

April 4, 2018

VIA ELECTRONIC DELIVERY


Martha Lynn Jarvis
Chief Clerk
430 N. Salisbury Street
Dobbs Building
Raleigh, NC 27603

Re: Motion for Leave to File Amicus Brief, and Amicus Brief of North Carolina Telephone
Cooperative Coalition, Docket No. E-23 sub 50

Dear Ms. Jarvis,

Please find enclosed the Motion for Leave to File Amicus Brief, and the Amicus Brief of
the North Carolina Telephone Coalition in the above referenced Dockets.

Sincerely,



Britton H. Allen

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EC-23, Sub 50

BLUE RIDGE ELECTRIC MEMBERSHIP
CORPORATION,
Complainant,

v.

CHARTER COMMUNICATIONS
PROPERTIES LLC,
Respondent.

MOTION FOR LEAVE TO FILE
AMICUS BRIEF BY
NC TELEPHONE
COOPERATIVE COALITION,
INC. (CarolinaLink)

NOW COMES the North Carolina Telephone Membership Cooperative Coalition, Inc. (CarolinaLink) through its undersigned counsel and pursuant to Commission Rule R1-7 respectfully requests the Commission allow the CarolinaLink to file an *Amicus Curiae* brief in the above captioned Docket on behalf of itself and its member companies. In support of this motion, CarolinaLink respectfully states the following.

1. CarolinaLink has eight Telephone Membership Corporations (TMCs) as member companies¹, which are organized under Chapter 117 of the North Carolina General Statutes. The TMCS serve more than 180,000 customers in all or parts of twenty-six counties, comprising some of the most rural areas in North Carolina.

¹ Atlantic Telephone Membership Corporation, Randolph Telephone Membership Corporation, Skyline Membership Corporation, Star Telephone Membership Corporation, Surry Telephone Membership Corporation, Tri-County Telephone Membership Corporation, Wilkes Telephone Membership Corporation, and Yadkin Valley Telephone Membership Corporation

2. The TMCs provide broadband, video, voice and related services to their members in these areas. Because TMC service areas often overlap with the territory of the Electric Membership Cooperatives² (EMCs) any excessive pole attachment rate charged by an EMC will disproportionately affect the TMCs and their members
3. In its brief the TMCs will address the following issues.
 - A. The FCC Rate is the appropriate methodology to use for pole attachments because it allows pole owners to recover their costs and provides for a fair rate for attachers.
 - B. The TVA rate is a flawed rate created for the purpose of subsidizing electric rates at the expense of attachers and their customers.
 - C. Rural broadband deployment and remains an important public policy and economic issue for the State and excessive pole attachment rates in rural areas by EMCs who operate as monopolies in those areas will slow or prevent that deployment.
4. The correct name of the TMCs is the North Carolina Telephone Cooperative Coalition, Inc. The post office address and electronic mailing address for the TMCs is

1514 Glenwood Ave, Suite 200
Raleigh, NC 27608
Attn: Dwight Allen- Executive Vice-President
Dwight@carolinalink.org
5. The TMCs request any notices filings or other correspondence be addressed to.

The Allen Law Offices, PLLC
1514 Glenwood Ave, Suite 200
Raleigh, NC 27608

² BREMC's service territory overlaps significantly with the TMCs including in Watauga, Wilkes, Ashe, and Alleghany counties.

WHEREFORE, for the foregoing reasons the TMCs respectfully request the Commission grant this Motion for Leave to File Brief *Amicus Curiae*.

Respectfully submitted, this 4th day of April, 2018

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**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. EC-23, Sub 50

BLUE RIDGE ELECTRIC MEMBERSHIP
CORPORATION,

Complainant,

v.

CHARTER COMMUNICATIONS
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Respondent.

NORTH CAROLINA TELEPHONE
COOPERATIVE COALITION'S
AMICUS BRIEF

**I. The Tennessee Valley Authority (TVA) rate unjustly enriches
electric suppliers who own the essential facility at the expense of
broadband development.**

The TVA approach is a recent innovation designed to inflate the rates certain electric suppliers can charge for access to their monopoly-bottleneck facilities. It was created by TVA's members with input from electric membership corporations with the goal of keeping their customers rates low at the expense of the third-party attachers. Notably, the TVA did not solicit input from other stakeholders. With an unbalanced forum, it is no wonder that the TVA created an unjust and unreasonable rate.

The TVA rate is flawed for a number of reasons. First, it is inappropriately based on the benefits received by the attacher, as opposed to the costs incurred by the pole owner. Secondly, 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. They do not. The truth is 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. 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 owners, nor do they have the right or as many opportunities to monetize the utility pole as the pole owner. Therefore, pole owners receive more benefits from their poles than attachers.

However, first and foremost, long-established economic principles demonstrate that pole attachments should be based on costs rather than benefits. While the TVA formula appears to equitably distribute 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. Cost allocation, as the name suggests, should only be based on cost-causation. The concept of cost allocation is a familiar concept to this Commission. Direct costs are easily assigned because they are incurred incrementally to benefit a certain group. In addition to direct costs, there are always common costs, which must be assigned on a rational, economically efficient basis. Common costs are allocated based on a reasonable allocator, which recognizes that common costs should be allocated in a manner that reasonably follows the percentage of direct costs incurred for each member of the group that receives benefits. In approving cost allocation methodologies, this Commission does not assign common costs by an arbitrary, value of service, method that selects who will be the winners and who will be the losers.

An allocation grounded in cost-causation is appropriate because the EMC's poles are essential facilities and the EMCs¹ have monopolistic control over the poles in their service territories. The EMCs have been given the right by the State of North Carolina to provide monopoly retail electric service in their territories. In providing their services, the EMCs used the State of North Carolina's policy of right-of-way encroachment, power of eminent domain or threat of imminent domain to construct their networks of utility poles. Under the TVA rate, the EMCs wish to subsidize their members' rates through higher charges for attachments to their poles at the expense of telecommunication companies that are offering essential services to North Carolinians. In other words, the EMCs want to raise the cost of another essential service, so that they can lower the cost of their own. This should not be allowed.

Furthermore, the EMCs monopolistic control over poles in their territories becomes increasingly problematic as some choose to enter the broadband provider marketplace. For instance, French Broad EMC already offers broadband service to businesses, school systems, and other organization, and plans to eventually serve residential homes.² In March, Roanoke Electric Cooperative announced a pilot project to serve residential and business customers with broadband service.³ The potential for anti-competitive behavior based on monopolistic control of poles should be obvious. The EMCs should be allowed to fully recover their costs from individual pole attachment but not to subsidize their own retail operations. The FCC formula provides just that.

¹ The TMCs recognize these complaint cases are decided on a case-by-case basis, however these policy decisions have been at issue in several cases involving EMCs, therefore the TMCs will address the EMCs involved in those cases as a group where appropriate and BREMC individually where appropriate.

² <http://www.frenchbroademc.com/broadband.cfm>

³ <http://roanokeelectric.coopwebbuilder2.com/content/roanoke-electric-cooperative%E2%80%99s-broadband-initiative-enters-next-phase>

On Page 6 of his testimony, BREMC Witness Arnett adopts the TVA mantra that the FCC formula is inappropriate because it was designed to encourage broadband deployment in rural areas, apparently rejecting the deployment of broadband in rural areas as an unworthy policy objective. However, on page 37, he states customers of EMCs have an incentive to foster the growth of advanced communications services in North Carolina. On his first point, Witness Arnett and the TVA are simply incorrect. The FCC formula is designed only to give an appropriate cost based return on a pole attachment not to stimulate broadband deployment. On his second point, if the EMCs have an incentive to foster growth of advanced communications services in their area, charging artificially high pole attachment rates to other providers hardly furthers that goal.

The FCC Formula Rate is Fair and Reasonable.

Unlike the TVA formula rate, the FCC formula rate has withstood the test of time. Since the 1970s, it has been critiqued and at times adjusted, but this extreme vetting has created a formula that accurately and fairly mimics a competitive market outcome. In fact, as recently as July 31, 2017, the United State Court of Appeals for the Eighth Circuit stated, “This approach represents a reasonable policy choice.” *Ameren Corp. v. FCC*, No. 16-1683 at pg. 8 (8th Circuit, July 31, 2017).

The FCC formula is designed to approximate an efficient rental rate that corresponds to the actual cost of the unit of service being produced. If pole attachments were in a competitive market in which a surplus could exist, the price would be driven down to its marginal costs. Nonetheless, the FCC 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 costs inspection fees, pole inventories and other charges.

In determining the fair and reasonableness of the FCC formula rate, it is enlightening to see that the FCC rate has been endorsed by many organizations, including the National Association of Regulatory Utility Commissioners and the National Association of State Utility Consumer Advocates and that the FCC formula has been adopted by the vast majority of state commissions. Duke Energy Progress, LLC, Duke Energy Carolinas, LLC and Dominion North Carolina Power, Inc use the FCC formula. If the Commission allows the EMCs to charge greater rates, then North Carolina's digital divide between Rural and Urban areas could be worsened because of the increased cost of broadband deployment in EMC areas, which trend heavily rural.

II. Rural broadband deployment remains an important public policy and economic issue for the State and increased pole attachment rates in rural areas by EMCs who operate as monopolies in those areas will slow that deployment.

The TMCs deem it necessary to emphasize that pole attachment rates are not only important to investor owned entities. In many instances, TMCs share many of the same characteristics with the EMCs. We are both member owned, we are both organized under Chapter 117, we both serve rural North Carolina with essential services and are operated for the benefit of our members. The TMCs have differed with Charter on many public policy issues and in most cases 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.

In this Docket, BREMC has expressed its responsibility to provide lowest cost service to its members. This concept is not exclusive to BREMC but is a responsibility shared by virtually all public service providers. This Commission would no doubt find this responsibility familiar and nearly identical to those that apply to investor owned utilities under Chapter 62. More importantly, however, the Territorial Assignment Act of 1965, N.C. Gen. Stat. § 62-110.2, grants each EMC monopoly status in their service territory. It is the exact same authority as that granted to an investor owned utility and it bestows on them a functional monopoly over poles. The EMCs use public right-of-way and the government power of eminent domain to locate these poles. These are rights granted to the EMCs by the people of the State at large and those rights should not be abused by declaring them to be a private fiefdom.

The shared use of poles has a long history in North Carolina and throughout the United States. In the early years, electric companies and telephone companies shared the use of poles. Both types of companies had about the same number of poles so they simply voluntarily shared the use of poles, often without compensation. As telephone technology developed, telephone companies reduced the number of poles that they owned by putting facilities underground.⁴ This resulted in a higher percentage of poles being owned by electric companies and the concept of pole attachments was born. However, the policy drivers did not change. It simply makes sense to use the same pole because it

⁴ Placing facilities underground does not always make sense. As discussed later, it is virtually impossible to bury facilities in the rock of mountainous terrain, which is a large part of the territory served by BREMC.

is aesthetically and economically illogical to construct multiple pole lines along the highway rights of ways. The situation became more complicated with the passage of Pole Attachment Act of 1978⁵, necessitated by the introduction of cable television. When cable companies were denied access to poles, Congress acted by requiring pole owners to permit cable companies to attach to poles, again on reasonable terms that served the public interest.

The EMCs serve a significant amount of territory and members, 2.5 million members spread through 93 North Carolina counties⁶, and the EMCs overlap the TMCs almost entirely. In the matter of pole attachments the only difference between investor owned utilities and EMCs is EMCs do not pay dividends to investors. As previously noted, Charter and the TMCs have not always seen eye-to-eye on public policy issues, but in this case both are operating in a competitive industry without monopoly power and attempting to deploy broadband to unserved and underserved rural areas of the State. Artificially high pole attachments rates based on flawed formulas designed to subsidize electric service increase these costs and slow deployment.

In his testimony, on pages 3-6, BREMC Witness Layton seeks to contrast BREMC with Charter. Among other things, he states, BREMC is operated under Chapter 117, on a not-for-profit basis, run solely for the benefit of its members, are smaller than IOUs, have customers that are normally spread far apart, and are required to serve all customers within their areas. Even if such statements serve to differentiate BREMC from Charter, each of the characteristics noted by Witness Layton are identical to and

⁵ Public Law 95-234—Feb. 21, 1978

⁶ <http://www.ncemcs.com/co-ops/default.htm>

perfectly describe TMCs, which are dependent on reasonable pole access from EMCs to provide broadband services in rural areas. The TVA rates would apply no differently to the TMCs than to Charter, so the differences between Charter and BREMC simply are not relevant to a determination of what constitutes a reasonable rate for pole attachments. What is relevant is the monopoly power BREMC and other EMCs possess within their own territories.

Additionally, the geography and topography in certain areas of the State make deployment difficult and burial of facilities impossible, most notably in the mountains.⁷ This is specifically true of BREMC. According to the NC Broadband Plan, released by the Broadband Infrastructure Office, many of the areas falling the furthest behind in terms of broadband deployment are in the mountains⁸, including Mitchell, Ashe, Allegheny, Transylvania, Alleghany and Rutherford. All of these areas are served with electric service by EMCs and some by BREMC.⁹ In most of these areas burial is impossible or at the very least cost prohibitive.

Rural broadband deployment continues to be a critical issue at the state and federal level. FCC Chairman Pai has signaled that broadband deployment will be a defining issue of his term as Chairman in declaring last August Rural Broadband Month stating, “One of the most significant things I’ve seen during my time here is that there is a digital divide in this country between those who can use cutting-edge communications services and those who cannot, I believe one of our core priorities going forward should

⁷ Not insignificantly, the mountain areas of North Carolina are perhaps the area of the State with the least access to broadband.

⁸ <https://ncbroadband.gov/map/>

⁹ <http://www.ncemcs.com/downloads/territoryMap.pdf>

be to close that divide.”¹⁰ One troubling statistic provided by Chairman Pai, for consumers who live in urban areas there is a 1-in-50 chance that you lack access to fixed high-speed broadband service, in rural areas the chances increases to 1-in-4. On May 5, 2017 Gov. Cooper made a similar statement, “Broadband is a must for economic success in our rural communities.” The fact is that the problematic areas for broadband deployment are in rural areas and often in areas served by EMCs. If the EMCs are allowed to implement artificially high pole attachment rates investment in broadband will further shift away from those areas, which will continue to be left behind.

Respectfully submitted, this 4th day of April, 2018

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¹⁰ Remarks of Ajit Pai, Chairman, Federal Communications Commission, Washington DC, January 24, 2017

CERTIFICATE OF SERVICE

I certify that all parties of record on the service list have been served with the foregoing Petition to Intervene either by electronic mail or by deposit in the U.S. Mail, postage prepaid.

This the 4th day of April, 2018.

By Britton H. Allen

Britton H. Allen

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Apr 04 2018