STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EC-23, SUB 50

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
	)	
Blue Ridge Electric Membership Corporation,	)	
	)	
	)	ORDER RESOLVING POLE
Complainant,	)	ATTACHMENT COMPLAINT
	)	PURSUANT TO NORTH CAROLINA
v.	)	GENERAL STATUTE § 62-350
	)	
Charter Communications Properties, LLC,	)	
	)	
Respondent.	)	

HEARD: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, November 8-9, 2017 and December 18, 2017

BEFORE: Chairman Edward S. Finley, Jr., Presiding, and Commissioners Bryan E. Beatty, ToNola D. Brown-Bland, Jerry C. Dockham, James G. Patterson, and Daniel G. Clodfelter

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BY THE COMMISSION: This is the fifth pole attachment case to come before the Commission under the jurisdiction provided in the General Assembly's 2015 amendments to North Carolina General Statute § 62-350 (N.C. Gen. Stat. § 62-350).

N.C. Gen. Stat. § 62-350 gives exclusive jurisdiction to the Commission to resolve disputes between municipally-owned and cooperatively organized utilities and communications service providers, defined to include telephone companies, telephone membership corporations (TMCs), broadband service providers, and cable operators. Municipal and cooperative utilities are required to allow communications service providers to use their poles, ducts and conduits at "just, reasonable, and nondiscriminatory rates, terms and conditions adopted pursuant to negotiated or adjudicated agreements." N.C. Gen. Stat. § 62-350(a). Where disputes between pole owners and attaching communications service providers are not resolved within a 90-day period, or where either party believes in good faith that they are at an impasse, either party may bring a complaint to the Commission for resolution. The Commission has exclusive jurisdiction over the dispute, and is required to adjudicate all such complaints on a case-by-case basis. N.C. Gen. Stat. § 62-350(c). With respect to rate issues, the Commission is granted discretion to "consider any evidence or rate-making methodologies offered or proposed by the parties . . . consistent with the public interest." Id. In particular, the law makes clear that the Commission "may consider any evidence presented by a party, including any methodologies previously applied." N.C. Session Law 2015-119, § 7. Any new rate adopted by the Commission is applied retroactively to the date of initiation of the proceeding or "the date immediately following the expiration of the 90-day negotiating period, whichever is earlier." N.C. Gen. Stat. § 62-350(c). If the rate relates to an existing agreement, however, the new rate "applies retroactively to the date immediately following the end of the existing agreement." Id.

In addition to setting forth a process to resolve disputes regarding rates and terms of attachment, N.C. Gen. Stat. § 62-350 separately addresses safety and compliance issues. The statute provides that, in the absence of a different agreement between the parties, if the facilities of a communications service provider do not comply with applicable safety rules and regulations, the electric membership corporation (EMC) or municipal utility must follow a prescribed procedure for notifying the communications service

provider, making a demand that the compliance issues be cured, and working together "cooperatively to determine the causation of, and to effectuate any remedy for, noncompliant lines, equipment, and attachments." Id. N.C. Gen. Stat. § 62-350(d).

Finally, in N.C. Gen. Stat. § 62-350, the General Assembly directed the Commission to "adjudicate disputes arising under this [statute] on a case-by-case basis." N.C. Gen. Stat. § 62-350(c). As a consequence of these directives, any decision reached in this docket regarding the rate, and/or the ratemaking methodology or the terms and conditions which govern these parties' pole attachment agreement will be based upon the unique facts and circumstances present in this docket. Furthermore, in each subsequent pole attachment dispute that is filed with the Commission, the Commission will be required to examine the unique facts and circumstances in that case and to make its decision based upon those unique facts and circumstances as a consequence of these directives. As a result, the Commission's ultimate decision in this docket will not and cannot establish a binding precedent in future pole attachment resolution proceedings with regard to core and salient issues raised by and addressed in this docket.

On November 30, 2016, Blue Ridge Electric Membership Corporation (Blue Ridge or the Complainant), an electric cooperative utility organized under Chapter 117 of the General Statutes, filed a Complaint (the Complaint) against Charter Communications Properties, LLC (Charter), a "communications services provider" as defined in N.C. Gen. Stat. § 62-350. Blue Ridge's Complaint alleged that Charter had improperly refused to agree to reasonable terms and conditions in a new pole attachment agreement, including a pole attachment rate.

On February 1, 2017, Charter filed its Answer to Blue Ridge's Complaint. In its Answer, Charter responded to the allegations of the Complaint and also sought additional relief against Blue Ridge in a Counterclaim. On March 1, 2017, Blue Ridge filed its Answer to Charter's Counterclaim.

On May 26, 2017, Blue Ridge filed a motion for a procedural schedule. Charter responded on May 31, 2017. The Chairman issued an order to establish a procedural schedule on June 7, 2017.

On August 8, 2017, Blue Ridge and Charter filed a joint motion to approve a stipulated protective agreement, which the Chairman granted by order dated August 10, 2017.

On September 12, 2017, Blue Ridge filed a motion for leave to amend its Complaint, and on September 18, 2017, filed a motion to compel discovery from Charter. Also, on September 18, 2017, Charter filed a motion for a temporary stay and in opposition to Blue Ridge's motion for leave to amend its Complaint. Blue Ridge opposed Charter's motion for a temporary stay and replied to Charter's opposition to its motion to amend its Complaint on September 21, 2017. Charter in turn replied in support of its motion for a temporary stay on September 22, 2017. On September 27, 2017, the Chairman issued an order granting Blue Ridge leave to amend its Complaint and denying the motion for a temporary stay.

On September 29, 2017, Charter filed its opposition to Blue Ridge's motion to compel discovery.

On October 3, 2017, Blue Ridge and Charter filed a joint motion for modification of the procedural schedule, that the Chairman granted by order dated October 6, 2017.

On October 9, 2017, the Chairman issued an order requiring Charter to submit an answer to Blue Ridge's Amended Complaint, and Charter filed the answer on October 16, 2017. The Chairman also issued an order on that date requiring the parties to make various pre-trial filings, including: (1) agreed upon stipulations covering all relevant and material facts, legal issues and factual issues; (2) contentions covering matters which the parties had not been able to stipulate; (3) a clear and concise listing and statement of each issue in dispute; (4) a list of the names and addresses of all witnesses each party may offer at trial, together with a brief statement of what counsel proposed to establish by their testimony; and (5) a list of exhibits which each party may offer at trial. These filings were duly submitted by the parties on November 2, 2017.

On October 16, 2017, Blue Ridge filed direct testimony of Wilfred Arnett, Gregory Booth, and Lee Layton. On October 31, 2017, Charter filed responsive testimony of Michael Mullins, Nestor Martin, and Patricia Kravtin. On November 1, 2017, Blue Ridge filed a notice of its objection to untimely filing and moved to supplement its rebuttal testimony at the hearing. Charter opposed this motion on November 3, 2017. Blue Ridge submitted rebuttal testimony of witnesses Arnett, Booth, and Layton on November 6, 2017. Blue Ridge replied to Charter's opposition to its motion to supplement its rebuttal testimony on November 7, 2017, and the Chairman, at the hearing, issued an oral ruling on Blue Ridge's motion by stating that Blue Ridge's counsel could ask their rebuttal witnesses additional questions when they took the stand. [Tr. Vol. 1, p.11].

The matter came on for hearing as scheduled on November 8 and 9, 2017, and concluded on December 18, 2017. Blue Ridge presented direct testimony, rebuttal testimony, and exhibits of witnesses Layton, Arnett and Booth. Charter offered responsive testimony and exhibits of witnesses Mullins, Martin and Kravtin.

On January 24, 2018, Charlotte Mitchell, counsel for Blue Ridge, moved to withdraw from the case following her appointment to the North Carolina Utilities Commission. The Chairman granted her motion the same day.

Pursuant to order of the Chairman at the conclusion of the hearing, post-hearing proposed orders and briefs were to be filed thirty (30) days from the filing of the last transcript. [Tr. Vol. 5, p. 155].

On February 14, 2018, Blue Ridge filed a motion to extend time to submit post-hearing briefs and proposed orders to April 4, 2018. On February 19, 2018, the Commission granted Blue Ridge's motion.

Blue Ridge and Charter filed briefs and proposed orders in accordance with the Order. Also, on that date, the North Carolina Association of Electric Cooperatives (NCAEC), the North Carolina Cable Telecommunications Association (NCCTA), the North

Carolina Telephone Membership Cooperative Coalition (CarolinaLink), and Carolina Telephone and Telegraph Company LLC d/b/a CenturyLink, Central Telephone Company d/b/a CenturyLink and MebTel, Inc. d/b/a CenturyLink (collectively, CenturyLink) filed motions to participate in the proceeding as Amicus Curiae or, in the case of CenturyLink, a letter. On May 4, 2018, the Chairman granted the requests. Briefly summarized, the Amici comments are as follows.

Post-Hearing Amicus Briefs

NCAEC: NCAEC noted that it is a non-profit affiliate of the NCEMC charged with representing the common interest of its members (all 26 EMCs headquartered in North Carolina) including Blue Ridge. NCAEC commented that by law, EMCs must make electric service available to customers at the lowest cost consistent with sound economy and prudent management.

NCAEC stated that Charter is asking the Commission to adopt the Federal Communications Commission (FCC) rate methodology. According to NCAEC, properly determining just and reasonable pole attachment rates requires the Commission to address the FCC's rates shortcomings by considering the full range of potential rate methodologies, based on how parties actually use space on the poles. It also requires the Commission to weigh cable companies' false promises of rural broadband against the public's overriding interest in ensuring EMCs' members are not being forced to subsidize the operations of for-profit cable companies through electric rates. Additionally, NCAEC stated that the Commission should refuse Charter's demand that it consider only the subsidization of broadband and nothing else when it sets rates that are consistent with the public interest.

NCAEC stated that as the Commission considers the various rate methodologies discussed in this proceeding, the Commission should be mindful that the FCC Methodology rate is the clear wrong answer. NCAEC argued that the Tennessee Valley Authority (TVA) methodology represents a fairer and more reasonable way to divide the costs of the pole and reflects a proper understanding of the ways in which the parties use the pole and allocates the entire Communications Worker Safety Zone equally among communications attachers (but not the electric utility) and allocates the Support Space among all attaching entities on an equal, per capita basis.

Finally, NCAEC observed that the Commission's decision in this proceeding is not a binary choice and that Blue Ridge offered several alternative methodologies which the Commission is entitled to consider including the American Public Power Association (APPA) Rate, the Telecom Plus Rate and the Arkansas Formula. NCAEC also observed that the Commission is free to modify the space allocation factor contained in the proposed methodology to conform to the Commission's understanding of what would constitute a just and reasonable rate, consistent with the public interest and the parties' actual use of the poles.

CarolinaLink: CarolinaLink asserted that the TVA rate approach is a recent innovation designed to inflate rates certain electric suppliers can charge for access to their facilities.

CarolinaLink argued that the TVA rate methodology is flawed for several reasons. CarolinaLink maintained that it is inappropriately based on the benefits received by the attacher, as opposed to the cost incurred by the pole owner. In addition, CarolinaLink maintained that even if it was appropriate to base the rate on benefits as opposed to costs, which it is not, the TVA rate wrongly assumes the attachers and pole owners benefit equally from the pole. CarolinaLink argued that they do not benefit equally and that a pole owner realizes a greater benefit from the pole because it owns the poles, designs the network with its needs in mind, and dictates the location of the attachment. CarolinaLink noted that while telecommunication and cable companies have a right to attach their facilities to utility poles, they do not have the right to exert the same control over the poles as the pole owner, nor do they have the right or as many opportunities to monetize the utility pole as the pole owner. Therefore, CarolinaLink asserted, pole owners receive more benefits from their poles than attachers.

CarolinaLink stated that long-established economic principles demonstrate that pole attachments should be based on costs rather than benefits or arbitrary and subjective value of service concepts. CarolinaLink noted that while the TVA formula appears to attribute the cost of the pole between the attachers and pole owner, in reality its cost allocation formula is based on the faulty notion that attachers and the pole owners each receive an equal benefit. CarolinaLink maintained that cost allocation, as the name suggests, should only be based on cost-causation and that the Commission is familiar with the concept of cost allocation. CarolinaLink maintained that direct costs are easily assigned because they are incurred incrementally to benefit a certain group. CarolinaLink noted that in addition to direct costs, there are always common costs, which must be assigned on a rational, economically efficient basis. CarolinaLink noted that common costs are allocated based on a reasonable allocator, which recognizes that a percentage of the common costs must be apportioned. CarolinaLink asserted that in approving cost allocation methodologies, the Commission does not assign common costs by an arbitrary method that selects who will be the winner and who will be the loser, totally disregarding the issue of cost causation.

CarolinaLink also noted that the EMCs' monopolistic control over poles in their service areas becomes increasingly problematic as some of the EMCs choose to enter the broadband market. CarolinaLink asserted that the EMCs should not be permitted to inflate the costs to potential competitors by artificially allocating unnecessary costs to those competitors or by arbitrarily assigning a value of service component to serve their own purposes.

CarolinaLink maintained that the FCC rate methodology has withstood the test of time. CarolinaLink also noted that as recently as July 31, 2017, the United States Court of Appeals for the Eighth Circuit stated that the FCC Cable Rate formula represents a reasonable policy choice.

CarolinaLink asserted that the FCC Cable Rate formula approximates an efficient rental rate that corresponds to the actual cost of the unit of service being produced. CarolinaLink noted that if pole attachments were in a competitive market in which a surplus could exist,

the price would be driven down to its marginal costs. CarolinaLink argued that the FCC Cable Rate formula provides the pole owner with more than just its marginal costs and fairly compensates the pole owner for all out-of-pocket expenses, such as make-ready cost inspection fees, pole inventories, and other charges.

CarolinaLink noted that pole attachment rates are not only important to Investor Owned Utilities (IOUs), the rates are important to TMCs. CarolinaLink stated that, in many instances, the TMCs share many of the same characteristics with the EMCs; they are both member owned, are both organized under Chapter 117, both serve rural North Carolina with essential services, and are both operated for the benefit of their members. CarolinaLink maintained that the TMCs have differed with Charter on many public policy issues and in most cases have sided with the EMCs; however, in this limited instance, the TMCs share more in common with Charter than the EMCs and the EMCs share more in common with investor owned utilities than the TMCs.

CarolinaLink noted that, all combined, the EMCs serve a significant amount of territory, 2.5 million members spread through 93 North Carolina counties, and the EMCs overlap the TMCs almost entirely.

CarolinaLink also noted that rural broadband deployment continues to be a critical issue at the state and federal level. CarolinaLink asserted that the most problematic areas for broadband deployment are in rural areas and often in areas served by EMCs. CarolinaLink argued that broadband is a must for economic success in rural communities and that if EMC's are allowed to implement artificially high pole attachment rates investment in broadband will further shift away from rural areas and that those areas will continue to be left behind.

CenturyLink: CenturyLink stated that it was filing a letter to express support for the positions advocated by Charter. CenturyLink observed that like Charter, it relies on existing utility networks owned by electric and telephone utilities to provide services. Further, CenturyLink noted that excessive rates and burdensome contract terms are a concern of all pole attaching entities and that access to utility poles at just, reasonable and non-discriminatory rates is essential to the expansion of broadband and other advanced services across North Carolina, especially the rural areas which may be unserved or underserved. Pole attachment fees can be one of the largest costs in reaching rural customers and are a key component in determining how and where advanced services can be deployed. Finally, CenturyLink urged the Commission to consider the comments that CenturyLink made in its Amicus Brief in the prior pole attachment proceedings and incorporate those comments by reference into this proceeding.

NCCTA: NCCTA stated that the fundamental issue presented in this proceeding relates to the interpretation of N.C. Gen. Stat. § 62-350. According to NCCTA this is the same basic issue addressed by the Commission in prior pole attachment proceedings. NCCTA asserted that the orders issued in the prior proceedings were well reasoned, in the public interest, and in accord with the statutory requirement of N.C. Gen. Stat. § 62-350. Further, NCCTA urged the Commission to apply the same principles in the present proceeding

and apply the FCC pole attachment rate methodology which is widely accepted, time-tested, and best suited for balancing the interests at stake. Finally, NCCTA urged the Commission to consider the comments that it made in its Amicus Brief in the prior pole attachment proceedings and incorporate those comments by reference into this proceeding.

Based on the foregoing, Blue Ridge's Complaint, Charter's Counterclaim and Answers and other filings, the evidence and exhibits presented at the hearing, and the entire record in this proceeding, the Commission now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Charter and Blue Ridge entered into a pole attachment agreement as of September 1, 2008 (the 2008 Agreement). The 2008 Agreement expired on September 1, 2013.

2. A true and correct copy of the 2008 Agreement is attached as Exhibit No. LL-3 to the Direct Testimony of witness Layton.

3. Blue Ridge approached Charter about a new pole attachment agreement on May 22, 2014, noting that the 2008 Agreement had expired and offering a new draft agreement. [MM Ex. 2] On May 26, 2015, Charter sent a redlined draft agreement back to Blue Ridge. Despite negotiation efforts, the parties have not been able to resolve their differences regarding the rates, terms and conditions for a new agreement.

4. On or about June 22, 2015, the parties agreed to operate under the terminated 2008 Agreement until the General Assembly completed action on the revisions to N.C. Gen. Stat. § 62-350. [MM Ex. 4] Charter attaches and has attached to Blue Ridge's poles pursuant to the 2008 Agreement.

5. The Commission has exclusive jurisdiction under N.C. Gen. Stat. § 62-350 to determine the just and reasonable rates that Blue Ridge may charge Charter for attaching its facilities to Blue Ridge's poles.

6. The Commission has exclusive jurisdiction under N.C. Gen. Stat. § 62-350 to determine the appropriate terms and conditions for Charter's continued use of or attachment to the poles, ducts, or conduits owned or controlled by Blue Ridge, including matters customary to such negotiations, such as a fair and reasonable rate for the use of facilities, indemnification by the attaching entity for losses caused in connection with the attachments, and the removal, replacement, or repair of installed facilities for safety reasons.

7. Charter and Blue Ridge each discussed at the hearing numerous state and federal decisions, and rate methodologies and methods which have been developed and/or applied by various state commissions, energy and communications related interest groups, organizations and federally established regulatory and administrative agencies.

8. Although Charter and Blue Ridge discussed at hearing various rate methodologies and methods, Charter and Blue Ridge each advocated that the Commission adopt specific, separate and distinct methodologies to determine the just and reasonable pole attachment rate that should be applied to resolve the dispute in this case.

9. Charter contended that the Commission should apply the FCC Cable Rate Methodology (FCC Rate Methodology) which was developed by the FCC, an administrative agency created by the federal government.

10. Blue Ridge compared the TVA methodology (TVA Rate Methodology) that was developed by the TVA, an administrative agency created by the federal government, to a number of other potential rate formulas, including the formula adopted by the American Public Power Association, the Telecom Plus formula considered by the United States House of Representatives, the formula adopted by the Arkansas Public Service Commission and the FCC Rate Methodology. After doing so, Blue Ridge contended that the TVA Rate Methodology was the proper formula for the Commission to apply to determine the just and reasonable rates that Charter should pay to attach to Blue Ridge's poles.

11. Neither the FCC nor the TVA has regulatory authority over the pole attachment rates charged by Blue Ridge.

12. While the Commission is not required under N.C. Gen. Stat. § 62-350 to apply the FCC Rate Methodology, the TVA Rate Methodology or any other rate methodologies discussed by the parties in deciding on the just and reasonable rates that should apply under the facts of this case, the Commission, in its discretion, may consider any evidence or rate-making methodologies offered or proposed by the parties to arrive at its decision as to the just and reasonable rates that Blue Ridge is authorized to charge Charter.

13. It is therefore appropriate for the Commission to consider both the FCC Rate Methodology and the TVA Rate Methodology in making its decision as to the maximum just and reasonable rates that Blue Ridge may charge Charter to attach to its poles.

14. The FCC Rate Methodology and the TVA Rate Methodology rely on the same inputs and generate almost identical average annual pole costs. They differ significantly, however, in their allocation of those costs.[1]

15. The primary difference between the FCC Rate Methodology and the TVA Rate Methodology is the allocation of the cost of the space on the pole.

[1] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

16. Based upon the evidence presented in this docket, it is appropriate for the Commission to apply economic, cost-based principles in allocating costs of providing pole attachment service.[2]

17. Blue Ridge does not have any duty to construct facilities necessary to provide pole attachment services to Charter, and Charter is separately responsible for covering the EMC's measurable and verifiable costs that are directly attributable to Charter's attachments. Charter occupies space on Blue Ridge's poles only so long as that space is not required by Blue Ridge for its own utility service.[3]

18. While economic cost causation and cost allocation principles justify reliance on the FCC Rate Methodology, it is appropriate for the Commission to consider the public interest benefits and detriments from raising or lowering pole attachment rates under N.C. Gen. Stat. § 62-350.[4]

19. While economic cost causation and cost allocation principles justify reliance on the FCC Rate Methodology, it is appropriate for the Commission to consider the benefits from lower pole attachment rates on economic efficiency in the communications sector as well as, more specifically, the geographic expansion of broadband service.[5]

20. It is not appropriate for the Commission to treat non-profit and for-profit entities differently regarding pole attachment rates.[6]

21. Based upon the evidence herein presented, the FCC Rate Methodology for allocating the total costs of a pole based on the percentage of space used by the attacher established by the FCC and approved by the North Carolina Business Court and affirmed by the North Carolina Court of Appeals is the appropriate methodology for allocating the total costs of the pole, including unusable space.[7]

22. The costs associated with the "safety space" on a pole should be allocated in accordance with the FCC Rate Methodology.[8]

23. The parties disagree as to whether the Commission should use the FCC Rate Methodology's or the TVA Rate Methodology's presumptions in determining the appropriate rate for Charter's attachments to Blue Ridge's poles, or whether the

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[2] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

[3] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

[4] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

[5] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

[6] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

[7] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

[8] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

Commission should employ actual data Blue Ridge has introduced to rebut those presumptions.

24. The FCC Cable Rate Methodology employs rebuttable presumptions regarding the height and use of a utility's poles, which include presumptions that: (i) the average height of a distribution pole is 37.5 feet; (ii) these poles are, on average, buried six feet deep, and (iii) in order to maintain proper clearances, the lowest attachment on a pole must be at least 18 feet off the ground. In applying the FCC Cable Rate, the FCC treats these presumptions as rebuttable. *See* 47 C.F.R. § 1.1418 (providing that the presumptions regarding space occupied by cable company's attachment, the amount of usable space, and average pole height "may be rebutted by either party").

25. The TVA Rate Methodology also employs rebuttable presumptions.

26. According to Blue Ridge's records and recently collected audit data, Blue Ridge had an average of 2.35 attachers on its poles (*i.e.*, Blue Ridge, Charter, and other third-party attachers) in the years 2014, 2015, and 2016.

27. According to Blue Ridge's Rural Utilities Service (RUS) and accounting records, Blue Ridge's actual data shows the following:

a) **Pole Height**. The average height of Blue Ridge's distribution poles, calculated using its continuing property records, is roughly one foot less than the 37.5 feet presumption under the FCC cable rate, resulting in average pole heights of (a) 36.83 feet for 2014, (b) 36.85 feet for 2015, and (c) 36.87 feet for 2016.

b) **Attachment Height**. The FCC cable formula presumes that all entities attaching to the pole require 18 feet of ground clearance, and thus the first attacher will attach at this height, rendering the remainder of the pole "usable space." However, because Blue Ridge's poles are spaced farther apart than is typical, attachers are required to make the first attachment higher on the pole in order to maintain ground clearance. As a result the first available attachment on Blue Ridge's poles based on its yearly average pole height was (a) 21.3 feet in 2014, (b) 21.8 feet in 2015, and (c) 21.26 feet in 2016. This necessarily results in less "Usable Space" and more "Support Space" that must be allocated among the attachers.

c) **Appurtenance Factor**. While the FCC Cable rate presumes an appurtenance rate of 15%, meaning 85% of a utility's Account 364 is attributable to distribution poles, Blue Ridge's true bare pole costs, net of appurtenances, were (a) 87.0% for 2014; (b) 87.29% for 2015; and (c) 87.41% for 2016.

d) **Number of Attachments / Occupied Space**. The FCC Cable Rate presumes that cable company attachments use only one foot of

space, and that a cable company only attaches once to each pole. Blue Ridge's 2015-2016 pole audit showed that Charter had 27,674 attachments on 24,888 poles. This means Charter has an average of 1.11 attachments per pole, which is reflected by showing that it uses 1.11 feet of space as opposed to the FCC Rate Methodology presumption of 1 foot of space.

28. The evidence that Blue Ridge provided to rebut the FCC Rate Methodology's presumptions is reliable, and more accurately reflects the costs and the parties' use of Blue Ridge's distribution poles. It is therefore appropriate to use the actual data provided by Blue Ridge with the FCC Rate Methodology to calculate the maximum pole attachment rates that Blue Ridge may charge Charter.

29. Blue Ridge's maximum just and reasonable pole attachment rates for the years 2015-2017 should be determined based on the FCC's Rate Methodology.

30. The FCC Rate Methodology presumptions should be replaced with actual data provided by Blue Ridge. When Blue Ridge's actual data is employed in the FCC Rate Methodology, the resulting rates for rate years 2015, 2016, and 2017, are as follows:

2015 - $8.49 per pole

2016 - $8.37 per pole

2017 - $8.31 per pole

31. Charter paid the following rates to Blue Ridge for 2015 through August 2017:[9]

2015 - $26.64 per year

2016 - $26.64 per year

2017 - $26.64 per year

32. Blue Ridge owes a refund to Charter for excessive pole attachment fees paid from August 25, 2015, through August 31, 2017, and for excessive pole attachment fees paid after August 31, 2017.[10]

[9] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

[10] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

33. In addition to a just and reasonable pole attachment rate, it is appropriate for Charter to pay Blue Ridge's measurable and verifiable costs directly attributable to Blue Ridge providing pole attachment space to Charter.[11]

34. It is appropriate for the Commission to look to industry standard provisions in agreements negotiated in regulated and unregulated situations as cogent evidence of reasonableness.[12]

35. Issues regarding the condition and compliance of Charter's outside plant as presented at the hearing are not yet ripe for Commission consideration.[13]

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-4

The evidence supporting these Findings of Fact is found in the Joint Stipulations and the record of evidence.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 5-13

The evidence supporting these Findings of Fact is found in the testimony of Charter witnesses Kravtin, Martin and Mullins, Blue Ridge witness Arnett, the Joint Stipulations, and the record of evidence.

Witness Kravtin testified that the FCC has regulated pole attachment matters, including how to set just and reasonable, cost-based pole attachment rates, for many years. [Kravtin Tr. Vol. 4, pp. 168-69.] As noted by witness Kravtin, the rate methodology approved by the FCC under 47 U.S.C. § 224(d) has been found by numerous courts, including the United States Supreme Court, to be compensatory and subsidy free. [Tr. Vol. 4, pp. 201-02 & n.43.][14] The FCC has issued scores of decisions implementing its rate formula and has reaffirmed the formula recently in Restoring Internet Freedom, WC No. 17-108, Declaratory Ruling, Report & Order, 2018 WL 305638, ¶¶ 185-91 (FCC 2018). Witness Kravtin testified that reliance on this well-understood and easy-to-apply methodology would avoid the need for constant Commission refinement and explanation. [Kravtin, Tr. Vol. 4, p. 204.]

As explained by witness Kravtin, the FCC Rate Methodology[15] is applied directly to electric IOUs and incumbent local exchange carriers (ILECs) in those 30 states that

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[11] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

[12] Issue No. 3 per the November 2, 2017 Joint Statement of Issues.

[13] Issue No. 3 per the November 2, 2017 Joint Statement of Issues.

[14] *See, e.g.*, FCC v. Florida Power Corp., 480 U.S. 245, 253-54 (1987).

[15] Pursuant to 47 U.S.C. § 224(d)(1), the FCC has regulated pole attachments made by cable operators to provide cable service since 1978. Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC No. 78-144, First Report & Order, 68 FCC2d 1585, 1585, 1598-99 (1978). The Commission will refer to this rate methodology throughout as the "FCC Rate." In 1996 Congress amended the Pole Attachment Act to provide for regulation of

have not chosen themselves to regulate pole attachment rates. *See* States That Have Certified That They Regulate Pole Attachments, Public Notice, WC No. 10-101, 25 FCC Rcd 5541, 5541-42 (2010). The pole attachment rates of IOUs and ILECs in North Carolina are based on the FCC Rate Methodology. [Kravtin, Tr. Vol. 4, p. 180; Martin, Tr. Vol. 4, p. 80.] The poles owned by IOUs and ILECs are "largely if not entirely indistinguishable" from the poles owned by the Cooperatives. [Kravtin, Tr. Vol. 4, p. 180.] Witnesses Martin and Mullins testified similarly. [Martin, Tr. Vol. 4, p. 77; Mullins, Tr. Vol. 3, p. 236.] Witness Kravtin testified that, due in part to historic joint use[16] pole agreements between ILECs and Blue Ridge, those parties have constructed poles with the same physical characteristics, often interspersed in a pole line. Further, these poles are sometimes adjacent to virtually identical poles owned by a federally regulated IOU. [Kravtin, Tr. Vol. 4, p. 180; Martin, Tr. Vol. 4, p. 77; Mullins, Tr. Vol. 3 p. 236.] Due to joint use agreements, in almost all situations, there is only one set of poles on any particular road.[17] [*See* Martin, Tr. Vol. 4, pp. 138-39.]

Witness Kravtin noted that the average pole attachment rate that Charter paid in 2016 to North Carolina IOUs and ILECs, which are regulated by the FCC under its standard rate methodology, was $7.20 for IOUs and $3.24 for ILECs. [Kravtin, Tr. Vol. 4, p. 234.] These rates are in the same range as the rates that witness Kravtin calculated for Blue Ridge under the FCC Rate Methodology. Witness Kravtin testified that it makes no sense from an economic perspective to have the rates charged by different types of entities vary widely. [Kravtin, Tr. Vol. 4, pp. 179-80, 246-47.] On the other hand, she testified that there are significant public interest benefits in having similar poles regulated similarly, regardless what type of entity owns them. [Kravtin, Tr. Vol. 4, pp. 196-97.]

Witness Kravtin also observed that the large majority of states that regulate pole attachments,[18] including poles owned by electric cooperatives, do so according to the FCC Rate Methodology or a close cousin. For example, she testified that Ohio, New

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attachments made by telecommunications carriers to provide telecommunications service pursuant to 224 U.S.C. § 224(e). In 2011 and 2015, the FCC released orders bringing the "telecommunications" rate into line with the "cable rate." Implementation of Section 224 of the Act: A National Broadband Plan for Our Future, 26 FCC Rcd. 5240, 5322 (2011), aff'd sub nom. Am. Elec. Power Serv. Corp. v. FCC, 708 F.3d 183 (D.C. Cir. 2013); Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Order on Reconsideration, 30 FCC Rcd. 13731 (2015).

[16] The term "joint use" refers to arrangements between different pole owners, generally electric and telephone providers, to each share their poles with the other entity.

[17] *****BEGIN CONFIDENTIAL*******END CONFIDENTIAL*****

[18] The Federal Pole Attachment Act allows states to "reverse-preempt" the FCC's pole attachment regulations so long as they meet certain federal standards. 47 U.S.C. § 224(c). To date, twenty states and the District of Columbia have reverse-preempted FCC jurisdiction over the rates, terms, and conditions of pole attachments in their states. *See* States That Have Certified That They Regulate Pole Attachments, WC No. 10-101, Public Notice, 25 FCC Rcd 5541, 5542 (FCC WCB 2010). North Carolina has chosen to allow the pole attachment service of IOUs and ILECs to continue to be regulated by the FCC.

York, California, Michigan, and Kentucky, along with 10 other states, all regulate IOU and ILEC pole attachment rates according to the FCC Rate Methodology or something very close to it. [Kravtin, Tr. Vol. 4, p. 204 and Ex. PDK 7.] While some of these methodologies were initially adopted decades ago, many have been reaffirmed more recently.[19] In addition, eleven states regulate the pole attachment rates of cooperatives and/or municipal utilities according to the FCC Rate Methodology. [Ex. PDK 7.]

Witness Kravtin also testified that the National Association of Regulatory Utility Commissioners (NARUC) has strongly recommended that state utility commissions apply the FCC pole attachment rate methodology to electric cooperatives. [Kravtin, Tr. Vol. 4, pp. 204-05; Exs. PDK 11 and 12.] She also noted that the National Association of State Utility Consumer Advocates (NASUCA) has similarly endorsed the FCC formula for uniform application to all pole owners. [Kravtin, Tr. Vol. 4, pp. 204-05; Ex. PDK 13.] Witness Kravtin also pointed out that even the National Rural Electric Cooperative Association (NRECA), Blue Ridge's own national trade association, has found the FCC pole attachment formula to be "unimpeachable." [Kravtin, Tr. Vol. 4, pp. 242-43.]

Witness Kravtin, testified that the North Carolina Business Court relied on the FCC Rate Methodology to determine that the pole attachment rates sought by the Town of Landis and Rutherford EMC were excessive and neither just nor reasonable. [Kravtin, Tr. Vol. 4, p. 165; Time Warner Entertainment-Advance/Newhouse Partnership v. Town of Landis, No. 10-CVS-1172, 2014 WL 2921723 (N.C. Sup. Ct. Jun. 24, 2014) (Landis); Rutherford Electric Membership Corp. v. Time Warner Entertainment-Advance/Newhouse, 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) (Rutherford).] The Rutherford case, which was unanimously affirmed in the Court of Appeals, found that, based on the evidence presented in that case, including the testimony of witness Kravtin,[20] "the FCC Cable Rate formula's allocation method, used to determine what percentage of the fully allocated costs to assign to the attaching party, provides an economically justified means of reasonably allocating costs." Rutherford, 2014 WL 2159382 at *9. "[F]ar from providing any subsidy to communications providers, the FCC Cable Rate formula actually leaves

[19] Implementation of Section 224 of the Act: A National Broadband Plan for Our Future, 26 FCC Rcd 5240, 5322 (2011), aff'd sub nom. Am. Elec. Power Serv. Corp. v. FCC, 708 F.3d 183 (D.C. Cir. 2013); Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Order on Reconsideration, 30 FCC Rcd. 13731 (2015); *see also,* Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 ACC 52.900 – 3 AAC 52.940, Order Adopting Regulations, 2002 Alas. PUC LEXIS 689, at *3-6 (Alaska Pub. Util. Comm'n 2002); Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, Decision 98-10-058, 1998 Cal. PUC LEXIS 879, at *87-88 (Cal. Pub. Util. Comm'n 1998); Application of Consumers Power Co., Nos. U-10741, U-10816, U-108211, Opinion and Order, 1997 Mich. PUC LEXIS 26, at *32-33 (Mich. Pub. Util. Comm'n 1997); Rulemaking to Amend Oregon Admin. Rules Relating to Safety and Attachment Standards, Order No. 01-839, 2001 Ore. PUC LEXIS 483, at *13-15 (Ore. Pub. Util. Comm'n 2001).

[20] Witness Kravtin served as an expert for Time Warner Cable Southeast LLC in the Rutherford and Landis cases.

the utility and its customers better off than they would be if no attachments were made to their poles." Id.

Witness Arnett, testifying on behalf of Blue Ridge, urged the Commission to rely on a rate formula adopted by the TVA in a resolution dated February 20, 2016, which was developed for use by the local power distribution companies that are the TVA's wholesale electric power customers. [Arnett, Tr. Vol. 2, p. 46.] The TVA provides electric power to approximately 165 retail electric distributors in seven states, including three electric cooperatives in North Carolina: Blue Ridge Mountain Electric Membership Corp., Tri-State Membership Corp. and Mountain Electric Cooperative. [Arnett, Tr. Vol. 2, pp. 46-47.] Witness Arnett opined that the TVA considered the FCC Rate Methodology but rejected it as providing a "subsidy" to the attachers. [Arnett, Tr. Vol. 2, p. 84.] In developing the methodology, the TVA noted that, "[u]nlike the FCC, however, the TVA is charged with keeping electric rates as low as feasible, and ensuring that electric ratepayers do not subsidize other business activities is important in achieving this objective." [WA Ex. 3; PDK Ex. 14 at Attachment B.] Although witness Arnett testified that the TVA Rate Methodology is based, at least in part, on the TVA's "recogni[tion] that certain portions of the poles are of equal benefit to all attaching parties" [Arnett, Tr. Vol. 2, p. 53], a review of the TVA's resolution and supporting documentation does not reflect any such finding. [*See* WA Ex. 3.]

In support of his testimony urging the Commission to adopt the TVA Rate Methodology, witness Arnett relied on rate methodologies (i) considered by the United States House of Representatives (but never adopted by Congress), (ii) adopted by the Arkansas Public Service Commission, and (iii) recommended by the APPA. [Arnett, Tr. Vol. 2, pp. 67-77.] While none of these other methodologies exactly mirrors that adopted by the TVA, witness Arnett testified that each of them shared some common elements with the TVA's methodology.

Witness Arnett also relied on 1954 guidance from the Rural Electric Administration (REA) about how rates for joint use arrangements between telephone companies and EMCs, which both owned poles shared by the others, should be set. [Arnett, Tr. Vol. 2, pp. 102-03 and WA Ex. 31.] He did not address, however, whether the rights of telephone joint users and those of cable operators like Charter are equivalent, agreeing at the hearing that the REA method was meant for users who each own a percentage of the pole.[21] [Arnett, Tr. Vol. 2, p. 157.] Although witness Arnett attacked the FCC rate formula as unreasonable in his judgment, he did not address the independent and affirmative decisions reached by 15 states to follow the FCC method, or the recommendations of other objective bodies such as NARUC and NASUCA, that state utility commissions should follow the FCC Rate Methodology, or the finding by the NRECA that the FCC rate method is "unimpeachable." [*See* Arnett, Tr. Vol. 2, pp. 84 and 161-63.]

In response to witness Arnett's recommendation of the TVA Rate Methodology, witness Kravtin pointed out that the TVA does not have general jurisdiction over pole attachment matters and that the TVA explicitly declared its sole objective to be to keep

[21] ***BEGIN CONFIDENTIAL]***END CONFIDENTIAL***

pole rates high in order to support lower electric rates. Also, witness Kravtin stated that the TVA rate was the product of a closed process that involved only parties that stood to benefit from higher pole attachment rates. As noted by witness Kravtin, the TVA did not conduct a public proceeding or seek the input of any parties other than the pole owners and their trade association. [Kravtin, Tr. Vol. 4, pp. 173-74.] Witness Kravtin testified that the "TVA's rejection of the FCC Rate, for example, was based on a number of patently false premises likely supplied by its customers and their advocates, and without the benefit of any information from other stakeholders, a complete record, or an open debate to better inform its findings." [Kravtin, Tr. Vol. 4, p. 218.] Witness Kravtin dismissed the APPA's recommendation as "another industry-driven formula designed to serve the self-interest of its public power company members." [Kravtin, Tr. Vol. 4, p. 220.] Witness Arnett confirmed that he has no knowledge of any other regulator ever following the methodologies used in his referenced proceedings or the approach advocated by the APPA. [Arnett, Tr. Vol. 2, p. 146.] Witness Kravtin also observed that the TVA has itself announced plans to invest in its own fiber infrastructure, which will be used to compete with cable operators. [Kravtin, Tr. Vol. 4, pp. 219-20 and n.64.]

Discussion and Conclusions

The Commission has exclusive jurisdiction under N.C. Gen. Stat. § 62-350 to determine the just and reasonable rates that Blue Ridge can charge Charter for attaching its facilities to Blue Ridge's poles. In making that determination, the Commission, in its discretion, may consider any evidence or rate-making methodologies offered or proposed by the parties to arrive at its decision as to the just and reasonable rates that Blue Ridge is authorized to charge Charter.

During the hearing, both Blue Ridge and Charter discussed numerous state and federal decisions, and rate methodologies and methods which had been developed and/or applied by various state commissions, energy and communications related interest groups, organizations and federally established regulatory and administrative agencies. However, at hearing, Charter and Blue Ridge each advocated that the Commission adopt its preferred rate-making methodology and find that the alternative proposed by the other party was inappropriate. More specifically, Charter requested that the Commission adopt the FCC Rate Methodology to determine the just and reasonable rate that Blue Ridge should charge Charter to attach to Blue Ridge's poles and determine that the TVA Rate Methodology advocated by Blue Ridge was inappropriate for that purpose. And, Blue Ridge requested that the Commission adopt the TVA Rate Methodology to determine the maximum just and reasonable rate that Blue Ridge may charge Charter to attach to Blue Ridge's poles and determine that the FCC Rate Methodology advocated by Charter was inappropriate for that purpose. That is, the parties have requested that the Commission determine whether the FCC Rate Methodology or the TVA Rate Methodology is the proper methodology for the Commission to use to determine the just and reasonable rates that Blue Ridge should charge for Charter to attach to its poles.

The FCC Rate Methodology is widely recognized as a reasonable regulatory tool for this Commission to follow. It is used by the FCC to set maximum pole attachment rates of IOUs and ILECs in thirty states, and applies in North Carolina to poles that are

often identical to and interspersed with poles owned by Blue Ridge in its service territory. It, or a closely related methodology, is used by state agencies to set pole attachment rates in 15 other states in their own, independent regulation of pole attachments. It is strongly recommended by NARUC and NASUCA as the appropriate rate methodology for regulating EMC pole rates, and even Blue Ridge's own national trade association has termed it "unimpeachable." The FCC Rate Methodology has been upheld in the federal courts, including the United States Supreme Court, as compensatory. And, importantly, it was found by the North Carolina Business Court, in a decision unanimously affirmed in the Court of Appeals, to present a reasonable rate methodology that benefits the pole owner.

The TVA Rate Methodology, on the other hand, was adopted for a specific and limited purpose, to keep electric rates low, and was the result of a process that involved only those that would benefit from high pole attachment rates. The evidence before the Commission is that neither the parties that will have to pay the TVA pole attachment rates nor members of the public who may be affected were consulted. The Commission, therefore, will give minimal weight to the fact that the TVA rejected the FCC Rate Methodology and adopted a different one. The extent to which the TVA approach has any merit must stand or fall entirely on its economic underpinnings and public interest considerations.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 14-15

Evidence supporting these Findings of Fact is found in the testimony of witnesses Kravtin, Arnett, Layton and Mullins.

The pole attachment rate methodology applied by the TVA in its February 2016 resolution relies on the historic FCC Rate Methodology for most of the cost inputs. As described by witnesses Kravtin and Arnett, both methods use the same utility accounts to determine the average net cost of a utility pole and multiply by the same elements to derive an average annual cost to own and maintain a pole. The numbered accounts of the RUS (used by Blue Ridge and other EMCs) and the Federal Energy Regulatory Commission (FERC) accounts (used by IOUs to compute the FCC Rate) are the same. Both the FCC and the TVA presume that 15% of the pole investment account (Account 364 in both RUS and FERC accounting) consists of appurtenances such as cross arms and other facilities and hardware that are not used by attaching third parties. The FCC and the TVA both presume that 15% of the costs in that account should be subtracted out in determining the net cost of an average pole. Both the FCC and the TVA also create an annual carrying charge for the average pole by factoring in the annual cost of depreciation, maintenance, taxes (if any), administrative and general expenses and a rate of return.

The formulas used by both the FCC and the TVA to derive an annual cost of a pole are virtually identical, as depicted below in Figures 1 and 2.[22]

[22] The only differences are that the TVA relies on a three-year average for maintenance expenses while the FCC relies on a single year, and the TVA uses a rate of return of 8.5% while

FIGURE 1

FCC Cable Rate Formula =

Net Bare Pole Cost (NBP) x Carrying Charge Factor (CCF) x Space Allocation Factor (SAF)

Where the SAF = Space Occupied by Attacher / Usable Space on Pole

[Kravtin, Tr. Vol. 4, p. 186.]

FIGURE 2

TVA Rate Formula =

Pole Attachment Rate = (Space Allocation) x (Net Cost of Bare Pole) x (Carrying Cost)

[*See* WA Ex. 2.1-2.3]

Witnesses Kravtin and Arnett agreed that the difference between the FCC Rate Methodology and the TVA Rate Methodology lies in their allocation of the annual cost of the pole to the third-party communications service provider. They explained that the TVA has followed the FCC method in dividing the pole, and the annual cost thereof, into "usable" and "unusable" space. Both the FCC and the TVA presume an average pole as being 37.5 feet long. Both presume that the bottom 6 feet of the pole are buried to give the pole stability, and both presume that attachments cannot be made lower than 18 feet above ground in order to achieve the necessary minimum ground clearance to avoid contact between the wires attached to the poles and vehicles traversing underneath. The TVA, like the FCC, treats this 24 feet of space as "unusable." Both the FCC and the TVA consider the 13.5 feet of space that is above the 18 foot minimum ground clearance on an average pole to be "usable" for the attachment of wires, cables and other revenue-generating facilities. Both the FCC and the TVA also presume that a communications attachment occupies one foot of this usable space. [Kravtin, Tr. Vol. 4, pp. 186-87 and n.29; Arnett, Tr. Vol. 2, pp. 49-51.]

As explained by witnesses Kravtin and Arnett, both the FCC and the TVA also recognize that the electric attachments occupy the upper-most portion of the usable space, and the communications attachments occupy the lower portion of the usable space. Both also recognize that the National Electric Safety Code (NESC) requires a 40-inch "safety space" (termed by the NESC as the "Communication Worker Safety Zone") (the "safety space") between some energized conductors and communications facilities.

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the FCC relies on a default rate of return of 11%. [Arnett, Tr. Vol. 2, p. 49; Kravtin, Tr. Vol. 4, pp. 188-89, 229.]

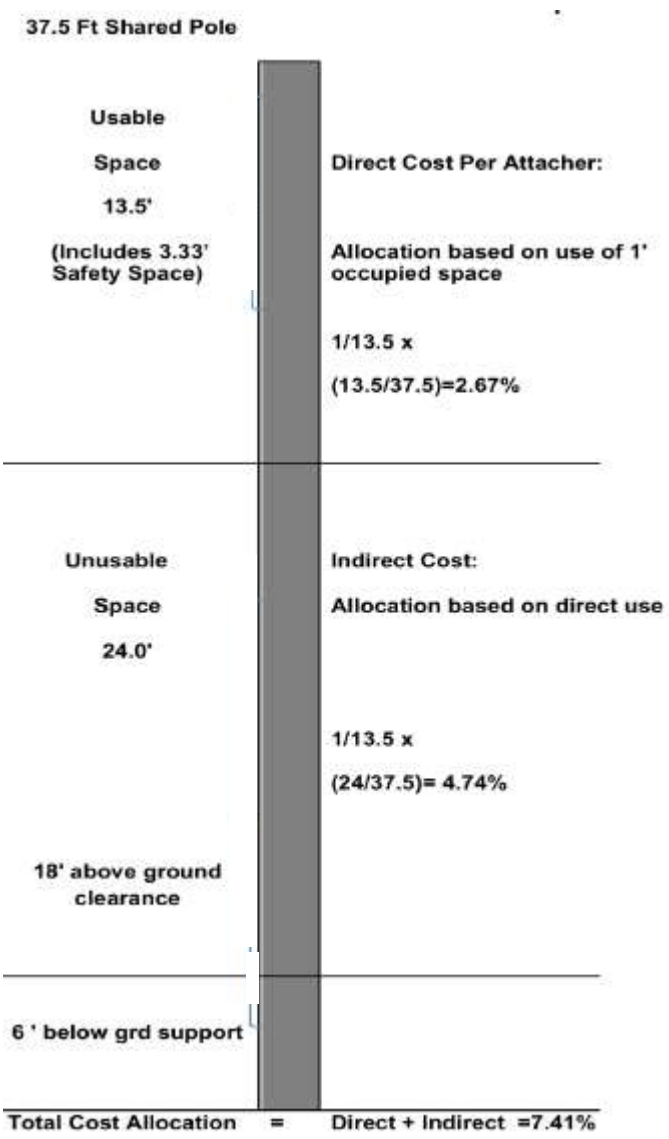
Witnesses Kravtin and Arnett agreed that the NESC has exceptions to the 40-inch safety space and allows street lights, traffic control devices, and even communications facilities owned by the pole owner to be placed within the "safety space." Both witnesses, and others on behalf of Blue Ridge and Charter, agreed that the placement of devices such as street lights in the safety space generates revenue for Blue Ridge. [Kravtin, Tr. Vol. 4, p. 209 n.49; Arnett, Tr. Vol. 2, pp. 56-57, 165-166; Mullins, Tr. Vol. 3, pp. 245-246; Layton, Tr. Vol. 1, p. 20.]

The testimony of witnesses Kravtin, Mullins and Arnett differed in their description of the purpose and effect of the safety space. Witness Kravtin testified that the safety space is required only because of the danger caused by electric shock and that from an economics point of view the need for the safety space relates to the electrification of Blue Ridge's facilities. [Kravtin, Tr. Vol. 5, p. 35.] Her economic benefit assessment was supported by the testimony of witness Mullins who explained that the safety space benefits the employees of both the electric utility and communications attachers by lessening the likelihood that any of these workers will come into simultaneous contact with the electrical and communications facilities. [Mullins, Tr. Vol. 3, pp. 245-46.] Witness Arnett, on the other hand, testified that the safety space is required only because the communications facilities are present on the pole. [Arnett, Tr. Vol. 2, p. 56.] Although witness Arnett testified that Blue Ridge does not often attach facilities in the safety space, he agreed with witness Kravtin that Blue Ridge is allowed to place its facilities in that space and does so. [Arnett, Tr. Vol. 2, pp. 57-58, 164-65.]

Witness Kravtin explained that the FCC uses a "proportionate" and "cost-based" method to allocate the costs of attachment, based on the percentage of the usable space on a pole that is occupied by the attachment. In other words, the communications attacher is allocated the percentage of the annual cost of the entire pole represented by the percentage of the space "usable" for the attachment of revenue generating facilities that is occupied by the attacher's attachment. Presuming that the communications attachment occupies one foot and that there are 13.5 feet of space that are "usable" for attachments, the FCC allocates 1/13.5 (or 7.41%) of the costs of the entire pole to the communications attacher. The FCC treats the safety space as usable to the pole owner, and does not assign any of that space directly to the communications attacher, meaning that the communications attacher pays 7.41% of the costs of that space, as it does of the entire pole.

The FCC method of allocation is reflected in Figure 3.

FIGURE 3



[Ex. PDK 9.]

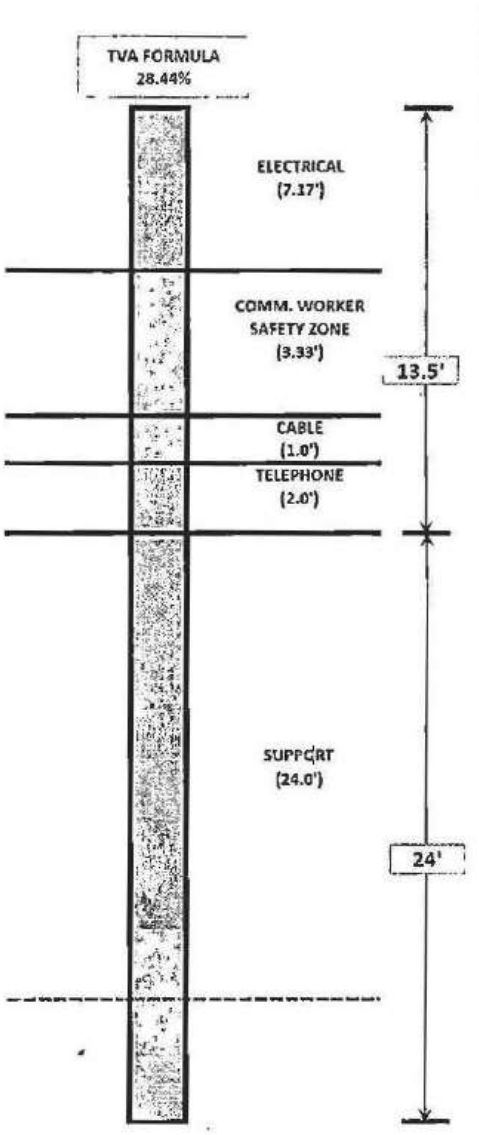
According to witnesses Kravtin and Arnett, the TVA's allocation method also relies upon the proportionate allocation method used by the FCC for allocation of the costs of the pole space that is above the safety space. [Kravtin, Tr. Vol. 4, pp. 185-87, 219; Arnett, Tr. Vol. 2, pp. 49-51.] However, unlike the FCC, the TVA assigns to the third party communications service provider more than the one foot of space its attachment actually occupies. The TVA also assigns to all communications service providers that use the

pole (and none to the EMC pole owner) the entire cost of the 40-inch safety space.[23] In addition, the TVA allocates the cost of the 24 feet of unusable space to all attachers, including the EMC pole owner, on a per-capita basis. In other words, the cost of the unusable space is allocated on an equal basis to all pole users. The TVA presumes that there are three entities that use an average pole, but allows the pole owner to rebut that presumption. The TVA allocation method, as proposed in witness Arnett's exhibit, is reflected in Figure 4.

The TVA relies on the same factual presumptions relied on by the FCC. These include presuming that (i) an average pole has three attaching parties, (ii) an average pole is 37.5 feet tall and has 13.5 feet of usable space and 24 feet of unusable space, and (iii) a communications provider's attachment occupies one foot of usable space. [Kravtin, Tr. Vol. 4, pp. 186-87; Arnett, Tr. Vol. 2, pp. 49-52.] Applying these FCC/TVA presumptions, the TVA Rate Methodology allocates 28.44% of the total pole costs to each third party communications service provider.

[23] In other words, if Charter were the only communications service provider on the pole, the TVA would allocate all of the cost of the 40-inch safety space to Charter. If Charter and another communications service provider occupied the pole, the cost of the 40-inch safety space would be allocated evenly between the two providers.

FIGURE 4



[Arnett, Tr. Vol. 2, p. 54.]

Discussion and Conclusions

The evidence establishes that the TVA has modeled much of its rate methodology on that used for many years by the FCC. The basic reliance of the formula on the cost accounts of the particular utility, the inputs relied on, and the structure of the formula used by the TVA mirrors closely the FCC's formula. The TVA also relies on the same presumptions about pole space relied on in the FCC formula: that an average pole has 24 feet of unusable space and 13.5 feet of usable space, and that a communications attachment occupies one foot of the usable space.

Only in the allocation of these costs to the attaching parties does the TVA chart a new path. Whereas the FCC bases its allocation methodology on the theory that the costs of the entire pole should be assigned based on the attacher's occupancy of a portion of the usable, revenue-generating space, the TVA assigns only the costs of the usable space under that theory. Unlike the FCC, the TVA assigns the cost of the 24 feet of unusable space equally among all providers on the pole (including the pole owner) on a per-capita basis. Further, the TVA assigns the costs of the 40-inch safety space entirely to the communications service providers and none to the EMC pole owner. The FCC, on the other hand, treats the safety space as usable to the pole owner and does not allocate any of that space directly to the communications services provider(s). The FCC thus allocates the cost of the safety space according to the same percentage as it allocates the costs of the usable space.

The result of these allocation methods is that, where the presumptions jointly applied by both the FCC and the TVA are employed, the FCC assigns 7.41% of the annual costs of the entire pole to the communications services provider. The TVA assigns 28.44% of the pole costs to each of the communications services providers under those same presumptions, such that two communications services providers would pay more of the pole's costs (56.88%) than the pole owner (43.12%).

The FCC Rate Methodology employs rebuttable presumptions regarding the height and use of a utility's poles, which include presumptions that: (i) the average height of a distribution pole is 37.5 feet; (ii) these poles are, on average, buried six feet deep, and (iii) in order to maintain proper clearances, the lowest attachment on a pole must be at least 18 feet off the ground. In applying the FCC Rate Methodology, the FCC treats these presumptions as rebuttable by either party.[24] The TVA Rate Methodology also employs certain rebuttable presumptions. Because witness Arnett determined that Charter has an actual average of 2.35 entities attached to its poles, and attempted to rebut the presumptions that average poles have 13.5 feet of usable space and 24 feet of unusable space, he allocated a total of 41.16% (for 2016) of Blue Ridge's pole costs to Charter alone.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 16-17

The evidence supporting these Findings of Fact is found in the testimony of witnesses Kravtin, Martin, Mullins, Arnett, and Layton.

Witness Kravtin is a trained, practicing economist, who was educated in the field and has many years of experience in dealing with the economic basis for utility rates, in particular pole attachment rates. [Kravtin, Tr. Vol. 4, pp. 162-64.] She testified that the primary purpose of pole attachment regulation is to protect "cable operators and other

[24] See 47 C.F.R. § 1.1418 which provides that with respect to the FCC Cable Rate Methodology: "the space occupied by an attachment is presumed to be one (1) foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 37.5 feet. These presumptions may be rebutted by either party."

communications attachers against potential abuse by pole-owning utilities that control access to a vital input of production needed by those attachers." [Kravtin, Tr. Vol. 4, p. 174.] Excessively high pole attachment rates, she observed, act like a tax that raises the cost to the communications companies of doing business. [Kravtin, Tr. Vol. 4, p. 175.] Ultimately, such rates result in higher prices for the communications services and distort that market. [Kravtin, Tr. Vol. 4, p. 175.]

Witness Kravtin also provided testimony concerning the economic underpinnings of the FCC pole attachment rate allocation method, pointing out that the FCC allocation is based on the fundamental economic principle of cost-causation in that costs lacking a direct or strong causal linkage to the provision of the service at issue (such as overhead and other common costs) are allocated in the same ratio as direct costs characterized by a strong cost causal linkage. [Kravtin, Tr. Vol. 4, pp. 190-91.] The rate formula allocates costs of the entire pole based upon the use of the space on the pole that is usable for revenue generating activities. Said another way, she testified that the FCC cost assignment method "allocates costs attributable to *both* usable and unusable space on the pole based on the attacher's direct occupancy of space." [Kravtin, Tr. Vol. 4, p. 170 (Emphasis original.).] She described the FCC Rate formula as based on a "widely accepted methodology, with a longstanding history of use in state and federal regulatory cost allocation manuals." [Kravtin, Tr. Vol. 4, p. 189.]

The FCC Rate, she observed, is similar to that "commonly used in leasing arrangements throughout the economy, in which the costs associated with common space of the facility are allocated to individual tenants on the basis of the tenant's direct occupancy of space on the shared facility." [Kravtin, Tr. Vol. 4, p. 192.] Relying on a real estate example, she pointed out that if a tenant leases one of the 10 floors of a building while the owner uses the other 9 floors, the tenant would not be expected to pay more than one-tenth of the costs of the common space, such as the lobby, elevator, garage and grounds. The tenant would not be charged one-half of the common space costs simply because two entities share use the common space. [Kravtin, Tr. Vol. 4, pp. 192-93.] Similarly, she testified that the same concept is used in allocating common costs for shopping malls and airport terminals. [Kravtin, Tr. Vol. 4, p. 193.] "[A]s an economic matter, the costs associated with space on the pole do *not* vary according to the number of attaching entities but rather to the economic utilization of pole capacity." [Kravtin, Tr. Vol. 4, pp. 194-95 (emphasis original).]

The FCC Rate, witness Kravtin emphasized, is fully compensatory and does not provide any kind of subsidy to the communications attachers. In reaching that conclusion, she explained that as an economic term a "subsidy" is present only when a rate does not cover marginal costs, defined as the additional costs that would not exist but for the product sold. [Kravtin, Tr. Vol. 4, pp. 197, 206-07.] "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." [Kravtin, Tr. Vol. 4, p. 197 n.35.] On the other hand, she stated, any recovery higher than marginal cost, which is clearly recovered under the FCC Rate Methodology, prevents any subsidy from Blue Ridge's electric customers to Charter and its communications customers. [Kravtin, Tr. Vol. 4, pp. 198-201.] She also noted that the FCC and numerous courts, including the U.S.

Supreme Court, have held that the FCC pole attachment rate formula is fully compensatory to the pole owner and does not result in a subsidy.[25] [Kravtin, Tr. Vol. 4, p. 201-02, n.43.][26]

Witness Kravtin further supported her rate recommendation based on the following economic benefits: (1) the FCC Rate achieves "competitive and technical neutrality" since it can be applied uniformly across different utilities; (2) the FCC Rate "best mimics a competitive market outcome"; and (3) the FCC Rate provides "straightforward, consistent and predictable rates." [Kravtin, Tr. Vol. 4, pp. 195-203.] Witness Kravtin also noted that to allocate costs based on the number of attaching parties, as the TVA's methodology does, has no support in economic analysis and leads to arbitrary results. [Kravtin, Tr. Vol. 4, p. 191.] Further, she noted that it results in widely fluctuating rates based on the number of third party attachers. [Kravtin, Tr. Vol. 4, p. 226.] For example, witness Kravtin observed that a rate could double based on differences only in the number of attaching entities, even when the costs to the pole owner remain constant. [Kravtin, Tr. Vol. 4, p. 226.]

Witness Kravtin testified that the FCC Rate Methodology "adheres closely to the key economic and public policy principles of effective pole rate regulation." [Kravtin,

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[25] Amendment of Commission's Rules and Policies Governing Pole Attachments, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, ¶¶ 15-25 (FCC 2001) ("2001 Reconsideration Order"); 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 1357, 1363, 1370-71 (11th Cir. 2002); Detroit Edison Co. v. Michigan Pub. Serv. Commission, Nos, 203421, 203480, slip op., 1998 WL 1988754, 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-010831, 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.); Trenton Cable TV, Inc. v. Missouri Pub. 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.").

[26] It is noteworthy that the North Carolina Business Court also found that the FCC Rate does not result in a subsidy to a communications service provider such as TWC at the expense of the Cooperative. In discussing this very issue, the Court of Appeals found that the FCC Cable Rate "actually leaves the utility and its customers better off than they would be if no attachments were made to their poles" because the cable attacher "pays most of the incremental 'but for' costs of attachment up front, as well as its share of the fully allocated costs of pole ownership that necessarily would exist even absent its attachment." Rutherford Electric Membership Corp. v. Time Warner Entertainment-Advance/Newhouse Partnership, 240 N.C. App. 199, 213, 771 S.E. 2d 768, 778 (N.C. Ct. App. 2015). In terms of subsidies, the Court found that, if anything, in light of the agreement's terms, they flowed the opposite direction because "[w]hen [TWC] pay[s] to create surplus space where it does not already exist, [the Cooperative] benefits from receiving a taller, stronger pole that enhances [the Cooperative's] network, and [TWC] remain[s] obligated to pay annual rent to maintain an attachment to that pole." Id.

Tr. Vol. 4, pp. 166-67.] In particular, she noted that the FCC Rate Methodology's use of its "proportionate" or "direct cost" allocator follows the principle of the "cost causer pays" [Kravtin, Tr. Vol. 4, p. 184], "commonly used in leasing arrangements in other sectors of the economy" such as commercial real estate. [Kravtin, Tr. Vol. 4, pp. 192-93, 208.] She also testified that excessively high pole attachment rates artificially raise costs of providing communications services and reduce consumer demand for and ability to pay for new and enhanced services, especially in less densely populated areas such as those served by Blue Ridge. [Kravtin, Tr. Vol. 4, pp. 175-76, 231.] As for the overall impact on Blue Ridge's electric rates, she testified that Charter's pole attachment payments at the current $26.64 rate in 2016 only amounted to a very small portion of Blue Ridge's total electric revenues. [Kravtin, Tr. Vol. 4, p. 176-77.][27]

In support of the FCC fully allocated rate, witness Kravtin emphasized the limited and contingent nature of Charter's rights to attach to Blue Ridge's poles. Witnesses Kravtin, Mullins and Martin testified that the current and proposed Blue Ridge pole attachment agreements give Charter the right to attach to poles only where the existing configuration of the pole will accommodate the attachment consistent with the NESC requirements. If there is insufficient unused space on the pole to accommodate the attachment, Charter will be allowed to attach only if it pays for reconfiguring the existing attachments on the pole or for installing a new pole, if necessary. Even if Charter has thus paid for a new pole, the pole is owned by Blue Ridge, and Charter pays annual rental to use it. In all cases where Charter's facilities are attached to a pole, the attachment is contingent on Blue Ridge not requiring the space for the latter's own utility services. If Blue Ridge needs the space sometime in the future, Charter is required to remove its attachment or pay at that time for a new pole.

Charter does not contest these provisions and recognizes that its pole attachment agreements, both currently and in the future, will provide the right to attach only in "surplus" or "excess" space. [Kravtin, Tr. Vol. 4, pp. 198-99, n.38; Mullins, Tr. Vol. 3, p. 224; Martin, Tr. Vol. 4, p. 141.] In addition, Charter's pole attachment agreements with Blue Ridge, both in the past and as proposed by both parties, require Charter to pay all out of pocket expenses incurred by the utility associated directly with the attachment. [Martin, Tr. Vol. 4, p. 84; Mullins, Tr. Vol. 3, p. 237.] Thus, Blue Ridge is permitted to charge Charter for the costs of pole inspections and audits, and all expenses related to making the pole ready for attachment, including post-construction review expenses. [Kravtin, Tr. Vol. 4, p. 198 n.36; Mullins, Tr. Vol. 3, p. 232; Martin, Tr. Vol. 4, p. 84.] Charter's contingent attachment rights and responsibility for absorbing Blue Ridge's "but for" costs related to Charter's attachments gives witness Kravtin assurance that the FCC fully allocated pole attachment rate does not create any kind of subsidy. [Kravtin, Tr. Vol. 4, pp. 206-07.]

Witness Arnett, who testified as a rate expert for Blue Ridge, is a consultant with decades of experience in representing pole owners, many of them cooperatives, in pole attachment matters. [Arnett, Tr. Vol. 2, pp. 43-44, WA Ex. 1.] But he is not an economist,

[27] *****BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*****

does not have a college degree, and does not claim any educational background or professional training in dealing with rate issues. [Arnett, Tr. Vol. 2, pp. 132-33; WA Ex. 1.] On cross examination, he acknowledged that he has no background in rate making, no experience in rate making theory, and no knowledge of any rate allocation methods used by this Commission. [Arnett, Tr. Vol. 2, pp. 136-38.][28] In his testimony, witness Arnett did not purport to provide any economic analysis in support of his recommendation that the Commission follow the rate methodology adopted by the TVA in February 2016. Nor did he give any "economics" based justification for his contention that the FCC Rate results in Blue Ridge providing a subsidy to Charter. Instead, his testimony focused on explaining how the TVA Rate Methodology he advocates works, providing his intuitive support for the methodology, and pointing to other rate formulas that, in his view, are similar to that adopted by the TVA.[29]

In justifying the TVA's equal allocation of the costs of the "unusable space" (also referred to as "common space") on a pole, witness Arnett relied on the benefit to Charter in being able to use Blue Ridge's poles. Witness Arnett testified that the principles underlying the TVA Rate Methodology arise from the "TVA's regulatory philosophy that (a) the parties benefitting from the various sections of the pole should be responsible for those costs, and (b) where multiple parties derive benefit, those respective costs should be shared equally." [Arnett, Tr. Vol. 2, p. 49.] Although he testified that the "TVA recognizes that certain portions of the pole are of equal benefit to all attaching parties" [Arnett, Tr. Vol. 2, p. 53], he was not able to identify any evidence that the TVA had based its rate method on such a philosophy or recognition. [Arnett, Tr. Vol. 2, pp. 170-73.]

Nevertheless, witness Arnett testified that sharing the costs of unusable common space equally among all attaching parties makes sense because all attaching entities benefit equally from the common or unusable space on the pole and therefore should pay an equal share of those costs. [Arnett, Tr. Vol. 2, p. 55.] Witness Arnett asserted that "[a]ll attaching entities need" the portions of the pole that are buried in the ground and used to achieve minimum ground clearance. [Arnett, Tr. Vol. 2, p. 55.] In addition, witness Arnett testified that Charter, like all other attaching parties including Blue Ridge, uses the "unusable" pole space to transition between underground and aerial facilities through the use of "risers" and relies on this space for power supplies and other equipment. [Arnett, Tr. Vol. 2, p. 55.] Witness Arnett did not address witness Kravtin's testimony demonstrating that Charter has only a contingent right to use space on Blue Ridge's poles. Witnesses Layton and Arnett testified that Blue Ridge does not make any capital investment for Charter; Blue Ridge does not take account of, or even consider, the

[28] Witness Arnett testified that he has never been accepted as a rate expert in any judicial case and although he presented recommendations for how pole attachment rates should be set before two regulatory commissions, his rate recommendations were not accepted. He testified that he now believes that the rate methodologies he then recommended are not reasonable. [Arnett, Tr. Vol. 2, pp. 133, 140-42.]

[29] See discussion at pp. 16-17 supra.

possibility that Charter may want to attach to a pole in designing its pole plant. [Layton, Tr. Vol. 1, pp. 31-32; Arnett, Tr. Vol. 2, pp. 94-95.]

Witness Arnett attacked the FCC rate as "subsidized." [Arnett, Tr. Vol. 2, pp. 84, 115.] He also argued that the Commission should consider the "benefits received" by Charter, essentially that Charter avoids the greater cost it would incur if it installed equivalent facilities underground. [Arnett, Tr. Vol. 2, pp. 80-82, 85.] Witness Arnett further testified that in comparing Charter's proposed annual payment per pole to the avoided costs of pole ownership, Charter's proposal "results in a subsidy instead of an equitable sharing of costs." [Arnett, Tr. Vol. 2, p. 84.]

Discussion and Conclusions

The disagreement between the parties regarding the appropriate rate methodology to apply is essentially threefold: (1) how to allocate the costs associated with the unusable portion of the pole among users of the pole, (2) how to allocate the cost associated with the "safety space" on the pole among users of the pole and (3) whether Blue Ridge's actual data should be used to calculate the maximum pole attachment rate in lieu of the presumptions used in the FCC and the TVA rate methodologies.

Allocating the annual costs of owning and maintaining a pole based on the percentage of the usable and revenue-generating space occupied by the attachment is supported by well-recognized cost-causation principles and is consistent with previous decisions of the Commission in analogous circumstances. *See* Order Addressing Collocation Issues, Docket No. P-100, Sub 133j (NCUC Dec. 28, 2001), at 17 (concluding in a proceeding involving competitive access to incumbent telephone company central office facilities that "it is appropriate to allocate security costs to carriers based on square footage occupied in the central office as a recurring charge," and rejecting the arguments of BellSouth and Verizon to allocate the costs on a pro-rata basis among the occupants of the property) (Collocation Order), motion for recon. denied, Order Addressing Motions for Reconsideration and Clarification, Docket No. P-100, Sub 133j (Aug. 20, 2002), at 118 ("[T]he Commission finds it appropriate to deny Verizon's Motion for Reconsideration and Clarification in this regard and affirms its original decision that security costs should be allocated based on square footage occupied in the central office."). This allocation method previously adopted by the Commission is the same as one would expect in a competitive real estate market where the costs of common space in a building are allocated on the basis of the number of apartments or floors occupied by each tenant, rather than simply based on a per-capita allocation. In fact, the Commission notes, when a tenant rents an apartment, the tenant typically has a lease that guarantees that the tenant has a right to stay in the rented space identified in the lease for a specific period of time. In this case, Charter can be forced to move to a different location on the pole or to leave a pole altogether at any time if Blue Ridge needs the space on the pole. Similarly, this method is how one would allocate the common costs of a factory production system (the costs of the building, conveyor belts, and so on) based on the direct costs of the different product lines, not simply dividing the common costs by the number of product lines. While it is true that all product lines benefit from the common costs, they do not benefit from them "equally" in any economic sense.

This approach is consistent with the general approach to cost allocation recognized and applied by the Commission as a foundation of its regulatory approach to setting rates, which seeks to allocate costs based on practical, observable or logical links to cost causation.[30] As also recognized by the FCC in establishing uniform methods of cost allocation in Part 64 of its Rules, where costs cannot be directly assigned to regulated or unregulated activities (i.e., "common costs"), they may be allocated "based upon an indirect, cost-causative linkage to another cost category . . . for which a direct assignment or allocation is available." 47 C.F.R. § 64.901(b)(3). In other words, where common costs can be linked to a method of direct assignment (i.e., the space occupied on a pole or facility), the direct method should be used to assign common costs.

Based on the evidence presented in this docket, the Commission can discern no principled basis grounded in cost causation for the arbitrary allocation of costs associated with unusable space on a per-capita basis. Indeed, the theory seems rooted in the pure numerical convenience of dividing costs by users. Where the character and nature of the attachers' rights and patterns differ, as they do here, the use of this method of allocation is not sufficiently related to the costs that are being allocated. An attacher that occupies one foot of space on the pole does not stand in an equal position vis-à-vis the pole owner that (a) would own and operate the pole for its electric distribution needs regardless of the presence of an attacher, (b) has superior rights to utilize the entirety of the pole and may require the attacher to vacate the pole for the owner's use, and (c) uses a much greater portion of the pole as a whole. Similarly, an attacher that uses one foot of space does not stand in the same position as an attacher that uses two feet of space. The use of a space allocation factor consistent with the FCC approach also has the benefit of leading to more rational, less arbitrary pricing. The unrebutted evidence shows that adoption of Blue Ridge's proposed methodology would result in widely fluctuating rates depending on the number of third party attachers. Even where the costs of the pole remain constant, the rate charged for an attachment could double based solely on the number of attaching entities. Again, the Commission can perceive no principled reason why prices for attachment should vary so widely depending on the number of attaching parties.

Blue Ridge's argument that Charter benefits equally with Blue Ridge from the cost of the unusable space on a pole is not supported in the record and is the precise argument rejected by this Commission allocating space costs in the Collocation Order. *See* BellSouth Proposed Order, Docket No. P-100, Sub 133j, at 120 (Feb. 16, 2001) (arguing that security access "provides equal value to all parties; therefore, all parties should share equally in the costs of security services"). It is also the argument rejected by the Commission in the January 2018 Pole Attachment Orders. *See* e.g., Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, Docket Nos. EC-43, Sub 88, EC-49 Sub 55, EC-55, Sub 70 and EC-39, Sub 44. (NCUC Jan. 9, 2018). The question is not whether Charter benefits from the portions of the pole that are buried and are used to

[30] 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); and Rule R19-1 (requiring Electric Membership Corporations to file cost allocation manuals updated within 30 days of any significant change).

achieve minimum grade clearance. Rather, the question is: what is the just and reasonable proportion of that cost to allocate to Charter. Blue Ridge did not choose to provide any expert economic testimony to support its position, and it is not clear from the record whether any such economic basis exists. Although there may be instances where allocating costs on a per-capita basis is appropriate in rate setting despite widely varying usage and rights, this case plainly does not present such a situation. The record here is clear not only that Charter occupies only a very small percentage of the usable space on the pole, but that even that occupancy is contingent and potentially temporary. Similar to the finding of the Business Court in the *Rutherford* case,[31] the record here does not establish that Blue Ridge expends capital to serve Charter by installing taller poles. To the contrary, Blue Ridge's witnesses made plain that it does not construct any pole plant to serve Charter. As stated by witness Kravtin, Charter occupies only "surplus" or "excess" space on the pole that is not required by Blue Ridge for its own purposes.[32] By any reasonable measure, Charter does not enjoy equal benefits to those of the pole owner from the common ("unusable") space on Blue Ridge's poles.

The argument that all parties' wires may traverse the "unusable" space between the ground line and the height necessary for minimum grade clearance with "risers" does not alter the Commission's analysis.[33] Risers are simply a means used by all parties to transition between underground and aerial facilities. The testimony was that risers do not affect the usefulness of any portion of the pole for attachment of wires and cables.[34] [Mullins, Tr. Vol. 3, p. 224.]

The Commission does not find a basis for deviating from this approach to cost allocation with respect to costs associated with maintenance of the so-called "safety space" on the pole. Blue Ridge's proposal would shift to communications service providers, including Charter, 100% of the costs associated with the safety space. The Commission finds unhelpful the "chicken or the egg" debate between witnesses Booth, Arnett and Kravtin about whether the safety space is required due to the presence of

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[31] Rutherford, 2014 WL 2159382 at *10.

[32] Witness Arnett disputed that Blue Ridge has any "surplus space," arguing that it does not create any space that it does not intend to use. [Arnett, Tr. Vol 2, pp. 94-95.] The Commission understands, however, witness Kravtin's position to be that the pole space occupied by Charter is "surplus" in the sense that it is not currently being used by Blue Ridge. When Blue Ridge needs the space, it is entitled to reclaim it.

[33] Risers are vertical conduits used by all pole users to transition between underground and aerial service. The presence of a riser on a pole does not preclude other uses of that same space (there can be multiple risers on a single pole), and risers do not prevent the pole owner from making revenue-generating use of excess usable pole space for horizontal attachments.

[34] Nor does the fact that Charter occasionally places power supplies in the pole space below minimum grade affect the analysis. Power supplies are devices that enable the electric utility to generate electric revenue. The FCC has held that neither risers nor power supplies should count in its rate making method because both relate to the "unusable" and not the "usable" space. *See, e.g.,* Capital Cities Cable, Inc. v. Mountain States Tel. & Tel. Co., 1984 FCC LEXIS 2443, ¶ 23 (FCC June 29, 1984).

communications facilities on a pole or due to the fact that the pole carries energized and dangerous electric conductors. Obviously, it is the presence of both the communications facilities as well as the presence of electric power that creates the need for the space. Again, the question before the Commission is the appropriate method for allocating costs associated with that space. Based on the evidence presented here, the Commission is in agreement with the FCC and the Business Court that the safety space is actually usable (and used) by Blue Ridge for revenue generating facilities.[35] Blue Ridge's proposed methodology would have the inappropriate effect of allocating to Charter up to 100% of the costs of space it cannot use, while allocating to the pole owner none of the costs associated with space that it can and, in fact does, use.

The Commission takes notice of the following NESC provisions relating to the definition of the "communication worker safety zone."

Rule 238E defines "[c]ommunication worker safety zone" as:

> The clearances specified in Rules 235C and 238 create a communication worker safety zone between the facilities located in the supply space and facilities located in the communication space, both at the structure and in the span between structures. Except as allowed by Rules 238C, 238D, and 239, no supply or communication facility shall be located in the communication worker safety zone.[36]

Related to this definition:

- Rule 235C provides the vertical clearance at the support for line conductors and service drops.

- Rule 238 (Table 238-1) states, in pertinent part, that there must be a 40 inch vertical clearance between supply conductors and communications equipment, between communication conductors and supply equipment, and

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[35] Adoption of Rules for the Regulation of Cable Television Pole Attachments, Memorandum Opinion & Second Report & Order, 72 FCC 2d 59, 69-71 (1979) ("Second Report & Order") (finding, based on an extensive record, that safety space is to be considered usable space for ratemaking purposes, and that no portion of the safety space is to be considered occupied by cable television), aff'd on recon., 77 FCC 2d 187, 188-91 (1980) (affirming that "electric utilities make resourceful use of safety space for mounting street light support brackets, step-down distribution transformer and grounded shielded power conductors"); aff'd sub nom., Monongahela Power Co. v. FCC, 655 F.2d 1254, 1256 (D.C. Cir. 1981) (FCC's treatment of safety space as usable space was "a conscientious exercise of discretion," supported by the record evidence of "industry practice, . . . on utility companies' profitable use of the safety clearance space, and . . . the risk of replacement cost that many utility contracts [impose] on their [cable] lessees."); Amendment of Rules and Policies Governing Pole Attachments, Report & Order, 15 FCC Rcd 6453, 6467 ¶ 22 (2000) ("The [safety] space is usable and is used by the electric utilities."); Landis, 2014 WL 2921723 at *12; Rutherford, 2014 WL 2159382 at *15.

[36] 2017 NESC (C2 2017).

between supply and communications equipment for supply voltages from 0 kV to 8.7 kV.

- Rule 238C specifies the following clearances for span wires or brackets: "Span wires or brackets carrying luminaires, traffic signals, or trolley conductors shall have vertical clearances from communications lines and equipment not less than the values specified in Table 238-2."

- Rule 238D specifies the following clearance of drip loops associated with luminaires and traffic signals:

  > "If a drip loop of conductors entering a luminaire, a luminaire bracket, or a traffic signal bracket is above a communication cable, the lowest point of the loop shall be not less than 300 mm (12 in) above the highest (1) communication cable, or (2) through bolt or other equipment.
  >
  > *EXCEPTION*: The above clearance may be reduced to 75 mm (3 in) if the loop is covered by a suitable nonmetallic covering that extends at least 50 mm (2 in) beyond the loop."

- Rule 239 provides for the clearance of vertical and lateral facilities from other facilities and surfaces on the same supporting structure.

As noted above, the NESC only allows the safety space to be used by the electric company/pole owner to install such things as luminaires (street lights), traffic signals, or trolley conductors. Therefore, the Commission concludes that it is appropriate to classify the Communication Worker Safety Zone as usable space to the EMC as accounted for in the FCC Rate Methodology advocated for use in this proceeding by Charter.

Blue Ridge's witnesses asserted in this case that very few of Blue Ridge's streetlights or other facilities are actually placed in the safety space, based on their interpretation of the NESC's definitions. [Booth, Tr. Vol. 3, pp. 116-17; Layton, Tr. Vol. 1, p. 82.] Witnesses Booth and Layton argued that even though Blue Ridge's streetlights may be found in the midst of the required 40 inch separation between Blue Ridge's neutral conductors and Charter's facilities, the streetlights are actually located in the Cooperative's "supply space," and not the "safety space." [Booth, Tr. Vol. 3, pp. 116-17; Layton, Tr. Vol. 1, p. 82.] In essence, witness Booth took the position that the safety space does not start at the lowest electrical conductor,[37] but starts at the bottom of the

[37] Witness Booth refused to agree that the definitions in the NESC Rules measuring vertical clearance requirements from surface to surface of the closest electrical supply lines and communications lines and specifying that the Communication Worker Safety Zone is established by the electrical facilities and the communications facilities mean that the safety space is tied to the location of existing facilities on the pole. [Tr. Vol. 3, pp. 165-81.]

electric supply space, which he argues may be set by the EMC far below existing electrical facilities if the EMC desires to do so. [Tr. Vol. 3, pp. 180-82.]

Witness Booth's testimony in this matter that the Communication Worker Safety Zone is not tied to the location of existing facilities, and is based instead on some arbitrary and unilateral determination by the EMC pole owner of the lower bound of its "supply space" on a pole is hard to square with the wording of the NESC. But the Commission does not have to resolve the issue in this case. First, it is conceded by Blue Ridge's witnesses that the NESC allows the EMC to place its streetlights and other revenue generating facilities in the safety space, and that Charter is prohibited from placing its facilities in that space. [Layton, Tr. Vol. 1, pp. 121-22; Arnett, Tr. Vol. 2, pp. 56-58.] In other words, the safety space is "usable" by Blue Ridge but not "usable" by Charter, regardless of how the safety space is defined or where on a particular pole it is located. It would make no sense, therefore, to treat Charter as using the safety space and to treat Blue Ridge as not using it. Second, and most important, the evidence establishes that the presence of safety space on a pole never prevents Blue Ridge from placing any of its electrical facilities in that space on a pole. Due to Blue Ridge's rights at any time to commandeer any space on the pole for its facilities, the concept that safety space is in any way not "usable" by the EMC pole owner is not reasonable.

The Commission notes that the Business Court in the Rutherford case rejected the opinion of witness Booth, Blue Ridge's expert also in this case, that the cable operator should be held responsible for the safety space, finding that, "there is no basis for allocating the safety space entirely to the attacher as Booth did." Rutherford, 2014 WL 2159382, at *15. The Commission reaches that same conclusion based on the evidence presented here. Further, the Commission concludes that, based upon the evidence herein presented, the FCC Rate Methodology for allocating the total costs of a pole based on the percentage of space used by the attacher established by the FCC and approved by the North Carolina Business Court and affirmed by the North Carolina Court of Appeals is the appropriate methodology for allocating the total costs of the pole, including unusable space.[38]

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 18-20

The evidence supporting Findings of Fact Nos. 18-20 is found in the testimony of witnesses Kravtin, Martin, Mullins, Arnett and Layton.

The parties presented diametrically opposed theories of the purpose of pole attachment regulation. Witness Kravtin testified that pole attachments are regulated because they are a form of essential facility over which Blue Ridge (and other pole owners) have monopoly control, a fact that is supported by numerous decisions in the federal courts. [Kravtin, Tr. Vol. 4, p. 168.][39] She testified that "[t]he purpose of effective

[38] Issue Nos. 1 and 2 per the November 2, 2017 Joint Statement of Issues.

[39] *See, e.g.*, Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327, 330 (2002) ("[Cable companies 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

pole regulation is to protect cable and other communications attachers, for whom utility poles are essential bottleneck facilities, from being charged per unit attachment rates far in excess of a cost-based, competitive market level rate and from other harmful monopoly type practices of pole owning utilities." [Kravtin, Tr. Vol. 4, p. 167.] "Fundamental to pole rate regulation," in her opinion, "is recognition of the fact that pole-owning utilities, by virtue of historical incumbency, own and control existing pole plant to which cable operators and other communications attachers have no practical alternative to attach." [Kravtin, Tr. Vol. 4, pp. 174-75.] Witness Mullins testified that "due to economic, aesthetic, regulatory and other factors, Charter often has no practical alternative to using Blue Ridge's poles . . . ." [Mullins, Tr. Vol. 3, p. 227.] Further, there generally is a single set of poles on which to place aerial cables. [*See* Mullins, Tr. Vol. 3, p. 227; *see also* Martin, Tr. Vol. 4, p. 79.] [40] Witness Mullins also testified that it would cost approximately $56 million (not counting the cost to wreck out existing aerial facilities) to move underground the facilities that Charter currently has attached to Blue Ridge's poles, which would be "prohibitively expensive." [Mullins, Tr. Vol. 3, pp. 223, 227-28.]

Witness Arnett, in contrast, testified that Blue Ridge's poles are not essential facilities to Charter because more than half of Charter's distribution infrastructure in North Carolina is placed underground and because some telephone companies have shifted their facilities from overhead to underground. [Arnett, Tr. Vol. 2, pp. 92-94] He testified that one of the telephone companies that currently attaches to Blue Ridge's poles removed approximately 1,400 of its total of 27,000 attachments from Blue Ridge's poles in the last five years. [Arnett, Tr. Vol. 3, p. 13.] He accepted, however, Charter's representation that it would cost about $45,109.40 per mile to move its aerial construction underground. [Arnett, Tr. Vol. 2, p. 85.] And none of Blue Ridge's witnesses addressed the feasibility of moving Charter's existing facilities off Blue Ridge's poles or how Charter could afford to continue to provide service if doing so required an additional investment of more than $45,000 per mile to serve what witness Mullins notes is a small number of households per mile in Blue Ridge's service territory. [Mullins, Tr. Vol. 3, pp. 228-29.][41] Although witness Arnett argued that a facility may not be deemed to be an "essential facility" if it is replaceable, even at a much higher cost, he acknowledged that he may be mistaken as to how to define an essential facility. [Arnett, Tr. Vol. 3, p. 11.]

Witness Arnett did not employ any economic or cost-causation principles to support his opinion that Charter should equally share on a per-capita basis the costs of

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monopoly rents."); *see also* Common Carrier Bureau Cautions Owners of Utility Poles, 1995 FCC LEXIS 193, *1 (1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems"); FCC v. Florida Power Corp., 480 U.S. 245, 247 (1987) ("[I]n most instances underground installation of necessary cables is impossible or impractical. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables.").

[40] Although witness Arnett testified that there are situations where there is more than one pole line in Blue Ridge's service territory, he was unable to give any estimate as to how prevalent that situation is. [Arnett, Tr. Vol. 3, pp. 10-11.]

[41] *****BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*****

the unusable common space on a pole. Instead, he grounded his opinion in the overall benefit he asserted that Charter gains from using Blue Ridge's poles in the first place, as well as the equal benefit that he believes all pole users gain from use of the unusable space. [Arnett, Tr. Vol. 2, pp. 53-55, 84-87, 103-104.]. Witness Arnett suggested that the much higher cost to Charter of constructing its own facilities, rather than relying on attaching to Blue Ridge's poles, should be factored in by the Commission. [Arnett, Tr. Vol. 2, pp. 84-85.] Again, he chose not to address witness Kravtin's opinion that Charter has only limited and conditional rights of attachment.

Witness Kravtin testified about the damaging impact of excessive pole attachment rates on the market for communications services: "[E]xcessively high pole attachment rates operate like a non-cost based tax on the final or 'downstream' communications and broadband services bought by consumers." [Kravtin, Tr. Vol. 4, p. 175.] "Ultimately," she pointed out, "high pole attachment rates result in higher prices for communications services which in turn serve to reduce consumers' demand for and/or ability to pay for these services." [Kravtin, Tr. Vol. 4, p. 175.] She also testified that, in particular, higher pole attachment rates "discourage communications companies from making additional investment in the state and their ability to roll out, or continue to expand advanced broadband service offerings." [Kravtin, Tr. Vol. 4, p. 176.] She explained that the "dampening effect" of high pole attachment rates on broadband service deployment and adoption is especially serious in more rural and less densely populated areas due to the fact that these areas contain fewer potential customers per pole. [Kravtin, Tr. Vol. 4, p. 231.] In such areas, because there are relatively more poles necessary to serve a potential subscriber, the impact of high pole attachment rates is especially severe. [*See* Kravtin, Tr. Vol. 4, pp. 231-32.] The need for increased broadband deployment, in turn, has been recognized at both the national and state level, according to witness Kravtin's testimony. She noted that the FCC recently observed that it "has repeatedly recognized the importance of pole attachments to the deployment of communications networks." [Kravtin, Tr. Vol. 4, pp. 178-79 n.19.] Witness Kravtin testified that FCC Chairman Pai has emphasized that lower pole attachment rates are important "[t]o bring the benefits of the digital age to all Americans." [Kravtin, Tr. Vol. 4, pp. 178-79 n.19.] Witness Kravtin also said that the North Carolina Department of Information Technology is developing its own broadband plan to ensure affordable broadband access to sparsely populated areas. [Kravtin, Tr. Vol. 4, pp. 178-79 n.19.]

None of Blue Ridge's witnesses either debated the importance of broadband or argued that attachment rates may not be an important factor in a communications company's determination to expand its distribution plant in less populated areas. Nor did any Blue Ridge witness testify that lower Blue Ridge pole rates will have a significant effect on its electric rates. Witness Kravtin, on the other hand, testified that the impact of pole attachment revenues to total electricity revenues was, at most, very small. [Kravtin, Tr. Vol. 4, p. 176-77.][42] Witness Kravtin noted that EMCs already have a cost advantage over investor-owned companies due to the low interest loans that the former receive from the federal RUS. [Kravtin, Tr. Vol. 4, p. 181.] Cooperatives have available low-cost loans,

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and by their nature they do not have to pay the higher cost of raising public equity. [Kravtin, Tr. Vol. 4, p. 181.] Nevertheless, witness Kravtin testified that the FCC Rate methodology relies on a cost of money component that assumes the higher cost of equity applicable to IOUs, thus benefiting any cooperatives subject to pole attachment regulation pursuant to the FCC Rate Method. [Kravtin, Tr. Vol. 4, pp. 181-82 and n.21.]

With respect to comparing IOUs and cooperative utilities in other ways, witness Kravtin testified that EMCs "use the same type of plant, technology, and production techniques to provide electricity service to subscribers and in the same basic manner as IOUs." [Kravtin, Tr. Vol. 4, p. 212.] She and witness Martin also testified that IOUs and EMCs use poles that are indistinguishable. [Kravtin, Tr. Vol. 4, pp. 180, 196; Martin, Tr. Vol. 4, p. 77.] Witness Arnett testified that pole rates should be calculated based on economic cost allocation principles uninfluenced by the facts that Blue Ridge is a non-profit entity and that Charter is a large for-profit company. [Arnett, Tr. Vol. 3, pp. 46-47.]

Blue Ridge witness Layton testified that a Blue Ridge affiliate provides dark fiber services via facilities attached to Blue Ridge's poles. [Layton, Tr. Vol. 2, p. 9]. Witness Kravtin, moreover, testified that preventing pole owning electric utilities from charging excessive pole rates "has taken on heightened significance in recent years, with the increased opportunity of pole owning utilities to directly compete with communications attachers." [Kravtin, Tr. Vol. 4, p. 178.]

Discussion and Conclusions

While externalities and value of service principles associated with rates have seldom if ever been determinative, the Commission has considered both in past cases, at least in considering different classes of service. *See*, e.g., State ex. rel. Utilities Comm'n v. Durham, 282 N.C. 308, 314-15 (1972); Public Service Co. of North Carolina, Inc., Docket No. G-5, Sub 386, 1998 WL 941806, ¶ 57 (NCUC 1998). In this case the rate formulae advanced by the opposing parties are the FCC formula and the TVA formula. Even without considering externalities and value of service principles, the Commission determines that the FCC formula is based on valid and acceptable cost of service and cost allocation principles and the TVA formula is not. Nevertheless, N.C. Gen. Stat. § 62-350 directs the Commission, on a case-by-case basis in response to a dispute filed with the Commission, to set pole attachment rates that are "just and reasonable" and "consistent with the public interest." N.C. Gen. Stat. § 62-350(c). In considering whether a rate would be consistent with the public interest, it is appropriate to consider any externalities inherent in higher or lower pole attachment rates, as well as the impact of the rate on value of service principles.

Both parties presented testimony advocating pole attachment rates that rely, in some way, on the pole-related costs of Blue Ridge. The pole-related costs the parties believe should be factored into the rates directly as inputs are virtually identical. The principal difference between the parties relates to the appropriate allocation of those pole-related costs. As noted above, the economic analysis presented by witness Kravtin, Charter's expert, in support of a cost-based proportionate allocation of the costs of the common space is the sole economic testimony presented in the case. That analysis

provides a solid basis on cost allocation principles in support of the FCC Rate formula. The Commission also concludes that the FCC formula finds additional support in the testimony regarding externalities and value of service principles.

The Commission agrees with witness Kravtin that there is a general benefit in the expansion of broadband service, and the Commission determines, as witness Kravtin asserts, that lower pole attachment rates would likely assist in the expansion of broadband service. In opposition to the economic principle that lower input costs are most likely to lead to expansion of output, Blue Ridge has presented no contrary economic evidence. In essence, witness Arnett simply argues that there is no assurance that lower pole rates in the range recommended by witness Kravtin will result in expanded broadband and that higher pole rates will reduce the cost of electricity to Blue Ridge's members. But witness Arnett did not even discuss, much less present any evidence of, the impact on electric rates of the lower pole attachment rate witness Kravtin recommends. Nor did witness Arnett provide any reason why the Commission should favor lower EMC electric rates over lower pole attachment rates in the public interest analysis under N.C. Gen. Stat. § 62-350 in any event. While lower electric rates, to the extent supported by evidence, might provide an arguable public interest benefit in support of higher pole attachment rates, the Commission cannot ignore the fact that the statute is primarily directed toward pole attachment, and not electric, rates. The Commission is confident that Blue Ridge does not intend to suggest that N.C. Gen. Stat. § 62-350 gives the Commission jurisdiction over cooperative electric rates.[43]

Further, the Commission finds convincing witness Kravtin's testimony that the purpose of pole attachment regulation is to control the natural incentive for monopoly owners of essential facilities to overcharge. The history of pole attachment regulation at the federal level and in other states has been directed toward that goal, and the Commission has been made aware of no different objective on the part of the General Assembly in passing and amending N.C. Gen. Stat. § 62-350. Although witness Arnett contends that poles are not an "essential facility" to Charter, the evidence shows that it would be prohibitively expensive and infeasible for Charter to transfer its existing aerial facilities underground.[44] The Commission has no basis in the record, therefore, to depart

[43] The fact that electric cooperatives are formed, in part, to "mak[e] electric energy available to inhabitants of the State at the lowest cost consistent with sound economy and prudent management," N.C. Gen. Stat. § 117-10, has no bearing on the Commission's mandate under N.C. Gen. Stat. § 62-350 to adjudicate just and reasonable pole attachment rates. If the General Assembly intended the Commission to prioritize low electric rates in adjudicating disputes over pole attachment rates, it would have said so explicitly. The Commission assumes that any such intention would have to be accompanied by some regulatory authority by the Commission over those electric rates so that the Commission could evaluate whether a reduction in pole attachment rates could properly be off-set by reduction of expenses or a more efficient electric delivery operation.

[44] The testimony of Blue Ridge's witnesses that some ILECs have found it possible to remove some aerial facilities and place them underground does not counter the infeasibility for Charter to move all of its facilities off of Blue Ridge's poles at a cost of more than $56 million.

from the many prior decisions finding that poles are "essential" monopoly facilities to communications service providers.[45] Moreover, with respect to the argument between the parties over whether Blue Ridge's poles are essential facilities and thus providing entitlement for communications providers to attach on that basis, the Commission concludes that the North Carolina General Assembly has effectively preempted that debate. N.C. Gen. Stat. § 62-350 requires that "a membership corporation . . . shall allow any communications service provider to utilize its poles" at rates determined by the Commission to be just and reasonable. Neither the right to attach nor the attachment rate is triggered by any finding that the poles are "essential facilities."

In addition, the Commission does not find that the non-profit nature of Blue Ridge presents any compelling argument for higher pole attachment rates. The poles owned by Blue Ridge are fundamentally the same as the IOU- and telephone company-owned poles that Charter also relies on in North Carolina and that are subject to the FCC pole attachment rate formula. In addition, IOUs and cooperatively-organized electric utilities operate the same types of facilities to provide the same services. The only meaningful difference identified by the parties is that, as witness Kravtin testified, EMC costs are lower than IOU costs, in particular because cooperatives have access to money at a lower cost. Nevertheless, witness Kravtin's use of the FCC Rate formula involves an acceptance of a default annual rate of return of 11%, which is intended to reflect a blended overall cost of both equity and debt. Even the TVA, which has adopted a rate formula intended to be very favorable to its wholesale electric customers, relies on a lower rate of return (8.5%). The Evidence and Conclusions for Finding of Fact No. 33 addresses Blue Ridge's argument that it should also be allowed to recover additional "but for" costs separately from the pole rental rate, but that analysis is no different for investor-owned or cooperatively-organized utilities. The Commission is thus confident that the FCC Rate formula fairly allocates pole costs of nonprofit cooperatives in exactly the same way it does for investor-owned utilities.

It is possible to characterize witness Arnett's focus on the benefits that Charter receives from being able to attach to Blue Ridge's poles as a value of service analysis. The Commission has, on occasion, looked to value of service as a factor to be considered in rate design for different classes of customers, traditionally as a downward constraint on rates recognizing that certain classes of consumers may have substitute service available in some situations. See, e.g., State ex. rel. Utilities Commission v. Durham, 282

[Mullins, Tr. Vol. 3, p. 228.] Charter's witnesses testified that it would be "prohibitively expensive." [Mullins, Tr. Vol. 3, p. 227.]

[45] *See* Otter Tail Co. v. United States, 410 U.S. 366, 378 (U.S. 1973) (finding that for practical reasons, "[i]nterconnection with other utilities is frequently the only solution."); FCC v. Florida Power Corp., 480 U.S. 245, 247 (1987) ("[I]n most instances underground installation of necessary cables is impossible or impractical. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables."); MCI Commc'ns Corp. v. Am. Tel. and Tel. Co., 708 F.2d 1081, 1133 (7th Cir. 1983) (facilities were essential where "[i]t would not be economically feasible . . . to duplicate . . . local distribution facilities"). The evidence in this case does not establish that Charter would have any viable and economic alternative to attaching to large numbers of Blue Ridge's poles.

N.C. 308, 314-15 (1972); *Order Granting Partial Rate Increase*, Docket No. G-5, Sub 386, 1998 WL 941806, ¶ 57 (NCUC 1998). The Commission, however, has never applied the concept to increase the rates paid by customers on the basis that the service is particularly "valuable" to the consumer. Nor has the Commission ever set a customer's rate based on the "value" to the customer of avoiding the prohibitive cost of providing the utility service to itself, as opposed to relying on the utility's provision of the service, as witness Arnett suggests. In any event, traditional value of service principles are inapplicable here, where the Commission is not asked to design rates for different classes of customers and the record evidence indicates Charter does not have viable substitutes to attaching to poles owned by Blue Ridge and in light of the prohibitive cost of relocating its existing aerial network underground.

As a final comment, the Commission notes that, in the hearing and its post-hearing filings, Blue Ridge implores the Commission to "disregard Charter's illusory promises that [Charter] will extend broadband if awarded a low pole attachment rate." Blue Ridge's Post Hearing Brief, p. 3. The Commission has not acceded to that request. Instead, as the text above indicates, the Commission has chosen to accord substantial weight to witness Kravtin's expert opinion that lower pole attachment rates would likely assist in the expansion of broadband service. While as a matter of economic theory, witness Kravtin's assertion in this regard is undoubtedly true, it provides no solace to Blue Ridge because it is not supported by any hard or quantifiable data from Charter or for that matter any other communications service provider that demonstrates conclusively that the lower pole attachment rates has led to the expansion of broadband it its territory. Thus, in this and other pole attachment proceedings that may come before this Commission in the future, the Commission looks forward to quantifiable data being presented to the Commission by Charter and other communications service providers which will support this opinion. For that to happen, Charter and other communications service providers would have to do more than just talk the talk when they come before the Commission seeking to use the FCC rate methodology, which was purposely designed by Congress and the FCC to produce low rates to encourage the expansion of cable/ broadband. (While the FCC was statutorily mandated to structure this low rate to encourage the expansion of cable and broadband, this Commission has no such mandate. This Commission is charged with developing just and reasonable rates and protecting the public interest.) Indeed, they will have to walk the walk. That is, Charter and every other communications service provider that advances this assertion should now commit to and follow through with the commitment to expand broadband in the areas served by customers similar to those residing in Blue Ridge's territory in return for this low rate. If they fail to do so, Blue Ridge's assessment that Charter's promise of broadband service in exchange for a lower FCC rate is illusory would prove to be correct. Without quantifiable data, this Commission is unlikely to accord any weight to such empty promises in the future.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 21-22

The evidence presented in support of these Findings of Fact has been discussed above.

Discussion and Conclusions

Based on the evidence in the record in this docket, the Commission concludes that the FCC Rate Methodology should be used to set Blue Ridge's maximum pole attachment rate. The FCC formula is longstanding, well-understood, widely applied, and judicially approved. It is employed in the vast majority of states, including for the electric IOUs and telecommunications ILECs in North Carolina. It has been found by the U.S. Supreme Court to be fully compensatory. It relies on the well-accepted economic theory that common or indirect costs are appropriately allocated on the same basis as direct costs are incurred and assigned. Applying it here to cooperative pole owners like Blue Ridge would bring uniform treatment to most poles in the state, avoiding in large part the anomaly of having widely varying rates for virtually identical poles which are placed in a pole line side by side.[46]

In contrast, the TVA pole attachment rate method is new and untested and, so far as presented in this case, without any basis in economic theory. Its reliance on a per-capita allocation of the cost of the unusable common space results in widely varying rates even where the underlying costs are themselves similar, and produces the highest rates in rural areas where high rates can have the most pernicious impact.

No evidence was presented to the Commission that Blue Ridge requires a continuation of pole attachment rates in the range it has been charging. The pole attachment rates that Blue Ridge has been charging Charter are substantially higher than the rates that Blue Ridge has been charging other pole attachers,[47] [Martin, Tr. Vol. 3, p. 225; see MM Exs. 9-14], and Blue Ridge's pole attachment revenues are a tiny fraction of its electric revenues.

The rate methodologies relied on by Blue Ridge in support of the TVA method are not only different from that method, they have had very limited application. Furthermore, Blue Ridge has not made a convincing case for the proposition that Charter should share

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[46] Blue Ridge argues that the Commission cannot achieve uniform treatment through adoption of the FCC Rate Methodology because three EMCs in North Carolina purchase their electric power from the TVA and thus the TVA sets their pole attachment rates. Nevertheless, the Commission's decision to rely on the FCC Rate Methodology in the state will mean that the vast majority of poles in the state are regulated according to the same rate methodology.

[47] Blue Ridge charged Charter the highest annual pole attachment rate of any third party attacher. The annual rate that Blue Ridge has imposed on Charter is more than double the rate that Blue Ridge has imposed on Charter's direct competitor, SkyBest. [Martin, Tr. Vol. 3, p. 225.] While Blue Ridge explains the former disparity by noting that the majority of these agreements are with joint users, it has yet to provide a satisfactory explanation of this disparate treatment between Charter and SkyBest, another third party attacher and a direct competitor of Charter.

equally on a per-capita basis the costs of the unusable space. Charter has only limited, conditional and potentially temporary rights to occupy Blue Ridge's poles, and it is wholly responsible for paying to create or preserve the limited amount of pole space that it uses. For this reason, it does not share the benefits of using any portion of the pole equally with Blue Ridge.

In some respects, the pole attachment service provided to Charter by Blue Ridge is like interruptible electric service, which generally is provided at rates well below standard rates.[48] *See,* e.g., State ex. rel. Utilities Commission v. Durham, 282 N.C. 308, 308 (1972) (noting that "interruptible customers pay at a substantially lower rate than the firm customers".); Order on Petition for Limited Waiver of Rate Schedule 106 Billing Procedures, Docket No. G-9, Sub 649, (NCUC Oct. 29, 2014) (reciting evidence that Piedmont's interruptible transportation customers paid between 28.6% and 36.3% less than firm customers for the first 15,000 therms of service; concluding that "in exchange for agreeing to curtail their service Piedmont's interruptible customers pay substantially lower rates than Piedmont's firm transportation customers."); Federal Energy Regulatory Commission, Cost of Service Rates Manual 41 (1999), available at https://www.ferc.gov/industries/gas/gen-info/cost-of-service-manual.doc ("[P]aying the lowest unit rate that a firm shipper could pay for firm service, appropriately recognizes the inferior quality of interruptible service."). As with interruptible electric service, the evidence here reflects that Blue Ridge does not incur capital investment to provide Charter with pole attachment service. Instead, Charter is entitled to make pole attachments only to the extent that pole space is available and not required for Blue Ridge's own facilities. Charter's service rights are even more limited than those of an interruptible service customer because Charter itself absorbs any necessary capital expenditures in connection with making space on Blue Ridge's poles, yet continues to pay for the service thereby made possible.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 23-30

The evidence supporting these Findings of Fact is found in the testimony of witnesses Arnett and Kravtin.

The FCC Rate Methodology employs rebuttable presumptions regarding the height and use of a utility's poles, which include presumptions that: (i) the average height of a distribution pole is 37.5 feet; (ii) these poles are, on average, buried six feet deep, and (iii) in order to maintain proper clearances, the lowest attachment on a pole must be at least 18 feet off the ground. In applying the FCC Rate Methodology, the FCC treats these presumptions as rebuttable by either party.[49] The TVA Rate Methodology also employs presumptions that may be rebutted.

[48] In "interruptible" service, the customer is entitled to service only to the extent that it is not necessary to serve another customer. The "interruptible" service customer understands that its service may be interrupted if necessary to serve a regular customer.

[49] See 47 C.F.R. § 1.1418 which provides that with respect to the FCC Cable Rate Methodology: "the space occupied by an attachment is presumed to be one (1) foot. The amount

Witness Arnett offered testimony and calculations in support of an argument that Blue Ridge should be permitted to rebut each of these factual presumptions. [Arnett, Tr. Vol. 2, pp. 60-61.] He testified that the average Blue Ridge pole is 36.83 feet, 36.85 feet and 36.87 feet for 2014, 2015 and 2016 respectively. [Arnett, Tr. Vol. 2, pp. 61-62.] In rebutting the presumption that the average pole is 37.5 feet long, he looked to the continuing property records of all of Blue Ridge's distribution poles in Account 364. [Arnett, Tr. Vol. 2, pp. 61-62, 187-88.] He determined that the average amount of unusable space on those poles is 27.3 feet, 27.28 feet and 27.26 feet for the years 2014, 2015 and 2016 respectively by estimating that the average mid-span clearance requirement for the lowest communications cable would be 15.5 feet, by calculating the average span length between poles and the expected "sag" of the lowest communications cables, and by assuming that poles are buried 6 feet in the ground. [Arnett, Tr. Vol. 2, pp. 63-65.] He then determined that an average Blue Ridge pole has 9.53 feet of usable space for 2014, 9.57 feet of usable space for 2015 and 9.61 feet of usable space for 2016 by subtracting his unusable space calculation for each year during the subject period (27.26 feet) from his average pole height (36.87 feet).

In addition to the aforementioned, he also testified about and attempted to rebut or refine the following presumptions that the FCC relied upon in developing the FCC Cable Rate Methodology. Although he accepted the FCC/TVA presumption that communications attachments occupy one foot of usable space, he determined that Charter has an average of 1.1 attachments on those Blue Ridge poles to which it is attached. [Arnett, Tr. Vol. 2, p. 63.] Based on Blue Ridge's continuing property records, he determined that the percentage of the pole investment account (Account 364) consisting of "appurtenances" is 12.59%, rather than the presumed 15%. [Arnett, Tr. Vol. 2, pp. 61-62.] And, finally, based on a survey, Blue Ridge has an average of only 2.35 entities attached to its poles. [Arnett, Tr. Vol. 2, p. 60.] By utilizing the aforementioned figures, witness Arnett calculated that the maximum pole attachment rate utilizing the modified FCC Rate Methodology should be (a) $8.49 for rate years 2015, (b) $8.37 for rate year 2016, and (c) $8.31 for rate year 2017. *See* Exhibit WA-33 (providing calculations).

In her testimony, witness Kravtin stated that the Commission should set rates using the FCC Rate Methodology's "presumptions," rather than actual data regarding Blue Ridge's pole plant, because those presumptions are "generically applicable" and "streamline the formula process." *See* Kravtin Tr. Vol. 4, p. 188. Her position, however, directly contradicts her own testimony where she states:

> ***As with any presumptive value in the formula, to the extent there is actual (or statistically significant) utility or attacher specific data to support use of alternative space presumptions those can be used in lieu of the FCC's established space presumptions***. So, for example, if actual data exists to support use of a 35-foot joint use pole with 11

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of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 37.5 feet. These presumptions may be rebutted by either party."

> feet of usable space and 24 feet of unusable space, the space allocation factor would be 1/11 or 9.09%.

Kravtin Tr. Vol. 4, pp. 187 (emphasis added).

By ignoring Blue Ridge's actual data and applying the FCC Rate Methodology's presumptions, witness Kravtin calculated the following maximum attachment rates of $5.22 for rate year 2015, $5.20 for rate year 2016 and $5.18 for rate year 2017.

Discussion and Conclusions

In its Post Hearing Brief and Proposed Order, Charter argued that the Commission should reject Blue Ridge's attempts to rebut the presumptions that the FCC (and the TVA) relied upon in the FCC/TVA formulae because: (1) witness Arnett designed his own methods for rebutting the presumptions, (2) the TVA has not offered any guidance on how presumptions employed in the pole attachment formula should be rebutted, (3) the FCC has offered guidance on how the presumptions employed in the FCC formula should be rebutted and witness Arnett has failed to comply with that guidance, and (4) Blue Ridge cherry picked and rebutted only those presumptions that benefitted Blue Ridge. While it is not entirely clear from the aforementioned, it appears that the crux of Charter's argument is that the Commission should reject witness Arnett's evidence because: (1) he designed his own methods for rebutting the FCC Rate Methodology's presumptions, and (2) witness Arnett's method did not comply with FCC decisions and guidelines. There is no merit to these arguments.

When Congress enacted Section 224 of the federal Pole Attachment Act of 1978, it specifically exempted EMCs from regulation by the FCC. Prior to 2009, EMC pole attachment rates were not subject to regulation in North Carolina. The General Assembly enacted N.C. Gen. Stat. § 62-350 in 2009. In the 2009 version of the statute, the General Assembly placed responsibility for resolving pole attachment disputes with the North Carolina Business Court. The General Assembly amended the statute in 2015 to grant this Commission exclusive jurisdiction to resolve disputes arising under the statute. When determining a pole attachment dispute filed pursuant to N.C. Gen. Stat. § 62-350, the Commission may, in its discretion "consider <u>any evidence or rate-making methodologies</u> offered or proposed by the parties" in making its decision regarding the just and reasonable rates by which a communications service provider shall be able to attach to an EMC's poles. N.C. Gen. Stat. § 62-350. Further, in making that determination, the Commission "shall apply the rules of evidence applicable in civil actions in the superior court [in these actions], in so far as practicable." N.C. Gen. Stat. § 62-65.

In this docket, the Commission has determined that it is proper for the pole attachment rates in this case to be determined by using the FCC Rate formula. FCC regulations specifically permit the following three presumptions employed in the FCC formula to be rebutted by either party: (1) that the space occupied by an attachment is one foot; (2) that the amount of usable space is presumed to be 13.5 feet; and (3) that the amount of unusable space is presumed to be 37.5 feet. And, North Carolina law permits any presumption employed in the formula other than a conclusive presumption to be rebutted. <u>Brandis & Broun on North Carolina Evidence</u>, Sixth Edition, Section 44,

footnote 191, p. 149. None of the presumptions employed in the FCC Rate Methodology are conclusive. Thus, under North Carolina law, the presumptions used in the FCC and the TVA rate formulas may be rebutted.

Here, witness Arnett testified that Blue Ridge has actual data that should be used in lieu of the permissive presumptions employed in the FCC and the TVA formulas to calculate the maximum pole attachment rate. As previously noted, during the hearing, witness Arnett presented evidence to the Commission which he contended better reflected Blue Ridge's actual system data. The evidence was presented without objection. The evidence is admissible. It is relevant and, it is material. Thus, the only real issue with regard to witness Arnett's testimony is whether this evidence is sufficient to persuade the Commission that it is accurate and that it can and should be utilized in the FCC formula in lieu of the presumptions employed by the FCC to determine the maximum pole attachment rate applicable in this proceeding.

The Commission has carefully considered the evidence presented in this proceeding by witness Arnett to rebut the FCC's presumptions as well as the flaws in that evidence detailed in Charter's post hearing filings. In evaluating witness Arnett's testimony and the flaws identified by Charter, the Commission is mindful that Charter witness Kravtin stated that "[a]s with any presumptive value in the formula, to the extent there is actual (or statistically significant) utility or attacher specific data to support use of alternative space presumptions, those can be used in lieu of the FCC's established space presumptions." [Kravtin Test, Vol. 4, pp. 187.] Further, the Commission is mindful that witness Arnett has fifty plus years of experience with pole attachment issues, and that he had 17 plus years in BellSouth's engineering department performing and managing all aspects of BellSouth's outside plant engineering. This experience has given him particular insight which he used to develop actual or statistically significant utility or attacher specific data in this case. (The depth of witness Arnett's expertise in these matters is illustrated by the following colloquy between witness Arnett and Mr. Gillespie:

> Q. Do you know the guidance the FCC has given regarding the information that you need to rebut the presumption that there's 13.5 feet of usable space on the pole?
>
> A. No, sir, but I know how to calculate that.
>
> Q. My question was whether you've gotten any guidance from the FCC according to what are discussed what you need to look to, what information you need in order to rebut that presumption.
>
> A. I did those kinds of calculations whenever I was in the engineering department at Southern Bell and Bell South for their communications cables. We routinely calculated the point of attachment and those points of attachment were almost never on an electric co-op pole 18 feet.

Emphasis added. Tr. Vol. 2. pp.197-198.) The Commission finds his expertise in these matters particularly persuasive in this case.

In light of the aforementioned and after duly considering that evidence and the record proper, the Commission finds by the greater weight of the evidence in this case

that witness Arnett has presented actual, credible and statistically significant specific data which should be used in lieu of the FCC's established space presumptions in calculating the maximum pole attachment rates that should apply in this case. Further, the Commission finds and concludes that such a finding is consistent with the statutory directive that the Commission consider each case filed under N.C. Gen. Stat. § 62-350 on a "case by case basis" and that the Commission "consider any evidence or rate-making methodologies offered or proposed by the parties" in making its decision. As noted above, by applying Blue Ridge's actual data in the FCC rate formula, the following rates result: (a) $8.49 for rate year 2015, (b) $8.37 for rate year 2016, and (c) $8.31 for rate year 2017.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 31-32

The evidence supporting these Findings of Fact is found in the testimony of witnesses Arnett, Kravtin and Mullins, and the Joint Stipulations, agreed to by both parties.

Witness Arnett calculated Blue Ridge's pole attachment rates for the years 2015-2017 according to the FCC Rate Methodology, based on cost data provided by Blue Ridge. He calculated Blue Ridge's annual rates as follows:

2015 - $8.49

2016 - $8.37

2017 - $8.31

The uncontradicted testimony is that Charter paid the following rates for 2015 through August 2017:

2015– $26.64

2016- $26.64

2017– $26.64

[Joint Stipulations ¶¶ 8-10.][50]

Blue Ridge commenced an effort to negotiate a new pole attachment agreement with Charter on May 22, 2014 by notifying Michael Mullins at Charter that the 2008 Agreement between the parties had expired and sending Charter a draft agreement to start negotiations. [Layton, Tr. Vol. 1, p. 36.] Charter responded with a redlined draft on May 26, 2015, and the negotiations were joined. [*See* MM Ex. 3; Mullins, Tr. Vol. 3, p. 237; Layton, Tr. Vol. 1, p. 37.] The parties were unable to reach an agreement on a new pole attachment agreement, and the 90-day negotiating period under N.C. Gen. Stat. § 62-350 was complete as of August 25, 2015. Charter has paid Blue Ridge at the $26.24

[50] *****BEGIN CONFIDENTIAL***** *****END CONFIDENTIAL*****

rate through August 2017. [Joint Stipulations ¶ 10.] During this period of time, the 2015-16 Inventory found that Charter had 27,674 attachments to 24,888 Blue Ridge poles. [Joint Stipulations ¶ 12.]

Discussion and Conclusions

Blue Ridge contends that Charter's counterclaim requesting that the Commission require Blue Ridge to refund the difference between the pole attachment rates that Charter paid Blue Ridge to continue attaching to Blue Ridge's poles in 2015, 2016 and 2017 and the rates that the Commission determines that Charter should have been paying during those periods should be denied because a close reading of N.C. Gen. Stat. § 62-350(c) indicates that the Commission is "not authorized to apply rates retroactively when the parties are operating under an existing agreement." Blue Ridge Proposed Order, p. 65. Blue Ridge's core argument is that the parties have an "existing agreement" and that, by statute, any new rate that the Commission determines in that circumstance should be applied "prospectively" from the date that the Commission issues an order. There is no merit to this argument.

At the outset, the Commission notes that Blue Ridge is essentially arguing that Charter waived its right to seek recovery for overpayments that it allegedly made to Blue Ridge during the periods in question by agreeing to extend the term of the 2008 Agreement [51] or that it is statutorily estopped and/or "bar[red]" [52] from pursuing this claim because of that act. Waiver, bar and estoppel are affirmative defenses which were required to be set forth in Blue Ridge's response to Charter's Counterclaim. N.C. Gen. Stat. § 1A-1, Rule 15(c). As such, these affirmative defenses must be pled with certainty and particularity and established by the greater weight of the evidence. Duke University v. Saint. Paul Mercury Insurance Company, 95 N.C. App. 663, 673, 384 S.E. 2d 36, 42 (1989).[53] "Failure to raise an affirmative defense in the pleadings generally results in a waiver thereof." Robinson v. Powell, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998).

Blue Ridge's pre-hearing responses and pleadings did not set forth any affirmative defenses to Charter's counterclaims. Nor did Blue Ridge present any evidence during the hearing itself from which one could infer that Blue Ridge believed that it had an affirmative and/or statutory defense to Charter's counterclaims. Arguably, Blue Ridge has waived its right to assert these defenses by its failure to set forth these defenses with particularity and certainty prior to its post-hearing filings. Assuming arguendo, however, that Blue

[51] The 2008 Agreement terminated on September 1, 2013.

[52] "Charter's stipulation and admissions that the 2008 Agreement remains in place---bar it from seeking 'true-up' payments under G.S. 62-350." Emphasis added. Blue Ridge Post-Hearing Brief, p. 9.

[53] This specificity requirement is consistent with the pleading requirements set forth in N.C. Gen. Stat. § 62-350(c) which provides in pertinent part that: "The parties shall identify with specificity in their respective filings the issues in dispute." Emphasis added. The Commission's Order Requiring Pretrial Filing also required the parties to file: "3. A clear and concise listing and statement of each issue in dispute."

Ridge did not waive these defenses by failing to plead them prior to its post-hearing pleadings, its argument that Charter is barred from recovering these alleged overpayments by a close reading of N.C. Gen. Stat. § 62-350(c) lacks merit.

In pertinent part, N.C. Gen. Stat. § 62-350(c) states:

> The Commission shall apply any new rate adopted as a result of the action retroactively to the date immediately following the expiration of the 90-day negotiating period or initiation of the proceeding, whichever is earlier. If the new rate is for the continuation of an existing agreement, the new rate shall apply retroactively to the date immediately following the end of the existing agreement. Emphasis added.

As previously noted, the core of Blue Ridge's argument is that the Commission is "not authorized to apply rates retroactively when the parties are operating under an existing agreement and that, by statute, any new rate that the Commission determines in that circumstance should be applied "prospectively" from the date that the Commission issues an order. Blue Ridge Proposed Order, p. 65. Blue Ridge's argument is, on its face, inconsistent with the statute. That is, the text of the statute does not contain any reference to a prospective application. Nor does the text of the statute indicate that, under the circumstances described therein, the new rate shall apply "prospectively from the date of the order." Blue Ridge Proposed Order, p. 67. Instead, by its clear terms, the pertinent text of N.C. Gen. Stat. § 62-350(c) states that "[i]f the new rate is for the continuation of an existing agreement, the new rate shall apply retroactively to the date immediately following the end of the existing agreement." Emphasis added.

Under the terms of the 2008 Agreement, that agreement ended on September 1, 2013. See footnote 58, Charter Proposed Order, Public Version, p. 43. Thus, the 2008 Agreement ceased to exist on that date. Blue Ridge acknowledged this fact on numerous occasions. See Testimony, Lee Layton, Tr. Vol. 1, p. 36, footnote 2, Blue Ridge Brief, pp. 4-5. *****BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL***** Because the 2008 Agreement ceased to exist on September 1, 2013, N.C. Gen. Stat. § 62-350 would not apply and could not be interposed to bar Charter from collecting for any alleged overpayments that it made after the expiration date of the agreement.

Moreover, if the 2008 Agreement did in fact continue in existence as Blue Ridge contends, under the plain text of the statute, any new rate determined by this Commission in this docket would apply retroactively to September 1, 2013, the only end date specified in the 2008 Agreement. Applying the statute in accordance with this literal interpretation [54] is problematic for Blue Ridge because it would increase rather than decrease Blue

[54] The pertinent provision in N.C. Gen. Stat. § 62-350(c) provides that "if the new rate is for the continuation of an existing agreement, the new rate shall apply retroactively to the date immediately following the end of the existing agreement." By its clear terms, this provision is intended to facilitate "the continuation of an existing agreement" by resolving a rate dispute. Thus, this provision only applies when there is unanimity between the parties that the current terms and conditions in an existing agreement should continue to apply and will continue to apply once the Commission resolves the rate issue. In that situation, the only dispute between the parties that

Ridge's potential liability because Charter would be able to seek recovery for payments made since that September 1, 2013 expiration date instead of August 25, 2015, i.e., the date that Charter alleges that the 90-day negotiation period expired and that its recovery right began.

To avoid this literal application of the statute, Blue Ridge here contends that not only did the parties (implicitly) agree (in 2015) to continue operating under the terminated 2008 Agreement, but that they also agreed that the 2008 Agreement would not end until this Commission issues an order in this docket.[55] While there is abundant evidence in the record that Charter agreed to operate pursuant to the "expired" 2008 Agreement,[56] Blue Ridge has not cited to any document or discussion in the record proper where Charter specifically agrees that the term of the "expired" 2008 Agreement would be extended until the date that the Commission issues an order in this dispute.[57] In fact, the documentary evidence in this proceeding indicates only that the parties agreed to continue operating under the terms of the "expired" 2008 Agreement for a limited term which was and is well short of the date of this order.[58] Operating "under" or "pursuant to"

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the Commission should be requested to resolve is the rate dispute. That is not the case here because Blue Ridge and Charter seek Commission approval to change the terms and conditions that have previously governed the parties' operations. Therefore, N.C. Gen. Stat. § 62-350(c) does not apply in this circumstance.

[55] See Paragraph 72, Blue Ridge Proposed Order, p. 67, where Blue Ridge states: "Because Charter is operating under an existing pole attachment agreement with Blue Ridge, it is not entitled to recover retroactive "true up" payments based on the rate the Commission ultimately adopts. Instead, pursuant to Section 62-350, the rate the Commission adopts will only apply prospectively from the date of this order. Charter's counterclaim for "true up" payments retroactively applying the rate the Commission adopts back to 2015 therefore should be denied." The crux of this argument is that the parties must have agreed and/or understood that N.C. Gen. Stat. § 62-350 would provide for an expiration date different from the date set forth in the 2008 Agreement when they agreed to continue operating pursuant to the terms of that agreement and that the expiration date would be the date that the Commission issues an order in this docket.

[56] For instance, Blue Ridge made the following statements as support for its position: "it is undisputed that Charter has continued to attach to Blue Ridge's poles pursuant to the 2008 Agreement and thus agreed to *continue its term* through continued performance." Blue Ridge's Post Hearing Brief, p. 8. Further, Blue Ridge stated: In addition to stipulating that it continues to attach to Blue Ridge's poles "pursuant to" the 2008 Agreement, see Joint Stipulations, [] the evidence makes clear that Charter has agreed through its conduct to continue operating under the 2008 Agreement, even after the expiration of the original term." Blue Ridge's Proposed Order, p. 66.These are Blue Ridge's words and not Charter's.

[57] In Paragraph 6 of the Joint Stipulations, the parties stipulated that: "Charter attaches and has facilities attached to Blue Ridge's utility poles pursuant to a Pole Attachment Agreement dated September 1, 2008."

[58] ***** BEGIN CONFIDENTIAL*** *** END CONFIDENTIAL*****

the terms of an expired agreement is not the same as and does not mandate an interpretation or finding that the term, i.e., length of the agreement, was extended.

Moreover, even if one assumes arguendo that the parties agreed that the term of the agreement would be extended until the date that the Commission issues an order in this docket, N.C. Gen. Stat. § 62-350(c) would not bar Charter's overpayment recovery because the revival of the expired 2008 Agreement and the extension of its term do not result in the "continuation of the existing agreement." Instead, it results in the formation of a "new" agreement with different terms and conditions including a new expiration date. See, Lewis v. Edwards, 147 N.C. App. 39, 554 S.E.2d 17(2001). The cited sentence in N.C. Gen. Stat. § 62-350(c) does not apply to this newly formed agreement.

When the parties continue to operate based upon this newly formed agreement and initiate and/or follow through on previously begun negotiations as a result thereof, the first sentence in N.C. Gen. Stat. § 62-350(c) applies. It provides that "[t]he Commission shall apply any new rate adopted as a result of the action retroactively to the date immediately following the expiration of the 90-day negotiating period or initiation of the proceeding, whichever is earlier." See the first sentence in N.C. Gen. Stat. § 62-350(c). Here, the 90-day negotiating period expired on August 25, 2015 and Blue Ridge filed the complaint initiating this action on November 30, 2016. Thus, pursuant to this language, Charter is entitled to seek reimbursement for alleged overpayments since August of 2015.

In addition to the aforementioned, Blue Ridge also argues that Charter is statutorily "barred" [59] from recovering any "overpayments" that it made to Blue Ridge while the parties continued to operate under the 2008 Agreement. Blue Ridge's argument in this regard is dependent upon the language in N.C. Gen. Stat. § 62-350, Charter's subsequent conduct after the 2008 Agreement expired and the parties' stipulation.

With regard to the former, N.C. Gen. Stat. § 62-350 did not exist in 2008. It was enacted by the General Assembly in 2009, long after the parties had reached the 2008 Agreement. For this reason, the 2008 Agreement did not include and could not have included a specific reference to the yet to be enacted provisions in N.C. Gen. Stat. § 62-350. Perhaps an agreed upon change of law provision may have incorporated subsequent changes in relevant law such as the enactment of N.C. Gen. Stat. § 62-350 into the 2008 Agreement, but no such provision was included in the 2008 Agreement. Thus, the terms of N.C. Gen. Stat. § 62-350 could not have been included in the Agreement unless the Agreement itself was specifically modified by the parties at some date subsequent to the effective date of the Agreement.[60]

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[59] See Blue Ridge's Post-Hearing Brief, p. 9. "Charter's stipulation and admissions that the 2008 Agreement remains in place—and that it is subject to an existing pole attachment agreement---bar it from seeking 'true-up' payments under G.S. 62-350."

[60] It is noteworthy that, at the time when the parties agreed to continue operating under the terms of the terminated 2008 Agreement, i.e., in 2015, the status of N.C. Gen. Stat. § 62-350 itself was uncertain. Blue Ridge acknowledged this uncertainty when it proposed that the parties continue to operate under the expired 2008 Agreement. See MM Ex 4 and LL-5 where Blue Ridge acknowledged that "the [General Assembly might] add other provisions to guide [the parties']

The later inclusion of such a provision in the parties' agreement would have necessitated the agreement of both parties as well as additional consideration. Neither party produced a written and/or signed document where the parties agreed to this specific term. Neither party produced any direct evidence or testimony where the parties explicitly discussed and agreed to that specific term. And, neither party produced any evidence that any additional consideration was provided in support of this modification. Instead, Blue Ridge cites to the parties' stipulation (and conduct) and asks this Commission to infer that Charter has agreed (or should be deemed to have agreed) to be bound by this "new" term in the 2008 Agreement.

While N.C. Gen. Stat. § 62-69 allows the Commission to resolve any proceeding by stipulation, the Commission may not extend the agreed upon stipulation beyond the limits set by the parties. Utilities Commission v. CUCA, Inc., 348 N.C. 452, 500 S.E.2d 693 (1998). The Parties' joint stipulation states: "Charter attaches and has attached to Blue Ridge's utility poles pursuant to a Pole Attachment Agreement dated September 1, 2008." The text of the stipulation clearly indicates that the parties agreed to continue operating under the 2008 Agreement. It does not, however, indicate that the parties agreed to or stipulated that the alleged overpayments made pursuant to the agreement could not be recovered by Charter because of N.C. Gen. Stat. § 62-350.

The same is true of Charter's conduct. While Charter's conduct indicates that it agreed to continue operating under the terms and conditions of the 2008 Agreement, one could not fairly conclude from that conduct that by continuing to operate under the terms of the 2008 Agreement, Charter understood and agreed that it was forgoing its rights to recovery of any alleged overpayments. In fact, Charter's pursuit of this claim in this proceeding is a rather strong indication that it did not and does not believe that it agreed to be statutorily barred from recovering any alleged overpayments either by agreeing to operate under the 2008 Agreement or by agreeing to the stipulation. Therefore, without more, the Commission cannot reasonably conclude from Charter's conduct and stipulation that Charter agreed to and/or understood that it would be statutorily precluded from seeking repayment for any alleged overpayments. Were the Commission to do so, the Commission would extend the agreed upon stipulation beyond the limits set by Charter and Blue Ridge and/or draw an unreasonable inference from Charter's conduct. Thus, for this reason and the reasons previously articulated, the Commission concludes that N.C. Gen. Stat. § 62-350(c) does not prevent Charter from pursuing recovery for overpayments that it can prove that it has made in this proceeding simply because it agreed to continue operating under the terms of the 2008 Agreement. Charter is therefore entitled to pursue recovery for any overpayments that it is alleged to have made.

The only remaining issue in this regard is the starting date that Charter should be allowed to begin recovering for any alleged overpayments that it made to Blue Ridge. N.C. Gen. Stat. § 62-350 requires that communications attachers and cooperatives must

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negotiations." MM Ex 4 and LL-5. Thus, because of this uncertainty, even if the Commission could find that the parties are operating under an "existing" agreement, the Commission could not and cannot conclude that Charter was bound by the statutory provision cited by Blue Ridge without compelling evidence that Blue Ridge specifically agreed that this provision would apply. No such evidence has been presented.

either negotiate for a period of 90 days or reach an impasse before submitting a pole attachment dispute to the Commission. *See* N.C. Gen. Stat. § 62-350(c). There are two ways to trigger this 90-day negotiation period under the statute: (1) "[f]ollowing receipt of a request from a communications service provider" or (2) "[f]ollowing a request from a party to an existing agreement," (that is, a request from either party), provided the request is "made pursuant to the terms of the agreement or made within 120 days prior to or following the end of the term of the agreement." *See* N.C. Gen. Stat. § 62-350(b).

Blue Ridge contends that the parties' negotiations in this case do not meet either of these triggers and that, as a result, the 90-day negotiating period never did commence. In support of this contention Blue Ridge observes that it sent a request to negotiate a renewed pole attachment agreement to Charter on May 22, 2014, which is more than 120 days from September 1, 2013—the date the 2008 Agreement was set to otherwise expire (*See* Layton Tr. Vol. 1, p. 36; see also Exhibit LL-3, p. 2) and that Blue Ridge is not a communications attacher. Thus, the negotiations were not initiated "following a request from a communications attacher," and the negotiations were not initiated "following a request …made [by either party] pursuant to the terms of the agreement or made within 120 days prior to or following the end of the term of the agreement." *See* N.C. Gen. Stat. § 62-350(b). Emphasis added. As a result, according to Blue Ridge, even if any new rate were to be applied retroactively, because the 90-day negotiating period never did commence, the new rate would apply only back to the commencement of this action, not the parties' negotiations.[61] The Commission does not agree.

N.C. Gen. Stat. § 62-350(c) expressly requires the Commission to award reimbursement of overpayments. The statute provides that any new rates set by the Commission "shall apply . . . retroactively to the date immediately following the expiration of the 90-day-negotiating period or initiation of the proceeding, whichever is earlier." N.C. Gen. Stat. § 62-350(c). Here, the 90-day negotiating period expired on August 25, 2015. [62] That date is well before the initiation date of this proceeding. Blue Ridge sent a proposed new agreement to Charter in May 2014. Charter responded to Blue Ridge's proposal on May 26, 2015, declaring at that time its intent to negotiate the agreement – including the rate – by submitting a redline of it.[63] Contrary to Blue Ridge's contention that Charter did not dispute the rate, Charter's redline flags Blue Ridge's rate and notes: "To be determined. These rates are to be calculated in accordance with the FCC cable formula."[64] Accordingly, Charter requested to negotiate the rate at that time – consistent

[61] According to Blue Ridge the pertinent provision of N.C. Gen. Stat. § 62-350(c) states: "The Commission shall apply any new rate adopted as a result of the action retroactively to the date immediately following the expiration of the 90-day negotiation period or the initiation of the proceeding, whichever is earlier."

[62] Although the parties' 2008 Agreement expired on September 1, 2013, and it is arguable that the negotiations under N.C. Gen. Stat. § 62-350 started on May 22, 2014, Charter seeks refunds of overpayments only from August 26, 2015, 90 days following its return of a redlined draft agreement to Blue Ridge.

[63] Mullins, Tr. Vol. 3, p. 236-37; *see also* Layton Ex. 7.

[64] *See* Layton Ex. 7, Draft Redline Agreement, Ex. C.

with the requirements of N.C. Gen. Stat. § 62-350(b) – and the negotiating period expired 90 days later.

The Commission finds and concludes that the negotiating period commenced on May 26, 2015 and that the new rates determined in this case, therefore, will be effective as of August 25, 2015 (90 days after the start of the negotiating period). Based on the Commission's conclusion that Blue Ridge's maximum just and reasonable rates for the years 2015-2017 are properly calculated according to the FCC Rate Methodology, as modified to reflect the actual data supplied by witness Arnett, the Commission determines that, according to the evidence of record, Blue Ridge owes a refund to Charter for the period from August 25, 2015, through August 31, 2017 [65] and that Charter shall calculate such refund and provide it to Blue Ridge for verification. Blue Ridge also owes a refund to Charter for any additional overpayments made to it based on Blue Ridge's excessive rate. The refunds shall be calculated based on the following guidelines.

In the past, Charter invoiced Blue Ridge on per attachment rather than a per pole basis. The 2015-2016 Inventory revealed that Charter had more attachments than there would have been if there was only one attachment per pole. Because of this mismatch between the number of poles and the number of attachments, witness Arnett determined that Charter occupied 1.11 feet of space per attachment rather than the one foot per attachment that the FCC and the TVA rate formulas presumed. Witness Arnett used this hybrid space allocation factor to calculate the maximum rate that Charter should have been paying under the TVA and the FCC rate methodologies. This hybrid rate thus accounts for the fact that Charter has more than one attachment on some poles.[66]

Charter does not object if Blue Ridge is permitted to charge Charter the FCC rate for any attachment that is not within one foot of another attachment. Charter contends, however, that it would be inappropriate for the Commission to allow Blue Ridge to charge per attachment and to also use an average occupancy of more than one foot because that would amount to double billing. The Commission agrees.

Thus, to be fair to Charter, any refund due Charter shall be determined by multiplying the rates calculated by witness Arnett times the number of poles in Blue Ridge's inventory for each year in question and subtracting that amount from the total amount of attachment fees that Charter paid for that year(s). The parties shall work

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[65] The Commission notes that Blue Ridge's annual RUS filing shows accumulated Patronage Capital ***__BEGIN CONFIDENTIAL__*** ***__END CONFIDENTIAL__*** The record does not reflect whether some of the ***__BEGIN CONFIDENTIAL__*** **__END CONFIDENTIAL__*** Patronage Capital is the result of Blue Ridge accruing for this payment, but there is no testimony that payment by Blue Ridge of the refund will have any significant adverse effect on Blue Ridge or its members. [*See* Kravtin, Confidential Tr. Vol. 4, pp. 181-82 n.22.]

[66] Witness Arnett accepted the presumption that Charter's attachments use one foot of usable space. He nevertheless calculated that Charter should be treated as occupying 1.11 feet on average based on the audit results showing that Charter made 27,674 attachments on 24,888 poles.

collaboratively to calculate the refund due recognizing that, in the past, Charter has been billed on a per attachment basis and that the Commission is requiring the pole attachment rates determined in this proceeding to be hereinafter applied on a per pole basis.[67] If Blue Ridge desires, and Charter is agreeable, the Commission will allow the parties to use this refund amount as a credit against future pole attachment bills until the amount of the credit is fully exhausted.[68]

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 33

The evidence supporting this Finding of Fact is found in the testimony of witnesses Kravtin, Martin, Layton, Arnett and Booth.

Charter's witnesses agreed that under appropriate terms and conditions of attachment, and in addition to an annual pole attachment rental rate, Charter is responsible for paying any out-of-pocket expenses incurred by Blue Ridge directly attributable to Charter's attachments. Those expenses include the costs of making poles ready for Charter's attachments (including all costs associated with installing a new pole and removing the old pole, if necessary, to accommodate Charter's attachment); the costs incurred by Blue Ridge in conducting pre-construction inspections and engineering; the costs incurred in any post-construction inspection; measurable and direct costs incurred by Blue Ridge in processing Charter's pole attachment applications; and the costs incurred by Blue Ridge in auditing those poles to which Charter is attached. [Kravtin, Tr. Vol. 4, pp. 184-85; Martin, Tr. Vol. 4, pp. 86-87.] Witness Kravtin termed these costs "but for" costs, and she testified that because Charter pays those costs, Blue Ridge's remaining marginal costs of attachment are very small, certainly well under the FCC fully allocated rate she advocates. [Kravtin, Tr. Vol. 4, pp. 176-77.]

Witnesses Arnett, Booth and Layton testified that Blue Ridge incurs additional costs related to providing pole attachments that should be recovered. [Arnett, Tr. Vol. 2, pp. 88-89; Booth, Tr. Vol. 3, pp. 58-59, 72;. Layton, Tr. Vol. 1, pp. 55-57.] These witnesses testified that Charter's presence on Blue Ridge's poles creates numerous costs and burdens on the EMC that would not be present "but for" Charter's attachments. [Booth, Tr. Vol. 3, pp. 58-59, 72; Arnett, Tr. Vol. 2, pp. 88-89.] According to this testimony, these costs and burdens include pole damage, pole climbing impediments, impediments to vegetation management, clearance violations, public safety violations, failure to allow for expansion by Blue Ridge, failure to bond equipment to pole ground, downed Charter cables, and various administrative costs. [Booth, Tr. Vol. 3, pp. 78-81,

[67] While the Commission has established that bills will be issued on this basis in the future, nothing precludes the parties from agreeing to a different arrangement.

[68] Blue Ridge witness Arnett testified that Charter is attached to 442 poles that are used for transmission (as opposed to distribution) of electricity. He testified that these poles are typically larger and more expensive than distribution poles and that it would be appropriate for Blue Ridge to charge a different rate for attachment to these poles than Blue Ridge charges for distribution poles. [Arnett, Tr. Vol. 2, p. 67.] Blue Ridge did not propose any rate for transmission poles in this proceeding, however, and under N.C. Gen. Stat. § 62-350, no such issue is before the Commission for resolution.

85-93.] Witness Arnett testified that the annual rental rate does not cover all "but for" costs and argued that Blue Ridge should be allowed to charge Charter separately for the hiring of administrative personnel to oversee Charter's attachments. [Arnett, Tr. Vol. 2, pp. 88-89.] No witness on behalf of Blue Ridge presented evidence of any specific amounts that it contended Charter should be charged for additional "but for" costs.

Witness Kravtin, in response to the testimony of witnesses Booth and Arnett, said that undocumented "but for" costs could not properly be added to the fully allocated costs allowed under the FCC Rate Methodology. [Kravtin, Tr. Vol. 4, p. 201.] She noted that not only does the fully allocated FCC Rate provide additional contribution to the pole owner beyond "but for" costs, [Kravtin, Tr. Vol. 4, p. 170], but also that similarly undocumented claims of "but for" costs of pole owners have been rejected by the FCC.[69]

Discussion and Conclusions

The Commission concludes that, in addition to an annual pole attachment rate, it is appropriate for Charter to pay the direct and measurable out-of-pocket "but for" costs for certain expenses incurred by Blue Ridge associated with Charter's attachments, including make-ready construction and engineering costs and the costs to Blue Ridge of post-construction inspections and audits of poles to which Charter is attached.

Blue Ridge argues that Charter is responsible for other "but for" costs that should be the direct responsibility of Charter. The testimony is unclear, however, as to what conditions Blue Ridge has identified regarding Charter's facilities have been caused by Charter, as opposed to other parties. Equally importantly, Blue Ridge has not introduced any evidence of the amount of any of the "but for" costs Blue Ridge claims. Without any evidence of the amount of additional costs it claims, or even how to calculate them, the Commission has no basis in the record heretofore developed to award them, even were it otherwise inclined to do so. Nor is the Commission willing to simply allow Blue Ridge to impose on Charter generalized, non-specific and non-verifiable costs, in addition to verifiable out-of-pocket costs that Charter has testified are appropriate and the fully allocated costs recovered in the annual FCC Rate. Not only would such a practice undoubtedly cause additional conflict and the potential for additional and unnecessary proceedings before the Commission, but this Commission has previously, and correctly, rejected efforts to set rates by reference to undocumented costs. *See, e.g.,* Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 106, at 23-24 (Dec. 19, 2007) ("uncertain and unquantifiable costs . . . should not be taken into account in calculating avoided cost rates").

[69] The FCC rejected similar claims by electric utilities that were submitted without any cost study. *See* Implementation of Section 224 of the Act, Report & Order on Reconsideration, 26 FCC Rcd 5240 ¶¶ 189-190 (2011), aff'd sub nom. Am. Elec. Power Serv. Corp. v. FCC, 708 F.3d 183 (D.C. Cir. 2013) (rejecting pole-owner claims that they incur significant unrecovered costs outside of the make-ready process because they "did not provide any cost study" demonstrating additional costs incurred "solely to accommodate third party attachers").

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 34

The evidence supporting this Finding of Fact is found in the testimony of witnesses Martin, Mullins, Kravtin, Layton, Arnett and Booth.

Blue Ridge has raised a number of issues related to the terms and conditions of attachment to be contained in a new pole attachment agreement between the parties.

Through witness Kravtin, Charter presented testimony that Blue Ridge has been able to exercise leverage over Charter because it has "monopoly ownership and control over the existing distribution network of poles." [Kravtin, Tr. Vol. 4, p. 168.] According to witnesses Kravtin, Mullins and Martin, Charter has no practical alternative to attaching to Blue Ridge's poles in its service territory. [Kravtin, Tr. Vol. 4, pp. 174-75; Martin, Tr. Vol. 4, p. 79; Mullins, Tr. Vol. 3, p. 227.] Regardless of the size of the entities, witness Martin testified, the pole owner has a monopoly on critical infrastructure and has the "ability to dictate the terms of attachment." [Martin, Tr. Vol. 4, p. 79.] Witness Arnett testified that there are some places where other pole owners have poles that would serve as an alternative for Charter. [Arnett, Tr. Vol. 2, p. 87.] But witness Arnett was not able to estimate how prevalent such situations are in the field. [Arnett, Tr. Vol. 3, pp. 16-17.]

Witness Martin introduced evidence of industry standard terms of attachment that are present in most pole attachment agreements, even in the absence of any regulatory oversight. Witness Martin testified that Charter's attachments are generally the same regardless of the pole owner and that most pole agreements are similar. [Martin, Tr. Vol. 4, p. 77.] Because most agreements are similar, witness Martin testified, "they can serve as a barometer of what terms and conditions are just and reasonable." [Martin Tr. Vol. 4, p. 78.]

Witness Martin also testified that there are standard terms and conditions that other pole owners, including cooperatives in North Carolina, accepted both before and after the advent of regulatory oversight, and that these terms continue in effect. [Martin, Tr. Vol. 4, p. 78, and NM Ex. 3.] According to witness Martin, these agreements help to establish the industry standard terms on which Charter relies. [Martin, Tr. Vol. 4, pp. 78, 83-84, and NM Ex. 3.]

Witness Booth testified as an engineering expert for Blue Ridge in this proceeding. He is a professional engineer who has an extensive history of assisting cooperative utilities, including Blue Ridge, for more than 50 years in engineering matters. [Booth, Tr. Vol. 3, pp. 54-57.] He has served as an expert witness for cooperatives in litigation matters in a large number of cases, and he assisted Jones-Onslow Electric Membership Corp., in developing its agreement with Time Warner Cable Southeast LLC, as reflected in the January 2018 Pole Attachment Orders. *See* GLB Ex. 1; see also Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, Docket No. EC-43, Sub 88 (JOEMC), at *51 (NCUC Jan. 9, 2018). He also served as a rate expert for Rutherford EMC in the Rutherford case before the Business Court.

In this proceeding, witness Booth urged the Commission to adopt language for Blue Ridge's pole attachment agreement different from and far more restrictive than the language in the 2007 JOEMC agreement on which witness Booth had advised the EMC. *See* Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, Docket No. EC-43, Sub 88 (JOEMC), at *51 (NCUC Jan. 9, 2018). In his testimony in the instant matter, witness Booth relied on the many photographs of Charter's facilities that were contained in his exhibits. [Booth Tr. Vol. 3, pp. 75 and Ex. GLB 3.] He testified that the photographs show safety hazards, pole damage and other problems caused by Charter. [Booth, Tr. Vol. 3, pp. 78-81.] In light of what witness Booth contended are unsafe and unsound practices on the part of Charter, he asserted that Blue Ridge requires language in the agreement that better protects it. [Booth, Tr. Vol. 3, pp. 60-65.] Neither witness Booth nor any other witness for Blue Ridge addressed Charter's extensive testimony about the industry standard terms that are found across pole attachment agreements in North Carolina.

Discussion and Conclusions

The Commission is mindful that many of the issues related to the contractual terms and conditions raised in this case have been addressed by the FCC and other regulatory authorities. In addition, extensive evidence has been presented of certain "industry standard" terms and conditions that have been accepted by North Carolina cooperatives prior to this Commission being afforded jurisdiction over these matters. Where there are templates for resolution of similar concerns that have been accepted by a regulatory authority that has dealt with pole attachments for decades, and where large numbers of electric cooperatives have accepted terms and conditions as safe and protective of the reliability of their networks when there was no regulatory oversight, the Commission will look closely to those sources as potentially reflecting an unbiased resolution of the issues presented by the parties in this case.

The evidence reflects that the terms and conditions of attachment to EMC poles were largely within the control of the EMCs prior to regulation under N.C. Gen. Stat. § 62-350. No tribunal had jurisdiction over EMCs' pole attachment service until 2009. Yet Charter had a need to attach, and especially to retain its existing attachments, to Blue Ridge's poles.

In this Order, the Commission will address individually each of the issues related to terms and conditions of agreement that are listed in the parties' November 2, 2017 Joint Statement of Issues. In this case, Blue Ridge argues that a number of the terms and conditions specified in its 2008 pole attachment agreement with Charter are just and reasonable, while Charter argues that they are burdensome, unreasonable and contrary to industry standard. The Commission notes that whereas voluntary agreement by Blue Ridge and Charter to terms and conditions that Charter also found acceptable in the past was evidence of the reasonableness of those terms and conditions, the fact that Charter and Blue Ridge agreed to certain provisions that Charter now contests is less persuasive evidence of reasonableness because at the time the 2008 Agreement was executed, Charter had limited leverage and there was no tribunal with authority to protect Charter's

rights to reasonable terms. [Kravtin, Tr. Vol. 4, pp. 180-81; Martin, Tr. Vol. 4, pp. 78-80; Mullins, Tr. Vol. 3, p. 223.]

The Commission will now address and provide a decision individually on each of the contested terms and conditions (Issues (a) through (l) – or referred to as Issue Nos. 3(a) through 3(l) per the November 2, 2017 Joint Statement of Issues).

Issue (a): Disputed Invoices[70]

Witnesses Layton and Booth, on behalf of Blue Ridge, argued that Charter should be required to pay any disputed invoices, and that allowing Charter to withhold payment on disputed invoices until the dispute is resolved creates an incentive for Charter to unreasonably dispute payment obligations. [Layton, Tr. Vol. 1, pp. 60-61; Booth, Tr. Vol. 3, p. 63.] Witness Layton also testified that Charter had recently refused to pay for two make-ready projects, despite the fact that the parties do not dispute the amount owed. [Layton, Tr. Vol. 1, pp. 60-61.]

On behalf of Charter, witness Martin testified that if Charter were required to pay where there is a good faith dispute, Blue Ridge would have an incentive to work less efficiently to resolve the dispute. Witness Martin also noted that N.C. Gen. Stat. § 62-350(c) addresses the issue, requiring that a party pay undisputed amounts prior to bringing an issue to the Commission. [Martin, Tr. Vol. 4, p. 108.]

Discussion and Conclusions for Issue (a)
Disputed Invoices

Sections 4.2 of the parties' 2003 and 2008 Agreements respectively require Charter to pay Blue Ridge's monthly invoices for attachment fees within 30 days. Those same provisions, however, recognize that Charter may not pay invoices within the 30 day period and provide that, when that occurs, interest shall accrue on the unpaid attachment fees and charges at twelve percent (12%) per annum.[71] In negotiating a new Agreement, Charter has insisted on including provisions in any new agreement that would allow it to withhold payment on any disputed invoices until the dispute is resolved. While Blue Ridge agrees that it is appropriate for Charter to have a mechanism to dispute invoices, Blue Ridge argues that Charter should be required to pay outstanding invoices in full pending resolution of the dispute. See Blue Ridge Proposed Order, p. 50. Charter objects to this proposal.

In 2009, the General Assembly enacted N.C. Gen. Stat. § 62-350. In pertinent part, N.C. Gen. Stat. § 62-350(c) provides that "[p]rior to initiating any proceeding under this subsection, a party must pay any undisputed fees related to the use of poles, ducts, conduits which are due and owing under a preexisting agreement with the [] membership

[70] Issue No. 3(a) per the November 2, 2017 Joint Statement of Issues.

[71] The 2003 Agreement and the 2008 Agreement are essentially identical. See Blue Ridge Answer to Counterclaim.

corporation. In any proceeding brought under this subsection, the Commission may resolve any dispute regarding fees alleged to be owing under a preexisting agreement or regarding safety compliance arising under subsection (d) of this section." This provision clearly contemplates that: (1) there will be fee disputes between attachers and pole owners; (2) the Commission will be asked to resolve these disputes; and (3) prior to bringing any of these disputes to the Commission for resolution, a party must pay all undisputed amounts to the opposing party. This provision clearly does not contemplate that a party must pay all disputed invoices to the opposing party prior to bringing a dispute to the Commission for resolution.

Blue Ridge's argument that Charter should be required to pay any disputed invoices in full pending resolution of the parties' disagreement by this Commission is inconsistent with the tone, tenor and text of N.C. Gen. Stat. § 62-350. It is also inconsistent with the tone, tenor and text of the 2003 and 2008 Agreements, which Charter had little choice but to accept if it wished to provide service in the areas served by Blue Ridge. Therefore, the Commission denies Blue Ridge's request that Charter be required to pay in full any invoices which it disputes in good faith prior to filing a fee dispute resolution proceeding with this Commission and affirms that, under N.C. Gen. Stat. § 62-350, Charter is only obligated pay any undisputed invoices to Blue Ridge prior to filing a dispute resolution proceeding with the Commission. The Commission will, however, expect the parties to behave in good faith toward each other in regards to paying and/or disputing invoices.

Issue (b): Requirements regarding new attachments, overlashing and drop poles (a/k/a secondary poles)[72]

Witness Layton, on behalf of Blue Ridge, testified that, in its negotiations, Charter took the position that it should be required to seek a permit only for projects involving ten or more attachments. Instead, witness Layton requests the Commission to require that Charter apply for a permit for each attachment and pay an associated application fee. [Layton, Tr. Vol. 1, p. 60.]

Witness Booth testified on behalf of Blue Ridge that various safety violations by Charter caused damage to Blue Ridge. Witness Booth maintained that Charter should not be allowed to overlash its facilities without completing a full application process to ensure that Blue Ridge has notice and an opportunity to review and approve the design and construction. [Booth, Tr. Vol. 3, p. 61.] He testified that overlashing can affect the windloading on a pole and that this should be "policed through the permitting process."[73] [Booth, Tr. Vol. 3, pp. 61, 97.] No witness for Blue Ridge presented any testimony on why aerial drops not physically attached to the pole should be considered an attachment.

[72] Issue No. 3(b) per the November 2, 2017 Joint Statement of Issues.

[73] ***BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL***

Charter witness Martin proposed the following language for Blue Ridge's and Charter's pole attachment agreement related to the permitting process:

> ***Permit and Approval Process:*** *Charter shall comply with the Cooperative's generally applicable, non-discriminatory Attachment approval application procedures for all new Attachments to the Cooperative's poles, except for secondary poles (a/k/a lift poles or drop poles). Charter shall notify Cooperative of all new secondary pole Attachments on a quarterly basis, and such Attachments shall be subject to the Annual Attachment Fee. Charter may overlash its existing Attachments where such activity will not cause the Attachment to become noncompliant with the safety standards described above. Charter shall provide prior notice to Cooperative of all new overlashings at least 15 days in advance, except for projects involving the overlashings of 5 or fewer poles, when Charter shall provide at least forty-eight (48) hours prior notice to Cooperative. Licensor may perform a post-overlash inspection of Licensee's overlashing on poles as Licensor deems critical in its reasonable discretion, including reliance on Licensor's professional engineers as Licensor deems necessary, and Licensee shall pay for the actual cost. Licensee shall provide sufficient information regarding its overlash to allow Licensor to determine the impact of Charter's overlash on the pole loading. There shall be no additional annual Attachment Fee for overlashings of Licensee's existing facilities.* [Martin, Tr. Vol. 4, pp. 94-95.]

The testimony of the parties was consistent that Charter should be required to file an application and obtain a permit before attaching to a mainline distribution pole. [*See, e.g.*, Martin, Tr. Vol. 4, pp. 94-95; Layton, Tr. Vol. 1, p. 60.]

Witnesses Martin and Mullins testified that it is impractical to both provide timely service and treat drop poles as attachments subject to the same notice or permitting to which mainline poles are subject.[74] [Martin, Tr. Vol. 4, pp. 118-19; Mullins, Tr. Vol. 3, pp. 233-34.] Witness Martin agreed that after-the-fact notice of drop attachments is, however, appropriate, and his exhibit showed that it is industry-standard. [Martin, Tr. Vol. 4, p. 94-95; NM Ex. 3.]

Witness Martin testified that "overlashing" a light-weight, half-inch in diameter cable onto an existing steel strand hung between poles is an important technique for efficiently and cost-effectively deploying advanced communications services. [Martin, Tr. Vol. 4, pp. 93-94.][75] A reasonable contractual term, he stated, will allow overlashing by Charter upon prior notice that includes information necessary for Blue Ridge to conduct

[74] Drop poles, also referred to as Secondary Poles or Lift Poles, are typically installed across a street from the main distribution pole line in order to provide clearance for facilities necessary to provide service to a customer.

[75] Overlashing is the process of lashing additional fiber or coaxial cable onto an existing steel strand hung between poles.

a safety analysis of the overlash. [Martin, Tr. Vol. 4, p. 90-91.] Witness Martin also testified that this practice has provided a practical solution acceptable to other cooperatives in the past. [Martin, Tr. Vol. 4, p. 91.]

Witness Martin testified that it is industry-standard in pole attachment agreements to allow overlashing of existing attachments without additional permitting or even notice. He stated that in his review of 90 pole attachment agreements with various North Carolina pole owners, 72% of those agreements do not require any notice or permitting for overlashing. [*See* NM Ex. 3, pp. 12-23.] Of the remaining 25 agreements, 19 require notice only after the fact. [*See* NM Ex. 3, pp. 12-23.] Only 6 agreements require permitting prior to overlashing being performed. [*See* NM Ex. 3, pp. 12-23.] Witnesses Martin and Mullins observed that Charter is one of the only attachers required to submit a permit to Blue Ridge prior to overlashing, even though overlashing by third-parties is common and Charter's direct competitors are not subject to the same permitting requirements.[76] [Mullins, Tr. Vol. 3, pp. 225, 241-42; Martin, Tr. Vol. 4, p. 92; *see* MM Ex. 1.] Witness Martin also testified that his proposed language is consistent with the FCC's determination that attempts to impose permitting requirements for overlashing are "unjust and unreasonable on [their] face." [Martin, Tr. Vol. 4, 92-93.]

Discussion and Conclusions for Issue (b)
Requirements regarding new attachments, overlashing, and drop poles (a/k/a secondary poles)

The parties agree that Charter is (and should be) required to submit an application and obtain approval from Blue Ridge prior to making an attachment on a mainline distribution pole. No evidence was submitted of any specific safety issues that would require prior approval or application for attachment to drop poles, and the record reflects a strong industry standard of allowing Charter to continue to provide notice of drop attachments after-the-fact. The FCC requires Charter to provide service to new customers within seven days, which would not be possible if a full permitting process for drop poles were required. 47 C.F.R. § 76.309(c)(2)(i). Blue Ridge does not require any kind of notice of overlashing by joint user telephone companies, who often overlash bigger and heavier cables to their strand. [Martin, Tr. Vol. 4, pp. 93-94; *see* Mullins, Tr. Vol. 3, pp. 239-40.]

Witness Martin's proposed language regarding overlashing would require Charter to supply sufficient information to allow Blue Ridge to determine the impact of the overlashing on pole loading, and would permit Blue Ridge to conduct a post-overlash inspection (by a registered professional engineer if deemed necessary) at Charter's cost. Under these notice requirements proposed by Charter, Blue Ridge would receive 30 days' prior notice for overlashing projects involving 20 or more poles, 15 days' notice for six to 19 poles and 48 hours' notice for projects of five or fewer poles. Charter's additional proposed language would address witness Booth's concerns about pole loading by requiring Charter to supply information that will allow Blue Ridge to determine

[76] *See also* *** **BEGIN CONFIDENTIAL**** *** **END CONFIDENTIAL****

the effect on loading at Charter's expense. Accordingly, the Commission finds it appropriate to approve the following language as proposed by Charter:

> ***Permit and Approval Process****: Charter shall comply with Cooperative's Attachment approval application procedures for all new Attachments to the Cooperative's poles, except for secondary poles (a/k/a lift poles or drop poles). Charter shall notify the Cooperative of all new secondary pole Attachments on a quarterly basis, and such Attachments shall be subject to the Annual Attachment Fee. Charter may overlash its existing Attachments where such activity will not cause the Attachment to become noncompliant with the safety standards described above. Charter shall provide prior notice to the Cooperative of all new overlashings at least 30 days in advance for projects involving overlashing to 20 or more poles, at least 15 days in advance for projects involving overlashing 6 to 19 poles and at least 48 hours in advance for projects involving overlashing 5 or fewer poles. The Cooperative may perform a post-overlash inspection of Charter's overlashing on poles as the Cooperative deems critical in its reasonable discretion, including reliance on the Cooperative's professional engineers as the Cooperative deems necessary, and Charter shall pay for the actual cost. Charter shall provide sufficient information regarding its overlash to allow the Cooperative to determine the impact of Charter's overlash on the pole loading. There shall be no additional annual Attachment Fee for overlashings of Charter's existing facilities.*

Issue (c): Certification requirements related to Charter's attachments to Blue Ridge's poles[77]

Witness Booth testified that neither Charter nor its contractors carefully review whether they are meeting NESC requirements [Booth, Tr. Vol 3, p. 82], adding that contractors used by communications attachers generally, including ILECs and other phone companies, are not properly trained in Code requirements. [Booth, Tr. Vol. 3, p. 160.] He believes that the lack of training applies to the "entire communications industry across the board." [Booth, Tr. Vol. 3, p. 160.] He also testified that Charter and its contractors do not engage the services of professional engineers (PEs). [Booth, Tr. Vol. 3, pp. 58-59.] Witnesses Layton and Booth also testified that a North Carolina statute, N.C. Gen. Stat. § 89C-2, requires that a person be certified as a professional engineer to certify compliance with the NESC. [Layton, Tr. Vol. 1, p. 61; Booth, Tr. Vol. 3, p. 95.] Witness Booth proposed that the pole attachment agreement require Charter within 30 days of installing the last attachment or overlashing covered by a permit provide Blue Ridge a certification by a professional engineer, licensed and registered in North Carolina, that the attachments "are of sound engineering design and fully comply with the safety and operational requirements of the agreement, including without limitation the NESC." [Booth, Tr. Vol. 3, p. 95.] If the certification is not provided, witness Booth

[77] Issue No. 3(c) per the November 2, 2017 Joint Statement of Issues.

requests that Blue Ridge have the right to declare that the attachment is unauthorized. [Booth, Tr. Vol. 3, p. 95.]

Witness Martin proposed the following language on behalf of Charter:

> ***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.* [Martin, Tr. Vol. 4, pp. 90-91.]

Witness Martin testified that Charter does not rely on professional engineers and expressed his view that it is unnecessary to obtain routine certification for every installation. Instead, his exhibit showed that the industry standard, to the extent pole agreements address certification at all, is for a certification by an "authorized representative" of the attacher with knowledge and experience with the NESC and safety and operational requirements.

Witness Martin also testified that requiring a professional engineer to certify each communications attachment is unnecessary and would be prohibitively expensive. [Martin, Tr. Vol. 4, p. 89.] Charter competes directly with ILECs such as Skybest, CenturyLink, and AT&T in Blue Ridge's territory in the provision of video, internet, and voice services. [*See* Martin, Tr. Vol. 4, pp. 83, 94; Mullins, Tr. Vol. 3, p. 223.] Charter's competitors attach facilities much like Charter's to Blue Ridge's poles. [*See* Martin, Tr. Vol. 4, p. 83; NM Ex. 3.] Blue Ridge's joint use agreements with Charter's competitors do not require any professional engineer [Martin, Tr. Vol. 4, p. 89.][78] Further, witness Booth testified that Blue Ridge itself does not perform a full PE analysis of each and every one of its own attachments. [Booth, Tr. Vol. 3, pp. 83-84.] Witness Martin testified that if Blue Ridge believes that a professional engineer is required in any instance, it can have a professional engineer conduct a post-construction inspection at Charter's expense. [Martin, Tr. Vol. 4, p. 89.] Charter's proposed language contains such a provision. [Martin, Tr. Vol. 4, pp. 89-90.] Witness Mullins testified that Charter has an arrangement with Duke Energy under which Duke contracts with a third-party engineering group that reviews Charter's attachments at Charter's expense. [Mullins, Tr. Vol. 4. p. 53.]

Discussion and Conclusions for Issue (c)
Certification requirements related to Charter's attachments to Blue Ridge's poles

Section 5.9 of Charter's 2003 and 2008 Agreements with Blue Ridge both required Charter to provide, within 30 days after completing the last attachment covered by an

[78] *****BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*****

application, a certification from a professional engineer that Charter's attachments to Blue Ridge's poles "are of sound engineering design, fully comply with the [Rules specified in the agreement], th[e] agreement and the latest edition of the National Electric Safety Code, and were constructed as provided in the Make Ready Engineering Plans" Charter provided in its application. The agreements required Charter to make this certification in a form attached to the agreements as an exhibit, which requires a professional engineer's signature.

Charter, despite having agreed to these provisions twice before without any request for modification, has refused to accept them in its current negotiations with Blue Ridge, and instead proposes that it (i) should be allowed to provide certification from an "authorized representative," and (ii) should not have to provide any certification with respect to secondary or "drop" poles that serve a single house.

Charter's proposal that it provide a certification from only "an authorized representative", which could be any employee, is inadequate to address Blue Ridge's safety concerns and assure it that Charter's attachments comply with the NESC and applicable safety standards. Moreover, it would be unlawful for one of Charter's employees to certify that Charter's attachments are of "sound engineering design and fully comply" with the NESC and other design specifications, unless he or she is a licensed engineer. *See* N.C. Gen. Stat. § § 89C-2 and 89C-3. At the hearing, witness Booth, himself a licensed professional engineer, introduced guidance he received from the North Carolina Board of Examiners for Engineers and Land Surveyors, advising that providing such a certification would require a professional engineer's license under N.C. Gen. Stat. § 89C-3(6), and that doing so without a license would violate N.C. Gen. Stat. § 89C-2.

Accordingly, the Commission concludes that Blue Ridge's proposed terms and conditions requiring Charter to provide a certification from a licensed professional engineer that its attachments are of sound engineering and comply with applicable design and safety standards, as set forth in its 2003 and 2008 Agreements with Charter, are just and reasonable and appropriate for inclusion in a new pole attachment agreement between the parties. In doing so, however, the Commission further concludes that the language adopted herein does not specify that the professional engineer must be a Charter employee. The Commission therefore concludes that Charter may fulfill the requirements of this provision by contracting directly with a professional engineer or through some other third-party arrangement.

Issue (d): Transferring attachments[79]

Blue Ridge suggested that if Charter does not act on any Blue Ridge request that Charter transfer its facilities to a different pole in a timely fashion, Blue Ridge may consider the attachment unauthorized, assess an unauthorized attachment fee, and

[79] Issue No. 3(d) per the November 2, 2017 Joint Statement of Issues.

recover from Charter all costs associated with making a transfer without incurring liability to Charter.[80] [Booth, Tr. Vol. 3, pp. 99-100.]

Witness Martin testified that Charter accepts responsibility for the costs incurred by Blue Ridge for any failures to timely meet requests to transfer its facilities, and is prepared to reimburse Blue Ridge for the actual costs of performing work Blue Ridge undertakes that Charter is required to perform under the terms of the agreement. [Martin, Tr. Vol. 4, p. 105.] Noting that the Cooperative could revoke an attachment permit and deem an overdue transfer to be an Unauthorized Attachment or engage in self-help at Charter's expense if Charter's failure to complete the transfer becomes problematic, Charter proposed the following language:

> ***Transfers & Relocation***: *The Cooperative may replace or relocate poles for a number of reasons, including without limitation when existing poles have deteriorated, when new attachers require additional pole space, and when poles must be relocated at the request of the North Carolina Department of Transportation, another governmental body or a private landowner. In such cases, Charter shall, within 60 days after receipt of written notice, transfer its Attachments to the new poles. If such transfer is not timely performed, the Cooperative may, at its option: (i) revoke the permit for the Attachment and declare it to be an Unauthorized Attachment subject to the Unauthorized Attachment fee; or (ii) transfer Charter's Attachments and Charter shall reimburse the Cooperative for the actual costs of completing such work. If Cooperative elects to do such work, it shall not be liable to Charter for any loss or damage except when caused by the Cooperative's gross negligence or willful misconduct.* [Martin, Tr. Vol. 4, pp. 105-06.]

Discussion and Conclusions for Issue (d)
Transferring attachments

Here, the parties appear to be in agreement on this issue. Witness Booth testified that "[a]s Charter's proposal is generally consistent with the 2008 Agreement, it appears to be reasonable." [Booth, Tr. Vol. 3, p. 139.] Charter's proposed provision guarantees the Cooperative will recover any costs incurred for completing the work and ensures all parties know the Unauthorized Attachment fee upfront, which should be sufficient to incentivize compliance. Therefore, the Commission concludes that Charter's proposed language is appropriate.

Issue (e): Non-compliant attachments[81]

On behalf of Blue Ridge, witness Booth testified in favor of language in the pole agreement that would require Charter to provide a plan to correct non-compliant

[80] *****BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*****

[81] Issue No. 3(e) per the November 2, 2017 Joint Statement of Issues.

attachments within a time certain.[82] [Booth, Tr. Vol. 3, p. 135.] Witness Booth argued that allowing Charter to correct non-compliant attachments within a "reasonable timeframe" would invite litigation. [Booth, Tr. Vol. 3, p. 135.]

Witness Booth testified that the photographs included in his exhibits demonstrated a wide scope of Charter's non-compliant attachments. He proposed unspecified amounts of "liquidated damages" for any non-compliant Charter attachment. [Booth, Tr. Vol. 3, pp. 60-61.] Witness Mullins on behalf of Charter testified that Charter had not had an opportunity to fully review the situations presented by the photographs in witness Booth's hearing exhibits, but that he believed that much of the noncompliance depicted was created by Blue Ridge and other attachers. [Mullins, Tr. Vol. 3, pp. 267-77.] There is also widespread agreement that attachments that are at one time compliant may fall out of compliance due to natural forces, and that all attaching parties' attachments, including Blue Ridge's, may fall out of compliance and require maintenance and correction. [Martin, Tr. Vol. 4, p. 97; Mullins, Tr. Vol. 3, pp. 259-60.]

Witness Martin proposed the following language for the Blue Ridge pole agreement:

> ***Notification and Opportunity to Cure Safety Violations:*** *If Charter's Attachments are out of compliance with applicable safety and operational requirements and specifications, whether in a safety inspection or otherwise, then the Cooperative will provide written notice to Charter of the non-compliant Attachment containing the pole number, location, and description of the problem. Charter must either contest the notice of non-compliance in writing or correct them consistent with the specifications of G.S. 62-350(d)(1). If Charter should fail to correct the non-compliance within a reasonable timeframe within G.S. 62-350, the Cooperative may revoke the permit for the Attachment. The cost of correcting all violations shall be borne by the party that has created the violation. Charter shall not be responsible for the cost of correcting a non-compliant Attachment(s) that were placed by or otherwise created by Cooperative or another attacher after Charter's facilities were attached.* [Martin, Tr. Vol. 4, p. 98.]

As witness Martin explained, the NESC does not require that existing facilities be brought up to the latest version of the Code, except where specifically indicated. [Martin, Tr. Vol. 4, pp. 99-100.] Witness Martin proposed the following language to clarify this issue:

> ***Compliance with Safety Standards:*** *Charter's Attachments constructed on the Cooperative's poles after the Commencement Date shall be placed and maintained at all times in accordance with the requirements and specifications of the National Electrical Safety Code, the National Electrical Code, the North Carolina Department of Transportation, the Occupational Safety and Health Act, the Rural Utilities Service, the Society of Cable*

[82] *****BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*****

Television Engineer's Recommended Practices for Coaxial Cable Construction and Testing and for Optical Fiber Cable Construction, and the operational standards developed by the Cooperative. And in all cases as such requirements, specifications, and standards may be modified, revised, supplemented or replaced from time to time, all revisions taking effect after Charter's facilities have been installed shall be treated as applying on a prospective basis, except to the extent NESC requires that a modified, revised, supplemented or replaced rule must be applied retroactively. [Martin, Tr. Vol. 4, p. 100.]

Discussion and Conclusions for Issue (e)
Non-compliant attachments

The Commission has insufficient basis, at this time, to determine causation and responsibility for any compliance issues reflected in witnesses Booth's or Layton's photographs. Furthermore, N.C. Gen. Stat. § 62-350 sets forth required processes and procedures for dealing with non-compliant attachments. The statute does not provide for penalties for non-compliant attachments, and the Commission has no basis for accepting any "liquidated damages" amounts. *See* Eastern Carolina Internal Medicine P.A. v. Faidas, 149 N.C. App. 940, 945-46 (N.C. Ct. App. 2002).[83]

Under Charter's proposed language, all attachments, post-agreement, would have to comply with the most current safety standards that are in place on the date that the attachment is placed. Thus, the practical effect of the language proposed by Charter is to grandfather or protect all authorized attachments which were placed on Blue Ridge's poles prior to the commencement of any new agreement from revision or modification that might be necessitated by future changes by the organizations specified above (including Blue Ridge) unless the revision or modification is mandated by the NESC. The Commission finds unpersuasive witness Booth's contention that allowing Charter to correct non-compliant attachments within a "reasonable time" invites disputes. The Commission recognizes that fixing some compliance issues often requires the cooperation and coordination of two or more parties on a pole. Furthermore, provisions that allow Blue Ridge to recover any costs incurred for completing work and clear Unauthorized Attachment fees will incentivize compliance.

The Commission, therefore, finds it appropriate to adopt Charter's proposed language.

[83] In Eastern Carolina Internal Medicine, the court found that liquidated damages are permitted when they are reasonable estimates of probable damages or where they are reasonably proportionate to the actual damage caused by a breach. But penalty clauses designed as punishment or a threat to prevent a breach are not enforceable. 149 N.C. App. at 945-56.

Issue (f): Insurance requirements[84]

Witness Layton testified that, to adequately protect Blue Ridge, Charter should be required to carry sufficient insurance to meet requirements imposed by the RUS, Blue Ridge's lender. [Booth, Tr. Vol. 3, 141.] On behalf of Charter, witness Martin testified that the amount of insurance it carries should be consistent with the standards set by Charter's management, and that the requirements of RUS for financing Blue Ridge's infrastructure do not apply to Charter. [Martin, Tr. Vol. 4, p. 109.]

Discussion and Conclusions for Issue (f)
Insurance Requirements

In its Post Hearing Brief and Proposed Order, Blue Ridge states that the RUS, the government agency that provides loans to finance construction of Blue Ridge's system, "mandates" that all of its borrowers require third parties working on their system to provide proof of such insurance and to maintain the levels of insurance set forth in its proposed terms and conditions. In support of this proposition, Blue Ridge cited 7 C.F.R. § 1788.48. However, 7 C.F.R. § 1788.48 applies only to "contractors, engineers, and architects performing work for borrowers under construction, engineering and architectural service contracts…" 7 C.F.R. § 1788.47(a). Charter is not a contractor, engineer, and/or architect performing work for Blue Ridge. Thus, 7 C.F.R. § 1788.48 does not support Blue Ridge's request that Charter be required to maintain coverages for worker's compensation, commercial general liability and automobile liability insurance sufficient to meet requirements imposed by RUS. As a result, the Commission determines that Blue Ridge has not met its burden to establish a basis for its complaint on this subject and that its request that the Commission conclude that Blue Ridge's proposed terms and conditions requiring Charter to maintain specified levels of insurance, as set forth in Article 20 of the 2003 and 2008 Agreements is just reasonable and appropriate for inclusion in a new pole attachment agreement between the parties should be and is hereby denied.

In making this determination, the Commission notes that Charter indicated that "[it] is willing to maintain sufficient coverages for worker's compensation, commercial general liability, and automobile liability insurance, as determined by Charter's risk management." Martin, Tr. Vol. 4, p. 109. However, Charter has not filed any proposed language that details the kinds, amounts and the terms of the coverage that its risk management has determined would be sufficient to adequately insure the risks that arise in this situation. And, the record is, for the most part, devoid of any substantive discussion regarding this proposal. In the absence of such, the Commission cannot determine from the record here presented whether Charter's proposal is just and reasonable, whether it would alleviate the concerns expressed by Blue Ridge that Charter's position amounts to no commitment at all, as it would allow Charter to drop or increase its coverage at any time, and/or whether Blue Ridge would be amenable to Charter's proposal if its concerns could somewhat be alleviated after further discussions and negotiations. In light of this, the Commission finds and concludes that further discussions and negotiations about this

[84] Issue No. 3(f) per the November 2, 2017 Joint Statement of Issues.

issue are warranted. The Commission therefore directs the parties to re-start good faith negotiations with the goal of resolving this issue.

Issue (g): Default Remedies[85]

Witness Layton testified that Blue Ridge should be entitled to charge Charter for the cost of performing work that Charter is required to perform, but does not, under the pole attachment agreement. Witness Layton also testified that Blue Ridge should be allowed to withhold performance of make-ready work until after Charter cures any failures to perform under the contract. [Layton, Tr. Vol. 1, p. 63.] Witness Booth testified that Blue Ridge should be allowed to withhold consent for additional attachments if Charter is in default under the agreement. [Booth, Tr. Vol. 3, p. 64.]

Witness Martin proposed language intended to ensure that Blue Ridge provides reasonable notice of any alleged default and a reasonable time for cure. If Charter fails to take appropriate actions, despite notice, witness Martin proposed a number of alternative actions for Blue Ridge. [Martin, Tr. Vol. 4, pp. 107-108.] Specifically, witness Martin proposed the following language:

> ***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;*
>
> *(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 shall be entitled to take all steps necessary to cure any defaults.*

[85] Issue No. 3(g) per the November 2, 2017 Joint Statement of Issues.

The 30-day notice and cure period does not apply to any default by Charter of its payment obligations under this Agreement. [Martin, Tr. Vol. 4, pp. 107-08.]

Witness Martin testified that his proposed language provides more options to Blue Ridge than are contained in many other pole agreements. [Martin, Tr. Vol. 4, p. 108.]

Discussion and Conclusions for Issue (g)
Default remedies

Default provisions must clearly articulate proportionate consequences for failure to uphold the terms of the agreement, after a reasonable period of time to cure the issue. The Commission finds Blue Ridge's proposed remedy unreasonable under this standard. Suspending Charter's access to all of the poles on which it has existing attachments would introduce further risks for both parties, including preventing Charter from maintaining its network and addressing issues affecting both parties' systems. The Commission finds that Charter's proposed default language incentivizes good faith efforts to remediate defaults and is reasonable.

Issue (h): Confidentiality[86]

Witness Layton requested that the Commission agree with Blue Ridge that the rates, terms and conditions of any pole attachment agreement that result from this proceeding be kept confidential and therefore proposed that the Commission adopt specific language to be included in the pole attachment agreement on confidentiality. [Layton, Tr. Vol. 1, p. 63.] Witness Booth claimed that pole attachment agreements contain "market sensitive information," although he did not demonstrate any basis for his statement. [Booth, Tr. Vol. 3, p. 64.]

Witness Martin, responding on behalf of Charter, argued that keeping pole attachment agreements confidential is not "industry standard," and there is no basis for keeping Charter's agreement with Blue Ridge, or its terms, confidential. [Martin, Tr. Vol. 4, p. 109.]

Discussion and Conclusions for Issue (h)
Confidentiality

Blue Ridge has provided no basis for keeping the rates, terms and conditions of the pole agreement that results from this proceeding confidential. The Commission declines to make such a ruling. As a public agency, the Commission is bound by the North Carolina Public Records Act, N.C. Gen. Stat. § 132-1, et seq., which establishes a presumption that all agency records shall be open to the public. Blue Ridge has cited no provision of the Public Records Act supporting a conclusion that the rates, terms and

[86] Issue No. 3(h) per the November 2, 2017 Joint Statement of Issues.

conditions of the pole agreement that results from this proceeding are confidential[87] nor does the Commission find that any provision of N.C. Gen. Stat. § 62-350 establishes the ability of one party to a pole attachment agreement to unilaterally declare the terms and conditions of the agreement to be confidential. Should Blue Ridge have a legitimate concern that any element of its pole attachment agreement with Charter contains any "market sensitive information," it may request Charter to agree to keep it confidential, and if Blue Ridge is unsatisfied with the result, it may bring the issue to the Commission. Blue Ridge's proposed language on confidentiality is therefore denied.

Issue (i): Indemnity[88]

Witnesses Layton and Booth, on behalf of Blue Ridge, testified that Charter should be required to defend and indemnify Blue Ridge for all attachments that Charter has made to Blue Ridge's poles. [Layton, Tr. Vol. 1, pp. 63-64; Booth, Tr. Vol. 3, p. 60.]

In response, witness Martin testified that each party should be responsible for its own negligence, and suggested the following language to protect the interests of both the pole owner and attachers:

> ***Indemnity and Limitation of Liability***: *Except as otherwise specified herein, each party shall defend, indemnify and hold harmless the other party from any and all claims, liabilities, suits and damages arising from or based upon any breach of the party's obligations under the Agreement. Notwithstanding, neither party shall be liable to the other in any way for indirect or consequential losses or damages, however caused or contributed to, in connection with this Agreement or with any equipment or service governed hereby.* [Martin, Tr. Vol. 4, p. 106.]

Witness Martin testified that mutual indemnification is standard in the industry and that Blue Ridge has mutual indemnification provisions in virtually all of its agreements with joint users. [Martin, Tr. Vol. 4, p. 106.]

[87] The Commission acknowledges that the General Assembly has created a statutory exemption from disclosure for certain "trade secret" information. N.C. Gen. Stat. § 132-1.2. Blue Ridge has not made a showing that the information in question qualifies under this exemption. On its face, the Commission declines to find, under this record, that the information in question is the property of a "private person" or that disclosure of the information creates any competitive concerns in light of the nature of the information at issue and the nature of the market for pole attachments.

[88] Issue No. 3(i) per the November 2, 2017 Joint Statement of Issues.

Discussion and Conclusions for Issue (i)
Indemnity

The Commission finds that, based on the evidence of industry standard and of similar provisions in virtually all of Blue Ridge's joint use agreements, it is appropriate to adopt Charter's proposed language on this issue.

Issue (j): Reservation of Space[89]

Witnesses Layton and Booth asserted that Blue Ridge should be allowed in its pole attachment agreement to prohibit Charter from making any new attachments closer than 72 vertical inches from Blue Ridge's neutral conductor. [Layton, Tr. Vol. 1, p. 64; Booth, Tr. Vol. 3, p. 65.] The NESC prohibits attachments of communications facilities closer than 40 vertical inches from a neutral and 30 inches from a grounded transformer. [*See* EEE, 2017 National Electrical Code, Table 235-5; Booth, Tr. Vol. 3, pp. 78-79.] Witness Booth explained that transformers are usually placed so that their tops are at the same height as the neutral conductors. [Booth, Tr. Vol. 3, p. 66.] Witness Booth maintained that Blue Ridge should be able to require Charter to attach 72 inches below the neutral for any hypothetical attachments it may plan to make in the future. [Booth, Tr. Vol. 3, pp. 181-82, 215-17.] Preventing Charter from attaching closer than 72 inches below the neutral on each Blue Ridge pole, therefore, would keep space available for a transformer on every pole that does not already contain one.[90] [Booth, Tr. Vol. 3, pp. 78-79, 181-82.] Blue Ridge witness Booth claimed on cross examination that RUS requires the top 8.5 feet or 9.5 feet of a pole to be reserved for electric equipment (including the 72 inches), but on cross examination he was not able to identify specifically any such RUS requirement. [Booth, Tr. Vol. 3, pp. 67, 189-95.][91]

Witness Martin testified that Charter is willing to accept language that would allow Blue Ridge to reclaim any space needed by Blue Ridge for its core utility service, but stated that Charter should be allowed to occupy, at least temporarily, pole space for so long as it is available. [Martin, Tr. Vol. 4, pp. 102-04.] He proposed the following language:

> ***New or Relocated Charter Attachments****: Whenever Charter installs new Attachments, transfers existing Charter Attachments to replaced poles, or relocates existing Charter Attachments to a relocated line of poles, Charter shall attach at least forty (40) inches and, preferably seventy-two (72) inches vertical clearance under the effectively grounded neutral of Cooperative.* [Martin, Tr. Vol. 4, p. 103.]

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[89] Issue No. 3(j) per the November 2, 2017 Joint Statement of Issues.

[90] *****BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*****

[91] *****BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*****

Witness Martin testified that "virtually every other communications attacher (other than Charter) is allowed to place its facilities within 40 inches of Blue Ridge's neutral."[92] [Martin, Tr. Vol. 4, p. 103.] And Blue Ridge witness Layton admitted that Charter and its predecessors have been attaching their facilities approximately 40 inches from Blue Ridge's neutral for decades and that they did not violate any RUS requirement by doing so. [Layton, Tr. Vol. 2, pp. 33-34.]

A different related issue was also explored at hearing. Recent inspections conducted on behalf of Blue Ridge have found a number of instances where Blue Ridge's electrified facilities (mostly transformers) are closer to Charter's cables than the clearances allowed by the NESC. The parties differ on whether such violations have been caused by Blue Ridge placing the facilities after Charter was already attached, or whether Charter placed its facilities too close to existing Blue Ridge facilities. [Mullins, Tr. Vol. 3, pp. 269-75; Booth, Tr. Vol. 3, pp. 120-25].[93] While Charter agrees that it is responsible for making space available for new transformers or other Blue Ridge facilities to be placed, it contends that Blue Ridge must be responsible for curing violations that it has created by failing to give Charter notice and an opportunity to decide how it wished to deal with the reclamation of space: moving its attachment, paying for a new pole, or removing its attachment from the pole. [Mullins, Tr. Vol. 3, p. 255.] Charter contends that it does not bear responsibility for curing violations created by Blue Ridge without notice ***BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL***[94]

Discussion and Conclusions for Issue (j)
Reservation of space

The parties agree that Charter occupies space on Blue Ridge's poles only so long as that space is not required by the Cooperative for its electric service. The Commission does not find Blue Ridge's apparent position that it should be allowed to prohibit even temporary occupancy of the top 8.5 feet or 9.5 feet on a pole, to the extent that Blue Ridge has no present or impending need for it, reasonable. The Commission finds Blue Ridge's position on this issue inconsistent with the access rights afforded to Charter in N.C. Gen. Stat. § 62-350. In addition, the FCC has addressed this issue stating that, "[w]e will permit the electric utility to reserve space if such reservation is consistent with a bona fide development plan . . . . The electric utility must permit use of its reserved space by cable operators . . . until such time as the utility has an actual need for that space." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, 16053, ¶ 1169 (1996). Further, the Commission agrees with Charter's position that reclamation of space by Blue Ridge must be for a use related to the provision of its core electric service. Especially in light of the testimony Blue Ridge

[92] ***BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL***

[93] The Commission expects that the parties will make a good faith effort to determine fault in each of these cases as required by N.C. Gen. Stat. § 62-350(d)(4) ("All attaching parties shall work cooperatively to determine causation of, and to effectuate any remedy for, noncompliant lines, equipment, and attachments.").

[94] ***BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL***

has allowed its affiliate, which provides dark fiber communications service that could compete with Charter, to attach, it would be unreasonable for the Cooperative to deny Charter access to its poles with the intention of competing directly with it. Accordingly, the Commission finds it appropriate to adopt Charter's proposed language on this issue.

Based on the record in this proceeding, the Commission finds that the next pole attachment agreement between the parties should make Charter responsible for making space for new Blue Ridge attachments according to the language proposed by Charter. To provide clarification on this issue, the Commission specifies that Charter should not be held responsible for curing violations of NESC separation requirements that have been caused by Blue Ridge placing its facilities too close to Charter's facilities without any appropriate notice or opportunity for Charter to remedy. Where Blue Ridge has taken such action in the past, or does so in the future, it should bear the responsibility for cure.

Issue (k): Recovery of Space[95]

Witnesses for both parties agree that Blue Ridge has, and should have, the right to reclaim any space used by Charter when needed for its utility service. [Martin, Tr. Vol. 4, pp. 101-02; Booth, Tr. Vol. 3, p. 64.] Charter proposed the following language that would require Charter to rearrange its facilities (including paying for a new pole, if necessary), or vacate the pole, on 30 days' notice to accommodate Blue Ridge's need for more pole space.

> ***Reservation of Space****: Should the Cooperative, at any time, reasonably require the space Charter's Attachments occupy on its poles for the provision of its core electric service, Charter shall, upon receipt of thirty (30) days' notice (a) rearrange its Attachments to other space if available on the pole, at its own expense, (b) vacate the space by removing its Attachments at its own expense or (c) if no space is available and Charter does not wish to remove its Attachments, Charter may request the Cooperative replace the pole with a larger pole that can accommodate Charter's Attachments. Charter shall bear the expense of such replacement and transfer its Attachments to the new pole.* [Martin, Tr. Vol. 4, p. 102.][96]

Witness Martin noted that this language is similar to the parties' 2008 pole attachment agreement, which also provides for 30 days' notice. [Martin, Tr. Vol. 4, p. 101; MM Ex. 1.] Witness Martin also maintained that Charter should not be required to pay for the recovery of space to be used for Blue Ridge's competitive communications service, Ridgelink, as that would allow Blue Ridge to favor itself in the provision of competitive communications services. [Martin, Tr. Vol. 4, p. 101; *see* N.C. Gen. Stat. § 62-350(a).] Witness Booth stated on direct examination that if Blue Ridge requires additional space on the pole, Charter should remove or rearrange its attachments "within a time certain to allow Blue Ridge to use the space," or "immediately." [Booth, Tr. Vol. 3,

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[95] Issue No. 3(k) per the November 2, 2017 Joint Statement of Issues.

[96] *****BEGIN CONFIDENTIAL***** *****END CONFIDENTIAL*****

pp. 64, 105.] Witness Booth testified this was necessary because of the safety violations it attributes to Charter. [Booth, Tr. Vol. 3, pp. 105-06.]

Discussion and Conclusions for Issue (k)
Recovery of space

The parties agree that Blue Ridge can reclaim any space used by Charter if Blue Ridge needs it for the provision of its core utility service. The difference between the parties' positions here is the amount of notice which Blue Ridge must give to Charter. Charter proposes that Blue Ridge give it 30 days' notice to rearrange or remove its attachments, or request that Blue Ridge replace the pole at Charter's expense. Blue Ridge argues that Charter should be required to vacate the space immediately. The Commission finds the parties' prior agreement indicative of industry norms and inherently reasonable.[97] Further, the Commission agrees with Charter's position that the recovery of space by Blue Ridge must be for a use related to the provision of its core electric service. Should Blue Ridge construct communications facilities that could compete with Charter, it would be unreasonable for the Cooperative to deny Charter access to its poles with the intention of competing directly with it. Accordingly, the Commission finds it appropriate to adopt Charter's proposed language on this issue.

Issue (l): Unauthorized Attachments[98]

Through witness Layton, Blue Ridge seeks permission to impose penalties for attachments made by Charter without permission of both an unspecified "unauthorized attachment fee" and "back rent." [Layton, Tr. Vol. 1, p. 65.] Witness Layton asserts that if Charter is required only to pay back rent, it will have "perverse . . . incentives" to fail to seek authorization. [Layton, Tr. Vol. 1, p. 65.]

Witness Martin testified that Charter is willing to pay unauthorized attachment penalties in certain circumstances, but that the amount must be reasonable. [Martin, Tr. Vol. 4, pp. 95-96.] He proposed the following language:

> ***Unauthorized Attachments****: The Cooperative may assess a fee for any Charter Attachment that has not been authorized in accordance with this Agreement ("Unauthorized Attachment"). The fee for Unauthorized Attachments shall be equal to five (5) times the current Annual Attachment Fee and shall be imposed in a non-discriminatory manner as to all attachers.* [Martin, Tr. Vol. 4, p. 96.]

Discussion and Conclusions for Issue (l)
Unauthorized attachments

The primary difference in the positions of the parties on unauthorized attachments is the magnitude of the penalty. Blue Ridge seeks back rent, plus an unspecified penalty

[97] *****BEGIN CONFIDENTIAL***** *****END CONFIDENTIAL*****

[98] Issue No. 3(l) per the November 2, 2017 Joint Statement of Issues.

amount per unauthorized attachment. Charter seeks the traditional FCC standard of five years of back rent. For the following reasons, the Commission finds the language proposed by Charter to be just and reasonable.

Any claims for liquated damages that are penalties unrelated to actual damage are impermissible. No costs (above and beyond lost rental payments) have been established. Furthermore, assuming that pole attachment audits are conducted on a regular basis, and also that some attachments made without authorization were made more recently than five years ago, a five year attachment back rental, such as Charter proposes, is itself a penalty and a disincentive for Charter not to obtain authorization.

Blue Ridge has failed to justify any amount of "liquidated damages" for unauthorized attachments or noncompliant attachments. *See* Chris v. Epstein, 113 N.C. App. 751, 757, 440 S.E. 2d 581, 584-85 (N.C. Ct. App. 1994). Liquidated damages may be appropriate where the damages are reasonably difficult to ascertain because of their indefiniteness or uncertainty and where the amount is either a reasonable estimate of the damages that would probably be caused as a result of a breach or is reasonably proportionate to the damages actually caused by the breach. Knutton v. Cofield, 273 N.C. 355, 360-61, 160 S. E.2d 29, 34 (N.C. Ct. App. 1968). While Blue Ridge introduced scores of photographs in this hearing of alleged safety violations by Charter, it made no attempt to quantify the costs to correct these violations, nor did it produce any evidence of amounts it spent in the past to remedy such violations. As a result, Blue Ridge has not made a reasonable effort to show that any amount of liquidated damages is a reasonable estimate of the damages that Charter has caused or will cause or that proposed liquidated damages are reasonably proportionate to the damages actually caused by Charter's breach. Damages which bear no relationship to the actual harm that is suffered and are imposed to facilitate Charter's compliance with the agreement are a penalty. Penalty clauses included in contracts that are denominated as liquidated damages are unenforceable. Knutton v. Cofield, 273 N.C. 355, 360-61, 160 S. E.2d 29, 34 (N.C. Ct. App. 1968). The Commission also notes that double recovery of actual and liquidated damages is not permitted under North Carolina law. Handex of Carolinas, Inc. v. Cnty. of Haywood, 168 N.C. App. 1, 4, 607 S.E. 2d 25, 28 (N.C. Ct. App. 2005).

Assuming that Blue Ridge conducts attachment inventories on a regular five-year cycle, and assuming that new attachments are made on a regular basis throughout that time period, the penalty proposed by Charter (of five times the annual rate for each unauthorized attachment) will average a recovery of double the annual payment that would otherwise have been paid. Based on the evidence, including Charter's explicit agreement, the Commission finds that that penalty should create a sufficient incentive to Charter. Further, the evidence reflects that such an unauthorized attachment fee is industry-standard. Accordingly, for the aforementioned reasons, the Commission finds it appropriate to adopt Charter's proposed unauthorized attachment fee language.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 35

The evidence supporting this Finding of Fact is found in the testimony of witnesses Booth, Layton and Mullins.

Witness Booth testified that the photographs included in his exhibits illustrate various safety violations by Charter. [Booth, Tr. Vol. 3, pp. 77-82; *see* GLB Ex. 3.] Witness Mullins testified that Charter had not had an opportunity to fully review the situations presented by the photographs in witness Booth's hearing exhibits, but that he believed that much of the noncompliance depicted was created by Blue Ridge and other attachers. [Mullins, Tr. Vol. 3, pp. 267-77.] Witness Layton testified that the purpose of at least one of the safety inspections "was for this litigation." [Layton, Tr. Vol. 1, p. 199.]

Discussion and Conclusions

The issues raised by Blue Ridge regarding the condition and compliance of Charter's outside plant are not ripe for Commission consideration. N.C. Gen. Stat. § 62-350 sets forth required processes and procedures for dealing with noncompliant attachments and disputes as to the cause of the noncompliance. As stated above, the Commission has insufficient basis to determine causation and responsibility for any compliance issues, but understands that the parties are working to remedy any violations that do exist. [Layton, Tr. Vol. 1, p. 91; Mullins, Tr. Vol. 3, pp. 254-56.]

The Commission is confident that the parties will work cooperatively to determine the causation and appropriate remedy for any noncompliant attachments, as directed by N.C. Gen. Stat. § 62-350(d)(4).

IT IS, THEREFORE, ORDERED as follows:

1. That Blue Ridge's maximum just and reasonable pole attachment rates for the years 2015-2017 should be determined based on the FCC Rate Methodology, as modified to reflect the actual data provided by Blue Ridge. Therefore, the Commission finds that the following rates are the appropriate maximum just and reasonable rates: $8.49 per year per pole for rate year 2015, $8.37 per year per pole for rate year 2016, and $8.31 per year per pole for rate year 2017.

2. That Blue Ridge owes a refund to Charter for excessive pole attachment fees paid from August 25, 2015, to August 31, 2017, in an amount to be calculated by the parties, and for excessive pole attachment fees paid after August 31, 2017. If Blue Ridge desires, and Charter is agreeable, the refund may be used as a credit against future pole attachment bills until the amount of the credit is fully exhausted.

3. That in addition to a just and reasonable pole attachment rate, it is appropriate for Charter to pay Blue Ridge's measurable and verifiable costs directly attributable to Blue Ridge providing pole attachment space to Charter.

4. That for Issues (b), (d), (e), (g), (i), (j), (k), and (l), the language proposed by Charter for the disputed terms and conditions is hereby approved and adopted. With respect to Issue (c), the language set forth by Blue Ridge is hereby approved and adopted.

5. That the parties shall negotiate appropriate language to include in their pole attachment agreement based on the Commission's conclusions outlined herein for Issues (a) and (f).

6. That Blue Ridge's proposal to have the rate, terms, and conditions of the parties' pole attachment agreement deemed confidential (Issue (h)) is hereby denied.

ISSUED BY ORDER OF THE COMMISSION.

This the 17th day of October, 2018.

NORTH CAROLINA UTILITIES COMMISSION

Janice H. Fulmore, Deputy Clerk

Commissioner Bryan E. Beatty resigned from the Commission on January 31, 2018 and did not participate in the decision.