

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

**DOCKET NO. EC-23, SUB 50**

BLUE RIDGE ELECTRIC	)	
MEMBERSHIP CORPORATION	)	
Petitioner,	)	
	)	
v.	)	<b>CHARTER COMMUNICATIONS</b>
	)	<b>PROPERTIES LLC’S REPLY IN</b>
CHARTER COMMUNICATIONS	)	<b>SUPPORT OF MOTION FOR</b>
PROPERTIES LLC,	)	<b>TEMPORARY STAY</b>
	)	
Respondent.	)	

Charter Communications Properties LLC (“Charter”) respectfully submits this reply in support of its Motion for Temporary Stay, filed on September 18, 2017.

A temporary stay of this case until the Commission enters decisions in the four pending cases involving the reasonableness of virtually identical pole attachment rates, terms, and conditions under G.S. § 62-350 is reasonable, sensible, and permissible. BREMC does not, and cannot, seriously dispute that a stay will promote an efficient allocation of the parties’ and the Commission’s resources, avoid substantial waste, and better equip the parties to settle or narrow the issues in this case. Nor does BREMC identify any actual harm or prejudice it would suffer from a stay. A temporary stay is squarely within the Commission’s discretion and would preserve the Commission’s ability to resolve this matter on a case-by-case basis at an appropriate time.

There is no dispute that this case is virtually identical to the four preceding cases— involving many of the same rates, terms, and conditions, the same rate theories, and the same expert witnesses. Given this undisputed overlap, Charter’s Motion identified the common sense efficiencies a temporary stay promises for the parties and the Commission.

Continuing to litigate this case while the Commission resolves the four similar cases will require the parties to incur substantial costs completing discovery and preparing fact and expert testimony on issues they could potentially resolve with a stay. The guidance provided by the Commission's decisions in the pending cases will allow the parties—Charter and BREMC—to better assess the respective strengths and weaknesses of their positions and promote an informal resolution. Mot. at 5-9. BREMC itself acknowledges that the Commission's decisions in the other cases could help the parties resolve their disputes in this one. Opp. at 7. A stay also would allow the Commission to direct its resources to resolving the important issues in the four pending dockets based on the voluminous record already developed in those cases, rather than diverting resources to refereeing this dispute and preparing it for hearing. Absent a stay, there is insufficient time under the current schedule for the Commission to issue decisions in the other cases and for the parties to benefit from them prior to the spending significant resources prepare for and conducting the hearing scheduled for the first week of November.

Because it cannot dispute the common sense benefits of a temporary stay, BREMC's Opposition instead (1) fights a straw man and (2) seeks to poison the well by conjuring various offensive motives for Charter's Motion, none of which are true. BREMC's straw man is built on the unfounded and simply wrong notion that the Commission's decisions in the other four cases somehow would confine the Commission here. Those rulings would not "decide" the outcome in this case. *See* Opp. at 3. Nor would they be "applicable to and binding on the parties" to this case. *See id.* at 4. And Charter never suggested they would or purported those to be benefits of a temporary stay. That said, there can be no genuine dispute that guidance from the Commission on the very

same rates, terms, and conditions at issue in this case could assist the parties in reaching an informal resolution—without compromising in any way the Commission’s ability to reach a case-specific decision at the appropriate time.

BREMC’s conjectures about Charter’s motives are not helpful. With regards to the bona fides of Charter’s interest in settlement discussions, actions speak louder than words: Charter would remind the Commission that Charter’s affiliate, Time Warner Cable, successfully negotiated resolutions to two disputes with EMCs after initiating proceedings against them. *See* Order Dismissing Proceeding With Prejudice and Closing Docket, Docket No. EC-82, Sub 19 (Aug. 10, 2016) (Energy United Electric Membership Corporation); and Order Dismissing Proceeding With Prejudice and Closing Docket, Docket No. EC-52, Sub 39 (Aug. 25, 2016) (South River Electric Membership Corporation). Charter has successfully negotiated pole attachment agreements with cooperatives and other entities for dozens of years in North Carolina; it is only the co-ops’ ongoing efforts to substantially alter industry standard terms and conditions that has caused these negotiations to become more difficult and BREMC’s public “finger-pointing” in its pleadings illustrates that point. Here, for months Charter has requested a response to the proposed agreement it sent to BREMC in 2016, and while BREMC has said it would send a response, it still has not. For months Charter has invited settlement discussions, with no response from BREMC until September 8, 2017,<sup>1</sup> and BREMC fails to disclose that Charter confirmed its interest in discussing settlement the day before BREMC filed its opposition.

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<sup>1</sup> Similarly, BREMC’s suggestion that Charter did not respond to its request that those conversations be kept confidential is incorrect. Charter’s counsel confirmed in a September 12, 2017 telephone conversation with BREMC’s counsel that settlement conversations would be confidential and should embrace all rates and terms of a new agreement.

*See* September 20, 2017 Letter from A. George to M. Tilley, attached hereto. Charter reiterates its interest in resolving this dispute—but resolution takes the involvement and commitment of both parties. Regardless, the fundamental point is the simple and uncontroverted fact that both parties will be in a better position to assess their respective positions after the Commission issues its orders in the pending cases.

Nor is there any nefarious motive behind the timing of Charter's Motion. There is a simple reason why Charter waited until this week to file its request for a stay: the parties to the four related cases filed their post-hearing briefing last week (on September 12) and no party requested a reply brief, thus closing the filings in those dockets. And discovery in this case has progressed sufficiently to establish that the rates, terms, and conditions at issue here are virtually identical to the rates, terms, and conditions in the other cases, even down to the same expert witnesses. With the other four cases now finally ready for the Commission to resolve, and with so little time remaining for it to do so before the hearing in this case, Charter deemed now the appropriate time to request a temporary stay of further proceedings.

Contrary to BREMC's speculation, Charter is not seeking to avoid discovery. Charter has invested substantial time and resources meeting BREMC's burdensome discovery requests, and communicated early in the process that its production would take some time and would need to occur on a rolling basis. That Charter's assessment was accurate does not mean Charter has been derelict or evasive of its responsibilities. To be sure, BREMC leaves out that Charter served supplemental responses and thousands of pages of documents the day before BREMC filed its Opposition, completing virtually all of its outstanding document discovery and addressing most of the issues BREMC raised in

its unnecessary motion to compel.<sup>2</sup> And Charter has worked with BREMC to schedule a deposition for the first week of October, though an obvious benefit of a stay would be avoiding the need for further discovery until the parties have attempted to resolve this dispute (or narrow the issues) based on the Commission's forthcoming guidance in the other four cases.

Charter respectfully submits that the time is right for a stay. The four similar dockets are now ready for the Commission to resolve, assuring any stay will not extend indefinitely while the parties in those dockets make additional filings. The stay will end in the near future when the Commission enters decisions in those dockets. The stay likely will not extend longer than other periods in which BREMC and Charter either voluntarily stayed negotiations or declined to prosecute this case. The stay will not prejudice any party or deny BREMC its day in court if that is where the parties ultimately end up. The stay will promote an informal resolution. And the stay is appropriate now because the parties have not yet expended the significant resources necessary to conduct depositions, prepare prefiled testimony, and prepare for the hearing.<sup>3</sup>

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<sup>2</sup> Charter owes additional responses to only two requests embraced by BREMC's motion (Requests 21 and 41). Charter is working diligently to address these requests—as it has been for some time—and will serve supplemental responses as soon as possible.

<sup>3</sup> The Commission would be required to revisit the current procedural schedule in any event if it were to grant BREMC's motion to amend its petition. While Charter disputes BREMC's motion, and the Cooperative's various misrepresentations on reply, one thing is clear: BREMC seeks to add at least two terms to this dispute (recovery of space and reservation of space) that have never been the subject of the parties' pleadings nor any discovery. And, despite BREMC's attempts to confuse the issues, the parties' rate theories and related discovery address the allocation of space for billing purposes, not BREMC's proposed terms about how much separation Charter must allow between facilities or when Charter must remove its facilities. Thus, at a minimum, Charter would need additional time to respond to these issues and for related discovery if the Commission were to grant BREMC's motion to amend.

Accordingly, Charter requests the Commission to enter an order suspending its June 7, 2017 Order Establishing Procedural Schedule (“Procedural Schedule”) and staying further proceedings in the above-captioned docket temporarily until the Commission enters orders in Docket Nos. EC-43, Sub 88; EC-49, Sub 55; EC-55, Sub 70; EC-39, Sub 44.

Respectfully submitted, this 22nd day of September, 2017.

/s/ Marcus Trathen

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*Attorneys for Respondent Charter  
Communications Properties LLC.*

**CERTIFICATE OF SERVICE**

I certify that a copy of Charter Communications Properties LLC's Reply In Support of Motion for Temporary Stay has been served by electronic mail on counsel of record in this proceeding.

This the 22nd day of September, 2017.

/s/ Marcus Trathen  
*Attorney for Charter Communications  
Properties LLC*

OFFICIAL COPY

Sep 22 2017

# **ATTACHMENT**

**Letter Dated September 20, 2017  
from Aaron George to Matthew Tilley**



September 20, 2017

File Number: 36EX-261145

**VIA ELECTRONIC MAIL ONLY**

Matthew Tilley  
One Wells Fargo Center  
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Re: Blue Ridge Electric Membership Corporation ("BREMC") v. Charter Communications Properties, LLC ("Charter"), Docket No. EC-23, Sub 50, North Carolina Utilities Commission

Matthew:

This is the second time in three working days that you or your co-counsel has demanded that Charter take action within an unrealistic timeframe—in this instance, one day. The first came after close of business Friday demanding action by 8:00 am Monday morning. These demands are unproductive and undermine any hope of trying to resolve these issues in good faith.

That said, I am compelled to address your letter because it is apparent that BREMC misunderstands Charter's position. Charter objected to BREMC's untimely motion to amend its petition for a number of reasons, including BREMC's inexplicable tardiness and the clear prejudice to Charter if BREMC were allowed to add new claims to be heard in less than two months, giving Charter insufficient time to respond or take related discovery. While Charter's Opposition acknowledged that some of the items included in BREMC's proposed amendment are similar to those raised by Charter in its Counterclaims (indemnity, overflashing, and unauthorized attachments), others are entirely new to this proceeding (reservation of space and recovery of space). Charter thus opposed BREMC's attempt to add new claims to its nearly year-old petition without properly alleging under Section 62-350 that the terms were the subject of a dispute between the parties.

Perhaps recognizing that at least some of the terms in BREMC's amended petition have not been the subject of a dispute between the parties, your letter appears intended to cure this deficiency in one of two ways: Either by ginning up ex-post-facto "disputes" over the terms BREMC seeks to add through its untimely motion; or by pretextually attempting to narrow the issues by demanding Charter accept BREMC's proposals without negotiation. Neither can cure the problems with BREMC's motion.

Matthew Tilley  
September 20, 2017  
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Your letter cannot create a "dispute" over these terms by demanding that Charter decide—in less than 24 hours—whether to take or leave BREMC's unilateral proposals. Section 62-350 contemplates that parties would negotiate (in good faith, no less) for a minimum of 90 days before declaring a dispute requiring Commission intervention, not less than one. G.S. § 62-350(c). If anything, your letter underscores the concerns Charter identified in its opposition about pole owners abusing the complaint process at the Commission by manufacturing new "disputes" solely for purposes of litigation—rather than allowing those disputes to crystallize through good faith negotiations as contemplated by the statute.

If your letter truly seeks to "narrow" the issues, your approach is counterproductive. As you know, Charter believes BREMC filed its petition prematurely without fully understanding Charter's positions. For months I have repeatedly sought discussions with BREMC aimed at reaching a new agreement or, at a minimum, narrowing the issues in dispute. BREMC finally confirmed its interest in pursuing those discussions, just a few weeks ago. You and I both agreed that for those discussions to be productive, each rate, term, and condition of the new agreement needs to be on the table.

Charter remains willing to negotiate with BREMC in good faith on *all* of the rates, terms, and conditions to be included in a new pole attachment agreement. But Charter cannot accede to BREMC's unreasonable demands. Please let us know whether BREMC is willing to meet with Charter in good faith negotiations, as we had previously agreed.

Sincerely,



Aaron George  
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP