its obligation to
5 pay an application fee. That is not the case. In the parties' negotiations, Charter
6 agreed to submit a permit application for every new attachment; it simply
7 proposed a modified fee structure that would apply only to applications involving
8 more than ten poles, recognizing that the Cooperative likely incurs minor costs
9 processing applications involving only a handful of poles. But Charter does not
10 maintain for purposes of this proceeding that it is unreasonable for it to submit an
11 application fee on each new permit application.

12 Charter is willing to follow procedures for new permit applications that
13 are similar to those outlined in the parties' 2008 agreement (except with respect to
14 Professional Engineer certifications, discussed below). Charter in fact proposes a
15 reasonable, non-refundable application fee for each new permit application.
16 Additionally, Charter remains willing to pay for the preparation of engineering
17 plans for any necessary make-ready construction work as well as direct costs of
18 any make-ready construction work necessary in Blue Ridge's discretion, to
19 accommodate Charter's attachments. Charter's proposed provisions thus ensure
20 that Blue Ridge completely recovers any direct costs it incurs related to Charter's
21 attachments.

22 Q. What language does Charter propose the Commission adopt in this
23 proceeding?

24 A. Charter proposes the Commission approve the following language in this
25 proceeding to ensure costs are recovered:

1 **Annual Attachment Fee:** Charter shall pay Cooperative an Annual
2 Attachment Fee in advance, on a per pole basis for each foot of usable space
3 occupied by Charter, not to include risers, in an amount [negotiated by the
4 parties or specified by the Commission, provided such Fee shall not exceed
5 the just and reasonable rate determined consistent with the Order of the
6 Commission in this proceeding] for each of the Cooperative's poles to which
7 Charter is attached.

8 **Direct Charges.** Charter shall be responsible for the direct, verifiable costs
9 the Cooperative incurs to accommodate Charter's attachments to its poles for
10 pre and post-construction inspections, makeready engineering and makeready
11 construction, and audits of Charter's attachments. Charter will submit a non-
12 refundable Application Fee of \$10 per pole along with its permit application
13 for new attachments to cover administrative costs of processing the
14 application. Upon receipt of the application and fee, the Cooperative will
15 provide Charter of an estimate of any make ready work necessary to
16 accommodate the proposed attachments. The estimate will include the cost of
17 the make-ready survey in addition to the costs of the make-ready work
18 including any change or addition to a pole, pole replacement, or
19 rearrangement of existing facilities on a pole necessary to accommodate
20 Charter's proposed facilities, together with the Make Ready Fee. The Make
21 Ready Fee shall not include costs to correct existing violations of the safety
22 standards caused by the Cooperative or other attachers. Only upon Charter's
23 approval of the estimated cost, shall the make-ready work begin. Charter will
24 pay the total estimated cost of the Make Ready Fee. After completion of the
25 work, Charter will be assessed the Cooperative's actual costs. If the actual
26 cost is less than the estimated cost, the excess shall be returned to the
27 Licensee. If the actual cost exceeds the estimated cost, the additional amount
28 shall be billed to Charter.

29 **Q. How does Charter's proposal compare to what is standard in the industry?**

30 **A. Charter's proposal is consistent with virtually every pole attachment agreement it has**
31 executed in North Carolina.

32 **Q. Why is Charter's proposal reasonable?**

33 **A. Charter's proposal is consistent with standard requirements in the industry and**
34 across the state of North Carolina. Charter's proposal conforms to the parties'
35 prior agreements, even though in practice the parties have followed a different
36 approach that has also worked well on the ground. I also note that none of Blue

1 Ridge's other pole attachment agreements includes any language along the lines
2 proposed by Mr. Arnett.

3 **B. CERTIFICATIONS RELATED TO NEW ATTACHMENTS**

4 **Q. Is a requirement that Charter certify that its new attachments on the**
5 **Cooperative's poles were made in compliance with applicable requirements**
6 **reasonable?**

7 A. As a general matter, yes. But Charter should be allowed to submit a certification
8 from an "authorized representative" after Charter has made its last attachment
9 covered by a specific permit. Charter's certification would state that its
10 attachments are of sound engineering design and fully comply with the applicable
11 engineering standards under the pole attachment agreement and the latest version
12 of the safety and operational requirements in effect at the time of the attachment.
13 The certification also would state that Charter constructed its attachments
14 substantially as provided in the engineering plans reviewed by Blue Ridge as part
15 of the make-ready process.

16 **Q. How would Charter define "authorized representative"?**

17 A. An "authorized representative" is an employee or contractor of Charter having
18 adequate knowledge of and experience with the National Electrical Safety Code
19 ("NESC") and any other safety and operational requirements of the parties'
20 Agreement.

21 **Q. Why is Charter's proposal reasonable?**

22 A. Charter's proposal is more generous than the current industry standard. Of
23 Charter and its affiliate TWC's 90 agreements with pole owners in North
24 Carolina, 68 do not require any kind of post-installation certification. See NM Ex.
25 3, Table 1. Of the rest, five require a certification only upon demand of the pole

1 owner. To my knowledge, we have never been asked to provide a certification.
2 While nine of the ninety agreements require a Professional Engineer certification,
3 all of these agreements were between Charter/TWC and either an electrical
4 cooperative or a municipal utility, and all predated G.S. § 62-350. All of the
5 agreements Charter has executed with municipal utilities and cooperatives since
6 the enactment of G.S. § 62-350 allow certification by an authorized representative
7 or a construction supervisor.

8 **Q. Blue Ridge asserts that Charter's certification should be submitted by a**
9 **Professional Engineer? Is this reasonable?**

10 **A.** No. Requiring a Registered Professional Engineer to certify each and every
11 communications attachment is wholly unnecessary and would be prohibitively
12 expensive. For communications attachments, having a Professional Engineer's
13 certification is not industry standard. As detailed in Mr. Mullin's testimony, Blue
14 Ridge does not require a Professional Engineer to certify the attachments of any
15 of their other third-party attachers, except for Morris Broadband, and Blue Ridge
16 does not ever recall seeing a certification from that company. Our employees and
17 contractors have decades of experience, are trained to safely attach Charter
18 facilities to poles in accordance with the requirements of the NESC, and generally
19 speaking we have a great track record of success. I would note, in addition, that
20 Blue Ridge can always conduct a post-construction inspection and involve a PE as
21 it deems necessary, at Charter's expense. Charter follows similar arrangements
22 with other pole owners in the state.

23 **Q. Do you have any language regarding certifications that the Commission**
24 **could adopt in the course of this proceeding?**

25 **A.** Yes. I propose the Commission adopt the following language:

Certification: Upon written request from the Cooperative, no later than 30 days after Charter installs the last Attachment covered by its approved application, Charter shall send to the Cooperative a certification (the "Certification") by a Registered Professional Engineer in the State of North Carolina or an authorized representative that the Attachments are of sound engineering design and fully comply with the safety and operational requirements of this Agreement, including without limitation the National Electrical Safety Code. If Certification is not received when requested, the Cooperative may declare the Attachment to be unauthorized.

C. OVERLASHING

Q. What is the process of overlashing?

A. Overlashing is the process of "lashing" additional fiber optic or coaxial cable onto the steel strand supporting a pre-existing mainline communications wire attachment. Overlashed fiber optic and coaxial wires are lightweight and about a half-inch in diameter. In some cases, Charter will use the overlashing activity to swap out a lower-capacity wire already lashed to the strand with a new higher-capacity wire.

Q. Why does Charter overlash its attachments?

A. Overlashing is vital for cable operators like Charter because it enables them quickly, efficiently, and cost-effectively to deploy advanced communications services and additional network capacity relying on existing and previously-permitted mainline attachments. The ability to quickly upgrade facilities is critical for Charter to compete for and serve new customers, particularly business customers seeking higher-capacity connections.

Q. What does Charter believe is a reasonable contract term related to overlashing attachments?

A. A reasonable provision would allow Charter to overlash its facilities without applying for a separate permit where the overlash will not cause Charter's

1 attachment to become non-compliant with applicable standards. Charter will
2 notify Blue Ridge of the overlash by submitting a notification prior to making the
3 overlash. This practice has been acceptable to other cooperatives in the past,
4 including Jones-Onslow Electric Membership Corporation and Union Electric
5 Membership Corporation. In our experience, an email notification has garnered a
6 quick response and work has proceeded to everyone's satisfaction. Charter will
7 provide Blue Ridge with information regarding its overlashing that the
8 Cooperative requires in good faith to allow it to do any non-discriminatory
9 loading analysis that it deems necessary. Charter will pay Blue Ridge's actual
10 costs of any loading analysis it actually performs, including work Blue Ridge
11 deems necessary from one of its professional engineers. We also understand Blue
12 Ridge's staking technicians have a design manual that is intended to "take the
13 math" out of the loading analysis. *See* NM Ex. 2; NM Ex. 4, at 182-188. The
14 design manual includes pages indicating the loading attributable to hypothetical
15 cable and telephone attachments. *See* NM Ex. 5 at BREMC-013727. We are
16 willing to work with Blue Ridge to provide actual information about Charter's
17 overlashed facilities for use in the design manual and to streamline the process for
18 everyone. If Blue Ridge determines that the overlash caused the attachment to be
19 non-compliant, then the parties will follow the procedures outlined elsewhere in
20 the agreement for bringing the attachment up to code. As has been the parties'
21 past practice, Charter's overlashed facilities will not be subject to an additional
22 annual attachment fee.

1 **Q. How does Charter's position compare to terms and conditions Blue Ridge has**
2 **agreed to with other communications attachers?**

3 A. As Mr. Mullins explains, Charter's proposal to give notice of its overlashed
4 attachments is more than Blue Ridge requires of any of its joint users, and more
5 than it requires of other third-party attachers, including Charter's competitor
6 Skybest. None of these companies are required to permit or even provide notice
7 of overlashing activity. This is the case even though all communications
8 companies employ the practice of overlashing, and telephone companies' copper
9 bundles are larger and heavier than the coaxial or fiber optic wires used by
10 Charter. Further, Charter's language allows Blue Ridge to conduct any loading
11 analysis it deems necessary in connection with the overlash. To the extent the
12 Commission believes this is a reasonable requirement in a pole agreement,
13 Charter suggests that this standard should apply to all attachers.

14 **Q. How does Charter's position compare to industry standards?**

15 A. Charter's position is standard in the industry. After an extensive rulemaking
16 involving all interested stakeholders, including pole-owning electric utilities, the
17 FCC adopted an express policy promoting overlashing because it does not
18 materially affect the safety of an attachment and it "facilitates and expedites
19 installing infrastructure essential to providing cable and telecommunications
20 services to American communities." *Implementation of Section 703(e) of the*
21 *Telecommunications Act of 1996, Amendments of the Commission's Rules and*
22 *Policies Governing Pole Attachments*, Report & Order, 13 FCC Rcd 6777, 6807
23 ¶ 62 (1998) ("Telecom Order"). Consistent with this, the FCC rejected attempts
24 to impose permitting requirements for overlashing as "unjust and unreasonable on

1 [their] face.” *See Cable Television Assoc. of Ga. v. Ga. Power Co.*, Order, 18
2 FCC Rcd 22287 ¶ 13 (2003).

3 **Q. How does Charter’s proposal compare to other pole attachment agreements in**
4 **North Carolina?**

5 A. It is entirely consistent with those agreements. The majority of Charter’s pole
6 agreements in North Carolina, 65 of 90, do not require any kind of permitting or
7 even notice for overlashed facilities. NM Ex. 3, Table 2 (beginning on page 12).
8 Where overlashing is subject to some kind of procedure, most of those
9 agreements (19 of 25) require notice only, and do not subject Charter’s projects to
10 a permitting process. *Id.* Six of those agreements allow after-the-fact notice.
11 Another six of the agreements require five days’ prior notice, and two more allow
12 for 48 hours’ notice for smaller overlash projects. *Id.* A handful require slightly
13 more advance notice, typically for larger overlashing projects, like the agreement
14 TWC signed last summer with Energy United Electric Membership Corporation,
15 which requires 15 days prior notice for overlashing projects involving more than 5
16 poles. *Id.*

17 **Q. Is there a legitimate concern about overlashing on prior notice without a full**
18 **permitting process?**

19 A. No. As I noted, full permitting for overlashing is not common, and the loading
20 impact of overlashing is very minor. The communications companies who account
21 for about two-thirds of the third-party attachments on Blue Ridge’s poles—including
22 Charter’s direct competitors—are not required to submit any kind of notice or
23 application to Blue Ridge for their overlashing. And Charter’s lightweight fiber optic
24 and coaxial cable wires and associated equipment generally do not have any material
25 impact on pole loading. Charter’s wires are far lighter and have a smaller radius that

1 could be subject to wind pressure than the older copper wires historically used by
 2 telephone companies like AT&T, CenturyLink, and Skyline. And they are far lighter
 3 than the larger and heavier equipment installed by Blue Ridge at the top of the pole,
 4 where the loads from wind and ice are greater. Because Blue Ridge does not require
 5 Charter's direct competitors to permit overlashing, and overlashing is an important
 6 technique for winning commercial customers, it is essential that Charter not be
 7 subject to a harsher regime. Otherwise, Charter could not compete for the sort of
 8 small businesses that often require overlashing of only a few poles.

9 **Q. Is a requirement for a full permitting process prior to overlashing a reasonable**
 10 **requirement?**

11 **A.** No. Unnecessary permitting requirements for overlashing would contribute to
 12 delaying and potentially interfering with Charter's ability to bring broadband and
 13 other services to more people in North Carolina, and to compete with other
 14 providers.

15 **Q. Mr. Booth suggested that the NESC requires permitting prior to overlashing,**
 16 **is that correct?**

17 **A.** No. I am not aware of any permitting requirement for overlashing in the NESC.

18 **Q. What contract language does Charter propose the Commission adopt in this**
 19 **proceeding?**

20 **A.** The Commission should adopt the following provision, which addresses the
 21 permitting process for attachments to the Cooperative's poles:

22 **Permit and Approval Process:** Charter shall comply with the Cooperative's
 23 generally applicable, non-discriminatory Attachment approval application
 24 procedures for all new Attachments to the Cooperative's poles, except for
 25 secondary poles (a/k/a lift poles or drop poles). Charter shall notify Cooperative
 26 of all new secondary pole Attachments on a quarterly basis, and such Attachments
 27 shall be subject to the Annual Attachment Fee. Charter may overlash its existing
 28 Attachments where such activity will not cause the Attachment to become
 29 noncompliant with the safety standards described above. Charter shall provide

1 prior notice to Cooperative of all new overlashings at least 15 days in advance,
 2 except for projects involving the overlashings of 5 or fewer poles, when Charter
 3 shall provide at least forty-eight (48) hours prior notice to Cooperative. Licensor
 4 may perform a post-overlash inspection of Licensee's overlashing on poles as
 5 Licensor deems critical in its reasonable discretion, including reliance on
 6 Licensor's professional engineers as Licensor deems necessary, and Licensee
 7 shall pay for the actual cost. Licensee shall provide sufficient information
 8 regarding its overlash to allow Licensor to determine the impact of Charter's
 9 overlash on the pole loading. There shall be no additional annual Attachment Fee
 10 for overlashings of Licensee's existing facilities.

11 **Q. Does Charter's proposed post-overlash notice requirement address Blue Ridge's**
 12 **concerns about overloading its poles?**

13 **A.** Yes. Under Charter's proposed language, Charter would provide notification
 14 before overlashing any of its existing attachments. Based on its knowledge of the
 15 age and facilities already existing on its poles, Blue Ridge could then determine
 16 whether a load bearing study needs to be performed. Given it is rare for an
 17 overlash wire to contribute substantially to the loading of a pole, let alone
 18 overload it, this approach is sensible and will minimize the costs and delays
 19 associated with making overlash attachments. This is also consistent with the
 20 requirements applicable to other communications companies making attachments
 21 to Blue Ridge's poles, industry standards, and the bulk of agreements Charter has
 22 entered into with other pole owners in North Carolina.

23 **D. UNAUTHORIZED ATTACHMENTS**

24 **Q. Is Charter willing to pay an unauthorized attachment penalty?**

25 **A.** In certain circumstances, yes. But the penalty must be reasonable and Charter
 26 should be provided sufficient information to determine whether the attachment is
 27 truly unauthorized and given an opportunity to obtain a permit for it. Permitting
 28 practices and record-keeping by pole owners and Charter have not been consistent
 29 over the years. A reasonable penalty is an attachment fee equal to the otherwise

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1 applicable annual pole attachment fee for the number of years since the most
2 recent inventory, or five years, whichever is less.

3 **Q. Does Charter have language it proposes the Commission adopt to address**
4 **unauthorized attachments?**

5 A. Yes. Charter asks the Commission to approve the following language:

6 **Unauthorized Attachments:** The Cooperative may assess a fee for any
7 Attachment that has not been authorized in accordance with this Agreement
8 ("Unauthorized Attachment"). The fee for Unauthorized Attachments shall be
9 equal to five (5) times the current Annual Attachment Fee and shall be
10 imposed in a non-discriminatory manner as to all attachers.

11 **Q. Is Charter's proposal consistent with the industry standard?**

12 A. Yes. None of our agreements allow pole owners to seek penalties reaching back
13 decades. *See* NM Ex. 3, Table 3 (beginning at page 24). This is consistent with
14 the FCC's conclusion that allowing open-ended penalties that reach back
15 indefinitely would "grossly overcompensate" the pole owner if the unauthorized
16 attachment were installed more recently. *See Cable Television Assoc. of Ga.*, 18
17 FCC Rcd 22287 ¶ 22 (rejecting penalty that would require payment of pole
18 attachment fees until the last inventory, and instructing utility to negotiate a
19 reasonable maximum period for the assessment of back-rent). Only about half of
20 Charter's agreements authorize any kind of financial penalty. Of those, almost
21 half tie the penalty to the then-current annual rental rate, and many cap the
22 penalty at five years of rental payments. *See* NM Ex. 3, Table 3. If anything,
23 Charter's position is more generous than the industry standard. It is also
24 straightforward and easy to apply, because it does not require the parties to
25 determine when the attachment was made, only whether it was authorized.

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1 Q. Is Charter's proposal consistent with the requirements Blue Ridge imposes
2 on other communications attachers?

3 A. It is more generous than what Blue Ridge imposes on other communications
4 attachers. As detailed by Mr. Mullins, most of Blue Ridge's third-party
5 communications attachers are not required to pay any kind of penalty for the
6 discovery of unauthorized attachments, even though Blue Ridge conceded it
7 discovered unauthorized attachments by all parties during its 2015/2016 audit.
8 Even where Blue Ridge's agreements contain penalty provisions, it has not
9 enforced them. *See* NM Ex. 4, at 171, 223.

10 E. NON-COMPLIANT ATTACHMENTS

11 Q. Should the agreement address remediating non-compliant attachments
12 discovered during a safety inspection or otherwise?

13 A. Yes. Charter has a strong interest in maintaining a safe and reliable network. But
14 attachments can become non-compliant over time for a number of reasons,
15 including from stresses exerted by the environment, acts of God, actions by
16 members of the public, and issues created by the pole owner or third-party
17 attachers. Charter should have a reasonable opportunity to participate in the
18 process of allocating responsibility for non-compliant attachments. And it should
19 be allowed to remedy non-compliant attachments without paying unreasonable
20 penalties. Charter proposes industry standard terms for safety inspections and
21 remediation be included as part of any new agreement.

22 Q. Does Charter have a recommendation for contract language dealing with
23 non-compliant attachments?

24 A. Yes. Charter proposes the Commission approve the following language for a new
25 agreement:

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1 **Notification and Opportunity to Cure Safety Violations:** If Charter's
2 Attachments are out of compliance with applicable safety and operational
3 requirements and specifications, whether in a safety inspection or otherwise,
4 then Cooperative will provide written notice to Charter of the non-compliant
5 Attachment containing the pole number, location, and description of the
6 problem. Charter must either contest the notice of non-compliance in writing
7 or correct them consistent with the specifications of G.S. 62-350(d)(1). If
8 Charter should fail to correct the non-compliance within a reasonable
9 timeframe within G.S. 62-350, the Cooperative may revoke the permit for the
10 Attachment. The cost of correcting all violations shall be borne by the party
11 that has created the violation. Charter shall not be responsible for the cost of
12 correcting a non-compliant Attachment(s) that were placed by or otherwise
13 created by Cooperative or another attacher after Charter's facilities were
14 attached.

15 **Q. How does this differ from the provision Blue Ridge proposes?**

16 **A.** Mr. Layton's testimony suggests that he believes that the responsibility for taking
17 corrective action for non-compliance should always default to Charter, unless
18 Charter can prove it did not cause the violation. But this ignores the many factors
19 I discussed above that could lead to a compliance issue. Nor should Charter be
20 responsible for correcting the cost of non-compliance resulting from "build
21 downs" or actions by the Cooperative or other attachers after Charter's facilities
22 were attached. Sometimes it is clear that Blue Ridge created the violation, as
23 discussed in Mr. Mullin's testimony. But other times Charter cannot "prove" in
24 those circumstances that the Cooperative or a third-party created the issue,
25 because the necessary records are not in its possession. A provision that
26 automatically assigns responsibility to Charter would invite a substantial risk of
27 abuse and disputes.

28 **Q. Should Blue Ridge be entitled to charge a penalty for non-compliant**
29 **attachments?**

30 **A.** No. There should be no penalty for non-compliant attachments because causation
31 is not always provable and all attachers, including the Cooperative, cause

1 violations. Charter has as much interest in maintaining a safe and reliable
2 network as Blue Ridge. Charter must provide reliable service for competitive
3 reasons and to maintain its critical 911 capabilities. And it must provide a safe
4 network for its employees and the public. Additionally, while I am not a lawyer, I
5 understand that N.C.G.S. 62-350(d)(3) requires Charter to pay only the
6 Cooperative's "reasonable and actual costs" to bring the facilities into compliance
7 (if Charter did not do so itself after reasonable notice). Should Charter fail to
8 bring its facilities into compliance, then the Cooperative may revoke the permit
9 for the attachment which would require Charter to file a new application for the
10 attachment after curing any violation.

11 **Q. Mr. Booth suggests all of Charter's attachments should comply with the latest**
12 **version of the NESC and other codes and standards. Is this reasonable?**

13 **A.** No. Bringing every existing facility up to new safety standards each time a new
14 standard is adopted is unnecessary and extraordinarily expensive. It is not a practice
15 followed by Blue Ridge and is not required of its other communications attachers.
16 Nor does the NESC require that all existing attachments and electric facilities be
17 brought up to the latest version of the safety code, except as specifically indicated in
18 the code. Rather, facilities are deemed compliant as long as the facilities meet the
19 requirements that were in place at the time they were made. Charter thus believes
20 that a reasonable provision would require Charter to place and maintain its
21 attachments according to the requirements of the latest NESC in effect as of the date
22 of the attachment. Charter would be required to conform its attachments to the
23 requirements of subsequent revisions of the safety code, to the extent required by the
24 NESC. Charter also would be required to comply with generally applicable

1 requirements, specifications, rules and regulations of any governing authority with
2 jurisdiction, the terms of the parties' pole attachment agreement, including the agreed
3 upon rules Blue Ridge sets forth in exhibits to the agreement.

4 **Q. Do you have proposed language to address this issue?**

5 **A.** Yes. I propose the following language:

6 **Compliance with Safety Standards:** Charter's Attachments constructed on
7 the Cooperative's poles after the Commencement Date shall be placed and
8 maintained at all times in accordance with the requirements and specifications
9 of the National Electrical Safety Code, the National Electrical Code, the North
10 Carolina Department of Transportation, the Occupational Safety and Health
11 Act, the Rural Utilities Service, the Society of Cable Television Engineer's
12 Recommended Practices for Coaxial Cable Construction and Testing and for
13 Optical Fiber Cable Construction, and the operational standards developed by
14 the Cooperative. And in all cases as such requirements, specifications, and
15 standards may be modified, revised, supplemented or replaced from time to
16 time, all revisions taking effect after Charter's facilities have been installed
17 shall be treated as applying on a prospective basis, except to the extent NESC
18 requires that a modified, revised, supplemented or replaced rule must be
19 applied retroactively.

20 **Q. Why are Charter's proposals reasonable?**

21 **A.** Charter's proposals fit squarely with the industry standard. And, as Mr. Mullins
22 testified, Blue Ridge requires virtually the same of its joint users and other
23 communications attachers. Charter's proposal also mirrors the statutory
24 requirements of G.S. § 62-350. The statute requires notice and cure provisions,
25 and also requires all parties to "work cooperatively to determine the causation of,
26 and to effectuate any remedy for, noncompliant lines, equipment, and
27 attachments. G.S. § 62-350(d)(4).

F. RECOVERY OF SPACE

1

2 **Q. Does Charter dispute a contract provision that would allow Blue Ridge to**
3 **recover space on its pole occupied by Charter's attachment, at Charter's**
4 **expense, for its core electric service?**

5 **A.** No. Charter appreciates that Blue Ridge will occasionally require additional
6 space for the provision of its core utility service. Charter would agree to
7 reasonable language similar to the language in the 2008 agreement that allows
8 Blue Ridge to recover space for its core utility service. In no event, however,
9 should Charter be required to pay for the recovery of space to be used for Blue
10 Ridge's competitive communications service, Ridgeline. Otherwise, it could
11 favor itself in the provision of competitive communications services. *See*
12 N.C.G.S. 62-350(a).

13 **Q. Do you have a response to Mr. Booth's discussion of the supply space and his**
14 **attempt to blame all encroachments on Charter?**

15 **A.** Whatever Mr. Booth happens to believe, the agreements between Blue Ridge and
16 Charter (and between Blue Ridge and other communications attachers) say
17 nothing about an 8.5 foot "supply space." The actual agreements instead specify
18 a required separation between Blue Ridge's facilities and the communications
19 facilities. Given these requirements, it is incumbent upon Blue Ridge to tell us
20 that it needs more space, and ask us to rearrange our attachments, vacate the pole,
21 or pay for a taller pole to accommodate the change, rather than dropping a
22 transformer too close to our cable and creating a dangerous condition.

1 Q. What language does Charter propose the Commission approve in this
2 proceeding?

3 A. Charter recommends the Commission approve the following language:

4 **Reservation of Space:** Should the Cooperative, at any time, reasonably
5 require the space Charter's Attachments occupy on its poles for the provision
6 of its core electric service, Charter shall, upon receipt of thirty (30) days'
7 notice, (a) rearrange its Attachments to other space if available on the pole, at
8 its own expense, (b) vacate the space by removing its Attachments at its own
9 expense, or (c) if no space is available and Charter does not wish to remove its
10 Attachments, Charter may request the Cooperative replace the pole with a
11 larger pole that can accommodate Charter's Attachments. Charter shall bear
12 the expense of such replacement and transfer its Attachments to the new pole.

13 G. RESERVATION OF SPACE

14 Q. Does Charter dispute a contract provision that would allow Blue Ridge to
15 reserve space on its pole for expansion of its core electric service?

16 A. No. But the requirement needs to be reasonable and non-discriminatory.

17 Q. What is wrong with Blue Ridge's proposal to reserve at least 72 inches
18 vertical clearance under Blue Ridge's grounded neutral?

19 A. Having such a requirement is unreasonable, inefficient and wasteful. The 72 inch
20 requirement, if strictly enforced, would lead to Charter replacing poles
21 unnecessarily with taller poles, even where there is no expectation that the extra
22 height will be used. For instance, if Charter needed to attach to a line of poles
23 running down a rural highway with very few existing attachments, there may be
24 plenty of space to provide adequate clearance for Charter to meet the NESC
25 clearance requirements and maintain 40 inches of safety space below the electric
26 facilities. But a taller pole would be necessary to ensure 72 inches of separation.
27 Requiring Charter to replace those poles would serve no productive purpose. The
28 taller poles would just line the road, half empty, obstructing views.

1 Q. But Charter already follows this requirement, right?

2 A. We do, but Blue Ridge's staking technicians have worked with us to avoid
3 unnecessary waste. As for a new agreement, we have learned through discovery
4 in this case that virtually every other communications attacher (other than
5 Charter) is allowed to place its facilities within 40 inches of Blue Ridge's neutral.
6 Blue Ridge's 72 inch requirement is thus not only discriminatory, it is pointless,
7 because the vast majority of third-party attachments made to its poles
8 (approximately 70 percent) are not subject to it.

9 Q. What does Charter propose for this provision?

10 A. Charter proposes the following language regarding new or relocated attachments:

11 New or Relocated Charter Attachments: Whenever Charter installs new
12 Attachments, transfers existing Charter Attachments to replaced poles, or
13 relocates existing Charter Attachments to a relocated line of poles, Charter
14 shall attach at least forty (40) inches and, preferably seventy-two (72) inches
15 vertical clearance under the effectively grounded neutral of Cooperative.

16 Q. Is Charter's position consistent with the industry standard?

17 A. Yes. The industry standard, as embodied in virtually all of Charter's other North
18 Carolina agreements, provides that utilities may reserve space for their core utility
19 purposes, pursuant to a bona-fide development plan. *Implementation of the Local*
20 *Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd.
21 15499, 16053, at ¶1169 (1996) ("We will permit the electric utility to reserve
22 space if such reservation is consistent with a bona fide development plan. . . . The
23 electric utility must permit use of its reserved space by cable operators . . . until
24 such time as the utility has an actual need for that space. . . . The utility shall give
25 the displaced cable operator . . . the opportunity to pay for the cost of any
26 modifications needed to expand capacity and to continue to maintain its

1 attachment.”). The language proposed above is similar to the provisions that
2 govern every other attachment to the Cooperative’s poles by other
3 communications companies, and would ensure non-discriminatory treatment of
4 the communications companies attached to Blue Ridge’s poles.

5 **Q. How does this proposal relate to your proposed language that Charter not be**
6 **liable for the costs of correcting build-downs?**

7 **A.** The language of these two provisions would allow Blue Ridge to trigger their
8 rights to reclaim pole space where they need the space on a going forward basis.
9 But where Blue Ridge has simply built down on Charter’s facilities without
10 giving notice or an opportunity for Charter to avoid having Blue Ridge create a
11 safety violation related to its attachment, Blue Ridge should not be permitted to
12 push the remediation costs on Charter. That would only reward Blue Ridge for
13 having created an unsafe situation that could affect the workers of both
14 companies.

15 **H. TRANSFER & RELOCATION OF FACILITIES**

16 **Q. When do attachers need to transfer facilities?**

17 **A.** In addition to instances where the pole owner needs to recover space, Charter may
18 need to transfer its facilities when a pole is being replaced or relocated. This
19 could happen for any number of reasons, including because the pole is old, worn,
20 rotten, or broken, or because a taller or stronger pole is needed to accommodate
21 other facilities or meet engineering standards. In some instances, poles will need
22 to be relocated because of proposed widening of a roadway, or because of the
23 needs of adjacent property owners.

1 Q. How do pole attachers and pole owners usually coordinate those transfers?

2 A. With Blue Ridge, we use an automated system, NJUNS, which helps pole owners
3 with multiple attachers coordinate notice and timing of facility transfers. This
4 coordination is necessary because Charter often cannot make a transfer until the
5 phone company first moves its facilities.

6 Q. What happens if Charter does not transfer its facilities in the prescribed
7 time?

8 A. We try not to let that happen, but I understand it has happened in Blue Ridge's
9 territory. Charter accepts responsibility for the actual costs incurred by Blue
10 Ridge if it must make a special return to the job site to remove an old pole
11 because we failed to meet the time period for completing the transfer.

12 Q. How does Charter propose the new agreement address transfer of facilities?

13 A. The new agreement should include reasonable language that requires Blue Ridge
14 to provide us notice in writing (or electronically) to transfer our facilities within
15 60 days, consistent with the 2008 agreement. Blue Ridge would be allowed to
16 transfer our facilities at our expense if we failed to do so within the required time.
17 Alternatively, the Cooperative may terminate the permit associated with that
18 attachment upon thirty days' notice, if we fail to complete the transfer. Charter
19 proposes the Commission approve the following language:

20 **Transfers & Relocation:** The Cooperative may replace or relocate poles for a
21 number of reasons, including without limitation when existing poles have
22 deteriorated, when new attachers require additional pole space, and when
23 poles must be relocated at the request of the North Carolina Department of
24 Transportation, another governmental body or a private landowner. In such
25 cases, Charter shall, within 60 days after receipt of written notice, transfer its
26 Attachments to the new poles. If such transfer is not timely performed, the
27 Cooperative may, at its option: (i) revoke the permit for the Attachment and
28 declare it to be an Unauthorized Attachment subject to the Unauthorized
29 Attachment fee; or (ii) transfer Charter's Attachments and Charter shall

1 reimburse the Cooperative for the actual costs of completing such work. If
2 Cooperative elects to do such work, it shall not be liable to Charter for any
3 loss or damage except when caused by the Cooperative's gross negligence or
4 willful misconduct.

5 **Q. Is Charter's proposal consistent with the industry standard?**

6 A. Yes. Except in emergency situations, 60 of Charter's 90 pole attachment
7 agreements in North Carolina require notice to Charter of the need to transfer
8 attachments during or at a prescribed period of time. Nineteen allow the pole
9 owner to transfer the attachments itself if Charter has failed to do so in the
10 prescribed time. See NM Ex. 1, Table 4 (beginning at page 58). This proposal is
11 also consistent with the parties' current agreement.

12 **I. INDEMNIFICATION**

13 **Q. How does Charter propose to cover indemnification?**

14 A. Charter believes that a reasonable indemnification provision would require each
15 party to indemnify the other for its own negligence. The following language
16 protects both parties interests:

17 **Indemnity and Limitation of Liability:** Except as otherwise specified
18 herein, each party shall defend, indemnify and hold harmless the other party
19 from any and all claims, liabilities, suits and damages arising from or based
20 upon any breach of the party's obligations under the Agreement.
21 Notwithstanding, neither party shall be liable to the other in any way for
22 indirect or consequential losses or damages, however caused or contributed to,
23 in connection with this Agreement or with any equipment or service governed
24 hereby.

25 **Q. Is a mutual indemnification provision just and reasonable?**

26 A. Yes. Mutual indemnification is standard in the industry. Blue Ridge also have
27 mutual indemnification provisions with virtually all of its joint-users. I believe
28 mutual indemnification is necessary based on the noncompliance issues involving
29 Charter's facilities created by Blue Ridge, as detailed in Mr. Mullins' testimony.

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J. DEFAULT REMEDIES

Q. What terms will govern if a party defaults on its obligations under the agreement?

A. Reasonable "default remedies" ensure the Cooperative has avenues to remedy circumstances where Charter has defaulted on its obligations under the Agreement. Charter's proposal is consistent with the 2008 agreement, and would require Blue Ridge to provide written notice to Charter describing, in reasonable detail, the alleged default and give Charter a reasonable time to correct the violation (depending on the nature or character of the alleged violation). If Charter failed to perform work it is obligated to do, despite notice of default, Blue Ridge could elect to take a number of different actions. The language of the proposal is as follows:

Defaults: If Charter is in material default under this Agreement and fails to correct such default within the cure period specified below, the Cooperative may, at its option:

- (a) declare this Agreement to be terminated in its entirety;
- (b) terminate the authorization covering the pole(s) with respect to which such default shall have occurred;
- (c) decline to authorize additional Attachments under this Agreement until such defaults are cured;
- (d) suspend all make-ready construction work; and/or
- (e) correct such default without incurring any liability to Charter, except when caused by Cooperative's gross negligence or willful misconduct, and Charter shall reimburse Cooperative for the actual costs of doing the work; and/or
- (f) obtain specific performance of the terms of this Agreement through a court of competent jurisdiction.

For a period of thirty (30) days following receipt of notice from the Cooperative (or, for defaults of a nature not susceptible to remedy within this thirty (30) day period, within a reasonable time period thereafter), Charter

1 shall be entitled to take all steps necessary to cure any defaults. The 30-day
2 notice and cure period does not apply to any default by Charter of its payment
3 obligations under this Agreement.

4 **Q. How does this proposal differ from what Blue Ridge proposes?**

5 A. It is unclear what, precisely, Blue Ridge proposes. This proposal provides notice
6 and an opportunity for Charter to cure a default and clarifies the obligations and
7 limitations of each party's responsibilities.

8 **Q. How do these proposals compare to the industry standard?**

9 A. The default remedies I outline above would give the pole owner more options for
10 remedies than the default provisions found in many other pole attachment
11 agreements. See NM Ex. 3, Table 5 (beginning at page 101).

12 **K. DISPUTED INVOICES**

13 **Q. Is it reasonable for Blue Ridge to require Charter to pay disputed invoices in full**
14 **pending resolution of the dispute?**

15 A. No. Blue Ridge asserts that allowing Charter to dispute an invoice without paying
16 it would give Charter incentives to work "less than efficiently" to resolve
17 disputes. The converse is of course true as well—if Charter is required to pay
18 upfront, then Blue Ridge would be incented to work less than efficiently to
19 resolve disputes. If a good faith dispute exists, I believe both parties will work
20 together to resolve it. In any event, this issue seems to be addressed already by
21 Section 62-350, which requires a party seeking to bring a dispute to the
22 Commission pay only "any undisputed fees related to the use of poles, ducts, or
23 conduits which are due and owing." G.S. § 62-350(c).

L. INSURANCE

2 Q. Is it reasonable for Blue Ridge to require Charter to maintain insurance
3 coverage as Blue Ridge is required to maintain by the Rural Utilities Service?

4 A. No. Charter is willing to maintain sufficient coverages for worker's
5 compensation, commercial general liability, and automobile liability insurance, as
6 determined by Charter's risk management. Blue Ridge's obligations to the Rural
7 Utilities Service ("RUS"), arising from the financing of Blue Ridge's electrical
8 infrastructure, have no bearing on what is appropriate coverage for Charter's
9 attachments. Charter has not borrowed money from RUS and has not constructed
10 an inherently dangerous electrical transmission and distribution system.

M. CONFIDENTIALITY

12 Q. Is there any reason for a pole attachment agreement to be confidential?

13 A. None at all. I am aware of few other pole attachment agreements (other than this
14 one) that are marked confidential. It is certainly not industry standard. Nor is
15 there any "market sensitive information" as suggested by Mr. Booth. Blue Ridge
16 testified in its deposition that there is no sensitive or proprietary information in a
17 pole agreement. The only reason Blue Ridge could provide for a confidentiality
18 provision is that it is "nobody else's business." NM Ex. 4, at 237-238. As Mr.
19 Mullins explains, it is our business when Blue Ridge uses the cover of
20 confidentiality to charge the highest pole rate and to impose the most stringent
21 requirements on Charter, while allowing its direct competitors to operate with
22 lower costs and less red tape.

V. CONCLUSION

1

2 Q. Does this conclude your responsive testimony?

3 A. Yes.

1 (Whereupon, Exhibits NM 1-5
2 were identified as premarked.)

3 BY MR. GEORGE:

4 Q Mr. Martin, do you have a summary of your
5 testimony?

6 A I do.

7 Q Would you please go ahead and give it?

8 A Good afternoon, Mr. Chairman, Commissioners. I
9 am the Senior Director of Construction for Charter in the
10 Carolina Region. I have worked in the cable industry for
11 almost 39 years. In my career, I have hundreds of -- I
12 have seen hundreds of Pole Attachment Agreements with all
13 kinds of pole owners, from big investor-owned utilities
14 like Duke Energy, to smaller municipal utilities. My
15 experience in the scores of pole agreements Charter has
16 with pole owners in North Carolina point to a very clear
17 -- to very clear industry standards. My testimony
18 discusses how these industry standards stack up against
19 the reasonable terms and conditions proposed by Charter
20 and the unreasonable terms proposed by Blue Ridge.

21 In all cases, Charter's proposed terms are in
22 line with those industry standards, terms, and
23 conditions, the existing agreements between Blue Ridge
24 and other communications companies attached to their

1 poles, or both. Often, the terms we propose are more
2 restrictive of Charter than the terms Blue Ridge has
3 extended to the telephone companies attached to its
4 poles, even though the telephone companies use more space
5 on the poles and generally attach heavier and larger
6 bundles of copper cables.

7 I also ask the Commissioners to keep in mind
8 that the industry standard terms I discuss are found in
9 agreements with all types of utilities, investor owned,
10 cooperative, and municipal utilities. It is not
11 surprising that the industry standard applies to no
12 matter who the pole owner is because the pole owns -- the
13 poles owned by these companies are very similar. In
14 fact, where Charter makes attachments to the poles owned
15 by the cooperative, like Blue Ridge, it often will have
16 attachments to Duke Energy or telephone poles in the same
17 area, if not on the same street. The space used by
18 Charter on these poles and the way Charter takes its
19 physical attachment -- makes its physical attachments is
20 generally the same, no matter who owns the pole. Despite
21 these similarities, investor-owned utilities charge rates
22 in the range of 6 to \$7 for our attachments while some
23 cooperatives, including Blue Ridge, demand rates many
24 times those amounts. Thank you for your time.

1 MR. GEORGE: The witness is available for cross
2 examination.

3 CHAIRMAN FINLEY: Cross examination.

4 MR. MILLEN: Thank you.

5 CROSS EXAMINATION BY MR. MILLEN:

6 Q Mr. Martin, as I understand it, you are now a
7 -- an employee of Charter Communications Properties, LLC;
8 is that correct?

9 A Yes.

10 Q And in your direct testimony, you state that
11 Charter and its affiliates operate cable systems in North
12 Carolina and 40 other states across the country; is that
13 correct?

14 A That is correct.

15 Q Okay. And is it the case that in your direct
16 testimony here, among other things, you describe the
17 contractual provisions that are acceptable or not
18 acceptable to Charter?

19 A Yes.

20 Q Okay. The fact is, as I understand it, you are
21 not the person at Charter who has ultimate authority
22 within Charter to approve a Pole Attachment Agreement; is
23 that right?

24 A That is right.

1 Q In fact, that person is someone named Darrel
2 Hegar; is that correct?

3 A Darrel Hegar.

4 Q Okay. And he is Charter's Regional Vice
5 President; is that correct?

6 A He is the Regional Vice President for the
7 Carolina region. That is correct.

8 Q Okay. And he's not here.

9 A He is not here today.

10 Q Okay. And, in fact, Mr. Hegar, as I understand
11 it, has never given you instructions as to what would be
12 or would not be acceptable terms for Charter in the
13 negotiation of a Pole Attachment Agreement; is that
14 correct?

15 A Mr. Hegar has never given me instructions to --
16 with regards to the specifics of pole agreements.

17 Q Okay. And, in fact, it's also the case that
18 Charter has no set policy for what are acceptable terms,
19 correct?

20 A We do each agreement on its -- on its own
21 individual basis.

22 Q I.e. no set policy?

23 A Correct.

24 Q Okay. And you, yourself, as I understand it,

1 have been given no instructions from Charter's management
2 as to what terms and conditions are or are not acceptable
3 to the Company for inclusion in a Pole Attachment
4 Agreement with a cooperative, right?

5 A I personally have not been, correct.

6 Q Okay. But that's 75 percent of your -- of your
7 sworn testimony before this Commission, right?

8 A Yes.

9 Q But it's -- it's not something that you have
10 any authority to approve, and the people who do have
11 authority to approve it have never told you what it is,
12 right?

13 A I -- I participate in the negotiations for each
14 and every one of the pole agreements that I'm involved
15 with, along with counsel. And we negotiate those terms,
16 and I make recommendations not only to Mr. Hegar, but
17 also to my immediate Vice President of Engineering who
18 also will -- would have some -- some decision making in
19 the final outcome.

20 Q But you've said you were never told by Mr.
21 Hegar, the approver, what's acceptable to him.

22 A No. And I have not personally been told by
23 Hegar.

24 Q Okay. Now, as I understand it, you think it's

1 reasonable for Charter to comply with the National
2 Electric Safety Code when it makes its attachments to
3 electric co-op poles, right?

4 A Yes.

5 Q But you don't know whether Charter has a safety
6 practices manual; is that correct?

7 A I am aware that there's a safety practices
8 manual. I am personally not familiar with the safety
9 practices manual. In my current responsibility with
10 Charter, I really don't have a need to be personally
11 involved with that. That falls back to the construction
12 managers and those that oversee construction crews for
13 the Company.

14 Q Is the fact that you now know that Charter has
15 a safety practices manual something that you learned
16 between the time of your deposition last month and today?

17 A Quite possibly, yes.

18 Q Okay. You'd also agree, with respect to the
19 rules of the North Carolina Department of Transportation,
20 that it's reasonable that Charter comply with those when
21 attaching to co-op poles, right?

22 A Yes. Of course.

23 Q But, again, you haven't had any specific
24 training on NCDOT requirements, right?

1 A I have not had any personal training on NCDOT
2 requirements.

3 Q Okay. Now, as I understand it, you state in
4 your testimony -- I'm going to quote here. If we have to
5 look at it, we can, but I'm -- I think I got this right.
6 "Our employees and contractors have decades of
7 experience, are trained to safely attach Charter
8 facilities to poles in accordance with the requirements
9 of the NESC and, generally speaking, we have a great
10 track record of success." That's your testimony, right?

11 A Yes, it is.

12 Q But your claim about that that great track
13 record can't really be squared with Blue Ridge's
14 inventory results provided to Charter in Mr. Booth's five
15 circuit survey and the hundreds of pictures in this
16 proceeding, can it?

17 A I have not seen any of the actual results that
18 you are referring to. I have heard it here in testimony,
19 but I'm not personally familiar with any of the results
20 or have seen any of the specifics, so I can't agree or
21 disagree with that statement without having some
22 additional information.

23 Q In any event, your statement about -- in your
24 direct testimony about the great track record of Charter,

1 then, is not based on anything related to this case, as I
2 understand it?

3 A That is correct.

4 Q Okay.

5 A It would be -- it would be related to my
6 experience within the past 11 years working here in North
7 Carolina with previously Time Warner Cable and now
8 Charter.

9 Q And you've been with Charter about 18 months,
10 right?

11 A Yeah. That would be correct. May of 2016.

12 Q Okay. Now, on the issue of unauthorized
13 attachments, isn't it the case that the contract between
14 Charter and Duke Energy provides for both a penalty fee
15 and back rent for unauthorized attachments?

16 A That is correct.

17 Q And you heard -- you were here for Mr. Mullins'
18 testimony sitting right there, right?

19 A Yes.

20 Q And did you hear Mr. Mullins say that -- that
21 Charter was simply incapable of reporting attachments on
22 secondary poles to -- to Blue Ridge?

23 A I did hear him say that.

24 Q Okay.

1 A However, there are ways we can work through
2 identifying post installation where those drops were
3 attached on secondary poles and report that on a monthly
4 or quarterly basis. It is difficult for us to do that
5 prior to the installations being done on those service
6 drops and laterals.

7 Q Okay. So what you're saying is maybe you could
8 do it, but you're not doing it now, right?

9 A It is currently not in effect for Blue Ridge,
10 correct.

11 Q And the only way you're going to do it is if
12 it's in the contract, right?

13 MR. GEORGE: Objection.

14 CHAIRMAN FINLEY: Overruled. Ask -- answer if
15 you can.

16 A If it is a contract requirement, of course, we
17 would be obligated to it.

18 Q And it is a contract requirement, but you're
19 not doing it now, right?

20 A Correct.

21 Q And that's the source of at least some of those
22 1,400 or so unauthorized attachments, right?

23 A Again, I have not seen the specific details
24 with the results of the unauthorized attachments, but in

1 my experience, generally speaking, the -- the
2 unauthorized attachments can be attributed directly to
3 service drops and laterals that come off the main
4 distribution lines, correct.

5 Q Which you're supposed to tell Blue Ridge about,
6 but you all don't.

7 A We currently are not, correct.

8 Q Okay. Now, when it comes to Duke, they did an
9 audit solely in Haywood County and hit Charter with a
10 claim for just 770 unauthorized attachments, and there
11 were charges of over \$21,000 for those and 36 months of
12 back rent for a total of about 15,000. Do you remember
13 that?

14 A I recall seeing some of that, but not
15 specifically, so if you could point it out to me, I could
16 -- I could verify.

17 Q Well, you remember generally there was a
18 Haywood County audit, a lot of unauthorized attachments
19 on Duke, and you paid them a bunch of money. You
20 remember that much, right?

21 A Yes.

22 Q Okay. And there's no reason why that provision
23 in the Duke contract shouldn't be the standard adopted
24 here for unauthorized attachments, right?

1 A We have precedent in place with that type of an
2 arrangement, correct.

3 Q Well, my question is even simpler than that,
4 which is, is there any reason why Blue Ridge should be
5 treated less well than Duke when it comes to your all's
6 unauthorized attachments which apparently you can't
7 control?

8 A I would agree there should be some parity
9 there.

10 Q Okay. Now, as I understand it, prior to your
11 current position, your position was Senior Director of
12 Network Engineering; is that right?

13 A For Time Warner Cable, correct.

14 Q Okay. But you're not a licensed professional
15 engineer?

16 A I am not a licensed professional engineer.

17 Q Not trained as an engineer at all, right?

18 A Correct.

19 Q You'd agree with Mr. Mullins, there's no
20 professional engineers that get anywhere near this stuff
21 for Charter, right?

22 A We have no professional engineers on staff,
23 correct.

24 Q And unless Duke requires you to deal with

1 somebody on a third-party basis, you don't deal with any
2 third -- with any professional engineers on this stuff,
3 right?

4 A As required by any other contracts, which I
5 couldn't specify at this point, but there may be other
6 instances where we would have to retain professional
7 services from an engineering firm, yes.

8 Q As I understand it, and this is in your direct
9 testimony, Charter contends that requiring a professional
10 engineer certification of attachments would be
11 "prohibitively expensive"; is that correct?

12 A For every -- yes, it would be.

13 Q Okay.

14 A For every -- if it were to be applied for every
15 job, every construction job, every -- every aerial
16 attachment that we have to perform, it would be
17 prohibitively expensive.

18 Q But you've not done any study to determine what
19 that actual expense would be?

20 A I have not personally, no.

21 Q Okay. And have you looked at, for example, the
22 costs that are associated with doing something similar,
23 contracting with a third-party engineering outfit for
24 Duke to determine the prohibitiveness of the expense of

1 this?

2 A Could you restate the question, please?

3 Q Yeah. That was probably --

4 A Yeah.

5 Q -- way too complicated. You could have looked
6 at what it cost to do it for Duke, right, to deal with
7 third-party engineers, right?

8 A Yes, but that's included in the application
9 fee. It's an engineering fee that's paid up front and to
10 perform that activity.

11 Q So you paid Duke an engineering fee. You don't
12 pay an engineering fee to Blue Ridge, right?

13 A Correct.

14 Q Duke's a really, really big company, tons of
15 professional engineers, right?

16 A I don't know how many engineers they have on
17 staff, but I -- we could draw that conclusion.

18 Q You know it's a big company, right?

19 A Yes.

20 Q Okay. Compared to Blue Ridge, it's a behemoth,
21 right?

22 A Multi-state, yes.

23 Q Okay. Do you really think it's fair for you
24 all to place on to the three or four professional

1 engineers who work for Blue Ridge the requirement to
2 provide engineering for your all's cable system?

3 A I don't think we've ever required Blue Ridge to
4 take on that responsibility without due compensation for
5 that -- those services to be performed. As -- as
6 referenced by Mr. Mullins, we would prefer to see the
7 pole owners take on that responsibility, at our expense,
8 to complete that. You have the information about the
9 poles. You have the information of the other attachers
10 on that pole. You have all of the information that --
11 that we would have to obtain to be able to provide the
12 same wind and ice loading analysis for -- for the
13 loading.

14 Q You want these folks at a \$125 million annual
15 revenue electric co-op to engineer your system, right?

16 A That's not what we're saying. What we're
17 saying is it could be done through a third party that's
18 authorized by Blue Ridge, similar to the situation with
19 Duke Energy. Duke Energy doesn't take that on
20 themselves. They have a third-party professional
21 engineering firm that handles that for them.

22 Q Okay. Now, your -- your actual suggestion here
23 is not what you just said, right? That's not the
24 contract term you asked the Commission for, is it?

1 A It is not.

2 Q The contract term that you asked the Commission
3 for, as I understand it, was that instead of a
4 professional engineer, Charter would have someone called
5 an "authorized representative" make that certification;
6 is that correct?

7 A That has been done in the past, and that is our
8 recommendation, yes.

9 Q Hadn't been done with Blue Ridge, right?

10 A Not with Blue Ridge --

11 Q Okay.

12 A -- specifically, no.

13 Q And it wasn't done with any of the Time Warner
14 co-ops that were in here complaining about Time Warner
15 earlier this year, right?

16 A To my recollection, it was not, either.

17 Q Okay. And the point of Charter's proposal, as
18 I understand it, would be the authorized representative,
19 of course, would not be a professional engineer, right?

20 A Correct.

21 Q And that would be somebody who is less
22 expensive, right?

23 A It would be someone already on -- on staff in
24 the Company, as a -- for example, my -- the Vice

1 President of Field Engineering, who is my personal
2 manager.

3 Q Okay. So my question to you, then, is that
4 person -- let's take him as an example or anybody on your
5 staff -- how can somebody who is not a professional
6 engineer certify attachments are, as in your proposed
7 contract term, "of sound engineering design and fully
8 comply with the safety and operational requirements of
9 the National Electric Safety Code"? How can a non-
10 professional engineer authorized representative certify
11 that?

12 A The plant would be built to the specifications
13 and the National Electric Safety Code standards required
14 for us to construct that plant on the pole owner's
15 facilities.

16 Q And even if that person could make such a
17 certification, that would be done in the context which,
18 as Mr. Mullins just testified, Charter has no regular
19 program to inspect its lines and aerial facilities for
20 safety violations under NSC Rule 214, right?

21 MR. GEORGE: Objection to the characterization
22 of Mr. Mullins' testimony.

23 CHAIRMAN FINLEY: Rephrase it, Mr. Millen,
24 please.

1 Q You heard Mullins, right?

2 A Yes.

3 Q He says you all don't do regular safety
4 inspections, right?

5 A He stated that, yes.

6 Q Okay. An authorized representative, not a
7 professional engineer, is going to give this
8 certification, but in a context where you all aren't even
9 doing safety inspections in the first instance, right?

10 A Let me answer your question this way. We're
11 talking about new attachments going forward. I can tell
12 you that it is the responsibility of all the construction
13 coordinators that report to Mr. Mullins to -- to not post
14 construction, but during construction, to QC and perform
15 quality assurance on those -- on those attachments that
16 are being made, not just for aerial attachments, but all
17 underground work as well. That is part of their day-to-
18 day responsibilities. And as part of that, they have --
19 they have specific -- a specific checklist, if you will,
20 that they use to ensure that everything is being built
21 not only in any -- within NESC compliance, but also
22 within Charter Communications' specifications and
23 standards.

24 Q But no regular program?

1 A There is no regular program, but it is their
2 responsibility as part of that new build construction.

3 Q Let me ask you this, does your written
4 testimony contain the following summary from pages 2 and
5 3? I'm reading -- I'm going to, again, quote it. You
6 can check if you want. "Given the minimal amount of
7 surplus space Charter uses on Blue Ridge's poles
8 described by Charter's witness Michael Mullins, and the
9 economic principles described by Charter's expert witness
10 Patricia Kravtin, Charter believes its fair share is best
11 represented by an allocation of those costs, based on the
12 proportion actually used by Charter of the space on the
13 pole than can be used to suspend wires and cables above
14 the street." Is that your testimony?

15 A That sounds right, yes.

16 Q Okay. And so you are familiar with Ms.
17 Kravtin's testimony and the economic principles that she
18 describes in her testimony, right?

19 A I'm not a rate expert, but I am familiar with
20 her testimony.

21 Q Okay. Now, in making the attachment, is it
22 your understanding that the parties agree that Charter
23 uses that 1 foot of space on the standard, sort of
24 hypothetical pole measured for these purposes at 37-1/2

1 feet?

2 A Yes.

3 MR. GEORGE: Objection. This is outside the
4 scope of Mr. Martin's direct testimony.

5 CHAIRMAN FINLEY: Well, we don't have a rule
6 around here that you've got to be limited to the scope of
7 the direct testimony. Overruled.

8 MR. MILLEN: Thank you.

9 Q Can you answer that question?

10 A Could you ask it one more time --

11 Q Yeah.

12 A -- to make sure I got it?

13 Q In making -- in making the -- in making the
14 attachments, your understanding, the parties agree that
15 Charter uses 1 foot of space on the standard hypothetical
16 pole we're talking about here, 37-1/2 feet?

17 A Yes.

18 Q I'm going to spare us all the getting out the
19 poles again, I think.

20 A Thank you.

21 Q But you would agree that Charter needs to be
22 charged for use of that 1 foot, correct?

23 MR. GEORGE: Objection. Mr. Martin has not
24 been submitted as an expert on rate -- on rates in this

1 proceeding.

2 CHAIRMAN FINLEY: Answer to the extent you
3 know, Mr. Martin.

4 A Again, I'm not a rate expert, but that is my
5 understanding.

6 Q Okay. And you're -- you're also aware that
7 under the economic principles enunciated by Ms. Kravtin
8 that you refer to in your direct testimony, the amount
9 allocated to Charter on the pole is 7.41 percent, right?

10 A I believe that is correct, yes.

11 Q Okay. Now, on that 37-1/2 foot pole, what
12 amount of space allocation, actual space, is represented
13 by 7.41 percent?

14 A I -- I can't answer that question.

15 Q You'd need a calculator?

16 A Yes.

17 Q I got one.

18 MR. MILLEN: Can I approach?

19 CHAIRMAN FINLEY: Yeah, you may approach, but
20 while -- let him make that calculation. We're going to
21 take afternoon recess and come back at five minutes until
22 4:00.

23 (Recess taken from 3:41 p.m. to 3:54 p.m.)

24 CHAIRMAN FINLEY: All right. Let's go back on

1 the record. Mr. Millen.

2 MR. MILLEN: Thank you.

3 Q Were you able to figure out how to run that
4 calculator?

5 A No.

6 Q Okay. Turn it on, if you would.

7 A Now, you tell me what to punch in, and I'll
8 punch it in. I'm not the rate expert, and I --

9 Q I'm not asking you to do that. I'm just asking
10 you what -- my question to you was, do you know what 7.41
11 percent on a 37-1/2 foot pole represents in terms of
12 actual space?

13 A I do not know.

14 Q Okay. If you'll turn that on by hitting AC.

15 A Are you going to show me how to use a
16 calculator?

17 Q If you don't know how, I'll show you.

18 MR. MILLEN: Can I show him how to use a
19 calculator?

20 CHAIRMAN FINLEY: Why don't you do it yourself
21 and ask him if it's not correct.

22 MR. MILLEN: Sure.

23 A Show me.

24 Q 37.5 times .071 equals -- what does it equal?

1 A 2.6625.

2 Q Okay. So less than 3 feet, right? Seven four
3 one, less than 3 feet, right?

4 A If those -- if that was footage, then yes, it's
5 less than 3 feet.

6 Q Okay. Now, you're also aware that when there's
7 a telecommunications attacher to the pole such as
8 Charter, and Charter wants to use the OSHA work rules
9 that apply not to electric workers, but to communication
10 workers, then there's a requirement under the NESC for
11 something called the communications worker safety zone.
12 You know that, right?

13 A Yes, I do.

14 Q Okay. And that's a 40-inch clearance, as we've
15 discussed here, between Blue Ridge's electric equipment
16 and Charter's cable, right?

17 A Yes, it is.

18 Q And it's only the fact that Charter attaches to
19 that pole that creates the requirement for this 40-inch
20 communications worker safety zone in the first instance,
21 right?

22 A Or any other communications attachment on that
23 pole.

24 Q Yeah. I'm using a hypothetical pole where it's

1 just Blue Ridge and Charter, right?

2 A Okay.

3 Q When it's just Blue Ridge, there's no
4 communications worker safety zone, right?

5 A Correct.

6 Q Charter attaches, now there is one, right?

7 A Correct. Forty (40) inches.

8 Q Right. And that's because of your attachment
9 and your work rules, right?

10 A Yes.

11 Q Okay. Now, again, under the economic
12 principles enunciated by Ms. Kravtin, is it your
13 understanding that only 7.41 percent of that 40-inch
14 communications worker safety zone gets allocated to
15 Charter?

16 A Again, I'm not the rate expert, nor the space
17 expert on the pole and how those rates relate to those --
18 to that space and usage.

19 Q That wasn't what I asked. You said in your
20 direct testimony that based on your understanding, the
21 economic principles enunciated by Ms. Kravtin, that this
22 is the way you should be charged, right?

23 A I agreed with Ms. Kravtin's findings, yes.

24 Q Okay. And so my question to you is, it's your

1 understanding then -- you understand this, right?

2 A Yes. Of course.

3 Q That -- that 7.41 percent of that
4 communications worker safety zone gets allocated to
5 Charter, right?

6 A Yes.

7 Q Do you know what that relates to in actual
8 space?

9 A I do not.

10 Q Would you be surprised if it's less than 3
11 inches?

12 A I -- I've not had an opportunity to review or
13 validate that.

14 Q Okay. Now, in order for the attachment to be
15 of any use to Charter at all, it has to be on a
16 particular place on the pole, right?

17 A Yes.

18 Q In other words, if Blue Ridge required Charter
19 to take its 1 foot at 8 feet -- at the 8-foot height on
20 the pole, that's -- that's no good to Charter, right?

21 A That would not be feasible. We would not be
22 able to maintain vertical clearance.

23 Q Okay. Basically, Charter generally needs to be
24 at the 18-foot level or above in order to meet those

1 vertical clearance requirements, right?

2 A Generally speaking, correct.

3 Q And so Charter is the beneficiary of the fact
4 that that pole has an 18 foot of height for you all to
5 attach to, right?

6 A Again, Charter being the only other attacher on
7 the pole?

8 Q Sure.

9 A Yes.

10 Q Okay. In other words, if that pole isn't as
11 high as that, it's of no value to you at all?

12 A Correct.

13 Q You get nothing from it?

14 A Correct.

15 Q You have to be in a particular place on that
16 pole, not just any old 1 foot along the way, right?

17 A Correct.

18 Q Okay. Now, under the 7.41 percent space
19 allocation of the 18 feet to get you where you need to
20 be, would you be surprised that only about 1-1/3 feet is
21 the space allocated to you all?

22 A Again, I'm not the expert on that, and I have
23 no way of validating or affirming what you've just said.

24 Q Other than arithmetic, right?

1 A Correct.

2 Q Okay. And in order for Charter to use this
3 pole at all, it has to be stable, right?

4 A Yes.

5 Q And stable in this context means it has to be
6 buried 6 feet in the ground, right?

7 A That is the standard.

8 Q Okay. But Charter's space allocation at 7.41
9 percent for those 6 feet needed to create a stable pole,
10 that's less than 6 inches, right?

11 A Arithmetic, yes.

12 Q Okay. Now, as I understand your testimony,
13 Charter's communication facilities are installed overhead
14 and underground, right?

15 A They are.

16 Q And you state on page 5 of your testimony --
17 this is at lines 19 and 20 if you want to check me.

18 A Page 5, you said?

19 Q Yes, sir.

20 A Okay.

21 Q You state at lines 19 through 20 that, "Charter
22 often has not had an alternative to attaching to utility
23 poles when building its cable system." Is that right?

24 A That is correct.

1 Q Okay. But you don't quantify in any way the
2 word "often" in your testimony, do you?

3 A I don't believe I do.

4 Q Okay. Now, do you understand that the economic
5 principles enunciated by Ms. Kravtin refer to Blue
6 Ridge's poles as essential facilities for Charter?

7 A Yes, I do.

8 Q And Ms. Kravtin states that Charter and other
9 communications providers have no alternative but to
10 attach; is that right?

11 MR. GEORGE: Objection. Ms. Kravtin will be
12 available to testify about her testimony.

13 Q You understand that's her testimony, right?

14 A Yes.

15 Q Okay. But --

16 CHAIRMAN FINLEY: He can ask questions of what
17 Ms. Kravtin says. You know, if it were me, I think I'd
18 be asking Ms. Kravtin, but he has that right.

19 Q But you testify, notwithstanding what Ms.
20 Kravtin has said, that Charter sometimes buries its
21 facilities, right?

22 A Yes.

23 Q And when it buries its facilities, that's based
24 on an economic calculation done by Charter, right?

1 A In part. It could also be based on the
2 availability of existing poles. It could be based on the
3 make ready costs that have been provided to Charter for
4 the construction of taller poles. There could be a
5 multitude of reasons. It could be a directive by the
6 builder or the developer to go underground.

7 Q But it's all economics, right? It's all
8 dollars and cents, everything you've described.

9 MR. GEORGE: Objection. That's a
10 mischaracterization of his testimony.

11 CHAIRMAN FINLEY: Overruled.

12 Q Right?

13 A It's certainly more expensive to build
14 underground plant.

15 Q Not my question. My question is, in making the
16 decision of whether to go overhead or underground, it's
17 all an economic calculation?

18 A Yes.

19 Q There's nothing aesthetic about it, for
20 example?

21 A Well, we would not go out and set our own poles
22 adjacent to the incumbent pole owners' poles, nor would
23 we go across the street and set poles. There is some
24 aesthetic involved in that.

1 Q Okay. But it's all -- it really comes down to
2 dollars and cents. Wouldn't you agree with that?

3 A Well, again, it's much more expensive to build
4 underground plant --

5 Q Okay.

6 A -- so...

7 Q How does Charter make the decision, the
8 economic calculation, to decide to go underground as
9 opposed to aerial?

10 A It's based on the availability of the pole
11 space. If the poles exist and the space is there for us
12 to make our attachments in compliance with NESC and per
13 any other requirements within the specific pole agreement
14 of that pole owner, we would make the attachments on the
15 pole. That would obviously be our first preference.

16 Q And that's because poles are cheaper.

17 A I don't know if poles are cheaper. It's --
18 aerial construction is less expensive than underground
19 construction. I've stated that twice already.

20 Q Okay. Now, the underground construction lasts
21 longer, right?

22 A I don't know if I would agree with that.

23 Q Okay. Did you hear the testimony from Mr.
24 Layton that one of the Telcos that was a joint user with

1 Blue Ridge has been putting most of its system
2 underground?

3 A I did hear that testimony.

4 Q Okay. And so they're coming off the poles and
5 going underground, right?

6 MR. GEORGE: Objection to the characterization
7 of Mr. Layton's testimony.

8 Q You understood that's what he was testifying
9 to, right?

10 A Yes.

11 Q Okay. And that's a decision that that
12 particular utility made, right?

13 MR. GEORGE: Objection. Foundation.

14 CHAIRMAN FINLEY: Overruled.

15 A You can surmise that.

16 Q And you testified this summer in the Carteret-
17 Craven situation that you all were not attaching overhead
18 much at Carteret-Craven because they were such a pain in
19 the neck to deal with that you just decided to go
20 underground, right?

21 A I don't recall if that was my testimony.

22 Q Are you sure?

23 A I haven't reviewed my -- my testimony from --
24 from the June hearing.

1 Q What percentage of Charter's facilities are
2 buried versus overhead in North Carolina?

3 A Approximately, the system average is 58 percent
4 underground, 48 percent aerial.

5 Q Fifty-eight (58) and 48 or 58 and 42?

6 A Excuse me, 42. Sorry.

7 Q I can give you the calculator back. What
8 percentage of Charter's facilities are buried versus
9 overhead in the Blue Ridge service territory?

10 A I don't know that personally.

11 Q Okay. Are you familiar with the fact that
12 Charter's expert, Ms. Kravtin, states in her testimony
13 that attachers, like Charter's, "use of pole space is
14 fully subordinate to that of the utility who can reclaim
15 the space for its core service at any time"?

16 A I believe I've seen that, yes.

17 Q Okay. Do you agree with her?

18 A I do.

19 Q Okay. You heard Mr. Gillespie in his opening
20 statement say yesterday that this is surplus space and
21 when required, to give it back when it's needed by the
22 co-op, Charter will give it back?

23 A Yes.

24 Q And that it's completely subject to

1 displacement?

2 A Yes.

3 Q Okay. Now, in that case, I want to ask you
4 about this concept in your testimony that you refer to as
5 build down. Do you remember that testimony?

6 A I do recall that term.

7 Q Okay. So is build down a situation where the
8 electric utility builds its primaries and conductors down
9 to the transformers it provides services to the
10 customers? That's what build down is, right?

11 A From the top down, yes.

12 Q Okay. And what this means for Blue Ridge, for
13 example, is it adds its electrical equipment to the pole
14 in a manner that can render Charter's attachment out of
15 compliance, right?

16 A Correct.

17 Q Okay. For example, if Blue Ridge were to add a
18 transformer in the electrical supply place which was
19 within 30 inches of Charter's cable, right?

20 A Yes.

21 Q Okay. And in that circumstance, it's Charter
22 who should bear the cost of coming back into compliance
23 because as Ms. Kravtin states, Charter's use of the space
24 is subordinate to Blue Ridge in every case, right?

1 A That would -- that would be my conclusion, yes.

2 Q Okay. But you testified at your deposition
3 that if the height of a given pole meant that the
4 addition of Blue Ridge's electric equipment rendered
5 Charter out of compliance, and the only way to fix that
6 was to install a taller pole, then Blue Ridge would have
7 to share that cost with Charter. Was that your testimony
8 at deposition?

9 A It was.

10 Q Okay. So your testimony that Charter would
11 have to -- would only share that cost with Blue Ridge, as
12 opposed to bear that cost entirely, that conflicts and
13 contradicts with Ms. Kravtin's testimony that Blue Ridge
14 can reclaim the space for its core service at any time,
15 doesn't it?

16 MR. GEORGE: Objection. Characterization.

17 CHAIRMAN FINLEY: Overruled.

18 A It would seem to be a contradiction, however,
19 my -- my response during the deposition was in general
20 with regards to how I've -- we -- I have personally
21 experienced those arrangements to have been worked out.
22 Of course, as in the case with Blue Ridge, it is a
23 requirement in the agreement that if that space is
24 needed, then Charter would have to bear the cost.

1 Q Okay. So that's a just and reasonable contract
2 term, from your position and Charter's position, that
3 Charter needs to bear that cost, not Blue Ridge?

4 A If given notification at the time that the
5 space is needed.

6 Q Now, one way to deal with that issue without
7 having to relocate things on the pole would be for the
8 Commission to adopt Blue Ridge's contractual requirement
9 that Charter only attach 72 inches below Blue Ridge's
10 grounded neutral on the pole, correct?

11 A With the qualification that the 72 inches below
12 the neutral also allows Charter to maintain its vertical
13 clearance over roads, driveways, and other vehicular
14 areas.

15 Q So that's a condition that you would add to
16 that; is that right?

17 A Yes, it would.

18 Q Because you don't want to pay for a taller
19 pole, right?

20 A Correct.

21 Q Now, you heard Mr. Layton's testimony that if
22 one of their customers says we need service -- one of
23 their members says we need electric service, they've got
24 to put a transformer on that pole. Putting the

1 transformer on that pole renders you all out of
2 compliance because of the height of the pole. Who should
3 bear that cost?

4 A Different circumstances. Charter's already on
5 that -- on that pole as an attacher. We have, obviously,
6 a need for that attachment to be retained -- be
7 maintained. So if we're confronted with that situation,
8 then Charter would participate in the replacement of that
9 pole and share -- will pay outright the cost of that pole
10 replacement. Making new attachments, we now have a
11 choice whether to pay for a new pole or go underground.

12 Q So you think they ought to have to pay if
13 providing electric service, core electric service, to
14 their members, which Ms. Kravtin says they can reclaim
15 the pole -- the space on that pole for that core service
16 at any time, they ought to have to pay if you're
17 attached?

18 MR. GEORGE: Objection. That's a total
19 mischaracterization of the witness' --

20 CHAIRMAN FINLEY: I don't think that's what he
21 said.

22 Q Isn't that what you said?

23 A Could you repeat that?

24 Q They've got a customer, a member needs electric

1 service. They put a transformer on the pole. Charter is
2 now out of compliance. A taller pole is needed. Who
3 pays, just you, or you and them?

4 A Again, as I -- the agreement between Charter
5 and Blue Ridge requires Charter to pay for the
6 replacement of that pole at the time it's informed that
7 that space needs to be reclaimed.

8 Q Okay. So Blue Ridge doesn't have to pay
9 anything in that circumstance?

10 A If the notification comes at the time it is
11 identified, not two, four, five, or 10 years later when
12 it -- you know, it's determined that we've been in
13 violation for -- since the last pole audit.

14 Q Why is that?

15 A Because things may have changed on that pole.
16 There may be other attachers on that pole at this time,
17 and -- and that would now no longer require Charter to
18 possibly just lower its line, but now it requires other
19 attachers to relocate their facilities, to readjust their
20 facilities as well. So -- so what we would have done
21 five years ago quite simply by just lowering that
22 attachment, now we may be precluded from doing that
23 because of the other attachers that may be on that pole
24 now.

1 Q So the fact that you are now out of compliance
2 is a cost they need to bear?

3 A No. I believe in my deposition I said that the
4 -- it would be a shared cost with all the attachers on
5 that pole, and possibly even Blue Ridge.

6 Q So that's another instance in which your simple
7 presence on that pole becomes a cost to Blue Ridge over
8 and above whatever amount you're paying year by year,
9 right?

10 A That's not what I said. Again, if we are not
11 able to lower our facilities in compliance with the
12 requirements or the request from Blue Ridge because of
13 another attacher, then why would Charter bear the full
14 brunt of having to replace that pole when there's yet
15 another attacher on that pole?

16 Q Because they own the pole, their members
17 designed it and built it, and you are just a lessee on
18 that space, and that space can be reclaimed for core
19 service at any time.

20 MR. GEORGE: Objection. Is that a question?

21 CHAIRMAN FINLEY: Now, let's let the lawyers --

22 Q Do you understand?

23 CHAIRMAN FINLEY: Hold it. Hold it, Mr.

24 Millen. Let's let the lawyers ask the question and the

1 witnesses answer. And if they have a rhetorical
2 question, that doesn't mean that you answer his question.

3 Q Do you understand that?

4 A Again, Mr. Millen, I -- my answer was that if
5 there's other attachers on that pole, it should be a
6 shared responsibility.

7 Q So what you want is a contract that says Blue
8 Ridge can't reserve space to build down for its future
9 core service to its members, and if Charter is already on
10 a pole that has to be taller to accommodate core electric
11 service, then Blue Ridge has to share the cost of the
12 taller pole, right?

13 A Maybe I'm not answering clearly. I'm also
14 referring to the other attacher or attachers on that pole
15 as the shared responsibility.

16 Q Let's talk about a pole with just two
17 attachers, you all and them.

18 A Then hypothetically, yes, that would be
19 correct.

20 Q They all have to pay, too?

21 A My premise there is that we were granted an
22 attachment application to make that attachment on that
23 pole, whether it was five years ago, 10 years ago. We've
24 been paying pole rent for those attachments for all of

1 that time. Now we have to bear the full cost of
2 replacing that pole because the pole owner has determined
3 that they need additional space on that pole.

4 Q Isn't what you're suggesting there, that
5 particular contractual regime and provision, doesn't that
6 subordinate Blue Ridge's use of its own poles to provide
7 electricity to its members, to Charter, and its cable TV
8 services?

9 A No. I don't believe it does.

10 Q Okay. Now, is it your understanding that
11 Charter wants the Commission to order Blue Ridge to pay
12 Charter over \$1 million in so-called overcharges for the
13 years 2015 to 2017?

14 MR. GEORGE: Objection. This is also covered
15 by Patricia Kravtin's testimony.

16 CHAIRMAN FINLEY: Overruled.

17 A I'm not personally familiar with all the
18 details with regards to the financials for the years
19 prior to 2017.

20 Q But you know that Charter has asked this
21 Commission to order Blue Ridge to pay Charter over \$1
22 million in so-called overcharges?

23 A I am familiar with that, yes.

24 Q Okay. And those amounts were paid by Charter

1 and not paid under protest; is that correct?

2 A Again, I'm not personally familiar with
3 anything that occurred at Charter prior to 2017, but I do
4 -- I am not aware of any of those having been paid under
5 protest.

6 Q Okay. Can you explain to the Commission on
7 what basis Charter is entitled to clawback any amount
8 from Blue Ridge?

9 MR. GEORGE: Objection. Calls for a legal
10 conclusion.

11 CHAIRMAN FINLEY: Answer if you know.

12 A I don't know.

13 Q Do you understand that if Charter obtains that
14 \$1 million plus, that it will come from a not-for-profit
15 electric cooperative, and that cost, because Blue Ridge
16 is a cooperative, will necessary be borne by Blue Ridge's
17 members?

18 MR. GEORGE: Objection. Calls for speculation.

19 CHAIRMAN FINLEY: Overruled. He can answer
20 that one.

21 A If Blue Ridge is a nonprofit, then, yes, it
22 would come from that membership.

23 Q Okay. And do you also understand that because
24 of the way Blue Ridge is structured under the North

1 Carolina law, that that payment from Blue Ridge to
2 Charter, if the Commission were to order it, would find
3 its way into the electric rate?

4 MR. GEORGE: Objection. Foundation.

5 A I can't --

6 CHAIRMAN FINLEY: Overruled.

7 A -- answer that.

8 CHAIRMAN FINLEY: I think that's an obvious
9 answer to that one.

10 Q Okay. And you understand that that amount
11 would be paid to Charter, which is a for-profit
12 corporation with annual income of over \$45 billion and a
13 market capitalization of nearly \$100 billion?

14 A Yes.

15 Q Not only are the two entities here different in
16 size and in their profit/not-for-profit status, but they
17 also have different service requirements, right?

18 A Define service requirements.

19 Q You under--- you're familiar with the term
20 build out requirements as it applies to cable television
21 franchises, right?

22 A I am familiar with that term, yes.

23 Q Okay. And it's the case that in certain
24 circumstances where Charter is granted a cable TV

1 franchise, it has a requirement to build out its system,
2 given certain density requirements; is that correct?

3 A That was the -- that was the practice in the
4 municipal franchises in the early days of cable, correct.

5 Q Okay. And that density requirement would
6 typically be measured in terms of so many homes per mile
7 of line, right?

8 A Yes.

9 Q And we heard Mr. Mullins' testimony that I
10 think your all's average in this area is about 53
11 customers per mile, right?

12 A I believe 53 homes per mile, I believe was
13 his --

14 Q Fifty-three (53) homes per mile. Okay. And
15 Charter's state franchise with North Carolina has -- has
16 no build out requirements, correct?

17 A The state -- correct. The state franchise does
18 not have a build out requirement.

19 Q And what that effectively means is that Charter
20 can decide where within a county it wants to provide
21 service and where it won't provide service, right?

22 A Yes.

23 Q And we looked at that map, and that's
24 reflective of that, right?

1 MR. GEORGE: Objection. I don't -- this is all
2 duplicative of testimony we've already heard.

3 CHAIRMAN FINLEY: Overruled.

4 Q You've seen this map before that shows in blue
5 where you all serve and then in green where Blue Ridge
6 serves, right?

7 MS. HARDEN: For the record, Lee Layton Number
8 2.

9 MR. MILLEN: Layton 2.

10 A Yes. I saw it yesterday in Mr. Layton's
11 testimony.

12 Q And basically what this means is where it's
13 dense enough, you all serve, and where it starts to get
14 rural, you all aren't interested, right?

15 MR. GEORGE: Objection. Characterization.

16 CHAIRMAN FINLEY: Overruled. You may answer if
17 you can.

18 A I don't know the history behind the specifics
19 of how or when that plant was constructed and built or
20 any prior companies that may have been there prior to
21 Charter.

22 Q Okay. Irrespective to what you know, though,
23 you do know that that map reflects choices made by
24 Charter?

1 A I don't know if I could agree to the word
2 "choices," but...

3 Q Charter makes a choice based on profitability
4 criteria, right, who it's going to serve, who it has no
5 interest in serving?

6 A Again -- again, not being familiar with the
7 initial franchises, the municipal franchises, what the
8 build out requirements were, I can't speak to the
9 specifics of the areas that currently have service
10 provided by Charter versus those that do not.

11 Q That's how you did it at Time Warner, right?

12 A I'm sorry?

13 Q That's how you did at Time Warner. It was a
14 choice based on profitability, right?

15 A Yes.

16 Q Okay. Now, you understand that electrical
17 cooperatives are generally required to serve all persons
18 in their service areas, right?

19 A Yes.

20 Q And so when we look at that map, you understand
21 that Blue Ridge has no choice about who to provide
22 electricity to, right?

23 A As I understand it, that would be correct, yes.

24 Q And if somebody way out wants them to build a

1 line down a country lane, they're going to do that,
2 right?

3 A I don't know specifically the arrangements that
4 are -- that the co-ops are bound by, so...

5 Q You all won't do that, right?

6 A Mr. Mullins testified that there is a copay
7 offered to the -- to the customer, and if the customer is
8 so willing, then, yes, we would build it out as part of
9 that copay.

10 Q So the customer has to pay for at least part of
11 the line?

12 A That would be correct.

13 Q Do you know whether Blue Ridge gets to charge
14 its members for the lines, other than on a cooperative
15 membership basis?

16 A No, I do not.

17 MR. MILLEN: Nothing further.

18 CHAIRMAN FINLEY: Redirect?

19 REDIRECT EXAMINATION BY MR. GEORGE:

20 Q Mr. Martin, Mr. Millen asked you a few
21 questions about undergrounding. Is it an economic
22 decision to go underground when a developer requires
23 underground construction?

24 A No, it is not.

1 Q And you also had a discussion about back rent
2 that Charter pays Duke for unauthorized attachments. Do
3 you recall that?

4 A Yes, I do.

5 Q And what -- what does Charter pay back Duke for
6 unauthorized attachments?

7 A There is an unauthorized attachment fee and
8 then there's a charge per attachment back for five years
9 or to the date of the last inventory audit.

10 Q And is that consistent with what you propose
11 here?

12 A It is.

13 Q And you mentioned, in some lines of questioning
14 with Mr. Millen, about Charter paying for certain
15 engineering expenses. Can you elaborate on what you
16 meant by that?

17 A Specifically with regards to Duke attachments?

18 Q No. Just in general.

19 A Repeat the question, please.

20 Q You mentioned -- you had a discussion about
21 Charter being willing to pay for certain engineering
22 expenses.

23 A Yes.

24 Q And can you elaborate on what types of

1 expenses?

2 A Well, predominantly the loading requirements
3 that would be required for any new attachments on -- on
4 the Blue Ridge poles. Again, as I stated in my
5 testimony, we would prefer to see the pole owners take
6 ownership of that responsibility through possibly a
7 third-party pole owner selected firm, and Charter would
8 incur the cost associated with the loading requirements
9 as stipulated in the agreement.

10 Q And is that all new attachments?

11 A That would be specifically for new attachments
12 where Charter is not on the poles.

13 Q What about secondary attachments?

14 A Secondary attachment as in drop attachments?
15 No, that would not include drop attachments. As I stated
16 in my testimony, the drop attachments, it is very
17 difficult for us to, again, with the seven-day
18 installation requirement under the SEC rules, as well as
19 the fact that we have the -- the volume that's handled by
20 both in-house installation as well as contract
21 installation crews, we would be able to work out an
22 arrangement by which we would report those attachments to
23 Blue Ridge either on a monthly or quarterly basis, but it
24 would be after the fact and, of course, loading

1 calculations would not have been performed on those.

2 MR. GEORGE: I have no further questions.

3 CHAIRMAN FINLEY: Questions by the Commission?

4 (No response.)

5 CHAIRMAN FINLEY: All right. Thank you, Mr.
6 Martin.

7 CHAIRMAN FINLEY: Without objection, we will
8 receive into evidence Mr. Martin's exhibits.

9 (Whereupon, Exhibits NM 1-5 were
10 admitted into evidence. Exhibits
11 NM 4 and NM 5 were filed under
12 seal.)

13 THE WITNESS: Thank you, Mr. Chairman,
14 Commission.

15 (Witness excused.)

16 MR. GILLESPIE: Mr. Chairman, we'll call
17 Patricia Kravtin.

18 MR. MILLEN: Mr. Chairman, before we get to
19 that witness, could I inquire as to timing issues and the
20 Commission's views on that?

21 CHAIRMAN FINLEY: Our Commission -- our views
22 are we're going to go to 5:00 today. You know, we may
23 have a little leeway with that, but if we don't get
24 finished by 5:00, we'll come back another day.

1 MR. MILLEN: I would just -- for the benefit of
2 the Commission, we had indicated approximately an hour's
3 worth of cross examination of Mr. Kravtin and 5:00 isn't
4 -- obviously, isn't going to do it. I don't know whether
5 truncating this makes sense, doing half now, half at a
6 different time, going beyond that, but I just -- I bring
7 it up for the Commission's consideration and I'd also
8 note that I believe in the previous proceeding there was
9 very little cross examination of Ms. Kravtin, and we
10 wanted to -- so all the ground I would be plowing here
11 would be new ground in that regard.

12 CHAIRMAN FINLEY: Let's get started.

13 MR. MILLEN: Okay.

14 PATRICIA KRAVTIN; Having first been duly sworn,
15 testified as follows:

16 DIRECT EXAMINATION BY MR. GILLESPIE:

17 Q Good afternoon, Ms. Kravtin. Please state your
18 name and business address for the record.

19 A Patricia D. Kravtin, 500 Atlantic Avenue
20 Boston, Massachusetts.

21 Q Did you cause to be filed in this proceeding
22 responsive testimony consisting of 71 pages and 15
23 exhibits?

24 A Yes, I did.

1 Q If I asked you the questions in these prefiled
2 submissions today, would your answers be the same?

3 A Yes, subject to a couple of minor corrections.

4 Q So you have some corrections to your testimony?

5 A Yes, I do.

6 Q Did you prepare a written summary of your
7 corrections?

8 A Yes, I did.

9 MR. GILLESPIE: I'm going to hand out the
10 written summary.

11 Q And would you describe your corrections,
12 please?

13 A Yes. On page 41, line 7, I had referred to a
14 footnote, but the text of the footnote was inadvertently
15 admitted (sic), and the footnote should read, as it will
16 be on the handout, "The result of the TVA's approach is
17 an extraordinarily high percentage of overall costs,
18 roughly five to six times the cable rate, assigned to
19 communication attachers far in excess of those causally
20 related to Blue Ridge Mountain's actual incurrence of
21 costs related to those attachments." And at page --
22 excuse me -- Blue Ridge EMC.

23 And at page 67, lines 1 through 5, the full
24 sentence on the page had some extraneous text

1 inadvertently included, and should be removed so that the
2 sentence now reads, "In addition, he substituted BREMC
3 values for pole characteristics, including pole height,
4 36.87 feet, versus a presumptive value of 37-1/2 feet --
5 usable (sic) -- "space (27.26 feet versus the presumptive
6 value of 24 feet), and space occupied, 1.11 feet versus 1
7 foot."

8 MR. GILLESPIE: Mr. Chairman, I would ask that
9 Ms. Kravtin's responsive testimony be entered into the
10 record and that her corresponding exhibits 1 through 15
11 be marked for identification.

12 CHAIRMAN FINLEY: Ms. Kravtin's 71 pages of
13 testimony, filed on October 31, 2017, is copied into the
14 record as though given orally from the stand, and her 15
15 exhibits are marked for identification as premarked in
16 the filing.

17 (Whereupon, the prefiled responsive
18 testimony of Patricia D. Kravtin was
19 copied into the record as if given
20 orally from the stand.)

21

22

23

24

1 **I. INTRODUCTION, QUALIFICATIONS AND SUMMARY**

2 **Q. Please state your name, position and business address.**

3 A. My name is Patricia D. Kravtin. I am principal and owner of Patricia D. Kravtin
4 Economic Consulting, a private practice specializing in the analysis of
5 communications and energy regulation and markets. My business address is 500
6 Atlantic Ave., Unit 19A, Boston, Massachusetts, 02210.

7 **Q. On whose behalf is this testimony being presented?**

8 A. My testimony is offered on behalf of Charter Communications Properties, LLC
9 ("Charter").

10 **Q. Can you please summarize the details of your educational background and**
11 **professional experience?**

12 A. I received a B.A. with Distinction in Economics from the George Washington
13 University. I studied in the Ph.D. program in Economics under a National
14 Science Foundation Fellowship at the Massachusetts Institute of Technology
15 (M.I.T.), completing all course requirements for the Ph.D. degree and passing oral
16 and written examinations in my chosen fields of study: government regulation of
17 industry, industrial organization, and urban and regional economics. My
18 professional background includes a wide range of consulting experiences in
19 regulated industries. Between 1982 and 2000, I was a consultant at the national
20 economic research and consulting firm of Economics and Technology, Inc. (ETI)
21 in that firm's regulatory consulting group, where I held positions of increasing
22 responsibility, including Senior Vice President/Senior Economist. Upon leaving
23 ETI in September 2000, I began my own consulting practice specializing in
24 telecommunications, cable, and energy regulation and markets. A detailed

1 resume summarizing my training, previous experience, and prior testimony and
2 reports is provided as Exhibit PDK-1 to this testimony.

3 **Q. Please describe your experience of particular relevance to this proceeding.**

4 A. Over the course of my career, I have been actively involved in a number of state
5 and federal regulatory commission proceedings involving rates charged by
6 utilities in exchange for access to poles, ducts, conduits, and rights-of-way. Many
7 of the proceedings in which I have served as an expert have involved the
8 calculation of just and reasonable pole attachment rental rates. Through the
9 course of my involvement in these proceedings, I have substantial experience in
10 applying regulated rate formulas.

11 I have served as an expert on pole attachment matters in proceedings involving
12 investor-owned electric utilities ("IOUs"), non-profit consumer-owned utilities
13 (cooperatives or "Coops"), municipally owned utilities, as well as incumbent local
14 exchange carriers ("ILECs"). I have testified before various state (and provincial)
15 regulatory commission including this Commission, the Connecticut Department
16 of Public Utility Control, the New Hampshire Public Utilities Commission, the
17 Kentucky Public Service Commission, the Arkansas Public Service Commission,
18 the Public Utilities Commission of Texas, the New Jersey Board of Public
19 Utilities, the Virginia Corporation Commission, the Ohio Public Utilities
20 Commission, the Massachusetts Department of Telecommunications and Cable,
21 the Wisconsin Public Service Commission, the Georgia Public Service
22 Commission, the South Carolina Public Service Commission, the Public Service
23 Commission of the District of Columbia, the New York Public Service

1 Commission and the Ontario Energy Board. I have also testified on these and
2 related matters before state and federal courts in Maryland, Florida, New York,
3 California, Tennessee, Washington, and North Carolina.

4 In addition, I have submitted reports on pole attachment rates, terms and
5 conditions in numerous proceedings before the Federal Communications
6 Commission ("FCC"), including its seminal 2010 pole rulemaking proceedings,
7 *Implementation of Section 224 of the Act; A National Broadband Plan for our*
8 *Future*, as well as its 2007 predecessor.¹

9 I have been actively involved in the area of broadband deployment, having
10 testified extensively on the matter. In addition to having authored a number of
11 reports on the subject, I participated as a grant reviewer for the Broadband
12 Technology Opportunities Program ("BTOP") administered by the National
13 Telecommunications and Information Administration ("NTIA").

14 **Q. Are you familiar with the rules governing pole attachment rates in North**
15 **Carolina?**

16 **A.** Yes. I am familiar with the applicable law, North Carolina statute, N.C.G.S.
17 § 62-350, as enacted in 2009, and amended in 2015,² to address potential abuses
18 of third party communications attachers by pole-owning electric membership

¹ See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, Order & Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 (2010); *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007).

² It is my understanding that Section 62-350 as amended "deleted an express reference to the federal pole attachment rate methodology." However, it is my further understanding it states "the Commission may consider any evidence presented by a party, including any methodologies previously applied." See *Blue Ridge EMC Electric Membership Cooperation v. Charter Communications Properties LLC*, N.C.U.C. Docket No. EC-39, Sub 44, Answer to Complaint and Counterclaims at 12 (filed January 31, 2017) ("Charter Answer and Counterclaims"), citing SB 88.N.C. Session Law 2015-119 § 7 (2015).

1 corporations ("EMCs") and municipal utilities, and to ensure communications
2 providers have access to poles at just and reasonable rates, terms, and conditions
3 consistent with the public interest.³ In particular, I participated in prior litigation
4 brought pursuant to this statute before the North Carolina Business Court
5 involving Rutherford EMC (2013) and the Town of Landis (2010).⁴ The Court in
6 those two cases found the FCC Rate to provide "just and reasonable
7 compensation"⁵ and "a reasonable means of allocating costs without creating a
8 subsidy from the pole owner to the attacher."⁶ On May 30, 2017, I submitted
9 direct testimony before this Commission on pole related matters relating to
10 Carteret-Craven, Jones-Onslow, and Surry-Yadkin EMCs. On June 15, 2017, I
11 submitted responsive testimony before this Commission on pole related matters
12 relating to Union Power EMC.

13 **Q. What is the purpose of your testimony?**

14 A. I was asked by counsel for Charter to offer my opinions on matters relating to the
15 pole attachment rental rates Blue Ridge Electric Membership Corporation ("Blue
16 Ridge" or "BREMC") charges Charter and to respond to direct testimony filed by
17 BREMC on October 16, 2017, specifically the testimony of Mr. Wilfred Arnett,
18 and to a more limited extent Mr. Gregory Booth. In particular, I was asked to
19 present specific calculations of the maximum just and reasonable pole attachment

³ See *id.* at 12.

⁴ See *Time Warner Entertainment – Advance/Newhouse P'ship vs. Town of Landis*, No.10 CVS 1172, 2014 WL 2921723 (N.C. Sup. Ct. June 24, 2014); *Rutherford Elec. Membership Corp. v. Time Warner Entertainment – Advance/Newhouse P'ship*, No. 13-CVS-231, 2014 WL 2159382 (N.C. Super. Ct. May 22, 2014), *aff'd* 771 S.E.2d 768 (N.C. Ct. App. 2015).

⁵ See Charter Answer and Counterclaims at 13, *citing Rutherford*, 2014 WL 2159382 at *9.

⁶ See Charter Answer and Counterclaims at 14, *citing Landis*, 2014 WL 2921723 at *10.

1 rental rates that BREMC may charge Charter, and of the resulting overcharges
2 due to be refunded to Charter for the relevant true-up period,⁷ pursuant to the
3 applicable law, N.C.G.S. § 62-350 ("Section 62-350").

4 My testimony will explain why in my opinion, as an economist with substantial
5 experience in determining just and reasonable rates for pole attachment rentals, an
6 economically appropriate just and reasonable rate that pole owning EMCs in
7 North Carolina such as Blue Ridge may charge communications providers for
8 pole attachment rentals (and accordingly serve as the basis of overcharges due to
9 be refunded to Charter) should be calculated using the FCC Rate methodology—
10 as implemented by the FCC pursuant to §224(d) of the Communications Act of
11 1934 ("Act" or "Section 224")⁸ and as adopted by the overwhelming majority of
12 states certified to regulate pole attachments—rather than the outlier TVA method
13 employed by BREMC witness Mr. Wilfred Arnett. In support of my opinion, my
14 testimony explains the underlying history and continued strong economic and
15 public policy rationale for the FCC Rate and its proportionate cost-based
16 allocator, as juxtaposed against the many shortcomings of the highly flawed TVA
17 method.

18 **Q. Please summarize your testimony.**

19 A. The approach I have taken in determining maximum just and reasonable rates for
20 BREMC pole attachments pursuant to Section 62-350—the widely accepted FCC
21 Rate methodology—adheres closely to the key economic and public policy

⁷ I understand the relevant true up period to be from the present date back to the date immediately following expiration of the 90-day negotiation period triggered by Charter's written request, or the termination of the prior pole agreement, whichever is later.

1 principles of effective pole rate regulation. First and foremost among these
2 considerations are the essential facility characteristics of third party pole
3 attachments, the economic principles of cost causation and subsidy-avoidance
4 underlying cost-based rates, and the public interest benefits that ensue from the
5 efficient and productive use of surplus capacity on the pole owner's existing
6 utility pole network. By contrast, the TVA approach employed by BREMC
7 suffers from a number of flaws that from an economic and public policy
8 standpoint are at odds with effective pole regulation in North Carolina pursuant to
9 Section 62-350. This testimony addresses and fully explains these and related
10 points in the following sections:

11 Purpose of Effective Pole Attachment Rate Regulation: The purpose of effective
12 pole regulation is to protect cable and other communications attachers, for whom
13 utility poles are essential bottleneck facilities, from being charged per unit
14 attachment rates far in excess of a cost-based, competitive market level rate and
15 from other harmful monopoly type practices of pole owning utilities. Because
16 third party attachers generally occupy otherwise vacant space on a pole and their
17 attachment does not displace or preclude another, the true economic cost of
18 attachment is very low. (In the situations where surplus space does not presently
19 exist, under a routine process referred to as make ready, attachers separately
20 reimburse the owner up to the full costs of replacing the pole in order to
21 accommodate their attachment). Accordingly, charging excessively high
22 recurring pole attachment rates operate akin to a non-cost based tax on

⁸ See 47 U.S.C § 224(d), 47 C.F.R. § 1.1409(e)(1).

1 communications and broadband services, and like a tax, creates a number of
2 distorting impacts on the market for communications services to the overall
3 detriment of the public good.

4 Applicability of Effective Pole Rate Regulation to EMCs: From an economic and
5 public policy perspective, the same structural market conditions underlying the
6 need for effective economic regulation of pole attachments apply to EMCs such
7 as Blue Ridge regulated pursuant to Section 62-350 as they do to IOUs
8 historically subject to Section 224 regulation in North Carolina. EMCs use the
9 same type of plant, technology, and production techniques to provide electricity
10 service to subscribers in the same basic manner and under the same basic
11 operating conditions as IOUs. EMCs and IOUs have the same inherent
12 opportunity and incentive to leverage their monopoly ownership and control over
13 the existing distribution network of poles to extract excessive rates and impose
14 other unreasonable terms and conditions of access on communications attachers
15 requiring access.

16 The Recommended Widely Accepted FCC Rate Formula Methodology: The FCC
17 Rate formula produces efficient, predictable, easy to administer, cost-based just
18 and reasonable rates that are subsidy-free and fully compensatory to the pole
19 owner. The FCC Rate, adopted by the overwhelming majority of states that
20 regulate pole attachments, is widely used and accepted. The FCC Rate has
21 received strong endorsements by NARUC and the National Association of State
22 Utility Consumer Advocates ("NASUCA"), national associations representing the
23 NCUC's peer state regulators and public advocates respectively, as the

1 appropriate pole attachment rate formula for all manner of pole owners (including
2 electric cooperatives). Even Blue Ridge's own national association, the National
3 Rural Electric Cooperative Association ("NRECA"), has published a pole-owner
4 "Toolkit" relied upon repeatedly by Mr. Arnett that acknowledges the FCC Rate
5 is "unimpeachable."⁹ The FCC Rate is so widely adopted because it is based on a
6 direct cost allocation methodology, which closely tracks the cost-based rate that a
7 competitive market (if one existed) would produce, providing many important
8 benefits to consumers. For the pole owner and its electric customers (who also
9 benefit as consumers of communications services), the FCC Rate encourages an
10 efficient use of resources by facilitating the occupancy of surplus space on the
11 utility's existing network of poles—where the attacher's use is fully subordinate
12 to that of the utility who can reclaim the space for its core service at any time.
13 The FCC Rate, by design, and in practice, provides a source of contribution to
14 recovery of the utility's electric cost of service for this subordinate use of excess
15 space on utility poles, over and above the true "but for" costs caused by the
16 attacher and recovered by the utility in make ready and other direct reimbursable
17 fees charged to the attacher. Because the state's IOUs use the FCC Rate in setting
18 communications attachment rates, applying that same methodology to EMCs will
19 serve to bring pole rates across the state into harmony, thereby minimizing market
20 distortions and non-cost based rate incongruities for access to utility poles.

⁹ See NRECA Pole Attachment Toolkit at 5, attached as Exhibit PDK-2 to this testimony. My copy of Exhibit PDK-2 came from the publicly filed exhibit in the Rutherford trial, in which I appeared as an expert witness. While this copy is marked "Confidential," I understand it was offered by Rutherford EMC and admitted into the public record by the court. (That document is also attached as a publicly filed exhibit in the Exhibit to Direct Testimony of Wilfred Arnett, WA-16)

1 Economic Rationale for the FCC Rate's Proportional Cost Allocator: The

2 defining feature of the FCC Rate formula is its use of a "proportionate" or direct
3 cost allocator, i.e., one that allocates costs attributable to *both* usable and unusable
4 space on the pole based on the attacher's direct occupancy of space in proportion
5 to the total space on the pole which is available for attachments. This type of
6 direct cost-based allocator is very commonly applied to leasing arrangements in
7 other sectors of the economy, for example, commercial and residential real estate.
8 The direct cost-based allocator has been historically relied on by state and federal
9 regulators in cost allocation applications, including by this Commission.¹⁰ By
10 allocating the attacher's fully allocated share of the costs of the entire pole in
11 direct proportion to a reasonable allocation of usable space occupied (over and
12 above any make ready and other direct reimbursement fees paid by the attacher),
13 the FCC Rate assures full compensation for the costs associated with *both* the
14 usable and unusable space on the pole attributable to the attacher. It simply does
15 so in a way most closely aligned in the economic sense with how costs of pole
16 attachments are actually incurred. Again, this is no different conceptually than
17 how an owner of an office building would allocate the costs of the common space
18 (e.g., lobby, elevator, parking garage, open space) to itself or other tenants
19 directly occupying varying amounts of square footage. The owner charges a
20 tenant occupying one floor of space a much smaller, proportional share of
21 common overhead than it allocates to itself or another tenant with a larger, multi-
22 floor footprint. And the single floor tenant would not be charged the share of

¹⁰ See, e.g., *Order Addressing Collocation Issues*, Docket No. P-100, Sub 133j, (Dec. 28, 2001), at 273. Attached to this testimony as Exhibit PDK-3.

1 overhead associated with adjacent, vacant floors in the building available for rent
2 and/or future occupancy by the owner. Indeed, it would seem nonsensical for the
3 owner to assign common costs to tenants occupying vastly different amounts of
4 square footage on an equal per capita basis, even though all tenants need access to
5 and use of the lobby, elevator, etc. Mr. Arnett's criticisms of the FCC Rate are
6 not based on objective economic reasoning or the application of well-established
7 economic public policy principles. Mr. Arnett's belief that the FCC Rate is
8 inappropriate for Blue Ridge and his various criticism reflect his (and the pole
9 owner's) subjective notion that the FCC Rate produces too low a cost allocation
10 percentage and resultant pole attachment rate to be "fair" or subsidy-free to the
11 utility pole owner in relation to the benefits received by the communications
12 attacher. Mr. Arnett's criticisms are readily dismissed when evaluated in the
13 context of the common and widespread application of direct cost-based allocators
14 of common costs throughout the economy and in other regulatory contexts, and
15 against the objective public interest criteria that underlie the economic cost-based
16 regulation of poles. Plain and simple: non-cost based factors such as benefits
17 received or value to attachers are *not* economic costs to the pole owner that should
18 be included or recovered in regulated rates for an essential facility such as poles.

19 Calculation of Pole Attachment Rates for BREMC Under Recommended FCC

20 Rate: Applying data provided by BREMC, I have estimated the maximum just
21 and reasonable pole attachment rates under the recommended FCC Rate formula,
22 expressed annually, for the relevant unit of cost, i.e. per foot of occupied space.
23 My calculations apply the widely used, long standing, generically applicable FCC

1 space, height, and appurtenance presumptions designed to further streamline the
2 formula process, reduce regulatory administrative burden, and deter “results-
3 driven” manipulation of the formula’s data inputs. Otherwise, my calculations
4 rely on BREMC-provided cost data and hence produce rates strictly based on cost
5 and operating conditions specific to BREMC. The rates calculated range from
6 \$5.18 based on 2016 costs, \$5.20 based on 2015 costs, and \$5.22 based on 2014
7 costs.¹¹ The just and reasonable rates I have calculated using the FCC Rate are
8 very closely in line with the average pole attachment rates that Charter pays IOUs
9 in North Carolina. For 2016, I understand that the average rate paid to IOUs
10 statewide by Charter was \$7.20 for electric IOUs, and \$3.24 for the ILECs. The
11 regulated, cost-based attachment rates charged by North Carolina IOUs provide
12 an economically appropriate benchmark for the just and reasonableness rates
13 applicable to BREMC.

14 Calculation of Overcharges Paid by Charter to BREMC: The amounts paid by
15 Charter to BREMC for communications attachments for the rate years 2015 to
16 2017 were based on a per pole rate of \$26.64, which Charter paid subject to true-
17 up and credit for any amounts overpaid.” It is my understanding, that under
18 Section 62-350, Charter is entitled to a refund to begin no earlier than 90 days
19 from the date it requests to negotiate a rate if the rate it has been paying is in
20 excess of a just and reasonable rate.¹² The overpayments I have calculated are

¹¹ See Exhibit PDK-4 to this testimony.

¹² I understand the relevant true up period to be from the present date back to the date immediately following expiration of the 90-day negotiation period triggered by Charter’s written request, or the termination of the prior pole agreement effective at the end of the then current term, whichever is later. I

1 based on the difference between the rates Charter actually paid BREMC per
2 attachment over the applicable true up period and the maximum just and
3 reasonable rates calculated under the FCC Rate and more aligned with a
4 competitive cost-based market benchmark and IOU benchmark rates. The
5 difference between the just and reasonable amounts due from Charter for the
6 period 2015 – 2017 and the invoiced amounts Charter actually paid BREMC on a
7 per attachment basis is \$1,010,251. I have also calculated overpayments to
8 include an additional source of overcharges, based on my understanding that
9 whereas Charter was invoiced and paid BRMEC on a *per attachment*, Charter's
10 agreement with BREMC stipulated that it pay on a *per pole* basis. Total
11 overcharges, including those resulting from BREMC applying a *per pole* rate of
12 \$26.64 to a higher count of attachments, is \$ 1,092,205.

13 The TVA Board resolution relied upon by Mr. Arnett was the product of a deeply
14 flawed and one-sided process that resulted in an outlier approach and excessive
15 rates. The TVA approach does not legitimize Blue Ridge's charging of
16 extraordinarily high rates of \$26.64 for its pole attachment fee. TVA developed
17 its resolution by soliciting input only from its pole-owning customers who stood
18 to benefit from the highest possible pole attachment rates and the trade association
19 whose mission is to advocate on behalf of TVA's customers in matters involving
20 the TVA. TVA's biased and defective process resulted in a methodology
21 undermined by false premises and unreasonable allocations that are not cost-based
22 in the economic sense. The end result is an untested outlier formula yielding

understand the applicable true up date is August 25, 2015, and that Charter has paid invoices received from

1 widely varying and unpredictable rates—some as high as \$85 per pole for TVA’s
2 customers—unmoored from any economic cost-causation principles or public
3 interest considerations. In this case, Mr. Arnett manipulated the TVA’s already
4 flawed formula further to produce rates that are even more unjust and
5 unreasonable by his selective, inappropriate, and unsupported substitutions of data
6 for the presumptive inputs that Mr. Arnett himself relied upon in the Carteret-
7 Craven, Jones-Onslow, Surry-Yadkin, and Union Power cases.¹³ Although Mr.
8 Arnett refers in his testimony to the TVA allocation of 28.44% (based on reliance
9 on the TVA’s presumptions regarding pole height, minimum attachment height,
10 space occupied by the attachment, and the percent of the pole investment account
11 that consists of items that are not used or useful for pole attachments, he actually
12 has relied on an allocation of 41.16% for 2016 which is about 45 percent higher
13 than the already excessive “standard” TVA allocation.

14 **II. PURPOSE OF EFFECTIVE POLE ATTACHMENT RATE REGULATION**

15 **Q. Please describe the purpose of pole attachment regulation historically.**

16 **A.** The primary purpose of pole attachment rate regulation historically, and
17 continuing into the present day, is about protecting cable operators and other
18 communications attachers against potential abuse by pole-owning utilities that
19 control access to a vital input of production needed by those attachers.
20 Fundamental to pole rate regulation is recognition of the fact that pole-owning
21 utilities, by virtue of historical incumbency, own and control existing pole plant to

BREMC through August of this year (2017).

¹³ See Exhibits to Direct Testimony of Wilfred Arnett in Docket Nos. EC-43, Sub 88; EC-49, Sub 55; EC-55, Sub 70; and EC-39, Sub 44, WA-5 to WA Exhibit Nos. 4-7.

1 which cable operators and other communications attachers have no practical
2 alternative but to attach. In the absence of effective pole regulation, pole-owning
3 utilities are in a position to limit access to these essential bottleneck facilities
4 and/or to extract excessive monopoly rents.¹⁴

5 **Q. What is the economic harm from pole owners charging excessive monopoly-**
6 **level rates?**

7 **A.** In many respects, excessively high pole attachment rates operate like a non-cost
8 based tax on the final or “downstream” communications and broadband services
9 bought by consumers. Just like a tax, excessively high rates for the required pole
10 attachment input artificially raise the costs to communications companies of doing
11 business in North Carolina, and have a number of distorting impacts on the
12 market for communications services. Ultimately, high pole attachment rates
13 result in higher prices for communications services which in turn serve to reduce
14 consumers’ demand for and/or ability to pay for these services, especially new
15 and enhanced service offerings, than would otherwise exist with pole attachment
16 rates set at more true economic cost-based levels more akin to those a competitive
17 market would produce.¹⁵ Because many poles can be required to serve an
18 individual broadband customer, and this is especially the case in less densely

¹⁴ See *NCTA v. Gulf Power*, 534 U.S. 327, 330 (2002) (“Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents.”)

¹⁵ In a competitive market, defined as one with many buyers and sellers none of which large enough to control prices, prices are bid down closer to incremental or marginal costs of production, and input owners are not able to sustain charging rents too far in excess of a normal level of compensation for the use of their productive capacity.

1 populated areas, the impact of a pole attachment rate set in excess of a more
2 competitive, just and reasonable level can be quite significant.¹⁶

3 In addition, all else being equal, higher pole rates serve to discourage
4 communications companies from making additional investment in the state and
5 their ability to roll out, or continue to expand advanced broadband service
6 offerings—services increasingly required by North Carolina residents, businesses,
7 and government alike. From a resource utilization perspective, high pole rates
8 further harm the overall economy of the state by discouraging use of otherwise
9 surplus space on the utility's existing network of poles, resulting in a potential
10 loss in the productive capacity of the existing pole network to levels below that
11 most efficient.

12 **Q. Are there any correspondingly negative economic impacts on the pole owner**
13 **and its electricity customers from pricing essential pole attachments closer to**
14 **the competitive level?**

15 **A.** No, there are not. There are several reasons why this is so. First, the true
16 marginal costs of pole attachments not already recovered in make ready or other
17 direct reimbursement fees paid to the pole owner by the attacher (over and above
18 the recurring rental rate) are very small, as is the magnitude of pole attachment

¹⁶ For example, according to information provided in BREMC's 2016 Year End RUS Form 7, there are on average ***BEGIN CONFIDENTIAL*** poles per aerial mile of distribution plant in BREMC's service territory, and an estimated ***BEGIN CONFIDENTIAL*** households served per aerial mile. Assuming a 45% broadband penetration rate, consistent with nationally reported levels, would translate into an average of about ***BEGIN CONFIDENTIAL*** broadband subscribers per aerial mile, and roughly ***BEGIN CONFIDENTIAL*** needed to serve an individual broadband subscriber. Accordingly, in considering the potential impact that a pole attachment rate set in excess of a just and reasonable amount could have on the average broadband subscriber, the per unit amount of excess must be multiplied by some ***BEGIN CONFIDENTIAL*** times. These estimates are based on averages. To serve customers in areas with less than average density, or less than average subscription rates, would have a correspondingly higher per-customer cost.

1 revenues relative to total electricity revenues of the utility.¹⁷ Second, the FCC
2 methodology builds in two layers of cost recovery to ensure against cross-subsidy
3 or other economic harm to the pole owner or its customers from the presence of
4 communications attachments on the utility's poles.

5 Through the normal and routine process of make ready, communications attachers
6 pay for the total out-of-pocket costs to rearrange wires on the pole or to install
7 taller and/or stronger poles as may be required to accommodate their attachment.
8 Yet these poles remain fully owned by the electric utility who now enjoys the
9 benefit of the space to realize additional revenues from third party rentals, to use
10 for its needs, and/or to realize savings to its own capital upgrade program. Under
11 the FCC Rate methodology, communications attachers continue to pay fully
12 allocated rental rates—which by design recover well in excess of marginal
13 costs—to attach to all poles, including the poles *attachers paid* to replace.

14 Given these circumstances, any impact on electricity rates resulting from the
15 hosting of communications attachments will be negligible—if not decidedly
16 positive due to the fully allocated nature of the recurring rental rate providing
17 contribution to the recovery of the utility's overhead costs in combination with the
18 attachers' payment of make ready and other direct reimbursement fees.

¹⁷ For BREMC, total pole attachment revenues in 2016 (of which Charter-related revenues is just a portion) amounted to only ***BEGIN CONFIDENTIAL*** [REDACTED] ***END CONFIDENTIAL*** of total electric revenues ***BEGIN CONFIDENTIAL*** [REDACTED] ***END CONFIDENTIAL*** See BREMC Response to Charter's First Set of Data Requests, No. 9.

1 **Q. Does the same need for effective pole rate regulation exist today as existed at**
2 **the time pole rate regulation was enacted decades ago?**

3 **A. Yes. If anything, preventing a pole-owning electric utility from charging**
4 **excessive, overly compensatory rates to the detriment of the consuming public**
5 **(which include BREMC’s own members), has taken on heightened significance in**
6 **recent years, with the increased opportunity and interest of pole owning utilities to**
7 **directly compete with communications attachers in the broadband market.¹⁸ In**
8 **addition, control of the essential bottleneck pole facility effectively affords the**
9 **electric utility a powerful gatekeeper role with respect to the roll-out and**
10 **availability of new advanced communications and broadband services and**
11 **applications in its service area. The increasing importance of broadband in recent**
12 **years on all aspects of societal and economic well being has been widely and**
13 **repeatedly recognized by policymakers at the state and federal level, and has only**
14 **reinforced the critical role that effective pole attachment regulation continues to**
15 **play in the present time. While true as a general matter across all areas, this is**
16 **especially so in areas where the economic conditions for broadband deployment**
17 **are the most unfavorable, i.e., lower population densities resulting in higher**
18 **construction costs per capita and a lower number of subscribers per pole over**
19 **which to spread the cost burden.¹⁹**

¹⁸ See, e.g., *Roanoke Connect*, Roanoke-Chowan News Herald, 10/19/2017 (attached as Exhibit PDK-5 to this testimony).

¹⁹ These points are emphasized in the FCC’s National Broadband Plan, which recommends rates for pole attachments be set as low and as close to uniform as possible (in the vicinity of the current FCC Rate) to support the goal of broadband deployment, and particularly in less densely populated or rural areas where the “impact of these rates can be particularly acute.” See *Connecting America: The National Broadband Plan*, March 16, 2010, at 110, available at <http://www.broadband.gov/plan/#read-the-plan>. See also *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC’s Report & Order on Remand, Declaratory Ruling, & Order, 30 FCC Rcd. 5601 ¶ 478 (2015) (“The Commission has repeatedly

1 Q. How is pole rate regulation distinct from traditional electric utility rate of
2 return or cost of service ratemaking?

3 A. From an economic perspective, effective pole rate regulation is more properly
4 focused on constraining the rents that utilities are permitted to charge attachers for
5 access to the essential pole facility to per unit cost levels more in line with what a
6 competitive market (if such a market existed) would produce for one foot of
7 occupancy of otherwise vacant space on the owner's existing pole network—yet
8 ensure against cross-subsidy. The FCC Rate's fully allocated cost methodology
9 demonstrably does so, especially in conjunction with make ready and other direct
10 reimbursement fees paid by communications attachers. Any increase to the pole
11 attachment rate to recover additional "value" or "benefit" to the attacher over and
12 above costs that have a strong demonstrable economic cost causative linkage to
13 the per unit direct cost of attachment (such as occurs with a per capita attribution
14 of pole costs) will result in excessive rates and contribution under a just and
15 reasonable standard (indeed a subsidy to the utility's core electric business).
16 Excessive rates will have distorting impacts on both the demand for and supply of
17 communications services (with no significant offsetting benefits for electricity

recognized the importance of pole attachments to the deployment of communications networks, and we thus conclude that applying these provisions will help ensure just and reasonable rates for broadband Internet access service by continuing pole access and thereby limiting the input costs that broadband providers otherwise would need to incur." FCC Chairman Pai recently declared that "[t]o bring the benefits of the digital age to all Americans, the FCC needs to make it easier for companies to build and expand broadband networks. We need to reduce the cost of broadband deployment, and we need to eliminate unnecessary rules that slow down or deter deployment." *Infrastructure Month at the FCC*, FCC Blog (Mar. 30, 2017), available at <https://www.fcc.gov/news-events/blog/2017/03/30/infrastructure-month-fcc> (last accessed May 29, 2017). It is my understanding that the state of North Carolina is in the process of developing its own broadband plan with particular emphasis on ensuring affordable, advanced broadband access across the state but particularly in sparsely populated and economically distressed areas. See Charter Complaint at 11, citing the North Carolina Department of Information Technology, State Broadband Plan Progress Report (Dec. 1, 2015). See also Exhibit PDK-6 containing excerpts of comments presented in the federal broadband proceedings and the North Carolina State Broadband Plan Progress Report.

1 services) that is detrimental to economic and societal well being, including that of
2 BREMC's own members, in the manner described above.

3 **III. APPLICABILITY OF EFFECTIVE POLE RATE REGULATION**
4 **TO EMCS**

5 **Q. Historically, cooperatives and municipally owned utilities have not been**
6 **subject to Section 224 pole rate regulation in North Carolina. Does their**
7 **different organizational structure and form of ownership affect the need for**
8 **the type of effective pole rate regulation as designed and implemented for**
9 **IOUs pursuant to Section 224?**

10 **A.** No, it does not. The economic and practical reality facing communications
11 providers requiring access to the utility's existing monopoly-owned and
12 controlled network of poles holds universally true for all manner of utilities,
13 regardless of their organizational structure and form of ownership (i.e., investor-
14 owned, cooperatively owned, or municipally owned). From an economic and
15 public policy perspective, the same structural market conditions underlying the
16 need for effective economic regulation of pole attachments apply as much to
17 EMCs such as Blue Ridge regulated pursuant to Section 62-350 in North Carolina
18 as they do to investor-owned utilities ("IOUs") in the state historically subject to
19 FCC Section 224 regulation. EMCs in North Carolina use the same type of pole
20 plant, technology, and production techniques to provide electricity service to
21 subscribers and in the same basic manner and under the same operating conditions
22 as IOUs. Structurally, IOU and EMC owned poles are largely if not entirely
23 indistinguishable, and it is not uncommon for IOU and EMC-owned poles to be
24 adjacently located, especially in areas where their pole networks have been built
25 under joint ownership arrangements.

1 Moreover, EMCs and IOUs have the same inherent opportunity and incentive to
2 leverage their monopoly ownership and control over the existing distribution
3 network of poles (to which communications providers have found it essential to
4 attach) to extract excessive rates and impose other unreasonable terms and
5 conditions of access. Similar to their IOU counterparts, the entry—or even the
6 prospect of entry—of cooperatives into convergent telecommunications and
7 broadband markets in recent years, such as just recently announced by Roanoke
8 Electric Cooperative,²⁰ provides a heightened incentive for these cooperatives to
9 charge excessive pole attachment rates.

10 If anything, EMCs have a lower cost structure than IOUs because of their tax-
11 exempt status and ability to access lower interest borrowing.²¹ (In addition to its
12 ability to borrow at relatively low interest rates, BREMC has access to a
13 substantial amount of retained earnings in the form of patronage capital.²²) If a
14 free market for pole attachments existed (which it does not), one would expect to
15 see rates for EMC pole attachments set at lower levels than those charged by
16 IOUs. Over the past decade or so, this has not been the case nationally, as
17 cooperatives exempt from the pricing constraints mandated in Section 224 have

²⁰ See “Roanoke Connect,” *op. cit.*

²¹ As an EMC, Blue Ridge does not need to access capital equity markets. Its sole source of external capital funding is through debt and borrowed at relatively low interest rates. In 2016, BREMC’s cost of debt was only **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** (see BREMC-014286), about **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** less than the 9.75% cost of capital recently determined for regulated ILECS by the FCC, and only about **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** of the current 11% rate of return default input applied to IOUs in the FCC Rate formula.

²² For example, as of year end 2016, the RUS Form 7 shows BREMC to have of approximately **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** in accumulated Patronage Capital, further evidenced by a **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** ratio of

1 been free to raise rates to higher and higher levels vis-à-vis those set for IOUs
2 whose attachment rates have been subject to federal or state regulation.

3 **Q. How do you address the fact that cooperatives have historically been**
4 **excluded from the definition of “utility” in the Federal Pole Attachment Act?**

5 A. While cooperatives have historically been excluded from the definition of
6 “utility” in Section 224 and, therefore, exempt from direct FCC pole regulation
7 because of federal-state jurisdictional issues, their exemption does not in any
8 meaningful way refute the applicability of the structural market conditions facing
9 communications attachers needing access to poles owned by cooperatives. Any
10 notion that the market dynamics would be different in the case of a cooperatively
11 owned utility is belied by the monopoly level rate increases put forward by
12 cooperatives around the country and here in North Carolina in recent years.

13 By specifically subjecting EMCs to state regulatory oversight of pole attachments
14 pursuant to Section 62-350, the North Carolina General Assembly, as a growing
15 number of states nationwide have done in recent years, correctly recognized that
16 the compelling reasons for regulatory oversight of pole attachments are not
17 dependent on the organizational Charter of the pole-owning utility. To this very
18 point, the present exclusion of municipal and cooperatively-owned utilities from
19 the FCC pole attachment rules governing other electric utilities was identified by
20 the FCC in the open meetings leading up to the release of its seminal National

1 Broadband Plan Policy Framework as a “critical gap,” for which it offered
2 specific recommendations for “coherent and uniform” pole rate regulations.²³
3 Indeed, the same legislative history Mr. Arnett cites as a reason the FCC Rate
4 should not be used for cooperatives today, *see* Direct Testimony of Wil Arnett at
5 36, also states that, at the time, “cooperative utilities charge the lowest pole rates
6 to CATV pole users.” *See* WA Ex. No. 23 (S. Rep. No. 95-580 at 18 (1977)). As
7 shown below, Blue Ridge now charges among the highest pole rates to Charter
8 anywhere in the state, many multiples higher than the rates Charter pays to IOUs
9 in North Carolina. The nascent state of the cable industry and the historic
10 exclusion of coops from rate regulation almost forty years ago based on
11 conditions extant at the time in no way undermines the economic and public
12 policy appropriateness of the FCC Rate or its applicability to Blue Ridge today.
13 Finally, it is the prevailing position, not just among the FCC, but among state
14 regulators and other public interest oriented organizations, that the public would
15 be best served by having all types of pole-owning utilities, including cooperatives,
16 use the FCC Rate. Mr. Arnett’s opinions, including his references to a very few

²³ *See* FCC News Release, “*FCC Identifies Critical Gaps in Path to Future Universal Broadband*” (November 18, 2009) https://apps.fcc.gov/edocs_public/attachmatch/DOC-294706A1.pdf; FCC Meeting Slides, “*National Broadband Plan Policy Framework, December 16, 2009 – FCC Open Meeting, at 14*, (“Amend section 224 to establish a consistent framework for all poles, ducts, and conduits”), and PDK Ex. 6: final *National Broadband Report*, sent to Congress on March 10, 2010, <http://www.fcc.gov/> at 130-131 (“RECOMMENDATION 6.5: Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way. Even if the FCC implemented all of the recommendations related to its Section 224 authority, additional steps would be needed to establish a comprehensive national broadband infrastructure policy ... due to exemptions written into Section 224, a reformed FCC regime would apply to only 49 million of the nation’s 134 million poles. In particular, the statute does not apply in states that adopt their own system of regulation and exempts poles owned by co-operatives, municipalities and non-utilities. The nation needs a coherent and uniform policy for broadband access to privately owned physical infrastructure. Congress should consider amending or replacing Section 224 with a harmonized and simple policy that establishes minimum standards throughout the nation—although states should remain free to enforce standards that are not inconsistent with federal law.”)

1 outlier formulas, should be considered against the majority of state jurisdictions
2 that have adopted the FCC Rate²⁴ or some close variant of it (e.g., the nearby state
3 of Kentucky)²⁵—a number of those having jurisdiction over cooperatives—along
4 with the unbiased assessments of organizations representing the public interest,
5 cable customers, utility customers, and other stakeholders who have analyzed the
6 issue of pole attachment rates.

7 **IV. THE RECOMMENDED WIDELY ACCEPTED**
8 **FCC RATE METHODOLOGY**

9 **Q. Please provide an overview of the FCC methodology you are recommending**
10 **apply to pole attachment rates charged by BREMC to Charter.**

11 **A.** Under the FCC Rate formula I am recommending, the recovery of the cost of the
12 pole attachment is based upon the fundamental economic principle of cost-causer
13 pays.²⁶ The utility recovers all such costs including a normal (reasonable) return
14 on capital that would not be borne by the utility *but for* the attacher for the
15 relevant unit of service, i.e., pole attachment. Under well-established economic
16 principles and corresponding legal principles of just compensation, rates designed

²⁴ See Exhibit PDK-7 for a listing of states that have adopted the FCC formula or a close variant of it.

²⁵ See Kentucky Public Service Commission ("KPSC") Admin. Case No. 251, September 17, 1982, attached as Exhibit PDK-8 The KPSC formula follows closely the FCC Cable methodology but varies in these two key respects: First, the KPSC formula reflects net bare pole costs limited to the type and size deemed more likely used for the provision of a cable attachment, i.e., poles with heights of 35, 40, and 45 feet and develops separate per unit net bare pole costs and space allocation factors for poles designated as two and three user poles as follows: Two users poles presume electric and cable attachers on poles 35- 40 feet tall, and three user poles presume electric, cable, and telco attachers on poles 40 - 45 feet tall. Second, the KPSC treats the 3.33 feet of safety space as unusable space, resulting in a proportionate usable space-based cost allocator of 1/8.17% for the two user poles (37.5 feet average height less 6 feet buried less 20 feet clearance less 3.33 safety = 8.17%), and 1/13.17 for the three user poles (42.5 feet average height less 6ft buried less 20 feet clearance less 3.33 safety = 13.17 feet).

²⁶ The fundamental economic principle of cost causation holds that the entity causally responsible—i.e., the entity but for whose existence or action a cost would not have been incurred, in this case, the pole attacher—is attributed those costs reasonably attributable to the attachment, and conversely, is not attributed costs directly attributable to the costs of providing the utility's core electric service (for which the attacher is not causally responsible).

1 in this manner prevent any potential situation of cross-subsidy between the utility
2 pole owner and the communications attacher.

3 Pursuant to Section 224, the FCC Rate formula is required to produce a rate
4 falling within a range of reasonableness bounded by marginal or “but for” costs at
5 the lower end of the range, and fully allocated costs (defined as costs that would
6 exist regardless of the attachment) at the upper end of the range. Specifically, the
7 FCC Rate calculates a maximum annual pole attachment rent for cable companies
8 by taking the sum of the actual capital costs and operating expenses of the utility
9 attributable to the *entire* pole, expressed on an annual basis, and apportioning
10 those costs to the attacher based on the percentage of the usable space on the pole
11 that is occupied by the attacher. As so defined, the FCC Rate produces a fully
12 allocated rate at the *upper* bound of the range of reasonableness. The FCC Rate
13 allocates to an attacher its fair, just and reasonable proportionate share of the *full*
14 set of ongoing utility operating and capital costs (including a return on capital)
15 associated with the *entire* pole. It is *not* a marginal cost formula. The FCC Rate is
16 designed to produce an efficient rate, yet one that substantially exceeds the true
17 marginal costs of pole attachments, which, on a recurring basis, are exceedingly
18 small – estimated in the order of magnitude of \$1.00.²⁷ It does so using a
19 proportionate or occupancy-based cost allocation factor. The FCC Rate

²⁷ Estimates of the marginal costs of pole attachments, i.e., the lower end of the Section 224 just and reasonable range of rates, have been calculated by myself and others at fractions of the FCC Rate, falling generally in the \$1.00 to \$1.50 range. See Report of Patricia D. Kravtin submitted August 16, 2010, Attachment A to Comments filed by the National Cable and Telecommunications Association, *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 at 31-25; see also *Implementation of Section 224 of the Act. A National Broadband Plan for Our Future*, WC Docket No. 07-245, Order & Further Notice of Proposed Rulemaking, 25 FCC Rcd. 11864, Appendix A “Pole Attachment Rates” (2010).

1 methodology allocates to an attacher its fair, just and reasonable proportionate
2 share of the *full* set of ongoing utility operating and capital costs (including a
3 return on capital) associated with the *entire* pole.

4 **Q. Operationally, how does the FCC Rate methodology work?**

5 A. The FCC Rate consists of the following three major components: (1) the net
6 investment per bare pole, (2) a carrying charge factor (CCF) comprised of a full
7 range of operating and capital costs, including a return on capital,²⁸ and (3) a
8 space allocation factor used to attribute to an attacher its share of the total pole
9 costs as derived in the first two components of the formula. The first two
10 components calculate the pool of utility costs associated with the entire pole to be
11 allocated to attachers, whereas the third component provides the basis by which
12 the utility's pole-related costs are allocated to a given attaching entity. These
13 three components are multiplied in a simple straightforward manner.

14 Expressed as an equation, the FCC Rate formula is as follows:

15 ***FCC Rate Formula =***

16 *Net Bare Pole Cost (NBP) x Carrying Charge Factor (CCF) x Space Allocation*
17 *Factor (SAF)*

18 *Where the SAF = Space Occupied by Attacher / Usable Space on Pole*

19 Using the widely accepted FCC presumptions of a 37.5-foot joint use pole, with
20 13.5 feet of usable space, 24 feet of unusable space,²⁹ and 1 foot of space
21 occupied by the attacher, the cost allocation factor—applicable to the costs of the

²⁸ The five elements of the carrying charge factor include: maintenance, administrative and general, depreciation, taxes, and rate of return (cost of capital).

²⁹ This corresponds to 18 feet above ground clearance and 6 feet of below ground support.

1 entire pole—is 1/13.5 share or 7.41%.³⁰ As with any presumptive value in the
2 formula, to the extent there is actual (or statistically significant) utility or attacher
3 specific data to support the use of alternative space presumptions those can be
4 used in lieu of the FCC's established space presumptions subject to Commission
5 oversight. So, for example, if actual data exists to support use of a 35-foot joint
6 use pole with 11 feet of usable space and 24 feet of unusable space, the space
7 allocation factor would be 1/11 share or 9.09%. The allocation of the costs of the
8 entire pole under the FCC Rate using FCC space presumptions is illustrated
9 graphically in Exhibit PDK-9 to this testimony.

10 **Q. In your calculations you have relied on the all the FCC presumptive values,**
11 **which have been adopted also by TVA, including instances where Mr. Arnett**
12 **has used values based on BRMEC specific data. Can you explain why you**
13 **have chosen to rely on the presumptive values and not the BRMEC specific**
14 **data.**

15 **A.** Yes. First of all, I note that the "FCC presumptive values" have been adopted by
16 the TVA, so they are also the "TVA presumptive values." To the best of my
17 knowledge, TVA has not given any guidance as to what information to use to
18 rebut any of the presumptions except for the number of attaching entities on an
19 average pole. Indeed, I am not aware that TVA has allowed any of the wholesale
20 power customers that it regulates to rebut any other presumptions. While Mr.
21 Arnett purports to rely on the TVA rate method, therefore, he is really way out in
22 front of even TVA, and we have no way to know whether TVA would accept the
23 methods he uses to rebut the presumptions. I also note that while Mr. Arnett has
24 used a method for determining the appurtenance deduction that is used by the

³⁰ See 47 C.F.R. § 1.1418.

1 FCC – and he relies on a specific FCC decision about how rebutting that
2 presumption regarding appurtenances may be accomplished – he has selectively
3 chosen not to follow the FCC’s guidance on how to rebut other presumptions.

4 Second, the FCC presumptive values are widely used, generically applicable
5 values that had held up well over the test of time. Their use is designed to further
6 streamline the formula process, reduce regulatory administrative burden, and
7 deter “results-driven” manipulation of the formula’s data inputs such as would
8 appear Mr. Arnett has done in his TVA Rate calculations. For these reasons, and
9 to avoid the time and resources required to properly scrutinize and independently
10 validate “actual” utility values the utility may choose to present, in my opinion,
11 the Commission would be well served to adopt the FCC presumptions and apply
12 them generically and consistently. Such scrutiny is required because the utility
13 generally has all the leverage with respect to the decision to provide “actual” data
14 in lieu of the presumptive values, and will be incented to substitute actual values
15 only if the use of “actual” values result in a higher rate – as in this case.

16 For example, in his calculation of the 2016 FCC Cable Rate, Mr. Arnett applies a
17 BRMEC specific value for the appurtenance factor of 87.41% rather the
18 presumptive value of 85% that I have relied on in my calculations. The effect of
19 doing so would be to increase the FCC rate by \$0.15, from \$5.18 to \$5.33, or
20 about a 3% *increase* to the regulated rate. However, Mr. Arnett chose to apply
21 the FCC default rate of return of 11%, despite the availability of a BREMC
22 specific value for rate of return of ***BEGIN

23 **CONFIDENTIAL***** [REDACTED] *****END CONFIDENTIAL***** (see BREMC-

014258). Had Mr. Arnett correspondingly used the BRMEC specific rate of return figure for the FCC default value, the regulated rate would have decreased from \$5.33 to \$4.18 by \$1.15, or about a 22% *decrease*. Unlike Mr. Arnett, I have consistently applied the FCC determined values, including the exceedingly generous rate of return of 11% that works greatly to the gain of the utility and much more than makes up for any small differences between other FCC presumptions and BREMC specific data that may work to the gain of the attacher. Of course, Mr. Arnett has applied his methods for rebutting the presumptions in calculating his TVA rate, as well. And the result is a rate that is 45 percent higher than the high rate that Blue Ridge would obtain under TVA's presumptions.

V. ECONOMIC RATIONALE FOR THE FCC RATE'S
PROPORTIONAL COST ALLOCATOR

Q. The defining feature of the FCC Rate methodology is its third component, i.e., the space allocation factor used to allocate the annual costs attributable to the entire pole as determined by the first two components of the formula. Could you describe this component and its underlying economic and public policy rationale in more detail?

A. Yes. As illustrated graphically in Exhibit PDK-9, the cost allocator embodied in the FCC Rate, also referred to as the "space allocation factor," assigns the common or indirect cost of "unusable space" on the pole in the same proportion as it assigns the direct costs of "usable space." The assignment of common or indirect costs on the basis of how direct costs are assigned is a widely accepted methodology, with a longstanding history of use in state and federal regulatory cost allocation manuals and other regulatory applications, including by this Commission.

1 **Q. Please describe other regulatory applications of the cost allocation**
2 **methodology embodied in the FCC Rate.**

3 A. One prime example is Part 64 of the FCC rules, and its state counterparts.³¹ Part
4 64 rules established specific cost allocation guidelines to deal with the allocation
5 of costs between regulated and non-regulated activities and in particular so as to
6 prevent the cross-subsidization of the latter. These rules, however, have general
7 applicability and have been frequently applied to a wide range of regulatory cost
8 applications at the state and federal level. The Part 64 rules instruct utilities to
9 adhere to the following hierarchy of cost assignment, of which the FCC pole
10 formula methodology adheres: first, where there is a strong causal or
11 demonstrable, observable link to the provision of the service at issue, those costs
12 are assigned on that basis. In the pole attachment context, this strong cost causal
13 link is the attachment's physical occupancy of one foot of usable space on the
14 pole - occupancy that actually excludes another attachment from being made in
15 that usable space; second, common costs that do not have such a direct or
16 demonstrable cost causal link, are to be allocated "based upon an indirect, cost-
17 causative linkage to another cost category...for which a direct assignment or
18 allocation is available." See 47 C.F.R. § 64.901(b)(3). In the pole attachment
19 context, the FCC methodology assigns the common costs associated with the
20 unusable space on the pole on the same basis, i.e., in the same ratio (1 foot
21 occupied space/13.5 feet total usable feet on the pole), as the assignment of direct

³¹ See, e.g., Commission Rule R9-2 (adopting FCC Uniform System of Accounts for telephone companies; requiring submission of cost allocation plans); Rule R8-27 (adopting FERC Uniform System of Accounts for electric utilities); Rule R19-1 (requiring Electric Membership Corporations to file cost allocation manuals updated within 30 days of any significant change),

1 costs associated with the usable space on the pole (and characterized by a strong
2 cost causal linkage) was made.

3 **Q. Does the per capita methodology adhere to this widely accepted cost**
4 **allocation principles embodied in the Part 64 Rules and its state**
5 **counterparts?**

6 A. No it could not. The per capita methodology, at its core, relies on an “equal
7 benefits” theory – that while on first blush and without a fuller and more
8 thoughtful understanding of the underlying economics and public interest
9 implications may, as Mr. Arnett opines “feel” or “seem” like it would be “fair.”
10 However, Mr. Arnett’s sentiment is simply not grounded in sound cost allocation
11 principles. The per capita methodology produces an inherently arbitrary
12 assignment of costs, that is grossly unfair, unjust, unreasonable, and at odds with
13 key economic development goals in the state and the overall well-being of its
14 citizens. This is particularly the case in lower density areas when there are
15 relatively few attachers, as is the case here and as typically characterizes EMC
16 service areas; there is simply no cost rationale for charging a single attacher,
17 occupying the same one foot of space on the pole, and imposing the same cost
18 burden on the utility, a pole rate multiples higher than would be charged that
19 attacher if additional third party attachers happened to be present on the pole.

20 **Q. You mentioned above a previous matter before this Commission that applied**
21 **costing principles akin to that underlying the FCC Rate’s proportionate use**
22 **cost allocator. What case are you referring to?**

23 A. I am referring to a 2000 Collocation case involving the charges incumbent
24 telephone companies (“ILECs”) could recover from competitive local providers
25 (“CLPs), requiring interconnection to the ILEC’s central office facilities. In

1 particular, I am referring to the Commission's decision to allocate common costs
2 associated with central office security services on per square foot of occupancy
3 basis, akin to the proportionate based allocator used to allocate common costs
4 under the FCC Rate. With regard to the setting of recurring charges to recover
5 security costs, the Commission ruled in "agree[ment] with the CLPs and Sprint
6 that it is appropriate to pro rate security costs on the basis of square footage."³²
7 In adopting this methodology, the Commission rejected the per capita
8 methodology proposed by the ILECs, relying, among other economic rationale,
9 on the reasoning of the Public Staff, who argued that "the vast difference [in
10 square footage] makes the per capita proposals of BellSouth and Verizon adopted
11 by the Commission considerably less reasonable than the allocation per square
12 foot used and recommended by Sprint."³³

13 **Q. In addition to its widely used applications in the regulatory arena, are there**
14 **applications of the FCC Rate's proportionate cost allocation methodology**
15 **found in the broader economy?**

16 **A.** Absolutely. The FCC Rate's use of a proportionate cost allocation methodology
17 is similar to that commonly used in leasing arrangements throughout the
18 economy, in which costs associated with common space of the facility are
19 allocated to individual tenants on the basis of the tenant's direct occupancy of
20 space on the shared facility. Perhaps the most familiar and often cited example is
21 real estate. For example, a tenant leasing one floor of space in a ten-story office
22 building where the landlord occupied the other nine stories of office space would
23 appropriately be charged a proportionate or one-tenth share of the common space

³² See, Exhibit PDK-5, *Order Addressing Collocation Issues*, *op. cit.* at 273.

1 costs (*i.e.*, lobby, elevator, garage, grounds). The tenant would *not* be charged
2 one-half of the common costs of the office building such as would occur under a
3 per capita formula where the landlord would bear the other one-half of the
4 common costs despite occupying nine-tenths of the “usable” space of the
5 building. Indeed, it would be nonsensical to assign common costs to the tenants of
6 this building on an equal per capita basis.

7 The same concepts applies to tenants leasing residential apartments or those
8 owning condominiums (where residents who occupy a 2000 square foot unit are
9 assessed a proportionately higher monthly fee to cover costs of common space
10 and expenses than those occupying a 500 square foot unit), malls (where anchor
11 department stores pay proportionately more toward common costs of the mall
12 such as concourses, parking lots and access roads than a tenant with a small store-
13 front, and airport terminals (where airlines pay fees to the airport authority based
14 on the number of gates they occupy, not their mere presence in a terminal). Yet
15 another example, under IRS rules for home office expenses, taxpayers are allowed
16 to deduct a percentage of total costs of their home based upon the dedicated
17 square footage as a percentage of the total square footage of their home. A person
18 working out of one small room in their home is allowed to claim as a cost and
19 therefore deduct proportionately less of the total costs of their home than a person
20 who entire first floor is devoted to their office.

³³ See, *Id.* at 271.

- 1 **Q. What about the concern that an occupancy-based cost allocator does not**
2 **provide the utility with the appropriate cost recovery of the entire pole?**
- 3 A. Like under all of these above-mentioned familiar leasing examples, the
4 occupancy-based cost allocator provides appropriate cost recovery for the entire
5 facility. It is a common misunderstanding of the FCC Rate, because it uses an
6 occupancy-based (i.e., direct cost) allocator, to assume incorrectly that the
7 formula either does not assign, or that it under assigns, the costs of unusable (i.e.,
8 common) space to the attacher. Such a misunderstanding confuses the type of
9 allocator used to assign total facility costs (i.e., an occupancy-based one) with the
10 underlying facility costs being assigned (i.e., the total costs of the facility). By
11 allocating the attacher's fully allocated share of the costs of the entire pole in
12 proportion to a reasonable allocation of usable space occupied—over and above
13 any make ready or other directly reimbursable fees paid by the attacher³⁴—the
14 FCC Rate assures that the pole owner is fully compensated for the costs directly
15 and indirectly attributable to the communications attacher. It simply does so in a
16 manner most closely aligned in the true economic sense with how the costs of
17 pole attachments are actually incurred.
- 18 **Q. Please explain.**
- 19 A. The FCC Rate's proportionate-based allocation methodology is most closely
20 aligned with the manner in which the pole owner actually incurs costs, because, as
21 an economic matter, the costs associated with space on the pole do *not* vary

³⁴ In the true economic sense, make-ready costs are in large measure the *only* incremental costs of pole attachments and constitute a very important, yet often overlooked, component of the FCC methodology in that the methodology allows for full recovery of these costs *in addition to* the fully allocated formula-based rental rate.

1 according to the number of attaching entities but rather to the economic utilization
 2 of pole capacity. Attachers generally occupy otherwise vacant space on a pole
 3 such that their attachment does not displace or preclude another. Moreover, in
 4 those instances where there is not surplus space on the pole, the process of make-
 5 ready—the total costs of which the pole owner can recover through additional
 6 charges to the attachers up to and including the full costs of pole replacement—
 7 readily allows the pole owner to access more space to accommodate an additional
 8 attachment.

9 **Q. In addition to greater consistency with fundamental economic principles of**
 10 **cost causation, does the direct occupancy-based cost allocation methodology**
 11 **used in the FCC Rate have other supporting economic and policy rationale?**

12 **A.** Yes, the FCC Rate's proportionate cost allocator has a number of other very
 13 positive attributes. These include:

14 Competitive and Technological Neutrality: The FCC Rate is not inherently
 15 biased or in favor of any one industry or competitor over another. It can be, and
 16 has been, readily applied in uniform fashion across different utilities, different
 17 areas of the state and country, and different types of broadband providers using
 18 different technological platforms. *See, e.g.,* Exhibit PDK-7. Its reasonableness
 19 does not depend upon any particular technology or presence of any particular
 20 number of facilities-based entities. This feature is particularly significant given
 21 the highly dynamic, increasingly convergent communications marketplace where
 22 providers offer varying bundles of video, voice, and internet services using wired
 23 and wireless technology. In North Carolina, where IOUs are subject to Section
 24 224 regulation, setting attachment rates charged by EMCs such as Blue Ridge

1 pursuant to the same FCC Rate formula that regulates IOU pole attachment rates
2 offers the added advantage of bringing rates paid by communications providers
3 across the state into harmony for access to utility poles—an essential facility
4 whose inherent homogeneity in production (in more layman’s terms “a pole is a
5 pole”) makes them largely indistinguishable across utilities regardless of a
6 utility’s organizational structure. Ensuring that rates across the state and across
7 utilities are based on the same regulatory principles will serve to minimize market
8 distortions and non-cost based rate incongruities of the type discussed above.

9 Best Mimics a Competitive Market Outcome: As previously noted, there is no
10 competitive market for pole attachments. However, the FCC Rate establishes a
11 proxy for such pricing that assures the utility a compensatory rate without any
12 • subsidy flowing to the attachers. The FCC Rate better approximates the outcome
13 of a competitive market by producing a lower, more efficient rental rate
14 corresponding to the actual cost of the unit of service being produced, i.e., one
15 foot of otherwise surplus pole space on the utility’s existing pole network. In a
16 competitive market, such as would result if there were multiple competing pole
17 owners with surplus pole space to rent, the price for attachments would be driven
18 down towards marginal cost. Lower input rates in turn allow for lower rates to
19 end users in the final services market, in this case the market for broadband and
20 other communications services—with its resultant benefits to consumers
21 (including BREMC’s own members) of a greater array of innovative and
22 advanced service offerings and at lower rates. However, while the rate produced
23 by the FCC Rate comes closer to this objective competitive market standard, as

1 explained more fully below, it is a fully allocated cost rate that exceeds the true
2 marginal cost and thus fully ensures against cross-subsidy.

3 Produces Fully Compensatory Subsidy-Free Rates: The FCC Rate formula
4 produces rates that are subsidy-free by objective economic standards, and fully
5 compensatory to the pole owner. As well established in the economic and
6 regulatory literature, marginal costs are defined as the additional costs caused by,
7 or that “but for” the attachment, would not exist for the pole owner. From an
8 economic perspective, as long as the pole owner recovers its marginal costs of
9 hosting communications attachments, there can be no valid claim of cross
10 subsidy, or similar finding pursuant to just compensation principles, that the pole
11 owner or its customers are worse off from hosting the attachment.³⁵ While pole
12 owners often cite to cost savings enjoyed by communications providers vis-à-vis
13 the cost of constructing their own stand-alone networks, as widely acknowledged,
14 the construction of duplicative parallel pole networks would be practically and
15 economically infeasible. Even if such parallel networks were feasible, a
16 competitive market outcome produces a price closer to the marginal cost of the
17 good or service being produced, and specifically excludes—as does the related
18 legal principle of just compensation—the consideration of any uncaptured value
19 to the buyer of a hypothetical alternative.

³⁵ It is a central and well-established tenet of economics that rates that recover the marginal costs of production are economically efficient and subsidy-free. For a subsidy to occur, the utility must have unrecovered costs that *but for* the attacher would otherwise not exist. This is decidedly *not* the case for pole attachments. Since make ready charges alone essentially cover the marginal costs of attachment, the utility will not bear a higher cost as a result of the attacher.

1 Pole owners similarly often cite to additional unrecovered costs of pole
2 attachments, as do Messrs. Arnett and Booth. Mr. Arnett asserts there are
3 additional "but for" costs not recovered in the annual rental rate, that should be
4 separately recoverable from the attacher *in addition to* the rental and existing
5 make ready and other direct fees. Mr. Arnett's claim is further expanded on by
6 Mr. Booth who suggests there are a number of "but for" costs purportedly
7 unrecovered in the rental rate. *See* Direct Testimony of Wil Arnett at 46-47,
8 Direct Testimony of Gregory Booth at 33-41. Such claims are simply not true.
9 The fully allocated costs recovered in the FCC Rate include an expansive set of
10 costs, including a host of costs that would exist for BREMC regardless of whether
11 there were any third party communications attachers occupying space on the
12 utility's poles.³⁶ In addition, the formula provides for a very generous recovery of
13 capital costs, especially for an EMC that has a zero cost of equity.³⁷ The FCC
14 Rate, in fact, allows BREMC to recover through the rental rate ongoing costs that
15 are *much more* than the marginal cost for a third-party communications attacher's
16 use of otherwise vacant space on utility poles. This is especially the case when

³⁶ For example, the FCC Rate formula includes the entirety of costs booked to Administrative and General-related Accounts 920 to 930, covering a wide expanse of overhead costs such as administrative and general salaries including officer salaries, office supplies and expenses including telephone and court-related expenses, outside services employed including attorney fees and audit expenses, property insurance, injuries and damages, employee pensions and benefits including health insurance related expenses, and miscellaneous general expenses including general advertising, bank service fees, association dues, etc. Distribution Plant Maintenance-related costs included in Account 593 for overhead lines also contain a number of sub-accounts that include non-pole related expenses such as repairing grounds, cleaning insulators, sampling, testing, changing, purifying and replenishing insulating oil, etc.

³⁷ For the past several decades, the FCC Rate has included a default value for the rate of return element of the carrying charge factor based on an overall weighted cost of debt plus equity of 11.25%. The default value is currently set at 11%, but is being reduced by the FCC over the next several years but is still an exceedingly high 9.75%, a value between two and two and a half times BREMC's actual average cost of debt of ***BEGIN CONFIDENTIAL*** [REDACTED] ***END CONFIDENTIAL***. *See* BREMC-014286.

1 you take into account that under the FCC methodology in addition to receiving
2 annual formula rental payments based on a cost causative allocation of fully
3 allocated costs, BREMC will *also* receive make-ready payments and other direct
4 reimbursement fees cover any out-of-pocket costs it could potentially incur in
5 connection with hosting a communications attachment in the event there is not
6 already existing surplus space on its poles.³⁸ In addition to its inclusion of fully
7 allocated costs unrelated to poles, the FCC Rate builds in additional contribution
8 to the pole owner by providing capital cost recovery that under a true “but for”
9 cost standard would either be excluded entirely, or included but at a very minimal
10 level. Indeed, had the FCC Rate been designed to set rates based on the lower
11 “but for” standard of costs, the rate formula would have included a much smaller
12 set of costs, and the rates produced by that formula would be a fraction of the
13 fully allocated cost-based rate.

14 Moreover, *in addition to* the excess contribution over “but for” costs built into the
15 fully allocated cost-based FCC Rate, the FCC methodology already allows for
16 additional recovery of true “but for” costs. Consider especially the fact that cable
17 attachers regulated under Section 62-350 are typically occupying at most one

³⁸ Under the FCC methodology, the utility is able to charge the communications attacher additional up front or non-recurring make-ready charges, to fully reimburse the pole owner for any out-of-pocket or true “but for” costs the utility incurs to make the pole capable of hosting the attachment, which include the entire cost of rearrangements, pole modifications, or the cost of total replacements as necessary to accommodate the attachment to the extent space is not already available on a pole as vacant or surplus space. *Plus* as pole owner, BREMC retains full ownership of the enhanced asset value of any and all improvements to their pole property (including the creation of additional space for the utility to rent or occupy) fully funded by those make-ready charges. Where poles have been changed-out to taller and/or stronger poles, BREMC will get the full value of the upgraded asset for its own use, and it also gets the recurring revenue stream in the form of rent from the attacher who paid to replace that pole, as well as from others.

1 foot³⁹ of otherwise surplus space on the utility's existing network of poles that
2 would go unused, and that the utility is able to impose make-ready charges, over
3 and above the rental rate, to recover any actual out-of-pocket costs (e.g., for pole
4 change-out or rearrangement) incurred by the utility in order to accommodate the
5 communications attachment. As an attacher, Charter enjoys none of the rights of
6 telephone joint owners, including the right to specified amounts of space on
7 utility's poles. The attacher's use of pole space is fully subordinate to that of the
8 utility who can reclaim the space for its core service at any time.⁴⁰ Mr. Arnett, in
9 fact, agreed in a recent deposition that the limited categories of true "but-for"
10 costs are best addressed specifically in the pole attachment agreement, not
11 through a general catch-all provision that could lead to more disputes. *See* PDK-
12 10 (Excerpts of June 13, 2017 Deposition of Wilfred Arnett ("Arnett Depo.") at
13 197:4-206:1). Unlike the more generalized types of administrative costs that
14 Messrs. Arnett and Booth assert would not exist "but for" the presence of Charter
15 attachments, make-ready costs and the other direct fees are directly linked to time
16 and pole specific activities attributable to an individual attacher, and as such, are
17 readily tracked and documented. Also, it is the pole owners themselves that

³⁹ A communications attachment occupies a small fraction of the space used by the utility itself in the provision of its core electric service, and has correspondingly small weight and clearance (both horizontal and vertical) requirements *vis-à-vis* the electric service. The assignment of 1 foot of usable space to an individual attachment is already a generous space allocation from an economic cost causation perspective given my understanding that the typical third party communications attachment on the pole actually takes up only a few inches.

⁴⁰ In this key respect, third party pole attachment is a lower grade of service, one by design, does not involve capital expenditures on the part of the utility to accommodate the service, since any such investment would be subject to the make ready process and associated fees imposed on the attacher. In many respects, this is akin to interruptible electric service. It is my understanding the Commission has set lower rates for that service commensurate with its limitations of service.

1 determine the level of make-ready charges, and such charges may also include
2 certain corporate or administrative cost loadings.⁴¹

3 What Messrs. Arnett and Booth are essentially proposing here is adoption of a
4 rate structure that allows the pole owner to charge rates using the best of both cost
5 standards. They would have the Commission apply the higher fully allocated cost
6 standard to set the recurring rate, but *in addition*, apply the lower “but for”
7 standard to a comprehensive set of generalized, unspecified, and unquantified cost
8 add ons—seemingly over and above the true “but for” costs included in make-
9 ready and other direct fees. Finally, both Mr. Arnett and Mr. Booth’s assertions
10 of unrecovered costs are made without any supporting factual or empirical
11 documentation; similarly undocumented claims of “but for” expenses by pole
12 owners have been rejected by regulators.⁴²

13 As widely recognized and clearly stated by the FCC, “under economic and legal
14 principles, a given service (e.g., access to poles) is not subsidized by other
15 services (e.g., electric service) if the rate for that service covers all the costs
16 caused by that service”—as the FCC Rate indisputably does. The FCC Rate has

⁴¹ Whatever small amount of incremental cost relating to corporate-related administrative costs that may not be captured in those make-ready charges are more than compensated for in the multitude of administrative costs recovered in the FCC rate that have nothing to do with poles or pole attachments, and again in other sources of excess recovery built into the FCC Rate such as the high cost of capital recovery.

⁴² See *Implementation of Section 224 of the Act*, Report & Order & Order on Reconsideration, 26 FCC Rcd 5240 ¶ 189-190 (April 7, 2011), *aff’d sub nom. Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) (“April 2011 Order”). The FCC explained that electric utility pole owners “did not provide any cost study, let alone one that might demonstrate that pole owners incur capital costs outside the make-ready context solely to accommodate third-party attachers” and further stating and noting that utilities provided “only an anecdotal assertion of additional capital costs that would not be incurred ‘but for’ communications attachers.” The FCC also explained that it had invited utility pole owners to submit evidence to support claims that they had put in taller poles for third parties but that, in response, electric utilities did not provide any cost study, let alone one that might demonstrate that pole owners incur capital costs outside the make-ready context solely to accommodate third party-attachments.

1 been repeatedly found by regulatory agencies and by the courts, including the
2 U.S. Supreme Court, to produce rates that are just, reasonable and fully
3 compensatory to the utility.⁴³ Pole owners often advocate for the use of per capita
4 based allocation approaches such as that recently employed by TVA for its
5 wholesale customer pole owners that allocate costs associated with unusable
6 space on the pole on a per entity basis. They do so for the very reason that these
7 approaches produce higher rates.⁴⁴ However, as discussed in more detail in the
8 section of my testimony addressing the inherent and numerous flaws in the TVA
9 approach used by BREMC to calculate pole attachment rates applicable to
10 Charter, rates produced using those approaches do not correspond to the actual
11 incurrence of costs by the pole owner, and add complexity, arbitrariness, and
12 contentious to the process.

13 Provides Straightforward, Consistent, and Predictable Rates: The FCC Rate
14 provides for the most straightforward, consistent and predictable formula
15 application—qualities of utmost importance to firms in making business decisions
16 to invest in new technology and to roll out new services. The overarching

⁴³ See, e.g., *Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 ¶¶ 15-25 (2001); *FCC v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987) (finding that it could not be "seriously argued, that a rate providing for the recovery of fully allocated cost, including the cost of capital, is confiscatory."); *Alabama Power Co. v. FCC*, 311 F.3d at 1363, 1370; *Detroit Edison Co. v. Michigan Public Serv. Comm'n*, Nos. 203421, 203480, slip op., at 3-4 (Mich. Ct. App. Nov. 24, 1998), *affirming Consumers Power Co., Detroit Edison Co., Setting Just and Reasonable Rates for Attachments to Utility Poles, Ducts and Conduits*, Case Nos. U-010741, U-010816, U-01083 1, Opinion & Order (Mich. Pub. Serv. Comm'n Feb. 11, 1997), *appeal denied*, 461 Mich. 853, 602 N.W.2d 386, 1999 Mich. LEXIS 3252, 1999 WL 711854 (Mich.); *In the Matter of Trenton Cable TV, Inc. v. Missouri Public Serv. Co.*, PA-81-0037, ¶ 4 (rel. Jan. 25, 1985) ("Since any rate within the range assures that the utility will receive at least the additional costs which would not be incurred but for the provision of cable attachments, that rate will not subsidize cable subscribers at the expense of the public.").

1 concept underlying the FCC Rate methodology, and one of the key reasons
2 behind its widespread adoption, is that it can be applied in a very straightforward
3 manner. The data inputs used in the FCC Rate are recorded in the FERC uniform
4 reporting system for IOUs, FCC uniform reporting requirements for telephone
5 companies, and the equivalent reporting system used by the Rural Utilities
6 Service ("RUS") for cooperatives. In fact, the accounts imposed by the RUS on
7 all cooperatives that utilize RUS loans—as do virtually all cooperatives—are the
8 same as those used by FERC by IOUs. Accordingly, the FCC Rate can be
9 updated annually with a minimum of private, administrative effort, and little, if
10 any, regulatory involvement.

11 Easy and Least Costly to Administer: From a regulatory or administrative
12 perspective, the FCC Rate is the easiest and least costly cost-based methodology
13 to implement and administer, as it engenders fewer areas of contention due to the
14 formula's simplicity and the straightforward nature of its data inputs, especially
15 when the FCC's widely accepted and commonly applied presumptive values for
16 joint use pole characteristics are used. In particular, the FCC Rate's
17 proportionate, occupancy-based cost allocation methodology makes data
18 requirements much easier to satisfy as compared with other "per capita" type
19 approaches that require information on the number of attaching entities to
20 determine the cost allocation component of the formula.⁴⁵ The attacher-specific

⁴⁵ As with any formulaic approach, the accuracy and integrity of the formula depends on the accuracy and integrity of the underlying data inputs used to run the formula. It is very important therefore that the data used in the formula be subject to careful scrutiny and held to a high standard as to reliability, accuracy, consistency, and ability to be verified and replicated. The FCC and majority of state regulators with jurisdiction over poles have found the FCC Rate to best achieve this objective.

1 audit data or statistically significant sample data needed to verify the number of
2 attaching entities are often not available or are costly or time consuming to obtain.

3 Most Widely Used and Time-Tested Formula: And finally, a particularly key
4 advantage of the FCC Rate is that it is the most widely used and time-tested rate
5 methodology. The longstanding and widespread use of the FCC Rate is not just
6 due to its federal mandate, but its widespread adoption by the overwhelming
7 majority of states that regulate pole attachments. See Exhibit PDK-7. In adopting
8 the FCC Rate, the majority of state regulators have found the FCC Rate's
9 proportionate cost allocation methodology to best promote market efficiency,
10 resource utilization, and other public interest benefits including a greater array
11 and adoption of advanced communications and broadband services at lower
12 prices. Moreover, from a practical perspective, there is a substantial body of
13 federal and state precedent interpreting and applying the FCC Rate which further
14 enhances the ease by which attachers, utilities, and the Commission can rely upon
15 it thereby minimizing administrative and litigation costs. As noted above, the
16 FCC Rate is already being used in North Carolina in setting rates for IOUs under
17 FCC jurisdiction and therefore is easily reproducible by cooperatives across the
18 state.

19 I would also add that the FCC Rate has been endorsed by key national
20 organizations representing public utility commissioners, including NARUC, and
21 organizations representing consumers of both cable and utility services, including
22 NASUCA. In a 2001 Ad Hoc Committee Report on Pole Attachments (attached
23 as Exhibit PDK-11), the NARUC committee concluded and specifically

1 recommended that cooperatives be regulated and required to follow the FCC Rate
2 methodology, having reasoned that “[t]he necessity of providing [cooperatives] an
3 exemption from pole attachment rules has diminished considerably,” and
4 “[i]slands of regulatory exception will only serve to segregate market
5 development.”⁴⁶ In 2008, NARUC issued a “Resolution Governing Pole
6 Attachment Policy” (also attached in Exhibit PDK-12) that highlighted the
7 importance of adopting “technology-neutral pole attachment policies” to facilitate
8 broadband deployment, “in accordance with FCC rules,” without distinction to
9 type of utility ownership.⁴⁷ Perhaps the strongest of public interest endorsements
10 for applying the FCC Rate to cooperatives is that of the National Association of
11 State Utility Consumer Advocates, a group whose very Charter is to represent
12 consumer interests, including cable, telephone and utility ratepayers. NASUCA
13 has consistently supported the FCC Rate, including in its most recent publicly
14 submitted comments on the matter (provided in Exhibit PDK-13), urging the FCC
15 to apply the FCC Rate uniformly as the best way to balance interests of the
16 various consumer constituencies.⁴⁸

⁴⁶ See Ad Hoc Group of the 706 Federal/State Joint Conference on Advanced Services, *Pole Attachments*, Presented at the 2001 NARUC Summer Meetings in Seattle, Washington, July 2001, Exhibit PDK-11.

⁴⁷ The 2008 NARUC Resolution made specific note of the “mutual and long-standing commitment [of state commissions] to adopt in conjunction with the FCC policy to facilitate the deployment of advanced service by removing barriers and promoting technology neutral solutions.” See Exhibit PDK-12.

⁴⁸ Reply Comments of The National Association of State Utility Consumer Advocates in FCC Docket 07-245, filed April 22, 2008, at 1-2, 5 (“This rate was upheld against challenges that it was confiscatory. Thus, this is the rate that should be used for all pole attachments, regardless of the exact service provided over the attachment, and regardless of the identity of the attacher. Equally importantly, the Commission must not increase the rate paid by broadband service providers because this would be contrary to ‘the nation’s commitment to achieving universal broadband deployment and adoption.’”). See Exhibit PDK-13.

VI. INVALID CRITIQUES OF THE FCC RATE

Q. Mr. Arnett asserts a number of criticisms of the FCC Rate in general and more specifically as it is applied to Blue Ridge. How do you respond?

A. Mr. Arnett's criticisms of the FCC Rate are familiar ones, expressed repeatedly over the years by electric utilities seeking to obtain the highest possible pole attachment rate from regulators and courts. See Direct Testimony of Wil Arnett at 41-35. These arguments have been asserted by IOUs subject to pole rate regulation, and in more recent years, by cooperatively owned utilities as they have increasingly engaged in behavior akin to their IOU counterparts and come under the scrutiny of state regulators as in North Carolina.

None of Mr. Arnett's criticisms are economically valid, and have been rejected by the FCC, the overwhelming majority of state regulators who have adopted the FCC Rate, and state and federal courts, including state and appellate courts in North Carolina and the U.S. Supreme Court. Mr. Arnett fails to identify these other authorities, which are identified and summarized in the attached Exhibit PDK-7. Most of Mr. Arnett's arguments have already been addressed above. I will briefly address a few other points raised by Mr. Arnett.

The FCC Rate is fully compensatory to pole owners and is not a subsidized rate.

Mr. Arnett's assertion that the FCC Rate is a subsidized rate appears to be based on the notion that to be subsidy-free, a rate must reflect the benefits received or value to the attacher (e.g., cost savings). Mr. Arnett's use of the word "subsidy" is at odds with the established, objective economic definition of subsidy and the related legal principle of just compensation. These principles, as described in the economics literature and upheld by courts, hold that as long as the pole owner

1 recovers its marginal costs, there can be no valid claim of cross-subsidy. Under
2 cost based regulation, it is the costs incurred by the pole owner that should be
3 used in setting rates. The *attacher's* hypothetical avoided costs of constructing its
4 own poles or of going underground are *not* properly considered as "costs" to the
5 *pole owner* or properly recoverable from the attacher. *See* Direct Testimony of
6 Wil Arnett at 42-43, 45. In the same way, the other possible or perceived benefits
7 received by the attacher mentioned repeatedly by Mr. Arnett are not "costs" to the
8 pole owner or a "subsidy" to the attacher and do not justify artificially high pole
9 rates. *See e.g., Id.* at 40) As explained above, in combination with make ready
10 and other direct fees, the FCC Rate provides a fully allocated cost recovery to the
11 pole owner at multiples of the pole owner's marginal cost and hence there can be
12 no valid claim of a subsidy to the attacher.

13 The FCC Rate's presumptive 7.41% proportionate share of costs is economically
14 appropriate, if not high, in relation to the pole owner's true economic costs. Mr.
15 Arnett takes issue with the FCC Rate's recovery of what he perceives to be "only
16 a small fraction of the annual costs to own and maintain the poles." *See* Direct
17 Testimony of Wil Arnett at 38. Again, Mr. Arnett's conclusions are based on his
18 incorrect adherence to what he refers to as "benefits received principles," or his
19 personal sense of whether a rate may "bear ...resemblance to being equitable" or
20 "seem like a fair sharing of costs" or "sound like a subsidy" rather than the
21 proper, objective, and economic cost-based standard. *See* Direct Testimony of
22 Wil Arnett at 38, 42. Mr. Arnett defines a subsidized rental rate according to his
23 personal standard of whether that rate reflects "the benefits derived" rather than

1 the correct economic definition for determining subsidy, which is strictly based on
2 whether the rate reflects the cost to the pole owner. The economic concept of
3 subsidy has nothing to do with the benefits derived by the attacher. *See Id.* at 40.
4 When compared against the objective benchmark of the true economic costs to the
5 owner of hosting a third party attachment, i.e., the marginal costs of hosting
6 which are very low, the presumptive 7.41% allocation factor is actually high,
7 especially taking into account the additional recovery the pole owner receives
8 from the attacher in make ready and other direct fees.

9 The FCC Rate allocates an economically appropriate percentage of the costs
10 associated with the unusable or common space on the pole. Mr. Arnett opines
11 that having cable companies to pay for only 7.4% of the annual costs associated
12 with the common space (a/k/a “support space” or “unusable space”) “makes no
13 sense at all.” *See Id.* at 39. I could not more strongly disagree. From an
14 economics cost causation perspective, it makes perfect sense to allocate indirect
15 or common costs at the same percentage as direct costs. As explained above, the
16 proportionate cost allocation methodology is widely used in other regulatory cost
17 applications, and is commonly found outside the regulatory arena as well—a
18 primary example being real estate rental markets, as illustrated by Congress’
19 example of the 10 story apartment building, but as noted above, there are many
20 other such examples one can cite to in the broader economy. Again, Mr. Arnett
21 cites to an attacher’s benefit from the common space as the basis upon which to
22 allocate costs. As in the real estate application, of course all tenants “need access
23 to and make use of the common space of the building, but that concept of benefit

1 that applies to all tenants does not drive their relative allocations of common
2 costs. Rather, as described above, their relative allocations of common costs are
3 proportional to their allocations of direct cost, and based upon their relative
4 square foot occupancy of space. It is entirely appropriate, fair and equitable from
5 an economic standpoint that a tenant occupying 7.4% the total square footage of
6 rental space pays 7.4% of the common costs, and the same is true for attachers.

7 The FCC Rate properly allocates safety space as usable to the electric utility.

8 Contrary to Mr. Arnett's claims, the space on the pole designated as "safety
9 space" is usable by the pole-owning utilities—but not by attachers. Accordingly,
10 pursuant to cost causation principles, it is not reasonably or logically reclassified
11 as space usable to attachers. Doing so serves only to provide excess recovery for
12 the pole owner. As acknowledged by Mr. Arnett (see Direct Testimony of Wil
13 Arnett at 14), pole owners can and do place attachments within the safety space.
14 These include not only streetlights and other security lights as mentioned by Mr.
15 Arnett, but a host of other revenue-generating attachments.⁴⁹ Contrary to Mr.
16 Arnett's belief (see Direct Testimony of Wil Arnett at 15-16), the pole owner's
17 ability to place attachments within the safety space (regardless of whether it is a
18 stated "practice" of the utility) and to realize revenues from such placement, is
19 what is the most relevant from an economic cost perspective: It dictates the

⁴⁹ Attachments routinely made in this space by utilities include streetlights, private floodlights, traffic signals, fire and police call boxes and alarm signal wires, municipal communications systems, transformers and grounded conductors as well as a utility's own communications fiber.

1 proper treatment of this space for purposes of cost attribution as directly usable
 2 space by the pole owner.⁵⁰

3 **VII. CALCULATION OF POLE ATTACHMENT RATES FOR BREMC**
 4 **UNDER RECOMMENDED FCC RATE FORMULA**

5 **Q. Have you calculated just and reasonable pole attachment rates that BREMC**
 6 **may charge Charter based on the recommended FCC Rate formula?**

7 **A. Yes, I have.** Those rates, which I have calculated for the relevant years at issue in
 8 this proceeding for BREMC are provided in Table 1 below.

9 **Q. Can you describe how those rates were calculated?**

10 **A. Yes.** Applying data provided by BREMC in discovery, I have estimated the
 11 maximum just and reasonable pole attachment rates (annual, per foot of occupied
 12 space) under the FCC Rate for the years at issue in this proceeding. My
 13 calculations, as summarized in Table 1 below, apply the widely used FCC
 14 presumptive values for usable and unusable space and total pole height as
 15 described earlier,⁵¹ but rely strictly on cost data specific to BREMC. Supporting
 16 rate calculations are provided in Exhibit PDK-4. As shown in Table 1 on the
 17 following page, the just and reasonable rates for BREMC range from \$5.18 for
 18 the 2017 rate year to \$5.22 for 2015.

⁵⁰ To the extent the pole owner needs to place an attachment within the required safety clearances, it can order the attacher to relocate its attachment at the attacher's expense, or, if necessary, require the attacher either to remove its attachment or pay the costs for installation of a taller pole.

⁵¹ The FCC presumptive values apply a total pole height for an average joint use pole of 37.5 feet, with 13.5 feet of usable space (inclusive of the 40 inches of so-called "safety space"), and 24 feet of unusable space, comprised of 6 feet underground support and 18 feet of above grade clearances.

1

Table 1

CALCULATION OF JUST & REASONABLE RATE UNDER RECOMMENDED FCC RATE FORMULA - BLUE RIDGE EMC			
Rate Year	2017	2016	2015
Cost Data for Year Ending	2016	2015	2014
	BEGIN CONFIDENTIAL		
Net Bare Pole Cost x Carrying Charge Factor x			
	END CONFIDENTIAL		
Space Allocation Factor =	7.41%	7.41%	7.41%
Max. Pole Attachment Rate	\$5.18	\$5.20	\$5.22

2 **Q. In your opinion, would rates higher than those presented in Table 1 above be**
3 **just and reasonable rates for BREMC to charge Charter?**

4 **A.** No, they would not. For the many reasons described in this testimony, rates set
5 any higher than the maximum just and reasonable rates calculated based on the
6 widely accepted FCC Rate in my opinion would fail to serve the ultimate
7 purposes of effective pole rate regulation embodied in Section 62-350. By
8 objective economic standards, rates calculated using the FCC Rate are cost-based,
9 subsidy-free, and fully compensatory to the pole owner. Rates set higher than this
10 level are inefficiently high vis-à-vis well established economic cost standards and
11 contrary to the public interest.

12 **Q.** **Is it a valid concern that the rates you have calculated using the FCC Rate**
13 **are lower than rate levels Charter has been paying EMCs such as Blue Ridge**
14 **for cable attachments?**

15 **A.** No, it is not. That the rate levels calculated using the FCC Rate are lower than the
16 rate levels previously imposed on the attaching entities by the cooperatives, or
17 other so-called "market benchmark" rates set by other monopoly pole owners, is
18 not a valid economic or public policy concern. Any such "market" rates do not
19 reflect "free market" rates at all, but rather rates set in an unbalanced market

1 environment where the pole owner has an inordinate amount of leverage and can
2 use that leverage to impose excessively high monopoly rates.

3 **Q. In your opinion, what would be a more appropriate benchmark for just and**
4 **reasonable rates that Blue Ridge may charge Charter pursuant to Section 63-**
5 **250?**

6 A. The more appropriate benchmark for just and reasonable pole attachment rates for
7 BREMC would be the average rates that Charter and other communications
8 providers pay IOUs in North Carolina subject to Section 224 regulation. As noted
9 above, operationally, cooperatives use the same type of plant, technology, and
10 production techniques to provide electricity service to subscribers and in the same
11 basic manner as IOUs. Indeed, it is not uncommon for IOU and EMC-owned
12 poles to be adjacently located, especially in areas where their pole networks have
13 been built under EMC-ILEC joint ownership arrangements, or to have contiguous
14 or overlapping territories with IOUs, as appears to be the case with Blue Ridge
15 and Duke Energy.

16 **Q. How do the rates you have calculated for BREMC compare to the average**
17 **rates Charter pays IOUs in North Carolina?**

18 A. The just and reasonable rates I have calculated for BREMC are very closely in
19 line with the average pole attachment rates that Charter pays IOUs in North
20 Carolina, as shown in Table 2 below.

21

Table 2

Average Pole Attachment Rates Charter Paid Investor Owned Utilities 2015-2017			
	2015	2016	2017
Electric	\$6.64	\$7.20	\$7.26
Telco	\$3.38	\$3.24	\$2.52

1 **VIII. CALCULATION OF OVERCHARGES PAID BY CHARTER TO BREMC**

2 **Q. What is your understanding of Charter's entitlement to a refund of amounts**
3 **paid to BREMC in excess of just and reasonable rates under Section 62-350?**

4 **A.** It is my understanding that under Section 62-350, Charter is entitled to a refund
5 for the applicable true up period if the rate it has been paying is in excess of a just
6 and reasonable rate. I further understand the applicable true-up period for
7 purposes of calculating that refund is from the present date back to the date
8 immediately following expiration of the 90-day negotiation period triggered by
9 Charter's written request, or the termination of the prior pole agreement effective
10 at the end of the then current term, whichever is later.⁵²

11 **Q. Can you describe the process by which you calculated the amount of**
12 **overcharges paid by Charter to BREMC for pole attachments for the**
13 **applicable true-up period.**

14 **A.** Yes. For the reasons described in this testimony, it would be unjust and
15 unreasonable for calculations of overpayments to be based on the excessively
16 high monopoly level rates unilaterally imposed on Charter by BREMC,⁵³ or some
17 other monopoly level rate. These include rates calculated using alternative
18 approaches such as recently employed by TVA for its wholesale customer pole
19 owners and used by BREMC to calculate proposed rates/or that have been set in
20 reference to rates charged by other unregulated pole owning utilities or any other
21 arbitrary criteria designed to maximize revenues or otherwise promote the special

⁵² See Charter Answer and Counterclaims at 3, 12-13. I understand the applicable true up date is August 25, 2015, and that Charter has paid invoices received from BREMC through August of this year (2017).

⁵³ The same would apply to the calculation of any potential underpayments by Charter due BREMC.

1 interests of the pole owner in contrast to just and reasonable rates more aligned
2 with a competitive market or regulated IOU benchmark rate.

3 Accordingly, the overpayments I have calculated as due Charter are based on the
4 difference between the rates Charter actually paid BREMC over the relevant true
5 up period and the maximum just and reasonable rates that a correct application of
6 the FCC Rate produces. The amounts paid by Charter to BREMC for
7 communications attachments for the years 2015 to 2017 were based on a per pole
8 attachment rate of \$26.64, which Charter paid subject to true-up and credit for any
9 amounts overpaid.

10 As shown in Table 3 on the following page, the difference between the maximum
11 just and reasonable amounts that should have been due to BREMC from Charter
12 annually for the years 2015-2017 and the invoiced amounts Charter actually paid
13 BREMC on a per attachment basis over this period totaled some \$1,010,251. The
14 overcharge amounts presented in Table 3 do not include any interest component
15 as would be economically appropriate to reflect the time value of money over the
16 span of years that Charter paid BREMC in excess of just and reasonable rates.
17 Had interest been applied, the amounts owed Charter would be significantly
18 higher.

Table 3

CALCULATION OF OVERCHARGES BY CHARTER TO BLUE RIDGE EMC IN RELATION TO JUST AND REASONABLE AMOUNTS UNDER FCC RATE			
Rate Year	2017	2016	2015
Cost Year	2016 ¹	2015	2014
Rate paid by Charter ²	\$26.64	\$26.64	\$26.64
Just and Reasonable Rate ³	\$5.18	\$5.20	\$5.22
Excess Paid by Charter x	\$21.46	\$21.44	\$21.42
No. of Attachments ² x	27,674	26,301	26,301
% of Year Applicable ⁴ =	41.92%	100.00%	35.07%
Overcharges	\$248,891	\$563,805	\$197,555
Total Overcharges	\$1,010,251		
¹ Charter Invoices. ² Exhibit PDK-4. ³ True up period began August 25, 2015, 90 days from the trigger date of May 26, 2015			

I have also calculated overpayments to include an additional source of overcharges, based on my understanding that whereas Charter was invoiced and paid BRMEC on a *per attachment*, Charter's agreement with BREMC stipulated that it pay on a *per pole* basis. Total overcharges, including those resulting from BREMC applying a *per pole* rate of \$26.64 to a higher count of attachments, is \$1,092,205.

IX. THE OUTLIER TVA APPROACH IS HIGHLY FLAWED AND WAS DEVELOPED EXPRESSLY TO SERVE THE LIMITED INTERESTS OF ITS POLE OWNING CUSTOMERS IN CHARGING THE HIGHEST POSSIBLE POLE ATTACHMENT RATES

Q. Mr. Arnett uses the TVA approach for calculating pole attachment rates for Blue Ridge. What is your overall opinion of the TVA approach?

A. The TVA approach is marred by a deeply flawed process that led to adoption of an uneconomic, untested, unpredictable, and unreasonable rate methodology that

1 serves only to advance TVA's customers' interests in obtaining the highest
2 possible pole attachment rates from communications attachers.

3 **Q. In what respect was the TVA process flawed?**

4 A. It is my understanding that the TVA began exploring a pole attachment rate
5 methodology in 2015.⁵⁴ In a manner that would be highly irregular for a public
6 regulatory agency, TVA solicited only the input of the local power companies
7 who purchase power from the TVA, most of whom are rural electric cooperatives,
8 and their association, the Tennessee Valley Public Power Association
9 ("TVPPA").⁵⁵ According to its website, TVPPA's mission is to "serve as an
10 effective advocate for our members' interests . . . with the TVA."⁵⁶ It appears
11 TVA's members and other cooperative associations contacted other advocates for
12 electric cooperatives, including Mr. Arnett and to my understanding, one of the
13 other cooperatives' attorneys in the related proceedings.⁵⁷ TVA did not solicit
14 input from any other stakeholders, including advocates for the public interest or
15 the third-party attachers who would be required to pay any new pole attachment
16 rate. As far as I am aware, there is no evidence of a public notice on TVA's
17 website (where it posts public notices of other business),⁵⁸ and it is my
18 understanding that TVA did not even notify the public or cable operators of its

⁵⁴ See Exhibit PDK-10 (Arnett Depo. at 112:1-116:18).

⁵⁵ See TVA Proposed Board Resolution and Memorandum to the Board of Directors, dated January 22, 2016 (Attached as Exhibit PDK-14).

⁵⁶ See <http://www.tvppa.com/about/>

⁵⁷ See Exhibit PDK-10 (Arnett Depo. at 112:1-116:18, discussing two TVA cooperatives who had contacted him); Exhibit PDK-15 (email thread between T. Magee and J. Brogden dated February 20, 2015 re: TVA Pole Attachment Questions).

⁵⁸ See <https://www.tva.gov/Newsroom/Press-Releases> (the first item listed as of the date of this report is a press release from June 8, 2017, soliciting public comment on proposed rule changes).

1 consideration of a new pole attachment rate requirement for its customers until it
 2 was adopted by the Board. Accordingly, TVA's analysis of the issue was
 3 informed only by information and proposals supplied by its customers who stood
 4 to benefit the most from an excessively high pole attachment rate, and their
 5 advocates, and who would have no incentive to provide the TVA with any
 6 information or perspective other than that supporting their own biased views.

7 **Q. Does the process under which the TVA developed its pole rate resolution**
 8 **bear any resemblance to the manner in which the FCC developed the FCC**
 9 **Rate?**

10 A. Not in the least. The FCC's pole attachment rate methodologies have been
 11 developed through public and fully considered notice and comment rulemakings
 12 under the federal Administrative Procedures Act. The FCC's most recent
 13 rulemaking (culminating in the 2011 Order)⁵⁹ considered the viewpoints,
 14 arguments, and evidence supplied by hundreds of interested parties over several
 15 years.⁶⁰ The FCC considered the viewpoints of large and small cable operators,
 16 investor-owned utilities, telephone companies, and public interest groups alike. It
 17 also considered comments and evidence submitted by the North Carolina
 18 Association of Electric Cooperatives, NRECA, the American Public Power
 19 Association ("APPA"), and more than a dozen other rural electric cooperatives or
 20 their state associations.

⁵⁹ April 2011 Order.

⁵⁹ April 2011 Order.

⁶⁰ My understanding is that interested parties filed over 640 comments, reply comments, letters, and notices of ex parte meetings over the course of the FCC's deliberations in WC Docket No. 07-245. See https://www.fcc.gov/ecfs/search/filings?date_received=%5Bgte%5D1900-01-01%5Blte%5D2011-04-11&proceedings_name=07-245&sort=date_disseminated,DESC (limiting filings to the date range from the docket's opening to the release of the 2011 Pole Order).

1 **Q. In defense of TVA, Mr. Arnett states that “TVA fully consider[ed] the FCC**
2 **formula before adopting its own rate formula?” Does TVA’s consideration**
3 **of the FCC methodology negate your concerns about process?**

4 **A. No, it does not. While TVA may have considered some undisclosed information**
5 **about the FCC methodology, it was far from well-informed. TVA’s rejection of**
6 **the FCC Rate, for example, was based on a number of patently false premises**
7 **likely supplied by its customers or their advocates, and without the benefit of any**
8 **information from other stakeholders, a complete record, or an open debate to**
9 **better inform its findings.⁶¹ Those false premises include a number of the same**
10 **assertions made by Mr. Arnett in this proceeding. Principal among these**
11 **falsehoods is that the FCC Rate is a subsidized rate that does not appropriately**
12 **compensate pole owners. As recapped in the preceding section of this testimony,**
13 **such a claim is simply untrue under an objective economic definition of subsidy**
14 **or the legal principle of just compensation. TVA, to my knowledge, did not**
15 **attempt to justify its conclusion in light of these economic principles or judicial**
16 **findings that the FCC Rate is not confiscatory—of which it may not be aware**
17 **given the limited input it received. Second, TVA asserted that pole owners take**
18 **the interests of attaching entities into account in making their capital investment**
19 **decisions. While a common anecdotal argument of pole owning utilities, the**
20 **evidence I am aware does not support that claim. The evidence I have seen is that**
21 **utilities install taller or stronger poles to meet the operational needs of their own**
22 **core electric business such as required to accommodate load growth or to**
23 **maintain reliable electric service, or based on requirements of their joint-use**

⁶¹ See Exhibit PDK-14, Attachment B “Summary of Consideration and Comments Related to Recommendation to TVA Board February 2016.”

1 agreements with other pole owners.⁶² Nor does it appear the power companies
2 provided any empirical evidence to the TVA that would support such a claim.

3 The third principal myth that the TVA took as gospel, despite its obvious
4 refutation, is that the FCC Rate only recovers costs of the space occupied in the
5 usable space. Even Mr. Arnett refutes this claim in his testimony. He
6 acknowledges that the FCC Rate also allocates the costs of the unusable space at
7 the same proportionate share as it allocates costs of the usable space. *See Direct*
8 *Testimony of Wil Arnett at 11.*

9 **Q. What was the outcome of TVA's insular process?**

10 A. The outcome of the TVA's process—a process guided by biased one-sided input
11 and that allowed for misinformation—was the adoption of a highly flawed outlier
12 rate approach—one that is among the most extreme of which I am aware. By its
13 own admission, TVA adopted a rate specifically designed to advance its
14 interpretation of its statutory imperative to keep electric rates as low as feasible.⁶³
15 As such, it adopted a methodology that by design does not take into account the
16 essential facility nature of the pole attachment and the potential harm to
17 communications attachers who need access to that essential facility to provide
18 service, or the interest of the consuming public. I saw nothing in the TVA's
19 description of its approach indicating that it took into account consideration of the
20 economic and public policy principles underlying effective pole rate regulation.

⁶² Evidence from other proceedings I have been involved in, including information from actual construction planning documents and guidelines, indicates pole investment and placement decisions are first and foremost driven by the needs of the core electric service. If and when they build taller/stronger poles it is for their own network integrity or for joint users, not third-party cable attachers like Charter, who pay for taller/stronger poles when they are needed for Charter's attachments.

⁶³ *See Exhibit PDK-14, Attachment A, "Determination by the TVA Board," at 1.*

1 Nor did I see anything acknowledging its own potential anticompetitive motives
2 and conflict, as evidenced by TVA's announcement of a "strategic plan" to
3 deploy its own fiber optic network for commercial purposes.⁶⁴

4 **Q. What aspects of the TVA approach are most problematic economically?**

5 A. Aside from the egregiously high rates produced by the approach which I address
6 below, there are several features of the TVA method which stand out as being in
7 stark conflict with the core economic principles of cost causation underlying
8 effective pole rate regulation. The first non-cost based feature is the TVA's use
9 of a per capita allocation to assign the costs of the common space equally among
10 attachers. The TVA makes no distinction between the pole owner who has total
11 ownership rights and control over the pole network specifically designed and
12 operated to provide electricity, and a third party attacher with extremely
13 subordinate rights of access to the facility. As explained above, a per capita
14 approach bears no relation to the actual incurrence of cost to the owner of hosting
15 an attachment, and to assign costs on an equal per capita basis to attachers makes
16 no sense economically. The second non-cost based feature is the TVA's
17 assignment of 100% of the costs associated with the safety space to
18 communications attachers on the premise that it is unusable to the utility and
19 solely for the benefit of communications. As recapped above, this premise is
20 patently false. Not even the flawed APPA formula, another industry-driven
21 formula designed to serve the self-interest of its public power company members,
22 goes so far as to exclude the pole owner from even a per capita share of the costs

⁶⁴ See TVA Press Release, "TVA Directors Approve \$300M Strategic Fiber Plan," May 11, 2017, available at <https://www.tva.gov/Newsroom/Press-Releases/TVA-Board-Approves-300-Million-Strategic-Fiber->

1 of the safety space. *See* Direct Testimony of Wil Arnett at 26-28. The third
2 feature that stands out as decidedly non-cost based is the TVA's allowance of an
3 annual escalator to be used in lieu of the pole owner's updating of the formula to
4 reflect the most recent annual costs—even if pole costs go down that year. This
5 feature allows the pole owner to arbitrage to its sole benefit whatever rate is
6 higher: the already high one produced by updating the formula, or an even higher
7 one produced by applying the Handy Whitman new utility construction index to
8 the preceding year's rate.⁶⁵

9 **Q. Mr. Arnett refers to a handful of approaches that he asserts are similar to**
10 **the TVA. Does the existence of a few similar approaches justify adoption of**
11 **the TVA resolution in North Carolina?**

12 **A.** Absolutely not. To the contrary, that Mr. Arnett can point to a very few, similar
13 outlier approaches that have very limited applicability or national credibility
14 hardly justifies the adoption of the TVA resolution by the NCUC for Blue Ridge
15 in this proceeding. If anything, the approaches Mr. Arnett cherry-picks only serve
16 to highlight the extreme outlier nature of the TVA. Over the years, disgruntled
17 with the low, competitive level rates produced by the FCC Rate, pole owners and
18 their advocates have come up with and tried to gain traction for a number of
19 theories that would fetch them a much higher monopoly-rate level, typically in the
20 range of \$30 or more. In the Business Court cases, the pole owners presented as
21 many as four alternative approaches to justify the high rates they hoped to charge,

Initiative.

⁶⁵ *See* Exhibit PDK-14, Attachment A, at 2.

1 none of which prevailed.⁶⁶ Blue Ridge have now turned to yet another approach,
2 the TVA approach, which yields rates even higher than the rates rejected as unjust
3 and unreasonable by the Business Court.

4 The first method described by Mr. Arnett as a model for the TVA, the APPA
5 formula, is not a formula approved by a court or regulator. It was developed by
6 the power industry strictly on behalf of its members so there cannot be even a
7 pretense of public interest concern. Of course, in that respect, it is true that the
8 APPA and TVA approaches are similar, because both were developed or
9 influenced largely by advocates for pole owners and geared to achieve monopoly-
10 level pole rates. Mr. Arnett also discusses a formula that he refers to as the
11 "Telecom Plus" formula. The so-called "Telecom Plus" formula is none other
12 than an earlier version of the per capita-based Telecom Formula that was actually
13 passed by Congress, in 1996 which it expanded utility's obligation to provide
14 access to poles to include telecommunications carriers pursuant to the
15 Telecommunications Act of 1996. The difference between the "Telecom Plus"
16 formula (that was not enacted) and the FCC Telecom formula is that the former
17 does not apply the statutorily required application of a 2/3 factor to reduce the
18 share of common costs assigned to the attacher on a per capita basis that was
19 included in the version of the Telecom formula that become law. But like the
20 APPA formula, the "Telecom Plus" formula is not a sanctioned formula. Indeed,
21 it was rejected by Congress in favor of the version of the formula that at the time
22 was expected to produce a rate closer to the FCC Cable Rate. Even so, the FCC

⁶⁶ See, e.g., Charter Answer & Counterclaim at 13-14, citing *Rutherford*, 2014 WL 2159382, at *12-16, and *Landis*, 2014 WL 2921723, at *12-13.

1 along with a number of state commissions have found even with the 2/3 reduction
2 factor in the common cost allocation, the per capita allocation embodied in the
3 Telecom Formula produced excessive pole rates that had a detrimental impact on
4 broadband deployment and accessibility. The FCC in its seminal April 2011
5 Order effectively abandoned the Telecom Formula, by adding a new set of cost
6 reduction factors (.44 in rural areas such as served by Blue Ridge and .66 in urban
7 areas) to the formula that result in a cost allocation factor for the Telecom
8 Formula that is effectively equivalent to the cost allocation factor in the Cable
9 Rate formula.⁶⁷ Mr. Arnett conveniently does not discuss the most recent history
10 with the Telecom Formula and the compelling rationale advanced in the most
11 FCC pole rulemaking proceeding for the convergence of the Telecom and Cable
12 cost allocation.

13 Mr. Arnett mentions one other example of a per capita formula, but one that
14 produces a cost allocation considerably less than the TVA and accordingly, one
15 that he does not support (Arkansas). See Direct Testimony of Wil Arnett at 33-
16 35. I too believe that the Arkansas formula does not allocate costs in a just and
17 reasonable manner, but not for the same reason. Rather it is because that formula,
18 similar to the TVA, is not driven by cost causation principles. The Arkansas
19 formula as originally proposed by the Arkansas Staff in 2008 was modeled on the
20 existing Telecom formula at the time. The only change Staff made to the existing
21 Telecom formula was to treat the safety space as unusable and allocating that
22 space on a per capita basis (rather than on a proportionate basis) among all

⁶⁷ See April 2011 Order.

1 attachers, including the utility (i.e. it presumed 10.17 feet of usable space and
2 27.33 feet of unusable space, rather than the FCC's 13.5 feet and 24 feet,
3 respectively). Otherwise, it kept the FCC Telecom formula intact, including, most
4 notably, the 2/3 cost reduction factor in recognition of the fact primary use of the
5 poles to provide electric service as reflected as well as all the FCC space and
6 height presumptions. When the Arkansas Commission reopened the pole formula
7 rulemaking seven years later, the Arkansas staff merely resubmitted its 2008
8 proposal without any additional cost rationale for doing so. Like Mr. Arnett, the
9 Arkansas Staff in merely resubmitting its 2008 proposal ignored the critical
10 developments that occurred in the landscape for broadband services and the vital
11 role they have grown to play since 2008 and the overwhelming body of evidence
12 presented in the FCC 2011 pole proceeding demonstrating the public interest
13 benefit of abandoning the per capita approach of the Telecom formula in favor of
14 the proportionate based allocation in the Cable Rate formula. Given its original
15 intent in 2008 to adopt the FCC Telecom with only the one change to reclassify
16 safety space from usable to the utility to unusable, it made no sense from a cost
17 principle perspective, not to apply that same logic to the FCC Telecom formula
18 current at the time of the 2015 rulemaking. Had the Arkansas Commission
19 applied its Staff's costing principle to the current FCC Telecom Formula, the
20 resulting cost allocation factor would have been 8.30% for three attaching entities
21 (.44 x 18.86%) or 11.86% for two attaching entities (.44 cost reduction factor x
22 26.96%). Finally, to the best of my knowledge, none of these outlier formulas,
23 including the Arkansas formula, have been used in practice, or to calculate pole

1 rates as high as those identified by the TVA as likely to result. And Mr. Arnett
2 nowhere discusses or accounts for the many decisions of courts and state
3 regulators approving the FCC Rate. *See* Exhibit PDK-7.

4 **Q. How high are the rate levels that TVA identifies as likely to result from its**
5 **approach?**

6 A. The TVA is quite open about the high rate levels its Board resolution produces.
7 This is not surprising since producing high rates was among the key drivers of its
8 approach. According to TVA's own analysis (included in Exhibit PDK-15),⁶⁸
9 rates calculated under its approach are as high as \$85 per pole per year. Several
10 TVA rates are shown in excess of the \$70 mark, and many rates shown to exceed
11 \$45 per pole per year. The rate levels produced by the TVA approach are so high
12 that the pole owners themselves expressed concerns, with some asking for caps or
13 waivers from charging their actual computed TVA rate.⁶⁹ These kind of
14 aberrational situations are to be expected when cost-based formulas like the FCC
15 Rate are modified in ways that stray so far from economic cost causation
16 principles.
17 TVA's highly uneconomic cost allocation percentages in the range of 40 to 50%
18 not only produce unreasonably high rates, they produce rates that can fluctuate
19 greatly based on minor year to year cost differences for a given utility as well as
20 across peer utilities for a given year. TVA's own analysis shows rates ranging
21 from \$17 to \$45 within only one standard deviation of the \$31 mean, for

⁶⁸ *See* Exhibit PDK-15, January 15, 2016 LPC Pole Attachment Rate Regulation at slides 5-6.

⁶⁹ *See* Exhibit PDK-14, January 22, 2016 Memo at 3, Attachment A at 2, Attachment B at 5-6; *see also* Exhibit PDK-15 (email from M. Bernauer to T. Holt re: Pole Attachment Calculation -- Muscle Shoals.xlsx, dated March 7, 2016, stating "I believe the rate is too high . . ."); *id.* (email from E. Bowman to J. Brogdon

1 customers who can be expected to have similar cost structures. This is a very
2 undesirable characteristic for a regulated rate, or for any rate for that matter, as
3 markets operate best with stable, consistent, predictable prices. The FCC Rate, by
4 contrast yields reliable and predictable rates across all types of pole owners and
5 cost structures, as would be expected given the nature of poles.
6 Moreover, with its use of a per capita allocator for unusable space and safety
7 space on the pole, TVA rates will also fluctuate widely based on the presence or
8 absence of other third party attachers—even though from an economic cost-
9 causation perspective, the costs to the pole owner of hosting a third party
10 attachment are the same whether or not there is another entity present. TVA itself
11 demonstrated how a rate could double from \$17.69 to \$34.19 based on differences
12 in the average number of entities, where the space occupied by the attacher and
13 the cost of pole ownership were held constant.⁷⁰ This example perfectly
14 illustrates how a per-capita approach departs from sound economic cost-causation
15 principles. It shows how an attacher could pay widely varying amounts based on
16 factors (the presence or absence of other attachers) that have nothing to do with
17 the space the attacher occupies or the pole owner's underlying costs. Plus the per
18 capita allocator adds an unnecessary layer of complexity and cost from an
19 administrative and regulatory perspective, described in more detail below.
20 The FCC Rate, by contrast yields reliable and predictable rates across all types of
21 pole owners and cost structures, and does not vary with the number of attachers.

re: optional method for calculating "average number of attaching parties," dated February 6, 2016, stating the TVA rate "of about \$58 in the new model . . . would be very difficult to defend and implement").

⁷⁰ See Exhibit PDK-15, Pole Attachment Rate Template Workshop, April -- May 2016 at slide 17.

1 This is illustrated by the fact that Blue Ridge's calculated rates are all in line with
2 those paid to IOUs in the state. This is not surprising given the FCC Rate's
3 grounding in sound economic and public policy. Not only is this beneficial from
4 a cost causation perspective; from an administrative perspective, the FCC Rate is
5 by and far the simplest and least costly to administer and update annually.

6 **Q. Did Mr. Arnett properly calculate rates for Blue Ridge under the TVA**
7 **approach as you understand it based on TVA's own calculation guidelines?**

8 A. While Mr. Arnett may have followed the TVA approach insofar as the
9 computation of the formula goes, I believe he erred in the manner by which he
10 substituted utility data in lieu of TVA presumptive values (values consistent with
11 widely accepted FCC presumptions). In this case, Mr. Arnett has modified the
12 TVA's already flawed formula further in such a way so to produce rates that are
13 even more unjust and unreasonable by making selective, inappropriate, and
14 unsupported substitutions of data for the widely applied presumptive inputs for
15 pole characteristics and appurtenances that Mr. Arnett himself relied upon in the
16 Carteret-Craven, Jones-Onslow, Surry-Yadkin, and Union Power cases.

17 **Q. Please explain.**

18 A. As discussed earlier in my testimony, the FCC presumptive values are widely
19 used, generically applicable values that had held up well over the test of time.
20 Their use is designed to further streamline the formula process, reduce regulatory
21 administrative burden, and deter "results-driven" manipulation of the formula's
22 data inputs such as would appear Mr. Arnett has done in his TVA Rate
23 calculations. As mentioned earlier in my discussion of the Cable Rate, Mr. Arnett
24 choose to apply a BRMEC value for the appurtenance factor (87.41% for 2016

1 rather the presumptive value of 85%). In addition, he substituted BRMEC values
2 for pole characteristics, including pole height (36.87 feet versus the presumptive
3 value of 37.5 feet), unusable space (27.26 feet versus the 27.33 feet based on the
4 presumptive value of 24 feet plus 3.33 safety), and space occupied (1.11 feet
5 versus 1 foot). While these variations may seem small, in combination with his
6 use of a BRMEC specific number of attaching entities figure of 2.35 in lieu of the
7 presumptive number of 3.0, the effect of Mr. Arnett using these alternative data
8 inputs has a very dramatic impact on the derived space allocation factor. As
9 shown in WA Exhibit 2.3, Mr. Arnett's rate calculations use a space allocation
10 factor of 41.16%, as compared with the already excessive factor of 28.44% based
11 on the presumptive values. The result of his manipulations is to increase the
12 already-high TVA rate (based on a 28.44% allocation factor) by an incredible
13 45%. In addition to the fact that his data substitutions create a space allocation
14 factor that is multiples of any sanctioned space allocation factor ever applied to
15 regulated pole attachment rates that I am aware, Mr. Arnett's substitutions are
16 inappropriate and unjustified in a number of respects.

17 First, he has applied his substitutions selectively in ways that demonstratively
18 favor the EMC. This provides an unfair advantage where the EMC has the
19 leverage over the attacher, since the EMC is in possession of the data to rebut a
20 presumption. If allowed to make substitutions at its discretion, the EMC or its
21 experts will be incited to choose to do so only when it produces a higher rate
22 result, and never a lower one. As mentioned earlier, Mr. Arnett chose not to
23 substitute the BREMC specific rate of return of 5% that was available to use,

1 keeping instead the 8.5% default value set by the TVA. That substitution would
2 have lowered his derived rate substantially. I would also note that in the prior
3 Coop-related matters before this Commission in which Mr. Arnett participated,
4 Mr. Arnett had access to appurtenance data for at least a couple of those EMCs
5 that he seemingly chose not to apply. Based on my calculations applying the
6 actual appurtenances to those EMCs would have resulted in a lower pole rate for
7 two of the three for which data was available.

8 Second, as to his substitutions of the various BREMC pole characteristic input
9 figures, his values are not necessarily representative of the relevant population of
10 joint use poles. Mr. Arnett admitted in deposition questioning, that the data he
11 reviewed and relied on was not specific to those poles that had third party
12 attachers present on them.⁷¹ A large part of the reason why presumptions are so
13 heavily relied upon is the significant amount of resources involved to track data at
14 the level of detail required to provide a statistically reliable rebuttal of the
15 assumptions – as required to ensure against any manipulation of the formula
16 inputs. The presumptive values were based on an extensive data collection effort
17 and have withstood the test of time as applicable to joint use poles with third party
18 attachers present on the poles.] Even the TVA process to my understanding
19 requires its Staff to vet any rebuttal of presumptive values, and to my knowledge,
20 Mr. Arnett's inputs have not been put to that scrutiny.

21 Third, I would note that Mr. Arnett's adjustment to the unusable space input to
22 account for BREMC's purported higher than average foot span resulting in the

⁷¹ See Arnett Deposition dated October 25, 2017, at pages 113-115 (attached as Exhibit PDK-10).

1 need for attachers to attach higher on the pole to ensure ground clearance, as
2 previously recognized by the FCC,⁷² is likely to result in the double recovery of
3 costs. This is because, as explained above, attachers pay for the complete costs
4 associated with maintaining or creating the proper amount of clearance for their
5 attachments through the make ready process.

6 Finally, with regard to Mr. Arnett's use of 1.1 for space occupied on the pole by
7 Charter in lieu of the presumptive one foot of space, Mr. Arnett is inappropriately
8 mixing a rating or contractual issue with a costing one. He does not appear to be
9 disputing the almost universally accepted presumptive value of 1 foot per
10 attachment, generally or as it applies to Charter. Rather, the basis for his 1.1
11 figure, as I understand it, is to reflect the fact that on a small percentage of poles,
12 Charter may have multiple attachments. *See* Direct Testimony of Wil Arnett at 21.
13 The latter is a rating and contractual issue, and is not appropriately dealt with by a
14 unilateral decision to alter the formula methodology as Mr. Arnett appears to have
15 done. In addition to confusing rating and costing issues, Mr. Arnett's
16 methodology would add yet another piece of input data to the formula that would
17 require significant resources to be able track and verify at the level of detail
18 required into a formula process intended to be a streamlined non- burdensome
19 administrative process.

⁷² *See Amendment of Rules & Policies Governing Pole Attachments*, Report & Order, 15 FCC Rcd 6453, 6472 ¶ 30 (2000).

1 **Q. Do you wish to respond to Mr. Arnett's testimony addressing the impact of**
2 **BREMC's proposed pole attachment rates on Charter's broadband**
3 **operations? (See Direct Testimony of Wil Arnet at 44-45)**

4 **A. Mr. Arnett sets up a red herring argument on the important public policy issue**
5 concerning the connection between pole attachment rates and Charter's
6 broadband operations. No one is suggesting that the deployment or adoption of
7 broadband service is totally dependent on the FCC Rate being used. Obviously
8 that is not the case; broadband is just too important a service and too dynamic a
9 market. Rather the policy concern for regulators is that when pole owners are left
10 to their devices, they want to charge high rates such as those produced by the
11 TVA or one of the other outlier approaches that Mr. Arnett describes. The
12 problem is those high rates will have a dampening effect on the development of
13 robust competition and as importantly, on the continuing pace and quality (i.e.,
14 higher and higher speeds) of broadband service deployment and adoption rates—
15 especially out into rural and less densely populated areas where economic
16 conditions are less favorable.⁷³
17 As I explain above, high rates relative to their economic cost of production
18 operate just like a tax. It is a basic tenet of economics that a tax will ultimately be
19 factored into the price of the product, and will serve to discourage both the
20 provision of and demand for the product and any other good or service that relies
21 on it. This is true of any intermediate or final good or service and broadband is no
22 exception. Just think about the response to a governmental decision to levy a tax

⁷³ The 2015 Report of the North Carolina Department of Information Technology (attached to as Exhibit PDK-6) makes this point, noting its concern with the relatively low ranking of the state in regard to the deployment and adoption of the ever increasing FCC suggested threshold definition of advanced telecommunications capability.

1 on a key input used by producers in the state in providing a product that is
2 important to consumers and the economic growth of the state—a tax that had the
3 effect of doubling, tripling, or quadrupling the price of that input. To put it into
4 perspective, the FCC in 2011 abandoned its old Telecom Formula because it
5 produced rates for the critical pole attachment input the FCC found would impede
6 broadband deployment and adoption. Yet the rates produced by the TVA are
7 many multiples of those produced by the FCC’s retired approach.

8 X. CONCLUSION

9 Q. Does this conclude your responsive testimony?

10 A. Yes, it does.

1 (Whereupon, Exhibits PDK 1-15
2 were identified as premarked.)

3 Q Ms. Kravtin, do you have a summary of your
4 testimony?

5 A Yes, I do.

6 Q Please go ahead and give it.

7 A Thank you. Good afternoon. It's a pleasure to
8 be back before the Commission. Thank you for this
9 opportunity. I am principal and owner of Patricia D.
10 Kravtin Economic Consulting. I am a trained economist
11 with a BA in Economics with honors from the George
12 Washington University, and at the graduate level I
13 studied in the Ph.D. program in Economics at MIT under a
14 National Science Foundation Fellowship. At MIT, I
15 completed all course requirements for the Ph.D. degree.
16 I passed oral and written examinations in the specialized
17 fields of Government Regulation of Industry, Industrial
18 Organization, and Urban and Regional Economics. I have
19 35 years of professional experience specializing in
20 communications and energy markets and regulation. Over
21 the course of my career, I've been involved in numerous
22 state and federal regulatory commission proceedings
23 dealing with the rates charged by utilities in exchange
24 for access to essential facilities, including poles,

1 ducts, conduits, and right-of-ways. I have served on
2 (sic) an expert on pole attachment matters in state and
3 federal courts, have been qualified as an expert,
4 including the North Carolina Business Court and before
5 this Commission.

6 Blue Ridge's witness, Mr. Arnett, calculates a
7 proposed pole attachment rate of between 26 to \$27,
8 almost five times the widely used regulate -- regulated
9 rate that I calculate for Blue Ridge in the range of 5 to
10 \$6, my rate being right in line with the average rates of
11 \$7.20 and \$3.24 cents that Charter pays to IOUs and ILECs
12 in the state. Primarily, the reason for this huge
13 difference between Mr. Arnett's rate and my own is the
14 way the common or indirect costs of owning and
15 maintaining a pole are being allocated to third-party
16 attachers. I rely on the rate method applied by the FCC
17 and used in 45 of the 50 states and the District of
18 Columbia for decades, including a majority of states that
19 regulate pole attachments, including those of co-ops and
20 munis, and I have provided a listing of those states in
21 Exhibit 7 of my testimony. And Mr. Arnett relies on an
22 untested method recently used by the TVA for its
23 wholesale electric customers and developed through a
24 process that just really took an input from those

1 customers and their advocates. So in all respects, it
2 really is an industry driven formula.

3 Both the FCC method and the TFA -- TVA method
4 allocate the cost of a so-called usable space -- and
5 we're talking about the space toward the top of the pole
6 that is usable for attachments and also for revenue
7 generating purposes -- according to the percentage of
8 usable space occupied by a third-party attachment, so
9 it's, to be clear, this usable space that is allocated on
10 a direct basis. The other parts of the pole, as I will
11 discuss, are not. So this is a percent of the revenue
12 generating space foreclosed to the pole owner for other
13 uses or revenue generating activities by the attachment.
14 The FCC method then applies the same proportionate direct
15 cost allocator consistently to the cost of the entire
16 pole, including indirect or common cost of poles. The
17 FCC approach applies to IOUs and ILECs in North Carolina
18 and is widely used, as I mentioned, by utility
19 commissions across the country that regulate pole
20 attachments, again, not just of IOUs and ILECs, but
21 co-ops and munis as well.

22 To illustrate, I prepared a couple of slides
23 that demonstrate how the FCC pro rata method consistently
24 allocates costs associated with both the usable revenue

1 generating space and the common or unusable space to
2 Charter. So if we could get those slides up, I have
3 copies prepared.

4 MR. GILLESPIE: Apparently, the -- our ability
5 to access that overhead is not working, but I believe
6 that each of the Commissioners have been provided copies
7 of the slides, so you can discuss them.

8 A Okay. So if we look at page 1 of the handout,
9 and on the left side of the page, we look at how the
10 costs of usable space are allocated. And as I mentioned,
11 it's allocated on a direct occupancy basis. So the
12 direct costs we're using accepted presumptions. One (1)
13 foot of space occupied by Charter directly is allocated
14 on the percentage basis. It's 1 over 13-1/2 percent, or
15 7.41 percent. That same percentage is then applied to
16 allocate the cost of common space on the pole. We are
17 not allocating space, but we're using the direct space
18 allocator to allocate the cost associated with common
19 cost, which by definition are costs that do not vary by
20 user. So we need an indirect method to apply and
21 allocate the costs.

22 So the FCC method uses the same allocator that
23 drives from a direct use, and so those percentages are
24 shown, 7.41 percent for Charter. If you apply those --

1 basically the same allocation method, it's imputing
2 approximately 77.8 percent of the cost of that space to
3 the pole owner and 14.8 percent to the Telco, based on a
4 presumption that the Telco is on 2 feet of space.

5 Then if we turn to the next page, obviously, if
6 we're using a 7.41 percent allocator to allocate usable
7 space, again, based on direct occupancy, we're using that
8 same allocation to allocate the cost of common space.
9 Then on an aggregate basis, the FCC rate would allocate
10 cost at the rate of 7.41 percent. And, similarly, for
11 the other entities, it would impute an allocation of 77.8
12 percent to the utility and 14.8 percent to the Telco.

13 The FCC method of allocating common costs,
14 again, these are costs that cannot be directly assigned,
15 and so there was a misleading discussion I think with Mr.
16 Martin in that we're not talking about the allocation of
17 space; we're talking about using a direct cost allocator,
18 which is 1 over 13-1/2 percent of the usable space as a
19 means of allocating in an economic way costs that, by
20 definition, cannot be directly allocated. This method
21 best aligns with widely accepted core economic cost
22 principles well recognized in the economic literature,
23 the courts, and in federal and state pole regulatory
24 proceedings for decades, and this includes the FCC's

1 recent 2011 pole rulemaking proceeding. I cited my
2 testimony in which these cost causation principles were a
3 cornerstone of the FCC's decision to abandon the original
4 telecom formula, which had a per capita method similar to
5 that using the TVA, but augmented in a way even less
6 consistent with cost causation principles in favor of the
7 FCC's longstanding pro rata method.

8 The FCC proportionate pro rata method is
9 commonly used in a number of cost allocation contexts,
10 such as by this Commission in a co-location matter cited
11 in my testimony. The FCC's proportionate method is also
12 how markets work to typically allocate common costs of a
13 shared facility where there are common costs, again, that
14 don't vary with use and so it cannot be directly
15 allocated, as can be the direct -- the direct space. And
16 this is a key underpinning of economic regulation, is
17 that the idea is to, where there's a market failure due
18 to market power, that you want to mimic the result of an
19 effectively competitive market. That's an efficient
20 outcome that gets to a result that maximizes public
21 welfare and the public interest, and in a competitive
22 market, where there are enough sellers and buyers that
23 prices are bid down closer to marginal costs. And so
24 this methodology is the best way to mimic that

1 competitive market of goal of efficiency.

2 So under the direct cost approach, common
3 costs, costs that go -- that by their nature cannot be
4 assigned to a user directly, are assigned on the same
5 percentage basis or pro rata share as direct costs. For
6 example, where you have common costs of a building, we're
7 talking about things like elevators, lobbies, garages,
8 you wouldn't allocate those on an equal per capita basis
9 to a tenant who's occupying only a small percentage of
10 the floors. Yes, all the tenants use or need access to
11 those common facilities, but it's not an economically
12 just and reasonable or efficient way to assign it on a
13 per capita basis as a TVA does.

14 Another example we might be familiar with,
15 common areas of malls, again, that have facilities like
16 escalators, elevators, stairwells, restrooms, the list
17 continues, that cannot be directly allocated. And,
18 again, very common, they're allocated according to the
19 tenant's pro rata share. A small tenant -- a tenant with
20 a small storefront wouldn't be allocated the same as an
21 anchor tenant. It's the way the IRS allocates the
22 overhead of home ownership, where some portion is used
23 for a home office. It's not divided half between the
24 residential function and the business function. The IRS

1 requires it be allocated on a proportionate pro rata
2 basis. It's the way the FCC allocates costs under Part
3 64 of its rules pertaining to allocation, generally among
4 affiliates or between regulated and unregulated
5 activities. Again, it's the way this Commission
6 allocated the cost of providing security for CLECs, or
7 competitive local exchange carriers, that occupied a
8 portion of an ILEC central office facility.

9 The FCC method has been adjudged just and
10 reasonable and subsidy free by the North Carolina
11 Business Court and affirmed by the North Carolina Court
12 of Appeals. The business court's finding that the FCC's
13 fully allocated rate, in combination with additional make
14 ready and direct reimbursement fees to be subsidy free,
15 is consistent with well established economic principles,
16 that define subsidy relative to an objective marginal
17 cost benchmark, not a subjective view of what might feel
18 to be a subsidy or to lower rate. Economics provides a
19 very objective framework with which to judge whether a
20 rate is a subsidy or not. And I think that is a key
21 feature, that we -- that we build in objective benchmarks
22 so that we avoid some of the subjectivity or the problems
23 with subjectivity that might enter into a cost allocation
24 based methodology.

1 And I would also suggest it's important to keep
2 track that the FCC method is, in fact, a two-part
3 recovery method. We focus a lot on the recurring rate,
4 but that is a rate that applies in addition to the true
5 -- what would be truer but for out-of-pocket costs that
6 would be recovered through make ready and other direct
7 fees, such as we've heard about through this hearing,
8 where Charter has to pay additional costs associated with
9 its attachments if required -- if the utility is required
10 to put in a taller or stronger pole. So the recurring
11 rate is really in addition to additional contribution
12 over and above those other costs. So taken together,
13 it's been demonstrated time and time again that it's not
14 a subsidy rate by objective economic benchmarks, and has
15 been confirmed in regulatory proceedings and the courts,
16 including up to the Supreme Court.

17 Also significant is that the FCC methodology
18 has been strongly endorsed by the Commission's peer
19 regulators and advocates, NARUC, of which this Commission
20 is a member, and NASUCA, an organization of public
21 advocates. Like the Commission, these organizations
22 serve as stewards of the greater public -- greater public
23 interest. They are not beholden to any one particular
24 stakeholder, be that the communication companies or the

1 electric companies. Their mission is to protect the
2 public interest. Both groups have come out with very
3 strong support of the FCC rate being in the public
4 interest and being a sound subsidy-free methodology. The
5 same cannot be said of the TVA, who's stated motivation
6 in their memorandum adopting their formula was a desire
7 to keep its wholesale electric customer electric rates
8 low by increasing revenues from other sources.

9 So the problem is that TVA's parochial mission,
10 and it is their mission, but the problem is that it does
11 not align with the greater public interest, and that's --
12 that's a big key difference with the FCC rate. While
13 it's true the FCC rate -- and one of the advantages of it
14 is to promote broadband competition and affordability of
15 this very key service, that's clear, but that's not --
16 that's an additional benefit. It's not the overriding
17 reason or foundation for that formula. Its foundation
18 goes to the fact that formula best serves the purpose of
19 the economic regulation of poles in the first place,
20 which was to prevent monopoly abuses of an essential
21 facility and also to do so in a way that creates the
22 greater public interest and most mimics the competitive
23 market in producing an efficient -- an efficient rate.

24 Indeed, the co-ops' own national association,

1 NRECA, advises that the FCC approach is unimpeachable.
2 The TVA approach, by contrast, is uneconomic,
3 unpredictable, unreasonable, and also administratively
4 burdensome rate methodology. It requires a lot of input
5 and interaction, and things that have not been tested in
6 court or even in practice as to how the TVA rate would be
7 -- would be implemented. The unpredictability of the TVA
8 approach is exacerbated here by the fact that Mr. Arnett
9 doesn't use the TVA's factual presumptions that are
10 embedded into the formula. He rejects the assumptions,
11 comes up with his own, with the result being his proposed
12 rate is between 44 to 45 percent higher than the already
13 high rate the TVA method would drive by applying its
14 factual presumptions.

15 The TVA method is an extreme outlier in terms
16 of both the aberrationally high percentages of pole costs
17 that are being allocated to attachers. And, again, it's
18 an objective benchmark of an effectively competitive
19 market standard and the resulting pole rates that it
20 produces; in fact, rates so high that its own members
21 expressed concern to the TVA. And, again, the TVA --
22 it's not helpful to benchmark the TVA relative to other
23 industry driven formulas that also have that same
24 motivation. Instead, it should be benchmarked against

1 the majority of states that regulate pole attachments and
2 have used a rate at the level of the regulated rate or
3 close to it.

4 I prepared a couple of slides to contrast the
5 TVA method with the FCC, and so if we turn now to the
6 third page of the handout, okay, and we'll look at the
7 first page which, again, breaks out usable space which
8 can be allocated on a direct basis, in other words,
9 according to the space. That's the only component that
10 it makes sense to allocate based on space. Okay. And as
11 shown in the slides, unlike the FCC, which uses a
12 consistent and straightforward proportionate allocator to
13 allocate the costs of the entire pole, the TVA requires
14 three distinctly calculated cost allocations to derive
15 the rate. Costs associated with the usable space on the
16 pole -- that's on the left -- the left chart -- totals
17 37.15 percent, and that's derived 3.57 feet over 9.61
18 feet of usable space. It's derived in two parts. The
19 1.1 feet of direct attachment, the markup of 10 percent
20 is Mr. Arnett's way of capturing his belief that Charter
21 has multiple attachments on some poles. But, anyway, so
22 the 1.1 -- that small difference. The 1.1 feet of direct
23 attachment, and then an additional 2.47 feet from a per
24 capita allocation that includes the utility share of the

1 3.3 -- excuse me -- excluding the utility from that of
2 the 3.33 feet of safety space. Now, by comparison, Mr.
3 Arnett's calculation you see would effectively allocate
4 the residual, only 4.4 feet, 46.62 percent of usable
5 space to Blue Ridge, and that is far less than what Blue
6 Ridge claims they use, which again, is -- is
7 demonstration of the excessive allocations going to the
8 third-party attachers. It's only leaving 4.8 -- 4.48
9 feet effectively to the utility. Despite the fact that
10 Blue Ridge is the only attacher that can attach and
11 garner space from the safety space, it's excluded from
12 that per capita allocation.

13 Now, on the right side of the chart, costs
14 associated with the unusable space are allocated also on
15 a per capita basis, but in this part, the pole owner is
16 included in the allocation. And after you account for
17 the presence of the Telco, which is on, according to
18 their data, 35 percent of the poles to which Charter is
19 attached, what you see is that Charter and Blue Ridge are
20 each allocated 11.59 percent of the total 26 -- 27.26
21 feet presumed by Mr. Arnett. So they're each getting an
22 allocation, an equal share, of usable space of 42.55
23 percent, despite Blue Ridge's disproportionately greater
24 use and also its privileges of ownership compared to

1 Charter's very inferior contingent rights to the space.
2 We've heard a lot about it this hearing.

3 So unlike the example of a building or a mall,
4 you're seeing that the common space is being allocated by
5 the TVA method in a rate method that isn't economically
6 supportable, either in terms of the theory of economic
7 regulation of trying to come up with a rate that would be
8 a competitive benchmark or what we see in markets by
9 allocating essentially an equal -- an equal share to an
10 occupant of a small amount of usable space and with
11 limited rights to one that has primacy of the pole.

12 And then we'll now turn to the final page where
13 you combine the allocations of the usable space and the
14 unusable space. And in totality, what the TVA rate, as
15 calculated by Mr. Arnett, does is allocate on an
16 aggregate basis 41.16 percent to Charter and a very close
17 43.59 percent to Blue Ridge, with some remainder going to
18 the Telco, again, assuming it's on 35 percent of the
19 poles.

20 From an economic perspective, excessively high
21 pole attachment rates, such as derived by the TVA, as Mr.
22 Arnett has calculated in particular, it distorts the
23 market to the overall detriment of the public good,
24 taking into consideration, in particular, the totality of

1 public interest impacts. They're both direct economic
2 impacts on the market, but also multiplier effects as an
3 uneconomic and unefficient rate moves through the economy
4 and impacts on -- on jobs and innovation and productivity
5 and all the other aspects of market failure that happen
6 from an excessive -- excessive rate, and also including
7 interfering with the ability of broadband providers who
8 require access to the essential pole attachment input to
9 provide service and to compete in a fair and neutral
10 manner. And this ability to compete in a fair and
11 neutral manner is a key underpinning of what economic
12 regulation of poles, from its inception -- inception, and
13 continuing to the present day, is intended to do.

14 Thank you so much for this opportunity.

15 MR. GILLESPIE: Mr. Chairman, the witness is
16 available for cross examination.

17 CHAIRMAN FINLEY: All right. It's 4:52.
18 You've got an hour's worth of cross examination?

19 MR. MILLEN: At least, yeah. At least.

20 CHAIRMAN FINLEY: Then we'll have redirect
21 examination, then we'll have Commission questions, and
22 then we'll have questions on the Commission's questions.
23 So we're going to break today and come back another day.
24 I will tell you that the week of Thanksgiving, much to

1 the chagrin of some of my colleagues here, we're going to
2 start a very complicated and probably long-lasting Duke
3 Progress general rate case that has some contested issues
4 in it. And I don't know how long that case is going to
5 last, and that's going to sort of dictate what the
6 Commission's schedule looks like. I have checked, in
7 anticipation that we might reach this point. That case
8 will carry on into the week of November the 27th, and
9 should it conclude before that week is out, we'll be
10 looking toward the end of that week. Otherwise, we're
11 into December. And what we'll have to do is play it by
12 ear and give you all some dates when to come back.

13 MR. GILLESPIE: Thank you.

14 CHAIRMAN FINLEY: Now, let me raise other --
15 raise -- we can go off the record, Madam Court Reporter.

16 (Off-the-record discussion.)

17 CHAIRMAN FINLEY: We're adjourned for this
18 afternoon.

19 (The hearing was adjourned, to be
20 reconvened at a later date.)

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STATE OF NORTH CAROLINA

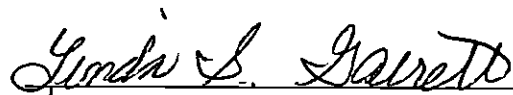
COUNTY OF WAKE

C E R T I F I C A T E

I, Linda S. Garrett, Notary Public/Court Reporter,
do hereby certify that the foregoing hearing before the
North Carolina Utilities Commission in Docket No. EC-23,
Sub 50, was taken and transcribed under my
supervision; and that the foregoing pages constitute a
true and accurate transcript of said Hearing.

I do further certify that I am not of counsel for,
or in the employment of either of the parties to this
action, nor am I interested in the results of this
action.

IN WITNESS WHEREOF, I have hereunto subscribed my
name this 2nd day of December, 2017.



Linda S. Garrett

Notary Public No. 19971700150

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N.C. Utilities Commission