STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EC-23, SUB 50

Blue Ridge Electric Membership Corporation, Complainant v. Charter Communications Properties, LLC, Respondent.	)	**CHARTER COMMUNICATIONS PROPERTIES, LLC'S ANSWER TO COMPLAINT AND COUNTERCLAIMS**

Respondent Charter Communications Properties, LLC ("Charter") respectfully submits this Answer to the November 30, 2016 Verified Complaint and Petition for Relief ("Complaint") filed by Blue Ridge Electric Membership Corporation ("BREMC" or "Cooperative") and files counterclaims to address additional disputed issues.

PRELIMINARY STATEMENT

BREMC's premature Complaint against Charter was filed in the midst of what Charter considered to be on-going and cooperative negotiations for a new pole attachment agreement ("Agreement"). BREMC's failure to fully engage with Charter led to a Complaint that misstates Charter's positions, reneges on agreed-to terms and includes issues that Charter did not dispute at all. Even after the Complaint was filed, Charter reached out to BREMC in an effort to narrow the issues, but, to no avail. As a result, Charter has little choice but to file this Answer and Counterclaim.[1]

[1] Charter remains willing to try and negotiate the agreement terms and conditions. One area where the parties will likely require Commission assistance relates to the excessive pole attachment rate that BREMC seeks to impose on Charter. Pole attachment rates are also the subject of Time Warner Cable Southeast LLC v. Jones-Onslow Electric Membership Corporation (Docket No. EC-43, Sub 88), Time Warner Cable Southeast LLC v. Surry-Yadkin Electric

In order to provide its services, Charter maintains and installs attachments on cooperatively-owned poles throughout the state, including on poles owned by BREMC. Owing to a variety of economic, environmental, aesthetic, local zoning and right-of-way restrictions, cable operators do not have a practical alternative to relying on existing utility pole networks owned by electric and telephone utilities in any given locality to construct their communications networks. Courts, legislatures and administrative agencies have long recognized this reality. As the United States Supreme Court observed, "[c]able television operators, in order to deliver television signals to their subscribers, must have a physical carrier for the cable; in most instances, underground installation of the necessary cables is impossible and impractical. Utility company poles provide, under such circumstances, virtually the only practical medium for the installation of television cables." *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987).[2] Once cable operators have constructed their aerial networks on existing pole infrastructure, they are essentially captive because it would be prohibitively expensive and impractical (or impossible) to rebuild those networks underground or install their own poles. As a result, pole owners, including BREMC, have

Membership Corporation (Docket No. EC-49, Sub 55), Time Warner Cable Southeast LLC v. Carteret-Craven Electric Membership Corporation (Docket No. EC-55, Sub 70), and Union Electric Membership Corporation v. Time Warner Cable Southeast LLC (Docket No. EC-39, Sub 44). Charter is willing to await the outcome of those cases in order to determine the appropriate rate formula to apply in this case.

[2] *See also Georgia Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033, 1036 (11th Cir. 2003) (noting "lack of alternatives to these existing poles"); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002), *cert. denied*, 540 U.S. 937 (2003) (utilities are "the owner of . . . 'essential' facilities" for cable operators); *Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002) ("As a practical matter, cable companies have had little choice but to" attach "their distribution cables to utility poles owned and maintained by power and telephone companies."); *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 576-77 (D.C. Cir. 2002) ("Since building new poles was prohibitively expensive, cable operators instead leased existing space from utilities . . . .").

superior bargaining power over cable companies when negotiating pole attachment agreement rates, terms and conditions.[3]

The North Carolina General Assembly recognized that pole owning cooperatives have superior bargaining power over attachers and passed N.C.G.S. § 62-350 to stem abuses related to pole attachments rates, terms and conditions. *See* N.C.G.S. § 62-350(a) (requiring cooperatives to allow communications service providers to use cooperatively-owned poles "at just, reasonable and nondiscriminatory rates, terms and conditions adopted pursuant to negotiated or adjudicated agreements."). When parties are unable to reach agreement through negotiation, they may seek assistance from the Commission which is vested with authority to resolve disputes over pole attachment rates, terms and conditions.

In addition to answering BREMC's Complaint, Charter asks the Commission to reject the pole attachment rates imposed by BREMC as unjust and unreasonable, inconsistent with the public interest, and in violation of N.C.G.S. § 62-350, and set rates calculated in accordance with the widely used (including in North Carolina), fully compensatory cable pole attachment rate formula specified by Congress and implemented by the Federal Communications Commission throughout much of the Nation. Charter also requests that any over-payments made since 90 days after negotiations began on April 20, 2015 related to a new pole attachment agreement be returned, with statutory interest.

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[3] *See Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 FCC Rcd. 7099, ¶ 14 (1991) (When passing the federal Pole Attachment Act "Congress was concerned with abusive conduct by the utilities. For example, the relevant Senate report refers to testimony received in committee concerning: 'the local monopoly in ownership or control of poles' by the utilities; the 'superior bargaining position' enjoyed by utilities over cable operators in negotiating rates, terms and conditions for pole attachments; and allegations of 'exorbitant rental fees and other unfair terms' demanded by the utilities in return for the right to lease pole space. As the Senate report and case law bear out, Congress clearly acted to protect cable operators from anticompetitive conduct by utilities.") (internal citation omitted).

ANSWER TO COMPLAINT

For its Answer to the Complaint, Charter states and alleges as follows:

PARTIES

1. Charter is without knowledge or information sufficient to form a belief as to the truth of the allegations asserted in Paragraph 1 of the Complaint and therefore denies those allegations. Answering further, Charter admits that BREMC owns utility poles in its service coverage area and operates for the benefit of its electric customers.

2. Charter is without knowledge or information sufficient to form a belief as to the truth of the allegations asserted in Paragraph 2 of the Complaint and therefore denies those allegations.

3. Charter admits the allegations of Paragraph 3 to the extent that it defines Charter as a Delaware limited liability company, and a communications service provider. Charter's mailing address is 12405 Powerscourt Drive, St. Louis, Missouri, 63131. Charter further states that it uses utility poles, ducts and/or conduits owned and/or controlled by BREMC to provide communications services in Alleghany, Ashe, Caldwell, and Watauga counties in North Carolina.

BACKGROUND

4. Paragraph 4 of the Complaint states legal conclusions to which no response is required. Answering further, to the extent a response is deemed required, Charter admits that the federal Pole Attachment Act, 47 U.S.C. § 224, granted the Federal Communications Commission jurisdiction to ensure the rates, terms and conditions for pole attachments are just and reasonable and that the 1996 amendments to the Act granted both

cable and telecommunications service providers an affirmative right of nondiscriminatory access to poles, ducts, and conduits owned or controlled by utilities.

5. Paragraph 5 of the Complaint states a legal conclusion to which no response is required. Answering further, to the extent a response is deemed required, Charter admits that the federal Pole Attachment Act, 47 U.S.C. § 224, does not subject cooperatively organized utilities to the pole attachment jurisdiction of the Federal Communications Commission.

6. Paragraph 6 of the Complaint states a legal conclusion to which no response is required. Answering further, to the extent a response is deemed required, Charter admits that North Carolina General Statute Section 62-350 governs the attachments of cable and telecommunications service providers to poles of North Carolina's member-owned cooperatives.

7. Paragraph 7 of the Complaint states a legal conclusion to which no response is required. Answering further, to the extent a response is deemed required, Charter states that Section 62-350 speaks for itself.

8. Charter admits the allegations of Paragraph 8 of the Complaint that it entered into a pole attachment license agreement with BREMC in 2003 to use BREMC's poles to provide communications services to customers within BREMC's territory. Charter further admits that the parties have worked collaboratively to ensure their systems are maintained safely.

9. Charter admits the allegations of Paragraph 9 of the Complaint to the extent that it states the parties have been engaged in ongoing negotiations over a new pole

attachment license agreement since April 2015 and further admits that some issues remain unresolved.

10. With respect to Paragraph 10 of the Complaint, Charter admits that 90 days have elapsed since negotiations began in April 2015, but denies BREMC's allegations in other respects. Charter submitted a redline of the agreement to BREMC in May 2015 and the parties have since discussed the proposed revisions both in person and through written electronic correspondence. Charter denies that the parties are at an impasse on certain issues and therefore denies in part the allegations of Paragraph 10 of the Complaint as described further in Paragraph 11 of the Complaint.

ISSUES IN DISPUTE

11. **Terms and Conditions of New Pole Attachment License Agreement**. Paragraph 11 states legal conclusions to which no response is required. To the extent a response is deemed required, Charter denies these allegations. With regard to the specific issues identified by BREMC, Charter responds:

a. Disputed Invoices. Charter admits the allegations of the first three sentences of Paragraph 11(a) of the Complaint. Charter denies the remaining allegations of Paragraph 11(a) of the Complaint.

b. Permit Application and Fee. Charter admits that Charter and BREMC agree attachments should continue to be permitted, reviewed, and poles will be made ready to accommodate attachments in accordance with engineering plans the parties agree upon as alleged in Paragraph 11(b) of the Complaint. Charter denies the remaining allegations of Paragraph 11(b) of the Complaint.

c. Certification of Pole Attachment. Charter admits that its pole attachments must be of sound engineering design and comply with safety specifications as alleged in the first sentence of Paragraph 11(c) of the Complaint, but disagrees with the remaining allegations regarding confirmation and certification in the first, second and fourth sentence of the Paragraph 11(c). Charter is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding BREMC's position and reasoning as

stated in the third, fifth and sixth sentences of Paragraph 11(c) of the Complaint and therefore Charter denies those allegations. Charter denies the remaining allegations of Paragraph 11(c) of the Complaint.

d. Maintenance and Transfers. Charter admits the points of agreement and disagreement alleged in the first two sentences of Paragraph 11(d) of the Complaint, but denies the allegations in the third and fourth sentence. Charter admits the points of agreement and disagreement alleged in the fifth, sixth and seventh sentences of Paragraph 11(d) of the Complaint, *i.e.*, the parties agree that a permit for an attachment transfers with an existing attachment when an attachment is transferred to a replacement or relocated pole, Charter is responsible for the cost associated with transferring those attachments, but that the parties disagree over the consequences of failure to timely complete the transfer. Charter denies the remaining allegations of Paragraph 11(d) of the Complaint.

e. Non-Compliant Attachments. Charter admits that the parties agree that Charter must develop a plan for corrective action and disagrees over the timeline and course of that plan, and denies all other allegations of Paragraph 11(e) of the Complaint.

f. Insurance. Charter admits to the first sentence of Paragraph 11(f) of the Complaint that Charter should be obligated to provide insurance coverage and that the parties disagree to the extent of the insurance coverage. Charter denies the allegations of the second sentence of Paragraph 11(f) of the Complaint. Charter is without knowledge or information sufficient to form a belief as to the truth of the allegations asserted in the third, sixth, and seventh sentences of Paragraph 11(f) of the Complaint and therefore denies those allegations. The fourth and fifth sentences of Paragraph 11(f) of the Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, Charter denies these allegations.

g. Rights and Obligations in the Event of Default. Charter admits only the first sentence of Paragraph 11(g) of the Complaint that the parties agree a new pole attachment agreement must establish remedies for default, and denies all other allegations of Paragraph 11(g) of the Complaint.

h. Right to Withhold Consent. Charter admits all allegations of Paragraph 11(h) of the Complaint and that BREMC may not withhold consent where otherwise limited by law.

i. Confidentiality. Charter admits that the parties disagree whether the new pole attachment agreement should be treated as confidential and denies all other allegations of Paragraph 11(i) of the Complaint.

12. **Methodology for Calculating Pole Attachment Fee**. Charter admits only the first sentence of Paragraph 12 of the Complaint, that the parties have been unable to agree on a methodology for calculating the annual pole attachment rate. Answering further, Charter denies the allegations of the second sentence of Paragraph 12 of the Complaint. The second and third paragraphs of Paragraph 12 of the Complaint state legal conclusions to which no response is required. To the extent a response is deemed required, Charter denies these allegations. The last sentence of Paragraph 12 of the Complaint contains no allegations.

REQUESTED RELIEF

Charter denies that BREMC is entitled to relief in this proceeding, either as prayed for in its Complaint or otherwise.

GENERAL DENIAL

Charter denies each and every allegation of fact, conclusion of law, or other matter contained in BREMC's Complaint not specifically admitted herein.

COUNTERCLAIM

I IDENTIFICATION OF THE PARTIES

1. Counter-Complainant Charter is a Delaware limited liability company and its mailing address is 12405 Powerscourt Drive, St. Louis, Missouri, 63131. Charter is a cable operator under federal law, 47 U.S.C. § 522(5), and a communications service provider under state law, N.C.G.S. § 62-350(e). Charter provides cable television, broadband Internet access, voice-over-Internet-protocol and other communications services to residents throughout North Carolina. In order to provide its services, Charter

must attach its facilities to existing poles in North Carolina, including poles owned by BREMC and other membership corporations.

2. The names and addresses of the authorized representatives for Charter in this proceeding, and the persons to whom communications on behalf of Charter should be sent, are:

Marcus W. Trathen
Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Wells Fargo Capitol Center
150 Fayetteville Street, Suite 1700
Raleigh, NC 27601
(919) 839-0300
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ageorge@sheppardmullin.com
cross@sheppardmullin.com

3. Counter-Respondent BREMC is an electric membership corporation organized and operating under the provisions of Article 2 of Chapter 117 of the North Carolina General Statutes. On information and belief, BREMC has its principal place of business at 1216 Blowing Rock Boulevard NE, Lenoir, North Carolina, 28645. The Cooperative owns or controls poles in the areas where it provides service in North Carolina. On information and belief the counsel for the Cooperative are as follows:

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II. JURISDICTION

4. The Commission has jurisdiction over this matter pursuant to N.C.G.S. § 62-350.

5. Section 62-350 gives the Commission "exclusive jurisdiction over proceedings arising under this section" to "adjudicate disputes arising under this section on a case-by-case basis." N.C.G.S. § 62-350(c).

6. Charter brings these counterclaims pursuant to Section 62-350 to resolve disputes concerning the rate for attachments to utility poles owned by BREMC, as well as other pole attachment issues. Charter has paid all disputed fees for the use of the Cooperative's poles.

III. BACKGROUND

A. Regulation of Pole Attachment Access and Rates

7. As discussed above, cable operators must rely on existing utility pole networks, including those owned and operated by BREMC, to construct their cable networks.

8. The United States Supreme Court has found that cable operators' dependence on the use of existing pole infrastructure has led to abuses by utilities. Specifically, while cable operators have found it "essential" to lease pole space from

utilities, "[u]tilities, in turn, have found it convenient to charge monopoly rents." *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 330 (2002).

9. Cable operators' dependence on existing poles and utilities' corresponding abuses of their "superior bargaining power" to impose monopolistic rates, terms and conditions led to the federal Pole Attachment Act nearly 40 years ago. Pub. L. No. 95-234, 92 Stat. 33 (1978) (47 U.S.C. § 224). Section 224 of the federal Pole Attachment Act gives the Federal Communications Commission ("FCC") authority to regulate pole attachment relationships between cable operators and investor-owned electric ("IOUs") and telephone companies, including the IOUs in North Carolina. 47 U.S.C. § 224(b)(1). Congress directed the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." *Id.*

10. Congress exempted poles owned by cooperatively-organized and municipal utilities from regulation under Section 224. 47 U.S.C. § 224(a)(1). These utilities were excluded because Congress believed that those rates would remain low because of local control. S. Rep. No. 95-580, at 16-18 (1977).

11. But, in the absence of regulation, cooperatively-organized and municipal pole owners subjected attachers to the same abusive practices that led the Congress to regulate IOUs.

12. To stem these abuses, the General Assembly enacted N.C.G.S. § 62-350 in 2009.

13. Section 62-350 requires pole owning municipal utilities and membership cooperatives to allow communications service providers access to their poles, ducts, and

conduits, at just, reasonable, and nondiscriminatory rates, terms and conditions adopted pursuant to negotiated or adjudicated agreements. N.C.G.S. § 62-350(a).

14. To that end, Section 62-350 provides a mechanism for resolving disputes between communications service providers and municipal utilities and membership cooperatives in the event the parties are unable to reach agreement within 90 days of a request to negotiate reasonable rates, terms and conditions or if either party believes there is an impasse. *Id.* § 62-350(c).[4] To perfect its right to seek resolution of a dispute, the communications service provider must pay any undisputed fees related to the use of poles, ducts, or conduits which are due and owing under a preexisting agreement with the municipality or membership cooperative.

15. The statute, as amended in 2015, directs the Commission to resolve disputes arising under Section 62-350 on a case-by-case basis, consistent with the public interest and necessity to derive just and reasonable rates, terms, and conditions. *Id.* The Commission may consider any evidence or ratemaking methodologies offered or proposed by the parties. *Id.* Although the 2015 amendments to Section 62-350 deleted an express reference to the federal pole attachment rate methodology applicable to IOUs in the state, the General Assembly emphasized that "the Commission may consider any evidence presented by a party, including any methodologies previously applied." S.B. 88, N.C. Session Law 2015-119 § 7 (2015).

16. Upon resolution of a dispute, the Commission shall apply any new rate adopted retroactively to the date immediately following the expiration of the 90-day

[4] The General Assembly amended Section 62-350 in June 2015 to reassign exclusive jurisdiction from the North Carolina Business Court, which had raised concerns about its rate-setting authority, to the Commission. *See An Act to Assign Pole Attachment Disputes to the North Carolina Utilities Commission*, S.B. 88, N.C. Session Law 2015-119 (2015).

negotiation period. N.C.G.S. § 62-350(c). If the dispute and new rate arises in the context of a negotiation for the continuation of an existing agreement, the Commission shall apply the new rate retroactively to the date immediately following the end of the existing agreement. *Id.*

B. North Carolina Business Court Decisions Under Section 62-350

17. The Business Court resolved two cases arising under Section 62-350 prior to its amendment in June 2015. One case addressed the reasonableness of pole attachment rates imposed by a membership cooperative. *See 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). The other addressed pole attachment rates, terms, and conditions imposed by a municipal utility. *See Time Warner Entertainment-Advance/Newhouse P'ship v. Town of Landis*, No. 10-CVS-1172, 2014 WL 2921723 (N.C. Sup. Ct. June 24, 2014).

18. In *Rutherford*, after extensive discovery and a four day trial, the Business Court rejected the methodologies proposed by the cooperative and its experts, concluding that the methodologies were not supported by competent evidence. *See Rutherford*, 2014 WL 2159382, at *12-16. In so doing, the court rejected the cooperative's proposed rates—ranging from $15.50 to $19.65—as unjust and unreasonable. *Id.* Instead, the court found that a rate calculated under the FCC's "Cable Rate" formula provided just and reasonable compensation to the cooperative. *Id.* at *9. The court reasoned that the Cable Rate formula offers "an analytical structure that is well-understood, widely used, and judicially sanctioned," and that the state's reliance on established FCC precedent would "provide helpful guidance to parties involved in future negotiations over just and reasonable pole

attachment rates, terms, and conditions." *Id*. at *10. The North Carolina Court of Appeals affirmed the Business Court's decision. *See* 771 S.E.2d 768.

19. Similarly, in *Landis*, the Business Court rejected the methodologies proposed by the Town and its expert as irrational and unsupported, concluding that the Town's proposed $18.00 rate was unjust and unreasonable. *See Landis*, 2014 WL 2921723, at *12-13. The court again found that a rate calculated under the Cable Rate formula provided just and reasonable compensation to municipally owned utilities in North Carolina. *See id.* at *10. Referencing the reasoning of its *Rutherford* decision, the court explained that the Cable Rate formula "provides a reasonable means of allocating costs without creating a subsidy from the pole owner to the attacher." *Id*.

20. As the Business Court recognized, the Cable Rate formula is straightforward, relies on costs kept in the normal course and forms the basis of most pole attachment rates across the nation, including for the more than one hundred thousand attachments to poles owned by IOUs in North Carolina. Regulatory agencies, federal and state courts (including the Business Court) and the United States Supreme Court have all concluded that the Cable Rate formula is fully compensatory to pole owners and does not result in subsidies to attachers. *See, e.g. Florida Power Corp.*, 480 U.S. at 254 (rejecting a Takings Clause claim because it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory" and holding the Cable Rate formula compensates utilities for the "fully allocated cost" of pole attachments); *Alabama Power*, 311 F.3d at 1372 (rejecting an as-applied Fifth Amendment challenge and holding the Cable Rate formula provides just compensation to pole owners); *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd*,

187 F.3d 1324 (11th Cir. 1999) (affirming that the Pole Attachment Act provides a process for obtaining just compensation); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5322 (2011) ("We find no evidence in the record that supports the utilities' assertions that the lower-bound telecom formula results in rates so low that it forces electric ratepayers to subsidize third-party attachment rates."), *aff'd sub nom. Am. Elec. Power Serv. Corp. v. FCC*, 208 F.3d 183 (D.C. Cir. 2013) (hereinafter "2011 Pole Rate Order"); *Rutherford*, 2014 WL 2159382, at *9 (rejecting the cooperative's subsidy arguments and concluding that "the FCC Cable Rate formula actually leaves the utility and its customers better off than they would be if no attachments were made to their poles."); *Landis*, 2014 WL 2921723, at *10 (same). The Cable Rate formula also provides a uniform and consistent methodology for all types of utilities because it utilizes costs specific to each utility and relies on essentially the same system of accounts used by membership cooperatives. *Rutherford*, 2014 WL 2159382, at *10.

C. Low and Uniform Rates Serve the Public Interest

21. Access to utility poles on just, reasonable and nondiscriminatory rates, terms and conditions is essential to the expansion of broadband and other advanced services throughout North Carolina, particularly in rural areas.

22. In its 2010 National Broadband Plan, the FCC found that "[t]he cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands." National Broadband Plan (2010) at 109, *available at* https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf (last visited January 30, 2017) (finding that "the expense of obtaining permits and leasing pole attachments and rights-of-way can

amount to 20% of the cost of fiber optic deployment"). The National Broadband Plan concluded that the impact of higher pole attachment rates "can be particularly acute in rural areas, where there often are more poles per mile than households." *Id.* at 110. To promote broadband deployment, the National Broadband Plan recommended that the FCC establish rates for pole attachments "that are as low and close to uniform as possible." *Id.* at 110.

23. At the legislature's direction, North Carolina's Broadband Infrastructure Office is developing the state's own broadband plan. Consistent with the National Broadband Plan, the state's progress report released in December 2015 found that communities "in sparsely populated or economically distressed areas . . . continue to find themselves on the wrong side of the digital divide." *See* North Carolina Department of Information Technology, State Broadband Plan Progress Report (Dec. 1, 2015) at 5, *available at* https://ncbroadband.gov/wp-content//uploads/2016/02/Broadband-Plan-Progress-Report-12-1-2015.pdf (last visited January 30, 2017). The report further identified "infrastructure cost" as one of the key challenges to broadband deployment in the state, particularly given the "significant infrastructure upgrades" necessary to keep pace with evolving technologies and demands for data. *See id.* at 4-5.

24. Consistent with the recommendations of the National Broadband Plan and the state's broadband objectives, low and uniform pole attachment rates throughout North Carolina (regardless of whether the poles are owned by IOUs, municipal utilities, or

membership cooperatives) will promote the expansion of broadband in rural areas and facilitate the infrastructure upgrades needed in the coming years.

IV. THE PARTIES' DISPUTE

25. Charter depends on access to the poles owned by BREMC to deliver its services to its customers. Charter is attached to approximately 26,000 poles owned by the Cooperative.

26. ***The Parties' Pole Attachment Agreement***. Prior to and after the enactment of Section 62-350, Charter has attached its facilities to BREMC's poles pursuant to a pole attachment agreement executed by BREMC and Charter in 2003. Ex. 1 ("Agreement"). The Agreement was for a three-year term, continuing for not more than two successive one-year terms or until terminated by either party by providing written notice at least 120 days prior to the end of any period. *Id.* Art. 2.1.

27. The Agreement provided for a per-pole, annual attachment fee of $15.00 beginning in 2003, and increasing by $1.00 each year until reaching a $23.00 per pole attachment fee in 2008, charged quarterly. *Id*. Arts. 4.1, 4.2 & Exhibit C. In 2003, when the Agreement was signed, BREMC's rates were not subject to regulation under Section 62-350 or any other federal or state authority. Indeed, a decision by the United States Court of Appeals for the Fourth Circuit ruled that it did not have sufficient basis to assert jurisdiction over pole rates charged by North Carolina electric cooperatives, having determined that the state legislature or courts should resolve the issues presented. *Time Warner Entertainment-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp.*, 506 F.3d 304, 3015 (4th Cir. 2007) ("[I]f any regulation or compulsion is to be applied to pole-attachment agreements, it should be done by the North Carolina legislature,

the North Carolina Utilities Commission, [or] the North Carolina state Courts."). Therefore, Charter had little choice but to accept the rates imposed by BREMC if Charter wanted to attach to BREMC's poles and provide its services.

28. ***The Parties' Negotiations and Dispute***. On April 20, 2015, BREMC sent Charter a proposed new attachment agreement and the parties began negotiations. The negotiations were suspended while the North Carolina General Assembly considered amendments to N.C.G.S. § 62-350. Negotiations resumed again in October 2015, and drafts were exchanged and terms discussed over the next year.

29. In 2015 and 2016 BREMC charged and Charter paid an annualized rate of about $25 per attachment, while the parties continued to negotiate the agreement and the rates. BREMC's current rate is approximately five times the rate established by the evidence in the *Rutherford* case as the highest average IOU cost-based rate in North Carolina.

30. On November 22, 2016, Charter received an invoice for back rent that BREMC claims is owed for alleged unpermitted attachments discovered in an inventory that BREMC recently performed. Charter requested data to support the number of alleged unpermitted attachments. No such data has yet to be provided. Only days later, Charter received notification that BREMC had filed its Complaint with the Commission.

31. Despite Charter's efforts to keep negotiations on track and narrow the issues before the Commission, BREMC has refused to negotiate and now the parties are at an impasse. *See* N.C.G.S. § 62-350(c). That impasse, as well as the expiration of the 90-day

period following the initiation of negotiations, gives the Commission jurisdiction to resolve the parties' dispute regarding a just and reasonable pole attachment rate.

V. JUST AND REASONABLE RATES

32. BREMC urges the Commission to calculate rates using a methodology adopted by the Tennessee Valley Authority ("TVA") in February 2016. The TVA, which was established by Congress in 1933 to bring electric power to rural areas of the Southeast, is a wholesale and retail electric provider. TVA has no authority over BREMC.

33. In deciding to regulate, for the first time, the pole attachment rates of its wholesale electric customers, the TVA sought only the input from its electric customers—including a large number of cooperative utilities who would benefit from high pole attachment rates. Not surprisingly, the rate formula it adopted allocates an excessive portion of pole costs to each attacher, based on a rate methodology advocated by the Tennessee Valley Public Power Association, ("TVPPA") an association representing public power utility pole owners. TVA was candid in admitting its focus was solely on keeping pole attachments rates as high as possible in support of low electric rates. *See* TVA Board Resolution *available at* https://www.tva.com/file_source/TVA/Site%20Content/About%20TVA/Guidelines%20and%20Reports/tva_determination_on_regulation_of_pole_attachments.pdf (last visited January 30, 2017).[5] Because pole attachment revenues received by cooperative and municipal utilities that purchase power from TVA are allegedly used to offset electric rates, the TVA unreasonably relied on a methodology intended to result in excessive pole

[5] The TVA Board Resolution noted that it seeks "to ensure that electric systems are operated for the benefit of electric consumers and that electric rates are kept as low as feasible." TVA, Determination on Regulation of Pole Attachments, February, 2016.

attachment rates. The TVA formula relies heavily on a recommended formula of the American Public Power Association—a national association of public power entities—that has never been accepted by any regulatory authority.

34. TVA conducted no public proceeding and did not seek (or receive) input from any party other than the TVPPA and its utility members. Indeed, TVA proceeded in secret, treating the issue as "Confidential and Business Sensitive," with no public notice that it was even considering regulating the pole attachment rates of its wholesale customers. *See* TVA Proposed Board Resolution labeled as "TVA Restricted Information—Confidential and Business Sensitive."[6] While TVA met with the TVPPA and TVA's individual wholesale customers, it did not consult any party that attaches its facilities to its customers' poles or any member of the public who would benefit from increased extension of broadband.

35. Charter requests that the Commission reject BREMC's request to use the TVA's flawed formula, determine that the rates charged by BREMC are unjust and unreasonable, and instead apply the Cable Rate formula, which is used to calculate rates for the vast majority of poles in the State of North Carolina.

36. The federal Pole Attachment Act directs the FCC to regulate pole attachment rates based on the costs of the pole owner to make attachment space available to cable operators. 47 U.S.C. § 224(b)(1). Under Section 224(d), a rate is just and reasonable if it falls within a zone of reasonableness between the incremental and fully

[6] Despite the "Confidential and Business Sensitive" designation the Proposed Board Resolution is publicly available on TVA's website, visit https://www.tva.com/file_source/TVA/Site%20Content/About%20TVA/Guidelines%20and%20Reports/tva_determination_on_regulation_of_pole_attachments.pdf (last visited January 30, 2017).

allocated costs of providing attachments: "[A] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of operating expenses and actual capital cost of the utility attributable to the entire pole, duct, conduit, or right-of-way." *Id.*§ 224(d)(1).

37. On the low end of the range a rate is reasonable if it covers the utility's incremental costs caused by the attacher. These costs consist primarily of the make-ready charges that attachers typically pay to accommodate their attachments. *See* Ex. 1 Art. 5 (requiring Charter to pay for any modifications necessary to the poles and related facilities to accommodate Charter's attachment).

38. On the high end of the range the formula allows a utility to recover from the attacher a portion of its fully allocated costs, i.e., those costs the pole owner incurs notwithstanding the attachments. This fully-allocated upper bound range is the Cable Rate formula.[7]

39. The Cable Rate formula derives the maximum allowable pole attachment rate by determining the annual cost of owning and maintaining (the carrying charges) a bare utility pole (the net bare pole investment) and then multiplying these costs by a space allocation factor based on the amount of usable pole space the attacher uses. The FCC Cable Rate formula can be expressed as follows:

> Maximum Rate = Space Factor x Net Cost of a Bare Pole x Carrying Charge Rate

[7] As applied, the Cable Rate formula not only provides for the recovery of fully allocated costs but also for recovery of all make-ready and other incremental costs.

40. Under the Cable Rate formula, the cable operator pays for the costs of the entire pole in proportion to the usable space it uses for its attachments. For example, an average pole of 37.5 feet contains 13.5 feet of usable space (i.e., on this typical pole, 6 feet is buried under ground for stability and there is 18 feet of clearance to the lowest attachment and thus 24 feet is considered unusable). In addition, a typical cable attachment is assigned one foot of usable space. As a result, under the Cable Rate formula, the cable attacher is assigned 1/13.5 or 7.4 percent of the annual costs of each pole it occupies. *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6529, Appendix C-2 (2000) ("*Fee Order*"); *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 16 FCC Rcd 12103, 12108, 12174, & Appendix D-2 (2001) ("*Reconsideration Order*") (affirming use of rebuttable presumptions of 1 foot of occupied space and 13.5 feet of total usable space).

41. As discussed above, the Cable Rate methodology is widely accepted because it has been found to fully compensate the pole owner. *See e.g.*, *Florida Power Corp.*, 480 U.S. at 254 (holding the Cable Rate formula compensates utilities for the "fully allocated cost" of pole attachments). Indeed, nearly every state that has "reverse preempted" the FCC to self-regulate pole attachments, uses the Cable Rate formula or a close proxy to determine maximum just and reasonable pole attachment rates.[8] The nearby states of Kentucky and Ohio, for example, either have adopted a rate methodology based largely on the FCC method (Kentucky), or have adopted the FCC rate methodology wholesale (Ohio). *See Adoption of a Standard Methodology for Establishing Rates for*

[8] Twenty-one states are certified to self-regulate pole attachments. *See* 47 U.S.C. § 224(c)(allowing states to regulate pole attachments upon certification); *States That Have Certified That They Regulate Pole Attachments*, Public Notice, WC Docket No. 10-101, 25 FCC Rcd 5541, 5541-42 (2010).

Cable Television Pole Attachments, 49 P.U.R. 4th 128, No. 251 (Ky. PSC 1982); *Re: Columbus & Southern Electric Co.*, 50 P.U.R. 4th 37 (Pub. Util. Comm. Oh. 1982).

42. Aligning BREMC's rates with the prevailing rates charged in North Carolina (and elsewhere in the United States) would promote consistency, uniformity, and predictability in rates across the state. Consistent, uniform, and predictable rates, in turn, would serve the public interest and necessity by reducing competitive incongruities, market distortions, and market disputes that negatively affect communications service providers' investment decisions to expand their networks and services, while promoting broadband investment, particularly in rural areas. *See Rutherford*, 2014 WL 2159382, at *10; *see also 2011 Pole Rate Order*, 26 FCC Rcd at 5244 ¶ 157; National Broadband Plan at 110.

43. By contrast, utilizing the TVA methodology requested by BREMC would have an adverse impact on the social and economic development of the areas served by BREMC because it would hinder the expansion of broadband access.

VI. OVERLASHING

44. Charter requests that the Commission find BREMC's proposed requirement that Charter submit an application and application fee in order to overlash to be unjust and unreasonable.

45. Overlashing is a routine practice that involves tying communications wires to existing, supportive strands already attached to poles. Overlashing allows cable operators to replace old or non-functioning cables, or expand the capacity of existing facilities in an efficient and non-disruptive manner. "[O]verlashing . . . facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition [and helps] provide

diversity of services over existing facilities, fostering the availability of telecommunications services to communities, and increasing opportunities for competition in the marketplace."[9]

46. The FCC has rejected attempts to impose permitting requirements for overlashing as "unjust and unreasonable on [their] face." *See Cable Television Assoc. of Ga. v. Ga. Power Co.*, Order, 18 FCC Rcd 22287 ¶ 13 (2003); *see also Amendment of Commission's Rules and Policies Governing Pole Attachments,* Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141 ¶ 73 (2001). Indeed, Charter overlashes its own facilities throughout North Carolina (on investor-owned utility poles subject to FCC jurisdiction) without pole owner approval or incident.

47. Charter requests that the Commission determine it is reasonable for Charter to overlash its attachment(s) without applying for a permit in order to ensure that its customers are served in an efficient manner.

VII. UNAUTHORIZED ATTACHMENT FEE

48. Charter requests that the Commission determine that BREMC may charge either compensatory back rent for alleged unpermitted attachments or a penalty, but not both. Moreover, BREMC seeks to impose a penalty on other breaches of contract.

49. While Charter does not reject a penalty for attachments it makes without a permit (although in the vast majority of cases, poor record-keeping and outdated processes

[9] *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments,* Report and Order, 13 FCC Rcd 6777, 6807 ¶ 62 (1998).

usually account for so-called "unauthorized attachments"), any penalty must be just and reasonable. Charter does reject any penalty for other breaches.

50. The FCC's "unauthorized attachment" penalty for unpermitted attachments is followed in many jurisdictions and Charter believes it is a reasonable solution. Specifically, the FCC allows a pole owner to impose "an unauthorized attachment fee of five times the current annual rental fee per pole if the pole occupant does not have a permit and the violation is self-reported or discovered through a joint inspection." *2011 Pole Rate Order*, 26 FCC Rcd. at 5291 ¶ 115 (emphasis added). An additional $100 per pole sanction is allowed "if the violation is found by the pole owner in an inspection in which the pole occupant has declined to participate." *Id.* The $100 fine is intended to encourage cooperation between the utility and the attacher to conduct a joint audit. These fees are imposed "in lieu of any amounts recoverable for unpaid fees." *Mile Hi Cable Partners v. Pub. Serv. Co.*, 15 FCC Rcd 11450, 11459 (Cable Serv. Bur. 2000).

51. Charter requests that the Commission determine that a reasonable unauthorized attachment fee is consistent with the FCC's approach and that unauthorized attachment fees may be applied only to attachments made without a permit and no other breaches.

VIII. INDEMNITY REQUIREMENTS

52. Charter requests that the Commission find BREMC's demand that Charter indemnify BREMC for any liability, loss or damage that may arise on account of BREMC's own negligence to be unjust and unreasonable.

53. There is no reasonable justification for Charter to be liable for claims that arise from BREMC's own negligence. The FCC has found such one-sided indemnity

provisions unreasonable, holding reciprocal indemnification provisions to be preferable because each party would assume the "responsibility for losses occasioned by its own misconduct." *Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd 16333, ¶ 31 (2003). This Commission also favors mutual indemnity provisions for the same reason. *See, e.g., Re Progress Energy Carolina, Inc.*, Docket No. E-100, Sub 101, 240 P.U.R. 4th 533 (NC Util. Comm. 2005) (requiring parties to use a mutual indemnity provision in their interconnection standard agreement).

54. Charter requests that the Commission determine that an indemnification requirement must be reciprocal to be reasonable, and cannot require an attaching entity to indemnify the pole owner for claims or losses that arise from the pole owner's own negligence.

IX. REQUESTED RELIEF

WHEREFORE, the Counter- Complainant Charter requests that the Commission issue an order granting the following relief:

1. Finding BREMC's monthly pole attachment rate of $2.02 for July 2015, through December 2015 to be unjust and unreasonable;

2. Finding BREMC's monthly pole attachment rate of $2.22 for 2016 unjust and unreasonable;

3. Finding that, consistent with the public interest and precedent, BREMC's pole attachment rate should be based on its pole-related costs in the same manner as IOUs in the state and in the manner previously determined to be just and reasonable by the North Carolina Business Court;

4. Adopting a just and reasonable rate for Charter's attachments to BREMC's

utility poles based on its pole related costs and the rates paid by IOUs in North Carolina;

5. Applying the new rate adopted as a result of this proceeding retroactively to the date immediately following the expiration of the 90-day negotiating period triggered by BREMC's April 20, 2015 request for negotiations under Section 62-350;

6. Providing for statutory interest under North Carolina law for all overpayments made by Charter to BREMC starting after expiration of the 90-day negotiating period triggered by BREMC's April 20, 2015 request for negotiations under Section 62-350;

7. Requiring BREMC to pay Charter the total sum of the overpayments plus statutory interest or allow Charter to take a credit against future pole attachment fees in those amounts;

8. Finding that it is reasonable for attachers to overlash their own attachment(s) without applying for a permit;

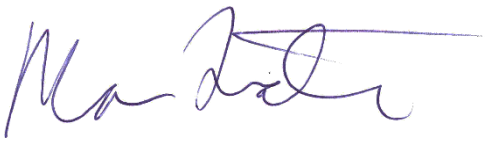
9. Finding that a reasonable unauthorized attachment penalty must be consistent with the FCC's approach;

10. Finding that an indemnification requirement must be reciprocal to be reasonable, and that Charter cannot be required to indemnify BREMC against liability, loss or damages arising from BREMC's own negligence or willful misconduct;

11. Assessing the costs of this proceeding to BREMC; and

12. Awarding Charter such other relief as the Commission deems just, reasonable and proper.

Respectfully submitted, this 31st day of January, 2017.



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CERTIFICATE OF SERVICE

I certify that a copy of Charter Communications Properties, LLC's Answer to Complaint and Counterclaims has been served by electronic mail on counsel of record in this proceeding.

This 31st day of January, 2017.

/s/ Marcus Trathen
Marcus W. Trathen

Attorney for Charter Communications Properties, LLC