

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. EC-23, SUB 50

BLUE RIDGE ELECTRIC)	
MEMBERSHIP CORPORATION)	
Petitioner,)	
)	
v.)	CHARTER COMMUNICATIONS
)	PROPERTIES LLC'S MOTION
CHARTER COMMUNICATIONS)	FOR TEMPORARY STAY
PROPERTIES LLC,)	
)	
Respondent.)	

Pursuant to Commission Rule R1-7(a)(5), Charter Communications Properties LLC ("Charter") respectfully 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 four pending cases involving the reasonableness of virtually identical pole attachment rates, terms, and conditions under G.S. § 62-350. *See* Docket Nos. EC-43, Sub 88; EC-49, Sub 55; EC-55, Sub 70; EC-39, Sub 44. In support of this Motion, Charter states the following:

INTRODUCTION

This matter is the seventh case between pole owners and communications companies requesting the Commission to adjudicate just and reasonable pole attachment rates, terms, and conditions. Two of these cases were settled and dismissed by the parties

in 2016.¹ The other four cases were the subject of three days of hearings held before the Commission from June 20, 2017, through June 22, 2017, consisting of live testimony and thousands of pages of testimony and exhibits.² Those cases are now fully briefed and ripe for the Commission's resolution, after the parties and five amici submitted post-hearing briefs on September 12, 2017.

This is the latest-filed of the seven cases. The pleadings and initial discovery in this case have established that it involves virtually identical claims and counterclaims—including the same rate theories and experts, and some of the same fact witnesses—as the four cases the Commission is set to decide. Indeed, BREMC's recent filing, styled a "First Amendment to Verified Petition for Relief," if accepted by the Commission,³ would bring these cases into even closer alignment, adding issues to this case that are fully briefed and ripe for resolution in the other cases.⁴

Given the overlap between the issues raised in this case and the other cases pending before the Commission, Charter believes that prosecuting this case on the current procedural schedule—requiring further discovery and depositions during the next month, submission of prefiled testimony beginning in early-October, and a full hearing in less than

¹ See Docket Nos. EC-82, Sub 19 (matter involving Time Warner Cable Southeast, LLC ("TWC") and Energy United EMC) & EC-52, Sub 39 (matter involving TWC and South River EMC).

² See Docket Nos. EC-43, Sub 88 (TWC v. Jones-Onslow EMC); EC-49, Sub 55 (TWC v. Surry-Yadkin EMC); EC-55, Sub 70 (TWC v. Carteret-Craven EMC); EC-39, Sub 44 (Union EMC v. TWC).

³ Charter is contemporaneously filing its objection to BREMC's motion to amend its petition. BREMC's motion to amend comes nearly 10 months after filing its initial petition and two-and-a-half months after the commencement of discovery.

⁴ Bringing these cases into alignment is one of the stated justifications for BREMC's motion. Mot. ¶ 4 ("[A]s a result of the positions Charter has taken in this and similar proceedings, BREMC has determined there are additional terms and conditions in dispute that will require a ruling from the Commission.").

two months—will result in a waste of the parties’ and the Commission’s resources. It is likely that the Commission’s decisions in the other pending cases will provide instructive precedent for both Charter and BREMC. That precedent is likely to promote settlement or, at a minimum, a substantial narrowing of the issues that must be addressed through further discovery, in the parties’ prefiled testimony, and ultimately at a hearing before the Commission. A temporary stay will not prejudice BREMC, as it will be able to submit testimony and proceed to a case-specific hearing on any issues the parties are not able to resolve based on the Commission’s precedent. Finally, a temporary stay would allow the parties to focus their resources on working cooperatively to address conditions in the field identified by BREMC in a prior audit and only recently communicated to Charter (*en masse* in a single day), rather than diverting local personnel and resources to supporting this litigation.

For these reasons, and as more fully explained below, Charter requests the Commission suspend its Procedural Order and stay further proceedings in this case until it resolves the four cases that are now ripe for decision.

BACKGROUND

BREMC filed its Petition on November 30, 2016, seeking the Commission’s resolution of purported disputes between the parties related to just and reasonable rates, terms, and conditions of attachment. Pursuant to an extension granted by the Commission, Charter filed its Answer and Counterclaims on January 31, 2017. BREMC filed its Answer to Charter’s Counterclaim on March 1, 2017.

Neither party took steps to prosecute this case while the four earlier-filed cases between TWC and the other EMCs progressed through discovery and prefiled testimony.

In May 2017, BREMC indicated to Charter that it had been prompted by staff counsel to propose a procedural schedule. The parties discussed proposed procedural schedules but could not reach agreement. Each party filed a competing proposal, and the Commission entered the current Procedural Schedule on June 7, 2017.

The Procedural Schedule called for discovery to open on July 5, 2017, with an October 3, 2017, cut-off for new discovery requests. Both parties have propounded initial discovery requests. And both parties have worked in good faith to resolve their disputes related to those requests without resort to the Commission, based in large part on the Commission's earlier resolution of disputes between TWC and the other EMCs over similar discovery requests.⁵ Discovery remains ongoing; neither party has conducted any depositions, but both have indicated their intent to do so. BREMC has served a corporate deposition notice on Charter and asked for dates toward the end of September or early October. Charter, likewise, intends to take a corporate deposition of BREMC. Additionally, if the Commission allows BREMC to amend its Petition to add additional claims, Charter intends to propound additional written discovery after answering the Amended Petition.

BREMC is currently scheduled to submit its prefiled direct testimony on October 11, 2017. Charter is scheduled to file its responsive testimony no later than October 25, 2017. And BREMC will file its rebuttal testimony no later than November 1, 2017. This case is currently scheduled for hearing during the week of November 6, 2017.

⁵ That is, until today, when BREMC filed a motion to compel Charter's remaining document production. Charter has worked diligently to collect thousands of pages of documents and information that it is producing on a rolling basis (and which is distinct from the information produced by TWC in the earlier cases). It will shortly produce the documents BREMC seeks to compel, mooting the cooperative's motion.

After the Commission entered the Procedural Schedule in this case, it held three days of hearings near the end of June in the similar cases between TWC and the four other EMCs. The Commission in July extended the parties' deadlines to file post-hearing briefs in those cases until September 12, 2017. The parties to those cases and five amici filed post-hearing briefs last week. Those cases are now ripe for the Commission's resolution. Charter conferred with BREMC prior to filing this Motion, but BREMC indicated it would oppose a temporary stay.

ARGUMENT

A. A Temporary Stay Would Conserve The Parties' And The Commission's Resources Because The Parties' Claims And Counterclaims In This Case Overlap Significantly With The Claims The Commission Is Set To Resolve.

A stay is warranted because the majority of the issues raised in BREMC's Petition and Charter's Counterclaims are the same as the issues to be resolved in the four similar cases involving TWC and other EMCs.

The parties' rate dispute is identical to the rate disputes the Commission is set to resolve. Like TWC in the pending cases, Charter asks the Commission to reject the Cooperative's current rates under Section 62-350, and to approve rates calculated in accordance with the widely used, fully compensatory pole attachment rate formula specified by the U.S. Congress and implemented by the Federal Communications Commission ("FCC") throughout much of the country, including in North Carolina. Answer & Counterclaim at 3, 20-24. And like each of the four EMCs before it, BREMC seeks the Commission's approval of the pole attachment rate methodology approved in 2016 by the Tennessee Valley Authority ("TVA") to serve the exclusive interests of its pole-owning wholesale electric power customers. Petition at 11-13. The parties' discovery to date suggests they will use the same rate experts who presented testimony in the four

prior cases—Patricia Kravtin for Charter (who previously testified for TWC) and Wil Arnett for BREMC (who previously testified for the other four EMCs).⁶

The parties' dispute over terms and conditions also overlaps substantially with the issues in the four pending cases. Charter and BREMC have identified virtually the same disputes as TWC and the other four EMCs related to terms and conditions addressing (i) certifications; (ii) overlashing; (iii) unauthorized attachment fees; (iv) non-compliant attachments; (v) pole transfers; (vi) indemnity requirements; and (vii) default remedies, including the ability to withhold consent to making new attachments. *Compare* Petition at 6-10 & Answer & Counterclaim at 24-27 to Joint Issue List, Issue Nos. 3.c., 3.e., 3.h., 3.i., 3.j., 3.m, and 3.n., filed in Docket Nos. EC-43, Sub 88, EC-49, Sub 55, EC-55, Sub 70, & EC-39, Sub 44.⁷ And the parties' discovery to date further suggests they will be submitting fact and expert testimony on these issues from many of the same lay and expert witnesses, including Nestor Martin on behalf of Charter (who previously testified on behalf of TWC) and Gregory Booth on behalf of BREMC (who previously testified on behalf of the other four EMCs).⁸

Additionally, if the Commission were to allow BREMC's amended petition, which Charter opposes, it would add claims to this case that are the same as those in the four pending cases—including claims addressing the appropriate terms and conditions for the

⁶ BREMC has not formally identified Mr. Arnett as its rate expert, but has disclosed that he executed the non-disclosure agreement attached to the protective order in this case, giving him access to TWC's confidential information.

⁷ While BREMC has raised a handful of disputed terms and conditions not addressed in the four pending cases (i.e., payment of disputed invoices, application fees, insurance, and confidentiality), the issues that overlap with those cases—in particular the parties' rate dispute—predominate over these isolated terms.

⁸ Like Mr. Arnett, Mr. Booth has executed the non-disclosure agreement attached to the protective order in this case, giving him access to TWC's confidential information.

Cooperative's reservation and recovery of space. Compare Am. Pet. at 2 to Joint Issue List, Issue No. 3.d. And its amendment at this stage of the proceedings, standing alone, would necessitate a suspension of the current procedural schedule in any event to allow Charter its customary 30 days to respond to BREMC's new claims and to take discovery on those claims.

A stay of this case until the Commission resolves the four pending and fully-briefed cases promises to conserve substantial resources of the parties and the Commission. The Commission's decisions in the four pending cases will supply its first precedent under Section 62-350. That precedent will allow Charter and BREMC to better assess the strengths and weaknesses of their respective positions on most, if not all, of the disputed rates, terms, and conditions. That precedent also will promote the possible settlement of their disputes without further proceedings.⁹ Even if the Commission's decisions do not result in a global settlement, they likely will enable the parties to narrow the issues ultimately submitted to the Commission. To be sure, Charter has maintained from the beginning of this case that BREMC filed its Petition prematurely in the middle of what Charter considered to be on-going, cooperative, and productive negotiations for a new pole attachment agreement. *See Answer & Counterclaim* at 1. In the nearly 10 months since BREMC filed its Petition, Charter has regularly offered to explore with BREMC how the parties may be able to narrow or eliminate the issues ultimately submitted to the Commission. BREMC recently confirmed its mutual interest in those discussions, and the

⁹ Charter believes that precedent guiding the parties on the most significant issues will inform the parties' assessment of their positions on the handful of issues specific to this case, even if those issues are not directly addressed by the Commission's decisions. Charter also believes that BREMC has misunderstood Charter's position on several of these issues and that they are susceptible to informal resolution.

parties are now working to identify next steps. A stay until the Commission decides the pending cases would allow the parties to direct their efforts and resources to these discussions, rather than continued litigation.

Absent a stay, however, the parties and the Commission will be forced to spend significant additional resources in litigation. The parties will be required to pursue additional discovery and prepare prefiled fact and expert testimony on every dispute that is currently pending between them—including all of the disputed rates, terms, and conditions the Commission is set to resolve in the other cases. If the Commission does not issue decisions in the four pending cases in the next few weeks—which would be a tall order given the number of issues, extensive record, and exhaustive briefing in those cases—the parties here will be forced to marshal witnesses and invest time and resources preparing for a hearing. For its part, the Commission would be required to devote time and resources to hearing many of the same issues it already spent the better part of a week hearing just three months ago. And, following the hearing and preparation of transcripts, the parties would find themselves submitting post-hearing briefings on the same issues currently pending before the Commission, and the amici as well will likely feel compelled to weigh in again on the same issues. The parties' continued litigation, including the filing of prefiled testimony and preparing for hearing this dispute, is also likely only to harden the parties' positions and diminish the possibility of reaching an informal resolution.

Finally, while Charter recognizes that the current Procedural Schedule is the same schedule Charter proposed earlier this year, the circumstances are now quite different. At the time Charter proposed the prior schedule, it did not know how extensively this case would overlap with the earlier-filed cases. The EMCs in the other four dockets had not yet

submitted their prefiled testimony or firmly established their litigation positions. And discovery had not yet begun in this case. As explained above, the subsequent developments in those cases and this one show that they will involve virtually the same rate theories and experts, as well as similar facts and argument. Charter also believed at the time that the Commission would have an opportunity to issue decisions in the other four cases and provide guidance to the parties before the proposed hearing date in this case. But the extended post-hearing briefing schedule in those cases now means there is very little time for the Commission to resolve those cases before this one goes to hearing.

B. BREMC Would Suffer No Hardship From A Temporary Stay.

A temporary stay of this case will not cause any hardship or prejudice to BREMC. After the Commission issues its decisions in the four pending cases, BREMC and Charter would be free to pick up this case where it currently stands, complete discovery, submit prefiled testimony and proceed to a hearing on any issues the parties are not able to resolve based on the Commission's newly-issued precedent. This approach would satisfy Section 62-350's case-by-case requirement and promote an efficient allocation of the parties' and the Commission's resources.

Nor can BREMC be heard to complain about the modest delay in resolving this case a temporary stay would entail. The parties have been in negotiations for a new pole attachment agreement since April 2015. Along the way, negotiations have been suspended by the parties for a number of reasons, including for several months while the General Assembly worked on its amendments to Section 62-350 in 2015. Negotiations also were stalled by BREMC when it chose to file its Petition initiating this case rather than respond to Charter's latest proposed draft agreement. (Indeed, nearly 10 months later, Charter is still waiting for that response, which BREMC has said for months is forthcoming). In the

meantime, Charter continues to make annual pole attachment rental payments in the amounts requested by BREMC under protest and subject to adjustment based on the outcome of this case. And BREMC and Charter continue to operate under the terms of their prior agreement, just as they have for the last decade.¹⁰ Additionally, BREMC abided a de facto stay when it allowed more than two months to pass after filing its answer to Charter's counterclaims without taking any steps to prosecute its claims—and apparently only initiated conversations about a procedural schedule at staff counsel's urging.

Far from causing any hardship, a temporary stay would conserve BREMC's resources along with the resources of Charter and the Commission and promote an informal resolution of some, if not all, of the parties' disputes.

C. A Stay Would Allow The Parties To Direct Finite Local Resources To More Productive Purposes.

Without advance notice or warning, on Friday, August 25, 2017, BREMC submitted 3,400 "tickets" to Charter through the National Joint Utilities Notification System ("NJUNS") identifying nearly 5,000 alleged noncompliance issues and requesting action on every ticket within 30 days. BREMC has since indicated that it does not expect each ticket to be addressed in 30 days (which would be impossible in any event). BREMC also confirmed that all of the tickets relate to issues identified in an audit conducted in 2015 and 2016. BREMC has not explained why it waited until now—in the middle of this proceeding and with Charter's local resources occupied responding to BREMC's discovery requests and preparing their own testimony—to submit thousands of tickets in one day relating to issues first identified years ago. Nor has it explained why it did not submit the

¹⁰ Even if the parties were not operating under that agreement, Section 62-350 supplies terms and conditions that apply in the absence of an agreement, pending the resolution of a dispute before the Commission. *See* G.S. § 62-350(d).

tickets on a rolling basis closer to the time the issue was discovered, as is customary for these types of audits.¹¹

The timing and nature of BREMC's ticket dump suggests that BREMC, like the four EMCs in the pending proceedings, seeks to paint Charter in a bad light (and overwhelm its local construction team) through "gotcha" tactics. But Charter's preliminary review indicates that the tickets are incomplete and tell a different story. The tickets do not identify the applicable standard that is allegedly not met, the proposed remediation, or how BREMC envisions the sequencing of work by affected parties. Standing alone, the tickets do not mean that Charter is the cause of noncompliance or even that Charter is in a position to remediate the issue. Despite having incomplete information and insufficient time to conduct a full review, Charter has already identified issues with the tickets. Some tickets relate to noncompliance issues created by other parties, not Charter. Some tickets instruct Charter to take actions that it cannot take until other companies complete their work, requiring coordination and sequencing of work between BREMC, Charter, and the other attaching entities. Some tickets even provide instructions that would actually create compliance issues if Charter were to follow them.

Issues like these mean Charter must assess each ticket and develop an action plan for addressing all of them. Doing so will require Charter's personnel and contractors to identify and confirm the noncompliance issues in each ticket, confirm Charter's responsibility for them, determine whether it can proceed with the work or wait for another party, identify the resources/crews it needs to deploy for each ticket, and develop an appropriate remediation schedule. And it will require a mobilization of resources in

¹¹ Surry-Yadkin, for example, is following this customary procedure and it is working well for the parties.

Charter's local construction offices and among its subcontractors who work in the area, including dedicated teams focused on this project. Charter conservatively estimates this project will likely cost hundreds of thousands of dollars and take half-a-year or more to address. It also will require BREMC and other affected parties to coordinate and work cooperatively with Charter, as required by Section 62-350, to determine the causation of, and the appropriate remedy for, the issues identified in the tickets.

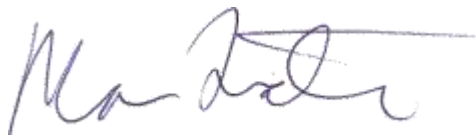
Charter does not know why BREMC chose to submit thousands of tickets in a single batch now, when it has apparently known of these issues for some time. Charter, however, is willing to devote the necessary local resources and work with BREMC to assure that its facilities are in compliance with applicable standards. But Charter has finite resources in the area, and the local construction personnel who must develop and implement an action plan for tackling this massive project are the same people BREMC wants to sit for depositions in a few weeks, and who must prepare testimony and attend the hearing, if it were to go forward as currently scheduled. The parties are required by statute to coordinate in good faith to address causation and remediation, and they must start that process now. *See* G.S. § 62-350(d)(4) (requiring coordination to identify causation and remediation) & (d)(1) (requiring prompt and diligent action). Meeting these obligations alone would justify a temporary stay since the same people are involved in both this project and this case. A temporary stay of this case, moreover, will allow Charter and BREMC to focus their resources on cooperatively addressing compliance issues, without the costs and conflict inherent in litigation. This ultimately will serve the public interest by promoting a safer and more reliable aerial network.

CONCLUSION

With the substantial overlap between this case and the cases the Commission is set to resolve, Charter submits the only sensible approach to conserve the parties' and the Commission's resources is to suspend the Procedural Schedule and stay this case until the Commission issues decisions in the pending cases under Section 62-350. A temporary stay will promote an informal resolution of this case, cause no hardship on either party, and will allow them to focus their resources on a plan to remediate compliance issues.

WHEREFORE, for the foregoing reasons, Charter respectfully requests that the Commission issue an Order suspending the Procedural Schedule and staying this case until the Commission issues decisions in Docket Nos. EC-43, Sub 88, EC-49, Sub 55, EC-55, Sub 70, and EC-39, Sub 44.

Respectfully submitted, this 18th day of September, 2017.



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CERTIFICATE OF SERVICE

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

This the 18th day of September, 2017.



*Attorney for Charter Communications
Properties LLC*