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, **Petitioner,** **v.** **CHARTER COMMUNICATIONS PROPERTIES LLC,** **Respondent.**	**NCAEC'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

The North Carolina Association of Electric Cooperatives ("NCAEC") moves the Commission for leave to file the attached *amicus curiae* brief in support of Petitioner, Blue Ridge Electric Membership Corporation ("Blue Ridge") in this proceeding. In support of this motion, the NCAEC shows the Court as follows:

1. This is a proceeding initiated by Blue Ridge, an electric membership electric corporation formed under the North Carolina Electric Membership Corporation Act, N.C.G.S. § 117-6, *et seq*., against Respondent, Charter Communications Properties, LLC ("Charter"), pursuant to N.C.G.S. § 62-350 ("Section62-350") to determine just and reasonable rates, terms, and conditions for Charter's attachments to Blue Ridge's utility poles.

2. NCAEC is a non-profit affiliate of the North Carolina Electric Membership Corporation ("NCEMC") charged with representing—via education and advocacy—the common interests of its members: all 26 electric membership corporations headquartered in North Carolina, including Blue Ridge (the "EMCs"). EMCs are not-for-profit, member-owned corporations, charged by law with making "electric energy available to inhabitants of the State at the ***lowest cost*** consistent with sound economy and prudent management of the business of such corporations." N.C. Gen. Stat. § 117-10 (emphasis added). Pursuant to their statutory mission, NCAEC's members provide energy and related services to over a million households and businesses from the Blue Ridge Mountains to the Outer Banks—who are affected by the Commission's decisions regarding the rates and conditions for Charter and other communication providers' attachments to the EMCs' distribution poles.

3. NCAEC's members have a substantial interest in the issues presented in this case. NCAEC's operate electrical distributions systems to which Charter and other telecommunications companies attach communications equipment, by means of what are commonly referred to as "pole attachments." Accordingly, NCAEC's members are affected by the Commission's decisions as to the methodologies to be used in determining just and reasonable pole attachment rates.

4. NCAEC therefore requests leave to submit the attached *amicus curiae* brief to address the interest of all North Carolina's EMCs in ensuring the Commission adopts a rate methodology for pole attachments that fully and appropriately compensates EMCs and their members for communications companies' attachments to EMC's poles.

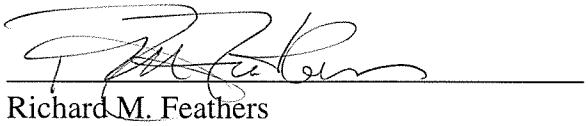
5. In this its brief, NCAEC will address the following issues: (i) whether Section 62-350 requires the Commission to consider alternative rate methodologies,

including potential modifications to the formulas proposed by the parties, in order to determine just and reasonable rates; (ii) whether Section 62-350's requirement that the Commission determine rates on a "case-by-case basis" requires use of actual data and evidence of the manner in which the parties actually use the cooperative's poles in determining pole attachment rates; and (iii) whether the Commission must consider the public's interest in keeping electric rates low, and ensuring amounts EMC's members pay for electricity are not used to subsidize communications companies, in determining pole attachment rates.

WHEREFORE, the North Carolina Association of Electric Cooperatives requests leave to file an *amicus curiae* brief in this proceeding, as set forth above.

Respectfully submitted, this the 4th day of April, 2018.

NORTH CAROLINA ASSOCIATION OF ELECTRIC COOPERATIVES



Richard M. Feathers
Senior Vice President, General Counsel
Post Office Box 27306
Raleigh, NC 27611-7306
Telephone: (919) 875-312
rick.feathers@ncemcs.com

CERTIFICATE OF SERVICE

The undersigned certifies that he has served a copy of the foregoing document upon the parties of record in this proceeding, or their attorneys, by electronic mail as follows:

Marcus W. Trathen
Brooks Pierce
Wells Fargo Capital Center
150 Fayetteville Street, Suite 1700
Raleigh, N.C. 27601
(919)-839-0300
mtrathen@brookspierce.com

Debbie W. Harden
Pressly M. Millen
Matthew F. Tilley
Womble Bond Dickinson (US) LLP
One Wells Fargo Center
301 South College Street; Suite 3500
Charlotte, NC 28202-6307
Debbie.Harden@wbd-us.com
Press.Millen@wbd-us.com
Matthew.Tilley@wbd-us.com

Gardner F. Gillespie
J. Aaron George
Carrie A. Ross
Sheppard Mullin Richter & Hampton
2099 Pennsylvania Ave. NW, Suite 100
Washington D.C. 20006
(202)-747-1900
ggillespie@sheppardmullin.com
ageorge@sheppardmullin.com
cross@sheppardmullin.com

This 4th day of April, 2018.

Richard M. Feathers

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, **Petitioner,** **v.** **CHARTER COMMUNICATIONS PROPERTIES LLC,** **Respondent.**	**NCAEC'S POST-HEARING *AMICUS* BRIEF**

The North Carolina Association of Electric Cooperatives ("NCAEC"), appearing as *amicus curiae*, submits the following post-hearing brief in support of Petitioner, Blue Ridge Electric Membership Corporation ("Blue Ridge") in its action pursuant to N.C.G.S. § 62-350 ("Section 62-350") against Respondent, Charter Communications Properties, LLC ("Charter") for the Commission's consideration.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

NCAEC is a non-profit affiliate of the North Carolina Electric Membership Corporation ("NCEMC") charged with representing—via education and advocacy—the common interests of its members: all 26 electric membership corporations headquartered in North Carolina, including Blue Ridge (the "EMCs"). NCAEC's members are actively engaged in the retail distribution and sale of electricity, facilitated by EMC-owned

distribution systems to which Respondent, Charter Communications Properties, LLC ("Charter") and other telecommunications companies attach communications equipment, by means of what are commonly referred to as "pole attachments."

EMCs are not-for-profit corporations, charged by law with making "electric energy available to inhabitants of the State at the ***lowest cost*** consistent with sound economy and prudent management of the business of such corporations." Unlike investor-owned utilities ("IOUs"), such as Duke Energy, EMCs do not have shareholders, but instead are owned by those who purchase electricity from them—*i.e.*, their members N.C. Gen. Stat. § 117-10 (emphasis added). Pursuant to their statutory mission, NCAEC's members provide energy and related services to over a million households and businesses from the Blue Ridge Mountains to the Outer Banks—who are affected by the Commission's decisions regarding the rates and conditions for Charter and other communication providers' attachments to the EMCs' distribution poles.

NCAEC accordingly submits this brief to address the interest of all North Carolina's EMCs in ensuring the Commission adopts a rate methodology for pole attachments that fully and appropriately compensates EMCs and their members for communications companies' attachments to EMC's poles.

INTRODUCTION

Charter, like its affiliate, Time Warner Cable Southeast, LLC, ("TWC") in proceedings this summer against four EMCs,[1] asked the Commission to adopt a pole

---

[1] *Time Warner Cable Southeast, LLC, v. Jones-Onslow, Electric Membership Corporation*, Docket No. EC-43, Sub 88; *Time Warner Cable Southeast, LLC, v. Surry-Yadkin Electric Membership Corporation*, Docket No. EC-49, Sub 55; *Time Warner Cable Southeast, LLC, v. Carteret-Craven Electric Membership Corporation,* Docket No. EC-55, Sub 70; *Time Warner Cable Southeast, LLC, v. Union Electric Membership Corporation d/b/a Union Power Cooperative*, EC-39, Sub 44.

attachment formula developed by the Federal Communications Commission ("FCC") that was intended solely for application to IOUs and not electric cooperatives. This rate, known as the "FCC Cable Rate," is deliberately intended to subsidize communications attachers, and when applied to an EMC, necessarily and inappropriately shifts the added costs of cable companies' attachments to an EMC's members (as opposed to an IOU's shareholders).

Although Charter will expectedly argue the Commission should treat its prior decisions in the *Time Warner* matters adopting the FCC rate as binding in here, NCAEC urges the Commission to heed Section 62-350's directive to determine pole attachment rates on a "case-by-case basis." As the Commission recognized when it denied NCAEC's intervention in the *Time Warner* cases: Section 62-350 requires that "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" thus, "the Commission's ultimate decision in [the Time Warner cases] will not and cannot establish a precedent in future pole attachment rate dispute resolution proceedings."[2]

Properly determining just and reasonable pole attachment rates in this case thus requires the Commission to address the FCC rate's shortcomings by considering the full range of potential rate methodologies, based on how the parties actually use space on the pole. 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 forced to subsidize the operations of for-profit cable companies' through their electric rates.

---

[2] *See* Order Denying Petitions to Intervene and Granting Limited Amici Curiae Status, N.C.U.C. Docket No. EC-43, Sub 88, August 9, 2016, p. 8.

The FCC rate fails to accomplish either of these objectives. The Commission accordingly should consider an alternative or modified rate formula that more accurately reflects cable companies' use of EMCs' poles and allocates the costs associated with those attachments in a just and reasonable manner. Absent a clear statement of public policy requiring the subsidization of broadband, application of an unmodified FCC rate is not proper.

ARGUMENT

I. THIS CASE DOES NOT INVOLVE A "BINARY CHOICE" BETWEEN THE FCC AND TVA RATES.

Contrary to the Commission's determination in the *Time Warner* proceedings, resolving this case does not involve a mere "binary choice," limiting the Commission's options to choosing between the FCC and TVA methodologies, and foreclosing it from considering any of the other alternative methodologies offered in evidence by the parties.[3] Instead, Section 62-350 requires the Commission to consider all potential rate methodologies in order to set a "just and reasonable" rate that "consistent with the public interest." *See* N.C.G.S. § 62-350(c).

If nothing else, the General Assembly's swift reaction to the Business Court's decisions in *Time Warner Entertainment v. Town of Landis,*[4] and *Rutherford Elec.*

---

[3] *See, e.g.,* Order Resolving Pole Attachment Complaint Pursuant to G.S. 62-350, *Union Electric Membership Corporation v. Time Warner Cable Southeast*, LLC, Docket No. EC-39, Sub 44, at p. 25 (January 8, 2018) (the "*Time Warner* Order"). The Commission's conclusion that the *Time Warner* proceedings presented a "binary choice" does not appear to have come at the suggestion of any of the parties—none of whom made such an argument in their submissions to the Commission. Instead, it appears that the North Carolina Cable Television Association ("NCCTA")—appearing as *"amicus,"* albeit represented by the same law firm that served as TWC's trial counsel—led the Commission to this conclusion. *See Time Warner* Order, at p. 14. As explained above, in urging the Commission to treat these cases as a "binary choice," the NCCTA led the Commission to error.

[4] *See Time Warner Entertainment Advance/Newhouse Partnership v. Town of Landis* No. 10 CVS 1172, 2014 WL 2921723 (N.C. Super. June 24, 2014).

Membership Corp. v. Time Warner Entertainment,[5] make clear that Section 62-350 requires more of the Commission than an "either-or" decision between the rate an EMC proposes and the FCC formula. As the Commission is aware, the General Assembly responded to the *Rutherford* and *Landis* decisions, which wrongly concluded the FCC formula was a default method by which others should be measured, by amending Section 62-350 to (1) revoke the Business Court's jurisdiction over pole attachment cases, instead setting them before the Commission, and (2) remove any reference to the FCC formula from the statute. *See* 2015 N.C. Sess. L. 119. In doing so, the General Assembly deliberately transferred pole attachment disputes out of the courts, whose jurisdiction is limited to deciding actual controversies between litigants,[6] to the Commission, a ratemaking body that is not limited by the same justiciability doctrines and practical constraints, and is thus free to consider matters of policy and public interest and apply them in a ratemaking context. Accordingly, the current version of the Section 62-350 requires the Commission to "resolve any dispute . . . consistent with the public interest and necessity so as to derive just and reasonable rates, terms, and conditions" concerning pole attachments and directs that "[t]he Commission, in its discretion, may consider any evidence or rate-making methodologies offered or proposed by the parties." N.C.G.S. § 63-350(c).

---

[5] *See Rutherford Elec. Membership Corp. v. Time Warner Entertainment-Advance/Newhouse Partnership*, No. 13 CVS 231, 2014 WL 2159382 (N.C. Super. May 22, 2014).

[6] *See Time Warner Entm't Advance/Newhouse P'ship v. Town of Landis*, 228 N.C. App. 510, 516, 747 S.E.2d 610, 614 (2013) (citing *Gaston Bd. of Realtors, Inc. v. Harrison,* 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)).

The text of the statute and legislative history thus could not be more clear: Section 62-350 requires the Commission to consider the full range of available evidence and rate methodologies, and to set pole attachment rates in a manner consistent with the public interest—*including ensuring EMC members are not required to subsidize the operation of communications companies, like Charter, through electric rates.* This means the Commission must exercise independent judgment and consider alternative rate methodologies or other potential modifications to the parties' proposed space allocation formulas in order to reach a rate that best serves the public interest. Reducing the Commission's analysis to a "binary choice," without considering alternative rate structures and related evidence, abdicates the Commission's duty of independent judgment and fails to meet its obligations under Section 62-350.

In this case, Blue Ridge has presented a number of potential rate methodologies, and thus has given the Commission more than just a "binary choice." In his direct testimony, Blue Ridge's rate expert, Wil Arnett provided a series of calculations applying not only the TVA rate, but also methodologies developed by the American Public Power Association, based on decisions by the Washington State Court of Appeals (the "APPA Rate"); the Arkansas Public Service Commission (the "Arkansas Formula"); and the U.S. House of Representatives' "Telecom Plus Rate," resulting in a range of rates between $17.05 and $28.54 using Blue Ridge's 2016 actual data. *See* Arnett Test., Vol. 2, pp. 67-78, 114-116; Exhibit WA-33. Of these, only Charter's chosen FCC rate is an outlier, producing a rate that is exceptionally low, at $5.56 based on the calculations of Charter's rate expert, Patricia Kravtin, who used a series of presumptions rather than actual data. *Id.*

The Commission similarly is not bound to accept any of these proposed rate methodologies at face value, and may appropriately consider modifications to the space allocation formulas used by existing methodologies in order to derive a fair rate. Indeed, that is exactly what the Virginia State Corporation Commission did in *Application of Northern Virginia Electric Membership Corporation* ("NOVEC").[7] There, the Virginia State Corporation Commission adopted the FCC rate's general methodology, including its proportionate sharing of the "unusable space," but chose to allocate 1.8 feet of space, rather than 1 foot of space, to the cable company's attachments, to reflect a share of the Communications Worker Safety Zone.[8] The Virginia State Commission likewise required communications attachers to pay the cooperative's cost of hiring an employee to administer pole attachments, recognizing that such added administrative expenses, if not compensated, would only add to the burden placed on the cooperative's members, and thus their electric rates.[9]

NCAEC submits—as it has before—that among the various rate methodologies from which the Commission has to choose, the FCC rate stands out as a clear wrong answer. Whatever the Commission's view or predisposition, Section 62-350 requires it to consider each of the rate methodologies and practical modifications to their space allocation formulas that Blue Ridge has presented—not just the FCC and TVA formulas—

---

7 *See* Final Order, *Application of Northern Virginia Cooperative*, Virginia State Corporation Commission, Case No. PUE-2013-00055 (Oct. 14, 2014), *adopting* Report of Howard P. Anderson, Jr., Hearing Examiner (June 14, 2014).

8 *See* Virginia State Corporation Commission, Application of Northern Virginia Electric Cooperative, Case No. PUE-2013-00055, "Report of Howard P. Anderson, Jr., Hearing Examiner," pp. 22-23 (June 12, 2014).

9 *See id.*, at p. 36.

to determine which methodology best serves the public interest and avoids subsidization of cable companies by EMC members.

II. SECTION 62-350 REQUIRES THE COMMISSION TO DETERMINE POLE ATTACHMENT RATES ON A CASE-BY-CASE BASIS.

The Commission should likewise refuse Charter's invitation to apply the FCC rate to EMCs out of a supposed desire to establish rates that are "consistent" with those IOUs and ILECs charge pursuant to FCC regulations, ignoring the fact that Congress recognized and endorsed such "inconsistency" when it implemented pole attachment regulation.[10]

During the hearing, Charter's rate expert, Patricia Kravtin, repeatedly asserted the FCC rate is "just and reasonable" and "best approximate[s] a competitive market" because it brings the rates Blue Ridge and other EMCs charge "into harmony" with those charged by IOUs and ILECs. *See* Kravtin Test, Vol. 4, pp. 167, 196. Such circular arguments, however, fail to prove anything: The mere fact the FCC rate is applied elsewhere does not make it just and reasonable. Likewise, because IOUs and ILECs are subject to FCC regulation, the rates they charge are not, and cannot be, evidence of what pole owners would charge in a "competitive" market.[11]

Yet, aside from the holes in her logic, Ms. Kravtin's "consistency" argument fails to recognize that Section 62-350 requires the Commission to treat EMCs differently than IOUs and to regulate pole attachment rates on a "case-by-case basis."

---

[10] The Commission should note that the TVA methodology is applied in North Carolina by at least three electric cooperatives and one municipally-owned system subject to TVA regulation, including one immediately adjacent to Blue Ridge's service territory.

[11] Ms. Kravtin's rate would not achieve "harmony," as she suggests. The $5.56 rate she proposes for Blue Ridge (for 2016) is substantially below even the rates Charter pays IOUs in North Carolina subject FCC regulation, which according to Ms. Kravin averages $7.20.

Indeed, Congress and the General Assembly have long recognized that electric cooperatives hold a unique position as member-owned, member-governed organizations, created to benefit the very people they serve. Congress expressly exempted electric cooperatives from FCC pole attachment regulation under Section 224 of the Communications Act of 1934, known as the "Pole Attachment Act," for precisely this reason. *See* 47 U.S.C. § 224(a)(1) (excluding "any person who is cooperatively organized" from the definition of a covered "utility"). In doing so, Congress recognized that "the pole [attachment] rates charged by municipally owned corporations and cooperative utilities are already subject to a decision making process based upon constituent needs and interests." S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977), *reprinted in*, 1978 U.S. Code Cong. & Ad News 109, 126 (observing that, because they are predominantly located in rural areas, where television signals are poor, "customers of these utilities have an added incentive to foster the growth of cable television in their areas.") Congress concluded that members of electric cooperatives—who are potential customers of both electricity and communications services—can determine for themselves the "equitable distribution of pole costs between utilities and cable television systems." *Id.*

As a result of this longstanding exemption from FCC jurisdiction, the FCC formula has never been intended nor designed to apply to electric cooperatives. In fact, Congress warned against applying the FCC formulas to electric cooperatives in the Senate Report that accompanied its original 1978 Pole Attachment Act, explaining:

> ***The committee is of the opinion that no Federal formula could accommodate all the various local needs and priorities in an entirely satisfactory manner.*** As noted above, the committee believes that familiarity with the specific operating environment of the utilities and cable television systems within a State, as well as the needs and interests of State or local constituents, is indispensable to efficient and equitable regulation.

Id. (emphasis added).

The General Assembly likewise has refused to apply the FCC rate formula to electric cooperatives, and instead has acted purposefully to make clear the FCC formula does not enjoy any preferential or default status when determining the pole attachment rates EMCs should charge.

Although the 1978 Pole Attachment Act permits states to regulate pole attachments, the General Assembly refrained from doing so until 2009, when cable-company lobbying efforts secured passage of N.C. Gen. Stat. § 62-350. Even then, our Legislature stopped well short of imposing the FCC methodology, choosing instead to simply list the FCC methodology among the "factors and evidence" a court could consider in determining a just and reasonable rate. *See* N.C.G.S. § 62-350 (2009). And, as discussed above, when the Business Court issued decisions in *Rutherford* and *Landis* incorrectly treating the FCC formula as a "default" against which other formulas should be measured, the General Assembly took immediate action to transfer jurisdiction over pole attachment cases to the Commission and eliminate any reference to the FCC formula or Section 224 of the federal Communications Act, from the statute.

The legislative history thus contradicts any notion that the General Assembly intended the Commission to apply the FCC formula as a matter of default, and, along with it, any argument that a rate methodology satisfies Section 62-350 simply because it is "consistent" with the FCC formula. If the General Assembly thought that such "consistency" was necessary or sufficient to render pole attachment rates just and reasonable, it could have easily specified the FCC formula in the statute. Instead, it did exactly the opposite, responding to the *Rutherford* and *Landis* decisions by expressly requiring the Commission to consider all available methodologies and adjudicate pole

attachment rates on a "case-by-case basis" and transferring jurisdiction over these matters from the courts to a ratemaking body.

III. KEEPING ELECTRIC RATES LOW IS A MATTER OF PUBLIC INTEREST.

The Commission similarly should refuse Charter's demands that it consider only the subsidization of broadband, and nothing else, when determining whether the pole attachment rates it sets are "consistent with the public interest." Fulfilling the Commission's obligations under Section 62-350 requires it to consider the full range of public interests, including the need to keep electricity rates low and ensure EMC members are not forced to subsidize communications companies through their electricity bills.

In the *Time Warner* cases, the Commission wrongly accepted TWC's argument that it should consider only "expansion of broadband" when determining the public interest, and disregard any interest in keeping electric rates low, based on TWC and NCCTA's arguments that (1) Section 62-350 is focused on pole regulation, not the provision of electricity and (2) the General Assembly did not include any express provision in the statute requiring the Commission "to prioritize low electric rates." *Time Warner* Order, p. 43. Neither argument, however, withstands scrutiny.

First, even though it relates to pole attachments, Section 62-350 protects EMCs from rates that are too low just as it protects cable companies from rates that are too high. Our courts have long held that, in order to be "just and reasonable," a rate must not only be fair to purchasers (in this case, Charter and other attachers), but must also enable the regulated entity (in this case, Blue Ridge and other EMCs) to "maintain its facilities and service" and "obtain a fair rate of return" for its shareholders or members. *See State ex rel.*

Utilities Comm'n v. Gen. Tel. Co. of Se., 281 N.C. 318, 370, 189 S.E.2d 705, 738 (1972). A rate that fails to fairly compensate a pole owner, such as Blue Ridge, is thus neither "just" nor "reasonable."

Second, the fact that Section 62-350 does not include a provision requiring the Commission to ensure electricity rates remain low proves nothing. Section 62-350 does not include a provision favoring the subsidization of broadband, either. In fact, the North Carolina Electric Membership Corporation Act and the Public Utilities Act do not include *any* provision establishing a policy in favor of broadband. *But they do include numerous statements of policy in favor of low electric rates.*

To that end, the North Carolina Electric Membership Corporation Act charges EMCs, such as Blue Ridge, with responsibility for "promoting and encouraging the fullest possible use of electric energy in the rural section of the State by making electric energy available to inhabitants of the State at the lowest cost consistent with sound economy and prudent management." *See* N.C.G.S. § 117-10. Likewise, the "Statement of Policy" at the outset of the Public Utilities Act charges this Commission with the duty to "provide fair regulation of public utilities in the interest of the public" and "promote . . . economical utility service to all of the . . . residents of the State." *See* N.C.G.S. §§ 62-2(1) and (2). Given that neither statute includes any statement of policy in favor of broadband, these provisions constitute the closest statements of policy on point for the purpose of interpreting Section 62-350.

In addition to the express statements of policy in the statutes, Blue Ridge introduced evidence at hearing to show that keeping electric rates low—and ensuring Blue Ridge's members are not forced to subsidize Charter's operations through their electricity bills—is

a matter of vital public concern. In his direct testimony, Mr. Layton, Blue Ridge's former Chief Operating Officer, explained that the average household income in Blue Ridge's service territory is significantly lower than the State or national averages, and that certain counties are among the lowest in North Carolina in terms of household income.[12] *See* Layton Test., Vol 1, p. 33.

Blue Ridge also introduced exhibits showing that, because Charter can pick and choose the customers to whom its provides service, Charter only offers service to customers in the more densely populated areas of Blue Ridge's service territory. *See* Layton Test, Vol. 1, pp. 33-34; Exhibits LL-1 and LL-2. As a result, setting a rate that is too low would require Blue Ridge's members—most of whom live well outside the areas Charter chooses to serve—to pay higher rates for electricity (a necessary service) to subsidize cable television and internet (which are, at minimum, optional services) for the handful of members that live in areas dense enough that Charter will serve them. Such a regime is hardly in the "public interest." Moreover, the question of how to weigh competing interests in maintaining low electricity rates and subsidizing broadband implicates the very reason Congress exempted cooperatives from pole attachment regulation in the first place—surely, Blue Ridge's members are best positioned to understand best to balance the low likelihood of broadband expansion against the impact of pole attachment rates on the costs of electric service, just as Congress expected they would.

---

[12] Blue Ridge's service territory includes Allegheny, Ashe, Caldwell, and Watauga counties, as well as small portions of Avery, Alexander, and Wilkes Counties. According to 2015 Census data, the median household income was $35,673 in Caldwell County, $37,656 in Watauga County, $36,267 in Ashe County, and $36,968 in Allegheny County. In comparison, the median household income in North Carolina was $47,803, and nationwide it was $57,516.

In sum, Charter cannot provide any basis to insist that the Commission consider only the expansion of broadband, and nothing else, when determining whether pole attachment rates are consistent with the public interest. If anything, the numerous statements of policy in the statutes require the Commission to focus its efforts on keeping electricity rates as low as possible.

IV. THE FCC RATE WILL NOT FULFILL CHARTER'S FALSE PROMISE TO EXPAND RURAL BROADBAND.

All told, Charter's oft-repeated arguments regarding the importance of rural broadband amount to nothing more than a series of illusory, unenforceable statements made in a transparent attempt to secure artificially low pole attachment rates. Indeed, while Charter and its witnesses professed a singular commitment to the expansion of rural broadband—and insist that rural broadband ought to be the sole focus of the Commission's public interest analysis—Charter did not produce a scintilla of evidence that lowered pole attachment rates actually would cause it to extend service to a single additional Blue Ridge member.

Charter has no obligation to spend the money it would save if the Commission awarded it the FCC rate on the expansion of broadband in rural areas, or, for that matter, any customers in the Blue Ridge's service territory. Unlike EMCs, Charter is free to pick and choose who it serves, and it does not have any obligation to extend service to any set of customers in any given area. *See* Martin Test., Vol. 4, pp. 154-55. At hearing, Nestor Martin conceded that Charter picks and chooses who it serves based on an assessment of profitability. *See id.* By contrast, Blue Ridge, like all EMCs, is statutorily required to serve every customer in its service territory, regardless of costs. *See* Layton Test. Layton Test., Vol. 1, p. 31. As a result, Charter chooses to serve only the most densely populated portions

of Blue Ridge's territory, where there are enough customers to make doing so "profitable." Thus, while Blue Ridge's territory as a whole is quite sparse—averaging only nine electric meters per mile—Charter's witnesses indicated that the areas it serves in Blue Ridge's territory average 53 homes per mile. *See* Layton Test., Vol. 1, pp. 32-33. *Id.*; Exhibit LL-2; Exhibit Ex. LL3.

Charter's operational witness, Mike Mullins, also acknowledged that, under company policies, it will only automatically extend service to customers who live within 250 feet—less than a football field—of Charter's existing distribution lines. *See* Mullins Test., Vol. 4, pp. 16-18. Thus, only this small sub-set of customers will ever be guaranteed the opportunity to buy Charter's services, no matter what amount Charter pays to attach to Blue Ridge's poles.

Importantly, despite Charter's repeated professions that it needs low pole attachment rates to promote the expansion of its broadband products, ***no Charter witness identified any plans to expand Charter's services to any new customers in Blue Ridge's service territory.*** Charter's silence regarding actual plans to extend broadband speaks volumes.

Testimony and decisions in similar pole attachment proceedings in other jurisdictions reveal that cable companies' promises to expand broadband in exchange for the FCC rate are really just a "red herring."

In fact, Cox Communications' Executive Vice President and Chief Strategy and Product Officer, Dallas Clement, explained in comments before the FCC that rural areas do not have high speed broadband service primarily because of the large capital expenditures, secondarily because average revenues might not be sufficient, and only

thirdly because of higher operating expenses.[13] In describing the higher operating expense costs, he did not even mention pole attachment costs. If pole attachment rates were a significant reason cable companies do not provide broadband to rural parts of America, Cox's witness before the FCC certainly would have mentioned it.[14]

The Virginia State Corporation Commission, in NOVEC, concluded pole attachment rates have only a negligible effect on broadband expansion in rural areas..[15] In that proceeding, Comcast argued that high pole attachment rental rates were impeding its ability to serve rural America. The Hearing Examiner, after extensive evidentiary hearings, rejected Comcast's arguments, concluding that other factors, not pole attachment fees, had led Comcast to decide not to extend broadband. Specifically, the Hearing Examiner concluded:

> Although Comcast and VTIA have argued that the attachment rates charged by electric cooperatives are a significant factor preventing expanded broadband deployment in rural areas, the greater weight of evidence in this proceeding simply does not support this contention. I find that the record in this proceeding indicates that reasonable pole attachment rates have little impact on broadband expansion. With the exception of the Page County example noted above, if pole attachment rates were a major factor, one would expect broadband to be readily available in rural areas served by IOUs, whose FCC-regulated attachment rates are similar to the rates advocated by Comcast. As Mr. Farmer, President and CEO of FEC, pointed out from his personal experience, broadband is not readily available in

---

[13] *See* transcript of the FCC's National Broadband Plan Workshop, Deployment - Wired, at 80 (August 12, 2009) ("[l]n order of priority, I'd say it's the CAPEX to get there. Then it's what's the average revenue out of that home? And that's sort of the second issue. And then the third issue is the cost to support.").http://www.broadband.gov/docs/ws 02 deploy wired transcript.pdf (last visited September 7, 2017).

[14] *See id.,* at 76-82.

[15] *See generally* Virginia State Corporation Commission, Application of Northern Virginia Electric Cooperative, Case No. PUE-2013-00055, "Report of Howard P. Anderson, Jr., Hearing Examiner" (June 12, 2014).

> rural IOU service areas despite FCC-regulated pole attachment rates that are significantly lower than most electric cooperative rates. The fact remains that the cost of providing broadband service in rural areas is often prohibitive for for-profit companies such as Comcast because the customer density simply does not support the cost of providing the service. Customer density appears to be the overriding factor in broadband expansion;
> therefore, the rate recommended herein should not have any significant impact one way or the other on the development and utilization of broadband technology in NOVEC's service territory.[16]

The Hearing Examiner's report was affirmed by the full Virginia State Corporation Commission.[17] (As discussed, below, the Virginia Commission, based in part on the findings above, went on to approve a rate methodology that allocated a share of the Communications Worker Safety Zone to cable attachers, resulting in a rate of $17.11 in 2012.)

In sum, the real factor that drives cable providers' decisions whether to expand broadband services is *population density*. There are simply fewer people per square mile in large portions of the areas EMCs serve, and thus less potential revenue, which makes these areas less attractive to for-profit cable companies, like Charter.

The lack of any evidence to support Charter's arguments regarding the expansion of broadband exposes its empty promises for what they are. There is no basis in the record for the Commission to find that imposing the FCC rate will result in a positive "externality" in the form of expanded broadband service. Instead, imposing artificially low pole attachment rates through the FCC methodology will only increase EMC electric rates, siphon money from rural areas of North Carolina, and provide a subsidy to for-profit cable companies like Charter.

---

[16] *Id.* at pp. 43-44.

[17] *See* Final Order, *Application of Northern Virginia Cooperative*, Virginia State Corporation Commission, Case No. PUE-2013-00055 (Oct. 14, 2014), *adopting* Report of Howard P. Anderson, Jr., Hearing Examiner (June 14, 2014).

V. ISSUES OF SPACE ALLOCATION TURN ON EQUITY CONCERNS—NOT MATTERS OF ECONOMICS.

Finally, although Charter and Ms. Kravtin take great pains to cloak their arguments in in a veil of "economic theory," the principal differences between the rate methodologies proposed by the parties are not a matter of economics. The FCC and TVA formulas calculate an EMC's annual pole costs in substantially the same way, using the same cost inputs, pulled from the same RUS accounts. Instead, as Ms. Kravtin acknowledges, the primary difference between the various methodologies—including the FCC and TVA formulas—is how they allocate space, and thus costs, among the parties attached to the pole. Kravtin Test., Vol. 4, p. 234-35. That question turns on a true understanding of (i) how the parties use the pole and (ii) how the costs associated with that use should be shared.

Indeed, the inconsistencies in Ms. Kravtin's position reveal that her analysis is nothing more than a results-oriented position, designed to ensure her client pays as little as possible for the use of Blue Ridge's poles.

Ms. Kravtin asserts the FCC rate rests on the "fundamental economic principle of cost-causer pays"—meaning that an attacher should pay for all costs that would not be borne by the utility, but for the attachment. Kravtin Test., Vol. 4, p. 184. Yet, though she claims this principle is "well-established," she was unable—either at deposition or on cross examination during the hearing—to identify any economic literature that supports it. Kravtin Test., Vol 5, p. 33-34.

Ms. Kravtin also fails to apply her newly-minted doctrine of "cost-causer-pays" in a consistent or coherent manner, and instead stubbornly clings to the position that Charter should only have to pay for a fractional share of the pole based on the erroneous notion that it uses only "one foot" of space.

Perhaps the best example of this results-oriented reasoning is Ms. Kravtin's treatment of the "Communications Worker Safety Zone"—the 3.33 feet required by the National Electric Safety Code to protect communications workers from coming into contact with utilities' energized electrical facilities. Ms. Kravtin concedes, as she must, that this space would not be required on the pole if there no communications companies were attached. In other words, EMCs, like Blue Ridge, would be able to install shorter poles, and would not need the Communications Worker Safety Zone, *but for* the attachments of communications companies, like Charter. Kravtin Test., Vol. 5, p. 34 (admitted that, until a communications company attaches to a pole, "there's no need for those safety clearances"). Yet, even though her client undoubtedly *caused* the presence of the Communications Worker Safety Zone, Ms. Kravtin asserts that it should be allocated entirely to Blue Ridge. Her reason, however, has nothing to do with "cost-causation" and is inconsistent with Ms. Kravtin's "cost-causer-pays" principle. Instead she asserts a *benefits* principle, arguing that electrical utilities are technically allowed to use this space by installing street lights—even though uncontroverted evidence showed Blue Ridge does not do so. *See* Kravtin Test., Vol. 4, p. 209.

NCAEC submits, as it did in the *Time Warner* cases, that the TVA formula represents a fairer and more reasonable way to divide the costs of a pole. The TVA's formula reflects a proper understanding of the ways in which the parties use space on the pole and, accordingly, (i) allocates the entire Communications Worker Safety Zone equally among communications attachers (but not the electric utility); and (ii) allocates the Support Space among all attaching entities on an equal, per-capita basis.

Yet, as noted above, the Commission's decision is not a mere "binary choice." Mr. Arnett has offered several alternative methodologies the Commission may consider, including the APPA Rate, Telecom Plus Rate, and Arkansas Formula. The Commission

is also free to modify the space allocation factor contained in the parties' proposed methodology to conform to its understanding of what would constitute a just and reasonable rate, consistent with the public interest and the parties *actual use* of the pole—just as the Virginia State Corporation Commission did in *NOVEC*.[18]

The equitable allocation of space embodied in the TVA methodology, and the other methodologies Mr. Arnett has modeled, stand in stark contrast to the lop-sided allocation under the FCC formula. While Charter and Ms. Kravtin attempt to disguise it as economic theory, the FCC formula is ultimately only a results-oriented formula that permits cable companies, such as Charter, to pay only a small fraction of the costs associated with their attachments to EMCs' poles. In this regard, the FCC formula is an outlier-and insufficient to establish a just and reasonable rate under Section 62-350. The public interest accordingly requires that the Commission adopt a formula that more appropriately compensates EMCs for the true costs of cable company's attachments, based on a recognition of how the parties actually use space on the pole.

CONCLUSION

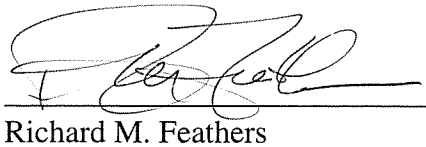
For each of the foregoing reasons, the Commission should refuse to apply the FCC rate, but instead should adopt a rate methodology that sufficiently compensates EMCs for the costs of communications companies' attachments to their poles, and otherwise grant the relief set out in the Proposed Order submitted by Petitioner Blue Ridge Electric Membership Corporation in this action.

---

[18] *See* Virginia State Corporation Commission, Application of Northern Virginia Electric Cooperative, Case No. PUE-2013-00055, p. 22-23 (June 12, 2014) (adopting the FCC cable rate's basis formula, including proportionate allocation of the "unusable space," but allocating 1.8 feet of space, rather than 1 foot, to cable attachers, in order to reflect a share of the Communications Worker Safety Zone).

Respectfully submitted, this the 4th day of April, 2018.

NORTH CAROLINA ASSOCIATION OF ELECTRIC COOPERATIVES



Richard M. Feathers
Senior Vice President, General Counsel
Post Office Box 27306
Raleigh, NC 27611-7306
Telephone: (919) 875-312
rick.feathers@ncemcs.com

CERTIFICATE OF SERVICE

The undersigned certifies that he has served a copy of the foregoing document upon the parties of record in this proceeding, or their attorneys, by electronic mail as follows:

Marcus W. Trathen
Brooks Pierce
Wells Fargo Capital Center
150 Fayetteville Street, Suite 1700
Raleigh, N.C. 27601
(919)-839-0300
mtrathen@brookspierce.com

Debbie W. Harden
Pressly M. Millen
Matthew F. Tilley
Womble Bond Dickinson (US) LLP
One Wells Fargo Center
301 South College Street; Suite 3500
Charlotte, NC 28202-6307
Debbie.Harden@wbd-us.com
Press.Millen@wbd-us.com
Matthew.Tilley@wbd-us.com

Gardner F. Gillespie
J. Aaron George
Carrie A. Ross
Sheppard Mullin Richter & Hampton
2099 Pennsylvania Ave. NW, Suite 100
Washington D.C. 20006
(202)-747-1900
ggillespie@sheppardmullin.com
ageorge@sheppardmullin.com
cross@sheppardmullin.com

This 4th day of April, 2018.

Richard M. Feathers